

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 28688

**JENNIFER CHASE ALONE, as the Personal Representative of
ELFREDA ANN TAKES WAR BONNETT,**
Plaintiff,

vs.

WESTERN COOPERATIVE COMPANY, INC.,
Defendant/Third-Party Plaintiff,

and

C. BRUNSCH, INC., d/b/a LAKOTA PLAINS PROPANE
Defendant/Third-Party Plaintiff/Appellant,

vs.

**OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL,
DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENY
ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM,
ROBIN T. (LAST NAME UNKNOWN) AND JOHN AND JANE DOE 1-100,**
Third-Party Defendants/Appellees.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
OGLALA LAKOTA COUNTY, SOUTH DAKOTA

The Honorable Jeffrey Connolly
Circuit Court Judge

APPELLANT'S BRIEF

JOHN K. NOONEY
ROBERT J. GALBRAITH
NOONEY & SOLAY, LLP
326 Founders Park Drive
P.O. Box 8030
Rapid City, SD 57709-8030
*Attorneys for Appellant,
C. Brunsch, Inc.*

MARK F. MARSHALL
BANGS, MCCULLEN, BUTLER,
FOYE & SIMMONS
333 West Boulevard, Suite 400
P.O. Box 2670
Rapid City, SD 57709-2670
*Attorneys for Appellees, Oglala
Sioux Lakota Housing Authority,
Richard Hill, Derek Janis, Wes
Cottier, William White, Ben Plenty
Arrows, Renaldo Two Bulls,
Brandon Wes, Derek Slim, and
Robin Tuttle*

EVAN THOMPSON
BROWN, KALECZYC, BERRY &
HOVEN, P.C.
800 N. Last Chance Gulch, #101
P.O. Box 1697
Helena MT 59624
*Attorneys for Appellees, Oglala
Sioux Lakota Housing Authority,
Richard Hill, Derek Janis, Wes
Cottier, William White, Ben Plenty
Arrows, Renaldo Two Bulls,
Brandon Wes, Derek Slim, and
Robin Tuttle*

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PRELIMINARY STATEMENT

For ease of reference, citations to the pleadings will be referred to as Settled Record (“SR”) and the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. “SR 001, Complaint,” or “SR 309, Motion for Protective Order.” References to the documents in the Appendix will be referred to as, “Document” and Appendix (“App.”) with the appropriate page number or paragraph assigned, e.g. “Rule 54(b) Judgment Granting Third-Party Defendants’ Motion to Dismiss, App. at A-1-25,” or “Memorandum Order, App. at B-1-17.”

The Appellant, C. Brunsch, Inc., d/b/a Lakota Plains Propane will be referred to as “Lakota Plains.” The Appellee, Oglala Sioux Lakota Housing Authority will be referred to as the “Housing Authority.” The Appellees, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle will be referred to as the “Individual Third-Party Defendants.”

JURISDICTIONAL STATEMENT

This is an appeal from the trial court’s Rule 54(b) Judgment Granting Third-Party Defendants’ Motion to Dismiss, App. at A-1-25 (the “Rule 54(b) Judgment.” On February 14, 2018, the trial court entered a Memorandum Order related to the Housing Authority and the Individual Third-Party Defendants’ Motions to Dismiss. App. at B-1-17. The Housing Authority filed a Motion for Rule 54(b) Certification on February

21, 2018. SR 1272. Lakota Plains did not oppose the Housing Authority's motion. SR 3200, C. Brunsch, Inc.'s Response to Motion for Rule 54(b) Certification. A hearing was held on July 11, 2018, at which time the trial court granted the Housing Authority's Motion for Rule 54(b) Certification and provided a detailed analysis of the factors enumerated by this Court in *Davis v. Farmland Mut. Ins. Co.*, 2003 S.D. 111, 669 N.W.2d 713, which analysis was incorporated into the trial court's Rule 54(b) Judgment. App. at A-1-25. The Rule 54(b) Judgment was signed on August 1, 2018 and filed on August 1, 2018. App. at A-1 and A-4. Notice of Entry of Rule 54(b) Judgment Granting Third-Party Defendants' Motion to Dismiss was filed on August 9, 2018. SR 3358. Lakota Plains filed a Notice of Appeal on August 3, 2018. SR 3340. This Court has jurisdiction over this action pursuant to SDCL § 15-26A-3 and SDCL § 15-6-54(b).

STATEMENT OF ISSUES

- I. Whether the Third-Party Plaintiff, C. Brunsch, Inc., d/b/a Lakota Plains Propane was entitled to discovery from the Third-Party Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle before the evidentiary hearing on the Third-Party Defendants' Motions to Dismiss.**

The Trial Court held in the negative.

MOST RELEVANT AUTHORITIES

SDCL § 15-6-12

Huttenville Hutterian Brethren, Inc. v. Waldner,
2010 S.D. 86, 791 N.W.2d 169

Supreme Pork, Inc. v. Master Blaster, Inc.,
2009 S.D. 20, 764 N.W.2d 474

II. Whether the Third-Party Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle were entitled to a dismissal based on subject matter jurisdiction.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

Lewis v. Clarke,
137 S.Ct. 1285, 197 L.Ed. 2d 631 (2017)

25 U.S.C. § 4101

25 U.S.C. § 5301

25 U.S.C. § 5321

STATEMENT OF THE CASE

This action was commenced by the Plaintiff, Jennifer Chase Alone (“Chase Alone”), as the personal representative of Elfreda Ann Takes War Bonnett (“Takes War Bonnett”) in South Dakota State Court in the Seventh Judicial Circuit, in Oglala Lakota County, against two Defendants, Lakota Plains and Western Cooperative Company, Inc. (“Westco”). SR 001, Complaint. Chase Alone brought claims for negligence, strict liability, and breach of warranty surrounding an explosion which occurred on October 6, 2016 at a duplex located at 157 and 158 East Ridge Housing, Pine Ridge, Oglala Lakota County, South Dakota. SR 001, Complaint, ¶ 1. Lakota Plains provided propane to Unit 157. SR 001, Complaint, ¶ 6. Westco provided propane to Unit 158. SR 001, Complaint, ¶ 5.

It is virtually undisputed (and the Court found as an undisputed fact with respect to Westco’s Motion for Summary Judgment), that while the propane met all industry standards (the breach of warranty claims against both parties have been dismissed), that propane gas entered Unit 157 through an uncapped propane line and spread through an undivided crawl space into Unit 158 before both units exploded. Memorandum Order, App. at B-2-3. Lakota Plains and Westco brought Third-Party Complaints against the Housing Authority and the Individual Third-Party Defendants as the parties responsible for leaving the uncapped line in

Unit 157. SR 055, Third Party Complaint; SR 084, Third-Party Complaint. Lakota Plains alleged that “during the remodeling and/or refurbishing of Unit 157 that one or more of the individuals named as Third-Party Defendants [the Housing Authority and the Individual Third-Party Defendants] failed to cap or seal one or more propane service lines, which had previously provided propane to propane appliances in Unit 157, which were no longer necessary as a result of the decision to install electrical appliances.” SR 084, Third-Party Complaint, ¶ 21. Lakota Plains further alleged that “[t]he sole cause of the claim more fully set forth in the Complaint was the failure to cap or seal propane line(s) as a part of the remodeling and/or refurbishing of Unit 157. SR 084, Third-Party Complaint, ¶ 22.

To date, the Housing Authority and the Individual Third-Party Defendants have not denied those allegations. On September 14, 2017, the Housing Authority and one of the Individual Third-Party Defendants filed the Third-Party Defendants’ Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction. SR 189. Along with the Motion to Dismiss, they filed the Third-Party Defendants’ Brief in Support of Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction and the Affidavit of Doyle Pipe on Head. SR 191 and App. at C-1-3, respectively. On October 20, 2017, the Housing Authority filed Oglala Sioux Lakota Housing’s Motion to Dismiss

Third-Party Complaints Based on Sovereign Immunity. SR 307. On January 3, 2018, the remainder of the Individual Third-Party Defendants filed the Third-Party Defendants' Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction. SR 458. The brief in support of that motion incorporated the Affidavit of Doyle Pipe on Head that had previously been submitted on September 14, 2017 as Exhibit A. SR 460, Third-Party Defendants' Brief in Support of Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction.

Lakota Plains served written discovery on the Housing Authority on September 12, 2017, two days prior to the Housing Authority's first Motion to Dismiss. SR 712, Affidavit of Robert J. Galbraith, Exhibit 2. The Housing Authority refused to answer any discovery. SR 712, Affidavit of Robert J. Galbraith, Exhibit 3. After receiving the Affidavit of Doyle Pipe on Head, Lakota Plains served a Notice of Video-Taped Deposition of Oglala Sioux Lakota Housing Authority Consistent with SDCL § 15-6-30(b)(6) *Duces Tecum* ("Notice of Housing Authority Deposition") on October 17, 2017. SR 712, Affidavit of Robert J. Galbraith, Exhibit 4. In response to the Notice of Housing Authority Deposition, the Housing Authority filed a Motion for Protective Order on October 20, 2017. SR 309. At the time of the hearing on the Housing Authority and Individual Third-Party Defendants' Motions to Dismiss on

January 18, 2018, the Housing Authority and the Individual Third-Party Defendants had provided no discovery to Lakota Plains.

Lakota Plains argued that the Court did have subject matter jurisdiction over the Third-Party Complaint and objected to the Housing Authority and the Individual Third-Party Defendants' Motions on the basis of their failure to provide discovery. SR 690, Third-Party Plaintiff, C. Brunsch, Inc.'s Response to Third-Party Defendants' Motions for Dismiss and Motion for Protective Order. Lakota Plains further filed an Affidavit in Compliance with SDCL § 15-6-56(f) asserting that it was necessary to conduct discovery regarding the factual issues which needed to be resolved to address the Housing Authority and Individual Third-Party Defendants' Motions to Dismiss. SR 680.

A hearing on the Motions to Dismiss filed by the Housing Authority and the Individual Third-Party Defendants was held on January 18, 2018.¹ Over Lakota Plains objection, the Housing Authority called Doyle Pipe on Head to testify related to the subject matter jurisdiction arguments. Transcript, App. at D-3-4, pp. 52:19 – 53:22. The exhibits the Housing Authority introduced through Doyle Pipe on Head were provided to Lakota Plains during a recess in the hearing, at which time Lakota Plains was provided with ten minutes to review them. Transcript, App. at D-3, pp. 51:8 – 52:13.

¹ Other issues were also addressed during the hearing which are not on appeal herein.

After the hearing, the Court issued a Memorandum Order on February 14, 2018 granting the Housing Authority and the Individual Third-Party Defendants' Motions to Dismiss on the basis of subject matter jurisdiction. App. at B-1-17. The Court entered a Rule 54(b) Judgment Granting Third-Party Defendants' Motions to Dismiss on August 1, 2018. App. at A-1-25. This appeal followed.

STATEMENT OF THE FACTS

For purposes of this Appellant's Brief, the facts will be divided into facts taken from the pleadings and facts outside the pleadings.

Generally, "[a] motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712 (citing *Nygaard v. Sioux Valley Hosp. & Health Sys.*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 (citing *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496)). However, this test can be different for a motion under SDCL § 15-6-12(b)(1). This Court has held that:

But we are presented with a factual Rule 12(b)(1) subject matter jurisdiction question. Therefore, courts consider matters outside the pleadings. *Decker*, 1999 SD 62, ¶ 14, 594 N.W.2d at 362 (citing *Osborn v. United States*, 918 F.2d 724 (8th Cir.1990)). As *Osborn* explained:

A court deciding a motion under Rule 12(b)(1) must distinguish between a “facial attack” and a “factual attack.” In the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).... In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

918 F.2d at 729 n. 6 (citations omitted). In factual attacks, the court must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute.

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction-its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Id. at 730. Thus, evidentiary hearings, affidavits, documents, and live testimony may all be considered to resolve the subject matter jurisdiction dispute. *Id.*

Huttenville Hutterian Brethren, Inc. v. Waldner, 2010 S.D. 86, ¶ 20, 791

N.W.2d 169, 174–75. The Housing Authority and the Individual Third-Party Defendants prefaced their motions as a “factual attack.”

Transcript, App. at D-2, p. 13:11 – 13:14. Thus, the Rule 12(b)(5)

safeguards² related to presumptive truthfulness do not attach to Lakota

Plains' allegations. However, *Waldner* was silent as to whether a

defendant can refuse to answer discovery based on the premise that the

² *Waldner* refers to these safeguards as “12(b)(6) safeguards” as the Court was quoting the Eighth Circuit decision in *Osborn*. The South Dakota equivalent of Fed.R.Civ.P. 12(b)(6) is SDCL § 15-6-12(b)(5).

“12(b)[5] safeguards” are not available; essentially, whether a defendant can claim the trial court has no subject matter jurisdiction under SDCL § 15-6-12(b)(1), refuse to answer any discovery, and seek an evidentiary hearing before the trial court to present testimony and exhibits it previously refused to provide to the non-movant. For that reason, this Appellant’s Brief provides this Court with both the facts taken from the pleadings and the facts outside the pleadings.

FACTS TAKEN FROM THE PLEADINGS

In this case, Chase Alone, as the Personal Representative of Takes War Bonnett, filed claims for negligence, strict liability, and breach of warranties against Lakota Plains and Westco. SR 001, Complaint. On October 6, 2016, a massive propane explosion destroyed the duplex located at 157 and 158 East Ridge Housing (a common unit) in Pine Ridge, Oglala Lakota County, South Dakota. SR 001, Complaint, ¶ 1. The explosion killed Takes War Bonnett, who was a guest in Unit 158. SR 001, Complaint, ¶ 2. Lakota Plains and Westco are the companies who supplied propane to Units 157 and 158, respectively. SR 001, Complaint, ¶¶ 5-6.

In turn, both Lakota Plains and Westco filed a Third-Party Complaint against the Housing Authority and the Individual Third-Party Defendants. SR 055 and SR 084. Under the Third-Party Complaint, Lakota Plains alleged that the “sole cause of Elfreda Ann Takes War

Bonnett's death was the result of the action or inaction of the [Housing Authority], as owner of Unit 157, and/or those Third-Party Defendants individually identified above [the Individual Third-Party Defendants], who were responsible for the remodeling and/or refurbishing of Unit 157." SR 084, Third-Party Complaint, ¶ 3. Even the Plaintiff's expert in this case believes that the explosion was caused, at least in part,³ by an uncapped propane gas line left in Unit 157 by either the Housing Authority or the Individual Third-Party Defendants. SR 538, Affidavit of Robert Stubbs, ¶ 6.

Units 157 and 158 were residential housing units owned by the Housing Authority. SR 084, Third-Party Complaint, ¶ 4. Prior to the Spring of 2016, Unit 157 was damaged, which resulted in Unit 157 being empty for a period of years. SR 084, Third-Party Complaint, ¶ 6. During the Spring of 2016, actions were taken to remodel and/or refurbish Unit 157. SR 084, Third-Party Complaint, ¶ 7. The remodel work was completed by the Housing Authority and the Individual Third-Party Defendants. SR 084, Third-Party Complaint, ¶ 8-18. Prior to the remodel work, the furnace, stove/range, and hot water heater in Unit

³ As the trial court noted, the Affidavit of Robert Stubbs identifies that "one of the causes of the explosion that demolished Units 157 and 158 on October 6, 2016, and resulting deaths and severe injuries, was an uncapped interior propane gas line in Unit 157 that, because it was uncapped, allowed gas into Unit 157." SR 538, *Affidavit of Robert Stubbs*, ¶ 6. However, as the trial court recognized, "Stubbs does not identify any other cause of the explosion in his fifteen-page affidavit." Memorandum Order, App. at B-3.

157 were fueled by propane. SR 084, Third-Party Complaint, ¶ 19. As a part of the remodel, the Housing Authority decided to replace the propane stove/range and hot water heater with electrical appliances. SR 084, Third-Party Complaint, ¶ 20. When that work was completed, the Individual Third-Party Defendants failed to cap one or more of the service lines which previously provided propane to the propane appliances, but were no longer necessary as a result of the Housing Authority's decision to install electrical appliances. SR 084, Third-Party Complaint, ¶ 21. The sole cause of the explosion in Units 157 and 158 was the uncapped propane line(s). SR 084, Third-Party Complaint, ¶ 22.

In response, the Housing Authority and the Individual Third-Party Defendants chose to file Motions to Dismiss,⁴ without any form of Answer or other assertion of any defenses, factual or otherwise, except for subject matter jurisdiction. Both the Housing Authority and the Individual Third-Party Defendants relied on the Affidavit of Doyle Pipe on Head (App. at C-1-3) to support their respective Motions to Dismiss. Yet, the Housing Authority refused to make Doyle Pipe on Head available for a deposition to otherwise be subject to cross-examination on the assertions he made in his Affidavit. After receiving the Affidavit of Doyle

⁴ Lakota Plains is not suggesting it was inappropriate for the Housing Authority and the Individual Third-Party Defendants to file only a Motion to Dismiss, only that the pleadings are devoid of any factual assertions by the Housing Authority and the Individual Third-Party Defendants.

Pipe on Head, Lakota Plains served the Notice of Housing Authority Deposition on October 17, 2017. SR 712, Affidavit of Robert J. Galbraith, Exhibit 4. The Housing Authority's only response was a Motion for Protective Order, arguing that the Housing Authority need not respond to any discovery in this case. SR 309. Further, not one of the Individual Third-Party Defendants filed an affidavit or appeared to testify during the hearing. The Housing Authority and the Individual Third-Party Defendants relied solely and entirely on the Affidavit and testimony of Doyle Pipe on Head.

For purposes of the Motions to Dismiss that were before the trial court, these were the facts taken from the pleadings, nothing more, nothing less. Lakota Plains was not aware of and was required to rely entirely on the unsupported assertions in the Affidavit of Doyle Pipe on Head for any information related to the tribal membership status or employment status of any of the Individual Third-Party Defendants. Lakota Plains was aware from publicly available information that the Housing Authority receives federal funding, and as a part of that federal funding, must take certain actions (such as obtaining a policy of insurance),⁵ but Lakota Plains was not aware of the entirety of any

⁵ Counsel for the Housing Authority communicated to counsel for Lakota Plains that the Housing Authority maintains \$1,000,000 of insurance as a requirement of its federal funding. SR 712, Affidavit of Robert J. Galbraith, ¶ 2; this fact was later acknowledged by Doyle Pipe on Head, although he did not have any specifics of the coverage. Transcript, App. at D-12, p. 92:11 – 92:20.

agreement that the Housing Authority had with the federal government, including whether or not the Housing Authority had waived any immunities or consented to jurisdiction outside of tribal court as a result of any such agreement or any other actions taken by individuals at the Housing Authority or with the tribe.

FACTS OUTSIDE THE PLEADINGS

At the time of the hearing on January 18, 2018, the Housing Authority called Doyle Pipe on Head over Lakota Plains objection to testify related to the Housing Authority and the Individual Third-Party Defendants' subject matter jurisdiction arguments. Transcript, App. at D-3-4, pp. 52:19 – 53:22. None of the Individual Third-Party Defendants was present or testified. The Housing Authority and the Individual Third-Party Defendants introduced six exhibits through Doyle Pipe on Head. SR 1073, 1076, 1090, 1098, 1134, 1152, and 1161. The exhibits introduced through Doyle Pipe on Head were provided to Lakota Plains during a recess in the hearing, at which time Lakota Plains was provided with ten minutes to review them before Doyle Pipe on Head took the stand. Transcript, App. at D-3, pp. 51:8 – 52:13. The trial court permitted Doyle Pipe on Head to provide testimony related to the structure and operation of the Housing Authority (Transcript, App. at D-4, pp. 55:23 – 56:12), testimony as to how the Housing Authority was created (Transcript, App. at D-5, p. 57:1 – 57:12), to lay foundation for

an unsigned tribal charter (Transcript, App. at D-5-6, pp. 58:14 – 61:15), testimony related to the Housing Authority’s funding sources (Transcript, App. at D-6, pp. 62:24 – 64:4), testimony related to whether Doyle Pipe on Head believes the Housing Authority waived its immunity or consented to suit in any other jurisdictions (Transcript. App. at D-6-7, pp. 64:15 – 68:14), testimony related to whether the Housing Authority has any federal contracts that waive immunity or consent to jurisdiction outside of tribal court (Transcript, App. at D-7, p. 68:15 – 68:20), testimony related to the tribal enrollment status and employment status of the Individual Third-Party Defendants (Transcript, App. at D-7-8, pp. 68:21 – 70:10), testimony related to “title status reports” for Units 157 and 158 (Transcript, App. at D-9, pp. 78:10 – 80:10), testimony related to whether the Housing Authority has ever contractually waived sovereign immunity or consented to be sued (Transcript, App. at D-10-11, pp. 83:8 – 83:22 and 85:4 – 85:10),⁶ and testimony related to whether the

⁶ It must be noted that Doyle Pipe on Head’s testimony that the Housing Authority has never consented to be sued is directly contradicted by the Eighth Circuit Court of Appeals decision in *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, wherein the Court specifically recognized that the Housing Authority consented to be sued when it held:

The tribal ordinance chartering the Housing Authority provides, as part of the Housing Authority's powers, that

[t]he Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority, except insofar as expressly authorized hereafter by the Council.

Housing Authority could continue to operate if it were exposed to litigation (Transcript, App. at D-83:23 – 85:1). Doyle Pipe on Head readily acknowledged that he does not know which tasks were performed by any of the Individual Third-Party Defendants related to Unit 157 and is only generally aware that renovation work was done. Transcript, App. at D-11, p. 85:11 – 85:19. Yet, this is the only information that Lakota Plains was permitted to receive and the only witness Lakota Plains was ever provided access to, and all without any ability for discovery related to facts asserted by Doyle Pipe on Head.

ARGUMENT

I. C. BRUNSCH, INC., d/b/a LAKOTA PLAINS PROPANE WAS ENTITLED TO DISCOVERY FROM THE OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL, DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENTY ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM, AND ROBIN TUTTLE BEFORE THE EVIDENTIARY HEARING ON THE THIRD-PARTY DEFENDANTS' MOTIONS TO DISMISS

Ordinance Chartering the Oglala Sioux Housing Authority, Article V, § 2 (1976). A “sue and be sued” clause such as is set forth in the tribal ordinance quoted above has been recognized as constituting an express waiver of sovereign immunity. *See, e.g., American Indian Agricultural Credit*, 780 F.2d at 1379 (quoting with approval the “sue or be sued” clause at issue in *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23 (D.Minn.1974) (Heaney, J., sitting by designation), *aff’d* 517 F.2d 508 (8th Cir.1975); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521–22 (5th Cir.), *cert. denied*, 385 U.S. 918, 87 S.Ct. 227, 17 L.Ed.2d 143 (1966) (tribal corporation validly waived sovereign immunity through use of “sue and be sued” clause, though waiver qualified to bar attachment of property).

797 F.2d 668, 671 (8th Cir. 1986). While this language is certainly not dispositive of this case, it certainly shows the need for discovery related to the factual assertions made by Doyle Pipe on Head which are contrary to prior published precedent related to the very entity involved in this case.

Generally, “[a] motion to dismiss tests the legal sufficiency of the pleading, and therefore, [this Court] review[s] the grant of a motion to dismiss de novo.” *Matter of Elizabeth A. Briggs Revocable Living Tr.*, 2017 S.D. 40, 898 N.W.2d 465, 472 (citing *Sisney v. State*, 2008 S.D. 71, ¶ 8, 754 N.W.2d 639, 643). The Court also reviews jurisdictional issues *de novo*. *Waldner*, 2010 S.D. 86, ¶ 18 (citing *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 9, 675 N.W.2d 739, 742).

Lakota Plains filed its Third-Party Complaint against the Housing Authority and the Individual Third-Party Defendants on July 11, 2017. SR 084, Third-Party Complaint. On September 12, 2017, before having received any answer or responsive pleading, Lakota Plains served the Defendant/Third-Party Plaintiff, C. Brunsch, Inc.’s First Set of Interrogatories and Request for Production of Documents to Third-Party Defendant, Oglala Sioux Lakota Housing Authority. SR 712, Affidavit of Robert J. Galbraith, Exhibit 2. Two days later, on September 14, 2017, the Housing Authority and one of the Individual Third-Party Defendants filed the Third-Party Defendants’ Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction. SR 189.⁷ Along with the Motion to Dismiss, the Housing Authority filed the Affidavit of Doyle Pipe on Head. App. at C-1-3.

⁷ The differences in the dates on which the various responses of the Housing Authority and the Individual Third-Party Defendants were filed came as a result of differences in the time or manner in which they were served. It is not alleged that any of the responsive pleadings were untimely.

On October 12, 2017, the Housing Authority served the Oglala Sioux Lakota Housing Authority's Responses to Defendant/Third-Party Plaintiff C. Brunsch Inc.'s First Set of Interrogatories and Request for Production of Documents. SR 712, Affidavit of Robert J. Galbraith, Exhibit 3. The only interrogatory that was responded to by the Housing Authority, subject to an objection that the Housing Authority is not required to answer discovery, was in response to Interrogatory No. 1, that the Housing Authority's counsel, Evan M.T. Thompson, prepared the answers. SR 712, Affidavit of Robert J. Galbraith, Exhibit 3. Other than Interrogatory No. 1, the Housing Authority did not answer a single interrogatory or request for production. Instead, the Housing Authority provided an objection to each and every question which provided, in part, that "OSLH enjoys sovereign immunity as a governmental arm of the Oglala Sioux Tribe. Sovereign immunity is an absolute jurisdictional bar and OSLH is not required to respond to discovery requests or be otherwise burdened by the unwarranted demands of defending against the Third-Party Plaintiffs' claims." SR 712, Affidavit of Robert J. Galbraith, Exhibit 3.

On October 17, 2017, after receiving the Affidavit of Doyle Pipe on Head and the Housing Authority's objections to written discovery, Lakota Plains served the Notice of Housing Authority Deposition. SR 712, Affidavit of Robert J. Galbraith, Exhibit 4. The Notice of Housing

Authority Deposition was met only with a Motion for Protective Order which alleged that “[t]he cloak of sovereign immunity protects OSLH not only from liability but from suit as well...OSLH prays that the Court grant its motion that discovery not be had of it in this action.” SR 309, Motion for Protective Order. On that same date, the Housing Authority filed Oglala Sioux Lakota Housing’s Motion to Dismiss Third-Party Complaints Based on Sovereign Immunity. SR 307.

On January 3, 2018, the remainder of the Individual Third-Party Defendants filed the Third-Party Defendants’ Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction. SR 458. The brief in support of that motion incorporated and attached the Affidavit of Doyle Pipe on Head that had previously been submitted on September 14, 2017 as Exhibit A. SR 460, Third-Party Defendants’ Brief in Support of Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction.

The three Motions to Dismiss and the Motion for Protective Order, along with various other motions which are not at issue in this appeal were scheduled for hearing on January 18, 2018. A Notice of Hearing on Third-Party Defendants’ Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction was filed by the Housing Authority and the Individual Third-Party Defendants on January 4, 2018. SR 536. The Notice of Hearing did not indicate that the hearing

would be an evidentiary hearing or that the Housing Authority or the Individual Third-Party Defendants intended to submit evidence or bring witnesses.

Yet, despite the fact that the Housing Authority had denied any and all attempts for discovery and provided no indication that the Housing Authority intended to bring witnesses to the hearing on January 18, 2018, that's exactly what happened.

Before the hearing (and before Lakota Plains was aware that the Housing Authority intended to present evidence), Lakota Plains filed an Affidavit in Compliance with SDCL § 15-6-56(f).⁸ SR 680. The Affidavit alleged the following facts:

- Even the Third-Party Defendants acknowledge there are factual issues that must be addressed by this Court in determining the Third-Party Defendants' claims related to subject matter jurisdiction and sovereign immunity.
- Affiant and the law firm of Nooney & Solay, LLP cannot be prepared to try those factual issues identified by the Third-Party Defendants without discovery related to those factual issues. To date, the Third-Party Defendants have failed and/or refused to provide any discovery.
- It is necessary to conduct written discovery related to those claims made by the Housing Authority, including discovery into to the operation of the Housing Authority, the Housing Authority's Charter, the Housing Authority's federal funding, including all contracts, regulations, and aspects related to the Housing Authority's procurement of insurance and

⁸ SDCL § 15-6-56(f) provides that "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

potential waiver of sovereign immunity, the alleged employment of the individual Third-Party Defendants, the scope of work completed by the individual Third-Party Defendants, and all facts contained in the Affidavit of Doyle Pipes on Head, provided and relied upon in support of all of the Third-Party Defendants' Motions.

- It is necessary to take the SDCL § 15-6-30(b)(6) deposition of the Housing Authority to address issues related to the operation of the Housing Authority, the Housing Authority's Charter, the Housing Authority's federal funding, including all contracts, regulations, and aspects related to the Housing Authority's procurement of insurance and potential waiver of sovereign immunity, the alleged employment of the individual Third-Party Defendants, the scope of work completed by the individual Third-Party Defendants, and all facts contained in the Affidavit of Doyle Pipes on Head, provided and relied upon in support of all of the Third-Party Defendants' Motions.
- Based on the information gathered during the SDCL § 15-6-30(b)(6) deposition of the Housing Authority, or if the deposition is not allowed, it is necessary to take the deposition of the individual Third-Party Defendants related to those same facts identified above.
- Without the discovery identified above, Lakota Plains cannot present by affidavit or testimony those facts necessary to justify its opposition to the Third-Party Defendants' Motions.

SR 680. Lakota Plains further alleged in its responsive pleading that the Court should treat the Housing Authority and Individual Third-Party Defendants' motions as motions for summary judgment. Lakota Plains provided the following analysis:

When dealing with a Motion to Dismiss, and particularly a Motion to Dismiss for failure to state a claim upon which relief can be granted under SDCL § 15-6-12(b)(5), 'if...matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given

reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.” SDCL § 15-6-12(b) (emphasis added).

In deciding a Motion to Dismiss based upon subject matter jurisdiction under SDCL § 15-6-12(b)(1), “[a] court...must distinguish between a ‘facial attack’ and a ‘factual attack.’ In the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).... In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.” *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 175. In this case, the same principles related to the requirement of additional discovery will apply as with a Motion to Dismiss under SDCL § 15-6-12(b)(5). If the attack is facial, the Court cannot consider matters outside the pleadings without giving Lakota Plains a “reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.” “The general rule is that a complaint should not be dismissed ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). It cannot be said that Lakota Plains can prove “no set of facts.” As more fully identified below, there are any number of factors that could lead to a waiver of the protections sought by the Third-Party Defendants.

If the attack is a factual one, “the court must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute.” *Waldner*, 2010 S.D. 86, ¶ 20. “Thus, evidentiary hearings, affidavits, documents, and live testimony may all be considered to resolve the subject matter jurisdiction dispute.” *Id.* None of this can be conducted when the Third-Party Defendants will not allow any discovery related to the factual assertions of the Third-Party Defendants in support of the Motions to Dismiss.

SR 690, Third-Party Plaintiff, C. Brunsch, Inc.’s Response to Third Party Defendants’ Motions to Dismiss and Motion for Protective Order.

During the hearing, the Housing Authority acknowledged that their attack was a “factual attack.” Transcript, App. at D-2, p. 13:11 – 13:14.

In reviewing this issue, the Court must look to this Court's prior analysis in *Waldner*:

But we are presented with a factual Rule 12(b)(1) subject matter jurisdiction question. Therefore, courts consider matters outside the pleadings. *Decker*, 1999 SD 62, ¶ 14, 594 N.W.2d at 362 (citing *Osborn v. United States*, 918 F.2d 724 (8th Cir.1990)). As *Osborn* explained:

A court deciding a motion under Rule 12(b)(1) must distinguish between a “facial attack” and a “factual attack.” In the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).... In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

918 F.2d at 729 n. 6 (citations omitted). In factual attacks, the court must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute.

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction-its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Id. at 730. Thus, evidentiary hearings, affidavits, documents, and live testimony may all be considered to resolve the subject matter jurisdiction dispute. *Id.*

2010 S.D. 86, ¶ 20.

It is not disputed that in a factual attack, the trial court considers matters outside the pleadings and weighs the evidence to resolve disputed issues of fact. However, what is less clear is what the Eighth

Circuit or this Court meant when it stated that “the non-moving party does not have the benefit of 12(b)(6) safeguards.” Lakota Plains believes and the caselaw supports the position that the above language is restricted only to the “presumptive truthfulness” of the pleadings, *i.e.*, the trial court may weigh the evidence. What is not addressed, however, is the non-movant’s right to discovery. Lakota Plains respectfully submits that the standard the trial court’s are required to use for a motion under SDCL § 15-6-12(b)(5) is appropriate for purposes of obtaining evidence, *i.e.*, that “[i]f, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.” SDCL § 15-6-12(b). Hence, Lakota Plains filed the Affidavit in Compliance with SDCL § 15-6-56(f) seeking discovery related to the issues being presented to the Court. SR 680. While the trial court can still weigh the evidence when addressing subject matter jurisdiction, certainly, the language that “all parties shall be given reasonable opportunity to present all material made pertinent to such a motion” still applies.

Simply put, if the Court accepts the argument made by the Housing Authority and the Individual Third-Party Defendants, any evidentiary hearing is tantamount to trial by ambush. The Housing Authority and the Third-Party Defendants failed and refused to provide any discovery arguing very clearly that “[t]he cloak of sovereign immunity protects OSLH not only from liability but from suit as well...OSLH prays that the Court grant its motion that discovery not be had of it in this action.” SR 309, Motion for Protective Order.

The analysis here might be different if the Housing Authority and the Individual Third-Party Defendants relied on the allegations in the pleadings. They did not. The Housing Authority and the Individual Third-Party Defendants showed up at the hearing, without informing any parties or the Court that they intended to bring a witness and introduce testimony and exhibits that would have been subject to said discovery. As this Court has previously held “the purpose of pretrial discovery is to allow ‘the parties to obtain the fullest possible knowledge of the issues and facts before trial.’” *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 14, 764 N.W.2d 474, 481. The purpose of the rules is “to promote the truth finding process and avoid trial by ambush.” *Id.*; see also *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 16.

The Housing Authority and the Individual Third-Party Defendants cannot argue that this case involved anything other than trial by ambush. The Housing Authority refused to answer a single written discovery question aside from the answer that their counsel provided the answers to discovery, refused to appear for a deposition, and otherwise refused to provide any evidence whatsoever in advance of the evidentiary hearing on their motion.⁹ Even more concerning is the fact that Doyle Pipe on Head's testimony that the Housing Authority has never consented to be sued is directly contradicted by the Eighth Circuit Court of Appeals decision in *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). This is not to suggest that Doyle Pipe on Head knowingly lied or that he would have been with the Housing Authority in 1986 when the *Weeks* decision was issued, but it does show the importance of discovery and Lakota Plains ability to discover facts and examine witnesses through deposition testimony. In *Weeks*, the Eighth Circuit held that the Housing Authority waived sovereign immunity as a result of a "sue or be sued" clause in its charter. 797 F.2d at 671. The Housing Authority simply alleged that its charter has

⁹ It is acknowledged that the Housing Authority informally provided certain documents before they became a party to this litigation. However, the Housing Authority refused to ever go on the record or provide sworn testimony with respect to any discovery. Such informal discovery is not binding on the Housing Authority, did not provide any information other than documents, and provided Lakota Plains with no assurance that it had all documents requested.

changed since *Weeks*, and introduced an unsigned copy during the hearing as Exhibit B, when Lakota Plains had not had an opportunity to ask the Housing Authority a single question, by written interrogatory or deposition, related to the Charter, the basis for any changes, the intent of the Charter, or even if what was provided was the most recent version of the Charter. SR 1076. Further, the *Weeks* Court held, the “sue or be sued” language was included as a result of HUD regulations which required that provision in order for the Housing Authority to qualify for HUD assistance. 797 F.2d at 676, n. 2. The Housing Authority readily acknowledges that more than 70% of the Housing Authority’s operating budget is still funded by the federal government. App. at C-3, ¶ 12. Yet, Lakota Plains was entitled to no discovery related to the Housing Authority’s funding and any conditions attached thereto.

It was error for the trial court to allow the Housing Authority and the Individual Third-Party Defendants to provide evidence to the trial court, by way of affidavit, testimony, or exhibits, without allowing Lakota Plains the opportunity to conduct discovery with respect to the Housing Authority and the Individual Third-Party Defendants’ claims.

II. THE COURT ERRED WHEN IT GRANTED THE OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL, DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENTY ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM, AND ROBIN TUTTLE'S MOTIONS TO DISMISS BASED ON SUBJECT MATTER JURISDICTION

In facing a motion to dismiss, the “[p]leadings should not be dismissed merely because the court entertains doubt as to whether the pleader will prevail in the action.” *Thompson v. Summers*, 567 N.W.2d 387, 390 (S.D. 1997). A motion to dismiss is viewed with disfavor and is rarely granted. *Id.*

Lakota Plains ability to analyze whether the Housing Authority and the Individual Third-Party Defendants should be dismissed for lack of subject matter jurisdiction, as well as the ability of this Court to review the same is hindered by the Housing Authority’s refusal to answer or provide discovery as more fully set forth above. Neither Lakota Plains, nor the trial court, nor this Court has received any information from the Individual Third-Party Defendants, but rather the entire basis of their dismissal was premised upon information provided by a non-party, Doyle Pipe on Head. It is unclear whether or not the Individual Third-Party Defendants’ counsel has even had contact with each of the Third-Party Defendants. Even so, the Individual Third-Party Defendants are not entitled to dismissal as they are sued for the individual actions, not for their official capacities.

The United States Supreme Court addressed this issue in *Lewis v. Clarke*, 137 S.Ct. 1285, 197 L.Ed. 2d 631 (2017). In *Lewis*, a limosine driven by William Clark, an employee of the Mohegan Tribal Gaming Authority, was transporting patrons of the Mohegan Sun Casino when it

struck Brian and Michelle Lewis. *Id.* at 1289. The Lewises filed suit against Clark in state court and Clark moved to dismiss for lack of subject matter jurisdiction on the basis of tribal sovereign immunity. *Id.* The Supreme Court of Connecticut held that tribal sovereign immunity barred the suit. *Id.* at 1290. The United States Supreme Court reversed. The Court held that “[t]he distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation.” *Id.* at 1291 (internal citations omitted). On the other hand, “[p]ersonal-capacity suits...seek to impose *individual* liability upon a government officer for actions taken under color of state law. [O]fficers sued in their personal capacity come to court as individuals, and the real party in interest is the individual, not the sovereign.” *Id.* (internal citations omitted).

Lakota Plains’ claims against the Individual Third-Party Defendants are clearly personal capacity suits. If the individual Third-Party Defendants leave their positions, they will continue to be named as parties in this litigation for their actions in failing to cap the propane gas line in Unit 157. As the *Lewis* Court held, “[t]his is not a suit against Clarke [the individual Third-Party Defendants] in his official capacity. It

is simply a suit against Clarke [the individual Third-Party Defendants] to recover for his [their] personal actions, which ‘will not require action by the sovereign or disturb the sovereign's property.’” *Id.* at 1291.

With respect to the Housing Authority, there are any number of contractual or statutory situations in which the Housing Authority could have consented to suit in other jurisdictions and/or waived sovereign immunity. In 1975, Congress passed Public Law 93-638, the Indian Self Determination and Education Assistance Act (“ISDEAA”), “to provide maximum Indian participation in the Government and education of the Indian people; to provide for full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.” That law is now codified beginning at 25 U.S.C. § 5301. 25 U.S.C. § 5321 provides rules for 638 “self-determination contracts.” Within that code provision “[t]he Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof[.]” 25 U.S.C. § 5321(a)(1). The code provision further provides for the procurement of insurance and the waiver of immunity. “[T]he

Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this chapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.” 25 U.S.C. § 5321(c)(1). “Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.” 25 U.S.C. § 5321(c)(3)(A) (emphasis added). During the hearing, Doyle Pipe on Head acknowledged that the Housing Authority does maintain insurance coverage. Transcript, App. at D-12, p. 92:11 – 92:20. However, Doyle Pipe on Head denies, without any evidence other than his testimony, that the Housing Authority has any 638 contracts. Transcript, App. at D-7, p. 68:15 – 68:17.

The Native American Housing Assistance and Self Determination Act (“NAHASDA”), to which the Housing Authority acknowledges is applicable, is codified at 25 U.S.C. § 4101. Under the NAHASDA, Congress recognized “the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal Government shall work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for tribes and their members.” 25 U.S.C. § 4101. Further, “[f]ederal assistance to meet these responsibilities shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.).” *Id.* (emphasis added).

Further, if the Court considers the unsigned charter provided by the Housing Authority (SR 1076), the Charter specifically provides that “OSLH shall have the power to sue and is authorized to consent to be sued in the Oglala Sioux Tribal Courts or another court of competent jurisdiction[.]” *See Charter, Art. VI(2)(b)*. There is no question that the Charter language allows the Housing Authority to “consent to be sued on

the Oglala Sioux Tribal Courts or another court of competent jurisdiction.”

Certainly, the trial court in this case is “another court of competent jurisdiction.” There is also no question that the Housing Authority carries insurance in the event it is sued. One must ask the rhetorical question, what is the purpose of insurance if there are not some situations wherein the Housing Authority has consented to be sued. However, as the Housing Authority asserts that it has never consented to be sued (despite the fact that it did consent to be sued in *Weeks*), neither Lakota Plains, nor the trial court, nor this Court can make any assessment of which jurisdiction(s) the Housing Authority consented to suit in.

Through the ISDEAA or NAHASDA, the U.S. Department of Housing and Urban Development provides assistance and/or grants for Native American housing. Doyle Pipe on Head acknowledged that there are conditions attached to that funding, one of which includes procuring insurance coverage. Transcript, App. at D-12, p. 92:11 – 92:20. Lakota Plains presented sufficient questions of fact, which could not be weighed by the trial court without additional information, which precluded the dismissal in this case.

The trial court erred when it dismissed the Housing Authority and the Individual Third-Party Defendants on the basis of subject matter jurisdiction. At the very least, additional discovery is necessary. Without

regard to discovery, under the United States Supreme Court's holding in *Lewis*, Lakota Plains suit against the Individual Third-Party Defendants in their personal capacity, for their own actions, should not be dismissed.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellant, C. Brunsch, Inc., d/b/a Lakota Plains Propane, respectfully requests that this Court reverse the Trial Court's Rule 54(b) Judgment Granting Third-Party Defendants' Motion to Dismiss and to remand this case for further discovery and/or proceedings related to the Third-Party Complaint filed by C. Brunsch, Inc., d/b/a Lakota Plains Propane against the Third-Party Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle.

Dated this 2nd day of October, 2018.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith
JOHN K. NOONEY
ROBERT J. GALBRAITH
Attorneys for Appellant
326 Founders Park Drive / P. O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846
john@nooneysolay.com
robert@nooneysolay.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 7,862 words and 42,000 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 2nd day of October, 2018.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith
JOHN K. NOONEY
ROBERT J. GALBRAITH
Attorneys for Appellees
326 Founders Park Drive / P. O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846
robert@nooneysolay.com

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

<p>JENNIFER CHASE ALONE, as the Personal Representative of ELFREDA ANN TAKES WAR BONNETT, Deceased,</p> <p>Plaintiff,</p> <p>vs.</p> <p>C. BRUNSCH, INC., a South Dakota corporation, doing business as Lakota Plains Propane, Inc., and WESTERN COOPERATIVE COMPANY, INC., a Nebraska corporation,</p> <p>Defendants/Third-Party Plaintiffs,</p> <p>vs.</p> <p>Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, Robin T. (last name unknown) and John and Jane Doe 1-100,</p> <p>Third-Party Defendants.</p>	<p>Appeal No. 28688</p> <p>CERTIFICATE OF SERVICE</p>
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I, Robert J. Galbraith, attorney for the Appellant, hereby certify
that a true and correct copy of the foregoing *Appellant's Brief* was served
by email on the 2nd day of October, 2018 to:

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Tel: (605) 341-4400
Attorneys for Plaintiff
jim@southdakotajustice.com

Stanley Karon
Karon Trial Law P.A.
6600 Lyndale Ave S
Minneapolis, MN 55423
Attorneys for Plaintiff
karontrial@yahoo.com

Mark D. Covin
David M. Dahlmeier
Amie E. Penny Sayler
100 South 5th Street, Suite 1500
Minneapolis, MN 55402-1254
Telephone: (612) 333-3000
Facsimile: (612) 333-8829
Attorneys for Defendant/ Third-Party Plaintiff, Western Cooperative Company
mcovin@bassford.com
ddahlmeier@bassford.com
asayler@bassford.com

Mark F. Marshall
Bangs, McCullen, Butler, Foye & Simmons
333 West Boulevard, Suite 400
P.O. Box 2670
Rapid City, SD 57709
Attorneys for Third-Party Defendants
mmarshall@bangsmccullen.com

Evan Thompson
Browning, Kaleczyc, Berry & Hoven, P.C.
800 N. Last Chance Gulch, #101
P.O. Box 1697
Helena, MT 59624
Attorneys for Third-Party Defendants
evan@bkbh.com

/s/ Robert J. Galbraith
ROBERT J. GALBRAITH

APPENDIX

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A

STATE OF SOUTH DAKOTA)
) :SS
COUNTY OF OGLALA LAKOTA)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

JENNIFER CHASE ALONE, as the
Personal Representative of ELFREDA
ANN TAKES WAR BONNETT,
Deceased,

Plaintiff,

vs.

C. BRUNSCH, INC., a South Dakota
corporation, doing business as
Lakota Plains Propane, Inc., and
WESTERN COOPERATIVE
COMPANY, INC., a Nebraska
corporation,

Defendants/Third-Party Plaintiffs,

vs.

Oglala Sioux Lakota Housing
Authority, Richard Hill, Derek Janis,
Wes Cottier, William White, Ben
Plenty Arrows, Renaldo Two Bulls,
Brandon Wes, Derek Slim, Robin T.
(last name unknown) and John and
Jane Doe 1-100,

Third-Party Defendants.

56CIV17-0000007

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
AUG 01 2018
By: _____

**RULE 54(B) JUDGMENT GRANTING
THIRD-PARTY DEFENDANTS'
MOTION TO DISMISS**

THIS MATTER originally came before the Court, on 18th day of January,
2018, on the Third-Party Defendants' Motion to Dismiss Third-Party
Complaints Based on Lack of Subject Matter Jurisdiction, dated September 14,
2017, the Oglala Sioux Lakota Housing's Motion to Dismiss Third-Party
Complaints Based on Sovereign Immunity and Oglala Sioux Lakota Housing's

Motion for Protective Order, dated October 20, 2017, and the Third-Party Defendants' Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction, dated January 3, 2018; the Plaintiff, Jennifer Chase Alone, as the Personal Representative of Elfreda Ann Takes War Bonnett, appearing through her counsel, James Leach, the Defendant/Third-Party Plaintiff, C. Brunsch, Inc., appearing through its counsel John Nooney and Robert Galbraith, the Defendant/Third-Party Plaintiff, Western Cooperative Company, Inc., appearing through its counsel, David Dahlmeier, and the Third-Party Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle, appearing through their counsel Evan Thompson and Mark Marshall; the Court reviewed the submissions of the parties and considered the evidence of argument of counsel and issued a Memorandum Order on February 14, 2018; and

THIS MATTER having come before the Court again on the 11th day of July, 2018, on the Oglala Sioux Lakota Housing Authority filed a Motion for Rule 54(B) Certification; the Plaintiff, Jennifer Chase Alone, as the Personal Representative of Elfreda Ann Takes War Bonnett, appearing through her counsel, James Leach, the Defendant/Third-Party Plaintiff, C. Brunsch, Inc., appearing through its counsel John Nooney and Robert Galbraith, the Defendant/Third-Party Plaintiff, Western Cooperative Company, Inc., did not appear as it had previously been dismissed from this case, and the Third-Party

Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle, appearing through their counsel Evan Thompson and Mark Marshall, the Court having had an opportunity to consider the submissions of the parties and hear argument of counsel, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that the Third-Party Defendants' Motions to Dismiss are hereby granted for those reasons more fully set forth in the Court's Memorandum Order, dated February 14, 2018, the Court finding that it does not have subject matter jurisdiction over the Third-Party Defendants; and it is further

ORDERED, ADJUDGED AND DECREED that the Oglala Sioux Lakota Housing Authority's Motion for Rule 54(B) Certification is hereby granted, the Court having balanced the factors required by *Davis v. Farmland Mut. Ins. Co.*, 2003 S.D. 111, 669 N.W.2d 713, and having determined there is no just reason for delay in entering this Judgment as a final judgment under South Dakota law; and it is further

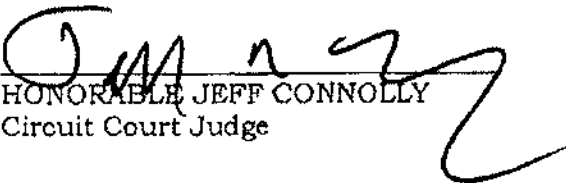
ORDERED, ADJUDGED AND DECREED that the Court's oral findings with respect to the factors in *Davis v. Farmland Mut. Ins. Co.*, 2003 S.D. 111, 669 N.W.2d 713, a transcript of which is attached hereto as Exhibit 1, are hereby incorporated into this Judgment is if fully set forth herein.

Dated this 1st day of ~~July~~ ^{August}, 2018.

ATTEST:
Ranae Truman
Clerk of Courts

By: Deputy Clerk
(SEAL)

BY THE COURT:



HONORABLE JEFF CONNOLLY
Circuit Court Judge

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT
3
4 JENNIFER CHASE ALONE, as)
5 the Personal)
6 Representative of ELFREDA)
7 ANN TAKES WAR BONNETT,)
8 Deceased)
9 Plaintiff,)
10 vs.)
11 C. BRUNSCH, INC., a South)
12 Dakota corporation, doing)
13 business as Lakota Plains)
14 Propane, Inc., and)
15 WESTERN COOPERATIVE)
16 COMPANY, INC., A Nebraska)
17 corporation)
18 Defendants/Third-Party)
19 Plaintiffs,)
20 OGLALA SIOUX LAKOTA)
21 HOUSING AUTHORITY,)
22 RICHARD HILL, DEREK)
23 JANIS, WES COTTIER,)
24 WILLIAM WHITE, BEN PLENTY)
25 ARROWS, RENALDO TWO)
26 BULLS, BRANDON WES, DEREK)
27 SLIM, ROBIN T. (Last name)
28 unknown) and John and)
29 Jane Doe, 1-100,)
30 Third-Party Defendants,)
31
32 BEFORE: THE HONORABLE JEFFREY R. CONNOLLY
33 Circuit Court Judge
34 Pennington County Courthouse
35 Rapid City, South Dakota
36 July 11, 2018 at 9:00 AM
37
38 George R. Cameron
39 Official Court Reporter To
40 Judge Jeffrey R. Connolly
41 Seventh Judicial Circuit
42 Pennington County Courthouse
43 Rapid City, South Dakota 57709
44 605.394.2571

MOTIONS
HEARING
EXCERPT

FILE 56-CIV-17-07



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APPEARANCES:

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For the Plaintiff:

MR. JAMES D. LEACH
South Dakota Justice
1671 Sheridan Lake Road
Rapid City, South Dakota 57702
605-341-4400

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For the Defendant,
C. Brunsch, Inc.:

MR. ROBERT J. GALBRAITH
-AND-
JOHN K. NOONEY
Nooney & Solay
326 Founders Park Drive
Rapid City, South Dakota 57701
605-721-5846

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17

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For Oglala Sioux
Lakota Housing
Authority:

MARK F. MARSHALL
Bangs McCullen
333 West Boulevard
Suite 400
Rapid City, SD 57701
605.343.1040

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21

22

23

24

25

For Oglala Sioux
Lakota Housing
Authority:

EVAN M.J. THOMPSON [VIA PHONE]
Browning, Kaleczyc, Berry
800 N. Last Chance Gulch
Suite 101
Helena, Montana 59624
406.443.6820

1 THE COURT: Okay. Well, I have, of course, reviewed
2 54(b), the file, the submissions of parties. I have
3 heard the argument of counsel here. I reviewed the
4 briefs and the filings, anything -- the entire file as
5 it is relevant to this.

6 I also note that I have been considering this and
7 thinking about this matter for a considerable amount
8 of time. This isn't something that is being made
9 after ruling on the record, so to speak, as to -- you
10 know, I'm not immediately deciding what I'm going to
11 do here.

12 I mean, I made this decision after taking it
13 under advisement for four or five weeks in writing in
14 a 17-page memorandum opinion, and that was back in
15 February. So it's been a number of months.

16 I think Mr. Leach raised the 54(b) issue the very
17 next day in a letter he e-mailed to us. So this is
18 something which I have considered for a great deal of
19 time.

20 I have also considered -- and I have reviewed and
21 read through Davis v Farmland, 669 N.W.2d, 713, and
22 that's, of course, also published at 2003 South
23 Dakota 111, which sets forth the South Dakota Supreme
24 Court's guidance as to when 54(b) certification should
25 be utilized.

1 I note that I'm not to grant such a motion for
2 the convenience of the parties. And I don't think
3 that the Court should rely upon the Supreme Court to
4 screen this. I don't think that I should defer to
5 them by sending it up and seeing whether or not they
6 do a show cause.

7 But that all being said, after reviewing all
8 those factors which I will go through, I think this is
9 the type of case that should be granted the 54(b)
10 certification. And I have given considerable
11 consideration to that.

12 I think that, frankly, there's no just reason to
13 delay a final adjudication of the subject matter
14 jurisdiction issue in relation to the 12(b)(1) motion
15 as to the third-party claims of Brunsch against the
16 third-party defendants.

17 And I'm going to go through those factors because
18 I have to. But one of the major issues here is I
19 think that the issues involving the rights of Indian
20 tribes is a special kind of issue that I think we need
21 to resolve. And I think it can be unduly harsh if we
22 get it wrong.

23 So I note that in Davis v. Farmland the Supreme
24 Court adopted three rules. One, that the burden is
25 on the moving party, and in this case that would be

1 Mr. Thompson's clients. But I note that Mr.
2 Galbraith's and Mr. Nooney's clients are also seeking
3 this. I think collectively they have met that burden
4 to show that this is an infrequently harsh case
5 meriting favorable exercise of the Court's discretion.

6 I also note that the second factor that the
7 Supreme Court has imposed upon circuit courts is that
8 I balance the competing factors present in the case to
9 determine if it's in the best interest of sound
10 judicial administration of public policy to certify
11 the judgment as final. And I'm going to do that.

12 I will go through each of those factors, or most
13 of those factors anyway. But I think, after
14 determining or going through those factors I'm going
15 to find that it is in the interest of judicial economy
16 that the questions of whether or not I have subject
17 matter jurisdiction over the third-party -- or
18 potential theoretical third-party complaints against
19 the housing authority and the other third-party
20 potential defendants, I think it's important that we
21 resolve those issues because they have substantial
22 impact on how the ultimate case and how -- well, how
23 the ultimate resolution of this case is determined.

24 It determines -- or it would be very helpful to
25 know who might be the potential tortfeasors. And it

1 would be very helpful to know, because I think the way
2 sovereign immunity may or may not protect the tribe
3 from subpoenas or discovery requests, I think, the
4 analysis is different if they are parties or if they
5 are non-parties.

6 And I think that ties into what I said earlier is
7 that the special relationship and the sovereignty or
8 the quasi sovereignty of the tribe makes this not the
9 run of the mill case in which one of the parties is
10 dismissed.

11 And that's a roundabout way of saying that I find
12 that, after looking through all those factors, I'm
13 going to find that the interest of justice will be
14 served by pursuing in this manner.

15 Now, here is the third factor I want to get out,
16 too. I also have to marshal and articulate the
17 factors upon which I am relying in granting
18 certification. But I think by going through the
19 reasons I think this is infrequently harsh, which I'm
20 going to do a little more in-depth here, and by going
21 through those, I think there's five factors that were
22 laid out in Davis as to what the competing factors
23 that need to be balanced are, and I think by doing
24 that I will be marshaling out those facts.

25 So, as I said, as to the first factor, I believe

1 that the parties seeking 34(b) certification have met
2 their burden by showing that this is an infrequently
3 harsh case and that it involves a rare case in which
4 the circuit court has subject matter jurisdiction over
5 the underlying case and the potential tortfeasors
6 identified in the underlying case, but I do not, at
7 least in my determination thus far, do not have
8 subject matter jurisdiction over other potential
9 tortfeasors involved in the case.

10 And I think that's very different. It's
11 certainly different from what happened in Davis. And
12 I think that that's rare. I think that that's
13 infrequent. And I think it's overly harsh if I'm
14 wrong on that, because we could go through an entire
15 case, and maybe two sets of litigation, without having
16 a party that may or may not be -- at least there is a
17 strong argument that they are a tortfeasor.

18 I also think that it would be unduly harsh
19 because of the special interest that -- or the special
20 relationship and status of the Indian tribe, in that
21 the Oglala Housing Authority, which is an entity of
22 the Oglala Sioux Nation, that I think it makes sense
23 that, if I'm wrong on this, that we need to resolve it
24 sooner rather than later.

25 I also note that I do not believe the underlying

1 -- well, here is the thing. Unlike in Davis, I don't
2 think we are going to get a broader or -- and maybe
3 this is one of the factors. But I don't think we are
4 going to get a more rounded out record as to subject
5 matter jurisdiction by going forward with the
6 underlying case. So I think that is a factor that
7 weighs in going forward with it now.

8 What I'm trying to say is development of the
9 record was not -- development of the record in the
10 underlying action, which would be, as I understand it,
11 that Brunsch's either negligently didn't do a pressure
12 test or negatively didn't warn the plaintiff's of what
13 was going on, that's not going to round out the record
14 for the Supreme Court to have a better determination
15 of subject matter jurisdiction two or three years down
16 the road.

17 So I do think it's infrequently harsh and rare
18 that I should exercise my discretion in certifying it
19 under 54(b).

20 As to the factors I'm supposed to balance, the
21 relationship of the adjudicated claims and the
22 unadjudicated claims. First of all, the subject
23 matter jurisdiction of the third parties -- well,
24 because of what I said before that this is a rare
25 case where there are potential tortfeasors, I have

1 subject matter jurisdiction over, and there is
2 potential tortfeasors I don't have subject matter
3 jurisdiction over, I think that that relationship
4 between the potential tortfeasors I'm letting out and
5 the tortfeasors I'm not letting out is the type of
6 case. That relationship supports in those
7 unadjudicated claims vis-a-sis the adjudicated claims
8 supports and is a factor weighing in favor of 54(b)
9 certification.

10 The second one, the possibility that need for
11 review might be or may not be mooted by future
12 developments of the trial court, like I said, I don't
13 think we are going to gain more insight into whether
14 or not I have subject matter jurisdiction over the
15 actions of tribal members on trust land by going
16 forward with the remaining claims against C Brunsch.

17 So I think that weighs in the favor of 54(b).
18 The possibility -- it's very likely that the Supreme
19 Court, as to the third factor, the Supreme Court will
20 need to figure out subject matter jurisdiction of the
21 third parties again, probably in another case. So it
22 makes sense to do it now. And I think that weighs --
23 that's a judicial economy argument.

24 I don't think there's any claims or counterclaims
25 that result in a set-off against the judgment sought

1 to be reverse, so I don't think that weighs one way or
2 another in my determination.

3 And then I think a number of the miscellaneous
4 factors, if were close, tip the balance in favor of
5 54(b) certification.

6 And there is -- I don't know exactly how this is
7 going to play out, but I think it is at least
8 possible that there is going to be a lengthy delay
9 regardless. And I think judicial economy dictates
10 that the subject matter jurisdiction over the
11 potential third-party should be finally adjudicated at
12 this time.

13 So I think that that marshals out all of that,
14 the balancing of it. You are the party seeking,
15 Mr. Thompson. Do you think that that adequately
16 marshals and articulates the factors which I have
17 relied upon?

18 MR. THOMPSON: I do.

19 THE COURT: And maybe you want to put something in
20 writing, or not. But I think that what I have just
21 set forth is a reasoned statement, and I intend it to
22 be a part of the record. I think it supports the
23 determination that there is no just reason for delay
24 of final adjudication as to my determination on the
25 12(b)(1) motion as to the subject matter jurisdiction

1 -- or rather the lack of subject matter jurisdiction
2 over the third-party defendants.

3 So, with good cause, that is my determination.
4 So the first question, I have done that now. I think
5 that that just informs the type of judgment that
6 should be prepared as directed on Page 16 of the
7 February 14th order. Right?

8 MR. GALBRAITH: Agreed. And, Your Honor, from my
9 stand -- I know this is Mr. Thompson's judgment and
10 order. But from my standpoint --

11 THE COURT: Yeah. You are arguing this -- you are
12 seeking this as well, so --

13 MR. GALBRAITH: What I think we probably should do,
14 subject to somebody telling me I'm wrong, is I think
15 the parties can get together to put together the
16 judgment, and we can order a transcript from George of
17 the Court's decision today and attach that as an
18 exhibit to the judgment as the reason statement.

19 THE COURT: Well, that's going to have to go to
20 court.

21 MR. GALBRAITH: So that would be my intention is to
22 order a transcript from George. I'm sure that we will
23 get one of the whole hearing, but for purposes of
24 getting the judgment in place of that portion of
25 today's hearing with the Court's decision and attach

1 that to the judgment as an exhibit.

2 THE COURT: Okay. So that resolves how the judgment,
3 the final judgment, is done. Now that I have done
4 that for better or worse, what else do we need to do?
5 Do we need to talk about anything else at this point?
6 Do we need to set a hearing?

7 MR. NOONEY: From our perspective, Your Honor, on the
8 other pending motion that C Brunsch has as it concerns
9 adding the additional named third-party, my instinct
10 was, and we will just push that down and see what
11 happens. Because, as we all understand, once we file
12 this judgment and then the appropriate appeal on that,
13 there is going to be a little waiting time to see what
14 the Supreme Court does. So my thought is that we will
15 just push that matter down the road.

16 THE COURT: They could ask to show cause.

17 MR. NOONEY: Of course, they can. We have seen that
18 before. And then, finally, as it concerns our pending
19 issues as it relates to the Housing Authority and the
20 individually named third-party defendants, I would
21 similarly just defer defer all that until a later
22 date until we get some guidelines from the Supreme
23 Court, either in an order to show cause or some
24 resolution of those appeal issues.

25 So from our perspective, we would push those

1 issues, which I think are the only pending issues.

2 THE COURT: Well, I have a hearing set on August
3 10th. Right?

4 MR. NOONEY: We have a hearing on August 10th. Now
5 part of that is, of course, in Brunsch. I mean, I
6 call it Lakota Plains Two. From Lakota Plains One,
7 the pending motions that I just identified the third
8 party pleadings and the protective order issues, we
9 would prefer just to -- we could get with Mr. Thompson
10 on the latter of those and just not do anything on
11 that.

12 I have already told Mr. Leach and the Court that
13 as it concerns the third party -- adding an additional
14 third-party defendant, we would just defer that as
15 well.

16 THE COURT: At your last hearing I denied your motion
17 for summary judgment, and you asked me to hold off on
18 that. But after reviewing that -- I mean, maybe
19 that's an intermediate appeal, but I signed that
20 judgment.

21 MR. GALBRAITH: That one was signed, yes.

22 MR. NOONEY: That's true, yes.

23 THE COURT: So I'm not setting any further hearings,
24 and I'm not at this time cancelling any further
25 hearings. So, Mr. Leach?

1 MR. LEACH: Well, just a couple of things so I am
2 clear and so we are all on the same wavelength. If I
3 understand it, Dakota Plains is taking all motions it
4 has filed concerning plaintiff off calendar.

5 THE COURT: I'm not sure if they have any on the
6 calendar at this point. But I think that you --

7 MR. NOONEY: Well, we have one.

8 THE COURT: Okay.

9 MR. NOONEY: We have the motion to add the additional
10 third-party defendant, Don Hill, but we are going to
11 take that off calendar.

12 THE COURT: Okay. You are going to take that off
13 calendar.

14 MR. GALBRAITH: I think we have to. I think that
15 with --

16 THE COURT: I'm not trying to overly --

17 MR. GALBRAITH: We haven't filed yet. I mean, I think
18 that is what we are all kind of beating around the
19 bush on is we haven't filed the appeal yet. But once
20 the appeal is filed, particularly as the Court has
21 just identified in the reason statement, I think that
22 these issues are so intertwined, I think everything at
23 the trial court level stayed until we either get a
24 dismissal from the Supreme Court on an order to show
25 cause or a decision.

1 THE COURT: It might be -- yeah, once you have filed
2 the appeal.

3 MR. GALBRAITH: Right.

4 THE COURT: Which is not filed. But, I mean, that is
5 not my determination. I'm not making a finding on
6 that.

7 MR. GALBRAITH: I understand that. But that's going
8 to be our position. And, obviously, we do intend to
9 file the appeal. But just as we are talking about all
10 of these issues, we are pulling our stuff off the
11 calendar, because we anticipate we are not going to be
12 able to address it.

13 THE COURT: Well, I guess it goes back to what I said.
14 I'm not going to add anything to the calendar at this
15 time, but I'm not pulling anything off. But, if you
16 want to pull anything off or come to an agreement, so
17 be it.

18 MR. LEACH: We have a motion that we agreed to extend
19 until August 10th.

20 THE COURT: Yes. And I guess I'm not saying one way
21 or another where that's at. I'm not taking it off the
22 calendar right now, but --

23 MR. LEACH: Right. And for this moment I'm leaving it
24 on.

25 THE COURT: Right. As am I.

1 MR. LEACH: What did you say? I'm sorry, Your Honor?

2 THE COURT: I said, as am I. I'm leaving it on my
3 calendar as of now.

4 MR. LEACH: Okay.

5 THE COURT: Anything further?

6 MR. GALBRAITH: Nothing from us.

7 MR. LEACH: No, Your Honor.

8 THE COURT: Okay. We are adjourned.

9 MR. GALBRAITH: Thank you, Your Honor.

10 *** **

11 [PROCEEDINGS CONCLUDED]

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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF PENNINGTON) SS. CERTIFICATE

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4
5
6 I, George R. Cameron, Official
7 Court Reporter, State of South Dakota, do hereby
8 certify that I reported in stenotype the proceedings
9 of the above-entitled action; that I thereafter
10 transcribed said stenotype notes into typewriting; and
11 that the foregoing pages 1-17, inclusive, are a true,
12 full and correct transcript of my stenotype notes.

13 IN TESTIMONY WHEREOF, I hereto set my hand and
14 official seal this 11th day of July, 2018.

15

16

17 /s/ George R. Cameron

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20 _____
George R. Cameron
Official Court Reporter

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B

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF OGALA LAKOTA)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

JENNIFER CHAS ALONE, as)
the Personal Representative of)
ELFREDA ANN TAKES WAR)
BONNETT, Deceased,)

56Civ17-000007

Plaintiff,)

vs.)

C. BRUNSCH, INC., a South Dakota)
corporation, doing business as Lakota)
Plains Propane, Inc., and WESTERN)
COOPERATIVE COMPANY, INC.,)
a Nebraska Corporation,)

Defendants/Third Party Plaintiffs,)

vs.)

OGLALA SIOUX TRIBAL)
HOUSING AUTHORITY,)
RICHARD HILL, DEREK JANIS,)
WES COTTIER, WILLIAM WHITE,)
BEN PLENTY ARROWS,)
RENALDO TWO BULLS,)
BRANDON WES, DEREK SLIM,)
ROBIN T. (last name unknown), and)
John and Jane Doe, 1-100,)

Third-Party Defendants.)

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

FEB 14 2018

By: _____

MEMORANDUM ORDER

There are several motions before the Court. A hearing was held, by agreement in Rapid City, on January 18, 2018. All parties were represented by counsel. Numerous submissions were filed and reviewed thoroughly by the Court. At the hearing, the Court heard and considered the argument of counsel and the testimony of Doyle Pipe on Head. The Court also received and considered several exhibits.

A. WESTERN'S MOTION FOR SUMMARY JUDGMENT

Defendant and third-party plaintiff, Western Cooperative Company, Inc. ("Western") moved for summary judgment based on a lack of a duty owed to plaintiff.

After reviewing all the submissions and the file, the Court concludes that there is no issue as to any material fact and thus Western's motion for summary judgment is **GRANTED**.

1. Summary Judgment Facts

For purposes of the motion for summary judgment the Court will rely on the following material facts, resolving questions of fact in favor of the plaintiff. On October 6, 2016, an explosion destroyed a duplex located at 157 and 158 East Ridge Loop, in Pine Ridge.¹ RoWayne and Velvende Wounded Horse lived in 158 East Ridge with their daughter, Jaemin. Velvende was not home at the time of the explosion. RoWayne and Jaemin, however, were seriously injured in the explosion. Sadly, the explosion killed plaintiff, Elfreda Takes War Bonnett.² Takes War Bonnett, was a guest at 158 East Ridge at the time of the explosion.³ Another guest at 158 East Ridge, a neighbor, also died. Three people present at 157 East Ridge were also killed or injured in the explosion. The only plaintiff in this case, though, is Takes War Bonnett.

At some point prior to the explosion, Western delivered propane gas to 158 East Ridge.⁴ The other defendant (and third-party plaintiff), Casey Brunsch, Inc d/b/a as Lakota Plains Propane ("Lakota Plains"), previously delivered propane gas to 157 East Ridge.⁵ Lakota Plains has not moved for summary judgment.

According to chemist Robert Stubbs, who plaintiff retained as a consultant, propane gas (supplied by Lakota Plains) entered 157 East Ridge from an uncapped propane line.⁶ Also according to Stubbs, the propane gas, leaking from 157 East Ridge,

¹ Complaint ¶ 1.

² *Id.* ¶ 2. The common spelling is, "War Bonnet." The Court will adhere to the spelling in the caption.

³ *Id.* ¶ 2.

⁴ *Id.* ¶ 5.

⁵ *Id.* ¶ 6.

⁶ Affidavit of Robert Stubbs ¶ 13.

spread through an undivided crawl space into 158 East Ridge.⁷ The occupants of 158 East Ridge smelled propane.⁸ RoWayne telephoned third-party defendant, Oglala Sioux Tribal Housing Authority ("Housing Authority"), to inform them of the leak.⁹ Wounded Horse also attempted to fix the leak and vent the house.¹⁰ The explosion occurred about thirty minutes after RoWayne telephoned the Housing Authority.

Stubbs opines that the explosion "probably" began in unit 158.¹¹ Stubbs states, in an affidavit offered in resistance to Western's motion for summary judgement, that the "uncapped interior propane gas line in Unit 157" was "*one of the causes of the explosion.*"¹² But Stubbs does not identify any other cause of the explosion in his fifteen-page affidavit. In fact, despite his unsupported assertion that there were other potential causes of the explosion, Stubbs's affidavit repeatedly concedes that there was an interior uncapped propane line in 157 East Ridge, which—because it was not capped—allowed propane gas to leak and accumulate in the common crawl space until it was ignited by something and exploded.¹³ Plaintiff's counsel, in his briefing, asserts that there was another cause of the explosion. But plaintiff's attorney never identifies what the other cause might be. In fact, plaintiff's counsel repeatedly concedes in his brief that a propane leak at 157 East Ridge led to the explosion.¹⁴ At the hearing,

⁷ *Id.* ¶ 9 and 20.

⁸ *Id.* ¶ 9.

⁹ *Id.* ¶ 11.

¹⁰ *Id.* ¶ 11; Ex. 1.

¹¹ *Id.* ¶ 13.

¹² *Id.* ¶ 6.

¹³ *Id.* ¶¶ 6, 9, 13, 16, 20, and 21.

¹⁴ Plaintiff's Objection to Western's Motion for Summary Judgment 4 ("the issues whether it is foreseeable, *in light of the particular facts of this case*, that LP Gas sold by Lakota Propane may leak into either side of a very small duplex and explode"); 5 ("Any gas that entered Unit 157—as it did here"); 6 ("Gas that entered 157"); and 15 ("here, the foreseeability of harm to the occupants of Unit 158 from an explosion in Unit 158 caused by gas entering the common, undivided crawl space under Unit 157").

plaintiff's counsel conceded that propane gas leaked from an uncapped line in 157 East Ridge, not at 158 East Ridge.¹⁵

Accordingly, for purposes of summary judgement, the deadly explosion occurred after propane gas accumulated in the crawl space and exploded. The fugitive propane gas was supplied by Lakota Plains, not Western. The propane gas leaked from an uncapped line at 157 East Ridge, which was not a customer of Western. Even viewing the facts in the light most favorable to plaintiff, there is no evidence that propane gas from 158 East Ridge—Western's propane gas—ever leaked prior to the explosion. Also, there is no evidence that Western knew of the leak. Furthermore, there is no question that plaintiff was a guest at 158 East Ridge on the day of the explosion.

2. Summary Judgment Analysis

Plaintiff's case against Western and Lakota Plains is presented in a three-count complaint alleging negligence, strict liability, and breach of implied warranties. The gist of plaintiff's claim is that Western failed to warn the Wounded Horse family of the dangerous nature of propane gas. And that this failure caused the death of their guest,

¹⁵ The following discussion occurred at the hearing:

THE COURT: And the undisputed portion of that is that somewhere in 157 there was an uncapped line, and somehow propane leaked from that, and that's what was combusted?

MR. LEACH: No, not somehow. The undisputed fact is that it was a common, undivided crawl space, meaning that with certainty, from Mr. Stubbs' affidavit, that propane, because it is heavier than air, is spreading out under both floors.

THE COURT: Yes, I get that. But where did it come from?

MR. LEACH: It came from -- as far as we know, the uncapped line in 157 into the common, undivided crawl space. Okay. I have given you my first theory of liability.

Hearing Transcript at 131.

the plaintiff, when propane gas supplied by Lakota Plains exploded after leaking from an uncapped pipe in the adjoining property.

Many jurisdictions recognize that, "Negligence and strict liability merge into a single products-liability theory in failure to warn cases, both requiring proof of a manufacture or supplier's duty of care."¹⁶ Importantly, "[E]ven though the cause of action for failure to warn could be based on negligence or strict liability in tort, the two theories, while conceptually different, often merge into a single breach of duty."¹⁷ The South Dakota Supreme has recognized this merger as well.¹⁸ Accordingly, the Court will make a single duty determination in considering the negligence and the strict liability claims.

Summary judgment is typically not appropriate in a negligence case, unless there is no duty.¹⁹ The existence of a duty is a question of law.²⁰ Plaintiff has the burden of establishing a duty.²¹ Specifically, "plaintiff must prove a duty existed from the

¹⁶ *Lammie v. Gappa Oil Co., Inc.*, 2009 WL 67438, at *2 (Minn. Ct. App. Jan. 13, 2009)(unpublished)(cleaned up). *Lammie* is an unpublished decision from the Minnesota Court of Appeals. It's facts though are similar to the facts in the instant case, and it is well-reasoned. *See also Harris v. Texas Utilities Co.*, 71 S.W.3d 874, 881-82 (Tex. App. 2002)("there is no doctrinal distinction between negligence and strict liability failure to warn actions under the Restatement Because we agree that the analysis of the duty to warn under strict liability and negligence theories invokes the same basic principles, we decide the existence of a duty to warn under both common law theories as a single question.")(internal citations omitted); *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3d Cir.1990)("the standard imposed upon the defendant meeting a claim of strict liability based upon a failure to warn is the same as that imposed upon the defendant faced with a claim of negligent failure to warn"); *Natural Gas Odorizing v. Downs*, 685 N.E.2d 155, 163 n. 11 (Ind. Ct. App. 1997)("there is no doctrinal distinction between negligence and strict liability failure-to-warn actions under the Restatement."); and *Olsen v. Prosope, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) ("After reviewing the authors and comments on the failure to warn question, we believe any posited distinction between strict liability and negligence principles [in warnings cases] is illusory").

¹⁷ *O'Flynn v. Owens-Corning Fiberglas*, 759 So.2d 526, 535 (Miss.Ct.App. 2000).

¹⁸ *See Kurst v. Shur-Co.*, 2016 S.D. 35, ¶ 18("Causation is a necessary element of a failure-to-warn claim, whether pursued under a negligence or strict-liability theory"); and *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 17("In a products liability case premised on alleged inadequate warnings, both causation and inadequate warnings are separate but necessary elements of negligence and strict liability").

¹⁹ *McGuire v. Curry*, 2009 S.D. 40, ¶ 7.

²⁰ *Janis v. Nash Finch Company*, 2010 S.D. 27, ¶ 8.

²¹ *Tschetter v. Berven*, 2001 S.D. 11, ¶ 21.

defendant to the plaintiff.”²² Here, under the facts most favorable to the plaintiff, plaintiff cannot articulate a duty owed from Western to Takes War Bonnett.

“[A] duty depends on “whether a ‘relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff.””²³ Takes War Bonnett was a guest of Wounded Horse family on the day of the explosion. Western did not sell propane gas to Takes War Bonnett. Simply put, a duty from Western to Takes War Bonnett was not established through the relationship between the parties.

Plaintiff argues, however, that foreseeability created a duty. When considering foreseeability, it is important not to confuse “the concepts of foreseeability of harm as it relates to the element of causation and foreseeability of harm relevant to the element of duty.”²⁴ “[F]oreseeability in defining the boundaries of a duty is always a question of law’ and is examined at the time the act or omission occurred.”²⁵ “The South Dakota Supreme Court makes no-duty determinations when it finds that a relationship does not establish a duty or foreseeability of the injury is too remote.”²⁶ Again, here the duty is not established by the relationship between Takes War Bonnett and Western, and the foreseeability of the injury is too remote to establish a duty. But more importantly, the explosion did not result from the use of Western’s propane gas. The explosion was the result of an uncapped interior gas line in 157 East Ridge, which leaked propane gas supplied by Lakota Plains.

²² *Hoekman v. Nelson*, 2000 S.D. 99, ¶ 8.

²³ *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶ 10.

²⁴ *Id.* ¶ 13.

²⁵ *Id.* ¶ 14 (internal citations omitted).

²⁶ Brigid C. Hoffman, Note, *Reaffirming the Role of the Jury: The Problem of Summary Judgment, Duty, and Roadkill in Zerfas v. Amco Insurance Company*, 62 S.D. L. REV. 453, 469 (2017).

Plaintiff argues that “Western’s failures were a foreseeable cause of Elfrada Ann Takes War Bonnett’s death.”²⁷ “However, foreseeability for purpose of establishing a duty is not invariably the same as the foreseeability relevant to causation.”²⁸ Plaintiff’s argue that Western could have foreseen that propane supplied to its customer’s neighbors, by another company, could have spread into the crawl space below 158 East Ridge and exploded. However, the “fact that a certain event, such as a propane gas explosion, is conceivable does not mean it is foreseeable in the legal sense.”²⁹ It is not here. While the tragic events of this case might have been conceivable, they were not foreseeable to Western in the legal sense.

“The risk reasonably to be perceived defines the duty to be obeyed. No one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen.”³⁰ “Negligence in products liability actions involving inadequate warnings requires a plaintiff to ‘show that the manufacturer or seller failed to exercise reasonable care to inform *those expected to use the product* of its condition or of the facts which make it likely to be dangerous.’”³¹ Here, not only could Western not have expected Takes War Bonnett to use its product, it wasn’t even Western’s product that exploded, it was propane supplied by Lakota Plains.

Plaintiff argues that a duty should be imposed upon propane suppliers to warn of the dangers of not just their own products, but of other supplier’s products. Other

²⁷ Plaintiff’s Objection to Western’s Motion for Summary Judgment 4.

²⁸ *Peterson v. Spink Elec. Co-op., Inc.*, 1998 S.D. 60, ¶ 15.

²⁹ *Lammie v. Gappu Oil Co., Inc.*, 2009 WL 67438, at *4 (Minn. Ct. App. Jan. 13, 2009)(unpublished)(“it would be carrying the duty of a manufacturer too far to require it to anticipate every injury that might occur.”)

³⁰ *Johnson v. Hayman & Assoc., Inc.*, 2015 S.D. 63, ¶ 15, 867 N.W.2d 698, 702 (citations omitted).

³¹ *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 13, 855 N.W.2d 145, 150 (emphasis added).

jurisdictions have declined to extend, to a defendant, the duty to warn about the dangerous of someone else's product. In *Lammle v. Gappa Oil Co., Inc.*, the Minnesota Court of Appeals stated:

The connection between the wholesale supply of propane to the retailer and an unknown party's flawed decision to leave a propane line uncapped—and yet another party's decision to ignore the odor warning and leave propane flowing into a home—is simply too attenuated, factually and as a matter of public policy, to impose liability on the wholesalers. On the undisputed facts of this case, the district court correctly determined that Ferrellgas and EPO, as wholesale suppliers, did not have a duty to warn appellants of the unforeseeable risk that resulted in harm.³²

In *Simonetta v. Viad Corp.*, the Washington Supreme Court opined, “we find little to no support under our case law for extending the duty to warn to another manufacturer's product.”³³ And in *Garman v. Magic Chef, Inc.*, the California Court of Appeals wrote:

A failure to warn may create liability for harm caused by use of an unreasonably dangerous product. That rule, however, does not apply to the facts in this case because it was not any unreasonably dangerous condition or feature of respondent's product which caused the injury. To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense.³⁴

Here, the chain of events which led to Takes War Bonnett's death is far too remote to impose a duty upon Western. Summary judgement is appropriate as a matter of law as to the negligence and strict liability claims because no duty existed for Western to warn Takes War Bonnett of the events that led to her death.

Likewise, the breach of warranty claims must also be dismissed. Plaintiff claims that Western's propane breached the implied warranties of merchantability and fitness

³² *Lammle v. Gappa Oil Co., Inc.*, 2009 WL 67438, at *4 (Minn. Ct. App. Jan. 13, 2009)(unpublished).

³³ *Simonetta v. Viad Corp.*, 197 P.3d 127, 133 (WA. 2008).

³⁴ *Garman v. Magic Chef, Inc.*, 117 Cal. App. 3d 634, 638, 173 Cal. Rptr. 20 (Cal. Ct. App. 1981).

for a particular purpose. But considering the facts most favorable to plaintiff, Western's product played no part in the explosion. To borrow from the California Court of appeals, it would be "semantic nonsense" to conclude that the implied warranties contained in South Dakota's codification of the Uniform Commercial Code would require sellers to warranty, expressly or impliedly, someone else's product. Or that they would be liable for the unfitness or unmerchantability of someone else's products. Accordingly, Western is entitled to Summary Judgment as to the implied warranty claims as well.

B. MOTIONS TO STRIKE

On the eve of the hearing, Western filed additional exhibits and affidavits. Plaintiff moved to strike. As explained at the hearing, those motions to strike, after being considered under Rule 12(f), were DENIED. These documents are not struck from the record. They were, however, too untimely filed to be considered in relation to the motion for summary judgment. Accordingly, the Court did not consider or rely upon the documents in determining the motion for summary judgment.

C. MOTIONS TO DISMISS THE THIRD-PARTY COMPLAINTS BASED ON SUBJECT MATTER JURISDICTION

Both Western and Lakota Plains initiated third-party complaints against various third-party defendants, including the Housing Authority and several individuals who are likely employees or independent contractors of the Housing Authority. In two separate motions, the third-party defendants moved for dismissal of the third-party complaints based on lack of subject matter jurisdiction. Third-party defendants' motions were raised pursuant to Rule 12(b)(1). Third-party defendants argue that South Dakota courts lack subject matter jurisdiction over claims against tribal members arising on trust land within the exterior boundaries of the Reservation.

Indeed, it is an accepted principle of civil jurisdiction “that Indian conduct occurring on trust allotments is beyond the State’s jurisdiction.”³⁵ Third-party defendants supported their motion to dismiss with an affidavit, which addressed the enrollment status of the individual third-party defendants, the role of the Housing Authority, and the trust status of the land at issue in this case.

Third-party plaintiffs argue the motions to dismiss for lack of subject matter jurisdiction should be converted to motions for summary judgment because the third-party defendants asked the Court to look at matters outside the pleadings. Plainly, Rule 12(b) allows motions to dismiss brought pursuant to Rule 12(b)(5) to be converted to motions for summary judgment. This is a 12(b)(1) motion, though, not a 12(b)(5) motion. Third-party plaintiffs offer no support for the theory that 12(b)(1) motions should be converted to motions for summary judgment.

Rule 12(b)(1) motions are properly analyzed under the South Dakota Supreme Court’s direction in *Hutterville Hutterian Brethren, Inc. v. Waldner*.³⁶ The Supreme Court explained in *Hutterville*:

A court deciding a motion under Rule 12(b)(1) must distinguish between a “facial attack” and a “factual attack.” In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of [12(b)(5)] safeguards. In factual attacks, the court must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute. Because at issue in a factual 12(b)(1) motion is the trial court’s jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Thus, evidentiary hearings, affidavits,

³⁵ *Risse v. Meeks*, 1998 S.D. 112, ¶ 18.

³⁶ *See Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86.

documents, and live testimony may all be considered to resolve the subject matter jurisdiction dispute.³⁷

This 12(b)(1) motion is a factual attack, because it hinges on the assertion that the duplex was located on trust land and that the third-party defendants were tribal members. Therefore, the Court will consider matters outside the pleadings and will freely weigh the evidence to satisfy itself whether it has the power to hear the third-party action.

In *Risse v. Meeks*,³⁸ the South Dakota Supreme Court considered whether a state court had subject matter jurisdiction over a punitive damages case arising on fee land outside the exterior boundaries of the Pine Ridge Indian Reservation. In *Risse*, a nontribal member residing off of the reservation sued tribal-member defendants alleging that they willfully, wantonly, and recklessly failed to install a fence around their grazing land.³⁹ Defendants were enrolled members of the Oglala Sioux Tribe and resided within the exterior boundaries of the Pine Ridge Indian Reservation.⁴⁰ The grazing land, however, was outside the current exterior boundaries of the Pine Ridge Reservation, but importantly, the land was held in trust by the United States for the benefit of the Oglala Sioux Tribe.⁴¹ The South Dakota Supreme Court affirmed the circuit court's determination that it did not have subject matter jurisdiction.⁴²

³⁷ *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20 (cleaned up). "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. See Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018). Use of "cleaned up" signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization) without altering the substance of the quotation.

³⁸ *Risse v. Meeks*, 1998 S.D. 112.

³⁹ *Id.* ¶¶ 1-5.

⁴⁰ *Id.* ¶ 2.

⁴¹ *Id.* ¶ 3.

⁴² See generally *Id.*

Here, third-party defendants have presented affidavit and live testimony. Having reviewed this information, the Court concludes it does not have subject matter jurisdiction over the third-party complaints. The Court is satisfied that the third-party defendants are all tribal entities or tribal members. The affidavits of Doyle Pipe on Head, satisfy the Court that the Housing Authority is the Oglala Sioux Tribe's housing authority and that it operates solely on trust land. The Housing Authority only serves tribal members, and it typically only employs tribal members. The affidavits also establish that all the other third-party defendants are enrolled members of the Tribe. The third-party complaints allege that the conduct (the failure to cap a propane line at 157 East Ridge) took place at a Housing Authority-operated duplex, which by the nature of the Housing Authority's mission, took place on trust land within the exterior boundaries of the Reservation.

Further support for these conclusions are found in Pipe on Head's testimony at the hearing, and exhibits A-G. Here, like in *Risse*, the defendants to the third-party complaint are enrolled tribal members, also the third party-complaint alleges negligence which occurred on trust land. Unlike *Risse*, the trust land in the instant case is within the exterior boundaries of the reservation. While the Court is required to make factual determinations, the Court does so within the framework enunciated in *Hutterville*.

Third-party plaintiffs argue that they should be able to conduct additional discovery in relations to the 12(b)(1) motions. First, the record does not suggest that third-party plaintiffs attempted to initiate any discovery in relation to the factual issue in dispute—that the alleged negligence occurred on trust land within the exterior

boundaries of the Reservation or whether the third-party defendants are tribal members. Third-party plaintiffs had several months to peruse such discovery and did not do so, they should not be allowed to do so now. Second, the *Hutterville* framework does not require the Court to eliminate the existence of disputed material fact ("the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims"). The Court may "satisfy itself."⁴³ Third, third-party-plaintiffs' argument that they should be able to conduct discovery as to whether the Housing Authority consented to suit in state court is also unavailing. "Jurisdiction cannot be conferred by consent, agreement, stipulation or waiver."⁴⁴

Put simply, additional discovery of the type contemplated by third-party plaintiffs, would not reveal any information which would upset the Court's determination. Third-party defendants have proven, to the Court's satisfaction, that the duplex is on trust land through submission of a Title Status Report from the Department of Interior.⁴⁵ It is beyond debate that the village of Pine Ridge and East Ridge housing are within the exterior boundaries of the Pine Ridge Indian Reservation. Moreover, it defies common sense to consider that the Housing Authority would build and manage tribal housing on non-trust land. Similarly, the third-party defendants have established that the third-party defendants are tribal members. They have done so through submission of tribal document, mostly enrollment documents.⁴⁶ Even though third-party

⁴³ *Hutterville*, 2010 S.D. 86, ¶ 20.

⁴⁴ *Pennington Cty. v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, ¶ 17.

⁴⁵ Hearing Exhibit G.

⁴⁶ Hearing Exhibits E and F.

plaintiffs are requesting additional discovery, the Court is more than satisfied it does not have subject matter jurisdiction over the third-party complaints.

Further, the Court concludes that it would infringe upon tribal severity to exercise subject matter jurisdiction over the third-party complaints. "A tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its member, through commercial dealing, contracts, leases, or other arrangements."⁴⁷ Here, the third-party plaintiffs entered onto the Reservation to do business with tribal members and entities. The Oglala Sioux Tribe has established a court system and a jurisdictional framework to handle claims like the ones in the third-party complaints. The Oglala Sioux Tribal Court is equipped to resolve the claims in the third-party complaints, and it should.

Accordingly, third-party defendants' motions to dismiss for lack of subject matter jurisdiction against Lakota Plains are **GRANTED**. Lakota Plains's third-party complaint against all third-party defendants is dismissed for lack of subject matter jurisdiction. Third-party defendants' motions to dismiss Western's third-party complaint are **MOOT** because the underlying complaint against Western is dismissed on summary judgment. Alternatively, however, the third-party defendants' motion against Western for dismissal based on subject matter jurisdiction should be granted.

D. MOTIONS TO DISMISS THIRD-PARTY COMPLAINTS BASED ON SOVEREIGN IMMUNITY

The Housing Authority also moved to dismiss both third-party complaints based on its sovereign immunity. The Housing Authority's motion to dismiss Lakota Plains's third-party complaint based on sovereign immunity is **MOOT** because the

⁴⁷ *Sage v. Sicangu Qyate Ho, Inc.* 473 N.W.2d 480, 482 (S.D. 1991)(cleaned up).

Court has already determined that it does not have subject matter jurisdiction over the third-party complaint.

The Housing Authority's motion to dismiss Western's third-party complaint based on sovereign immunity is **MOOT** because the complaint against Western has been dismissed on summary judgment. Alternatively, the Housing Authority's motion to dismiss Western's third-party complaint based on sovereign immunity is **MOOT** because the Court has already determined that it does not have subject matter jurisdiction over the third-party complaint.

Plaintiff joined in the Housing Authority's motion to dismiss the third-party complaints based on sovereign immunity. To the extent plaintiff has moved to dismiss the third-party complaints against the Housing Authority based on sovereign immunity, the motion is denied as **MOOT** and for lack of standing.

E. MOTIONS FOR PROTECTIVE ORDERS

The Housing Authority moved for a protective order, pursuant to Rule 26(c). Plaintiff joined the Housing Authority's motion for a protective order. On February 6, 2018, all third-party defendants moved for a second protective order, also based on Rule 26(c).

A hearing has been scheduled for 9 a.m. on March 15, 2018 at the Pennington County Courthouse. Accordingly, the Court will hold these matters in abeyance until at least that time.

F. MOTIONS TO COMPEL

Plaintiff moved to compel discovery from both Western and Lakota Plains. The motion to compel against Western is **MOOT** because the Court granted Western's motion for summary judgment.

The motion to compel against Lakota Plains concerns three interrogatories. Lakota Plains objects based on attorney work product and/or legal conclusion. Lakota Plains concedes that they will supplement the interrogatories when and if they retain an expert. The Court has considered the submissions along with Rule 37 and agrees with Lakota Plains. Plaintiff's motion is **DENIED**.

CONCLUSION

This memorandum opinion constitutes the Court's findings of fact and conclusions of law. Western and Third-Party defendants are directed to prepare appropriate judgments for the Court's consideration.

For these reasons, it is hereby:

ORDERED that Western's motion for summary judgment is **GRANTED**. It is further

ORDERED that third-party defendants' motions to dismiss for lack of subject matter jurisdiction against Lakota Plains are **GRANTED**. It is further

ORDERED that third-party defendants' motions to dismiss for lack of subject matter jurisdiction against Western are **DENIED AS MOOT**. In the alternative, they are **GRANTED**. It is further

ORDERED that the Housing Authority's motion to dismiss based on sovereign immunity against Lakota Plains and Western are **DENIED AS MOOT**. It is further

ORDERED that the plaintiff's motion to compel against Lakota Plains is **DENIED**. It is further

ORDERED that the plaintiff's motion to compel against Western is **DENIED AS MOOT**.

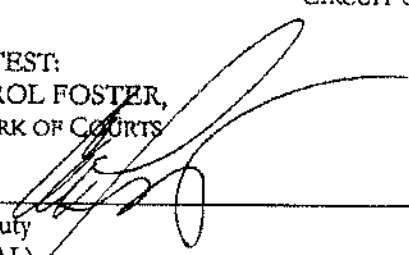
Dated February 14, 2018.

BY THE COURT:



THE HONORABLE JEFFREY ROBERT CONNOLLY
CIRCUIT COURT JUDGE

ATTEST:
CAROL FOSTER,
CLERK OF COURTS

By: 
Deputy
(SEAL)



C

1 STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

2 COUNTY OF OGLALA LAKOTA)

) SS

SEVENTH JUDICIAL CIRCUIT

3
4 JENNIFER CHASE ALONE, as the Personal
5 Representative of ELFREDA ANN TAKES
6 WAR BONNET, Deceased,

56CIV17-0000007

7 Plaintiff,

8 vs.

AFFIDAVIT OF DOYLE PIPE ON HEAD

9 C. BRUNSCH, INC., a South Dakota
10 corporation, doing business as Lakota Plains
11 Propane, Inc., and WESTERN
12 COOPERATIVE COMPANY, INC., a
13 Nebraska corporation,

14 Defendants/Third-Party Plaintiffs,

15 vs.

16 OGLALA SIOUX LAKOTA HOUSING
17 AUTHORITY, RICHARD HILL, DEREK
18 JANIS, WES COTTIER, WILLIAM WHITE,
19 BEN PLENTY ARROWS, RENALDO TWO
20 BULLS, BRANDON WES, DEREK SLIM,
21 ROBIN T. (last name unknown), and JOHN
22 AND JANE DOE 1-100,

23 Third-Party Defendants.

24 STATE OF SOUTH DAKOTA)

:SS

25 County of Oglala Lakota)

26 I, Doyle Pipe On Head, being first duly sworn upon my oath, depose and state:


- 27
1. I am over eighteen years of age and reside in Oglala Lakota County, South Dakota.
 2. I am the acting CEO for Oglala Sioux Lakota Housing ("OSLH").
 3. I am familiar with OSLH's structure and operation generally.

- 1 4. I am also familiar with OSLH's former or current employees and/or officials,
2 Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows,
3 Renaldo Two Bulls, Brandon Shangreau, Robin Tuttle, and Tom Waters
4 (collectively hereinafter "Employees"),¹ who are named (or are believed to be
5 named) as third-party defendants in this lawsuit, with regard to their enrollment
6 status in the Oglala Sioux Tribe and scope of their employment with OSLH at all
7 times relevant to the claims raised in the Third-Party Complaints.
- 8 5. OSLH is the public housing authority for the Oglala Sioux Tribe ("Tribe").
9 OSLH was created by the Tribe via ordinance to develop and administer public
10 housing projects on the Reservation. OSLH was formerly known as the Oglala
11 Sioux Housing Authority.
- 12 6. OSLH operates exclusively within the exterior boundaries of the Pine Ridge
13 Indian Reservation ("Reservation") and it only serves members of the Tribe.
- 14 7. The Employees are all members of the Tribe.
- 15 8. At all times relevant to this lawsuit, any work that was completed by the
16 Employees on Units 157 and 158, which were destroyed in the explosion that is
17 the subject of this matter, was performed by the Employees within the course and
18 scope of their employment with OSLH and on trust property within the exterior
19 boundaries of the Reservation.
- 20 9. Upon information and belief, Elfreda Ann Takes War Bonnet and Jennifer Chase
21 Alone are also enrolled members of the Tribe.
- 22 10. The real property on which public housing rental Units 157 and 158 are located is
23 trust property owned by the Tribe and held in trust by the United States. The
24 property is wholly located within the exterior boundaries of the Reservation.
- 25
26
27

¹While not named correctly in the Third Party Complaints, it is believed that "Robin T." "Brandon Wes," and "Derek Slim," refers respectively to Robin Tuttle, Brandon Shangreau, and Tom Waters.

- 1 11. OSLH owned Units 157 and 158 and had home-site leases for the Units which
2 authorized use of the Tribe's trust property for public housing purposes.
3 12. Greater than 70% of OSLH's operating budget is funded by the Federal
4 Government. The remaining 30% of OSLH's operating budget is generated by
5 rental income obtained by OSLH and other grants.
6 13. Upon information and belief, C. Brunsch, Inc., doing business as Lakota Plains
7 Propane, Inc., and Western Cooperative Company, Inc., Defendants/Third-Party
8 Plaintiffs in this matter, are distributors of propane gas and sold propane gas to
9 the tenants in Units 157 and 158. Because Units 157 and 158 are located on the
10 Reservation and on trust property, the sales necessarily took place within the
11 exterior boundaries of the reservation on trust property.
12 14. The foregoing is based upon my personal knowledge.

13 DATED this 13 day of September, 2017.

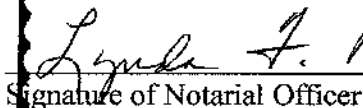
14 
15 Doyle Pipe On Head, acting CEO

16
17 On this 13th day of September, 2017, before me, the undersigned, a Notary Public
18 in and for the State of South Dakota, personally appeared **Doyle Pipe On Head**, known to me to
19 be the person whose name is subscribed to the foregoing instrument and acknowledged to me
that he executed and affirmed the same.

20 IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on
21 the day and year first above written.

22 (Notarial Seal)

23 LYNDIA F. RODRIGUEZ
Notary Public
SEAL
South Dakota

24 
Signature of Notarial Officer

25 My commission expires: 6/18
26
27

D

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT
3
4 JENNIFER CHASE ALONE, as)
5 the Personal)
6 Representative of ELFREDA)
7 ANN TAKES WAR BONNETT,)
8 Deceased)
9 Plaintiff,)
10 vs.)
11 C. BRUNSCH, INC., a South)
12 Dakota corporation, doing)
13 business as Lakota Plains)
14 Propane, Inc., and)
15 WESTERN COOPERATIVE)
16 COMPANY, INC., A Nebraska)
17 corporation)
18 Defendants/Third-Party)
19 Plaintiffs,)
20 OGLALA SIOUX LAKOTA)
21 HOUSING AUTHORITY,)
22 RICHARD HILL, DEREK)
23 JANIS, WES COTTIER,)
24 WILLIAM WHITE, BEN PLENTY)
25 ARROWS, RENALDO TWO)
BULLS, BRANDON WES, DEREK)
SLIM, ROBIN T. (Last name)
unknown) and John and)
Jane Doe, 1-100,)
Third-Party Defendants,)

BEFORE: THE HONORABLE JEFFREY R. CONNOLLY
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
January 18, 2018 at 2:00 PM

George R. Cameron
Official Court Reporter To
Judge Jeffrey R. Connolly
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota 57709
605.394.2571

MOTIONS
HEARING
FILE 56-CIV-17-07

1
2
3 APPEARANCES:
4
5
6 For the Plaintiff: MR. JAMES D. LEACH
7 South Dakota Justice
8 1671 Sheridan Lake Road
9 Rapid City, South Dakota 57702
605-341-4400
10 For the Defendant, MR. ROBERT J. GALBRAITH
11 C. Brunsch, Inc.: MR. JOHN K. NOONEY
12 Nooney & Solay
13 632 Main Street
14 Second Floor
15 Rapid City, South Dakota 57709
16 605-721-5846
17
18 For Oglala Sioux MARK F. MARSHALL
19 Lakota Housing Bangs McCullen
20 Authority: 333 West Boulevard
21 Suite 400
22 Rapid City, SD 57701
23 605.343.1040
24
25 For Oglala Sioux MR. EVAN M.J. THOMPSON
19 Lakota Housing Browning, Kaleczyc, Berry & Hoven
20 Authority: 800 North Last Chance Gulch
21 Suite 101
22 PO Box 1697
23 Helena, Montana 59624
24
25 For Western DAVID M. DAHLMEIER
Cooperative Company: Bassford Remele
100 South 5th Street
Suite 1500
Minneapolis, MN 55402
612.333.3000

I N D E X	
WITNESS	PAGE
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A. Letter from Nooney, 02-27-17.....	22 22
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1 THE COURT: We are on the record in Oglala Lakota
2 County File 17-07, Jennifer Joy Chase Alone versus
3 C Brunsch Inc. And Western Cooperative Company, Inc.
4 Who do we have? We have Mr. Leach here.
5 MR. LEACH: You sure do. And I am representing the
6 Plaintiff.
7 THE COURT: Okay.
8 MR. GALBRAITH: Rob Galbraith and John Nooney on
9 behalf of C Brunsch, Inc.
10 THE COURT: Okay.
11 MR. DAHLMEIER: Good afternoon, Your Honor. David
12 Dahlmeyer for Western Cooperative.
13 MR. MARSHALL: Good afternoon, Your Honor. Mark
14 Marshall on behalf of --
15 THE COURT: A number of people, the third-party
16 defendants.
17 MR. MARSHALL: The third-party defendants. With me,
18 Your Honor, is Evan Thompson of Billings, Montana. I
19 have previously moved his admission pro hac, and he
20 will be handling all substantive matters on behalf of
21 the third part defendants.
22 THE COURT: Okay. Do you have one of your clients,
23 just for the sake of the record, as well?
24 MR. THOMPSON: And this is our client, Doyle Pipe On
25 Head.

<p style="text-align: right;">13</p> <p>1 existence of its power to hear the case.</p> <p>2 In short, no presumptive truthfulness attaches to</p> <p>3 the plaintiff's allegations, and the existence of</p> <p>4 disputed material facts will not preclude the Trial</p> <p>5 Court from evaluating for itself the merits of</p> <p>6 jurisdictional claims.</p> <p>7 The Hutterville Court noted, <i>Thus evidentiary</i></p> <p>8 <i>hearings, affidavits, documents and live testimony may</i></p> <p>9 <i>all be considered to resolve the subject matter</i></p> <p>10 <i>jurisdiction dispute.</i></p> <p>11 THE COURT: First of all, are you saying this is -- so</p> <p>12 you are saying this is a factual attack, not a facial</p> <p>13 attack, under 12(b)(1)?</p> <p>14 MR. THOMPSON: Yes.</p> <p>15 THE COURT: What are the material facts that you just</p> <p>16 referenced that I need to know to determine the</p> <p>17 jurisdictional issue, and were any of them pled or not</p> <p>18 pled in the third-party complaint?</p> <p>19 MR. THOMPSON: Okay. The facts relevant to the</p> <p>20 subject matter jurisdiction argument, the pure subject</p> <p>21 matter jurisdiction argument --</p> <p>22 THE COURT: Yes. I understand the distinction</p> <p>23 between --</p> <p>24 MR. THOMPSON: (Continuing) -- are simply that are we</p> <p>25 dealing with tribal members or tribal entities or</p>	<p style="text-align: right;">15</p> <p>1 benefit of the tribe. And the second part of that is</p> <p>2 you are alleging that the -- is it the enrollment</p> <p>3 status -- and what is it? Is it enrollment status?</p> <p>4 Is it membership? Is it the blood quantum? What is</p> <p>5 it?</p> <p>6 MR. THOMPSON: We have alleged membership, which is</p> <p>7 based on blood quantum, which all of the named</p> <p>8 individual employees are tribal members of the Oglala</p> <p>9 Sioux Tribe.</p> <p>10 THE COURT: Okay. And you are just saying, based on</p> <p>11 Mr. Pipe On Head's affidavit, that he knows that they</p> <p>12 are?</p> <p>13 MR. THOMPSON: Absolutely. They record that</p> <p>14 information during the regular course and scope of</p> <p>15 their business. I have also brought exhibits to</p> <p>16 introduce today that are from their employee files</p> <p>17 that demonstrate that they are, in fact, tribal</p> <p>18 members, and they were, in fact, employed by the</p> <p>19 Housing Authority.</p> <p>20 THE COURT: Okay.</p> <p>21 MR. THOMPSON: With regard to the sovereign immunity</p> <p>22 argument, the only fact that needs to be determined</p> <p>23 today -- well, because it's clear that OSLH enjoys</p> <p>24 sovereign immunity as a governmental entity, that's</p> <p>25 been established under the case law, even in the</p>
<p style="text-align: right;">14</p> <p>1 non-tribal entities that consent to the jurisdiction</p> <p>2 of the tribe, and did the occurrence which led to the</p> <p>3 third-party complaint occur within the reservation</p> <p>4 boundaries. That's it. That's all we need to decide</p> <p>5 today, to determine that.</p> <p>6 THE COURT: And by reservation boundaries, is that on</p> <p>7 trust land within -- how about if it's fee land --</p> <p>8 MR. THOMPSON: Well, according to --</p> <p>9 THE COURT: (Continuing) -- a sold allotment.</p> <p>10 MR. THOMPSON: Sure. According to Red Fox, they note</p> <p>11 that even where the occurrence occurred on a state</p> <p>12 highway easement, although it was in -- because it was</p> <p>13 within the reservation boundaries, the boundaries of</p> <p>14 the reservation, that subject matter jurisdiction was</p> <p>15 appropriate in the tribal jurisdiction.</p> <p>16 So I think that the fact that it happened on</p> <p>17 trust property bolsters the argument, but it is not</p> <p>18 necessary for the finding.</p> <p>19 THE COURT: Okay. And you are saying here that this</p> <p>20 was -- the allegation, at least, or your argument is,</p> <p>21 or what you think the material fact is, the answer to</p> <p>22 that question is that this was trust land owned by the</p> <p>23 tribe --</p> <p>24 MR. THOMPSON: Owned by the trust.</p> <p>25 THE COURT: (Continuing) -- held in trust for the</p>	<p style="text-align: right;">16</p> <p>1 Weeks Construction Case sighted by the third-party</p> <p>2 plaintiffs.</p> <p>3 The only thing that needs to be determined</p> <p>4 factually is whether or not that sovereign immunity</p> <p>5 has been waived by written instrument. That's the</p> <p>6 only -- or by an act of congress. Those are the only</p> <p>7 -- the facts that we need to determine, whether it's</p> <p>8 been waived.</p> <p>9 If it hasn't been waived, it divests the core of</p> <p>10 subject matter jurisdiction it may have, and it</p> <p>11 compels dismissal as well.</p> <p>12 THE COURT: But just so as I understand your argument,</p> <p>13 hypothetically, if I grant the motion as it relates to</p> <p>14 OSLH, based on subject matter jurisdiction, based then</p> <p>15 -- and let's just be clear here, September 14th</p> <p>16 motion -- I don't even need to consider the</p> <p>17 alternative motion. I imagine you are going to make</p> <p>18 arguments that relate to the protective order</p> <p>19 regarding their sovereign immunity --</p> <p>20 MR. THOMPSON: Sure.</p> <p>21 THE COURT: (Continuing) -- but I don't need to -- in</p> <p>22 that hypothetical situation, I wouldn't have to</p> <p>23 resolve the motion. The motion to dismiss would be</p> <p>24 moot.</p> <p>25 Now, the argument or the resolution of whether or</p>

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1 the plaintiff's allegations. And how I read that is,
2 even if they would have alleged that they were
3 non-tribal members or this was a tribal -- there would
4 be no presumption there. I would have to still weigh
5 the evidence. I think that's what that means.
6 And then it continues. And the existence of
7 disputed material facts would not preclude the trial
8 Court from evaluating for itself the merits of the
9 jurisdictional claims. Which I read to be, even if
10 there are disputed facts -- the existence of disputed
11 facts, if I'm satisfied that there is no -- well,
12 basically, if I'm satisfied as to jurisdiction, or
13 not, that's the final end of this. That should not
14 preclude the Trial Court from evaluating for itself
15 the merits of the jurisdictional claims.
16 Then it goes on to say that that evidentiary --
17 and this is kind of paraphrasing the sentence that the
18 Supreme Court in South Dakota left out of Osborn. It
19 paraphrases it though.
20 *That evidentiary hearings, affidavits, documents*
21 *and live testimony may all be considered to resolve*
22 *the subject matter jurisdiction dispute.*
23 My sense coming into this hearing was that if
24 Mr. Pipe On Head was here, that I would consider his
25 testimony.

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1 Now, I'm not positive that after hearing his
2 testimony I would be in a better position to resolve
3 the issue. I might. I might, after hearing his
4 testimony, figure out where we are at. But I am
5 inclined to allow him to testify.
6 Without making a final ruling, I don't think that
7 the third-party plaintiffs are necessarily entitled to
8 discovery at this stage, because I haven't determined
9 whether or not there is actual subject matter
10 jurisdiction or this is a proper forum.
11 I also note that nothing in this recitation of
12 what the Court is supposed to do in Hutterville or in
13 Osborn talks about having discovery.
14 I do note that there might be in one of the --
15 one of the cases or the other that there might have
16 been depositions that had been done. But it doesn't
17 say that you have to -- it says do it at the earliest
18 convenience, I believe, is what it says.
19 So I'm inclined to take his testimony. I'm not
20 necessarily inclined to say that after hearing it I
21 might not allow the third-party plaintiffs to renew
22 their motion or to ask for more time or to go forward
23 appropriately.
24 But I think it is appropriate coming into here --
25 well, I think I have wide latitude under this series

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1 of cases, is what I'm saying, to consider how we get
2 that evidence.
3 I'm not satisfied, I don't think, with the
4 affidavit itself. I will allow you to testify. You
5 are requesting for him to testify. Do you want to do
6 it right now? Do you want to take a short break?
7 MR. GALBRAITH: Yes.
8 THE COURT: And are you willing to share some of this
9 stuff before the testimony?
10 MR. THOMPSON: Willing to share some of what stuff,
11 Your Honor?
12 THE COURT: Some of the stuff you are going to go over
13 with him.
14 MR. THOMPSON: Oh, absolutely. I can pass that out
15 right now.
16 THE COURT: All right. So how much time do you guys
17 need? Do you want to take ten minutes? Mr. Nooney,
18 do you -- Mr. Dahlmeier?
19 MR. NOONEY: It depends on what he's going to give us,
20 I guess.
21 MR. THOMPSON: I have got -- I have got just a few
22 documents.
23 MR. NOONEY: All right. Can we take a look at what he
24 has?
25 THE COURT: And just to be a little ahead of myself,

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1 I'm not sure -- I will allow you to make your record.
2 But even if -- my thought is I can take this evidence
3 however I want.
4 And even if I take more evidence in a different
5 form later that, even if it includes discovery,
6 depositions, interrogatories, I don't think there is
7 anything that precludes me from taking this form now,
8 and then figuring out where I am at the end of it. So
9 does anybody want to make a short record before we
10 take a short recess?
11 MR. GALBRAITH: No, Your Honor.
12 THE COURT: All right. I will check back with you in
13 about ten minutes, or let me know.
14 *** *** ***
15 [REPORTER'S NOTE: At this point a brief
16 recess was held; whereupon, the following proceedings
17 were thereafter conducted.]
18 *** *** ***
19 THE COURT: Just for the sake of the record. Why we
20 took a quick recess is I suggested -- or I went over
21 what I think the scope of the Court's ability to take
22 evidence -- to weigh evidence regarding 12(b)(1)'s
23 issues. I think that it includes or allows me to take
24 the testimony of Mr. Pipe On Head. Are you ready to
25 proceed?

<p style="text-align: center;">53</p> <p>1 MR. THOMPSON: Yes, Your Honor.</p> <p>2 THE COURT: Does anybody want to make a record before</p> <p>3 we do this?</p> <p>4 MR. GALBRAITH: Nothing beyond what --</p> <p>5 THE COURT: Beyond what I made. Okay.</p> <p>6 MR. GALBRAITH: Yes.</p> <p>7 THE COURT: Okay. Well, I will allow you to --</p> <p>8 MR. GALBRAITH: I guess, Your Honor, just for my -- as</p> <p>9 opposed to objecting to every question, a standing</p> <p>10 objection that the questions have not been subject to</p> <p>11 discovery.</p> <p>12 THE COURT: That's fair.</p> <p>13 MR. GALBRAITH: Okay.</p> <p>14 THE COURT: And so you are objecting. You are</p> <p>15 basically saying that you should have had discovery</p> <p>16 before we --</p> <p>17 MR. GALBRAITH: An objection to every question that</p> <p>18 it's facts not previously disclosed or subject to</p> <p>19 discovery.</p> <p>20 THE COURT: That's fair. Okay. Do you want that</p> <p>21 objection, too, Mr. Dahlmeier?</p> <p>22 MR. DAHLMEIER: Yes, Your Honor. Thank you.</p> <p>23 MR. THOMPSON: I will call my witness, Mr. Pipe On</p> <p>24 Head.</p> <p>25 *** **</p>	<p style="text-align: center;">55</p> <p>1 Q Were you employed in that position at the time of the</p> <p>2 explosion that is the subject of this lawsuit?</p> <p>3 A Yes.</p> <p>4 Q And can you tell me what structure was involved in the</p> <p>5 explosion at issue?</p> <p>6 A The structure was a home residence that was a duplex.</p> <p>7 So it was basically two houses that are together.</p> <p>8 Q Okay. And did your position change following the</p> <p>9 explosion?</p> <p>10 A Yes. Briefly, in 2017, I was the acting CEO for -- me</p> <p>11 and Vince Martin were acting CEOs for a period of</p> <p>12 about eight months.</p> <p>13 Q And why is it that you stepped into that role?</p> <p>14 A Our former CEO, Paul Iron Cloud, passed away.</p> <p>15 Q Are you still in that position?</p> <p>16 A No, I'm not. I am back as the chief contracts</p> <p>17 officer.</p> <p>18 Q Okay. And so with regards to all times relevant to</p> <p>19 this lawsuit in 2016 to the present, you have either</p> <p>20 been the chief contracts officer or the acting joint</p> <p>21 CEO. Correct?</p> <p>22 A Yes.</p> <p>23 Q Are you familiar with OSLH's structure and operation</p> <p>24 generally?</p> <p>25 A Yes, I am.</p>
<p style="text-align: center;">54</p> <p>1 DOYLE PIPE ON HEAD, having been called as a</p> <p>2 witness herein on behalf of counsel for the</p> <p>3 third-party defendant, and after having been first</p> <p>4 duly sworn, was examined and testified as follows:</p> <p>5 EXAMINATION</p> <p>6 BY MR. THOMPSON:</p> <p>7 Q Sir, would you state your full name for the record,</p> <p>8 please?</p> <p>9 A My name is Doyle Pipe On Head.</p> <p>10 Q And, Doyle, we've had an opportunity to meet before,</p> <p>11 but is it okay if I refer to you as Doyle?</p> <p>12 A Yes.</p> <p>13 Q Doyle, where are you employed?</p> <p>14 A I work at Oglala Sioux Lakota Housing.</p> <p>15 Q Okay. And I'm going to refer to that as OSLH. But</p> <p>16 when did you begin working with OSLH?</p> <p>17 A I started working there in May of 2006.</p> <p>18 Q And in 2016 what was your position with OSLH?</p> <p>19 A I was the chief contracts officer.</p> <p>20 Q And what does that position entail? What do you do in</p> <p>21 that position?</p> <p>22 A I oversee procurement, and I help -- I supervise a</p> <p>23 number of different departments for the organization.</p> <p>24 Q And do you review contracts that OSLH enters into?</p> <p>25 A Yes, I do.</p>	<p style="text-align: center;">56</p> <p>1 Q What is OSLH?</p> <p>2 A OSLH is a tribally designated housing entity.</p> <p>3 Q And what functions does OSLH perform for the tribe?</p> <p>4 A OSLH operates and owns and manages low-rent housing</p> <p>5 for -- kind of like public housing for the tribal</p> <p>6 residents.</p> <p>7 Q Is it public housing?</p> <p>8 A It is very similar to public housing.</p> <p>9 Q Okay. But is OSLH a private business?</p> <p>10 A No, it is not.</p> <p>11 Q Is it a governmental agency of the tribe?</p> <p>12 A Yes, it is.</p> <p>13 Q Okay. And does OSLH perform maintenance on its rental</p> <p>14 units?</p> <p>15 A Yes, we do.</p> <p>16 Q Does OSLH renovate its rental units when required?</p> <p>17 A Yes.</p> <p>18 Q Did OSLH ever operate under a different name?</p> <p>19 A When the organization was first created, I believe the</p> <p>20 name -- the official name that they had was Oglala</p> <p>21 Sioux Housing Authority.</p> <p>22 Q And then it subsequently changed to OSLH?</p> <p>23 A Yes.</p> <p>24 Q But it is the same entity?</p> <p>25 A Yes, it is.</p>

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1 Q And how was OSLH created?
2 A How was it created?
3 Q Yes. How was it created?
4 A Well, the tribal housing -- the Oglala Sioux Tribe is
5 the one that had applied for funding under HUD, which
6 is Housing and Urban Development. And they requested
7 authorization to put in the Indian Housing Block
8 Grant, or apply for public housing. And that's how
9 the organization initially got started.
10 Q Did the tribe issue any sort of document that created
11 OSLH?
12 A They created a Charter.
13 Q Okay. And have you ever reviewed the Charter?
14 A Yes, I have.
15 Q And pursuant to that Charter did the tribe
16 explicitly extend its sovereign immunity protections
17 to OSLH?
18 MR. GALBRAITH: Objection.
19 THE COURT: What is the objection?
20 MR. GALBRAITH: Foundation, hearsay, calls for a legal
21 conclusion.
22 THE COURT: Sustained.
23 MR. THOMPSON: I will go ahead and enter -- I guess we
24 will enter it as an exhibit again. This is already an
25 exhibit on the record, but we will go ahead and make

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1 this Hearing Exhibit B.
2 THE COURT: And what are you marking?
3 MR. THOMPSON: I am marking the Charter.
4 THE COURT: Okay.
5 MR. THOMPSON: The Charter of the Oglala Sioux Lakota
6 Housing.
7 *** **
8 [REPORTER'S NOTE: Whereupon, at this point
9 the third-party defendant's Exhibit B, is marked for
10 identification purposes.]
11 *** **
12 EXAMINATION CONTINUED
13 BY MR. THOMPSON:
14 Q Doyle, I'm just going to hand you this Exhibit B, and
15 would you take a look at that, please?
16 A Yes.
17 MR. THOMPSON: Here is a copy for you.
18 MR. GALBRAITH: Thank you.
19 THE COURT: And while you do that, Mr. Dahlmeier, are
20 you waiting for a plane, either one of you, just out
21 of curiosity?
22 MR. DAHLMEIER: No, Your Honor.
23 *** **
24 EXAMINATION CONTINUED
25 BY MR. THOMPSON:

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1 Q Do you recognize that document, Doyle?
2 A Yes, I do.
3 Q And what is that document?
4 A It's the Charter that creates the Oglala Sioux Lakota
5 Housing.
6 Q Okay. And is this the current Charter that Housing
7 operates under, the most current version of it?
8 A Yes, it is.
9 Q Okay. And would you turn to Page 9, please?
10 A Okay.
11 Q Okay. On Page 9, in Section 2 there, do you see where
12 the Subsection B is?
13 A Yes.
14 Q Will you read that into the record, please?
15 MR. GALBRAITH: And I think that before we read it
16 into the record or testify from it, are we going to
17 offer it?
18 MR. THOMPSON: I have offered it as Exhibit B.
19 THE COURT: And I don't know that you have offered
20 it.
21 MR. THOMPSON: Oh, I thought I did. I apologize. I
22 am offering it as Exhibit B.
23 THE COURT: Any objection?
24 MR. THOMPSON: And it is already an exhibit in the
25 action.

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1 MR. GALBRAITH: Your Honor, I am going to object. I
2 don't see that it is signed. I don't know if it's a
3 document that would be signed. It is certainly not an
4 original. It suggests that it's adopted by a tribal
5 ordinance. I don't have a copy of that tribal
6 ordinance. I don't know if Mr. Pipe On Head was there
7 when it was entered or took any part in the Tribal
8 Ordinance 07-43 or the entry of this Charter.
9 So I'm going to object based on foundation. I
10 don't think it's the best evidence. I don't know that
11 it's original or signed. I will object.
12 MR. THOMPSON: Your Honor, there is no signature line
13 on here, indicating that it was never signed.
14 This document, as Mr. Pipe On Head just testified
15 to, is a document which he recognizes as the Charter
16 under which OSLH operates under. He is an official
17 and the former CEO, and he would know, and I think
18 that that foundation should be sufficient.
19 THE COURT: I'm not concerned about the originality of
20 it. Going forward, I probably don't want too much
21 talking objections or responses. But I think there is
22 barely enough foundation here.
23 Also, because this is -- I recognize this isn't a
24 jury matter, so I am inclined to -- I mean, it's
25 already in the record. I'm not really too concerned

<p style="text-align: center;">61</p> <p>1 about it being in the record.</p> <p>2 If there is a reasoning behind his lacking the</p> <p>3 knowledge that I should just disregard what it says, I</p> <p>4 will do that. But I'm not really -- I mean, I guess I</p> <p>5 can't get my head around it anyway, because you are</p> <p>6 both asking me to look at the Charter. Right?</p> <p>7 So why can't -- I mean, why wouldn't I look at</p> <p>8 the Charter and put it in the record?</p> <p>9 MR. GALBRAITH: I'm just making my record, Your</p> <p>10 Honor.</p> <p>11 THE COURT: Okay. So, I think it's barely enough</p> <p>12 foundation.</p> <p>13 MR. THOMPSON: With barely enough foundation I will</p> <p>14 proceed.</p> <p>15 THE COURT: So it is received.</p> <p>16 *** ** *</p> <p>17 [REPORTER'S NOTE: Whereupon, at this point</p> <p>18 third-party defendant's Exhibit B, having been first</p> <p>19 duly marked for identification purposes, is hereby</p> <p>20 offered and received into evidence.]</p> <p>21 *** ** *</p> <p>22 EXAMINATION CONTINUED</p> <p>23 BY MR. THOMPSON:</p> <p>24 Q Would you, please, read that Subsection B into the</p> <p>25 record, please?</p>	<p style="text-align: center;">63</p> <p>1 A Yes.</p> <p>2 Q And how is OSLH funded?</p> <p>3 A The primary source of funding is through HUD or</p> <p>4 NAHASDA funding.</p> <p>5 Q Okay. So what -- what type of funding do you receive</p> <p>6 from HUD?</p> <p>7 A It's an Indian housing block grant. It's similar to</p> <p>8 public housing grants.</p> <p>9 Q Okay. And HUD is funded through NAHASDA?</p> <p>10 A Yes.</p> <p>11 Q For Indian block grants?</p> <p>12 A Yes.</p> <p>13 Q Okay. And so OSLH would apply to obtain block grants</p> <p>14 through HUD. Correct?</p> <p>15 A Yes.</p> <p>16 Q Is there a written document that demonstrates the</p> <p>17 relationship between HUD and OSLH?</p> <p>18 A Yes. We have an Indian Housing Plan. It is the</p> <p>19 application for funding for our housing activities.</p> <p>20 Q And then what do you do with that plan?</p> <p>21 A The Indian Housing Plan is where we put in our</p> <p>22 activities for the year.</p> <p>23 Q Where do you submit that Indian Housing Plan?</p> <p>24 A We submit it to our -- to the original HUD Office.</p> <p>25 Q And why do you submit it to HUD?</p>
<p style="text-align: center;">62</p> <p>1 A The Tribe confers on OSLH sovereign immunity from suit</p> <p>2 to the same extent that the Tribe would have such</p> <p>3 sovereign immunity if it were engaged in the</p> <p>4 activities undertaken by the OSLH.</p> <p>5 OSLH shall have the power to sue and is</p> <p>6 authorized to consent to be sued in the Oglala Sioux</p> <p>7 Tribal Courts or another court of competent</p> <p>8 jurisdiction, provided, however, that no such consent</p> <p>9 to suit shall be effective against OSLH unless such</p> <p>10 OSLH consent (1) is explicit, and (2) is contained in</p> <p>11 a written contract, agreement, or commercial documents</p> <p>12 to which the OSLH is a party. In no case shall any</p> <p>13 such recovery exceed the assets of OSLH.</p> <p>14 Q As the chief contracts officer for OSLH, is that</p> <p>15 consistent with your understanding of the requirements</p> <p>16 to waive sovereign immunity?</p> <p>17 A Yes.</p> <p>18 Q Does OSLH or its employees operate or perform any</p> <p>19 services outside of the Reservation boundaries?</p> <p>20 A No, we don't.</p> <p>21 Q So all work that OSLH and its employees perform is</p> <p>22 conducted within the Oglala Sioux Reservation?</p> <p>23 A Yes.</p> <p>24 Q Are you familiar with OSLH's funding sources and</p> <p>25 processes by which it obtains funding?</p>	<p style="text-align: center;">64</p> <p>1 A So we can get operating funds from HUD.</p> <p>2 Q Does HUD issue any sort of document that memorializes</p> <p>3 the agreement for funding between OSLH?</p> <p>4 A Yes. Every year we have a funding agreement that we</p> <p>5 sign with HUD.</p> <p>6 MR. THOMPSON: I'm going to offer two exhibits here</p> <p>7 for you to take a look at, Exhibits C and D. And</p> <p>8 these are --</p> <p>9 MR. GALBRAITH: Can you tell me which they are?</p> <p>10 MR. THOMPSON: Yes. From just representing here that</p> <p>11 first is a letter from HUD to OSLH, combined with what</p> <p>12 is -- and then the Indian Housing Plan Performance</p> <p>13 Report is Exhibit D.</p> <p>14 *** ** *</p> <p>15 [REPORTER'S NOTE: Whereupon, at this point</p> <p>16 third-party defendant's Exhibits C and D, are hereby</p> <p>17 marked for identification purposes.]</p> <p>18 *** ** *</p> <p>19 EXAMINATION CONTINUED</p> <p>20 BY MR. THOMPSON:</p> <p>21 Q So would you just take a minute to look through those</p> <p>22 for a second?</p> <p>23 A (The Witness Complies)</p> <p>24 MR. THOMPSON: Your Honor, may I approach?</p> <p>25 THE COURT: Please.</p>

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1 MR. THOMPSON: And here is Exhibit B for you.
2 *** **
3 EXAMINATION CONTINUED
4 BY MR. THOMPSON:
5 Q Take your time, Doyle, and let me know when you have
6 had an opportunity to look at them.
7 A I did.
8 Q Do you recognize these documents, Doyle?
9 A Yes, I do.
10 Q And why do you recognize them?
11 A Because these are the documents that we signed with
12 HUD.
13 Q Okay. So you have reviewed these before?
14 A Yes, I have.
15 Q Okay. And, Doyle, can you tell me what is Exhibit C,
16 please?
17 A Exhibit C is the funding grant agreement.
18 Q Okay. And does the language on these annual funding
19 letters, the agreements, vary from year to year?
20 A They are usually pretty much the same.
21 Q Did OSLH waive its sovereign immunity in this
22 document?
23 MR. GALBRAITH: Objection, foundation --
24 A No, we didn't.
25 MR. GALBRAITH: (Continuing) -- and calls for a legal

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1 conclusion.
2 THE COURT: It is sustained. It calls for a legal
3 conclusion.
4 Q Is sovereign immunity mentioned anywhere in that
5 document?
6 A No, it isn't.
7 Q Is the word *consent to suit* mentioned anywhere in that
8 document?
9 A No, it isn't.
10 Q Doyle, do you know what a waiver of sovereign immunity
11 is?
12 A Yes, I do.
13 Q Okay. And you are authorized to waive sovereign
14 immunity to obtain funding. Correct?
15 A Yes.
16 Q But there is no language in this document that tends
17 to show that?
18 A No, there isn't.
19 Q All right. Doyle, can you tell me what Exhibit D is,
20 please?
21 A Exhibit D is -- it is an Indian Housing Plan, and it
22 also actually doubles as our annual performance
23 report at the end of the year. At the beginning of
24 the year, before the year starts, we file the
25 Indian Housing Plan to demonstrate to HUD what our

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1 activities are going to be for the year and how the
2 funding is going to be utilized.
3 And then after the funding year is over we report
4 back on the activities and our performance in the
5 annual performance report, which is at the back end
6 of this document.
7 Q Okay. And this is the document that you referenced
8 earlier that you said would be submitted to HUD in
9 order to obtain funding. Correct?
10 A Yes.
11 Q And in our Exhibits C and D, what year were those
12 submitted and received?
13 A These are the documents for the year 2016.
14 Q Okay. And did you -- have you reviewed this Indian
15 Housing Plan and Annual Performance Report before
16 today?
17 A Yes, I have.
18 Q Is there any language in that document that discusses
19 sovereign immunity?
20 A No, it doesn't.
21 Q Is there any language in that document that discusses
22 a consent to be sued?
23 A No, it doesn't.
24 Q Did OSLH intend to waive its sovereign immunity by
25 that document?

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1 MR. GALBRAITH: Objection, foundation, calls for a
2 legal conclusion.
3 MR. THOMPSON: It talks about intent.
4 THE COURT: No. I think he has laid foundation. And
5 whether or not they actually waived it is a legal
6 conclusion. But I don't know if you are necessarily
7 asking that. You are just asking if he thinks they
8 waived it. So I will allow it. But I'm going to
9 determine, if appropriate, whether or not it actually
10 is waived.
11 A No, I believe it doesn't waive sovereign immunity.
12 Q And OSLH didn't intend to waive its sovereign immunity
13 by either Exhibit D or Exhibit C. Correct?
14 A Correct.
15 Q Okay. Does OSLH operate pursuant to a 638 Contract
16 with the United States Government?
17 A No.
18 Q Other than Exhibits C and D, has OSLH contracted with
19 the United States Government to obtain funding?
20 A No.
21 Q Are you familiar with OSLH's current and former
22 officials and employees who are named as defendants
23 in this lawsuit, Richard Hill, Derek Janis, Wes
24 Cottier, William White, Ben Plenty Arrows, Brandon
25 Shangreau, Robin Tuttle, Tom Waters and Renaldo

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1 Two Bulls?

2 **A Yes, I am familiar with them.**

3 Q And are you familiar with their employment status and

4 enrollment status?

5 **A Yes, I am.**

6 Q Are all of the individuals that I just named still

7 employed with OSLH?

8 **A All of them except for one.**

9 Q And which one is that?

10 **A That's that Renaldo.**

11 Q Renaldo Two Bulls?

12 **A Two Bulls, yes.**

13 Q Does OSLH have a hiring preference where it seeks to

14 hire enrolled members of the Oglala Sioux Tribe?

15 **A Yes, we do.**

16 Q And does OSLH collect documents which verify whether

17 or not its employees are enrolled members of the

18 Tribe?

19 **A Yes, we do.**

20 Q And does OSLH keep those documents in the ordinary

21 course of its business?

22 **A Yes, we do. It's in their personnel files.**

23 Q And does OSLH keep records of whether individuals are

24 employed by OSLH in the course and scope of its

26 business?

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1 **A Yes, we do.**

2 Q Do you know whether the defendants I just named are

3 enrolled members of the tribe?

4 MR. GALBRAITH: Objection, foundation.

5 THE COURT: Overruled.

6 Q You can go ahead and answer, Doyle. Do you know

7 whether they are?

8 **A Yes. I have reviewed their file -- their personnel**

9 **information, and I am 100 percent sure that they are**

10 **all enrolled members.**

11 MR. THOMPSON: I'm going to offer Exhibits E and F,

12 and these are the employment documents that I

13 previously referred to.

14 THE COURT: You are going to mark them and then offer

15 them?

16 MR. THOMPSON: I have marked one as Exhibit E and one

17 as Exhibit F, Your Honor.

18 MR. GALBRAITH: Which is which?

19 MR. THOMPSON: Sure. I have marked the Notice of

20 Personnel Action Forms as Exhibit E, and I have marked

21 the certificates and evidence of Indian blood as

22 Exhibit F.

23 *** **

24 [REPORTER'S NOTE: Whereupon, at this point

25 third-party defendant's Exhibits E and F, having been

71

1 first duly marked for identification purposes, are

2 hereby offered and received into evidence.]

3 *** **

4 EXAMINATION CONTINUED

5 BY MR. THOMPSON:

6 Q Doyle, would you go ahead and review Exhibits E and F,

7 please?

8 **A (The Witness Complies)**

9 Q Doyle, have you seen these documents before today?

10 **A Yes, I have.**

11 Q And where did you see those?

12 **A I have looked at each of these individual's personnel**

13 **files and seen these documents before.**

14 Q Okay. And these are the documents that are kept in

15 the ordinary course and scope of OSLH's business. Is

16 that correct?

17 **A Yes.**

18 Q Can you tell me what is Exhibit E?

19 **A Exhibit E is the record that documents their date of**

20 **hire, and what position and rate and all that.**

21 Q Okay. And that is for each of the named OSLH

22 employees that are named as third-party defendants in

23 this matter. Correct?

24 **A Yes.**

25 Q And can you tell me what is Exhibit F, please?

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1 **A Yes. Exhibit F is a Certificate of Indian Blood**

2 **Decree. What that demonstrates is whether or not**

3 **somebody is an enrolled tribal member with the Oglala**

4 **Sioux Tribe.**

5 Q Okay. And within Exhibit F does it contain evidence

6 of Indian blood for each named OSLH employee in this

7 matter?

8 **A Yes, it does.**

9 Q And what does it demonstrate? Are they all enrolled

10 in the tribe?

11 MR. GALBRAITH: Objection.

12 **A Yes, they are all enrolled members.**

13 MR. GALBRAITH: Objection. The document has not been

14 offered.

15 THE COURT: Well, I think he has laid enough

16 foundation. Again, what the documents say is

17 probably my decision to make. They have not been

18 offered. I don't know -- I mean, if he is going to

19 testify on them further, they should probably be

20 offered.

21 MR. THOMPSON: Excuse me. I guess I'm unfamiliar with

22 what -- you know, I've asked that they be entered as

23 exhibits. Do I need to do something else?

24 THE COURT: I have a chart that says marked, offered

25 and received.

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1 BY MR. THOMPSON:

2 Q So with regard to the enrollment information, Doyle,

3 are those publically available documents? Can you

4 request that information from the tribe?

5 **A I don't know if you can or not.**

6 Q Okay. Fair enough. But, in any event, those are

7 documents that OSLH would have relied upon in hiring

8 those individuals?

9 **A Yes.**

10 Q And it's a document that they would have relied upon

11 to give them preference in hiring. Correct?

12 **A Yes.**

13 Q Okay. No further questions on those documents. Do

14 you know whether the duplex at issue in this matter is

15 located on fee property or trust property?

16 **A It's located on trust property.**

17 Q And those duplexes are located in Pine Ridge?

18 **A In Pine Ridge, yes.**

19 Q Within the exterior boundaries of the Oglala Sioux

20 Reservation?

21 **A Yes.**

22 Q And so any maintenance or work that was performed on

23 those -- on the duplex by OSLH's employees

24 necessarily had to be done within Reservation

25 boundaries. Correct?

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1 **A Yes.**

2 Q Did OSLH own the duplex and operate the rental units

3 in it?

4 **A Yes.**

5 Q Does OSLH own the property that the duplex was

6 situated on?

7 **A We leased the land from the tribe.**

8 Q So the tribe owns that property?

9 **A The tribe, yes.**

10 Q Have you reviewed documents that identify the status

11 of the real property on which the duplex that was

12 involved in was situated?

13 **A Yes.**

14 Q What documents did you review?

15 **A I reviewed two title status reports, and then an**

16 **aerial that shows the area where the duplexes were**

17 **at.**

18 Q Okay. And how did you obtain those documents?

19 **A I requested them from our development office.**

20 Q And does your development office maintain those

21 documents, or do they request them from another

22 source?

23 **A We -- they keep copies of them, but the origins of**

24 **the sources of those documents are -- or the title**

25 **status reports come from BIA, the Bureau of Indian**

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1 **Affairs. And the aerial photograph came from the**

2 **Land Office, I believe, the Oglala Sioux Tribe Land**

3 **Office.**

4 MR. THOMPSON: Okay. And now I'm going to hand you

5 what I have marked as Exhibit G. And I'm offering

6 this into the record.

7 *** **

8 [REPORTER'S NOTE: Whereupon, at this point

9 third-party defendant's Exhibit G, having been first

10 duly marked for identification purposes, is hereby

11 offered and received into evidence.]

12 *** **

13 MR. THOMPSON: Your Honor, I am approaching with E

14 and F.

15 THE COURT: Thank you.

16 MR. THOMPSON: Thank you. So take a minute to look at

17 that, and let me know when you have had a chance to

18 look through them.

19 THE COURT: Did you mark G?

20 MR. THOMPSON: Yes, Your Honor, I marked this as

21 Exhibit G.

22 THE COURT: Thank you.

23 MR. THOMPSON: And I believe I offered them, Exhibits

24 E and F, but if I haven't, I am now.

25 THE COURT: Is there any objection to --

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1 MR. GALBRAITH: Objection is based on not previously

2 disclosed or subject to discovery, foundation and

3 hearsay.

4 THE COURT: Okay.

5 MR. THOMPSON: Your Honor, these are publically

6 available documents. They can be requested from the

7 BIA and other tribal governmental offices, and there

8 is no need to disclose them prior to.

9 THE COURT: I will receive them under the same caveat

10 that, if I rely on them, I will let you know.

11 *** **

12 [REPORTER'S NOTE: Whereupon, at this point

13 third-party defendant's Exhibits E and F, having been

14 previously marked for identification purposes, are

15 hereby offered and received into evidence.]

16 *** **

17 EXAMINATION CONTINUED

18 BY MR. THOMPSON:

19 Q Doyle, what is the first page of Exhibit G?

20 **A The first page is an aerial photograph of the area**

21 **where the duplex was located in.**

22 Q Okay. So can you identify on there which is the units

23 in question?

24 **A Yes.**

25 Q And can I have you just draw a circle around them with

81

1 this pen, please?

2 **A (The Witness Complies)**

3 **Q** Okay. Now, can you tell me, does that aerial show

4 tract numbers of where those duplexes sit on?

5 **A Yes, it does.**

6 **Q** And what tract numbers does those duplex properties

7 sit on?

8 **A Tract Number 10466, and Tract Number 10465.**

9 **Q** Can you find on the remaining pages in the title

10 reports -- well, first of all, can you tell me what

11 are the subsequent written pages of Exhibit G,

12 type-written pages of Exhibit G?

13 **A The Title Status Report is the official record that**

14 **shows which tracts of land are leased to the parties**

15 **involved, or whoever has the lease on those tracts of**

16 **land.**

17 **Q** And do those tract reports correspond to the aerial

18 photograph?

19 **A Yes.**

20 **Q** Okay. And do those reports identify whether or not

21 those tracts are held in trust by United States

22 Government?

23 **A Yes.**

24 **Q** And they are held in trust by the United States

25 Government?

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1 MR. GALBRAITH: Objection, calls for a legal

2 conclusion. Additionally, the document speaks for

3 itself.

4 MR. THOMPSON: I'm not asking him to conclusively

5 determine the legal conclusion, just what the document

6 says.

7 THE COURT: Overruled.

8 *** **

9 EXAMINATION CONTINUED

10 BY MR. THOMPSON:

11 **Q** Does that document also identify who the owner of

12 those tracts are for whom title is held in trust by

13 the United States Government?

14 **A Yes, it does.**

15 **Q** And who is identified as the owner for those two

16 tracts?

17 **A I believe it's the Oglala Sioux Tribe.**

18 **Q** Does it say the Oglala Sioux Tribe on those documents?

19 And take your time and review them.

20 **A (The Witness Complies)**

21 **Q** I apologize that they are double-sided. But I'm just

22 going to direct your attention to looking at the first

23 typewritten document, the second page of that.

24 **A (The Witness Complies)**

25 **Q** And then the second typewritten document for the other

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1 tract, the second page of that.

2 **A (The Witness Complies) Okay.**

3 **Q** Do they -- who do those documents identify the owner

4 of those parcels as?

5 **A The Oglala Sioux Tribe.**

6 MR. THOMPSON: Thank you. And I am approaching with

7 Exhibit G, Your Honor.

8 **Q** Okay, Doyle. In your review of contracts in your

9 position as the Chief Contracts Officer and as CEO,

10 have you reviewed any documents that discuss sovereign

11 immunity or consent to be sued that would permit the

12 propane companies to sue it for money damages?

13 **A Could you restate that again?**

14 **Q** Yes. In your positions as chief contracts officer and

15 as acting CEO of OSLH, in your review of contracts,

16 have you reviewed any contracts that have discussed or

17 have been stated in them a waiver of sovereign

18 immunity where it stated consent to be sued that would

19 permit relative to suits arising from the explosion at

20 issue in this case?

21 **A I have never seen any documents that waived sovereign**

22 **immunity.**

23 **Q** If OSLH were exposed to this lawsuit, and damages

24 were awarded against it for which it was responsible

25 to pay, would that frustrate OSLH's ability to

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1 operate?

2 MR. GALBRAITH: Objection, foundation, speculation.

3 THE COURT: Sustained.

4 **Q** Doyle, are you familiar with OSLH's budget on which

5 it's operates?

6 **A Yes, I am.**

7 **Q** And are you familiar with the difficulties that OSLH

8 faces in trying to operate within that budget?

9 **A Yes, I am.**

10 **Q** Does OSLH operate on a tight budget?

11 **A Yes.**

12 **Q** Would you say that OSLH is under-funded?

13 **A Yes, it is.**

14 **Q** Approximately, how many housing rental units does

15 OSLH operate?

16 **A We operate or manage approximately 1,200.**

17 **Q** And could OSLH operate without federal funding?

18 **A It would be very hard.**

19 **Q** Based on your understanding of OSLH's finances and

20 its operating budget, if OSLH remains in this lawsuit,

21 and damages were eventually awarded against it for

22 which it was responsible to pay, would that frustrate

23 OSLH's ability to operate?

24 MR. GALBRAITH: Objection, speculation.

25 THE COURT: Overruled.

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1 A Yes.
2 Q Do you work in maintenance?
3 A No, I don't.
4 Q Doyle, you mentioned that in your review of contracts,
5 as the chief contracting officer and as CEO, that you
6 had not reviewed anything that discussed sovereign
7 immunity in it. Have you reviewed any contracts in
8 those capacities that have explicitly stated a consent
9 to be sued?
10 A No, I have not.
11 Q Thank you. Do you know what specific work was
12 performed on the duplexes by the named OSLH employees
13 in this matter?
14 A I am aware that a renovation was done, and that is
15 about it.
16 Q So you don't know which employees that are named in
17 this action, what tasks they performed during that
18 renovation?
19 A No, I don't.
20 Q And would you say that OSLH's maintenance crew is
21 short staffed?
22 A Yes.
23 Q Upon information and belief --
24 MR. THOMPSON: Never mind. That's all I have.
25 THE COURT: Who wants to go first?

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1 MR. GALBRAITH: I will.
2 THE COURT: All right. Well, Mr. Leach wants to go
3 first, too.
4 MR. LEACH: I have just about one question, Your
5 Honor.
6 THE COURT: Do you mind if he goes first? Well, how
7 are we doing this? You joined -- you have joined
8 their motion --
9 MR. LEACH: My question doesn't relate to the pending
10 motion; it relates to the summary judgment motion that
11 Western filed.
12 THE COURT: Yeah, I'm not going to do that right now.
13 You can do that maybe at the end. I can control
14 the -- well, the rules of evidence allow me under
15 6-something to control the way of it. Plus, I think,
16 that under the --
17 MR. LEACH: That's fine. Thank you, Your Honor.
18 THE COURT: Mr. Galbraith.
19 MR. GALBRAITH: Thank you, Your Honor.
20 *** **
21 EXAMINATION
22 BY MR. GALBRAITH:
23 Q Mr. Pipe On Head, do you also -- do you mind if I call
24 you Doyle, because that's easier for me, also?
25 A Okay.

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1 Q And OSLH is a tongue twister for me, so I will
2 generally refer to OSLH as the Housing Authority.
3 Does that make sense?
4 A Sure.
5 Q Okay. Thank you. I think you testified first that
6 the maintenance and renovation on the Housing
7 Authority's homes was completed by the Housing
8 Authority, that the Housing Authority was responsible
9 for that. Is that right?
10 A Yes.
11 Q And is that specific to the maintenance or renovation
12 on Unit 157, also, that occurred prior to the
13 explosion?
14 A Yes.
15 Q And so all of the maintenance that was done on Unit
16 157 was done by the Housing Authority or an employee
17 of the Housing Authority?
18 MR. THOMPSON: Objection. Foundation made a mistake
19 regarding facts in evidence.
20 THE COURT: Overruled.
21 MR. GALBRAITH: You can answer, if you can.
22 THE WITNESS: What was that again?
23 *** **
24 EXAMINATION CONTINUED
25 BY MR. GALBRAITH:

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1 Q That all of the work that was done on Unit 157
2 related to the maintenance or renovation was completed
3 by The Housing Authority or an employee of The Housing
4 Authority?
5 A As far as I know.
6 Q Okay. Well, I guess, Mr. Thompson has, as he
7 suggested earlier today, and I think you heard that,
8 provided us some documents related to the maintenance
9 or the renovation that was done on Unit 157. Would
10 you or someone at the Housing Authority have collected
11 those documents for Mr. Thompson?
12 A What kind of documents?
13 Q They were documents related to the work or the
14 renovation work or the maintenance work that was done
15 on Unit 157?
16 MR. THOMPSON: Objection, foundation.
17 THE COURT: Overruled.
18 Q Would you or someone there at the Housing Authority
19 have collected those and provided them to
20 Mr. Thompson?
21 A Yes.
22 Q And would all of the documents that you have collected
23 and provided to Mr. Thompson related to this
24 litigation, would those be documents that were kept in
25 the ordinary course of business at the Housing

<p style="text-align: right;">89</p> <p>1 Authority?</p> <p>2 A Yes.</p> <p>3 Q And so on -- so in November of 2016 I believe that</p> <p>4 Mr. Thompson gave us about 180 pages from the Housing</p> <p>5 Authority, and those were documents that you or</p> <p>6 someone at the Housing Authority collected and gave</p> <p>7 to him, and those are kept in the ordinary course of</p> <p>8 business?</p> <p>9 A Yes.</p> <p>10 Q And then he provided about -- well, what we have as</p> <p>11 documents that are Bates stamped as 109 through 146 in</p> <p>12 December of 2016 from the Housing Authority. Do you</p> <p>13 have the same answer there that those were collected</p> <p>14 by you or someone at the Housing Authority and</p> <p>15 provided to Mr. Thompson?</p> <p>16 A Yes.</p> <p>17 Q And those are documents kept in the ordinary course of</p> <p>18 business also?</p> <p>19 A Yes.</p> <p>20 Q And then in April of this year we received --</p> <p>21 MR. NOONEY: Last year.</p> <p>22 Q (Continuing) -- I'm sorry. April of last year. We</p> <p>23 haven't gotten to April of this year. There's 549</p> <p>24 additional documents from Mr. Thompson related to the</p> <p>25 Housing Authority. Would you or someone at The</p>	<p style="text-align: right;">91</p> <p>1 THE COURT: I think that it is a fair question.</p> <p>2 Overruled.</p> <p>3 Q Are you aware of that?</p> <p>4 A Yes.</p> <p>5 Q So you are aware then that NAHASDA specifically has a</p> <p>6 provision that says that the assistance is available</p> <p>7 directly to Indian tribes or tribally designated</p> <p>8 entities under authority similar to those accorded</p> <p>9 tribes in Public Law 93-638?</p> <p>10 A Yes.</p> <p>11 Q And Public Law 93-638 is where the term 638 Contracts</p> <p>12 comes from. Right?</p> <p>13 A I believe so.</p> <p>14 Q So that is contained within NAHASDA.</p> <p>15 A (No Response)</p> <p>16 Q Mr. Thompson gave to you -- do you have the original</p> <p>17 exhibits up here?</p> <p>18 MR. THOMPSON: They are.</p> <p>19 MR. GALBRAITH: Okay. Can I steal one from you,</p> <p>20 Judge?</p> <p>21 THE COURT: Yes. Here. Well, let me keep mine.</p> <p>22 Q Mr. Thompson gave to you Exhibit C. And he asked you</p> <p>23 the question, sir, if there was anything related to</p> <p>24 sovereign immunity or consent to be sued contained</p> <p>25 within Exhibit C. Do you remember that?</p>
<p style="text-align: right;">90</p> <p>1 Housing Authority have collected those and provided</p> <p>2 them to him?</p> <p>3 A Yes.</p> <p>4 Q And, similarly, those are documents that are kept in</p> <p>5 the ordinary course of business?</p> <p>6 A Yes.</p> <p>7 Q You said, sir, that the primary source of funding is</p> <p>8 through HUD and NAHASDA. Is that right?</p> <p>9 A Yes.</p> <p>10 Q And I think you also said -- or maybe you didn't, and</p> <p>11 I need to ask this question. Are you aware of whether</p> <p>12 or not the Housing Authority has any of what we have</p> <p>13 been referring to as 638 contracts?</p> <p>14 A No. We don't have any 638 contracts.</p> <p>15 Q Are you aware, sir, of the federal statute related</p> <p>16 to NAHASDA, 25 USC, Section 4101, and specifically</p> <p>17 Part 7, that says: <i>Federal assistance to meet these</i></p> <p>18 <i>responsibilities shall be provided in a manner that</i></p> <p>19 <i>recognizes the right of Indian self-determination and</i></p> <p>20 <i>Tribal self-governance by making such assistance</i></p> <p>21 <i>available directly to the Indian Tribes or Tribally</i></p> <p>22 <i>designated entities under authorities similar to those</i></p> <p>23 <i>accorded Indian Tribes in Public Law 93-638.</i></p> <p>24 MR. THOMPSON: Objection, foundation, calls for a</p> <p>25 conclusion.</p>	<p style="text-align: right;">92</p> <p>1 A Yes.</p> <p>2 Q Sir, is there anything in Exhibit C that requires the</p> <p>3 Housing Authority to maintain insurance?</p> <p>4 A (No Response)</p> <p>5 MR. THOMPSON: Objection, calls for a conclusion.</p> <p>6 THE COURT: Overruled.</p> <p>7 MR. GALBRAITH: The tricky thing about these always</p> <p>8 is, too, the Judge has it. And so I'm sure that, if</p> <p>9 it is there, Mr. Thompson will point it out to him</p> <p>10 later.</p> <p>11 Q As you look at it -- or as you recall that document --</p> <p>12 and I think you said you looked at it before today --</p> <p>13 are you aware of anything in there that requires the</p> <p>14 Housing Authority to maintain insurance?</p> <p>15 A I don't know if it's specifically stated in this</p> <p>16 document here.</p> <p>17 Q But The Housing Authority does maintain insurance. Is</p> <p>18 that Correct?</p> <p>19 A Part of the funding does require that we have</p> <p>20 insurance.</p> <p>21 Q Does it required a certain amount of insurance? Or</p> <p>22 does The Housing Authority decide that?</p> <p>23 A I think it -- I'm not aware of the specific amount.</p> <p>24 Q Of the amount that the Housing Authority has or the</p> <p>25 amount that is required?</p>

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 28688

**JENNIFER CHASE ALONE, as the Personal Representative of ELFREDA ANN
TAKES WAR BONNETT,**

Plaintiff,

vs.

C. BRUNSCH, INC., d/b/a LAKOTA PLAINS PROPANE

Defendant/Third-Party Plaintiff/Appellant,

and

**OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL,
DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENTY
ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM,
ROBIN T. (LAST NAME UNKNOWN) AND JOHN AND JANE DOE 1-100,**

Third-Party Defendants/Appellees.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
OGLALA LAKOTA COUNTY, SOUTH DAKOTA

The Honorable Jeffrey R. Connolly
Circuit Court Judge

APPELLEES' BRIEF

NOTICE OF APPEAL FILED AUGUST 3, 2018.

Evan M.T. Thompson
BROWNING, KALECZYC,
BERRY & HOVEN, P.C.
800 N. Last Chance Gulch, Ste 101
P.O. Box 1697
Helena, MT 59624
Phone: (406) 443-6820
Facsimile: (406) 443-6883
evan@bkbh.com

Mark Marshall
333 West Blvd., Suite 400
Rapid City, SD 57709-2670
Telephone: (605) 343-1040
Fax: (605) 343-1503
mmarshall@bangsmccullen.com

*Attorneys for Appellees, Oglala
Sioux Lakota Housing Authority,
Richard Hill, Derek Janis, Wes
Cottier, William White, Ben Plenty
Arrows, Renaldo Two Bulls,
Brandon Wes, Derek Slim, and
Robin Tuttle*

John K. Nooney
Nooney & Solay, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709
John@nooneysolay.com

*Attorneys for Appellant
C. Brunsch, Inc.*

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PRELIMINARY STATEMENT

Citations to the pleadings will be referred to as Settled Records (“SR”), the numbers assigned by the Clerk, and any further designation as appropriate, e.g. “SR 001, Complaint.” References to the documents in the Appendix will be referred to as the document name and Appendix (“App.”) with the appropriate page and/or paragraph number, e.g. “Memorandum Order, App. at B-1-17, ¶ 4.”

Appellees, Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Shangreau [erroneously named as “Brandon Wes”], Tom Waters [erroneously named as “Derek Slim”], Robin Tuttle shall be collectively referred to as “OSLH.” Individually, Oglala Sioux Lakota Housing Authority will be referred to as the “Housing Authority” and the named Housing Authority officials and employees shall be referred to collectively as “OSLH Employees.” Appellant, C. Brunsch, Inc., shall be referred to as “Appellant.”

JURISDICTIONAL STATEMENT

Jurisdiction over this matter is exclusive in the courts of the Oglala Sioux Lakota Tribe (“Tribe”) of the Pine Ridge Reservation (“Reservation”) and the South Dakota Circuit Court of the Seventh Judicial District (“Circuit Court”) lacks subject matter jurisdiction necessary to reach the merits of any of Appellants’ claims. While jurisdiction over the underlying dispute is not proper in South Dakota Circuit Court, this Court has jurisdiction to determine whether the Circuit Court properly dismissed this matter for lack of subject matter jurisdiction.

This Court has appellate jurisdiction over the Circuit Court’s well-reasoned Memorandum Order of February 14, 2018 (“Order”), which dismissed Appellant’s claims against Appellees on the basis that the Circuit Court lacked subject matter jurisdiction. The Order was certified by the Circuit Court as a final decision pursuant to Rule 54(b). App. at A-1, A-4. Following Rule 54 (b) certification, Appellant filed a Notice of Appeal on August 3, 2018. SR 3340. This Court has jurisdiction over this appeal pursuant to SDCL § 15-26(A)-3 and SDCL § 15-6-54(b).

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT APPROPRIATELY DISMISSED APPELLANT’S THIRD PARTY CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION APPELLANT’S CLAIMS AGAINST TRIBAL ENTITIES AND MEMBERS FOR ALLEGED TORTS COMMITTED WITHIN THE RESERVATION ON TRUST LAND?

A. The Circuit Court appropriately held that it lacked jurisdiction over Appellant’s third-party claims against OSLH due to their tribal status and location that the alleged torts were committed. It further held that assumption of jurisdiction would infringe upon tribal sovereignty.

B. Most Relevant Cases:

- a. South Dakota's Constitution Art. XXII.
- b. *Risse v. Meeks*, 1998 S.D. 112, 585 N.W.2d 875.
- c. *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480 (S.D. 1991).
- d. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).
- e. Oglala Sioux Tribe Law & Order Code (“OSLOC”) Chapter 2, § 20.

II. WHETHER APPELLANT’S UNTIMELY AND FUTILE DISCOVERY PURSUITS SHOULD HAVE DELAYED THE CIRCUIT COURT’S RESOLUTION OF OSLH’S MOTION TO DISMISS RE: SUBJECT MATTER JURISDICTION?

A. The Circuit Court properly held that Appellant’s discovery pursuits were untimely and not necessary to resolve whether it lacked subject matter jurisdiction over the third-party claims. It further held that a summary judgment standard should not be applied to the factual challenge of the Court’s subject matter jurisdiction.

B. Most Relevant Authority

- a. *Huttenville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, 791 N.W.2d 169.
- b. *Osborn v. United States*, 918 F.2d 724 (8th Cir.1990).
- c. SDCL § 15-6-12(b).
- d. *Storm v. Durr*, 2003 S.D. 6, ¶ 11, 657 N.W.2d 34

STATEMENT OF THE CASE

This matter arose in the South Dakota State Circuit Court for the Seventh Judicial District, County of Oglala Lakota (“Circuit Court”). Honorable Jeffrey Robert Connolly presided.

Plaintiff, Jennifer Chase Alone (“Plaintiff”), as the personal representative of the Estate of Elfreda Ann Takes War Bonnet initiated this matter against Appellant, seeking damages as a result of Appellant’s negligence which resulted in an explosion that destroyed a duplex located in Pine Ridge, Oglala Lakota County, South Dakota. SR 001, Complaint. Appellant subsequently filed a Third-Party Complaint alleging OSLH was responsible for the explosion. SR 084, Third-Party Complaint. Appellant’s third-party claims (“claims”) and the underlying circumstances of the explosion have not been

established. OSLH has not filed an Answer to Appellant's Third-Party Complaint, and contrary to Appellant's representation, OSLH disputes Appellant's claims.

While OSLH has not denied Appellant's allegations in a substantive Answer, it moved for dismissal based on the Circuit Court's lack of subject matter jurisdiction. SR 189, Motion to Dismiss I; SR 458, Motion to Dismiss II. OSLH's first Motion to Dismiss re: subject matter jurisdiction was filed on September 14, 2017. SR189, Motion to Dismiss I. The second Motion to Dismiss re: subject matter jurisdiction was substantively identical and raised no new issues to be decided. SR458, Motion to Dismiss II; SR460, Brief in Support of Motion to Dismiss II. In support of OSLH's Motions to Dismiss re: subject matter jurisdiction, OSLH submitted briefs in support and the Housing Authority's Chief Contracting Officer and former acting CEO, Doyle Pipe On Head's Affidavit. SR 191, Brief in Support of Motion to Dismiss I; SR 460, Brief in Support of Motion to Dismiss II; SR 205, Aff. of Pipe On Head (submitted as App. at C-1-3).

Appellant served written discovery on the Housing Authority, only, on September 12, 2017. SR 712, Aff. of Galbraith, Exhibit 2 attached thereto. The Housing Authority objected to the discovery requests, which sought information regarding the merits of Appellant's claims, on the basis it enjoys sovereign immunity as an arm of the Oglala Sioux Tribal Government. SR 712, Aff. of Galbraith, Exhibit 3 attached thereto. Appellant further attempted to depose the Housing Authority, pursuant to SDCL § 15-6-30(b)(6), on numerous topics that went to the underlying merits of Appellant's claims. SR 712, Aff. of Galbraith, Exhibit 4. The Housing Authority, only, objected on the basis of sovereign immunity and moved for a protective order because Appellant refused to

limit the scope of its inquiry. SR 309; Hearing Transcript, App. at D-11, 43:18 – 44:4. Appellant *never* issued *any* written discovery or deposition subpoenas to OSLH Employees.

While Appellant contends OSLH never provided it any discovery, this is only a half-truth. Although the Housing Authority objected to Appellant's formal discovery, prior to litigation being initiated, OSLH voluntarily provided Appellant with hundreds of documents (549 pages) it kept within the ordinary course of business. App. at D-11, 43:10-17. Appellant acknowledged this. App. at D-22-23, 88:6 – 90:6. At no time prior to the Hearing on the Motions to Dismiss did Appellant suggest discovery was needed to address the key facts affecting subject matter jurisdiction: (1) the status of the land where the alleged actions or omissions of OSLH occurred, i.e. whether it was on trust property or within the Reservation boundaries; and (2) the tribal affiliation status of OSLH. Rather, Appellant directed its entire written discovery towards facts regarding the underlying merits of its claims. SR 712, Aff. of Galbraith, ¶ 4 and Exhibit 2 attached thereto; SR 712; App. at D-7, 28:10-19; Memorandum Order, App. at B-12-13. As Appellant did not pursue written discovery of facts affecting jurisdiction, it also did not file any motions to compel. App. at D-11, 44:5-13.

At no time did Appellant seek to depose OSLH Employees. The only deposition it sought prior to the Hearing was the Housing Authority's 30(b)(6) deposition. SR 712, Aff. of Galbraith, ¶ 6, Exhibit 4 attached thereto. None of the 47 topics Appellant sought in the 30(b)(6) deposition on were aimed at the factual statements affecting subject matter jurisdiction in Mr. Pipe On Head's Affidavit, the status of the land at issue, or Indian

status of OSLH. *Id.*; *see also* App. at C-1-3. All 47 topics were directed to the merits of the underlying litigation. *Id.*

From the time OSLH raised subject matter jurisdiction as a defense on September 14, 2017 until the Hearing on January 18, 2018, Appellant had more than four months to seek discovery regarding facts relevant to subject matter jurisdiction. SR189; App. D-6-7, 21:12 – 25:22. Appellant chose not to, instead waiting until the eleventh hour – less than a week before the Hearing – to suggest for the first time it needed discovery to respond to OSLH’s subject matter jurisdiction arguments. SR 712, Aff. of Galbraith, ¶¶ 4, 6 and Exhibits 2 and 4 attached thereto; App. D-6-7, 21:12 – 25:22. At that time, OSLH’s counsel had solidified travel arrangements to attend the Hearing from out of State.

Had Appellant limited its discovery pursuits to only that which was necessary to resolve the subject matter jurisdiction and/or sovereign immunity issues, there would have been no objection. App. at D-6-7, 24:13 – 25:22; D-11, 43:10 – 44:13; D-12, 46:2-7. Counsel for OSLH contacted Appellant’s counsel and requested Appellant stipulate to limit the scope of the 30(b)(6) deposition to those issues necessary to resolve the motions to dismiss. *Id.* However, Appellant declined, necessitating the Housing Authority’s Motion for Protective Order. *Id.* OSLH Employees did not move for a protective order based on sovereign immunity. SR 309.

As made clear at the Hearing, Appellant had the burden of proof to establish jurisdiction in the Circuit Court and to pursue reasonable discovery tailored to address the threshold issue of jurisdiction to meet its burden of proof. App. at D-6-7, 23:13 – 25:22; D-11, 43:10 – 44:13. Appellant does not deny it made zero effort to obtain tribal membership information from the Tribe or information regarding status of the land at

issue from the Bureau of Indian Affairs (“BIA”). Appellant had equal ability and opportunity to seek this information.

A Hearing was held on the Motions to Dismiss re: subject matter jurisdiction.¹ During the Hearing, OSLH’s counsel again outlined the determinative facts necessary to resolve the challenge of subject matter jurisdiction: (1) the location of the alleged actions or omissions of OSLH, and (2) the status of the Housing Authority and the OSLH Employees as a tribal governmental entity and tribal members. App. at D-4, 13:14 – 15:19.

OSLH then called Mr. Pipe On Head to testify related to the subject matter jurisdiction arguments. App. at D-14-25; App. at C-1-3. The testimony largely confirmed his prior Affidavit and OSLH introduced several publicly available exhibits through him that further supported dismissal. *Id.* Appellant cross-examined Mr. Pipe On Head. *Id.* While Mr. Pipe On Head testified regarding a variety of topics, a very limited amount of testimony was relied upon by the Circuit Court in reaching its decision to dismiss for lack of subject matter jurisdiction. App. at B-9-17.

Mr. Pipe On Head’s most relevant testimony affecting jurisdiction was (1) the Housing Authority is a governmental agency of the Tribe created by a tribal Charter (App. at D-14-15, 54:9 – 59:8; SR 1076, OSLH Charter, (submitted as App. at E-1-14)); (2) OSLH operates exclusively within the boundaries of the Reservation (App. at D-16, 62:18-23; D-20, 77:13-25; App. at E-1-14); (3) OSLH Employees are enrolled members of the Tribe and the Housing Authority maintains record of their tribal enrollment status during the ordinary course of its business (App. at D-16-20, 62:18-23 – 77:12; SR 1134,

¹ Other issues were also addressed during the hearing which are not at issue in this appeal, including the issue of the Housing Authority’s sovereign immunity.

Personnel Action Sheets, (submitted as App. at F-1-18); SR 1152, Tribal Enrollment Sheets, (submitted as App. at G-1-9)); and (4) the duplex at issue was within the Reservation and located on trust property owned by the Tribe (App. at D-20, 77:13 – 83:5; SR 1161, Housing Units (submitted as App. at H-1-11)). These determinative facts established by Mr. Pipe On Head’s testimony and Affidavit were also supported with documentary evidence received as exhibits during the Hearing, most of which are publicly available governmental documents for which a foundation was laid by Mr. Pipe On Head. App. at E-1-14; App. at F-1-18; App. at G-1-9; App. at H-1-11; App. at D-14-21. Appellant did not previously issue discovery requests to OSLH seeking the documents offered as exhibits at the Hearing. SR 712, Aff. of Galbraith, ¶ 4 and Exhibit 2 attached thereto.

Following the Hearing, the Circuit Court entered its Memorandum Order granting OSLH’s Motions to Dismiss re: subject matter jurisdiction App. at B-1-17. The Circuit Court rightly concluded it lacked jurisdiction over tort claims against tribal members and a tribal entity that occurred within the boundaries of the Reservation on trust property owned by the Tribe. App. at B-9-14, B-16. The Circuit Court found sufficient evidentiary support for the factual challenge of its subject matter jurisdiction in the form of Mr. Pipe On Head’s Affidavit, Mr. Pipe On Head’s live testimony, and Exhibits A-G that were received at the Hearing. App. at B-12; *see also* App. at E-1-14; App. at F-1-18; App. at G-1-9; App. at H-1-11; SR 1090, SR 1098. Based on evidence presented, the Circuit Court concluded (1) OSLH is comprised of a tribal entity and tribal members; (2) the Housing Authority is the Tribe’s public housing authority that operates only on trust land within the Reservation; (3) the Housing Authority only serves tribal members and

typically only employs tribal members; (4) OSLH Employees are enrolled members of the Tribe; and (5) the alleged culpable conduct of OSLH took place on trust land within the exterior boundaries of the Reservation. *Id.*

In addition to holding subject matter jurisdiction barred Appellant's claims, the Circuit Court addressed the issue of Appellant's untimely request for further discovery. Having reviewed Appellant's prior discovery requests, the Circuit Court made the following observation

[T]he record does not suggest that [Appellant] attempted to initiate *any discovery in relation to the factual issue in dispute* – that the alleged negligence occurred on trust land within the exterior boundaries of the Reservation or whether the third-party defendants are tribal members. [Appellant] had several months to pursue such discovery and did not do so, they should not be allowed to do so now.

App. at B-12-13; *see also* SR 712, Aff. of Galbraith, ¶¶ 4, 6 and Exhibits 2 and 4 attached thereto. Appellant never suggested the Housing Authority was not a tribal entity for purposes of jurisdiction.

The Circuit Court observed it had a duty to “satisfy itself” that it may properly maintain jurisdiction, and in doing so, was not required to eliminate the existence of disputed material fact. App. at B-13. Finally, the Circuit Court held Appellant's request to conduct discovery regarding whether the Housing Authority consented to jurisdiction in State court was also unavailing because “jurisdiction cannot be conferred by consent, agreement, stipulation or waiver.” *Id.* The Circuit Court concluded “additional discovery of the type contemplated by [Appellant], would not reveal any information which would upset the Court's determination.” App. at B-13.

The Circuit Court held maintaining such jurisdiction would infringe upon the Tribe's sovereignty. App. at B-13-14. The Circuit Court observed (1) the Tribe may

regulate the activities of non-members, such as Appellant, who enter into consensual relationships with the Tribe or its members; (2) the Tribe has an established court system and jurisdictional framework to handle claims such as Appellant's; and (3) the Oglala Sioux Tribal Court is equipped to resolve such claims. App. at B-14.

The Circuit Court expressly declined to reach the issue of sovereign immunity as its dismissal of Appellant's claims on the basis of subject matter jurisdiction rendered the issue of sovereign immunity moot.² App. at B-14-15. The Circuit Court dismissed Appellant's claims on the sole basis it lacked subject matter jurisdiction. App. at B-16. Thereafter, the Circuit Court certified the Memorandum Order as a final judgment pursuant to OSLH's Motion for Rule 54(b) Certification and Appellant subsequently initiated this Appeal. App. at A-1-25; SR 1272; SR 3340; SR 3358.

STATEMENT OF FACTS

The Housing Authority is an arm of tribal government of the Oglala Sioux Tribe ("Tribe") and OSLH Employees are enrolled tribal members employed by the Housing Authority. App. at C-1-3, ¶ 6; SR 84, Third-Party Complaint, ¶¶ 4-5, 7-8; Hearing Transcript, App. at D-14-15, 56:1 – 59:8; App. at D-16-20, 62:18-23 – 77:12; App. at E-1-14; App. at F-1-18; App. at G-1-9. The Housing Authority operates exclusively within the exterior boundaries of the Pine Ridge Indian Reservation ("Reservation") and only serves members of the Tribe. App. at C-2, ¶ 6; SR 84, Third-Party Complaint, ¶ 5; App. at D-16, 62:18-23; D-20, 77:13-25; App at E-1-14.

² Appellant's Brief is devoted nearly exclusively to the issue of sovereign immunity. As that issue has no bearing on this appeal, OSLH largely declines to address those arguments. Subject matter jurisdiction and sovereign immunity, while having some relation to one another, are not one in the same. Appellant's attempt to conflate those issues should be ignored as it confuses the primary issue on appeal: whether the Circuit Court lacked subject matter jurisdiction.

Appellant is a propane company that entered consensual business relationships with individual tribal members within the Reservation to deliver propane to various residential properties. *See* SR 1, Complaint, ¶ 6; SR 42, ¶ 7; App. at C-2, ¶¶ 5-6, 13. By doing so, Appellant consented to the exclusive jurisdiction of the Tribe. App. at B-14; *See also* Oglala Sioux Tribe Law & Order Code (“OSLOC”) Chapter 2, § 20 (submitted as App. at I-1-2).

The explosion at issue occurred in public housing Units 157 and 158, which are rental units owned and operated by the Housing Authority. App. at C-2-3, ¶¶ 10-11; SR 84, Third-Party Complaint, ¶¶ 3-4; App. at D-20, 77:13 – 83:5; App. at H-1-11. The real property on which Units 157 and 158 are located is trust property owned by the Tribe and held in trust by the United States. App. at C-2-3, ¶¶ 10-11; App. at D-20, 77:13 – 83:5; App. at H-1-11. The property is located within the exterior boundaries of the Reservation. *Id.* All alleged actions or omissions of OSLH occurred on trust property within the exterior boundaries of the Reservation. App. at C-2-3, ¶¶ 4, 8 App. at D-16, 62:18-23; D-20, 77:13 – 83:5; App. at E-1-14.

STANDARD OF REVIEW

A court’s dismissal for lack of subject matter jurisdiction is generally reviewed *de novo*. However, review is slightly different regarding a factual Rule 12(b)(1) challenge of subject matter jurisdiction. *Huterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169. In such instances, a trial court may consider matters outside the pleadings and no presumptive truthfulness attaches where the court must satisfy itself it has fully evaluated its ability to hear the controversy. As the Court observed in *Waldner*:

A court deciding a motion under Rule 12(b)(1) *must* distinguish between a “facial attack” and a “factual attack.” In the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).... *In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards. In factual attacks, the court must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction-its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.* Thus, evidentiary hearings, affidavits, documents, and live testimony may all be considered to resolve the subject matter jurisdiction dispute.

Waldner, ¶ 20 (citing *Osborn v. United States*, 918 F.2d 724, 729-80, n. 6 (8th Cir.1990))

(emphasis added). As the Eighth Circuit observed regarding this same issue:

As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, ‘any rational mode of inquiry will do.’ *Once the evidence is submitted, the district court must decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue.*

Osborn, 918 F.2d at 730 (internal citation omitted) (emphasis added).

In resolving a factual Rule 12(b)(1) attack, a trial court must not simply ignore the facts affecting jurisdiction. The trial court must have latitude and discretion in receiving and evaluating such facts to satisfy itself regarding its subject matter jurisdiction.

Appellant never articulated an argument that it disputes the established facts affecting subject matter jurisdiction. To the extent this Court may determine that determinative facts were in dispute, and the Circuit Court made a determination of disputed fact, it may review those findings “under the ‘clearly erroneous’ standard.” *See Osborn*, 918 F.2d at 730.

In any event, the Circuit Court appropriately satisfied its mandate to receive evidence of facts affecting its jurisdiction, and upon review of that evidence, properly

concluded there were sufficient facts available to satisfy itself that it lacked subject matter jurisdiction. This determination should not be disturbed.

ARGUMENT

Appellant presents zero argument or authority that should overturn the Circuit Court's proper dismissal of its claims. As the following arguments demonstrate: (I) the law of South Dakota disclaims subject matter jurisdiction over Appellant's claims; (II) Appellant's discovery pursuits were untimely and futile; and (III) Appellant failed to present additional credible authority or argument to support its appeal.

I. THE CIRCUIT COURT PROPERLY DETERMINED IT LACKED SUBJECT MATTER JURISDICTION.

Based on the parties' briefing and uncontested evidence, the Circuit Court properly determined it did not have subject matter jurisdiction over Appellant's claims. App. at B-9-17. The Circuit Court properly recognized the long-accepted principal of civil jurisdiction in South Dakota "that Indian conduct occurring on trust allotments is beyond the State's jurisdiction." App. at B-10 (citing *Risse v. Meeks*, 1998 S.D. 112, ¶ 18). The Circuit Court's finding that OSLH is comprised of "tribal entities or tribal members" and the alleged tortious conduct took place on trust land within the exterior boundaries of the Reservation was determinative. App. at B-12. Moreover, the Circuit Court properly determined exercise of subject matter jurisdiction would infringe on the sovereignty of the Oglala Sioux Tribe. App. at B-14.

A. South Dakota's Constitution Expressly Disclaims State Court Subject Matter Jurisdiction Over Claims Against Indians Arising on Indian Lands.

South Dakota's Constitution Art. XXII declares ‘Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.’ *Risse v. Meeks*, 1998 S.D. 112, ¶ 12, 585 N.W.2d 875, 877 (citing *Smith v. Temple*, 82 S.D. 650, 152 N.W.2d 547 (1967) (emphasis added)). Consistent with its Constitution, the South Dakota Supreme Court held that “[i]n general, civil jurisdiction over disputes between reservation Indians lies exclusively in tribal court.” *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 482, 69 Ed. Law Rep. 573 (S.D. 1991) (emphasis added).

Pursuant to South Dakota’s Constitution and interpreting case law, where, such as here, the actions or omissions of an Indian resulting in a civil claim occur on property held by the United States in trust for an Indian tribe, adjudication of such claims in state court is improper. *Risse*, ¶ 18 (citing *DeCoteau v. District County Court*, 420 U.S. 425, 428, 95 S.Ct. 1082, 1085, 43 L.Ed.2d 300, 305 (1975) (“Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities.” (emphasis added))); *See also Peano v. Brennan*, 20 S.D. 342, 106 N.W. 409 (1906) (Pursuant to Art. XXII of South Dakota Constitution, State has no jurisdiction to adjudicate civil suit where cause of action arose on real property within the Pine Ridge Indian Reservation); *Red Fox v. Hettich*, 494 N.W.2d 638, 643 (S.D. 1993) (Tribal Court was appropriate jurisdiction over civil action arising within exterior boundaries of Standing Rock Sioux Indian Reservation on a state highway easement).

“It is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands ‘presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.’” *Sage*, 473 N.W.2d at 482 (citing *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d

1301, 1305 (9th Cir.1988)) (citations omitted); *see also Red Fox*, 494 N.W.2d at 644 (“Absent specific treaty provisions or federal statutes which categorically bar or grant [a tribe’s] civil judicial jurisdiction, ‘[c]ivil jurisdiction over [activities of non-Indians on reservation lands] presumptively lies in the tribal courts [.]’”). Furthermore, “[a] tribe may regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 428, 109 S.Ct. 2994, 3007, 106 L.Ed.2d 343, *U.S. reh'g denied*, 492 U.S. 937, 110 S.Ct. 22, 106 L.Ed.2d 635 (1989) (quoting *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981)).

The jurisdictional bar is true regardless of whether the plaintiff is a non-Indian. *Sage*, 473 N.W.2d 480; *Risse*, ¶¶ 17-20.³ In *Risse*, civil claims by non-Indian plaintiffs against Indian defendants in South Dakota State court were properly dismissed due to the Court’s lack of subject matter jurisdiction because the alleged actions or omissions occurred on trust property even though the property was exterior to the current boundaries of the Pine Ridge Reservation. *Risse*, ¶¶ 3, 17-20.

The Constitution of South Dakota is clear: if a claim against an Indian arises on Indian land (i.e. property held in trust by the United States for the benefit of Indian tribes), State courts may not assume subject matter jurisdiction. Here, the relevant facts establishing an absence of subject matter jurisdiction are (1) the Housing Authority is a governmental agency of the Tribe, (2) OSLH Employees are tribal members, (3)

³ Other jurisdictions have reached the same conclusion. *See Milbank Mutual Ins. Co. v. Eagleman*, 218 Mont. 58, 705 P.2d 1117 (1985) (Montana state courts lack subject-matter jurisdiction over suit between Indians and non-Indians arising out of on-reservation conduct).

Appellant is a non-Indian business that entered into consensual business relationships with tribal members within the Reservation; and (4) the alleged actions or omissions of OSLH occurred on trust property and within the Reservation. *See* SR 84, Third-Party Complaint, ¶¶ 4-5, 7-8; App. at D-14-15, 56:1 – 59:8; App. at D-16-20, 62:18-23 – 77:12; App. at E-1-14; App. at F-1-18; App. at G-1-9; App. at D-16, 62:18-23; SR 1, Complaint, ¶ 6; SR 42, ¶ 7; App. at B-14; App. at I-1-2; App. at C-2-3, ¶¶ 10-11; App. at D-20, 77:13 – 83:5; App. at H-1-11; App. at C-2-3, ¶¶ 4, 5-6, 8, 13.

On these facts, it is clear the Circuit Court lacks subject matter jurisdiction. Appellant never presented any competing authority supporting an alternate conclusion and erroneously limits its arguments to the related but separate issue of sovereign immunity. *See* Appellant’s Brief; SR 690. The Circuit Court relied on well-settled law in South Dakota, which Appellant chose to ignore, in reaching its appropriate conclusion warranting dismissal. App. at B-11-14. OSLH respectfully requests the Court affirm the Circuit Court’s Memorandum Order and uphold dismissal.

B. Principals of Infringement and Preemption Further Required Dismissal.

Even if South Dakota’s Constitution did not disclaim subject matter jurisdiction over Appellant’s claims, principals of infringement and preemption required the Circuit Court to dismiss Appellant’s claims for lack of subject matter jurisdiction. *See* App. at B-14. “There are two distinct barriers to a state’s assumption of jurisdiction over reservation Indians: ‘infringement’ and ‘preemption.’” *Sage, supra*, 473 N.W.2d at 481. Either of these “‘can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members,’” but they are generally considered

together because “[t]hey are related[.]” *Id.* (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980)).

“Infringement” arises from Indian tribes’ inherent sovereignty. *Sage*, 473 N.W.2d at 481 (citation omitted). “[E]ven when an assertion of state jurisdiction over reservation Indians is not expressly preempted by federal law to the contrary, ‘the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.’” *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959)). However, the preemption inquiry tends to overshadow the infringement doctrine in “modern cases.” *Sage*, 473 N.W.2d at 482 (citation omitted). “Preemption” requires “‘a particularized inquiry into the nature of the state, federal, and tribal interest at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.’” *Id.* (quoting *White Mountain Apache*, 448 U.S. at 145, 100 S.Ct. at 2584).

The Third-Party Complaint at issue represents a dispute between reservation Indians and Appellant, who does not appear to be a reservation Indian, and therefore requires “a more exacting infringement and preemption analysis.” *Sage*, 473 N.W.2d at 482. The South Dakota Supreme Court has issued varied rulings on subject matter jurisdiction over disputes between “reservation Indians” and non-members. *See id.* (list of cases omitted). However, where the dispute involves a reservation Indian and an outsider who voluntarily enters a consensual business relationship with the tribal member, the U.S. Supreme Court and other courts have consistently held state subject matter jurisdiction either infringes on tribal sovereignty or is preempted by federal law. *Id.* (“A tribe may regulate ... the activities of nonmembers who enter consensual

relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”) (internal quotation marks and citations omitted); *see also Brendale*, 492 U.S. at 428, 109 S.Ct. at 3007.

Infringement and preemption precluded the Circuit Court’s subject matter jurisdiction and each doctrine provided independent basis for dismissal.

1. Assumption of subject matter jurisdiction would infringe on the Tribe’s sovereignty.

The South Dakota Supreme Court “has consistently held it is ‘inappropriate for states to assert jurisdiction over ‘reservation affairs’ if it would interfere with tribal sovereignty and self-government and impair the authority of tribal courts.’” *Risse, supra*, 1998 S.D. 112, 585 N.W.2d at 877 (citing *Gesinger v. Gesinger*, 531 N.W.2d 17, 20 (S.D.1995); *In re Guardianship of Flyinghorse*, 456 N.W.2d 567, 568 (S.D.1990); *Wells v. Wells*, 451 N.W.2d 402, 405 (S.D.1990)). The test for determining whether state courts may assume jurisdiction over claims involving Indians is “whether the state action [would infringe] on the right of reservation Indians to make their own laws and be ruled by them.” *Wells*, 451 N.W.2d at 405, (S.D. 1990) (citing *Williams*, 358 U.S. at 220, 79 S.Ct. at 271; *accord In re Guardianship of D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D.1980)). The *Wells* Court stated “[i]n applying the [*Williams v. Lee* infringement test” even where a claim arises from “a single transaction that occurred on the reservation,” it “is only appropriate that tribal law and tribal courts govern.” *Wells*, 451 N.W.2d at 405 (emphasis added).

Williams v. Lee involved a non-Indian operator of a general store on the Navajo Reservation who brought suit in Arizona State court against tribal members who lived on the reservation, to collect for goods sold on credit. *Williams*, 358 U.S. at 217-18. The

tribal defendants filed a motion to dismiss, asserting jurisdiction was only appropriate in Navajo Tribal Court. *Williams*, 358 U.S. at 218. The motion to dismiss was denied, judgment was entered against the tribal defendants, and the Arizona Supreme Court affirmed, holding that no Act of Congress expressly forbids Arizona to exercise jurisdiction over civil suits by non-Indians against Indians, even where the action arises on an Indian reservation. *Id.* Finding Arizona's determination doubtful, the United States Supreme Court granted certiorari. *Id.*

The United States Supreme Court overturned the decision of the Arizona Supreme Court na. The Court stated:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

Williams, 358 U.S. at 223 (internal citations omitted) (emphasis added).

“A court's jurisdiction of the subject matter ... exists when a constitution or statute specifically confers upon the court such jurisdiction.” *Red Fox*, 494 N.W.2d at 643 (S.D. 1993) (citation omitted). “This power is likewise conferred upon Indian courts by their constitutions or tribal codes.” *Id.*

The Oglala Sioux Tribe enacted law expressly providing for, and preserving, subject matter jurisdiction over civil suits wherein the defendant is a member of the Tribe, or if a non-Indian consents to the Tribe's jurisdiction by performing certain acts. *See OSLOC*, Chapter 2, § 20 (App. at I-1-2). The relevant statute provides in pertinent part:

The Oglala Sioux Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Oglala Sioux Tribe and of all other suits between members and non-members who consent to the jurisdiction of the Tribe

(a) Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe, by doing personally through an employee, through an agent, or through a subsidiary, any of the following acts within the exterior boundaries of the Pine Ridge Indian Reservation.

1. The transaction of any business.

2. The commission or omission of any act which results in a tort action...

8. Any contractual agreement entered into within the exterior boundaries of the Pine Ridge Indian Reservation.

App. at I-1-2, OSLOC Chapter 2, § 20(a) (emphasis added).

It is clear the Tribe has enacted laws to adjudicate civil claims arising within Reservation boundaries between members and non-members alike. The Tribe's Law and Order Code expressly maintains civil subject matter jurisdiction over this matter, as the Housing Authority, an arm of the Tribe's government, and OSLH Employees, enrolled members of the Tribe, are third-party defendants to this civil action. Moreover, Appellant consented to the Tribe's jurisdiction by transacting business within the exterior boundaries of the Reservation, committing actions or omissions resulting in a tort action, and entering contractual agreements with the Tribe or its members within the Reservation. *See* SR 1, Complaint, ¶ 6; SR 42, ¶ 7; App. at C-2, ¶¶ 5-6, 13.⁴

The Circuit Court correctly determined assuming subject matter jurisdiction over Appellant's claims would infringe upon the Tribe's sovereignty and violate well established law. Appellant never presented any competing authority supporting an alternate conclusion regarding infringement and erroneously limits its arguments both

⁴ While extraneous to the record on appeal, Appellant acknowledged the jurisdiction of the Tribal Court, as it subsequently filed multiple (nearly identical) actions against the Housing Authority in Tribal Court, all arising from the same underlying circumstances as its two separate State court actions against OSLH.

before the Circuit Court, and now on appeal, to the related but separate issue of sovereign immunity. *See* Appellant’s Brief; SR 690. Dismissal was also appropriate on the basis of infringement. As the Circuit Court concluded, the Tribe should be left to make its own laws and be ruled by them.

i. Appellees are “Reservation Indians”

The Housing Authority is a “reservation Indian” for the purpose of the infringement and preemption analysis. As the Eighth Circuit U.S. Court of Appeals previously found in *Weeks Const., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670 (8th Cir. 1986), “[t]he Housing Authority was created by Oglala Sioux tribal ordinance to develop and administer housing projects on the Pine Ridge Indian Reservation in South Dakota.” *Id.* It is well established Indian housing authorities are tribal governmental entities. *See, e.g., E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1080 (9th Cir. 2001) (“[Tribal housing authorities are] not simply business entit[ies] that happen to be run by a tribe or its members, but, rather, occup[y] a role quintessentially related to self-governance.”); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) (determining tribal housing authority was a tribal, governmental agency); *Weeks*, 797 F.2d at 670 (“a housing authority, established by a tribal council pursuant to its powers of self-government, is a tribal agency.”).

OSLH Employees, as tribal members residing and working on the Reservation, are also “reservation Indians” for purposes of this analysis. App. at C-3, ¶¶ 4, 7-8; App at D—17-18, 68:21 – 72:12, D-20, 77:2-12; App. at F-1-18; App. at G-1-9. The record establishes any alleged actions or omissions of OSLH Employees occurred while they were “perform[ing] work” “associated with the remodeling and/or refurbishing” the

duplex in question, that is located on trust property. *See* SR 84, Third-Party Complaint, ¶¶ 3, 8-18; App. at D-22, 87:5 – 88:5. Tribal agency/member status, and the bar to State court jurisdiction that it creates, applies to OSLH for alleged actions or omissions occurring on trust property within the boundaries of the Reservation. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1471 (9th Cir. 1999). Accordingly, OSLH must legally be treated as “reservation Indians” for purposes of jurisdiction.

2. Preemption deprived the Circuit Court of subject matter jurisdiction.

In addition to infringement, the Circuit Court’s jurisdiction over Appellant’s claims is preempted by federal law. This provides further basis to affirm the Circuit Court’s Memorandum Order.

The Housing Authority’s operating budget is funded primarily by the federal government under the Native American Housing Assistance and Self Determination Act, 25 U.S.C. §§ 4101 *et seq.*, (“NAHASDA”). App. at C-3, ¶ 12; App. at D-16, 62:24 – 63:15; Letter, SR 1090; Indian Housing Plan, SR 1098. Under NAHASDA, Housing and Urban Development (“HUD”) provides grants to either tribes or tribally-designated housing entities, such as OSLH, to carry out affordable housing activities. *Id.* NAHASDA “highlights the importance of affordable homes in safe and healthy environments on Indian reservations [and] in Indian communities,” as a means to achieve “self-sufficiency and self-determination.” *E.E.O.C.*, 260 F.3d at 1080 (quoting 25 U.S.C. § 4101) (emphasis added). This comprehensive legislative scheme, designed specifically to give tribes greater self-determination rights using federal funds, effectively preempts any contrary state laws relative to federal Indian housing policies. *See, e.g.*, 25

U.S.C. § 4101(7); *see also Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 188 F.Supp.2d 1148, 1153 (D.S.D. 2002).

In *Sage*, *supra*, the Court held State court jurisdiction over a dispute between a non-Indian and a school located on the Rosebud Sioux Indian Reservation was preempted by federal law. *Sage*, 473 N.W.2d at 482-84. Even though the school was owned and operated by a non-profit corporation incorporated under the laws of South Dakota, the Court held subject matter jurisdiction was preempted because the school qualified as a “tribal organization” eligible to receive federal grants through the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450b(1). *Id.* at 483-84. The *Sage* Court recognized that where a comprehensive federal regulatory funding scheme applies to a tribal entity, coupled with the express federal policy of encouraging tribal “self-sufficiency,” “self-determination,” and “participation...in the planning, conduct, and administration of programs and services,” state courts cannot exercise subject matter jurisdiction over claims against a tribal entity due to the risk of significant impacts that would frustrate congressional intent. *Sage*, 473 N.W.2d at 483 (citing 25 U.S.C. § 450a); App. at D-22, 84:4 – 85:1.⁵

The Housing Authority receives federal funding directly through NAHASDA, and it is undeniably a tribal governmental entity. App. at C-3, ¶ 12; App. at D-16, 62:24 – 63:15, D-21-22, 84:4 – 85:1; Letter and Indian Housing Plan (submitted collectively as App. at J-1-44). Federal funding accounts for nearly all of the Housing Authority’s annual operating budget. *Id.* Assumption of subject matter jurisdiction would frustrate

⁵ Because South Dakota’s common law preemption analysis does not provide that a tort claim is created by federal law for purposes of preemption, OSLH reserves the right to argue that no federal cause of action is created under NAHASDA.

federal policy and law. Thus, preemption applies. App. at D-21-22, 84:4 – 85:1. As the foregoing authority demonstrates, preemption further barred the Circuit Court’s assumption of subject matter jurisdiction. Again, the Court should affirm dismissal.

C. Appellant Grossly Misunderstands the Distinction Between Subject Matter Jurisdiction and Sovereign Immunity.

As it did before the Circuit Court, Appellant devotes nearly all of its Appellant’s Brief to the issue of sovereign immunity, as opposed to subject matter jurisdiction. It is important to recognize OSLH made two separate arguments regarding these separate concepts through two separate sets of motions. SR 189; SR 191; SR 458; SR 460; (compare with) SR 307; SR 311. First, OSLH argued it is not subject to the Court’s subject matter jurisdiction based on (1) its status as tribal members and a tribal entity; and (2) because the alleged actions or omissions of OSLH occurred within the Reservation on trust property. SR 191; SR 460. Second, the Housing Authority, only, argued that if the Circuit Court determined it enjoyed subject matter jurisdiction in the face of the determinative facts set forth in the preceding sentence, that sovereign immunity divested the Circuit Court of any subject matter jurisdiction it assumed. SR 311. Surprisingly, Appellant devotes its entire argument on appeal to the latter argument which was not decided by the Circuit Court. Appellant provides zero authority to contradict the former argument, which is determinative on appeal. Importantly, OSLH Employees have not yet moved for dismissal based on sovereign immunity. See SR 307.

Appellant attempts to support its misdirected arguments with *Lewis v. Clarke*, 137 S.Ct. 1285, 197 L.Ed. 2d 631 (2017). *Lewis* is 100% inapplicable to the issue of pure subject matter jurisdiction, which is the subject of this appeal. *Lewis* deals entirely with the issue of sovereign immunity. *Id.* Notably, *Lewis* is completely silent on (1) South

Dakota's Constitution which disclaims jurisdiction over the conduct of Indians on Indian land; (2) the infringement analysis; (3) the preemption analysis; and (4) any analysis whatsoever on the pure subject matter jurisdictional interplay between state and tribal courts. *Lewis* is completely devoid of any support whatsoever for Appellant's appeal and should be disregarded.

Whether OSLH Employees are sued in an individual or official capacity has no bearing on the issue of whether the Circuit Court had subject matter jurisdiction over them.⁶ Again, *Lewis* should be disregarded as inapplicable to the Circuit Court's dismissal of Appellant's claims based on the pure subject matter jurisdiction analysis.

Appellant also points to the "sue and be sued clause" in the Housing Authority's Charter for the proposition OSLH may have consented to subject matter jurisdiction in the Circuit Court for Appellant's claims. Not only is this a stretch of the imagination, it is contrary to law. The language of the Charter simply provides the Housing Authority may "consent to be sued (i.e. waive its sovereign immunity) in the Oglala Sioux Tribal Court or another court of competent jurisdiction." This clause does not state the Housing Authority may consent to be sued in any court, regardless of whether such court is authorized to exercise subject matter jurisdiction over the controversy. This clause simply provides the Housing Authority may consent to be sued in a court of competent jurisdiction. Typically, that court is the Tribal Court. However, it is possible another court could have competent jurisdiction in limited situations if OSLH waived its

⁶ OSLH asserts there is no credible argument that OSLH Employees are sued in an individual capacity and the Housing Authority is the real party in interest. OSLH reserves the right to so argue in the context of its Motions to Dismiss re: sovereign immunity in the unlikely event this matter is remanded. OSLH also denies *Lewis* provides any credible authority impacting its unresolved sovereign immunity defense.

sovereign immunity (i.e. for torts committed by the Housing Authority on fee land outside of the Reservation). It defies reason and established law to suggest the Housing Authority may force a foreign court to hear its controversies simply because it desires the court to exceed the lawful limits of its constitutionally or statutorily granted authority. Such an interpretation borders on absurd. Moreover, the Housing Authority could not consent to jurisdiction on behalf of the OSLH Employees if they were actually named in an individually capacity, as Appellant now suggests.

The South Dakota Supreme Court previously held “[subject matter j]urisdiction cannot be conferred by consent, agreement, stipulation or waiver.” *Pennington Cty. v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, ¶ 17, 641 N.W.2d 127, 133 (citing *Weston v. Jones*, 1999SR160, ¶ 33, 603 N.W.2d 706, 713 (Sabers, J., dissenting)) (emphasis added). Rather, “[s]ubject matter jurisdiction is the power of a court to act.” *Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 20, 769 N.W.2d 817, 825 (citations omitted). “Subject matter jurisdiction is conferred solely by constitutional or statutory provisions.” *Cable*, ¶ 20 (citations omitted)) (emphasis added). “Furthermore, subject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ.” *Id.*

Appellant further suggests Mr. Pipe On Head’s testimony is contradicted by *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, *supra*, because *Weeks* interpreted language in the Oglala Sioux Tribe’s Ordinance chartering the Housing Authority, as a waiver of the Housing Authority’s sovereign immunity. Appellant’s Brief, pp. 26-27. Appellant suggests this alleged contradiction supports its argument regarding its untimely request for discovery. Appellant is mistaken. This position is

exceptionally misplaced because OSLH Employees have not raised their sovereign immunity yet. SR 307; SR 311.

Regardless, Mr. Pipe On Head did not testify regarding whether sovereign immunity was waived by the Tribe through operation of its Ordinance chartering the Housing Authority. Rather, his testimony was: *based on his review of contracts, he has not seen a waiver by the Housing Authority of its sovereign immunity.* App. at D-22, 65:4-10; D-17, 65:21 – 68:14. Moreover, *Weeks* is a dated case and the purported waiver of sovereign immunity found in *Weeks* was expressly contradicted in subsequent case law holding that a “sue and be sued clause” in a tribal entity’s charter, standing alone, is not an unequivocal waiver of sovereign immunity. *Dillon*, 144 F.3d at 584; *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000); *see also Calvello v. Yankton Sioux Tribe*, 1998 S.D. 107, ¶ 12, 584 N.W.2d 108, 113. As noted above, the only point from *Weeks* that is applicable to the issue of subject matter jurisdiction, is the Oglala Sioux Housing Authority was found to be a tribal governmental agency. *See Weeks*, 797 F.2d at 670–671.

A final point worth making in light of the question posed by Appellant, is the purchase of insurance does not constitute a waiver of tribal sovereign immunity. This issue has been addressed by multiple jurisdictions, all holding the purchase of insurance is not an implication of waiver or an implied or express waiver of sovereign immunity. Rather, obtaining liability coverage provides protection of tribal assets and limits total exposure in the event a tribe’s sovereign immunity is waived, abrogated or ignored. *See Wilhite v. Awe Kualawaache Care Ctr.*, 2018 IER Cases 388820, 2018 WL 5255181, at *3 (D. Mont. Oct. 22, 2018) (“The purchase of insurance hardly constitutes a ‘clear

waiver’ of immunity, as noted by other courts faced with similar arguments.”); *Seminole Tribe of Fla. v. McCor*, 903 So.2d 353, 359 (Fla.2d DCA 2005) (“[T]he purchase of insurance may simply be a measure to provide protection for the Tribe’s assets against the possibility that the Tribe’s immunity will be abrogated or ignored.”); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977) (purpose of tribal sovereign immunity would be defeated if it could be implicitly waived to the extent of insurance coverage).

Again, the issue of sovereign immunity was not addressed because it was rendered moot by the Circuit Court’s decision to dismiss the matter on the basis of subject matter jurisdiction. Appellant’s arguments regarding sovereign immunity should be disregarded.

As more completely described above, there is no constitutional or statutory authority which vests subject matter jurisdiction in the Circuit Court over Appellant’s claims against OSLH, for alleged tortious conduct on Indian land. Rather, the available and well-settled legal authority of South Dakota consistently denies such jurisdiction is appropriately maintained in state courts. Appellant utterly failed to establish the Circuit Court erred in dismissing its claims for lack of subject matter jurisdiction. Accordingly, the Court should affirm the Circuit Court’s determination.

II. APPELLANT’S FAILURE TO PURSUE REASONABLE DISCOVERY SHOULD NOT BE CHARGED AGAINST OSLH AND NO AMOUNT OF DISCOVERY COULD YIELD ALTERNATIVE FACTS REGARDING THE CIRCUIT COURT’S LACK OF SUBJECT MATTER JURISDICTION.

Appellant’s position regarding discovery is ridiculous. Appellant’s position is: despite having actual knowledge that OSLH presented a factual challenge of the Circuit Court’s jurisdiction for *four months*, it may wait until the eve of the Hearing of that

threshold issue, which was set for more than a month, to suggest at the last second it could not adequately respond without discovery of the previously disclosed determinative facts of land status and tribal member status. Absent from Appellant's argument, is what information it thinks it may have uncovered that could contradict the publicly available land status reports and tribal enrollment records. This is because there is zero documentation or information available that could defeat those determinative supporting documents.

At the eleventh hour, Appellant complained for the first time it did not have an opportunity to discover facts relevant to subject matter jurisdiction. Nothing could be further from the truth. In fact, the Circuit Court expressly found nothing in the record suggested Appellant "attempted to initiate *any* discovery in relation to the factual issue in dispute – that the alleged negligence occurred on trust land within the exterior boundaries of the Reservation or whether the third-party defendants are tribal members." App. at B-12-13 (emphasis added).

OSLH first moved to dismiss Appellant's claims on the basis of subject matter jurisdiction on September 14, 2017 and disclosed the supporting facts at that time. SR 189; SR 191. Thereafter, Appellant had more than *four months* before the Hearing held on January 18, 2018 to seek any discovery necessary to address that threshold issue. SR189; App. D-6-7, 21:12 – 25:22. Appellant chose not to, and now seeks to escape dismissal for its failure to seek reasonable discovery in a timely fashion.

At no time prior to the week of the Hearing did Appellant suggest discovery was needed to address the key facts affecting subject matter jurisdiction: (1) the status of the land where the alleged actions or omissions of OSLH occurred, and (2) the status of the

Housing Authority and the OSLH Employees as a tribal governmental entity and tribal members. Appellant did not issue *any* written discovery requests or deposition subpoenas whatsoever to the OSLH Employees and further did not issue *any* discovery requests or deposition subpoenas to the Housing Authority aimed at the underlying facts affecting subject matter jurisdiction. App. at D-6-7; App. at B-12-13. Rather, Appellant directed its entire written discovery to the Housing Authority only and sought only information regarding the underlying merits of its claims. SR 712, Aff. of Galbraith, ¶ 4 and Exhibit 2 attached thereto; SR 712; App. at D-7, 28:10-19; App. at B-12-13. Additionally, the only deposition Appellant sought prior to the Hearing, was a 30(b)(6) deposition of the Housing Authority. SR 712, Aff. of Galbraith, ¶ 6, Exhibit 4 attached thereto. Like Appellant's written discovery, none of the 47 topics Appellant sought to depose the Housing Authority on were aimed at the factual content of Doyle Pipe On Head's Affidavit concerning subject matter jurisdiction, the status of the land where the alleged torts occurred, or Indian status of OSLH. *Id.*; *see also* App. at C-1-3. All 47 topics were directed to the merits of the underlying litigation. *Id.* As Appellant did not issue any discovery directed towards subject matter jurisdiction, it also did not file any motion to compel discovery of such information. App. at D-11, 44:5-13. Again, Appellant's complaints it was inappropriately denied discovery necessary to address the Circuit Court's subject matter jurisdiction are patently false.

Appellant's choice not to seek discovery tailored to obtain information affecting subject matter jurisdiction until the eleventh hour – less than a week before the Hearing – despite having actual knowledge of OSLH's arguments and factual support for its Motions to Dismiss, should not be charged against OSLH. SR 712, Aff. of Galbraith, ¶¶

4, 6 and Exhibits 2 and 4 attached thereto; App. D-6-7, 21:12 – 25:22. As the Circuit Court observed, having reviewed Appellant’s discovery requests to the Housing Authority, Appellant did not ask *any* questions related to the enrollment status of any of the OSLH Employees or the status of the land where the alleged actions or omissions occurred. App. D-7, 28:10-19 (“I went through [the written discovery] pretty carefully, and I didn’t see where you ever asked for the third-party defendants[’]...tribal membership, Indian status. And I didn’t see anything related to the status of the land.”); *see also* SR 712, Aff. of Galbraith, ¶¶ 4, 6 and Exhibits 2 and 4 attached thereto.

Importantly, Appellant never suggested the Housing Authority was not a tribal entity for purposes of jurisdiction. Moreover, it *never* sought *any* written discovery from OSLH Employees or requested to take *any* of their depositions. Appellant never attempted to seek tribal enrollment documents or land status reports, which are governmental documents, from any publicly available source, i.e. the Tribe or the BIA. Appellant had equal ability and opportunity to seek this information from these public sources, but chose not to. Finally, no motions to compel were ever made to the Court in an effort to obtain information related to jurisdiction. So, what exactly did Appellants do prior to the Hearing to seek information and facts affecting subject matter jurisdiction? The answer is: Nothing. Appellant never articulated a need for discovery it felt was necessary to address OSLH’s Motions to Dismiss re: subject matter jurisdiction until days before the Hearing, which had been scheduled for over a month (and had been previously scheduled months earlier), and knowing counsel for OSLH already made travel arrangements from out of State to attend the Hearing.

Moreover, as counsel for OSLH indicated, if Appellant limited its discovery pursuits to information affecting subject matter jurisdiction and/or sovereign immunity issues, there would have been no objection. App at. D-6-7, 24:13 – 25:22; D-11, 43:10 – 44:13; D-12, 46:2-7. Counsel for OSLH contacted Appellant’s counsel and requested Appellant stipulate to limit the scope of the requested 30(b)(6) deposition to those issues necessary to resolve the Motions to Dismiss. *Id.* That offer was declined and the Housing Authority’s Motion for Protective Order became necessary. *Id.*

Interestingly, Appellant also complains that OSLH did not inform it in its Notice of Hearing that it intended to present additional evidence and testimony at the Hearing to support its position. Appellant’s Brief, pp. 19-20. OSLH is unaware of any requirement in law that it need to do so and posits that it is the quintessential nature of a *hearing* that parties may introduce evidence and testimony.

As OSLH made clear at the Hearing, Appellant had the burden of proof to establish jurisdiction in the Circuit Court and OSLH should not be held responsible for Appellant’s failure to seek discovery reasonably tailored to address the threshold issue of jurisdiction and meet their burden of proof. App. at D-6-7, 23:13 – 25:22; D-11, 43:10 – 44:13. Appellant unilaterally elected to sit on its hands, waiting until the eleventh hour to suggest it needed further discovery to respond to the Motions to Dismiss. Moreover, it had no explanation regarding its failure to obtain this very limited information on its own accord from publicly available sources. Such a litigation tactic should not have been, and was not, condoned by the Circuit Court.

OSLH was not required to both draft and respond to Appellant’s discovery requests in this matter. Had Appellant felt it needed to engage in certain discovery to

fully address OSLH's Motions to Dismiss, it should have timely done so. However, to OSLH's prejudice and expense, Appellant sought to delay resolution of the threshold subject matter jurisdiction issue. Appellant sleeping on its due diligence to investigate matters which it felt may impact resolution of the Circuit Court's subject matter jurisdiction should not be charged against OSLH. Because Appellant failed to pursue any relevant discovery tailored to address the issues raised by OSLH's Motions to Dismiss re: subject matter jurisdiction in the months preceding the Hearing, the Circuit Court properly elected to receive the evidence presented by OSLH and decline Appellant's untimely request to engage in additional discovery at such a late hour, when the Court was prepared to resolve the Motions. App. at D-13. The Circuit Court was required to make a factual determination affecting its jurisdiction and it did so appropriately. *Waldner, supra*, ¶ 20; *Osborn, supra*, 918 F.2d at 730. Moreover, the Circuit Court appropriately determined the type of additional discovery contemplated by Appellant's untimely request would not reveal any information which could upset the facts supporting its determination. App. at D-13-14.

Simply, no amount of discovery could change the dispositive facts: (1) OSLH is comprised of a quintessential tribal governmental agency and tribal members, and (2) all of the underlying alleged actions or omissions of OSLH occurred within the Reservation on trust property. App. at D-7, 25:11-22. These facts, and these facts alone, were necessary to resolve the issue of subject matter jurisdiction and they were readily ascertained from evidence in the record. Appellant's untimely discovery pursuits were nothing more than a last gasp effort to blow air into the tires of its case that had ran flat. Such an untimely exercise in futility would have done little more than delay the ultimate

resolution of the jurisdictional issues, to OSLH's prejudice and detriment. This Court should not now disturb the Circuit Court's appropriate holding as a result of Appellant's glaring shortcomings.

III. APPELLANT'S ADDITIONAL ARGUMENTS ARE MERITLESS.

A. Factual 12(b)(1) Challenges of Subject Matter Jurisdiction Are Not Converted to Motions for Summary Judgment.

Appellant further argues the Motions to Dismiss regarding subject matter jurisdiction should have been treated as motions for summary judgment. Appellant's Brief pp. 21-25. Appellant suggests the SDCL § 12(b)(1) Motions to Dismiss re: subject matter jurisdiction should be treated as SDCL § 15-6-12(b)(5) motions to dismiss for failure to state which in turn should be disposed of as provided for in SDCL § 15-6-56 regarding summary judgment. Appellant's Brief, p. 25. Appellant has *never offered legal support* for that position. Appellant's Brief, 21-25; App. at B-10.

Appellant also suggests the Hearing on the Motions to Dismiss re: subject matter jurisdiction should have been treated as a trial on the merits of that issue. Appellant's Brief, 25-26. Again, Appellant provides *no* supporting authority. *Id.*

Contrary to Appellant's unsupported desires, the clear precedent in South Dakota provides factual challenges of subject matter jurisdiction are not converted to motions for summary judgment or considered under a summary judgment standard where evidence outside the pleadings is considered. SDCL § 15-6-12(b) expressly provides that converting a motion to dismiss into a motion for summary judgment is only mandatory where a party moves to dismiss for *failure to state a claim upon which relief can be granted* under SDCL § 15-6-12(b)(5). *See* SDCL § 15-6-12(b) ("If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim

upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment...”) (emphasis added). The South Dakota Supreme Court has confirmed OSLH’s interpretation of the cited Statute. *See Storm v. Durr*, 2003 S.D. 6, ¶ 11, 657 N.W.2d 34 (“the assertion that the trial court considered matters outside the pleadings is irrelevant here because this was not a motion to dismiss for failure to state a claim upon which relief could be granted under SDCL 15-6-12(b).”). Under the law of South Dakota, Appellant’s desire to escape dismissal by asking the Circuit Court to convert the Motions to Dismiss to summary judgment motions finds no support.

Here, OSLH did not move to dismiss the Third-Party claims for failure to state a claim. Rather, it presented a factual challenge of subject matter jurisdiction pursuant to SDCL § 15-6-12(b)(1) via its Motions to Dismiss.

The South Dakota Supreme Court previously held, that when presented with a factual Rule 12(b)(1) subject matter jurisdiction question, “courts consider matters outside the pleadings.” *Waldner*, ¶ 20 (citing *Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc.*, 1999SR62, ¶ 14, 594 N.W.2d 357) (emphasis added). Where a factual attack is made regarding subject matter jurisdiction, “the court...must weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute.” *Waldner*, ¶ 20. As the *Waldner* Court noted:

Because at issue in a factual 12(b)(1) motion is the trial court’s jurisdiction-its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Waldner, ¶ 20 (citing *Osborn*, 918 F.2d at 730). “Thus, *evidentiary hearings, affidavits, documents, and live testimony* may all be considered to resolve the subject matter jurisdiction dispute.” *Id.* (emphasis added). “[I]t is often necessary to consider matters outside the pleadings to determine whether a case should be dismissed.” *Storm, supra*, ¶ 11.

Because the Circuit Court’s subject matter jurisdiction was challenged via OSLH’s 12(b)(1) Motions to Dismiss, and resolution of factual considerations was necessary to resolve the Motions, the Circuit Court properly considered all available evidence necessary to resolve this threshold issue without converting the Motions to Dismiss to motions for summary judgment. Conversion of the Motions, and declining to resolve the factual issues regarding the Circuit Court’s jurisdiction at its earliest opportunity would have been reversible error and deprived OSLH of its right to due process. As such, the Circuit Court made an appropriate determination in not converting the Motions to Dismiss to motions for summary judgment.

CONCLUSION

For the reasons stated herein, OSLH respectfully requests the Court affirm the Circuit Court’s Memorandum Order.

//

DATED this 30th day of November, 2018.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: /s/ Evan M.T. Thompson

Evan Thompson
BROWNING, KALECZYC, BERRY &
HOVEN, P.C.
800 N. Last Chance Gulch, Ste. 101
P.O. Box 1697
Helena, MT 59624
P. (406) 443-6820; F. (406) 443-6882
evan@bkbh.com

Mark Marshall
333 West Blvd., Suite 400
P.O. Box 2670
Rapid City, SD 57709-2670
P. (605) 343-1040; F. (605) 343-1503
mmarshall@bansmccullen.com

Attorneys for Appellees / Third-party Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellee's Brief complies with the type space and volume limitation provided for in the South Dakota Codified Laws. This brief contains 9,974 words, 12 point typeface and Times New Roman font. I have relied on the word and character count of our word processing system used to prepare this Brief.

/s/ *Evan M.T. Thompson*

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2018, the above and foregoing *Appellee's Brief* was served on the following:

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Tel: (605) 341-4400
jim@southdakotajustice.com

Attorneys for Plaintiff

Mark D. Covin
David M. Dahlmeier
Amie E. Penny Sayler
100 South 5th Street, Ste 1500
Minneapolis, MN 55402-1254
Telephone: (612) 333-3000
Facsimile: (612) 333-8829
mcovin@bassford.com
ddahlmeier@bassford.com
asayler@bassford.com

*Attorneys for Defendant/Third-Party
Plaintiff, Western Cooperative
Company*

Stanley Karon
Karon Trial Law P.A.
6600 Lyndale Ave. S.
Minneapolis, MN 55423
karontrial@yahoo.com

Attorneys for Plaintiff

JOHN K. NOONEY
ROBERT J. GALBRAITH
NOONEY & SOLAY, LLP
326 Founders Park Drive
P.O. Box 8030
Rapid City, SD 57709-8030

*Attorneys for Appellant,
C. Brunsch, Inc.*

/s/ Evan M.T. Thompson

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 28688

**JENNIFER CHASE ALONE, as the Personal Representative of ELFREDA ANN
TAKES WAR BONNETT,**

Plaintiff,

vs.

C. BRUNSCH, INC., d/b/a LAKOTA PLAINS PROPANE

Defendant/Third-Party Plaintiff/Appellant,

and

**OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL,
DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENTY
ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM,
ROBIN T. (LAST NAME UNKNOWN) AND JOHN AND JANE DOE 1-100,**

Third-Party Defendants/Appellees.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
OGLALA LAKOTA COUNTY, SOUTH DAKOTA

The Honorable Jeffrey R. Connolly
Circuit Court Judge

APPENDIX TO APPELLEES' BRIEF

Evan M.T. Thompson
BROWNING, KALECZYC,
BERRY & HOVEN, P.C.
800 N. Last Chance Gulch, Ste 101
P.O. Box 1697
Helena, MT 59624
Phone: (406) 443-6820
Facsimile: (406) 443-6883
evan@bkbh.com

Mark Marshall
333 West Blvd., Suite 400
Rapid City, SD 57709-2670
Telephone: (605) 343-1040
Fax: (605) 343-1503
mmarshall@bangsmccullen.com

*Attorneys for Appellees, Oglala
Sioux Lakota Housing Authority,
Richard Hill, Derek Janis, Wes
Cottier, William White, Ben Plenty
Arrows, Renaldo Two Bulls,
Brandon Wes, Derek Slim, and
Robin Tuttle*

John K. Nooney
Nooney & Solay, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709
John@nooneysolay.com

*Attorneys for Appellant
C. Brunsch, Inc.*

NOTICE OF APPEAL FILED AUGUST 3, 2018.

APPENDIX

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A

STATE OF SOUTH DAKOTA)
) :SS
COUNTY OF OGLALA LAKOTA)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

<p>JENNIFER CHASE ALONE, as the Personal Representative of ELFREDA ANN TAKES WAR BONNETT, Deceased,</p> <p>Plaintiff,</p> <p>vs.</p> <p>C. BRUNSCH, INC., a South Dakota corporation, doing business as Lakota Plains Propane, Inc., and WESTERN COOPERATIVE COMPANY, INC., a Nebraska corporation,</p> <p>Defendants/Third-Party Plaintiffs,</p> <p>vs.</p> <p>Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, Robin T. (last name unknown) and John and Jane Doe 1-100,</p> <p>Third-Party Defendants.</p>	<p>56CIV17-0000007</p> <p>RULE 54(B) JUDGMENT GRANTING THIRD-PARTY DEFENDANTS' MOTION TO DISMISS</p>
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FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
AUG 01 2018
By: _____

THIS MATTER originally came before the Court, on 18th day of January, 2018, on the Third-Party Defendants' Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction, dated September 14, 2017, the Oglala Sioux Lakota Housing's Motion to Dismiss Third-Party Complaints Based on Sovereign Immunity and Oglala Sioux Lakota Housing's

Motion for Protective Order, dated October 20, 2017, and the Third-Party Defendants' Motion to Dismiss Third-Party Complaints Based on Lack of Subject Matter Jurisdiction, dated January 3, 2018; the Plaintiff, Jennifer Chase Alone, as the Personal Representative of Elfreda Ann Takes War Bonnett, appearing through her counsel, James Leach, the Defendant/Third-Party Plaintiff, C. Brunsch, Inc., appearing through its counsel John Nooney and Robert Galbraith, the Defendant/Third-Party Plaintiff, Western Cooperative Company, Inc., appearing through its counsel, David Dahlmeier, and the Third-Party Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle, appearing through their counsel Evan Thompson and Mark Marshall; the Court reviewed the submissions of the parties and considered the evidence of argument of counsel and issued a Memorandum Order on February 14, 2018; and

THIS MATTER having come before the Court again on the 11th day of July, 2018, on the Oglala Sioux Lakota Housing Authority filed a Motion for Rule 54(B) Certification; the Plaintiff, Jennifer Chase Alone, as the Personal Representative of Elfreda Ann Takes War Bonnett, appearing through her counsel, James Leach, the Defendant/Third-Party Plaintiff, C. Brunsch, Inc., appearing through its counsel John Nooney and Robert Galbraith, the Defendant/Third-Party Plaintiff, Western Cooperative Company, Inc., did not appear as it had previously been dismissed from this case, and the Third-Party

Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle, appearing through their counsel Evan Thompson and Mark Marshall, the Court having had an opportunity to consider the submissions of the parties and hear argument of counsel, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that the Third-Party Defendants' Motions to Dismiss are hereby granted for those reasons more fully set forth in the Court's Memorandum Order, dated February 14, 2018, the Court finding that it does not have subject matter jurisdiction over the Third-Party Defendants; and it is further

ORDERED, ADJUDGED AND DECREED that the Oglala Sioux Lakota Housing Authority's Motion for Rule 54(B) Certification is hereby granted, the Court having balanced the factors required by *Davis v. Farmland Mut. Ins. Co.*, 2003 S.D. 111, 669 N.W.2d 713, and having determined there is no just reason for delay in entering this Judgment as a final judgment under South Dakota law; and it is further

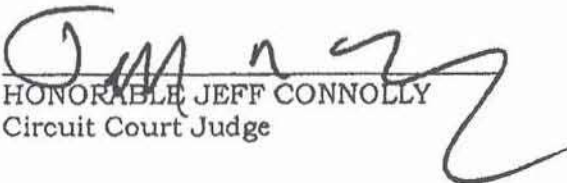
ORDERED, ADJUDGED AND DECREED that the Court's oral findings with respect to the factors in *Davis v. Farmland Mut. Ins. Co.*, 2003 S.D. 111, 669 N.W.2d 713, a transcript of which is attached hereto as Exhibit 1, are hereby incorporated into this Judgment as if fully set forth herein.

Dated this 1st day of ~~July~~ ^{August}, 2018.

ATTEST:
Ranae Truman
Clerk of Courts

By: Deputy Clerk
(SEAL)

BY THE COURT:

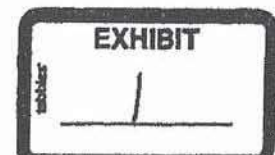


HONORABLE JEFF CONNOLLY
Circuit Court Judge

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT
3
4 JENNIFER CHASE ALONE, as)
5 the Personal)
6 Representative of ELFREDA)
7 ANN TAKES WAR BONNETT,)
8 Deceased)
9 Plaintiff,)
10 vs.)
11 C. BRUNSCH, INC., a South)
12 Dakota corporation, doing)
13 business as Lakota Plains)
14 Propane, Inc., and)
15 WESTERN COOPERATIVE)
16 COMPANY, INC., A Nebraska)
17 corporation)
18 Defendants/Third-Party)
19 Plaintiffs,)
20 OGLALA SIOUX LAKOTA)
21 HOUSING AUTHORITY,)
22 RICHARD HILL, DEREK)
23 JANIS, WES COTTIER,)
24 WILLIAM WHITE, BEN PLENTY)
25 ARROWS, RENALDO TWO)
26 BULLS, BRANDON WES, DEREK)
27 SLIM, ROBIN T. (Last name)
28 unknown) and John and)
29 Jane Doe, 1-100,)
30 Third-Party Defendants,)
31
32 BEFORE: THE HONORABLE JEFFREY R. CONNOLLY
33 Circuit Court Judge
34 Pennington County Courthouse
35 Rapid City, South Dakota
36 July 11, 2018 at 9:00 AM
37
38 George R. Cameron
39 Official Court Reporter To
40 Judge Jeffrey R. Connolly
41 Seventh Judicial Circuit
42 Pennington County Courthouse
43 Rapid City, South Dakota 57709
44 605.394.2571

MOTIONS
HEARING
EXCERPT

FILE 56-CIV-17-07



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3 APPEARANCES:

4

5

6

7

8

9

For the Plaintiff:

MR. JAMES D. LEACH
South Dakota Justice
1671 Sheridan Lake Road
Rapid City, South Dakota 57702
605-341-4400

10

11

12

13

14

For the Defendant,
C. Brunsch, Inc.:

MR. ROBERT J. GALBRAITH
-AND-
JOHN K. NOONEY
Nooney & Solay
326 Founders Park Drive
Rapid City, South Dakota 57701
605-721-5846

15

16

17

18

For Oglala Sioux
Lakota Housing
Authority:

MARK F. MARSHALL
Bangs McCullen
333 West Boulevard
Suite 400
Rapid City, SD 57701
605.343.1040

19

20

21

22

23

24

25

For Oglala Sioux
Lakota Housing
Authority:

EVAN M.J. THOMPSON [VIA PHONE]
Browning, Kaleczyc, Berry
800 N. Last Chance Gulch
Suite 101
Helena, Montana 59624
406.443.6820

1 THE COURT: Okay. Well, I have, of course, reviewed
2 54(b), the file, the submissions of parties. I have
3 heard the argument of counsel here. I reviewed the
4 briefs and the filings, anything -- the entire file as
5 it is relevant to this.

6 I also note that I have been considering this and
7 thinking about this matter for a considerable amount
8 of time. This isn't something that is being made
9 after ruling on the record, so to speak, as to -- you
10 know, I'm not immediately deciding what I'm going to
11 do here.

12 I mean, I made this decision after taking it
13 under advisement for four or five weeks in writing in
14 a 17-page memorandum opinion, and that was back in
15 February. So it's been a number of months.

16 I think Mr. Leach raised the 54(b) issue the very
17 next day in a letter he e-mailed to us. So this is
18 something which I have considered for a great deal of
19 time.

20 I have also considered -- and I have reviewed and
21 read through Davis v Farmland, 669 N.W.2d, 713, and
22 that's, of course, also published at 2003 South
23 Dakota 111, which sets forth the South Dakota Supreme
24 Court's guidance as to when 54(b) certification should
25 be utilized.

1 I note that I'm not to grant such a motion for
2 the convenience of the parties. And I don't think
3 that the Court should rely upon the Supreme Court to
4 screen this. I don't think that I should defer to
5 them by sending it up and seeing whether or not they
6 do a show cause.

7 But that all being said, after reviewing all
8 those factors which I will go through, I think this is
9 the type of case that should be granted the 54(b)
10 certification. And I have given considerable
11 consideration to that.

12 I think that, frankly, there's no just reason to
13 delay a final adjudication of the subject matter
14 jurisdiction issue in relation to the 12(b)(1) motion
15 as to the third-party claims of Brunsch against the
16 third-party defendants.

17 And I'm going to go through those factors because
18 I have to. But one of the major issues here is I
19 think that the issues involving the rights of Indian
20 tribes is a special kind of issue that I think we need
21 to resolve. And I think it can be unduly harsh if we
22 get it wrong.

23 So I note that in Davis v. Farmland the Supreme
24 Court adopted three rules. One, that the burden is
25 on the moving party, and in this case that would be

1 Mr. Thompson's clients. But I note that Mr.
2 Galbraith's and Mr. Nooney's clients are also seeking
3 this. I think collectively they have met that burden
4 to show that this is an infrequently harsh case
5 meriting favorable exercise of the Court's discretion.

6 I also note that the second factor that the
7 Supreme Court has imposed upon circuit courts is that
8 I balance the competing factors present in the case to
9 determine if it's in the best interest of sound
10 judicial administration of public policy to certify
11 the judgment as final. And I'm going to do that.

12 I will go through each of those factors, or most
13 of those factors anyway. But I think, after
14 determining or going through those factors I'm going
15 to find that it is in the interest of judicial economy
16 that the questions of whether or not I have subject
17 matter jurisdiction over the third-party -- or
18 potential theoretical third-party complaints against
19 the housing authority and the other third-party
20 potential defendants, I think it's important that we
21 resolve those issues because they have substantial
22 impact on how the ultimate case and how -- well, how
23 the ultimate resolution of this case is determined.

24 It determines -- or it would be very helpful to
25 know who might be the potential tortfeasors. And it

1 would be very helpful to know, because I think the way
2 sovereign immunity may or may not protect the tribe
3 from subpoenas or discovery requests, I think, the
4 analysis is different if they are parties or if they
5 are non-parties.

6 And I think that ties into what I said earlier is
7 that the special relationship and the sovereignty or
8 the quasi sovereignty of the tribe makes this not the
9 run of the mill case in which one of the parties is
10 dismissed.

11 And that's a roundabout way of saying that I find
12 that, after looking through all those factors, I'm
13 going to find that the interest of justice will be
14 served by pursuing in this manner.

15 Now, here is the third factor I want to get out,
16 too. I also have to marshal and articulate the
17 factors upon which I am relying in granting
18 certification. But I think by going through the
19 reasons I think this is infrequently harsh, which I'm
20 going to do a little more in-depth here, and by going
21 through those, I think there's five factors that were
22 laid out in Davis as to what the competing factors
23 that need to be balanced are, and I think by doing
24 that I will be marshaling out those facts.

25 So, as I said, as to the first factor, I believe

1 that the parties seeking 34(b) certification have met
2 their burden by showing that this is an infrequently
3 harsh case and that it involves a rare case in which
4 the circuit court has subject matter jurisdiction over
5 the underlying case and the potential tortfeasors
6 identified in the underlying case, but I do not, at
7 least in my determination thus far, do not have
8 subject matter jurisdiction over other potential
9 tortfeasors involved in the case.

10 And I think that's very different. It's
11 certainly different from what happened in Davis. And
12 I think that that's rare. I think that that's
13 infrequent. And I think it's overly harsh if I'm
14 wrong on that, because we could go through an entire
15 case, and maybe two sets of litigation, without having
16 a party that may or may not be -- at least there is a
17 strong argument that they are a tortfeasor.

18 I also think that it would be unduly harsh
19 because of the special interest that -- or the special
20 relationship and status of the Indian tribe, in that
21 the Oglala Housing Authority, which is an entity of
22 the Oglala Sioux Nation, that I think it makes sense
23 that, if I'm wrong on this, that we need to resolve it
24 sooner rather than later.

25 I also note that I do not believe the underlying

1 -- well, here is the thing. Unlike in Davis, I don't
2 think we are going to get a broader or -- and maybe
3 this is one of the factors. But I don't think we are
4 going to get a more rounded out record as to subject
5 matter jurisdiction by going forward with the
6 underlying case. So I think that is a factor that
7 weighs in going forward with it now.

8 What I'm trying to say is development of the
9 record was not -- development of the record in the
10 underlying action, which would be, as I understand it,
11 that Brunsch's either negligently didn't do a pressure
12 test or negatively didn't warn the plaintiff's of what
13 was going on, that's not going to round out the record
14 for the Supreme Court to have a better determination
15 of subject matter jurisdiction two or three years down
16 the road.

17 So I do think it's infrequently harsh and rare
18 that I should exercise my discretion in certifying it
19 under 54(b).

20 As to the factors I'm supposed to balance, the
21 relationship of the adjudicated claims and the
22 unadjudicated claims. First of all, the subject
23 matter jurisdiction of the third parties -- well,
24 because of what I said before that this is a rare
25 case where there are potential tortfeasors, I have

1 subject matter jurisdiction over, and there is
2 potential tortfeasors I don't have subject matter
3 jurisdiction over, I think that that relationship
4 between the potential tortfeasors I'm letting out and
5 the tortfeasors I'm not letting out is the type of
6 case. That relationship supports in those
7 unadjudicated claims vis-a-sis the adjudicated claims
8 supports and is a factor weighing in favor of 54(b)
9 certification.

10 The second one, the possibility that need for
11 review might be or may not be mooted by future
12 developments of the trial court, like I said, I don't
13 think we are going to gain more insight into whether
14 or not I have subject matter jurisdiction over the
15 actions of tribal members on trust land by going
16 forward with the remaining claims against C Brunsch.

17 So I think that weighs in the favor of 54(b).
18 The possibility -- it's very likely that the Supreme
19 Court, as to the third factor, the Supreme Court will
20 need to figure out subject matter jurisdiction of the
21 third parties again, probably in another case. So it
22 makes sense to do it now. And I think that weighs --
23 that's a judicial economy argument.

24 I don't think there's any claims or counterclaims
25 that result in a set-off against the judgment sought

1 to be reverse, so I don't think that weighs one way or
2 another in my determination.

3 And then I think a number of the miscellaneous
4 factors, if were close, tip the balance in favor of
5 54(b) certification.

6 And there is -- I don't know exactly how this is
7 going to play out, but I think it is at least
8 possible that there is going to be a lengthy delay
9 regardless. And I think judicial economy dictates
10 that the subject matter jurisdiction over the
11 potential third-party should be finally adjudicated at
12 this time.

13 So I think that that marshals out all of that,
14 the balancing of it. You are the party seeking,
15 Mr. Thompson. Do you think that that adequately
16 marshals and articulates the factors which I have
17 relied upon?

18 MR. THOMPSON: I do.

19 THE COURT: And maybe you want to put something in
20 writing, or not. But I think that what I have just
21 set forth is a reasoned statement, and I intend it to
22 be a part of the record. I think it supports the
23 determination that there is no just reason for delay
24 of final adjudication as to my determination on the
25 12(b) (1) motion as to the subject matter jurisdiction

1 -- or rather the lack of subject matter jurisdiction
2 over the third-party defendants.

3 So, with good cause, that is my determination.
4 So the first question, I have done that now. I think
5 that that just informs the type of judgment that
6 should be prepared as directed on Page 16 of the
7 February 14th order. Right?

8 MR. GALBRAITH: Agreed. And, Your Honor, from my
9 stand -- I know this is Mr. Thompson's judgment and
10 order. But from my standpoint --

11 THE COURT: Yeah. You are arguing this -- you are
12 seeking this as well, so --

13 MR. GALBRAITH: What I think we probably should do,
14 subject to somebody telling me I'm wrong, is I think
15 the parties can get together to put together the
16 judgment, and we can order a transcript from George of
17 the Court's decision today and attach that as an
18 exhibit to the judgment as the reason statement.

19 THE COURT: Well, that's going to have to go to
20 court.

21 MR. GALBRAITH: So that would be my intention is to
22 order a transcript from George. I'm sure that we will
23 get one of the whole hearing, but for purposes of
24 getting the judgment in place of that portion of
25 today's hearing with the Court's decision and attach

1 that to the judgment as an exhibit.

2 THE COURT: Okay. So that resolves how the judgment,
3 the final judgment, is done. Now that I have done
4 that for better or worse, what else do we need to do?
5 Do we need to talk about anything else at this point?
6 Do we need to set a hearing?

7 MR. NOONEY: From our perspective, Your Honor, on the
8 other pending motion that C Brunsch has as it concerns
9 adding the additional named third-party, my instinct
10 was, and we will just push that down and see what
11 happens. Because, as we all understand, once we file
12 this judgment and then the appropriate appeal on that,
13 there is going to be a little waiting time to see what
14 the Supreme Court does. So my thought is that we will
15 just push that matter down the road.

16 THE COURT: They could ask to show cause.

17 MR. NOONEY: Of course, they can. We have seen that
18 before. And then, finally, as it concerns our pending
19 issues as it relates to the Housing Authority and the
20 individually named third-party defendants, I would
21 similarly just defer defer all that until a later
22 date until we get some guidelines from the Supreme
23 Court, either in an order to show cause or some
24 resolution of those appeal issues.

25 So from our perspective, we would push those

1 issues, which I think are the only pending issues.

2 THE COURT: Well, I have a hearing set on August
3 10th. Right?

4 MR. NOONEY: We have a hearing on August 10th. Now
5 part of that is, of course, in Brunsch. I mean, I
6 call it Lakota Plains Two. From Lakota Plains One,
7 the pending motions that I just identified the third
8 party pleadings and the protective order issues, we
9 would prefer just to -- we could get with Mr. Thompson
10 on the latter of those and just not do anything on
11 that.

12 I have already told Mr. Leach and the Court that
13 as it concerns the third party -- adding an additional
14 third-party defendant, we would just defer that as
15 well.

16 THE COURT: At your last hearing I denied your motion
17 for summary judgment, and you asked me to hold off on
18 that. But after reviewing that -- I mean, maybe
19 that's an intermediate appeal, but I signed that
20 judgment.

21 MR. GALBRAITH: That one was signed, yes.

22 MR. NOONEY: That's true, yes.

23 THE COURT: So I'm not setting any further hearings,
24 and I'm not at this time cancelling any further
25 hearings. So, Mr. Leach?

1 MR. LEACH: Well, just a couple of things so I am
2 clear and so we are all on the same wavelength. If I
3 understand it, Dakota Plains is taking all motions it
4 has filed concerning plaintiff off calendar.

5 THE COURT: I'm not sure if they have any on the
6 calendar at this point. But I think that you --

7 MR. NOONEY: Well, we have one.

8 THE COURT: Okay.

9 MR. NOONEY: We have the motion to add the additional
10 third-party defendant, Don Hill, but we are going to
11 take that off calendar.

12 THE COURT: Okay. You are going to take that off
13 calendar.

14 MR. GALBRAITH: I think we have to. I think that
15 with --

16 THE COURT: I'm not trying to overly --

17 MR. GALBRAITH: We haven't filed yet. I mean, I think
18 that is what we are all kind of beating around the
19 bush on is we haven't filed the appeal yet. But once
20 the appeal is filed, particularly as the Court has
21 just identified in the reason statement, I think that
22 these issues are so intertwined, I think everything at
23 the trial court level stayed until we either get a
24 dismissal from the Supreme Court on an order to show
25 cause or a decision.

1 THE COURT: It might be -- yeah, once you have filed
2 the appeal.

3 MR. GALBRAITH: Right.

4 THE COURT: Which is not filed. But, I mean, that is
5 not my determination. I'm not making a finding on
6 that.

7 MR. GALBRAITH: I understand that. But that's going
8 to be our position. And, obviously, we do intend to
9 file the appeal. But just as we are talking about all
10 of these issues, we are pulling our stuff off the
11 calendar, because we anticipate we are not going to be
12 able to address it.

13 THE COURT: Well, I guess it goes back to what I said.
14 I'm not going to add anything to the calendar at this
15 time, but I'm not pulling anything off. But, if you
16 want to pull anything off or come to an agreement, so
17 be it.

18 MR. LEACH: We have a motion that we agreed to extend
19 until August 10th.

20 THE COURT: Yes. And I guess I'm not saying one way
21 or another where that's at. I'm not taking it off the
22 calendar right now, but --

23 MR. LEACH: Right. And for this moment I'm leaving it
24 on.

25 THE COURT: Right. As am I.

1 MR. LEACH: What did you say? I'm sorry, Your Honor?

2 THE COURT: I said, as am I. I'm leaving it on my
3 calendar as of now.

4 MR. LEACH: Okay.

5 THE COURT: Anything further?

6 MR. GALBRAITH: Nothing from us.

7 MR. LEACH: No, Your Honor.

8 THE COURT: Okay. We are adjourned.

9 MR. GALBRAITH: Thank you, Your Honor.

10 *** **

11 [PROCEEDINGS CONCLUDED]

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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF PENNINGTON) SS. CERTIFICATE

3
4
5
6 I, George R. Cameron, Official
7 Court Reporter, State of South Dakota, do hereby
8 certify that I reported in stenotype the proceedings
9 of the above-entitled action; that I thereafter
10 transcribed said stenotype notes into typewriting; and
11 that the foregoing pages 1-17, inclusive, are a true,
12 full and correct transcript of my stenotype notes.

13 IN TESTIMONY WHEREOF, I hereto set my hand and
14 official seal this 11th day of July, 2018.

15

16

17 /s/ George R. Cameron

18

19

20 _____
21 George R. Cameron
22 Official Court Reporter

21

22

23

24

25

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STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF OGALA LAKOTA)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

56Civ17-000007

JENNIFER CHAS ALONE, as)
the Personal Representative of)
ELFREDA ANN TAKES WAR)
BONNETT, Deceased,)

Plaintiff,)

vs.)

C. BRUNSCH, INC., a South Dakota)
corporation, doing business as Lakota)
Plains Propane, Inc., and WESTERN)
COOPERATIVE COMPANY, INC.,)
a Nebraska Corporation,)

Defendants/Third Party Plaintiffs,)

vs.)

OGLALA SIOUX TRIBAL)
HOUSING AUTHORITY,)
RICHARD HILL, DEREK JANIS,)
WES COTTIER, WILLIAM WHITE,)
BEN PLENTY ARROWS,)
RENALDO TWO BULLS,)
BRANDON WES, DEREK SLIM,)
ROBIN T. (last name unknown), and)
John and Jane Doe, 1-100,)

Third-Party Defendants.)

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

FEB 14 2018

By: _____

MEMORANDUM ORDER

There are several motions before the Court. A hearing was held, by agreement in Rapid City, on January 18, 2018. All parties were represented by counsel. Numerous submissions were filed and reviewed thoroughly by the Court. At the hearing, the Court heard and considered the argument of counsel and the testimony of Doyle Pipe on Head. The Court also received and considered several exhibits.

A. WESTERN'S MOTION FOR SUMMARY JUDGMENT

Defendant and third-party plaintiff, Western Cooperative Company, Inc. ("Western") moved for summary judgment based on a lack of a duty owed to plaintiff.

After reviewing all the submissions and the file, the Court concludes that there is no issue as to any material fact and thus Western's motion for summary judgment is **GRANTED**.

1. Summary Judgment Facts

For purposes of the motion for summary judgment the Court will rely on the following material facts, resolving questions of fact in favor of the plaintiff. On October 6, 2016, an explosion destroyed a duplex located at 157 and 158 East Ridge Loop, in Pine Ridge.¹ RoWayne and Velvende Wounded Horse lived in 158 East Ridge with their daughter, Jaemin. Velvende was not home at the time of the explosion. RoWayne and Jaemin, however, were seriously injured in the explosion. Sadly, the explosion killed plaintiff, Elfreda Takes War Bonnett.² Takes War Bonnett, was a guest at 158 East Ridge at the time of the explosion.³ Another guest at 158 East Ridge, a neighbor, also died. Three people present at 157 East Ridge were also killed or injured in the explosion. The only plaintiff in this case, though, is Takes War Bonnett.

At some point prior to the explosion, Western delivered propane gas to 158 East Ridge.⁴ The other defendant (and third-party plaintiff), Casey Brunsch, Inc d/b/a as Lakota Plains Propane ("Lakota Plains"), previously delivered propane gas to 157 East Ridge.⁵ Lakota Plains has not moved for summary judgment.

According to chemist Robert Stubbs, who plaintiff retained as a consultant, propane gas (supplied by Lakota Plains) entered 157 East Ridge from an uncapped propane line.⁶ Also according to Stubbs, the propane gas, leaking from 157 East Ridge,

¹ Complaint ¶ 1.

² *Id.* ¶ 2. The common spelling is, "War Bonnet." The Court will adhere to the spelling in the caption.

³ *Id.* ¶ 2.

⁴ *Id.* ¶ 5.

⁵ *Id.* ¶ 6.

⁶ Affidavit of Robert Stubbs ¶ 13.

spread through an undivided crawl space into 158 East Ridge.⁷ The occupants of 158 East Ridge smelled propane.⁸ RoWayne telephoned third-party defendant, Oglala Sioux Tribal Housing Authority (“Housing Authority”), to inform them of the leak.⁹ Wounded Horse also attempted to fix the leak and vent the house.¹⁰ The explosion occurred about thirty minutes after RoWayne telephoned the Housing Authority.

Stubbs opines that the explosion “probably” began in unit 158.¹¹ Stubbs states, in an affidavit offered in resistance to Western’s motion for summary judgement, that the “uncapped interior propane gas line in Unit 157” was “*one of the causes of the explosion.*”¹² But Stubbs does not identify any other cause of the explosion in his fifteen-page affidavit. In fact, despite his unsupported assertion that there were other potential causes of the explosion, Stubbs’s affidavit repeatedly concedes that there was an interior uncapped propane line in 157 East Ridge, which—because it was not capped—allowed propane gas to leak and accumulate in the common crawl space until it was ignited by something and exploded.¹³ Plaintiff’s counsel, in his briefing, asserts that there was another cause of the explosion. But plaintiff’s attorney never identifies what the other cause might be. In fact, plaintiff’s counsel repeatedly concedes in his brief that a propane leak at 157 East Ridge led to the explosion.¹⁴ At the hearing,

⁷ *Id.* ¶¶ 9 and 20.

⁸ *Id.* ¶ 9.

⁹ *Id.* ¶ 11.

¹⁰ *Id.* ¶¶ 11; Ex. 1.

¹¹ *Id.* ¶ 13.

¹² *Id.* ¶ 6.

¹³ *Id.* ¶¶ 6, 9, 13, 16, 20, and 21.

¹⁴ Plaintiff’s Objection to Western’s Motion for Summary Judgment 4 (“the issues whether it is foreseeable, *in light of the particular facts of this case*, that LP Gas sold by Lakota Propane may leak into either side of a very small duplex and explode”); 5 (“Any gas that entered Unit 157—as it did here”); 6 (“Gas that entered 157”); and 15 (“here, the foreseeability of harm to the occupants of Unit 158 from an explosion in Unit 158 caused by gas entering the common, undivided crawl space under Unit 157”).

plaintiff's counsel conceded that propane gas leaked from an uncapped line in 157 East Ridge, not at 158 East Ridge.¹⁵

Accordingly, for purposes of summary judgement, the deadly explosion occurred after propane gas accumulated in the crawl space and exploded. The fugitive propane gas was supplied by Lakota Plains, not Western. The propane gas leaked from an uncapped line at 157 East Ridge, which was not a customer of Western. Even viewing the facts in the light most favorable to plaintiff, there is no evidence that propane gas from 158 East Ridge—Western's propane gas—ever leaked prior to the explosion. Also, there is no evidence that Western knew of the leak. Furthermore, there is no question that plaintiff was a guest at 158 East Ridge on the day of the explosion.

2. Summary Judgment Analysis

Plaintiff's case against Western and Lakota Plains is presented in a three-count complaint alleging negligence, strict liability, and breach of implied warranties. The gist of plaintiff's claim is that Western failed to warn the Wounded Horse family of the dangerous nature of propane gas. And that this failure caused the death of their guest,

¹⁵ The following discussion occurred at the hearing:

THE COURT: And the undisputed portion of that is that somewhere in 157 there was an uncapped line, and somehow propane leaked from that, and that's what was combusted?

MR. LEACH: No, not somehow. The undisputed fact is that it was a common, undivided crawl space, meaning that with certainty, from Mr. Stubbs' affidavit, that propane, because it is heavier than air, is spreading out under both floors.

THE COURT: Yes, I get that. But where did it come from?

MR. LEACH: It came from -- as far as we know, the uncapped line in 157 into the common, undivided crawl space. Okay. I have given you my first theory of liability.

Hearing Transcript at 131.

the plaintiff, when propane gas supplied by Lakota Plains exploded after leaking from an uncapped pipe in the adjoining property.

Many jurisdictions recognize that, “Negligence and strict liability merge into a single products-liability theory in failure to warn cases, both requiring proof of a manufacture or supplier’s duty of care.”¹⁶ Importantly, “[E]ven though the cause of action for failure to warn could be based on negligence or strict liability in tort, the two theories, while conceptually different, often merge into a single breach of duty.”¹⁷ The South Dakota Supreme has recognized this merger as well.¹⁸ Accordingly, the Court will make a single duty determination in considering the negligence and the strict liability claims.

Summary judgment is typically not appropriate in a negligence case, unless there is no duty.¹⁹ The existence of a duty is a question of law.²⁰ Plaintiff has the burden of establishing a duty.²¹ Specifically, “plaintiff must prove a duty existed *from the*

¹⁶ *Lammle v. Gappa Oil Co., Inc.*, 2009 WL 67438, at *2 (Minn. Ct. App. Jan. 13, 2009)(unpublished)(cleaned up). *Lammle* is an unpublished decision from the Minnesota Court of Appeals. Its facts though are similar to the facts in the instant case, and it is well-reasoned. *See also Hannu v. Texas Utilities Co.*, 71 S.W.3d 874, 881–82 (Tex. App. 2002)(“there is no doctrinal distinction between negligence and strict liability failure to warn actions under the Restatement Because we agree that the analysis of the duty to warn under strict liability and negligence theories invokes the same basic principles, we decide the existence of a duty to warn under both common law theories as a single question.”)(internal citations omitted); *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3d Cir.1990)(“the standard imposed upon the defendant meeting a claim of strict liability based upon a failure to warn is the same as that imposed upon the defendant faced with a claim of negligent failure to warn”); *Natural Gas Odorizing v. Downs*, 685 N.E.2d 155, 163 n. 11 (Ind. Ct. App. 1997)(“there is no doctrinal distinction between negligence and strict liability failure-to-warn actions under the Restatement.”); and *Olson v. Prosope, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) (“After reviewing the authors and comments on the failure to warn question, we believe any posited distinction between strict liability and negligence principles [in warnings cases] is illusory”).

¹⁷ *O’Flynn v. Owens-Corning Fiberglas*, 759 So.2d 526, 535 (Miss.Ct.App. 2000).

¹⁸ *See Karst v. Shur-Co.*, 2016 S.D. 35, ¶ 18(“Causation is a necessary element of a failure-to-warn claim, whether pursued under a negligence or strict-liability theory”); and *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 17(“In a products liability case premised on alleged inadequate warnings, both causation and inadequate warnings are separate but necessary elements of negligence and strict liability”).

¹⁹ *McGuire v. Curry*, 2009 S.D. 40, ¶ 7.

²⁰ *Janis v. Nash Finch Company*, 2010 S.D. 27, ¶ 8.

²¹ *Tschetter v. Berven*, 2001 S.D. 11, ¶ 21.

*defendant to the plaintiff.*²² Here, under the facts most favorable to the plaintiff, plaintiff cannot articulate a duty owed from Western to Takes War Bonnett.

“[A] duty depends on ‘whether a ‘relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff.’”²³ Takes War Bonnett was a guest of Wounded Horse family on the day of the explosion. Western did not sell propane gas to Takes War Bonnett. Simply put, a duty from Western to Takes War Bonnett was not established through the relationship between the parties.

Plaintiff argues, however, that foreseeability created a duty. When considering foreseeability, it is important not to confuse “the concepts of foreseeability of harm as it relates to the element of causation and foreseeability of harm relevant to the element of duty.”²⁴ “[F]oreseeability in defining the boundaries of a duty is always a question of law’ and is examined at the time the act or omission occurred.”²⁵ “The South Dakota Supreme Court makes no-duty determinations when it finds that a relationship does not establish a duty or foreseeability of the injury is too remote.”²⁶ Again, here the duty is not established by the relationship between Takes War Bonnett and Western, and the foreseeability of the injury is too remote to establish a duty. But more importantly, the explosion did not result from the use of Western’s propane gas. The explosion was the result of an uncapped interior gas line in 157 East Ridge, which leaked propane gas supplied by Lakota Plains.

²² *Hoekman v. Nelson*, 2000 S.D. 99, ¶ 8.

²³ *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶ 10.

²⁴ *Id.* ¶ 13.

²⁵ *Id.* ¶ 14 (internal citations omitted).

²⁶ Brigid C. Hoffman, Note, *Reaffirming the Role of the Jury: The Problem of Summary Judgment, Duty, and Roadkill in Zerfas v. Amco Insurance Company*, 62 S.D. L. REV. 453, 469 (2017).

Plaintiff argues that “Western’s failures were a foreseeable cause of Elfrada Ann Takes War Bonnett’s death.”²⁷ “However, foreseeability for purpose of establishing a duty is not invariably the same as the foreseeability relevant to causation.”²⁸ Plaintiff’s argue that Western could have foreseen that propane supplied to its customer’s neighbors, by another company, could have spread into the crawl space below 158 East Ridge and exploded. However, the “fact that a certain event, such as a propane gas explosion, is conceivable does not mean it is foreseeable in the legal sense.”²⁹ It is not here. While the tragic events of this case might have been conceivable, they were not foreseeable to Western in the legal sense.

“The risk reasonably to be perceived defines the duty to be obeyed. No one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen.”³⁰ “Negligence in products liability actions involving inadequate warnings requires a plaintiff to ‘show that the manufacturer or seller failed to exercise reasonable care to inform *those expected to use the product* of its condition or of the facts which make it likely to be dangerous.’”³¹ Here, not only could Western not have expected Takes War Bonnett to use its product, it wasn’t even Western’s product that exploded, it was propane supplied by Lakota Plains.

Plaintiff argues that a duty should be imposed upon propane suppliers to warn of the dangers of not just their own products, but of other supplier’s products. Other

²⁷ Plaintiff’s Objection to Western’s Motion for Summary Judgment 4.

²⁸ *Peterson v. Spink Elec. Co-op., Inc.*, 1998 S.D. 60, ¶ 15.

²⁹ *Lammle v. Gappa Oil Co., Inc.*, 2009 WL 67438, at *4 (Minn. Ct. App. Jan. 13, 2009)(unpublished)(“it would be carrying the duty of a manufacturer too far to require it to anticipate every injury that might occur.”)

³⁰ *Johnson v. Hayman & Assoc., Inc.*, 2015 S.D. 63, ¶ 15, 867 N.W.2d 698, 702 (citations omitted).

³¹ *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 13, 855 N.W.2d 145, 150 (emphasis added).

jurisdictions have declined to extend, to a defendant, the duty to warn about the dangerous of someone else's product. In *Lammle v. Gappa Oil Co., Inc.*, the Minnesota Court of Appeals stated:

The connection between the wholesale supply of propane to the retailer and an unknown party's flawed decision to leave a propane line uncapped—and yet another party's decision to ignore the odor warning and leave propane flowing into a home—is simply too attenuated, factually and as a matter of public policy, to impose liability on the wholesalers. On the undisputed facts of this case, the district court correctly determined that Ferrellgas and EPO, as wholesale suppliers, did not have a duty to warn appellants of the unforeseeable risk that resulted in harm.³²

In *Simonetta v. Viad Corp.*, the Washington Supreme Court opined, “we find little to no support under our case law for extending the duty to warn to another manufacturer's product.”³³ And in *Garman v. Magic Chef, Inc.*, the California Court of Appeals wrote:

A failure to warn may create liability for harm caused by use of an unreasonably dangerous product. That rule, however, does not apply to the facts in this case because it was not any unreasonably dangerous condition or feature of respondent's product which caused the injury. To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense.³⁴

Here, the chain of events which led to Takes War Bonnett's death is far too remote to impose a duty upon Western. Summary judgement is appropriate as a matter of law as to the negligence and strict liability claims because no duty existed for Western to warn Takes War Bonnett of the events that led to her death.

Likewise, the breach of warranty claims must also be dismissed. Plaintiff claims that Western's propane breached the implied warranties of merchantability and fitness

³² *Lammle v. Gappa Oil Co., Inc.*, 2009 WL 67438, at *4 (Minn. Ct. App. Jan. 13, 2009)(unpublished).

³³ *Simonetta v. Viad Corp.*, 197 P.3d 127, 133 (WA. 2008).

³⁴ *Garman v. Magic Chef, Inc.*, 117 Cal. App. 3d 634, 638, 173 Cal. Rptr. 20 (Cal. Ct. App. 1981).

for a particular purpose. But considering the facts most favorable to plaintiff, Western's product played no part in the explosion. To borrow from the California Court of appeals, it would be "semantic nonsense" to conclude that the implied warranties contained in South Dakota's codification of the Uniform Commercial Code would require sellers to warranty, expressly or impliedly, someone else's product. Or that they would be liable for the unfitness or unmerchantability of someone else's products. Accordingly, Western is entitled to Summary Judgment as to the implied warranty claims as well.

B. MOTIONS TO STRIKE

On the eve of the hearing, Western filed additional exhibits and affidavits. Plaintiff moved to strike. As explained at the hearing, those motions to strike, after being considered under Rule 12(f), were DENIED. These documents are not struck from the record. They were, however, too untimely filed to be considered in relation to the motion for summary judgment. Accordingly, the Court did not consider or rely upon the documents in determining the motion for summary judgment.

C. MOTIONS TO DISMISS THE THIRD-PARTY COMPLAINTS BASED ON SUBJECT MATTER JURISDICTION

Both Western and Lakota Plains initiated third-party complaints against various third-party defendants, including the Housing Authority and several individuals who are likely employees or independent contractors of the Housing Authority. In two separate motions, the third-party defendants moved for dismissal of the third-party complaints based on lack of subject matter jurisdiction. Third-party defendants' motions were raised pursuant to Rule 12(b)(1). Third-party defendants argue that South Dakota courts lack subject matter jurisdiction over claims against tribal members arising on trust land within the exterior boundaries of the Reservation.

Indeed, it is an accepted principle of civil jurisdiction “that Indian conduct occurring on trust allotments is beyond the State’s jurisdiction.”³⁵ Third-party defendants supported their motion to dismiss with an affidavit, which addressed the enrollment status of the individual third-party defendants, the role of the Housing Authority, and the trust status of the land at issue in this case.

Third-party plaintiffs argue the motions to dismiss for lack of subject matter jurisdiction should be converted to motions for summary judgment because the third-party defendants asked the Court to look at matters outside the pleadings. Plainly, Rule 12(b) allows motions to dismiss brought pursuant to Rule 12(b)(5) to be converted to motions for summary judgment. This is a 12(b)(1) motion, though, not a 12(b)(5) motion. Third-party plaintiffs offer no support for the theory that 12(b)(1) motions should be converted to motions for summary judgment.

Rule 12(b)(1) motions are properly analyzed under the South Dakota Supreme Court’s direction in *Hutterville Hutterian Brethren, Inc. v. Waldner*.³⁶ The Supreme Court explained in *Hutterville*:

A court deciding a motion under Rule 12(b)(1) must distinguish between a “facial attack” and a “factual attack.” In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of [12(b)(5)] safeguards. In factual attacks, the court must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute. Because at issue in a factual 12(b)(1) motion is the trial court’s jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Thus, evidentiary hearings, affidavits,

³⁵ *Risse v. Meeker*, 1998 S.D. 112, ¶ 18.

³⁶ See *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86.

documents, and live testimony may all be considered to resolve the subject matter jurisdiction dispute.³⁷

This 12(b)(1) motion is a factual attack, because it hinges on the assertion that the duplex was located on trust land and that the third-party defendants were tribal members. Therefore, the Court will consider matters outside the pleadings and will freely weigh the evidence to satisfy itself whether it has the power to hear the third-party action.

In *Risse v. Meeker*,³⁸ the South Dakota Supreme Court considered whether a state court had subject matter jurisdiction over a punitive damages case arising on fee land outside the exterior boundaries of the Pine Ridge Indian Reservation. In *Risse*, a nontribal member residing off of the reservation sued tribal-member defendants alleging that they willfully, wantonly, and recklessly failed to install a fence around their grazing land.³⁹ Defendants were enrolled members of the Oglala Sioux Tribe and resided within the exterior boundaries of the Pine Ridge Indian Reservation.⁴⁰ The grazing land, however, was outside the current exterior boundaries of the Pine Ridge Reservation, but importantly, the land was held in trust by the United States for the benefit of the Oglala Sioux Tribe.⁴¹ The South Dakota Supreme Court affirmed the circuit court's determination that it did not have subject matter jurisdiction.⁴²

³⁷ *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20 (cleaned up). "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. See Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018). Use of "cleaned up" signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization) without altering the substance of the quotation.

³⁸ *Risse v. Meeker*, 1998 S.D. 112.

³⁹ *Id.* ¶¶1-5.

⁴⁰ *Id.* ¶ 2.

⁴¹ *Id.* ¶ 3.

⁴² See generally *Id.*

Here, third-party defendants have presented affidavit and live testimony. Having reviewed this information, the Court concludes it does not have subject matter jurisdiction over the third-party complaints. The Court is satisfied that the third-party defendants are all tribal entities or tribal members. The affidavits of Doyle Pipe on Head, satisfy the Court that the Housing Authority is the Oglala Sioux Tribe's housing authority and that it operates solely on trust land. The Housing Authority only serves tribal members, and it typically only employs tribal members. The affidavits also establish that all the other third-party defendants are enrolled members of the Tribe. The third-party complaints allege that the conduct (the failure to cap a propane line at 157 East Ridge) took place at a Housing Authority-operated duplex, which by the nature of the Housing Authority's mission, took place on trust land within the exterior boundaries of the Reservation.

Further support for these conclusions are found in Pipe on Head's testimony at the hearing, and exhibits A-G. Here, like in *Risse*, the defendants to the third-party complaint are enrolled tribal members, also the third party-complaint alleges negligence which occurred on trust land. Unlike *Risse*, the trust land in the instant case is within the exterior boundaries of the reservation. While the Court is required to make factual determinations, the Court does so within the framework enunciated in *Hutterville*.

Third-party plaintiffs argue that they should be able to conduct additional discovery in relations to the 12(b)(1) motions. First, the record does not suggest that third-party plaintiffs attempted to initiate any discovery in relation to the factual issue in dispute—that the alleged negligence occurred on trust land within the exterior

boundaries of the Reservation or whether the third-party defendants are tribal members. Third-party plaintiffs had several months to peruse such discovery and did not do so, they should not be allowed to do so now. Second, the *Hutterville* framework does not require the Court to eliminate the existence of disputed material fact ("the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims"). The Court may "satisfy itself."⁴³ Third, third-party-plaintiffs' argument that they should be able to conduct discovery as to whether the Housing Authority consented to suit in state court is also unavailing. "Jurisdiction cannot be conferred by consent, agreement, stipulation or waiver."⁴⁴

Put simply, additional discovery of the type contemplated by third-party plaintiffs, would not reveal any information which would upset the Court's determination. Third-party defendants have proven, to the Court's satisfaction, that the duplex is on trust land through submission of a Title Status Report from the Department of Interior.⁴⁵ It is beyond debate that the village of Pine Ridge and East Ridge housing are within the exterior boundaries of the Pine Ridge Indian Reservation. Moreover, it defies common sense to consider that the Housing Authority would build and manage tribal housing on non-trust land. Similarly, the third-party defendants have established that the third-party defendants are tribal members. They have done so through submission of tribal document, mostly enrollment documents.⁴⁶ Even though third-party

⁴³ *Hutterville*, 2010 S.D. 86, ¶ 20.

⁴⁴ *Pennington Cty. v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, ¶ 17.

⁴⁵ Hearing Exhibit G.

⁴⁶ Hearing Exhibits E and F.

plaintiffs are requesting additional discovery, the Court is more than satisfied it does not have subject matter jurisdiction over the third-party complaints.

Further, the Court concludes that it would infringe upon tribal sovereignty to exercise subject matter jurisdiction over the third-party complaints. "A tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its member, through commercial dealing, contracts, leases, or other arrangements."⁴⁷ Here, the third-party plaintiffs entered onto the Reservation to do business with tribal members and entities. The Oglala Sioux Tribe has established a court system and a jurisdictional framework to handle claims like the ones in the third-party complaints. The Oglala Sioux Tribal Court is equipped to resolve the claims in the third-party complaints, and it should.

Accordingly, third-party defendants' motions to dismiss for lack of subject matter jurisdiction against Lakota Plains are GRANTED. Lakota Plains's third-party complaint against all third-party defendants is dismissed for lack of subject matter jurisdiction. Third-party defendants' motions to dismiss Western's third-party complaint are MOOT because the underlying complaint against Western is dismissed on summary judgment. Alternatively, however, the third-party defendants' motion against Western for dismissal based on subject matter jurisdiction should be granted.

D. MOTIONS TO DISMISS THIRD-PARTY COMPLAINTS BASED ON SOVEREIGN IMMUNITY

The Housing Authority also moved to dismiss both third-party complaints based on its sovereign immunity. The Housing Authority's motion to dismiss Lakota Plains's third-party complaint based on sovereign immunity is MOOT because the

⁴⁷ *Sage v. Sicangu Oyate Ho, Inc.* 473 N.W.2d 480, 482 (S.D. 1991)(cleaned up).

Court has already determined that it does not have subject matter jurisdiction over the third-party complaint.

The Housing Authority's motion to dismiss Western's third-party complaint based on sovereign immunity is MOOT because the complaint against Western has been dismissed on summary judgment. Alternatively, the Housing Authority's motion to dismiss Western's third-party complaint based on sovereign immunity is MOOT because the Court has already determined that it does not have subject matter jurisdiction over the third-party complaint.

Plaintiff joined in the Housing Authority's motion to dismiss the third-party complaints based on sovereign immunity. To the extent plaintiff has moved to dismiss the third-party complaints against the Housing Authority based on sovereign immunity, the motion is denied as MOOT and for lack of standing.

E. MOTIONS FOR PROTECTIVE ORDERS

The Housing Authority moved for a protective order, pursuant to Rule 26(c). Plaintiff joined the Housing Authority's motion for a protective order. On February 6, 2018, all third-party defendants moved for a second protective order, also based on Rule 26(c).

A hearing has been scheduled for 9 a.m. on March 15, 2018 at the Pennington County Courthouse. Accordingly, the Court will hold these matters in abeyance until at least that time.

F. MOTIONS TO COMPEL

Plaintiff moved to compel discovery from both Western and Lakota Plains. The motion to compel against Western is MOOT because the Court granted Western's motion for summary judgement.

The motion to compel against Lakota Plains concerns three interrogatories. Lakota Plains objects based on attorney work product and/or legal conclusion. Lakota Plains concedes that they will supplement the interrogatories when and if they retain an expert. The Court has considered the submissions along with Rule 37 and agrees with Lakota Plains. Plaintiff's motion is **DENIED**.

CONCLUSION

This memorandum opinion constitutes the Court's findings of fact and conclusions of law. Western and Third-Party defendants are directed to prepare appropriate judgments for the Court's consideration.

For these reasons, it is hereby:

ORDERED that Western's motion for summary judgment is **GRANTED**. It is further

ORDERED that third-party defendants' motions to dismiss for lack of subject matter jurisdiction against Lakota Plains are **GRANTED**. It is further

ORDERED that third-party defendants' motions to dismiss for lack of subject matter jurisdiction against Western are **DENIED AS MOOT**. In the alternative, they are **GRANTED**. It is further

ORDERED that the Housing Authority's motion to dismiss based on sovereign immunity against Lakota Plains and Western are **DENIED AS MOOT**. It is further

ORDERED that the plaintiff's motion to compel against Lakota Plains is **DENIED**. It is further

ORDERED that the plaintiff's motion to compel against Western is **DENIED AS MOOT**.

Dated February 14, 2018.

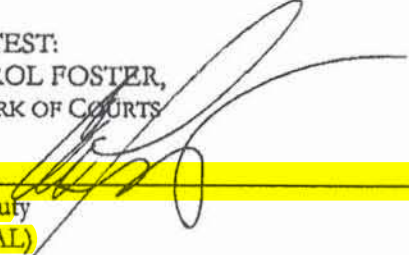
BY THE COURT:



THE HONORABLE JEFFREY ROBERT CONNOLLY

CIRCUIT COURT JUDGE

ATTEST:
CAROL FOSTER,
CLERK OF COURTS

By: 
Deputy
(SEAL)



C

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF OGLALA LAKOTA) SS

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

4 JENNIFER CHASE ALONE, as the Personal
5 Representative of ELFREDA ANN TAKES
6 WAR BONNET, Deceased,

7 Plaintiff,

8 vs.

9 C. BRUNSCH, INC., a South Dakota
10 corporation, doing business as Lakota Plains
11 Propane, Inc., and WESTERN
12 COOPERATIVE COMPANY, INC., a
13 Nebraska corporation,

14 Defendants/Third-Party Plaintiffs,

15 vs.

16 OGLALA SIOUX LAKOTA HOUSING
17 AUTHORITY, RICHARD HILL, DEREK
18 JANIS, WES COTTIER, WILLIAM WHITE,
19 BEN PLENTY ARROWS, RENALDO TWO
20 BULLS, BRANDON WES, DEREK SLIM,
21 ROBIN T. (last name unknown), and JOHN
22 AND JANE DOE 1-100,

23 Third-Party Defendants.

56CIV17-0000007

AFFIDAVIT OF DOYLE PIPE ON HEAD

24 STATE OF SOUTH DAKOTA)
25 County of Oglala Lakota) :ss

26 I, Doyle Pipe On Head, being first duly sworn upon my oath, depose and state:

- 27 1. I am over eighteen years of age and reside in Oglala Lakota County, South
Dakota.
2. I am the acting CEO for Oglala Sioux Lakota Housing ("OSLH").
3. I am familiar with OSLH's structure and operation generally.

- 1 4. I am also familiar with OSLH's former or current employees and/or officials,
2 Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows,
3 Renaldo Two Bulls, Brandon Shangreau, Robin Tuttle, and Tom Waters
4 (collectively hereinafter "Employees"),¹ who are named (or are believed to be
5 named) as third-party defendants in this lawsuit, with regard to their enrollment
6 status in the Oglala Sioux Tribe and scope of their employment with OSLH at all
7 times relevant to the claims raised in the Third-Party Complaints.
- 8 5. OSLH is the public housing authority for the Oglala Sioux Tribe ("Tribe").
9 OSLH was created by the Tribe via ordinance to develop and administer public
10 housing projects on the Reservation. OSLH was formerly known as the Oglala
11 Sioux Housing Authority.
- 12 6. OSLH operates exclusively within the exterior boundaries of the Pine Ridge
13 Indian Reservation ("Reservation") and it only serves members of the Tribe.
- 14 7. The Employees are all members of the Tribe.
- 15 8. At all times relevant to this lawsuit, any work that was completed by the
16 Employees on Units 157 and 158, which were destroyed in the explosion that is
17 the subject of this matter, was performed by the Employees within the course and
18 scope of their employment with OSLH and on trust property within the exterior
19 boundaries of the Reservation.
- 20 9. Upon information and belief, Elfreda Ann Takes War Bonnet and Jennifer Chase
21 Alone are also enrolled members of the Tribe.
- 22 10. The real property on which public housing rental Units 157 and 158 are located is
23 trust property owned by the Tribe and held in trust by the United States. The
24 property is wholly located within the exterior boundaries of the Reservation.

27 ¹While not named correctly in the Third Party Complaints, it is believed that "Robin T." "Brandon Wes," and
"Derek Slim," refers respectively to Robin Tuttle, Brandon Shangreau, and Tom Waters.

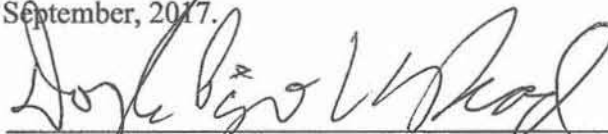
1 11. OSLH owned Units 157 and 158 and had home-site leases for the Units which
2 authorized use of the Tribe's trust property for public housing purposes.

3 12. Greater than 70% of OSLH's operating budget is funded by the Federal
4 Government. The remaining 30% of OSLH's operating budget is generated by
5 rental income obtained by OSLH and other grants.

6 13. Upon information and belief, C. Brunsch, Inc., doing business as Lakota Plains
7 Propane, Inc., and Western Cooperative Company, Inc., Defendants/Third-Party
8 Plaintiffs in this matter, are distributors of propane gas and sold propane gas to
9 the tenants in Units 157 and 158. Because Units 157 and 158 are located on the
10 Reservation and on trust property, the sales necessarily took place within the
11 exterior boundaries of the reservation on trust property.

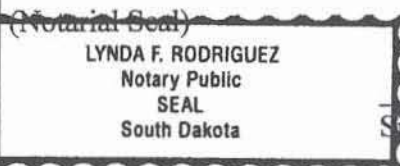
12 14. The foregoing is based upon my personal knowledge.

13 DATED this 13 day of September, 2017.

14 
15 Doyle Pipe On Head, acting CEO

16
17 On this 13th day of September, 2017, before me, the undersigned, a Notary Public
18 in and for the State of South Dakota, personally appeared **Doyle Pipe On Head**, known to me to
19 be the person whose name is subscribed to the foregoing instrument and acknowledged to me
20 that he executed and affirmed the same.

21 IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on
22 the day and year first above written.



25 
26 Signature of Notarial Officer

27 My commission expires: 6/18

D

1		3	
1	STATE OF SOUTH DAKOTA) IN CIRCUIT COURT	1	
2	COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT	2	
3		3	APPEARANCES:
4	JENNIFER CHASE ALONE, as)	4	
5	the Personal)	5	
6	Representative of ELFREDA)	6	For the Plaintiff: MR. JAMES D. LEACH
7	ANN TAKES WAR BONNETT,)	7	South Dakota Justice
8	Deceased)	8	1671 Sheridan Lake Road
9	Plaintiff,)	9	Rapid City, South Dakota 57702
10	vs.)	10	605-341-4400
11	C. BRUNSCH, INC., a South)	11	
12	Dakota corporation, doing)	12	For the Defendant, MR. ROBERT J. GALBRAITH
13	business as Lakota Plains)	13	MR. JOHN K. NOONEY
14	Propane, Inc., and)	14	Nooney & Solay
15	WESTERN COOPERATIVE)	15	632 Main Street
16	COMPANY, INC., A Nebraska)	16	Second Floor
17	corporation)	17	Rapid City, South Dakota 57709
18	Defendants/Third-Party)	18	605-721-5846
19	Plaintiffs,)	19	
20	OGLALA SIOUX LAKOTA)	20	For Oglala Sioux MARK F. MARSHALL
21	HOUSING AUTHORITY,)	21	Lakota Housing Bangs McCullen
22	RICHARD HILL, DEREK)	22	Authority: 333 West Boulevard
23	JANIS, WES COTTIER,)	23	Suite 400
24	WILLIAM WHITE, BEN PLENTY)	24	Rapid City, SD 57701
25	ARROWS, RENALDO TWO)	25	605.343.1040
	BULLS, BRANDON WES, DEREK)		
	SLIM, ROBIN T. (Last name)		
	unknown) and John and)		
	Jane Doe, 1-100,)		
	Third-Party Defendants,)		
19	BEFORE: THE HONORABLE JEFFREY R. CONNOLLY	19	For Oglala Sioux MR. EVAN M.J. THOMPSON
20	Circuit Court Judge	20	Lakota Housing Browning, Kaleczyc, Berry & Hoven
21	Pennington County Courthouse	21	Authority: 800 North Last Chance Gulch
22	Rapid City, South Dakota	22	Suite 101
23	January 18, 2018 at 2:00 PM	23	PO Box 1697
24		24	Helena, Montana 59624
25		25	
	George R. Cameron		
	Official Court Reporter To		
	Judge Jeffrey R. Connolly		
	Seventh Judicial Circuit		
	Pennington County Courthouse		
	Rapid City, South Dakota 57709		
	605.394.2571		
2		4	
1		1	THE COURT: We are on the record in Oglala Lakota
2	I N D E X	2	County File 17-07, Jennifer Joy Chase Alone versus
3		3	C Brunsch Inc. And Western Cooperative Company, Inc.
4	WITNESS PAGE	4	Who do we have? We have Mr. Leach here.
5	DOYLE PIPE ON HEAD	5	MR. LEACH: You sure do. And I am representing the
6	Examination by Mr. Thompson: 53 - 85	6	Plaintiff.
7	Examination by Mr. Galbraith: 85 - 97	7	THE COURT: Okay.
8	Examination by Mr. Thompson: 97 - 99	8	MR. GALBRAITH: Rob Galbraith and John Nooney on
9	Examination by Mr. Galbraith: 99 - 99	9	behalf of C Brunsch, Inc.
10		10	THE COURT: Okay.
11	E X H I B I T S	11	MR. DAHLMEIER: Good afternoon, Your Honor. David
12	EXHIBIT NUMBER MARKED ADMITTED	12	Dahlmeier for Western Cooperative.
13	A. Letter from Nooney, 02-27-17..... 22 22	13	MR. MARSHALL: Good afternoon, Your Honor. Mark
14	B. OSLH Charter..... 38 61	14	Marshall on behalf of --
15	C. HUD Letter-03-24-16..... 64 xx	15	THE COURT: A number of people, the third-party
16	D. Indian Housing Report..... 64 xx	16	defendants.
17	E. Notice of Personnel Action..... 70 71	17	MR. MARSHALL: The third-party defendants. With me,
18	F. Certificate of Indian Blood..... 70 71	18	Your Honor, is Evan Thompson of Billings, Montana. I
19	G. Aerial Photo..... 79 79	19	have previously moved his admission pro hac, and he
20		20	will be handling all substantive matters on behalf of
21		21	the third part defendants.
22		22	THE COURT: Okay. Do you have one of your clients,
23		23	just for the sake of the record, as well?
24		24	MR. THOMPSON: And this is our client, Doyle Pipe On
25		25	Head.

<p style="text-align: center;">5</p> <p>1 THE COURT: Okay. Co-CEO of the Oglala Sioux Lakota 2 Housing Authority? 3 MR. THOMPSON: Former co-CEO, and now the chief 4 contracts officer. 5 THE COURT: Okay. 6 MR. MARSHALL: Your Honor, with leave of Court is it 7 acceptable that we sit here in the jury box? 8 THE COURT: Yeah. I think that's fine. I mean, I 9 don't have an objection. I can't imagine anybody else 10 does. Does anybody have an objection to that? 11 MR. LEACH: No. 12 MR. GALBRAITH: No. 13 THE COURT: Here is the only person that might. 14 George might. You don't have the benefit of a 15 microphone. 16 MR. THOMPSON: I will make sure to speak up. 17 THE COURT: But you are facing George directly, so 18 that shouldn't be a problem as long as you do that. 19 If need be, there is a microphone that -- I don't know 20 if it will reach that far. If it becomes an issue, 21 George, just raise your hand, and I'm sure Ann can 22 come and set a microphone up over there if that's an 23 issue. 24 So, thank you. I think that sets what we have 25 here. We have a number of motions. The first thing</p>	<p style="text-align: center;">7</p> <p>1 MR. GALBRAITH: Correct. 2 THE COURT: I also note that Western Cooperative has a 3 motion for summary judgment that was filed on 4 December 13th, at least appears to be ripe and to be 5 noticed. 6 Mr. Leash has -- well, he filed on November 28th 7 a motion to compel discovery concerning Western, and 8 then renewed that motion on the 3rd of January. So 9 the renewed motion is what is pending. Right, 10 Mr. Leach? 11 MR. LEACH: Correct. 12 THE COURT: And then also a January 3, 2018 motion to 13 compel from Mr. Nooney's client. 14 MR. LEACH: Correct. 15 THE COURT: For what it's worth, there were some 16 documents filed yesterday and today, and there are 17 motions to strike made that I need to probably 18 resolve. 19 We also have, in the third party action, the -- 20 on September 14th of last year the OSLH and 21 third-party defendant, Hill, filed a motion to dismiss 22 under 12(b)(1) on the concept of subject matter 23 jurisdiction. Is that right? 24 MR. THOMPSON: Yes. 25 THE COURT: The remaining defendants, as far as I</p>
<p style="text-align: center;">6</p> <p>1 I'm going to do is just go through what I think the 2 pending motions or right motions might be. And then 3 I'm not sure, because there's dispositive motions that 4 vary. I mean, there's two separate lawsuits kind of 5 going on here. Maybe that's not the best way to say 6 it. But there's dispositive motions, both in the 7 underlying action that has been filed and in the third 8 party litigation. 9 I'm not sure if there is a good way to handle it 10 or a good order to do it. I'm inclined to start with 11 the third-party motions to dismiss first just because 12 they were filed first. Noting that there might not be 13 a good way to do it. 14 But here is what I have pending for motions. 15 Now, first of all, I note that both defendants, 16 first-party defendants, filed 12(b)(5) motions to 17 dismiss contemporaneous with their answers, but I 18 don't think that those have been developed. That's 19 correct. Right. 20 MR. GALBRAITH: Correct. 21 THE COURT: Just probably in the common course you 22 did 12(b)(5) failure to state a claim motions, but 23 nothing has been set. Nothing has been briefed or 24 anything regarding the failure to state a claim. 25 Right?</p>	<p style="text-align: center;">8</p> <p>1 understand, were not served, because they were all 2 likely -- or the majority of them, if not all of them, 3 were served ultimately through publication. 4 There was a motion that was substantially the 5 same that applied to the remaining third-party 6 defendants that was filed on January 3rd. Right? 7 MR. THOMPSON: Correct. 8 THE COURT: Okay. I also have what I think -- and I 9 will let the parties discuss this. But what is an 10 alternative motion filed by the Oglala Sioux Lakota 11 Housing Authority on October 20th, arguing that, if 12 there is any remaining subject matter jurisdiction 13 that it should be -- that this Court is divested of 14 that subject matter jurisdiction as it is related to 15 the OSLH through the concept of sovereign immunity. 16 MR. THOMPSON: Correct. 17 THE COURT: That is pending. There is also 18 contemporaneously filed with that a protective order 19 to protect certain individuals from discovery. And 20 I'm missing something. Oh, Mr. Leach has joined the 21 motion for protective order and for the sovereign 22 immunity argument. 23 Did I miss anything that might be out there? 24 MR. THOMPSON: No. 25 THE COURT: Okay. So what I want to do first, I have</p>

<p style="text-align: center;">9</p> <p>1 spent a considerable amount of time preparing for 2 this. I think that I have read everything that was 3 submitted. I have spent, frankly, Monday, Tuesday, 4 Wednesday and this morning preparing. So I think I 5 have read everything. I think I have read what I 6 think are the appropriate cases that have been 7 cited. 8 I have a number of questions. But I think the 9 best thing -- like I said, I didn't know where to 10 start. And since the first substantive motion was the 11 September motion regarding the third-party 12 defendant's motion to dismiss, I think it's best to 13 start with that. So that's your motion. 14 Mr. Thompson, let's begin with that. 15 MR. THOMPSON: May it please the Court, Evan Thompson 16 on behalf of the Oglala Sioux Lakota Housing, and I 17 will refer to them today as the -- the Housing 18 Authority today as OSLH, and its named officials and 19 employees, Richard Hill, Derek Janis, William White, 20 Robin Tuttle, Ben Plenty Arrows, Wes Cottier, Brandon 21 Shangreau, Tom Waters, and former employ Renaldo Two 22 Bulls. 23 The subject of today's hearing relative to OSLH's 24 involvement or the third-party defendant's involvement 25 are the three separate motions identified by the Court</p>	<p style="text-align: center;">11</p> <p>1 And the third is premised on OSLH's sovereign 2 immunity, which divests the Court of any subject 3 matter jurisdiction it may otherwise have. 4 Additionally, OSLH moved for a protective order 5 barring discovery in this matter on the basis that 6 sovereign immunity not only bars the propane company's 7 claims, but also OSLH's -- rather the unwarranted 8 demands of litigation, including discovery. Those 9 motions have been fully briefed and are ripe. 10 A couple of initial matters that have been 11 raised in the response briefs. But the first is that 12 the propane companies have asked that the Court 13 convert the motions to dismiss into summary judgment 14 motions. 15 The propane companies assert without merit that 16 OSLH's motions to dismiss, because they have 17 referenced materials outside of the pleadings, must be 18 converted to motions for summary judgment pursuant to 19 South Dakota Codified Law, Section 15-6-12(b). 20 However, their position on this point is directly 21 contrary to South Dakota Law. 22 The mandatory conversion provision of 15-6-12(b) 23 is expressly limited to motions to dismiss premised on 24 failure to state a claim upon which relief can be 25 granted.</p>
<p style="text-align: center;">10</p> <p>1 in the motion for a protective order. 2 Just a little bit of background before jumping 3 into the argument. This is an intra-tribal matter 4 involving individual members of the Oglala Sioux 5 Tribe, it's governmental agency, OSLH, and two propane 6 companies who sold propane to individual tribal 7 members residing within the Oglala Sioux Reservation 8 boundaries, thereby, consenting to tribal court 9 jurisdiction. 10 The plaintiffs and third-party plaintiff's claims 11 result from an explosion which occurred in a duplex 12 that is owned and operated by OSLH, and which is 13 located on Indian trust property within the 14 reservation. The duplex units were occupied by tribal 15 members. 16 The plaintiffs filed suit against the propane 17 companies as a result of the explosion. The propane 18 companies in turn filed third-party complaints against 19 OSLH and its employees alleging they are responsible 20 for the explosion. 21 After being served with third-party complaints, 22 OSLH and the employees filed their motions to 23 dismiss. Two of those motions are substantively 24 identical, and are based on the Court's lack of 25 subject matter jurisdiction.</p>	<p style="text-align: center;">12</p> <p>1 In pertinent part, the statute reads, <i>If on a</i> 2 <i>motion asserting the defense number five to dismiss</i> 3 <i>for failure of the pleading to state a claim upon</i> 4 <i>which relief can be granted, matters outside the</i> 5 <i>pleading are presented to and not excluded by the</i> 6 <i>Court, the motions shall be treated as one for summary</i> 7 <i>judgment.</i> 8 The South Dakota Supreme Court confirmed in Storm 9 v Duhr that the mandatory conversion of a motion to 10 dismiss to a motion for summary judgment is limited to 11 those incidents where the motion to dismiss is for 12 failure to state a claim under 12(b)(5). 13 Furthermore, in Hutterville Hutterian Brethren, 14 Inc. v. Waldner, the South Dakota Supreme Court 15 observed that courts considering matters outside of 16 the pleadings when presented with a factual 12(b)(1) 17 motion questioning subject matter jurisdiction. 18 And the Hutterville Court stated, <i>The Court</i> 19 <i>must weigh the evidence and resolve disputed issues of</i> 20 <i>fact affecting the merits of the jurisdictional</i> 21 <i>dispute.</i> 22 And this is because such a motion impacts the 23 Court's very power to hear the case and their 24 substantial authority that the Trial Court is free to 25 weigh the evidence and satisfy itself as to the</p>

<p style="text-align: right;">13</p> <p>1 existence of its power to hear the case.</p> <p>2 In short, no presumptive truthfulness attaches to</p> <p>3 the plaintiff's allegations, and the existence of</p> <p>4 disputed material facts will not preclude the Trial</p> <p>5 Court from evaluating for itself the merits of</p> <p>6 jurisdictional claims.</p> <p>7 The Hutterville Court noted, <i>Thus evidentiary</i></p> <p>8 <i>hearings, affidavits, documents and live testimony may</i></p> <p>9 <i>all be considered to resolve the subject matter</i></p> <p>10 <i>jurisdiction dispute.</i></p> <p>11 THE COURT: First of all, are you saying this is -- so</p> <p>12 you are saying this is a factual attack, not a facial</p> <p>13 attack, under 12(b)(1)?</p> <p>14 MR. THOMPSON: Yes.</p> <p>15 THE COURT: What are the material facts that you just</p> <p>16 referenced that I need to know to determine the</p> <p>17 jurisdictional issue, and were any of them pled or not</p> <p>18 pled in the third-party complaint?</p> <p>19 MR. THOMPSON: Okay. The facts relevant to the</p> <p>20 subject matter jurisdiction argument, the pure subject</p> <p>21 matter jurisdiction argument --</p> <p>22 THE COURT: Yes. I understand the distinction</p> <p>23 between --</p> <p>24 MR. THOMPSON: (Continuing) -- are simply that are we</p> <p>25 dealing with tribal members or tribal entities or</p>	<p style="text-align: right;">15</p> <p>1 benefit of the tribe. And the second part of that is</p> <p>2 you are alleging that the -- is it the enrollment</p> <p>3 status -- and what is it? Is it enrollment status?</p> <p>4 Is it membership? Is it the blood quantum? What is</p> <p>5 it?</p> <p>6 MR. THOMPSON: We have alleged membership, which is</p> <p>7 based on blood quantum, which all of the named</p> <p>8 individual employees are tribal members of the Oglala</p> <p>9 Sioux Tribe.</p> <p>10 THE COURT: Okay. And you are just saying, based on</p> <p>11 Mr. Pipe On Head's affidavit, that he knows that they</p> <p>12 are?</p> <p>13 MR. THOMPSON: Absolutely. They record that</p> <p>14 information during the regular course and scope of</p> <p>15 their business. I have also brought exhibits to</p> <p>16 introduce today that are from their employee files</p> <p>17 that demonstrate that they are, in fact, tribal</p> <p>18 members, and they were, in fact, employed by the</p> <p>19 Housing Authority.</p> <p>20 THE COURT: Okay.</p> <p>21 MR. THOMPSON: With regard to the sovereign immunity</p> <p>22 argument, the only fact that needs to be determined</p> <p>23 today -- well, because it's clear that OSLH enjoys</p> <p>24 sovereign immunity as a governmental entity, that's</p> <p>25 been established under the case law, even in the</p>
<p style="text-align: right;">14</p> <p>1 non-tribal entities that consent to the jurisdiction</p> <p>2 of the tribe, and did the occurrence which led to the</p> <p>3 third-party complaint occur within the reservation</p> <p>4 boundaries. That's it. That's all we need to decide</p> <p>5 today, to determine that.</p> <p>6 THE COURT: And by reservation boundaries, is that on</p> <p>7 trust land within -- how about if it's fee land --</p> <p>8 MR. THOMPSON: Well, according to --</p> <p>9 THE COURT: (Continuing) -- a sold allotment.</p> <p>10 MR. THOMPSON: Sure. According to Red Fox, they note</p> <p>11 that even where the occurrence occurred on a state</p> <p>12 highway easement, although it was in -- because it was</p> <p>13 within the reservation boundaries, the boundaries of</p> <p>14 the reservation, that subject matter jurisdiction was</p> <p>15 appropriate in the tribal jurisdiction.</p> <p>16 So I think that the fact that it happened on</p> <p>17 trust property bolsters the argument, but it is not</p> <p>18 necessary for the finding.</p> <p>19 THE COURT: Okay. And you are saying here that this</p> <p>20 was -- the allegation, at least, or your argument is,</p> <p>21 or what you think the material fact is, the answer to</p> <p>22 that question is that this was trust land owned by the</p> <p>23 tribe --</p> <p>24 MR. THOMPSON: Owned by the trust.</p> <p>25 THE COURT: (Continuing) -- held in trust for the</p>	<p style="text-align: right;">16</p> <p>1 Weeks Construction Case sighted by the third-party</p> <p>2 plaintiffs.</p> <p>3 The only thing that needs to be determined</p> <p>4 factually is whether or not that sovereign immunity</p> <p>5 has been waived by written instrument. That's the</p> <p>6 only -- or by an act of congress. Those are the only</p> <p>7 -- the facts that we need to determine, whether it's</p> <p>8 been waived.</p> <p>9 If it hasn't been waived, it divests the core of</p> <p>10 subject matter jurisdiction it may have, and it</p> <p>11 compels dismissal as well.</p> <p>12 THE COURT: But just so as I understand your argument,</p> <p>13 hypothetically, if I grant the motion as it relates to</p> <p>14 OSLH, based on subject matter jurisdiction, based then</p> <p>15 -- and let's just be clear here, September 14th</p> <p>16 motion -- I don't even need to consider the</p> <p>17 alternative motion. I imagine you are going to make</p> <p>18 arguments that relate to the protective order</p> <p>19 regarding their sovereign immunity --</p> <p>20 MR. THOMPSON: Sure.</p> <p>21 THE COURT: (Continuing) -- but I don't need to -- in</p> <p>22 that hypothetical situation, I wouldn't have to</p> <p>23 resolve the motion. The motion to dismiss would be</p> <p>24 moot.</p> <p>25 Now, the argument or the resolution of whether or</p>

<p>17</p> <p>1 not they are immune and how far that immunity extends</p> <p>2 might not be moot, but the motion itself would be</p> <p>3 moot. Right?</p> <p>4 MR. THOMPSON: Correct, Your Honor. The issue of</p> <p>5 whether sovereign immunity divests the Court of</p> <p>6 subject matter jurisdiction, if the Court is to</p> <p>7 dispose of the claims based on it's subject -- the</p> <p>8 pure subject matter jurisdiction argument, it does not</p> <p>9 need to determine whether it is divested of its</p> <p>10 subject matter jurisdiction.</p> <p>11 THE COURT: Okay.</p> <p>12 MR. THOMPSON: It only needs to --</p> <p>13 THE COURT: Okay. That was the question I was asking.</p> <p>14 MR. THOMPSON: Okay.</p> <p>15 THE COURT: But I might have to -- well, we can take</p> <p>16 that up later. Okay. Continue.</p> <p>17 MR. THOMPSON: Sure. So, again, because we are</p> <p>18 dealing with the 12(b)(1) factual challenge of the</p> <p>19 core subject matter jurisdiction, the Court is</p> <p>20 required to resolve any factual disputes as early as</p> <p>21 possible in the litigation to determine whether it may</p> <p>22 hear the cause.</p> <p>23 In any event, conversion of the pending motion to</p> <p>24 dismiss to summary judgment motions is simply not</p> <p>25 warranted and is, in fact, disfavored by South Dakota</p>	<p>19</p> <p>1 entitled to?</p> <p>2 MR. THOMPSON: Well, they would have been entitled</p> <p>3 to discovery had they requested such discovery that is</p> <p>4 aimed at the subject matter jurisdiction and the</p> <p>5 sovereign immunity issues. They haven't done that.</p> <p>6 I have Mr. Pipe On Head here available to testify</p> <p>7 today, since we are having a hearing. We can</p> <p>8 absolutely put him on the bench, and I have some</p> <p>9 questions for him, and we can run through that.</p> <p>10 Additionally, I have got a few additional</p> <p>11 exhibits that I was intending to enter today, in</p> <p>12 addition to what has already been entered with the</p> <p>13 brief.</p> <p>14 THE COURT: Well, I contemplated that, if Mr. Pipe On</p> <p>15 Head was here, that might potentially -- I want to</p> <p>16 hear from them first. But, hypothetically, if he</p> <p>17 doesn't testify, is there anything that you -- I mean,</p> <p>18 are you asking me to allow him to testify so that you</p> <p>19 can put on these exhibits? Or are there exhibits that</p> <p>20 you want to put in anyway and --</p> <p>21 MR. THOMPSON: I intend to introduce exhibits anyway,</p> <p>22 whether he testifies or not. One of the arguments</p> <p>23 they have made in briefing is they haven't had an</p> <p>24 opportunity to cross-examine Mr. Pipe On Head, so I</p> <p>25 have brought him with me here today so that we can do</p>
<p>18</p> <p>1 Law.</p> <p>2 If the Court were to kick the can down the road</p> <p>3 on this and preclude resolution of the motion to</p> <p>4 dismiss as early as possible, OSLH and it's employee's</p> <p>5 rights to due process would be denied, and they would</p> <p>6 be exposed to significant litigation impacts from</p> <p>7 which they are otherwise protected.</p> <p>8 Accordingly, we respectfully request that the</p> <p>9 motions to dismiss be resolved without further delay.</p> <p>10 THE COURT: Okay. Before I turn to these gentlemen, I</p> <p>11 have one more question.</p> <p>12 MR. THOMPSON: Yes, Your Honor.</p> <p>13 THE COURT: Even if you are right that this should not</p> <p>14 be converted to a 56 Motion, a summary judgment</p> <p>15 motion, I have read the Hutterville Case, and I think</p> <p>16 it's Osborn, it's an 8th Circuit Case, there are still</p> <p>17 requirements.</p> <p>18 I mean, are you telling me that the affidavit of</p> <p>19 Doyle Pipe On Head is enough for me to resolve those</p> <p>20 questions of material fact, or is there something else</p> <p>21 that I need to do?</p> <p>22 I mean, those cases suggest that an evidentiary</p> <p>23 hearing, live testimony, all may be considered. So</p> <p>24 is it best to have a hearing to determine those</p> <p>25 things? Is there any level of discover they are</p>	<p>20</p> <p>1 that.</p> <p>2 THE COURT: Okay. And the documents are enrollment</p> <p>3 status?</p> <p>4 MR. THOMPSON: What I intend to introduce today are,</p> <p>5 yes, the documents that establish the enrollment</p> <p>6 status, the NAHASDA Agreement --</p> <p>7 THE COURT: Okay.</p> <p>8 MR. THOMPSON: (Continuing) -- and the documents that</p> <p>9 are submitted to NAHASDA in order to obtain that</p> <p>10 funding.</p> <p>11 And then I also brought an aerial map of the site</p> <p>12 that corresponds to the BIA's report demonstrating</p> <p>13 that this is, in fact, trust property, even though I</p> <p>14 don't think it's absolutely necessary for the Court to</p> <p>15 make its ruling, we brought that, too.</p> <p>16 THE COURT: Where are the different ways where the --</p> <p>17 well, I think I know the answer to that. Okay. Do</p> <p>18 you have anything further to add regarding this</p> <p>19 limited issue? And I guess I was -- I mean regarding</p> <p>20 all of your motions?</p> <p>21 MR. THOMPSON: Well, I guess I -- I'm still in the</p> <p>22 preliminary issues.</p> <p>23 THE COURT: And I realize that this is complicated.</p> <p>24 So what you have told me now is everything related to</p> <p>25 the underlying motion, but you haven't really gotten</p>

<p style="text-align: right;">21</p> <p>1 to the summary --</p> <p>2 MR. THOMPSON: I haven't really gotten to the</p> <p>3 substantive issue.</p> <p>4 THE COURT: (Continuing) -- to the sovereign</p> <p>5 immunity.</p> <p>6 MR. THOMPSON: I was very quickly addressing the</p> <p>7 initial matter of whether they should convert it.</p> <p>8 THE COURT: Okay.</p> <p>9 MR. THOMPSON: I have one more initial issue that I</p> <p>10 would like to discuss regarding this --</p> <p>11 THE COURT: Got you.</p> <p>12 MR. THOMPSON: Okay. So the second initial matter.</p> <p>13 The propane companies have asserted in their response</p> <p>14 brief for the first time on the eve of this hearing</p> <p>15 that they have not had an adequate opportunity to</p> <p>16 discover facts relevant to this Court's subject</p> <p>17 matter jurisdiction and OSLH's sovereign immunity,</p> <p>18 and as a result, cannot be effective today. That is</p> <p>19 false.</p> <p>20 They have had ample opportunity to discover any</p> <p>21 facts necessary to resolve these issues, however, they</p> <p>22 have made no attempt to do so.</p> <p>23 Their failures to pursue discovery of information</p> <p>24 necessary to adequately respond to the motion to</p> <p>25 dismiss should not be charged against the third-party</p>	<p style="text-align: right;">23</p> <p>1 *** **</p> <p>2 MR. THOMPSON: In the last paragraph of this letter,</p> <p>3 on the first page of this letter -- oh, I think I gave</p> <p>4 away one of my copies. Jim, I apologize. Can I steal</p> <p>5 that back from you? I'm sorry. I did not make enough</p> <p>6 copies.</p> <p>7 The last paragraph, the last full sentence it</p> <p>8 says -- and this is John Nooney stating: <i>I fully</i></p> <p>9 <i>acknowledge from conversations with you that the</i></p> <p>10 <i>Housing Authority will assert the immunity defense to</i></p> <p>11 <i>the extent that they are named as a defendant.</i></p> <p>12 <i>February 23, 2017.</i></p> <p>13 So, at a minimum within the confines of this</p> <p>14 litigation, they have had three full months to</p> <p>15 articulate an appropriately tailored discovery</p> <p>16 request that they felt was necessary to respond to the</p> <p>17 motion to dismiss after they had filed. They have</p> <p>18 issued none that address the issue raised by the</p> <p>19 motions.</p> <p>20 THE COURT: Well, what types of questions or discovery</p> <p>21 could they have conducted that would have been aimed</p> <p>22 at that?</p> <p>23 MR. THOMPSON: Your Honor, they could have simply</p> <p>24 asked for any documents that provide for a waiver of</p> <p>25 OSLH's sovereign immunity. They could have asked</p>
<p style="text-align: right;">22</p> <p>1 defendants.</p> <p>2 These third-party complaints were filed on July 11,</p> <p>3 2017. This Court's subject matter jurisdiction</p> <p>4 challenged on September 14th of 2017, and the</p> <p>5 sovereign immunity motion was filed October 20th of</p> <p>6 2017.</p> <p>7 And it should also be noted that long before</p> <p>8 litigation was initiated, the propane companies were</p> <p>9 made aware of OSLH's intent to rely on its sovereign</p> <p>10 immunity as a defense to any claims resulting from the</p> <p>11 explosion, and as a bar to this Court's jurisdiction</p> <p>12 as early as February of 2017.</p> <p>13 I informed counsel for each propane company that</p> <p>14 OSLH intended to rely on its sovereign immunity, and</p> <p>15 that's reflected in a letter Mr. Nooney sent to me on</p> <p>16 February 23rd of 2017. May I approach, Your Honor?</p> <p>17 THE COURT: Yes.</p> <p>18 MR. THOMPSON: Your Honor, I would introduce this a</p> <p>19 Hearing Exhibit A.</p> <p>20 THE COURT: Okay.</p> <p>21 *** **</p> <p>22 [REPORTER'S NOTE: Whereupon, at this point</p> <p>23 Third-Party Defendant's Exhibit A, having been first</p> <p>24 duly received, is marked for identification purposes,</p> <p>25 and is admitted into evidence.]</p>	<p style="text-align: right;">24</p> <p>1 interrogatories on that point.</p> <p>2 They could have asked interrogatories about the</p> <p>3 membership status of the third party -- the individual</p> <p>4 employee third-party defendants.</p> <p>5 They could have asked for information regarding</p> <p>6 the status of the property it was on to the extent</p> <p>7 that is necessary to establish.</p> <p>8 THE COURT: But every time they asked any type of</p> <p>9 question -- I mean, I looked through it. It looked</p> <p>10 like every time they asked a question, you objected</p> <p>11 and said, we have sovereign immunity.</p> <p>12 MR. THOMPSON: Absolutely.</p> <p>13 THE COURT: So you are saying you would not have</p> <p>14 objected to those questions?</p> <p>15 MR. THOMPSON: Because that's something that needs to</p> <p>16 be resolved right away. We don't want to be here.</p> <p>17 We want to give them all the information that they</p> <p>18 need so that we can get out of this. It's just not</p> <p>19 there though. That's the problem. There's nothing</p> <p>20 there.</p> <p>21 But -- so you have read the discovery requests.</p> <p>22 I won't need to introduce those as an exhibit. But if</p> <p>23 you look through there, they are all directed at the</p> <p>24 factual basis of the underlying occurrence. There is</p> <p>25 nothing in there that addresses the dispositive facts</p>

<p style="text-align: right;">25</p> <p>1 to be resolved by the motion to dismiss.</p> <p>2 And then, as you point out, had they requested</p> <p>3 it, we would have done it. It's not OSLH's</p> <p>4 responsibility to both draft the discovery requests</p> <p>5 for the propane companies and respond to them. That's</p> <p>6 not our job. That's their job.</p> <p>7 If they have failed to ask the right questions,</p> <p>8 fault cannot be levied against any of the third-party</p> <p>9 defendants, only against themselves. But we shouldn't</p> <p>10 be penalized for that.</p> <p>11 In any event, no amount of discovery here could</p> <p>12 yield facts that would defeat OSLH's motion to dismiss</p> <p>13 in this matter. There is no discovery that could</p> <p>14 yield and alternate conclusion that the parties to</p> <p>15 this action are tribal members or tribal governmental</p> <p>16 agency where two private propane companies who entered</p> <p>17 into consensual business relationships with its tribe</p> <p>18 or its members, and that all underlying facts occurred</p> <p>19 within the Reservation boundaries.</p> <p>20 These facts, and these facts alone, are necessary</p> <p>21 to resolve a motion to dismiss for a subject matter</p> <p>22 jurisdiction.</p> <p>23 Moreover, OSLH has not waived its sovereign</p> <p>24 immunity by written instrument. This is the only way</p> <p>25 that OSLH can waive its sovereign immunity absent a</p>	<p style="text-align: right;">27</p> <p>1 additional discovery, we request that they be</p> <p>2 required to pay our attorney's fees and costs for</p> <p>3 such additional discovery and a rehearing for these</p> <p>4 matters, which have been set for a month, and which</p> <p>5 were previously set for a hearing a month ago. So</p> <p>6 I think that fundamental fairness would require</p> <p>7 that.</p> <p>8 But, anyway, we suggest that this hearing</p> <p>9 proceed as scheduled, and that these issues be</p> <p>10 resolved as soon as possible thereafter, unless the</p> <p>11 Court would like to delay the hearing. I would ask</p> <p>12 the opportunity to call my sole witness, Mr. Pipe On</p> <p>13 Head.</p> <p>14 THE COURT: Well, what are your thoughts on him</p> <p>15 calling Mr. Pipe On Head as a witness?</p> <p>16 MR. GALBRAITH: We think Mr. Pipe On Head will be a</p> <p>17 witness at a time that we can have an evidentiary</p> <p>18 hearing on this matter in a discovery-related --</p> <p>19 THE COURT: Why can't we not do it right now?</p> <p>20 MR. GALBRAITH: Because we've not had any opportunity</p> <p>21 to -- the suggestion that discovery would have been</p> <p>22 answered is -- there's not a better -- it's</p> <p>23 ridiculous.</p> <p>24 THE COURT: Well, you didn't ask the question. I</p> <p>25 mean, you didn't ask questions about the enrollment</p>
<p style="text-align: right;">26</p> <p>1 congressional waiver, and no instruments exist that</p> <p>2 contain that.</p> <p>3 Moreover, congressional waivers are public</p> <p>4 information. They don't need discovery for that.</p> <p>5 They can just look that up. They haven't found it.</p> <p>6 THE COURT: If they have a waiver, they would have a</p> <p>7 copy of it. I mean, if you waived it to them, they</p> <p>8 would have a copy of the contract or the waiver.</p> <p>9 Right?</p> <p>10 MR. THOMPSON: Absolutely. Had there been a waiver of</p> <p>11 the claims pursuant -- a waiver of sovereign immunity</p> <p>12 for these claims, they would have it. They don't have</p> <p>13 it, because it doesn't exist. But we don't feel there</p> <p>14 is any need for additional discovery. They have</p> <p>15 slept on their rights to do that. They don't get to</p> <p>16 come in the week before trial and say, hey, hold on a</p> <p>17 second. We need to pursue discovery. That's -- they</p> <p>18 have not --</p> <p>19 THE COURT: Well, we're not before trial. I mean, we</p> <p>20 are nowhere near trial.</p> <p>21 MR. THOMPSON: The hearing. The hearing. Excuse me,</p> <p>22 Your Honor. I misspoke.</p> <p>23 THE COURT: I got a little worried there.</p> <p>24 MR. THOMPSON: And Should the Court decide to grant</p> <p>25 the propane company's untimely request to engage in</p>	<p style="text-align: right;">28</p> <p>1 status of any of the third-party defendants.</p> <p>2 MR. GALBRAITH: We did specifically ask to take a</p> <p>3 deposition related to ownership, management and</p> <p>4 operation of Units 157 and 158 related to any actions</p> <p>5 taken on behalf of the Housing Authority as it</p> <p>6 concerns any actions, requests or discussions to</p> <p>7 effectuate a defense of immunity as it concerns the</p> <p>8 incident, the explosion of 157 or 158. We did ask</p> <p>9 for --</p> <p>10 THE COURT: I get the immunity part. I think you</p> <p>11 might have an argument there. But I didn't see -- and</p> <p>12 maybe I'm wrong. Maybe if there is something there</p> <p>13 that you -- I cut you off. I apologize. I went</p> <p>14 through it pretty carefully, and I didn't see</p> <p>15 anything where you ever asked for the enrollment</p> <p>16 status or the status of any of the third-party</p> <p>17 defendants, their, for lack of a better term, tribal</p> <p>18 membership, Indian status. And I didn't see anything</p> <p>19 related to the status of the land.</p> <p>20 I mean, I think the --</p> <p>21 MR. GALBRAITH: We were whole-heartedly told at the</p> <p>22 inception of this case, Your Honor, that drafting such</p> <p>23 discovery would be a complete waste of our time. We</p> <p>24 were told that they wouldn't answer anything.</p> <p>25 We were never sent a letter that said, hey, why</p>

<p style="text-align: right;">29</p> <p>1 don't you ask us some discovery related to these 2 issues. We will give that to you. 3 We were told -- in fact, there were even a few 4 documents provided informally before they were brought 5 in, and we were told, <i>we don't have to answer any</i> 6 <i>discovery ever.</i> 7 And so to suggest now, gosh, we would have 8 answered it. This is the first time we've ever heard 9 it. This is the first time we've ever been told we 10 would have answered any discovery. We have been told, 11 without question, <i>we're not answering it, no way, no</i> 12 <i>how.</i> 13 THE COURT: Let me ask you this. You were the one, I 14 think, in your brief that brought up the Hutterville 15 Case. Is there anything in that analysis -- the South 16 Dakota Supreme Court's analysis or the underlying 17 analysis in Osborn that says -- it says that you are 18 entitled to an evidentiary hearing. 19 Does it say -- is there anything in there that 20 says -- that I missed that says you are entitled to 21 discover prior to the evidentiary hearing? 22 MR. GALBRAITH: Well, I think any -- any case we ever 23 get involved with, we are entitled to discovery, 24 period. 25 THE COURT: Even if there is no personal jurisdiction</p>	<p style="text-align: right;">31</p> <p>1 to come out good on the record, is it? 2 There is no state court jurisdiction when you 3 have an admission -- an alleged admission or action 4 concerning a Reservation Indian on the Reservation, 5 for lack of a better term. I mean, that doesn't get 6 to the immunity part, does it? 7 MR. GALBRAITH: We have a Charter that says that they 8 can consent to any jurisdiction. Their Charter -- 9 their Charter, and that's at -- 10 THE COURT: I've read the Charter. 11 MR. GALBRAITH: The Charter in Article 6-2(b) says 12 that they have the power to sue, and are authorized to 13 consent to be sued in the Oglala Sioux Tribal Courts 14 or another court of competent jurisdiction. 15 THE COURT: Did they consent? I mean, are you telling 16 me that they consented to be sued in state court? 17 MR. GALBRAITH: I'm telling you that we do not know -- 18 THE COURT: Okay. 19 MR. GALBRAITH: -- because we have never been allowed 20 to do anything. 21 THE COURT: Well, I mean, how would you not know? I 22 mean, in a relationship between your client and their 23 clients, how would you not know if they consented to 24 be sued? 25 MR. GALBRAITH: Because, Your Honor, as --</p>
<p style="text-align: right;">30</p> <p>1 over the other parties? 2 MR. GALBRAITH: Well, until there is a determination 3 that there is no subject matter jurisdiction. The 4 protective order, Your Honor, is filed based solely on 5 the Alltel Case, which this Court is very well aware 6 of, and that's based on the presumption that a 7 subpoena is a suit. It's an action. 8 THE COURT: I think it's a little behind here. Fair 9 enough. I will allow you to continue. 10 MR. GALBRAITH: As we sit here today -- I mean, what 11 we have been told in this case is, well, there's 12 nothing in any of our federal funding that provides 13 for a waiver. We do know that there's a provision for 14 some insurance coverage. We have not been provided 15 those provisions. We have not been provided 16 anything -- 17 THE COURT: Those all relate to sovereign immunity. 18 That's the alternative action though. 19 MR. GALBRAITH: Well -- 20 THE COURT: I'm asking about the underlying motion 21 they made that I don't have any jurisdiction, that 22 there is no jurisdiction in state court for a dispute 23 on the Reservation involving people or entities that 24 come onto the Reservation and transact business on the 25 Reservation, their suits against -- this is not going</p>	<p style="text-align: right;">32</p> <p>1 THE COURT: I mean, are you saying that it's a blank 2 consent? 3 MR. GALBRAITH: It could be. I mean, the federal 4 government used to require, as was seen in the Weeks 5 Case, sue or be sued language. That's not there 6 anymore. We don't dispute that. What we don't know 7 is what NAHASDA requires today. We do know, as we 8 look through -- 9 THE COURT: But that has nothing to do with where I'm 10 at. I'm still at the first motion. 11 MR. GALBRAITH: Well -- 12 THE COURT: Right? 13 MR. GALBRAITH: But this has to play in. Because, if 14 they have consented to a suit in state court, then 15 this Court has subject matter jurisdiction. 16 THE COURT: So you are saying that the individual 17 third-party defendants, Tuttle, Plenty Arrows, they 18 all consented at some point to be sued in state 19 court? 20 MR. GALBRAITH: The Housing Authority has potentially 21 consented to be sued in state court. 22 THE COURT: All right. Well, I'm a little confused. 23 But continue on. 24 MR. GALBRAITH: We -- we have then, Your Honor, the 25 NAHASDA statutes, and they have drawn the distinction</p>

<p style="text-align: center;">33</p> <p>1 between the two, between 638 and between NAHASDA, 2 which is in 4101. But we ignore Subsection 7 of the 3 4101 that says federal assistance to meet these 4 responsibilities shall be provided in a manner that 5 recognizes the right of Indian self-determination and 6 tribal self-governance by making such assistance 7 available directly to the Indian tribes or tribally 8 designated entities under authorities similar to 9 those accorded in Indian public tribes and Public Law 10 93-638 Contracts. That's in the NAHASDA statutes. 11 That's not in the 638 statutes. 12 We've both -- both third-party plaintiffs have 13 cited to the provisions of the 638 Statutes which 14 relate to waiver. And what we are saying is we don't 15 know what their waiver is in this case, if any. 16 THE COURT: That's waiver of sovereign immunity. 17 Right? 18 MR. GALBRAITH: Well, it could also be consent to 19 jurisdiction, Your Honor. Because we know in their 20 Charter, in the same sentence where they can waive 21 immunity, they can consent to jurisdiction in any 22 court of competent jurisdiction. 23 And so as we look at the three facts that -- 24 THE COURT: Can you -- well, go ahead. 25 MR. GALBRAITH: (Continuing) -- the three facts that</p>	<p style="text-align: center;">35</p> <p>1 and I'm prepared to let him testify to this and let 2 you cross-examine him, you know, yes, we're going to 3 ask to continue this hearing so we can be provided 4 some discovery that we are now being told will be 5 allowed. 6 I have not been to any hearing in this court or 7 another where I have been told, you know, you can come 8 to the hearing and go through some limited 9 cross-examination, but you are not permitted to take 10 any discover first. 11 And so, I mean, you look at when discovery was 12 first set -- standard discovery was sent actually 13 before the first motion to dismiss was filed. It was 14 sent on September 12th of 2017. We were not told, 15 guys, if you ask something related -- related to our 16 motion to dismiss, we will answer it. We were told, 17 we have immunity, you don't have jurisdiction, we are 18 not answering anything. There was no clarification, 19 no caveat. 20 We filed a notice of deposition, which included 21 issues related to immunity, ownership, management, 22 things that get into where these houses are and who 23 worked on them, what their status was. We did ask 24 about whether or not these people were employees, 25 contractors, subcontractors. We were not provided any</p>
<p style="text-align: center;">34</p> <p>1 Mr. Thompson identified for subject matter 2 jurisdiction. Tribal members or tribal entities. 3 Aside from being told that these people are tribal 4 members and were working within the scope of their 5 employment, we have nothing. Then we have -- 6 THE COURT: I agree with you there. 7 MR. GALBRAITH: Then we have consent. We have 8 nothing. And then we have within the Reservation 9 boundaries. 10 THE COURT: That's a little -- I don't know if I'm 11 inclined to just believe an affidavit, but the 12 concept that East Ridge Housing is not within the 13 Reservation boundaries is a little hard for me to get 14 my head around. 15 MR. GALBRAITH: Yeah. And that's the third -- that's 16 just one of the three facts that he identified. That 17 fact is not in the record. I think that one is 18 probably not going to be disputed that it's within 19 the tribal boundaries. But -- 20 THE COURT: Yes. But I'm not sure if the affidavit is 21 enough. 22 MR. GALBRAITH: Correct. 23 THE COURT: That's what I'm saying. 24 MR. GALBRAITH: And so as we sit here and we say, 25 well, gosh, I brought Mr. Pipe On Head along with me,</p>	<p style="text-align: center;">36</p> <p>1 information related to that. 2 And, again, we're not told, guys, if you narrow 3 this down, we will answer it. All we are told is, we 4 are not subject to anything. We are not answering it, 5 so go away. 6 And now we are told on the day of the hearing, 7 where they are asking to be dismissed from this case, 8 well, gosh, if somebody would have asked the right 9 question, we would have answered it. 10 THE COURT: But we don't know, because you didn't ask 11 it. But in fairness, they -- 12 MR. GALBRAITH: We were told very early on they won't 13 answer anything. So it's sure convenient to sit and 14 say, gosh, if you guys would have asked the right 15 question, we would have answered it, after we told 16 you, we'll answer nothing. 17 And so that was the position that was taken with 18 us very early on in this case. It was not that we 19 will answer something or tailor it down, it's just 20 we're not going to answer anything, so it's all a 21 waste of time. 22 And so, as we sit here today -- I can actually 23 say, as we sit here today, based on seeing this, we 24 have notices of depositions and subpoenas out to all 25 of the individuals that have been filed.</p>

<p style="text-align: center;">37</p> <p>1 The notices for the rest of the third-party</p> <p>2 defendants filed today. Mr. Pipe On Head, I think,</p> <p>3 was yesterday or two days ago. Because, if discovery</p> <p>4 is going to be answered, even if it's related to this</p> <p>5 usual, we'll take it.</p> <p>6 But to sit here today and suggest, well, yeah,</p> <p>7 we have always told people we won't answer it. But,</p> <p>8 if they had asked the right questions, we would have</p> <p>9 answered it. And now I will present testimony today,</p> <p>10 and I will give them a limited opportunity to</p> <p>11 cross-examine, without having had the ability to take</p> <p>12 his deposition, without having had the ability to</p> <p>13 see -- I assume he is going to get up and say that all</p> <p>14 of our NAHASDA documents don't include any consent to</p> <p>15 -- to jurisdiction.</p> <p>16 THE COURT: I don't know if I'm going to let Mr.</p> <p>17 Thompson ask that question, frankly. But that is</p> <p>18 getting a little ahead of ourselves.</p> <p>19 MR. GALBRAITH: And so that's the issue that we have</p> <p>20 is, I don't know that Mr. Pipe On Head can testify to</p> <p>21 the tribal status of other people who are not sitting</p> <p>22 here today. I don't know that he can testify to the</p> <p>23 ability or the waiver of immunity or the consent to</p> <p>24 jurisdiction.</p> <p>25 THE COURT: Okay. Well, I know that I have read the</p>	<p style="text-align: center;">39</p> <p>1 whether you were finished?</p> <p>2 MR. DAHLMEIER: Oh, pardon me. I thought you said</p> <p>3 Dahlmeier.</p> <p>4 THE COURT: I might have mumbled. But, no.</p> <p>5 Mr. Galbraith, do you have anything that you want to</p> <p>6 add before I --</p> <p>7 MR. GALBRAITH: I'm just checking through, because I</p> <p>8 had tried to take them down in the order that</p> <p>9 Mr. Thompson addressed them.</p> <p>10 THE COURT: Okay.</p> <p>11 MR. GALBRAITH: I think the Court has identified the</p> <p>12 issues related to subject matter on facial versus</p> <p>13 factual attack. Obviously, our Court has said on a</p> <p>14 facial attack that -- that the rule related to</p> <p>15 12(b)(5) does apply.</p> <p>16 So, Your Honor, we are sitting here on a factual</p> <p>17 attack. We have suggested that the courts have all</p> <p>18 said that weighing of evidence and evidentiary</p> <p>19 hearings and documents and facts are admissible to</p> <p>20 that. We have said it, and they have said it. We can</p> <p>21 do that. But I didn't think there is anything that</p> <p>22 ever suggests that I'm entitled to discovery before we</p> <p>23 do that.</p> <p>24 He addressed some of the sovereign immunity</p> <p>25 factual questions on waiver, and I will avoid that,</p>
<p style="text-align: center;">38</p> <p>1 Charter. Where would that be?</p> <p>2 MR. THOMPSON: That would be Exhibit B of our motion</p> <p>3 to dismiss for sovereign immunity, I believe.</p> <p>4 THE COURT: Exhibit B?</p> <p>5 MR. THOMPSON: Exhibit B.</p> <p>6 *** **</p> <p>7 [REPORTER'S NOTE: Whereupon, at this point</p> <p>8 the Third-Party Defendant's Exhibit B is marked for</p> <p>9 identification purposes.]</p> <p>10 *** **</p> <p>11 THE COURT: To the motion itself?</p> <p>12 MR. THOMPSON: Excuse me. To the brief in support of</p> <p>13 the motion, Your Honor. And if I could just respond</p> <p>14 to certain things he has said here today.</p> <p>15 THE COURT: Well, I do want to hear from that. And I</p> <p>16 might have a question for him first. And I do want to</p> <p>17 make sure that he -- I might want to -- I want to make</p> <p>18 sure he's done, and I think I have another -- I think</p> <p>19 it is probably fair to let the other co-defendant go</p> <p>20 first.</p> <p>21 So, Mr. Galbraith, do you have anything which you</p> <p>22 would like to add before I figure out if I have a</p> <p>23 question for you?</p> <p>24 MR. DAHLMEIER: Mr. Dahlmeier.</p> <p>25 THE COURT: Well, no. I'm wondering, Mr. Galbraith,</p>	<p style="text-align: center;">40</p> <p>1 because I know that you are sticking to subject matter</p> <p>2 jurisdiction.</p> <p>3 THE COURT: I'm more interested in it.</p> <p>4 MR. GALBRAITH: The discovery issue we have been</p> <p>5 through. You know, so then the question is asked</p> <p>6 has there been a waiver. We would have it. You</p> <p>7 know, this is a case where -- actually, the statement</p> <p>8 that -- that the propane companies provided the</p> <p>9 propane to the people who lived in the houses is not</p> <p>10 necessarily correct. It doesn't change where he was</p> <p>11 going with that. We provided our propane to the</p> <p>12 Housing Authority. I don't know that that's the same</p> <p>13 for Westco.</p> <p>14 And the issue that we have is this is not a</p> <p>15 breach of contract case where we have a contract where</p> <p>16 somebody says in the contract there is or is not a</p> <p>17 waiver. This is a negligence case. And we have</p> <p>18 situations in the past where we have tribal entities</p> <p>19 and even, particularly, housing authorities that as a</p> <p>20 result of their federal assistance, have consented to</p> <p>21 jurisdictions or waived immunity, or have done things</p> <p>22 like that.</p> <p>23 We do know that there is insurance in place in</p> <p>24 this case. And so as we sit here and say -- and I</p> <p>25 think it was said with respect to preemption, but it</p>

<p style="text-align: center;">41</p> <p>1 was also said with respect to attorney's fees, that</p> <p>2 somehow any defense costs or liability in this case is</p> <p>3 going to come down to a federal preemption or hurt the</p> <p>4 tribe. There is insurance coverage.</p> <p>5 So to the extent this Court says, I'm not letting</p> <p>6 you guys out yet, I don't know whether they have</p> <p>7 tendered this insurance, or not. But they certainly</p> <p>8 have the ability to do that.</p> <p>9 So any argument that, gosh, this is a financial</p> <p>10 hardship on the tribe, I don't think we can get there.</p> <p>11 Because we do know there is insurance coverage in</p> <p>12 place in this case.</p> <p>13 So I don't think that exists under a, hey, I'm</p> <p>14 going to let you guys conduct discovery and have an</p> <p>15 evidentiary hearing on jurisdiction or on the</p> <p>16 preemption issue.</p> <p>17 And as of my notes in response to the comments</p> <p>18 made by Mr. Thompson, that's all I have.</p> <p>19 THE COURT: Okay. So just so I'm clear, you are</p> <p>20 looking at Article 6, Powers to Be. Is this where</p> <p>21 the consent -- is that where you are saying that they</p> <p>22 can -- OSLH shall have the power to sue, and is</p> <p>23 authorized to consent and to be sued in the Oglala</p> <p>24 Sioux Tribal Courts or another court of competent</p> <p>25 jurisdiction. That is the language you are relying</p>	<p style="text-align: center;">43</p> <p>1 Honor. I would just join in their arguments.</p> <p>2 THE COURT: Okay. And I'm not really quite sure you</p> <p>3 joined -- you joined one of the arguments, Mr. Leach.</p> <p>4 I'm really not sure what your position to join them</p> <p>5 is. But do you have anything to add before I turn</p> <p>6 back to --</p> <p>7 MR. LEACH: No. I think Mr. Thompson is well</p> <p>8 qualified to address the issues, Your Honor.</p> <p>9 THE COURT: Mr. Thompson?</p> <p>10 MR. THOMPSON: Yes, Your Honor. You know, this</p> <p>11 suggestion that we would have just flat out denied</p> <p>12 everything and anything, and that I have made -- that</p> <p>13 is just not true.</p> <p>14 We have provided probably a thousand documents</p> <p>15 prior to this litigation being initiated. We have</p> <p>16 been trying to -- we haven't been just stonewalling</p> <p>17 them. We have given them nearly everything we have.</p> <p>18 Also, once that subpoena was issued, the 30(b)(6)</p> <p>19 was issued, I spoke with Mr. Nooney on the phone, and</p> <p>20 I said, are you going to withdraw this thing? We have</p> <p>21 sovereign immunity. He said, no. I said, we can't</p> <p>22 just be answering and going into a deposition with</p> <p>23 47 different topics. I said, look, you are not</p> <p>24 entitled to that.</p> <p>25 You know, if you want to talk about sovereign</p>
<p style="text-align: center;">42</p> <p>1 on?</p> <p>2 MR. GALBRAITH: They have the ability to consent to be</p> <p>3 sued in this court, absolutely.</p> <p>4 THE COURT: There is a big difference between</p> <p>5 consenting to be sued and me actually having subject</p> <p>6 matter jurisdiction though. Right? If I don't have</p> <p>7 subject matter jurisdiction because the South Dakota</p> <p>8 Constitution -- hypothetically, if the South Dakota</p> <p>9 Constitution is telling me that I don't have</p> <p>10 jurisdiction, and if the South Dakota Supreme Court is</p> <p>11 telling me I don't have jurisdiction, and if the U.S.</p> <p>12 Supreme Court is telling me I don't have jurisdiction,</p> <p>13 they can't stipulate to jurisdiction, can they? Is</p> <p>14 that what you are saying?</p> <p>15 MR. GALBRAITH: I think they can. But even beside</p> <p>16 that fact --</p> <p>17 THE COURT: Okay.</p> <p>18 MR. GALBRAITH: (Continuing) -- I think we are all in</p> <p>19 agreement that there is a factual issue here that</p> <p>20 needs to be addressed. They have asked for an</p> <p>21 evidentiary hearing. We will ask for an evidentiary</p> <p>22 hearing, but we will ask for discovery on those issues</p> <p>23 before we get to that hearing.</p> <p>24 THE COURT: Okay. Mr. Dahlmeier?</p> <p>25 MR. DAHLMEIER: I don't have anything to add, Your</p>	<p style="text-align: center;">44</p> <p>1 immunity and subject matter jurisdiction, I think that</p> <p>2 I said that I would be more than willing to do that.</p> <p>3 But he said, no, we should just resolve all of it at</p> <p>4 once, and I said, okay.</p> <p>5 So they also had the ability to move to compel.</p> <p>6 If they felt they needed that, they could have done</p> <p>7 that. They didn't do it.</p> <p>8 He keeps saying that, we weren't told that we</p> <p>9 could -- that you would answer discovery. Well, how</p> <p>10 is it my job to tell them how to do their job? I</p> <p>11 don't understand that.</p> <p>12 The burden of proof is on them. They need to</p> <p>13 meet their burdens. They didn't do so.</p> <p>14 Now, with regard to the Charter, the Charter is</p> <p>15 -- the language that we have been discussing is the</p> <p>16 method of waiver of sovereign immunity. It says it</p> <p>17 needs to be waived, one, explicitly; two, in a written</p> <p>18 instrument. That has not happened here. There is</p> <p>19 nothing out there that says, you can come sue us for</p> <p>20 the damages as a result of this explosion in state</p> <p>21 court.</p> <p>22 We are here throughout this litigation contesting</p> <p>23 jurisdiction, contesting the fact that we waived our</p> <p>24 sovereign immunity. This isn't as if we are</p> <p>25 consenting. We are here fighting it.</p>

<p style="text-align: right;">45</p> <p>1 And the jurisdiction provision in there, Your 2 Honor, simply authorizes the Housing Authority, OSLH, 3 to waive its sovereign immunity in any jurisdiction it 4 chooses. But there has to be a waiver of sovereign 5 immunity. This is -- that has to be read together as 6 one clause. 7 So they talk about NAHASDA and 638 Contracts. 8 Look, 638 -- OSLH doesn't operate pursuant to the 638 9 Contract. There's nothing in there, nothing. 10 He talked about consent versus waiver. I think 11 he hit it on the nose. There is no consent. There 12 hasn't been a waiver. There is no consent. 13 And I believe that an affidavit is competent 14 evidence under the Hutterville Case. It says 15 specifically -- explicitly in there that affidavits 16 are competent evidence when resolving a motion to 17 dismiss a factual challenge under 12(b)(1). 18 And with regard to insurance. Look. Insurance 19 hasn't -- they don't -- they haven't stated whether 20 they are operating under a reservation of rights. 21 In fact, I don't know. I'm not coverage counsel. 22 And, Your Honor, insurance hasn't been established as 23 available here. 24 So I think it's prejudicial to proceed with that 25 motion when, in fact, that isn't established in this</p>	<p style="text-align: right;">47</p> <p>1 substantive arguments. 2 THE COURT: Well, this is what -- this is my 3 interpretation of the Hutterville Hutterian Brethren 4 versus Waldner Case, which is cited by multiple 5 parties in this case. 6 This is 2010 S.D. 86, picking it up in the 7 discussion section around Paragraph 20. It says, 8 <i>When deciding a motion under 12(b)(1)</i> -- and that's 9 what I'm doing here. And so the first ruling, I guess 10 I am making, is I don't think -- this is not 11 converted to a summary judgment, because it's not a 12 12(b)(5) Motion. 13 This is a 12 -- all three of these various 14 motions to dismiss brought by the third-party 15 defendants are 12(b)(1) subject matter jurisdiction. 16 Well, are 12(b)(1). 17 The Hutterville Case instructs the courts to 18 consider matters outside the pleadings. It goes on 19 quoting Osborn versus United States, an Eighth Circuit 20 Case, a 1998 Circuit Case found at 918 Fed 2nd 724 21 that, <i>When deciding a motion under 12(b)(1) the Court</i> 22 <i>must distinguish between a facial attack and a factual</i> 23 <i>attack.</i> 24 Well, I think there is a consensus here that this 25 is a factual attack. This isn't where I facially can</p>
<p style="text-align: right;">46</p> <p>1 case. 2 Yeah. They haven't asked for everything. And 3 had they asked for it, again, they would have gotten 4 it. But at this time, at this hearing, when we are 5 ready to resolve these issues, yeah, we're not going 6 to consent to more discovery right now. We have had 7 three months to do it, but it hasn't been done. 8 And I guess just to comment on the insurance 9 issue, I was going to get to this in a substantive 10 argument, but I might as well address it now since we 11 are talking about insurance. 12 The purchase of insurance is not a waiver or an 13 indication that sovereign immunity has been waived. 14 And there is ample authority on that cited in my reply 15 brief. 16 Insurance is available to limit exposure and 17 protect the Housing Authority in the event that 18 sovereign immunity is waived, is abrogated or is 19 ignored. The insurance is just an extra 20 precautionary measure. It's not a waiver explicit, or 21 otherwise, of sovereign immunity. 22 THE COURT: Anything else? 23 MR. THOMPSON: Well, Your Honor, I guess it would 24 depend on whether we are going to be able to call our 25 witness, otherwise, I would just move into the</p>	<p style="text-align: right;">48</p> <p>1 look at the pleadings. 2 Frankly, I don't think -- I looked at the 3 third-party complaint, and they are silent on many of 4 the issues. They are silent on sovereign immunity. 5 They are silent on the status of the land at issue. 6 They are silent on the enrollment status of the 7 players. 8 So, in quoting the Osborn Case, the Hutterville 9 Case continues. In a factual attack the Court 10 considers matters outside the pleadings, and the 11 non-moving party does not have the benefit of the 12 12(b)(6) safeguards. 13 So we don't necessarily pause things in the same 14 way that we do if we convert it. In a factual attack 15 the Court must also weigh the evidence and resolve 16 disputed issues of fact affecting the merits of the 17 jurisdictional dispute. 18 And then it goes on to quote Osborn again. 19 Because at issue in a 12(b)(1) Motion is the Trial 20 Court's jurisdiction. It's very power to hear the 21 case. There is a substantial authority that the 22 Trial Court is free to weigh the evidence and satisfy 23 itself as to the existence of its power to hear the 24 case. 25 In short, no presumptive truthfulness attaches to</p>

<p style="text-align: right;">49</p> <p>1 the plaintiff's allegations. And how I read that is, 2 even if they would have alleged that they were 3 non-tribal members or this was a tribal -- there would 4 be no presumption there. I would have to still weigh 5 the evidence. I think that's what that means. 6 And then it continues. And the existence of 7 disputed material facts would not preclude the trial 8 Court from evaluating for itself the merits of the 9 jurisdictional claims. Which I read to be, even if 10 there are disputed facts -- the existence of disputed 11 facts, if I'm satisfied that there is no -- well, 12 basically, if I'm satisfied as to jurisdiction, or 13 not, that's the final end of this. That should not 14 preclude the Trial Court from evaluating for itself 15 the merits of the jurisdictional claims. 16 Then it goes on to say that that evidentiary -- 17 and this is kind of paraphrasing the sentence that the 18 Supreme Court in South Dakota left out of Osborn. It 19 paraphrases it though. 20 <i>That evidentiary hearings, affidavits, documents</i> 21 <i>and live testimony may all be considered to resolve</i> 22 <i>the subject matter jurisdiction dispute.</i> 23 My sense coming into this hearing was that if 24 Mr. Pipe On Head was here, that I would consider his 25 testimony.</p>	<p style="text-align: right;">51</p> <p>1 of cases, is what I'm saying, to consider how we get 2 that evidence. 3 I'm not satisfied, I don't think, with the 4 affidavit itself. I will allow you to testify. You 5 are requesting for him to testify. Do you want to do 6 it right now? Do you want to take a short break? 7 MR. GALBRAITH: Yes. 8 THE COURT: And are you willing to share some of this 9 stuff before the testimony? 10 MR. THOMPSON: Willing to share some of what stuff, 11 Your Honor? 12 THE COURT: Some of the stuff you are going to go over 13 with him. 14 MR. THOMPSON: Oh, absolutely. I can pass that out 15 right now. 16 THE COURT: All right. So how much time do you guys 17 need? Do you want to take ten minutes? Mr. Nooney, 18 do you -- Mr. Dahlmeier? 19 MR. NOONEY: It depends on what he's going to give us, 20 I guess. 21 MR. THOMPSON: I have got -- I have got just a few 22 documents. 23 MR. NOONEY: All right. Can we take a look at what he 24 has? 25 THE COURT: And just to be a little ahead of myself,</p>
<p style="text-align: right;">50</p> <p>1 Now, I'm not positive that after hearing his 2 testimony I would be in a better position to resolve 3 the issue. I might. I might, after hearing his 4 testimony, figure out where we are at. But I am 5 inclined to allow him to testify. 6 Without making a final ruling, I don't think that 7 the third-party plaintiffs are necessarily entitled to 8 discovery at this stage, because I haven't determined 9 whether or not there is actual subject matter 10 jurisdiction or this is a proper forum. 11 I also note that nothing in this recitation of 12 what the Court is supposed to do in Hutterville or in 13 Osborn talks about having discovery. 14 I do note that there might be in one of the -- 15 one of the cases or the other that there might have 16 been depositions that had been done. But it doesn't 17 say that you have to -- it says do it at the earliest 18 convenience, I believe, is what it says. 19 So I'm inclined to take his testimony. I'm not 20 necessarily inclined to say that after hearing it I 21 might not allow the third-party plaintiffs to renew 22 their motion or to ask for more time or to go forward 23 appropriately. 24 But I think it is appropriate coming into here -- 25 well, I think I have wide latitude under this series</p>	<p style="text-align: right;">52</p> <p>1 I'm not sure -- I will allow you to make your record. 2 But even if -- my thought is I can take this evidence 3 however I want. 4 And even if I take more evidence in a different 5 form later that, even if it includes discovery, 6 depositions, interrogatories, I don't think there is 7 anything that precludes me from taking this form now, 8 and then figuring out where I am at the end of it. So 9 does anybody want to make a short record before we 10 take a short recess? 11 MR. GALBRAITH: No, Your Honor. 12 THE COURT: All right. I will check back with you in 13 about ten minutes, or let me know. 14 *** *** *** 15 [REPORTER'S NOTE: At this point a brief 16 recess was held; whereupon, the following proceedings 17 were thereafter conducted.] 18 *** *** *** 19 THE COURT: Just for the sake of the record. Why we 20 took a quick recess is I suggested -- or I went over 21 what I think the scope of the Court's ability to take 22 evidence -- to weigh evidence regarding 12(b)(1)'s 23 issues. I think that it includes or allows me to take 24 the testimony of Mr. Pipe On Head. Are you ready to 25 proceed?</p>

<p style="text-align: right;">53</p> <p>1 MR. THOMPSON: Yes, Your Honor.</p> <p>2 THE COURT: Does anybody want to make a record before</p> <p>3 we do this?</p> <p>4 MR. GALBRAITH: Nothing beyond what --</p> <p>5 THE COURT: Beyond what I made. Okay.</p> <p>6 MR. GALBRAITH: Yes.</p> <p>7 THE COURT: Okay. Well, I will allow you to --</p> <p>8 MR. GALBRAITH: I guess, Your Honor, just for my -- as</p> <p>9 opposed to objecting to every question, a standing</p> <p>10 objection that the questions have not been subject to</p> <p>11 discovery.</p> <p>12 THE COURT: That's fair.</p> <p>13 MR. GALBRAITH: Okay.</p> <p>14 THE COURT: And so you are objecting. You are</p> <p>15 basically saying that you should have had discovery</p> <p>16 before we --</p> <p>17 MR. GALBRAITH: An objection to every question that</p> <p>18 it's facts not previously disclosed or subject to</p> <p>19 discovery.</p> <p>20 THE COURT: That's fair. Okay. Do you want that</p> <p>21 objection, too, Mr. Dahlmeier?</p> <p>22 MR. DAHLMEIER: Yes, Your Honor. Thank you.</p> <p>23 MR. THOMPSON: I will call my witness, Mr. Pipe On</p> <p>24 Head.</p> <p>25 *** **</p>	<p style="text-align: right;">55</p> <p>1 Q Were you employed in that position at the time of the</p> <p>2 explosion that is the subject of this lawsuit?</p> <p>3 A Yes.</p> <p>4 Q And can you tell me what structure was involved in the</p> <p>5 explosion at issue?</p> <p>6 A The structure was a home residence that was a duplex.</p> <p>7 So it was basically two houses that are together.</p> <p>8 Q Okay. And did your position change following the</p> <p>9 explosion?</p> <p>10 A Yes. Briefly, in 2017, I was the acting CEO for -- me</p> <p>11 and Vince Martin were acting CEOs for a period of</p> <p>12 about eight months.</p> <p>13 Q And why is it that you stepped into that role?</p> <p>14 A Our former CEO, Paul Iron Cloud, passed away.</p> <p>15 Q Are you still in that position?</p> <p>16 A No, I'm not. I am back as the chief contracts</p> <p>17 officer.</p> <p>18 Q Okay. And so with regards to all times relevant to</p> <p>19 this lawsuit in 2016 to the present, you have either</p> <p>20 been the chief contracts officer or the acting joint</p> <p>21 CEO. Correct?</p> <p>22 A Yes.</p> <p>23 Q Are you familiar with OSLH's structure and operation</p> <p>24 generally?</p> <p>25 A Yes, I am.</p>
<p style="text-align: right;">54</p> <p>1 DOYLE PIPE ON HEAD, having been called as a</p> <p>2 witness herein on behalf of counsel for the</p> <p>3 third-party defendant, and after having been first</p> <p>4 duly sworn, was examined and testified as follows:</p> <p>5 EXAMINATION</p> <p>6 BY MR. THOMPSON:</p> <p>7 Q Sir, would you state your full name for the record,</p> <p>8 please?</p> <p>9 A My name is Doyle Pipe On Head.</p> <p>10 Q And, Doyle, we've had an opportunity to meet before,</p> <p>11 but is it okay if I refer to you as Doyle?</p> <p>12 A Yes.</p> <p>13 Q Doyle, where are you employed?</p> <p>14 A I work at Oglala Sioux Lakota Housing.</p> <p>15 Q Okay. And I'm going to refer to that as OSLH. But</p> <p>16 when did you begin working with OSLH?</p> <p>17 A I started working there in May of 2006.</p> <p>18 Q And in 2016 what was your position with OSLH?</p> <p>19 A I was the chief contracts officer.</p> <p>20 Q And what does that position entail? What do you do in</p> <p>21 that position?</p> <p>22 A I oversee procurement, and I help -- I supervise a</p> <p>23 number of different departments for the organization.</p> <p>24 Q And do you review contracts that OSLH enters into?</p> <p>25 A Yes, I do.</p>	<p style="text-align: right;">56</p> <p>1 Q What is OSLH?</p> <p>2 A OSLH is a tribally designated housing entity.</p> <p>3 Q And what functions does OSLH perform for the tribe?</p> <p>4 A OSLH operates and owns and manages low-rent housing</p> <p>5 for -- kind of like public housing for the tribal</p> <p>6 residents.</p> <p>7 Q Is it public housing?</p> <p>8 A It is very similar to public housing.</p> <p>9 Q Okay. But is OSLH a private business?</p> <p>10 A No, it is not.</p> <p>11 Q Is it a governmental agency of the tribe?</p> <p>12 A Yes, it is.</p> <p>13 Q Okay. And does OSLH perform maintenance on its rental</p> <p>14 units?</p> <p>15 A Yes, we do.</p> <p>16 Q Does OSLH renovate its rental units when required?</p> <p>17 A Yes.</p> <p>18 Q Did OSLH ever operate under a different name?</p> <p>19 A When the organization was first created, I believe the</p> <p>20 name -- the official name that they had was Oglala</p> <p>21 Sioux Housing Authority.</p> <p>22 Q And then it subsequently changed to OSLH?</p> <p>23 A Yes.</p> <p>24 Q But it is the same entity?</p> <p>25 A Yes, it is.</p>

<p style="text-align: right;">57</p> <p>1 Q And how was OSLH created?</p> <p>2 A How was it created?</p> <p>3 Q Yes. How was it created?</p> <p>4 A Well, the tribal housing -- the Oglala Sioux Tribe is</p> <p>5 the one that had applied for funding under HUD, which</p> <p>6 is Housing and Urban Development. And they requested</p> <p>7 authorization to put in the Indian Housing Block</p> <p>8 Grant, or apply for public housing. And that's how</p> <p>9 the organization initially got started.</p> <p>10 Q Did the tribe issue any sort of document that created</p> <p>11 OSLH?</p> <p>12 A They created a Charter.</p> <p>13 Q Okay. And have you ever reviewed the Charter?</p> <p>14 A Yes, I have.</p> <p>15 Q And pursuant to that Charter did the tribe</p> <p>16 explicitly extend its sovereign immunity protections</p> <p>17 to OSLH?</p> <p>18 MR. GALBRAITH: Objection.</p> <p>19 THE COURT: What is the objection?</p> <p>20 MR. GALBRAITH: Foundation, hearsay, calls for a legal</p> <p>21 conclusion.</p> <p>22 THE COURT: Sustained.</p> <p>23 MR. THOMPSON: I will go ahead and enter -- I guess we</p> <p>24 will enter it as an exhibit again. This is already an</p> <p>25 exhibit on the record, but we will go ahead and make</p>	<p style="text-align: right;">59</p> <p>1 Q Do you recognize that document, Doyle?</p> <p>2 A Yes, I do.</p> <p>3 Q And what is that document?</p> <p>4 A It's the Charter that creates the Oglala Sioux Lakota</p> <p>5 Housing.</p> <p>6 Q Okay. And is this the current Charter that Housing</p> <p>7 operates under, the most current version of it?</p> <p>8 A Yes, it is.</p> <p>9 Q Okay. And would you turn to Page 9, please?</p> <p>10 A Okay.</p> <p>11 Q Okay. On Page 9, in Section 2 there, do you see where</p> <p>12 the Subsection B is?</p> <p>13 A Yes.</p> <p>14 Q Will you read that into the record, please?</p> <p>15 MR. GALBRAITH: And I think that before we read it</p> <p>16 into the record or testify from it, are we going to</p> <p>17 offer it?</p> <p>18 MR. THOMPSON: I have offered it as Exhibit B.</p> <p>19 THE COURT: And I don't know that you have offered</p> <p>20 it.</p> <p>21 MR. THOMPSON: Oh, I thought I did. I apologize. I</p> <p>22 am offering it as Exhibit B.</p> <p>23 THE COURT: Any objection?</p> <p>24 MR. THOMPSON: And it is already an exhibit in the</p> <p>25 action.</p>
<p style="text-align: right;">58</p> <p>1 this Hearing Exhibit B.</p> <p>2 THE COURT: And what are you marking?</p> <p>3 MR. THOMPSON: I am marking the Charter.</p> <p>4 THE COURT: Okay.</p> <p>5 MR. THOMPSON: The Charter of the Oglala Sioux Lakota</p> <p>6 Housing.</p> <p>7 *** **</p> <p>8 [REPORTER'S NOTE: Whereupon, at this point</p> <p>9 the third-party defendant's Exhibit B, is marked for</p> <p>10 identification purposes.]</p> <p>11 *** **</p> <p>12 EXAMINATION CONTINUED</p> <p>13 BY MR. THOMPSON:</p> <p>14 Q Doyle, I'm just going to hand you this Exhibit B, and</p> <p>15 would you take a look at that, please?</p> <p>16 A Yes.</p> <p>17 MR. THOMPSON: Here is a copy for you.</p> <p>18 MR. GALBRAITH: Thank you.</p> <p>19 THE COURT: And while you do that, Mr. Dahlmeier, are</p> <p>20 you waiting for a plane, either one of you, just out</p> <p>21 of curiosity?</p> <p>22 MR. DAHLMEIER: No, Your Honor.</p> <p>23 *** **</p> <p>24 EXAMINATION CONTINUED</p> <p>25 BY MR. THOMPSON:</p>	<p style="text-align: right;">60</p> <p>1 MR. GALBRAITH: Your Honor, I am going to object. I</p> <p>2 don't see that it is signed. I don't know if it's a</p> <p>3 document that would be signed. It is certainly not an</p> <p>4 original. It suggests that it's adopted by a tribal</p> <p>5 ordinance. I don't have a copy of that tribal</p> <p>6 ordinance. I don't know if Mr. Pipe On Head was there</p> <p>7 when it was entered or took any part in the Tribal</p> <p>8 Ordinance 07-43 or the entry of this Charter.</p> <p>9 So I'm going to object based on foundation. I</p> <p>10 don't think it's the best evidence. I don't know that</p> <p>11 it's original or signed. I will object.</p> <p>12 MR. THOMPSON: Your Honor, there is no signature line</p> <p>13 on here, indicating that it was never signed.</p> <p>14 This document, as Mr. Pipe On Head just testified</p> <p>15 to, is a document which he recognizes as the Charter</p> <p>16 under which OSLH operates under. He is an official</p> <p>17 and the former CEO, and he would know, and I think</p> <p>18 that that foundation should be sufficient.</p> <p>19 THE COURT: I'm not concerned about the originality of</p> <p>20 it. Going forward, I probably don't want too much</p> <p>21 talking objections or responses. But I think there is</p> <p>22 barely enough foundation here.</p> <p>23 Also, because this is -- I recognize this isn't a</p> <p>24 jury matter, so I am inclined to -- I mean, it's</p> <p>25 already in the record. I'm not really too concerned</p>

<p style="text-align: right;">61</p> <p>1 about it being in the record.</p> <p>2 If there is a reasoning behind his lacking the</p> <p>3 knowledge that I should just disregard what it says, I</p> <p>4 will do that. But I'm not really -- I mean, I guess I</p> <p>5 can't get my head around it anyway, because you are</p> <p>6 both asking me to look at the Charter. Right?</p> <p>7 So why can't -- I mean, why wouldn't I look at</p> <p>8 the Charter and put it in the record?</p> <p>9 MR. GALBRAITH: I'm just making my record, Your</p> <p>10 Honor.</p> <p>11 THE COURT: Okay. So, I think it's barely enough</p> <p>12 foundation.</p> <p>13 MR. THOMPSON: With barely enough foundation I will</p> <p>14 proceed.</p> <p>15 THE COURT: So it is received.</p> <p>16 *** **</p> <p>17 [REPORTER'S NOTE: Whereupon, at this point</p> <p>18 third-party defendant's Exhibit B, having been first</p> <p>19 duly marked for identification purposes, is hereby</p> <p>20 offered and received into evidence.]</p> <p>21 *** **</p> <p>22 EXAMINATION CONTINUED</p> <p>23 BY MR. THOMPSON:</p> <p>24 Q Would you, please, read that Subsection B into the</p> <p>25 record, please?</p>	<p style="text-align: right;">63</p> <p>1 A Yes.</p> <p>2 Q And how is OSLH funded?</p> <p>3 A The primary source of funding is through HUD or</p> <p>4 NAHASDA funding.</p> <p>5 Q Okay. So what -- what type of funding do you receive</p> <p>6 from HUD?</p> <p>7 A It's an Indian housing block grant. It's similar to</p> <p>8 public housing grants.</p> <p>9 Q Okay. And HUD is funded through NAHASDA?</p> <p>10 A Yes.</p> <p>11 Q For Indian block grants?</p> <p>12 A Yes.</p> <p>13 Q Okay. And so OSLH would apply to obtain block grants</p> <p>14 through HUD. Correct?</p> <p>15 A Yes.</p> <p>16 Q Is there a written document that demonstrates the</p> <p>17 relationship between HUD and OSLH?</p> <p>18 A Yes. We have an Indian Housing Plan. It is the</p> <p>19 application for funding for our housing activities.</p> <p>20 Q And then what do you do with that plan?</p> <p>21 A The Indian Housing Plan is where we put in our</p> <p>22 activities for the year.</p> <p>23 Q Where do you submit that Indian Housing Plan?</p> <p>24 A We submit it to our -- to the original HUD Office.</p> <p>25 Q And why do you submit it to HUD?</p>
<p style="text-align: right;">62</p> <p>1 A The Tribe confers on OSLH sovereign immunity from suit</p> <p>2 to the same extent that the Tribe would have such</p> <p>3 sovereign immunity if it were engaged in the</p> <p>4 activities undertaken by the OSLH.</p> <p>5 OSLH shall have the power to sue and is</p> <p>6 authorized to consent to be sued in the Oglala Sioux</p> <p>7 Tribal Courts or another court of competent</p> <p>8 jurisdiction, provided, however, that no such consent</p> <p>9 to suit shall be effective against OSLH unless such</p> <p>10 OSLH consent (1) is explicit, and (2) is contained in</p> <p>11 a written contract, agreement, or commercial documents</p> <p>12 to which the OSLH is a party. In no case shall any</p> <p>13 such recovery exceed the assets of OSLH.</p> <p>14 Q As the chief contracts officer for OSLH, is that</p> <p>15 consistent with your understanding of the requirements</p> <p>16 to waive sovereign immunity?</p> <p>17 A Yes.</p> <p>18 Q Does OSLH or its employees operate or perform any</p> <p>19 services outside of the Reservation boundaries?</p> <p>20 A No, we don't.</p> <p>21 Q So all work that OSLH and its employees perform is</p> <p>22 conducted within the Oglala Sioux Reservation?</p> <p>23 A Yes.</p> <p>24 Q Are you familiar with OSLH's funding sources and</p> <p>25 processes by which it obtains funding?</p>	<p style="text-align: right;">64</p> <p>1 A So we can get operating funds from HUD.</p> <p>2 Q Does HUD issue any sort of document that memorializes</p> <p>3 the agreement for funding between OSLH?</p> <p>4 A Yes. Every year we have a funding agreement that we</p> <p>5 sign with HUD.</p> <p>6 MR. THOMPSON: I'm going to offer two exhibits here</p> <p>7 for you to take a look at, Exhibits C and D. And</p> <p>8 these are --</p> <p>9 MR. GALBRAITH: Can you tell me which they are?</p> <p>10 MR. THOMPSON: Yes. From just representing here that</p> <p>11 first is a letter from HUD to OSLH, combined with what</p> <p>12 is -- and then the Indian Housing Plan Performance</p> <p>13 Report is Exhibit D.</p> <p>14 *** **</p> <p>15 [REPORTER'S NOTE: Whereupon, at this point</p> <p>16 third-party defendant's Exhibits C and D, are hereby</p> <p>17 marked for identification purposes.]</p> <p>18 *** **</p> <p>19 EXAMINATION CONTINUED</p> <p>20 BY MR. THOMPSON:</p> <p>21 Q So would you just take a minute to look through those</p> <p>22 for a second?</p> <p>23 A (The Witness Complies)</p> <p>24 MR. THOMPSON: Your Honor, may I approach?</p> <p>25 THE COURT: Please.</p>

<p style="text-align: right;">65</p> <p>1 MR. THOMPSON: And here is Exhibit B for you.</p> <p>2 *** **</p> <p>3 EXAMINATION CONTINUED</p> <p>4 BY MR. THOMPSON:</p> <p>5 Q Take your time, Doyle, and let me know when you have</p> <p>6 had an opportunity to look at them.</p> <p>7 A I did.</p> <p>8 Q Do you recognize these documents, Doyle?</p> <p>9 A Yes, I do.</p> <p>10 Q And why do you recognize them?</p> <p>11 A Because these are the documents that we signed with</p> <p>12 HUD.</p> <p>13 Q Okay. So you have reviewed these before?</p> <p>14 A Yes, I have.</p> <p>15 Q Okay. And, Doyle, can you tell me what is Exhibit C,</p> <p>16 please?</p> <p>17 A Exhibit C is the funding grant agreement.</p> <p>18 Q Okay. And does the language on these annual funding</p> <p>19 letters, the agreements, vary from year to year?</p> <p>20 A They are usually pretty much the same.</p> <p>21 Q Did OSLH waive its sovereign immunity in this</p> <p>22 document?</p> <p>23 MR. GALBRAITH: Objection, foundation --</p> <p>24 A No, we didn't.</p> <p>25 MR. GALBRAITH: (Continuing) -- and calls for a legal</p>	<p style="text-align: right;">67</p> <p>1 activities are going to be for the year and how the</p> <p>2 funding is going to be utilized.</p> <p>3 And then after the funding year is over we report</p> <p>4 back on the activities and our performance in the</p> <p>5 annual performance report, which is at the back end</p> <p>6 of this document.</p> <p>7 Q Okay. And this is the document that you referenced</p> <p>8 earlier that you said would be submitted to HUD in</p> <p>9 order to obtain funding. Correct?</p> <p>10 A Yes.</p> <p>11 Q And in our Exhibits C and D, what year were those</p> <p>12 submitted and received?</p> <p>13 A These are the documents for the year 2016.</p> <p>14 Q Okay. And did you -- have you reviewed this Indian</p> <p>15 Housing Plan and Annual Performance Report before</p> <p>16 today?</p> <p>17 A Yes, I have.</p> <p>18 Q Is there any language in that document that discusses</p> <p>19 sovereign immunity?</p> <p>20 A No, it doesn't.</p> <p>21 Q Is there any language in that document that discusses</p> <p>22 a consent to be sued?</p> <p>23 A No, it doesn't.</p> <p>24 Q Did OSLH intend to waive its sovereign immunity by</p> <p>25 that document?</p>
<p style="text-align: right;">66</p> <p>1 conclusion.</p> <p>2 THE COURT: It is sustained. It calls for a legal</p> <p>3 conclusion.</p> <p>4 Q Is sovereign immunity mentioned anywhere in that</p> <p>5 document?</p> <p>6 A No, it isn't.</p> <p>7 Q Is the word <i>consent to suit</i> mentioned anywhere in that</p> <p>8 document?</p> <p>9 A No, it isn't.</p> <p>10 Q Doyle, do you know what a waiver of sovereign immunity</p> <p>11 is?</p> <p>12 A Yes, I do.</p> <p>13 Q Okay. And you are authorized to waive sovereign</p> <p>14 immunity to obtain funding. Correct?</p> <p>15 A Yes.</p> <p>16 Q But there is no language in this document that tends</p> <p>17 to show that?</p> <p>18 A No, there isn't.</p> <p>19 Q All right. Doyle, can you tell me what Exhibit D is,</p> <p>20 please?</p> <p>21 A Exhibit D is -- it is an Indian Housing Plan, and it</p> <p>22 also actually doubles as our annual performance</p> <p>23 report at the end of the year. At the beginning of</p> <p>24 the year, before the year starts, we file the</p> <p>25 Indian Housing Plan to demonstrate to HUD what our</p>	<p style="text-align: right;">68</p> <p>1 MR. GALBRAITH: Objection, foundation, calls for a</p> <p>2 legal conclusion.</p> <p>3 MR. THOMPSON: It talks about intent.</p> <p>4 THE COURT: No. I think he has laid foundation. And</p> <p>5 whether or not they actually waived it is a legal</p> <p>6 conclusion. But I don't know if you are necessarily</p> <p>7 asking that. You are just asking if he thinks they</p> <p>8 waived it. So I will allow it. But I'm going to</p> <p>9 determine, if appropriate, whether or not it actually</p> <p>10 is waived.</p> <p>11 A No, I believe it doesn't waive sovereign immunity.</p> <p>12 Q And OSLH didn't intend to waive its sovereign immunity</p> <p>13 by either Exhibit D or Exhibit C. Correct?</p> <p>14 A Correct.</p> <p>15 Q Okay. Does OSLH operate pursuant to a 638 Contract</p> <p>16 with the United States Government?</p> <p>17 A No.</p> <p>18 Q Other than Exhibits C and D, has OSLH contracted with</p> <p>19 the United States Government to obtain funding?</p> <p>20 A No.</p> <p>21 Q Are you familiar with OSLH's current and former</p> <p>22 officials and employees who are named as defendants</p> <p>23 in this lawsuit, Richard Hill, Derek Janis, Wes</p> <p>24 Cottier, William White, Ben Plenty Arrows, Brandon</p> <p>25 Shangreau, Robin Tuttle, Tom Waters and Renaldo</p>

<p style="text-align: right;">69</p> <p>1 Two Bulls?</p> <p>2 A Yes, I am familiar with them.</p> <p>3 Q And are you familiar with their employment status and</p> <p>4 enrollment status?</p> <p>5 A Yes, I am.</p> <p>6 Q Are all of the individuals that I just named still</p> <p>7 employed with OSLH?</p> <p>8 A All of them except for one.</p> <p>9 Q And which one is that?</p> <p>10 A That's that Renaldo.</p> <p>11 Q Renaldo Two Bulls?</p> <p>12 A Two Bulls, yes.</p> <p>13 Q Does OSLH have a hiring preference where it seeks to</p> <p>14 hire enrolled members of the Oglala Sioux Tribe?</p> <p>15 A Yes, we do.</p> <p>16 Q And does OSLH collect documents which verify whether</p> <p>17 or not its employees are enrolled members of the</p> <p>18 Tribe?</p> <p>19 A Yes, we do.</p> <p>20 Q And does OSLH keep those documents in the ordinary</p> <p>21 course of its business?</p> <p>22 A Yes, we do. It's in their personnel files.</p> <p>23 Q And does OSLH keep records of whether individuals are</p> <p>24 employed by OSLH in the course and scope of its</p> <p>25 business?</p>	<p style="text-align: right;">71</p> <p>1 first duly marked for identification purposes, are</p> <p>2 hereby offered and received into evidence.]</p> <p>3 *** ***)</p> <p>4 EXAMINATION CONTINUED</p> <p>5 BY MR. THOMPSON:</p> <p>6 Q Doyle, would you go ahead and review Exhibits E and F,</p> <p>7 please?</p> <p>8 A (The Witness Complies)</p> <p>9 Q Doyle, have you seen these documents before today?</p> <p>10 A Yes, I have.</p> <p>11 Q And where did you see those?</p> <p>12 A I have looked at each of these individual's personnel</p> <p>13 files and seen these documents before.</p> <p>14 Q Okay. And these are the documents that are kept in</p> <p>15 the ordinary course and scope of OSLH's business. Is</p> <p>16 that correct?</p> <p>17 A Yes.</p> <p>18 Q Can you tell me what is Exhibit E?</p> <p>19 A Exhibit E is the record that documents their date of</p> <p>20 hire, and what position and rate and all that.</p> <p>21 Q Okay. And that is for each of the named OSLH</p> <p>22 employees that are named as third-party defendants in</p> <p>23 this matter. Correct?</p> <p>24 A Yes.</p> <p>25 Q And can you tell me what is Exhibit F, please?</p>
<p style="text-align: right;">70</p> <p>1 A Yes, we do.</p> <p>2 Q Do you know whether the defendants I just named are</p> <p>3 enrolled members of the tribe?</p> <p>4 MR. GALBRAITH: Objection, foundation.</p> <p>5 THE COURT: Overruled.</p> <p>6 Q You can go ahead and answer, Doyle. Do you know</p> <p>7 whether they are?</p> <p>8 A Yes. I have reviewed their file -- their personnel</p> <p>9 information, and I am 100 percent sure that they are</p> <p>10 all enrolled members.</p> <p>11 MR. THOMPSON: I'm going to offer Exhibits E and F,</p> <p>12 and these are the employment documents that I</p> <p>13 previously referred to.</p> <p>14 THE COURT: You are going to mark them and then offer</p> <p>15 them?</p> <p>16 MR. THOMPSON: I have marked one as Exhibit E and one</p> <p>17 as Exhibit F, Your Honor.</p> <p>18 MR. GALBRAITH: Which is which?</p> <p>19 MR. THOMPSON: Sure. I have marked the Notice of</p> <p>20 Personnel Action Forms as Exhibit E, and I have marked</p> <p>21 the certificates and evidence of Indian blood as</p> <p>22 Exhibit F.</p> <p>23 *** ***)</p> <p>24 [REPORTER'S NOTE: Whereupon, at this point</p> <p>25 third-party defendant's Exhibits E and F, having been</p>	<p style="text-align: right;">72</p> <p>1 A Yes. Exhibit F is a Certificate of Indian Blood</p> <p>2 Decree. What that demonstrates is whether or not</p> <p>3 somebody is an enrolled tribal member with the Oglala</p> <p>4 Sioux Tribe.</p> <p>5 Q Okay. And within Exhibit F does it contain evidence</p> <p>6 of Indian blood for each named OSLH employee in this</p> <p>7 matter?</p> <p>8 A Yes, it does.</p> <p>9 Q And what does it demonstrate? Are they all enrolled</p> <p>10 in the tribe?</p> <p>11 MR. GALBRAITH: Objection.</p> <p>12 A Yes, they are all enrolled members.</p> <p>13 MR. GALBRAITH: Objection. The document has not been</p> <p>14 offered.</p> <p>15 THE COURT: Well, I think he has laid enough</p> <p>16 foundation. Again, what the documents say is</p> <p>17 probably my decision to make. They have not been</p> <p>18 offered. I don't know -- I mean, if he is going to</p> <p>19 testify on them further, they should probably be</p> <p>20 offered.</p> <p>21 MR. THOMPSON: Excuse me. I guess I'm unfamiliar with</p> <p>22 what -- you know, I've asked that they be entered as</p> <p>23 exhibits. Do I need to do something else?</p> <p>24 THE COURT: I have a chart that says marked, offered</p> <p>25 and received.</p>

<p style="text-align: right;">73</p> <p>1 MR. THOMPSON: Okay.</p> <p>2 THE COURT: So I have marked Exhibits A, B, C, D, E</p> <p>3 and F. I understand that Exhibit B has been offered,</p> <p>4 and I have received it, I think, over Mr. Galbraith's</p> <p>5 objection.</p> <p>6 MR. THOMPSON: Okay. I would like to offer all</p> <p>7 exhibits that I am entering today.</p> <p>8 THE COURT: Okay. We will check those boxes.</p> <p>9 MR. THOMPSON: Thank you.</p> <p>10 THE COURT: What objections for Exhibits A, C, D and F</p> <p>11 exist?</p> <p>12 MR. GALBRAITH: Object -- you have not -- what is</p> <p>13 Exhibit A? I have not seen A.</p> <p>14 THE COURT: A letter from John Nooney.</p> <p>15 MR. GALBRAITH: Oh, okay.</p> <p>16 THE COURT: And then Exhibit C is a HUD letter.</p> <p>17 Exhibit D is an Indian Housing Report.</p> <p>18 MR. GALBRAITH: That would -- okay, the letter before</p> <p>19 we went to break.</p> <p>20 THE COURT: Yes. I haven't seen Exhibits E and F, but</p> <p>21 those are the ones he is questioning about, the one</p> <p>22 you objected to.</p> <p>23 MR. GALBRAITH: Exhibit A, I am going to object to</p> <p>24 just based on not relevant to what we are doing today.</p> <p>25 That is the letter between Mr. Thompson and my</p>	<p style="text-align: right;">75</p> <p>1 THE COURT: I appreciate that. You will have a</p> <p>2 standing joinder to Mr. Galbraith's. And, if you</p> <p>3 don't join, you can let me know.</p> <p>4 MR. DAHLMEIER: Thank you.</p> <p>5 THE COURT: Mr. Thompson, here is what I'm likely</p> <p>6 going to do. I will let you make your record</p> <p>7 regarding all that. I am inclined, because there is</p> <p>8 not a jury here, to take everything and receive it,</p> <p>9 and then look at it, and if I rely on it, I will tell</p> <p>10 you that I relied on it. If I didn't rely on it, I</p> <p>11 think it's a moot point.</p> <p>12 So what record do you want to make regarding --</p> <p>13 MR. THOMPSON: Sure.</p> <p>14 THE COURT: So I'm likely going to receive them. But</p> <p>15 what record do you want to make?</p> <p>16 MR. THOMPSON: Okay. With regard to Exhibit A, which</p> <p>17 has been objected to on relevancy, it's relevant to</p> <p>18 show that the defendants were on notice that</p> <p>19 sovereign immunity would be asserted in this matter</p> <p>20 for over a year, and it impacts our argument that</p> <p>21 says, hey, they should have asked discovery questions</p> <p>22 tailored to those issues during the course of these</p> <p>23 proceedings, rather than wait until a week before</p> <p>24 trial to do so.</p> <p>25 And what was Exhibit B again?</p>
<p style="text-align: right;">74</p> <p>1 office.</p> <p>2 Exhibits C, D, E and F, the global objection to</p> <p>3 all of those documents, based on the fact that they</p> <p>4 have not previously been disclosed, and we saw them</p> <p>5 for the first time today, and we have not been</p> <p>6 permitted any discovery into those.</p> <p>7 Further objection as to Exhibit C. That is a HUD</p> <p>8 document, and I would object based on foundation and</p> <p>9 hearsay.</p> <p>10 Further objection as to Exhibit D, foundation and</p> <p>11 hearsay.</p> <p>12 Exhibit E appears to be an Oglala Housing</p> <p>13 document, so I would just object based on not</p> <p>14 previously disclosed.</p> <p>15 And then Exhibit F is not a Housing Authority</p> <p>16 document, so I would object based on not previously</p> <p>17 disclosed, foundation and hearsay.</p> <p>18 THE COURT: Okay. Just so -- well, do you want to</p> <p>19 make some objections at all?</p> <p>20 MR. DAHLMEIER: Just briefly, Your Honor. For the</p> <p>21 sake of efficiency, Western will just join all the</p> <p>22 objections that are being lodged, both with respect to</p> <p>23 the testimony and the documents and the proceedings</p> <p>24 generally as it relates to this issue so as to avoid</p> <p>25 any redundancy.</p>	<p style="text-align: right;">76</p> <p>1 THE COURT: It's already received.</p> <p>2 MR. GALBRAITH: Exhibit B is in. We are good on</p> <p>3 Exhibit B.</p> <p>4 MR. THOMPSON: So Exhibit B is in. Exhibits C and D</p> <p>5 are the NAHASDA documents. Those are publically</p> <p>6 available document. They don't need to be obtained</p> <p>7 through discovery. Those can be obtained by</p> <p>8 submitting a FOIA request to the United States</p> <p>9 Government.</p> <p>10 So the fact that they weren't previously</p> <p>11 disclosed by my office seems a bit irrelevant, since</p> <p>12 they could have obtained those through other processes</p> <p>13 that are equally available to them.</p> <p>14 And I think enough foundation has been laid for</p> <p>15 all exhibits. We have identified how they play into</p> <p>16 the course and scope of OSLH's business.</p> <p>17 We have identified that Mr. Pipe On Head has</p> <p>18 reviewed those prior to today, during the course of</p> <p>19 his employment with OSLH.</p> <p>20 And that is all the record I would like to make</p> <p>21 on those right now.</p> <p>22 THE COURT: Okay. They are all received then.</p> <p>23 MR. THOMPSON: Thank you.</p> <p>24 *** **</p> <p>25 EXAMINATION CONTINUED</p>

<p style="text-align: right;">77</p> <p>1 BY MR. THOMPSON:</p> <p>2 Q So with regard to the enrollment information, Doyle,</p> <p>3 are those publically available documents? Can you</p> <p>4 request that information from the tribe?</p> <p>5 A I don't know if you can or not.</p> <p>6 Q Okay. Fair enough. But, in any event, those are</p> <p>7 documents that OSLH would have relied upon in hiring</p> <p>8 those individuals?</p> <p>9 A Yes.</p> <p>10 Q And it's a document that they would have relied upon</p> <p>11 to give them preference in hiring. Correct?</p> <p>12 A Yes.</p> <p>13 Q Okay. No further questions on those documents. Do</p> <p>14 you know whether the duplex at issue in this matter is</p> <p>15 located on fee property or trust property?</p> <p>16 A It's located on trust property.</p> <p>17 Q And those duplexes are located in Pine Ridge?</p> <p>18 A In Pine Ridge, yes.</p> <p>19 Q Within the exterior boundaries of the Oglala Sioux</p> <p>20 Reservation?</p> <p>21 A Yes.</p> <p>22 Q And so any maintenance or work that was performed on</p> <p>23 those -- on the duplex by OSLH's employees</p> <p>24 necessarily had to be done within Reservation</p> <p>25 boundaries. Correct?</p>	<p style="text-align: right;">79</p> <p>1 Affairs. And the aerial photograph came from the</p> <p>2 Land Office, I believe, the Oglala Sioux Tribe Land</p> <p>3 Office.</p> <p>4 MR. THOMPSON: Okay. And now I'm going to hand you</p> <p>5 what I have marked as Exhibit G. And I'm offering</p> <p>6 this into the record.</p> <p>7 *** **</p> <p>8 [REPORTER'S NOTE: Whereupon, at this point</p> <p>9 third-party defendant's Exhibit G, having been first</p> <p>10 duly marked for identification purposes, is hereby</p> <p>11 offered and received into evidence.]</p> <p>12 *** **</p> <p>13 MR. THOMPSON: Your Honor, I am approaching with E</p> <p>14 and F.</p> <p>15 THE COURT: Thank you.</p> <p>16 MR. THOMPSON: Thank you. So take a minute to look at</p> <p>17 that, and let me know when you have had a chance to</p> <p>18 look through them.</p> <p>19 THE COURT: Did you mark G?</p> <p>20 MR. THOMPSON: Yes, Your Honor, I marked this as</p> <p>21 Exhibit G.</p> <p>22 THE COURT: Thank you.</p> <p>23 MR. THOMPSON: And I believe I offered them, Exhibits</p> <p>24 E and F, but if I haven't, I am now.</p> <p>25 THE COURT: Is there any objection to --</p>
<p style="text-align: right;">78</p> <p>1 A Yes.</p> <p>2 Q Did OSLH own the duplex and operate the rental units</p> <p>3 in it?</p> <p>4 A Yes.</p> <p>5 Q Does OSLH own the property that the duplex was</p> <p>6 situated on?</p> <p>7 A We leased the land from the tribe.</p> <p>8 Q So the tribe owns that property?</p> <p>9 A The tribe, yes.</p> <p>10 Q Have you reviewed documents that identify the status</p> <p>11 of the real property on which the duplex that was</p> <p>12 involved in was situated?</p> <p>13 A Yes.</p> <p>14 Q What documents did you review?</p> <p>15 A I reviewed two title status reports, and then an</p> <p>16 aerial that shows the area where the duplexes were</p> <p>17 at.</p> <p>18 Q Okay. And how did you obtain those documents?</p> <p>19 A I requested them from our development office.</p> <p>20 Q And does your development office maintain those</p> <p>21 documents, or do they request them from another</p> <p>22 source?</p> <p>23 A We -- they keep copies of them, but the origins of</p> <p>24 the sources of those documents are -- or the title</p> <p>25 status reports come from BIA, the Bureau of Indian</p>	<p style="text-align: right;">80</p> <p>1 MR. GALBRAITH: Objection is based on not previously</p> <p>2 disclosed or subject to discovery, foundation and</p> <p>3 hearsay.</p> <p>4 THE COURT: Okay.</p> <p>5 MR. THOMPSON: Your Honor, these are publically</p> <p>6 available documents. They can be requested from the</p> <p>7 BIA and other tribal governmental offices, and there</p> <p>8 is no need to disclose them prior to.</p> <p>9 THE COURT: I will receive them under the same caveat</p> <p>10 that, if I rely on them, I will let you know.</p> <p>11 *** **</p> <p>12 [REPORTER'S NOTE: Whereupon, at this point</p> <p>13 third-party defendant's Exhibits E and F, having been</p> <p>14 previously marked for identification purposes, are</p> <p>15 hereby offered and received into evidence.]</p> <p>16 *** **</p> <p>17 EXAMINATION CONTINUED</p> <p>18 BY MR. THOMPSON:</p> <p>19 Q Doyle, what is the first page of Exhibit G?</p> <p>20 A The first page is an aerial photograph of the area</p> <p>21 where the duplex was located in.</p> <p>22 Q Okay. So can you identify on there which is the units</p> <p>23 in question?</p> <p>24 A Yes.</p> <p>25 Q And can I have you just draw a circle around them with</p>

<p style="text-align: right;">81</p> <p>1 this pen, please?</p> <p>2 A (The Witness Complies)</p> <p>3 Q Okay. Now, can you tell me, does that aerial show</p> <p>4 tract numbers of where those duplexes sit on?</p> <p>5 A Yes, it does.</p> <p>6 Q And what tract numbers does those duplex properties</p> <p>7 sit on?</p> <p>8 A Tract Number 10466, and Tract Number 10465.</p> <p>9 Q Can you find on the remaining pages in the title</p> <p>10 reports -- well, first of all, can you tell me what</p> <p>11 are the subsequent written pages of Exhibit G,</p> <p>12 type-written pages of Exhibit G?</p> <p>13 A The Title Status Report is the official record that</p> <p>14 shows which tracts of land are leased to the parties</p> <p>15 involved, or whoever has the lease on those tracts of</p> <p>16 land.</p> <p>17 Q And do those tract reports correspond to the aerial</p> <p>18 photograph?</p> <p>19 A Yes.</p> <p>20 Q Okay. And do those reports identify whether or not</p> <p>21 those tracts are held in trust by United States</p> <p>22 Government?</p> <p>23 A Yes.</p> <p>24 Q And they are held in trust by the United States</p> <p>25 Government?</p>	<p style="text-align: right;">83</p> <p>1 tract, the second page of that.</p> <p>2 A (The Witness Complies) Okay.</p> <p>3 Q Do they -- who do those documents identify the owner</p> <p>4 of those parcels as?</p> <p>5 A The Oglala Sioux Tribe.</p> <p>6 MR. THOMPSON: Thank you. And I am approaching with</p> <p>7 Exhibit G, Your Honor.</p> <p>8 Q Okay, Doyle. In your review of contracts in your</p> <p>9 position as the Chief Contracts Officer and as CEO,</p> <p>10 have you reviewed any documents that discuss sovereign</p> <p>11 immunity or consent to be sued that would permit the</p> <p>12 propane companies to sue it for money damages?</p> <p>13 A Could you restate that again?</p> <p>14 Q Yes. In your positions as chief contracts officer and</p> <p>15 as acting CEO of OSLH, in your review of contracts,</p> <p>16 have you reviewed any contracts that have discussed or</p> <p>17 have been stated in them a waiver of sovereign</p> <p>18 immunity where it stated consent to be sued that would</p> <p>19 permit relative to suits arising from the explosion at</p> <p>20 issue in this case?</p> <p>21 A I have never seen any documents that waived sovereign</p> <p>22 immunity.</p> <p>23 Q If OSLH were exposed to this lawsuit, and damages</p> <p>24 were awarded against it for which it was responsible</p> <p>25 to pay, would that frustrate OSLH's ability to</p>
<p style="text-align: right;">82</p> <p>1 MR. GALBRAITH: Objection, calls for a legal</p> <p>2 conclusion. Additionally, the document speaks for</p> <p>3 itself.</p> <p>4 MR. THOMPSON: I'm not asking him to conclusively</p> <p>5 determine the legal conclusion, just what the document</p> <p>6 says.</p> <p>7 THE COURT: Overruled.</p> <p>8 *** **</p> <p>9 EXAMINATION CONTINUED</p> <p>10 BY MR. THOMPSON:</p> <p>11 Q Does that document also identify who the owner of</p> <p>12 those tracts are for whom title is held in trust by</p> <p>13 the United States Government?</p> <p>14 A Yes, it does.</p> <p>15 Q And who is identified as the owner for those two</p> <p>16 tracts?</p> <p>17 A I believe it's the Oglala Sioux Tribe.</p> <p>18 Q Does it say the Oglala Sioux Tribe on those documents?</p> <p>19 And take your time and review them.</p> <p>20 A (The Witness Complies)</p> <p>21 Q I apologize that they are double-sided. But I'm just</p> <p>22 going to direct your attention to looking at the first</p> <p>23 typewritten document, the second page of that.</p> <p>24 A (The Witness Complies)</p> <p>25 Q And then the second typewritten document for the other</p>	<p style="text-align: right;">84</p> <p>1 operate?</p> <p>2 MR. GALBRAITH: Objection, foundation, speculation.</p> <p>3 THE COURT: Sustained.</p> <p>4 Q Doyle, are you familiar with OSLH's budget on which</p> <p>5 it's operates?</p> <p>6 A Yes, I am.</p> <p>7 Q And are you familiar with the difficulties that OSLH</p> <p>8 faces in trying to operate within that budget?</p> <p>9 A Yes, I am.</p> <p>10 Q Does OSLH operate on a tight budget?</p> <p>11 A Yes.</p> <p>12 Q Would you say that OSLH is under-funded?</p> <p>13 A Yes, it is.</p> <p>14 Q Approximately, how many housing rental units does</p> <p>15 OSLH operate?</p> <p>16 A We operate or manage approximately 1,200.</p> <p>17 Q And could OSLH operate without federal funding?</p> <p>18 A It would be very hard.</p> <p>19 Q Based on your understanding of OSLH's finances and</p> <p>20 its operating budget, if OSLH remains in this lawsuit,</p> <p>21 and damages were eventually awarded against it for</p> <p>22 which it was responsible to pay, would that frustrate</p> <p>23 OSLH's ability to operate?</p> <p>24 MR. GALBRAITH: Objection, speculation.</p> <p>25 THE COURT: Overruled.</p>

<p style="text-align: right;">85</p> <p>1 A Yes.</p> <p>2 Q Do you work in maintenance?</p> <p>3 A No, I don't.</p> <p>4 Q Doyle, you mentioned that in your review of contracts,</p> <p>5 as the chief contracting officer and as CEO, that you</p> <p>6 had not reviewed anything that discussed sovereign</p> <p>7 immunity in it. Have you reviewed any contracts in</p> <p>8 those capacities that have explicitly stated a consent</p> <p>9 to be sued?</p> <p>10 A No, I have not.</p> <p>11 Q Thank you. Do you know what specific work was</p> <p>12 performed on the duplexes by the named OSLH employees</p> <p>13 in this matter?</p> <p>14 A I am aware that a renovation was done, and that is</p> <p>15 about it.</p> <p>16 Q So you don't know which employees that are named in</p> <p>17 this action, what tasks they performed during that</p> <p>18 renovation?</p> <p>19 A No, I don't.</p> <p>20 Q And would you say that OSLH's maintenance crew is</p> <p>21 short staffed?</p> <p>22 A Yes.</p> <p>23 Q Upon information and belief --</p> <p>24 MR. THOMPSON: Never mind. That's all I have.</p> <p>25 THE COURT: Who wants to go first?</p>	<p style="text-align: right;">87</p> <p>1 Q And OSLH is a tongue twister for me, so I will</p> <p>2 generally refer to OSLH as the Housing Authority.</p> <p>3 Does that make sense?</p> <p>4 A Sure.</p> <p>5 Q Okay. Thank you. I think you testified first that</p> <p>6 the maintenance and renovation on the Housing</p> <p>7 Authority's homes was completed by the Housing</p> <p>8 Authority, that the Housing Authority was responsible</p> <p>9 for that. Is that right?</p> <p>10 A Yes.</p> <p>11 Q And is that specific to the maintenance or renovation</p> <p>12 on Unit 157, also, that occurred prior to the</p> <p>13 explosion?</p> <p>14 A Yes.</p> <p>15 Q And so all of the maintenance that was done on Unit</p> <p>16 157 was done by the Housing Authority or an employee</p> <p>17 of the Housing Authority?</p> <p>18 MR. THOMPSON: Objection. Foundation made a mistake</p> <p>19 regarding facts in evidence.</p> <p>20 THE COURT: Overruled.</p> <p>21 MR. GALBRAITH: You can answer, if you can.</p> <p>22 THE WITNESS: What was that again?</p> <p>23 *** **</p> <p>24 EXAMINATION CONTINUED</p> <p>25 BY MR. GALBRAITH:</p>
<p style="text-align: right;">86</p> <p>1 MR. GALBRAITH: I will.</p> <p>2 THE COURT: All right. Well, Mr. Leach wants to go</p> <p>3 first, too.</p> <p>4 MR. LEACH: I have just about one question, Your</p> <p>5 Honor.</p> <p>6 THE COURT: Do you mind if he goes first? Well, how</p> <p>7 are we doing this? You joined -- you have joined</p> <p>8 their motion --</p> <p>9 MR. LEACH: My question doesn't relate to the pending</p> <p>10 motion; it relates to the summary judgment motion that</p> <p>11 Western filed.</p> <p>12 THE COURT: Yeah, I'm not going to do that right now.</p> <p>13 You can do that maybe at the end. I can control</p> <p>14 the -- well, the rules of evidence allow me under</p> <p>15 6-something to control the way of it. Plus, I think,</p> <p>16 that under the --</p> <p>17 MR. LEACH: That's fine. Thank you, Your Honor.</p> <p>18 THE COURT: Mr. Galbraith.</p> <p>19 MR. GALBRAITH: Thank you, Your Honor.</p> <p>20 *** **</p> <p>21 EXAMINATION</p> <p>22 BY MR. GALBRAITH:</p> <p>23 Q Mr. Pipe On Head, do you also -- do you mind if I call</p> <p>24 you Doyle, because that's easier for me, also?</p> <p>25 A Okay.</p>	<p style="text-align: right;">88</p> <p>1 Q That all of the work that was done on Unit 157</p> <p>2 related to the maintenance or renovation was completed</p> <p>3 by The Housing Authority or an employee of The Housing</p> <p>4 Authority?</p> <p>5 A As far as I know.</p> <p>6 Q Okay. Well, I guess, Mr. Thompson has, as he</p> <p>7 suggested earlier today, and I think you heard that,</p> <p>8 provided us some documents related to the maintenance</p> <p>9 or the renovation that was done on Unit 157. Would</p> <p>10 you or someone at the Housing Authority have collected</p> <p>11 those documents for Mr. Thompson?</p> <p>12 A What kind of documents?</p> <p>13 Q They were documents related to the work or the</p> <p>14 renovation work or the maintenance work that was done</p> <p>15 on Unit 157?</p> <p>16 MR. THOMPSON: Objection, foundation.</p> <p>17 THE COURT: Overruled.</p> <p>18 Q Would you or someone there at the Housing Authority</p> <p>19 have collected those and provided them to</p> <p>20 Mr. Thompson?</p> <p>21 A Yes.</p> <p>22 Q And would all of the documents that you have collected</p> <p>23 and provided to Mr. Thompson related to this</p> <p>24 litigation, would those be documents that were kept in</p> <p>25 the ordinary course of business at the Housing</p>

<p style="text-align: right;">89</p> <p>1 Authority?</p> <p>2 A Yes.</p> <p>3 Q And so on -- so in November of 2016 I believe that</p> <p>4 Mr. Thompson gave us about 180 pages from the Housing</p> <p>5 Authority, and those were documents that you or</p> <p>6 someone at the Housing Authority collected and gave</p> <p>7 to him, and those are kept in the ordinary course of</p> <p>8 business?</p> <p>9 A Yes.</p> <p>10 Q And then he provided about -- well, what we have as</p> <p>11 documents that are Bates stamped as 109 through 146 in</p> <p>12 December of 2016 from the Housing Authority. Do you</p> <p>13 have the same answer there that those were collected</p> <p>14 by you or someone at the Housing Authority and</p> <p>15 provided to Mr. Thompson?</p> <p>16 A Yes.</p> <p>17 Q And those are documents kept in the ordinary course of</p> <p>18 business also?</p> <p>19 A Yes.</p> <p>20 Q And then in April of this year we received --</p> <p>21 MR. NOONEY: Last year.</p> <p>22 Q (Continuing) -- I'm sorry. April of last year. We</p> <p>23 haven't gotten to April of this year. There's 549</p> <p>24 additional documents from Mr. Thompson related to the</p> <p>25 Housing Authority. Would you or someone at The</p>	<p style="text-align: right;">91</p> <p>1 THE COURT: I think that it is a fair question.</p> <p>2 Overruled.</p> <p>3 Q Are you aware of that?</p> <p>4 A Yes.</p> <p>5 Q So you are aware then that NAHASDA specifically has a</p> <p>6 provision that says that the assistance is available</p> <p>7 directly to Indian tribes or tribally designated</p> <p>8 entities under authority similar to those accorded</p> <p>9 tribes in Public Law 93-638?</p> <p>10 A Yes.</p> <p>11 Q And Public Law 93-638 is where the term 638 Contracts</p> <p>12 comes from. Right?</p> <p>13 A I believe so.</p> <p>14 Q So that is contained within NAHASDA.</p> <p>15 A (No Response)</p> <p>16 Q Mr. Thompson gave to you -- do you have the original</p> <p>17 exhibits up here?</p> <p>18 MR. THOMPSON: They are.</p> <p>19 MR. GALBRAITH: Okay. Can I steal one from you,</p> <p>20 Judge?</p> <p>21 THE COURT: Yes. Here. Well, let me keep mine.</p> <p>22 Q Mr. Thompson gave to you Exhibit C. And he asked you</p> <p>23 the question, sir, if there was anything related to</p> <p>24 sovereign immunity or consent to be sued contained</p> <p>25 within Exhibit C. Do you remember that?</p>
<p style="text-align: right;">90</p> <p>1 Housing Authority have collected those and provided</p> <p>2 them to him?</p> <p>3 A Yes.</p> <p>4 Q And, similarly, those are documents that are kept in</p> <p>5 the ordinary course of business?</p> <p>6 A Yes.</p> <p>7 Q You said, sir, that the primary source of funding is</p> <p>8 through HUD and NAHASDA. Is that right?</p> <p>9 A Yes.</p> <p>10 Q And I think you also said -- or maybe you didn't, and</p> <p>11 I need to ask this question. Are you aware of whether</p> <p>12 or not the Housing Authority has any of what we have</p> <p>13 been referring to as 638 contracts?</p> <p>14 A No. We don't have any 638 contracts.</p> <p>15 Q Are you aware, sir, of the federal statute related</p> <p>16 to NAHASDA, 25 USC, Section 4101, and specifically</p> <p>17 Part 7, that says: <i>Federal assistance to meet these</i></p> <p>18 <i>responsibilities shall be provided in a manner that</i></p> <p>19 <i>recognizes the right of Indian self-determination and</i></p> <p>20 <i>Tribal self-governance by making such assistance</i></p> <p>21 <i>available directly to the Indian Tribes or Tribally</i></p> <p>22 <i>designated entities under authorities similar to those</i></p> <p>23 <i>accorded Indian Tribes in Public Law 93-638.</i></p> <p>24 MR. THOMPSON: Objection, foundation, calls for a</p> <p>25 conclusion.</p>	<p style="text-align: right;">92</p> <p>1 A Yes.</p> <p>2 Q Sir, is there anything in Exhibit C that requires the</p> <p>3 Housing Authority to maintain insurance?</p> <p>4 A (No Response)</p> <p>5 MR. THOMPSON: Objection, calls for a conclusion.</p> <p>6 THE COURT: Overruled.</p> <p>7 MR. GALBRAITH: The tricky thing about these always</p> <p>8 is, too, the Judge has it. And so I'm sure that, if</p> <p>9 it is there, Mr. Thompson will point it out to him</p> <p>10 later.</p> <p>11 Q As you look at it -- or as you recall that document --</p> <p>12 and I think you said you looked at it before today --</p> <p>13 are you aware of anything in there that requires the</p> <p>14 Housing Authority to maintain insurance?</p> <p>15 A I don't know if it's specifically stated in this</p> <p>16 document here.</p> <p>17 Q But The Housing Authority does maintain insurance. Is</p> <p>18 that Correct?</p> <p>19 A Part of the funding does require that we have</p> <p>20 insurance.</p> <p>21 Q Does it required a certain amount of insurance? Or</p> <p>22 does The Housing Authority decide that?</p> <p>23 A I think it -- I'm not aware of the specific amount.</p> <p>24 Q Of the amount that the Housing Authority has or the</p> <p>25 amount that is required?</p>

<p style="text-align: right;">93</p> <p>1 A The amount that is required.</p> <p>2 Q Are you aware of the amount that the Housing</p> <p>3 Authority has?</p> <p>4 MR. THOMPSON: Objection. Go ahead. I'm sorry. I</p> <p>5 will withdraw that.</p> <p>6 A I do see our agreement with the insurance company when</p> <p>7 it comes through.</p> <p>8 Q Okay. And do you know how much insurance the Housing</p> <p>9 Authority maintains?</p> <p>10 MR. THOMPSON: Objection. It's irrelevant.</p> <p>11 THE COURT: Well, it's overrule. He can answer, if he</p> <p>12 knows.</p> <p>13 A Can you state that again?</p> <p>14 Q Are you aware of how much insurance the Housing</p> <p>15 Authority maintains, the dollar amount?</p> <p>16 A The dollar amount for our premiums or --</p> <p>17 Q For your -- for your coverage, your liability</p> <p>18 coverage?</p> <p>19 A The liability coverage?</p> <p>20 Q Yes.</p> <p>21 A I believe -- I believe it's in the neighborhood of</p> <p>22 around a million.</p> <p>23 Q If I told you that Mr. Thompson has previously told me</p> <p>24 that it's a million, you would have no reason to</p> <p>25 disagree with that?</p>	<p style="text-align: right;">95</p> <p>1 A Yes.</p> <p>2 Q So, if it's not in Exhibit C or Exhibit D, it must be</p> <p>3 somewhere else. Right?</p> <p>4 A HUD has their own regulations that they publish.</p> <p>5 Q Okay. So there is something beyond the record that we</p> <p>6 have in here today that requires the Housing Authority</p> <p>7 to maintain a policy of insurance?</p> <p>8 A Yes.</p> <p>9 Q Okay. Then, Doyle, I will give you what has been</p> <p>10 marked as Exhibit F. Exhibit F, Doyle, relates to</p> <p>11 some documents from the tribe related to certificates</p> <p>12 of Indian blood. Is that right?</p> <p>13 A Yes.</p> <p>14 Q And these are given to you by the employees when they</p> <p>15 receive their positions with the Housing Authority.</p> <p>16 Is that correct?</p> <p>17 A These certificates of Indian blood are attached to</p> <p>18 their employment application.</p> <p>19 Q So they come in with the application before you hire</p> <p>20 your employees?</p> <p>21 A Yes.</p> <p>22 Q Does the Housing Authority do anything to verify at a</p> <p>23 later date enrollment status, or do you just rely on</p> <p>24 the certificates you receive with the application?</p> <p>25 A I think that we rely on the certificates that we</p>
<p style="text-align: right;">94</p> <p>1 A No, I don't.</p> <p>2 Q Do you know who the coverage is maintained through,</p> <p>3 what company?</p> <p>4 A Yes. Our property insurance is through Amerind.</p> <p>5 MR. THOMPSON: A-M-E-R-I-N-D.</p> <p>6 Q Similarly, sir, I'm going to hand you what has been</p> <p>7 marked and received as Exhibit D. And Mr. Thompson</p> <p>8 had you -- I don't know if he had you look through it,</p> <p>9 but you said that you had looked through it prior to</p> <p>10 today. And he asked you if there was anything in</p> <p>11 there that waived sovereign immunity or had a consent</p> <p>12 to sue. I will ask the same question I did with</p> <p>13 respect to Exhibit C. Is there anything in that</p> <p>14 document that requires insurance, to the best of your</p> <p>15 recollection?</p> <p>16 A (No Response)</p> <p>17 Q And, Doyle, I can promise you that all the lawyers</p> <p>18 will go through this document in detail later. As you</p> <p>19 sit here today, do you recall personally there being</p> <p>20 anything in this document on insurance?</p> <p>21 A I'm not aware of a requirement like that on this</p> <p>22 document.</p> <p>23 Q But I think that you have already told me that</p> <p>24 insurance is a requirement of your federal funding.</p> <p>25 Is that right?</p>	<p style="text-align: right;">96</p> <p>1 receive with the application.</p> <p>2 Q Then Mr. Thompson asked you about the Housing</p> <p>3 Authority and the tight budget, and that it would be,</p> <p>4 I think you said, very hard to operate without federal</p> <p>5 funding?</p> <p>6 A Yes.</p> <p>7 Q The gist of his questions related to, obviously, the</p> <p>8 Housing Authority has two lawyers sitting here, and</p> <p>9 somebody is asking them for damages in a lawsuit. The</p> <p>10 liability coverage though would cover damages in a</p> <p>11 lawsuit and defense costs, damages up to a million</p> <p>12 dollars, and defense costs for anything related to</p> <p>13 that. Correct?</p> <p>14 MR. THOMPSON: Objection, foundation, calls for facts</p> <p>15 not in evidence, calls for speculation.</p> <p>16 THE COURT: Duly noted. Overruled.</p> <p>17 MR. GALBRAITH: You can answer.</p> <p>18 A The insurance does cover the liability up to that</p> <p>19 amount.</p> <p>20 Q Has this claim been submitted to your insurance</p> <p>21 company?</p> <p>22 A I'm not sure.</p> <p>23 Q And I don't want to know about conversations that you</p> <p>24 have had with Mr. Thompson or Mr. Marshall, but other</p> <p>25 than that, have there been any conversations amongst</p>

<p style="text-align: right;">97</p> <p>1 the Housing Authority or the tribe about submitting</p> <p>2 this claim to your insurance company?</p> <p>3 MR. THOMPSON: Objection. It's irrelevant. I can't</p> <p>4 see how this has any bearing on subject matter</p> <p>5 jurisdiction or sovereign immunity.</p> <p>6 THE COURT: Yes. You opened up the door to a number</p> <p>7 of things, but I don't think that necessarily. So</p> <p>8 that objection is sustained.</p> <p>9 Q And just so I'm clear, sir, with respect to your</p> <p>10 testimony, because this question was asked, but I just</p> <p>11 want to make sure. Richard Hill, Derek Janis, Wes</p> <p>12 Cottier, William White, Ben Plenty Arrows, Renaldo Two</p> <p>13 Bulls, Brandon Wes, Derek Slim, and then we have some</p> <p>14 -- some other names that you don't have in here, those</p> <p>15 individuals that I have just named, those were all</p> <p>16 employees of the Housing Authority?</p> <p>17 A Yes.</p> <p>18 Q And their actions at the time that they were working</p> <p>19 on or doing anything with respect to Unit 157 would</p> <p>20 have all been within their scope of their employment</p> <p>21 at the Housing Authority?</p> <p>22 A Yes.</p> <p>23 Q And so anything that they did, or did not do, that is</p> <p>24 under the ambit and responsibility of the Housing</p> <p>25 Authority?</p>	<p style="text-align: right;">99</p> <p>1 A No.</p> <p>2 Q And so Mr. Galbraith asked you a few questions about</p> <p>3 the language of NAHASDA, and you agreed that what he</p> <p>4 said sounded good, but did you rely on his</p> <p>5 representations of the language in NAHASDA as accurate</p> <p>6 in making your response?</p> <p>7 A No, I didn't.</p> <p>8 Q So you know -- you remember the provisions that he</p> <p>9 stated, and you have memorized those provisions?</p> <p>10 A I don't know them.</p> <p>11 Q You don't know them?</p> <p>12 A No.</p> <p>13 Q All right. But, regardless, it is your</p> <p>14 understanding that OSLH does not operate pursuant to a</p> <p>15 638 Contract?</p> <p>16 A My understanding is we do not operate on a 638</p> <p>17 Contract.</p> <p>18 Q Okay. And when Mr. Galbraith mentioned that NAHASDA</p> <p>19 says it's similar to the Indian Self-Determination</p> <p>20 Employment Assistance -- and Employment Assistance</p> <p>21 Act -- Education Assistance Act, you don't know</p> <p>22 whether those two things are one and the same, do</p> <p>23 you?</p> <p>24 A No, I don't.</p> <p>25 Q And you don't know how those two acts operate</p>
<p style="text-align: right;">98</p> <p>1 A Yes.</p> <p>2 MR. GALBRAITH: I have nothing further.</p> <p>3 THE COURT: Mr. Dahlmeier, do you want to ask any</p> <p>4 questions of the witness?</p> <p>5 MR. DAHLMEIER: Nothing, Your Honor. Thank you.</p> <p>6 MR. THOMPSON: Your Honor, I have just a couple of</p> <p>7 follow-ups.</p> <p>8 *** **</p> <p>9 EXAMINATION</p> <p>10 BY MR. THOMPSON:</p> <p>11 Q Mr. Galbraith discussed various documents that were</p> <p>12 provided by my office to their office. Doyle, have</p> <p>13 you ever reviewed all of those documents?</p> <p>14 A I generally review the bulk of the documents that we</p> <p>15 sign with HUD.</p> <p>16 Q But with regard to the documents that I have provided</p> <p>17 from my office to their office, did you review those</p> <p>18 documents that I provided to them? Do you know</p> <p>19 exactly what documents I have provided to them?</p> <p>20 A Not exactly, no.</p> <p>21 Q And so do you know with particularity whether it was</p> <p>22 you or someone else at Housing that provided those</p> <p>23 documents?</p> <p>24 A No, I don't.</p> <p>25 Q Have you memorized NAHASDA?</p>	<p style="text-align: right;">100</p> <p>1 together, do you?</p> <p>2 A No, I don't.</p> <p>3 Q So, again, you were relying on what Mr. Galbraith</p> <p>4 represented in making your response to him. Is that</p> <p>5 correct?</p> <p>6 A Yes.</p> <p>7 MR. THOMPSON: Thank you. I have nothing further,</p> <p>8 Your Honor.</p> <p>9 THE COURT: Does that elicit any re-cross?</p> <p>10 MR. GALBRAITH: Just the clarification of one small</p> <p>11 issue.</p> <p>12 *** **</p> <p>13 EXAMINATION</p> <p>14 BY MR. GALBRAITH:</p> <p>15 Q With respect to some documents that have been provided</p> <p>16 by Mr. Thompson's office from the Housing Authority,</p> <p>17 I'm not suggesting, sir, that you know what every one</p> <p>18 of those documents says, but anything that he has</p> <p>19 provided to us from the Housing Authority, those are</p> <p>20 documents that the Housing Authority provided to him</p> <p>21 and keeps in the ordinary course of its business.</p> <p>22 Correct?</p> <p>23 A Yes.</p> <p>24 MR. GALBRAITH: Okay. Nothing further.</p> <p>25 THE COURT: Okay. You may step down. Well, I haven't</p>

<p style="text-align: right;">101</p> <p>1 determined as of right now whether or not I have 2 enough evidence to resolve the 12(b)(1) motions. 3 That being said, do you have any other evidence you 4 want to present, Mr. Thompson? 5 MR. THOMPSON: I have no other evidence that I would 6 like to present, but I -- I hadn't really gotten to 7 the oral argument yet on those two motions. 8 THE COURT: Okay. Mr. Nooney or Mr. Dahlmeier, 9 whoever wants to talk, I guess, three questions. 10 One, and I will throw them all out there. Do you 11 have any evidence you want me to weigh in 12 considering the 12(b)(1)? Do you have any -- and now 13 that you have heard that, I have already kind of ruled 14 on your discovery. I have kind of -- I have commented 15 on it. 16 But is there anything that came out of there that 17 I should know that you are entitled to more discovery 18 before you present me with more evidence regarding 19 the 12(b)(1) motions? 20 Or is there evidence that you can't present today 21 separate from discovery that you would intend to 22 present under the 12(b) Motion? 23 MR. GALBRAITH: And I will try to answer all three at 24 once, because I think that they are inter-related. 25 THE COURT: They might be. But I wanted to make sure</p>	<p style="text-align: right;">103</p> <p>1 that also contain -- 2 THE COURT: Waiver, sovereign immunity. 3 MR. GALBRAITH: (Continuing) -- waiver or consent or 4 anything like that. 5 THE COURT: Okay. 6 MR. GALBRAITH: And so we would need at least some 7 inquiry into those issues to figure out where we are 8 at. I think that issue was left open today. 9 THE COURT: Okay. Well, just briefly, here is where 10 I'm going to go with it. Mr. Dahlmeier is here, and 11 he has a pending motion, dispositive motion, too. So 12 I'm not going to -- I'm going to hear the rest of this 13 before I make any decision. 14 MR. THOMPSON: Just two comments. 15 THE COURT: Yes. 16 MR. THOMPSON: Both NAHASDA and the issue of insurance 17 were raised by the propane companies in their 18 briefing. They knew about those issues long ago, and 19 they didn't ask for any discovery related to that. I 20 don't see how Mr. Pipe On Head's testimony here today 21 told them anything they didn't already know. 22 NAHASDA is a public document. They could have 23 went through it and figured it out, and they haven't 24 done it. Because they have had prior knowledge of it, 25 I don't see why they need additional discovery of it</p>
<p style="text-align: right;">102</p> <p>1 I was considering all of those three things. 2 MR. GALBRAITH: Yes. There is evidence that we would 3 like to provide to the Court. We don't have anything 4 that we are going to be providing to you today. 5 As we have discussed since this hearing started, 6 we believe we were entitled to some discovery before 7 evidence was put on. 8 In light of the testimony that we have heard 9 today which, obviously, is new to us as of the last 10 hour, we would like some time to have an opportunity 11 to think about that testimony, and go back to NAHASDA 12 and the standards and see what, if anything, we may 13 need discovery on or we may want to provide to the 14 Court. 15 Certainly, whatever is out there that requires 16 the procurement of insurance is an issue that may 17 have -- or a document or a regulation or rule that may 18 have other regulations or rules next to it that have 19 other requirements. 20 And, as we sit here today, we have not seen 21 anything that requires the tribe to have insurance. 22 But we know that they do. And we know that it's a 23 requirement. 24 And so there could be something in those 25 documents, rules, regulations, wherever that exists,</p>	<p style="text-align: right;">104</p> <p>1 now when they didn't make those pursuits in the three 2 months they have had since their last dispositive 3 motion that OSLH has filed. 4 THE COURT: Okay. 5 MR. GALBRAITH: And just to be clear, the third-party 6 defendants, or at least all but one of them, were 7 served earlier this month. The service was completed 8 earlier this month. 9 So to suggest that there has been three months to 10 do discovery related to issues especially with regard 11 to those individuals, we have not had everybody a 12 party to this litigation for more than 30 days. 13 MR. THOMPSON: They were a party at the time I entered 14 an appearance on their behalf and filed a dispositive 15 motion on their behalf on October 20th. 16 THE COURT: You filed a dispositive motion on behalf 17 of those other people on January 3rd. Right? 18 MR. THOMPSON: January -- 19 THE COURT: That's when you -- because you filed a 20 dispositive motion on behalf of Mr. Hill and on behalf 21 of the Housing Authority on October 20th. 22 MR. THOMPSON: Well, no. I -- 23 THE COURT: Sorry. On September 14th. The sovereign 24 immunity motion was on October 20th. But there was a 25 motion -- I understand, and I set this out at the</p>

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JAN 31 2018

By: _____

ADOPTED BY TRIBAL
ORDINANCE NO. 07-43
ON September 12, 2007

**CHARTER
OF
OGLALA SIOUX (LAKOTA) HOUSING**
(As amended on September 12, 2007)

Pursuant to the authority vested in the Oglala Sioux Tribe by its Constitution, and particularly by Article IV, Sections 1(a), 1(e) and 1(o) thereof, and its authority to provide for the health, safety, morals and welfare of the Tribe, the Tribal Council of the Oglala Sioux Tribe hereby establishes a public tribal corporation known as the Oglala Sioux (Lakota) Housing (hereinafter referred to as OSLH), and enacts this ordinance which shall constitute the charter of the OSLH and establish the purposes, powers and duties of this tribally chartered entity.

In any suit, action or proceeding involving the validity or enforcement of or relating to any of its contracts, OSLH shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of this ordinance. A copy of the ordinance duly certified by the Secretary of the Tribal Council shall be admissible in evidence in any suit, action or proceeding.

The Charter of OSLH was originally adopted and established on February 9, 1998 when OSLH became the successor to The Oglala Sioux Housing Authority. That Charter has now been amended by the Tribal Council on September 12, 2007 and this is the current OSLH Charter.

ARTICLE I

DECLARATION OF NEED

It is hereby declared:

1. That there exist on the Pine Ridge Indian Reservation unsanitary, unsafe, and overcrowded dwelling accommodations; that there is a shortage of decent, safe and sanitary dwelling accommodations available at rents or prices which persons of all income levels can afford; and that such shortage forces such persons to occupy unsanitary, unsafe and overcrowded dwelling accommodations;
2. That these conditions cause an increase in and spread of disease and crime and constitute a menace to health, safety, morals and welfare; and that these conditions necessitate excessive and disproportionate expenditures of public funds and crime prevention and punishment, public health and safety protection, fire and accident prevention, and other public services and facilities;

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3. That assisting in providing of decent, safe and sanitary dwelling accommodations for persons of all income are public uses and purposes for which money may be spent and private property acquired and are governmental functions of Tribal concern;
4. That residential construction activity and a supply of acceptable housing are important factors to general economic activity, and that the undertakings authorized by this ordinance to aid the production of better housing and housing districts and community development at lower costs will make possible a more stable and larger volume of residential construction and housing supply which will assist materially in improving employment; and
5. That the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

ARTICLE II

PURPOSE

OSLH shall be organized and operated for the primary purposes of:

1. Remedying unsafe and unsanitary housing conditions that are injurious to the public health, safety and morals;
2. Alleviating the acute shortage of decent, safe and sanitary dwellings for persons of low income, and
3. To assist persons of all income levels to obtain good and decent housing at a fair and reasonable cost.

A secondary purpose of OSLH shall be to provide employment and economic development opportunities through the construction, reconstruction, improvement, extension, alteration or repair and operation of housing.

ARTICLE III

DEFINITIONS

The following terms, wherever used or referred to in this ordinance, shall have the following respective meanings unless a different meaning clearly appears from the context:

"Area of Operation" means all areas within the jurisdiction of the Tribe and any other Indian area identified in the Tribe's Indian Housing Plan or by some other Tribal Council declaration.

"Board" means the Board of Directors of OSLH.

"Council" means the Oglala Sioux Tribal Council.

"Federal government" includes the United States of America, the Department of Housing and Urban Development, or any other agency or instrumentality, corporate or otherwise, of the United State of America.

"Homebuyer" means a person(s) who has executed a lease-purchase agreement with OSLH, and who has not yet achieved homeownership.

"Housing project" or "project" means any work or undertaking to provide or assist in providing (by any suitable method, including but not limited to: rental; sale of individual units in single or multifamily structures under conventional, condominium, or cooperative sales contracts or lease-purchase agreements; loans; or subsidizing of rental or charges) decent, safe and sanitary living accommodations. Such work or undertaking may include, but is not limited to, buildings, land, leaseholds, equipment, facilities, and other real or personal property for necessary, convenient, or desirable appurtenances, for streets, sewers, water service, utilities, parks, site preparation or landscaping, and for administrative, community, health, recreational, welfare or other purposes. The term "housing project" or "project" also may be applied to, but not limited to, the planning of the buildings and improvements, the acquisition of property or any interest therein, the demolition of existing structures, the construction, reconstruction, rehabilitation, alteration or repair of the improvements or other property and all other work in connection therewith, and the term shall include all other real and personal property and all tangible or intangible assets held or used in connection with the housing project.

"Obligations" means any notes, bonds, interim certificates, debentures, or other forms of obligation issued by OSLH pursuant to this ordinance.

"Obligee" includes any holder of an obligation, agent or trustee for any holder of an obligation, or any assignee or assignees of such lessor's interest or any part thereof.

"Persons of low income" means persons or families who cannot afford (as determined by OSLH) to pay enough to cause private enterprise in their locality to build or assist in providing an adequate supply of decent, safe, and sanitary dwellings for their use.

"Tribe" means the Oglala Sioux Tribe of the Pine Ridge Indian Reservation, South Dakota.

ARTICLE IV

BOARD OF DIRECTORS

A. BOARD AND BOARD MEMBER DUTIES AND ROLES.

1. OSLH shall be governed by a Board of Directors that shall hire on a multi-year basis and when necessary, suspend or fire a Chief Executive Officer (C.E.O.).
2. The C.E.O. shall select a staff of his or her choosing. The C.E.O. and staff shall then administer and manage OSLH, OSLH programs and OSLH activities.
3. The Board of Director's duties shall additionally include establishing written OSLH policies, monitoring for compliance with policies, laws, regulations and contractual obligations, designating areas of program activities as well as establishing organizational goals, ensuring proper financial accounting and maintaining fiscal stability, and generally conducting oversight.
4. The Board of Director's duties shall not include administering or managing, hiring or firing personnel or making contracting/procurement decisions except in regards to employment of the CEO and reviewing large contracts/procurement before their award. The Board shall not select who specifically gets a home or what individuals are selected to participate in an OSLH program. The Board of Directors shall not run the day-to-day activities of OSLH and shall not interject itself into the management of OSLH.
5. Apart from their participation on the Board, individual Board Members have no other authority except that authorized under this Charter. Individually, Board Members shall not engage in or interject themselves into OSLH management and program decisions. This means Board Members shall in their individual capacity refrain from directing, managing and influencing the activities of OSLH and its staff.
6. The Board of Directors and individual Board Members shall conduct themselves in a manner similar to that of a non-profit or for-profit corporate board of directors leaving the administering of OSLH and its programs to the CEO and his or her staff.
7. The Board shall elect annually its Chairman and other officers.

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1. The Board of Directors shall consist of a three (3) member Board made up of enrolled Tribal members. No officer in the Tribe and no Tribal Council person may sit on the Board. There also shall be no other ex-officio or non-voting members. After the first appointment by the Tribal Council in September 2007, the Board shall be a self-appointing Board with Board Members being appointed by the existing Board.
2. In September 2007, upon the amendment to the Charter, one (1) Board Member shall be appointed specifically to a three (3) year term, one to a four (4) year term and one to a five (5) year term.
3. Upon the expiration of the above, as well as all subsequent terms thereafter, all Board Members shall be appointed to three (3) year terms. The Board of Directors shall formally notify the Tribal Secretary of any expiring terms or Board vacancies and when appointments are made. Should a Board Member vacate or be removed from the Board by the Board, a replacement shall be appointed by a majority of the Board but those replacement appointments shall only be for the remainder of those terms.
4. No Board Members at the time of their appointment, or during the term of their appointment, shall be delinquent to or owe money to OSLH (including any of its preceding organizational entities). No Board Member may have a felony conviction and no Board Member may have had a misdemeanor conviction in the past five (5) years.
5. Board Members may resign from the Board by providing a written resignation and it should be given to the Board of Directors' Chairperson with a copy provided to the Tribal Secretary. Once made, said resignation may not be rescinded.
6. Except for resignation, removal for death or incapacity, or removal for criminal convictions, Board Members shall serve on the Board until the Board appoints a replacement which shall occur as soon as possible. No Board Member shall serve consecutively for more than twelve (12) years.
7. No person shall be barred from serving on the Board because he or she is a tenant, owner or homebuyer in any housing owned or assisted by OSLH or otherwise are participants in an OSLH program; and such Board Members shall be entitled to fully participate in all meetings concerning matters that affect all similar tenants, owners, or homebuyers, even though such matters affect the Board Member as well. However, such Board Members shall not be entitled or permitted to participate in or be present at any meeting, or to be counted or treated as a Member of the Board, concerning any matter involving the Director's individual rights, obligations or status as a tenant, homebuyer or participant.
8. Board Members shall be removed by the Board with a majority vote of the Board for (1) prohibited criminal convictions cited in the Charter, (2) serious or repeated violation of the Standards and the Conduct of this Charter, (3) abandonment of duties, incapacity, or death, and (4) other serious and repeated violations of the Charter.

12. Whenever demand for OSLH programs or projects exceed OSLH current capabilities, participation in those programs and projects shall be based on first-come, first-serve waiting lists. Those waiting lists shall be posted at the OSLH main office in a public location.
13. OSLH will seek and obtain funds, loans and assistance from a variety of governmental and private sector sources and accompanying that assistance will often be rules, restrictions and funding requirements that OSLH will have to comply with. However, OSLH is a tribally chartered governmental entity with tribally specified declared Needs and Purposes. As a tribally driven organization it is foremost an organization that is self-directed to serve the housing needs of the Oglala Sioux Tribe and its members.
14. Should the Tribal Council determine that OSLH is not and will not materially comply with this Charter, the Tribal Council has the inherent right, as the organization chartering OSLH, to revoke this Charter. Upon doing so, the Board of directors shall have no further authorities and powers. In such case, the Tribe may elect to specifically assume the obligations of OSLH itself or form and charter a new organization to do so.

ARTICLE V

STANDARDS OF CONDUCT

1. The duties and responsibilities of OSLH Board members, employees, grantees and agents are to OSLH. Their own interests are not to conflict with these duties and responsibilities.
2. Upon being considered for appointment and once becoming a Board Member, Board Members are prohibited from entering into, proposing or acquiring a contract or any financial interest, direct or indirect, in any OSLH project or activity except for subsequent permanent employment with OSLH that is approved unanimously by the other Board Members. Upon leaving the Board, Board Members are likewise prohibited from having such a contract or any financial interest, direct or indirect, in any OSLH project or activity, for a period of one (1) year after their tenure on the Board.
3. OSLH employees are prohibited from entering into, proposing or having a contract or any other financial interest, direct or indirect, in any OSLH project or activity. Except for subsequent employment approved unanimously by the Board, former employees are prohibited from having a contract or any financial interest, direct or indirect, in any OSLH project or activity in which the former employee had a substantial interest, responsibility or involvement with during his or her position with the OSLH for a period of one (1) year after termination of their employment. The above mentioned exception may be done in rare and unique circumstances by the Board but only after full and public disclosure and assurance that this interest is not obtained because of non-public information obtained acquired as a result of the prior employment.
4. No employee, Board Member, officer or agent of OSLH or any grantee shall ever participate in a decision, selection, award or administration of a contract if in fact, or by appearance, the

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Board Member, employee, officer, agent or any member of his or her immediate family, or his or her partner, or an organization which employs or is about to employ such a person, has a financial or other interest in the firm to be selected or awarded. Any and all conflicts of interest must be promptly, openly and publicly disclosed by both individuals and the OSLH.

Not participating in a decision, shall mean not discussing the matter in or outside meetings, not being physically present for any discussions and neither voting on nor being present for a vote. Furthermore, it means not using an OSLH position to influence a decision in which you have a personal interest.

5. Where the Tribe has established by law or resolution ethical and conflicts of interest requirements for the Tribe, Tribal Council, Tribal officials and/or Tribal entities, those standards shall also apply. Furthermore, the indirect interest as used in these Standards of Conduct include minimally, and are not limited to, family members to the first degree, adopted children and anyone living or residing in the same household.
6. Board Members, staff, agents and grantees shall not use OSLH resources, moneys, contracts, personnel or facilities for political purposes. OSLH shall also restrain others from using OSLH resources for political purposes.
7. All Board Members have a fiduciary responsibility to always take actions and do only what is in the best interest of OSLH.
8. Board Members and the C.E.O. shall provide a written Disclosure of Interest (hereinafter Disclosure) to OSLH and to members of the Board and periodically update it as circumstances warrant.

This Disclosure shall identify: 1) any contract or direct or indirect financial interest in any OSLH project or activity, 2) the date that interest was acquired and, 3) all family members to the first degree, all adopted children and anyone living or residing in the same house and household.

9. The Board shall establish any other standards of conduct that it believes are prudent and appropriate so long as they do not supercede or supplant standards established in this Charter or under Tribal law.

ARTICLE VI

POWERS

1. OSLH shall have perpetual succession in its corporate name.

2. OSLH shall have the following immunities:

(a) The Tribe confers on OSLH all of the Tribe's rights, privileges and immunities concerning federal, state, and local taxes, regulation, and jurisdiction, to the same extent that the Tribe would have such rights, privileges, and immunities if it engaged in the activities undertaken by OSLH.

(b) The Tribe confers on OSLH sovereign immunity from suit to the same extent that the Tribe would have such sovereign immunity if it engaged in the activities undertaken by OSLH. OSLH shall have the power to sue and is authorized to consent to be sued in the Oglala Sioux Tribal Courts or another court of competent jurisdiction, provided, however, that no such consent to suit shall be effective against the OSLH unless such OSLH consent (i) is explicit, and (ii) is contained in a written contract, agreement, or commercial documents to which the OSLH is a party. In no case shall any such recovery exceed the assets of OSLH.

(c) Any consent to suit may be limited to the court or courts in which suit may be brought, to the matters that may be made the subject of the suit and to the assets or revenues of the OSLH against which any judgment may be executed.

(d) Any immunity conferred on the OSLH under this Charter shall not extend, nor be construed to extend, to any action, suit, or judicial proceeding brought or prosecuted by Oglala Sioux Tribe.

(e) Consent to suit by OSLH shall in no way extend to an action against the Tribe, nor shall a consent to suit by OSLH in any way be deemed a waiver of any of the rights, privileges and immunities of the Tribe. The Tribe shall not be liable for the payment or performance of any of the obligations of OSLH, and no recourse shall be had against any assets or revenues of the Tribe in order to satisfy the obligations of OSLH.

3. OSLH shall have the following powers which it may exercise consistent with the purposes for which it is established:

(a) To adopt and use a corporate seal.

(b) To enter into agreements, contracts and understandings with any governmental agency, Federal, state or local (including the Council), or with any person, partnership, corporation or Indian tribe; and to agree to any conditions attached to Federal financial assistance.

- (c) To obligate itself, in any contract with the Federal government to convey to the Federal government possession of or title to the project to which such contract relates, upon the occurrence of a substantial default (as defined in such contract) with respect to the covenants or conditions to which OSLH is subject; and such contract may further provide that in case of such conveyance, the Federal government may complete, operate, manage, lease, convey or otherwise deal with the project and funds in accordance with the terms of such contract: Provided, that the contract requires that, as soon as practicable after the Federal government is satisfied that all defaults with respect to the project have been cured and that the project will thereafter be operated in accordance with the terms of the contract, the Federal government shall re-convey to OSLH the project as then constituted.
- (d) To lease property from the Tribe and others for such periods as are authorized by law, and to hold and manage or to sublease the same.
- (e) To borrow or lend money, to issue temporary or long term evidence of indebtedness, and to repay the same. Obligations shall be issued and repaid in accordance with the provisions of Article VII of this Ordinance.
- (f) To pledge the assets and receipts of OSLH as security for debts; and to acquire, sell, lease, exchange, transfer or assign personal property or interests therein.
- (g) To purchase land or interest in land or take the same by gift; to lease land or interests in land to the extent provided by law.
- (h) To undertake and carry out studies and analyses of housing needs, to prepare housing plans, to execute on the Pine Ridge Indian Reservation the same, to operate projects and to provide for the construction, reconstruction, improvement, extension, alteration or repair of any project or any part thereof.
- (i) With respect to any dwellings, accommodations, lands, buildings, facilities or any project (including individual cooperative or condominium units): to lease or rent, sell, enter into lease-purchase agreements or leases with option to purchase; to establish and revise rents or required monthly payments; to make rules and regulations concerning the selection of tenants or homebuyers, including the establishment of priorities, and concerning the occupancy, rental, care and management of housing units; and to make such further rules and regulations as the Board may deem necessary and desirable to effectuate the powers granted by this ordinance.
- (j) To finance the purchase of a home by an eligible homebuyer and to enter into mortgages and leasehold agreements.
- (k) To terminate any lease or rental agreement or lease-purchase agreement when the tenant or homebuyer has violated the terms of such agreement, or failed to meet any of its obligations thereunder, or when such termination is otherwise authorized under the

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provisions of such agreement; and to bring action for eviction against such tenant or homebuyer or foreclosure against an owner/borrower.

- (l) To establish income limits for admission on assistance.
 - (m) To purchase insurance from any stock or mutual company for any property or against any risk or hazards.
 - (n) To carefully and prudently invest such funds as are not required for immediate disbursement.
 - (o) To establish and maintain such bank accounts as may be necessary or convenient.
 - (p) To employ a chief executive officer, technical and maintenance personnel and such other officers and employees, permanent or temporary, as OSLH may require; and to delegate to such officers and employees such powers or duties as the Board shall deem proper.
 - (q) To take such other actions and exercise such other powers that are engaged in by public corporations of this character as the Board may deem necessary and desirable to effectuate the purposes of OSLH.
 - (r) To adopt such bylaws as the Board deems necessary and appropriate.
4. It is the purpose and intent of this ordinance to authorize OSLH to do any and all things necessary or desirable to secure the financial aid or cooperation from non-profits, for-profits, and governmental entities to undertake, construct, maintain, operate or assist housing.
5. No other ordinance or enactment of the Tribe with respect to the powers or procedures of OSLH shall apply unless this Charter is modified to reflect those requirements or unless the other tribal ordinances specifically make reference to OSLH.

ARTICLE VII

OBLIGATIONS

1. OSLH may issue obligations from time to time in its discretion for any of its purposes and may also issue refunding obligations for the purpose of paying or retiring obligations previously issued by it. OSLH may issue such types of obligations as it may determine, including obligations on which the principal and interest are payable: (a) exclusively from the income and revenues of the project finances with the proceeds of such obligations, or with such income and revenues together with grants from the Federal government in aid of such project; (b) exclusively from the income and revenues of certain designated projects whether or not they were financed in whole or in part with the proceeds of such obligations; or (c) from its

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revenues generally. Any of such obligations may be additionally secured by a pledge of any revenues of any project or other property of OSLH.

2. Neither the Directors of OSLH nor any person executing the obligations shall be liable personally on the obligations by reason of issuance thereof.
3. The notes and other obligations of OSLH shall not be a debt of the Tribe and the obligations shall so state on their face.
4. Obligations of OSLH are declared to be issued for an essential public and governmental purpose and to be public instrumentalities and, together with interest thereon and income therefrom, may be exempt from taxes imposed by the Tribe. The tax exemption provisions of this ordinance may be considered part of the security for the repayment of obligations and shall constitute, by virtue of this ordinance and without necessity of being restated in the obligations, a contract between (a) OSLH and the Tribe, and (b) the holders of obligations and each of them, including all transferees of the obligations from time to time.
5. Obligations shall be issued and sold in the following manner:
 - (a) Obligations of OSLH shall be authorized by a resolution adopted by the vote of the majority of the Board and may be issued in one or more series.
 - (b) The obligations shall bear such dates, mature at such times, bear interest at such rates, be in such denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank of priority, to be executed in such manner, be payable in such medium of payment and at such places, and be subject to such terms of redemption, with or without premium, as such resolution may provide.
 - (c) In case any of the Directors of OSLH whose signatures appear on any obligations cease to be Directors before the delivery of such obligations, the signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if the Directors had remained in office until delivery.
6. In connection with the issuance of obligations and to secure the payment of such obligations, OSLH, subject to the limitations in this ordinance, may:
 - (a) Pledge all or any part of its gross or net rents, fees or revenue to which its right then exists or may thereafter come into existence.
 - (b) Provide for the powers and duties of obligees and limit their liabilities; and provide the terms and conditions on which such obligees may enforce any covenant or rights securing or relating to the obligations.
 - (c) Covenant against pledging all or any part of its rents, fees and revenues or against mortgaging any or all of its real or personal property to which its title or right then exists

or may thereafter come into existence or permitting or suffering any lien on such revenue or property.

- (d) Covenant with respect to limitations on its right to sell, lease or otherwise dispose of any project or any part thereof.
- (e) Covenant as to what other or additional debts or obligations may be incurred by it.
- (f) Covenant as to the obligations to be issued and as to the issuance of such obligations in escrow or otherwise, and as to the use and disposition of the proceeds thereof.
- (g) Provide for the replacement of lost, destroyed or mutilated obligations.
- (h) Covenant against extending the time for the payment of its obligations or interest thereon.
- (i) Redeem the obligations and covenant for their redemption and provide the terms and conditions thereof.
- (j) Covenant concerning the rents and fees to be charged in the operation of a project or projects, the amount to be raised each year or other period of time by rents, fees and other revenues, and as to the use and disposition to be made thereof.
- (k) Create or authorize the creation of special funds for monies held for construction or operation of debt service, reserves or other purposes, and covenant as to the use and disposition of the monies held in such funds.
- (l) Prescribe the procedure, if any, by which the terms of any contract with holders of obligations may be amended or abrogated, the proportion of outstanding obligations the holders of which must consent thereto, and the manner in which such consent may be given.
- (m) Covenant as to the use, maintenance and replacement of its real or personal property, the insurance to be carried thereon and the use and disposition of insurance monies.
- (n) Covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition or obligation.
- (o) Covenant and prescribe as to events of default and terms and conditions upon which any or all of its obligations become or may be declared due before maturity, and as to the terms and conditions upon which such declaration and its consequences may be waived.
- (p) Vest in any obligees or any proportion of them the right to enforce the payment of the obligations of any covenants securing or relating to the obligations.
- (q) Exercise all or any part or combination of the powers granted in this section.

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ARTICLE VII

COOPERATION IN CONNECTION WITH PROJECTS AND OTHER ASSISTED HOUSING

1. For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of projects, the Tribe hereby agrees that:
 - (a) It will not levy or impose any real or personal property taxes or special assessments upon OSLH or any properties owned by OSLH; furthermore the Tribe may also agree to exempt other housing assisted or financed by OSLH.
 - (b) It will furnish or cause to be furnished to OSLH, its projects and any assisted housing, all services and facilities of the same extent as the Tribe furnishes from time to time without cost or charge to other dwellings and inhabitants.
 - (c) It will do any and all things, within its lawful powers, necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of projects and other assisted housing.
 - (d) The Tribe hereby declares that the powers of the Tribal government shall be utilized to enforce eviction or foreclosure of a tenant, owner or homebuyer of OSLH assisted housing for nonpayment or other contract violations including action through the appropriate courts.
 - (e) The Tribal Courts shall have jurisdiction to hear and determine an action for eviction or foreclosure of a tenant, owner or homebuyer of OSLH assisted housing. The Tribal government hereby declares that the powers of the Tribal courts shall be utilized to enforce eviction or foreclosure of a tenant, owner or homebuyer for nonpayment or other contract or mortgage violations.

ARTICLE IX

MISCELLANEOUS

1. Each project developed or operated under a contract providing for Federal financial assistance shall be developed and operated in compliance with all requirements of such contract and applicable Federal legislation, and with all regulations and requirements prescribed from time to time by the Federal government in connection with such assistance.
2. OSLH shall obtain or provide for the obtaining of adequate fidelity bond coverage of its officers, agents, or employees handling cash or authorized to sign checks or certify vouchers.

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3. The properties owned by OSLH are declared to be public property used for essential public and governmental purposes and such property and OSLH are exempt from all taxes and special assessments of the Tribe.
4. All property is owned by OSLH pursuant to this Ordinance except where expressly, unequivocally and in writing agreed to otherwise by OSLH Board, shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same nor shall any judgment against OSLH be a charge or lien upon or limit the right of obligees to pursue any remedies for the enforcement of any pledge or lien given by OSLH on its rents, fees or revenues or the right of OSLH to bring eviction and foreclosure actions in accordance with Article IX (1)(e).
5. Any amendment to this Charter shall only be made by the Tribal Council.

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F



Oglala Sioux (Lakota) Housing

NOTICE OF PERSONNEL ACTION

Employee: Deane Davis Effective Date: 5-26-11

Employee Number: _____ Department: Maintenance

District: Pine Ridge Division: _____ Account Number: _____

CHECK APPLICABLE BOXES: From: _____ To: _____

☐ Department

☐ Job Title

☐ Part Time ☐ Full Time

☐ Rate 12.51 VR

☐ Temporary

☒ Probation Completed

☐ Permanent

Reason for the change(s):

☒ Hired ☒ Probation Completed ☐ Appoint

☐ Evaluation on file ☐ Length of service increase ☐ Promotion

☐ Transfer ☐ Medical Termination ☐ Demote

☐ Retirement ☐ Layoff ☐ Resignation

☐ Discharge ☐ Merit increase ☐ Other

Comments:

Hired Permanent Probation Completed

Supervisor: Richard Hill Date: 5-26-11

Signature If Applicable: [Signature] Date: 6-8-11

Concur: Pacall Date: 6-6-11

CC: Employee
Finance
Personnel File

June 21, 2000 - JH

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

JAN 31 2018

By: _____

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Oglala Sioux (Lakota) Housing

NOTICE OF PERSONNEL ACTION

Employee: Derek L. Jarvis Effective Date: 4/25/11
Employee Number: 100887 Department: Maint/Mod
District: Pine Ridge Division: Maintenance Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☐ Department

☒ Job Title Maintenance/Modernization Worker

☐ Part Time ☒ Full Time

☒ Rate \$12.51 hr.

☐ Temporary

☒ Probation 4/25/11 — 5/25/11

☐ Permanent

Reason for the change(s):

☐ Hired

☐ Probation Completed

☐ Appoint

☐ Evaluation on file

☐ Length of service increase

☐ Promotion

☐ Transfer

☐ Medical Termination

☐ Demote

☐ Retirement

☐ Layoff

☐ Resignation

☐ Discharge

☐ Merit increase

☐ Other

Comments:

Hire Date: 3/1/10
Lay off: 1/14/11
Recalled: 2/7/11

Supervisor: [Signature]

Date: 4-25-11

Signature if Applicable: [Signature]

Date: 4-27-11

Concur: [Signature]

Date: 4-27-11

CC: Employee
Finance
Personnel File

June 23, 2010 - HR



Oglala Sioux (Lakota) Housing

COPY

NOTICE OF PERSONNEL ACTION

Employee: Wesley Cottier Effective Date: 9/2/13
Employee Number: 100972 Department: Maint / Mod.
District: Pine Ridge Division: Preventive Maintenance Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☐ Department

☒ Job Title Maintenance Worker

☐ Part Time ☒ Full Time

☒ Rate \$12.51 hr.

☐ Temporary

☒ Probation 9/2/13 — 10/2/13 (30 Days)

☐ Permanent

Reason for the change(s):

☒ Hired

☐ Probation Completed

☐ Appoint

☐ Evaluation on file

☐ Length of service increase

☐ Promotion

☐ Transfer

☐ Medical Termination

☐ Demote

☐ Retirement

☐ Layoff

☐ Resignation

☐ Discharge

☐ Merit increase

☐ Other

Comments:

Original Hire Date: 1/13/13

Supervisor: Richard Hill

Date: 9-3-13

Signature if Applicable: Pat Condon

Date: 9.6.13

Concur: J

Date: 9-3-13

CC: Employee
Finance
Personnel File

June 21, 2010 - 698

F000003



Oglala Lakota County

COPY

NOTICE OF PERSONNEL ACTION

Employee: Wesley Cottier, Sr. Effective Date: 1/9/13
Employee Number: 100972 Department: Maint / Mod.
District: Pine Ridge Division: Preventive Maintenance Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☒ Department Maintenance / Modernization
☒ Job Title _____
☐ Part Time ☒ Full Time
☒ Rate \$12.51 hr.
☒ Temporary
☐ Probation
☐ Permanent

Reason for the change(s):

<input checked="" type="checkbox"/> Hired	<input type="checkbox"/> Probation Completed	<input type="checkbox"/> Appoint
<input type="checkbox"/> Evaluation on file	<input type="checkbox"/> Length of service increase	<input type="checkbox"/> Promotion
<input type="checkbox"/> Transfer	<input type="checkbox"/> Medical Termination	<input type="checkbox"/> Demote
<input type="checkbox"/> Retirement	<input type="checkbox"/> Layoff	<input type="checkbox"/> Resignation
<input type="checkbox"/> Discharge	<input type="checkbox"/> Merit increase	<input type="checkbox"/> Other

Comments:

Supervisor: Richard Hile

Date: 1-9-13

Signature if Applicable: [Signature]

Date: 1-9-13

Concur: [Signature]

Date: 1-9-13

CC: Employee
Finance
Personnel File

June 21, 2010 - HR

F000004



COPY

Oglala Sioux (Lakota) Housing

NOTICE OF PERSONNEL ACTION

EMPLOYEE: Rich Hill EFFECTIVE DATE: 7/13/04
EMPLOYEE NUMBER: _____ DEPARTMENT: Maint/Mod.
DISTRICT: _____ DIVISION: Western

CHECK APPLICABLE BOXES: FROM: _____ TO: _____
☒ DEPARTMENT Maint/Mod.
☒ JOB TITLE Maintenance Superintendent
☐ PART-TIME ☒ FULL-TIME
☒ RATE \$18.75 hr.
☐ TEMPORARY
☒ PROBATION 7/13/04 10/13/04
☐ PERMANENT

REASON FOR THE CHANGE(S):

<input checked="" type="checkbox"/> HIRED	<input type="checkbox"/> PROBATION COMPLETED
<input type="checkbox"/> APPOINT	<input type="checkbox"/> EVALUATION ON FILE
<input type="checkbox"/> PROMOTION	<input type="checkbox"/> LENGTH OF SERVICE INCREASE
<input type="checkbox"/> TRANSFER	<input type="checkbox"/> MEDICAL TERMINATION
<input type="checkbox"/> DEMOTE	<input type="checkbox"/> RETIREMENT
<input type="checkbox"/> LAYOFF	<input type="checkbox"/> RESIGNATION
<input type="checkbox"/> DISCHARGE	<input type="checkbox"/> MERIT INCREASE

COMMENTS:

for SUPERVISOR: Lynne Rodriguez DATE: 7/13/04


CC: EMPLOYEE
PERSONNEL FILE
FINANCE



Oglala Sioux Housing Authority

P.O. Box C
Pine Ridge, SD 57770

MEMORANDUM

TO: Richard Hill
FR: Executive Director 
DT: September 21, 1989
SB: Permanent Employment

Based on your supervisor's recommendation, you are herewith placed on "Permanent" Employment Status as laborer - (unskilled). Your rate of pay is \$5.65 per hour.

This appointment is effective September 28, 1989. Contact Janese Mousseaux for further processing.

DMT/vbf

F000006



Oglala Sioux Housing Authority

P.O. Box C
Pine Ridge, SD 57770

May 10, 1989

Mr. Richard Hill
P.O. Box #
Pine Ridge, SD 57770

Mr. Hill:

You have been selected to fill a temporary maintenance position. Your rate of pay will be \$5.65 per hour with your immediate supervisor being Gloria Bettelyoun.

You are to report to the OSHA Administrative Office at 8:00 AM on Thursday - May 11, 1989.

Sincerely,

Darrel M. Twiss
Executive Director

DMT:ibl

cc: Personnel file
file



Oglala Sioux (Lakota) County

NOTICE OF PERSONNEL ACTION

Employee: Benjamin Plenty Oxtown Effective Date: January 13, 2017

Employee Number: 101034 Department: Maintenance/Modernization

District: Pine Ridge Division: _____ Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☒ Department Maintenance/Modernization

☒ Job Title Maintenance Worker

☐ Part Time ☒ Full Time

☐ Rate

☐ Temporary

☐ Probation

☒ Permanent

Reason for the change(s):

☐ Hired

☐ Probation Completed

☐ Appoint

☐ Evaluation on file

☐ Length of service increase

☐ Promotion

☐ Transfer

☐ Medical Termination

☐ Demote

☐ Retirement

☐ Layoff

☐ Resignation

☐ Discharge

☐ Merit increase

☐ Other

Comments:

Supervisor: [Signature]

Date: 1-20-17

Signature if Applicable: [Signature]

Date: 1-20-17

Concur: [Signature]

Date: 1-20-17

CC: Employee
Finance
Personnel File

June 23, 2010 - HR



Oglala Sioux (Lakota) Housing

COPY

New

NOTICE OF PERSONNEL ACTION

Employee: Benjamin Platy Brown Effective Date: 10/14/15
Employee Number: 101034 Department: Maint/Mel.
District: Pine Ridge Division: Maintenance Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☐ Department

☒ Job Title Maintenance Worker

☐ Part Time ☒ Full Time

☒ Rate \$12.51 hr.

☒ Temporary

☐ Probation

☐ Permanent

Reason for the change(s):

☒ Hired

☐ Probation Completed

☐ Appoint

☐ Evaluation on file

☐ Length of service increase

☐ Promotion

☐ Transfer

☐ Medical Termination

☐ Demote

☐ Retirement

☐ Layoff

☐ Resignation

☐ Discharge

☐ Merit increase

☐ Other

Comments:

Supervisor: Leahann Hill

Date: 10-14-2015

Signature If Applicable: Paul Cond

Date: 10-14-15

Concur: Pac & cl

Date: 10-14-15

CC: Employee
Finance
Personnel File

June 21, 2010 - HR

F000009



Oglala Sioux (Lakota) Housing

COPY

NOTICE OF PERSONNEL ACTION

Employee: Shandon Shangeau Effective Date: 8/18/11
Employee Number: 100889 Department: Maint/Mod
District: Wakpau Division: Preventive Maintenance Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☐ Department

☒ Job Title Maintenance/Modernization Worker

☐ Part Time ☒ Full Time

☒ Rate \$12.95 hr.

☐ Temporary

☐ Probation

☒ Permanent

Reason for the change(s):

☒ Hired

☐ Probation Completed

☐ Appoint

☐ Evaluation on file

☐ Length of service increase

☐ Promotion

☐ Transfer

☐ Medical Termination

☐ Demote

☐ Retirement

☐ Layoff

☐ Resignation

☐ Discharge

☐ Merit increase

☐ Other

Comments:

Original Hire date: 3/22/10

Supervisor: Nelson Wagner

Date: 8-18-11

Signature if Applicable: [Signature]

Date: 8-25-11

Concur: [Signature]

Date: 8/26/11

CC: Employee
Finance
Personnel File

June 21, 2010 - HR



Oglala Sioux (Lakota) Housing

COPY

NOTICE OF PERSONNEL ACTION

~~CONFIDENTIAL~~

EMPLOYEE: Brandon Shangreau EFFECTIVE DATE: 3/22/10.
EMPLOYEE NUMBER: _____ DEPARTMENT: maint./mod.
DISTRICT: Wakpamti DIVISION: _____

CHECK APPLICABLE BOXES: FROM: TO:
☒ DEPARTMENT maint/mod.
☒ JOB TITLE Maintenance Worker
☐ PART-TIME ☒ FULL-TIME
☒ RATE \$12.51 hr
☒ TEMPORARY
☐ PROBATION
☐ PERMANENT

REASON FOR THE CHANGE(S):

<input checked="" type="checkbox"/> HIRED	<input type="checkbox"/> PROBATION COMPLETED
<input type="checkbox"/> APPOINT	<input type="checkbox"/> EVALUATION ON FILE
<input type="checkbox"/> PROMOTION	<input type="checkbox"/> LENGTH OF SERVICE INCREASE
<input type="checkbox"/> TRANSFER	<input type="checkbox"/> MEDICAL TERMINATION
<input type="checkbox"/> DEMOTE	<input type="checkbox"/> RETIREMENT
<input type="checkbox"/> LAYOFF	<input type="checkbox"/> RESIGNATION
<input type="checkbox"/> DISCHARGE	<input type="checkbox"/> MERIT INCREASE

COMMENTS:

SUPERVISOR: [Signature] DATE: 3-22-10
CC: EMPLOYEE
PERSONNEL FILE [Signature] DATE: 3-23-10
FINANCE Signature If Applicable
CONCUR: [Signature] DATE: 3-22-10
Chief Executive Officer



Oglala Sioux Lakota Housing

Copy

NOTICE OF PERSONNEL ACTION

Employee: William White Effective Date: October 14, 2015
Employee Number: 101002 Department: Maintenance/Modernization
District: Pine Ridge Division: Maintenance Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☒ Department Maintenance/Modernization
☒ Job Title Maintenance/Modernization Worker
☐ Part Time ☒ Full Time
☒ Rate \$ 12.51 ph
☐ Temporary
☐ Probation no probation required been here over a year.
☒ Permanent

Reason for the change(s):

<input checked="" type="checkbox"/> Hired	<input type="checkbox"/> Probation Completed	<input type="checkbox"/> Appoint
<input type="checkbox"/> Evaluation on file	<input type="checkbox"/> Length of service increase	<input type="checkbox"/> Promotion
<input type="checkbox"/> Transfer	<input type="checkbox"/> Medical Termination	<input type="checkbox"/> Demote
<input type="checkbox"/> Retirement	<input type="checkbox"/> Layoff	<input type="checkbox"/> Resignation
<input type="checkbox"/> Discharge	<input type="checkbox"/> Merit increase	<input type="checkbox"/> Other

Comments:

Supervisor: [Signature]

Date: 9-15-15

Signature If Applicable: [Signature]

Date: 9-14-15

Concur: [Signature]

Date: 9-14-15

CC: Employee
Finance
Personnel File

June 21, 2010 - HR



COPY

New

Oglala Sioux (Lakota) Housing

NOTICE OF PERSONNEL ACTION

Employee: William White Effective Date: 4-9-14.
Employee Number: 101002 Department: Meth & Mold Development
District: Res. Wide Division: _____ Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☒ Department Development meth/mold.
☒ Job Title Carpenter
☐ Part Time ☒ Full Time
☒ Rate \$12.⁰⁰ hr.
☒ Temporary
☐ Probation
☐ Permanent

Reason for the change(s):

<input checked="" type="checkbox"/> Hired	<input type="checkbox"/> Probation Completed	<input type="checkbox"/> Appoint
<input type="checkbox"/> Evaluation on file	<input type="checkbox"/> Length of service increase	<input type="checkbox"/> Promotion
<input type="checkbox"/> Transfer	<input type="checkbox"/> Medical Termination	<input type="checkbox"/> Demote
<input type="checkbox"/> Retirement	<input type="checkbox"/> Layoff	<input type="checkbox"/> Resignation
<input type="checkbox"/> Discharge	<input type="checkbox"/> Merit increase	<input type="checkbox"/> Other

Comments:

Supervisor: [Signature]
Signature if Applicable: [Signature]
Concur: [Signature]

Date: 4-8-14
Date: 4-14-14
Date: 4-17-14

CC: Employee
Finance
Personnel File

June 23, 2010 - HR



Oglala Sioux (Lakota) Housing

NOTICE OF PERSONNEL ACTION

Employee: Thomas Watten Effective Date: 4/25/11
Employee Number: 100883 Department: Maint/Mod
District: Pine Ridge Division: Representative Maintenance Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☐ Department

☐ Job Title Maintenance/Modernization Worker

☐ Part Time ☒ Full Time

☒ Rate \$12.95 hr.

☐ Temporary

☐ Probation

☒ Permanent

Reason for the change(s):

☐ Hired

☐ Probation Completed

☐ Appoint

☐ Evaluation on file

☐ Length of service increase

☐ Promotion

☐ Transfer

☐ Medical Termination

☐ Demote

☐ Retirement

☐ Layoff

☐ Resignation

☐ Discharge

☐ Merit increase

☐ Other

Comments:

Hire Date: 2/17/10

Supervisor: Thomas Hill

Date: 4-25-11

Signature if Applicable: [Signature]

Date: 4-27-11

Concur: [Signature]

Date: 4-28-11

CC: Employee
Finance
Personnel File

June 21, 2010 - HR



Oglala Sioux (Lakota) Housing

NOTICE OF PERSONNEL ACTION

New

EMPLOYEE: Tom Watters EFFECTIVE DATE: 2-8-10
EMPLOYEE NUMBER: _____ DEPARTMENT: Maintenance/Mol.
DISTRICT: Pine Ridge DIVISION: Preventative Maint.

CHECK APPLICABLE BOXES: FROM: TO:
☒ DEPARTMENT Maintenance
☒ JOB TITLE Maintenance/Modernization Worker
☐ PART-TIME ☐ FULL-TIME
☒ RATE (12.51)
☒ TEMPORARY
☐ PROBATION
☒ PERMANENT Tell filled

REASON FOR THE CHANGE(S):

<input checked="" type="checkbox"/> HIRED	<input type="checkbox"/> PROBATION COMPLETED
<input type="checkbox"/> APPOINT	<input type="checkbox"/> EVALUATION ON FILE
<input type="checkbox"/> PROMOTION	<input type="checkbox"/> LENGTH OF SERVICE INCREASE
<input type="checkbox"/> TRANSFER	<input type="checkbox"/> MEDICAL TERMINATION
<input type="checkbox"/> DEMOTE	<input type="checkbox"/> RETIREMENT
<input type="checkbox"/> LAYOFF	<input type="checkbox"/> RESIGNATION
<input type="checkbox"/> DISCHARGE	<input type="checkbox"/> MERIT INCREASE

COMMENTS: Temporary tell filled

SUPERVISOR: Richard Hill DATE: 2-5-10

CC: EMPLOYEE
PERSONNEL FILE [Signature] DATE: 2-5-10
FINANCE Signature If Applicable

CONCUR: Peele-Oh DATE: 2-5-10
Chief Executive Officer



Oglala Sioux (Lakota) Housing

NOTICE OF PERSONNEL ACTION

New

EMPLOYEE: Robin Tuttle EFFECTIVE DATE: 4/27/09
EMPLOYEE NUMBER: _____ DEPARTMENT: Electrical
DISTRICT: Res. Wide DIVISION: _____

CHECK APPLICABLE BOXES: FROM: TO:
☐ DEPARTMENT
☒ JOB TITLE Electrician
☒ PART-TIME ☒ FULL-TIME
☒ RATE \$12.51 hr.
☒ TEMPORARY 4/27/09 — 7/27/09
☐ PROBATION
☐ PERMANENT

REASON FOR THE CHANGE(S):

<input checked="" type="checkbox"/> HIRED	<input type="checkbox"/> PROBATION COMPLETED
<input type="checkbox"/> APPOINT	<input type="checkbox"/> EVALUATION ON FILE
<input type="checkbox"/> PROMOTION	<input type="checkbox"/> LENGTH OF SERVICE INCREASE
<input type="checkbox"/> TRANSFER	<input type="checkbox"/> MEDICAL TERMINATION
<input type="checkbox"/> DEMOTE	<input type="checkbox"/> RETIREMENT
<input type="checkbox"/> LAYOFF	<input type="checkbox"/> RESIGNATION
<input type="checkbox"/> DISCHARGE	<input type="checkbox"/> MERIT INCREASE

PIC

COMMENTS: Hired Temporary on an as needed basis only

SUPERVISOR: J. R. Rhee DATE: 5-4-9

CC: EMPLOYEE
PERSONNEL FILE
FINANCE

CONCUR: R. Rhee 5/4/09
Executive Director



Oglala Sioux (Lakota) Housing

COPY

NOTICE OF PERSONNEL ACTION

Employee: Ronald Two Bulls Effective Date: 5/5/14
Employee Number: 100949 Department: Maint/mod.
District: Res. Wide Division: _____ Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

☐ Department

☐ Job Title

☐ Part Time ☐ Full Time

☐ Rate

☐ Temporary

☐ Probation

☐ Permanent

Reason for the change(s):

☐ Hired

☐ Probation Completed

☐ Appoint

☐ Evaluation on file

☐ Length of service increase

☐ Promotion

☐ Transfer

☐ Medical Termination

☐ Demote

☐ Retirement

☐ Layoff

☐ Resignation

☒ Discharge

☐ Merit increase

☐ Other

Comments:

Three days - Job abandonment

Supervisor: Art Gmb

Date: 6-5-16

Signature if Applicable: Michael D. Jones

Date: 6/16/16

Concur: Pro-cc

Date: 6-16-16

CC: Employee
Finance
Personnel File

June 21, 2010 - HR



Oglala Sioux (Lakota) Housing

COPY

NOTICE OF PERSONNEL ACTION

Employee: Ronalds Joe Bulls Effective Date: 5/5/16
Employee Number: 100949 Department: Maint/Mod.
District: Leas. Wide Division: _____ Account Number: _____

CHECK APPLICABLE BOXES:

From:

To:

- ☐ Department
☐ Job Title
☐ Part Time ☐ Full Time
☐ Rate
☐ Temporary
☐ Probation
☐ Permanent

Reason for the change(s):

- | | | |
|---|---|--------------------------------------|
| <input type="checkbox"/> Hired | <input type="checkbox"/> Probation Completed | <input type="checkbox"/> Appoint |
| <input type="checkbox"/> Evaluation on file | <input type="checkbox"/> Length of service Increase | <input type="checkbox"/> Promotion |
| <input type="checkbox"/> Transfer | <input type="checkbox"/> Medical Termination | <input type="checkbox"/> Demote |
| <input type="checkbox"/> Retirement | <input type="checkbox"/> Layoff | <input type="checkbox"/> Resignation |
| <input checked="" type="checkbox"/> Discharge | <input type="checkbox"/> Merit increase | <input type="checkbox"/> Other |

Comments:

Three days - Job abandonment

Supervisor: Ali Goud

Date: 6-16-16

Signature if Applicable: Michael D. Jones

Date: 6/16/16

Concur: P. O. O.

Date: 6-16-16

CC: Employee
Finance
Personnel File

June 21, 2010 - HR

G

Unacceptable if Altered

Oglala Sioux Tribe
PO Box 2070
Pine Ridge, SD 57770

Wednesday, January 09, 2013



Certificate of Indian Blood

Name: **Wesley Wayne Cottier**

Date of Birth: **10/14/1976**

Enrollment Status: **Enrolled**

Resolution Number:

Enrollment Number: **U-036616**

Resolution Date:

Ethnic Affiliation/Blood Quantum

Total Quantum This Tribe: **47/128**


For Enrollment Director

Authorizing Signature



Unacceptable if Altered

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 .com

Page 1

Oglala Sioux Tribe
PO Box 2070
Pine Ridge, SD 57770
(605) 867-3321
receptionist@ogylala.org



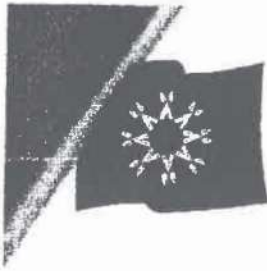
01/09/2013

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

JAN 31 2018

By: _____

G000001



Oglala Sioux Tribe
Department of Enrollment

P.O. Box 2070
Pine Ridge, South Dakota 57770-2070
Phone 605/867-1321 • FAX 605/867-2901



October 17, 2002

I hereby certify that THOMAS LANE WATERS is listed on the Pine Ridge Indian Reservation Census ledger, established 1908 (revised 1956), an official record of this agency, as being 7/32 degree OGLALA SIOUX INDIAN blood, with roll number G 28412 and was born June 12, 1957.


Assistant Enrollment Director

G000002



Certificate of Tribal Enrollment

Name: **Benjamin William Plenty Arrows, Jr.**
Date of Birth: **01/08/1983** Enrollment Status: **Enrolled**
Resolution Number: Enrollment Number: **U-037936**
Resolution Date:

Ethnic Affiliation/Blood Quantum

Total Quantum This Tribe: **115/128**

Bernadine Blue Bird

For Enrollment Director

Authorizing Signature





Oglala Sioux Tribe
Department of Enrollment

Box H
Pine Ridge, South Dakota 57770-2070
Phone 605/867-1321



March 21, 2001

I hereby certify that BRANDON CHARLES SHANGREAU is listed on the Pine Ridge Indian Reservation census ledger, established 1908 (revised 1956), an official record of this agency, as being 65/128 degree OGLALA SIOUX INDIAN blood, with roll number U30342 and was born September 11, 1986.


Enrollment Director

G000004



Oglala Sioux Tribal Nation
Pine Ridge Reservation

DOB: 11/23/1973 SEX: M
529-06-2766
EMPLOYEE NO: U-33472
31/32 3/13/2003

Robin E. Tuttle
ROBIN E
TUTTLE

P.O. BOX 122
POPCUPINE
SD 57772

John Thacker
John Thacker

State of South Dakota



State Electrical Commission
has issued AE 10428

By: ISSUANCE

To: ROBIN TUTTLE

2008-07-01
Effective Date

June 30, 2010
Expiration Date

Apprentice

South Dakota
OPERATOR LICENSE

CLASS A	ISSUE DATE 11/23/2004	EXPIRE DATE 11/23/2009
HEIGHT 6'10"	WEIGHT 175	EYE BRN
BIRTHDATE 11/23/1973	RESTRICTIONS O	SEX M

Robin E. Tuttle
TUTTLE, ROBIN EDWARD
110 E WATERTOWN ST #31
RAPID CITY, SD 57701-1562

LICENSE NUMBER
529062766

VERIFICATION OF INDIAN PREFERENCE FOR EMPLOYMENT
IN THE BUREAU OF INDIAN AFFAIRS AND INDIAN HEALTH SERVICE

Complete one of the categories as stated in the instructions and submit this form with your application for Federal employment.

Category A - MEMBERS OF FEDERALLY-RECOGNIZED INDIAN TRIBES, BANDS OR COMMUNITIES

This is to certify that the person named below is a member of the tribe shown:

William David Samuel White	U-025365	07/10/1967	1/2 Oglala Sioux Tribe (1/2 total)
Full Name	Enrollment No.	Date of Birth	Tribal Affiliation

I certify that the above information was taken from the official membership records of the Oglala Sioux Tribe (or records maintained for the Tribe by the BIA) and acknowledge that falsification and misrepresentation of this information is punishable under Federal Law, 18 U.S.C. 1001.

Certification by Tribal Official:

And if required, verification by the BIA Official maintaining the official tribal rolls that the individual is listed on enrollment list maintained by the BIA at the request of the tribe.

Bernadine Blue Bird 05-31-13
Signature Date

Signature of BIA Official Date

Bernadine Blue Bird, Assistant Director
Print Name & Title of Tribal OfficialName / Title Pine Ridge Agency
Agency**Category B - DESCENDANTS OF MEMBERS OF FEDERALLY-RECOGNIZED INDIAN TRIBES, BANDS OR COMMUNITIES WHO WERE RESIDING ON ANY INDIAN RESERVATION ON JUNE 1, 1934**

I certify that the person named below has established to my satisfaction that he/she is a descendant of an enrolled member of the tribe named below and that he/she was living on an Indian reservation on June 01, 1934. The applicant's family history is outlined on the attached family history chart.

Full Name Date of Birth

Reservation of Residence on June 01, 1934

Full Name of Ancestor & Tribal Affiliation

Title and source of records upon which this is based:

BIA Official Date

Title Agency

Category C - PERSONS WHO POSSESS AT LEAST ONE-HALF DEGREE INDIAN BLOOD DERIVED FROM TRIBES INDIGENOUS TO THE UNITED STATES:

I certify that I have reviewed the documentation to support the below listed individual's claim to possess at least one-half degree Indian blood. The applicant's family history is outlined on the attached family history chart and official records.

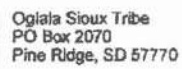
Full Name Date of Birth Degree of Blood and Tribal Derivation

Title & Source of Records upon which this is based:

BIA Official Date

☐ Official Records of Tribal Affiliation & Blood Degree☐ State or Academic Recognition of Indigenous Status

Title Agency



Wednesday, October 04, 2017

Certificate of Indian Blood

Name: _____

Date of Birth: 01/01/2001

Enrollment Status:

Resolution Number:

Enrolment Number: 22

Resolution Date:

Ethnic Affiliation/Blood Quantum

Total Quantum All Tribes:

Michael Ross

Authorizing Signature



Forwarded by: , PH.D. 2008

Page 1

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS

44 BIAH 302
ILLUSTRATION 1
PAGE 1 OF 6 PAGES

VERIFICATION OF INDIAN PREFERENCE FOR EMPLOYMENT
IN BUREAU OF INDIAN AFFAIRS AND INDIAN HEALTH SERVICE ONLY

To Establish eligibility for Indian preference for employment
with BIA/DHS, complete one of the categories below and submit
with your SF-171, Application for Federal Employment.

Category
A

MEMBERS OF FEDERALLY RECOGNIZED INDIAN TRIBES, BANDS OR
COMMUNITIES.

This is to certify that the person named below is a member of the tribe indicated:

Richard Wayne Hill	05-16-61	11/32 Oglala Sioux #U-22452
Full Name	Date of Birth	Tribal Affiliation
<i>Mar. Lecker</i>	<i>Billy L. Olson</i>	7-29-88
Tribal leader or Representative	BIA Representative	Date
Enrollment Director	Superintendent	
Title	Title	
7-29-88	Pine Ridge Agency, Pine Ridge, SD 57770	
Date	Agency Name	

Category
B

DESCENDANTS OF MEMBERS OF FEDERALLY RECOGNIZED INDIAN TRIBES, BANDS OR
COMMUNITIES WHO WERE RESIDING ON ANY INDIAN RESERVATION ON JUNE 1, 1934.

This is to certify that the person named below has established to my satisfaction that he is a descendant of an
enrolled member of the tribe named below and that he was living on an Indian reservation on June 1, 1934.
The applicant's family history is outlined on the attached family history chart:

Name of Individual	Date of Birth	Reservation of Residence on June 1, 1934
Ancestor		Tribal Record of Affiliation
Date		BIA Representative
		Title
		Agency

44 BIAH Release 82, 11/2/82

5-417A

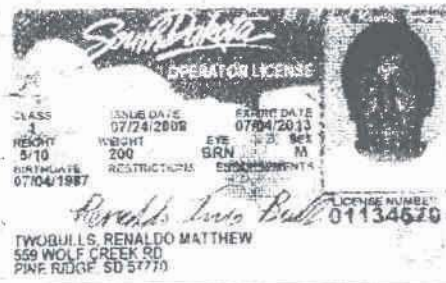
UNITED STATES
DEPARTMENT OF THE INTERIOR
PINE RIDGE INDIAN AGENCY
PINE RIDGE, SOUTH DAKOTA 57770

SEPTEMBER 2, 1998
Date

I HEREBY CERTIFY THAT RENALDO MATTHEW TWO BULLS IS LISTED
ON THE PINE RIDGE INDIAN RESERVATION CENSUS LEDGER, ESTABLISHED 1908 (revised 1956),
AN OFFICIAL RECORD OF THIS AGENCY, AS BEING 117/128 DEGREE OGLALA SIOUX INDIAN
BLOOD, WITH ROLL NO. D-31937 AND WAS BORN 07-04-87



[Signature]
ENROLLMENT CLERK



G000009

H

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

JAN 31 2018

By: _____



H00001



H000002



H000003

United States Department of the Interior
Bureau of Indian Affairs
Title Status Report

Report Certification Time and Date: 12/14/2017 07:28:53 AM
Requestor: PYELLOWB Date/Time: 01/17/2018 14:59:47

Land Legal Description

<u>Land Area</u>	<u>Land Area Name</u>	<u>Tract Number</u>	<u>LTRO</u>	<u>Region</u>	<u>Agency</u>	<u>Resources</u>
344	PINE RIDGE	T 10465	ABERDEEN, SD	GREAT PLAINS REGIONAL OFFICE	PINE RIDGE AGENCY	Both

<u>Section</u>	<u>Township</u>	<u>Range</u>	<u>State</u>	<u>County</u>	<u>Meridian</u>	<u>Legal Description</u>	<u>Acres</u>
7	035.00N	044.00W	SOUTH DAKOTA	OGDALA LAKOTA	Sixth Principal	LOT 02=	36.010
						LOT 01=	35.590
						LOT 2, BLK 2, WITHIN SW OF LOT 1	
						TOTAL TRACT ACRES:	71.600

Title Status

Tract 344 T 10465 is held by the United States of America in trust for the land owner(s) with trust interests and/or by the land owner(s) with restricted interests and/or fee simple interests, as listed in Appendix "A" attached to and incorporated in this Title Status Report.

The title to Tract 344 T 10465 is current, complete, correct, and without defect. Ownership is in unity and interests are owned in the following title status: trust.

The tract ownership is encumbered by the title documents as listed on Appendix "B" attached to and incorporated in this Title Status Report.

No Tract Notes or Coded Remarks for this tract.

This report does not cover encroachments nor any other rights that might be disclosed by a physical inspection of the premises, nor questions of location or boundary that an accurate survey may disclose. This Report also does not cover encumbrances, including but not limited to irrigation charges, unpaid claims, not filed or recorded in this Land Titles and Records Office. This report does not state the current ownership of the interests owned in fee simple but states the ownership at the time the interest ceased to be held in trust or restricted ownership status.

This Title Status Report is a true and correct report of the status of title to the real estate described herein according to the official land records recorded and maintained in this office.

Appendix "A"

Effective Ownership as of 10/08/2004

OWNER					DOCUMENT			NAME ACQUIRED	FRACTION	AGGREGATE SHARE	AGGREGATE
Tribe & Code	ID No. & DOB	Indian or Non-Indian	Title Status	Interest*	Class	Type	Number	SURNAME/FIRST NAME	AS ACQUIRED	CONVERTED TO LCD	DECIMAL
144 OGLALA SIOUX (PIKE RIDGE) - S	T344030	Tribe	Trust	All	Secretar	SPEC AUT	9846960	OGLALA SIOUX TRIBE	1 1	1 1	1.0000000000

* "All" means the equitable beneficial interest and the legal title interest merged together.

IN TRUST:	1
	1 1.0000000000
IN FEE:	0
	1 .0000000000
TOTAL:	1
	1 1.0000000000

Appendix "B"

Ownership of Tract 344 T 10465 is encumbered by the following:

Contract Type/Contractor Name	Contract Number	Contractor ID	Begin Date	Expiration Date	Leased Acres	Record Image#
Service Line Agreement	00001710PT	344C071092	08/30/2010	PERPETUAL	.005	
NEBRASKA PUBLIC POWER Service Line Agreement	00001731PT	344C071092	09/14/2010	PERPETUAL	.030	
NEBRASKA PUBLIC POWER Service Line Agreement	2010000149	344C071092	05/23/2011	PERPETUAL	.100	
NEBRASKA PUBLIC POWER Service Line Agreement	2010000182	344C071092	09/06/2011	PERPETUAL	.030	344 2010000182
NEBRASKA PUBLIC POWER Service Line Agreement	2010000187	344C071092	09/16/2011	PERPETUAL	.050	344 2010000187
NEBRASKA PUBLIC POWER Highways and Roads	2011000018	344C250130	10/31/2011	PERPETUAL	.080	2011000018
FRANKIE WHITE DRESS Service Line Agreement	2012000004	344C071227	10/16/2012	PERPETUAL	.140	344 2012000004
GOLDENWEST TELECOM COOP. Service Line Agreement	2013000028	344C071092	12/03/2013	PERPETUAL	.040	344 2013000028
NEBRASKA PUBLIC POWER Service Line Agreement	2013000140	344C071092	09/29/2014	PERPETUAL	.020	344 2013000140
NEBRASKA PUBLIC POWER Service Line Agreement	2014000031	344C071092	11/19/2014	PERPETUAL	.020	344 2014000031
NEBRASKA PUBLIC POWER Service Line Agreement	2014000175	344C071227	09/11/2015	PERPETUAL	.030	344 2014000175
GOLDENWEST TELECOM COOP. Water Line	2017000044	344C071375	01/18/2017	01/17/2067	.220	344 2017000044
OGALA SIOUX R.W.S.S. RESIDENTIAL	2453609520	344C001063	09/18/1995	09/17/2020	.500	45360---
OGALA SIOUX HOUSING AUTHORITY BUSINESS	2508211310	344C250821	02/01/2013	01/31/2018	.200	344 2508211310
ALSIE LEBEAU RESIDENTIAL	2508521217	344C250852	11/01/2013	10/31/2018	.200	344 2508521217
TRACIE GALLEGO RESIDENTIAL	2508721318	344C250872	07/01/2013	06/30/2018	.260	344 2508721318
LOLITA ESPARZA RESIDENTIAL	2509051318	344C001761	08/01/2013	07/31/2018	.270	344 2509051318
JAMES MATTERS RESIDENTIAL	2510341418	344C251034	01/01/2014	12/31/2018	.250	344 2510341418
GERALDINE MELPER RESIDENTIAL	2B12L81262	344C001063	03/01/2012	02/28/2062	.530	344 2B12L81262
OGALA SIOUX HOUSING AUTHORITY RESIDENTIAL	2B14141419	344C251034	09/01/2014	08/31/2019	.210	344 2B14141419
RICHARD S HAGEN RESIDENTIAL	2B159A1419	344C251034	08/01/2014	07/31/2019	.130	344 2B159A1419
FERRIS WHITE BULL RESIDENTIAL	2004650150	344C003154	01/01/2001	12/31/2050	.350	50595---
DENNIS BREWER BUSINESS	4200030337	344C251200	03/01/2015	02/28/2020	.190	344 4200030337
BELVA MATTHEWS RESIDENTIAL	4200030691	344C251200	03/01/2015	02/28/2020	.250	344 4200030691
BELVA MATTHEWS RESIDENTIAL	4200037962	344C251550	05/01/2017	04/30/2067	.520	344 4200037962
DALE GARNIER STEPHANIE GARNIER RESIDENTIAL	4200046819	344C251571	07/01/2017	06/30/2022	.290	344 4200046819
DEAN STEELE Highways and Roads	45879---	344C071019	05/17/1996	PERPETUAL	.060	
SD DEPT TRANSPORTATION Electric Line and Power	47646---	344C071092	03/10/1998	PERPETUAL	.190	
NEBRASKA PUBLIC POWER Electric Line and Power	48229---	344C071092	11/13/1998	PERPETUAL	.190	
NEBRASKA PUBLIC POWER Service Line Agreement	48463---	344C071092	01/21/1999	PERPETUAL	.060	
NEBRASKA PUBLIC POWER Service Line Agreement	48777---	344C071092	07/22/1999	PERPETUAL	.070	
NEBRASKA PUBLIC POWER Service Line Agreement	48782---	344C071092	07/22/1999	PERPETUAL	.080	
NEBRASKA PUBLIC POWER Service Line Agreement	48970---	344C071092	11/03/1999	PERPETUAL	.060	
NEBRASKA PUBLIC POWER Service Line Agreement	49532---	344C071092	07/31/2000	PERPETUAL	.110	
NEBRASKA PUBLIC POWER Electric Line and Power	49734---	344C071092	10/25/2000	PERPETUAL	.190	
NEBRASKA PUBLIC POWER BUSINESS	5004650125	344C001723	01/01/2001	12/31/2025	.520	50446
DARRELYN STEELE BUSINESS	5004650227	344C001063	07/01/2002	12/31/2027	.300	53371---
OGALA SIOUX HOUSING AUTHORITY BUSINESS	5004650529	344C250332	01/01/2005	12/31/2029	.720	
MARK R MINCKLER VISION CENTER						
Type of Encumbrance	Encumbrance Holder	Expiration Date	Document Number	Description and Explanation		
DETECT		PERPETUAL	2014000175	TITLE DEFECT- DOCUMENT IS MISSING DELAGATION OF AUTHORITY ON DOCUMENT.		
DETECT		01/17/2067	2017000044	CONTRACT DATE CHANGED TO 1/19/2017;		
DETECT		06/30/2022	4200046819	INCORRECT TERM-CHANGE FROM 50 YEARS TO PERPETUAL Superintendent approval signature does not contain ACTING on lease doc.		
MORTGAGE	FIRST NATIONAL BANK GORDON		60024	LEASEHOLD MTG APPD 04/11/08 SECURES NOTE DTD 07/24/06 FOR \$385,000.00, ENCUMBERING THE INT OF JOSEPH SHETLER, TIMOTHY CHANCELLOR, & VERNON ROCKEY.		

Appendix "B"

Type of Encumbrance	Encumbrance Holder	Expiration Date	Document Number	Description and Explanation
ASSIGNMENT	FIRST NATIONAL BANK OF NORTH PLATTE		52122	GRANTOR HEREBY ASSIGNS, GRANTS A CONTINUING SECURITY INTEREST IN, AND CONVEYS TO LENDER ALL OF GRANTOR'S RIGHT, TITLE, AND INTEREST IN AND TO THE RENTS, ADDENDUM TO COLLATERAL REAL ESTATE MORTGAGE DATED: 6/7/2016
MORTGAGE	FIRST NATIONAL BANK OF NORTH PLATTE	08/06/2021	65041	ASSIGNS LEASE # 02-68, DOC # 52207. APPD 12-13-04 R/W APPD 03-01-26, ACT OF 03-03-01 (31 STAT 1058-1084).
ASSIGNMENT	WILSON CONNIE S		54013	ASSIGNS TRIBAL INCOME APPD: 09/29/1983.
RIGHTS OF WAY	SHANNON COUNTY, S.DAK.	PERPETUAL	1781926	LEASE FOR 25 YRS. PLUS AUTO. 25 YR. EXTENSION, APPD. 10-08-86, 0.01 ACRES
ASSIGNMENT	FARMERS HOME ADMINISTRATION		36779---	LEASE FOR 25 YRS. PLUS AUTO. 25 YR. EXTENSION, APPD. 10-08-86, 0.01 ACRES
HOMESITE LEASE	OGALA SIOUX HOUSING AUTHORITY	10/07/2036	38760---	ASSIGNS LEASE DOC. NO. 344-41406, APPD 8-28-91
HOMESITE LEASE	OGALA SIOUX HOUSING AUTHORITY	10/07/2036	38761---	TELEPHONE LINE R/W, APPD. 4/14/92, ACT OF 2/5/48 (62 STAT. 17)
ASSIGNMENT	ROXIE DREHMER		42067---	ASSIGNS LSE DOC NO 42199 DTD 10-22-91.
RIGHTS OF WAY	GOLDEN WEST TELE. COOP.	PERPETUAL	42392---	MODIFIES UNRECORDED LEASE#92-15, TO CHANGE DESCR. HIGHWAY R/W APPD 4/24/96, ACT OF 2/5/48(62 STAT 17)
ASSIGNMENT	MODELINE TERRY		42473---	HW R/W, APPD 5-17-96. ACT OF 2-5-48 (62 STAT 17)
MISCELLANEOUS	-----		43924---	ELECTRIC S.L.A., APPD 3/10/98, ACT OF 2/5/48 (62 STAT 17)
RIGHTS OF WAY	BUREAU OF INDIAN AFFAIRS	PERPETUAL	45791---	ELECTRICAL SERVICE LINE R/W, APPD. 11-13-1998 25
RIGHTS OF WAY	SD DEP OF TRANSPORTATION	PERPETUAL	45879---	APPD. 1-21-1999 25 CFR 169.22 (C)
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	47646---	ELECTRICAL SERVICE LINE R/W, APPD 3/22/99 25
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	48229---	APPD. 1-21-1999 25 CFR 169.22 (C)
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	48463---	ELECTRICAL SERVICE LINE R/W, APPD 07/31/00, 25
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	48536---	CFR 169.22 FOR 3ETH HERMANODEZ.
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	48777---	ELECTRICAL SERVICE LINE R/W, APPD 10/25/2000, 25
SERVICE LINE AGREEMENT	NEB. PUBLIC POWER DIST.	PERPETUAL	48782---	CFR 169.22 (C)
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	48970---	ELECTRICAL SERVICE LINE AGREEMENT APPD 11-3-99, SESENNNNNN, 25 CFR 169.22
SERVICE LINE AGREEMENT	NE PUBLIC POWER DIST.	PERPETUAL	49332---	ELECTRICAL SERVICE LINE R/W, APPD 07/31/00, 25
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	49734---	CFR 169.22 FOR 3ETH HERMANODEZ.
MISCELLANEOUS	CHERYL HEMINGWAY		50438---	ELECTRICAL SERVICE LINE R/W, APPD 10/25/2000, 25
HOMESITE LEASE	DENNIS BREWER	09/03/2051	50595---	CFR 169.22 (C)
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	50699---	MODIFIES LEASE # 99-252, DUE TO RENTAL REVIEW BASED ON APPRAISAL INCREASE FROM \$145 TO \$609.
MISCELLANEOUS	OGALA SIOUX HOUSING AUTHORITY	10/01/2046	50737---	LEASE NO. 01-285, APPD 09/04/01. 50 YRS. BEGINNING 08/22/01, LTR 1 & 2 OF BLK 6, 15,400 SQ. FT.
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	51011---	ELECTRIC SERVICE LINE R/WAPPD 10-4-2001 PURSUANT TO 25 CFR 169.22
MORTGAGE	WELLS FARGO HOME MTG.		51020---	MODIFIES LEASE DOC # 46513---, LEASE # 95-211, TO CHANGE LAND DESCRIPTION TO READ AS 140X55 IN LOT 7, BLK 6 NEB #/1 NW.
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	52072---	ELECTRIC SERVICE LINE R/WAPPD 1-25-2002 PURSUANT TO 25 CFR 169.22
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	52080---	LESHOLD MTG SECURES NOTE DTD 09/21/2001, APPD 03/15/02 FOR \$45,720.00, ENCUMBERING THE INT OF DENNIS M. & BETTE BREWER.
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	52681---	ELECTRIC SERVICE LINE R/WAPPD 10-24-2002 PURSUANT TO 25 CFR 169.22
ASSIGNMENT	DONALD STANDING SOLDIER		52745---	ELECTRIC SERVICE LINE R/WAPPD 01-15-2003 PURSUANT TO 25 CFR 169.22
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	52931---	ELECTRICAL SERVICE LINE R/W, APPD 6/13/2003, 25
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	53088---	CFR 169.22 (C)
BUSINESS LEASE	OGALA SIOUX TRIBE	12/31/2027	53371---	ELECTRICAL SERVICE LINE R/W APPD 11/25/2003 25
MISCELLANEOUS	---		---5555	LEASE NO. 03-347, 6 MO. 24 YR., APPD 03-23-04
ASSIGNMENT	FMHA		27694---	TSR DOES NOT SHOW GRANTS OF USE THE TRIBE MAY MAKE WITHOUT DEPARTMENT APPROVAL.
ASSIGNMENT	FMHA		27695---	ASSIGNS TRIBAL INCOME APPD 11-13-73.
ASSIGNMENT	FMHA		27731---	ASSIGNMENT OF TRIBAL LAND ACQUISITION ENTERPRISE INCOME AND FUNDS, APPD: 12/16/1971. SUBORDINATES ASSIGNMENT OF INCOME DATED 3/19/1968 (DOCUMENT 344-27730).
ASSIGNMENT	FMHA		27732---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 27694.
ASSIGNMENT	FMHA		28487---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 27695.
ASSIGNMENT	FMHA		28488---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC 344-28488.
ASSIGNMENT	FMHA		30199---	ASSIGNS TRIBAL INCOME DTD: 07/29/1976.
ASSIGNMENT	FMHA		30200---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 30200.
ASSIGNMENT	FMHA		32570---	ASSIGNS TRIBAL INCOME APPD: 01/17/1978.
ASSIGNMENT	FMHA		32571---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 32571.
ASSIGNMENT	FMHA		34907---	ASSIGNMENT OF INCOME APPD 10-16-79.
ASSIGNMENT	FMHA		34908---	SUBORDINATES LIEN OF U.S. DOC 344-27730, TO LIEN OF FMHA, DOC 344-34908.
ASSIGNMENT	FMHA		34909---	ASSIGNS TRIBAL INCOME APPD 11-13-1980.
ASSIGNMENT	FMHA		36966---	ASSIGNS TRIBAL INCOME APPD: 07/21/1987.
ASSIGNMENT	FMHA		36967---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 36966, APPD 07/21/1987

United States Department of the Interior
Bureau of Indian Affairs
Title Status Report

Report Certification Time and Date: 04/29/1997 08:00:00 PM
Requestor: PYELLOWE Date/Time: 01/17/2018 14:59:45

Land Legal Description							
Land Area	Land Area Name	Tract Number	LTRC	Region	Agency	Resources	
344	PINE RIDGE	T 10466	ABERDEEN, SD	GREAT PLAINS REGIONAL OFFICE	PINE RIDGE AGENCY	Both	
Section	Township	Range	State	County	Meridian	Legal Description	Acres
7	035.00N	044.00W	SOUTH DAKOTA	OGLALA LAKOTA	Sixth Principal	LOT 01=N	143.000

METES AND BOUNDS: PARTS NE AND ENW LYING NORTH OF U.S. HWY 18
TOTAL TRACT ACRES: 143.000

Title Status

Tract 344 T 10466 is held by the United States of America in trust for the land owner(s) with trust interests and/or by the land owner(s) with restricted interests and/or fee simple interests, as listed in Appendix "A" attached to and incorporated in this Title Status Report.

The title to Tract 344 T 10466 is current, complete, correct, and without defect. Ownership is in unity and interests are owned in the following title status: trust.

The tract ownership is encumbered by the title documents as listed on Appendix "B" attached to and incorporated in this Title Status Report.

No Tract Notes or Coded Remarks for this tract.

This report does not cover encroachments nor any other rights that might be disclosed by a physical inspection of the premises, nor questions of location or boundary that an accurate survey may disclose. This Report also does not cover encumbrances, including but not limited to irrigation charges, unpaid claims, not filed or recorded in this Land Titles and Records Office. This report does not state the current ownership of the interests owned in fee simple but states the ownership at the time the interest ceased to be held in trust or restricted ownership status.

This Title Status Report is a true and correct report of the status of title to the real estate described herein according to the official land records recorded and maintained in this office.

Appendix "A"

Effective Ownership as of 10/08/2004

OWNER					DOCUMENT			NAME ACQUIRED	FRACTION	AGGREGATE SHARE	AGGREGATE
Tribe & Code	ID No. & DOB	Indian or Non-Indian	Title Status	Interest*	Class	Type	Number	SURNAME/FIRST NAME	AS ACQUIRED	CONVERTED TO LCD	DECIMAL
044 OGLALA SIOUX (PINE RIDGE) - S	7340030	Tribe	Trust	All	Secretar	SPEC AUT	9840960	OGLALA SIOUX TRIBE	1 1	1 1	1 1.0000000000
									IN TRUST:		
									1		
									1 1.0000000000		
									IN FEE:		
									0		
									1 .0000000000		
									TOTAL:		
									1		
									1 1.0000000000		

* "All" means the equitable beneficial interest and the legal title interest merged together.

Appendix "B"

Ownership of Tract 344 T 10466 is encumbered by the following:

Contract Type/Contractor Name	Contract Number	Contractor ID	Begin Date	Expiration Date	Leased Acres	Record Image#
Water Line	00000143PT	344C251534	03/22/2007	PERPETUAL	.640	344 00000143PT
USA IN TRUST FOR THE OGLALA SIOUX TRIBE						
Service Line Agreement	00000230PT	344C071092	12/06/2007	PERPETUAL	.020	
NEBRASKA PUBLIC POWER						
Water Line	00001691PT	344C251534	07/23/2010	PERPETUAL	1.860	344 00001691PT
USA IN TRUST FOR THE OGLALA SIOUX TRIBE						
Service Line Agreement	00001712PT	344C071092	08/31/2010	PERPETUAL	.170	
NEBRASKA PUBLIC POWER						
Water Line	2010000024	344C251534	11/02/2010	PERPETUAL	.230	344 2010000024
USA IN TRUST FOR THE OGLALA SIOUX TRIBE						
Service Line Agreement	2010000146	344C071092	06/23/2011	PERPETUAL	.040	
NEBRASKA PUBLIC POWER						
Water Line	2010000171	344C251534	08/26/2011	PERPETUAL	.330	344 2010000171
USA IN TRUST FOR THE OGLALA SIOUX TRIBE						
Water Line	2011000109	344C251534	07/20/2012	PERPETUAL	.260	344 2011000109
USA IN TRUST FOR THE OGLALA SIOUX TRIBE						
Service Line Agreement	2012000007	344C071092	10/19/2012	PERPETUAL	.070	344 2012000007
NEBRASKA PUBLIC POWER						
Service Line Agreement	2014000002	344C071227	10/02/2014	PERPETUAL	.220	344 2014000002
GOLDENWEST TELECOM COOP.						
Service Line Agreement	2014000006	344C071092	10/10/2014	PERPETUAL	.040	344 2014000006
NEBRASKA PUBLIC POWER						
Service Line Agreement	2014000052	344C071092	12/16/2014	PERPETUAL	143.000	344 2014000052
NEBRASKA PUBLIC POWER						
Service Line Agreement	2014000120	344C071092	06/01/2015	PERPETUAL	.070	344 2014000120
NEBRASKA PUBLIC POWER						
Service Line Agreement	2016000029	344C071092	01/19/2016	PERPETUAL	.060	344 2016000029
NEBRASKA PUBLIC POWER						
Water Line	2016000032	344C071375	01/21/2016	PERPETUAL	.200	344 2016000032
OGLALA SIOUX R.W.S.S						
Fiber Optic	2016000043	344C071227	02/23/2016	02/22/2066	1.260	344 2016000043
GOLDENWEST TELECOM COOP.						
Service Line Agreement	2016000108	344C071092	12/06/2015	PERPETUAL	.100	2016000108
NEBRASKA PUBLIC POWER						
Water Line	2017000026	344C071375	11/29/2016	PERPETUAL	.270	344 2017000026
OGLALA SIOUX R.W.S.S						
RESIDENTIAL	2042410731	344C084241	01/01/2007	12/31/2031	2.500	
BETTE GOINGS						
RESIDENTIAL	2080011621	344C251449	06/03/2016	05/31/2021	.210	344 2080011621
Bonita Andrews						
RESIDENTIAL	2080031621	344C251480	06/01/2016	05/31/2021	.211	344 2080031621
ASHLEY RABBIT						
RESIDENTIAL	2080091621	344C083688	06/01/2016	05/31/2021	.210	344 2080091621
AVIS MONROE						
RESIDENTIAL	2080101621	344C251429	06/01/2016	05/31/2021	.211	344 2080101621
LACEY WHALEN						
RESIDENTIAL	2509101318	344C250910	08/01/2013	07/31/2018	1.140	344 2509101318
DAWN BIRD NECKLACE						
RESIDENTIAL	2509291318	344C250929	09/01/2013	08/31/2018	1.250	344 2509291318
ROBERT TWO TWO						
RESIDENTIAL	2509571318	344C250957	10/01/2013	09/30/2018	1.020	2509571318
AMY BELT						
RESIDENTIAL	2509581318	344C250958	10/01/2013	09/30/2018	1.010	344 2509581318
ANNABELLE MARTINEZ						
RESIDENTIAL	2509701318	344C250970	10/01/2013	09/30/2018	1.130	344 2509701318
STEVE KING						
RESIDENTIAL	2509741318	344C250974	11/01/2013	10/31/2018	.240	344 2509741318
JOHN GALLEGO						
RESIDENTIAL	2812561419	344C251146	11/01/2014	10/31/2019	.330	344 2812561419
RONALD T MOUSSEAU JR						
RESIDENTIAL	2812L42520	344C251232	08/01/2015	07/31/2020	.270	344 2812L42520
BELLERON BLUE BIRD						
RESIDENTIAL	2812L54621	344C251455	07/01/2016	06/30/2021	.520	
PURVIS KILLS ENEMY AT NIGHT						
RESIDENTIAL	2821181621	344C251495	10/01/2016	09/30/2021	.330	344 2821181621
ELGIN BROWN JR NATASHA TWO TWO						
RESIDENTIAL	2856L16621	344C251406	06/01/2016	05/31/2021	1.000	344 2856L16621
AINKE WHITE PIPE						
RESIDENTIAL	2865L21419	344C251063	08/01/2014	07/31/2019	1.380	344 2865L21419
LENORA BREWER						
RESIDENTIAL	2004661419	344C251052	08/01/2014	07/31/2019	.200	2004661419
ASHLEY TWO TWO						
RESIDENTIAL	4200031215	344C083086	01/01/2016	12/31/2020	1.060	344 4200031215
MOLLIE RED HANK						
RESIDENTIAL	4200031219	344C083561	01/01/2015	12/31/2019	.160	344 4200031219
YOLANDA RED PAINT						
Service Line Agreement	49176---	344C071092	10/15/1999	PERPETUAL	.110	
NEBRASKA PUBLIC POWER						
Electric Line and Power	49712---	344C071092	09/18/2000	PERPETUAL	.340	
NEBRASKA PUBLIC POWER						
Telephone/Telegraph	50035---	344C071720	01/25/2001	PERPETUAL	143.000	
GOLDENWEST TELE COOP INC						

Appendix "B"

Contract Type/Contractor Name	Contract Number	Contractor ID	Begin Date	Expiration Date	Leased Acres	Record Image#
BUSINESS	5504751136	344C250475	04/01/2011	03/31/2036	1.000	
EDDIE ABOLD						
Type of Encumbrance	Encumbrance Holder	Expiration Date	Document Number	Description and Explanation		
DEFECT		01/31/2018	2509101318	INCORRECT APPROVAL. IT SHOULD BE 10/13/2013 AND NOT 10/31/2013.		
DEFECT		PERPETUAL	2014000002	LEGAL DESCRIPTION ON THE DOCUMENT DOES NOT MATCH TERMS. UNCERTAIN ON WHAT THE CORRECT LEGAL SHOULD READ.		
DEFECT		07/31/2020	2B12L42520	TERM IS FIVE YEARS, DOCUMENT DATE IS 7/31/2025, S/B 7/31/2020		
DEFECT		PERPETUAL	2014000006	MISSING DELEGATION OF AUTHORITY ON THIS DOCUMENT.		
DEFECT		05/31/2021	2B36L16621	Document states incorrect section in legal description		
DEFECT		PERPETUAL	2011000109	ROW LEASE SHOWS APPROVING OFFICIAL'S TITLE AS "SUPERINTENDENT" AND TRAMS SHOWS APPROVING OFFICIAL'S TITLE AS "ACTING SUPERINTENDENT"		
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER		53796	BLOCK B, LOT 1 ELECTRICAL SERVICE LINE R/W, APPD 08-25-2004, 25 CFR 169.22 (C)		
RIGHTS OF WAY	SHANNON COUNTY, S.DAK.	PERPETUAL	1781926	HWY R/W APPD 03-01-26, ACT OF 03-03-01 (31 STAT 1058-1084).		
ASSIGNMENT	FARMERS HOME ADMINISTRATION		16779---	ASSIGNS TRIBAL INCOME APPD: 09/29/1983.		
HOME SITE LEASE	OGJALA SIOUX HOUSING AUTHORITY	10/07/2036	38745---	LEASE FOR 25 YRS. PLUS AUTO. 25 YR. EXTENSION		
HOME SITE LEASE	OGJALA SIOUX HOUSING AUTHORITY	02/04/2040	41079---	APPD. 10-08-86, 2.5 ACRES		
RIGHTS OF WAY	GOLDEN WEST TEL. COOP.	PERPETUAL	42392---	LEASE, 25 YRS + AUTOMATIC 25 YR EXTENSION, APPD 2/5/90, 2.44 ACRES		
ASSIGNMENT	MARVIN & PAULINE MILLS	PERPETUAL	42795---	TELEPHONE LINE R/W, APPD. 4/14/92, ACT OF 2/5/48 (62 STAT. 17)		
MISCELLANEOUS	GLORIA ONE FEATHER	PERPETUAL	43708---	ASSIGNS LEASE DOC. NO. 89-103, APPD: 10/1/92		
RIGHTS OF WAY	BUREAU OF INDIAN AFFAIRS	PERPETUAL	45791---	MODIFIES DOC. NO. 42099, DTD. 9-27-91 TO CHANGE DESC.		
MISCELLANEOUS	CAROL COOMES	PERPETUAL	47317---	HIGHWAY R/W APPD 4/24/96, ACT OF 2/5/48 (62 STAT 17)		
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	48809---	CANCELS LSE. DOC. 44176, APPD. 4-25-94		
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	49176---	ELECTRICAL SERVICE LINE AGREEMENT APPD 8/8/99 25 CFR 169.22 LOT 5, BLOCK 1 W/I NW		
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	49712---	ELECTRICAL SERVICE LINE AGREEMENT APPD 10-15-99, SENNING, 25 CFR 169.22		
SERVICE LINE AGREEMENT	NEB PUBLIC POWER DIST	PERPETUAL	49750---	ELECTRIC SERVICE LINE R/W APPD 09-18-2000 PURSUANT TO 25 CFR 169.22		
SERVICE LINE AGREEMENT	ZANNITA FAST HORSE	PERPETUAL	49771---	ELECTRICAL SERVICE LINE R/W, APPD 10/31/2000, 25 CFR 169.22 (C)		
RIGHTS OF WAY	GOLDENWEST TEL. COOP INC	PERPETUAL	50035---	HWY R/W, APPD 10/31/2000, 25 CFR 169.22 (C)		
ASSIGNMENT	LEANN RABBIT	PERPETUAL	50205---	TELEPHONE LINE R/W APPD. 1-25-2001.		
MISCELLANEOUS	----	PERPETUAL	50339---	ACT OF 2/5/48 (62 STAT 17)		
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	50622---	ASSIGNMENT OF LEASE # 99-239, DOC NO. 49082, FROM MARLYS RABBIT TO LEANN RABBIT		
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	50701---	ELECTRICAL SERVICE LINE R/W, APPD. 8-29-2001 25 CFR 169.22 (C)		
SERVICE LINE AGREEMENT	NEB PUBLIC POWER DIST	PERPETUAL	51880---	ELECTRIC SERVICE LINE R/W APPD 10-4-2001 PURSUANT TO 25 CFR 169.22		
SERVICE LINE AGREEMENT	NEBRASKA PUBLIC POWER	PERPETUAL	52073---	ELECTRICAL SERVICE LINE R/W, APPD 10/31/2002, 25 CFR 169.22 (C)		
MISCELLANEOUS	---	---	55555	ELECTRIC SERVICE LINE APPD 10-26-2002 PURSUANT TO 25 CFR 169.22		
ASSIGNMENT	FMHA		27694---	TSR DOES NOT SHOW GRANTS OF USE THE TRIBE MAY MAKE WITHOUT DEPARTMENT APPROVAL.		
ASSIGNMENT	FMHA		27695---	ASSIGNS TRIBAL INCOME APPD 11-13-73.		
ASSIGNMENT	FMHA		27731---	ASSIGNMENT OF TRIBAL LAND ACQUISITION ENTERPRISE INCOME AND FUNDS, APPD: 12/16/1971. SUBORDINATES ASSIGNMENT OF INCOME DATED 3/19/1968 (DOCUMENT 344-27730).		
ASSIGNMENT	FMHA		27732---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 27694.		
ASSIGNMENT	FMHA		28487---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 27695.		
ASSIGNMENT	FMHA		28488---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC 344-28489.		
ASSIGNMENT	FMHA		30199---	ASSIGNS TRIBAL INCOME OFD: 07/29/1976.		
ASSIGNMENT	FMHA		30200---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 30200.		
ASSIGNMENT	FMHA		32571---	ASSIGNS TRIBAL INCOME APPD: 01/17/1978.		
ASSIGNMENT	FMHA		34907---	ASSIGNMENT OF INCOME APPD 10-16-79.		
ASSIGNMENT	FMHA		34908---	SUBORDINATES LIEN OF U.S. DOC 344-27730, TO LIEN OF FMHA, DOC 344-34908.		
ASSIGNMENT	FMHA		34908---	ASSIGNS TRIBAL INCOME APPD 11-13-1980.		
ASSIGNMENT	FMHA		38966---	ASSIGNS TRIBAL INCOME APPD: 07/21/1987.		
ASSIGNMENT	FMHA		38967---	SUBORDINATES LIEN OF U.S. DOC #: 344 27730, TO LIEN OF FMHA, DOC #: 344 38966, APPD 07/21/1987		

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OGLALA SIOUX TRIBE: LAW AND ORDER CODE

Last amended: 1996; New Ordinances Received: 2002.

CHAPTER 2

CIVIL ACTIONS

SECTION 20 - JURISDICTION.

The Oglala Sioux Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Oglala Sioux Tribe and of all other suits between members and non-members who consent to the jurisdiction of the tribe.

SECTION 20 (A) AND (B) - IMPLIED CONSENT TO TRIBAL JURISDICTION BY NONMEMBERS OF THE OGLALA SIOUX TRIBE.

(a) Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe, by doing personally through an employee, through an agent or through a subsidiary, any of the following acts within the exterior boundaries of the Pine Ridge Indian Reservation.

1. The transaction of any business.
2. The commission or omission of any act which results in a tort action.

3. The ownership use or possession of any property situated within the exterior boundaries of the Pine Ridge Indian Reservation.
4. Engaging in any employer-employee relationship.
5. Leasing or permitting of any land or property.
6. Residing on the Pine Ridge Indian Reservation.
7. Commission of any act giving rise to claims for spousal support, separate maintenance, child support, child custody, divorce or modification of any decree of divorce or separate maintenance proceeding.
8. Any contractual agreement entered into within the exterior boundaries of the Pine Ridge Indian Reservation.

(b) Service of process upon any person subject to implied consent may be made by service within or without the Pine Ridge Indian Reservation in the same manner provided for services within the Pine Ridge Indian Reservation.

Hist: 1937 Code, Ch. 2, Sec. 1. Ordinance 93-12 / 7-15-93. Amended by Ordinance 93-12/7-15-93.

SECTION 20.1 - EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) Effect of Exhaustion of Remedies. The Oglala Sioux Tribal Court shall entertain no action or suit against the Oglala Sioux Tribe, a Tribal government agency, or any Tribal official, or employee complaining of official conduct thereof, unless the plaintiff in such action has first exhausted Tribal administrative remedies to correct the conduct complained of by complying with the procedure set out in subsection (b) or (c) below as appropriate. Any complaint in the Tribal Court against the Oglala Sioux Tribe, a Tribal government agency, or any Tribal official, or employee complaining of the official conduct thereof which fails to demonstrate on its face that the plaintiff has complied with the requirements of this Section shall be dismissed by the Court without prejudice to the plaintiff's right to file the suit again when and if those requirements have been complied with.

(b) General Exhaustion Requirement. Except as provided in subsection (c) below for certain police complaints, a complaining party may exhaust Tribal administrative remedies under this ordinance by filing a written complaint with the Tribal Executive Committee, provided that if the Executive

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U. S. Department of Housing and Urban Development



Northern Plains Office of
Native American Programs

Region VIII, Denver
1670 Broadway Street
Denver, Colorado 80202-4801

Phone: 303-672-5453
Fax: 303-672-5003
Web: www.hud.gov

March 24, 2016

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

JAN 31 2018

Mr. Paul Iron Cloud
Chief Executive Officer
Oglala Sioux Lakota Housing
PO Box 603
Pine Ridge, SD 57770-0603

By: _____

Dear Mr. Iron Cloud:

Subject: Federal Fiscal Year (FFY) 2016 Indian Housing Block Grant

The U.S. Department of Housing and Urban Development (HUD), Office of Native American Programs (ONAP), is pleased to inform the Oglala Sioux Lakota Housing (OSLH) that full funding is now available for the FFY 2016 Indian Housing Plan (IHP) which was found to be in compliance with the requirements of Section 102 of the Native American Housing Assistance and Self-Determination Act (NAHASDA) on December 14, 2015.

On December 14, 2015, you requested advanced IHBG funding in the amount of \$5,000,000 and received two grants of \$3,230,959 and \$1,769,041, respectively, from your total FY 2016 allocation of \$12,024,545. Therefore, the enclosed grant agreement provides for the balance of \$7,024,545. If the final funding allocation is different from the amount estimated in the IHP it is not necessary to amend the IHP unless funds allocated to protect and maintain 1937 Housing Act units are reduced or a new activity is added.

The OSLH will be able to access funds through eLOCCS once the enclosed forms are completed and returned to the Northern Plains Office of Native American Programs (NPONAP). In order to expedite the process, please find enclosed the following funding documents.

- Amended Form HUD-52734-B Funding Approval/Agreement. Please sign and date the agreement and either scan and email to Cheryl.R.Cozaad@hud.gov or fax a copy to 303-672-5003 attention Cheryl Cozaad. Please keep a copy on file.
- Attachment A to HUD-52734-B, Additional Information (2 CFR § 200.210)
- Assurance of Compliance with 24 CFR § 50(h) (*Only needed if the OSLH declines to accept environmental review responsibilities.*)

As of December 26, 2014, the standards set forth in 2 CFR Part 200 are effective (see

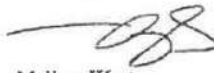
Program Guidance 2014-12 for additional information). In accordance with 2 CFR § 200.110, the procurement standards are contained in 2 CFR §§ 200.318 – 200.326. IHBG recipients may continue to comply with 24 CFR Part 85.36 for one additional fiscal year from the implementation of 2 CFR 200. If the recipient chooses to use the previous procurement standards for an additional fiscal year before adopting the procurement standards in 2 CFR §§ 200.318-200.326, it must document its decision in its internal procurement policy.

As a recipient of IHBG funds under NAHASDA the OSLH assumes the administrative requirements at 24 CFR Part 1000. As referenced in the grant agreement, an environmental review record is required in accordance with 24 CFR §§ 1000.18 – 1000.24. Funds, including leveraged resources, may not be obligated or used for any activities requiring a release of funds by HUD until such release is issued in writing.

In addition, please ensure your registration in the System for Award Management (SAM) is current. Only entities with active registrations in SAM may access HUD funds.

NPONAP looks forward to working with the OSLH to achieve the goals and objectives set forth in its IHP. For technical assistance in the successful implementation of the grant, please contact Maria Danz, Grants Management Specialist, at (303) 839-2687 or by e-mail at maria.e.danz@hud.gov.

Sincerely,



Melissa West
Acting Administrator

Enclosures

Attachment A to HUD-52734-B

Additional Information Required by 2 CFR § 200.210

As of December 26, 2014, all new grant agreements between HUD and Indian Housing Block Grant (IHBG) recipients are required to include the terms established in 2 CFR § 200.210. The IHBG Funding Agreement has not yet been updated to include all of the required terms; therefore, this attachment contains the additional grant requirements. Your FY2016 IHBG Award is also subject to the following terms.

Federal Award Project Description: The IHBG program is a formula grant that provides a range of affordable housing activities on Indian reservations and Indian areas. Eligible activities include housing development, assistance to housing developed under the Indian Housing Program, housing services to eligible families and individuals, crime prevention and safety, and HUD-approved model activities that provide creative approaches to solving affordable housing problems.

Recipient's DUNS Number: 118805303

Period of Performance Start: Date Recipient Signs Grant Agreement

End Date: September 15, 2025

CFDA Number and Name: 14.867 – Indian Housing Block Grant

Indirect Cost Rate: In accordance with 2 CFR § 200.414, the Oglala Sioux Lakota Housing (OSLH) is subject to the indirect cost rate negotiated with its cognizant agency, as defined in 2 CFR § 200.19. If OSLH has never received a negotiated indirect cost rate, OSLH can elect to charge a de minimus rate of 10% of modified total direct costs (as defined in 2 CFR § 200.68), which may be used indefinitely.

Funding Approval/AgreementNative American Housing Assistance and Self-Determination
Act of 1996 (Public Law 104-330)

Title I - Indian Housing Block Grant

Title VI - Federal Guarantees For Financing Tribal Housing Activities

U.S. Department of Housing
and Urban Development
Office of Native American Programs

DUNS #: 118805303

1. Name of Recipient Oglala Sioux (Lakota) Housing Authority	3. Recipient's 8-digit Tax Identification No. 460275106	4. Registered FFY 2016
2. Recipient's Complete Address PO Box 603 Pine Ridge, SD 57770-0603	5. Program/Grant Number 55-IH-46-13400	23. Amount Approved HUD \$12,024,545
		Type VI Loan Guarantee

This Grant Agreement between the Department of Housing and Urban Development (HUD) and the above named Recipient is made pursuant to the authority of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4101 et seq.). The Recipient's submissions for NAHASDA assistance, the NAHASDA statute (as now in effect and as may be amended by Congress), the HUD regulations at 24 CFR Part 1000 (as now in effect and as may be amended from time to time), and this Funding Approval, including any special conditions, constitute the Agreement. Subject to the provisions of this Grant Agreement, HUD will make the funding assistance specified here available to the Recipient upon execution of the Agreement by the parties. The Indian Tribe has agreed to assume all of the responsibilities for environmental review, decision making, and actions as specified and required in regulations issued by the Secretary consistent with and pursuant to Section 105 of NAHASDA. (If the Indian Tribe did not agree to assume these responsibilities, these responsibilities are retained by HUD). The Recipient further acknowledges its responsibility for adherence to the Agreement by entities to which it makes funding assistance hereunder available.

U.S. Department of Housing and Urban Development

Recipient

Name Melissa West		Name Paul Iron Cloud	
Signature 		Signature 	
Title Acting Administrator		Title CEO	
Date (mm/dd/yyyy) 02/25/2016		Date (mm/dd/yyyy) 02/05/16	
24. Special conditions (check applicable box) a. <input type="checkbox"/> Not applicable b. <input checked="" type="checkbox"/> See attachment(s)	8a. Date HUD Received Submission (mm/dd/yyyy) 10/07/2015 8b. Date Recipient Notified (mm/dd/yyyy) 12/30/2015 8c. Date of Start of Program Year (mm/dd/yyyy) 01/01/2016	9. (check one) a. <input type="checkbox"/> Orig. Funding apvl. b. <input checked="" type="checkbox"/> Amendment c. Amendment Number 2	10. Amount of Indian Housing Block Grant a. Funds Reserved for this Recipient \$12,024,545 b. Funds Now Being Approved \$7,024,545 c. Reservation to be Cancelled (a minus b)

11. (This section is to be completed only if a Tribally Designated Housing Entity (TDHE) is the recipient of the loan guarantee but is not the IHBG recipient)

11a. Name & Address of TDHE

Loan Guarantee Acceptance Provisions for Tribally Designated Housing Entities (TDHE)

The Tribally Designated Housing Entity hereby accepts the Grant Agreement executed by the Department of Housing and Urban Development (HUD) on the above date with respect to the above program grant number(s) as Recipient designated to receive loan guarantee assistance, and agrees to comply with the terms and conditions of the Agreement, applicable regulations, and other requirements of HUD now or hereafter in effect, pertaining to the assistance provided to it.

11b. Authorized Representative Name Not Applicable
Title _____
Signature _____
Date (mm/dd/yyyy) _____

HUD Accounting Use Only (show all dates as mm/dd/yyyy)

TAC		Program	Y	A	Reg.	Area	Document No.	Project No.	Category	Amount	Effective Date
1	5	3									
1	7	8									

Date Entered in PAS	Date Entered LOGS	Batch Number	Transaction Code	Entered by	Verified by
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form HUD-62734-B (12/98)

Attachment A to HUD-52734-B

Additional Information Required by 2 CFR § 200.210

As of December 26, 2014, all new grant agreements between HUD and Indian Housing Block Grant (IHBG) recipients are required to include the terms established in 2 CFR § 200.210. The IHBG Funding Agreement has not yet been updated to include all of the required terms; therefore, this attachment contains the additional grant requirements. Your FY2016 IHBG Award is also subject to the following terms.

Federal Award Project Description: The IHBG program is a formula grant that provides a range of affordable housing activities on Indian reservations and Indian areas. Eligible activities include housing development, assistance to housing developed under the Indian Housing Program, housing services to eligible families and individuals, crime prevention and safety, and HUD-approved model activities that provide creative approaches to solving affordable housing problems.

Recipient's DUNS Number: 118805303

Period of Performance Start: Date Recipient Signs Grant Agreement

End Date: September 15, 2025

CFDA Number and Name: 14.867 – Indian Housing Block Grant

Indirect Cost Rate: In accordance with 2 CFR § 200.414, the Oglala Sioux Lakota Housing (OSLH) is subject to the indirect cost rate negotiated with its cognizant agency, as defined in 2 CFR § 200.19. If OSLH has never received a negotiated indirect cost rate, OSLH can elect to charge a de minimus rate of 10% of modified total direct costs (as defined in 2 CFR § 200.68), which may be used indefinitely.

Funding Approval/Agreement

Native American Housing Assistance and Self-Determination
Act of 1996 (Public Law 104-330)
Title I - Indian Housing Block Grant
Title VI - Federal Guarantees For Financing Tribal Housing Activities

U.S. Department of Housing
and Urban Development
Office of Native American Programs

DUNS #: 118805303

1. Name of Recipient Oglala Sioux (Lakota) Housing Authority	3. Recipient's 9-digit Tax Identification No. 460275106	4. Reserved
2. Recipient's Complete Address PO Box 603 Pine Ridge, SD 57770-0603	5. Program/Grant Number 55-IH-46-13400	23. Amount Approved IHBG \$12,024,545
		Title VI Loan Guarantee

This Grant Agreement between the Department of Housing and Urban Development (HUD) and the above named Recipient is made pursuant to the authority of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4101 et seq.). The Recipient's submissions for NAHASDA assistance, the NAHASDA statute (as now in effect and as may be amended by Congress), the HUD regulations at 24 CFR Part 1000 (as now in effect and as may be amended from time to time), and this Funding Approval, including any special conditions, constitute the Agreement. Subject to the provisions of this Grant Agreement, HUD will make the funding assistance specified here available to the Recipient upon execution of the Agreement by the parties. The Indian Tribe has agreed to assume all of the responsibilities for environmental review, decision making, and actions as specified and required in regulations issued by the Secretary consistent with and pursuant to Section 105 of NAHASDA. (If the Indian Tribe did not agree to assume these responsibilities, these responsibilities are retained by HUD). The Recipient further acknowledges its responsibility for adherence to the Agreement by entities to which it makes funding assistance hereunder available.

U.S. Department of Housing and Urban Development

Recipient

Name Melissa West		Name Pedro Leon Chan	
Signature 		Signature 	
Title Acting Administrator		Title CEO	
Date (mm/dd/yyyy) 07/25/2016		Date (mm/dd/yyyy) 04/05/16	
24. Special conditions (check applicable box) a. <input type="checkbox"/> Not applicable b. <input checked="" type="checkbox"/> See attachment(s)	25. Date HUD Received Submission (mm/dd/yyyy) 10/07/2015 26. Date Recipient Notified (mm/dd/yyyy) 12/30/2015 27. Date of Start of Program Year (mm/dd/yyyy) 01/01/2016	28. (check one) a. <input type="checkbox"/> Orig. Funding appl. b. <input checked="" type="checkbox"/> Amendment 29. Amendment Number 2	30. Amount of Indian Housing Block Grant a. Funds Reserved for this Recipient \$12,024,545 b. Funds Now Being Approved \$7,024,545 c. Reservation to be Cancelled (a minus b) 

11. (This section is to be completed only if a Tribally Designated Housing Entity (TDHE) is the recipient of the loan guarantee but is not the IHBG recipient)

11a. Name & Address of TDHE

Loan Guarantees Acceptance Provisions for Tribally Designated Housing Entities (TDHE)

The Tribally Designated Housing Entity hereby accepts the Grant Agreement executed by the Department of Housing and Urban Development (HUD) on the above date with respect to the above program grant number(s) as Recipient designated to receive loan guarantee assistance, and agrees to comply with the terms and conditions of the Agreement, applicable regulations, and other requirements of HUD now or hereafter in effect, pertaining to the assistance provided to it.

11b. Authorized Representative Name Not Applicable
Title _____
Signature _____
Date (mm/dd/yyyy) _____

HUD Accounting Use Only (show all dates as mm/dd/yyyy)

TAC		Program	Y	A	Reg.	Area	Document No.	Project No.	Category	Amount	Effective Date
1	5	3									
1	7	6									

Date Entered in PAS	Date Entered LOCS	Batch Number	Transaction Code	Entered by	Verified by

form HUD-52734-B (12/88)

Attachment A to HUD-52734-B

Additional Information Required by 2 CFR § 200.210

As of December 26, 2014, all new grant agreements between HUD and Indian Housing Block Grant (IHBG) recipients are required to include the terms established in 2 CFR § 200.210. The IHBG Funding Agreement has not yet been updated to include all of the required terms; therefore, this attachment contains the additional grant requirements. Your FY2016 IHBG Award is also subject to the following terms.

Federal Award Project Description: The IHBG program is a formula grant that provides a range of affordable housing activities on Indian reservations and Indian areas. Eligible activities include housing development, assistance to housing developed under the Indian Housing Program, housing services to eligible families and individuals, crime prevention and safety, and HUD-approved model activities that provide creative approaches to solving affordable housing problems.

Recipient's DUNS Number: 118805303

Period of Performance Start: Date Recipient Signs Grant Agreement

End Date: September 15, 2025

CFDA Number and Name: 14.867 – Indian Housing Block Grant

Indirect Cost Rate: In accordance with 2 CFR § 200.414, the Oglala Sioux Lakota Housing (OSLH) is subject to the indirect cost rate negotiated with its cognizant agency, as defined in 2 CFR § 200.19. If OSLH has never received a negotiated indirect cost rate, OSLH can elect to charge a de minimus rate of 10% of modified total direct costs (as defined in 2 CFR § 200.68), which may be used indefinitely.

Funding Approval/AgreementNative American Housing Assistance and Self-Determination
Act of 1936 (Public Law 104-330)**Title I - Indian Housing Block Grant****Title VI - Federal Guarantees For Financing Tribal Housing Activities**U.S. Department of Housing
and Urban Development
Office of Native American Programs

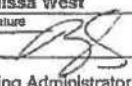
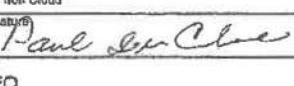

DUNs #: 118805303

1. Name of Recipient Oglala Sioux (Lakota) Housing Authority	3. Recipient's 9-digit Tax Identification No. 460275106	4. Reserved FFY 2016
2. Recipient's Complete Address PO Box 603 Pine Ridge, SD 57770-0603	5. Program/Grant Number 55-IH-46-13400	23. Amount Approved IHG \$12,024,545
		Title VI Loan Guarantee

This Grant Agreement between the Department of Housing and Urban Development (HUD) and the above named Recipient is made pursuant to the authority of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4101 et seq.). The Recipient's submissions for NAHASDA assistance, the NAHASDA statute (as now in effect and as may be amended by Congress), the HUD regulations at 24 CFR Part 1000 (as now in effect and as may be amended from time to time), and this Funding Approval, including any special conditions, constitute the Agreement. Subject to the provisions of this Grant Agreement, HUD will make the funding assistance specified here available to the Recipient upon execution of the Agreement by the parties. The Indian Tribe has agreed to assume all of the responsibilities for environmental review, decision making, and actions as specified and required in regulations issued by the Secretary consistent with and pursuant to Section 105 of NAHASDA. (If the Indian Tribe did not agree to assume these responsibilities, these responsibilities are retained by HUD). The Recipient further acknowledges its responsibility for adherence to the Agreement by entities to which it makes funding assistance hereunder available.

U.S. Department of Housing and Urban Development

Recipient

Name Melissa West		Name Paul Iron Cloud	
Signature 		Signature 	
Title Acting Administrator		Title CEO	
Date (mm/dd/yyyy) 03/25/2016		Date (mm/dd/yyyy) 04/05/16	
24. Special conditions (check applicable box) a. <input type="checkbox"/> Not applicable b. <input checked="" type="checkbox"/> See attachment(s)	8a. Date HUD Received Submission (mm/dd/yyyy) 10/07/2015 8b. Date Recipient Notified (mm/dd/yyyy) 12/30/2015 8c. Date of Start of Program Year (mm/dd/yyyy) 01/01/2016	9. (check one) a. <input type="checkbox"/> Orig. Funding appl. b. <input checked="" type="checkbox"/> Amendment c. Amendment Number 2	10. Amount of Indian Housing Block Grant a. Funds Reserved for this Recipient \$12,024,545 b. Funds Now Being Approved \$7,024,545 c. Reservation to be Cancelled (a minus b) 

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Loan Guarantee Acceptance Provisions for Tribally Designated Housing Entities (TDHE)

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11b. Authorized Representative Name Not Applicable
Title _____
Signature _____
Date (mm/dd/yyyy) _____

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1	7	6									

Date Entered in PAS	Date Entered LOGGS	Batch Number	Transaction Code	Entered by	Verified by
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form HUD-82734-B (12/96)

Indian Housing Block Grant (IHBG)

IHP/APR

U.S. Department of Housing
and Urban Development
Office of Public and Indian Housing
Office of Native American Programs

OAS Approval Number 2577-0218
(exp. 03/31/16)

For Recipient's Use: Indian Housing Plan 2016



INDIAN HOUSING PLAN/ANNUAL PERFORMANCE REPORT
(NAHASDA §§ 102(b)(1)(A) and 404(a)(2))

This form meets the requirements for an Indian Housing Plan (IHP) and Annual Performance Report (APR) required by the United States Department of Housing and Urban Development. In addition to these requirements, a tribe or tribally designated housing entity (TDHE) may elect to prepare a more comprehensive IHP. If a tribe or TDHE elects to prepare a more comprehensive IHP, the required elements of this IHP must still be submitted on the prescribed HUD form. The information requested does not lend itself to confidentiality.

Regulatory and statutory citations are provided throughout this form as applicable. Recipients are encouraged to review these citations when completing the IHP and APR sections of the form.

Under the Native American Housing Assistance and Self-Determination Act of 1986 (NAHASDA) (25 U.S.C. 4101 et seq.), HUD will provide grants, loan guarantees, and technical assistance to Indian tribes and Alaska Native villages for the development and operation of low-income housing in Indian areas. Grants will be made to eligible recipients under the Indian Housing Block Grant (IHBG) program. To be eligible for the grants, recipients must submit an IHP that meets the requirements of the Act. The recipient is required to submit the IHP to HUD at least 75 days prior to the start of its 12-month program year (NAHASDA § 102(a)(1)). The APR is due no later than 90 days after the end of the recipient's program year (24 CFR § 1000.514).

The IHP and the APR (previously two separate forms) are now combined into one form. The sections pertaining to the IHP are submitted before the beginning of the 12-month program year, leaving the APR (shaded) sections blank. If the IHP has been updated or amended, use the most recent version when preparing the APR. After the 12-month program year, enter the results from the 12-month program year in the shaded sections of the form to complete the APR. More details on how to complete the IHP and APR sections of the form can be found in the body of this form. In addition, a separate IHP and APR report form guidance is available at http://portal.hud.gov/indianportal/HUD7area/program_offices/public_indian_housing/ivcdetail/nahasda/guidance.

FORM COMPLETION OPTIONS: The IHP/APR form may be completed either in hard copy or electronically. Hard copy versions may be completed either by hand or typewriter. Alternatively, the form may be completed electronically as it is a Word document. It is recommended that the form be completed electronically because it is more efficient to complete, submit, and review the form. Furthermore, electronic versions of the form may be submitted to HUD as an email attachment. To document official signatures on the electronic version, you should sign a hard copy of the pages and either fax that signed page or email it as an attachment to your Area Office of Native American Programs. The sections of the IHP that require an official signature are Sections 1 and 8, and Sections 15 and 16, if applicable. For the APR, Section 1 requires an official signature.

Public reporting burden for the collection of information is estimated to average 62 hours, 25 hours for the IHP and 37 hours for the APR. This includes the time for collecting, reviewing, and reporting the data. The IHP data is used to verify that planned activities are eligible, expenditures are reasonable, and recipient certifies compliance with related requirements. The APR data is used to audit the program accurately and monitor recipient progress in completing approved activities, including reported expenditures, outputs, and outcomes. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

JAN 31 2018

By: _____

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SECTION 1: COVER PAGE

(1) Grant Number: 55HH4613400

(2) Recipient Program Year: 2016

(3) Federal Fiscal Year: 2016

(4) ☒ Initial Plan (Complete this Section then proceed to Section 2)

(5) ☐ Amended Plan (Complete this Section, Section 8 if applicable, and Section 16)

(6) ☐ Annual Performance Report (Complete items 27-30 and proceed to Section 3)

(7) ☐ Tribe

(8) ☒ TDHE

(9) Name of Recipient: Oglala Sioux (Lakota) Housing

(10) Contact Person: Doyle Pipe On Head

(11) Telephone Number with Area Code: 605-867-5161

(12) Mailing Address: 4 SaAnne Center Drive

(13) City: Pine Ridge

(14) State: SD

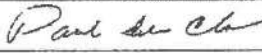
(15) Zip Code: 57770-9603

(16) Fax Number with Area Code (if available): 605-867-1095

(17) Email Address (if available): doyle.poh@oslh.org

(18) If TDHE, List Tribes Below: Oglala Sioux Tribe

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(19) Tax Identification Number: 46-0275106
(20) DUNS Number: 118905303
(21) CCR/SAM Expiration Date: 06/08/2016
(22) IHBG Fiscal Year Formula Amount: \$12123309
(23) Name of Authorized IHP Submitter: Mr. Paul Iron Cloud
(24) Title of Authorized IHP Submitter: Chief Executive Officer
(25) Signature of Authorized IHP Submitter: 
(26) IHP Submission Date: 10-7-15
(27) Name of Authorized APR Submitter:
(28) Title of Authorized APR Submitter:
(29) Signature of Authorized APR Submitter:
(30) APR Submission Date:

Certification: The information contained in this document is accurate and reflects the activities actually planned or accomplished during the program year. Activities planned and accomplished are eligible under applicable statutes and regulations.

Warning: If you knowingly make a false statement on this form, you may be subject to civil or criminal penalties under Section 1001 of Title 18 of the United States Code. In addition, any person who knowingly and materially violates any required disclosure of information, including intentional disclosure, is subject to a civil money penalty not to exceed \$10,000 for each violation.

ONE YEAR PLAN & ANNUAL PERFORMANCE REPORT

SECTION 2: HOUSING NEEDS

(NAHASDA § 102(b)(2)(B))

- (1) **Type of Need:** Check the appropriate box(es) below to describe the estimated types of housing needs and the need for other assistance for low-income Indian families (column B) and all Indian families (column C) inside and outside the jurisdiction.

(A) Type of Need	Check All That Apply	
	(B) Low-Income Indian Families	(C) All Indian Families
(1) Overcrowded Households	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(2) Renters Who Wish to Become Owners	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(3) Substandard Units Needing Rehabilitation	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(4) Homeless Households	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(5) Households Needing Affordable Rental Units	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(6) College Student Housing	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(7) Disabled Households Needing Accessibility	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(8) Units Needing Energy Efficiency Upgrades	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(9) Infrastructure to Support Housing	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
(10) Other (specify below)	<input type="checkbox"/>	<input type="checkbox"/>

- (2) **Other Needs.** (Describe the "Other" needs below. Note: this text is optional for all needs except "Other."):

- (3) **Planned Program Benefits.** (Describe below how your planned programs and activities will address the needs of low income families identified above. Also describe how your planned programs will address the various types of housing assistance needs. NAHASDA § 102(b)(2)(B)):

OS(L)H 2016 IHP will address overcrowded households by completing construction of 45 new low rent units with our Title VI guaranteed loan and other funds. We will also work on maintaining our 1158 low rent units and rehabbing at least 120 low rent units to deal with mold in bathrooms and basements using our ICDBG 14 grant and starting our ICDBG 15 grant. We will continue providing renovation for handicapped units. We will educate work on energy efficiency for new construction and low rent units. We will collaborate with the Oglala Sioux Tribe on infrastructure including water, wastewater, trash and home sites. We will pursue funding for homeless assistance and supportive housing for veterans and disabled following up with our work on the Low Income Housing Tax Credits.

(4) Geographic Distribution. (Describe below how the assistance will be distributed throughout the geographic area and how this geographic distribution is consistent with the needs of low income families. NAHASDA § 102(b)(2)(B)(i)): OS(L)H provides assistance over the entire 3,468 square mile Pine Ridge Indian Reservation. We have 19 low rent housing clusters and scattered home ownerships throughout the 9 Districts of the Reservation. We have maintenance departments in each of the 9 major towns (one in each District).

SECTION 3: PROGRAM DESCRIPTIONS

(NAHASDA § [102(b)(2)(A)], [233(a)], [235(c)], [404(b)], 24 CFR §1000.512(b)(2) and (3))

Planning and Reporting on Program Year Activities

For the IHP, the purpose of this section is to describe each program that will be operating during the 12-month program year. Each program must include the eligible activity, its planned outputs, intended outcome, who will be assisted, and types and levels of assistance. Each of the eligible activities has a specific, measurable output. The first column in the table below lists all eligible activities, the second column identifies the output measure for each eligible activity, and the third column identifies when to consider an output as completed for each eligible activity. Copy and paste text boxes 1.1 through 1.10 as often as needed so that all of your planned programs are included.

For the APR, the purpose of this section is to describe your accomplishments, actual outputs, actual outcomes, and any reasons for delays.

Eligible Activities May Include (citations below reference sections in NAHASDA)

Eligible Activity	Output Measure	Output Completion
(1) Modernization of 1937 Act Housing [202(1)]	Units	All work completed and unit passed final inspection
(2) Operation of 1937 Act Housing [202(1)]	Units	Number of units in inventory at Program Year End (PYE)
(3) Acquisition of Rental Housing [202(2)]	Units	When recipient takes title to the unit
(4) Construction of Rental Housing [202(2)]	Units	All work completed and unit passed final inspection
(5) Rehabilitation of Rental Housing [202(2)]	Units	All work completed and unit passed final inspection
(6) Acquisition of Land for Rental Housing Development [202(2)]	Acres	When recipient takes title to the land
(7) Development of Emergency Shelters [202(2)]	Households	Number of households served at any one time, based on capacity of the shelter
(8) Conversion of Other Structures to Affordable Housing [202(2)]	Units	All work completed and unit passed final inspection
(9) Other Rental Housing Development [202(2)]	Units	All work completed and unit passed final inspection
(10) Acquisition of Land for Homebuyer Unit Development [202(2)]	Acres	When recipient takes title to the land
(11) New Construction of Homebuyer Units [202(2)]	Units	All work completed and unit passed final inspection
(12) Acquisition of Homebuyer Units [202(2)]	Units	When recipient takes title to the unit
(13) Down Payment/Closing Cost Assistance [202(2)]	Units	When binding commitment signed
(14) Lending Subsidies for Homebuyers (Loan) [202(2)]	Units	When binding commitment signed
(15) Other Homebuyer Assistance Activities [202(2)]	Units	When binding commitment signed
(16) Rehabilitation Assistance to Existing Homeowners [202(2)]	Units	All work completed and unit passed final inspection
(17) Tenant Based Rental Assistance [202(3)]	Households	Count each household once per year
(18) Other Housing Service [202(3)]	Households	Count each household once per year

(19) Housing Management Services [202(4)]	Households	Count each household once per year
(20) Operation and Maintenance of NAHASDA-Assisted Units [202(4)]	Units	Number of units in inventory at PYE
(21) Crime Prevention and Safety [202(5)]	Dollars	Dollars spent (report in Uses of Funding Table only)
(22) Model Activities [202(6)]	Dollars	Dollars spent (report in Uses of Funding Table only)
(23) Self-Determination Program [231-235]		
Acquisition	Units	When recipient takes title to the unit
Construction	Units	All work completed and unit passed final inspection
Rehabilitation	Units	All work completed and unit passed final inspection
Infrastructure	Dollars	Dollars spent (report in Uses of Funding Table only)
(24) Infrastructure to Support Housing [202(2)]	Dollars	Dollars spent (report in Uses of Funding Table only)
(25) Reserve Accounts [202(9)]	N/A	N/A

Outcome May Include:

(1) Reduce over-crowding	(7) Create new affordable rental units
(2) Assist renters to become homeowners	(8) Assist affordable housing for college students
(3) Improve quality of substandard units	(9) Provide accessibility for disabled/elderly persons
(4) Improve quality of existing infrastructure	(10) Improve energy efficiency
(5) Address homelessness	(11) Reduction in crime reports
(6) Assist affordable housing for low income households	(12) Other – must provide description in boxes 1.4 (IHP) and 1.5

IHP: PLANNED PROGRAM YEAR ACTIVITIES (NAHASDA § 102(b)(2)(A))

For each planned activity, complete all the non-shaded sections below. It is recommended that for each program name you assign a unique identifier to help distinguish individual programs. This unique number can be any number of your choosing, but it should be simple and clear so that you and HUD can track tasks and results under the program and collect appropriate file documentation tied to this program.

- One way to number your programs is chronologically. For example, you could number your programs 2011-1, 2011-2, 2011-3 etc.
- Or, you may wish to number the programs based on type. For example rental 1, rental 2, homebuyer 1, homebuyer 2 etc. This type of numbering system might be appropriate if you have many programs that last over several years.
- Finally, you may wish to use an outline style of numbering. For example, all programs under your first eligible activity would start with the number 1 and then be consecutively numbered as 1.1, 1.2, 1.3 etc. The programs under the second eligible activity would be numbered as 2.1, 2.2., 2.3 etc.

APR: REPORTING ON PROGRAM YEAR PROGRESS (NAHASDA § 404(b))

Complete the shaded section of text below to describe your completed program tasks and actual results. Only report on activities completed during the 12-month program year. Financial data should be presented using the same basis of accounting as the Schedule of Expenditures of Federal Awards (SEFA) in the annual OMB Circular A-133 audit. For unit accomplishments, only count units when the unit was completed and occupied during the year. For households, only count the household if it received the assistance during the previous 12-month program year.

1.1 Program Name and Unique Identifier: 1.16 Maintain and Operate 1937 Act Housing Stock
<p>1.2 Program Description (This should be the description of the planned program.):</p> <p>OS(L)H will operate and maintain its 1937 Housing Act rental and homeownership units in accordance with HUD requirements and adopted policies/procedures. This will include 1.) The performance of routine and non-routine maintenance; 2) Unit inspections; 3.) Grounds and facilities operations and maintenance; 4.) Leasing management functions for tenants and homebuyers such as waiting list management, selections, evictions, counseling and training, conveyances, and managing Cohen Home for elderly and disabled; 5) Program oversight; 6.) Financial management/rent collection; 7.) Insurance coverage; and 8.) Records maintenance.</p>
1.3 Eligible Activity Number (Select one activity from the Eligible Activity list. Do not combine homeownership and rental housing in one activity, so that when housing units are reported in the APR they are correctly identified as homeownership or rental.): (2) Operation of 1937 Act Housing [302(1)]
1.4 Intended Outcome Number (Select one outcome from the Outcome list. Each program can have only one outcome. If more than one outcome applies, create a separate program for each outcome.): (6) Assist affordable housing for low income households
Describe Other Intended Outcome (Only if you selected "Other" above.):
1.5 Actual Outcome Number (In the APR identify the actual outcome from the Outcome list.): (6) Assist affordable housing for low income households.
Describe Other Actual Outcome (Only if you selected "Other" above.):
1.6 Who Will Be Assisted (Describe the types of households that will be assisted under the program. Please note: assistance made available to families whose incomes fall within 80 to 100 percent of the median should be included as a separate program within this section.): Native American low income households on the Pine Ridge Indian Reservation.
1.7 Types and Level of Assistance (Describe the types and the level of assistance that will be provided to each household, as applicable.): Inspect at least 600 low rent units for maintenance planning. Provide emergency, preventive and routine maintenance to 1158 1937 Act low rent units. Assist with procedures for application, recertification and rental levels for low income housing. Work with 218 1937 Act mutual help units on payment and conveyance procedures.
1.8 APR: (Describe the accomplishments for the APR in the 12-month program year. In accordance with 24 CFR § 1000.512(b)(3), provide an analysis and explanation of cost overruns or high unit costs.):

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1.9: Planned and Actual Outputs for 12-Month Program Year

Planned Number of Units to be Completed in Year Under this Program	Planned Number of Households To Be Served in Year Under this Program	Planned Number of Acres To Be Purchased in Year Under this Program	APR: Actual Number of Units Completed in Program Year	APR: Actual Number of Households Served in Program Year	APR: Actual Number of Acres Purchased in Program Year
1376					

1.10: APR: If the program is behind schedule, explain why. (24 CFR § 1000.512(b)(2))

NOTE: Remember to complete all the text boxes in Section 3 for each IHBG-funded program. If you are completing an electronic version of this form, you may copy and paste text boxes 1.1 through 1.10 as needed to describe each of your programs. If you are completing this form in hard copy, you may photocopy Section 3 as needed to describe each of your programs.

<p>1.1 Program Name and Unique Identifier: Goal 2-16 Modernization of 1937 Act Housing</p>
<p>1.2 Program Description (This should be the description of the planned program.):</p> <p>OS(L)H will provide modernization of low rent units (under \$30,000 a unit in one year); and continue to build ramps and renovate low rent units as needed to meet the needs of handicapped tenants. We will continue use the ICDBG 14 Grant to continue mold remediation and prevention for bathrooms, basements and kitchens (Provide \$159,000 match in 2016).</p>
<p>1.3 Eligible Activity Number (Select one activity from the Eligible Activity list. Do not combine homeownership and rental housing in one activity, so that when housing units are reported in the APR they are correctly identified as homeownership or rental.): (1) Modernization of 1937 Act Housing [202(1)]</p>
<p>1.4 Intended Outcome Number (Select one outcome from the Outcome list. Each program can have only one outcome. If more than one outcome applies, create a separate program for each outcome.): (3) Improve quality of substandard units</p>
<p>Describe Other Intended Outcome (Only if you selected "Other" above.):</p>
<p>1.5 Actual Outcome Number (In the APR identify the actual outcome from the Outcome list.): (3) Improve quality of substandard units.</p>

Describe Other Actual Outcome (Only if you selected "Other" above.):

1.6 Who Will Be Assisted (Describe the types of households that will be assisted under the program. Please note: assistance made available to families whose incomes fall within 80 to 100 percent of the median should be included as a separate program within this section.): Native American low income households on the Pine Ridge Indian Reservation.

1.7 Types and Level of Assistance (Describe the types and the level of assistance that will be provided to each household, as applicable.): Rehabilitate bathrooms, kitchens, and basements in at least 120 units under ICDBG 14.

1.8 APR: (Describe the accomplishments for the APR in the 12-month program year. In accordance with 24 CFR § 1000.512(b)(3), provide an analysis and explanation of cost overruns or high unit costs.):

1.9: Planned and Actual Outputs for 12-Month Program Year

Planned Number of Units to be Completed in Year Under this Program	Planned Number of Households To Be Served in Year Under this Program	Planned Number of Acres To Be Purchased in Year Under this Program	APR: Actual Number of Units Completed in Program Year	APR: Actual Number of Households Served in Program Year	APR: Actual Number of Acres Purchased in Program Year
137					

1.10: APR: If the program is behind schedule, explain why. (24 CFR § 1000.512(b)(2))

1.1 Program Name and Unique Identifier: Coal 3-16 Housing Development

1.2 Program Description (This should be the description of the planned program.): Complete construction of 13 Rural Innovation low rent units. Close Title VI guaranteed loan and begin construction of new units.

1.3 Eligible Activity Number (Select one activity from the Eligible Activity list.):
(4) Construction of Rental Housing (202(2))

1.4 Intended Outcome Number (Select one outcome from the Outcome list.):
(1) Reduce over-crowding

1.5 Actual Outcome Number (In the APR identify the actual outcome from the Outcome list.):
(1) Reduce overcrowding.

1.6 Who Will Be Assisted (Describe the types of households that will be assisted under the program. Please note: assistance made available to families whose incomes fall within 80 to 100 percent of the median should be included as a separate program within this section.): Native American low income households living on the Pine Ridge Indian Reservation.

1.7 Types and Level of Assistance (Describe the types and the level of assistance that will be provided to each household, as applicable.): Complete construction of 20 Title VI low-rent units.

1.8 APR: Describe the accomplishments for the APR in the 12-month program year.

1.9 Planned and Actual Outputs for 12-Month Program Year

Planned Number of Units to be Completed in Year Under this Program	Planned Number of Households To Be Served in Year Under this Program	APR: Actual Number of Units Completed in Program Year	APR: Actual Number of Households Served in Program Year:
20			

1.1 Program Name and Unique Identifier: Goal 4-14 Operation and Maintenance of NAHASDA Assisted Units

1.2 Program Description (This should be the description of the planned program.):
OS(L)FI will operate and maintain its NAHASDA Assisted rental (83) and homeownership (63) units in accordance with HUD requirements and adopted policies/procedures. This will include 1.) The performance of routine and non-routine maintenance; 2) Unit inspections; 3.) Grounds and facilities operations and maintenance; 4.) Leasing management functions for tenants and homebuyers such as waiting list management, selections, evictions, counseling and training, conveyances, and managing Cohen Home for elderly and disabled; 5) Program oversight; 6.) Financial management/rent collection; 7.) Insurance coverage; and 8.) Records maintenance.

1.3 Eligible Activity Number (Select one activity from the Eligible Activity list.):
(20) Operation and Maintenance of NAHASDA-Assisted Units (202(4))

1.4 Intended Outcome Number (Select one outcome from the Outcome list.):
(1) Reduce over-crowding

1.5 Actual Outcome Number (In the APR identify the actual outcome from the Outcome list.):
(1) Reduce overcrowding.

1.6 Who Will Be Assisted (Describe the types of households that will be assisted under the program. Please note: assistance made available to families whose incomes fall within 80 to 100 percent of the median should be included as a separate program within this section.): Native American low income households living on the Pine Ridge Indian Reservation.

1.7Types and Level of Assistance (Describe the types and the level of assistance that will be provided to each household, as applicable.): Inspect at least 54 low rent units for maintenance planning. Provide emergency, preventive and routine maintenance to 108 (45 1937 carryover, 18 Rural Innovation Fund, 45 Title VI) NAHASDA assisted low rent units. Assist with procedures for application, recertification and rental levels for low income housing. Work with 63 (45 Ellsworth, 18 ARRA) NAHASDA assisted homeownership units on payment and conveyance procedures.

1.8APR: Describe the accomplishments for the APR in the 12-month program year:

1.9 Planned and Actual Outputs for 12-Month Program Year

Planned Number of Units to be Completed in Year Under this Program	Planned Number of Households To Be Served in Year Under this Program	APR: Actual Number of Units Completed in Program Year	APR: Actual Number of Households Served in Program Year
171			

SECTION 4: MAINTAINING 1937 ACT UNITS, DEMOLITION, AND DISPOSITION

(1) **Maintaining 1937 Act Units** (NAHASDA § 102(b)(2)(A)(v)) *(Describe specifically how you will maintain and operate your 1937 Act housing units in order to ensure that these units will remain viable.)*
OS(L)H will provide necessary maintenance to existing rental units to ensure long-term viability. Participants in the homeownership program still on our list of Current Assisted Stock will be expected to be in compliance with their purchase agreement and accept responsibility for maintaining their units. OS(L)H will continue to seek funds to do needed rehab and modernization to 1937 Act low rent units and to assist homeowners to obtain resources for repairs.
Demolition and Disposition: We do not plan on demolishing any units. We do plan on conveying home ownership units.

(2) **Demolition and Disposition** (NAHASDA § 102(b)(2)(A)(iv)(I-III), 24 CFR 1000.134) *(Describe any planned demolition or sale of 1937 Act or NAHASDA-assisted housing units. If the recipient is planning on demolition or disposition of 1937 Act or NAHASDA-assisted housing units, be certain to include the timetable for any planned demolition or disposition and any other information that is required by HUD with respect to the demolition or disposition.)*

SECTION 5: BUDGETS

(1) Sources of Funding (NAHASDA § 102(b)(2)(C)(i) and 404 (b)) (Complete the non-shaded portions of the chart below to describe your estimated or anticipated sources of funding for the 12-month program year. APR Actual Sources of Funding -- Please complete the shaded portions of the chart below to describe your actual funds received. Only report on funds actually received and under a grant agreement or other binding commitment during the 12-month program year.)

SOURCE	IHP					APR					
	(A) Estimated amount on hand at beginning of program year	(B) Estimated amount to be received during 12- month program year	(C) Estimated total sources of funds (A + B)	(D) Estimated funds to be expended during 12- month program year	(E) Estimated unexpended funds remaining at end of program year (C minus D)	(F) Actual amount on hand at beginning of program year	(G) Actual amount received during 12- month program year	(H) Actual total sources of funding (F + G)	(I) Actual funds expended during 12- month program year	(J) Actual unexpended funds remaining at end of 12- month program year (H minus I)	(K) Actual unexpended funds obligated but not expended at end of 12- month program year
1. IHBG Funds	\$0	12,123,309	12,123,309	12,123,309	0						
2. IHBG Program Income	0	3,000,000	3,000,000	2,400,000	600,000						
3. Title VI	3,000,000	0	3,000,000	3,000,000	0						
4. Title VI Program Income	0	0	0	0	0						
5. 1937 Act Operating Reserves	0		0	0	0						
6. Carry Over 1937 Act Funds	0		0	0	0						
LEVERAGED FUNDS											
7. ICDBG Funds	200,000	0	200,000	200,000	0						
8. Other Federal Funds	0	0	0	0	0						
9. LIHTC	0	0	0	0	0						
10. Non-Federal Funds	0	0	0	0	0						
TOTAL	3,200,000	15,123,309	18,323,309	17,723,309	600,000						

Notes:

- For the IHP, fill in columns A, B, C, D, and E (non-shaded columns). For the APR, fill in columns F, G, H, I, J, and K (shaded columns).
- Total of Column D should match the total of Column N from the Uses Table on the following page.
- Total of Column I should match the Total of Column Q from the Uses Table on the following page.
- For the IHP, describe any estimated leverage in Line 3 below. For the APR, describe actual leverage in Line 4 below (APR).

(2) Uses of Funding (NAHASDA § 102(b)(2)(C)(ii)) (Note that the budget should not exceed the total funds on hand (Column C) and insert as many rows as needed to include all the programs identified in Section 3. Actual expenditures in the APR section are for the 12-month program year.)

PROGRAM NAME (lie to program names in Section 3 above)	Unique Identifier	IHP			APR		
		(L) Prior and current year IHBG (only) funds to be expended in 12- month program year	(M) Total all other funds to be expended in 12- month program year	(N) Total funds to be expended in 12- month program year (L + M)	(O) Total IHBG (only) funds expended in 12-month program year	(P) Total all other funds expended in 12- month program year	(Q) Total funds expended in 12-month program year (O+P)
Maintain and Operate 1937 Act Housing	1-14	7,291,009	200,000	7,491,009			
Modernization of 1937 Act Housing	2-14	1,000,000	1,532,000	2,532,000			
Housing Development	3-14	970,000	3,000,000	3,970,000			
Maintain and Operate NAHASDA Assisted Units	4-14	637,834	0	637,834			
			0				
Planning and Administration		2,224,466	195,000	2,419,466			
Loan Repayment - describe in 3 and 4 below.		0	673,000	673,000			
TOTAL		12,123,309	5,600,000	17,723,309			

Notes:

- Total of Column L cannot exceed the IHBG funds from Column C, Row 1 from the Sources Table on the previous page.
- Total of Column M cannot exceed the total from Column C, Rows 2-10 from the Sources Table on the previous page.
- Total of Column O cannot exceed total IHBG funds received in Column H, Row 1 from the Sources Table on the previous page.

- d. Total of Column P cannot exceed total of Column H, Rows 2-10 of the Sources Table on the previous page.
e. Total of Column Q should equal total of Column I of the Sources Table on the previous page.

(3) Estimated Sources or Uses of Funding (NAHASDA § 102(b)(2)(C)). (Provide any additional information about the estimated sources or uses of funding, including leverage (if any). You must provide the relevant information for any planned loan repayment listed in the Uses Table on the previous page. This planned loan repayment can be associated with Title VI or with private or tribal funding that is used for an eligible activity described in an IHP that has been determined to be in compliance by HUD. The text must describe which specific loan is planned to be repaid and the NAHASDA-eligible activity and program associated with this loan.): Our IHBG Formula is \$12,123,369 which we usually get in April. It might be less based on appropriation but we budget the full amount in the IHP. We will have \$200,000 of ICDBG 14 Category 2 Mold funding on hand to rehab bathrooms, basements and kitchens and will complete the work and close this out in 2016. We collect about \$3,000,000 a year in rental and home owner payments and we are budgeting \$2,400,000 including \$166,667 to match ICDBG FY14 in 2014, \$500,000 \$225,000 contingency, and \$673,000 in loan payments (USDA Administration Building \$165,000, Lacreek Ranch for land to build affordable housing \$20,000 and Title VI interest and then loan repayments). We moved quickly on Title VI and will have 25 houses done by 12/15 and will complete 20 more in 2016 with the \$3 million.

(4) APR (NAHASDA § 404(b)) (Enter any additional information about the actual sources or uses of funding, including leverage (if any). You must provide the relevant information for any actual loan repayment listed in the Uses Table on the previous page. The text must describe which loan was repaid and the NAHASDA-eligible activity and program associated with this loan.):

SECTION 6: OTHER SUBMISSION ITEMS

- (1) **Useful Life/Affordability Period(s)** (NAHASDA § 205, 24 CFR § 1000.142) *(Describe your plan or system for determining the useful life/affordability period of the housing it assists with IHBG and/or Title VI funds must be provided in the IHP. A record of the current, specific useful life/affordability period for housing units assisted with IHBG and/or Title VI funds (excluding Mutual Help) must be maintained in the recipient's files and available for review for the useful life/affordability period.)*:

Schedule for Low Rent Units and Non-Mutual Help Home Ownership Units is as follows:
Useful life for 1937 Act low-rent units is 10 years:

IHBG Funds Invested	Affordability Period
Under \$5,000	6 months
\$5,000 to \$15,000	5 years
\$15,001 to \$40,000	10 years
Over \$40,000	15 years
New construction or acquisition of newly constructed housing	30 years

The useful life of the TVI houses will be 30 years.

- (2) **Model Housing and Over-Income Activities** (NAHASDA § 202 (6), 24 CFR § 1000.108) *(If you wish to undertake a model housing activity or wish to serve non-low-income households during the 12-month program year, those activities may be described here, in the program description section of the 1-year plan, or as a separate submission.)*:

NA

- (3) **Tribal and Other Indian Preference** (NAHASDA § 201(b)(5), 24 CFR § 1000.120)

If preference will be given to tribal members or other Indian families, the preference policy must be described. This information may be provided here or in the program description section of the 1-year plan.

Does the Tribe have a preference policy? Yes ☒ No ☐

If yes, describe the policy. OS(L)H provides services first to members of the Oglala Sioux Tribe.

(4) Anticipated Planning and Administration Expenses (NAHASDA § 102(b)(2)(C)(ii), 24 CFR § 1000.238)

Do you intend to exceed your allowable spending cap for Planning and Administration? Yes ☐ No ☒

If yes, describe why the additional funds are needed for Planning and Administration. For a recipient administering funds from multiple grant beneficiaries with a mix of grant or expenditure amounts, for each beneficiary state the grant amount or expenditure amount, the cap percentage applied, and the actual dollar amount of the cap.

(5) Actual Planning and Administration Expenses (NAHASDA § 102(b)(2)(C)(ii), 24 CFR § 1000.238)

Did you exceed your spending cap for Planning and Administration? Yes ☐ No ☐

If yes, did you receive HUD approval to exceed your spending cap on Planning and Administration? Yes ☐ No ☐

If you did not receive approval for exceeding your spending cap on Planning and Administration costs, describe the reason(s) for exceeding the cap. (See Section 6, Line 5 of the Guidance for information on carry-over of unspent Planning and Administration expenses.)

(6) Expanded Formula Area – Verification of Substantial Housing Services (24 CFR § 1000.302(3))

If your Tribe has an expanded formula area, (i.e., an area that was justified based on housing services provided rather than the list of areas defined in 24 CFR § 1000.302 Formula Area (1)), the Tribe must demonstrate that it is continuing to provide substantial housing services to that expanded formula area. Does the Tribe have an expanded formula area?

Yes ☐ No ☒ If no, proceed to Section 7.

If yes, list each separate geographic area that has been added to the Tribe's formula area and the documented number of Tribal members residing there.

For each separate formula area expansion, list the budgeted amount of IHBG and other funds to be provided to all American Indian and Alaska Native (AIAN) households and to only those AIAN households with incomes 80% of median income or lower during the recipient's 12-month program year.

Total Expenditures on Affordable Housing Activities for:		
	All AIAN Households	AIAN Households with incomes 80% or less of Median Income
IHBG funds:		
Funds from other Sources:		

(7) **APR:** If answered "Yes" in Line 6, for each separate formula area expansion, list the actual amount of IHBG and other funds expended for all AIAN households and for only AIAN households with incomes 80% of median income or lower during the recipient's 12-month program year.

Total Expenditures on Affordable Housing Activities for:		
	All AIAN Households	AIAN Households with Incomes 80% or less of Median Income
IHBG funds:		
Funds from other Sources:		

SECTION 7: INDIAN HOUSING PLAN CERTIFICATION OF COMPLIANCE
(NAHASDA § 102(b)(2)(D))

By signing the IHP, you certify that you have all required policies and procedures in place in order to operate any planned IHBG programs.

(1) In accordance with applicable statutes, the recipient certifies that it will comply with Title II of the Civil Rights Act of 1968 in carrying out this Act, to the extent that such title is applicable, and other applicable federal statutes.

Yes ☒ No ☐

(2) To be eligible for minimum funding in accordance with 24 CFR 100.328, the recipient receiving less than \$200,000 under FCAS certifies that there are households within its jurisdiction at or below 80 percent of median income.

Yes ☐ No ☐ Not Applicable ☒

(3) The following certifications will only apply where applicable based on program activities.

(a) The recipient will maintain adequate insurance coverage for housing units that are owned and operated or assisted with grant amounts provided under NAHASDA, in compliance with such requirements as may be established by HUD.

Yes ☒ No ☐ Not Applicable ☐

(b) Policies are in effect and are available for review by HUD and the public governing the eligibility, admission, and occupancy of families for housing assisted with grant amounts provided under NAHASDA.

Yes ☒ No ☐ Not Applicable ☐

(c) Policies are in effect and are available for review by HUD and the public governing rents charged, including the methods by which such rents or homebuyer payments are determined, for housing assisted with grant amounts provided under NAHASDA.

Yes ☒ No ☐ Not Applicable ☐ and

(d) Policies are in effect and are available for review by HUD and the public governing the management and maintenance of housing assisted with grant amounts provided under NAHASDA.

Yes ☒ No ☐ Not Applicable ☐

SECTION 8: IHP TRIBAL CERTIFICATION
(NAHASDA § 102(c))

This certification is used when a Tribally Designated Housing Entity (TDHE) prepares the IHP on behalf of a tribe. This certification must be executed by the recognized tribal government covered under the IHP.

(1) The recognized tribal government of the grant beneficiary certifies that:

(2) ☒ It had an opportunity to review the IHP and has authorized the submission of the IHP by the TDHE; or

(3) ☐ It has delegated to such TDHE the authority to submit an IHP on behalf of the Tribe without prior review by the Tribe.

(4) Tribe:	Oglala Sioux Tribe
(5) Authorized Official's Name and Title:	Mr. John Steele, President
(6) Authorized Official's Signature:	<i>John W. Steele</i>
(7) Date (MM/DD/YYYY):	10-9-15

SECTION 9: TRIBAL WAGE RATE CERTIFICATION
(NAHASDA §§ 102(b)(2)(D)(vi) and 104(b))

By signing the IHP, you certify whether you will use tribally determined wages, Davis-Bacon wages, or HUD determined wages. Check only the applicable box below.

- (1) ☒ You will use tribally determined wage rates when required for IHBG-assisted construction or maintenance activities. The Tribe has appropriate laws and regulations in place in order for it to determine and distribute prevailing wages.
- (2) ☐ You will use Davis-Bacon or HUD determined wage rates when required for IHBG-assisted construction or maintenance activities.
- (3) ☐ You will use Davis-Bacon and/or HUD determined wage rates when required for IHBG-assisted construction except for the activities described below.

(4) List the activities using tribally determined wage rates: We use TERO rates for contracts.

SECTION 10: SELF-MONITORING

(NAHASDA § 403(b), 24 CFR § 1000.502)

(1) Do you have a procedure and/or policy for self-monitoring?

Yes ☐ No ☐

(2) Pursuant to 24 CFR § 1000.502 (b) where the recipient is a TDHE, did the TDHE provide periodic progress reports including the self-monitoring report, Annual Performance Report, and audit reports to the Tribe?

Yes ☐ No ☐ Not Applicable ☐

(3) Did you conduct self-monitoring, including monitoring sub-recipients?

Yes ☐ No ☐

(4) Self-Monitoring Results. *(Describe the results of the monitoring activities, including inspections for this program year.):*

SECTION 11: INSPECTIONS

(NAHASDA § 403(b))

(1) Inspection of Units (Use the table below to record the results of recurring inspections of assisted housing.)

(A) Activity		(B) Total number of units (Inventory)	(C) Units in standard condition	Results of inspections		(F) Total number of units inspected
				(D) Units needing rehabilitation	(E) Units needing to be replaced	
1.	1937 Housing Act Units:					
a.	Rental					
b.	Homeownership					
c.	Other					
	1937 Act Subtotal					
2.	NAHASDA-Assisted Units:					
a.	Rental					
b.	Homeownership					
c.	Rental Assistance					
d.	Other					
	NAHASDA Subtotal					
	Total					

Note: Total of column F should equal the sum of columns C+D+E.

(2) Did you comply with your inspection policy: Yes ☐ No: ☐

(3) If no, why not:

SECTION 12: AUDITS

(24 CFR §§ 1000.544 and 548)

This section is used to indicate whether an Office of Management and Budget Circular A-133 audit is required, based on a review of your financial records.

Did you expend \$500,000 or more in total Federal awards during the APR reporting period?

Yes ☒ No ☐

If Yes, an audit is required to be submitted to the Federal Audit Clearinghouse and your Area Office of Native American Programs.

If No, an audit is not required.

SECTION 18: PUBLIC AVAILABILITY
(NAHASDA § 408, 24 CFR § 1000.518)

(1) Did you make this APR available to the citizens in your jurisdiction before it was submitted to HUD
(24 CFR § 1000.518)?

Check one: Yes ☐ No ☐

(2) If you are a TDHE, did you submit this APR to the Tribe(s) (24 CFR § 1000.512)?

Check one: Yes ☐ No ☐ Not Applicable ☐

(3) If you answered "No" to question #1 and/or #2, provide an explanation as to why not and indicate when you will do so.

(4) Summarize any comments received from the Tribe(s) and/or the citizens (NAHASDA § 404(d)).

**SECTION 14: JOBS SUPPORTED BY NAHASDA
(NAHASDA §404(b))**

Use the table below to record the number of jobs supported with IHBG funds each year.

Indian Housing Block Grant Assistance (IHBG)	
(1) Number of Permanent Jobs Supported	
(2) Number of Temporary Jobs Supported	

(3) Narrative (optional):

SECTION 15: IHP WAIVER REQUESTS
(NAHASDA § 101(b)(2))

THIS SECTION IS ONLY REQUIRED IF THE RECIPIENT IS REQUESTING A WAIVER OF AN IHP SECTION OR A WAIVER OF THE IHP SUBMISSION DUE DATE. A waiver is valid for a period not to exceed 90 days. Fill out the form below if you are requesting a waiver of one or more sections of the IHP. NOTE: This is NOT a waiver of the IHBG program requirements but rather a request to waive some of the IHP submission items.

- (1) List below the sections of the IHP where you are requesting a waiver and/or a waiver of the IHP due date.
(List the requested waiver sections by name and section number): NA

- (2) Describe the reasons that you are requesting this waiver (Describe completely why you are unable to complete a particular section of the IHP or could not submit the IHP by the required due date.):

- (3) Describe the actions you will take in order to ensure that you are able to submit a complete IHP in the future and/or submit the IHP by the required due date. (This section should completely describe the procedural, staffing or technical corrections that you will make in order to submit a complete IHP in the future and/or submit the IHP by the required due date.):

(4) Recipient:	Oglala Sioux (Lakota) Housing
(5) Authorized Official's Name and Title:	Paul Iron Cloud
(6) Authorized Official's Signature:	
(7) Date (MM/DD/YYYY):	

SECTION 16: IHP AMENDMENTS
(24 CFR § 1000.232)

Use this section for IHP amendments only.

Fill out the text below to summarize your IHP amendment. This amendment is only required to be submitted to the HUD Area Office of Native American Programs when (1) the recipient is adding a new activity that was not described in the current One-Year Plan that has been determined to be in compliance by HUD or (2) to reduce the amount of funding that was previously budgeted for the operation and maintenance of 1937 Act housing under NAHASDA § 202(1). All other amendments will be reflected in the APR and do not need to be submitted to HUD.

NOTES:

- (1) If Line 2 in Section 8 (IHP Tribal Certification) is checked in the current IHP, a new certification must be signed and dated by the authorized tribal official and submitted with the IHP Amendment.
- (2) Section 1 (Cover Page) is recommended but not required with an IHP Amendment submission.

APR: REPORTING ON PROGRAM YEAR PROGRESS (NAHASDA § 404(b))

Complete the shaded section of text below to describe your completed program tasks and actual results. Only report on activities completed during the 12-month program year. Financial data should be presented using the same basis of accounting as the Schedule of Expenditures of Federal Awards (SEFA) in the annual OMB Circular A-133 audit. For unit accomplishments, only count units when the unit was completed and occupied during the year. For households, only count the household if it received the assistance during the previous 12-month program year.

(1) Program Name and Unique Identifier:
(2) Program Description (This should be the description of the planned program.):
(3) Eligible Activity Number (Select one activity from the Eligible Activities list in Section 3. Do not combine homeownership and rental housing in one activity, so that when units are reported in the APR they are correctly identified as homeownership or rental.):
(4) Intended Outcome Number (Select one Outcome from the Outcome list in Section 3.):
Describe Other Intended Outcome (Only if you selected "Other" above.):
(5) Actual Outcome Number (Select one Outcome from the Outcome list in Section 3.):

Describe Other Actual Outcome (Only if you selected "Other" above.):

(6) Who Will Be Assisted (Describe the types of households that will be assisted under the program. Please note: assistance made available to families whose incomes fall within 80 to 100 percent of the median income should be included as a separate program within this Section.):

(7). Types and Level of Assistance (Describe the types and the level of assistance that will be provided to each household, as applicable.):

(8). APR: (Describe the accomplishments for the APR in the 12-month program year. In accordance with 24 CFR § 1000.512(b)(3), provide an analysis and explanation of cost overruns or high unit costs.):

(9). Planned and Actual Outputs for 12-Month Program Year

Planned Number of Units to be Completed in Year Under this Program	Planned Number of Households To Be Served in Year Under this Program	Planned Number of Acres To Be Purchased in Year Under this Program	APR: Actual Number of Units Completed in Program Year	APR: Actual Number of Households Served in Program Year	APR: Actual Number of Acres Purchased in Program Year

(10). APR: If the program is behind schedule, explain why. (24 CFR § 1000.512(b)(2))

(11) Amended Sources of Funding (NAHASDA § 102(b)(2)(C)(i) and 404 (b)) (Complete the non-shaded portions of the chart below to describe your estimated or anticipated sources of funding for the 12-month program year. APR: Actual Sources of Funding:- Please complete the shaded portions of the chart below to describe your actual funds received. Only report on funds actually received and under a grant agreement or other binding commitment during the 12-month program year.)

SOURCE	IHP					APR					
	(A) Estimated amount on hand at beginning of program year	(B) Estimated amount to be received during 12-month program year	(C) Estimated total sources of funds (A + B)	(D) Estimated funds to be expended during 12-month program year	(E) Estimated unexpended funds remaining at end of program year (C minus D)	(F) Actual amount on hand at beginning of program year	(G) Actual amount received during 12-month program year	(H) Actual total sources of funding (F + G)	(I) Actual funds expended during 12-month program year	(J) Actual unexpended funds remaining at end of 12-month program year (H minus I)	(K) Actual unexpended funds obligated but not expended at end of 12-month program year
11. IHBS Funds											
12. IHBS Program Income											
13. Title VI											
14. Title VI Program Income											
15. 1937 Act Operating Reserves											
16. Carry Over 1937 Act Funds											
LEVERAGED FUNDS											
17. ICDBG Funds											
18. Other Federal Funds											
19. LHSIC											
20. Non-Federal Funds											
TOTAL											

Notes:

- For the IHP, fill in columns A, B, C, D, and E (non-shaded columns). For the APR, fill in columns F, G, H, I, J, and K (shaded columns).
- Total of Column D should match the total of Column N from the Uses Table on the following page.
- Total of Column I should match the Total of Column Q from the Uses Table on the following page.

(12) Amended Uses of Funding (NAHASDA § 102(b)(2)(C)(ii)) (Note that the budget should not exceed the total funds on hand and insert as many rows as needed to include all the programs identified in Section 3. Actual expenditures in the APR section are for the 12-month program year.)

PROGRAM NAME (Use program names in Section 3 above)	Unique Identifier	IHP			APR		
		(L) Prior and current year IHG (only) funds to be expended in 12-month program year	(M) Total all other funds to be expended in 12-month program year	(N) Total funds to be expended in 12-month program year (L + M)	(O) Total IHG (only) funds expended in 12-month program year	(P) Total all other funds expended in 12-month program year	(Q) Total funds expended in 12-month program year (O+P)
Planning and Administration							
Loan Repayment							
TOTAL							

Notes:

- Total of Column L cannot exceed the IHBG funds from Column C, Row 1 from the Sources Table on the previous page.
- Total of Column M cannot exceed the total from Column C, Rows 2-10 from the Sources Table on the previous page.
- Total of Column O cannot exceed total IHBG funds received in Column H, Row 1 from the Sources Table on the previous page.
- Total of Column P cannot exceed total of Column H, Rows 2-10 of the Sources Table on the previous page.
- Total of Column Q should equal total of Column I of the Sources Table on the previous page.

(13) Recipient:	
(14) Authorized Official's Name and Title:	
(15) Authorized Official's Signature:	I certify that all other sections of the IHP approved on _____ are accurate and reflect the activities planned.
(16) Date (MM/DD/YYYY):	

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 28688

**JENNIFER CHASE ALONE, as the Personal Representative of
ELFREDA ANN TAKES WAR BONNETT,**
Plaintiff,

vs.

WESTERN COOPERATIVE COMPANY, INC.,
Defendant/Third-Party Plaintiff,

and

C. BRUNSCH, INC., d/b/a LAKOTA PLAINS PROPANE
Defendant/Third-Party Plaintiff/Appellant,

vs.

**OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL,
DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENY
ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM,
ROBIN T. (LAST NAME UNKNOWN) AND JOHN AND JANE DOE 1-100,**
Third-Party Defendants/Appellees.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
OGLALA LAKOTA COUNTY, SOUTH DAKOTA

The Honorable Jeffrey Connolly
Circuit Court Judge

APPELLANT'S REPLY BRIEF

JOHN K. NOONEY
ROBERT J. GALBRAITH
NOONEY & SOLAY, LLP
326 Founders Park Drive
P.O. Box 8030
Rapid City, SD 57709-8030
*Attorneys for Appellant,
C. Brunsch, Inc.*

MARK F. MARSHALL
BANGS, MCCULLEN, BUTLER,
FOYE & SIMMONS
333 West Boulevard, Suite 400
P.O. Box 2670
Rapid City, SD 57709-2670
*Attorneys for Appellees, Oglala
Sioux Lakota Housing Authority,
Richard Hill, Derek Janis, Wes
Cottier, William White, Ben Plenty
Arrows, Renaldo Two Bulls,
Brandon Wes, Derek Slim, and
Robin Tuttle*

EVAN THOMPSON
BROWN, KALECZYC, BERRY &
HOVEN, P.C.
800 N. Last Chance Gulch, #101
P.O. Box 1697
Helena MT 59624
*Attorneys for Appellees, Oglala
Sioux Lakota Housing Authority,
Richard Hill, Derek Janis, Wes
Cottier, William White, Ben Plenty
Arrows, Renaldo Two Bulls,
Brandon Wes, Derek Slim, and
Robin Tuttle*

NOTICE OF APPEAL FILED AUGUST 3, 2018

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STATEMENT OF THE FACTS¹

The parties generally do not have any dispute as it concerns the procedural history of this case. This action was commenced by the Plaintiff, Jennifer Chase Alone (“Chase Alone”), as the personal representative of Elfreda Ann Takes War Bonnett (“Takes War Bonnett”) against Lakota Plains and Western Cooperative Company, Inc. (“Westco”) related to an explosion which occurred on October 6, 2016 at a duplex located at 157 and 158 East Ridge Housing, Pine Ridge, Oglala Lakota County, South Dakota. SR 001, Complaint, ¶ 1. Lakota Plains and Westco brought Third-Party Complaints against the Housing Authority and the Individual Third-Party Defendants as the parties responsible for leaving the uncapped line in Unit 157 which led to the explosion. SR 055, Third Party Complaint; SR 084, Third-Party Complaint.

Lakota Plains served written discovery on the Housing Authority on September 12, 2017, two days prior to the Housing Authority’s first

¹ Just as before, citations to the pleadings will be referred to as Settled Record (“SR”) and the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. “SR 001, Complaint,” or “SR 309, Motion for Protective Order.” References to the documents in the Appendix will be referred to as, “Document” and Appendix (“App.”) with the appropriate page number or paragraph assigned, e.g. “Rule 54(b) Judgment Granting Third-Party Defendants’ Motion to Dismiss, App. at A-1-25,” or “Memorandum Order, App. at B-1-17.” The Appellant, C. Brunsch, Inc., d/b/a Lakota Plains Propane will be referred to as “Lakota Plains.” The Appellee, Oglala Sioux Lakota Housing Authority will be referred to as the “Housing Authority.” The Appellees, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle will be referred to as the “Individual Third-Party Defendants.”

Motion to Dismiss. SR 712, Affidavit of Robert J. Galbraith, Exhibit 2. The Housing Authority refused to answer any of the discovery. SR 712, Affidavit of Robert J. Galbraith, Exhibit 3. After receiving the Affidavit of Doyle Pipe on Head, upon which the Housing Authority and the Individual Third-Party Defendants base nearly the entirety of their argument, Lakota Plains served a Notice of Video-Taped Deposition of Oglala Sioux Lakota Housing Authority Consistent with SDCL § 15-6-30(b)(6) *Duces Tecum* (“Notice of Housing Authority Deposition”) on October 17, 2017. SR 712, Affidavit of Robert J. Galbraith, Exhibit 4. In response to the Notice of Housing Authority Deposition, the Housing Authority filed a Motion for Protective Order on October 20, 2017. SR 309.

The Housing Authority readily acknowledges that it did not provide a single answer or response to the discovery identified above prior to the hearing on January 18, 2018.

ARGUMENT

I. C. BRUNSCH, INC., d/b/a LAKOTA PLAINS PROPANE WAS ENTITLED TO DISCOVERY FROM THE OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL, DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENTY ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM, AND ROBIN TUTTLE BEFORE THE EVIDENTIARY HEARING ON THE THIRD-PARTY DEFENDANTS’ MOTIONS TO DISMISS

On appeal, the Appellees' Brief to this Court is replete with arguments that Lakota Plains "sat on its rights" and never provided any discovery related to the Housing Authority and the Individual Third-Party Defendants' defense of subject matter jurisdiction until the "eleventh hour." However, a review of the discovery shows otherwise.

The Defendant/Third-Party Plaintiff, C. Brunsch Inc.'s First Set of Interrogatories and Request for Production of Documents to Third-Party Defendant, Oglala Sioux Lakota Housing Authority sought the names and addresses of the individuals who performed work at Units 157 or 158:

INTERROGATORY NO. 13: For the period of time 10 years prior to the Incident, please identify each individual or entity, including contractors, subcontractors, partnerships, independent contractors or others, including vendors or suppliers, who performed any work or provided any materials for work performed or undertaken at Unit 157. For each individual or entity identified, please provide the following:

- (a) The name and address of the person, including last known address, telephone number, email address;
- (b) The name of the company;
- (c) The date of services;
- (d) The nature of the services;
- (e) Materials which were provided;
- (f) All communication with the person responsible for the work; and
- (g) All invoices, work orders, purchase orders, all contracts all subcontracts.

INTERROGATORY NO. 14: For the period of time 10 years prior to the Incident, please identify each individual or entity, including contractors, subcontractors, partnerships, independent contractors or others, including vendors or suppliers, who

performed any work or provided any materials for work performed or undertaken at Unit 158.

- (a) The name and address of the person, including last known address, telephone number, email address;
- (b) The name of the company;
- (c) The date of services;
- (d) The nature of the services;
- (e) All communication with the person responsible for the work; and
- (f) All invoices, work orders, purchase orders, all contracts all subcontracts.

SR 712, Affidavit of Robert J. Galbraith, Exhibit 2. During the hearing, over Lakota Plains objection, the Housing Authority, through Doyle Pipe on Head, introduced as evidence the tribal enrollment records of the Individual Third-Party Defendants and the “Notice of Personnel Action” hiring records for the Third-Party Defendants. *See Appellees’ Appendix at F-1-18 and G-1-9.* While it shouldn’t be questioned that the “name and address of the person, including last known address, telephone number, email address” would provide at least some insight into the Individual Third-Party Defendants’ tribal status, it goes without saying that the “name of the company” would have provided information related to the employment status of the Individual Third-Party Defendants. Yet, without having ever previously provided any such information, the Housing Authority introduced this evidence during the hearing.

The Housing Authority is quick to point out to this Court that it “voluntarily provided Appellant with hundred of documents (549 pages) it kept within the ordinary course of business.” *See Appellees’ Brief, p. 5.*

Yet, the Housing Authority ignores the fact that, whether through voluntary disclosure or discovery, the Housing Authority failed and/or refused to provide a single one of the documents introduced during the hearing despite the fact that the Housing Authority was previously so “accommodating” with its voluntary disclosures.

The Notice of Housing Authority Deposition, served on October 17, 2017, further requested documents and information that was responsive to the ultimate decision reached by the Court. Among other categories, the Notice of Housing Authority Deposition contained the following topics:

- The ownership, management, and operation of Unit 157, a duplex, known as Duplex Number 157 of the Eastridge Housing, Pine Ridge, South Dakota. (Category No. 1)
- The ownership, management, and operation of Unit 158, a duplex, known as Duplex Number 158 of the Eastridge Housing, Pine Ridge, South Dakota. (Category No. 2)
- Any actions taken on behalf of the Oglala Sioux Lakota Housing Authority as it concerned any actions, requests or discussions to effectuate a defense of immunity as it concerns the incident, the explosion at units 157 and 158 on October 6, 2016. (Category No. 9)
- Any communication, written or oral, between Oglala Sioux Lakota

Housing Authority and the Tribal Council as it concerned the pending litigation. (Category No. 34)

- Any and all information as it concerned a defense raised in the litigation brought by Jennifer Chase Alone, as personal representative of Elfreda Ann Takes War Bonnett. (Category No. 44)

SR 712, Affidavit of Robert J. Galbraith, Exhibit 4. The Housing Authority and the Individual Third-Party Defendants argue to this Court that the “status of the land where the alleged actions or omissions of OSLH occurred” is one of the key facts to the issue now before the Court.² The first two categories identified above (which were the first two categories of the Notice of Housing Authority Deposition) sought information and documents related to those very topics. The Notice of Housing Authority Deposition further requested information and documents related to the claimed defense of immunity, communication between the Housing Authority and the Tribal Council (which would only go towards issues regarding jurisdiction and/or immunity), and information and documents related to any defense raised in this litigation.

Despite the Housing Authority and the Individual Third-Party

² Specifically, the Housing Authority and the Individual Third-Party Defendants state that “[a]t no time prior to the week of the Hearing did Appellant suggest discovery was needed to address the key facts affecting subject matter jurisdiction: (1) the status of the land where the alleged actions or omissions of OSLH occurred, and (2) the status of the Housing Authority and the OSLH Employees as a tribal governmental entity and tribal members.” *See Appellees’ Brief*, pp. 29-30.

Defendants' best efforts to establish otherwise, they cannot establish that some of the discovery sought by Lakota Plains related directly, or at the very least indirectly, to the defenses raised by the Housing Authority and the Individual Third-Party Defendants for lack of subject matter jurisdiction.

Under the South Dakota Rules of Civil Procedure, “[a] party that without substantial justification fails to disclose information required by subdivision 15-6-26(e)(1), or to amend a prior response to discovery as required by subdivision 15-6-26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” SDCL § 15-6-37(c). While the Housing Authority had not previously provided any documents or information, by way of informal disclosure, discovery answer, or supplement, the Housing Authority provided Lakota Plains with exhibits the Housing Authority intended to introduce through Doyle Pipe on Head during a recess at the time of the hearing, at which time Lakota Plains was provided with ten minutes to review them before Doyle Pipe on Head took the stand. Transcript, App. at D-3, pp. 51:8 – 52:13. Any of those documents could have been, and should have been, provided by the Housing Authority prior to the hearing. Doyle Pipe on Head, was permitted to lay foundation for an unsigned tribal charter (Transcript, App. at. D-5-6, pp. 58:14 – 61:15), provided testimony related to whether

Doyle Pipe on Head believes the Housing Authority waived its immunity or consented to suit in any other jurisdictions (Transcript. App. at D-6-7, pp. 64:15 – 68:14), provided testimony and laid foundation for documents related to the tribal enrollment status and employment status of the Individual Third-Party Defendants (Transcript, App. at D-7-8, pp. 68:21 – 70:10), and provided testimony related to “title status reports” for Units 157 and 158 (Transcript, App. at D-9, pp. 78:10 – 80:10). Under SDCL § 15-6-37(c), any such documents or information should have been excluded during the hearing. Yet, Lakota Plains was not so obtuse as to seek the outright exclusion of the testimony and documents. Lakota Plains sought additional time, and discovery, related to the same.

Also important to this analysis is the Housing Authority’s acknowledgement that their motion made a “factual attack,” as opposed to a “facial attack” to the Court’s subject matter jurisdiction. Both parties agree that according to this Court’s prior decision in *Hutterville Hutterian Brethren, Inc. v. Waldner*, that under a “factual attack,” the Court may consider matters “outside the pleadings,” that the Court “must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute,” and that “evidentiary hearings, affidavits, documents, and live testimony may all be considered to resolve the subject matter jurisdiction dispute.” 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 174–75. Where the parties disagree, however, is

whether a party opposing a “factual attack” is entitled to discovery. The Housing Authority would have this Court hold that a party that intends to mount a “factual attack” to subject matter jurisdiction need not answer any discovery, may bring an un-deposed witness and undisclosed exhibits to the hearing, and present its evidence for the first time to both the Court and the opposing party. As this Court has previously held “the purpose of pretrial discovery is to allow ‘the parties to obtain the fullest possible knowledge of the issues and facts before trial.’” *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 14, 764 N.W.2d 474, 481 (emphasis added). The purpose of the rules is “to promote the truth finding process and avoid trial by ambush.” *Id.*; see also *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 16. This case cannot be classified as anything other than trial by ambush. The Housing Authority refused to answer any discovery; the Housing Authority did not notify the parties or the Court of its intent to bring a witness and present evidence until after the hearing had started; the Housing Authority presented testimony from Doyle Pipe on Head (who Lakota Plains assumes would have been the witness tendered under the Notice of Housing Authority Deposition),³ and presented exhibits that

³ Nothing more than an assumption can be provided as the Housing Authority refused to appear for the deposition. At the time the Court granted the Housing Authority and Individual Third-Party Defendants’ Motion to Dismiss, the Housing Authority’s Motion for Protective Order related to the Notice of Housing Authority Deposition had not yet been ruled upon by the Court. See *Appellant’s Appendix, Memorandum Order, App. at B-15*.

had not previously been disclosed.

Certainly, this Court's holding in *Waldner* did not stand for the proposition that a party may refuse to answer discovery, and subsequently present testimony and exhibits for the Court's required factual determination.

It is in this sense that the Housing Authority and the Individual Third-Party Defendants mis-interpret Lakota Plains' argument under SDCL § 15-6-12(b). Lakota Plains readily acknowledges that the Court is free to weight the evidence and that the Rule 12(b)(5) safeguards⁴ related to "presumptive truthfulness" do not attach to the allegations in Lakota Plains' Third-Party Complaint. However, Lakota Plains continues to suggest that under SDCL § 15-6-12(b), that Lakota Plains "shall be given reasonable opportunity to present all material made pertinent to such a motion[.]" South Dakota law has been steadfast that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having

⁴ *Waldner* refers to these safeguards as "12(b)(6) safeguards" as the Court was quoting the Eighth Circuit decision in *Osborn*. The South Dakota equivalent of Fed.R.Civ.P. 12(b)(6) is SDCL § 15-6-12(b)(5).

knowledge of any discoverable matter.” SDCL § 15-6-26(b). It cannot have been the Legislature’s intent in the passing of SDCL § 15-6-12(b), nor this Court’s intent in *Waldner*, that SDCL § 15-6-12(b) and *Waldner* allow a party to withhold documents and information that the party later intends to (and ultimately does) submit to the Court. The Trial Court’s decision should be reversed for the failure to exclude the testimony and documents under SDCL § 15-6-37(c), and the failure to allow Lakota Plains discovery related to the factual issue ultimately decided by the Trial Court.

II. THE COURT ERRED WHEN IT GRANTED THE OGLALA SIOUX LAKOTA HOUSING AUTHORITY, RICHARD HILL, DEREK JANIS, WES COTTIER, WILLIAM WHITE, BEN PLENTY ARROWS, RENALDO TWO BULLS, BRANDON WES, DEREK SLIM, AND ROBIN TUTTLE'S MOTIONS TO DISMISS BASED ON SUBJECT MATTER JURISDICTION

As previously set forth, the ability of Lakota Plains or this Court to analyze the Housing Authority and the Individual Third-Party Defendants’ Motion to Dismiss is hindered by the Housing Authority’s refusal to answer or provide discovery as more fully set forth above. Neither a party nor the Court should be required to analyze a factual issue such as a “factual attack” on subject matter jurisdiction, without all the facts. The entire foundation of the Housing Authority and the Individual Third-Party Defendants’ Motion to Dismiss was provided by a non-party, Doyle Pipe on Head. The Housing Authority, through Doyle Pipe on Head, offered Certificates of Indian Blood for the Individual

Third-Party Defendants (included in the Appellees' Appendix as Exhibit G), as Exhibit F during the hearing. *See Appellees' Appendix at D-18, Transcript, p. 70:11 – 70:22.* Lakota Plains objected to the introduction of Exhibit F on the grounds that it was not previously disclosed, that it lacked foundation, and that it was hearsay. *See Appellees' Appendix at D-19, Transcript, p. 74:15 – 74:17.*⁵ This was the only evidence provided that the Individual Third-Party Defendants were enrolled tribal members. Exhibit F should have been excluded under all three objections. SDCL § 15-6-37(c) prohibits a party from using a previously undisclosed document during a hearing or trial. SDCL § 19-19-602 provides that a “witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Doyle Pipe on Head provided no suggestion that he had personal knowledge of the Individual Third-Party Defendants' Indian Blood, only that he had seen the documents he could not lay foundation for. SDCL § 19-19-801 defines hearsay. There can be no question, but that Exhibit F was a written assertion, offered to prove the truth of the matter asserted, the very definition of hearsay under South Dakota law. Even Doyle Pipe on Head acknowledged that while the Housing Authority provides preference to tribal members in hiring, it does not do anything

⁵ Lakota Plains provided the same objections to Exhibits C, D, and G and an objection based on failure to disclosure to Exhibit E. *See Appellees' Appendix at D-19-20, Transcript, pp. 74:2 – 74:17; pp. 79:4 – 80:3.*

to verify enrollment status at a later date. *See Appellees' Appendix at D-24, Transcript, pp. 95:22 – 96:1.*

The complete lack of knowledge, information, and discovery related to each parties' tribal status is further evidenced by the Housing Authority and the Individual Third-Party Defendants' continued assertion throughout the Appellees' Brief that Lakota Plains is a non-Indian. The Housing Authority and the Individual Third-Party Defendants provide no citation to the record or factual support for such assertion because none exists. Lakota Plains is a tribally chartered entity. Such evidence has not yet been provided because no discovery has been completed. Yet, just like the Housing Authority and the Individual Third-Party Defendants, Lakota Plains is a party in this South Dakota State Court action.

Lakota Plains continues to believe that discovery from the Housing Authority and/or the Individual Third-Party Defendants, including discovery related to enrollment status, residence, scope of employment, discovery related to the Indian Self Determination and Education Assistance Act ("ISDEAA") and the Native American Housing Assistance and Self Determination Act ("NAHASDA"), or insurance coverage may lead to additional facts that can be presented to this Court. It is easy at this juncture for the Housing Authority and the Individual Third-Party Defendants to argue that there is no evidence that could change the

Court's analysis when the Housing Authority refuses to provide any such evidence. If the Housing Authority's claim is true, isn't the better practice under South Dakota law to provide the evidence which one claims absolves it from liability?

The Housing Authority and the Individual Third-Party Defendants further suggest, by footnote, that Lakota Plains has seemingly acknowledged the jurisdiction of the Tribal Court as it subsequently filed nearly identical actions against the Housing Authority in Tribal Court. While this information is extraneous to the record on appeal, it again paints only a half-truth. Chase Alone, as the Personal Representative of Takes War Bonnett sued Lakota Plains in Tribal Court, just as was done in this case.⁶ Lakota Plains brought a Third-Party action in Tribal Court just as was done in this case. Interestingly enough, the Housing Authority asserts that the Tribal Court also lacks subject matter jurisdiction, thus completing a trifecta with the Housing Authority asserting within the appeal that South Dakota does not have jurisdiction, with the Appellees' Brief that the Federal Court does not have jurisdiction (*see Appellees' Brief, p. 23, n. 5*) and that the Tribal Court does not have subject matter jurisdiction. Certainly some Court must have subject matter jurisdiction over the Housing Authority.

⁶ Claims were also brought against Lakota Plains in Tribal Court by other persons, who are not parties to this case, who similarly have now filed claims in both State and Tribal Court.

Finally, the Housing Authority and the Third-Party Defendants do not provide any authority to suggest that the federal regulations in the ISDEAA or NAHASDA do not subject the Housing Authority and the Individual Third-Party Defendants to potential liability; instead, they simply suggest that they are inapplicable. As the Housing Authority and the Individual Third-Party Defendants have not provided any authority to contest the assertion that the ISDEAA and NAHASDA contain, at the very least, a waiver of sovereign immunity, Lakota Plains does not restate those arguments in this Reply Brief, but relies on the prior analysis provided by Lakota Plains.

Because the Trial Court admitted and relied upon testimony and exhibits that were not previously disclosed, and consisted of documents for which the witness lacked proper foundation and which consisted of inadmissible hearsay, the Trial Court's erred when it dismissed the Housing Authority and the Individual Third-Party Defendants on the basis of subject matter jurisdiction. At the very least, additional discovery is necessary.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellant, C. Brunsch, Inc., d/b/a Lakota Plains Propane, respectfully requests that this Court reverse the Trial Court's Rule 54(b) Judgment Granting Third-Party Defendants' Motion to Dismiss and to remand this

case for further discovery and/or proceedings related to the Third-Party Complaint filed by C. Brunsch, Inc., d/b/a Lakota Plains Propane against the Third-Party Defendants, the Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, and Robin Tuttle.

Dated this 2nd day of January, 2019.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith

JOHN K. NOONEY

ROBERT J. GALBRAITH

Attorneys for Appellant

326 Founders Park Drive / P. O. Box 8030

Rapid City, SD 57709-8030

(605) 721-5846

john@nooneysolay.com

robert@nooneysolay.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 3,624 words and 19,878 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 2nd day of January, 2019.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith

JOHN K. NOONEY

ROBERT J. GALBRAITH

Attorneys for Appellees

326 Founders Park Drive / P. O. Box 8030

Rapid City, SD 57709-8030

(605) 721-5846

robert@nooneysolay.com

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

<p>JENNIFER CHASE ALONE, as the Personal Representative of ELFREDA ANN TAKES WAR BONNETT, Deceased,</p> <p>Plaintiff,</p> <p>vs.</p> <p>C. BRUNSCH, INC., a South Dakota corporation, doing business as Lakota Plains Propane, Inc., and WESTERN COOPERATIVE COMPANY, INC., a Nebraska corporation,</p> <p>Defendants/Third-Party Plaintiffs,</p> <p>vs.</p> <p>Oglala Sioux Lakota Housing Authority, Richard Hill, Derek Janis, Wes Cottier, William White, Ben Plenty Arrows, Renaldo Two Bulls, Brandon Wes, Derek Slim, Robin T. (last name unknown) and John and Jane Doe 1-100,</p> <p>Third-Party Defendants.</p>	<p>Appeal No. 28688</p> <p>CERTIFICATE OF SERVICE</p>
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I, Robert J. Galbraith, attorney for the Appellant, hereby certify
that a true and correct copy of the foregoing *Appellant's Reply Brief* was
served by email on the 2nd day of January, 2019 to:

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Tel: (605) 341-4400
Attorneys for Plaintiff
jim@southdakotajustice.com

Stanley Karon
Karon Trial Law P.A.
6600 Lyndale Ave S
Minneapolis, MN 55423
Attorneys for Plaintiff
karontrial@yahoo.com

Mark D. Covin
David M. Dahlmeier
Amie E. Penny Sayler
100 South 5th Street, Suite 1500
Minneapolis, MN 55402-1254
Telephone: (612) 333-3000
Facsimile: (612) 333-8829
Attorneys for Defendant/ Third-Party Plaintiff, Western Cooperative Company
mcovin@bassford.com
ddahlmeier@bassford.com
asayler@bassford.com

Mark F. Marshall
Bangs, McCullen, Butler, Foye & Simmons
333 West Boulevard, Suite 400
P.O. Box 2670
Rapid City, SD 57709
Attorneys for Third-Party Defendants
mmarshall@bangsmccullen.com

Evan Thompson
Browning, Kaleczyc, Berry & Hoven, P.C.
800 N. Last Chance Gulch, #101
P.O. Box 1697
Helena, MT 59624
Attorneys for Third-Party Defendants
evan@bkbh.com

/s/ Robert J. Galbraith
ROBERT J. GALBRAITH