

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

REBECCA MERRILL,

1:10-CV-01155-OWW-SKO

Plaintiff,

MEMORANDUM DECISION RE:
DEFENDANTS' MOTION TO DISMISS
THE COMPLAINT (Doc. 12)

v.

PICAYUNE RANCHERIA OF
CHUKCHANSI INDIANS, dba
CHUKCHANSI GOLD RESORT &
CASINO, and DOES 1 through 10,
inclusive,

Defendants.

I. INTRODUCTION.

Defendant Picayune Rancheria of the Chukchansi Indians ("Chukchansi" or "Defendant"¹) moves to dismiss the complaint of Plaintiff Rebecca Merrill pursuant to Fed. R. Civ. P. 12(b)(1). According to Defendant, the Court lacks subject matter jurisdiction to hear Plaintiff's negligence-based claims because the Tribe has not waived its sovereign immunity.

Plaintiff has filed an opposition, to which Defendant has replied.

¹ Defendant is identified in the caption as the "Picayune Rancheria of the Chukchansi Indians, Chukchansi Economic Development Authority, dba Chukchansi Gold Resort & Casino."

1 II. FACTUAL AND PROCEDURAL BACKGROUND.

2 This action arises from an accident at Defendant's Resort &
3 Casino. Plaintiff alleges that, on August 4, 2009, she was a guest
4 of the Resort and returned to her car, which was located in the
5 handicapped section of Defendant's parking lot. (Doc. 1 at ¶ 6.)
6 Plaintiff retrieved a used coffee cup from her car and discarded it
7 in a nearby trash receptacle, which was located off the main
8 walkway on an area of dirt covered by tree bark. (Id. at ¶ 7.)
9 Returning to her vehicle, Plaintiff alleges that she "trip[ped]
10 [on] a significantly raised area of sidewalk [located between the
11 receptacle and her automobile]." (Id. at ¶ 7.) According to
12 Plaintiff, the damaged section of the sidewalk contained "multiple
13 discrete and severe levels" and was "in a state of disrepair [...]
14 the uneven nature of that section of the sidewalk was inconsistent
15 with the surrounding area." (Id. at ¶ 10.)

16 As a result of the fall, Plaintiff alleges she "felt
17 significant pain all over her body, specifically across her knees,
18 her right hip, her back, her right hand and her right wrist." (Id.
19 at ¶ 11.) Plaintiff was taken by ambulance to St. Agnes Medical
20 Center in Fresno, California, and, after a medical examination, she
21 was released. (Id.) Plaintiff subsequently received treatment
22 from a physical therapist for her injuries. (Id. at ¶ 12.)

23 On June 24, 2010, Plaintiff filed this action to recover
24 compensatory damages for the injuries allegedly suffered as a
25 result of the August 4, 2009 fall. The federal complaint advances
26 two claims for relief: (1) failure to exercise reasonable care for
27 the safety of an invitee while on commercial premises; and (2)
28 failure to provide reasonable notice to an invitee of defective

1 premises. (Id. at ¶¶ 14-18.)

2 On November 15, 2010, Defendant moved to dismiss this action
3 on the basis of sovereign immunity. (Doc. 13.) Plaintiff opposed
4 the motion on December 6, 2010. (Doc. 16.)

5
6 III. DISCUSSION.

7 Defendant argues that it is a federally recognized Indian
8 Tribe, entitled to sovereign immunity, and that the district court
9 lacks subject matter jurisdiction over the present action. The
10 motion to dismiss the complaint for lack of subject matter
11 jurisdiction is analyzed under Fed. R. Civ. P. 12(b)(1).²

12
13 A. Fed. R. Civ. P. 12(b)(1)

14 Dismissal of a claim is appropriate under Federal Rule of
15 Civil Procedure Rule 12(b)(1) when the court lacks subject-matter
16 jurisdiction over the claim. Federal subject-matter jurisdiction
17 must exist at the time the action is commenced. *Morongo Band of*
18 *Mission Indians v. California Bd. of Equalization*, 858 F.2d 1376,
19 1380 (9th Cir. 1988).

20 A Rule 12(b)(1) motion may either attack the sufficiency of
21 the complaint to establish federal jurisdiction (a facial
22 challenge) or allege a lack of jurisdiction that exists despite the
23 formal sufficiency of the complaint (a factual challenge). See

24
25 ² Defendant also argues that the Court lacks personal
26 jurisdiction, either general or specific, over it because "the
27 entire Complaint is barred by sovereign immunity." Defendant is
28 correct that a court must have either general or specific
jurisdiction in order to have in personam jurisdiction over the
defendant. See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d
797, 800-01 (9th Cir. 2004); Fed. R. Civ. P. 12(b)(1).

1 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial attack
2 asserts lack of federal jurisdiction based on the complaint alone,
3 and the court must "accept all allegations of fact in the complaint
4 as true and construe them in the light most favorable to the
5 plaintiffs." See *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d
6 1136, 1139 (9th Cir. 2003). By contrast, with a factual challenge,
7 a court need not assume the truth of factual allegations but may
8 hear additional evidence about jurisdiction and resolve factual
9 disputes when necessary. See *Roberts*, 812 F.2d at 1177 (quotation
10 omitted). If a defendant challenges jurisdiction by presenting
11 evidence, then the party opposing the motion must present
12 sufficient evidence to support the court's subject-matter
13 jurisdiction. See *Savage v. Glendale Union High School, Dist. No.*
14 *205, Maricopa County*, 343 F.3d 1036, 1040 n. 2 (9th Cir. 2003).

15 Defendant here advances a facial challenge to the complaint
16 under the doctrine of sovereign immunity.

17
18 B. Sovereign Immunity

19 Sovereign immunity limits a federal court's subject matter
20 jurisdiction over actions brought against a sovereign. Similarly,
21 tribal immunity precludes subject matter jurisdiction in an action
22 against an Indian Tribe. See, e.g., *Alvarado v. Table Mt.*
23 *Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). "Suits against
24 Indian tribes are [...] barred by sovereign immunity absent a clear
25 waiver by the tribe or congressional abrogation." *Oklahoma Tax*
26 *Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509
27 (1991); *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1398 (9th Cir.
28 1993). A tribe's sovereign immunity extends both to tribal

1 governing bodies and to tribal agencies which act as an arm of the
2 tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir.
3 2006).

4 In this case, it is undisputed that Defendant is a
5 federally-recognized sovereign Indian tribe. See *Breakthrough*
6 *Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, --- F.3d
7 ----, 2010 WL 5263143, at 1 (10th Cir. 2010) (stating that "the
8 [Chukchansi] Casino is operated for the benefit of a federally
9 recognized Indian tribe, the Picayune Rancheria of the Chukchansi
10 Indians."); see also 74 Fed. Reg. 40219 (2010) (listing "Picayune
11 Rancheria of Chukchansi Indians of California" as one of the
12 "Indian Tribal Entities Within the Contiguous 48 States Recognized
13 and Eligible to Receive Services From the United States Bureau of
14 Indian Affairs."). Plaintiff also does not dispute that the
15 alleged accident occurred on property owned and operated by
16 Defendant.³ Sovereign immunity applies unless Plaintiff shows it
17 has been expressly waived.

18
19 C. Waiver

20 Waiver of sovereign immunity by a tribe may not be implied and
21 must be expressed unequivocally. *Kescoli v. Babbitt*, 101 F.3d
22 1304, 1310 (9th Cir. 1996). "There is a strong presumption against
23 waiver of tribal sovereign immunity." *Demontiney v. United States*,
24 255 F.3d 801, 811 (9th Cir. 2001). Plaintiff argues that Defendant
25

26 ³ The Tribe wholly owns and operates the Resort & Casino,
27 which is not separately owned or operated under any law, and is
28 located in Coarsegold, California on land the United States holds
in trust for the Tribe. (Doc. 12-1 at ¶¶ 3-5.)

1 waived its sovereign immunity by adopting and distributing the
2 "Picayune Rancheria of Chukchansi Indians Indians Tort Claims
3 Ordinance." Plaintiff claims that the Ordinance, enacted on May
4 25, 2003, waives the Defendant's sovereign immunity for "any suits
5 brought against them relating to injuries suffered as a result of
6 negligent acts, omissions, or caused by a dangerous condition of
7 the property." (Doc. 16 at 2:26-2:28) (emphasis added). Plaintiff
8 argues, incorrectly, that this waiver of immunity extends to cases
9 filed against Defendant in federal court.

10 Plaintiff claims that Section 4.3 of the Ordinance is a clear
11 waiver of tribal immunity:⁴

12 4.3 The sovereign immunity of the Tribe and the
13 Chukchansi Gold Resort & Casino is waived in
the following instances:

14 4.3.1 Injuries proximately caused by the
15 negligent acts or omissions of the
Chukchansi Gold Resort & Casino;

16 4.3.2 Injuries proximately caused by the
17 condition of any property of the Tribe at
18 the Chukchansi Gold resort & Casino,
19 provided that the Claimant established
20 that the property was in dangerous
21 condition and the Chukchansi Gold Resort &
Casino personnel had actual knowledge or
constructive notice of the dangerous
condition and sufficient time to prior to
the injury to take measures to remedy or
protect against the dangerous condition;

22 4.3.3 Negligent acts or omissions of Chukchansi
23 Gold Resort & Casino employees or agents
within the course and scope of their
employment or agency.

24 (Id. at 3:1-3:13.)

25 Plaintiff's proposed reading of the May 25, 2003 Ordinance is

27 ⁴ The complete "Picayune Rancheria of Chukchansi Indians
28 Indians Tort Claims Ordinance" is attached as an exhibit to
Plaintiff's opposition, Doc. 16-1.

1 overly parsed and incomplete. In particular, Plaintiff overlooks
2 that the two preceding subsections of the Ordinance - §§ 4.1 & 4.2
3 - make clear that this limited waiver of immunity applies only to
4 suits filed in tribal court, not in federal court. Those
5 provisions of the Ordinance provide, in relevant part:

6 4.0 Limited Waiver of Sovereign Immunity

7 4.1 The sovereign immunity of the Tribe shall
8 continue except to the extent that it is
9 expressly waived by this Ordinance, Officers of
10 the Tribe, including members of the Tribal
11 Council, remain immune from suit for actions
12 arising within the course and scope of their
13 authority and duties.

14 4.2 *The Chukchansi Gold Resort & Casino and the
15 Tribe may be sued solely in Tribal Court. The
16 Tribe does not waive immunity from suit in any
17 state or federal court.*

18 (Doc. 16-1 at pg. 16) (emphasis added).

19 Contrary to Plaintiff's arguments, the presence of § 4.3 in
20 the Tribal Ordinance cannot serve as a broad and complete waiver
21 of sovereign immunity in this case. The Tribe's Ordinance
22 expressly reserves sovereign immunity with respect to litigation in
23 federal or state court. The only waiver and appropriate venue for
24 compensatory redress for negligence-based actions is in tribal
25 court. See Tribal Ordinance § 4.2 ("The Chukchansi Gold Resort &
26 Casino and the Tribe may be sued solely in Tribal Court.") The
27 relevant provisions, read together, demonstrate that the Tribe
28 unambiguously intended to preserve its tribal sovereign immunity as
to claims raised in any judicial forum, federal or state.

 Plaintiff submits no other documents or authority showing a
waiver of sovereign immunity as to claims advanced in a U.S.

1 District Court. Based on the plain and express language of Section
2 4.2 and a complete review of the Ordinance, the Court finds that,
3 at most, Defendant has agreed to a limited waiver of sovereign
4 immunity in tribal court for negligence-based claims allegedly
5 occurring at its Resort and/or parking facility.

6 Plaintiff's citation to two prefatory subsections, §§ 2.1 and
7 2.4, has little, if any, bearing on the analysis.⁵ These two
8 subsections, located in the "definition" portion of the Ordinance,
9 only serve to define the relevant commercial premises and adjacent
10 real property under the authority and control of the Tribe; and
11 the scope of "injuries" that are capable of redress in a tribal
12 forum, if a claimant complies with the claim and notice procedures
13 delineated in §§ 7.1 and 7.2 of the Ordinance. These two
14 subsections, taken separately or cumulatively with the other
15 subsections cited by Plaintiff, do not establish that Defendant
16 expressly waived its sovereign immunity with respect to federal

17 _____
18 ⁵ These provisions provide, in relevant part:

19 2.0 Definitions

20 2.1 "Chukchansi Gold Resort & Casino and its
21 appurtenances" includes the interior premises of
22 the Chukchansi Gold Resort & Casino, the parking
23 lots serving the Chukchansi Gold Resort &
Casino, and the roadway to the Chukchansi Gold
Resort & Casino, known as Lucky Lane [...]

24 2.4 "Injury" means death, injury to a person, damage
25 to or loss of property, or any other injury that
26 a person may suffer to his person, reputation or
27 character of such a nature that it would be
inactionable if inflicted by a private person.

28 (Doc. 16-1 at pgs. 14-15.)

1 court litigation.

2 It is appropriate to identify what this case is not about.
3 The arguments here are not comparable to those advanced and
4 discussed in *C & L Enter., Inc. v. Citizen Band Potawatomi Indian*
5 *Tribe of Okla.*, 532 U.S. 411 (2001), *Oglala Sioux Tribe v. C & W*
6 *Enterprises, Inc.*, 542 F.3d 224 (8th Cir. 2008), *Turn Key Gaming,*
7 *Inc. v. Oglala Sioux Tribe*, 313 F.3d 1087 (8th Cir. 2002), *Garcia*
8 *v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2nd Cir. 2001) and *Saroli v.*
9 *Agua Caliente Band of Cahuilla Indians*, No. 10-CV-1748-BEN-NLS,
10 2010 WL 4788570 (S.D. Cal. Nov. 7, 2010), cases involving "sue or
11 be sued" clauses inserted into tribal charters, disputes over
12 contracts and rental agreements, or the scope/enforceability of
13 "choice-of-law" and arbitration provisions. Those subjects were
14 not raised in the parties' briefing and are not addressed here.
15 The resolution of this dispute is limited to whether Defendant
16 waived its tribal sovereign immunity pursuant to the May 25, 2003
17 Ordinance.

18 The final argument advanced by Plaintiff is that Defendant has
19 not promptly administered her claim as required under the May 25,
20 2003 Ordinance.⁶ Plaintiff asserts her claim was properly filed

21
22 ⁶ With respect to this argument, Plaintiff refers to §§ 7.1
23 and 11 of the Ordinance. These provisions provide, in relevant
24 part:

24 7.0 Notice Requirements

25 7.1 Claims brought under this Ordinance must be made
26 within 180 days after the claim accrues. Claims
27 must be presented to the Chukchansi Gold Resort
28 & Casino General Manager on a claim form
provided by the Chukchansi Gold Resort & Casino.
The General Manager shall immediately forward

1 with the tribal court on September 17, 2009. To date, however,
2 Plaintiff has only received a June 24, 2010 letter from the Tribe
3 indicating that it was aware of an "open personal injury claim
4 against the Tribe." As a result, according to Plaintiff, the
5 status of her claim - i.e., its acceptance or rejection - is
6 entirely unclear.⁷

7 Plaintiff argues that the Tribe's alleged "unwillingness" to
8 timely process her claim constitutes a cognizable cause of action
9 in federal court:

10 As a result of the Tribe's unwillingness to provide any
11 information regarding the status of her claim, the Tribe
12 violated the Plaintiff's right to a prompt investigation
13 of her claim under the Ordinance. The plaintiff was

14 copies of all claims arising under this
15 Ordinance to the Tribal Gaming Commission, the
16 Chukchansi Economic Development Authority Board
17 of Director's and the Tribe's Insurer. Such
18 forms may be obtained from the Chukchansi Gold
19 Resort & Casino, or the Tribal Gaming Commission
20 [...]

21 11.0 Acceptance or Rejection of Claim

22 All claims meeting the criteria of Section 6.0 above
23 shall be forwarded to the Tribe's insurer within thirty
24 (30) calendar days of receipt of such a claim. The claim
25 shall be promptly investigated and the Claimant shall be
26 advised as to whether the Tribe's Insurer accepts or
27 rejects such claim. Notification of rejections shall be
28 made by the Tribe's personal service, or any form of mail
which shall provide a receipt to the sender. A copy of
any such notification shall be forwarded to the Chukchansi
Gold Resort & Casino General Manager, the Tribal Gaming
Commission and the Tribal Council.

(Doc. 16-1 at pgs. 17-18.)

⁷ Plaintiff claims she forwarded a number of electronic
documents to the Tribe's Director of Risk Management on March 8,
2010.

1 left with no other recourse than to file her complaint
2 in the Eastern District. More than nine months had
3 passed between the plaintiff filing her claim with the
4 Tribe, and finally being contacted by the Tribe's
insurer, albeit without an indication of rejection or
acceptance of her claim.

5 The Ordinance does not provide any remedy for a claimant
6 who does not receive the benefit of the rights afforded
7 under the Ordinance. In the absence of any confirmation
8 from the Tribe, the waiver of immunity for the type of
suit brought by the plaintiff, the Eastern District of
California was the appropriate forum at the time the
complaint was filed.

9 (Doc. 16 at 15:26-16:3.)

10 These arguments, which draw on constitutional due process, run
11 into a powerful impediment, namely that Indian tribes are neither
12 states nor part of the federal government, therefore Courts have
13 held that the Bill of Rights and the Fourteenth Amendment generally
14 do not apply to them. See, e.g., *Santa Clara Pueblo v. Martinez*,
15 436 U.S. 49, 56-57 (1978) ("[T]ribes have historically been regarded
16 as unconstrained by th[e]se constitutional provisions framed
17 specifically as limitations on federal or state authority."). The
18 Ninth Circuit has further held: "Constitutional guarantees [] are
19 not applicable to the exercise of governmental powers by an Indian
20 tribe except to the extent that they are made explicitly binding by
21 the Constitution or are imposed by Congress." *Trans-Canada Enters.*
22 *v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980).
23 These cases, and others, make clear that allegations of substantive
24 and/or procedural constitutional violations against a federally-
25 recognized Tribe do not create jurisdiction in the absence of
26 express congressional or constitutional authority, circumstances

1 not present in this case.⁸

2 Even if Plaintiff's arguments were valid, which they are not,
3 the Court would be constrained to interpret the meaning of "prompt
4 investigation" under the terms of the Ordinance. Such an
5 undertaking oversteps the boundaries of federal jurisdiction in
6 interpreting tribal constitutions and bylaws. See, e.g., *In re Sac*
7 *& Fox Tribe of the Mississippi of Iowa/Meskwaki Casino Litig.*, 340
8 F.3d 749, 751 (8th Cir. 2003) ("Jurisdiction to resolve internal
9 tribal disputes, interpret tribal constitutions and laws, and issue
10 tribal membership determinations lies with Indian tribes and not in
11 the district courts.") (citation omitted); see also *Goodface v.*
12 *Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) ("[T]he district court
13 overstepped the boundaries of its jurisdiction in interpreting the
14 tribal constitution and bylaws and addressing the merits of the
15 election dispute.").

16 Defendant did not waive its tribal sovereign immunity when it
17 adopted and distributed the May 25, 2003 Ordinance. The
18 subsections cited by Plaintiff do not establish that Defendant
19 expressly waived its sovereign immunity with respect to federal
20 court litigation, the required showing in this Circuit.
21 Plaintiff's remaining arguments are similarly flawed as the
22 allegations of an untimely claim investigation, without exhausting
23 tribal court review, do not create federal jurisdiction; and well-
24 established federal appellate law establishes that judicial

26 ⁸ There are no allegations or argument that such congressional
27 or constitutional authority exist in this case. Compare 25 U.S.C.
28 § 1303 (vesting district courts with jurisdiction over habeas writs
from tribal courts).

1 interpretation of tribal law is not allowed. No subject matter
2 jurisdiction exists over the present action.⁹

3
4 IV. CONCLUSION.

5 Defendant's motion to dismiss the complaint is GRANTED.
6 Defendant is a federally recognized Indian Tribe, entitled to
7 sovereign immunity. It has not expressly waived its tribal
8 sovereign immunity pursuant to the terms of the May 25, 2003
9 Ordinance. The complaint is DISMISSED.

10 Defendant shall submit a form of order consistent with, and
11 within five (5) days following electronic service of, this
12 Memorandum Decision.

13
14 IT IS SO ORDERED.

15 Dated: February 22, 2011

16 /s/ Oliver W. Wanger
17 UNITED STATES DISTRICT JUDGE

18
19
20
21 _____
22 ⁹ At oral argument, Plaintiff acknowledged that the Tribe did
23 not waive its tribal sovereign immunity by adopting the May 25,
24 2003 Ordinance. Plaintiff, however, asserted that the Court should
25 reserve its ruling on the motion "just in case" the Tribe's insurer
26 ignores her claim in perpetuity and/or facts develop relevant to a
27 potential "denial of access" claim against the Tribe. These issues
28 were not fully briefed and, to the extent it can be ascertained,
are not now ripe for decision. Particularly, it is undisputed that
Plaintiff has not filed an appeal under the Tribe's Tort Claims
Ordinance, i.e., she has not exhausted tribal court review.
Without any factual allegations in the operative Complaint, a Court
cannot speculate as to the merits of Plaintiffs' potential "lack of
access" claim.