

1 It is well-settled that Indian tribes possess "the common-
2 law immunity from suit traditionally enjoyed by sovereign
3 powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
4 "Absent congressional or tribal consent to suit, state and
5 federal courts have no jurisdiction over Indian tribes; only
6 consent gives the courts the jurisdictional authority to
7 adjudicate claims raised by or against tribal defendants." Pan
8 Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th
9 Cir. 1989).

10 The basis of defendants' motion is that the Tribe, as a
11 federally-recognized tribal entity, is immune from suit, and that
12 the other defendants are similarly immune due to their
13 relationship with the Tribe. In opposition, plaintiff argues that
14 Congress abrogated tribal sovereign immunity in enacting the
15 Family and Medical Leave Act of 1993; alternatively, she argues
16 that defendants have waived immunity through their actions.

17 The court is concerned by a predicate question: whether the
18 Tribe waived sovereign immunity by removing the action to federal
19 court.

20 The issue is an open one in the Ninth Circuit. District
21 courts to have considered it focus their analysis on whether
22 tribal immunity is more analogous to states' immunity to suit
23 under the Eleventh Amendment, or to foreign nations' immunity
24 under the Foreign Sovereign Immunities Act of 1976, 27 U.S.C.
25 § 1602 *et seq.* Courts taking the former position have found
26 removal to constitute waiver, *see, e.g., State Eng'r v. S. Fork*
27 *Band of the Te-Moak Tribe of W. Shoshone Indians*, 66 F. Supp. 2d
28

1 1163 (D. Nev. 1999),¹ while courts taking the latter position
2 have not, see, e.g., Ingrassia v. Chicken Ranch Bingo and Casino,
3 676 F. Supp. 2d 953 (E.D. Cal. 2009).

4 What distinguishes this case from these precedents (and
5 others) is that plaintiff is a member of the Tribe. While "the
6 doctrine of tribal immunity from suit might have been thought
7 necessary to protect nascent tribal governments from
8 encroachments by States," Kiowa Tribe v. Mfg. Techs., 523 U.S.
9 751, 758 (1998), no such concern about parochialism is presented
10 here. Although tribal sovereign immunity is a creation of the
11 federal courts, the immunity may equally be invoked in state and
12 federal courts. See, e.g., People ex rel. Dept. of Transportation
13 v. Naegele Outdoor Adver. Co., 38 Cal. 3d 509 (1985) (reversing
14 judgment, *inter alia*, on grounds that Congress did not authorize
15 "state regulation of outdoor advertising on Indian reservation
16 lands"); Cal. Parking Servs. v. Soboba Band of Luiseño Indians,
17 197 Cal. App. 4th 814 (2011) (upholding denial of plaintiff's
18 motion to compel arbitration on the grounds that arbitration
19 clause did not clearly waive tribal sovereign immunity); Trudgeon
20 v. Fantasy Springs Casino, 71 Cal. App. 4th 632 (1999) (upholding
21 summary judgment in favor of defendants on the basis of tribal
22 sovereign immunity). In short, there appears no principled reason
23 for defendants to have removed the action before asserting
24

25
26 ¹ While the district court amended its initial order on
27 reconsideration, the portion of the initial order finding waiver
28 was unaffected. See State Eng'r v. S. Fork Band of the Te-Moak
Tribe of W. Shoshone Indians, 114 F. Supp. 2d 1046 (D. Nev.
2000).

1 immunity. The question, then, is whether, in so doing, defendants
2 waived any immunity they may possess.

3 In light of the foregoing, the court hereby orders as
4 follows:

5 [1] The parties are DIRECTED to provide further briefing on
6 the following questions:


7 Does an Indian tribe's removal of an action to federal
8 court constitute a waiver of sovereign immunity? How is
9 the analysis affected by the fact that the plaintiff in
10 the underlying action was a tribe member?

11 Opening briefs are due within fourteen (14) days of
12 docketing of this order. Reply briefs, in any, are due
13 fourteen (14) days thereafter. Briefs may be no longer than
14 seven (7) pages in length.

15
16 [2] The hearing on defendants' motion, currently set for
17 hearing on January 13, 2014, is CONTINUED to March 3, 2014
18 at 10:00 a.m.

19 IT IS SO ORDERED.

20 DATED: January 9, 2014.

21
22
23 
24 LAWRENCE K. KARLTON
25 SENIOR JUDGE
26 UNITED STATES DISTRICT COURT
27
28