

1 compensation and medical treatment while his claim was investigated; his claim was
2 subsequently denied around March 2016. Defendant allegedly terminated Plaintiff
3 in September 2016 “for being on medical leave.” (*Id.* ¶31.)

4 In February 2017, Plaintiff filed claims in the Tribal Court, alleging personal
5 injury, workers compensation retaliation, and wrongful termination by the Tribe. (*Id.*
6 ¶¶5, 33.) The Tribal Court dismissed each of these claims on April 21, 2017 in a
7 written order. (*Id.* ¶¶7, 34.) The Tribal Court ruled that Plaintiff’s personal injury
8 claim was not serious, had not occurred while he was working at the Casino, and was
9 barred by a six-month statute of limitations. (*Id.* ¶¶8, 34.) The Tribal Court allegedly
10 ruled on this claim without allowing him to submit medical evidence. (*Id.* ¶9.) The
11 Tribal Court ruled that Plaintiff’s workers compensation claim was barred by a thirty-
12 day statute of limitations and his wrongful termination claim was barred by a five-
13 day statute of limitations. (*Id.* ¶¶10–11.) Plaintiff then filed claims in Tribal Court
14 alleging due process violations based on the Tribal Court’s ruling on medical
15 evidence at the demurrer stage and the Tribe’s statutes of limitations. (*Id.* ¶¶12, 36.)
16 The Tribe asserted that it had not waived sovereign immunity for his due process
17 claims and there was no forum for his claims. (*Id.* ¶¶13, 37.) Thereafter, Plaintiff
18 reasserted his claims in Tribal Court regarding due process violations and claimed
19 that the Indian Civil Rights Act (“ICRA”) had waived the Tribe’s sovereign
20 immunity. (*Id.* ¶¶14, 38.) The Tribe and Tribal Court disavowed this. (*Id.* ¶¶15, 39.)

21 Plaintiff filed his Complaint in this Court on October 12, 2017. (ECF No. 1.)
22 He asserts violations of his due process rights under ICRA based on the same conduct
23 he challenged in Tribal Court. (*Id.* ¶¶40–69.)

24 **II. LEGAL STANDARD**

25 Under Rule 12(b)(1), a complaint may dismissed for lack of subject matter
26 jurisdiction if it fails to allege facts sufficient to establish that jurisdiction exists. FED.
27 R. CIV. P. 12(b)(1); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2
28 (9th Cir. 2003). A federal court is presumed to lack subject matter jurisdiction until

1 the contrary affirmatively appears. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d
2 1221, 1225 (9th Cir. 1989). Because the Court’s power to hear the case is at stake,
3 the Court is not limited to considering the allegations of the complaint but may
4 consider extrinsic evidence. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th
5 Cir. 1983). Once a party has moved to dismiss for lack of subject matter jurisdiction
6 under Rule 12(b)(1), the opposing party bears the burden of establishing the Court’s
7 jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

8 A Rule 12(b)(1) challenge to jurisdiction may be facial or factual. *Safe Air for*
9 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the
10 challenger asserts that the allegations contained in a complaint are insufficient on
11 their face to invoke federal jurisdiction, whereas in a factual challenge, the challenger
12 disputes the truth of the allegations that, by themselves, would otherwise invoke
13 jurisdiction. *Id.* When a defendant makes a factual challenge “by presenting
14 affidavits or other evidence properly brought before the court, the party opposing the
15 motion must furnish affidavits or other evidence necessary to satisfy its burden of
16 establishing subject matter jurisdiction.” *Id.*; *Larimer v. Konocti Vista Casino*
17 *Resort, Marina & RV Park*, 814 F. Supp. 2d 952, 954 (N.D. Cal. 2011). An action
18 may be dismissed for lack of subject matter jurisdiction without giving the plaintiff
19 an opportunity to amend if it is clear that the jurisdictional deficiency cannot be cured
20 by amendment. *May Dep’t Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th
21 Cir. 1980).

22 **III. DISCUSSION**

23 Defendant moves to dismiss the Complaint on the ground that the Court lacks
24 subject matter jurisdiction over this case in view of the Tribe’s sovereign immunity,
25 which it argues has not been abrogated either by Congress or the Tribe. (ECF No.
26 4.) Although the Tribe also asserts a Rule 12(b)(6) challenge to Plaintiff’s claims
27 regarding the Tribe’s statutes of limitations, the Court declines to decide that issue
28 because the Court concludes that it lacks jurisdiction over the Complaint.

1 **A. The Tribe is Generally Entitled to Tribal Sovereign Immunity**

2 A sovereign can assert immunity from suit “at any time during judicial
3 proceedings.” *Cook v. AVI Casino Enters.*, 548 F.3d 718, 724 (9th Cir. 2008)
4 (quoting *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. 1999)). Because Indian tribes
5 exercise inherent sovereign authority over their members and territories, “[s]uits
6 against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by
7 the tribe or congressional abrogation.” *Okla. Tax Comm’n v. Citizen Band of*
8 *Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (citing *Santa Clara Pueblo v.*
9 *Martinez*, 436 U.S. 49, 58 (1978)); *see also Kiowa Tribe v. Mfg. Techs.*, 523 U.S.
10 751, 754 (1998) (“As a matter of federal law, an Indian tribe is subject to suit only
11 where Congress has authorized the suit or the tribe has waived its immunity.”). “The
12 immunity . . . extends to suits for declaratory and injunctive relief,” and “is not
13 defeated by an allegation that [the tribe] acted beyond its power.” *Imperial Granite*
14 *Co. v. Pala Band of Missions Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). This
15 immunity extends to tribal governing bodies and to tribal agencies which act as an
16 arm of the tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).
17 If found to exist, tribal sovereign immunity defeats the existence of subject matter
18 jurisdiction. *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015–16 (9th Cir.
19 2007).

20 The inclusion of a tribe on the Federal Register list of recognized tribes is
21 generally sufficient to establish entitlement to sovereign immunity. *Larimer*, 814 F.
22 Supp. 2d at 955; *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953,
23 957 (E.D. Cal. 2009) (citing *Cherokee Nation v. Babbit*, 117 F.3d 1489, 1499 (D.C.
24 Cir. 1997)). In support of the Tribe’s motion to dismiss, the Tribe’s General Counsel
25 declares that the Tribe is a federally-recognized Indian Tribe and submits as an
26 exhibit a 2017 Federal Register excerpt identifying “Indian Entities Recognized and
27 Eligible to Receive Services from the United States Bureau of Indian Affairs.” (ECF
28 No. 4-2 ¶¶3–4; ECF No. 4-3.) The Tribe appears on that list under its formal name,

1 the Barona Group of Capitan Grande Band of Mission Indians of the Barona
2 Reservation, California. (ECF No. 4-3 at 2.) Plaintiff does not dispute that the Tribe
3 is a federally-recognized tribe and implicitly recognizes that the Tribe generally
4 enjoys sovereign immunity by arguing extensively in the Complaint and his
5 opposition about waiver. (Compl. ¶¶16–18, 38; ECF No. 5 at 7.) Accordingly, the
6 Court finds that the Tribe has established that it is generally entitled to tribal
7 sovereign immunity from suit.

8 In opposition to the Tribe’s motion to dismiss, Plaintiff argues that “many laws
9 of general applicability are in fact enforceable against Indian Tribes even without a
10 specific waiver of sovereign immunity” and that somehow this is determinative of
11 jurisdiction in this case. (ECF No. 5 at 4.) Plaintiff points the Court to the Ninth
12 Circuit’s decision in *Donovan v. Coeur d’Alene Tribal Farm*, which found that the
13 defendant Indian Tribe in that case was not exempt from federal regulations
14 concerning the Occupational Safety and Health Act. 751 F.2d 1113 (9th Cir. 1985).
15 That federal laws of general applicability apply to Indian Tribes, however, does not
16 resolve the jurisdictional issue. *Donovan* unremarkably underscores the long-
17 standing view that Congress has the power to modify or extinguish tribal sovereignty.
18 *Id.* at 1115 (“Unlike the states, Indian tribes possess only a limited sovereignty that
19 is subject to complete defeasance.”); *see also Lone Wolf v. Hitchcock*, 187 U.S. 553,
20 565 (1903) (“Plenary authority over the tribal relations of the Indians has been
21 exercised by Congress from the beginning, and the power has always been deemed a
22 political one, not subject to be controlled by the judicial department of the
23 government”). Whether Congress has specifically exercised this plenary authority is
24 the fundamental question a court must address when a case implicates tribal
25 sovereignty. In the context of whether a party may sue an Indian tribe in federal or
26 state court, the question is whether Congress has expressly abrogated tribal sovereign
27 immunity for the particular claims a plaintiff presses. *Okla. Tax Comm’n*, 498 U.S.
28 at 509. The Court must therefore consider whether Congress has specifically done

1 so here with respect to Plaintiff’s ICRA claims.

2 **B. ICRA Does Not Abrogate the Tribe’s Sovereign Immunity from**
3 **Plaintiff’s Non-Habeas Claims**

4 Plaintiff seeks to assert ICRA claims against the Tribe on the ground that ICRA
5 waived the Tribe’s sovereign immunity. His claims are foreclosed by clear and
6 controlling precedent on ICRA.

7 In enacting ICRA, Congress established a set of statutory protections for
8 Indians against their tribal governments, which roughly parallel the constitutional
9 rights identified in the Bill of Rights in the United States Constitution. *See Wasson*
10 *v. Pyramid Lake Paiute Tribe*, 782 F. Supp. 1144, 1147 (D. Nev. 2011). The Act
11 provides in relevant part that “[n]o Indian tribe in exercising powers of self-
12 government shall . . . deprive any person of liberty or property without due process
13 of law.” 25 U.S.C. §1302(a)(8). Plaintiff asserts that he seeks to vindicate due
14 process rights under this ICRA provision. But ICRA “[can]not be interpreted to
15 impliedly create a federal cause of action against an Indian tribe or its officers for
16 deprivation of the Act’s substantive rights.” *Barker v. Menominee Nation Casino*,
17 897 F. Supp. 389, 395 (E.D. Wis. 1995) (citing *Santa Clara Pueblo*, 436 U.S. at 59).
18 As the Supreme Court expressly held in *Santa Clara Pueblo*, “[n]othing on the face
19 of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal
20 courts” for such actions. 436 U.S. at 59. While Congress enacted ICRA to provide
21 tribal members with certain protections available under the U.S. Constitution,
22 Congress was also concerned with maintaining the sovereign status of a tribe to create
23 and maintain its own government. *Santa Ynez Band of Mission Indians v. Torres*,
24 262 F. Supp. 2d 1038, 1044 (C.D. Cal. 2002) (citing *Poodry v. Tonawanda Band of*
25 *Seneca Indians*, 85 F.3d 874, 882–83 (2d Cir. 1996). Congress struck a balance in
26 the limited remedy it provided under ICRA: habeas corpus proceedings. *See* 25
27 U.S.C. §1303 (“[T]he writ of habeas corpus shall be available to any person, in a
28 court of the United States, to test the legality of his detention by order of an Indian

1 tribe.”). The waiver of tribal sovereign immunity effectuated by ICRA is accordingly
2 limited to habeas corpus actions under Section 1303 against the individual custodian
3 of a prisoner. *Santa Clara Pueblo*, 436 U.S. at 59; *Johnson v. Gila River Indian*
4 *Cmty.*, 174 F.3d 1032, 1035 (9th Cir. 1999) (“The only recognized exception to a
5 sovereign immunity defense under the ICRA is a habeas corpus action.”); *Pink v.*
6 *Modoc Indian Health Project*, 157 F.3d 1185, 1189 (9th Cir. 1997) (“ICRA only
7 provides a basis for an individual to bring a habeas corpus civil claim”); *R.J. Williams*
8 *Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 981 (9th Cir. 1983) (“Although §202(8)
9 of the Act, 25 U.S.C. §1302(8), provides that no Indian tribe in exercising powers of
10 self-government shall deprive any person of liberty or property without due process
11 of law, we have recognized that the *Santa Clara Pueblo* holding ‘foreclosed any
12 reading of the [Act] as authority for bringing civil actions in federal court to request
13 . . . forms of relief [other than habeas corpus].’” (quoting *Snow v. Quinault Indian*
14 *Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984)));
15 *Santa Ynez Band of Mission Indians*, 262 F. Supp. 2d at 1044; *Williams v. Pyramid*
16 *Lake Paiute Tribe*, 625 F. Supp. 1457, 1458 (D. Nev. 1986) (“[T]he only remedy
17 Congress intended to redress violations of ICRA is a petition for a writ of habeas
18 corpus . . . although a Tribe is bound by ICRA, a federal court has no jurisdiction to
19 enjoin violations or to award damages for violations of that Act.”).

20 Here, Plaintiff brings a civil suit against the Tribe seeking damages as well as
21 declaratory and injunctive relief. He does not seek release from custody, nor is he in
22 the custody of the Tribe. His action thus clearly runs afoul of the limitations on the
23 jurisdiction of this Court to entertain his suit notwithstanding the Tribe’s alleged
24 violations of ICRA. Plaintiff acknowledges that ICRA speaks only of habeas corpus
25 actions in federal court, yet contends that no case analyzing ICRA has ever addressed
26 the factual situation alleged here—a Tribe that has ‘intentionally attempted to
27 abrogate a Plaintiff’s rights by refusing to establish a forum.’ (ECF No. 5 at 5.) He
28 intimates that the Court should permit his suit because of the Tribe’s alleged conduct.

1 The Court is not persuaded.

2 As the Tribe observes in reply (ECF No. 7 at 3), the Tenth Circuit once
3 recognized a “narrow exception” to ICRA’s limited provision for habeas proceedings
4 as articulated by the Supreme Court in *Santa Clara Pueblo*. Specifically, in *Dry*
5 *Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, the Tenth Circuit determined that
6 *Santa Clara Pueblo*’s holding did not foreclose federal jurisdiction in that case
7 because “the issue relates to a matter outside of internal tribal affairs and . . . it
8 concerns an issue with a non-Indian” and the plaintiffs would “have no remedy within
9 the tribal machinery.” 623 F.2d 682, 685 (10th Cir. 1980). Subsequent Tenth Circuit
10 cases, however, have limited *Dry Creek* to its facts, substantially undermining its
11 viability in the Circuit in which it arose. *See, e.g., Enter. Mgmt. Consultants v. United*
12 *States*, 883 F.2d 890, 892 (10th Cir. 1989) (limiting *Dry Creek* to its “highly unusual”
13 facts). More importantly for this Court, the Ninth Circuit has declined to follow *Dry*
14 *Creek*’s exception to *Santa Clara Pueblo* on multiple occasions. *See Demontiney v.*
15 *United States*, 255 F.3d 801, 815 n.6 (9th Cir. 2001) (“In the past, we have declined
16 to follow *Dry Creek*[], in recognizing a federal right of action for civil claims under
17 ICRA where no other meaningful remedies are available We again decline to
18 follow *Dry Creek* here.”); *Johnson*, 174 F.3d at 1035 n.2 (“[E]xcept in habeas corpus
19 actions, this circuit has not recognized relief under the Act against a tribe in a civil
20 action.”); *see also Williams*, 625 F. Supp. at 1458 (declining to adopt *Dry Creek*
21 because Ninth Circuit “expressly rejected” it and finding the case inapplicable to
22 plaintiff Indian).

23 In reliance on *Demontiney v. United States*, 255 F.3d at 814, Plaintiff contends
24 that the Ninth Circuit has recognized that insufficient tribal remedies is a ground to
25 permit a suit to proceed in federal court. (ECF No. 5 at 6.) Plaintiff, however, omits
26 *Demontiney*’s key qualification that inadequate tribal remedies may provide a basis
27 for federal jurisdiction only insofar as a case “involves habeas review under ICRA.”
28 *Id.* (citing *St. Marks v. Chippewa Cree Tribe of Rocky Boy Reservations, Mont.*, 545

1 F.2d 1188, 1189 (9th Cir. 1976)). Because Plaintiff does not press a habeas claim
2 under ICRA, his reliance on *Demontiney*'s discussion regarding inadequate tribal
3 remedies is misplaced.

4 Faced with no authoritative basis for his assertions, Plaintiff baldly asserts that
5 his ICRA claims should be permitted on "public policy grounds" because of the
6 Tribe's alleged refusal to establish a venue to "frustrate [his] claims." (ECF No. 5 at
7 9–10.) He asserts that a failure to permit his suit would undermine the congressional
8 intent and purpose underlying ICRA. (*Id.* at 5, 10.) The Court rejects this argument.

9 Courts lack the authority to modify tribal sovereign immunity even when a
10 case raises questions of "fundamental substantive justice." *Lewis v. Norton*, 424 F.3d
11 959, 963 (9th Cir. 2005) ("[W]e are not in a position to modify well-settled doctrines
12 of tribal sovereign immunity. This is a matter in the hands of a higher authority than
13 our court."); *see also Cook*, 548 F.3d at 725–26 (rejecting policy-based arguments
14 that tribal sovereign immunity should not extend to tribal commercial activity
15 because "restrictions on tribal immunity are for Congress alone to impose"); *Fluent*
16 *v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991) ("The only branch
17 with the ability to provide a forum for resolution of the issues involved here is
18 Congress."). Whatever the validity of Plaintiff's questionable allegations that the
19 Tribe intentionally refused to establish a forum to litigate his ICRA due process
20 claims, there is no public policy "exception" to tribal sovereign immunity in federal
21 court save for whatever policy is expressly reflected in the text of a congressional
22 statute. The only statute on which Plaintiff purports to sue the Tribe is ICRA. The
23 text, structure, and history of that statute affirm that tribal sovereign immunity from
24 suit is not waived save for habeas proceedings. *Santa Clara Pueblo*, 436 U.S. at 59,
25 61. It is within the province of Congress, not this Court, to determine whether to
26 effectuate a more expansive waiver of tribal sovereign immunity under ICRA.
27 Although waiting for Congress to decide this issue may leave Plaintiff without a
28 forum for his claims, this result is one contemplated by sovereign immunity. *Makah*

1 *Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (“Sovereign immunity may
2 leave a party with no forum for [that party’s] claims.”). Accordingly, the Court
3 concludes that Plaintiff has failed to show that ICRA abrogates the Tribe’s immunity
4 from his suit.

5 **C. The Tribe Has Not Waived Its Sovereign Immunity from Plaintiff’s**
6 **Claims**

7 Although Congress did not waive the Tribe’s sovereign immunity from
8 Plaintiff’s suit, the question of whether the Tribe has done so is a final issue the Court
9 must resolve. A sovereign may waive its immunity from suit by voluntarily invoking
10 jurisdiction or by making a “clear declaration that it intends to submit itself to
11 jurisdiction.” *Cook*, 548 F.3d at 724 (quoting *Coll. Sav. Bank v. Fla. Prepaid*
12 *Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999)). This declaration
13 “must be explicit and unequivocal.” *Maxwell v. Cty. of San Diego*, 708 F.3d 1075,
14 1087 (9th Cir. 2013) (reviewing tribal agreements with state fire department and
15 finding no waiver of tribal sovereign immunity). The Tribe has not voluntarily
16 invoked this Court’s jurisdiction, nor has the Tribe made an explicit and unequivocal
17 declaration to submit itself to jurisdiction in federal court for the claims that Plaintiff
18 raises here.

19 To the contrary, the Tribe’s Workers Compensation Ordinance and Tort
20 Claims Ordinance unequivocally show otherwise. The Tribe has supplied copies of
21 both ordinances, each of which contains a clause specifically addressing the tribe’s
22 sovereign immunity from suit for workers compensation and tort claims. Section 20
23 of the Workers Compensation Ordinance provides that: “Nothing hereunder is
24 intended or interpreted to be a waiver of Sovereign Immunity of the Barona Band of
25 Mission Indians . . . from unconsented suit in Tribal, Federal or State court . . . except
26 to the extent expressly stated herein.” (ECF No. 4-4 at 17.) The Ordinance otherwise
27 states that the remedies available from the workers compensation system it
28 establishes are the “exclusive means of redressing employee work-related injuries.”

1 (*Id.* at 1.) Section IV of the Tort Claims Ordinance expressly provides that “[t]he
2 Barona Band of Mission Indians . . . may be sued solely in Barona Tribal Court. The
3 Tribe does not waive immunity from suit in any state or federal court.” (ECF No. 4-
4 5 at 3.) Although Plaintiff dresses his claims as due process claims under ICRA, he
5 asserts that he has suffered damages from the “loss” of his “rights” under the Tribe’s
6 worker compensation and tort claims ordinances, thus bringing his claims within
7 their ambit. (Compl. ¶¶43–44, 49–50, 55–56, 61–62, 67–68.) The unequivocal
8 declarations in both ordinances demonstrate that the Tribe has not waived its
9 sovereign immunity from suit in federal court for claims arising from workers
10 compensation and torts claims. *See Wasson*, 782 F. Supp. 2d at 1148 (finding no
11 waiver of tribal sovereign immunity in the tribal constitution and finding that the
12 tribal election code “indicates an intention not to waive immunity from suit as to
13 election disputes”); *Adams v. Moapa Band of Paiute Indians*, 991 F. Supp. 1218,
14 1223 (D. Nev. 1997) (finding no waiver of tribal sovereign immunity where
15 provision of tribe constitution expressly precluded it). Accordingly, the Court
16 concludes that the Tribe has not waived its sovereign immunity with respect to
17 Plaintiff’s claims here.

18 **IV. CONCLUSION & ORDER**

19 For the foregoing reasons, the Court **GRANTS** Defendant’s motion to dismiss
20 (ECF No. 4) and **HEREBY DISMISSES** the Complaint (ECF No. 1) with prejudice
21 for lack of subject matter jurisdiction based on tribal sovereign immunity. The Clerk
22 of the Court shall close the case.

23 **IT IS SO ORDERED.**

24
25 **DATED: March 8, 2018**


26 **Hon. Cynthia Bashant**
27 **United States District Judge**