Bird Industries, Inc. v. Tribal Business Council of Three Affiliated Tribes of Fort Berthold Indian Reservation, ___ F. Supp. 3d ___, 2022 WL 2666062 (D.N.D. Jul. 11, 2022)

- **Holding:** Suit alleging RICO violations and common-law torts by a tribal council was dismissed on the basis of its immunity from suit absent congressional abrogation or tribal waiver.
- **Summary:** Plaintiffs sued the Three Affiliated Tribes' business council alleging fraudulent activity violative of the Racketeer Influenced and Corrupt Practices Act and constituting common-law torts in connection with the failure of an aggregate and ready-mix manufacturing joint venture with the Four Bears Economic Development Corporation, an entity controlled by one geographical segment of the council. The lawsuit was preceded by an arbitration proceeding under the joint venture agreement in which the arbitrator dismissed the matter on sovereign immunity grounds. The business council moved to dismiss this action under Fed. R. Civ. P. 12(b)(1), arguing that (1) the controversy was an intra-tribal dispute (since the individual Plaintiff is a tribal member) and (2) the council was immune from suit from the RICO and tort claims. The district court disagreed as to the first ground but agreed as to the second.

  The court held that RICO claim did not constitute an intra-tribal dispute because that statute granted federal courts jurisdiction over claims under it and that because "this case turns on the application of federal law[,]" it "does not involve any of the internal tribal affairs such as tribal membership, politics, or domestic relations to which the intra-tribal dispute doctrine typically applies." The court added that tribal courts would not have jurisdiction over RICO claims given the lack of a jurisdictional authorization under the statute and that "since tribal courts clearly lack jurisdiction over RICO actions, the tribal exhaustion doctrine is also inapplicable."

  As for the tribal immunity-from-suit issue, the court began by noting that "Plaintiffs do not contend Congress has abrogated the Tribe's sovereign immunity or that the RICO statute constitutes a waiver." They instead "contend[ed] the arbitration clause in the purchase agreement for the sale of Lakeview Aggregates, LLC to the Four Bears Economic Development Corporation constitutes a waiver of the Tribe's sovereign immunity." But, on this score it agreed with the arbitrator:

  > [T]he waiver was invalid because it was never approved by the Tribal Business Council. The Four Bears Economic Development Corporation is a wholly owned subordinate entity of the Tribe. The Four Bears Economic Development Corporation's Articles of Incorporation explicitly provides it with sovereign immunity from suit identical to that enjoyed by the Tribe. ... To be valid and binding, any waiver of immunity by the Four Bears Economic Development Corporation must: (1) be explicit, (2) contained in a written contract, and (3) specifically approved by the Tribal Business Council.

  The court further observed that "the Tribal Business Council is the Defendant in this case and the Four Bears Economic Development Corporation is not" and that, in any event, the arbitration provision was limited to controversies concerning the joint venture agreement itself and "makes no mention of disputes being resolved in federal, state, or tribal court and certainly not in a far reaching RICO action in federal court."
- **Relevant (2022) Deskbook Sections:** 6:9 n.32; 7:17 n.2
- **Comment:** The court did not discuss the tribal common law-based claims discretely, but they too presumably would be barred by Defendant's sovereign immunity. Even if they

were not, the federal court would lack jurisdiction over them. The district court's decision was affirmed in an unreported per curiam decision by the 8th Circuit. 2023 WL 2486077.