United States Court of Appeals For the Tenth Circuit

Ronald J. Wopsock,
Luke J. Duncan, and Cassandra Kochamp,

Plaintiffs-Appellants,

v.

Millicent Maxine Natchees, in her individual capacity and
in her official capacity as Chairperson of the Tribal Business Committee
of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation,
T. Smileyarrowchis, in his individual capacity and in his official capacity
as Vice-Chairman of the Tribal Business Committee,
O. Roland McCook, Sr., in his individual capacity and in his official capacity
as a member of the Tribal Business Committee,
Richard Jenks, Jr., in his individual capacity and in his official capacity as a
member of the Tribal Business Committee,
John P. Jurris, and Susan Hammer,

Defendants-Appellees,

and

Gale A. Norton, Secretary of the Interior,
James Cason, Associate Deputy Secretary, Department of the Interior,
Chester D. Mills, in his individual capacity and in his official capacity
as Superintendent, Uintah and Ouray Agency, Bureau of Indian Affairs,
Wayne Nordwall, in his individual capacity, and
Brian Bowker, in his official capacity as Director, Western Regional Office,
Bureau of Indian Affairs,

Defendants-Appellees.

Appeal from the United States District Court for the District of Utah in
Case No. 2:04-CV-675, Judge Ted Stewart.

BRIEF OF APPELLANTS

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January 29, 2007

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STATEMENT OF RELATED CASES

On March 2, 2005, Appellants appealed to the Tenth Circuit Court of Appeals from the ruling of the Honorable Ted Stewart, announced in open court on February 25, 2005, denying Appellants' motion for a temporary restraining order and/or for a preliminary injunction (Case No. 05-4033). On or about March 14, 2005, Appellants filed their motion for transfer of Case No. 05-4033 to the Federal Circuit Court of Appeals. That motion was granted pursuant to Order of the Tenth Circuit Court of Appeals, dated March 22, 2005, Case No. 05-4033 was transferred to the United States Circuit Court for the Federal Circuit (Case No. 05-1298). The appeal became moot and, pursuant to the joint motion of all parties to Case No. 05-4033, Case No. 05-1298 was dismissed by Order of the Federal Circuit Court of Appeals on May 25, 2005.

Because this Court had previously ruled that appellate jurisdiction was in the United States Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(2), plaintiffs timely filed a notice of appeal to that Court, on July 20, 2005, from a final Order of the United States District Court for the District of Utah entered on June 21, 2005, dismissing the plaintiffs' First Amended Complaint, without leave to amend. On July 11, 2006, the United States Court of Appeals for the Federal Circuit held that,

based on a change in intervening law, it did not have appellate jurisdiction, but that this Court did, and transferred the appeal to this Court pursuant to 28 U.S.C. § 1631.

There are no cases known to counsel that are pending in this or any other court which will directly affect or be directly affected by this Court's decision in this appeal.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 13,150 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using WordPerfect 11, in 14 point Arial font.

DATED this 29th day of January, 2007.

PETERS SCOFIELD PRICE
A Professional Corporation

DAVID W. SCOFIELD
Attorneys for Appellants

STATEMENT OF JURISDICTION

Plaintiff's' First Amended Complaint ("FAC"), filed in the United States District Court of Utah, asserted claims arising under 42 U.S.C. § 1985(3), 25 U.S.C. § 476(d)(2) (the Indian Reorganization Act); 5 U.S.C. § 702 (the Administrative Procedure Act); 28 U.S.C. § 1346(a)(2) (the Little Tucker Act);and for constitutional torts, under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Original jurisdiction was invoked under 28 U.S.C. § 1331. Original jurisdiction over the conspiracy to deprive plaintiffs of their civil rights, under 42 U.S.C. § 1985, existed pursuant to 28 U.S.C. § 1343(a)(1)-(2), (4).

This appeal is from a final Order of the United States District Court for the District of Utah entered on June 21, 2005, dismissing the FAC, without leave to amend. Because this Court had previously ruled that appellate jurisdiction was in the United States Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(2), plaintiffs timely filed a notice of appeal to that Court, on July 20, 2005. On July 11, 2006, the United States Court of Appeals for the Federal Circuit held that, based on a change in intervening law, it did not have appellate jurisdiction, but that this Court did, and transferred the appeal to this Court pursuant to 28 U.S.C. §

1631.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the FAC support a claim against any defendant for obstruction of justice by adequately pleading facts required by *Wright v. No Skiter Incorporated,* 774 F.2d 422 (10th Cir. 1985), that are legally sufficient to state a claim?

2. Does the FAC support a *Bivens* constitutional torts claim against any defendant for retaliation against plaintiffs for exercising a constitutionally-protected right by adequately pleading facts required by *Robbins v. Wilkie,* 433 F.3d 755 (10th Cir. 2006) that are legally sufficient to state a claim?

3. Does the FAC support a claim against Nordwall and Mills under 42 U.S.C. § 1986, by adequately pleading facts that are legally sufficient to state a claim?

4. Do plaintiffs, as enrolled members of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation ("Ute Tribe"), have standing to assert any claims for declaratory and injunctive relief, under that provisions of the Act of June 18, 1934, 48 Stat. 987, codified at 25 U.S.C. § 461, et seq. ("IRA"), which affords a private right of action, to prevent the United States from recognizing the illegally-constituted (under the IRA) Ute Tribe's

Business Committee status and actions in government-to-government relations?

5. Did the district court abuse its discretion by dismissing without leave to amend, even though: (1) the motions it granted were the first response of defendants to any pleading: (2) no answer had been filed; (3) no initial pretrial conference had been held:(4) no schedule had been entered; (5) no discovery commenced; and (5) the discretion of the district court had been invoked by the filing of a written motion to amend prior to the hearing?

6. Does the district court have subject matter jurisdiction over any claim supported by the factual allegations of the FAC?

7. Can any defendants be immune from liability for their participation in an actionable conspiracy to obstruct justice by retaliating against Wopsock and Duncan for filing a federal lawsuit and, even if so, is not immunity a factual question not properly resolved on a motion to dismiss?

8. Does the doctrine of exhaustion apply to any claims of plaintiffs and, if so, as to such claims, are not any requirements to exhaust either met, or exempted by futility?

STATEMENT OF THE CASE

A. Nature of the Case.

The district court dismissed the FAC upon the initial motions to dismiss, without leave to amend. Liberalized pleading under Rule 8 of the Federal Rules of Civil Procedure requires that plaintiffs be allowed to pursue their valid claims. Plaintiffs Ronald J.Wopsock ("Wopsock") and Luke Duncan ("Duncan") were ousted from their jobs as members of the Uintah and Ouray Tribal Business Committee "Business Committee")[1] as the result of a well-orchestrated conspiracy to retaliate against them for filing a prior federal lawsuit against federal officials, including defendants Wayne Nordwall ("Nordwall") and Chester D. Mills ("Mills"), which lawsuit asserted claims for breach of trust for failure to protect the Ute Tribe's assets against their dissipation by non-tribal defendant John P. Jurrius ("Jurrius"). The well-pleaded facts of the FAC set forth the retaliation, and the conspiracy orchestrated by Jurrius, Nordwall and Mills, and participated in by all defendants, to commit such retaliation, sufficiently to place all defendants on notice of the underlying basis of the claims.

Plaintiff Cassandra Kochamp ("Kochamp"), a political supporter of

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[1]The Business Committee is the Ute Tribe's sole and governing political body.

Wopsock and Duncan, joined this action to assert her rights under the IRA. She, in turn, was fired from her job with the Ute Tribe.

The FAC seeks redress for plaintiffs' injuries against the conspirators for their conduct as part of the illegal conspiracy to obstruct justice. Nordwall and Mills, in addition actively participating in the conspiracy, had power to stop the conspiracy, but instead allowed the obstruction of justice to go forward unimpeded, in violation of 42 U.S. C. § 1986. Nordwall and Mills were defendants in the first litigation. Mills had a romantic and live-in relationship with Jurrius' employee, co-conspirator defendant Susan Hammer ("Hammer"). The four defendants who were the remaining members of the Business Committee undertook their actions, whether legal or illegal, knowingly and with the conscious intent to assist Jurrius and the conspiracy to violate federal law.

With respect to the declaratory and injunctive relief sought, Wopsock, Duncan and Kochamp seek relief, under the IRA provision allowing private rights of action, to enforce their federal right to require that any amendment to the Ute Constitution[2] be effected by way of a secretarial election, and to have any amendments in violation of federal law declared unenforceable and unrecognizable in government to government relations.

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[2]Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation (hereinafter "Ute Constitution").

These federal rights held by plaintiffs under the IRA spring from the decision voluntarily made by the Ute Tribe, itself, to be governed by federal law, to adopt and amend the Ute Constitution, when the Ute Tribe elected to enact such constitution under the provisions of the IRA. A private right of action to redress violations of that federal law was provided for by Congress in a 1988 amendment to the IRA. Congress expressly granted jurisdiction, stating that actions "to enforce the provisions of this section may be brought in the appropriate federal district court." *See* 25 U.S.C. § 476(d)(2).

B. Course of Proceedings and Disposition by the District Court.

The Complaint in this action was filed on July 22, 2004 (Docket No. 1). Twelve days later, on August 3, 2004, plaintiffs exercised their right to amend without leave of court, to correct certain technical errors in the Complaint, and filed the FAC (Docket No. 4)[3] A116-335.

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[3]On September 8, 2004, the district court entered an order (Docket No. 14), dismissing all of Plaintiff Mary Carol Jenkins' claims, without prejudice, based on a letter ostensibly sent *pro se* by Mary Carol Jenkins to the district court. On September 14, 2004, plaintiffs filed a motion to substitute Cassandra Kochamp ("Kochamp") as a plaintiff in the stead of Mary Carol Jenkins and to reinstate the dismissed claims (Docket No. 17), which motion was granted by order entered on December 3, 2004 (Docket No. 33). "Plaintiffs," as used throughout, is intended to refer to Wopsock, Duncan, and Kochamp as the substituted plaintiff in lieu of Mary Carol Jenkins.

Answers were due from Jurrius and Hammer (the Non-Tribal Defendants"), and defendants T. Smiley Arrowchis, O. Roland McCook, Sr., Richard Jenks, Jr. and Millicent Maxine Natchees (the "Tribal Defendants"), in late August, 2004. The Non-Tribal Defendants and Tribal Defendants joined to file three separate motions regarding extensions of time to respond to the FAC, on August 25, 2004, (Docket No. 8,), on August 30, 2004, (Docket No. 9), and on November 23, 2004 (Docket No. 24).[4] On September 3, 2004, the district court signed an order (Docket No. 13) that granted the Non-Tribal Defendants' and Tribal Defendants' **first** motion affording them 60 days after service of the final defendant in which to respond to the FAC.[5]

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[4]This is true despite the admission of the Non-Tribal Defendants and Tribal Defendants that they had prepared and had ready to file "for weeks" a motion to dismiss. *See* Docket No. 24 (A394-399), at 4, ¶ 6 ("The Tribal Defendants have had their Motion to Dismiss and supporting Memorandum in this matter prepared for weeks and provided a copy of those documents to Federal Defendants several weeks ago pursuant to a joint defense agreement.") On September 1, 2004, plaintiffs filed a stipulation to the **second** motion, for a ten day extension of time (Docket No. 11), but on August 31, 2004, the plaintiffs had filed a memorandum (Docket No. 10) opposing the **first** motion for extension, which first motion sought 60 days following service of the last defendant served in which to respond.

[5]The docket entry for such order suggested, by its language, that the court might have intended to grant only the stipulated, ten-day extension to the Non-Federal Defendants. On September 21, 2004, plaintiffs sought to have resolved the confusion between the docket entry and the actual language of the order extending the Non-Federal Defendants' time to

(continued...)

The Non-Tribal Defendants and Tribal Defendants filed their motion to dismiss the FAC on November 24, 2004 (Docket No. 43, A709-14). On December 3, 2004, the Federal Defendants filed a motion, "under Fed. R. Civ. P. 56 for summary judgment dismissing the third through sixth causes of the First Amended Complaint seeking relief against the Federal Officials in their official capacities[,]" (Docket No. 34, A440-43), and also a Rule 12(b)(6) motion to dismiss the Seventh and Eighth Causes of Action in the FAC, on grounds that no Bivens remedy could exist and that a civil rights claim under 42 U.S.C. § 1985(3) failed for a lack of pleading race-based animus. (Docket No. 36, A500-02). The summary judgment motion purported to be supported by the memorandum supporting it, with attachments, the Exhibits to the FAC, and the Declaration of Mills.[6]

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[5](...continued)
respond to the Amended Complaint, by filing their motion for clarification (Docket No. 18, A389-92). Plaintiffs are unaware of any order resolving that motion.

[6]On January 26, 2005, the district court issued a notice of hearing (Docket No. 46) for a hearing date of April 5, 2005 on the pending motions. Plaintiffs filed their opposition memorandum to the Federal Defendants' Motion to Dismiss the Seventh and Eighth Causes of Action on February 7, 2005 (Docket No. 49, A729-67). Plaintiffs' filed their opposition memorandum to the Federal Defendants' Motion for Summary Judgment and in support of their objection under FED R. CIV. P. 56(f) on February 11, 2005 (Docket No. 52, A777-819) and their opposition memorandum to the Non-Federal Defendants' Motion to Dismiss on February 12, 2005 (Docket No. 53, A891-941).

On February 15, 2005, plaintiff Wopsock first heard on the radio an announcement that the tribal election board would begin accepting nominations on February 22, 2005. *See* Declaration of Ronald J. Wopsock, at 5 ¶ 12 ("Wopsock Dec.")(Docket No. 57, A A1011-1020). Based on the short schedule between then and the primary and the general elections, the plaintiffs moved for a temporary restraining order against the Tribal Defendants on February 18, 2005 (Docket No. 55). At a non-evidentiary hearing seven days later, on February 25, 2005, the district court denied the motion for temporary restraining order, in part on grounds that the district court had no jurisdiction over the issues raised in the motion, thereby finally terminating the plaintiff's application for preliminary relief. *See* Minute Entry (Docket No. 65).[7]

Plaintiffs filed their first and only motion seeking leave to amend their complaint, and thereby invoking the discretion of the district court under Rule 15(a) to allow amendment, on April 4, 2005. A1300-02. Because motions to dismiss had been filed, no answer had been filed by any defendant, no attorney planning meeting had been held, no initial pretrial

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[7]On March 2, 2005, plaintiffs appealed the denial of their application for preliminary relief concerning the tribal election to the United States Court of Appeals for the Tenth Circuit, Case No. 05-4033 (transferred to this Court as Case No. 05-1298). Prior to final resolution of that appeal, the tribal election was held and officers installed, thus rendering that appeal moot.

scheduling conference had been held, no schedule for the case existed for any purpose, let alone cutting off the right to seek amendment, and discovery was not yet allowed to commence by virtue of FED. R. CIV. P. 26(d)("a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).") *See* Docket, *passim*, A1-22. As far as lateness in the case, procedurally, had plaintiffs not already used their amendment of right to cure technical problems with their initial complaint, they would have had available to them, at the time of filing their motion to amend, their ability to amend as of right.

On April 5, 2005, the district court granted defendants' motions. *See* Minute Entry of April 5 hearing, A1397. The district court reserved ruling on plaintiffs' motion for leave to amend, pending further briefing. The defendants filed their responses to the motion to amend, Docket Nos. 79 and 80. Plaintiffs filed their reply memorandum, with a revised proposed amended complaint in light of the district court's ruling on April 29, 2005 (Docket No. 81). The district court issued its written Order dismissing the FAC without leave to amend on June 21, 2005 (Docket No. 87, A23-32) ("Order") and plaintiffs timely appealed from the Order to the United States Court of Appeals for the Federal Circuit on July 20, 2005 (Docket No. 89, A1491-92). On July 11, 2006, the United States Court of Appeals for the

Federal Circuit held that, due to an intervening change in law, it did not have appellate jurisdiction. *Wopsock v. Natchees,* 454 F.3d1327, 1331 & n.3, 1332-33 ("Because the district court's jurisdiction over this case was not based in part on the Little Tucker Act, we lack jurisdiction over this appeal.") Although this Court had previously transferred the appeal of the denial of a preliminary injunction to the Federal Circuit, the Federal Circuit held that it was not bound by law of the case due to the intervening change in law and finding the Tenth Circuit to be the appropriate circuit to decide the appeal, it ordered the appeal transferred to this Court. *See id.* at 1333-34.

STATEMENT OF FACTS

Construed liberally in plaintiffs' favor, the allegations of the FAC, ¶¶ 3- 81 (A120-142), with attached exhibits (A205-335), and all inferences therefrom favorable to plaintiffs, establish a right to relief in plaintiffs, for injuries caused by reason of Jurrius' conspiracy to violate federal law. Jurrius, who purports to act as a financial adviser for the Tribe (FAC at 6, 11 ¶¶ 18, 38; A126, 130-31) to intimidate, coerce and retaliate against Wopsock and Duncan for their participation as parties plaintiff in a lawsuit in the United States District Court for the District of Utah, Wopsock v. Nordwall, Case No.2:03CV00826 TC ("Nordwall"). See FAC at 14-23,

A125-127. Nordwall was filed on September 19, 2003, against certain officials of the United States government, for their failing to exercise their fiduciary duties owing to the Tribe, in that they failed to adequately oversee and monitor the actions of Jurrius. FAC at 14-15 ¶¶ 47-50, A125-126. Although Jurrius was not named as a party in Nordwall, the allegations of the Complaint therein were very critical of Jurrius' actions in handling the Tribe's investments. *Id.* Wopsock and Duncan were, at the time Nordwall was filed, two out of the six members of the Tribe's governing body, the business committee, and thus would have offered testimony in that capacity about their criticisms of Jurrius when Nordwall went to trial. See FAC at 1-2, ¶¶ 3-4, A120-121, 14-15 ¶¶ 47-50, A125-126.

In a clandestine, irregular meeting (no notice was provided to Wopsock or Duncan) in the building where Jurrius offices, the other four members of the Tribe's business committee (the "tribal defendants"), on October 13, 2003, less than one month after Nordwall was filed, ostensibly voted as the business committee to enact Resolution No. 03-243, purporting to initiate proceedings for the expulsion of plaintiffs Wopsock and Duncan from the business committee. See FAC at 16-17 ¶¶ 52-60, A135-136. The FAC expressly pleads: "On information and belief, defendants Jurrius, Hammer and John Does 1-10 encouraged the tribal

defendants to promulgate the 'charges' of 'gross misconduct' or 'neglect of duty' against and to expel plaintiffs Wopsock and Duncan from the Tribal Business Committee in response to their having joined with other tribal members in filing the Complaint in Wopsock v. Nordwall." FAC ¶ 60, A136 (emphasis added).

In a tightly-controlled and virtually secret meeting on October 21, 2003, the conspiracy to intimidate Wopsock and Duncan continued, now actively joined by Federal Defendant Mills and Bureau of Indian Affairs' police. See FAC at 17-20 ¶¶ 61-69, A136-139. The other four business committee members voted to expel Wopsock and Duncan. *Id.*

Just four days after that meeting, in another irregular and this time, off-reservation, in Vernal, Utah, meeting, the remaining business committee members enacted Ordinance No. 03-002, entitled "To Amend Ordinance No. 93-06, As Amended, Governing Recall, Referendum and Elections of the Ute Indian Tribe of the Uintah and Ouray Reservation," during a rare Saturday meeting on October 25, 2003. FAC at 20-23 ¶¶ 70-81, A139-141. That Ordinance purported to amend the requirements for running for a seat on the business committee as set forth in the Tribe's constitution. *Id.* The only members of the Tribe disqualified from running for office by the change to the Tribe's constitutional requirements were

Ronald J. Wopsock and Luke Duncan. Jurrius had achieved his conspiratorial ends of punishing the two Tribe politicians who opposed him, costing them their jobs, prohibited them from running for office again for a long time and assuring that they could not offer testimony harmful to him while they held positions of authority with the Tribe.

Federal Defendant Mills and Bureau of Indian Affairs police participated in the occurrence of the October 21, 2003 meeting where Wopsock and Duncan were kicked off the business committee for filing their federal lawsuit accusing Jurrius of wrongdoing. FAC at 18-19, ¶¶ 64-65, A137-138. Despite the fact that Ordinance 03-002 purported to effect a change to the Tribe's constitutional qualifications for business committee candidates, in violation of the IRA, Mills knowingly and willfully approved it. FAC at 21 ¶ 72, A126-127. When Mills forwarded the Ordinance to Federal Defendant Nordwall for his approval, Nordwall expressed his understanding that the Ordinance violated the IRA. FAC at 37-39 ¶¶ 137-41, A130-131. Nordwall sought an opinion in that regard from the Regional Solicitor, who advised Nordwall that the Tribe had unlawfully amended its constitution by the Ordinance, in violation of the IRA. *See id.*

The Eighth Cause of Action expressly pleads a conspiracy to

retaliate for filing a complaint in federal court:

> 253. On information and belief, the tribal defendants, federal defendant Mills and private party defendants Jurrius, Hammer and an unknown number of John Does conspired with one another to retaliate against plaintiffs Wopsock and Duncan for having filed the Wopsock v. Nordwall Complaint and for having discussed their opinion of federal defendants Mills' and Nordwall's and private party defendant Jurrius' handling of the Tribe's finances with local media representatives, in violation of the plaintiffs' constitutional rights.

FAC ¶ 253, A191 (emphasis added). The Eighth Cause of action incorporates all prior allegations, see FAC, ¶ 244, A189 ("The plaintiffs incorporate by reference the allegations in paragraphs 1-243, above."), including without limitation all of the facts showing the existence of a conspiracy to retaliate for filing a federal lawsuit, the knowledge of that conspiracy by Mills and Nordwall, Mill's participation in the conspiracy by his attendance at the retaliation meeting, and both of their additional participation by unlawfully recognizing the legitimacy of the business committee for government to government relations.

SUMMARY OF ARGUMENT

The facts pleaded in the FAC, construed liberally in favor of plaintiffs and incorporating all reasonable inferences that might be drawn from it, raise serious and substantial issues concerning a civil rights conspiracy to obstruct justice in violation of federal law. The pleading requirements of

FED R. CIV. P. 8 have been met. Indeed, no defendant claimed in their motions that they had no fair notice of the claims against them.

Tribal law does not govern defendants' conspiratorial goal of obstructing justice in the *Nordwall* federal court action, federal law does. No matter who attempts to interfere with the process of justice in federal court, they are liable under the supreme federal laws they violate. As to the IRA, the Tribe, by its own free choice, elected to have an IRA constitution. The IRA governs amendments to the Ute Constitution. Regardless of tribal sovereignty, however, the Tribe is not a defendant in this case. The tribal defendants, when they made the choice to join Jurrius' conspiracy to obstruct justice in a federal court, were acting not as tribal officials, but as lawbreakers. Just as no person could argue that a Business Committee member could murder a federal official on the reservation as the result of the vote of the Business Committee and somehow be insulated from federal law, these individuals may not knowingly obstruct justice in a federal court. Federal law is supreme in this matter and plaintiffs should be allowed to go forward in the pursuit of the relief they seek.

Neither issues of exhaustion or immunity are applicable to the civil rights claims at issue. Further, Tribal law prohibits any remedy in Tribal

Court and a tribal judge confirmed that the Tribal Court had no jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW.

"A motion to dismiss under FED. R. CIV. P. 12(b)(6) 'admits all well-pleaded facts in the complaint as distinguished from conclusory allegations.'" *Tal v. Hogan,* 453 F.3d 1244, 1252 (10th Cir. 2006)(citation omitted). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id.* (citations omitted) "The legal sufficiency of a complaint under Rule 12(b)(6) is a question of law which this Court reviews *de novo.* 'In doing so, all facts alleged in the complaint are taken as true and all reasonable inferences are indulged in favor of the plaintiffs.'" *Id.* (citations omitted). This Court likewise reviews *de novo* dismissals based on lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1). *U.S. West Inc. v. Tristani,* 182 F.3d 1202, 1206 (10th Cir. 1999)("We review the district court's dismissal for lack of subject matter jurisdiction *de novo.*")

A refusal to allow amendment to a complaint is reviewed under an abuse of discretion standard. *Tool Box, Inc. v. Ogden City Corp.,* 419 F.3d

1084, 1086-87 (10th Cir. 2005)("We review the district court's denial of the Rule 15(a) motion to amend the complaint . . . under an abuse of discretion standard.")

II. THE FAC CONTAINS LEGALLY-SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT A CIVIL RIGHTS CLAIM FOR RETALIATION AGAINST WOPSOCK & DUNCAN, UNDER *WRIGHT V. NO SKITER INCORPORATED,* 774 F.2D 422 (10TH CIR. 1985).

A. The FAC's Allegations Suffice Under *Wright.*

In *Wright v. No Skiter Incorporated,* 774 F.2d 422 (10th Cir. 1985), the plaintiff's factual allegations were that "the defendants conspired to defeat [plaintiff's] low bid for the 1983 contract in retaliation for his bringing the federal suit alleged in the complaint for violation of § 1983 which was settled." *Id.* at 426. This Court held that those factual allegations were legally sufficient to state a claim under 42 U.S.C. § 1985(2). *Id.*

The pleadings here allege facts sufficient under *Wright* to state a claim. The FAC pleads that Wopsock and Duncan filed a federal lawsuit against Nordwall and Mills and that such suit was critical of Jurrius. FAC ¶¶ 47-48 (A133-34). The FAC pleads that defendants conspired to retaliate against Wopsock and Duncan by, among other things, having them removed from the Business Committee for filing a federal complaint. FAC ¶¶ 253-54 (A191-92). Because these factual allegations are sufficient under *Wright* to state a claim, a *de novo* review must reverse the district

court's dismissal.[10]

B. The General Rule Mandates That Dismissal Not Occur If Defendants Have Fair Notice And Suffer No Prejudice To Preparing A Defense.

The dismissal was error even though, as defendants will point out, the FAC does not expressly reference 42 U.S.C. § 1985(2) as the legal basis for its claims.[11] The Court in *Evans v. McDonald's Corp.,* 936 F.2d

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[10]The FAC also pleads a host of more detailed factual allegations concerning the conspiracy, in addition to those that are legally sufficient under *Wright* to state a claim.

[11]The FAC does expressly cite 42 U.S.C. § 1985(3), but the district court held that class-based animus had not been alleged to support a 42 U.S.C. § 1985(3) claim. While Tenth Circuit authority suggests that the class-based animus required by section 1985(3) must be racial, the United States Supreme Court has not so held. For class-based animus to exist, "the decision maker must have selected or reaffirmed a particular course of action 'because of,' not merely 'in spite of its adverse effects upon an identifiable group." *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 272 (1993). The allegations in the FAC show that the Defendants and Federal defendant Mills engaged in their conspiratorial acts 'because of' Plaintiffs Wopsock's and Duncan's membership in the political class of Jurrius opponents. *E.g.,* FAC ¶ 70 (A139). Within the Tribe, persons who are openly critical of Jurrius constitute a political faction both within and outside of Indian tribes. The courts have held that § 1985(3)'s protections extend to political factions in such circumstances, *see, e.g., Conklin v. Lovely,* 834 F.2d 543, 549 (6th Cir. 1987); *Means v. Wilson,* 522 F.2d 833, 839 (8th Cir. 1975) *cert. denied,* 424 U.S. 958 (1976); *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973). Plaintiffs therefore respectfully disagree with the conclusion that the allegations do not support a section 1985(3) claim and in any event preserve the issue for review by the United States Supreme Cout. In all events, the allegations, as they stood, could support the type of 42 U.S.C. § 1985(2) conspiracy claim, which does not require class-based animus and which the proposed second amended complaint

(continued...)

1087 (10th Cir. 1991) affirmed a grant of summary judgment against a Title VII plaintiff under Rule 56 (*not* Rule 12). *See id.* at 1088-89, 1091.

Evans stated the general rule that "a plaintiff should not be prevented from pursuing a valid claim just because she did not set forth in the complaint a theory on which she could recover . . .." *Id.* at 1090. This general rule "is based on the liberal pleading requirements of Rule 8 of the Federal Rules of Civil Procedure . . .." *Orr v. City of Albuquerque,* 417 F.3d 1144, 1153 (10th Cir. 2005). Since defendants' rule 12(b)(6) motions tested the legal sufficiency of the FAC under those same liberal pleading requirements, the district court's dismissal of the FAC for failure to expressly cite 42 U.S.C. § 1985(2), when it stated a claim under *Wright*, was error.

The United States Supreme Court has instructed firmly that a 12(b)(6) motion should not be granted "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." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). This instruction requires that a "complaint should not be dismissed merely

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[11](...continued)
expressly asserted as a legal theory. *See Kush v. Rutledge,* 460 U.S. 719, 726-27 (1983) ("[I]t is clear that Congress did not intend to impose a requirement of class-based animus on persons seeking to prove a violation of their rights under the first clause of § 1985(2).")

because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Thomas W. Garland, Inc. v. City of St. Louis,* 596 F.2d 784, 787 (8th Cir. 1979) (as amended *en banc*). *Accord Forseth v. Village of Sussex,* 199 F.3d 363, 368 (7th Cir. 2000) ("Having specified the wrong done to him, a plaintiff may substitute one legal theory for another without altering the complaint . . . . A complaint may not be dismissed unless it is impossible to prevail 'under any set of facts that could be proved consistent with the allegations.'")

Evans departed from the general rule *only* because the plaintiff sought to assert an entirely new theory after the close of discovery, only two weeks before trial, and in opposition to a summary judgment motion. *See Evans,* 936 F.2d at 1090-91. In those circumstances, this Court adopted an exception to the general rule, to prevent "waste [of] the parties' resources, as well as judicial resources, on discovery aimed at ultimately unavailing legal theories and would unfairly surprise defendants, requiring the court to grant further time for discovery or continuances." *Id.* at 1091.

The general rule should be followed, "'provided always that a late shift in the thrust of the case will not prejudice the other party in

maintaining his defense upon the merits.' 5 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 1219 at 194 (1990)[.]" *Id.* at 1090-91. This Court held that, under the circumstances present in *Evans,* where discovery was complete and trial only two weeks away, "the late shift in theories caused substantial prejudice to [defendant]." *Id.* at 1091.

C. Dismissing The FAC Was Error Where Defendants Were Not Prejudiced In The Preparation Of Their Defense.

No prejudicial circumstance exists in this case to justify a departure from the general rule– especially not in a rule 12(b)(6) context. Discovery had not even commenced. No answer had yet been filed. No schedule had yet been entered. Moreover, plaintiffs quoted 42 U.S.C. § 1985(2) in Plaintiffs' Memorandum In Opposition to Federal Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), filed February 14, 2005 (Docket No. 53, A891-910) [hereinafter "Mem. Opp. Dismiss"], so both the district court and defendants were aware of the statute's applicability to retaliation claims.

Plaintiffs argued that "Wopsock and Duncan were expelled from the Business Committee for their involvement in the 2003 lawsuit and Ms. Kochamp appears to have been dismissed from her employment as a direct result of her being a Plaintiff in this action. These retaliatory, illegal, and unauthorized actions of the Defendants, among other things, strongly suggest a conspiracy [to violate 42 U.S.C. § 1985(2)]." Mem. Opp.

Dismiss, at 13 n.4 (A907)(quoting 42 U.S.C. § 1985(2)). Defendants and the district court thus had notice that the allegations supported such a claim and defendants plainly would have had the opportunity to conduct discovery on such claim and would not have been prejudiced in preparing a defense by any failure to cite the statute in the FAC.[12]

D. The FAC Also States A Claim Under 42 U.S.C. § 1986.

Just like with section 1985(2), the FAC's allegations support a claim under 42 U.S.C. § 1986: "[A] § 1986 plaintiff must show that: (1) the defendant had actual knowledge of a § 1985 conspiracy, (2) the defendant had the power to prevent or aid in preventing the commission of a § 1985 violation, (3) the defendant neglected or refused to prevent a § 1985 conspiracy, and (4) a wrongful act was committed." *Clark v. Clabaugh,* 20 F.3d 1290, 1295 (3d Cir. 1994).

All the elements of such a claim are pleaded in the FAC. Mills attended the retaliation planning meeting and aided it by providing Bureau

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[12]The district court erroneously ruled that the pleaded facts raise nothing but an "intra-tribal" dispute. *See* Order at 2, A25 ("At the heart of plaintiffs' allegation is a plea for this Court to resolve a dispute between tribal members about tribal government.") The district court apparently digressed from the sufficient allegations of obstruction of justice because the tribal defendants were used as instrumentalities of the retaliation. The error of concluding that the FAC pleaded only an intra-tribal dispute over which the district court did not have jurisdiction is discussed *infra*, at Part VI.

of Indian Affairs police. FAC ¶¶ 64-65 (A137), 68-69 (A138-39). Nordwall sought, and then ignored, advice from the Solicitor's Office that the retaliatory actions were illegal and Mills approved them. FAC ¶¶ 137-147 (A156-59), 150 (A160), 152-155 (A161-62), 159 (A163), 165-66 (A166), 168-78 (A166-70). Despite having the power to refuse to recognize the illegally-constituted Business Committee for purposes of government-to-government relations and the power to disapprove any amendment to the Ute Tribe's Constitution that was made in violation of the IRA, Mills approved the actions and Nordwall did not overrule him. *Id.*

Wopsock and Duncan were fired in retaliation for filing a federal lawsuit. *Id.* Thus both Mills and Nordwall knew about the conspiracy, were in a position to prevent the enforcement of the actions taken by the four Business Committee Defendants in removing Wopsock and Duncan, yet did not act to prevent the conspiracy from achieving its goal. Just like the section 1985(2) claim, there is no prejudice in preparing a defense, all the required elements are pleaded, and dismissal was error.

III. THE FAC CONTAINS LEGALLY-SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT A *BIVENS* CLAIM FOR RETALIATION AGAINST WOPSOCK & DUNCAN, UNDER *ROBBINS V. WILKIE,* 433 F.3D 755 (10TH CIR. 2006).

The district court held that no *Bivens* remedy was available for retaliation against Wopsock and Duncan for their having exercised their

fundamental right to petition government by filing their complaint against Nordwall and Mills. In a case decided subsequent to the district court's decision refusing to recognize a *Bivens* remedy herein, this Court decided *Robbins v. Wilkie,* 433 F.3d 755 (10th Cir. 2006). In *Robbins,* this Court expressly recognized for the first time a *Bivens* remedy for retaliation by federal officials against one who exercises his fundamental right under the Fifth Amendment to exclude the government from his property. Robbins, a rancher, had exercised his fundamental right to refuse to grant a new easement to the Bureau of Land Management ("BLM"). *See id.* at 760. BLM agents had threatened the rancher about the consequences of not granting an easement and carried out their threats, within their ostensible BLM authority, by cancelling the rancher's rights of way across federal lands. *See id.*

This Court affirmed a denial of summary judgment on Robbins' *Bivens* claim, holding: "As we noted above, the right to exclude others from one's property is well established. Robbins has thus sufficiently alleged a violation of his clearly established Fifth Amendment rights, and Defendants are not entitled to qualified immunity on Robbins' *Bivens* claim." *Id.* at 767. *Robbins* recognized that retaliation for exercise of First Amendment rights, such as are at issue here, was long ago established as illegal. *See id.* at

766.

The retaliation by federal agents in *Robbins,* by way of using the complex law of federal land use regulation, is not substantially distinguishable from the retaliation by the federal officials here, in refusing to exercise their power under the IRA to refuse to recognize a Business Committee not constituted in accordance with the IRA and thereby approving the illegal retaliation. The district court's refusal to recognize a *Bivens* remedy was therefore erroneous, especially when discovery of facts had not yet commenced.

IV. THE DISTRICT COURT'S RULING ON FAILURE TO EXHAUST TRIBAL REMEDIES IS WRONG.

A. Plaintiffs Were Not Required to Exhaust Tribal Remedies Because the Tribal Court Lacked Jurisdiction over Some Defendants.

The guiding law as to the jurisdiction of tribal courts is contained in *Montana v. United States*, 450 U.S. 544 (1981), rehearing denied 452 U.S. 911 (1981), which recognizes the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 659-60 (2001) (Souter, J. concurring in judgment, joined by Kennedy, J., and Thomas, J.) (internal quotation marks omitted). Further, "it is undeniable that a tribe's remaining inherent civil jurisdiction to

adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of an individual over whom jurisdiction is claimed . . .." *Nevada v. Hicks*, 533 U.S. 353, 387 (2001) (O'Connor, J., concurring in part and concurring in judgment, joined by Stevens, J., and Breyer, J.). Where the defendant is not a member of the tribe seeking to exercise civil adjudicatory jurisdiction, such tribe's court is without jurisdiction over the case. *Id. See also Ford Motor Company v. Todecheene*, 394 F.3d 1170, 1178 (9th Cir. 2005) ("[W]e cannot ignore the clear guidance from the Court that tribal jurisdiction [over nonmembers] is to be limited, rather than expanded.").

Because the tribal court possessed no jurisdiction over plaintiffs' claims against nonmember defendants, plaintiffs had no exhaustion requirement as to those claims. There is simply no requirement "to exhaust tribal court remedies" when "jurisdiction [is] plainly lacking and exhaustion would serve only to delay the proceeding." *Ford Motor Company*, 394 F.3d at 1173 (referencing district court holding in *Ford Motor Company v. Todecheene*, 221 F. Supp. 2d 1070 (D. Ariz. 2002). *See also National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 n.21 (1985) ("We do not suggest that exhaustion would be required . . . where the action is patently violative of express jurisdictional

prohibitions.").

B. Plaintiffs Had No Tribal Court Remedies Available; Plaintiffs Were Not Required to Further Appeal When It Would Have Been Futile.

The plaintiffs were not required to further appeal the tribal court's ruling that it lacked jurisdiction to determine plaintiffs' claims. Exhaustion of tribal remedies is not required "where exhaustion would be futile," *National Farmers*, 471 U.S. at 857 n.21, and is fully complied with when a "tribal court was afforded the opportunity to make an initial determination regarding the existence of tribal jurisdiction . . . ." *Ford Motor Company*, 394 F.3d at 1183 (citing *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 975 (9th Cir. 2003) (per curiam)). Once a tribal court has been permitted to determine if jurisdiction exists, "[t]hat is all the exhaustion that is required." *Id.*

Federal district courts are to exercise jurisdiction in cases involving federal questions after ***available*** remedies have first been exhausted in a tribal court "*unless* exhaustion would be futile." *Superior Oil Company v. United States*, 798 F.2d 1324, 1331 (10th Cir. 1986) (emphasis in original). In this instance, the tribal court recognized controlling tribal law restricting its jurisdiction and held that the courts of the Tribe were wholly without authority to rule on the matters pressed by the plaintiffs. *See Duncan v.*

Natchees, slip op. No. CV-04-044 (Ute Tr. Ct. November 25, 2003), A254-262. Per the express language of Ordinance No. 87-04, courts of the Tribe, including the appellate court of the Tribe, are strictly prohibited from delving "into whether the Defendants' conduct violated Plaintiffs' rights under the Indian Civil Rights Act *or any other law*." *Id.* (emphasis added.)

Thus, plaintiffs afforded the tribal court an "opportunity to make an initial determination regarding the existence of tribal jurisdiction over [plaintiffs'] case;" thereby performing "all the exhaustion that is required." *Ford Motor Company*, 394 F. 3d at 1183. To seek further judicial review in the courts of the Tribe would have been to no avail, because Ordinance No. 87-04 forbids all courts of the Tribe from hearing cases which name tribal officials as defendants. When, as here, tribal courts are without jurisdiction to decide a case by the very laws of the tribe, exhaustion is inappropriate because the exercise would be by definition "futile." *Superior Oil Company,* 798 F.2d at 1331.[13]

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[13]Nor were the plaintiffs required to seek a ruling from the Business Committee. While Ordinance No. 87-04 may allow plaintiffs to seek redress before the Tribe's governing body and "tribal councils are competent adjudicatory forums," *White v. Pueblo of San Juan,* 728 F.2d 1307, 1313 (10th Cir. 1984), exhaustion is not required where the actions complained of "are sufficient in fact to constitute bad faith." *Superior Oil Company,* 798 F.2d at 1330. *Accord, Tenneco Oil Co.,* 725 F.2d 572. Here , those very same persons who acted in concert to obstruct justice and to deny the plaintiffs their civil rights, such conspiracy being the

(continued...)

V. THE FAILURE TO ALLOW AMENDMENT WAS AN ABUSE OF DISCRETION.

The United States Supreme Court has also given firm instruction about the liberal standards for amendment of pleadings. In *Foman v. Davis,* 371 U.S. 178 (1962), the Court instructed: "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; *this mandate is to be heeded.*" *Id.* at 182 (emphasis added). The district court abused its discretion by failing to heed this mandate. As shown above, the allegations of the FAC, without amendment, state a claim for relief no less than the allegations in *Wright,* and *Robbins.*

Any mis-labeling in the FAC of legal theories cannot overcome the factual bases pleaded for relief under *Conley's* instruction not to dismiss. *See Conley,* 355 U.S. at 346-47; *Thomas W. Garland,* 596 F.2d at 787. In other words, having "specified the wrong done to him, a plaintiff may substitute one legal theory for another without altering the complaint...." *Forseth,* 199 F.3d at 368. When plaintiffs filed their motion to amend, prior to any hearing or decision on the sufficiency of the FAC, they properly

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[13](...continued)
gravamen of plaintiffs' complaint, could hardly be expected, if called upon under Ordinance No. 87-04, to rule against themselves and in favor of the plaintiffs. The Non-Federal Defendants' overt actions depriving the plaintiffs of their civil rights and violating applicable federal law were, as pleaded, undertaken in "bad faith;" meaning that exhaustion of possible remedies before the Business Committee, if such actually exist, was not required. *See Superior Oil Company,* 798 F.2d at 1330.

invoked, under Tenth Circuit law, the discretion of the district court to allow amendment of the FAC. The district court abused its discretion in dismissing without leave to amend.

A presumption in favor of leave to amend exists at all times prior to the entry of judgment. *See The Tool Box, Inc. v. Ogden City Corp.,* 419 F.3d 1084, 1087 (10th Cir. 2005) ("Moreover, even though Rule 15(a) states that "leave [to amend] shall be freely given when justice so requires," "this presumption is reversed in cases, such as here, where a plaintiff seeks to amend a complaint after judgment has been entered and a case has been dismissed.") The proper way to invoke that presumption and the district court's discretion is to file a written motion before hearing and decision on a motion to dismiss. *See, e.g., Williams v. Oklahoma Department of Human Services,* Case No. 04-6051, 122 Fed. Appx. 958, 959 n.2; A1575-77 (10th Cir. December 28, 2004)("Our case law is clear that the proper way to invoke the discretion of the court in requesting leave to amend is to file a motion to amend under Rule 15(a) prior to dismissal or a motion under Rule 59(e) or Rule 60(b) after dismissal.")

Plaintiff's motion to amend was filed before the hearing on the very first motions to dismiss filed by defendants. Discovery had not commenced and no scheduling order was in effect, at all, let alone one that

had cut off the right to amend pleadings. At such an early stage in the litigation, especially given the serious and substantial claims of retaliation for the filing of a federal lawsuit, it was an abuse of discretion not to allow amendment.

The district court found the proposed amendment futile, in part on tribal immunity grounds. But just like in *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975), the pleaded civil rights conspiracy here arises due to the commission of constitutional torts by the federal defendants and non-tribal members, also under 42 U.S.C. § 1985, and involves tribal members conspiring with non-tribal members to commit a civil rights violation. *See id.* at 836 n.1 (identifying unnamed, non-Indian co-conspirators) and 840-41 (tribal defendants conspired with private individuals). In those circumstances, the tribal immunity does not extend to protect individual members of a tribe from an action under 42 U.S.C. § 1985. *See id.* at 838 ("Tribal immunity is based on the sovereignty of the tribe . . . and does not protect a tribal subject from suit.")[14]

Even if tribal exhaustion were applicable to actions under 42 U.S.C. § 1985 (and it is not), and to actions involving non-Indians (and it is not),

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[14]In *Means,* the Court reviewed an equal protection claim. Here, any controversy over a racial animus requirement can be avoided by looking to the conspiracy to obstruct justice. *See* Proposed Second Amended Complaint at 70-73, ¶¶ 242-52 (A1381-1384).

there are no remedies available in the Tribe to exhaust in reviewing Business Committee decisions.[15] Thus, the federal court forum is the sole forum available to provide any relief to plaintiffs for the obstruction of justice perpetrated by the conspiracy. The law is plain in that circumstance that the district court has jurisdiction to proceed. *See Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes,* 623 F.2d 682, 685 (10th Cir. 1980), *cert. denied,* 449 U.S. 1118 (1981) ("There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy.") *Accord Krempel v. Prarie Island Indian Community,* 125 F.3d 621, 622-23 (8th Cir. 1997)(reversing dismissal on exhaustion grounds where Tribal Court did not yet exist and have jurisdiction over dispute).

As to the district court's decision that the Federal Defendants have

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[15]Tribal law expressly excludes any remedies for review of decisions of the Business Committee. As found by the Tribal Court in *Duncan v. Natchees,* slip op. No. CV-04-044 (Ute Tr. Ct. November 25, 2003), FAC Ex. 11; A254-62, Ute Ordinance No. 87-04 prohibits any review of decisions of the Business Committee. *See id.* at 3 ("Thus, [the Tribal] Court cannot delve into whether the Defendants' conduct violated Plaintiffs' rights under the Indian Civil Rights Act *or any other law.* Pursuant to Ordinance No. 87-04, jurisdiction to review these issues vests with the Business Committee, not with this Court. [Emphasis added]") Plaintiffs were confronted with a tribal ordinance that prohibited tribal review. The Tribal Court interpreted such ordinance in accordance with its plain terms and found it had no jurisdiction over the claims asserted.

some sort of immunity with respect to claims under 42 U.S.C. § 1985, it is erroneous under Tenth Circuit law. In *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926 (10th Cir. 1975), the court denied a motion to dismiss brought by federal officers, reasoning that "[f]ederal jurisdiction does extend to federal officials even in the absence of a consent when they have acted beyond their statutory authority or where they have acted in an unconstitutional manner." *Id.* at 930. The federal defendants' conduct in acting to further a conspiracy to obstruct justice is sufficiently beyond their statutory authority for the court to hold that a claim had been stated against them.

Finally, the district court held the motion to amend to be untimely. All of the facts necessary to support a claim for relief are alleged in the FAC, however, so any amendment could not be untimely insofar as the underlying factual allegations are concerned. Moreover, as shown above, the district court and the defendants were placed on notice no later than the Mem. Opp. Dismiss (Docket No. 53, A891-994)), that those factual allegations supported a section 1985(2) claim and that plaintiffs intended to seek amendment. No answer had been filed, no discovery had commenced and no deadline for amendments to pleadings had been entered. Therefore, it was an abuse of discretion to hold plaintiff's motion

to amend to be "untimely." Nor does the district court's statement that the "amendments appear to be an attempt to avoid both this Court's prior rulings and arguments raised by defendants[,]" Order, at 8 (Docket No. 87, A23-32)) support a denial of leave to amend. The only prior substantive ruling of the Court was in denying a motion for preliminary injunction against the Business Committee defendants. *See* Minute Entry, Docket No. 65 (A1187). Such ruling did not address any sufficiency of pleading issues. Nor can one find anywhere in the record any arguments raised by defendants that a section 1985 or section 1986 claim could not be stated, other than in response to the motion to amend, itself.

Moreover, the recitation of the course of proceedings above shows that between the complaint filing and the filing of motions to dismiss, most delay was caused by court-ordered extensions of time for defendants to respond. The district court set a hearing date of April 5, a date over which plaintiffs had no control. In the interim, plaintiffs moved for a temporary restraining order and appealed its denial. The case was not languishing. But for plaintiffs' early amendment, without leave to correct technical errors in its original complaint, the *timing* would have conformed with what Congress would have allowed without leave from the Court, because no defendant had yet answered. Rule 15 prevented amendment as of right

only because of the prior amendment, not because it would be untimely in the procedural posture of the case. No discovery had been allowed to commence, no schedule was in place and plaintiffs had never previously sought leave from the district court to amend. All of the cases cited by the district court to support its ruling of untimeliness involved very remarkably different procedural postures, either as to the non-filing of a written motion or the significant development of the case through litigation, not cases where a written motion for leave to amend was filed before hearing on the very initial motions to dismiss.[16]

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[16]*Sipp v. Unumprovident Corp.,* 107 Fed. Appx. 867 (10th Cir. 2004), cited by the district court, is inapposite because leave to amend was sought only after the deadline for amendments. *See* 107 Fed. Appx. at 877. No deadline had yet been set in this case. *Viernow v. Euripedes Dev. Corp.,* 157 F.3d 785 (10th Cir. 1998), is also inapposite both due to a vast difference in the stage of proceedings, that had been fully litigated for over eighteen months, and in the filing of a motion to amend only after summary judgment had been orally granted. *Id.* at 799-800. *Pallottino v. City of Rio Rancho*, 31 F.3d 1023 (10th Cir. 1994), is again inapposite, because there, only after a first court-granted amendment, substantial case proceedings and progress and the hearing and decision on summary judgment did plaintiff file another motion to amend. *See id.* at 1025. *Platte Valley Wyo-Braska Beet Growers Ass'n v. Imperial Sugar Co.,* 100 Fed. Appx. 717, 2004 WL 1229575 (10th Cir. 2004) is inapposite not only because it expressly prohibits its use as precedent, but also because of the absence of any written motion to amend, the making of the motion only at the end of oral argument on the motion to dismiss, the absence of a proposed amended pleading, and the violation of local rules concerning motions to amend. *Id* at 720, **2 ("The District Court certainly acted within its discretion by refusing to consider a motion for leave to amend that did not comply with its own local rules.") None of the circumstances of the

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Under the circumstances, there is no justification for denial of leave to amend and the district court abused its discretion, which the written motion, filed pre-hearing, timely invoked.

VI. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT IT HELD NO SUBJECT MATTER JURISDICTION OVER ANY PORTION OF THE FAC.

Finding the "thrust of plaintiffs' claims [to be] rooted in tribal law and not federal law" Order at 2, the district court dismissed all eight causes of action in the FAC. *See* Order at 8; A31. Having characterized this case as an "internal leadership dispute" (Order at 3, A36) the district court erroneously overlooked the numerous substantive violations of federal law and the complicit actions of non-members of the Tribe pleaded in the FAC. The FAC pleads significant violations of federal law by tribal members and non-members alike, and federal court is the proper, and in some respects, only, forum through which relief may be granted. The district court erred in dismissing the FAC as merely an intra-tribal dispute. Counts 1 and 2 of the FAC allege that the Tribal Defendants acted beyond their authority in various respects, including enacting Ordinances 03-002 and 03-004. *See*

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[16](...continued)
foregoing cases are remotely similar to this case, in which a written motion to amend accompanied by a proposed amended pleading was filed before hearing, before any deadline for amendment and before the commencement of any discovery.

FAC at 26-36 ¶¶ 96-131(A145-55). Counts 3 - 7 allege causes of action arising under federal law against federal officials for their failure to comply with statutory duties under applicable federal law. *See* FAC at 36-70 ¶¶ 132-243 (A155-89). Count 8 alleges that the Tribal Defendants, the Federal Defendants and the non-member defendants conspired to deprive plaintiffs of their civil rights under federal law. *See* FAC at 70-74 ¶¶ 244-58 (A189-93). The relief requested includes *inter alia*, declaratory and injunctive relief under Counts 1 through 6, and monetary relief under Counts 5, 7 and 8. *See* FAC at 74-83 (A193-202).

As will be discussed below, the actions of the Federal Defendants, standing alone, form the basis of an independent federal cause of action. The requested relief against the Federal Defendants may only be awarded by a federal court and it was error for the district court to refuse to exercise jurisdiction. The effect of the district court's dismissal was to deprive the Plaintiffs of a forum to present their claims, claims they clearly have standing to assert.[17]

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[17]IRA § 476(d)(2) is meant to have an expansive reading. In *Thomas v. United States,* 189 F.3d 662 (8th Cir. 1999), the court not only upheld a tribal member's standing to enforce the provisions of § 476 but, in rejecting a claim that the tribe's governing body was an indispensable party, opined that "to the extent that anyone has a special legal status in regard to this, it is plaintiff." *Id.* at 669.

A. The Existence of a Tribal Dispute Does Not Convert this Federal Action Into an Intra-Tribal Dispute Nor Does it Preclude Federal Court Review.

The district court, erroneously viewing the entire case as an "intra-tribal" dispute, incorrectly washed all claims and parties out the door for the stated reason that the court "cannot reach plaintiffs' claims without first interpreting tribal law over which it lacks jurisdiction." Order, at 2 (A25).[18] But in fact neither the existence of a tribal dispute nor the fact that the Ute Constitution and ordinances are relevant to some of the claims asserted deprives the federal court of jurisdiction.

Federal courts are not divested of otherwise-present subject matter jurisdiction over a federal claim whenever some part of the case involves a tribal dispute. Indeed, it is the express role of the federal judiciary to, in the first instance, "determine under [28 U.S.C.] § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 853 (1985). The FAC pleads claims based on federal law and against federal officials and private parties, not just members of the Business Committee. No relief is sought beyond that which federal law provides in a federal forum.

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[18]Plaintiffs recognize that federal courts do not have jurisdiction to adjudicate purely intratribal disputes. *See Kaw Nation v. Lujan,* 387 F.3d 1139 (10th Cir. 2004).

Even if the actions of the Business Committee in expelling Wopsock and Duncan were entirely legal under both tribal and federal law (and they were not) that would not alter the analysis of the claims for retaliation against Wopsock and Duncan for filing a federal lawsuit. This is true because, even if the IRA does not prevent the co-conspirators from expelling Wopsock and Duncan from their elected positions (which it does), or from preventing their re-nomination and election (which it also does), the "familiar doctrine that lawful acts may become unlawful when taken in concert[,]" is applicable here. *United States v. United States Gypsum Co.*, 333 U.S. 364, 401 (1948).[19]

The doctrine was illustrated in *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), stating, "[t]he illegality consists, not in the separate action of each, but in the conspiracy and combination of all . . .." *Id.* at 312. While the "illegality" in that case was a combination in restraint of trade, there is no rational way to distinguish such from the "illegality" of each conspirator acting in furtherance of the illegal conspiracy here. Thus, when the actions of the tribal defendants are undertaken at the behest or encouragement of Jurrius, Mills and Nordwall, who desire retaliation

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[19]The Tribe is thus not an indispensable party and, moreover, the Tribal defendants are liable for retaliation, even if their acts were lawful under Tribal law, so long as their motivation was to retaliate to assist the conspiracy.

against Wopsock and Duncan, the illegal conspiracy exists so long as the object of retaliation is carried out, even if the means of retaliation would otherwise be lawful in the absence of the illegal conspiracy. "Because a criminal conspiracy by its nature is usually shrouded in a further conspiracy of silence, the common plan or purpose must often be, and may legitimately be, proved by circumstantial evidence." *United States v. Robertson,* 45 F.3d 1423, 1442 (10th Cir. 1995). "We have often recognized that the secretive nature of a criminal conspiracy means that direct proof is seldom available and the required unlawful agreement may be inferred from circumstantial evidence." *United States v. Hampton,* 786 F.2d 977, 979 (10th Cir. 1986). Plaintiffs are entitled to discover all of the circumstantial evidence to prove the conspiracy, although many facts giving rise to the inference have already been pleaded in the FAC.

The presence of federal causes of action and non-tribal member defendants not only distinguishes this case from being merely an intra-tribal dispute, but it prevents it from being treated as such. In fact, the cases cited by the district court in declining jurisdiction actually support federal court jurisdiction, even if an intra-tribal dispute is part of the case. *Goodface v. Grassrope,* 708 F.2d 335 (8th Cir. 1983), cited in the Order, is one such example supporting federal court jurisdiction over the federal

claims in this case.

> If the only parties to this action were the 1980 and 1982 councils and the only question presented was one of interpreting the tribal constitution and bylaws, we doubt whether a federal court would have jurisdiction. However, the 1982 council named various BIA officials as defendants in addition to the 1980 council members. We hold that the district court did have jurisdiction under 28 U.S.C. § 1331 to review, pursuant to the APA, the action taken by the BIA in refusing to recognize either tribal council. Although the APA may not be used as an independent grant of subject matter jurisdiction to review agency actions, the United States Supreme Court stated in *Califano v. Sanders,* 430 U.S. 99, 105, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977), that 28 U.S.C. § 1331 confers general jurisdiction on federal courts to review federal agency actions "subject only to preclusion-of-review statutes." We know of no statute precluding judicial review of BIA actions, and therefore we determine that the district court could review the agency action under the arbitrary or capricious standard enunciated in 5 U.S.C. § 706(2)(A).

Goodface, at 338. *See also In re Sac & Fox Tribe of the Miss. in Iowa / Meskwaki Casino Litig.,* 340 F.3d 749, 761, 763 (8th Cir. 2003) (district court had granted injunctive relief in matter involving competing tribal governments and circuit court held that federal claims should have been addressed by district court).

In the present case, the Federal Defendants are BIA officials whose actions are subject to injunctive and declaratory relief, and review under the Administrative Procedures Act, 5 U.S.C. § 501, *et seq.* The actions of

the Federal Defendants, in concert with the Tribal and Non-Tribal Defendants, additionally involve federal questions under 42 U.S.C. § 1985. These federal causes of action, which involved non-member defendants, are clearly within the district court's jurisdiction.

Smith v. Babbitt, 100 F.3d 556 (10th Cir. 1996), relied on in the Order, involved a challenge to an ordinance that altered the membership requirements of the Ute Constitution. *Id.* at 558-59. The ordinance, however, was approved by the BIA. *Id.* at 559. The significant distinction between *Smith* and this case is that the ordinance in *Smith* was approved by the BIA and, implicitly, complied with federal law in amending the Tribal Constitutional membership requirements. This case involves a conspiracy of tribal, non-tribal, and federal participants and the Federal Defendants' refusal to act in compliance with federal law. *See* FAC, *passim;* A116-204. It is notable that prior to the ultimate resolution reported in the cited *Smith* decision, a prior appellate panel dismissed the tribal defendants but retained jurisdiction of the claims against the federal defendants: "the appeal of the denial of injunctive relief remained pending as to the federal defendants." *Smith v. Babbitt,* 100 F.3d at 558.

B. The District Court Had Jurisdiction to Consider the Federal Claims Against the Federal Defendants Who Were Required to Disapprove Ordinance 03-002 Absent a Secretarial Election.

Federal Defendant Mills is the Superintendent of the Uintah and Ouray Agency, BIA. Federal Defendant Nordwall was the Director, Western Regional Office, BIA. These Federal Defendants operate under federal law and are subject to federal court jurisdiction. The BIA offices held by the Federal Defendants impose upon them statutory duties of oversight and compliance that they are not free to ignore. The Federal Defendants' general authority and responsibility to review tribal law was discussed in *Ransom v. Babbitt,* 69 F. Supp. 2d 141 (D.D.C. 1999), stating:

> In deciding the Tribal disputes that came to their attention, the BIA and the IBIA had the authority to review Tribal procedures to ensure that the Tribal Court rulings on which they relied were reasonable. In *United Keetoowah Band of Cherokee Indians,* the IBIA made clear not only its authority, but also its "responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe." *See* 22 IBIA at 80. The IBIA also retains the ability to review tribal political procedures when it is forced to recognize a person or an entity as a tribe's legitimate representative in relations with the United States. *See Pueblo of Zuni Concerned Community Citizens Comm.,* 14 IBIA 30 at 41-42. Although case law limits the extent to which the IBIA may decide internal tribal issues, it is clear that it must, at a minimum, determine whether tribal interpretations of their own laws are reasonable.

Ransom, 69 F. Supp.2d at 151-152.

Federal subject matter jurisdiction to review the legitimacy of tribal ordinances is an established matter of law. *See Tenneco Oil Co. v. Sac and Fox Tribe,* 725 F.2d 572, 575 (10th Cir. 1984) (directing review of a tribal ordinance's effect on federal oil and gas lease). The federal duty to review tribal ordinances to see if they actually effect a constitutional amendment was directly stated in *Williamson-Edwards v. Babbitt,* slip op., No. 2:96-CV-294, 1998 U.S. Dist. LEXIS 9241 (D. Mich. May 22, 1998) A1578-85: "Because not only the original Constitution but any amendments thereto must be approved by the Secretary, *see* 25 U.S.C. § 476(a), the resolutions must be reviewed by the Secretary if they effect a constitutional amendment even if they purport to be resolutions passed to protect the general welfare of the Community." *Id.*, 1998 U.S. Dist. LEXIS 9241 at *16-*17 (A1582).

As pleaded in the FAC, federal defendant Mills approved Ordinance 03-002 on October 31, 2003. FAC at 21, 36 ¶¶ 72, 134 (A140, A155). Later, following the filing of an appeal to the IBIA, Nordwall decided that Mills' approval was not necessary. FAC at 36- 387 ¶¶ 136-41 (A156-58). Nordwall's actions were contrary to the legal advice rendered by a solicitor whose advice Nordwall sought. *Id.* (A156-58). The federal defendants "must, at a minimum, determine whether or not tribal interpretations of their

own laws are reasonable." *Ransom,* 69 F. Supp.2d at 152. The Federal Defendants refused to disapprove Ordinance 03-002, despite its known defects, and refused to disapprove it in order to further the improper objectives of the Non-Federal and Tribal defendants. This unwavering and continuing refusal to act is in violation of the Federal Defendants' duties and is final for purposes of review under the APA. *See* 5 U.S.C. § 551(13) (defining failure to act as agency action).

In 1936, the Tribe adopted the Ute Constitution under the provisions of the IRA, codified in relevant part at 25 U.S.C. § 476. *See* FAC at 27-29 ¶¶ 97-107 & Ex. 1 (A146-48 and A205-18). "To amend its constitution, an [IRA] tribe must follow the procedures set out in the [IRA] and its associated regulations." *Shakopee Mdewakanton Sioux Community v. Babbitt*, 107 F.3d 667, 669 (8th Cir. 1997). The IRA provides that a constitutional amendment is effective only if ratified by a majority vote of the adult members and it is approved by the Secretary as a Secretarial Election. *See* 25 U.S.C. § 476(a) and (d). The Federal Defendants have a legal duty to ensure compliance with the Secretarial Election requirement, and to disapprove an ordinance if the Tribe attempts to amend its constitution without following the Secretarial Election procedures. *See* FAC at 47-50 ¶¶ 165-177 (A166-69). *See Williamson-Edwards*, 1998 U.S.

Dist. LEXIS 9241, pp. 16-17 A1582; *Ransom*, 69 F. Supp.2d at 151-152.

The Federal Defendants refused to execute their statutory duties. Even the most cursory review of Ordinance 03-002 (A249-51) reveals that it effects a substantive amendment of the Ute Constitution. A205-18. UTE CONSTITUTION, ART. IV, § 2, plainly states the criteria for serving on the Business Committee: "Any legal voter is eligible to serve as a member of the Business Committee." A206. Legal voters are defined to be members of the Tribe, over the age of twenty-one, who have lived on the reservation for one year preceding the election. UTE CONSTITUTION, ART. IV, § 1. A206. Plaintiffs Wopsock and Duncan met the substantive requirements in the Ute Constitution and were qualified to serve on the Business Committee. FAC at 1-2, 46 ¶¶ 3-4, 163(e) & Ex. 1(Ute Constitution) (A120-21, A165 and A205-18.)

However, after the ostensible removal of plaintiffs Wopsock and Duncan from the Business Committee, the Tribal Defendants quickly adopted Ordinance 03-002 to impose a new substantive requirement, being that a prospective committee member could not have been removed within the last four years. *See* FAC at 20, ¶ 70 (A56). This new substantive amendment was enacted in furtherance of the objects of the conspiracy and used for the selective purpose of keeping plaintiffs Wopsock and

Duncan from being reelected. The Federal Defendants' refusal to perform their duty and disprove Ordinance 03-002 furthered the conspiracy and deprived plaintiffs Wopsock and Duncan of their office, and their constituents of their representation.

Plaintiffs Wopsock and Duncan are persons aggrieved by agency action authorized to seek relief in federal court. *See* 5 U.S.C. §§ 702 and 706. The IRA provides a federal cause of action in 25 U.S.C. § 476(d)(2), stating that "actions to enforce the [Secretarial Election] provisions of this section may be brought in the appropriate Federal district court." Plaintiffs have done so.

Nevertheless, the district court found that since the Tribal Defendants did not request a Secretarial Election, IRA § 476 was not triggered and the entire matter was "tribal in nature and beyond the scope of the IRA." Order at 6 (A29). The district court's decision effectively authorizes the Tribal Defendants to decide whether and how to apply the IRA. Interpretation and enforcement of the IRA is a federal responsibility; specifically, it is the duty of the Federal Defendants.

The district court misapplied the law in rejecting this federal responsibility and the result is demonstrably erroneous. If the Tribe adopts an ordinance stating that only members of the Uintah Band can be elected,

and the Tribe does not request a Secretarial Election, the district court's decision would preclude federal court review. The Tribal Defendants are subject to the IRA and its enforcement is a federal responsibility.[20] The essential point that the District court missed was that there is no need for the Tribe to call for a Secretarial Election in order for the United States government to refuse to recognize as legitimate, for purposes of government to government relations, a business committee whose constitution violates the IRA. In other words, if a business committee is constituted by virtue of an amendment to the Ute Tribe Constitution, when a Secretarial Election has not been called, the United States government cannot recognize the legitimacy of that business committee.

The Federal Defendants' complicity in implementing the Ordinances effectively amended the Ute Constitution and changed the outcome of the election. The Federal Defendants' refusal to comply with their statutory duties raises reviewable questions regarding the legitimacy of the current Business Committee. *See* Facsimile Transmission dated January 13, 2004, from William Robert McConkie, Office of the Solicitor for the United

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[20]Tribal sovereignty does not displace federal law or preclude federal court review of the Federal Defendants' refusal to disapprove the ordinance. *See Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383, 386 (10th Cir. 1982) (finding BIA Superintendent's actions to be reviewable in federal court, but ultimately declining to order action committed to agency discretion).

States Department of the Interior, to Wayne Nordwall, with attachment (FAC Ex. 16 at page 12 of 12 of attachment, A302)), "I recommend that the Tribal Business Committee, as constituted after the replacements for the two expelled Business Committee members took office, not be recognized as the authorized Tribal Business Committee for any government-to-government relationship with the Department of the Interior.") A290-302. "The BIA has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe." *Kaw Nation v. Norton*, 405 F.3d 1317, 1325 (Fed. Cir. 2005) *citing Ransom,* 69 F. Supp.2d at 150 (quotations and emphasis omitted). The district court has jurisdiction to determine whether the Federal Defendants breached their duties in refusing to act, and the district court's summary judgment should be reversed.

C. The Federal Defendants Owed a Similar Duty to Disapprove Ordinance 03-004.

The Federal Defendants similarly refused to comply with their duty to disapprove Ordinance 03-004. FAC at 40-44 ¶¶ 148-159 (A159-63). Ordinance 03-004 amended the Ute Constitution's substantive requirements for recall petitions, but the Federal Defendants refused to require compliance with the Secretarial Election procedures. Recall petitions are governed by the Ute Constitution, art. V, § 3, which provides:

> Upon receipt of a petition signed by one-third of the eligible voters in any band calling for the recall of any member of the Committee representing said band, it shall be the duty of the Committee to call an election on such recall petition. No member may be recalled in any such election unless at least thirty percent of the legal voters of the band which he represents shall vote at such election.

FAC Ex. 1 at 3 (A207). In October of 2003, upon learning of the Tribal Defendants' efforts to remove plaintiffs Wopsock and Duncan from office, plaintiff Kochamp began to circulate a recall petition directed to tribal defendant Natchees. FAC at 30-36 ¶¶ 111-131 (A149-55). The Tribal Defendants thereafter effected an "emergency" adoption of Ordinance 03-004 on October 28, 2003. *See id.* Ordinance 03-004 immediately implemented a substantive amendment to Ute Constitution, art. V § 3, to additionally require, *inter alia*, posting a statement of the cause and constitutional basis for the petition, to post notice of the recall effort 20 days in advance of obtaining signatures, and to register notice of the effort with the secretary of the Business Committee. *See id.* A149-55.

On or about November 5, 2003, the recall petition was presented to the Tribal Defendants in compliance with Ute Constitution, art. V, § 3. However, Ordinance 03-004 was apparently used as the basis for rejecting the petition. Despite the constitutional requirement of holding a recall election, the Tribal Defendants have refused to accept the petition or hold

the mandatory recall election.

The Federal Defendants were advised in 1990 by the Regional Solicitor that a recall petition did not have to state any "cause" and that a "cause" requirement would require constitutional amendment. FAC at 34 ¶ 123 & Ex. 14 (A153 and A275-87). Despite this advice, Mills approved the Ordinance the day after receiving it. FAC at 41 ¶ 153 (A161). Nordwall later stated approval was not required. FAC at 42 ¶ 154 & Ex. 18 (A161 and A305-06).

Once again, in violation of their statutory duties and against known legal advice from a solicitor, the Federal Defendants refused to disapprove an ordinance that effected an amendment of the Ute Constitution. Plaintiffs sued under federal law (25 U.S.C. § 476(d)(2) and 5 U.S.C. § 706) to seek redress of a statutory violation, and the district court erred in granting summary judgment without considering the merits of Plaintiffs' claims.

The Federal Defendants' position that the district court has no jurisdiction over actions to enter affirmative injunctions that they perform their federally-mandated duties is remarkable. As recently as this year, the Tenth Circuit found to the contrary. *See Simmat v. United States Bureau of Prisons,* 413 F.3d 1225, 1238 (10th Cir. 2005). While they may argue

that any relief which the IBIA could afford, if any, is not ripe, there is certainly no issue of sovereign immunity. In fact, plaintiffs' counsel has found no case, statute or regulation suggesting that the IBIA has jurisdiction to adjudicate claims of conspiracies to obstruct justice brought under the Civil Rights Act of 1964 and, in any event, the IBIA's failure to issue a ruling timely has defeated the efficacy of any relief it might award.

D. The Tribal Defendants Have No Immunity When Acting Beyond Their Constitutional Authority.

Indian tribal officials enjoy qualified sovereign immunity from suit. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978). This qualified immunity evaporates when tribal officials act beyond the scope of the authority the tribe may bestow upon them. *See id. See also Tenneco Oil Co.,* 725 F.2d at 574 ("If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit."); *Smith v. Babbitt,* 875 F. Supp. at 1363 (Sovereign immunity "does not bar actions for prospective relief against individual tribal officials who have allegedly acted outside the scope of their permissible authority." (citation omitted)).

Specifically, sovereign immunity does not preclude actions for declaratory or injunctive relief against tribal officials. *Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes,* 261 F.3d 567, 570 (5th Cir. 2001)

("[T]ribal officials are not immune from suits for declaratory and injunctive relief.").

> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in Kiowa undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young,* 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity.

TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676, 680 (5th Cir. 1999). Indeed, the Tenth Circuit has similarly held that there is no immunity for actions beyond the power of the sovereign. *Tenneco Oil Co.,* 725 F.2d at 574 (citations and quotations in original).

The district court, in dismissing, erroneously held the Tribal Defendants to be immune. Order, p 5 (A28). Granting complete immunity to the Tribal Defendants, and refusing to assume federal jurisdiction, essentially granted the Tribal Defendants the unrestricted right to retaliate against federal court litigants for filing suit, something that 42 U.S.C. § 1985 prohibits, and to ignore the IRA, with no federal court review. The district court's decision should be reversed.

CONCLUSION

A conspiracy to obstruct justice has been pleaded, in violation of federal law. A part of the conspiracy required that the members of the Business Committee act outside the scope of their constitutional authority. Another portion of the conspiracy required that federal officials abandon their duties imposed by federal law. The Tribal Court has no jurisdiction over any portion of the dispute. In reality, only a United States District Court is in a position to grant relief to the plaintiffs. The district court's order of dismissal must be reversed and its order denying amendment must be reversed.

STATEMENT REGARDING ORAL ARGUMENT

The remarkable proposition of the District Court, that the federal courts have no jurisdiction to entertain suits alleging obstruction of justice in federal courts, simply because some of the conspirators are members of an Indian Tribe's governing body is a dangerous precedent that grants license to persons seeking to avoid liability for such conspiracies, if only they can find an agreeable conspirator who might otherwise be immune. Oral argument would be helpful to sort out the complexities of the issues

and is, therefore, requested.

RESPECTFULLY SUBMITTED this 29th day of January, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of the above and foregoing Appellants' Opening Brief were mailed, postage prepaid, this 29th day of January, 2007, to the following:

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

RONALD J. WOPSOCK, LUKE J. DUNCAN and CASSANDRA KOCHAMP,

Plaintiffs,

v.

MILLICENT MAXINE NATCHEES, in her individual capacity and in her official capacity as Chairperson of the Tribal Business Committee of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation; T. SMILEY ARROWCHIS, in his individual capacity and in his official capacity as Vice-Chairman of the Tribal Business Committee; O. RONALD MCCOOK, SR. and RICHARD JENKS, JR., in their individual capacities and in their official capacities as members of the Tribal Business Committee; GALE A. NORTON, in her official capacity as the Secretary of the Interior, United States Department of the Interior; JAMES CASON, in his official capacity as Acting Assistant Secretary – Indian Affairs, United States Department of the Interior; CHESTER D. MILLS, in his individual capacity and in his official capacity as the Superintendent, Uintah and Ouray Agency, Bureau of Indian Affairs; WAYNE NORDWALL, in his individual capacity; BRIAN BOWKER, in his official capacity as the Acting Director, Western Regional Office, Bureau of Indian Affairs; JOHN P. JURRIUS, in his individual capacity; SUSAN HAMMER, in her individual capacity; and JOHN DOES 1-10, in their individual and official capacities, as the facts and law so warrant,

Defendants.

Civil No. 2:04-CV-00675-TS

ORDER GRANTING MOTIONS TO DISMISS, GRANTING MOTION FOR SUMMARY JUDGMENT, AND DENYING MOTION TO AMEND COMPLAINT

Judge Ted Stewart

This matter is before the Court on tribal defendants' and federal defendants' motions to dismiss, federal defendants' motion for summary judgment, and plaintiffs' motion to amend their first amended complaint. The Court rules as follows:

Defendants challenge all eight of the claims plaintiffs alleged in the first amended complaint on jurisdictional grounds. Defendants argue that each of these causes of action fail because this Court lacks jurisdiction to entertain an internal dispute between tribal members. In a recent preliminary injunction hearing, the Court heard arguments similar if not identical to those currently pending before the Court. Previously, the Court found that plaintiffs were not likely to prevail on the merits due to the Court's finding that this dispute boils down to an intra-tribal dispute that implicates the tribe's sovereignty, and further found that plaintiffs failed to exhaust their tribal remedies.

The theory of liability, however, currently before the Court is broader than the theory of liability upon which plaintiffs brought their motion for preliminary injunction. Yet, the Court finds that this added breadth does not alter the Court's previous finding that what is at issue is an intra-tribal dispute that should be resolved by the Ute Tribe and not this federal Court.

In Counts 1 and 2 of plaintiffs' first amended complaint, plaintiffs argue that Ute tribal defendants violated Section 476 of the Indian Reorganization Act ("IRA") in enacting the Ute tribal ordinances 03-002 and 03-004. Counts 3 and 4 allege the federal defendants violated the IRA by failing to disapprove of the two ordinances just cited. Count 5 alleges that federal defendants breached duties established by the Indian Civil Rights Act, the IRA, and the Administrative Procedure Act by failing to properly administer the duties allegedly established by the Indian Civil Rights Act and the IRA, particularly federal defendants allowed to go

unchecked the removal of plaintiffs Wopsock and Duncan and the passage of the two ordinances. Count 6 alleges that defendants Mills and Nordwall had improper conflict of interests and breached their fiduciary duties to disapprove the two ordinances. Count 7 alleges federal defendants violated several of plaintiffs' constitutional rights by failing to disapprove the ordinances. And, finally, the eighth count alleged all defendants conspired to violate plaintiffs Wopsock's and Duncan's civil rights in facilitating the expulsion of these plaintiffs and the passage of the two ordinances.

Lack of Jurisdiction

The major thrust of plaintiffs' arguments regarding jurisdiction is that the actions that resulted in the expulsion of plaintiffs Wopsock and Duncan and the passage of Ute tribal Ordinances 03-002 and 03-004 is a matter of federal law and not Ute tribal law. The Court cannot agree. The thrust of plaintiffs' claims in the first amended complaint is rooted in Ute tribal law and not federal law. At the heart of plaintiffs' allegation is a plea for this Court to resolve a dispute between tribal members about tribal government. In many respects, the relief sought would in effect invalidate tribal ordinances by requiring the Court to interpret the Tribe's constitution and ordinances. In Re Sac & Fox Tribe, 340 F.3d 749, 763 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws ... lies with Indian tribes and not in the district courts"); Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996) (although plaintiffs alleged Indian Reorganization Act and other violations, "we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court"). The Court cannot reach plaintiffs' claims without first interpreting tribal law over which it lacks jurisdiction. This action seems to clearly

be a dispute between tribal members over matters of tribal law and is at the heart of tribal sovereignty.

The Court recognizes and has great respect for the Tribe's sovereignty. As the Court has said before in its ruling on plaintiffs' motion for preliminary injunction, if sovereignty means anything at all, it includes the right for the Tribe to resolve an internal leadership dispute. This Court finds, as other courts have found, that "substantial doubt exists that federal courts can intervene under any circumstance to determine the rights of the contestants in a tribal election dispute." Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983). Furthermore, "a dispute over the meaning of tribal law does not arise under the Constitution, laws or treaties of the United States, as required by 28 U.S.C §§ 1331 and 1362. This is the essential point of opinions holding that a federal court has no jurisdiction over an intra-tribal dispute." Kaw Nation v. Lujan, 378 F.3d 1139, 1143 (10th Cir. 2004).

Plaintiffs have referred to and relied upon Williamson-Edwards v. Babbitt, 1998 U.S. Dist. Lexis 9241 (W.D. Mich. 1998), discussed here today and mentioned in all the memoranda before the Court. The Court finds that case, first of all, to be not controlling and, second, easily distinguishable. It is not controlling because it is an unpublished case from the Western District of Michigan. It is easily distinguishable because, among other things, (i) it was an appeal from final agency action whereas this case is not, (ii) plaintiffs here do not seek the narrowly drawn relief sought in Williamson, (iii) plaintiffs here acknowledge the tribal nature of their claim, have named tribal members as defendants, and acknowledge the need to exhaust tribal remedies, and (iv) the Williamson court failed to address the provision of Section 476 of the IRA specifying

that the Secretary's duties under that Act are triggered only upon an official tribal request for a Secretarial election. See 25 U.S.C. 476(c).

Based on well-established law concerning non-interference by federal courts with intra-tribal disputes, and upon the finding that plaintiffs seek relief well beyond this Court's jurisdiction, the Court grants defendants' motion to dismiss as to Counts 1 and 2 of plaintiffs' amended complaint, federal defendants' motion to dismiss as to Count 7, and federal defendants' motion for summary judgment as to Counts 3, 4, 5, and 6. The claims in Count 6 are also dismissed for mootness. The dismissal of Count 7, the "Bivens" claim, is also based on the presence in this case of special factors counseling against the creation or recognition of a judicial remedy for the wrong claimed, given both the non-interference with intra-tribal disputes principle referred to above and the unique and comprehensive federal legislation concerning federal-tribal relationships. See, e.g., Bush v. Lucas, 462 U.S. 367 (1983). To the extent that plaintiffs' eighth cause of action rests on the allegations pertaining to defendants' conduct relating to the passage of ordinances 03-002 and 03-004, the Court also dismisses this claim for lack of jurisdiction for the same reasons noted above, as sought by all defendants against whom this claim was asserted. However, construing the eighth cause of action broadly, the Court finds that it is not appropriate to dismiss this count solely on this jurisdictional justification.

Civil Rights Claim

As to the federal defendants' motion to dismiss and tribal defendants' motion to dismiss what remains as plaintiffs' eighth count, the Court rules as follows: The Court considers the tribal defendants' motion to dismiss and BIA's motion to dismiss under Rule 12(b)(6). The Court construes the amended complaint in the light most favorable to plaintiffs. In doing so, however,

the Court fails to find any allegation that any harm suffered by plaintiffs was motivated by invidious, class-based animus. As such, plaintiffs fail to plead all of the elements required under clearly established Tenth Circuit law. Peoples v. Gilman, 109 Fed. Appx. 381, 2004 WL 2110719 (10th Cir. 2004), dismissing a Section 1985(3) claim for lack of class-based invidiously discriminatory bias, as well as the case of Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993). Late in the briefing plaintiffs alleged that they were part of a political faction. Plaintiffs' political faction claim has, however, been rejected by the Tenth Circuit. Brown v. Reardon, 770 F.2d 896, 905-06 (10th Cir. 985). The Court, therefore, also dismisses Count 8 in its entirety.

Tribal Sovereign Immunity

The Court would further note that it is persuaded as to Counts 1 and 2, and Count 8 as to the tribal defendants, the Court dismisses the counts because they have not waived their sovereign immunity and plaintiffs are therefore barred from pursuing those claims. That plaintiffs' claims are barred on sovereign immunity grounds is consistent with and supported by this Court's decision in Kenai Oil and Gas v. Department of Interior, 522 F. Supp 521, 531 (D. Utah 1981), aff'd, 671 F.2d 383 (10th Cir. 1982).

Indian Reorganization Act

As to Counts 3, 4, 5 in part, and 6 in part, as to all federal defendants, and for purposes of this ruling, Counts 1 and 2 as to the tribal defendants, the Court notes that plaintiffs purport to bring claims under the Indian Reorganization Act, particularly 25 U.S.C. § 476. The IRA is not triggered by the mere fact a tribal election is being held or a purported change in the tribal constitution is alleged by individual tribal members. The Court notes 25 C.F.R. § 81.1(s) which distinguishes between Secretarial and tribal elections. The IRA's Section 476 election and

review process relied upon by plaintiffs is triggered by an appropriate request by a tribe for federal involvement. Split Family Support Group v. Moran, 232 F.Supp.2d 1133, 1136 (D. Mont. 2002); 25 U.S.C. § 476(c)(1)(B) (requiring "tribal request for election to ratify an amendment to the constitution"); and Note to § 476 (defining "tribal request" as a "tribal resolution"). Plaintiffs have failed to allege and have failed to show any evidence that suggests that the Tribe made such a request. As such, the Court finds that the IRA has not been triggered and that federal jurisdiction on the basis of these claims is absent. Without such a request from the Tribe, these elections are tribal in nature and beyond the scope of the IRA.

The Court further notes that the federal defendants have not waived their sovereign immunity and consented to suit under the IRA in such circumstances. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1463 (10th Cir. 1989) (federal government may not be sued without its consent). Neither does the IRA impose upon those defendants the affirmative duties claimed by the plaintiffs. Instead, Sections 476(c) and (d) require the Secretary to perform certain limited duties set forth therein only after a tribal request for a Secretarial election has been made.

Exhaustion of Remedies

Plaintiffs' claims against tribal defendants are barred because plaintiffs failed to exhaust their tribal remedies. The Court relies on United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996) to support plaintiffs' obligation to exhaust tribal remedies. To exhaust tribal remedies, plaintiffs were required to challenge the ordinances at issue in tribal court and then pursue an appeal of any adverse decision in tribal trial court through the tribal appellate court. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987). Plaintiffs challenged ordinance 03-002 in tribal court but failed to appeal to tribal appellate court. Dismissal is appropriate in those circumstances. Davis v.

Mille Lacs Band of Chippewa Indians, 193 F.3d 990, 991, 992 (8th Cir. 1999). Plaintiffs did not challenge ordinance 03-004 in tribal court and, therefore, did not exhaust tribal remedies.

Also, as the Plaintiffs are still pursuing administrative claims before the Interior Board of Indian Appeals (IBIA) on many of the same claims asserted here, Plaintiffs have not yet exhausted their federal remedies nor obtained final agency action, as required by 5 U.S.C. § 704 for judicial review of any agency action under any Administrative Procedure Act (APA) claim that may still remain in the First Amended Complaint. As the APA supplies the only waiver of federal sovereign immunity possibly applicable here, this failure to exhaust further bars counts 3-6 of the First Amended Complaint alleged against the federal defendants.

Lack of Federal Duty

Furthermore, plaintiffs point to no aspect of tribal or federal law that requires the federal government to act but rather attempts to extend the law to create such duties. The Court finds unpersuasive and distinguishable the IBIA opinions cited by plaintiffs on this point. However, even assuming there were an affirmative duty for the federal government to act, the Ute Tribe provides a tribal forum for resolving such disputes. Consequently, the federal defendants have "no authority to take action contrary to the tribal resolution of such disputes." Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1465-66 (10th Cir. 1989).

Plaintiffs' Proposed Second Amended Complaint

Virtually contemporaneously with this Court's hearing on the motions to dismiss and for summary judgment, plaintiffs moved on April 4, 2005, to file a second amended complaint. Having earlier unilaterally amended their complaint in this action, plaintiffs now require court

approval for any further amendment absent consent of defendants, which consent has not been given. Fed. R. Civ. P. 15(a). The Court denies plaintiffs' motion for leave to amend.

The facts and claims sought to be asserted by plaintiffs in their second amended complaint were known to plaintiffs when they filed their earlier complaints. Denial of leave to amend is appropriate in those circumstances. Sipp v. Unumprovident Corp., 107 Fed. Appx. 867, 2004 WL 1859935 (10th Cir. 2004). Plaintiffs' amendments appear to be an attempt to avoid both this Court's prior rulings and arguments raised by defendants. Again, those are not appropriate reasons for amending a complaint. Viernow v. Euripedes Development Corp., 157 F.3d 785, 799-800 (10th Cir. 1998). Plaintiffs' motion is untimely, particularly when the new claims are not based on new evidence and there is no explanation for why plaintiffs waited until the last minute and after extensive briefing to pursue an amended complaint. Pallottino v. City of Rio Ranch, 31 F.3d 1023, 1027 (10th Cir. 1994); Platte Valley Wyo-Braska Beet Growers Assoc. v. Imperial Sugar Company, 100 Fed. Appx. 717, 2004 WL 1229575 (10th Cir. 2004).

The Court also finds that the new allegations in the proposed Second Amended Complaint are futile, and thus amendment should not be allowed for this further reason as well.

For the reasons cited, the Court grants the motions to dismiss, grants the motion for summary judgment, and denies the motion of plaintiffs to file a further amended complaint.

DATED this 21st day of June, 2005.

Ted Stewart
United States District Court Judge for Utah

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ADDENDUM 2

1 of 2 DOCUMENTS

RONALD J. WOPSOCK, LUKE J. DUNCAN, and CASSANDRA KOCHAMP, Plaintiffs-Appellants, v. MILLICENT MAXINE NATCHEES, in her individual capacity and in her official capacity as Chairperson of the Tribal Business Committee of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, T. SMILEY ARROWCHIS, in his individual capacity and in his official capacity as Vice-Chairman of the Tribal Business Committee, O. ROLAND MCCOOK, SR., in his individual capacity and in his official capacity as a member of the Tribal Business Committee, RICHARD JENKS, JR., in his individual capacity and in his official capacity as a member of the Tribal Business Committee, JOHN P. JURRIS, and SUSAN HAMMER, Defendants-Appellees, and DIRK KEMPTHORNE, Secretary of the Interior, JAMES CASON, Associate Deputy Secretary, Department of the Interior, ALLEN ANSPACH, in his official capacity as Acting Regional Director, Western Regional Office, Bureau of Indian Affairs, CHESTER D. MILLS, in his individual capacity and in his official capacity as Superintendent, Uintah and Ouray Agency, Bureau of Indian Affairs, and WAYNE NORDWALL, in his individual capacity, Defendants-Appellees.

05-1494

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

454 F.3d 1327; 2006 U.S. App. LEXIS 17236

July 11, 2006, Decided

PRIOR HISTORY: [**1] Appealed from: United States District Court for the District of Utah. Judge Ted Stewart. *Wopsock v. Natchees, 134 Fed. Appx. 438, 2005 U.S. App. LEXIS 10616 (2005)*

COUNSEL: David W. Scofield, Peters Scofield Price, P.C., of Salt Lake City, Utah, argued for plaintiffs-appellants.

Charles L. Kaiser, Davis Graham & Stubbs LLP, of Denver, Colorado, argued for defendants-appellees, Millicent Maxine Natchees, et al. With him on the brief was Charles A. Breer.

John A. Bryson, Attorney, Appellate Section, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendants-appellees, Dirk Kempthorne, Secretary of the Interior, et al. With him on the brief were Matthew J. McKeown, Deputy Assistant Attorney General, and William B. Lazarus, Attorney.

JUDGES: Before RADER, SCHALL, and BRYSON, Circuit Judges.

OPINION BY: BRYSON

OPINION: **[*1328]** BRYSON, Circuit Judge.

Ronald Wopsock, Luke Duncan, and Cassandra Kochamp brought this action in the United States District Court for the District of Utah against several officials of the Ute Indian Tribe and others associated with them ("the tribal defendants"), and against several federal officials, including the Secretary of the Interior ("the federal defendants"). The district court **[**2]** granted the tribal defendants' motion to dismiss the complaint and the federal defendants' motion for summary judgment. The plaintiffs appealed to this court. Because we conclude that this court lacks jurisdiction over the plaintiffs' appeal, we transfer the case to the United States Court of Appeals for the Tenth Circuit.

I

This case arises from a dispute within the Ute Indian Tribe concerning membership on the Tribe's Business Committee (the Tribe's governing body) and the rules **[*1329]** and procedures for election to the Business Committee. Mr. Wopsock and Mr. Duncan are members of the Tribe who previously served as elected members of the Business Committee. Ms. Kochamp is a member of the Tribe who initiated a petition to recall certain members of the Business Committee.

While Mr. Wopsock and Mr. Duncan were serving on the Business Committee, the Tribe entered into a financial consulting agreement with defendant John Jurrius. Concerned about Mr. Jurrius's subsequent management of the Tribe's assets, Mr. Wopsock and Mr. Duncan filed an action in the district court against the Bureau of Indian Affairs ("BIA") and several BIA officials, charging them with breach of their fiduciary obligations **[**3]** to the Tribe. n1 Shortly thereafter, the Business Committee passed two resolutions to expel Mr. Wopsock and Mr. Duncan from the Committee. The Business Committee then enacted Ordinance 03-002, which barred any member who had been expelled from the

Business Committee from running as a candidate for election to the Committee for a period of four years. Meanwhile, Mary Carol Jenkins began circulating a petition to recall defendant Millicent Maxine Natchees, the Chairperson of the Business Committee. The Business Committee then enacted Ordinance 03-004, which imposed additional requirements on recall petitions. Ms. Jenkins's recall petition was rejected for failing to comply with the new requirements.

n1 On September 29, 2004, the district court dismissed that action without prejudice, finding that "[n]one of the laws under which Plaintiffs seek relief provides a private right of action against the United States, its agencies or officials." Wopsock v. Nordwall, No. 2:03-CV-826 (D. Utah). The district court also concluded that the plaintiffs' claims under the Administrative Procedure Act ("APA") were not ripe. Id. In an unpublished decision, the Tenth Circuit affirmed. *Wopsock v. Nordwall, 180 Fed. Appx. 6 (10th Cir. 2006)*.

[**4]

On October 30, 2003, local BIA Superintendent Chester D. Mills approved Ordinances 03-002 and 03-004. In letters to both Superintendent Mills and BIA Western Division Director Wayne Nordwall, the plaintiffs appealed that approval. Superintendent Mills subsequently vacated his approval, explaining that "my approval of these two ordinances was not required by law, and in fact might be seen as an intrusion on the sovereignty of the Tribe." Director Nordwall similarly concluded that "the Superintendent's approval action was not needed and had no effect on the validity or invalidity of the resolution." Director Nordwall thus dismissed the plaintiffs' appeals. The plaintiffs appealed those decisions to the Interior Board of Indian Appeals ("IBIA"). n2

n2 On January 6, 2006, after the district court had entered judgment in this case, the IBIA dismissed both of the plaintiffs' appeals for lack of standing. The IBIA explained that "Appellants' injury appears to have been caused solely by elected officials from Appellants' own Tribe" and that there is "no basis for Appellants' contention that the injury they claim to have suffered was caused by the Regional Director, or that by Federal law he was somehow obliged to address it." *Jenkins v. W. Reg'l Dir., 42 IBIA 106, 114 (2006)*. The IBIA further concluded that "when the Regional Director dismissed Appellants' appeal below, in response to a specific request from the Tribe that he do so on the basis of mootness, his dismissal was correct and for that reason [the] controversy over

the Superintendent's purported approval of Ordinance No. 03-002 remains moot today." *Wopsock v. W. Reg'l Dir., 42 IBIA 117, 121-22 (2006).*

[**5]

On August 3, 2004, the plaintiffs filed their first amended complaint, which included a total of eight counts. Count 5, of particular relevance here, alleged that the tribal defendants violated the Indian Civil Rights Act ("ICRA") by abridging the plaintiffs' rights to due process, equal protection, and freedom of speech. Count 5 also alleged that the federal defendants **[*1330]** had breached their fiduciary duties by "fail[ing] to decline to recognize" the tribal defendants' actions, in violation of the Indian Reorganization Act ("IRA"), the ICRA, and the Administrative Procedure Act ("APA"). Under count 5, the plaintiffs sought declaratory and injunctive relief, as well as an award of money damages, pursuant to *28 U.S.C. § 1346(a)(2)* ("the Little Tucker Act"), in the amount of $ 10,000 to each plaintiff.

Before the district court, the plaintiffs sought a temporary restraining order or a preliminary injunction that would prevent the tribal defendants from enforcing or recognizing Ordinance 03-002. The plaintiffs expressed their concern that, in the absence of the requested relief, Mr. Wopsock and Mr. Duncan would be precluded from seeking office in the Tribe's April **[**6]** 2005 election. The district court denied the request, and the plaintiffs appealed. The Tenth Circuit concluded that it lacked jurisdiction over the plaintiffs' interlocutory appeal because *28 U.S.C. § 1295* "provides the Federal Circuit with exclusive jurisdiction in appeals from final decisions if the district court's jurisdiction 'was based, in whole or in part, on *28 U.S.C. section 1346*.'" Wopsock v. Natchees, No. 05-4033 (10th Cir. Mar. 22, 2005) (transfer order). The Tenth Circuit therefore transferred the plaintiffs' interlocutory appeal to this court.

On April 7, 2005, this court issued an order denying the plaintiffs' motion for an injunction pending appeal. On May 17, 2005, both parties stipulated to dismissal of the plaintiffs' appeal of the district court's order, explaining that the Tribe's April 2005 election had occurred and that the plaintiffs' request for injunctive relief was therefore moot. On May 22, 2005, we granted the joint motion and dismissed the plaintiffs' interlocutory appeal. *Wopsock v. Natchees, 134 Fed. Appx. 438 (Fed. Cir. 2005).*

Thereafter, the district court dismissed all eight counts of the first **[**7]** amended complaint. The district court reasoned that it lacked jurisdiction over counts 1 through 7 because it "cannot reach plaintiffs' claims without first interpreting tribal law over which it lacks jurisdiction." Citing *Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993)*, and *Brown v. Reardon, 770 F.2d 896, 905-06 (10th Cir. 1985)*, the court also explained that it failed "to find any

allegation that any harm suffered by plaintiffs was motivated by invidious, class-based animus," as is required to maintain a claim under *42 U.S.C. § 1985(3)*.

The district court then provided additional reasons for dismissing the plaintiffs' claims. The court concluded that the plaintiffs' claims were not properly within the scope of the IRA because that statute is "not triggered by the mere fact a tribal election is being held or a purported change in the tribal constitution is alleged by individual tribal members." Rather, the court held, the IRA is only triggered "by an appropriate request by a tribe for federal involvement." The court further noted that the IRA does not impose upon the federal defendants the affirmative duties asserted **[**8]** by the plaintiffs. The district court observed that the plaintiffs "point to no aspect of tribal or federal law that requires the federal government to act but rather attempt to extend the law to create such duties."

The district court also noted that neither the tribal defendants nor the federal defendants had waived their sovereign immunity. Furthermore, the court observed that the plaintiffs had failed to exhaust both their federal remedies and their tribal remedies. The court explained that the plaintiffs' administrative claims were still pending before the IBIA and that the plaintiffs had failed to appeal their challenge against Ordinance 03-002 to the tribal **[*1331]** appellate court and had never challenged Ordinance 03-004 in any tribal court. In those circumstances, the court ruled, dismissal was appropriate.

Finally, the district court addressed the plaintiffs' motion for leave to amend. The court explained that "[v]irtually contemporaneously with this Court's hearing on the motions to dismiss and for summary judgment, plaintiffs moved . . . to file a second amended complaint." The court found that the "facts and claims sought to be asserted . . . were known to plaintiffs when **[**9]** they filed their earlier complaints" and that "[p]laintiffs' amendments appear to be an attempt to avoid both this Court's prior rulings and arguments raised by defendants." The court therefore denied leave to amend the complaint.

II

This court has "exclusive jurisdiction . . . of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on *[28 U.S.C.] section 1346*." *28 U.S.C. § 1295(a)*. As a result, "the question whether we have jurisdiction in this case . . . depends on whether the jurisdiction of the district court in this case was based, at least in part, on the Little Tucker Act." *Doe v. United States, 372 F.3d 1308, 1311-12 (Fed. Cir. 2004)* (citing *United States v. Hohri, 482 U.S. 64, 72, 107 S. Ct. 2246, 96 L. Ed. 2d 51 (1987))*.

In the Tucker Act, *28 U.S.C. § 1491*, and the Little Tucker Act, *28 U.S.C. § 1346(a)(2)*, Congress waived sovereign immunity for certain actions for monetary relief against the United

States. *Doe, 372 F.3d at 1312*. Yet, as the Supreme **[**10]** Court has noted, the Tucker Act "does not create any substantive right enforceable against the United States for money damages.'" *United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980)* ("Mitchell I"). Consequently, a court must consider "whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell, 463 U.S. 206, 216, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)* ("Mitchell II"); see also *United States v. White Mountain Apache Tribe, 537 U.S. 465, 472, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003)* (discussing Mitchell II's "fair interpretation rule" and stating that "[i]t is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages" and that "a fair inference will do"); *Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005)*.

Moreover, the question whether a statute can fairly be interpreted as money-mandating is one that directly bears on the issue of jurisdiction. In *Fisher v. United States, 402 F.3d 1167, 1171-72 (Fed. Cir. 2005)* **[**11]** (en banc), we held that a court "should entertain and decide the jurisdictional and merits test in . . . [a] single step . . . in which the trial court determines both the question of whether the statute provides the predicate for its jurisdiction, and lays to rest . . . the question of whether the statute on its merits provides a money-mandating remedy." n3 In other words, because a court is always responsible for its own jurisdiction, a court that entertains a complaint alleging a Tucker **[*1332]** Act claim must determine at the outset whether the statute relied upon is one that is money-mandating. *Id. at 1173*. In the event that the court concludes that the source of substantive law does not meet the "money-mandating test," the court must dismiss the claim for lack of jurisdiction because "the absence of a money-mandating source [is] fatal to the court's jurisdiction under the Tucker Act." Id.

n3 In Fisher, we overruled *Gollehon Farming v. United States, 207 F.3d 1373 (Fed. Cir. 2000)*, which had prescribed a two-step approach to the money-mandating issue: (1) the plaintiff need only make a non-frivolous allegation that the statute may be interpreted as money-mandating to satisfy jurisdiction and (2) if it was subsequently decided that the statute was not money-mandating, the court would dismiss for failure to state a claim upon which relief could be granted. See *Fisher, 402 F.3d at 1172-73*.

[12]**

In *United States v. Navajo Nation, 537 U.S. 488, 503, 123 S. Ct. 1079, 155 L. Ed. 2d 60 (2003)*, the Supreme Court

addressed the "money-mandating test" by comparing Mitchell I, in which the Court concluded that the statute at issue (the Indian General Allotment Act) was not money-mandating, to Mitchell II, in which the Court found that the relevant timber management statutes could be interpreted as money-mandating. In doing so, the Court focused on the degree to which the statutes in each case created a trust relationship between the United States and the respondents. The Court observed that the statute in Mitchell I "created only a limited trust relationship. . . that does not impose any duty upon the Government to manage timber resources," while the statute in Mitchell II, "clearly give[s] the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Navajo Nation, 537 U.S. at 504-05*. The Court thus explained that, for purposes of determining whether a particular claim falls within the Tucker Act, "Mitchell I and Mitchell II . . . instruct [that] a Tribe must identify a substantive source **[**13]** of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id. at 506*. The Court then addressed the statute at issue in Navajo Nation (the Indian Mineral Leasing Act ("IMLA")) and found that the IMLA "simply requires Secretarial approval" and that "[u]nlike the 'elaborate' provisions before the Court in Mitchell II," the "Secretary is neither assigned a comprehensive managerial role nor . . . expressly invested with responsibility to secure the needs and best interests of the Indian owner and his heirs." *Id. at 507-08* (internal quotation marks omitted). The Court therefore concluded that "no provision of the IMLA or its regulations contains any trust language with respect to coal leasing" and rejected the respondent's claim for compensation. *Id. at 508*. Compare *Navajo Nation, 537 U.S. at 508*, with *White Mountain Apache Tribe, 537 U.S. at 475* (finding the statute in question to be money-mandating because it provides that "Fort Apache [is] 'held by the United States in trust for the White Mountain Apache Tribe'" **[**14]** and because "elementary trust law . . . confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch").

The plaintiffs in this case seek money damages pursuant to the Little Tucker Act as compensation for the federal defendants' alleged breach of the fiduciary duties created by the IRA, the ICRA and the APA. The IRA, however, cannot fairly be interpreted as mandating compensation by the federal government for the injury claimed by the plaintiffs. Like the statute at issue in *Navajo Nation*, the IRA does not grant the Secretary a "comprehensive managerial role"; rather, it simply requires the Secretary to "call and hold an election . . . after the receipt of a tribal request." See *25 U.S.C. § 476(c)*. In this manner, the IRA invests primary responsibility with the Tribe, not the Secretary. In fact, the Supreme Court has stated that "[t]he

overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, **[*1333]** both politically and economically." *Morton v. Mancari, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).* **[**15]** Moreover, as the Tenth Circuit has explained in distinguishing Mitchell II: "Indian tribes have a right to self-government . . . [and] . . . while the Department may be required by statute or tribal law to act in intratribal matters, it should act so as to avoid any unnecessary interference with a tribe's right to self-government." *Wheeler v. U. S. Dep't of the Interior, Bureau of Indian Affairs, 811 F.2d 549, 553 (10th Cir. 1987)*; see also *Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1465 (1989)* (distinguishing Mitchell II by finding that "no statute or regulation requires Department involvement in Cherokee election disputes; rather, . . . federal law precludes Department action"). Consequently, the IRA does not serve as the requisite money-mandating statute needed to establish jurisdiction under the Little Tucker Act.

The ICRA and the APA do not fulfill that role either. The ICRA is directed not at the federal government, but rather at Indian tribes. See *25 U.S.C. § 1302* ("No Indian tribe in exercising powers of self-government shall . . . ."). Thus it does not impose duties upon the federal government or **[**16]** its officials. Finally, the APA does not authorize an award of money damages at all; to the contrary, section 10(a) of the APA, *5 U.S.C. § 702*, specifically limits the Act to actions "seeking relief other than money damages."

Under *Fisher*, without a source of substantive law that can fairly be interpreted as mandating compensation, the Little Tucker Act did not give the district court jurisdiction to consider the plaintiffs' claim for money damages. Because the district court's jurisdiction over this case was not based in part on the Little Tucker Act, we lack jurisdiction over this appeal. See *Doe, 372 F.3d at 1317* (finding that the Federal Circuit lacked appellate jurisdiction because the "case was not one that was based on the Little Tucker Act at the outset, and it never became one through the passage of time or the unfolding of events"); see also *28 U.S.C. § 1295(a)(2).*

When we lack jurisdiction, we are "authorized by statute to transfer the case to 'any other court in which the action or appeal could have been brought at the time it was filed or noticed.'" *Doe, 372 F.3d at 1317* (quoting **[**17]** *28 U.S.C. § 1631*). To be sure, in a previous appeal, the Tenth Circuit transferred this case to us. In such situations, the Supreme Court has advised us that law-of-the-case principles should be applied so as to avoid "a perpetual game of jurisdictional ping-pong." *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988).* It is well established, however, that law-of-the-case principles do not bar a court from departing from earlier rulings when

there is "an intervening change of controlling legal authority, or [a showing that] the prior decision is clearly incorrect and its preservation would work a manifest injustice." *Toro Co. v. White Consol. Indus., 383 F.3d 1326, 1336 (Fed. Cir. 2004)*; see also 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478 (2d ed. 2002). In this case, the Tenth Circuit's earlier transfer of the plaintiffs' interlocutory appeal occurred almost simultaneously with our en banc decision in Fisher, in which we overruled prior precedent under which the Tenth Circuit's transfer decision would have been correct. **[**18]** Thus, this is a case in which there has been a change in the law and in which it is now quite clear that we lack jurisdiction over this appeal. We therefore consider it to be in the interest of justice to transfer the present appeal to the appropriate appellate tribunal for further proceedings. Because this case was **[*1334]** appealed from a final judgment of the United States District Court for the District of Utah, we direct that the appeal be transferred to the United States Court of Appeals for the Tenth Circuit.

Each party shall bear its own costs for this appeal.

TRANSFERRED.