No. 06-4215

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

MILLICENT MAXINE NATCHEES, in her individual 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 and in his official capacity as Vice-Chairperson of the Tribal Business Committee, O. ROLAND MCCOOK, SR., in his individual and in his official capacity as a member of the Tribal Business Committee, RICHARD JENKS, JR., in his individual and in his official capacity as a member of the Tribal Business Committee, JOHN P. JURRIS, and SUSAN HAMMER,

Defendants-Appellees,

*DIRK KEMPTHORNE, Secretary of the Interior, *CARL J. ARTMAN, Assistant Secretary-Indian Affairs, Department of the Interior, *ALLEN ANSPACH, in his official capacity as Acting Regional Director, Western Regional Office, Bureau of Indian Affairs,*DINAH PELTIER, in her official capacity as Acting Superintendent, Uintah and Ouray Agency, Bureau of Indian Affairs, and CHESTER D. MILLS and WAYNE NORDWALL, in their individual capacities.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
Case No. 2:04-CV-675, Judge Ted Stewart

BRIEF FOR THE FEDERAL DEFENDANT-APPELLEES

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*/ Pursuant to Rule 43(c)(2), Dirk Kempthorne is substituted for Gale A. Norton in her official capacity, Carl J. Artman is substituted for James Cason in his official capacity, Allen Anspach is substituted for Wayne Nordwall in his official capacity, and Diane Peltier is substituted for Chester Mills in his official capacity.

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STATEMENT OF RELATED CASES

A. Previous litigation. – In Wopsock v. Nordwall, 10th Cir. No. 04-4296, this Court affirmed the dismissal of an action brought by two of the plaintiffs in the instant case, along with other individuals, against officials and agencies of the United States Department of the Interior for alleged violations of fiduciary obligations to the Ute Indian Tribe of the Uintah and Ouray Indian Reservation.

B. Instant litigation. – In Wopsock v. Natchees, 10th Cir. No. 05-4033, plaintiffs appealed the denial of their motion for a temporary restraining order or a preliminary injunction. This Court granted the motion of the Federal appellees to transfer the appeal to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. 1295(a)(2) and 1631. This appeal was docketed in the Federal Circuit as No. 05-1298 and was subsequently dismissed as moot pursuant to the stipulation of the parties on May 25, 2005.

Following entry of final judgment dismissing the First Amended Complaint, plaintiffs noticed an appeal to the Federal Circuit, Wopsock v. Natchees, No. 05-1494. On July 11, 2006, the Federal Circuit held that it did not have appellate jurisdiction under 28 U.S.C. 1295(a)(2) and transferred the instant appeal to this Court. Wopsock v. Natchees, 454 F.3d 1327 (Fed. Cir. 2006).

JURISDICTIONAL STATEMENT

A. District court jurisdiction. – Plaintiffs' First Amended Complaint ("FAC") asserted jurisdiction under 28 U.S.C. 1331, 25 U.S.C. 476(d)(2), 5 U.S.C. 702, 28 U.S.C. 1346(a)(2), 42 U.S.C. 1985(3), and Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (A120).[1/]

B. Court of appeals jurisdiction. – Although the plaintiffs asserted a claim under the Little Tucker Act, 28 U.S.C. 1346(a)(2) (A163-170, 198-199), the Federal Circuit ruled in its transfer decision that it did not have exclusive jurisdiction over the appeal pursuant to 28 U.S.C. 1295(a)(2) because plaintiffs failed to identify a money-mandating statute that would establish jurisdiction under the Little Tucker Act. Wopsock v. Natchees, 454 F.3d at 1332-1333. This Court has jurisdiction under 28 U.S.C. 1291. The district court's judgment disposed of all claims of all parties and therefore is a final decision (A22-32, 1397). The judgment was entered on June 21, 2005 (A21), and the notice of appeal was filed on July 20, 2005, within the time allowed by Rule 4(a)(1)(B), Fed. R. App. P. (A22, 1491-1492).

[1/] "A" refers to Appellants' Appendix.

QUESTIONS PRESENTED

1. Whether the district court properly granted summary judgment dismissing all claims against the Federal officials in their official capacities.

2. Whether the district court properly dismissed all claims against Federal officials Wayne Nordwall and Chester Mills in their individual capacities.

3. Whether the district court abused its discretion in denying leave to amend the First Amended Complaint.

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition below. – This case arises from a dispute within the Ute Indian Tribe of the Uintah and Ouray Indian Reservation ("the Tribe") concerning membership on the Tribe's governing body, the Business Committee, and the rules and procedures governing elections for membership on the Business Committee. Plaintiffs-appellants Ronald J. Wopsock and Luke J. Duncan are members of the Tribe who had been elected to be members of the Business Committee, and plaintiff-appellant Cassandra Kochamp is a member of the Tribe who with other members initiated a petition to recall certain members of the Business Committee. They alleged that the Business Committee, in October of 2003, passed resolutions expelling plaintiffs Wopsock and Duncan from that body, that the Business Committee then enacted an

ordinance that disqualified any Tribal member from being nominated for, or from serving on, the Business Committee for a four-year period after being expelled from the Business Committee, and that the Business Committee conducted a special election to replace Wopsock and Duncan from which they were barred from being candidates. They also alleged that members of the Tribe began a petition for a special election to recall the Chairperson of the Business Committee and that thereafter the Business Committee enacted another ordinance changing the procedures for such a petition and refused to initiate a recall election because the petition did not meet the requirements of the new ordinance. Plaintiffs' primary claim is that these ordinances are unlawful amendments of the Tribe's constitution, enacted in violation of the provisions of the constitution and the Indian Reorganization Act, 25 U.S.C. 476.

The initial complaint (A33-115), filed on July 22, 2004, named as defendants four members of the Committee, in their individual and official capacities ("Tribal defendants"), the Secretary of the Interior and the Assistant Secretary-Indian Affairs of the Department of the Interior in their official capacities, and two other officials of the Interior Department in both their official and individual capacities: Chester D. Mills, the then Superintendent of the Uintah and Ouray Agency of the Bureau of Indian Affairs, and Wayne Nordwall, the then

Director of the Western Regional Office of the Bureau of Indian Affairs (A38-42).[2/] The complaint also named as defendants two private individuals, John P. Jurrius and Susan Hammer, whose business dealings with the Tribe were allegedly the cause of the dispute between the Business Committee and the two plaintiffs who were expelled from the Committee, and unnamed "John Does 1-10" (A42).

For relief, plaintiffs sought declaratory and injunctive relief against the Tribal defendants preventing them from recognizing the special election as valid and from implementing and relying on the two allegedly invalid ordinances (A108-109). With respect to the Federal officials, the plaintiffs alleged, inter alia, that they had breached a duty under the Indian Reorganization Act, 25 U.S.C. 476, to disapprove the ordinances; plaintiffs sought declaratory and injunctive relief preventing the Federal officials from recognizing the results of the special election, from recognizing the Chairperson as a lawful member of the Business Committee, and from recognizing the Business Committee as a validly constituted governing body of the Tribe (A109-110). In other claims against the Federal officials, plaintiffs sought declaratory and injunctive relief, as well as monetary

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[2/] Both Mills and Nordwall have since retired from Federal service. They continue as defendants only in their individual capacities, and their successors have been substituted as defendants in their official capacities as Superintendent of the Uintah and Ouray Agency and as Director of the Western Regional Office of the Bureau of Indian Affairs.

damages, for alleged breach of fiduciary duties to the plaintiffs and for failure to protect appellants from the Tribe's alleged violations of the Indian Civil Rights Act, 25 U.S.C. 1301 et seq. (A78-90).

Plaintiffs also sought monetary damages from Mills and Nordwall in their individual capacities under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) for alleged violation of plaintiffs' constitutional rights under the First and Fifth Amendments (A90-103). Finally, plaintiffs sought a declaration under 42 U.S.C. 1985(3) that the Tribal defendants, Mills, Nordwall, Jurrius, and Hammer had conspired to deprive plaintiffs of their civil rights and for an award of monetary damages from Tribal defendants, Jurrius and Hammer, but not from the Federal officials, for injuries inflicted by that alleged conspiracy (A103-107).

On August 3, 2004, plaintiffs filed the First Amended Complaint ("FAC"), which restated the claims with numerous changes in the allegations and the requested relief, including the addition of an express claim for monetary damages under the Little Tucker Act, 28 U.S.C. 1346(a)(2) (A116-204, 170).

The Federal defendants filed a motion for summary judgment on the claims against them in their official capacities and a motion to dismiss the claims against Mills and Nordwall in their individual capacities (A444-443, 500-502). The

Tribal and private party defendants also filed a motion to dismiss (A709-714). The district court set a hearing for April 5, 2005 (A15), and the plaintiffs opposed all the motions and presented an objection under Rule 56(f), Fed. R. Civ. P., to the Federal defendants' motion for summary judgment, claiming that facts essential to their opposition could only be had through discovery (A729-767, 777-819, 891-910).

On April 4, 2005, on the eve of the hearing, plaintiffs filed a motion under Rule 15, Fed. R. App. P., for leave to file a second amended complaint, which, inter alia, would have added two counts: (1) a claim under 42 U.S.C. 1985(2) that the Tribal defendants, Jurrius, and Hammer (but not Mills or Nordwall) had conspired to obstruct justice in federal court by retaliating against Wopsock and Duncan for having filed a previous lawsuit against the Federal officials, and (2) a claim under 42 U.S.C. 1986 that Mills and Nordwall had knowingly failed to prevent the injuries from the conspiracy (A1300-1396).

At the hearing, the district court granted the defendants' motions for summary judgment and for dismissal (A1397). The court deferred ruling on the motion to amend until consideration of the motion and the responses. On June 21, 2005, the district court denied the motion for leave to amend and entered judgment dismissing the FAC (A23-32).

B. Statutory background.

1. Indian Reorganization Act. – It is well established that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978), quoting Worcester v. Georgia, 6 Pet. 515, 559 (1832). Accord: Wheeler v. United States Department of the Interior, 811 F.2d 549, 551 (10th Cir. 1987). In 1934, Congress passed the Indian Reorganization Act ("IRA") as part of a major change in Federal policy on Indian Tribes, which provided a statutory means for Indian Tribes for organizing the exercise of their sovereign rights of self-government. Pub. L. No. 73-383, 73 Cong. 2d Sess., 48 Stat. 984-988. Section 16 of the IRA provided in pertinent part that any Indian Tribe could adopt a constitution and bylaws that would be effective when ratified by a majority vote "at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe," and that revocation or amendment of such constitution and bylaws could be effected in the same manner. 48 Stat. 987. In 1988, Congress amended the IRA to confirm the Secretary's approval authority over adoption, revocation, and amendment of constitutions and bylaws ratified in special elections under the IRA and to set deadlines for calling such elections and for making final approval decisions. Pub. L. No. 100-581, § 101,

100th Cong. 2d Sess., 102 Stat. 2938. The Secretary's obligation to call a special election under the IRA is triggered by "a tribal request," defined as:

> receipt in the Area Office of the Bureau of Indian Affairs having administrative jurisdiction over the requesting tribe, of a duly enacted tribal resolution requesting a Secretarial election as well as a copy of the proposed tribal constitution and bylaws, amendment, or revocation action * * *.

Pub. L. 100-581, § 102(2). The Secretary's implementing regulations explain that:

> Secretarial election means an election held within a tribe pursuant to and authorized by Federal Statute (as distinguished from tribal elections which are conducted under tribal authority).

25 C.F.R. 81.1(s).

2. Indian Civil Rights Act. – In 1968, Congress adopted the Indian Civil Rights Act ("ICRA"), 25 U.S.C. 1301 et seq., for the purposes of extending to individual Indians a certain level of protection from actions of the tribe of which they are members and of promoting the federal policy of supporting tribal self-government. Santa Clara Pueblo, 436 U.S. at 62-63. Thus, 25 U.S.C. 1302 provides in part that "[n]o Indian tribe in exercising powers of self-government shall" deny individuals many, but not all, of the rights secured under the Bill of Rights in the federal constitution. The prohibition applies only to Indian tribes and creates no obligations or duties for the United States or its officers and agencies. Further, the Supreme Court has held that there is no federal forum for

enforcing the ICRA except under the express provision in 25 U.S.C. 1303 for the privilege of a writ of habeas corpus in a "court of the United States." See Santa Clara Pueblo, 436 U.S. at 59-66.

3. The civil rights conspiracy statutes. – Under 42 U.S.C. 1985, Congress has provided a damages remedy for injuries caused by private conspiracies to interfere with a person's civil rights. In particular, 42 U.S.C. 1985(3) provides a cause of action if: (1) two or more persons conspire with the intent to deprive a person or group of persons of the equal protection of the law or of equal privileges and immunities under the laws; (2) at least one conspirator performs an overt act in furtherance of the conspiracy; and (3) the overt act injures the plaintiff in his person or property or deprives him of a constitutionally-protected right or privilege. Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993); Barnes Found. v. Township of Lower Merion, 242 F.3d 151, 162 (3rd Cir. 2001). To satisfy the intent requirement, a plaintiff must allege that the conspirators possessed some racial, or perhaps otherwise class-based, invidiously discriminatory animus. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); Brown v. Reardon, 770 F.2d 896, 905-906 (10th Cir. 1985).

Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." Great Am. Fed. Sav. and Loan

Ass'n. v. Novotny, 442 U.S. 366, 372 (1979). Accordingly, this Court has held that no damages remedy is available against Tribal officials in the context of tribal election disputes for alleged violations of the ICRA or non-specific violations of the federal constitution because the protections of the federal constitution have not been extended to individual Indians and the ICRA is not enforceable in federal courts. See Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1462 (10th Cir. 1989); Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987).

Further, 42 U.S.C. 1985(2) provides a damages remedy "if two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, * * *." This part of Section 1985(2) does not require a showing of race-based animus as part of its intent requirement. Kush v. Rutledge, 460 U.S. 719 (1983).

Finally, 42 U.S.C. 1986 provides a damages remedy against any "person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or

refused so to do, if such wrongful act be committed * * *." This provision further requires that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued." Ibid.

C. Statement of facts. – Appellants' First Amended Complaint alleged the following material facts. The appellants Wopsock and Duncan are enrolled members of the Tribe and previously served as members of the Tribal Business Committee (A120-121). During their tenure, the Tribe, through the Business Committee, entered into a financial consulting agreement with defendant John P. Jurrius concerning the management of certain assets of the Tribe, and Wopsock and Duncan became concerned about the performance of Jurrius under this agreement (A130-133). Wopsock and Duncan thereafter joined as plaintiffs in a lawsuit filed in the United States District Court for the District of Utah and brought against Superintendent Mills, Director Nordwall and the BIA for breach of their fiduciary obligations to the Tribe and seeking BIA supervision of the transactions under the agreement (A133-134).[3/]

[3/] Wopsock v. Nordwall, D. Utah, No. 2:03-CV-826 TC. The district court dismissed this action for lack of subject matter jurisdiction on September 29, 2004 (A487-499). This Court affirmed. 180 Fed. Appx. 6, 2006 WL 1174505 (10th Cir. No. 04-4296, May 4, 2006) (unpublished).

On October 13, 2003, the Business Committee enacted Resolution 03-243 which initiated proceedings for Wopsock's and Duncan's expulsion from the Business Committee (A135-136). Resolution 03-243 was accompanied by a written statement of charges which alleged that Wopsock and Duncan participated in the lawsuit brought against Superintendent Mills, Director Nordwall and the BIA for breach of their fiduciary obligations to the Tribe (A136). On October 21, 2003, the Business Committee passed Resolution Nos. 03-244 and 03-245 which effected the expulsion of Wopsock and Duncan from the Business Committee (A138-139).

Article IV, Section 3 of the Tribe's Constitution provides that "[a]ll elections * * * shall be held in accordance with rules and regulations prescribed by the Tribal Business Committee" (A206). On October 25, 2003, the Business Committee enacted Ordinance 03-002 which disqualified any tribal member who had been expelled from the Business Committee from running as a candidate for, or serving on the Business Committee for a period of four years following the tribal member's expulsion (A139). On December 17, 2003, the Tribe held a special election to replace Wopsock and Duncan, who were barred from being nominated as candidates (A140-142).

In October 2003, then plaintiff Mary Carol Jenkins began to circulate a petition for the conduct of a special election to recall defendant Natchees, the Chairperson of the Business Committee (A150).[4/] On or about October 28, 2003, the Business Committee also enacted Ordinance 03-004 which added new requirements for tribal recall petitions (A151-152). Upon the presentation of the recall petition, the Business Committee rejected the petition for failure to comply with the new requirements and refused to conduct the requested special election (A152-153). On October 30, 2003, Superintendent Mills approved Ordinances 03-002 and 03-004 (A140, 155, 160).

Appellants filed two administrative appeals to Area Director Nordwall from the approval of Ordinances 03-002 and 03-004 (A156, 161). Although appellants claimed that Federal officials did not have the authority to review or approve either ordinance, appellants also claimed that the ordinances were unlawful amendments to the Ute constitution (A319-329, 476-486). On December 19, 2003, Director Nordwall wrote to the Business Committee advising that the Superintendent's approval action was not needed and had no effect on the validity of the ordinances (A180-181). On January 26, 2004, Director Nordwall wrote to

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[4/] Mary Carol Jenkins was dismissed as a plaintiff, and appellant Cassandra Kochamp was substituted for her (A435-439).

appellants' counsel stating that the Superintendent's approval action was not required by the Tribe's Constitution and had no effect on the validity of Ordinance 03-004 (A305-306). On May 3, 2004, Director Nordwall again wrote to appellants' counsel stating that the Superintendent's approval action was not required by the Tribe's Constitution and had no effect on the validity of Ordinance 03-002 (A157-158, 161). Nordwall accordingly dismissed appellants' administrative appeals, and appellants appealed those decisions to the Interior Board of Indian Appeals ("IBIA") (A187-188).[5/]

D. The First Amended Complaint. – Appellants' FAC, filed August 3, 2004, pled eight counts. Count 1 was brought against the Tribal defendants and alleged that Ordinance 03-002 effectively amended the Ute constitution without complying with the requirements of the IRA (A145-149). Appellants sought a declaration that the Tribal defendants violated the IRA and injunctive relief preventing them from recognizing the special election as valid and from conducting any special elections applying the disqualification ordinance until Ute

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[5/] After the entry of the judgment below, the IBIA dismissed both those appeals on January 6, 2006, concluding that appellants lacked standing to appeal since the Area Director had declared the approval by Mills ineffective and that appellants could not pursue further relief from the BIA through their appeals. Jenkins v. Western Regional Director, 42 IBIA 106; Wopsock v. Western Regional Director, 42 IBIA 117.

constitution is properly amended (A193-194). Count 2 was also brought against the Tribal defendants and alleged that Ordinance 03-004 effectively amended the Ute constitution without complying with the requirements of the IRA (A149-155). Appellants sought a declaration that the Tribal defendants violated the IRA and injunctive relief prohibiting them from applying the invalid parts of the recall ordinance (A195-196).

Counts 3 and 4 were brought against Superintendent Mills and Director Nordwall in their official capacities (A155-163). Appellants alleged that these defendants' failure to disapprove Ordinances 03-002 and 03-004 violated their duties under the IRA (A155-163). Appellants sought declaratory and injunctive relief preventing Mills and Nordwall from recognizing the expulsion of Wopsock and Duncan, the special election, and the continued tenure of the Chairperson on the Business Committee as valid (A196-197).

Count 5 was brought against all the Federal officials in their official capacities (A163-170). Appellants alleged that the Tribal defendants had violated the appellants' rights under the ICRA, and that the Federal officials breached a duty to decline to recognize the actions of the Tribal defendants taken in violation of the ICRA (A63-170). Appellants sought declaratory and injunctive relief prohibiting the Federal officials from recognizing the Business Committee as

legitimate until Wopsock and Duncan are restored to their seats, and money damages under the Little Tucker Act, 28 U.S.C. 1346(a)(2) (A198-199).

Count 6 was brought against Mills and Nordwall in their official capacities (A170-175). Appellants alleged that both defendants had improper conflicts of interest that required them to recuse themselves from acting with respect to the Tribe (A170-175). In particular, appellants alleged that Mills was engaged to be married to defendant Susan Hammer, who worked for defendant Jurrius, and that both Mills and Nordwall had been accused of breaching fiduciary duties in the prior lawsuit seeking to have BIA supervise the Tribe's transactions with Jurrius (ibid.). Appellants sought declaratory and injunctive relief preventing Mills and Nordwall from acting with respect to the Tribe until these conflicts were eliminated (A199-200).

Count 7 was brought against Mills and Nordwall in their individual capacities (A175-189). Appellants alleged that these defendants' participation in the expulsion of Wopsock and Duncan and in the adoption of the ordinances, as well as the failure to enforce the IRA and the ICRA, violated appellants' First Amendment right to free speech and Fifth Amendment rights to due process and equal protection (ibid.). Appellants sought declaratory relief and money damages in the amount of $4,000,000 for each appellant under Bivens (A200-201).

Count 8 was brought against Mills and Nordwall, as well as Jurrius, Hammer, and the Tribal defendants, in their individual capacities (A189-193). Appellants alleged that these defendants conspired to deprive Wopsock and Duncan of equal protection and equal privileges by retaliating against them for bringing the first lawsuit and discussing the issues with the press (ibid.). Appellants sought declaratory relief, and monetary damages under 42 U.S.C. 1985(3) from the Tribal defendants, Jurrius and Hammer, but not from the Federal officials (A201-202).

E. The district court decision. – The district court dismissed the FAC in its entirety (A23-32). The court concluded that the FAC at bottom challenged the expulsion of Wopsock and Duncan and the adoption by the Business Committee of two ordinances, and accordingly, appellants sought to have the court resolve an internal tribal dispute between tribal members about matters of tribal law applying to the Tribe's self-government (A24-27). The court concluded that it lacked jurisdiction to address and resolve this dispute, relying "on well-established law concerning non-interference by federal courts with intra-tribal disputes" (A27). Accordingly, the court dismissed Counts 1, 2, 3, 4, 5, 6, and 7 on that ground, as well as Count 8 to the extent it rested on allegations raising an internal tribal dispute (A27). The court dismissed Count 8 in its entirety for failure to state a

claim because appellants failed to allege facts established the required intent of acting on a race-based animus (A27-28).

In other rulings, the court dismissed Count 7, the Bivens claim, because respect for tribal sovereignty and the complex federal legislation governing federal-tribal relationships were special circumstances counseling against recognizing a new Bivens action in this context (A27). With respect to the Tribal defendants, the court also held that Counts 1, 2 and 8 were barred by the doctrine of tribal sovereign immunity (A28). Further, Counts 1, 2, 3 and 4, as well as Counts 5 in part and 6 in part, failed because no duty under the IRA was triggered (A28-29). The court concluded that the IRA applied only if the Department of the Interior had received a "tribal request" for a Secretarial election (A28-29). Accordingly, there was no waiver of sovereign immunity allowing suit against the Federal officials under the IRA (A29). In addition, the court held that appellants had failed to exhaust their administrative remedies before the IBIA and therefore could not come within the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. 704 (A30). Finally, the court rejected appellants' claim that the Federal officials had a duty to act with respect to this controversy, finding

that appellants had "point[ed] to no aspect of tribal or federal law that requires the federal government to act * * *" (A30).[6/]

The court also denied the motion to amend (A30-31). The court held that leave was appropriately denied because the facts and claims asserted by the second amended complaint were known to appellants at the time they filed the original complaints, because the amendments were an attempt to avoid the court's prior rulings and the arguments raised by defendants, because the motion was untimely, and because amendment would be futile (A31).

SUMMARY OF ARGUMENT

1. The district court lacked jurisdiction over appellants' claims against the Federal officials in their official capacity because appellants' FAC failed to establish the requisite waiver of sovereign immunity. Counts 3 and 4 fail because the IRA provides a cause of action only for an Indian tribe, and not its individual members, to sue the Secretary only under the very limited circumstances where the tribe submits an appropriate "tribal request" for a Secretarial election. Count 5 fails because the ICRA has no waiver of sovereign

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[6/] The court also dismissed Count 6, the claim Mills and Nordwall had improper conflicts of interest, as moot (A27). The court provided no explanation, but presumably relied on the fact that Nordwall had retired and no longer was the Area Director and Mills no longer was engaged to defendant Hammer (A520-522).

immunity for individual Indians to obtain relief from the Federal officials for the Tribe's alleged violations of the ICRA. The ICRA applies only to Indian tribes and contains no grant of jurisdiction or waiver of sovereign immunity that would allow suit against Federal officials. Moreover, under controlling Tenth Circuit law, Federal officials have no fiduciary or trust duties to individual Indians to intervene in election disputes and intra-tribal controversies about the government of the tribe.

Counts 3, 4, 5 and 6 also fail because those claims do not come within the waiver of sovereign immunity provided by the APA. The FAC does not, and could not, identify a final agency action under the APA because the appellants' administrative appeals were pending with the IBIA at the time they filed their complaint. In addition, the FAC does not meet the requirements for failure to act claims under 5 U.S.C. 706(1), which provides a cause of action for "agency action unlawfully withheld." Neither the IRA, nor the ICRA, nor the Federal officials' trust responsibilities create mandatory duties to intervene in an intra-tribal dispute about elections and tribal leadership.

2. Even if the district court had jurisdiction over Counts 3, 4, 5, and 6, the FAC failed to state claims upon which relief could be granted. The IRA imposes duties on the Secretary only after an appropriate tribal request is made for a

Secretarial election and such an election has occurred. In addition, an Indian tribe, even though it chooses to organize under an IRA constitution, retains the sovereign power to govern itself through processes that do not invoke the IRA. Further, the ICRA imposes no duties directly on Federal officials, and the dispute here does not trigger the Secretary's limited responsibility to determine whether Tribal interpretations of its own laws are reasonable or whether an ordinance or constitutional amendment violates the ICRA. Count 6 of the FAC also fails to identify any specific statutory or regulatory provisions that could impose a trust duty on Mills and Nordwall to recuse themselves with respect to the Tribe's election and leadership dispute.

3. The district court correctly dismissed the claims brought against Mills and Nordwall in their individual capacities. The FAC does not state a claim against Mills and Nordwall under 42 U.S.C. 1985(2). Initially, this argument has been waived because it was not made to the district court as part of appellants' opposition to the defendants' dispositive motions. In addition, a fair reading of this new argument is that appellants do not charge that Mills and Nordwall were participants in a 1985(2) conspiracy. Even if this argument is aimed at Mills and Nordwall, appellants' belated attempt to substitute a new legal theory for its damages claim must be rejected as not providing fair notice to the defendants of

the nature of their claim. Nor does the FAC state a claim under 42 U.S.C. 1986. Finally, the FAC does not plead sufficient facts to establish that Mills and Nordwall agreed to conspire against Wopsock and Duncan or that would overcome Mills' and Nordwall's qualified immunity.

This Court has also decided not to recognize a Bivens claim where the BIA declines to intervene in the tribal election process. Accordingly, Mills and Nordwall cannot be liable under Bivens for their conduct with regard to this election dispute.

4. Lastly, the district court acted well within its discretion under Rule 15 when it denied leave to filed the proposed Second Amended Complaint. Appellants' motion was untimely, was based on facts known to appellants at the time they filed their original complaint, and the proposed amendment would have been futile in any event.

STANDARD OF REVIEW

This Court reviews both a dismissal pursuant to Rule 12(b)(6) and a grant of summary judgment de novo. Kaw Nation v. Lujan, 378 F.3d 1139 (10th Cir. 2004). Denial of motion for leave to amend a complaint is reviewed under the abuse of discretion standard. The Tool Box, Inc. v. Ogden City Corporation, 419 F.3d 1084, 1086-1087 (10th Cir. 2005).

ARGUMENT

I

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON ALL CLAIMS AGAINST THE FEDERAL OFFICIALS IN THEIR OFFICIAL CAPACITIES

A. The district court lacked jurisdiction over the claims against the Federal officials in their official capacities. – Federal Courts are courts of limited and not general jurisdiction, and appellants were required to affirmatively demonstrate the existence of subject matter jurisdiction. See Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986); Henry v. Office of Thrift Supervision, 43 F.3d 507, 511-12 (10th Cir. 1994). In order to maintain a suit against the United States or its officers in their official capacities, plaintiffs must identify both a grant of subject matter jurisdiction and a waiver of sovereign immunity to meet the jurisdictional prerequisites. See Nero v. Cherokee National of Oklahoma, 892 F.2d at 1459 n.2, 1463, citing United States v. Mitchell, 463 U.S. 206, 212 (1983); New Mexico v. Regan, 745 F.2d 1318, 1320 (10th Cir. 1984); Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1059 (10th Cir. 1993).[7] "A waiver of

[7] If such waiver exists, it is often found in a statute other than the jurisdictional statute itself. For example, 28 U.S.C. 1331 does not contain a waiver of the Government's immunity. Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990) (holding that 28 U.S.C. 1331 is not a waiver of sovereign immunity). See (continued...)

sovereign immunity 'cannot be implied but must be unequivocally expressed.'" United States v. Mitchell, 445 U.S. 535, 538 (1980), quoting United States v. King, 395 U.S. 1, 4 (1969). Furthermore, the particular conditions attached to a waiver of sovereign immunity must be strictly adhered to so as not to expand the waiver beyond what Congress intended. See United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983).

Here, appellants brought claims against the Federal officials in their official capacities in Counts 3, 4, 5, and 6 (A155-175). These counts invoked the provisions of the IRA, the ICRA, and the APA, and the trust responsibility the United States has with regard to Indian tribes. Appellants failed, however, to show that these provisions waived sovereign immunity for these counts of the FAC. Accordingly, the district court correctly dismissed them for lack of jurisdiction.

1. Counts 3 and 4 fail because the IRA does not supply a waiver of sovereign immunity for an action by individual Indians seeking to force Federal officials to enforce the IRA against an Indian tribe. – In Counts 3 and 4, appellants claim that Nordwall and Mills should have disapproved Ordinances 03-002 and

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[7/](...continued)
also State of Wyoming v. United States, 279 F.3d 1214 (10th Cir. 2000).

03-004 because there were not adopted pursuant to a Secretarial election conducted under the IRA and that appellants may have injunctive relief preventing Nordwall and Mills from accepting the ordinances as valid. Appellants argue (Br. 38, 44-48, 50-52) that jurisdiction and the requisite waiver of sovereign immunity is supplied by 25 U.S.C. 476(d)(2), which provides that:

> [i]f the Secretary [of the Interior] does not approve or disapprove the constitution and bylaws or amendments within the forty-five days [allowed under 476(d)(1) to annul tribal membership approval of provisions found by the Secretary to be contrary to applicable laws], the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

This provision, however, allows an Indian tribe, and not its individual members, to bring an action against the Secretary only under the very limited circumstances where the tribe submits an appropriate "tribal request" for a Secretarial election. As originally enacted and as subsequently amended, Section 476 grants to "any Indian tribe," not individual Indians, the right to organize its self-government through adoption of a constitution by an election supervised by the Secretary of the Interior pursuant to the tribe's request for such an election. The obligation imposed on the Secretary to conduct such an election is owed to the tribe, not the individual members. The Federal Circuit has already held in this case that the IRA "simply requires the Secretary [of the Interior] to 'call and hold

an election * * * after receipt of a tribal request.'" 454 F.3d at 1332, quoting 25 U.S.C. 476(c). This ruling is binding on appellants and this Court as the law of the case. See Christianson v. Colt Industrial Operating Corporation, 486 U.S. 800, 818 (1988); Wessel v. City of Albuquerque, 463 F.3d 1138, 1143-1144 (10th Cir. 2006); Gage v. General Motors Corporation, 796 F.2d 345, 349-350 (10th Cir. 1986).

Nor has that limitation been affected by the 1998 amendments to the IRA, which require the Secretary to make certain determinations and meet specified deadlines in response to a tribal request. See Pub. L. No. 100-581, Section 101. Accordingly, when those amendments also provided that "[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal district court," Congress provided only a limited cause of action to enforce the Secretary's duties that attach after receipt of the specified "tribal request." See 102 Stat. 2938-2939. As stated in Kickapoo Tribe of Oklahoma v. Lujan, 728 F.Supp. 791, 794 (D.D.C. 1990): "[T]he legislative history of the 1988 amendments to the IRA makes clear that Congress consented to suit only by the tribe submitting its proposed constitution for ratification * * * *. The Court finds nothing to suggest * * * that in amending the IRA, Congress was consenting to suit by 'other affected factions or groups.'"

Even if there were some ambiguity regarding individual Indians' ability to sue to enforce Section 476, that ambiguity should be resolved in favor of tribal sovereignty. The overriding purpose of the IRA Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government. Morton v. Mancari, 417 U.S. 535, 542 (1974). See also Coyote Valley Band of Pomo Indians v. United States, 639 F.Supp. 165, 171 (E.D. Cal. 1986) ("One of the primary objectives of the IRA was to 'encourage Indians to revitalize their self government' and to participate more directly in developing the laws which intimately affect their lives."); Martinez v. Southern Ute Tribe, 249 F.2d 915, 919 (10th Cir. 1957) (same). Allowing appellants to bring an action to force the Federal officials to nullify the subject ordinances would be adverse to and destructive of the purposes and goals of tribal self-government, as embodied in the IRA. "Ambiguities in federal law have been construed generously in order to comport with * * * traditional notions of sovereignty and with the federal policy of encouraging tribal independence." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980). See N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1195 (10th Cir. 2002) (same).

Appellants are individual Indians, not the Tribe, and their FAC did not allege that there has been a "tribal request" for a Secretarial election under the

IRA. Accordingly, their claims in Counts 3 and 4 do not come within the limited waiver of sovereign immunity found in 25 U.S.C. 476(d)(2).[8/]

2. Count 5 fails because the ICRA provides no waiver of sovereign immunity for individual Indians to obtain relief from the Federal officials for the Tribe's alleged violations of the ICRA. – Count 5 claims that the Tribal defendants violated appellants' rights secured by the ICRA and that the Federal officials had a duty to decline to recognize the tribal actions taken in violation of the ICRA as valid (A163-170).

ICRA, however, applies only to Indian tribes and contains no grant of jurisdiction or waiver of sovereign immunity that would allow suit against Federal officials. Indeed, the Supreme Court and this Court have conclusively held that the only jurisdiction that federal district courts have to enforce the ICRA is

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[8/] Appellants' reliance (Br. 29, 30) on Williamson-Edwards v. Babbitt, 1998 U.S. Dist. Lexis 9241 (W.D. Mich. 1998), is misplaced. In that case, the district court held that an action to force the BIA to review an ordinance implementing changes to a tribe's criteria for adoption into the tribe stated a claim under the IRA because the tribal constitution provided for such review and because the ordinance effectively amended the constitution's membership provisions. As the district court noted here (A26-27), however, the court in Williamson-Edwards failed to address the limitations on enforcement of the IRA, which permit enforcement only by tribes and only to enforce duties triggered by tribal request for a Secretarial election. Moreover, the court in Williamson-Edwards was reviewing a final agency decision that refused to conduct such a review. At the time appellants brought their action in this case, the IBIA had not resolved their administrative appeals.

through the writ of habeas corpus preserved by 25 U.S.C. 1303. See Santa Clara Pueblo, 436 U.S. at 59-60; Wheeler v. Swimmer, 835 F.2d at 261. Moreover, appellants' claim is precluded by the prior ruling of the Federal Circuit in this case, which held that the ICRA "does not impose duties upon the federal government or its officials." 454 F.3d at 1333. This Court has also unequivocally held that Federal officials have no fiduciary or trust duties to individual Indians to intervene in election disputes and intra-tribal controversies about the government of the tribe. Nero v. Cherokee Nation of Oklahoma, 892 F.2d at 1465; Wheeler v. United States Department of the Interior, 811 F.2d at 552. It necessarily follows that the statute does not provide jurisdiction over actions against Federal officials or authorize suit against them. See Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005). Although the Supreme Court noted in Santa Clara that individual Indians "may" be able to seek relief from the Department of the Interior where a tribal constitution requires approval of ordinances by the agency, 436 U.S. at 66 n.22, the availability of that avenue for redress does not create jurisdiction in the district courts to sue the agency.

Appellants also suggest (Br. 44-52) the district court had jurisdiction because the IBIA has recognized that in certain limited circumstances the Interior Department has the authority and responsibility to review and determine whether

Tribal interpretations of its own laws are reasonable or whether an ordinance or constitutional amendment violates the ICRA. The IBIA has recognized this responsibility in circumstances where the BIA is forced to make such determinations in order to carry out government-to-government relations with the tribe or where the BIA is required to approve the ordinance or constitutional amendment. See Cahto Tribe of Laytonville Rancheria v. Pacific Regional Director, 38 IBIA 244 (2002); Turtle Mountain Band of Chippewa Indians v. Great Plains Regional Director, 36 IBIA 297 (2001); Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992); United Keetoowah Band of Cherokee Indians v. Muskogee Area Director, 22 IBIA 75, 83 (1992). The fact that the IBIA has declared BIA has this responsibility does not, of course, determine the jurisdiction of the district court here since the IBIA has no authority to grant subject matter jurisdiction to the federal courts or waive the government's sovereign immunity.

3. Count 3, 4, 5 and 6 fail because these claims do not come within the waiver of sovereign immunity provided in the APA. – Appellants suggest (Br. 41-42, 48, 52) they may bring their claims against the Federal officials under the APA, which provides a cause of action to review agency action under certain conditions. The APA's waiver of sovereign immunity is not available for Counts 3, 4, 5 and 6 of the FAC because those counts do not identify any final agency

action as required by the APA and because they do not properly allege a failure to act claim under the APA.

Under the APA, sovereign immunity is waived for claims brought against the United States in federal court if: (1) the person bringing suit claims to have suffered harm because of final agency action (or inaction); (2) non-monetary relief is sought; (3) there is no other adequate remedy in a court; (4) the agency action challenged is not committed to the agency's discretion by law; and (5) there is not another statute that forbids the relief sought. See 5 U.S.C. 701(a), 702, 704. Sovereign immunity is waived pursuant to the APA only if all of the above requirements are met. See United Tribe of Shawnee Indians v. United States, 55 F.Supp.2d 1238, 1244 (D. Kan. 1999) ("the APA provides a waiver of sovereign immunity to the extent that the claims involve judicial review of agency action []") [citations omitted]. The appellants had the burden to establish an explicit waiver of sovereign immunity. See Colo. Farm Bureau Fed'n v. U. S. Forest Service, 220 F.3d 1171, 1173 (10th Cir. 2000) (plaintiff has the burden of identifying specific conduct and explaining how it constitutes "final agency action."); Fostvedt v. United States, 978 F.2d 1201, 1203 (10th Cir. 1992).

Here, appellants' complaint could not satisfy this requirement because their administrative appeals were pending with the IBIA at the time they filed their complaint. This Court has held that:

> The dictates of [the APA] require that judicial review may only be undertaken following "final" agency action. This includes all administrative relief accorded such as appeal to a superior agency authority or petition for agency reconsideration pursuant to the prescribed administrative rules. Generally, then, judicial review is limited to final decisions following the agency's application of its expertise and its steps to correct its own errors in making a proper record, all of which are within the agency's independent administrative process.

Franks v. Nimmo, 683 F.2d 1290, 1294 (10th Cir. 1982). Further, "the Department of the Interior decisions are not final for purposes of [5 U.S.C.] § 704 review if they are subject to appeal to a higher authority within the department." Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1055 n. 3 (10th Cir. 1993) (citing 25 C.F.R. 2.6(a), of the BIA's appeal regulations).[9/] See also Coosewoon v. Meridian Oil Co., 25 F.3d 920, 924-25 (10th Cir. 1994) (no

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[9/] Regarding the requirement to appeal to the IBIA, 43 C.F.R. 4.314 provides:

> No decision of an * * * BIA official that at the time of its rendition is subject to appeal to the [IBIA], will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending decision on appeal by order of the [IBIA].

decision subject to appeal within Interior shall be considered final for purposes of 5 U.S.C. 704).

In this case, appellants pursued administrative appeals to the IBIA from Director Nordwall's decision dismissing their appeals of Mills' approval of Tribal Ordinances Nos. 03-002 and 03-004. In those appeals, appellants sought relief from Nordwall's decision that no approval of the ordinances by BIA was required and from BIA's failure to intervene in their dispute with the Business Committee (A309-330, 473-486). The appeals before the IBIA regarding the actions of Defendant Mills and the decisions of Defendant Nordwall were still pending at the time appellants filed their complaint. Accordingly, appellants' failure to exhaust their administrative remedies meant the complaint could not satisfy the APA's final action requirement with respect to the counts that sought relief for the actions or failures to act of the Federal officials, Counts 3, 4, 5, and 6.

Second, Counts 3, 4, 5 and 6 of the FAC do not meet the requirements for failure to act claims under 5 U.S.C. 706(1), which provides a cause of action for "agency action unlawfully withheld." In Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64-65 (2004), the Supreme Court held that "a claim under 706(1) can proceed only where plaintiff asserts that an agency failed to take a discrete action that it is required to take." 542 U.S. at 64 (emphasis in original).

Here, no statute or regulation requires the Federal officials to take the actions appellants allege should be taken. Counts 3 and 4 are premised on an alleged duty to enforce the IRA against the Tribe. As we have shown, the IRA imposes no duty on the Federal officials in the absence of a tribal request for a Secretarial election. As to Count 5, there is no mandatory duty to enforce the ICRA against the Tribe. This Court has also held that Federal officials have no trust or fiduciary duties to intervene in an intra-tribal dispute about elections and tribal leadership, a conclusion that applies to Count 6's claim that Nordwall and Mills were obliged to recuse themselves because of alleged conflicts of interest. See Nero, supra; Wheeler, supra. In addition, the limited responsibility recognized by the IBIA for the BIA to interpret tribal law and make determinations of the validity of tribal actions for purposes of conducting government-to-government relations plainly vests the BIA with wide discretion in deciding when to assert that authority. As the Supreme Court recognized in Norton v. Southern Utah Wilderness Alliance, no 706(1) claim will lie in such circumstances. 452 U.S. at 66. Therefore, these counts of the FAC failed to assert an actionable failure to take mandatory actions as required under Norton v. Southern Utah Wilderness Alliance.

B. The FAC failed to state claims upon which relief can be granted against the Federal officials in the official capacities. – In considering under Rule 12(b)(6) whether a complaint adequately states a claim, the court accepts well-pleaded factual allegations as true and then considers whether the complaint is legally sufficient to state a claim upon which relief may be granted. Ordinance 59 Association v. United States Department of the Interior, 163 F.3d 1150, 1152 (10th Cir. 1998). Even if the district court had subject matter jurisdiction over each of the claims against the Federal officials, the FAC did not plead legally sufficient claims. The FAC did not state a cause of action under the IRA that would support Counts 3 and 4, or a claim under the ICRA for Count 5, or under any cognizable legal basis for Count 6. The judgment of dismissal may therefore be affirmed on these alternative grounds.

1. Counts 3 and 4 fail to state claims against the Federal officials under the IRA. – In Counts 3 and 4 appellants alleged that Mills and Nordwall violated a duty under the IRA to disapprove both of the ordinances (A155-163). As we have shown, the IRA imposes obligations on the Secretary only when a tribe submits a tribal request for the conduct of a Secretarial election. See pp. 24-27, supra. A "tribal request" "mean[s] a resolution passed by an official tribal body, not a petition signed by tribal members." Split Family Support Group v. Moran, 232

F.Supp.2d 1133, 1136 (D. Mont. 2002), citing Pub. L. No. 100-581 § 102(2). The FAC does not allege that such resolution was passed and submitted to the Secretary in this case.

Further, even if a tribal request had been made, the Secretary's duty to approve or disapprove the alleged "constitutionally amending" ordinances would have arisen only after an election occurred in which the Tribe adopted the ordinances. 25 U.S.C. 476(d). In Shakopee Mdewakanton Sioux Community v. Babbitt, 906 F.Supp. 513, 522 (D. Minn. 1995), aff'd, 107 F.3d 667 (8th Cir. 1997), the court determined that the Secretarial approval process does not apply "until an election [that] satisfies the conditions of § 476(a)(1) [including a tribal vote approving the amendment]" has occurred. The FAC fails to allege that a Secretarial election under 25 U.S.C. 476 took place in this case. Because the FAC failed to alleged any tribal request or Secretarial election, the FAC failed to state any legally sufficient claim that Mills and Nordwall had violated the IRA.

Secondly, Counts 3 and 4 fail for the independent reason that the Tribe, even though it chose to organize under an IRA constitution, retained the sovereign power to govern itself through processes that do not invoke the IRA. Prior to the enactment of the IRA, Indian tribes retained the right of self-government.

Wheeler v. U.S. Department of the Interior, 811 F.2d at 551. As originally enacted, Section 16 of the IRA provides in pertinent part:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and power: * * * [listing rights and powers].

48 Stat. 984, 987 (emphasis supplied).

Shortly after enactment, the Department of the Interior expressed its view that:

> The "powers vested in any Indian tribe or tribal council by existing law", (see sec. 16 of the IRA) are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:
>
> 1. The power to adopt a form of government, to create various offices and to prescribe the duties thereof, to provide for the manner of election and removal of tribal officers * * * *.
>
> * * * *
>
> The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine and define its own form of government. Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms and procedures which they are to attest to the authoritative character of acts done in the name of the tribe.

POWER OF INDIAN TRIBES, 55 Decisions of the Department of the Interior 14, 30, 65 (Oct 25, 1934), 1934 WL 2186 (D.O.I.). The view of the agency charged with implementing the IRA, published contemporaneously with its enactment, must be given considerable weight. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984); United States v. Mead Corp., 533 U.S. 218 (2001).

Therefore, on matters of election and removal of officers, the IRA was simply a restatement – not a limitation – of the Tribe's pre-existing powers. And in adopting or amending its constitution, a tribe has the option of: 1) requesting the Secretary to conduct an election thereon, or 2) promulgating such governing documents through procedures of its own choosing. Congress has recently reaffirmed that interpretation and adopted it into positive law by amending the IRA to provide that:

> (h) Tribal sovereignty. – Notwithstanding any other provision of this Act--
>
> (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
>
> (2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

25 U.S.C. 476(h). The introductory phrase "Notwithstanding any other provision of this Act" "connotes a legislative intent to displace any other provision of law that is contrary to the Act." Shoshone Indian Tribe v. United States, 364 F.3d 1339, 1346 (Fed. Cir. 2004). The plain meaning of these provisions therefore is that the Tribe retained its sovereign authority to govern itself through the enactment of Tribal ordinances at issue here.[10/] Such ordinances fall squarely within the realm of sovereign governance, involving as they do procedures for the election and recall of Tribal officers. Nothing in the IRA invalidates such action, regardless of whether the ordinances are inconsistent with the Tribal constitution.[11/] Accordingly, because the Tribe's adoption of the ordinances triggered no obligation for Mills and Nordwall under the IRA, Counts 3 and 4 of the FAC are not legally sufficient to state a claim upon which relief may be granted.

[10/] Even if there were some ambiguity regarding the meaning of subsection (h), that ambiguity should be resolved in favor of tribal sovereignty. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

[11/] The Senate Report accompanying this amendment states that this subsection "clarifies that Indian tribes that accepted the Indian Reorganization Act . . . are not required to adopt constitutions pursuant to the IRA and remain free to organize their governing bodies pursuant to organization governing documents that they determine." S. Rep. 108-49, *2 (2003).

2. Count 5 fails to state a claim under the ICRA – In Count 5, appellants allege a cause of action based on violations of the ICRA by the Tribal defendants, not the Federal officials (A163-170). Appellants concede that the ICRA does not allow the federal courts to review such claims against Tribal officials (A166). See Santa Clara Pueblo. The Supreme Court's holding that the only remedy ICRA provides in a federal court is by the writ of habeas corpus necessarily means there is no cause of action against Federal officials for enforcement the statute. Indeed, this Court has also unequivocally held that Federal officials have no fiduciary or trust duties to individual Indians to intervene in election disputes and intra-tribal controversies about the government of the tribe. Nero v. Cherokee Nation of Oklahoma, 892 F.2d at 1465; Wheeler v. United States Department of the Interior, 811 F.2d at 552.

Appellants' further claim (Br. 44) that Federal officials have the "general authority and responsibility to review tribal law" is equally unavailing because the FAC fails to state facts that would bring them within the very limited circumstances where the IBIA has sustained such action by BIA.[12/] In United

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[12/] Contrary to appellants' contention (Br. 14, 45, 49-50), neither Nordwall nor Mills received formal legal advice from the Solicitor's Office of the Interior Department that they had a duty to intervene in this election dispute. The document appellants rely on (A290-302) is a preliminary, unsigned draft

(continued...)

Keetoowah Band of Cherokee Indians v. Muskogee Area Director ("UKB"), 22 IBIA 75, reconsideration denied, 22 IBIA 172 (1992), two administrative judges of the IBIA upheld the decision of a BIA area director which did not recognize as valid a band ordinance disenrolling certain band members who held dual Indian enrollment with any other tribe. The band constitution provided that band membership consisted of the list of members certified by the BIA superintendent. The director found that the ordinance ran afoul of existing requirements of the band constitution requiring federal approval. As applied by the band, that disenrollment barred three candidates from running for office in a band election. The decision not to recognize the validity of the ordinance thus led to federal non-recognition of the results of the election for only those three offices. The director recognized as valid the rest of the band election.

The IBIA upheld the director's decision on the basis of several important factors. First, the band admitted that its disputed ordinance "was not motivated by either an exercise of tribal sovereignty over, or the Band's historical values concerning, its membership, but rather was a response to what the Band perceived to be the BIA's requirements for contracting under P.L. 93-638," thereby making

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[12/](...continued)
memorandum (A290) that was never adopted as the position of the Department.

federal review not action that would "substantially interfere with [the Band's] ability to maintain itself as a culturally and politically distinct entity." 22 IBIA at 81. No comparable facts concerning the Ute election ordinances at issue have been alleged, nor could they be.

Second, the disenrollment ordinance in UKB had a facially permanent effect of thwarting a part of the band constitution requiring federal approval in the earlier recognition of band membership. The IBIA noted "[t]he Band's resolution concerns tribal membership, not candidacy for tribal office." 22 IBIA at 80, fn. 6. In a later election dispute involving the same band, the IBIA found no provision in the band constitution authorizing the BIA or IBIA to review band council decisions concerning elections, thus clearly limiting the reach of the earlier UKB opinion. See Emma Sue Holland v. Acting Muskogee Area Director, BIA, 33 IBIA 64, 65 (1998).

The IBIA has limited UKB and other cases to contexts where "the Department already had jurisdiction to take action in a matter." Arthur J. Welmas and Linda Streeter Dukic v. Sacramento Area Director, BIA, 24 IBIA 264, 270-72 (1993). Appellants' FAC in this case does not allege they were disenrolled from the Ute Tribe, or that there is any provision in the Tribal constitution giving Federal officials the authority to take the action appellants contend was required.

Finally, the director in UKB did not annul the election. The BIA continued to recognize the election results for all but three of the offices voted on. The BIA and IBIA saw a number of ways to continue to deal on a government-to-government basis with the band without recognizing the three disputed officials whose election was not recognized, even though they were the band chief, assistant chief, and treasurer. Here, by contrast, appellants sought a much broader remedy, asking for an order enjoining the Federal officials from recognizing all actions of the Tribal Business Committee, for the previous full year and continuing thereafter (A196-200). Lacking the critically-distinguishing features of UKB, there is no proper claim here against the Federal officials for a court to review. To do so would interfere in an intra-tribal dispute in ways proscribed by statute (ICRA), case law (Santa Clara Pueblo and progeny), and federal policy generally.

3. Count 6 fails to state a claim under any cognizable legal basis. – In Count 6, appellants alleged that Mills and Nordwall had a fiduciary or trust duty to recuse themselves from acting on this tribal election and leadership matter because of allegedly disabling conflicts of interest (A170-175). This Court, however, has categorically held that Federal officials have no fiduciary or trust duties to individual Indians to intervene in election disputes and intra-tribal controversies

about the government of the tribe. Nero v. Cherokee Nation of Oklahoma, 892 F.2d at 1465; Wheeler v. United States Department of the Interior, 811 F.2d at 552-553. As the court noted in Wheeler and reaffirmed in Nero, in the absence of a trust corpus and Federal statutes and regulations creating specific trust duties, no enforceable trust duty for Federal officials is created. 811 F.2d at 552-553; 892 F.2d at 1465. Count 6 of the FAC fails to identify any specific statutory or regulatory provisions that could impose a trust duty on Mills and Nordwall to recuse themselves with respect to the Tribe's election and leadership dispute. Count 6, therefore, fails to state a claim upon which relief can be granted.

In addition, this claim is moot. Appellants sought declaratory and injunctive relief requiring Nordwall and Mills to recuse themselves because of alleged personal conflicts. As the district court noted (A27), Nordwall has retired and no longer is the Area Director. Since the judgment was entered below, Mills has also retired and is no longer the Superintendent. Since no meaningful relief based on these individuals' alleged personal conflicts can be provided, the claim has become moot.

II

THE DISTRICT COURT CORRECTLY DISMISSED ALL CLAIMS AGAINST MILLS AND NORDWALL IN THEIR INDIVIDUAL CAPACITIES

A. The FAC does not state a claim against Mills and Nordwall under either 42 U.S.C. 1985(2) or 1986. – Appellants have effectively abandoned their claim of an unlawful conspiracy under 42 U.S.C. 1985(3) to deprive Wopsock and Duncan of their civil rights.[13/] Instead, in a new argument not presented to the district court in their opposition to the motions for summary judgment and to dismiss, appellants contend that the FAC stated a claim of different unlawful conspiracies, one under 42 U.S.C. 1985(2) to obstruct justice in a federal court by retaliating against Wopsock and Duncan for bringing the prior lawsuit against Mills and Nordwall that threatened the Tribe's arrangements with Jurrius, and one under 42 U.S.C. 1986 for failure to prevent injuries inflicted as part of the alleged 1985(2) conspiracy (Br. 18-23). Appellants are barred from making this argument, however, because it was not made to the district court as grounds for denying the

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[13/] In a footnote (Br. 19 n.11), appellants address in a cursory fashion the district court's ruling that the 42 U.S.C. 1985(3) claim fails for lack of an allegation of a race or qualifying class based animus. Such cursory treatment is not sufficient to preserve an argument. See Dick v. Phone Directories Co., Inc., 397 F.3d 1256, 1268 (10th Cir. 2005). In any event, the district court was manifestly correct. See Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993); Brown v. Reardon, 770 F.2d at 905-06.

defendants' motions. See Hill v. Kansas Gas Service Co., 323 F.3d 858, 866 (10th Cir. 2003). Contrary to appellants' contention (Br. 22-23), the reference to 42 U.S.C. 1985(2) in a footnote in appellants' Memorandum in Opposition to Federal Defendants' Motions to Dismiss (A891, A907 n.4) does not constitute an argument that the FAC pled a claim under that subsection of 42 U.S.C. 1985. This portion of the appellants' memorandum was devoted exclusively to supporting its claim under 42 U.S.C. 1985(3) (A906-910). Moreover, the footnote expressly acknowledges that an amendment would be necessary to allege a claim under 1985(2) ("[I]n the event the Court denies the Motions on file herein, the First Amended Complaint will be amended to allege a 42 U.S.C. § 1985(2) violation * * *.") (A907 n.4). Further, no argument citing 42 U.S.C. 1986 was ever presented in these oppositions.

1. The FAC does not state a claim under 42 U.S.C. 1985(2). – Even if not waived, the argument has no merit. The FAC cannot be fairly read to state a proper 42 U.S.C. 1985(2) claim against Mills and Nordwall. The FAC nowhere cites that provision while it explicitly invokes the next subsection of 42 U.S.C. 1985, subsection (3) in Count 8. The two provisions have significantly different elements. A subsection (2) conspiracy aims to obstruct justice in either Federal or State court proceedings, while a subsection (3) conspiracy aims to deprive persons

of the equal protection of other laws that secure rights for those persons. See Wright v. No Skiter, Inc., 774 F.2d 422, 424-426 (10th Cir. 1985) (finding plaintiff had failed to state a subsection (3) conspiracy but had stated a subsection (2) conspiracy). Furthermore, a subsection (3) conspiracy and a subsection (2) conspiracy to obstruct justice in State court proceedings requires a showing of a race or qualifying class based animus, while no such showing is required for a subsection (2) conspiracy to obstruct justice in Federal courts. See Kush v. Rutledge, 460 U.S. 719 (1983).

Appellants' belated attempt to substitute a new legal theory for its damage claim must be rejected as not providing fair notice to the defendants of the nature of their claim. Appellants' reliance (Br. 14-15, 18) on ¶ 253 of the FAC is misplaced. Although this paragraph asserts that several defendants conspired to retaliate against plaintiffs Wopsock and Duncan for filing the prior lawsuit, the allegation is but one paragraph in the lengthy set of allegations supporting Count 8, which is expressly and exclusively premised on 42 U.S.C. 1985(3) (A189-193). There is no citation in the FAC to 42 U.S.C. 1985(2). Moreover, neither appellants' oppositions to the motions for summary judgment nor the oppositions to the motions to dismiss suggest, much less argue, that the FAC made out such a claim (A729-767, 777-819, 891-910). Defendants met and briefed the claim of a

conspiracy under subsection (3) and understandably provided no argument opposing a subsection (2) claim.

Appellants' contrary argument is foreclosed under the decisions of this Court. In Green Country Food Market v. Bottling Group, LLC, 371 F.3d 1275 (10th Cir. 2004), plaintiffs' complaint asserted claims under two sections of a state antitrust law, and plaintiffs subsequently raised the applicability of a third section in its opposition to defendants' summary judgment. 371 F.3d at 1279-1280. The district court declined to treat the complaint as alleging a violation of the third, unmentioned section, and the court of appeals affirmed, holding "[t]he liberalized pleading rules * * * do not permit plaintiffs to wait until the last minute to ascertain and refine theories on which they intend to build their case. * * *. '[w]e cannot say that the incorrect statutory citation was an unimportant detail implicitly corrected by the facts alleged in the complaint.' " 371 F.3d at 1279, quoting Dunn v. Ewell, 611 F.2d 815, 816 (10th Cir. 1980).

Finally, a properly stated claim under 42 U.S.C. 1985(2) must establish a conspiracy with facts that would show a meeting of the minds to obstruct justice in Federal court. See Brever v. Rockwell International Corp., 40 F.3d 1119, 1127 (10th Cir. 1994); Langley v. Adams County, Colorado, 987 F.2d 1473, 1482 (10th Cir. 1993); Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230-1231 (10th Cir.

1990). Here, as to Mills and Nordwall, the FAC alleges only that Mills reserved a conference room and attended a Business Committee meeting at which appellants were present, that Mills responded to the Business Committee's request to review and approve the ordinances, and that Nordwall took various actions to resolve the administrative appeals brought by appellants seeking to overturn Mills' approval (A155-158, 160-162, 176-188, 192). These actions are well within administrative responsibilities assigned to Mills and Nordwall as part of their official duties in dealing with Tribal matters. They provide scant support for an inference that Mills and Nordwall agreed to conspire against Wopsock and Duncan as retaliation for filing a lawsuit. Just as was the case in Langley and Abercrombie, supra, appellants have failed to allege "some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action." 987 F.2d at 1482, quoting Abercrombie, 896 F.2d at 1230-1231. Appellants rely (Br. 18) only on the mere fact that Wopsock and Duncan had filed a lawsuit and the conclusory allegation that defendants conspired to remove them from the Business Committee for filing that action but otherwise point to no factual basis for inferring a conspiracy.

Further, the appellants' reliance on Wright v. No Skiter, Inc., is misplaced. There, the plaintiff alleged a conspiracy to deprive him a contract for having filed

a lawsuit and supported that allegation with specific evidence of an illegal agreement to retaliate. 774 F.2d at 425 (citing deposition testimony of plaintiff). The FAC in this case fails to allege sufficient facts to infer such an agreement.

2. The FAC does not state a claim under 42 U.S.C. 1986. – Nor did the FAC state a claim under 42 U.S.C. 1986 for failure to prevent the injuries intended to be inflicted as part of the alleged 1985(2) conspiracy. The FAC nowhere cites to 42 U.S.C. 1986 or sets out such a claim. The FAC had no facts alleging advance knowledge of wrongs intended to be done or facts establishing any authority to prevent those wrongs. Nor did appellants ever cite this section in their oppositions to the motions to dismiss or ever argue that the FAC stated a claim under this section. Once again, this contention must be rejected as not providing fair notice to the defendants of the nature of their claim.

3. The FAC fails to allege sufficient facts to remove Mills' and Nordwall's qualified immunity. – Moreover, these allegations are plainly insufficient to overcome Mills' and Nordwall's qualified immunity to claims under 42 U.S.C. 1985(2) or 1986. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818

(1982); Bisbee v. Bey, 39 F.3d 1096, 1100-1102 (10th Cir. 1994). A complaint must plead specific facts, rather than allege a conspiracy in a conclusory manner, to survive a motion to dismiss. Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642, 645-646, 650 (10th Cir. 1988). "For the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must be as plaintiff maintains." Farmer v. Perrill, 288 F.3d 1254, 1259 (10th Cir. 2002) (internal quotations omitted).

The FAC fails to include any allegations that Mills or Nordwall violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Nor does the FAC identify any appropriate judicial authority establishing violations of the IRA, the ICRA, the Federal officials' trust duties, or that the discharge of Mills' and Nordwall's offical duties as described in the FAC could constitute actionable participation in a conspiracy to obstruct justice under 42 U.S.C. 1985(2). Accordingly, the FAC fails to state a claim sufficient to overcome Mills' and Nordwall's qualified immunity and was properly dismissed.

B. The FAC failed to state a claim under *Bivens*. – In Count 7, appellants sought damages under Bivens from Mills and Nordwall in their individual capacities for alleged violations of appellants' First Amendment right of free

speech and their Fifth Amendment rights to due process and equal protection (A175-189). The district court dismissed Count 7 for two independent reasons: (1) lack of jurisdiction to adjudicate an intra-tribal dispute, and (2) an intra-tribal dispute presented special factors that made a Bivens remedy inappropriate (A27).

That ruling is manifestly correct and should be affirmed. The Bivens claim is effectively foreclosed by this Court's decision in Nero. The court affirmed the dismissal of a Bivens claim for damages for alleged denial by Federal officials of a constitutional right to vote in a tribal election, holding that the officials had no duty to intervene in the tribal election process. 892 F.2d at 1465. There is no material distinction between the claim rejected in that case and Count 7 of the FAC here. Moreover, the district court correctly held that a Bivens remedy was not appropriate in this context because of the respect that must be paid to tribal sovereignty and because of the complex statutory and regulatory provisions addressing relations between Indian tribes and the Federal government and its officials (A27).

This Court's decisions in Robbins v. Wilkie, 300 F.3d at 1212 (2002) and 433 F.3d 755 (2006), cert. granted, 127 S.Ct. 722 (Dec. 1, 2006), do not require a different result. In its first decision in Robbins, the Court recognized that the Supreme Court has barred new Bivens claims when there are "'special factors

counseling hesitation in the absence of affirmative action by Congress'" or where there is an adequate substitute remedy. Robbins v. Wilkie, 300 F.3d at 1208, 1212 (2002), quoting Carlson v. Green, 446 U.S. 14, 18 (1980). In Robbins, there was no claim that "special factors" barred the recognition of a Bivens claim. Here, however, the complex statutory and regulatory provisions addressing relations between Indian tribes and the Federal government and its officials, in combination with the firmly established Federal policy of non-interference with tribal sovereignty, preclude a Bivens claim. Allowing such a claim will inject the federal courts into controversies about tribal elections and interpretation of tribal ordinances and constitutions, undermining the legislative scheme for supporting tribal self-government and self-determination. This was a sufficient and independent ground to deny a Bivens claim here, and nothing in Robbins v. Wilkie suggests otherwise.

Further, the facts of this case establish that there is an adequate substitute remedy here. Appellants challenged the actions of Mills and Nordwall by pursuing an administrative appeal to the Interior Board of Indian Appeals (A186 187, 606-609). See p. 14, supra. The IBIA rendered its decisions on January 6, 2006 on these appeals. See Jenkins v. Western Regional Director, 42 IBIA 106; Wopsock v. Western Regional Director, 42 IBIA 117. That the outcome was

adverse to appellants is irrelevant. Moreover, the fact that existing remedies do not provide complete relief does not entitle appellants to a Bivens remedy. See Correctional Services Corporation v. Malesko, 534 U.S. 61, 68-69 (2001); Schweiker v. Chilicky, 487 U.S. 412, 421-422 (1988); Bush v. Lucas, 462 U.S. 367, 385 n.28 (1983).

Appellants seek to come within this Court's decision in Robbins by characterizing their Bivens claim in a narrow fashion as limited to a remedy for retaliation against Wopsock and Duncan for filing their previous lawsuit (Br. 25-26). The alleged means of retaliation, however, is the failure of Mills and Nordwall to intervene in the tribal election controversy, thereby allowing the Tribe's actions to adversely impact Wopsock and Duncan (Br. 26). Permitting a Bivens remedy, therefore, would inevitably entangle the courts in the controversies about tribal elections and interpretation of tribal ordinances and constitutions. Moreover, even if the Bivens claim were viewed as merely seeking a remedy for retaliation for filing a lawsuit, there was a potentially available substitute remedy under 42 U.S.C. 1985(2), had the appellants properly invoked it. Finally, for the reasons set out above, pp. 50-51, supra, Mills and Nordwall are entitled to qualified immunity to the Bivens claim.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND THE COMPLAINT

The district court acted well within its discretion under Rule 15 when it denied leave to filed the proposed Second Amended Complaint. On the eve of the long-scheduled hearing on the defendants' motions for summary judgment and dismiss, and 10 months after filing the original complaint, appellants sought leave to amend their complaint to bolster their case against the deficiencies pointed out by both the district court and the defendants, and to add new claims, purportedly based on essentially the same facts as alleged in the FAC (A1303-1396). The district court's determination that the request was untimely and otherwise without merit should be affirmed.

This Court has ruled that untimeliness may be sufficient reason to deny leave to amend. Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994) (eight month delay sufficient grounds to deny leave). The district court also noted that appellants provided no explanation for their delay, further supporting the determination of untimeliness (A31, citing Pallottino, 31 F.3d at 1027, and Platte Valley Wyo-Braska Beet Growers Assn. v. Imperial Sugar Co., 100 Fed.

Appx. 717, 720, 2004 WL 1229575 (10th Cir. 2004) (unpublished). Appellants present no credible argument that would justify their delay.

Appellants do not attempt to controvert the district court's conclusion that at the time they filed the original complaint they were aware of the facts and claims to be asserted in the proposed second amended complaint (A31). This determination is adequate grounds for denying leave to amend. See Sipp v. Unumprovident Corporation, 107 Fed. Appx. 867 (10th Cir. 2004) (unpublished). Similarly, this Court has approved denial of leave to amend where the new claims were a belated attempt to salvage their case. See Viernow v. Euripedes Development Corp., 157 F.3d 785, 799-800 (10th Cir. 1998). Appellants' brief does not address these independent grounds relied upon by the district court, and in that circumstance they have effectively conceded they are correct See GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1387-88 (10th Cir. 1997) (failure to address alternative ground is concession).

Finally, the district court ruled that the proposed amendment would be futile. We have shown that the FAC failed to state a claim under either 42 U.S.C. 1985(2) or 42 U.S.C. 1986 against Mills or Nordwall, and the proposed Second Amended Complaint fails to do so for the same reasons, not the least of which is

that Count 8 of that document has no allegation that either Mills or Nordwall was a co-conspirator (A1381-1384).

Lastly, allowing amendment of the complaint to add Count 9, which asserted a claim under 42 U.S.C. 1986 for failure to prevent the injuries intended to be inflicted as part of the alleged 1985(2) conspiracy, would also have been futile. That count had no facts alleging advance knowledge of wrongs intended to be done or facts establishing any authority to prevent those wrongs. Nor did this count allege specific facts that would overcome Mills' and Nordwall's qualified immunity. Finally, a claim under 42 U.S.C. 1986 must be brought within one year of the time it accrues. The proposed Second Amended Complaint alleges that Mills' and Nordwall's conduct beginning in the fall of 2003 through January of 2004 constitutes a failure to prevent actionable harm under 42 U.S.C. 1985(2), yet they did not seek to bring this claim until April 4, 2005, well beyond the statute of limitations. For all these reasons, amendment would have been futile and leave was properly denied on that basis as well.

CONCLUSION

For the reasons set out above, the judgment of the district court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The Federal defendant-appellees submit that oral argument would be of assistance to the Court in addressing the legal and factual complexities of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two paper copies and one electronic copy of the foregoing Brief for the Federal-Defendant-Appellees have been served upon counsel this 5th day of April, 2007, by First Class United States Mail addressed to:

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I further certify that this brief has been submitted in PDF format by e-mail to esubmission@ca10.uscourts.gov; that all required privacy redactions have been made and, with the exception of those redactions, the digital submission of this brief is an exact copy of the written document filed with the Clerk; and that the digital submission has been scanned for viruses with Computer Associates eTrust InoculateIT, version 7.1.192, updated through April 5, 2007, and, according to the program, the document is free of viruses.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C),the attached Brief for the Federal-Defendant-Appellees is proportionately spaced, has a typeface of 14 points or more, was prepared using Corel WordPerfect Version12, and contains 13,021 words.

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ADDENDUM
Wopsock v. Natchees, 10th Cir. No. 06-4215
(separate Digital Submission is in scanned PDF format)