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. JURRIUS, 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 DISRICT OF UTAH
Case No. 2:04-CV-675, Judge Ted Stewart

BRIEF OF APPELLEE TRIBAL DEFENDANTS

DAVIS GRAHAM & STUBBS LLP
Charles L. Kaiser
Charles A. Breer
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
Telephone: (303) 892-9400
Facsimile: (303) 893-1379

Attorneys for Appellee Tribal Defendants

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STATEMENT OF RELATED CASES

Appellee Tribal Defendants are not aware of any cases that are pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

Millicent Maxine Natchees, T. Smiley Arrowchis, O. Roland McCook, Sr., and Richard Jenks, members or former members of the Ute Indian Tribe Business Committee ("Business Committee"), and John P. Jurrius and Susan M. Hammer, contractors of and agents for the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") (collectively, "Tribal Defendants"), respectfully submit this Response to the Opening Brief filed in this proceeding by Ronald J. Wopsock, Luke J. Duncan, and Cassandra Kochamp (collectively, "Wopsock" or "Appellants").

STATEMENT OF ISSUES

1. Wopsock's brief on appeal does not challenge the district court's decision rejecting Wopsock's Indian Reorganization Act ("IRA") claims against Tribal Defendants (First and Second Causes of Action). Accordingly, that portion of the district court's decision must be affirmed. If, however, Wopsock is somehow able to pursue IRA claims against Tribal Defendants notwithstanding the lack of argument on appeal, then the principal issues are whether (i) the district court erred in holding that it lacked jurisdiction to entertain Wopsock's challenges to two Tribal election ordinances enacted by the Business Committee because to reach the IRA claims the district court first would be required to interpret Tribal law and (ii) Wopsock failed to state a claim because, among other things, Wopsock did not allege that the Tribe had requested a Secretarial election as required by the IRA?

2. Did the district court err in dismissing Wopsock's claim under 42 U.S.C. § 1985(3) where, contrary to governing Tenth Circuit law, Wopsock failed to allege any

invidious class-based animus and he asserted late in the briefing that he was part of a political faction?

3. Did the district court abuse its discretion in denying Appellants' motion to file a third complaint asserting claims under 42 U.S.C. § 1985(2) where the motion was untimely, there was no explanation why Appellants waited until the last minute and after extensive briefing to file their motion, the facts and claims asserted in the proposed amended complaint were known to Appellants when they filed their original complaint, and the proposed third complaint appeared to be an attempt to avoid prior rulings by the district court and arguments of defendants?

STATEMENT OF THE CASE

A. Nature Of The Case.

This dispute arises out of the Business Committee's enactment in 2003 of two Tribal election ordinances, Ordinances 03-002 and 03-004, in the exercise of its authority under Article IV, Section 3 of the Tribe's Constitution ("[a]ll elections … shall be held in accordance with rules and regulations prescribed by the Tribal Business Committee"), A206.[1] Ordinance 03-002 provides that Business Committee members who are removed from office may not seek reelection to the Business Committee for a four-year period, A1074-1076, and Ordinance 03-004 imposes certain notice and similar technical requirements on those presenting a petition to recall a Business Committee member, A272-274. Appellants are individual Tribal members who dispute the Business Committee's authority to enact those election ordinances. To use the district court's

[1] Materials included in the Appendix are cited as "A[page no.]."

words, the "thrust" or "heart" of Appellants' first amended complaint is that the two election ordinances violate the IRA because they constitute "amendments" to the Ute Constitution, and, accordingly, the Tribe did not conform to the election process set out in 25 U.S.C. § 476. See Wopsock et al. v. Natchees et al., 2005 WL 1503425 at *1 (D. Utah 2005) ("Wopsock"), A25; First Amended Complaint ("FAC") ¶ 109 ("Ordinance No. 03-002 must be declared an unlawful, invalid attempt to amend the Constitution of the Ute Indian Tribe in violation of the Indian Reorganization Act); ¶ 130 (same for Ordinance 03-004), A149, 154.

Appellants have challenged Tribal Election Ordinances 03-002 and 03-004, the events surrounding them, and their implementation in a battery of actions brought in Ute Tribal Court and before the Department of the Interior ("Interior") and its Interior Board of Indian Appeals ("IBIA"). Wopsock et al. v. Natchees et al., CV-04-053 (Ute Tribal Ct. 2003), A590-592; Wopsock et al. v. Natchees et al., CV-04-044 (Ute Tribal Ct. 2003), A593-601; Wopsock et al. v. Natchees et al., CV-04-042 (Ute Tribal Ct. 2003), A602-603; Wopsock et al. v. Western Regional Director, 42 IBIA 117, 119 (2006); Jenkins v. Western Regional Director, 42 IBIA 106, 114 (2006)[2]; Wopsock et al. v. Small et al., CV-05-204 (Ute Tribal Ct. 2005); Kochamp et al. v. Natchees et al., CV-06-078 (Ute Tribal Ct. 2006); Wopsock et al. v. Natchees et al., CV-07-184 (Ute Tribal Ct. 2007).[3]

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[2] Jenkins was one of the original plaintiffs in this matter. A116.

[3] Appellants additionally filed a separate action in Utah Federal District Court challenging the implementation of the Tribe's Financial Plan that had been approved by Ute Tribe members at a general referendum. See Wopsock et al. v. Nordwall et al., No. 2:03-CV-826 TC (D. Utah 2004). Appellants there asserted many of the same "facts" alleged in this proceeding. On September 27, 2004, Judge Campbell dismissed

As they have done throughout this dispute, Appellants attempt to change course when confronted with law antithetical to their claims. In this appeal Appellants seek to marginalize the Tribal predicate for their claims and attempt to recast this litigation as one focused principally on Appellants' motion to amend their complaint to pursue section 1985(2) claims they had not previously pled. Appellants' shifting positions mean that many of their current claims on appeal were not presented to the district court and need not be addressed for the first time on appeal by this Court.

B. Course Of Proceedings.

1. First Amended Complaint.

The first amended complaint is 83 pages long. A116-204. It has a table of contents; contains well over 250 paragraphs in 19 designated sections; cites legal authority, including in sections addressing "Exhaustion of Tribal Remedies" and "Sovereign Immunity from Suit;" and is accompanied by 25 exhibits. Id. The amended complaint asserts eight causes of action, three of which are directed at Tribal Defendants: Appellants contended that the Tribal Defendants violated the IRA by enacting the two election ordinances (First and Second Causes of Action) and that Tribal Defendants conspired to violate Appellants' rights in violation of 42 U.S.C. § 1985(3) (Eighth Cause of Action). A145-155 (First and Second), A189-193 (Eighth).

Appellants' claims in Wopsock et al. v. Nordwall et al., and this Court affirmed the district court decision in Wopsock et al. v. Nordwall et al., 180 Fed. Appx. 6, *7, 2006 WL 1174505 (10th Cir. 2006) ("Plaintiffs' claims against defendants relate to the retention by the Ute Indian Tribe [] of John P. Jurrius as tribal financial advisor and the Tribe's subsequent approval of a financial plan"). In January 2007 the Tribe again held a general referendum to vote upon (i) the Financial Plan and (ii) whether to retain the Tribe's financial advisor. The vote was 580 in favor and 109 opposed.

2. Defendants' Motions To Dismiss And For Summary Judgment.

On November 24, 2004, Tribal Defendants moved to dismiss Appellants' claims on six separate grounds: (i) the district court lacked subject matter jurisdiction over matters of Tribal law, (ii) Appellants failed to state a claim under the IRA, (iii) Appellants had not exhausted Tribal remedies, (iv) Appellants failed to state a claim under 42 U.S.C. § 1985(3), (v) Appellants had not joined the Tribe as an indispensable party, and (vi) the Tribal Defendants had not waived sovereign immunity. A13 (docket entry showing filing date), 523-525. Federal Defendants also moved to dismiss and for summary judgment on the respective causes of action directed at them. A440, 500. All parties stipulated to a briefing schedule, adopted by the district court, which provided for briefing and oral argument on the motions over the winter of 2004 and spring of 2005. A15.

3. Wopsock's Motion For Preliminary Injunction/Temporary Restraining Order ("PI/TRO") And The District Court's Denial Of That Motion.

Before the parties completed briefing under their agreed-upon schedule, Appellants moved for a PI/TRO to enjoin Tribal Defendants from relying on Ordinance 03-002 when determining those candidates eligible for a then-upcoming Tribal election. A975-976.[4] Appellants did not seek to enjoin Federal Defendants in any way. The parties fully briefed the PI/TRO motion and the district court heard argument on it on February 25, 2005. A978 (Wopsock's brief); A1050 (Tribal Defendants' response);

[4] Although Wopsock asserts before this Court that they sought the PI/TRO upon hearing about the upcoming election on the radio, Op. Br. at 9, they knew that such elections are held early each odd-numbered year, as they expressly assert in their First Amended Complaint. See FAC ¶ 28, A128.

A18 (Wopsock's reply) (docket entry); A1501 (Hearing). The district court denied the PI/TRO motion because (i) the thrust of Appellants' claims was an intra-tribal dispute over which the court lacked jurisdiction and (ii) Appellants had failed to exhaust their Tribal remedies. A1493-1500.

4. Wopsock's Appeal To The Tenth And Federal Circuit Courts Of Appeal.

Wopsock appealed to this Court from the district court's decision and sought an injunction pending appeal. A1193-1195. Appellants' entire claim on appeal to this Court was that the Tribal Defendants had violated the IRA; Appellants sought no relief for alleged civil rights violations. After comprehensive briefing by all parties, this Court transferred the matter to the Federal Circuit Court of Appeals because Appellants had asserted a claim under the Little Tucker Act. A1297-1299. A three-judge panel from the Federal Circuit denied Appellants' motion for injunctive relief because "Wopsock has not met his burden of establishing a strong likelihood of success on the merits or a substantial case on the merits to obtain an injunction pending appeal." A1408-1410 (JJ. Lourie, Gajarsa, Linn). The Federal Circuit held that "Wopsock has not shown that the district court likely erred in determining that it did not have jurisdiction to review issues that likely arise under tribal law and Wopsock has not raised a substantial question in that regard." Id. at 1410.

5. Oral Argument/Motion For Second Amended (Third) Complaint.

Pursuant to the scheduling order agreed to by the parties and adopted by the court, the district court heard oral argument on the dispositive motions on April 5, 2005. A1537-1567. At the eleventh hour -- 4:32 pm on April 4, 2005 -- Appellants filed a

motion for leave to file a second amended (third) complaint. A1300. The proposed third complaint would have added new causes of action under 42 U.S.C. §§ 1985(2) and 1986, new class-based animus allegations, and new Tribal exhaustion assertions. A1306-1307. The district court did not have a chance to review the motion prior to argument and counsel for Tribal Defendants was not provided with a copy of the motion or new complaint before argument. A1539-1540. Given the last minute nature of Wopsock's filing, the district court heard argument on the dispositive motions but allowed the parties to submit briefs on the motion to file a third complaint. A1533. At the end of the hearing the district court ruled against Wopsock on the motions to dismiss and for summary judgment. Id.

6. Appellants' Proposed Third Amended (Fourth) Complaint.

All parties submitted briefs on Wopsock's motion to amend. Attached to Wopsock's final "reply" brief on the motion to amend was yet another new proposed complaint, Wopsock's fourth. A1430-1471. Wopsock candidly admitted that the proposed fourth complaint was intended to avoid the problems identified by the district court in its decisions and by defendants in their motions to dismiss and for summary judgment. See A1432 ("[s]ince the plaintiffs now have the benefit of this Court's ruling, they have modified their proposed Second Amended [fourth] Complaint [to] resolve[] certain issues ruled on by the Court and objected to by defendants"). Wopsock's fourth proposed complaint would have dismissed all Tribal members as defendants, eliminated the cause of action under 42 U.S.C. § 1985(3), asserted an action under 42 U.S.C.

§ 1985(2), and directed IRA claims against only Federal Defendants. A1437, 1444, 1452, 1456.

7. District Court Final Decision.

On June 21, 2005 the district court issued its decision granting the Tribal and Federal Defendants' motions to dismiss and for summary judgment and denying Appellants' motion to amend their complaint. See Wopsock, 2005 WL 1503425, A23-32. The grounds for the district court's decision are discussed below. Infra at 14-16.

8. Federal Circuit Court of Appeals Decision.

Wopsock appealed the district court's decision to the Federal Circuit Court of Appeals. The parties fully briefed the issues and the Federal Circuit heard argument on June 9, 2006. In its decision, the court held that it lacked jurisdiction to hear the appeal because neither the IRA nor any other statute Appellants relied upon as a basis for Little Tucker Act jurisdiction was "money mandating." Wopsock v. Natchees, 454 F.3d 1327, 1332-33 (Fed. Cir. 2006). According to the court, the IRA is not money mandating because it "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.'" Id. at 1332. "In this manner, the IRA invests primary responsibility with the Tribe, not the Secretary." Id. Because the Federal Circuit lacked jurisdiction, it transferred the appeal to this Court.

STATEMENT OF FACTS

A. The Tribe's Constitution And Election Ordinances.

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. In the exercise of that constitutional authority the Tribe has enacted ordinances establishing rules and regulations for elections virtually every year for decades, including ordinances which closely track those now challenged by Appellants. For instance, in 1990, when Appellant Duncan was Chairman of the Business Committee and Appellant Wopsock's brother was a member of that committee, the Tribe enacted an ordinance that established moratoria on re-election of Business Committee members recalled under Article V, Section 3 of the Tribe's Constitution. See Ordinance 90-02 at §§ A.3 ("Any member recalled shall not be allowed to be a candidate for the position vacant due to their recall") and A.6 (prohibiting recall of a Business Committee member for one year from the date that an attempted recall is held invalid), A560-564.

The Bureau of Indian Affairs ("BIA") sought to disapprove Ordinance 90-02 on the strength of a legal opinion that concluded that those provisions conflicted with both the Tribe's Constitution and federal law, an opinion that Appellants relied on in their first amended complaint in making the same claims. See FAC at ¶ 123 and Tab 14, A153, 275. The Tribe appealed, asserting that Ordinance 90-02 was an election ordinance authorized by Tribal law and that its enactment was an intratribal matter not subject to review in a nontribal forum. The IBIA reversed the BIA's decision disapproving Ordinance 90-02 and held that there is "no basis for a determination that the Ute Indian

Tribe's ordinances concerning election procedures, including recall election procedures, are subject to Secretarial review." Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24, 28 (1991). In so holding the IBIA (i) recognized that the Tribe was authorized by Article IV, Section 3 of its Constitution to enact Ordinance 90-02 because it established rules and regulations involving elections and (ii) rejected BIA's assertion that Ordinance 90-02 "was contrary to the tribal Constitution or federal Constitution or federal statutes." Ute Indian Tribe, 21 IBIA at 30.

In 2003 the Business Committee enacted the two election ordinances that Appellants contest here. Ordinance 03-002 provides that Business Committee members who are removed pursuant to Article V, Section 2 of the Tribe's Constitution are disqualified from running for re-election for the Business Committee for a four-year period. A1074-1076.[5] Ordinance 03-004 provides that those presenting a petition to recall a Business Committee member must post in public places a notice that describes the actions of that member thought to justify the recall, that persons carrying petitions and posting recall notices must be from the same Band as the Business Committee member for whom recall is sought, and that the requirement in earlier election ordinances

[5] Article V, Section 2 provides: "The Business Committee may by four (4) affirmative votes, expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken on the matter, such member or official shall be given a written statement of the charges against him at least five (5) days before the meeting of the Business Committee, before which he is to appear, and an opportunity to answer any and all charges at such designated Committee meeting. The decision of the Business Committee shall be final." A207.

that signatures remain active for 60 days begins to run 20 days after notice of the petition is given. A272-274.[6]

Appellants have repeatedly challenged those same ordinances in proceedings before the Ute Tribal Court, Interior and the IBIA, and the district court. Pleadings filed in each challenge make the same "factual" allegations. See, e.g., Pls. Verified Civil Complaint filed in Wopsock et al. v. Natchees et al., CV-04-053 (Ute Tribal Ct., Dec. 5, 2003), A1104-1119. They claim legally (i) that the election rules and regulations established by the ordinances "amend" the Tribe's Constitution, (ii) that such an "amendment" may not occur under the IRA until Interior has held a Secretarial election, and (iii) that Tribal Defendants can be sued in their individual capacities. See, e.g., FAC at ¶¶ 95, 109, 130, A145, 149, 154. And Appellants sought orders not only setting aside the election ordinances, but also for such relief as "declin[ing] to recognize the Tribal Business Committee and any enactments of the Business Committee," "declaring the Business Committee invalidly constituted," "sanction[ing] the [BIA] Superintendent," "a receiver to administer tribal affairs," "money damages," and an investigation by the "Inspector General." See, e.g., Wopsock et al. v. Western Regional Director, 42 IBIA at 119; A589.

[6] Article V, Section 3 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." A207.

B. The Tribal Court Rejected Appellants' Claims.

Prior to filing this action in federal district court, Appellants Wopsock and Duncan brought three actions in Ute Tribal Court challenging enactment of Ordinance 03-002 and their removal from the Business Committee under Article V, Section 2 of the Tribe's Constitution. See Wopsock et al. v. Natchees et al., CV-04-053 (challenging 03-002), A590-592; Wopsock et al. v. Natchees et al., CV-04-044 (challenging removal), A593-601; and Wopsock et al. v. Natchees et al., CV-04-042 (challenging removal), A602-603.[7] In their complaints, motions for temporary restraining orders, and arguments before the Tribal Court, Appellants made the same factual assertions and many of the legal claims they make here. The Tribal Trial Court rendered decisions dismissing each of those actions. The court held that removal decisions involving Appellants are final under the Tribe's Constitution; that "the action of the Defendants, of which the Plaintiffs complain, were actions performed in the Defendants' official capacity as Business Committee members"; and that the Court was without jurisdiction to provide the relief requested. A592, 600. Plaintiffs did not appeal to the Tribal Appellate Court from the Tribal Trial Court's December 5, 2003 decision in CV-04-053 dismissing their challenge to Ordinance 03-002, thus rendering that decision final. Infra at 27-30.

C. Interior And The IBIA Rejected Appellants' Claims.

Appellants filed two administrative appeals before Interior challenging 03-002 and 03-004. Wopsock et al. v. Nordwall, IBIA Docket No. 04-106-A; Jenkins et al. v.

[7] As discussed infra at 17, Appellants have continued to bring new actions in Tribal Court challenging the ordinances and their application.

Nordwall, IBIA Docket No. 04-73-A. In separate decisions the BIA Regional Director "dismiss[ed] [Appellants'] appeal[s] on the grounds that the Tribe has sole authority over Ordinance[s] No. 03-002 [and 03-004] and must resolve any disputes arising from passage of th[ose] ordinance[s]."[8] See A588-589, 604-605. Appellants appealed those Regional Director decisions to the IBIA, which affirmed them and rejected Appellants' challenges to both election ordinances. In Wopsock v. Western Regional Director, 42 IBIA at 121, the IBIA rejected Appellants' challenge to 03-002, holding that the claim is "not substantially different from the issue raised in Ute Indian Tribe, 21 IBIA [at] 30 … where we [held] … that BIA had no authority to review portions of an ordinance concerning recall procedures, passed by the Tribe's Business Committee." As for 03-004, the IBIA concluded in Jenkins v. Western Regional Director, 42 IBIA at 114, that, based on Ute Indian Tribe, 21 IBIA at 28, "Ordinance No. 03-004 did not require Secretarial or BIA approval." IBIA also disagreed with the IRA claims made by Appellants before the district court. Jenkins, 42 IBIA at 113 n.13 ("Appellants unsuccessfully attempt to characterize Ordinance No. 03-004 as the functional equivalent of an amendment to the Tribe's constitution, thus supposedly bringing it within the scope of IRA provisions."). Appellants never appealed from those IBIA decisions issued nearly one and a half years ago.

[8] The Interior appeals process requires a protesting party to first appeal to the Bureau of Indian Affairs' Regional Director and then to the IBIA. See 25 C.F.R. Part 2.

D. The District Court Rejected Appellants' Claims.

After considering more than a dozen briefs submitted by the parties, conducting hearings on the motions for a PI/TRO, to dismiss, and for summary judgment, and allowing post-hearing briefs on the motion to amend, the district court denied each of Appellants' claims.

1. The Court Lacked Jurisdiction.

The district court held that it did not possess jurisdiction to entertain Appellants' challenges to Ordinances 03-002 and 03-004 because (i) jurisdiction to interpret the Tribe's Constitution and Tribal law lies with the Tribe, not the federal courts and (ii) "[t]he Court cannot reach plaintiffs' claims without first interpreting tribal law over which it lacks jurisdiction." Wopsock, 2005 WL 1503425 at *1, A25. Appellants abandon on appeal any argument that the district court possessed jurisdiction to entertain matters of Tribal law in an action against Tribal Defendants under the IRA, and instead focus on the court's claimed jurisdiction to hear Appellants action against Federal Defendants under the Administrative Procedure Act ("APA") and the IRA. See infra at 20-24.

2. Appellants Failed To State A Claim Under The IRA.

The district court held that the language of the IRA and case law interpreting the statute require the Tribe to request the Secretary of the Interior's review before the statute is implicated and Appellants did not allege any such request by the Tribe. Consequently, the court concluded that "the IRA has not been triggered." Wopsock , 2005 WL 1503425 at *3, A28-29. On appeal Appellants address neither the plain language of the IRA nor

the case law interpreting that language that were relied upon by the district court. See infra at 24-27.

3. Appellants Failed To Exhaust Tribal Remedies.

The district court held that Appellants' challenges to the election ordinances were barred because Appellants failed to exhaust Tribal remedies. Wopsock, 2005 WL 1503425 at *4, A29-30. For Ordinance 03-002, Appellants failed to pursue an appeal of the Tribal Trial Court's decision to the Tribal Appellate Court and for Ordinance 03-004 Appellants failed to challenge the ordinance in Tribal Court at all. Id. On appeal Appellants do not address the United States Supreme Court tribal exhaustion case law relied upon by the district court in dismissing their action and instead rely upon contrary case law which the Ninth Circuit has withdrawn. See infra at 27-30.

4. The Tribal Defendants Did Not Waive Sovereign Immunity.

The district court expressed its "great respect for the Tribe's sovereignty" and held that the Tribal Defendants had not waived their sovereign immunity. Wopsock, 2005 WL 1503425 at *2, *3, A26, 28. Accordingly, the district court dismissed all claims against the Tribal Defendants on that independent ground. Id. at 2005 WL 1503425 at *3, A28. On appeal Appellants claim to fall within a sovereign immunity exception which has no application to the limited claims they continue to assert against Tribal Defendants on appeal. See infra at 31-35.

5. Appellants Failed To State A Claim Under 42 U.S.C. § 1985(3).

Construing the "amended complaint in the light most favorable to plaintiffs," the district court dismissed their section 1985(3) claim because Appellants did not allege

"that any harm suffered by plaintiffs was motivated by invidious, class-based animus [as] required under clearly established Tenth Circuit law." Wopsock, 2005 WL 1503425 at *3, A27-28. The court acknowledged that "[l]ate in the briefing plaintiffs alleged that they were part of a political faction," but the court found that a section 1985(3) "political faction claim" had "been rejected by the Tenth Circuit." Id. Appellants do not challenge on appeal the controlling Tenth Circuit authority relied upon by the district court. See infra at 35-37.

6. Appellants' Motion To Amend Was Improper.

The district court considered, and allowed additional briefing on, the proposed second amended complaint even though it was filed "[v]irtually contemporaneously" with the court's hearing on the dispositive motions. Wopsock, 2005 WL 1503425 at **4-5, A30-31. The district court denied the motion for leave to amend because, among other things, (i) "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," (ii) "[p]laintiffs' amendments appear to be an attempt to avoid both this Court's prior rulings and arguments raised by defendants," and (iii) "[p]laintiffs' 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." Id. On appeal Appellants ignore a number of the independent grounds relied upon by the district court in denying the motion to amend and with respect to other grounds such as timeliness Appellants rely upon new justifications which they never presented to the district court. See infra at 38-48.

E. Subsequent Developments.

The Business Committee enacted Ordinances 03-002 and 03-004 in October 2003. In the intervening three and a half years the Tribe has conducted three elections -- in December 2003 (to fill Wopsock's and Duncan's seats on the Business Committee) and regularly scheduled elections in the spring of 2005 and 2007 as directed by the Tribe's Constitution. The make-up of the Business Committee has changed as a result of those elections. None of the Tribal Defendants named in this action will continue to serve on the Business Committee following the April 2007 elections based on posted election results. The election ordinances have changed as well. In 2005 a Business Committee made up of members different from those who enacted 03-002 and 03-004 enacted election ordinance 05-005. Ordinance 05-005 repealed Ordinances 03-002 and 03-004, although the new ordinance contains provisions similar to those in 03-002 and 03-004. Appellants have continued to bring multiple actions in Tribal Court challenging every election, whether it was held pursuant to election ordinance 03-002 or the new election ordinance, 05-005. See Wopsock et al. v. Small et al., CV-05-204 (challenging spring 2005 election); Wopsock et al. v. Natchees et al., CV-07-184 (challenging spring 2007 election). Appellants have also continued their attempts to recall Business Committee Chairperson Maxine Natchees. See Kochamp et al v. Natchees et al., CV-06-078.[9]

SUMMARY OF ARGUMENT

After considering the shifting claims Wopsock made in the 80-plus page complaint, no fewer than six briefs, and arguments of the parties at two hearings, the

[9] Ms. Natchees was up for re-election in April 2007, but was not retained.

district court granted Defendants' dispositive motions and denied Wopsock's motion to amend. Appellants have demonstrated no error in the district court's judgment. First, Appellants do not challenge the district court's judgment with respect to their IRA claims against the Tribe. Second, in any event, the district court did not err in dismissing Appellants' IRA claims. The district court does not possess jurisdiction to entertain claims that require it first to interpret Tribal law, and the IRA does not provide a private right of action against Tribal Defendants; Appellants did not state a claim for relief because, contrary to the plain language of the IRA and settled case law, they did not allege that there had been a "tribal request" for an election; Appellants did not exhaust available tribal remedies; Appellants' claims are barred by sovereign immunity; and Appellants as individuals do not have standing to assert an IRA claim. Third, the district court did not err in dismissing Appellants' section 1985(3) claim. Appellants did not allege invidious, class-based animus as required by controlling Tenth Circuit precedent; their subsequent "political faction" claims have been rejected by the Tenth Circuit; and Appellants do not address the Tenth Circuit authority on which the district court relied. Fourth, the district court did not abuse its discretion in denying Wopsock's motion to amend. The district court denied that motion on a number of grounds clearly established in the Tenth Circuit, including that the motion was untimely, that there was no explanation why Wopsock waited until the last minute and after extensive briefing to file the motion, that facts and claims asserted by Wopsock in it were known when earlier complaints were filed, and that the motion was an attempt to avoid prior court rulings and arguments of Defendants. Appellants do not challenge all the independent grounds relied

upon by the district court; they make contentions never raised before the district court; and their contention that the district court has a duty to "construct a legal theory" for them is inconsistent with governing Tenth Circuit authority.

ARGUMENT

I. THE DISTRICT COURT PROPERLY REJECTED APPELLANTS' IRA CLAIMS.

A. On Appeal Appellants Have Abandoned Their Claim That Tribal Defendants Violated The IRA.

Appellants do not challenge on appeal the district court's decision insofar as directed at their IRA claims against the Tribal Defendants (First and Second Causes of Action). Appellants' IRA claims on appeal are devoted entirely to arguing that the Federal Defendants violated the IRA, not the Tribal Defendants. See, e.g., Op. Br. at 44-50 ("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"); id. at 50-53 ("The Federal Defendants Owed a Similar Duty to Disapprove Ordinance 03-004") (emphasis added). Nowhere in their brief on appeal do Appellants claim that (i) the district court possessed jurisdiction to hear an IRA claim against Tribal Defendants, (ii) Appellants have a cause of action under the IRA against the Tribal Defendants, or (iii) the Tribal Defendants breached any duty under the IRA. Rather than challenge the district court decision with respect to Tribal Defendants, Appellants cite Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996) , relied upon by the district court to show that it lacked jurisdiction, for the proposition that Tribal Defendants are properly dismissed when an IRA action is brought against both tribal and federal

defendants. Op. Br. at 43 ("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."). Appellants decision to forego an IRA challenge against the Tribal Defendants on appeal is consistent with their fourth proposed complaint in which they dropped their IRA claims against Tribal Defendants and asserted IRA claims against only Federal Defendants. See supra at 7-8. It is also consistent with the settled legal principle that there is no private right of action against Tribal Defendants under the IRA. See infra at 21-22.

B. In All Events, The District Court Lacked Jurisdiction To Entertain Appellants' IRA Claims Against Tribal Defendants.

1. The Legal Standard.

a. The District Court Does Not Have Jurisdiction To Hear Matters Of Tribal Law.

The Tenth Circuit has made clear that "a federal court has no jurisdiction over an intratribal dispute." Kaw Nation v. Lujan, 378 F.3d 1139, 1143 (10th Cir. 2004) (no federal court jurisdiction because "appointments [of tribal office holders] are governed by tribal rather than federal law"). Federal courts are vigilant in refraining from exercising subject matter jurisdiction over intratribal matters which would require them to interpret tribal constitutions or matters of tribal law because those issues go to core internal matters of tribal sovereignty. See, e.g., Sac & Fox Tribe v. Bureau of Indian Affairs, 439 F.3d 832, 835 (8th Cir. 2006) (district court properly dismissed action for lack of jurisdiction because it "would necessarily have to construe and apply tribal law"); Runs After v. United States, 766 F.2d 347, 352, 353 (8th Cir. 1985) ("resolution of … disputes

involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court"). Consequently, when the predicate act for an alleged violation of federal law requires an interpretation of tribal law, federal courts routinely hold that they do not have jurisdiction to hear the matter. For instance, in Smith v. Babbitt, 875 F. Supp. 1353, 1361 (D. Minn. 1995), aff'd, 100 F.3d 556 (8th Cir. 1996), the court could not entertain a dispute couched in terms of the Indian Gaming Revenue Act because "the Court manifestly cannot determine whether revenues or any other benefits have been given to 'non-members' … without first determining who the 'members' are" and that would "require the Court to interpret the Community's membership criteria as set out in the Community Constitution." That same result attains where a challenger alleges a violation of the IRA. See Smith v. Babbitt, 100 F.3d at 559 (8th Cir. 1996) ("It is true that Appellants allege violations of … [the] IRA …. However, upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.").

b. There Is No Private Right Of Action Against Tribal Defendants Under The IRA.

The IRA does not provide a private right of action against a tribe or its officials. See, e.g., Smith v. Babbitt, 875 F. Supp. at 1362 ("IRA does not contain a provision conferring federal courts with jurisdiction to hear a private cause of action against an Indian tribe or its officials for IRA 'violations.' [The] IRA has no language which abrogates a tribe's immunity from suit.") (emphasis added). It would be odd indeed for a statute intended to promote tribal self-government and sovereignty to create a cause of

action against tribes and their officials. See Morton v. Mancari, 417 U.S. 535, 542 (1974) ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government."); accord Wopsock, 454 F.3d at 1332-33.

2. The District Court Followed The Legal Standard.

The district court adhered to the Tenth Circuit's holdings that "a dispute over the meaning of tribal law does not arise under the Constitution, laws or treaties of the United States" and that jurisdiction to "interpret tribal constitutions and laws … lies with Indian tribes and not in the district courts." Wopsock, 2005 WL 1503425 at *2, A25-26. The court held that it "cannot reach plaintiffs' claims without first interpreting tribal law over which it lacks jurisdiction." Wopsock, 2005 WL 1503425 at *1, A25.[10] Accordingly, "[b]ased 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." Wopsock, 2005 WL 1503425 at *2, A27.

[10] In oral argument on the motion for PI/TRO, Judge Stewart repeatedly stated that the problem in reaching Appellants' IRA claim was that (i) it required the court to first interpret 03-002 and the Ute Constitution to determine whether 03-002 amended the Ute Constitution and (ii) those are matters of Tribal law. A1501-1524; A1506 ("isn't the problem with [Appellants' IRA claim] that the only way I can get to [that IRA claim] is to make that preliminary determination that it is an unconstitutional ordinance?"); A1507 ("The only way I can reach that conclusion is to say that it's unconstitutional"); A1507 ("In other words, I must interpret the Constitution?"). Appellants' counsel resisted, but acknowledged that the threshold issue was one of Tribal law. A1505 ("the business committee … purported to adopt what they refer to as an election ordinance, but what is in reality an amendment to the existing Ute tribal constitution. That is the issue that brings into play the federal statute.") (emphasis added).

3. The Appeal Fails.

Appellants claim the APA provides the district court with jurisdiction over Federal Defendants. See, e.g., Op. Br. at 46, 48, 52. If Appellants intend to also assert that the district court had jurisdiction over Tribal Defendants under the APA, then that claim fails. The APA cannot be a source of jurisdiction for an action against Tribal Defendants. First, the Court need not reach any such claim because Appellants never argued to the district court that it possesses jurisdiction to hear IRA claims against Tribal Defendants based on the APA and Appellants cannot make that claim for the first time on appeal.[11] See, e.g., Chavez v. City of Albuquerque, 402 F.3d 1039, 1047 (10th Cir. 2005) (court will not address arguments raised for first time on appeal). Second, Appellants' IRA claims against the Tribal Defendants could not be based on the APA because actions taken by Tribal Defendants do not constitute "agency" action or inaction. 5 U.S.C. § 551 (defining "agency"). Third, even when a district court has jurisdiction to hear an appeal of final agency action under the APA it does not possess jurisdiction to entertain matters of tribal law. See Sac & Fox v. Bureau of Indian Affairs, 321 F. Supp. 2d 1055, 1063 (N.D. Iowa 2004) (recognizing jurisdiction under the APA, but concluding that the "[t]he court is without jurisdiction to resolve intra-tribal disputes requiring interpretation of a tribal constitution"); accord, Sac & Fox v. Bureau of Indian Affairs, 360 F. Supp. 2d 986 (N.D. Iowa 2005), aff'd, 439 F.3d 832 (8th Cir. 2006). Fourth, even if Appellants could

[11] Appellants only alleged in their complaint that the APA was a basis for their IRA claims against Federal Defendants, not Tribal Defendants. See FAC at ¶¶ 96-110 (First Cause of Action), A145-149, and ¶¶ 111-131 (Second Cause of Action), A149-155; cf. ¶¶ 146 and 158 (asserting IRA and APA claims against Federal Defendants), A159, 162.

pursue an action against Tribal Defendants under the APA, there is no appeal from final agency action. Wopsock, 2005 WL 1503425 at *2, A26 ("this case is not … an appeal from final agency action").[12] Nor can there be agency inaction as Appellants claim, Op. Br. at 46, because Interior has rendered decisions dismissing their claims. In short, the APA cannot be a source of jurisdiction for an action against Tribal Defendants.

C. The District Court Properly Held That Appellants Failed To State A Claim For Relief Under The IRA.

1. The Legal Standard.

The IRA requires a request for Secretarial review from a tribe. The text of the IRA and case law interpreting that statute provide that the IRA's election and review process is invoked only upon a "tribal request" for a Secretarial election. 25 U.S.C. § 476(c)(1) (emphasis added). Section 476 requires the Secretary to "call and hold an election" within a prescribed period of time "after receipt of a tribal request for election to ratify an amendment to the constitution." 25 U.S.C. § 476(c)(1)(B) (emphasis added).

[12] Appellants cite Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.D.C. 1999), for the proposition that the district court had jurisdiction over Federal Defendants because the IBIA has authority to interpret tribal law when necessary to carry out the government-to-government relationship with tribes. Op. Br. at 44. The exception mentioned in Ransom has no application here. First, the exception is extremely narrow. Wopsock, 454 F.3d at 1333 ("Department may be required by statute or tribal law to act in intratribal matters [but] should act so as to avoid any unnecessary interference with a tribe's right to self-government") (quoting Wheeler v. U.S. Dep't of the Interior, 811 F.2d 549 (10th Cir. 1987)); Maroquin v. Anardarko Area Director, 29 IBIA 45, 48 (1996) ("In accordance with the well-established Federal policy of respect for tribal self-government, which recognizes the right of tribes to interpret their own laws, the [IBIA] has cautioned restraint on the part of BIA in undertaking to interpret tribal law."). Second, even under that exception any interpretation of Tribal law is to be made by BIA or IBIA; the BIA and IBIA have already considered and rejected Appellants' claims; and Appellants never appealed from those final IBIA decisions. See supra at 12-13.

Congress added that statutory language in its 1988 amendments to the IRA and in those same amendments defined a "tribal request" as a "tribal resolution" requesting an election. See Note to 25 U.S.C. § 476 ("[f]or the purpose of this Act, the term … appropriate tribal request means … a duly enacted tribal resolution requesting a Secretarial election"); P. L. No. 100-581, Title I, § 102(2), 102 Stat. 2939.

The case law confirms the IRA's unequivocal language. In Split Family Support Group v. Moran, 232 F. Supp. 2d 1133, 1134-35 (D. Mont. 2002), the court addressed the same contention Appellants make here -- that federal defendants failed to "meet their statutory duties to conduct an election as required by the Indian Reorganization Act." The court rejected plaintiffs' contention because there was no "tribal request." Id. at 1136 ("I understand 25 U.S.C. § 476(c), by its plain language as illuminated by the Public Law [the definition of "tribal request"], to mean a resolution passed by an official tribal body, not a petition signed by tribal members."). "To read the statute [as allowing plaintiffs' claim] means the word 'tribal' must be ignored." Id.[13] See also Wopsock, 454

[13] The Tribe's Constitution and Interior regulations are consistent. Article X of the Ute Constitution provides that "[w]henever the Tribal Business Committee shall, by an affirmative vote of four or more members, call for the submission of an amendment, the Secretary of the Interior shall call an election upon the proposed amendment." A213. Interior's regulations implementing the IRA require the election process to comply with the Tribe's constitutional amendment process. See 25 C.F.R. § 81.5(d). The Tribe has enacted no tribal resolution requesting the Secretary to call an election on a constitutional amendment. Accordingly, Appellants' assertions are inconsistent with both the Tribe's Constitution and Interior's regulations and are therefore without legal basis. See, e.g., Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959) (Interior bound by its own regulations). Nor do Appellants address either recent amendments to the IRA that are contrary to their claim or how their interpretation can square with rules of construction for statutes enacted to benefit tribes. A548-551.

F.3d at 1332 (IRA "simply requires the Secretary to 'call and hold an election … after the receipt of a tribal request").[14]

2. The District Court Followed The Legal Standard.

The district court held that "[t]he IRA's Section 476 election and review process relied upon by plaintiffs is triggered by an appropriate request by a tribe for federal involvement." Wopsock, 2005 WL 1503425 at *3. The court determined that the IRA process is triggered only by a "tribal request" based on language of 25 U.S.C. § 476(c)(1)(B) and the holding to that effect in Split Family Support Group v. Moran, 232 F. Supp. 2d at 1136. Wopsock, 2005 WL 1503425 at *3. Given that "Plaintiffs have failed to allege and have failed to show any evidence that suggests that the Tribe made such a request," the Court concluded "that the IRA has not been triggered." Id. The Federal Circuit Court of Appeals' interpretation of the IRA confirms the district court's analysis. Wopsock, 454 F.3d at 1332 ("the IRA … simply requires the Secretary to 'call and hold an election … after the receipt of a tribal request").

3. The Appeal Fails.

On the face of their brief Appellants challenge the district court's interpretation of the IRA only with respect to Federal Defendants, not Tribal Defendants. E.g., Op. Br. at 44-53 ("The Federal Defendants' refusal to comply with their statutory duties raises reviewable questions"). To the extent Appellants challenge the court's decision with

[14] The case law additionally recognizes that individual Tribal members such as Appellants do not have standing to pursue an IRA challenge against either the Tribal or Federal Defendants. Only a tribe may pursue an action under the IRA. See Kickapoo Tribe of Oklahoma v. Lujan, 728 F. Supp. 791, 794 (D.D.C. 1990) ("the 1988 amendments to the IRA makes clear that Congress consented to suit only by the tribe").

respect to Tribal Defendants as well, there is no need for the Court to address the issue because Appellants never address the district court's reliance on (i) 25 U.S.C. § 476(c)(1)(B)'s language requiring a "tribal request" before the IRA's election and review process is triggered, (ii) the definition of "tribal request" in the Note to 25 U.S.C. § 476, or (iii) the court's holding in Split Family. Appellants acknowledge that "the district court found that since the Tribal Defendants did not request a Secretarial Election, IRA § 476 was not triggered" and claim "[t]he district court misapplied the law in rejecting this federal responsibility," but Appellants tellingly do not rebut the plain language of the statute and relevant case law. Op. Br. at 48. In the Tenth Circuit "[a] litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound … in the face of contrary authority, forfeits the point." Atlantic Richfield v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1161 (10th Cir. 2000) (emphasis added).

D. The District Court Properly Held That Appellants Failed To Exhaust Tribal Remedies.

1. The Legal Standard.

The Supreme Court and Tenth Circuit hold that to exhaust tribal court remedies a losing party must pursue an appeal of their claim through the tribal appellate court. See, e.g., Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987) ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."); Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992) ("The Supreme Court has defined

exhaustion of tribal court remedies to include appellate review within the tribal court system"). A party's failure to appeal to a tribal appellate court means the tribal trial court's decision is final and no action may be brought in federal court. Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990, 991, 992 (8th Cir. 1999) (federal district court properly dismissed action for failure to exhaust tribal remedies because "[w]e do not think that the exhaustion requirement has been satisfied when the absence of tribal appellate review stems from the plaintiff's own failure to adhere to simple deadlines"). And a challenger must avail itself of tribal court remedies by filing a claim in tribal trial court in the first instance. See, e.g., National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985) ("examination should be conducted in the first instance in the Tribal Court itself").

2. The District Court Followed The Legal Standard.

The district court recognized that "[t]o 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." Wopsock, 2005 WL 1503425 at *4 (citing Iowa Mutual Ins., 480 U.S. at 17), A29. The court dismissed Appellants' challenge to 03-002 because "[p]laintiffs challenged ordinance 03-002 in tribal court but failed to appeal to tribal appellate court." Wopsock, 2005 WL 1503425 at *4, A29. With respect to 03-004, the court held that "[p]laintiffs did not challenge ordinance 03-004 in tribal court and, therefore, did not exhaust tribal remedies." Id., A30.

3. The Appeal Fails.

Appellants do not address the governing case law cited by the district court or the court's rationale for concluding that Appellants had not exhausted their Tribal remedies. Rather, Appellants argue for the first time on appeal that they were not required to exhaust Tribal remedies because the Tribal Court does not have jurisdiction over non-Tribal Defendants. Op. Br. at 26-28 (citing Ford Motor Company v. Todecheene, 394 F.3d 1170, 1178 (9th Cir. 2005)).[15] The claim fails. First, this Court need not address Appellants' arguments raised for the first time on appeal. See, e.g., Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 n.3 (10th Cir. 2006) ("Because, however, this argument was raised for the first time on appeal, we do not entertain it."). Second, the Ford Motor case cited by Appellants is not good law. Op. Br. at 27-29. The Ninth Circuit recently withdrew its opinion in Ford Motor, remanded that case to the district court, and directed the district court "to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction." Ford Motor Company v. Todecheene, 474 F.3d 1196 (9th Cir. 2007) (quoting Iowa Mutual Ins., 480 at 16 (1987)). The Ninth Circuit's most recent action is fully consistent with the district court's decision and relies on the same Supreme Court case law relied upon by the district court. Wopsock, 2005 WL 1503425 at *4, A29-30. Third, Appellants' claimed lack of Tribal Court jurisdiction

[15] Appellants additionally claim for the first time on appeal that "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. Co. v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985)." Op. Br. at 39. Appellants reliance on Crow Tribe is misplaced. The Supreme Court in Crow Tribe held that whether tribal courts have jurisdiction over non-Indians in civil cases should be determined "in the first instance in the Tribal Court itself." Crow Tribe, 471 U.S. at 856.

cannot be squared with their actions -- just weeks ago they brought yet another challenge to the election ordinance in Tribal Court as part of their challenge to the 2007 election. See supra at 17.

Appellants' additional justification for not exhausting Tribal remedies is that to do so would have been futile. Op. Br. at 28-29. According to Appellants, they "afforded the tribal court an opportunity to make an initial determination regarding the existence of tribal jurisdiction" but "[t]o seek further judicial review in the courts of the Tribe would have been to no avail." Id. at 29. The law relied upon by the district court is settled: to exhaust Tribal remedies a challenger must bring an action in Tribal Trial Court and pursue all available appeals to Tribal Appellate Court, irrespective of the decision of the Tribal Trial Court. Wopsock, 2005 WL 1503425 at *4, A29-30. Appellants do not contest the district court's findings that Appellants "failed to appeal to tribal appellate court" with respect to 03-002 and Appellants "did not challenge ordinance 03-004 in tribal court." Id. According to the Supreme Court, "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." Iowa Mutual Ins., 480 U.S. at 17. Speculative claims of futility are simply not legally sufficient. Bank of Oklahoma, 972 F.2d at 1170 ("Unless and until the Bank has sought resolution in tribal court, its claim of having no available remedy rings hollow"); White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 1984) ("aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility").

E. The District Court Properly Held That Tribal Defendants Did Not Waive Sovereign Immunity.

1. The Legal Standard.

Indian tribes possess inherent sovereign immunity from suit absent an unequivocal waiver of immunity by the tribe or Congress. Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 997 (10th Cir. 2001) ("As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress"). A tribe's sovereign immunity extends to individual tribal officials. Id.; Gallegos v. Jicarilla Apache Nation, 97 Fed. Appx. 806, 810 (10th Cir. 2003) ("Further, in addition to tribes themselves, this immunity from suit … protects Tribal officers"). Accordingly, merely naming individual tribal officials cannot be used as an end run to avoid sovereign immunity. See, e.g., Kenai Oil and Gas v. DOI, 522 F. Supp. 521, 531 (D. Utah 1981), aff'd, 671 F.2d 383 (10th Cir. 1982) ("Tribal immunity may not be evaded by suing tribal officers, as plaintiffs have done in this suit").[16]

2. The District Court Followed The Legal Standard.

The district court found that, in addition to the defects in jurisdiction, the failure to adequately state a claim, and the failure to exhaust tribal remedies, Appellants' claims

[16] For these same reasons the Tribe's sovereign immunity also extends to individuals who are not tribal members but who are employed, appointed, or authorized to act on behalf of the tribe when their actions are taken in furtherance of tribal business. See, e.g., Shenandoah v. Halbritter, 275 F. Supp. 2d 279, 287 and n.5 (N.D.N.Y. 2003) (finding immunity for "each of the named defendants … alleged to be either a member of the Oneida Nation or a non-member employed, appointed or authorized to act on behalf of the Nation"). Defendants Jurrius and Hammer were both authorized to act on behalf of the Tribe and therefore share the Tribe's sovereign immunity. Id.

directed at Tribal Defendants failed because Tribal Defendants had not waived their sovereign immunity. Wopsock, 2005 WL 1503425 at *3, A28. The district court's decision rests on at least three grounds.

First, Appellants could point to no waiver of sovereign immunity with respect to their "official capacity" claims, much less the required "unequivocal" waiver. Supra at 31. The IRA does not waive Tribal Defendants' sovereign immunity for the same reasons Appellants have no private cause of action against Tribal Defendants. See Smith v. Babbitt, 875 F. Supp. at 1362 ("IRA has no language which abrogates a tribe's immunity from suit"). Accordingly, Appellants' official capacity claims fail.

Second, the alleged "conspiratorial acts" for which Appellants sought to hold Tribal Defendants liable in their "individual capacity," see FAC ¶ 95, were taken by them in their official capacities, id. at ¶¶ 254(a-e) (conducting hearings, passing resolutions), A145, 192. See Village of Hotvela Traditional Elders v. IHS, 1 F. Supp. 2d 1022, 1029 (D. Ariz. 1997), aff'd, 141 F.3d 1182 (9th Cir. 1998) ("By holding meetings and adopting resolutions, the Board and its Chairperson clearly were acting within their authority as provided by the Hopi Constitution"). It is the collective action of the Business Committee which Appellants do not like, not the actions of each individual. See, e.g., Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991) ("The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused [plaintiff's] alleged injury"); Smith v. Babbitt, 875 F. Supp. at 1364 and n.7 ("It is the official action of the Community and the Business

Council, as legal entities authorized to act pursuant to these votes, that allegedly has caused the Plaintiffs' injuries").

Third, the Tribal Court already determined that the Tribal Defendants were acting in their official, not individual, capacities when they enacted the election ordinances. See Duncan, CV-04-053 at 3 ("the Business Committee Defendants' enactment of Ordinance No. 03-002 … was performed and could only have been performed in their official capacities as Business Committee Members"), A592. Issues of sovereign immunity are resolved in the first instance by a tribal forum. See Sharber v. Spirit Mountain Gaming Inc., 343 F.3d 974, 976 (9th Cir. 2003) ("the tribal exhaustion requirement also applies to issues of tribal sovereign immunity").

3. The Appeal Fails.

Appellants concede that "[a]s a general principle, federal and tribal officials, acting within the scope of their official authority, are immune from suit." FAC at ¶ 91, A144. They allege, however, that Tribal Defendants are amenable to suit (i) in their "official capacity" because "Congress has created a private cause of action for violations of the [IRA]" under Section 476(d)(2), FAC ¶ 93, A145, and (ii) in their "individual capacity" because they conspired against Appellants Wopsock and Duncan, id. at ¶ 95, A145. As described supra at 12, 21-22, 31-33, (i) the IRA does not waive sovereign immunity with respect to Tribal Defendants, (ii) Appellants were not acting in their individual capacities, and (iii) Appellants did not challenge on appeal the Tribal Trial Court's ruling that Tribal Defendants were acting in their official capacities. On appeal Appellants claim that they fall within an exception to sovereign immunity because they

seek prospective equitable relief for actions taken by Tribal Defendants which allegedly were beyond their constitutional authority. Op. Br. at 53. Appellants' claim fails.

First, Appellants do not explain how the exception is relevant at this point in the litigation because Appellants' request for prospective equitable relief relates to their IRA claims and they have abandoned their IRA claims against Tribal Defendants on appeal. See supra at 19-20. Appellants only other claim against Tribal Defendants -- their civil rights claim -- is, according to Appellants, one for "monetary relief," not prospective equitable relief. Op. Br. at 38 (Eighth Cause of Action is for "monetary relief"); infra at 47-48. Second, Appellants rely on Fifth Circuit case law which recognizes an exception to sovereign immunity in actions for equitable relief. Op. Br. at 53-54 (citing TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999)). The exception adopted by the Fifth Circuit was suggested by Justice Stevens in a lone concurring opinion which has been rejected by the Tenth Circuit as not the law. See Citizen Band Potawatomie Indian Tribe v. Tax Com'n, 969 F.2d 943, 948 n.5 (10th Cir. 1992) ("[w]hile Justice Stevens suggested that 'a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief, this view was not shared by any other member of the Court and was implicitly rejected [by] the majority" and to the extent appellant "asks us to adopt Justice Stevens' position, we reject it."). Third, as the Tribal Court held, exceptions such as those suggested by Appellants would swallow the tribal sovereign immunity rule because in any action directed at tribal activities (i) the allegation is always that the tribe acted unlawfully, (ii) tribes act through their officials, and (iii) a plaintiff could always avoid sovereign immunity principles by asserting that

tribal officials did not act within the scope of their authority. See, e.g., Wopsock et al, CV-04-44, A600 ("would completely circumvent and diminish its intended effect" because "all one would have to do … would be to file the action against the individual Business Committee members and claim that the decision was an illegal decision").

II. THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFFS FAILED TO STATE A CLAIM FOR RELIEF UNDER 42 U.S.C. § 1985(3).

A. The Legal Standard.

"Section 1985(3) does not itself create an independent cause of action." See Gallegos, 97 Fed. Appx. at 812. Rather, "a plaintiff must 'point to independent substantive rights enforceable in the federal courts' to serve as a predicate violation." Id. Alleged violations of constitutional rights relating to the tribal election process are not sufficient to provide such a predicate. Wheeler v. Swimmer, 835 F.2d 259, 261 (10th Cir. 1987) (rejecting 1985(3) claim for alleged violations of first, fifth, ninth, thirteenth, and fifteenth amendment rights which "[a]ll … relate to the tribal election process"). Among other things, the complaining party must additionally show "that a conspirator's action was motivated by a class-based, invidiously discriminatory animus." See, e.g., Peoples v. Gilman, 109 Fed. Appx. 381, 2004 WL 2110719 (10th Cir. 2004).

B. The District Court Followed The Legal Standard.

The district court "construe[d] the amended complaint in the light most favorable to plaintiffs," but could not "find any allegation that any harm suffered by plaintiffs was motivated by invidious, class-based animus." Wopsock, 2005 WL 1503425 at *3, A27-28. Given that failure, the court concluded that "plaintiffs fail to plead all of the elements

required under clearly established Tenth Circuit law." Id., A28 (citing Gilman, 109 Fed. Appx. 381, and Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993) (both dismissing section 1985(3) claims "for lack of class-based invidiously discriminatory bias"). The court exercised patience with respect to Appellants' shifting civil rights claims, acknowledging that "[l]ate in the briefing plaintiffs alleged they were part of a political faction" in an attempt to show the necessary class-based animus. Wopsock, 2005 WL 1503425 at *3, A28. The court held, however, that "[p]laintiffs' political faction claim has … been rejected by the Tenth Circuit." Id. (citing Brown v. Reardon, 770 F.2d 896, 905-06 (10th Cir. 1985)).[17]

C. The Appeal Fails.

On appeal Appellants' defense of their section 1985(3) claim is limited to a single footnote in which they seek to "preserve the issue for review by the United States Supreme Court." Op. Br. at 19-20 n.11. This Court need not address arguments not pursued beyond a mere reference in a footnote. See, e.g., United States v. Judd, 42 Fed. Appx. 140, 144, 2002 WL 1316496 (10th Cir. 2002) ("Arguments made in a perfunctory

[17] Appellants' section 1985(3) claim has evolved over the course of this litigation. Appellants originally pled no class-based animus to support a claim for relief under 42 U.S.C. § 1985(3). A189-193. When Tribal Defendants moved to dismiss on those grounds, Appellants asserted that they were a "political faction" opposed to the Tribe's financial advisor. A761. Once Tribal Defendants showed that the Tenth Circuit has rejected the political faction claim, A1250-1251, Appellants attempted to allege animus based on "race." See, e.g., Prop. 2nd Am. Comp. at ¶ 237, A1379-1380 ("defendant Jurrius was motivated by plaintiffs[']race"). Finally, in their proposed third amended complaint they attempted to drop the section 1985(3) claim altogether and assert a claim under section 1985(2). A1444.

manner, such as in a footnote, are waived."). To the extent the Court chooses to address the argument, it fails.

Appellants continue to claim that they were part of a "political class of Jurrius [the Tribe's financial advisor] opponents." Op. Br. at 19 n.11 citing FAC ¶ 70. The district court properly rejected that claim. First, Appellants rely on the same cases they cited before the district court to support their claim that an alleged political faction is sufficient to make out a section 1985(3) claim, but they never address the Tenth Circuit authority cited by the district court which rejects their political faction claim. Op. Br. at 19-20 n.11.[18] Second, Appellants never alleged in their first amended complaint that they were part of a political faction opposed to Mr. Jurrius. They claim to have made that allegation in paragraph 70 of their first amended complaint, Op. Br. at n.11, but paragraph 70 says nothing of the kind. It states that "[l]ess than one week after the tribal defendants expelled plaintiffs Wopsock and Duncan in response to their having joined in filing the Complaint in Wopsock v. Nordwall, the tribal defendants enacted Ordinance No. 03-002 …." A139 (emphasis added). The paragraph says nothing of a political class opposed to Mr. Jurrius and Mr. Jurrius is not even a "tribal defendant" as defined in the first amended complaint. See FAC ¶ 54, A135. Third, it makes no sense that Appellants could be a "political faction" when the person they oppose is not a politician or an elected official within the Tribe; he is an apolitical financial adviser who was retained by the Tribe when some of the Appellants were members of the Tribe's Business Committee.

[18] Appellants suggest that the Tenth Circuit's requirements for class-based animus are contrary to Supreme Court authority but make no attempt to explain any such inconsistency. Op. Br. at 19 n.11.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO FILE A SECOND AMENDED (THIRD) COMPLAINT.

A. The Legal Standard.

Whether to grant leave to amend a complaint is within the district court's discretion and "will not be disturbed absent an abuse of that discretion." See, e.g., Viernow v. Euripedes Development Corp., 157 F.3d 785, 799 (10th Cir. 1998). Under Tenth Circuit authority a district court may deny a motion to amend on a number of grounds. The Tenth Circuit has "often found untimeliness alone a sufficient reason to deny leave to amend." Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994). "[P]rejudice to the opposing party need not also be shown." Sipp v. Unumprovident Corporation, 107 Fed. Appx. 867, 876 (10th Cir. 2000). "Denial of leave to amend is particularly appropriate in cases in which the cause(s) of action were available to the plaintiff at the time that the original complaint was filed." Id. Similarly, courts will reject an "amendment that plaintiff did not choose to advance until after defendant showed plaintiff's original theory was fatally flawed." Biggs v. Logan Cty. Bd. of Cty. Comm., 211 F.3d 1277, 2000 WL 377476 (10th Cir. 2000).

B. The District Court Followed The Legal Standard.

The district court acted well within its discretion in denying the motion to amend. The court found that Appellants' motion, filed nine months after their original complaint, was "untimely." Wopsock, 2005 WL 1503425 at *5, A31. Courts frequently find that lesser lengths of time constitute undue delay. See, e.g., Pallottino, 31 F.3d at 1027 (denying motion when "motion for leave to amend was filed eight months after the

original complaint and over five months after a previous amended complaint"); Platte Valley Wyo-Braska Beet Growers Assoc. v. Imperial Sugar Co., 100 Fed. Appx. 717, 720 (10th Cir. 2004) (plaintiff's "motion for leave to amend suffered from undue delay [when plaintiff] first raised it before the District Court at the end of its arguments opposing [defendants'] motion to dismiss [which] occurred two and a half months after [plaintiff] filed its complaint and almost two months after [defendant] submitted its motion to dismiss"). The district court found Appellants' delay particularly inappropriate because "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." Wopsock, 2005 WL 1503425 at *5, A31. The cases cited by the district court fully support its conclusion. Id. (citing Pallottino, 31 F.3d at 1027 (rejecting motion when plaintiff "did not explain his failure to amend the complaint earlier, especially as it was not based on new evidence")) and Platte Valley, 100 Fed. Appx. at 720 ("[n]or did [plaintiff] explain why it failed to present its Rule 15 motion earlier, instead of waiting until the eleventh hour of its case").

The district court also determined that "[t]he facts and claims sought to be asserted by plaintiffs in their second amended complaint were known to plaintiffs when they filed their earlier complaints." Wopsock, 2005 WL 1503425 at *5, A31. The case law cited by the court fully supports its decision. See Sipp, 107 Fed. Appx. at 876 ("Denial of leave to amend is particularly appropriate in cases in which the cause(s) of action were available to the plaintiff at the time that the original complaint was filed.")). And the court denied Appellants' motion because the new claims were "an attempt to avoid both

this Court's prior rulings and arguments raised by defendants." Wopsock, 2005 WL 1503425 at *5, A31. Once again the court acted within its discretion. See Viernow, 157 F.3d at 800 (Tenth Circuit does "not favor permitting a party to attempt to salvage a lost case by untimely suggestion of new theories of recovery").

C. Appellants Have Not Shown That The District Court Abused Its Discretion In Denying Their Motion To Amend The Complaint.

Appellants present two overlapping reasons to support their claim that the district court was compelled to allow them to assert additional causes of action: (i) some of the grounds relied upon by the district court in denying Appellants' motion to amend constitute an abuse of discretion and (ii) the district court had a duty to review Appellants' complaint to determine whether it could support additional claims and to construct legal theories for them. Op. Br. at 18-22, 30-37. Appellants are wrong.

1. Appellants Have Not Shown The Court Abused Its Discretion.

a. Appellants Fail To Address The District Court's Independent Grounds For Denying Their Motion To Amend.

Appellants ignore the district court's holding that when they filed their earlier, 83-page complaints Appellants already knew "[t]he facts and claims sought to be asserted by plaintiffs in their second amended complaint." Wopsock, 2005 WL 1503425 at *5, A31. That is a sufficient ground on which to deny the motion to amend. See, e.g., Sipp, 107 Fed. Appx. at 877 ("Denial of leave to amend is particularly appropriate in cases in which the cause(s) of action were available to the plaintiff at the time that the original complaint was filed"). Appellants cannot simply ignore alternative grounds relied upon by the district court in rendering its decision. See GFF Corp. v. Associated Wholesale

Grocers, Inc., 130 F.3d 1381, 1387-88 (10th Cir. 1997) (rejecting claim because "GFF fails to address the district court's alternative ground for granting summary judgment").

b. The District Court Properly Found The Motion To Amend Was Untimely.

Appellants address the district court's finding that their motion was untimely. Op. Br. at 34-35. However, their attempt to justify the delay by blaming the court and Defendants fails. Id. at 35 ("most delay was caused by court-ordered extensions of time for defendants to respond [and] [t]he district court set a hearing date of April 5, a date over which plaintiffs had no control"). In moving to amend their complaint Appellants never suggested that defendants or court ordered scheduling was the reason for their delay in filing. Indeed, they offered no justification for their delay. A1303-1308. That unexplained delay was enough to deny the motion. See, e.g., Frank v. U.S. West, Inc., 3 F.3d 1357, 1365-66 (10th Cir. 1993) ("It is well settled in this circuit that untimeliness alone is a sufficient reason to deny leave to amend … especially when the party filing the motion has no adequate explanation for the delay"). Nor can Appellants on appeal rely for the first time on so-called court ordered delays as an excuse.[19] See, e.g., Chavez, 402 F.3d at 1047 ("Absent extraordinary circumstances not present here … we do not address arguments raised for the first time on appeal.") (citations omitted). Even if they could offer at this stage of proceedings newfound reasons for their delay, Appellants cannot blame the court or defendants for their failure to timely file a motion to amend. Appellants were free to file a motion to amend their complaint at any time; there was no

[19] Appellants do not mention that they entered into a stipulated briefing schedule which the court then adopted. A15 (docket entry).

scheduling or other orders which precluded them from filing a motion to amend their complaint earlier. The reason for the delay was not the court or defendants; it was that Appellants realized after briefing, oral argument, and a decision on the PI/TRO that their action contained fatal flaws. Filing a motion to amend only hours before a hearing on dispositive motions was a desperate attempt to avoid an adverse decision and was not attributable to the court or defendants. The district court did not abuse its discretion in holding that Appellants' motion was untimely.

c. The District Court Properly Found The Motion To Amend Was To Avoid Prior Rulings.

Appellants mention in passing the district court's holding that "Plaintiffs' amendments appear to be an attempt to avoid both this Court's prior rulings and arguments raised by defendants." Wopsock, 2005 WL 1503425 at *5, A31 (citing Viernow, 157 F.3d at 799-800. Appellants argue the district court abused its discretion in so holding because "[t]he only prior substantive ruling of the Court was in denying a motion for preliminary injunction" and "[s]uch ruling did not address any sufficiency of pleading issues." Op. Br. at 35. To the contrary, the district court's preliminary injunction ruling considered Appellants' probability of success on the merits. The court concluded that Appellants were not likely to prevail on the merits, a conclusion with which the Federal Circuit Court of Appeals agreed. See supra at 6. Appellants sought to amend their complaint to avoid the district court's decision. Appellants similarly asserted new civil rights claims in order to avoid Defendants' arguments showing that their existing claims were contrary to prevailing Tenth Circuit law. See supra at 6-8. The

Tenth Circuit does "not favor permitting a party to attempt to salvage a lost case by untimely suggestion of new theories, especially after the trial judge has already expressed adverse rulings." Viernow, 157 F.3d at 800.

2. Appellants Did Not Plead A Section 1985(2) Claim.

For the first time on appeal Appellants claim that the district court had a duty to examine the 83-page complaint and identify a section 1985(2) claim they had not stated. Op. Br. at 18-22 ("the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory"). Appellants' attempt to shift to the court the obligation to identify causes of action, like their attempt to shift to the court and defendants Appellants' failure to timely file their motion to amend, fails.

a. Appellants Never Raised The Issue Before The District Court.

Plaintiffs never contended before the district court that their first amended complaint stated a cause of action under section 1985(2). The established rule in the Tenth Circuit is that an appeals court will consider an issue for the first time on appeal only in extraordinary circumstances not present here. See, e.g., McDonald v. Kinder-Morgan, Inc., 287 F.3d 992, 999 (10th Cir. 2002) ("It is clear in this circuit that absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal."). If Appellants believed the first amended complaint stated a cause of action under 1985(2), then they were required to inform the court. Appellants never pursued that course before the court and tellingly never argued or even mentioned section 1985(2) in their response to the Tribal Defendants' motion to dismiss.

Appellants argue that because they cited section 1985(2) in a footnote to their brief opposing Federal Defendants' brief, that Tribal Defendants were on notice that Appellants were asserting such a claim against them. Op. Br. at 22-23. That claim fails. At the outset, what Appellants said in their brief directed at Federal Defendants could not put Tribal Defendants on notice that a claim was being made against them. More fundamentally, the footnote, which Appellants fail to fully quote, leaves no doubt that Appellants failed to assert a claim under section 1985(2). Appellants do not quote that portion of the footnote which says "in 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 (emphasis added); cf. Op. Br. at 22. That is, Appellants themselves recognized that their existing complaint did not state a cause of action under section 1985(2). Furthermore, Appellants expressly told the district court that the section 1985(2) claim was a "new claim." A1432 ("The originally-proposed Second Amended Complaint asserted two new claims."); id. ("The two new claims proposed by the plaintiffs are for (a) conspiracy to obstruct justice pursuant to 42 U.S.C. § 1985(2) and (b) [a section 1986 claim]."") (emphasis added). Appellants cannot in good faith claim that the district court was supposed to interpret the complaint as asserting a cause of action under section 1985(2) when Appellants themselves told the court just the opposite.[20]

[20] Appellants' claim that they asserted an action under section 1986 similarly fails. Op. Br. at 23-24. Appellants never asserted an action under section 1986 in their first amended complaint, never argued to the district court they were asserting such a claim, and never mentioned section 1986 in their briefs before the district court.

b. Appellants Were Required To Identify Their Cause Of Action.

In the Tenth Circuit "[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." Green Country Food Market v. Bottling Group, LLC, 371 F.3d 1275, 1279 (10th Cir. 2004). In Green Country the plaintiffs relied on two sections of an antitrust statute in their complaint, but failed to identify a third section of that statute. Id. at 1279-80. The Tenth Circuit rejected the same argument made by Appellants here -- that the facts alleged were sufficient to state a claim even though plaintiffs had not identified the relevant statutory section in their complaint. The Tenth Circuit held that "we 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 (In re Santa Fe Downs), 611 F.2d 815, 816 (10th Cir. 1980)). "The complaint did not place Defendants … on notice of the need to defend against a § 203(A) claim as was demonstrated by Defendants' failure to offer any defense to a § 203(A) claim in their initial motion for summary judgment." Green Country, 371 F.3d at 1280. The same is true here. None of the defendants were on notice of the need to defend against a section 1985(2) claim as evidenced by the fact that none of the motions to dismiss or for summary judgment, briefs in support of the motions, and response briefs filed by Tribal or Federal Defendants addressed section 1985(2). Moreover, in Green Country, the Tenth Circuit found that "[a] claim for unilateral acts in restraint of trade is sufficiently distinguishable from [the sections pled] that Plaintiffs should have mentioned the claim in

the complaint." Id. Again, the same is true here. Claims under sections 1985(2) and 1985(3) require significantly different allegations. Gallegos, 97 Fed. Appx. at 812 (describing distinct claims under section 1985(2) and section 1985(3)).

Indeed, application of the principles that control in the Tenth Circuit is even clearer here than in Green Country. In Green Country plaintiffs raised before the district court the question whether they had pled a claim under a statute not mentioned in the complaint. Id. at 1280 ("the district court did not err in holding that Plaintiffs had not pled a § 203(A) claim in their complaint"). In this proceeding Appellants did not. In Green Country plaintiffs made passing reference in their briefs to the additional claim not identified in their complaint. Id., 371 F.3d at 1281 ("Plaintiffs referenced § 203(A) only three times in their motions below"). In this proceeding Appellants' responses to Tribal Defendants make no reference to a section 1985(2) claim. Appellants simply cannot satisfy Tenth Circuit requirements.

c. The District Court Was Not Required to Identify Additional Claims for Appellants.

Appellants' assertion that it is the duty of the district court, not Appellants and their counsel, to identify their causes of action also flies in the face of controlling Tenth Circuit authority. It is settled law in the Tenth Circuit, even in the context of actions brought by pro se plaintiffs, that "we will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." Young v. Warren, 151 Fed. Appx. 664, 666 (10th Cir. 2005); Whitney v. State of New Mexico, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (same) (emphasis added). See

also Bender v. Suburban Hosp., Inc., 159 F.3d 186, 192 (4th Cir. 1998) ("[plaintiff's] final argument is that we reverse the district court because notice of pleading requires generosity in interpreting plaintiff's complaint. But generosity is not fantasy. We must read the complaint as plaintiff writes it.…"). Appellants have been represented by counsel from the outset of this litigation; they drafted complaints in excess of 80 pages; and it is their duty to "construct a legal theory on plaintiff's behalf." Indeed, in the Tenth Circuit courts need not consider new causes of action identified seriatim by plaintiffs, much less "construct a legal theory" for them. See, e.g., Pallottino, 31 F.3d at 1027 ("[a] busy district court need not allow itself to be imposed upon by the presentation of theories seriatim"). To accept Appellants' invitation to impose an obligation on district courts to "construct legal theories" for plaintiffs would be inconsistent with the adversarial system and would impose unreasonable and unfair burdens on busy district courts and opposing parties.

In all events, any section 1985(2) claim Appellants make against Tribal Defendants would be futile. There can be no doubt that Tribal Defendants, as agents of the Tribal government, possess sovereign immunity. Supra at 31-35. Appellants contend that sovereign immunity does not bar their section 1985(2) claim against Tribal Defendants for the reasons set out in Ex Parte Young, 209 U.S. 123 (1908), and like authority. Op. Br. at 54. But it is settled law that, setting aside other restrictions on its application, Ex Parte Young authorizes suits only for prospective relief, not for damages. See, e.g., Elephant Butte Irrigation District v. Dep't of the Interior, 160 F.3d 602, 608 (10th Cir. 1998); Edelman v. Jordan, 415 U.S. 651, 665-668 (1974). Here Appellants seek

damages for their alleged civil rights claim, not prospective relief -- they demand "punitive damages" of $18 million from Tribal Defendants and "monetary damages" from Tribal Defendants in an amount to be determined at trial. A1395; Op. Br. at 38 (characterizing the nearly identical claim for relief under Count 8 of the FAC as "monetary relief"). Appellants simply cannot make out a section 1985(2) claim against Tribal Defendants under those circumstances.

CONCLUSION

For these reasons Tribal Defendants respectfully submit that Wopsock's claims must be rejected and the district court's judgment must be affirmed.

Dated: April 20, 2007

DAVIS GRAHAM & STUBBS LLP

s/ Charles L. Kaiser

Charles L. Kaiser
Charles A. Breer
1550 Seventeenth Street
Denver, Colorado 80202
Telephone: 303-892-9400
Facsimile: 303-893-1379

Attorneys for Defendants-Appellees Millicent Maxine Natchees, T. Smiley Arrowchis, O. Roland McCook, Sr., Richard Jenks, Jr., John P. Jurrius, and Susan Hammer

STATEMENT OF ORAL ARGUMENT

Given the complexity of the issues, Tribal Defendants respectfully request the opportunity to present oral argument in this matter.

Dated: April 20, 2007

DAVIS GRAHAM & STUBBS LLP

s/ Charles L. Kaiser

Charles L. Kaiser
Charles A. Breer
1550 Seventeenth Street
Denver, Colorado 80202
Telephone: 303-892-9400
Facsimile: 303-893-1379

Attorneys for Defendants-Appellees Millicent Maxine Natchees, T. Smiley Arrowchis, O. Roland McCook, Sr., Richard Jenks, Jr., John P. Jurrius, and Susan Hammer

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 13,699 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: April 20, 2007

DAVIS GRAHAM & STUBBS LLP

s/ Charles L. Kaiser

Charles L. Kaiser
Charles A. Breer
1550 Seventeenth Street
Denver, Colorado 80202
Telephone: 303-892-9400
Facsimile: 303-893-1379

Attorneys for Defendants-Appellees Millicent Maxine Natchees, T. Smiley Arrowchis, O. Roland McCook, Sr., Richard Jenks, Jr., John P. Jurrius, and Susan Hammer

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE TRIBAL DEFENDANTS have been served upon counsel this 20th day of April, 2007, by First Class United States Mail addressed to:

David W. Scofield
Peters Scofield Price, P.C.
111 East Broadway, Suite 340
Salt Lake City, Utah 84111
dws@psplawyers.com

John A. Bryson
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, DC 20026
john.Bryson@usdoj.gov

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 McAfee VirusScan Enterprise, version 8.0.0, updated through April 18, 2007, and according to the program, the document is free of viruses.

s/ Cindy Marlowe
Cindy Marlowe