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9 The Hopi Tribal Council, Chairman Shingoitewa
10 And Vice Chairman Honanie

11 **UNITES STATES DISTRICT COURT**

12 **DISTRICT OF ARIZONA**

13 JERRY SEKAYUMPTewa, SR., *et al.*

14 Plaintiffs,

15 vs.

16 KENNETH SALAZAR, UNITED STATES
17 SECRETARY OF THE INTERIOR, *et al.*

18 Defendants.

NO. CIV 11 80 5 PCT DGC

**MOTION TO DISMISS UNDER
RULE 12(b)(1)**

(Assigned to Hon. Paul G. Rosenblatt)

19 Defendants the Hopi Tribe (the "Tribe"), The Hopi Tribal Council (the Tribal
20 Council"), Chairman LeRoy Shingoitewa (the "Chairman") and Vice Chairman Herman
21 Honanie (the "Vice Chairman") (the Chairman and Vice Chairman collectively the
22 "Officials") hereby move this Court to dismiss plaintiffs' Complaint under Rule
23 12(b)(1) based upon this Court's lack of subject matter jurisdiction over the Tribe, the
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1 Tribal Council and the Tribe's Officials. This Motion is supported by the following
2 Memorandum of Points and Authorities.

3 MEMORANDUM OF POINTS AND AUTHORITIES
4

5 Plaintiffs bring this declaratory judgment action, with a request for injunctive
6 relief, seeking this Court to interpret, in the first instance, the meaning of language in
7 the Constitution and By-laws of the Hopi Tribe (the "Constitution"), which was adopted
8 by the Tribe in 1936. Because there is no independent basis for this Court's
9 jurisdiction, and because the Tribe, Tribal Council and its Officials enjoy sovereign
10 immunity, this Court lacks subject matter jurisdiction over plaintiffs' claims.
11

12 I. FACTUAL BACKGROUND.
13

14 Relevant to the resolution of the present Motion are facts surrounding the
15 Constitution, proposed amendments to that Constitution (the "Proposed Amendments")
16 and a number of already pending actions in Hopi Tribal Court brought by most of the
17 plaintiffs to the present declaratory judgment action.

18 a. The Constitution.
19

20 The Constitution was adopted in December, 1936 after approval by majority vote
21 of the adult members of the Tribe. (A copy of the Constitution is attached hereto as
22 Exhibit 1) The Constitution was adopted pursuant to a federal law, the Indian
23 Reorganization Act, which codifies a tribe's right to request a Federal election to vote
24 on a written constitution and amendments thereto. The Constitution has been amended
25 three times since its adoption. The Constitution provides, in Article X, the manner in
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1 which it may be amended. Article X permits any Tribal Council Representative to
 2 propose an amendment at any Tribal Council meeting. While the Council may (but is
 3 not required to) discuss the proposed amendment at that meeting, they may not vote to
 4 accept the proposed amendment, or call for an election on such an amendment, until a
 5 later meeting. If approved by a majority vote, the Council shall then request the
 6 Secretary of the Interior to set an election for tribal members to approve or reject the
 7 proposed amendment (a "Secretarial Election"). If approved by the voters, the proposed
 8 amendment is adopted, subject to the Secretary's final approval.
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11 b. The Proposed Amendments.

12 In December, 1998, the Tribal Council passed a resolution forming a
 13 Constitutional Committee. (Affidavit of Chairman LeRoy Shingoitewa, attached hereto
 14 as Exhibit 2, ¶ 2) Resolution H-006-099 empowered the Committee to draft proposed
 15 Amendments to the 1936 Constitution in order to improve the Tribe's governmental
 16 organization.
 17

18 The Constitutional Committee met for over four years to reach consensus on
 19 amending the Constitution (the Proposed Amendments).¹ (Exhibit 2, ¶ 3) Included in
 20

21
 22 ¹ Because amending a constitution requires an election of the Tribe, to be conducted by
 23 the Secretary of the Department of the Interior, the elections are called "Secretarial
 Elections". These elections must be conducted in accordance with 25 C.F.R Part 81.

24 The term "amendment" is defined by 25 C.F.R. §81.1(b) as follows: "Amendment
 25 means any modification, change, or total revision of a constitution or charter." Thus the
 26 present Secretarial Election is to amend the current Constitution, notwithstanding any
 assertion that it is a total revision of that Constitution.

1 these meetings were 43 work sessions; 4 work sessions with the Tribal Council (the
2 governing body of the Tribe); 3 progress reports to the Tribal Council; 16 public
3 hearings; and two meetings with the Council Chairman and legal counsel. (Exhibit 2, ¶
4 4) In addition to these 68 meetings/presentations, there were also public service
5 announcements on the Tribe's radio station KUYI and two radio shows (or portions
6 thereof) dedicated to the issue of the Proposed Amendments. (Exhibit 2, ¶ 5) Finally,
7 there were more than a dozen newspaper articles addressing the amendment issue.
8 (Exhibit 2, ¶ 5)
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11 The Tribal Council declined to consider the work of the Constitutional
12 Committee after it completed its initial work in 2004. (Exhibit 2, ¶ 6) The matter of the
13 Proposed Amendments was essentially tabled for several years. (Exhibit 2, ¶ 6)
14 However, in early 2010, the work of the Constitutional Committee was revived and
15 further revised amendments were developed. (Exhibit 2, ¶ 7) The Proposed
16 Amendments that are subject to the present litigation are called Draft 24A. (Exhibit 2, ¶
17 7)
18

19
20 The Chairman of the Tribe, LeRoy N. Shingoitewa, introduced Resolution H-
21 053-2010 at a Tribal Council meeting on July 7, 2010. (Exhibit 2, ¶ 8) This Resolution
22 resolved "[T]hat the Tribal Council hereby requests the Secretary of the Interior to call
23 and hold a Secretarial Election for the voters of the Tribe to decide whether to approve
24 the proposed revised Constitution [Draft 24A] for the Tribe". The Constitution required
25 that a second Tribal Council meeting take place to vote on any such Resolution
26

1 addressing the Amendments. See Article X, Constitution and By-laws of the Hopi
2 Tribe. That second meeting of the Tribal Council occurred on August 4, 2010. (Exhibit
3 2, ¶ 9) Due to the significance of the issue, the Tribal Council set aside the entire day
4 on August 4, 2010 to debate the Resolution/Proposed Amendments and to hear the
5 public comments. (Exhibit 2, ¶ 10) Moreover, due to the expected crowd desiring to
6 address the Resolution/Proposed Amendments, the August 4th Tribal Council meeting
7 was moved from the Council Chambers to the Hotevilla Youth Center to accommodate
8 the public. (Exhibit 2, ¶ 10)
9

10
11 The Resolution took the entirety of the August 4, 2010 Tribal Council meeting.
12 It was exhaustively debated and significant and substantial public comment from Tribal
13 members occurred. (Exhibit 2, ¶ 11) The Tribal Council passed the Resolution by a
14 vote of 8 to 6. (Exhibit 2, ¶ 11)
15

16 As part of the Resolution, the Tribal Council authorized Chairman Shingoitewa
17 to carry out the intent of the Resolution, including interfacing with the Bureau of Indian
18 Affairs to facilitate and further the Secretarial Election process.
19

20 The Secretarial Election process began with the selection of a Federal Secretarial
21 Election Board pursuant to 25 C.F.R. §81.8. The chairperson of the Federal Secretarial
22 Election Board is the “officer in charge”, a BIA employee appointed by the Secretary of
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1 the Interior. (See 25 C.F.R. §81.1(m)) The Hopi Tribe was permitted by regulation to
2 appoint three members to the Federal Secretarial Board.² (Exhibit 2, ¶ 12)

3
4 The Federal Secretarial Election Board met and scheduled the date and procedure
5 for the Secretarial Election. The Secretarial Election is scheduled for January 27, 2011
6 and includes both absentee and “in person” voting. On behalf of the Secretary of
7 Interior, Ms. Chaney, as Chair of the Secretarial Election Board, mailed an official
8 notice and related documents to more than eight thousand adult members of the Tribe
9 advising the membership of: the Resolution; the Proposed Amendments; the federally
10 conducted election under 25 C.F.R. Part 81; and the requirements for voter registration
11 and voting in the Secretarial Election.³ (Exhibit 2, ¶ 13) Nearly 1,500 adult members of
12 the Hopi Tribe are currently registered to vote in the January 27, 2011 Secretarial
13 Election.
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19 ² The appointed Chairperson and BIA employee is Suzanne Chaney. Although chair of
20 the Federal Secretarial Election Board, she is not a party to this litigation. Alfonso
21 Sakeva, Sr., Marilyn Tewa and Darrell Kewanytewa are members of the Federal
22 Secretarial Election Board selected by the Hopi Tribe.

23 ³ There are minor, non-substantive differences between Draft #24A and the Proposed
24 Amendments contained in the Department of Interior pamphlet that is an exhibit to
25 Chairman Shingoitewa’s Affidavit. These minor changes were due to the Department
26 of Interior’s statutorily imposed duty to review and comment upon the Proposed
Amendments to ensure compliance with existing and applicable law. Chairman
Shingoitewa was authorized by the Resolution to address the comments of the
Department of Interior without returning the Proposed Amendments to the Tribal
Council for further action by the Tribal Council..

1 c. Currently Pending Litigation.

2 There are currently pending no less than four lawsuits in the Hopi Tribal Court
3 that raise issues central to plaintiffs' current claims. They include:

4
5 i. Hopi Tribal Council Representatives v. Shingoitewa, Tribal Court
6 Case No. 2010- AP – 0002. The plaintiffs in that matter include seven plaintiffs in the
7 present action: Singuah, Youvella, Lewis, Chaca, Koruh, Duwahoyeoma and Numkena.
8 That matter surrounded the Chairman's removal of the plaintiffs from their position as
9 Tribal Council Representatives pursuant to the Constitution. The Hopi Appellate Court
10 has already vacated a temporary restraining order obtained on an ex parte basis against
11 the Chairman that prohibited him from removing the representatives. The Appellate
12 Court issued two orders (attached hereto as Exhibits 3 and 4) setting forth the proofs
13 plaintiffs in that action must make in order to prevail on their claim that they are entitled
14 to hold seats on the Tribal Council.
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17 ii. In the Matter of Certified Question of Law Re Constitutionality of
18 Hopi Tribal Council Resolution H-053-2010 and Article III, Section 2 of the proposed
19 new Hopi Constitution, Hopi Appellate Case No. 2010 – AP – 0009. This matter was
20 brought directly to the Hopi Appellate Court by plaintiff in this action, Jerry
21 Sekayumptewa, Sr. (A copy of the Petition is attached hereto as Exhibit 5) Petitioner
22 seeks the Appellate Court to determine whether one aspect of the Proposed
23 Amendments, Article III, Section 2, violates the Constitution and/or the sovereign rights
24 of the Villages to organize.
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1 iii. Hamana, et al. v. Hopi Tribal Government, et. al., Hopi Tribal
 2 Court No. 2010 – CV – 0156. The Chairman and Vice Chairman are named defendants
 3 in this matter, as is the “Hopi Tribal Government”. Plaintiffs seek declaratory and
 4 injunctive relief seeking to enjoin the Secretarial Election and have the Resolution
 5 authorizing the Proposed Amendments declared null and void. (A copy of the
 6 Complaint is attached as Exhibit 6) There is presently a Motion for Preliminary
 7 Injunction pending, which will be heard on January 18, 2011.

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 10 iv. Honyaoma v. Hopi Tribal Government, et al., Hopi Tribal Court
 11 No. 2010 – CV – 1058. This matter has been consolidated with No. 2010 – CV – 0156.
 12 It, too, seeks declaratory and injunctive relief seeking to enjoin the Secretarial Election
 13 and declare the Resolution null and void. (A copy of the Complaint is attached hereto as
 14 Exhibit 7) The bases it seeks relief are broader than those asserted in Hamana.
 15

16 d. Plaintiffs’ Complaint In The Present Matter.

17 Plaintiffs’ Complaint seeks declarations and an injunction based upon four
 18 theories. First, they claim that the Constitution’s requirement that a majority of Tribal
 19 Council members voting in favor of the Resolution be interpreted to require a majority
 20 of all sitting Tribal Council members, not simply those who comprised the quorum
 21 attendance at the Tribal Council meeting.
 22

23 Second, engrafting on the Hopi Tribal Council Representatives lawsuit, plaintiffs
 24 claim that, notwithstanding their removal from the Tribal Council (and dissolution of
 25 the Temporary Restraining Order that enjoined their removal), the removed
 26

1 representatives should have been included in the count of Tribal Council members for
2 purposes of applying Article X of the Constitution.

3 Third, they assert that the Proposed Amendments conflict with the Constitution
4 and aboriginal rights of the villages as it relates to the ability of the villages to organize.

6 Finally, they claim that pending Tribal Court actions *may* be resolved in such a
7 manner as to affect the count of Tribal Council representatives for purposes of applying
8 Article X of the Constitution.

9
10 II. LEGAL ARGUMENT.

11 The burden to establish a recognized basis of subject matter jurisdiction rests
12 with plaintiffs. Milsap v U-Haul Truck Rental Co., 2006 WL 3797731 (D. Ariz.,
13 December 20, 2006) at *4; Lavis v. Bayless, 233 F.Supp.2d 1217, 1219 (D. Ariz. 2001).
14 A court typically will resolve any doubt about is jurisdiction over the subject matter of
15 the litigation first. Milsap, 2006 WL 3797731 at *4.

17 The pleading must show ‘affirmatively and distinctly the existence
18 of whatever is essential to federal jurisdiction, and if [it] does not
19 do so, the court, on having the defect called to its attention or on
20 discovering the same, must dismiss the case, *unless* the defect can
be corrected by amendment.’

21 Milsap, 2006 WL 3797731 at *4, quoting Association of Irrigated Residents v. C & R
22 Vanderham Dairy, 435 F. Supp.2d 1078 (E.D. Cal. 2006).

23 The starting point for the analysis of whether subject matter jurisdiction is present
24 is 28 U.S.C. §§ 2201 and 2202, the Federal Declaratory Judgment Act, for plaintiffs
25 assert they are entitled to an injunction under § 2202 and declaratory relief under §2201.
26

1 (See Plaintiff's Complaint, ¶ 2). The law is well settled, however, that the Federal
2 Declaratory Judgment Act does not independently confer jurisdiction on this Court.
3 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 876, 879 (1950).
4
5 Rather, under the Federal Declaratory Judgment Act, a plaintiff must establish an
6 independent basis for jurisdiction, outside of that Act. Here, plaintiffs raise two bases:
7 25 U.S.C. § 476 and 28 U.S.C. § 1331. Neither provides that independent basis in the
8 present action.
9

10 25 U.S.C. § 476 is Section 16 of the Indian Reorganization Act which, among
11 other things, provides for the development of tribal constitutions. However, it does not
12 provide an independent basis of federal jurisdiction. In Twin Cities Chippewa Tribal
13 Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967), plaintiff sought to
14 invalidate a tribal election held to amend the Minnesota Chippewa Tribe's Constitution.
15 Plaintiff alleged that the Tribe did not comply with applicable statutes, rules and
16 regulations regarding the election. The Eighth Circuit affirmed the District Court's
17 dismissal of the action based upon a lack of subject matter jurisdiction. The Appellate
18 Court stated:
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21 Plaintiffs first assert that the District Court had jurisdiction by
22 virtue of § 16 of the Indian Reorganization Act, 25 U.S.C.A. §476, 25
23 F.C.A. § 476. This argument is unacceptable, as a close reading of that
24 Act reveals its limited scope. The Act merely provides the authority and
25 procedures whereby an Indian tribe may organize itself and adopt a tribal
26 constitution and bylaws. The Act makes no mention of jurisdiction in any
sense and such is not within its purview. (Emphasis added)

Twin Cities Chippewa Tribal Council, 370 F.2d at 531.

1 Because 25 U.S.C. § 476 does not provide jurisdiction to the Court, it cannot be
2 used as a basis for providing jurisdiction under the Federal Declaratory Judgment Act.

3 Plaintiffs lastly assert that jurisdiction is predicated upon 28 U.S.C. §1331,
4 commonly referred to as “federal question” jurisdiction. The statute provides the Court
5 with jurisdiction if the action is one “arising under the Constitution, laws, or treaties of
6 the United States.” Here, there is no federal question. Plaintiffs’ claims do not come
7 under any Federal statute and do not seek enforcement of any Federal statute. At base,
8 plaintiffs’ claims seek interpretation of the Hopi Tribe’s Constitution and application of
9 its tribal law.
10

11 Again, Twin Cities Chippewa Tribal Council is instructive. There, plaintiff also
12 asserted that the District Court had jurisdiction to hear its election contest by virtue of 28
13 U.S.C. § 1331. The Eighth Circuit dismissed this contention:
14

15 [B]efore a District Court can exercise jurisdiction under 28
16 U.S.C.A. § 1331, 28 F.C.A. § 1331, the issue to be considered must
17 present a ‘federal question’ – must arise under the Constitution, laws, or
18 treaties of the United States. Before jurisdiction exists, a right or
19 immunity created by the Constitution or laws of the United States must be
20 an essential element of plaintiff’s cause of action. In the instant case,
21 plaintiffs argue that their rights to the tribal property were diluted as a
22 result of the alleged invalid election. Plaintiff’s rights to the tribal
23 property arise out of their membership in the Chippewa Tribe of Indians,
24 rather than the Constitution or laws of the United States. Thus, for the lack
25 of existence of a ‘federal question’ the very basis of 28 U.S.C.A. § 1331,
26 28 F.C.A. §1331, jurisdiction could not be founded on that section.
(Citations omitted)

Twin Cities Chippewa Tribal Council, 370 F.2d at 532.

1 In Runs After v. United States, 766 F.2d 347 (8th Cir. 1985) plaintiff sought to
2 have the District Court evaluate the validity of tribal council resolutions. Plaintiff
3 claimed and the Court assumed that the resolutions were invalid. Plaintiff asserted
4 “federal question” jurisdiction as one basis of jurisdiction. The Eighth Circuit affirmed
5 the District Court’s conclusion that jurisdiction did not lie.
6

7 Next, to the extent that appellants' complaint can be characterized
8 as one seeking federal judicial review of the two Tribal Council
9 resolutions at issue, a characterization with which appellants do not agree,
10 the district court correctly dismissed the complaint for lack of jurisdiction.
11 Appellants essentially argue that the Tribal Council resolutions banning
12 appellants Joan LeBeau, Gib LeBeau and Walter Woods from holding
13 tribal office “forever” and disqualifying Bertha Chasing Hawk and Grady
14 Claymore from running for tribal office in the 1984 tribal general election
15 were politically motivated because appellants opposed the manner in
16 which the Tribal Council was conducting tribal affairs, particularly the
17 handling of tribal funds. Appellants alleged that the tribal council
18 resolutions were clearly inconsistent with the tribal constitution, bylaws
19 and election ordinance. Such an action would necessarily require the
20 district court to interpret the tribal constitution and tribal law.

21 We believe the district court correctly held that resolution of such
22 disputes involving questions of interpretation of the tribal constitution and
23 tribal law is not within the jurisdiction of the district court. Appellants may
24 seek review in tribal court or pursue alternative, political remedies.
25 (Emphasis added; citations omitted)
26

20 Runs After, 766 F.2d at 352.

21 Thus, plaintiffs' claims, which, at base, require interpretation of the Tribe’s
22 Constitution, and application of tribal law more generally, do not arise out of the
23 Constitution or laws of the United States and do not give rise to federal question
24 jurisdiction.
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1 There is another reason why “federal question” jurisdiction and jurisdiction more
2 generally does not exist. The claims are barred by sovereign immunity. The Hopi Tribe,
3 Tribal Council and its Officials enjoy sovereign immunity and cannot be sued without
4 their consent or by the consent of Congress. Lomayaktewa v. Hathaway, 520 F.2d 1324,
5 1326 (9th Cir. 1975). But, any waiver, either by a tribe or Congressional act must be
6 expressed, it may not be implied. Village of Hotvela [sic] Traditional Elders v. Indian
7 Health Services, 1 F.Supp.2d 1022, 1027 (D. Ariz. 1997).

8
9 The Court in Twin Cities Chippewa Tribal Council recognized that federal
10 question jurisdiction does not provide such a waiver and does not supersede the
11 sovereign immunity of a tribe.
12

13 [P]laintiffs argue that they are entitled to a judicial interpretation of
14 the [Indian Reorganization] Act, thus invoking jurisdiction below under 28
15 U.S.C.A. §1331, 28 F.C.A. §1331. This argument overlooks defendant
16 Minnesota Chippewa Tribe’s sovereign immunity, protecting it from suit
17 in the federal courts. Indian tribes under the tutelage of the United States
18 are not subject to suit without the consent of Congress and 28 U.S.C. §
19 1331 does not operate to waive sovereign immunity.

20 Twin Cities Chippewa Tribal Counsel, 370 F.2d at 531-32.

21 Plaintiffs in the present action do not assert that there has been a waiver of
22 sovereign immunity; much less demonstrate where that express waiver is located. The
23 presence of sovereign immunity deprives the Court of jurisdiction over plaintiffs’
24 claim. Memphis Biofuels, LLC v. Chickasaw Nation Industries, 585 F.3d 917, 919-20
25 (6th Cir. 2009)(sovereign immunity is a jurisdictional matter).
26

1 Even if one were to assume that 28 U.S.C. § 1331 is a sufficient basis for
2 plaintiffs' claims under the Federal Declaratory Judgment Act, that does not end the
3 inquiry. Jurisdiction under that act is discretionary, not mandatory. Brillhart v. Excess
4 Insurance Company of America, 316 U.S. 491, 492, 62 S.Ct. 1173, 1175 (1942);
5 Government Employers Insurance Company v. Dizo, 133 F.3d 1220, 1223 (9th Cir.
6 1998). Discretionary jurisdiction should not be extended where exercising that
7 jurisdiction would require "needless determinations of state law issues", encourage
8 forum shopping or lead to duplicative litigation in multiple forums. Dizo, 133 F.3d at
9 1225.

12 These criteria fully fit the present action. First, the critical issues in this case
13 involve determination of tribal law issues. Indeed, the very first claim made by
14 plaintiffs seeks to have this Court interpret the meaning of the Hopi Constitution. The
15 remaining counts follow suit, asking the Court to interpret Hopi law and its Constitution.
16 Second, given that multiple plaintiffs have multiple suits in Tribal Court, exercising
17 jurisdiction here would only encourage forum shopping. Finally, there is, as indicated
18 above multiple lawsuits touching directly or indirectly upon the issues that must be
19 resolved in this action for plaintiffs to proceed.

22 Equally as important to the reasons set forth above militating in favor of
23 declining to exercise jurisdiction here is another reason. The plaintiffs have failed to
24 exhaust their tribal court remedies. The Hopi Tribe, Tribal Council and the Officials
25 believe that this is an appropriate consideration for the Court in the context of
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1 exercising discretionary jurisdiction. Moreover, it is an independent basis upon which
2 this Court should dismiss this action (i.e. even if the court in the first instance believes
3 that it has subject matter jurisdiction, it should nonetheless dismiss this action based
4 upon principles of comity).

6 Where a tribal court has subject matter jurisdiction over a civil action, federal
7 courts will stay or dismiss that action to “permit the tribal court to determine in the first
8 instance whether it has the power to exercise subject-matter jurisdiction over a dispute.”
9 Stock West Corp. v. Taylor, 964 F.2d 912,919 (9th Cir. 1992). Such exhaustion is a
10 matter of comity. Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 16 n.8, 107
11 S.Ct. 971, 94 L.Ed.2d 10 (1987). Indeed, a tribal court presumptively has jurisdiction
12 over activities that take place on tribal land. Wellman v. Chevron U.S.A., Inc., 815 F.2d
13 577, 578 (9th Cir. 1987). The fact that no tribal action is currently pending does not
14 defeat the requirement that a party first exhaust tribal remedies. United States v. Tsosie,
15 92 F.3d 1037, 1041 (10th Cir. 1996); Smith v. Moffett, 947 F.2d 442, 444 (10th Cir.
16 1991)(holding comity to be a concern even in the absence of a pending tribal action).

18 The tribal exhaustion rule was created in National Farmers Union Insurance Cos.
19 v. Crow Tribe of Indians, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). There,
20 a tribal member brought suit against a school district and its insurer in tribal court. The
21 defendants countered by filing a declaratory judgment action in Federal Court, seeking
22 an order that the tribal court had no jurisdiction over a non-Indian. The United States
23 Supreme Court disagreed and refused to extend a rule, announced in Oliphant v.
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1 Suquamish Indian Tribe, 435 U.S.191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), that found
2 that tribal courts lacked jurisdiction over non-Indians in criminal matters. The Supreme
3 Court stated:
4

5 [W]e conclude that the answer to the question whether a tribal
6 court has the power to exercise civil subject-matter jurisdiction over non-
7 Indians in a case of this kind is not automatically foreclosed, as an
8 extension of Oliphant would require. Rather, the existence and extent of a
9 tribal court's jurisdiction will require a careful examination of tribal
10 sovereignty, the extent to which that sovereignty has been altered,
divested, or diminished, as well as a detailed study of relevant statutes,
Executive Branch policy as embodied in treaties and elsewhere, and
administrative or judicial decisions.

11 We believe that examination should be conducted in the first
12 instance in the Tribal Court itself. Our cases have often recognized that
13 Congress is committed to a policy of supporting tribal self-government
14 and self-determination. That policy favors a rule that will provide the
15 forum whose jurisdiction is being challenged the first opportunity to
16 evaluate the factual and legal bases for the challenge. Moreover, the
orderly administration of justice in the federal court will be served by
allowing a full record to be developed in the Tribal Court before either the
merits or any question concerning appropriate relief is addressed.

17 National Farmers, 471 U.S. at 855-56, 105 S.Ct. at 2453-54.

18 In Iowa Mutual Insurance Co. v. LaPlante, *supra*, the United States Supreme
19 Court noted that the exhaustion rule announced in National Farmers applied equally to
20 claims of federal jurisdiction based upon diversity of citizenship.
21

22 Regardless of the basis for jurisdiction, the federal policy
23 supporting tribal self-government directs a federal court to stay its
24 hand in order to give the tribal court a 'full opportunity to determine
25 its own jurisdiction.'... [U]nconditional access to the federal forum
26 would place it in direct competition with the tribal courts, thereby
impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes

1 upon tribal lawmaking authority, because tribal courts are best
2 qualified to interpret and apply tribal law. (Citations omitted.)

3 Iowa Mutual, 480 U.S. at 16, 107 S.Ct. at 976-77, 94 L.Ed.2d at 20.

4 More recently, the Tenth Circuit in Kerr-McGee Corporation v. Farley, 115 F.3d
5 1498 (10th Cir. 1997), recognized that a “substantial showing” must be made by the
6 party seeking to avoid the exhaustion rule. Farley, 115 F.3d at 1502. “In fact, tribal
7 courts rarely lose the first opportunity to determine jurisdiction because of an ‘express
8 jurisdictional prohibition.’” Id. It pointed to instances of exclusive jurisdiction and
9 sovereign immunity as those where exhaustion may not apply. Id.

10 Whether as a consideration of whether to exercise discretionary jurisdiction under
11 the Federal Declaratory Judgment Act, or independently under the principles of comity,
12 this Court should dismiss this action based upon plaintiffs’ failure to exhaust their tribal
13 remedies. There is and can be no question that the Hopi Tribal Court has jurisdiction
14 over the very claims made and issues raised here. Indeed, substantially similar, if not
15 identical issues have been raised by some of these very same plaintiffs in Hopi Tribal
16 Court.

17 Moreover, logically, it is in the Hopi Tribal Court that the present claims and
18 issues should be resolved. With all due respect to this Court, the Hopi Tribal Court is in
19 a better position to apply its law and interpret its law and Constitution than is this Court.
20 Moreover, as Farley, supra, suggests, tribal courts rarely lose the ability in the first
21 instance to determine its jurisdiction.
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