No. 10-35650
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* *

JAMES PARKER SHIELD; LOUELLA FREDRICKSEN; CAROLINE FLEURY; DARREL RUMMEL; and ROBERT RUDESEAL,	) D.C. Cause No.: CV-09-44-GF-SEH
Plaintiffs - Appellants,	)
-vs-	)
JOHN SINCLAIR, RONALD "CREE" DONEY, KEN ERICKSON, RANDY RANDOLPH, STEVE DONEY, JESSE FUZESY, KATHY MART, THELMA SEYFERT, BONNIE DONEY, and JOHN DOES 1 THROUGH 20,	)
Defendants - Appellees.	)

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Appeal from the United States District Court,
District of Montana

- -

APPELLANTS' OPENING BRIEF

- -

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JURISDICTIONAL STATEMENT

The following jurisdictional information is provided pursuant to FRAP 28(a)(4) and Circuit Rule 28-2.2:

(1) *Statutory Basis for District Court's Jurisdiction*: the District Court had jurisdiction pursuant to 28 U.S.C. § 1343(a)(1) and 28 U.S.C. § 1343(a)(4);

(2) *Basis for this Court's Jurisdiction:* the judgment rendered in the District Court is final and appealable, 28 U.S.C. § 1291;

(3) *Filing Information:* the judgment in this matter was entered June 24, 2010. CR 33; ER I, 3-4, based on an order issued by the District Court that same day, CR 32, ER I, 5-6.[1] That judgment is final as to all claims raised by the Appellants before the District Court. Notice of Appeal was filed July 23, 2010. CR 34; ER I, at 1. The appeal was timely filed. See FRAP 4(a)(1)(A).

STATEMENT OF ISSUES ON APPEAL

(1) Whether the District Court erred in dismissing Plaintiffs–Appellants' claims predicated upon alleged violations of 42 U.S.C.§ 1985(3)?

(2) Whether the District Court erred in dismissing Plaintiffs–Appellants' claims predicated upon alleged violations of 28 U.S.C. § 1302?

[1] CR refers to the Clerk's Docket Sheet and entry number; ER refers to the Appellant's Excerpts of Record. There are two volumes, ER I and ER II.

STATEMENT OF THE CASE

Appellants here (Plaintiffs below) filed their initial complaint for relief on May 5, 2009. CR 1, ER I, at 25. This complaint was not served on the Defendants. An amended complaint was filed on November 14, 2009, CR 8, ER I, at 25, and was served. Defendants appeared by way of a motion to dismiss filed May 6, 2010. CR 18. Appellants filed a brief in opposition to the motion, along with several affidavits. CR 24; 29 (Brief in Opposition; affidavits of Plaintiffs Louella Fredricksen, Caroline Fleury, Darrell Rummel, and Robert Rudeseal). The District Court ordered a hearing on the motion for June 24, 2010. CR 30. On that date, the Court took arguments of counsel, and issued an oral opinion granting the motion to dismiss. CR 31; ER I, 16-29 (Transcript of June 24, 2010 hearing). The clerk's judgment was entered that same date. CR 33, ER I, 3-4. This appeal ensued.

STATEMENT OF FACTS

_____This case arises out of a dispute between several members of the "Little Shell Tribe of Chippewa Indians," a non-federally recognized Indian tribe residing primarily within the political boundaries of the State of Montana [hereinafter Little Shell Tribe]. Although the Tribe is not currently federally recognized, it is recognized as a tribe by the government of the State of Montana, as well as several

local governments in that state. See Koke, et. al. v Little Shell Tribe of Chippewa Indians of Montana, 315 Mont. 510, 68 P.3d 814 (2003).

The Amended Complaint sets forth the key allegations. Appellants are all citizens of the United States, residents of the State of Montana, and are all enrolled members of the Little Shell Tribe. The named Defendants (Appellees on this appeal) all purported at the time material to the Amended Complaint to comprise either:

-the "tribal council" of the Little Shell Tribe, by virtue of election and/or appointment to positions on said council, although no elections had been held for those positions as required by the Tribal Constitution and ordinances of the Little Shell Tribe, or

-in the instance of Appellees Kathy Mart, Thelma Seyfert, and Bonnie Doney, the so-called "Elections Committee" for the Little Shell Tribe.[2]

Appellants allege that, beginning sometime around the end of calendar year 2008, and continuing through the time of the filing of the Amended Complaint,

[2] Appellees also named various "John Doe Defendants", i.e., " yet unidentified individuals and entities working in conjunction with one or more of the named Defendants, in furtherance of the acts complained in this Complaint. Their identities will be revealed through discovery, at which time Plaintiffs will move to amend this Complaint to name them as actual parties." CR 1, 8.

Appellee John Sinclair, in conjunction with one or more of the other named Appellees, as well as perhaps one or more of the "John Doe Defendants," embarked upon a conspiracy for the purpose of denying each Appellant the protections each has under the laws of the United States. At the time of filing both complaints, the known acts of each of the Appellees committed in furtherance of this conspiracy are as follows:

(1) Sometime in March 2009, John Sinclair and one or more of the named Appellees undertook actions to deprive Appellants James Parker Shield [Shield] and Louella Fredricksen [Fredricksen] of their status as enrolled members of the Little Shell Tribe, and in so doing, their right to vote in an upcoming election of tribal officers for the Tribe, said election scheduled for May 9, 2009. In a newsletter mailed to members of the Little Shell Tribe in April 2009, Sinclair included an article, in which he alleges grounds for dis-enrolling Shields and Fredricksen. CR 8 (Exhibit 1 to Amended Complaint). See also ER II, 2-4 (First Affidavit of Louella Fredricksen --June 10, 2009).

(2) In the aforementioned newsletter, Sinclair accused Shield of various actions consisting of unauthorized purchases of goods and services for use by the Little Shell Tribe, although neither Sinclair nor the other named Appellees, nor the governing body of the Little Shell Tribe, have ever caused criminal charges of any

kind whatsoever to be filed against Shield. CR 8 (Exhibit 1 to Amended Complaint). See also ER II, at 7 (First Affidavit of Louella Fredricksen --June 10, 2009).

(3) Also in the same newsletter, Sinclair states that Fredricksen is "guilty of bank fraud," in connection with a bank account established in 2007, although no such charges have ever been made or filed against her, and moreover, the allegations are patently false.[3] CR 8 (Exhibit 1 to Amended Complaint). See also ER II, at 7 (First Affidavit of Louella Fredricksen --June 10, 2009).

(4) Sinclair also alleged that Appellees Caroline Fleury [Fleury] and Darrel Rummel [Rummel] were ineligible to run as candidates for the upcoming election, on grounds that are false and untrue. Sinclair alleged that Fleury was ineligible due to her having missed tribal council meetings at a prior time when she served on the council, although at the times Fleury was alleged to have been on that council, she was, in fact, not a member of the council. Sinclair alleged that Rummel was ineligible due to having violated unspecified provisions of tribal election ordinances, although Rummel had done nothing she is not privileged to

[3]Fredricksen has a separate civil action filed against Sinclair in state district court, for defamation based on these and similar statements he has made about her in public settings. See Fredricksen v. Sinclair, Cause No. CDV 09-756, Montana Eighth Judicial District Court, Cascade County. That action is still pending.

do as a citizen of the United States with respect to her right to speak freely and openly as to her political opinions. CR 23. See also ER II, 12-54 (Affidavits of Caroline Fleury and Darrel Rummel).

(5) All of the aforementioned allegations by Sinclair and the other Appellees are false and untrue, and are a subterfuge. Each of the named Appellants has at various times over the past three to four years publicly spoken out against Sinclair and other members of his Council, expressing open disagreement with various policies, procedures and practices engaged in by the named Appellees. Sinclair has, at times in the past, attempted to "silence" political opposition by these and other individuals by alleging that he had information that he would use against these individuals in the event they continued with their political opposition to Sinclair and his agenda. CR 23. See also ER II, 1-7; 9-11; 12-54 (First Affidavit of Louella Fredricksen' Affidavits of Caroline Fleury and Darrel Rummel).

(6) By "dis-enrolling" Shield and Fredricksen, Sinclair and one or more of the other named Appellees deprived them of their right to vote in the aforementioned election. By disqualifying Fleury and Rummel as council candidates, Sinclair and others deprived these Appellants of their right to vote, and their right under the laws and ordinances of the Little Shell Tribe to run as

candidates for public office.

(7) Plaintiff Robert Rudeseal was also disqualified for running for a position on the tribal council, and was so notified in a memorandum letter dated April 22, 2009. CR 8 (Exhibit 2 to the Amended Complaint). In that memorandum, Rudeseal was accused of violating a tribal ordinance, for allegedly using the seal of the Little Shell Tribe without permission from the tribal council. He was further "found" to be in violation of unspecified "federal, State or Tribal laws/rules/regulations," and that this was the basis for his disqualification.

At no time has Plaintiff Rudeseal violated any ordinance respecting use of the tribal seal. Furthermore, the basis for his disqualification is not one recognized by the Little Shell Tribe; Article I, Section V, of the Tribal Constitution provides only that a person may not serve on the council if found guilty of a misdemeanor involving dishonesty in any Indian, State or Federal Court. ER II, 59-63 (Affidavit of Robert Rudeseal). Furthermore, Tribal Ordinance 2006-001 provides that an enrolled member may not serve on the council if they have been convicted of a felony or convicted of a misdemeanor involving dishonesty. ER II, at 4; 56-58. Rudeseal has not been found guilty of, or convicted of, any crime.

SUMMARY OF ARGUMENT

The District Court erred in dismissing Appellants claims predicated upon alleged violations of 42 U.S.C.§ 1985(3), one of several federal civil rights laws. Appellants properly plead a claim for conspiracy on the part of the Appellees to deprive Appellants of rights they have under the United States Constitution, specifically their right to vote, freedom of speech, the right to petition for a redress of grievances, the rights to due process and equal protection of its laws or deprive any person of liberty or property without due process of law, and to not be subject to any bill of attainder. The District Court had subject matter jurisdiction to entertain and adjudicate these claims.

The District Court also erred in dismissing claims predicated upon alleged violations of 28 U.S.C. § 1302, a provision of the federal Indian Civil Rights Act [ICRA]. The District Court wrongly determined that it had no jurisdiction to hear Appellants' claims. The Court had jurisdiction over the parties even though they are not members of a so-called "federally recognized tribe." Furthermore, the Court could have entertained jurisdiction over the claims despite a United States Supreme Court decision that holds otherwise. The facts of the instant case are different than those presented in the Supreme Court case, and arguably, the ruling in that case needs to be revisited, and modified or overruled in light of the facts of this case.

ARGUMENT

(1) The District Court erred in dismissing Plaintiffs' claims predicated upon alleged violations of 42 U.S.C.§ 1985(3).

(A) Standard of Review

The basis for the District Court's dismissal of Count One of the Amended Complaint was that it did not have subject matter jurisdiction over claims brought under 42 U.S.C. § 1985(3). ER I, 18-19. On appeal, a review of a District Court's ruling on a jurisdictional issue is *de novo.* Gager v. United States, 149 F.3d 918, 920 (9th Cir.), cert. den., 119 S. Ct. 412 (1998). Any factual findings on jurisdictional issues made by the District Court must be accepted on appellate review unless they are clearly erroneous. Panavision Int'l, L.P. v. Toeppen, 141 F. 3d 1316, 1319-1320 (9th Cir. 1998).

(B) The District Court's Conclusion that it Did Not Have Subject Matter Jurisdiction of the 1985 Claims Was Incorrect as a Matter of Law

The Appellees' original motion to dismiss raised subject matter jurisdiction as a defense; however, the argument was based solely on claims that "tribal government sovereignty" prohibited the federal court from exercising

jurisdiction.[4] CR 19. Appellants responded that these "sovereignty arguments" were misplaced. CR 23. Appellants expressly relied upon an Eighth Circuit decision, Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. den.,* 424 U.S. 958 (1976), for the preposition that aggrieved tribal members could indeed pursue claims under Section 1985 against tribal officials. CR 23.

The District Court did not rely upon Appellees' arguments or authorities in making its decision, and it did not distinguish or even reference the Means decision. Rather, it cited a decision by this Court, Schultz v. Sundberg, 759 F. 2d 714 (9th Cir. 1985), for the proposition that, in the District Court's own words, "a class based upon political opposition does not, and I emphasize, does not qualify as a class that is recognized that may bring claims–or that falls with the ambit of [Section] 1985." ER I 19.

The District Court's reliance upon Schultz was misplaced. There is ample

[4] Appellees' motion raise six grounds for dismissal: (1) lack of subject matter jurisdiction; (2) failure to exhaust administrative remedies; (3) lack of diversity of citizenship; (4) failure to name an indispensable party under Rule 19, F.R. Civ. P.; (5) failure to state a claim for relief under Rule 12(b), F.R. Civ. P.; and (6) sovereign immunity and lack of waiver of such immunity by the tribe. See CR 19. The District Court addressed only the subject matter jurisdiction argument, although as we shall see in the discussion *infra*, the Court's rationale for dismissal was for the most part vastly different than the rationale advocated by Appellees.

legal authority for the proposition that the "class" of Appellants in this case can state a claim for relief under 42 U.S.C. § 1985(3), and that the claims fall within the subject matter jurisdiction of a federal court. The holding in Schultz is, we believe, distinguishable on its facts. The District Court should have found subject matter jurisdiction, and allowed Appellants' amended complaint to proceed.

Initially, Appellants reference the plan language of Section 1985, which states in pertinent part:

> Depriving persons of rights or privileges: If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The United States Supreme Court construed the language and intent of Section 1985 in Griffin v. Breckenridge, 403 U.S. 88 (1971), concluding that to the extent that a plaintiff alleges: (1) a conspiracy; (2) for the purpose of depriving them of the same protections afforded other citizens under the law; and that (3) conspirators committed various acts in furtherance of the conspiracy; leading to (4) injury in the form of being deprive of the their constitutional rights, then the aggrieved party had stated an appropriate claim. These are, in fact, the essence of the allegations plead in the Amended Complaint in this case. The Supreme Court said nothing in this opinion to the effect that such claims were limited to instances of racial discrimination alone.

Schultz concerned an Alaska state legislator who brought several claims, including a Section 1985 action, against other Alaska public officials and state troopers for compelling him against his will to attend a joint session of the Alaska legislature. Alaska's governor at that time had submitted a list of political appointees to the state legislature for confirmation. Some of the nominees were not appointed by the time the legislature had adjourned. The governor issued a call for a special session. When the session convened, legislative leadership noted an absence of a quorum to conduct business. Representatives of the governor concluded that his office had the power to compel attendance by any recalcitrant

representative, including Schultz. A legislative sergeant-at-arms and some Alaska state troopers located Schultz, and with a minimal show of force, escorted him to the legislative chambers to produce a quorum . He sued thereafter, alleging in part a claim under Section 1985(3) for a breach of his civil rights by a conspiracy of other public officials and public employees.

The district court in that case rejected Schultz claims, and on appeal, this Court affirmed. 759 F. 2d at 716. In dismissing his Section 1985 claim, this Court stated:

> The class that Schultz is a member of is a transitory coalition of state representatives. The coalition sought to prevent consideration of Governor Sheffield's appointees by remaining absent from the joint session called for that purpose. Because there has not been any governmental determination that such a class merits special protection, the plaintiff's section 1985(3) claim cannot be maintained. Our holding is bolstered by *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). In that case, the Supreme Court held that section 1985(3) does not reach conspiracies motivated by economic or commercial, but non-racial animus. Id. at 3360. The Court also indicated that section 1985(3) probably did not extend to wholly political, non-racial conspiracies. Id. at 3359-60. We conclude that Schultz's section 1985(3) claim was properly dismissed.
>
> 759 F.2d at 718 [EMPHASIS ADDED].

This language was, presumably, what the District Court in the instant case honed in on when it decided to dismiss Appellants' Section 1985 claims.

We respectfully submit that the District Court's interpretation of Schultz is

erroneous, and that the facts of the instant case are sufficiently distinguishable to justify not applying that decision here. Initially, we note another statement in this Court's opinion in Schultz , concerning the reach of the United States Supreme Court's opinion in Griffin, *supra:*

> Schultz alleges that he is the member of a class of Alaska state representatives that was conspired against by a group of state senators and executive officials. In *Griffin v. Breckenridge,* . . . . the Supreme Court indicated that 42 U.S.C. § 1985(3) might apply to conspiracies motivated by a "class-based, invidiously discriminatory animus" other than racial discrimination . . . . . Applying this construction of section 1985(3), we have extended it beyond race only when the class in question can show that there has been a governmental determination that its members "require and warrant special federal assistance in protecting their civil rights." *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 333 (9th Cir.1979); accord *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720 (9th Cir.1981). More specifically, we require either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection. DeSantis, 608 F.2d at 333.
>
> 759 F. 2d at 718 [EMPHASIS ADDED].

Thus, this Court noted, correctly, that Griffin does not stand for the proposition that only race-based classes are entitled to protection under Section 1985; rather, it can extend to those who may "require and warrant special federal assistance in protecting their civil rights." 759 F. 2d at 718.

In Schultz, this Court rejected the Alaska legislator's claim that he and

others similarly situated constituted such a special class. There is no indication in this Court's opinion in Schultz that the claimant ever established sufficient grounds why he and others required and/or warranted "special federal assistance" in protecting their civil rights.

The limits of this opinion in this case are further underscored by this Court's discussion of another United State Supreme Court decision, United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983), for the proposition that section 1985(3) does not reach conspiracies motivated by economic or commercial, but non-racial animus. Schultz, 759 F. 2d at 718, citing United Brotherhood. This Court also stated that, in light of United Brotherhood, the provisions of Section 1985 "probably" did not extend to wholly political, non-racial conspiracies. Schultz, 759 F. 2d at 718, citing United Brotherhood.

The use of the word equivocal word "probably" does not indicate a firm rejection by this Court of the idea that Section 1985 claims could be presented by a class of individuals whose constitutional rights are threatened by political considerations. Initially, we emphasize again that Griffin, *supra,* does not express or mandate such a limitation. For that matter, the United Brotherhood decision does not openly express such a limitation. That case involved claims by a construction company and two of its employees against several unions, alleging

that they conspired to deprive the company and its workers of equal protection and equal privileges and immunities by planning and executing attacks on construction sites, assaulting workers, and destroying property, all on account of a labor-management dispute.

A majority of the United States Supreme Court ultimately rejected any notion that *socio-economic disputes* such as the one before it gave rise to civil rights violations. The Court did not decide that 1985 is limited only to race-based classifications; rather, it focused on whether the statute reaches conspiracies motivated by biases on account of economic views, status, and activities. 463 U.S. at 838-839. The Court took special notice of the fact that federal labor laws exist in part to deal with the kinds of situations involved in that case. Id. Further, the Court emphasized that state criminal laws dealing with physical assault and the destruction of property, as well as common law claims for injury to person and property, afforded more than adequate relief to victims. 463 U.S. at 839.

Any language in United Brotherhood that suggests the Court was going beyond the facts of that case and holding that only race-based classes are protected by the Section 1985 is at best dicta, and certainly nothing more than judicial musings about the potential reach of the statute. That may be why this Court was inclined to state in Schultz with much equivocation (i.e., the use of the word

"probably") the concern as to how far the protections of the statute did reach.

Consider now the circumstances of the instant case, recognizing that the District Court did not make any particular factual findings as to the nature of the Appellants' complaint here. Based on the allegations submitted in the Amended Complaint, as well as the affidavits submitted by Appellants, we have a group of citizens who either been disenfranchised by a government, been told that they cannot run for office in that government, or have been subjected to unwarranted and unsupported allegations of criminal activity by one or more representatives of that government, among other potential accusations. These parties have no forum within their tribal system for challenging these actions–there is no tribal court, and whatever avenues of resolution within the governmental system exist are controlled by the same persons who have committed the acts complained of. Appellants submit that they are therefore a class that "require[s] and warrant[s] special federal assistance in protecting their civil rights." Schultz, 759 F. 2d at 718, citing DeSantis, 608 F.2d at 333, and Canlis, 641 F.2d at 720.

There is precedent in the federal courts for affording citizens like Appellants such protections. In Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. den.,* 424 U.S. 958 (1976), the Eighth Circuit expressly recognized a right or claim by aggrieved tribal members to pursue claims under Section 1985(3) against tribal

officials, concluding that federal law also protects the right to vote and otherwise participate in tribal elections against interference from conspiracies. The appeals court there reversed a district court judgment that an action against tribal officials would not lie under Section 1985.

The District Court erred in dismissing this case by its reliance on Schultz. At a minimum, it would have more appropriate for the Court to have given both sets of parties an opportunity to brief the issue of the relevance of that decision to the facts at hand, since neither were aware in advance that the Court would rest its decision on it. Nevertheless, neither the relevant decisions of the United States Supreme Court (Griffin, United Brotherhood), nor the decisions on this Court including Schultz, specifically bar a group of citizens such as the Appellants from presenting a claim under Section 1985(3). They have alleged, and presented evidence to the District Court of a conspiracy, one intent on depriving them of the same protections afforded other citizens under the law; i.,e., the right of participation in their government, free of interference of other rights they enjoy. Their situation is no different than that presented by the claimants in Means, *supra*, where the claimants were allowed the opportunity to present their claims in federal court. Arguably, the Appellants here are even more entitled to special protection, given that they did not even have a forum in their own tribal

government for redressing their grievances.

The ruling of the District Court should be reversed, and it should entertain the 1985(3) claims on the merits. At the very least, the District Court should be directed on remand to first conduct a factual inquiry into whether Appellants constitute an appropriate class for purposes of making these claims.

(2) The District Court erred in dismissing Plaintiffs' claims predicated upon alleged violations of 28 U.S.C. § 1302?

A) Standard of Review

The District Court's dismissal of Count Two of the Amended Complaint was apparently premised on its belief that it did not have subject matter jurisdiction over claims brought under 25 U.S.C. § 1302. ER I, 20-21. In that event, this Court's review of the lower court ruling is *de novo*. Gager, *supra*.

(B) The District Court's Conclusion that it Did Not Have Subject Matter Jurisdiction of the Section 1302 Claims Was Incorrect as a Matter of Law

Much like the District Court's ruling on the Section 1985 claims, the lower court's dismissal of the "Section 1302" claims was also predicated primarily on an argument not even made by the Appellees. Their original motion to dismiss the 1302 claims was based primarily on the holding of the United States Supreme Court in Santa Clara v. Martinez, 439 U.S. 49 (1978), to the effect that the Indian

Civil Rights Act, of which Section 1302 is a part, "did not give federal courts broad jurisdiction to review tribal court actions. CR 18, at p.6. Appellees also argued that ICRA's definition of an "Indian Tribe" and "self-government powers" in 25 U.S.C. § 1301(1) and (2), respectively, somehow had no application to the Little Shell Tribe, although their argument is not clear as to why Appellees believe much. CR 18, at p. 7.

The District Court's rationale for dismissing the 1302 claims was for the most part different than the argument advanced by Appellees. The Court cited the definition of an "Indian Tribe" under Section 1301(1) – "any tribe, band, or other group of Indians, subject to the jurisdiction of the United States, and recognized as possessing powers of self government" – and then stated that since the "Little Shell Tribe is not recognized by the United States as a tribe falling under the ambit of the Indian Civil Rights Act," the Court had ho jurisdiction over the claim. ER I, 19-20. As an alternative, the Court referenced Martinez. ER I, at 20.

The District Court's holding is in error. There is no authority for the Court's interpretation of ICRA to the effect that it does not apply to the parties in this case. Moreover, the Court failed to consider Appellants' concerns that Martinez either does not apply to this case, or at least, should be re-visited in light of the facts in this case.

Initially, we present this Court with the relevant provisions of ICRA. Section 1302 of the Act provides in pertinent part:

> No Indian tribe in exercising powers of self-government shall—
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> . . . . . .
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> (9) pass any bill of attainder or ex post facto law . . .

25 U.S.C. § 1302 (1), (8) and (9). As noted previously, "Indian Tribe" is defined as "any tribe, band, or other group of Indians, subject to the jurisdiction of the United States, and recognized as possessing powers of self government" 25 U.S.C. § 1301(1).

In their Amended Complaint, Appellants alleged:

> 15. The named Defendants purport to be the governing body and/or the elections committee of the Little Shell Tribe. The Tribe is a tribe subject to the jurisdiction of the United States, and recognized as possessing powers of self-government. Koke, et. al. v Little Shell Tribe of Chippewa Indians of Montana, 2003 MT 121.
>
> 16. The named Defendants comprising the tribal council, as the purported governing body of the Little Shell Tribe, and the Defendants comprising the elections committee, have violated subsections (1), (8) and (9) of 25 U.S.C. § 1302 in the following particulars:

> (1) As to all Plaintiffs, through acts of dis-enrollment and/or by denying candidacies to office, Defendants have denied these Plaintiffs the right to assemble and to petition peaceably for a redress of grievances;
> (2) As to all Plaintiffs, through the same acts, Defendants have denied each of them the equal protection of the laws, and further denied them due process of law. Such procedures as may be provided for by tribal ordinance and/or by the current tribal council do not allow the affected Plaintiffs the opportunity for a fair and impartial determination of their grievances, leaving them no recourse but to petition for relief in this Court;
>
> (3) As to all Plaintiffs, Defendants have taken actions amounting to a issuance of a bill of attainder, depriving them of their civil rights as United States citizens.

See Amended Complaint, ¶¶ 15-16, CR 8. Appellants also alleged damages as a result of the wrongful conduct. Amended Complaint, ¶ 17, CR 8. Facts supporting the allegations in the amended complaint were also offered to the District Court by way of the aforementioned affidavits submitted in opposition to the Appellees' motion to dismiss. See ER II, and discussion in this brief, *supra*, pertaining to the affidavits of Appellees Fredricksen, Fleury, Rummel and Rudeseal.

As to the District Court's first rationale for dismissal – that ICRA does not apply to non-federally recognized tribes – we are aware of no legal authority in support of the this rationale. A search of relevant court decisions construing or interpreting Section 1301 of ICRA does not reveal anything remotely close to

supporting the District Court's decision. There is no question that the Little Shell Tribe is not one of the so-called "federally recognized tribes" that we commonly consider when we think of an "Indian Tribe." However, we are not aware of authority that supports the proposition that ICRA may not reach the actions of what it defines as an "Indian Tribe."

The only potential source of support for the District Court's position are the words "subject to the jurisdiction of the United States," as they appear in Section 1301(1). This phrase, unlike the other terms or phrases in Section 1301(1) – "Indian Tribe" and "recognized as possessing powers of self government" – is not defined in the Act. Even in the absence of a statutory definition, it is evident that the named defendants in the Appellant's Amended Complaint still fall within the scope of the definition. The Appellees are an "Indian Tribe" within the meaning of the Act. They are or constitute a "group of Indians", and they certainly purport to exercise powers of self-government, whether acting as a tribal council, or as an elections committee. That the Tribe itself is recognized as exercising self-government powers is acknowledged by the Appellees themselves.

As to the "jurisdiction" component, the can be no question that in many capacities, the Little Shell Tribe and its officials and members have come within the generalized jurisdiction of the United States government. Congress is

empowered to regulate commerce with the various Indian Tribes, United States Const., art. 1, sec. 8, cl. 3. There is no indication that this authority is limited only to tribes recognized "federally" by treaty, statute, or executive order. All Indians have been declared to be in a trust relationship with the United States government, see, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The Little Shell Tribe in particular has submitted to the federally mandated process of obtaining formal federal recognition pursuant to regulations adopted by the United States Department of Interior, see 25 C.F.R. part 83. See Koke, *supra*, for a discussion of the efforts by the Little Shell Tribe to seek federal recognition through this and other federal processes since the 1930s.

That the Little Shell Tribe acknowledges a relationship with the federal government is reflected in their own Constitution and ordinances. See, e.g., Little Shell Tribal Constitution, Preamble, states that the Constitution is established " in accordance with the provisions of the Enabling Act of Congress approved on the 18th day of June 1934," a reference to the federal Indian Organization Act, 25 U.S.C. § 461, et. seq., and that its foundation rests upon the "fundamental principles of the Constitution of the United States, recognizing the fact that we are under its jurisdiction . . . ." (EMPHASIS ADDED). See also Tribal Ordinance 2006-001, which references reporting tribal election results to the federal Bureau

of Indian Affairs. ER II, at 62. The Tribe has also willingly participated in certain federal aid programs benefitting their members. ER II, at 67.

Moreover, the basis of the Montana Supreme Court's determination that the Little Shell Tribe was an Indian tribe, and a sovereign with self-governing authority, was based on the United States Supreme Court's decision in Montoya v. United States, 180 U.S. 261 (1901), which holds that the existence of an "Indian Tribe" can be acknowledged by federal common law. See discussion in Koke, *supra*. The District Court did not consider these important determinants of general jurisdiction.

Further, the named Appellees are also citizens of the United States, despite their tribal status, see 8 U.S. C. § 1401(a)(2), and as such are subject to the laws of the United States, whenever applicable. We also find it difficult to accept the implication behind Appellees' argument to the lower court; i.e., that they are subject to no higher jurisdiction, a proposition that does not even apply to the states of the Union or the various federally-recognized tribes. They are clearly not a law unto themselves. There are some limits, and the forgoing list of general jurisdictional facts makes that abundantly clear.

In summary, there is no support for the District Court's interpretation of ICRA's reach. That much of the District Court's reasoning is in error, and should

be rejected by this Court.

The alternative basis for dismissal–the reference to the Santa Clara v. Martinez decision by the United States Supreme Court – arguably presents a more difficult question. As this court is fully aware, the United States Supreme Court concluded in that case that the habeas corpus provisions of Section 1303 of the Act was the exclusive federal remedy for violations of ICRA, which by implication potentially limits cases brought under the Act to situations where an aggrieved party has been detained by an order of an Indian Tribe. The decision also declared a tribe itself immune from suit, although the Court did not find that a tribal official would be *per se* immune from suit on account of the tribe's immunity. 436 U.S. at 58-59.

Appellants recognize that the holding in that case does present some potential obstacles to the assertion of jurisdiction. Nevertheless, Appellants acknowledged as much when they filed not only their original, but also their amended, complaints. Here is what they set forth in both documents:

> 18. Plaintiffs are informed and are aware that, pursuant to the United States Supreme Court's reasoning and decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the provisions of the Indian Civil Rights Act cited here as the basis for a claim for relief do not impliedly authorize private actions for declaratory or injunctive relief against tribal officers such as Defendants. Plaintiffs nevertheless have stated their claims here under the Act, on the basis that a good faith argument can be made that the

Martinez case was either wrongly decided, or that there should be a declared exception to the rule in that case, based upon the unusual circumstances presented by the instant case. The following is a list of stated reasons, not intended as exclusive, in support of Plaintiffs' position:

> (1) There are no forums available in the Little Shell Tribe to seek redress of violations of the Indian Civil Rights Act. There is no tribal court. Any non-judicial tribal institutions that might possibly redress grievances either do not exist, or are inherently biased against Plaintiffs, and cannot and will not afford any meaningful relief;
>
> (2) The Plaintiffs do not seek to undermine tribal sovereignty by these claims, but rather, to promote and enhance it, through free and fair elections;
>
> (3) Since the Martinez case was decided, the United States Supreme Court has issued other rulings addressing tribal sovereignty and threats to the same, and has acknowledged on more than one occasion that federal judicial forums may be open to litigants aggrieved of actions by tribal government officers, and that exhaustion of tribal court remedies might not be required in all instances;
>
> (4) Martinez was wrongly decided, in that (a) it failed to properly consider the legislative history behind the Act that supports an implied private remedy; (b) it failed to consider the plain meaning of all the provisions of the Act, read as a whole, that imply a private remedy; and (c) properly construed, the Act does afford an individual Indian, as defined in the Act, the right to being a civil action in federal court against tribal officials for declaratory and injunctive relief to enforce the provisions of the Act. The remedy of *habeas corpus* alone is insufficient to afford appropriate protections for those whom the Act is intended to protect

Amended Complaint, ¶ 18, CR 8. See also Original Complaint, ¶ 18, CR 1 (emphasis added).

As one legal scholar noted as early as 1981, "the *Santa Clara* decision has been highly controversial . . . . .[It] leaves many potential violations of federal law without a federal remedy. Enforcement of much of the Indian Civil Rights Act is therefore left entirely to the tribal courts. Some tribal court systems are reasonably well equipped for the task; others are not." W. Canby, American Indian Law 217 (1981). And what of the case where, as here, there is not even a tribal court system in place to deal with grievances under ICRA?

At least one federal appeals court has recognized that an exception to Martinez must lie at least in those instances where there is no tribal court forum to redress grievances. In Dry Creek Lodge, Inc.v. Arapaho Shoshone Tribes, 623 F. 2d 682 (10th Cir. 1980), the Tenth Circuit concluded that Martinez's limitation on the exercise of federal jurisdiction "disappears" in the instance where tribal courts or other judicial forums do not exist or do not operate to allow redress of grievances under ICRA. 623 F. 2d at 685. See also, Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F. 2d 1166 (10th Cir. 1992) (federal court jurisdiction lies in absence of a tribal court forum). The rationale is based upon the Martinez Court's primary concern that tribal forums be respected as the basis for resolving complaints under ICRA.

We acknowledge that as of now, this Circuit has declined to adopt the rationale set forth in Dry Creek. Demontigny v. United States, 255 F. 3d 1801 (9th Cir. 2001); Johnson v. Gila River Indian Community, 174 F. 3d 1032 (9th Cir.), cert. den., 528 U.S. 875(1999). Nevertheless, we maintain that these prior statements do not mean that, when presented with the appropriate facts, another look at the Dry Creek exception might be warranted. Even in Johnson, *supra*, this Court was willing to remand to the district court for a factual determination whether an appropriate tribal court remedy existed. 174 F. 3d at 1036.

As noted previously, the current structure of the Little Shell Tribe does not allow for any meaningful review of grievances under ICRA, or for that matter, any tribal ordinances relating to enrollment and election issues. There is no tribal court system in place. The alleged perpetrators of legal wrongs are also the judges of whether they acted wrongfully in the first place. These facts are a far cry from what was before the Supreme Court in Martinez, and they cry out at a minimum for an exception to the Supreme Court's holding, and at most, a complete review of that holding.

Appellants presented these arguments to the District Court below, to no avail. On this appeal, Appellants ask only that this Court reverse the holding of the District Court, in accordance with Johnson, *supra,* and allow development of

the record to demonstrate further the inequities of this particular tribal administrative and judicial system, and the egregious impact it has had on its members, including the Appellants.

CONCLUSION

The order of the District Court dismissing Appellants' claims for relief should be reversed. This cause should be remanded to the District Court for further proceedings.

DATED this 1st day of November, 2010.

s/ William O. Bronson
Attorney for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Appellants are not aware of any cases pending in this Court related to this action.

DATED this 1st day of November, 2010.

s/ William O. Bronson
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned hereby certifies that this brief:

(1) complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains **7,132** words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii);

(2) complies with the typeface requirements of FRAP 32(a)(5) and type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionately-spaced typeface using WordPerfect 11, in size 14 Times New Roman font.

DATED this 1st day of November, 2010.

s/ William O. Bronson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies the he served a copy of the forgoing APPELLANT'S OPENING BRIEF on the undersigned counsel of record this 1st day of November, 2010, through the Court's Appellate ECF Filing system:

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