No. 10-6031

In the United States Court of Appeals for the Tenth Circuit

MICHAEL C. TURNER, PLAINTIFF-APPELLANT,

v.

THE HONORABLE RONALD O. MCGEE, ACTING IN HIS INDIVIDUAL CAPACITY AS APPELLATE JUDGE IN THE COURT OF INDIAN OFFENSES; THE HONORABLE STEVEN PARKER, ACTING IN HIS INDIVIDUAL CAPACITY AS APPELLATE JUDGE IN THE COURT OF INDIAN OFFENSES; THE HONORABLE REBECCA CRYER, ACTING IN HER INDIVIDUAL CAPACITY AS APPELLATTE JUDGE IN THE COURT OF INDIAN OFFENSES; AND THE HONORABLE PHIL LUJAN, MAGISTRATE JUDGE IN THE COURT OF INDIAN OFFENSES FOR THE KIOWA TRIBE OF ANADARKO, OKLAHOMA, DEFENDANTS-APPELLEES.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE VICKI MILES-LAGRANGE
CHIEF DISTRICT JUDGE

D.C. NO. CIV-08-1299-M

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES ORAL ARGUMENT SET FOR MARCH 2012

SANFORD C. COATS
United States Attorney

SUZANNE MITCHELL
R.D. EVANS, JR.
Assistant U.S. Attorneys
210 Park Avenue, Suite 400
Oklahoma City, OK 73102
Telephone (405) 553-8700
Attorneys for Defendants-Appellees

Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

Rules

Other Authorities

Combined Statement of the Issues and Case[1]

The plaintiff does not dispute that the State of Oklahoma convicted him for violating its anti-cockfighting laws. Aplt's Corrected Supp. Br. at 15. He also agrees that he had several opportunities to challenge the state court's jurisdiction during that prosecution. *Id.* at 13-14. He also acknowledges that the Oklahoma state court ultimately rejected his arguments, finding that the crime did not occur on Indian land. *Id.* at 15; JN at 517-18.[2] Further, after the Oklahoma Court of Criminal Appeals dismissed his appeal for his untimely filing, JN at 531-32, he sought no further review from the United States Supreme Court.

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[1] References to the record will be in compliance with 10th Cir. Rule 28.1. References to the record on appeal will be by document number, and page number within the document, if appropriate ("Doc. __, at __"). References to the supplemental record on appeal will be designated as "Supp. Rec. at __. References to the items included in the plaintiff's unopposed motion for judicial notice are designated "JN at __." 10th Cir. R. 28.1.

[2] The plaintiff references two cases involving his former state co-defendant Robert Langford, a non-Indian. Aplt's Corrected Supp. Br. at 5-6. The State of Oklahoma dismissed the misdemeanor charge against Mr. Langford. JN at 67. Mr. Langford's federal prosecution emanated from events that took place on July 22, 2006, on Indian Country, which are unrelated to this case. JN at 409.

The plaintiff also agrees that he did not collaterally attack his conviction under Oklahoma's post-conviction statutes, which permit relief when the conviction violates "the Constitution of the United States or the Constitution or laws of this state." Okla. Stat. Ann. tit. 22, § 1080. Nor did he challenge his conviction by filing a habeas petition under 28 U.S.C. § 2254.

Instead, the plaintiff sought declaratory relief in the Court of Indian Offenses for the Kiowa Tribe of Oklahoma, a "CFR Court."[3] Aplt's Corrected Supp. Br. at 13-14. That court dismissed the plaintiff's action for lack of jurisdiction, and the Court of Indian Appeals summarily affirmed. *Id.*

Then, the plaintiff sought declaratory relief in federal district court, which promptly dismissed his case for lack of jurisdiction. *Id.* at 15; JN at 699. And, finally, the plaintiff filed a separate petition for injunctive relief in federal district court. Doc. 1. Citing jurisdiction

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[3] A "CFR court" is a court created pursuant to Bureau of Indian Affairs (BIA) regulations to preside over tribal matters in the absence of a court established by tribal government. *See Tillett v. Lujan*, 931 F.2d 636, 638, 640 (10th Cir. 1991); *see also* 25 C.F.R. § 11.800 (jurisdiction of the Court of Indian Offenses' appellate division).

under 28 U.S.C. §§ 1231 and 1362,[4] the plaintiff requested that the district court reverse the decisions of the Court of Indian Offenses and the Court of Indian Appeals, order the Court of Indian Offenses to reconsider the jurisdictional issues the plaintiff raised and lost, and enjoin the Oklahoma state courts from infringing upon his right to engage in commerce in Indian Country. *Id.* at 6-7.

The district court clerk entered a default judgment against the respondent judges of the Court of Indian Offenses and Court of Indian Appeals judges ("BIA Judges"). Doc. 21. The BIA Judges moved the district court to set the default judgement aside, arguing lack of jurisdiction and failure of service. Doc. 22. The district court granted this motion, agreeing that the plaintiff had not properly served them. Doc. 29.

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[4] The reference to § 1231 may be a typographical error. The plaintiff's supplemental brief maintains that the district court's jurisdiction arose under 28 U.S.C. § 1361 and 5 U.S.C. §§ 701-06. Aplt's Corrected Supp. Br. at 8-9. And he hints that 28 U.S.C. § 1331 also provided the district court jurisdiction. *Id.* at 44.

The BIA Judges then moved to dismiss the petition, arguing that the district court lacked subject-matter jurisdiction and that they were improperly served. Supp. Rec. at 2-13. The district court granted the BIA Judges' motion, noting the improper service and agreeing that it lacked jurisdiction. *Id.* at 42-44. The district court did not enter a separate judgment.

The plaintiff timely appealed. Doc. 31. He identified the district court's order setting aside the default judgment as the order being appealed. *Id.*, Att. 1.

After the plaintiff filed his opening brief, the BIA Judges moved to dismiss under Fed. R. App. P. 27 and Tenth Circuit Rule 27.2(A)(1)(a). Mot. to Dismiss (filed May 13, 2010). The motion argued that this Court lacked jurisdiction because the district court did not enter a final judgment and noting the plaintiff's error in his notice of appeal. *Id.* at 4-7 & n.2. The Clerk of Court referred that motion to the panel.

After the parties completed briefing, on February 2, 2011, this Court issued an order appointing counsel for the plaintiff and

setting the case for oral argument. The Court first asked the parties to brief any other issue that warranted supplement briefing. The BIA Judges believe two issues warrant supplemental briefing: the plaintiff's standing and the district court's subject-matter jurisdiction.

The Court also asked the parties to respond to the following questions, Order at 3-5, which the BIA Judges list with their recommended short answers, to facilitate the Court's consideration:

1. Are Appellees, who are magistrate judges of a Court of Indian Offenses appointed under 25 C.F.R. §§ 11.200 and 11.201, federal officers or agents, who are, as a result, subject to a claim for injunctive relief in federal court under *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225-35 & n.9 (10th Cir. 2005)?

   Short Answer:

   Yes, the BIA Judges are federal officers who may be subject to a claim for prospective injunctive relief to prevent ongoing or future infringement of federal rights.

2. Considering that the purpose of a Court of Indian offenses is to exercise retained tribal "jurisdiction over Indians that is exclusive of State Jurisdiction but where tribal courts have not been established to exercise that jurisdiction[,]" should Appellees be treated as tribal officers, instead of federal officers or agents, for purposes of federal jurisdiction? *See* 25 C.F.R. § 11.102; *cf. Tillett v. Lujan*, 931 F.2d 636, 650 (10th Cir. 1991) (noting that Court of Indian Offenses has "characteristics of [a federal] agency," but it also functions

as a tribal court).

Short Answer:

No, the BIA Judges are federal officers.

3. Should Appellees be judicially estopped from arguing that they are tribal officers or agents because they represented to the district court, in their motion to set aside the default, that they are federal officers or agents? *See* R. at 103-04, 109-12; *see also, e.g.*, *Bradford v. Wiggins*, 516 F.3d 1189, 1194-95 (10th Cir. 2008) (per curiam) (discussing factors for application of judicial estoppel).

Short Answer:

The BIA Judges do not argue they are tribal officers. But, if they did argue they were tribal officers, they should not be judicially estopped from doing so.

4. What part of Fed. R. Civ. P. 4 should govern service of process on Appellees, assuming, without yet deciding, that they are tribal officers?

Short Answer:

Assuming the BIA Judges are tribal officers, Fed. R. Civ. P. 4(c) and (e) are the best counterparts for service of process.

5. Assuming, without yet deciding, that Appellees should be treated as federal officers or agents, is [a] the required service upon the United States by certified mail in Fed. R. Civ. P. 4(i)(1)(A)(ii) and (i)(2) also governed by the requirement in Rule 4(c)(2) that service be done by a person at least eighteen years old who is "not a party[,]" and [b]

does service by certified mail satisfy that requirement because it is effected by a mail carrier?

Short Answer:

[a] Yes. Tenth Circuit precedent holds that only a nonparty can place the complaint in the mail. *Constien v. United States,* 628 F.3d 1207, 1213-14 (10th Cir. 2010) ("Even when service is effected by use of the mail, only a nonparty can place the summons and complaint in the mail.").

[b] A mail carrier who effects service by certified mail does not satisfy Rule 4(c). *See id.*

6. Where, as here, the district court stated that it was dismissing Appellant's federal petition for injunctive relief for lack of federal subject matter jurisdiction, does this court have the authority to choose not to determine whether the district court actually lacked subject matter jurisdiction over Appellant's federal petition on the basis that Appellees correctly decided that the Court of Indian Offenses lacked jurisdiction over Appellant's complaint filed there? *See Trackwell v. U.S. Gov't,* 472 F.3d 1242, 1245 (10th Cir. 2007) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998), for the general proposition that a federal court has no authority to decide the merits of a claim unless it first has jurisdiction to hear it).

Short Answer:

No. This Court must consider whether or not the district court correctly determined its subject-matter jurisdiction. If it determines the district court erred in this determination,

it should remand for the district court to determine the merits, or dismiss the appeal as frivolous.

7. If this Court has the authority to choose not to determine whether the district court actually lacked federal subject matter jurisdiction over Appellant's petition for injunctive relief, does this court have the authority to provide a reason for Appellees' dismissal of Appellant's complaint in the Court of Indian Offenses, when Appellees provided no reason in their orders of dismissal issued from that court? *See, e.g., Haga v. Astrue*, 482 F.3d 1205, 1207-08 (10th Cir. 2007) (citing *SEC v. Chenery Corp*., 318 U.S. 80, 88 (1943)), for the proposition that "this court may not create or adopt post-hoc rationalizations to support [an administrative] decision that are not apparent from the [administrative] decision itself").

Short Answer:

No. This Court cannot evaluate the Court of Indian Offenses' decision: it must first determine whether the district court lacked subject-matter jurisdiction. It may not adopt any post-hoc rationalizations to support the Court of Indian Offenses' decision.

8. Can it be determined based on either the existing district court record or under the principles under which this court may take judicial notice of other courts' or agencies' proceedings that the Court of Indian Offenses lacked jurisdiction over the complaint filed in that court? *See, e.g., United States v. Pinson*, 584 F.3d 972, 979 n.1 (10th Cir. 2009) (taking judicial notice of district court materials that "were not originally included in the record on appeal"); *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (noting that this court has discretion to take judicial

notice of proceedings in other courts and facts which are a matter of public record).

Short Answer:

The existing district court record does not provide documentation regarding the jurisdiction of the Court of Indian Offenses over the plaintiff's complaint filed there. The Court may take judicial notice of the Court of Indian Offenses' proceedings, because their accuracy "cannot reasonably be questioned." *United States v. Pinson*, 584 F.3d 972, 979 n.1 (10th Cir. 2009) (quoting Fed. R. Evid. 201(b)(2)). The Court may not supplement those findings, nor is there any such need.

The BIA Judges will examine the plaintiff's standing, his asserted jurisdictional bases, and provide comprehensive answers to the above questions.

Discussion

I. Standing and jurisdictional bases.

This Court must consider whether the district court had subject-matter jurisdiction at all. *Mires v. United States*, 466 F.3d 1208, 1211 (10th Cir. 2006) (stating that a party "may raise [the] court's lack of subject-matter jurisdiction at any time in the same civil action – even on appeal") (internal quotation marks omitted*); Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1164

(10th Cir. 2004) ("Because lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties, we must satisfy ourselves not only of our own jurisdiction, but also that of the lower courts in the cause under review.") (quotations omitted); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 628 F.2d 1289, 1301 (10th Cir. 1980) ("A federal court must in every case, and at every stage of the proceeding, satisfy itself as to its own jurisdiction, and the court is not bound by the acts or pleadings of the parties."); Aplees' Opening Br. at 13-16.

A. The plaintiff cannot establish Article III standing.

1. The law.

"The Supreme Court's 'standing jurisprudence contains two strands: Article III standing, which enforces the Constitution 's case-or-controversy requirement, . . . and prudential standing which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *The Wilderness Soc. v. Kane County, Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). The "irreducible constitutional

minimum of standing" requires three elements: (1) the plaintiff must have suffered an "injury in fact," that is, an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent," not "conjectural" or "hypothetical"; (2) there must be a causal connection between the injury and the conduct complained of ("traceability"); and (3) it must be "likely" as opposed to merely "speculative" that the injury will be redressed by a decision favorable to the plaintiff." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

2. The application of the law.

The plaintiff, who invoked federal jurisdiction, bears the burden of establishing all three elements. *Lujan*, 504 U.S. at 561. At the root of the plaintiff's alleged concrete injury-in-fact is the *Oklahoma state* court's finding that his offense of conviction did not occur on Indian country. This resulted in his alleged illegal conviction. But he challenges the *Court of Indian Offenses'* refusal to address this issue. Assuming that his alleged injury even satisfies Article III, the plaintiff cannot establish the remaining constitutional standing requirements.

The plaintiff must also establish traceability and a substantial likelihood that the relief requested will redress his alleged injury in fact. *Lujan*, 504 U.S. at 560-61. Often, as here, "redressability and traceability overlap as two sides of a causation coin." *Cache Valley Elec. Co. v. Utah Dep't of Transp.*, 149 F.3d 1119, 1123 (10th Cir. 1998) (quotation omitted). The plaintiff establishes neither.

In fact, the plaintiff makes no effort to establish traceability. "A plaintiff's injury is fairly traceable to the challenged action of a defendant where there is a 'causal connection between the injury and the conduct complained of' – that is, where the injury is the result of 'the challenged action of the defendant *and not the result of the independent action of some third party not before the court.*'" *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1080 (10th Cir. 2009) (quoting *Lujan*, 504 U.S. at 560) (emphasis added by *City of Colo. Springs*) (alteration omitted). Fair traceability thus requires a plaintiff to demonstrate by a substantial likelihood that the *defendant's* conduct caused his injury. Here, the plaintiff's injury arose from his

state-court conviction after the state court concluded that the offense did not take place on Indian land. The BIA Judges caused no injury.

To the extent the plaintiff seeks mandamus relief, he must show that he has a clear and indisputable right to that relief. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). This Court has "limited issuance of mandamus writs to those exceptional cases where the inferior court acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power." *United States v. Carrigan*, 804 F.2d 599, 602 (10th Cir. 1986) (internal quotation marks omitted). The plaintiff can show no just right to that relief here.

Next, "the requirement of redressability also ensures that the injury can likely be ameliorated by a favorable decision." *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1233 (10th Cir. 2010). "The plaintiff must show that a favorable judgment will relieve a discrete injury, although it need not relieve his or her every injury." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158 (10th Cir. 2005).

"The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce [the] challenged statute." *Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007), (addressing pre-enforcement challenge to criminal statute). "[I]t must be the effect of the court's judgment on the defendant that redresses the plaintiff's injury, whether directly or indirectly." *Nova Health Sys.*, 416 F.3d at 1159. The Court may not "assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees." *Id.* (internal quotation marks omitted).

Thus, in this case, the plaintiff had to establish that any injunctive relief entered against the BIA Judges "would somehow be binding on [them]" as they "are the ones charged" with reconsidering their previous dismissal. *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 892 (10th Cir. 2011). The plaintiff cannot make this showing. Even if he could show he deserved some sort of relief, he cannot demonstrate that this Court is empowered to grant it. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) (federal officers may be sued

in their official capacity for prospective injunctive relief to prevent future infringements of federal rights). And, this Court simply does not have the power to grant relief the plaintiff ultimately seeks – rectifying his alleged illegal conviction. *See Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring) ("Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power.") (emphasis omitted); *Glover River Org. v. U.S. Dep't of Interior*, 675 F.2d 251, 255 (10th Cir. 1982) (concluding that plaintiffs lacked standing because a remedy from the federal courts would not redress their "broad[]"alleged injuries, since it would not guarantee plaintiffs' desired funding of construction project).

B. The plaintiff also lacks prudential standing.

1. The law.

Next, assuming this Court determines that the plaintiff has Article III standing, this Court should consider the "prudential limitations" on its exercise of federal court jurisdiction. *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000) (internal

quotation omitted). "Like its constitutional counterpart, prudential standing establishes" prerequisites that the plaintiff must overcome before invoking federal court jurisdiction. *Bd. of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002).

First, a plaintiff must assert his own rights, not those of a third party. *Id.* Next, the plaintiff must not raise merely "a generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Third, the plaintiff must demonstrate "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). And, finally, in the context of a challenge to a federal agency's decision (the Court of Indian Appeals's summary affirmance of the Court of Indian Offenses' ruling), he must show that it is a final action, and it "must be one by which rights or obligations have been determined or from which legal consequences will flow." *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (quotations omitted).

2. The application of the law.

Here, the plaintiff stumbles on the third and fourth requirements: that his complaint falls within the zone of interests and that legal consequences flowed from the CFR Courts' decisions. *Crank*, 539 F.3d at 1242. Further, he must establish that his interests are impacted by this decision. *Id.* at 1242-43. He cannot make this showing.

"The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1452 (10th Cir. 1994). The plaintiff does not show that his challenge to the CFR Courts' rulings based on lack of jurisdiction fall within a Congressionally anticipated protected zone of interests. And the plaintiff does not identify what legal consequences flow from the Court of Indian Appeals's summary affirmance of the Court of Indian Offenses' dismissal of his case for lack of jurisdiction. He merely contends that whether or not the Hilltop, where the crime occurred,

qualifies as Indian Country is a federal question of law. Aplt's Corrected Supp. Br. at 8. But that is not enough. *See also* 25 C.F.R. §§ 11.116, 11.118 (outlining the civil jurisdiction and jurisdictional limitations of the Court of Indian Offenses).

The plaintiff contends he seeks relief pursuant to the Mandamus and Venue Act, 28 U.S.C. § 1361, the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and 28 U.S.C. § 1331 (the federal question statute). Aplt's Corrected Supp. Br. at 8-9,44. "Mandamus is a form of nonstatutory review; the [APA] authorizes statutory review of agency action generally." *Hernandez-Avalos v. I.N.S.*, 50 F.3d 842, 845 & n.6 (10th Cir. 1995) (quotation omitted). The identical zone-of-interests inquiry applies to mandamus and injunctive relief: Did the BIA Judges fail to discharge a duty owed to plaintiffs that Congress has directed them to perform? *Id.* ("The weight of scholarly authority suggests that mandamus and mandatory injunctions ought to be judged by the same standards or even that mandamus adds nothing to what is already available by injunction under 28 U.S.C. § 1331.") (internal citation omitted). The answer is no. His suggestion that he raises a

uniquely federal question, best decided by the Court of Indian Offenses, is of no matter – state courts "regularly and rightly" decide questions of federal law. *Yellowbear v. Attorney Gen. of Wyo.*, 380 Fed. Appx. 740, 742 (10th Cir. 2010) (quoting *In re C & M Props., L.L.C.*, 563 F.3d 1156, 1167 (10th Cir. 2009)). Congress did not authorize or direct the Court of Indian Offense to assume jurisdiction to enjoin a state court. *See* 25 C.F.R. § 11.116 ("The jurisdiction of Courts of Indian Offenses does not extend to . . . State employees acting within the scope of their employment.").

C. The plaintiff's alleged jurisdictional bases do not provide subject-matter jurisdiction.

In his opening brief, the plaintiff cited 28 U.S.C. §§ 1231 & 1362, but he no longer suggests either confers jurisdiction, and rightly so.[5] Aplt's Opening Br. at 1. In his corrected opening brief, he cites two statutes and references a third for a jurisdictional hook: 28 U.S.C. § 1361, the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and 28

[5] As the BIA Judges have argued, the plaintiff is not an "Indian tribe or band;" as such his citation to 28 U.S.C. § 1362 conferred no jurisdiction upon the district court. The plaintiff's reference to § 1231 appears to be a typographical error.

U.S.C. § 1331. Aplt's Corrected Supp. Br. at 8-9, 44. None provides jurisdiction.

1. Section 1361.

Section 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus is a drastic remedy, available only in extraordinary circumstances. *Allied Chem. Corp.*, 449 U.S. at 34-35. No such circumstances exist here.

To be eligible for this relief, a petitioner must establish "(1) that he has a clear right to relief, (2) that the respondent's duty to perform the act in question is plainly defined and peremptory, and (3) that he has no other adequate remedy." *Rios v. Ziglar*, 398 F.3d 1201, 1206 (10th Cir. 2005). The plaintiff can show none of these.

First, the plaintiff has no right to relief from the BIA Judges, much less one that is clear. 25 C.F.R. §§ 11.116, 11.118. Second, the plaintiff's suggestion that the BIA Judges were derelict in discharging a mandatory duty is patently frivolous. He simply cannot

show clear error in the CFR Courts' dismissal of his complaint. Indeed, "mandamus requires not only a clear error but one that unless immediately corrected will wreak irreparable harm." *In re Linee Aeree Italiane (Alitalia)*, 469 F.3d 638, 640 (7th Cir. 2006). In asking this Court to ignore the comity it confers upon the CFR Courts, he points to no constitutional or statutory duty owed to him.

Finally, this is not the kind of harm that justifies mandamus – review by other means was undisputedly available. His proper remedy would have been to seek state post-conviction or federal habeas relief which he failed to do.[6] *W. Shoshone Bus. Council For &*

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[6] Additionally, should this Court agree that the plaintiff's federal complaint amounts to an appeal from his state-court judgment, the *Rooker-Feldman* doctrine also forecloses this action. *Bolden v. City of Topeka*, 441 F.3d 1129, 1139 (10th Cir. 2006); *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-16 (1923); *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Lance v. Dennis*, 546 U.S. 459,460 (2006) (per curiam) (stating that the *Rooker-Feldman* doctrine "prevents the lower federal courts from exercising jurisdiction over cases brought by state-court losers challenging state-court judgments rendered before the district court proceedings commenced") (quotation omitted). The district court lacked the power to undo the state courts' judgments. *Alexander v. Lucas,* 259 Fed. Appx. 145, 148 (10th Cir. 2007) (In essence, [petitioner] asks that we vacate the state courts' dismissal of his petition . . . [but] [n]either we nor the district court have jurisdiction to do so.").

on Behalf of W. Shoshone Tribe of Duck Valley Reservation v. Babbitt, 1 F.3d 1052, 1059 (10th Cir. 1993) (stating that "the writ is not available when review by other means is possible") (citing *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)). For example, in a § 2254 proceeding, he could have put forth evidence demonstrating the Oklahoma state courts' alleged error. 28 U.S.C. § 2254(e); *see Yellowbear*, 380 Fed. Appx. at 743 (rejecting petitioner's § 2254 challenge to state-court determination of jurisdiction, stating that he "advances no persuasive argument or authority before this court suggesting that the Wyoming state courts' concurrent jurisdiction doesn't include the power to decide whether federal statutes divest them of criminal jurisdiction over the land in question"). Because other means of relief were available, mandamus relief is inappropriate, and the district court correctly dismissed for lack of jurisdiction on that basis. *Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419, Bhd. of Painters & Allied Trades, AFL-CIO v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981) ("If, however, defendants have been accorded sufficient discretion to act as they have, the courts may not direct them to act otherwise, and

dismissal for lack of jurisdiction is appropriate.").

2. The Administrative Procedure Act.

The plaintiff also argues that the APA confers jurisdiction. Aplt's Corrected Supp. Br. at 9 (citing 5 U.S.C. §§ 701-06). This argument also fails.

The plaintiff suggests that because a CFR Court is a federal agency, that alone confers jurisdiction under § 702. *Id.* CFR Courts exercise authority through a federally-administered forum, and their rulings are not simply administrative agency actions. *Gallegos v. French*, 2 Okla. Trib. 209, 234-35 (Delaware CIA 1991). The plaintiff's argument glosses over the district court's jurisdictional requirements.

Section 702 does not itself confer jurisdiction to review agency action. *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (concluding that the APA "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action"). Section 702 simply provides for judicial review of final agency action – but first there must exist an independent basis for subject matter jurisdiction. *Sierra Club v. Martin*, 110 F.3d 1551, 1554-55 n.11 (11th

Cir.1997) (citing *Califano*, 430 U.S. at 107). And the plaintiff points to none. *Beller v. United States,* 277 F. Supp. 2d 1164, 1167 (D. N.M. 2003) ("In other words, a plaintiff must present a 'ticket' into federal court (i.e., a valid assertion of a basis for federal subject matter jurisdiction separate and independent from the APA) before obtaining review of an agency action.").

As in *Beller*, here the plaintiff's "insistence on the availability of review under § 702 simply glosses over the crucial, threshold requirement of subject matter jurisdiction." *Id.* In *Beller* the plaintiff sought an injunction requiring the BIA to prohibit persons with DWI convictions from driving a BIA vehicle and to conduct background checks on its employees. *Id.* at 1165. The district court found no statutory basis, federal constitutional right, or other "judicially enforceable right" that might confer APA jurisdiction. *Id.* at 1168.

Similarly, here plaintiff's claim for mandamus relief is not based on an independent substantive statute or law which provides a legal basis conferring federal-subject-matter jurisdiction in this Court.

El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review, 959 F.2d 742, 753 (9th Cir. 1991) ("There is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'") (quoting *Lujan v. Nat'l Wildlife Found.*, 497 U.S. 871, 883 (1990)); *see Van Sickle v. Holloway*, 791 F.2d 1431, 1436 n.5 (10th Cir. 1986) ("We have no authority to issue such a writ to direct state courts or their judicial officers in the performance of their duties."); *Cauthon v. Simmons*, No. 95-3022, 1996 WL 3919, at *1 (10th Cir. Jan. 4, 1996) (affirming dismissal for lack of subject-matter jurisdiction "on the grounds that courts have no jurisdiction under Section 1361 to compel action by state officials"); *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) ("[T]he plaintiff must identify a substantive statute or regulation that the agency action had transgressed and establish that the statute or regulation applies to the United States."); *Chippewa v. Shoshone-Bannock Tribes Fort Hall Indian Reservation, Idaho,* No. CV-09-57-E-BLW, 2009 WL 3762328, at *2 (D. Idaho Nov. 9, 2009) ("Although the Court has not located any cases specifically holding that

a federal court cannot issue a writ of mandamus to a Tribal Court, it is clear by analogy to cases addressing the issue in the context of state courts that it cannot."). The district court had no subject-matter jurisdiction under the APA.

3. Section 1331.

The plaintiff's suggestion that § 1331 conferred jurisdiction is equally unavailing. Aplt's Corrected Supp. Br. at 44 ("In order to obtain a review of the jurisdictional decision of the . . . [Court of Indian Offenses], to which [the plaintiff] was entitled under 28 U.S.C. § 1331, he had no choice but to file his petition in the federal district court. . . ."). For this court to exercise federal question jurisdiction under 28 U.S.C. § 1331, there must be a constitutional or federal statutory provision under which the plaintiff is aggrieved. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("To bring a case within [§ 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."); *Rose v. Utah*, 399 Fed. Appx. 430, 437 (10th Cir. 2010) ("Section 1331 confers jurisdiction only where a federal

question is otherwise at issue; it does not create federal jurisdiction.") (internal quotation marks omitted).

The plaintiff does not specify the particular provisions of "the Constitution, laws, or treaties of the United States" under which his claims arose. That his *state*-court conviction may be problematic does not create a federal question under § 1331. His suggestion that he raises a uniquely federal question is of no matter – state courts "regularly and rightly" decide questions of federal law. *Yellowbear*, 380 Fed. Appx. at 742 (quoting *In re C & M Props., L.L.C.*, 563 F.3d at 1167). And, the state and federal courts provide remedies for a defendant to attack his conviction, such as direct and collateral appeals. Moreover, the BIA Judges dismissed the plaintiff's action "find[ing] no possible basis for jurisdiction." JN at 430, 530. And rightly so – the plaintiff cited no statutory basis for that court's jurisdiction. *Id.* at 266.

Quite simply, the federal district court could have entertained a properly exhausted and timely collateral challenge to the plaintiff's conviction under 28 U.S.C. § 2254. But the plaintiff did not

present a proper challenge and none of the plaintiff's cited cases involve a convicted defendant-turned-plaintiff presenting a belated end-run challenge to his conviction. So, the BIA Judges did not ignore their federally-bestowed duties and there is no federal-question jurisdiction here. Therefore, the Court need not proceed further.

II. Questions 1 & 2.

The BIA Judges are better classified as federal agents for purposes of this case and should be served under the federal rules.

Considering the Court's first and second inquiries, for service-of-process and jurisdictional purposes, the BIA Judges, who are magistrate judges on the Court of Indian Offenses and Court of Indian Appeals, are better characterized as federal agents, who may be sued in their official capacity for prospective injunctive relief to prevent future infringements of federal rights. *Larson*, 337 U.S. at 690. Thus, they must be served pursuant to Fed. R. Civ. P. 4(i). Five reasons support this conclusion.

First, the Department of Interior seems to have concluded that CFR Court judges are, at least for certain purposes, part of the

federal government. In 1993, in its response to final comments on proposed changes to the Code of Federal Regulations, the Department of Interior wrote:

> Several comments objected to the provision prohibiting Courts of Indian Offenses from adjudicating tribal government disputes absent a tribal council resolution or ordinance conferring such jurisdiction. They argue that these courts should be regarded as part of the tribal government and that resolution of such disputes by these courts is preferable to resolution by the BIA.
>
> *It is clear, however, that Courts of Indian Offenses are part of the Federal Government.* Their involvement, without the consent of the tribal government, in tribal government disputes, is an unwarranted interference in tribal affairs. Unless the tribal government requests it, Court of Indian Offenses should not become a competing forum for those matters.

Law and Order on Indian Reservations, 58 Fed. Reg. 54406-01 (Oct. 21, 1993) (emphasis added) (citations omitted). That conclusion carries significant weight because Congress has charged the Department of Interior to direct the Commissioner of Indian Affairs to manage "all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. Given Congress's plenary legislative power over Indian

affairs, the Department of Interior's conclusion weighs heavily in favor of concluding that CFR Court judges are, for service and jurisdictional purposes, federal officers.

Second, federal – not tribal – law created CFR Courts and the judges who oversee them. Title 25, §§ 11.1 *et seq*. of the Code of Federal Regulations provide the structure for CFR Courts. The Secretary of Indian Affairs appoints judges for each CFR Court, subject to the relevant tribal governing authority's vote. 25 C.F.R. §§ 11.200-201. The tribal governing body can make suggestions for additional qualifications and recommendations for training the CFR Court judges, but the Assistant Secretary of Indian Affairs must approve any such additions. *Id.* The Assistant Secretary can remove or dismiss any CFR Court judge, without a request from the tribe, as an exercise of the Assistant Secretary's discretion. *Id*. § 11.202. The Code of Federal Regulations also proscribes the manner in which the CFR Courts must maintain records. *Id*. § 11.206. CFR Courts must keep a record of all court proceedings, and those records are considered part of the records of the BIA. *Id.*; *United States v. Red Lake Band of Chippewa Indians*,

827 F.2d 380, 384 (8th Cir. 1987). Moreover, those records are protected by 44 U.S.C. § 3102, which governs records management *by federal agencies*. That federal law creates, structures, and controls the operation of the CFR Courts supports labeling the BIA Judges federal officers for service and jurisdictional purposes. *See* 44 U.S.C. § 3102.

Third, federal dollars fund the CFR Courts, including paying the BIA Judges' salaries. Specifically, the BIA expends congressionally appropriated money for the employment of Indian judges, including CFR Court judges. 25 U.S.C. § 13; *see* 25 U.S.C. § 3621(g) (authorizing allocation of funds to the Courts of Indian Offenses); *Gallegos*, 2 Okla. Trib. at 233 ("The court personnel are federal employees . . . ."). Indeed, the Department of the Interior's 2011 Budget Justification "Greenbook" includes expenditures for administering CFR Courts "for tribal communities *not served by tribal courts*." Dep't of Interior, Indian Affairs FY 2011 Budget Justifications and Performance Information (Greenbook), *available at* http://www.doi.gov/budget/2011/data/greenbook/FY2011_IA_Greenbook.pdf, at IA-PSJ-12 (last visited Oct. 10, 2011) (emphasis added).

Fourth, judicial opinions differentiate between tribal courts operated by the tribes and CFR Courts – a distinction that would be unnecessary if CFR Courts were simply tribal courts. For example, in *United States v. Wheeler*, 435 U.S. 313, 327-28 n.26 (1978), the Supreme Court held that a Navajo tribal court did not act as an arm of the federal government. In so holding, the Court declined to decide whether CFR Courts are an "arm of the federal government." *Id.* But the Ninth Circuit has indicated that CFR Courts are both a tribal and a federal agency. "It is pure fiction[,]" the Ninth Circuit explained, "to say that the [CFR Courts] are not in part, at least, arms of the federal government." *Colliflower v. Garland*, 342 F.2d 369, 378-79 (9th Cir. 1965).

Indeed, the CFR Courts have described themselves as, at least in part, arms of the federal government. For example, in *Combrick v. Allen*, 3 Okla. Trib. 46, 55 (Tonkawa CIA 1993), the Court of Indian Appeals wrote, "Because the Tonkawa Tribe *does not have its own tribal court*, the Court of Indian Offenses for the Anadarko Area Tribes was established to fill the void in jurisdiction in Indian

Country . . . pursuant to 25 C.F.R. § 11.1 *et seq*." (emphasis added). The *Combrick* court further "described the Court of Indian Offenses as a federally administered tribal court that serves as a judiciary for a tribe when no formal tribal court is in existence or functioning." *Id.* (quotations omitted).

Fifth, other sources also recognize this distinction between tribally operated courts and governmentally operated CFR Courts. For example, the Department of the Interior differentiates between "Courts of Indian Offenses," on the one hand, and "tribal justice systems" on the other. Dep't of Interior, Indian Affairs FY 2011 Budget Justifications and Performance Information (Greenbook), http://www.doi.gov/budget/2011/data/greenbook/FY2011_IA_Greenbook.pdf, at IA-PSJ-12 (last visited Oct. 10, 2011) (discussing separate allocations to "tribal justice systems and Courts of Indian Offenses"). Federal statutes make that same distinction. *See e.g.*, 25 U.S.C. § 3612(a) (ordering "a survey of conditions of tribal justice systems and Courts of Indian Offenses . . . ."); *id.* § 3621(g) (authorizing allocation of funds appropriated by Congress to the BIA among "the Bureau, Office, tribal

governments and Courts of Indian Offenses . . . .") (emphasis added); *id.* §§ 1301(3) & 3602; 25 C.F.R. § 11.118 ("A Court of Indian Offenses may exercise over a Federal or State official only the same jurisdiction that it could exercise if it were a tribal court.").

If CFR Courts were simply another type of tribal court, these distinctions would be unnecessary. That so many sources seem to differentiate between the two kinds of courts (*i.e.*, tribal courts and CFR Courts) leans in favor of finding that BIA Judges are federal agents for service and jurisdictional purposes.

In short, the parties agree that CFR Courts are, at least in part, arms of the federal government. Aplt's Br. at 36-37. Federal statutes and regulations create and govern the CFR Courts. At the very least, the BIA Judges are federal employees, and Fed. R. Civ. P. 4(i) governs service of process on federal employees.

This is not to say, however, that BIA Judges are exclusively federal agents. To be sure, they "apply the customs of the tribe," as long as the tribal customs are not inconsistent with the Code of Federal Regulations. 25 C.F.R. § 11.110. Though BIA Judges are more than a

branch of the Bureau of Indian Affairs, they are not Article III Judges. For example, in *Gallegos,* the Delaware Tribe Court of Indian Appeals observed that the Court of Indian Offenses is "not *simply* a branch of the Bureau of Indian Affairs," as it exercises the tribe's power, and further clarified that it is not an Article III court: it is "a tribal court which is administered by the federal government." *Gallegos*, 2 Okla. Trib. at 234-35 (emphasis added).

Thus, this Court should consider BIA Judges to be federal officers for purposes of proper service-of-process and jurisdictional issues. Service on these federal government employees should be governed by Fed. R. Civ. P. 4(i).

III. Question 3.

The BIA Judges should not be judicially estopped from later arguing that they are, at least in part, tribal officers or agents.

To start, the BIA Judges are not arguing that they are tribal officers for service-of-process purposes. But, to answer the Court's hypothetical, they should not be judicially stopped from so arguing.

There is no precise formula by which this Court determines

whether to apply the doctrine of judicial estoppel. *Bradford v. Wiggins*, 516 F.3d 1189, 1194-95 (10th Cir. 2008). However, this Court typically considers three factors in evaluating its rare application. *Id.*

First, the later position must be "clearly inconsistent" with the argument previously asserted; generally, the position is "one of fact rather than of law or legal theory." *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005). Second, the party advancing the "clearly inconsistent" argument must do so in a way that would "create the perception that either the first or second court was misled." *Id.* (quotation omitted). And lastly, the party seeking estoppel must show that the party advancing the inconsistent argument would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (quotation omitted). And, "[a]dditional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001).

Applying the *Johnson* factors and additional relevant considerations here, this Court should not estop the BIA Judges from advancing the argument that they are, at least in part, tribal officers.

This stance is not clearly inconsistent with any earlier advanced position. It is unclear that any earlier court was "convinced" the BIA Judges are federal officers, or that they would gain unfair advantage from advancing that theory.

As demonstrated above, to say that the judges are quasi-tribal officers is not clearly inconsistent with an argument that the judges are primarily federal officers. It is true that the government argues above that the judges should be considered federal officers for service-of-process and jurisdictional purposes. But, as that discussion conveys, Congress intended the CFR Courts to provide a tribal-justice system unless the tribe opted out of the CFR Court. No settled law declares that the CFR Courts are exclusively arms of the federal government or tribal entities, and indeed, the Supreme Court has expressly declined to rule on this question. *Wheeler*, 435 U.S. at 327-28 n.26.

Second, it is not clear that any court in this case has been "convinced" that the BIA Judges are federal officers. It is true that, at the district court level, the BIA Judges argued that the district court's

default judgment against them ought to be set aside under Fed. R. Civ. P. 55(d), which limits default judgments against the United States and its officers. Doc. 24, at 5-7. But the BIA Judges advanced two additional, independent reasons for setting aside the default judgment, including failure to effect proper service of process under Fed. R. Civ. P. 4(c)(2). *Id.* at 4-5; Doc. 25, at 10-11. And, indeed, the district court granted their motion to set aside the default judgment on that argument alone. Doc. 29.

And third, the BIA Judges would gain no unfair advantage from advancing an argument that they are, at least in part, tribal officers. *See infra* at 39-45. As explained below, the BIA judges were improperly served under Fed. R. Civ. P. 4(c)(2), regardless of whether they are federal or tribal officers. *Id.* This Court may affirm the dismissal the plaintiff's action on that basis alone, regardless of how it classifies the BIA Judges. *McCarty v. Gilchrist*, 646 F.3d 1281, 1285 (10th Cir. 2011) (stating that this Court "may affirm on any basis supported by the record, even though not relied on by the district court").

Finally, at least one court has opined that application of the doctrine of judicial estoppel against the government should be rare, and construed narrowly. *See United States v. Owens*, 54 F.3d 271, 274-76 (6th Cir. 1995). Given the unique nature of the CFR Courts, and because the BIA Judges have made no "knowing assault upon the integrity of the judicial system," this Court should not enforce the doctrine here. *Reynolds v. Comm'r of Internal Revenue*, 861 F.2d 469, 474 (6th Cir. 1988).

IV. Question 4.

If the BIA Judges are tribal officers, what part of Rule 4 applies?

Although Federal Rules of Civil Procedure 4 does not specifically address tribal officers, Rules 4(c) and (e) should apply. Indeed, the entirety of the Federal Rules of Civil Procedure mentions neither tribal officers, specifically, nor American Indians, generally. But Rule 1, addressing the scope and purpose of the Federal Rules, states that the rules should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." A court may use its inherent power to "fill gaps left by an

existing but incomplete procedural framework." Samuel P. Jordan, *Situating Inherent Power Within A Rules Regime*, 87 Denv. U.L. Rev. 311, 313 (2010). So, should this Court determine that the BIA Judges are tribal officers for service-of-process purposes, it may fill in this procedural gap.

A. The case law is unclear.

Case law also fails to reveal any standard for how tribal officers should be served in federal suits. A few federal cases discuss service on tribal officers, but none provides much direction. For instance, in *Mousseaux v. United States*, 28 F.3d 786 (8th Cir. 1994), the plaintiff sued a group of defendants, some of whom were federal agents and some of whom were tribal officers, and attempted to serve the complaint and summons by mail. None of the individual defendants acknowledged personal service, as required under Fed. R. Civ. P. 4(c)(2)(C)(ii) (1992), so the appellate court remanded the case for dismissal as to all the individual defendants for lack of service. *Id.* at 787.

Similarly, a plaintiff sued a group of defendants in *Allen v.*

Mayhew, No. CIV S-04-0322-LKK-CMK, 2008 WL 223662, at *6-*7 (E.D. Cal. Jan. 28, 2008). The court ruled that some of the defendants were tribal officers, and some, although tribal members, were not. *Id.* But when discussing service requirements on the initial summons, the court only referred to Fed. R. Civ. P. 4(e), which governs service of process for individuals located in the United States.[7] *See also Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 84 n.5 (S.D.N.Y. 2002) (finding that "the method of service [of subpoenas] on the tribal officials – substitute service at the Tribe's offices followed by mailing properly labeled copies to the same address – was sufficient under Federal Rules of Civil Procedure, Rule 45").

B. Analogy to state officials.

This Court could analogize tribal officers to state officials for service-of-process purposes. But serving state officials is not a well-settled topic either. Two approaches exist: in some circuits, Rule 4(j)

[7] The court's discussion is unclear. Apparently some defendants were added after the initial filing of the case, and the court relies on Rule 4(e) to evaluate their service. It is unclear, however, whether this second group of defendants was made up of only tribal officers, both tribal officers and individual tribal members, or only individual tribal members.

governs service of process of a state employee; in the First Circuit, Rule 4(e) governs service of process of a state employee, even when the employee is sued in the employee's official capacity.

Some courts reason that because a suit against a state employee is essentially just a suit against the state, Fed. R. Civ. P. 4(j) provides the appropriate mechanism for suing a state employee. *See Moore v. Hosemann*, 591 F.3d 741, 747 (5th Cir. 2009) (joining "a number of other courts" in holding that "state officers sued in their official capacities are subject to service under rule 4(j) or its predecessor"); *see also Chapman v. New York,* 227 F.R.D. 175, 179-80 (N.D.N.Y. 2005) ("[S]ervice upon governmental agencies and their employees is governed by Rule 4(j)."). Rule 4(j)(2) requires service upon the state's chief executive officer or pursuant to that state's law. The plaintiff provides no evidence that he complied with Rule 4(j)(2) – the record does not suggest he did. And there is no record evidence as to the tribe's service-of-process rules.

On the other hand, the First Circuit requires a plaintiff to serve state employees by simply following Fed. R. Civ. P. 4(e), which

governs service of process on individuals, even when the plaintiff sues the employee in the employee's official capacity. *Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003). The *Caisse* court reasoned that because a state employee "is bound by a judgment and can be held in contempt for disobeying a court order," it is "essential" that the employee be served as an individual. *Id.* The same reasoning applies whether the employee is sued in an official or an individual capacity. *Id.*[8] This approach is straightforward and simple to apply.

C. Analogy to service upon a foreign state.

The Court might analogize service upon tribal officers to service upon a foreign state. *See* 28 U.S.C. § 1608. "Section 1608, for example, establishes the exclusive means for service of process on a

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[8] Any ruling that tribal officers should be analogized to state officials should be undertaken with care and with all due respect to tribal sovereignty. As this Court has observed,

> Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.

Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959).

foreign state or its agencies or instrumentalities." *Yousuf v. Samantar*, 552 F.3d 371, 380 (4th Cir. 2009) (citing 28 U.S.C. § 1608(a), (b); Fed. R. Civ. P. 4(j)(1). But § 1608 is part of the Foreign Sovereign Immunities Act, and this Court would have to consider its applicability to a "domestic dependent nation[]." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (citations omitted); 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication."); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006) (holding that the Foreign Sovereign Immunities Act of 1976 does not apply to Native American tribes).

Even if this Court analogized or applied § 1608, the exact method for service of process remains unclear. Section 1608(a) applies to service of a foreign state or its subdivision. 28 U.S.C. § 1608(a). No notice under § 1608(a) has been sent to the head of the Kiowa Tribe. *Id.* And § 1608(b) applies to an agency or instrumentality of a foreign state, which does not include individuals like the BIA Judges. *Yousuf*,

552 F.3d at 381. Tellingly, § 1608's verbiage is strikingly similar to that of Rule 4 (*compare* 28 U.S.C. § 1608(b) *with* Fed. R. Civ. P 4(h)), which suggests that Rule 4 still applies, and that 4(c) and 4(e) apply here.

In the end, determining the proper procedure for service of process is unnecessary in this case. As explained, for service-of-process purposes, the BIA Judges are better characterized as federal officials. Because the plaintiff attempted to effect service personally, none of the defendants in this case were properly served. Fed. R. Civ. P. 4(c). So, this Court, like the district court, lacks subject-matter jurisdiction.

V. Question 5.

Sending the summons and complaint via certified mail does not comply with Fed. R. Civ. P. 4(c)'s requirement that a person who is at least 18 years old and not a party effect service.

Sending the summons and complaint via certified mail did not "cure" the service-of-process defects in this case. That argument is clearly foreclosed by this Court's precedent, and the plaintiff agrees. Aplt's Corrected Supp. Br. at 49-51; *Constien,* 628 F.3d at 1213 ("Even when service is effected by use of the mail, only a nonparty can place

the summons and complaint in the mail."). "The rule contains no mailing exception to the nonparty requirement for service." *Constien*, 628 F.3d at 1213-14. Even when considering the interplay between Rule 4(c)(2) and Rule 4(i)(1)(A)(ii), a nonparty must fulfill that provision's requirements. *Id.* at 1215 n.7.

The plaintiff concedes that he improperly served the BIA Judges, whether federal or tribal. Aplt's Corrected Supp. Br. at 47-49. "Service of process . . . is fundamental to any procedural imposition on a named defendant." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.* 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.").

The plaintiff claims that good cause should excuse his non-compliance. Aplt's Corrected Supp. Br. at 49-51. No good-cause exception to service applies here. *See* Aplees' Opening Br. at 16-19.

The narrow good-cause exception serves "to protect *only* those plaintiffs who have been meticulous in their efforts to comply

with the Rule." *In re City of Philadelphia Litig.*, 123 F.R.D. 512, 514 n.2 (E.D. Pa. 1988) (emphasis added). The plaintiff can demonstrate no such effort here. Twice before filing their motion to dismiss, the BIA Judges notified the plaintiff that his attempts at service were defective. Doc. 25, Ex. 1, at 2, Ex. 2, at 2. The district court also twice noted those deficiencies. Doc. 29 at 1; Doc. 30, at 1 n.2. The plaintiff cites no case allowing "a court [to] ignore a plaintiff's unjustified failure to comply with the [service-of-process Federal Rules]." *Jones v. Frank*, 973 F.2d 872, 873 (10th Cir. 1992) (refusing to apply good-cause exception); *McGregor v. United States*, 933 F.2d 156, 161 (2d Cir. 1991) (affirming dismissal of complaint where government's answer raised insufficiency of service as affirmative defense and plaintiff failed to correct deficiency); *Sys. Signs Supplies v. U.S. Dep't of Justice*, 903 F.2d 1011, 1014 (5th Cir. 1990) (affirming dismissal of plaintiff's pro se complaint where plaintiff failed to correct service defects after U.S. Attorney advised him of defects); *Whale v. United States*, 792 F.2d 951, 953-54 (9th Cir. 1986) (affirming dismissal of complaint where plaintiff could not show any justifiable excuse for not complying with the

Rules); *see also Moncrief v. Stone*, 961 F.2d 595, 597-98 (6th Cir. 1992) (affirming dismissal of complaint where plaintiff could offer no reason for failing to timely serve United States).

VI. Question 6.

The district court dismissed the plaintiff's petition because it lacked subject-matter jurisdiction – this Court must address whether the district court's dismissal was correct.

The plaintiff appeals from the district court's order of dismissal based on its lack of subject-matter jurisdiction over this case. The first and only issue this Court should address on appeal is whether the district court correctly dismissed this case.

When the lower court lacks jurisdiction, the appellate court has no jurisdiction over the merits of the case. *See Steel*, 523 U.S. at 93-95, 101 (expressly barring the practice of exercising hypothetical jurisdiction); *Trackwell*, 472 F.3d at 1245. The "first and fundamental question" this Court must answer is whether it has jurisdiction over a case, and the second is whether the lower court had jurisdiction over the case. *Great S. Fire Proof Hotel v. Jones*, 177 U.S. 449, 453 (1900). "Without jurisdiction the court cannot proceed at all in any cause." *Ex*

parte McCardle, 74 U.S. 506, 514 (1868). This requirement is "inflexible and without exception." *Steel,* 523 U.S. at 95.

Thus, when a district court dismisses an action for lack of subject-matter jurisdiction, it obviously has not made a merits decision. "As the district court [here] was without jurisdiction to consider the merits of [the plaintiff's claim for injunctive relief, this Court should] not consider the merits of the other arguments [the plaintiff] presents. . . ." *United States v. Harper*, 282 Fed. Appx. 727, 729 (10th Cir. 2008); *see Schmidt v. King*, 913 F.2d 837, 839 (10th Cir. 1990) ("Although [the parties] raise several arguments on appeal relating to the merits of this action, we do not address those arguments because we conclude the district court lacked jurisdiction to consider this action."); *Murray v. United States*, 686 F.2d 1320, 1327 n.14 (8th Cir. 1982) ("Where a motion to dismiss for lack of subject matter jurisdiction is granted on grounds of sovereign immunity, *the court is left without power to render judgment on the merits of the case*.") (emphasis added); 15A Wright, Miller & Cooper, Federal Practice and Procedure § 3903 ("The rule is well established that if a district court lacked subject

matter jurisdiction, the court of appeals is obliged to notice the lack . . . , and lacks jurisdiction to consider the merits of the case.").

Thus, if this Court agrees that the district court correctly determined it lacked subject-matter jurisdiction, this Court, like the district court, "is incapable of reaching a disposition on the merits of the underlying claims." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006); *see Steel*, 523 U.S. at 88-89; *Schmidt*, 913 F.2d at 839. To weigh in on the merits would amount to a prohibited "advisory opinion." *Steel*, 523 U.S. at 101.

Should this Court hold that the district court had subject-matter jurisdiction, and that the plaintiff properly served the BIA Judges, it should then reverse and remand to the district court for merits-based findings. *See Normandy Apartments, Ltd. v. U.S. Dept. of Housing & Urban Dev.*, 554 F.3d 1290, 1293 (10th Cir. 2009). A district court is best poised to evaluate the merits in the first instance. *Romero v. Schum*, 413 Fed. Appx. 61, 68 (10th Cir. 2011) (vacating and remanding for factual determinations where "the district court never determined whether the evidence established reasonable suspicion of

this crime" noting that such a "task is not lightly undertaken in the first instance by an appellate court [and is] appropriately left to the district court here"); *see also Colbert v. Bd. of County Comm'rs for Okla. County,* 414 Fed. Appx. 156, 162 (10th Cir. 2011) (where the district court did not reach the legal issue, declining "to address it and instead remand[ing] to the district court for consideration in the first instance"); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (10th Cir. 2005) ("Where an issue has been raised, but not ruled on, proper judicial administration generally favors remand for the district court to examine the issue initially.").

Of course, this Court also retains the inherent authority to dismiss the appeal as frivolous. *United States v. Hahn*, 359 F.3d 1315, 1329 n.15 (10th Cir. 2004) (en banc) (recognizing that "this court has inherent authority, wholly aside from any statutory warrant, to dismiss [this] appeal . . . as frivolous [because] the appeal . . . presents no arguably meritorious issue for our consideration" (quoting *Pillay v. I.N.S.*, 45 F.3d 14, 17 (2d Cir. 1995) (per curiam)).

VII. Question 7.

This Court does not have the authority to provide a reason for the dismissal of the plaintiff's complaint in the Court of Indian Offenses.

Relatedly, this Court cannot evaluate the Court of Indian Offenses' decision: it must first determine whether the district court lacked subject-matter jurisdiction over this case. As explained above, if this Court concludes that the district court lacked subject-matter jurisdiction, then it must dismiss this appeal.

Furthermore, by one Court of Indian Offenses' own observation, "[t]he regulations and court rules governing the organization of the Court of Indian Offenses do not provide for an appeal from the Court of Indian Appeals to the Bureau of Indian Affairs, the Interior Board of Indian Appeals, *or to any other forum*." *Gallegos*, 2 Okla. Trib. at 235 (emphasis added); Law and Order on Indian Reservations, 58 Fed. Reg. 54406-01 (Oct. 21, 1993) (stating that "decisions of a Court of Indian Offenses are appealable only to the appellate division of the Court of Indian Offenses, and that appellate division decisions are not subject to administrative appeals within the

Department of the Interior"). "The Court of Indian Appeals is the highest court in the western Oklahoma CFR court system." *Gallegos*, 2 Okla. Trib. at 235.

Even if this Court could review the Court of Indian Offenses' findings, it would be inappropriate for this Court to bolster or supplement that court's order. For example, courts reviewing an administrative law judge's decision should not "adopt post-hoc rationalizations to support the ALJ's decision that are not apparent from the ALJ's decision itself."[9] *Haga*, 482 F.3d at 1207-08 (citing *Allen v. Barnhart*, 357 F.3d 1140, 1142, 1145 (10th Cir. 2004); *Robinson v. Barnhart*, 366 F.3d 1078, 1084-85 (10th Cir. 2004) (per curiam); *Chenery*, 318 U.S. at 88). Post-hoc efforts to "salvage" an administrative court's decision are inappropriate. *See Allen*, 357 F.3d at 1142.

While the *Allen* court recognized a limited exception under which an appellate court could bolster the administrative court's

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[9] This Court has, in limited fashion, analogized CFR Courts to administrative courts. *See Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991).

opinion, that exception does not apply here. *Id.* at 1145. That exception applies only when no reasonable administrative fact-finder, following the proper analysis, could resolve the factual matter any other way. *Id.* Questions of jurisdiction – like the one the Court of Indian Offenses handled when it reviewed the plaintiff's complaint in that court – are questions of law. *See, e.g., Gates ex rel. Triumph Mortg. v. Sprint Spectrum*, 349 Fed. Appx. 257, 259 (10th Cir. 2009). And the Court of Indian Offenses is a court of limited jurisdiction. 25 C.F.R. §§ 11.116, 11.118; *see also Montana v. United States*, 450 U.S. 544, 566 (1981) (explaining the narrow exception that authorizes a tribal court to exercise civil jurisdiction over a non-Indian whose conduct implicates the "political integrity, the economic security, or health or welfare of the tribe").

VIII. Question 8.

This Court may take judicial notice of the Court of Indian Offenses' proceedings, but it may not supplement that court's findings.

The existing district court record does not provide sufficient information for this Court to determine whether the Court of Indian

Offenses lacked jurisdiction over the complaint the plaintiff filed in that court. However, the Court might conclude that federal regulations circumscribe the Court of Indian Offenses' jurisdiction without reference to the record. 25 C.F.R. §§ 11.116, 11.118.[10]

Failing that, as the plaintiff submits, this Court may take judicial notice of the Court of Indian Offenses' (and the Court of Indian Appeals') proceedings (specifically, JN at 266-69, 430-32, 675). Courts may exercise their discretion to take notice of their own records, as well as other judicial proceedings or other public records, when the source's accuracy "cannot reasonably be questioned." *Pinson*, 584 F.3d at 979 n.1 (quoting Fed. R. Evid. 201(b)(2)); *Ahidley*, 486 F.3d at 1192 n.5. And this Court may exercise its discretion to take judicial notice of another court's records "concerning matters that bear directly upon the

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[10] The Court of Indian Offenses' regulations impose specific limitations upon their jurisdiction. 25 C.F.R. § 11.118(a) ("A Court of Indian Offenses may exercise over a Federal or State official only the same jurisdiction that it could exercise if it were a tribal court. The jurisdiction of Courts of Indian Offenses does not extend to Federal or State employees acting within the scope of their employment."). This limited grant of jurisdiction did not and does not authorize the Court of Indian Offenses to enjoin the Oklahoma state court "from further court proceedings." JN at 266.

disposition of the case at hand." *Ahidley,* 486 F.3d at 1192; *St. Louis Baptist Temple v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979).

But, as argued above, *supra* at 53-54, this Court cannot supplement the Court of Indian Offenses' decision nor is there reason to do so. The Court of Indian Offense examined all possible bases for exercising jurisdiction, and found none. JN at 430-31; *see* 25 C.F.R. § 11.116, 118.[11]

Conclusion

This Court need not consider whether the Court of Indian Offenses lacked jurisdiction over the plaintiff's complaint. The only issue before this Court is whether the district court properly dismissed

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[11] The plaintiff filed a document titled "Injunction to Determine Jurisdiction." JN at 266-69. The Court of Indian Offenses's minutes state:

> The Court on its own initiative dismisses this matter summarily for lack of jurisdiction.
>
> The Court having considered the extensive body of federal case law including Indian cases absent a specific grant of jurisdiction can find no possible basis for jurisdiction [sic]. This matter is dismissed with prejudice.

Id. at 430. The relevant portion of the court's written order states "after being fully apprised of the premises through the briefs of all parties, the Court took notice, sua sponte, that it lacked jurisdiction over the case," and dismissed the action with prejudice. *Id*. at 431.

the plaintiff's complaint against the BIA Judges. To do so, the district court did not need to consider the merits of the plaintiff's claim because the plaintiff lacked standing to bring it, the district court had no subject-matter jurisdiction, and the plaintiff failed to effect proper service of process on the defendants.

If this Court concludes that the district court correctly dismissed the plaintiff's complaint, it should affirm the district court's order of dismissal. *See Chenery*, 318 U.S. at 88; *Richison v. Ernest Grp.*, 634 F.3d 1123, 1130 (10th Cir. 2011). Should this Court wish to offer an alternative ground for this dismissal, it can "affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court . . . ." *Richison*, 634 F.3d at 1130.

This preference for upholding district court decisions places a "heavy burden" on the plaintiff. *Id.* This Court should "affirm whenever the record allows it." *Id.* The plaintiff must establish the district court's error, and, if necessary "explain why *no other grounds* can support affirmance of the district court's decision." *Id.* (emphasis added).

For these reasons, this Court should dismiss this appeal.

Respectfully submitted,

SANFORD C. COATS
United States Attorney

s/ SUZANNE MITCHELL
R. D. EVANS, JR.
Assistant U.S. Attorneys
Bar Number: 017676
210 Park Avenue, Suite 400
Oklahoma City, Oklahoma 73102
(405) 553-8700
Suzanne.Mitchell@usdoj.gov

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s/ SUZANNE MITCHELL
Assistant U.S. Attorney