IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EASTERN SHAWNEE TRIBE OF OKLAHOMA,	)	
Plaintiff,	)	
v.	)	**Case No. 11-CV-00675-CVE-TLW**
JON D. DOUTHITT, Magistrate Judge of the Court of Indian Offenses, Miami, Oklahoma; and the COURT OF INDIAN OFFENSES FOR THE EASTERN SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

DEFENDANTS' REPLY
TO PLAINTIFF'S RESPONSE (DKT. # 17) TO
DEFENDANTS' MOTION TO DISMISS (DKT. # 16)

Introduction

Defendants, the magistrate judge and appellate judges of the Court of Indian Offenses for the Eastern Shawnee Tribe of Oklahoma (the "CFR Court"), do not dispute that this Court has jurisdiction to determine whether the CFR Court had the authority to adjudicate a case between tribal members and the tribal governing body, or legislature. They do not dispute that the Plaintiff, the Eastern Shawnee Tribe of Oklahoma ("ESTO," or the "Tribe")[1] has exhausted its tribal remedies. The problem in this case is that the jurisdictional challenge arises in this Court, the reviewing court,

[1] As set forth in the Complaint, Plaintiff is actually the Business Committee of the ESTO. In the underlying suit, six tribal members initially sued ESTO Chief Glenna Wallace and the ESTO Business Committee. *See Enyart v. Wallace*, No. CIV-2009-M05, attached to the Complaint (Dkt. # 2) as Ex. D. Chief Wallace opposed the Business Committee's actions, and the appellate division of the CFR Court renamed the case *Enyart v. Business Committee,* showing Chief Wallace as Respondent/Appellee in the caption of its Memorandum Opinion, attached as Ex. J to the Complaint.

not against the tribal members who brought suit initially, but against the judges who adjudicated the dispute. ESTO faults the CFR Court judges for performing their duty, *i.e.*, determining whether they have jurisdiction over an intratribal dispute, in a manner adverse to the Tribe's interest. In so doing, ESTO asks this Court to find that the CFR Court wrongfully determined tribal law and the scope of its own jurisdiction.

Defendants have argued that they are entitled to immunity from suit, as federal officials. ESTO has countered by arguing that the actions of these judges are *ultra vires*, *i.e.*, outside their authority. That argument, however, begs the question because, if these judges' determination of their own authority was correct, then their actions could not be *ultra vires*. ESTO further confounds the issue by arguing that the Administrative Procedures Act (the "APA") acts as a waiver of the CFR Court's sovereign immunity. The APA, however, does not apply to discretionary actions by an "agency" (if one assumes that judicial action by a CFR court can be properly deemed administrative action by an agency), and a CFR court has discretion to determine its own jurisdiction.

Hence, the issue becomes whether the CFR abused that discretion, which also begs the question because it involves a determination on the ultimate issue by this Court: whether the CFR court's determination of its own authority is correct. The danger in allowing this type of suit to proceed against those whose duty is to interpret tribal law is to unnecessarily involve the federal courts in issues of tribal law, and, in effect, to intrude upon tribal sovereignty and self-determination. It bears mentioning that, but for the fact that ESTO adopted the CFR Court as its tribal court, instead of establishing an independent tribal court system, the United States, on behalf of the Bureau of Indian Affairs ("BIA"), would not be involved.

Yet, even if the Court were to set aside the immunity issues, ESTO's arguments rest on the erroneous assumption that the Tribe has not granted jurisdiction to the CFR Court over this type of dispute and that the Tribe has not waived it s tribal immunity. The facts show that the Tribe's general membership adopted a tribal constitution, which was passed by resolution of the Tribe's governing body, granting that jurisdiction and waiving the Tribe's immunity. ESTO would have this Court overlook the relevant provisions of its tribal constitution, and the careful consideration given them by the CFR Court. Overturning the CFR Court findings in this regard would serve not only to entangle the federal court in the minutia of tribal government, but to sanction wrongful conduct by the Tribe's governing body and leave those aggrieved without an adequate remedy or forum for their grievances.

Argument

1. The CFR Court did not exceed the authority granted by federal regulation.

The federal regulations at issue here are found at 25 C.F.R. § 11.118, which provides, in relevant part, that

> (b) A court of Indian Offenses may not adjudicate an election dispute, take jurisdiction over a suit against a tribe, or adjudicate any internal tribal government dispute, *unless the relevant tribal government body passes a resolution, ordinance, or referendum granting the court jurisdiction*.
>
> * * *
>
> (d) A tribe may not be sued in a Court of Indian Offenses *unless its tribal governing body explicitly waives its tribal immunity by tribal resolution or ordinance*.

Id. (emphasis added). ESTO cites to remarks from the Department of the Interior in the regulatory history when the rule was proposed and finalized. Yet, ESTO ignores that portion of the remarks which indicate that a tribe may confer jurisdiction on its CFR court to resolve tribal disputes and

disputes against the tribal governing body, and the remarks which indicate that the tribal government can consent to the involvement of the CFR court in such disputes and, in fact request it. *See* Resp. Br., Dkt. # 17, at 4-5 (quoting 50 F.3d Reg. 43235 (Oct. 24, 1985) and 58 Fed. Reg. 54406, 54407 (Oct. 21, 1993)). That is what happened here.

a. The Tribal Constitution grants jurisdiction over tribal disputes to the CFR Court and thus, waives the Tribe's immunity when such disputes arise.

The Tribe attached its Constitution as Exhibit A to the Complaint (Dkt. # 2-1). It provides, in Article X, Section 1:

> Until such time as the Business Committee determines that the Tribe is financially and otherwise prepared to maintain a separate Tribal Court, the judicial authority of the Tribe shall be exercised by the Court of Indian Offenses. The jurisdiction of the Court of Indian Offenses shall include, but not be limited to, criminal and civil jurisdiction, including settlement of tribal disputes and interpretation of this Constitution and tribal enactments.

Id. at 9. The preamble and documents attached to the document indicate that the Tribe deemed this version of their Constitution an "Amendment" superceding an earlier version approved on November 7, 1939. *Id.* at 2, 17, 18. The Amendment was ratified by vote of the Tribe on June 17, 1999. The Certificate of Approval indicates that the BIA approved the amended version "as set forth in Resolution No. 02199-R-01 adopted by the Business Committee of the Eastern Shawnee Tribe of Oklahoma on February 19, 1999." *Id.* at 17.

The six tribal members who brought suit quoted Article X, Section 1 in their petition before the CFR Court. *See* Complaint, Ex. D, Petition for Injunctive Relief (Dkt. # 2-4), at 1. The Tribe responded with a Special Appearance and Motion to Quash and Dismiss. *See* Complaint, Ex. E, Respondent's Brief in Support of Its Motion to Dismiss (Dkt. # 2-5). The tribal members replied solely to the jurisdictional issue. *See* Petitioner's Reply to Respondents' Special Appearance and

Motion to Quash and Dismiss, filed July 8, 2009 (attached hereto as Ex. A). Judge Douthitt heard oral argument and issued the following ruling: "The Tribal Constitution, Article X, Section 1 grants full judicial authority to the C.F.R. Court. Court of Indian Offenses Case No. CIV 05-M01P Enyart v. Eastern Shawnee Election Board et al is in accord." *See* Court Minute, filed July 23, 2009 and Fax Cover Sheet, filed July 28, 2009 (attached hereto as Ex. B). ESTO filed a Motion for New Trial on the jurisdictional issue, which the judge reset for hearing and subsequently overruled. *See* Motion for New Trial, filed August 10, 2009, Order, filed August 19, 2009, and Court Minute, filed September 10, 2009 (attached hereto as Ex. C.). The Court subsequently set the remaining issues for trial, culminating in the April 28, 2011 Order attached to the Complaint in this action.[2]

In the April 28, 2011 order, Defendant Jon D. Douthitt found that he had jurisdiction of the parties and the subject matter. Complaint, Ex. F, Order of the Court (Dkt. # 2-6), at 1. He explicitly reaffirmed his findings and orders of jurisdiction in two subsequent orders addressing the Tribe's motion for new trial and motion for stay. *See* Complaint, Exs. G, H (Dkt. ## 2-7, 2-8). Thus, Judge Douthitt addressed the jurisdictional issues and ruled upon the merits of the matter, and the appellate court judges affirmed after oral argument and extensive briefing.

In addition to the briefs filed by the tribal members and the Business Committee, Chief Wallace filed an appellate brief. *See* Response Brief of Appellee Chief Glenna Wallace, dated July 20, 2011, and attached hereto as Ex. D. Chief Wallace summarized a portion of her argument in this manner: "The Constitution of the Eastern Shawnee Tribe established three branches of the tribal government. As the United States Supreme Court has stated on numerous occasions, the Tribal

[2] As this case is not a typical administrative appeal and arises in an unusual procedural posture, the entire record in the CFR Court has not been submitted by any party, but Defendants are willing to do so if it would assist the Court in its determination.

Court is a vital part of tribal government and, most often, is the proper forum in which to resolve tribal disputes and interpret tribal enactments and its constitution." *Id.* at 25.

The Court of Indian Appeals held, by reference to Article 10, Section 1 of the ESTO Constitution: "We believe this language is sufficient to satisfy the conditions of subsection (b) of 25 C.F.R. 11.118." Complaint, Ex. J, Memorandum Opinion ("Memo. Op.") (Dkt. # 2-10), at 4. The appellate court found further support for its position in 25 C.F.R. 11.108, "which states that the tribal governing body may enact ordinances which, when approved by the Secretary of the Interior are enforceable in Courts of Indian Offenses." Memo. Op. (Dkt. # 2-10) at 4-5. The appellate court judges also noted that the same jurisdictional challenge was addressed in an earlier case before the CFR Court in 2006 filed by the ESTO chief at the time. The appellate court's quote from the earlier case bears repeating:

> The Tribal Court is vested with authority to decide tribal disputes. This matter qualifies as a tribal dispute, and we believe, is exactly what the framers of the Constitution had in mind when the aforementioned section of the Constitution was drafted and adopted. Since the court is the duly designated forum for handling tribal disputes, it stands to reason that Sovereign Immunity has been waived with regard to suits initiated which are solely designed to settle such a dispute. ***To hold otherwise would severely cripple tribal government by eliminating any avenue for such disputes to be resolved.*** We hold that the Tribe has waived its Sovereign Immunity with regard to this cause of action.

Id. at 5 (emphasis added) (quoting *Enyart v. Eastern Shawnee Election Bd., et al.*, CIV-05-M01P (Court of Indian Offenses, App. Div. Opinion March 15, 2006) (attached as Ex. 2 to the Petitioner's Reply to Respondents' Special Appearance and Motion to Quash and Dismiss, attached hereto as Ex. A)).[3] The appellate court then addressed ESTO's contention that the Tribe had never effected

[3] ESTO argues that its Election Board hears election disputes and, since the validity of the Referendum at issue in this dispute was affirmed by the Election Board, Defendants' exercise of jurisdiction was unlawful. *See* Resp. Br., Dkt. # 17, at 12. However, the Election Board merely

the explicit waiver of tribal immunity envisioned in 25 C.F.R. § 11.118(d). The appellate court observed: "The problem with Appellant's argument is it would render the Constitution's grant of jurisdiction to resolve tribal disputes meaningless. Appellants do not point to any document which indicates the people in passing the Constitution intended this result." Memo. Op. (Dkt. # 2-10) at 6.

The appellate court relied on a Tenth Circuit case, *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174 (10th Cir. 1999), to show the degree of explicitness required to effect a waiver of tribal immunity. The *Osage Tribal Council* court noted that courts considering tribal immunity waivers "have only found statutory language inadequately explicit when there was no language specifically establishing the cause of action at issue." 187 F.3d at 1181 (citations omitted). The Tenth Circuit opined that a statement of intent is sufficient to waive tribal immunity. *Id.* at 1182.

Relying on the *Osage Tribal Council* case in part, the ESTO Court of Indian Appeals concluded: "The Eastern Shawnee Constitution explicitly states the Court is granted jurisdiction to resolve tribal disputes. We find this to be a sufficient waiver or immunity, as tribal disputes can [ ] only be created by and vis-a-vis tribal officials, branches and entities - the Respondents in this case." Memo. Op. (Dkt. # 2-10), at 7. The appellate panel then pointed out that members of the Business Committee were not entitled otherwise to claim tribal immunity because their actions were taken "in total disregard of the Eastern Shawnee Constitution and laws as well as rules of procedure adopted by the Business Committee," and thus, "outside any authority granted to them." *Id.*, at 7-8.

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certified the results of the Referendum and denied a challenge to the results. In the 2006 *Enyart* case, the CFR Court explained with regard to a recall election that the Election Board is not the appropriate tribal entity to hear allegations of unlawful or improper conduct by elected tribal officials. That is the role of the tribal court. *See Enyart*, CIV-05-M01P a 6-7.

This decision by the Court of Indian Appeals is sound and should not be overturned. ESTO adopted its Constitution by resolution.[4] To require, as ESTO argues, a separate resolution waiving tribal immunity every time members of the Tribe seek to challenge actions of their Business Committee would allow gaming of the system, as no tribal governing body would waive such immunity where tribal members allege unconstitutional conduct by the governing body itself. Tribal members granted jurisdiction to the CFR Court to settle tribal disputes and interpret their Constitution and tribal enactments. They chose this means of holding their governing body to account.

b. Deference to the CFR Court's determination of tribal law is warranted.

Several courts and scholars have addressed the standard of review for a federal court reviewing cases involving a tribal court's determination of tribal law. As the seminal treatise on Indian law sets forth:

> Federal courts are required to defer to tribal court determinations of tribal law. Just as state courts are the final arbiters of the meaning of state law, so are tribal courts the final arbiters of the meaning of tribal law. While the Supreme Court has held that the breadth of tribal court jurisdiction is a federal question, it is for the tribal court to determine both what its law is and the scope of its own jurisdiction. On review in the federal courts, the only question is whether the tribal court had the authority to adjudicate the case. While this federal question can be addressed de novo by the federal court, it is the job of the tribal courts to interpret the meaning of tribal law.

Cohen's Handbook of Federal Indian Law §7.04 (Matthew Bender 2009) (endnotes omitted); *see generally* 14A Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* §3691 (4th ed. 2011) (Westlaw database updated April 2012)) ("Federal district courts often extend

[4] ESTO cites to *U.S. Bancorp, N.A. v. Ike*, No. 3:01-CV-00067-ECR (D. Nev. Jun. 5, 2002) in support of its claim that this Court may review an exercise of jurisdiction by a CFR court, but ESTO ignores the statement in the opinion indicating that the tribe in that case had "not granted any additional authority to [the Court of Indian Offenses] pursuant to a resolution." *Id.* at 7.

deference to Indian tribal courts, in the interests of comity and tribal sovereignty, although the relationship among tribal law, federal statutes, and federal common law often is very complex"); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997) (federal courts, as a general matter, lack competence to decide matters of tribal law); *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1205 n. 12 (D. Minn. 1996) (Rights arising out of a tribe's constitution "must be determined at the tribal level, as federal courts do not have jurisdiction to interpret a tribal constitution or tribal laws.)

One scholar explained the need for deference by reference to review of similar state court jurisdictional questions:

> Thus, the rule applied when challenging tribal court jurisdiction in federal court should parallel the rule applied by federal courts when interpreting state "long-arm" statutes in diversity cases. In such cases, the state court's interpretation of its own state "long-arm" statute binds the federal court, which then applies federal interpretations of applicable constitutional jurisdictional limitations. Similarly, when reviewing tribal jurisdiction, the tribal court's interpretation of tribal law should bind the federal court, which should only review the federal law questions de novo.

Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 Minn. L. Rev. 259, 299 (Dec. 1993). Another has opined: "Tribal courts ought to be able to interpret and declare what tribal law is, for if tribal sovereignty and self-determination mean anything, they mean the authority to declare and interpret the law that will govern in tribal forums." Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction,* 31 Ariz. L. Rev. 329, 361 (April 1989). The CFR Court interpreted the ESTO Constitution and declared that the Tribe had granted jurisdiction to it over tribal disputes and that the Tribe had

waived its sovereign immunity in such matters. Deference to their decision is warranted under the circumstances of this case.

2. The CFR Court is entitled to sovereign immunity.

While the Court may review the CFR Court's determination of its own jurisdiction, the question remains whether it may do so in a case against the judges making that decision, or whether the issue arises more appropriately in a case against the opposing party who argued the jurisdictional issue before the CFR Court in the first instance. The CFR Court argues that the latter is more appropriate, as they are entitled to sovereign immunity as federal officials.

a. The actions of the CFR Court were not *ultra vires*.

Under the *ultra vires* doctrine (also known as the *Larson-Dugan* exception), sovereign immunity does not shield a federal official who has acted outside the scope of his legal authority. *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689 (1949); *accord Dugan v. Rank*, 372 &.S. 609, 621-22) (1963). ESTO's arguments in reliance on the doctrine fail, however, because ESTO equates an act outside the scope of judicial authority with an alleged incorrect decision or an erroneous exercise of jurisdiction. The Tenth has explained:

> Therefore, an official's erroneous exercise of delegated power is insufficient to invoke the exception. *Larson*, 337 U.S. at 690, 69 S.Ct. 1457; *accord Painter v. Shalala*, 97 F.3d 1351, 1358 (10th Cir. 1996). Official action is not ultra vires or invalid "if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." *Larson*, 337 U.S. at 695, 69 S.Ct. 1457. Moreover, the mere allegation that an officer acted wrongfully does not establish that the officer, in committing the alleged wrong, was not exercising the powers delegated to him by the sovereign. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001). If the officer is exercising such powers, the suit is in fact against the sovereign and may not proceed unless the sovereign has consented. *Id.* Thus, the question of whether a government official acted ultra vires is quite different from the question of whether that same official acted erroneously or incorrectly as a matter of law.

Wyoming v. United States, 279 F.3d 1214, 1229-30 (10th Cir. 2004). The CFR Court was exercising its power to determine the extent and scope of its own jurisdiction when it ruled that the Tribal Constitution granted it jurisdiction and waived the Tribe's immunity from suit.

The *United Tribe of Shawnee Indians* court, faced with a similar issue, remarked: "UTSI's argument assumes the very factual issue at the heart of this litigation." *Id.*, 253 F.3d at 548. ESTO's argument in this case assumes the issue at the heart of this litigation: did the CFR court properly exercise jurisdiction when it determined that the Tribe had granted the CFR court jurisdiction and waived its tribal immunity? If so, the CFR Court was not acting outside its legal authority. The CFR Court has been delegated the authority (indeed, the duty) to determine the extent and scope of its own jurisdiction. Consequently, any action taken by the CFR Court with respect to determining whether the Tribe granted jurisdiction to it and waived its immunity is within its delegated authority and is not *ultra vires*, notwithstanding ESTO's argument that the CFR Court wrongfully determined its jurisdiction. ESTO should not be permitted to invoke the *ultra vires* doctrine by attempting to equate the CFR Court's determination of its jurisdiction with a wrongful exercise of jurisdiction.

b. The actions of the CFR Court were not arbitrary and capricious, nor did they involve an abuse of discretion.

ESTO also invokes the broad waiver of sovereign immunity for federal officials found in the Administrative Procedures Act at 5 U.S.C. § 702. That provision, however, is circumscribed by two other sections. Section 701 provides an exception for "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The waiver provision of section 702 is "not implicated if it is found that the action is committed to agency discretion by law." *Vizenor v. Babbitt*, 927 F. Supp. 1193 (D. Minn. 1996). Congress has charged the Commissioner of Indian Affairs, under the direction of the

Secretary of the Interior, to manage "all Indian affairs and all matters arising out of Indian relations." 25 U.S.C. § 2. In *Tillett v. Lujan*, 931 F.2d 931 F.2d 636 (10th Cir. 1991) and other cases requiring exhaustion of tribal court remedies, the courts make it clear that the tribal court, or the CFR court where no tribal court exists, must determine the scope and extent of their own jurisdiction before returning to the federal courts. *Id.* at 640-41. The CFR Court's actions in determining its own jurisdiction have been committed to their discretion by law.

Under 5 U.S.C. § 706,

> [t]he reviewing court shall–
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> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be–
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> * * *
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The CFR Court's interpretation of the ESTO Constitution so as to exercise the jurisdiction granted it over tribal disputes, and to find that the Tribe had waived its immunity, was not arbitrary, capricious, or an abuse of their discretion to determine the CFR Court's own jurisdiction. As set forth above, the CFR Court judges heard argument, reviewed the evidence, and based their findings on tribal law – findings to which the reviewing court should defer based on consideration of comity and tribal sovereignty.

c. Policy considerations weigh against a finding that the CFR Court acted outside its authority.

ESTO attaches two cases to its Response Brief where reviewing courts permitted suit against a CFR court to proceed. In the first, *U.S. Bancorp, N.A. v. Ike* , 171 F. Supp. 2d 1122 (D. Nev.

2001), the Court dismissed the case because the "Mose Group," who opposed the elected tribal council, did not exhaust their tribal remedies prior to bringing a cross-claim against the elected tribal council. *Id.* at 1126. In addressing the argument of the Mose Group that it had exhausted its remedies, the federal judge commented that the group could have made allegations against the BIA, the Court of Indian Offenses, or the judge of the Court of Indian Offenses. *Id.* However, the judge did not cite any authority for that comment or set forth any analysis of whether that CFR court and its judge were entitled to sovereign immunity. In the subsequent ruling after the Mose Group sued the United States, the Secretary of the Interior, and the judge of the Court of Indian Offenses for that tribe, the federal court again did not address whether these defendants were entitled to sovereign immunity. *See U.S. Bancorp, N.A. v. Ike*, No. 3:01-CV-00067-ECR (D. Nev. Jun. 5, 2002) (attached as Ex. A to Resp. Br., Dkt. # 17-1.)[5]

The second case upon which ESTO relies is a case from the Western District of Oklahoma, *Panther Partners, LLC. v. Lujan*, NO. CIV-09125-R (W.D. Okla. Apr. 19, 2010). The underlying suit involved a case filed by tribal entities against Panther Partners, LLC, a Florida corporation, its managers, and the American Arbitration Association, none of whom were Indians. It was not an internal tribal dispute. In the April 19, 2010, opinion cited by ESTO, the federal judge first determined that the CFR Court judge failed to make a factual finding that any party to the litigation was an Indian, as required by 25 C.F.R. § 11.116. *Id.* at 3-4. Thus, the federal court determined, the CFR court judge's actions were *ultra vires*. *Id.* at 4.

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[5] ESTO mentions the *Bancorp* case involved a two-day hearing. Although no temporary restraining order has been requested in this case, as in *Bancorp*, Defendants would not be opposed to the Court scheduling oral argument on their motion to dismiss if it would assist the Court in determining the legal issues.

The *Panther Partners* court then examined whether a stay of the action pending exhaustion of tribal appellate remedies was proper, and finally, he turned to the question of sovereign immunity. Since he had already determined that the CFR Court judge's actions were *ultra vires*, he applied the *Larson-Dugan* exception to find that the federal defendants, including the CFR judge, were not entitled to federal sovereign immunity. He added a reference to the general waiver of 5 U.S.C. § 702, without any analysis of whether the CFR court judge's actions were committed to agency discretion by law or whether the judge had abused such discretion.[6] In any event, he was able to find that the *Larson-Dugan* exception applied only after he determined that the CFR court judge's action were *ultra vires*. Were the judge's actions not *ultra vires*, then presumably the *Larson-Dugan* exception would not apply. Were the judge's actions committed to agency discretion, and no abuse of discretion found, the presumably the general waiver of 5 U.S.C. § 702 would not apply.

All of which points to the injustice of hailing CFR court judges into federal court, based upon a mere allegation of wrongdoing, when the jurisdictional question could and should be raised and argued by the parties who were before the CFR court in the first instance. It does not facilitate settlement, as the parties to the case below are not involved. Further, it seems especially unfair and unnecessary for judges to be named as parties when the question of whether they acted outside their authority requires a determination of the ultimate issue: whether the CFR court had jurisdiction in the first place.

When a federal district court determines its own jurisdiction, the parties appeal the decision, and the federal court of appeals may determine whether the district judge's determination was

[6] The federal judge also indicated that the *Ex Parte Young* doctrine would be applicable if the defendants in *Panther Partners* were deemed tribal officers. *See Panther Partners,* No. CIV-09125-R at 6-7. Plaintiff in this case does not rely on this aspect of the *Panther Partners* case.

correct. It would be deemed improper for the party against whom the district judge ruled to name the district judge or district court in the appellate court, seeking a determination of the jurisdictional issue by a reviewing court. The same considerations should apply here. Allowing suit against the CFR Court judges merely serves as a disincentive for those who might wish to serve as CFR Court judges to apply for the position, and it could serve to unfairly constrain their actions and unduly influence the outcome of their rulings when they are called upon to determine their own jurisdiction. Such cases would seem to set an undesirable precedent and advance an undesirable policy.

Conclusion

Defendants did not exceed their jurisdiction and are immune from suit. Accordingly, this case merits dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, I electronically transmitted the foregoing DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE (DKT. # 17) TO DEFENDANTS' MOTION TO DISMISS (DKT. # 16) to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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