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, in his Official Capacity; and the COURT OF INDIAN OFFENSES FOR THE EASTERN SHAWNEE TRIBE OF OKLAHOMA	)	
Defendants,	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

Respectfully submitted,

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PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

Plaintiff Eastern Shawnee Tribe of Oklahoma ("**Plaintiff**" or "**Tribe**"), a federally recognized Indian tribe, hereby **opposes**, and respectfully requests that this Court **DENY**, the Motion to Dismiss entered by Magistrate Judge Jon D. Douthitt ("**Judge Douthitt**") and the Court of Indian Offenses for the Eastern Shawnee Tribe of Oklahoma ("**EST CFR Court**") (collectively, "**Defendant**").

I. Introduction

Defendant is a "federal officer[] or agent[]." Def.'s Mot. Dismiss 6. Federal regulations found at 25 C.F.R. § 11.1 *et. seq.* define and limit Defendant's authority. Two of those regulations are relevant to this case. First, "[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 governing body passes a resolution, ordinance, or referendum granting the court jurisdiction." 25 C.F.R. § 11.118(b). Second, "[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." 25 C.F.R. § 11.118(d) (2011). Although the Tribe has enacted no such resolution, ordinance, or referendum, Defendant nonetheless adjudicated an election dispute in a suit brought against the Tribe. Def.'s Mot. Dismiss 2, 4. The question on this Motion to Dismiss is a simple one: Where Defendant is a federal officer whose entire authority is defined and limited by federal regulations, and Plaintiff challenges Defendant's exercise of jurisdiction pursuant to those regulations, does this Court have the authority to that exercise of jurisdiction? It certainly does.

Defendant mischaracterizes the controversy before this Court. This case is not "essentially about the legislative branch of an Indian tribe . . . suing the tribe's judicial branch."

Def.'s Mot. Dismiss 1. Plaintiff has not sued a branch of its tribal government. Plaintiff has sued the EST CFR Court, which is a federal instrumentality, and Judge Douthitt, who is a federal employee.[1] Nor is this case "quintessentially, an internal tribal dispute." Id. It *was* an internal tribal dispute, until Defendant took it upon himself to intervene, in contravention of his authority under federal law, and despite Plaintiff's repeated attempts to persuade him to comply with the law. Defendant's actions give rise to this dispute over whether a federal agent has the authority to act contrary to both federal regulations and federal common law.

In short, this is a case about whether a federal official exceeded the specific authority he is given by federal regulations. That question is squarely within this Court's jurisdiction.

II. The question of whether Defendant exceeded the authority he is granted by federal regulation arises under federal law, and is a question squarely within the jurisdiction of this Court.

Defendant repeatedly characterizes this case as an internal tribal dispute that lies outside this Court's jurisdiction. See generally Def.'s Mot. Dismiss. In doing so, Defendant falsely suggests that Plaintiff has asked this Court to reconsider the *merits* of the underlying dispute. Defendant never addresses Plaintiff's one and only request—that this Court review Defendant's exercise of jurisdiction beyond the strict limitations contained within the federal regulations.

A. The Tenth Circuit recognizes that federal courts have the authority under 28 U.S.C. § 1331 to hear challenges to a CFR Court's exercise of jurisdiction.

In describing the nature of CFR Courts, Defendant cites with approval[2] Tillett v. Lujan, 931 F.2d 636 (10th Cir. 1991). That case concerned a Kiowa Tribe of Oklahoma tribal member's challenge to, among other things, the requirement that she "submit to the jurisdiction of the [Kiowa Tribe's] CFR court." Id. at 639. As a tribal member's suit against her tribe, it was what

[1] Defendant admits as much in claiming sovereign immunity as a "federal officer[] or agent[]." Def.'s Mot. Dismiss 6.
[2] Def.'s Mot. Dismiss 3.

Defendant has characterized as "a purely intratribal dispute." Def.'s Mot. Dismiss 6. Nonetheless, a unanimous panel of the Tenth Circuit held that the intratribal nature of the dispute did not resolve the question of federal court jurisdiction. In affirming the district court's holding that Tillett was required to exhaust her tribal court remedies, the Tenth Circuit noted: "Requiring Tillett to exhaust her tribal remedies does not preclude her from thereafter bringing suit in federal court challenging the tribal courts' exercise of jurisdiction. ***Once the tribal courts have acted, their determination of jurisdiction is subject to review in federal court***." Tillett, 931 F.2d at 641 (emphasis added, internal citations and quotation omitted). Plaintiff has exhausted its CFR Court remedies, and is entitled to a federal court review of Defendant's determination of jurisdiction.

Although the Tillett court did not specify the source of the federal courts' authority to hear challenges to tribal court jurisdiction, the U.S. Supreme Court has found the source of that authority in 28 U.S.C. § 1331, which authorizes federal courts to resolve federal questions. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 853 (1985) ("The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction."); see also Kaw Nation v. Lujan, 378 F.3d 1139, 1142 (10th Cir. 2004) ("Plaintiffs contend that under the Supreme Court's decision in National Farmers Union Insurance Companies v. Crow Tribe a federal court is empowered to determine under 28 U.S.C. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. Plaintiffs are correct that under National Farmers the outer boundaries of tribal jurisdiction — particularly over non-members — may be a matter of federal law" (internal citations and quotations omitted).); Cherokee Nation v. Nations Bank, N.A., 67 F. Supp. 2d 1303, 1305 (E.D. Okla. 1999) ("Under the provisions of 28 U.S.C. § 1331, a federal court has jurisdiction to

determine whether a tribal court has exceeded its jurisdiction."). Since National Farmers Union, federal courts have consistently reaffirmed their authority to review a tribal court's exercises of jurisdiction.[3]

B. Among the limits on CFR Court jurisdiction are specific prohibitions against hearing election disputes, and hearing suits against tribes that have not waived their sovereign immunity.

Defendant does not deny that he adjudicated an election dispute in a suit against the Tribe. Defendant describes such political disputes as "purely internal tribal disputes, *which the CFR courts were specifically designed to address*." Def.'s Mot. Dismiss 4 (emphasis added). This statement belies the regulatory history of the CFR Courts; that history demonstrates the clear intent of the U.S. Department of Interior ("**Interior**") that such disputes fall outside of CFR Court jurisdiction.

In 1985, Interior published a proposed rule containing major revisions to the regulations governing CFR Courts. 50 Fed. Reg. 43235 (Oct. 24, 1985). Among those revisions was a rule barring CFR Courts from hearing political disputes, and from hearing suits against tribes, unless the tribe in question made a specific grant of authority to the CFR Court. Interior explained:

> Some courts of Indian offenses have adjudicated disputes concerning basic issues of tribal government, such as who may exercise tribal authority and what is the extent of a particular tribal official's authority. The role of the Federal courts in adjudicating disputes concerning basic governmental issues has changed and developed over the history of the nation. An Indian tribe may or may not wish to accord its court the same role in resolving such issues that the Federal Government has accorded the Federal courts.
>
> In order to preserve such decisions for the tribes, it is proposed to provide that, ***absent tribal action, courts of Indian offenses will not adjudicate election disputes*** or question the decision of the tribal governing body concerning the distribution of tribal authority among tribal officials. The proposed rule provides,

[3] See, e.g., Plains Commerce Bank v. Long Family Land and Cattle, 554 U.S. 316 (2008); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); United States v. Tsosie, 92 F.3d 1037, 1044 n.13 (10th Cir. 1996); Brown v. Washoe Housing Auth., 835 F.2d 1327, 1329 (10th Cir. 1988); U.S. v. Turtle Mountain Housing Auth., 816 F.2d 1273, 1277 n.2 (8th Cir. 1987); Wellman v. Chevron USA, Inc., 815 F.2d 577, 578 (9th Cir. 1987).

> however, that the tribal governing body may confer such jurisdiction on the court of Indian offenses. The proposed rule also provides that tribal sovereign immunity in the court of Indian offenses is not waived absent enactment of a tribal ordinance waiving sovereign immunity.

Id. (emphasis added).

Eight years later, Interior published a final rule. 58 Fed. Reg. 54406 (Oct. 21, 1993). During that time, some tribes commented that they did not want such limitations on their CFR Courts. Id. at 54407. Interior stood firm, enacting a final rule that specifically barred CFR Courts from exercising jurisdiction over election disputes and other internal tribal government disputes, and from hearing suits against tribes that had not waived their immunity. 25 C.F.R. § 11.104(b) (2003),[4] *now codified at* 25 C.F.R. § 11.118(b) (2011) and § 11.118(d) (2011). Interior explained its decision thus:

> 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. United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383 (8th Cir. 1987), cert. denied 108 S. Ct. 1109 (1988). ***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***.

58 Fed. Reg. at 54407 (emphasis added). This regulatory history demonstrates that CFR Courts were ***not*** "specifically designed to address" tribal election disputes and suits against tribes. Quite the opposite***—CFR Courts were specifically prohibited from hearing such suits***.

[4] "Unless otherwise provided by a resolution or ordinance of the tribal governing body of the tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction, no Court of Indian Offenses may adjudicate an election dispute or take jurisdiction over a suit against the tribe or adjudicate any internal tribal government dispute." 25 C.F.R. § 11.104(b) (1994).

Defendant's entire authority is derived from the federal regulations that define and limit his jurisdiction, and those regulations bar Defendant from exercising jurisdiction over an election dispute, or a suit against a tribe, unless two specific and clearly defined conditions are met: (1) a specific grant of authority to hear election disputes or other internal tribal government disputes, and (2) an explicit waiver of tribal sovereign immunity. 25 C.F.R. § 11.118(b) (election disputes), § 11.118(d) (sovereign immunity). Defendant does not dispute that he adjudicated an election dispute governed by those regulations. The question for this Court, then, is a simple question of whether Defendant violated federal regulations by an improper exercise of jurisdiction. That question is squarely within this Court's jurisdiction.

C. Federal courts may review whether a CFR Court exceeded its jurisdiction by hearing an election dispute or internal tribal government dispute, or by hearing a suit against a tribe that has not clearly waived its sovereign immunity.

The U.S. District Court for the District of Nevada faced precisely this question when, after a contested election at the Te-Moak Tribe of Western Shoshone Indians , that tribe's Court of Indian Offenses issued a temporary restraining order ("**TRO**") barring one faction, the Mose Group, from entering the tribal offices. U.S. Bancorp, N.A. v. Ike, 171 F. Supp. 2d 1122, 1124 (D. Nev. 2001) [U.S. Bancorp I]. The other faction, the Ike Group, argued that the federal court lacked jurisdiction over what it described as a question of tribal law. Id. The federal court cited the regulatory prohibition against CFR Courts adjudicating election disputes, and noted that "[o]nce the tribal courts have acted, their determination of jurisdiction is subject to review in the federal court." Id. at 1126 (*quoting* Brown v. Washoe Housing Auth., 835 F.2d 1327, 1329 (10th Cir. 1988). The court concluded that "we do have jurisdiction to determine if the Court of Indian Offenses exceeded its jurisdiction when it issued a restraining order against the Mose Group." Id. at 1125-26. Because the cross-claim by the Mose Group named as defendants the Ike Group,

when it should have named the tribe's CFR Court and/or the judge of that court, the federal court dismissed, but allowed the Mose Group to amend its complaint to name the proper federal defendants.[5] Id. at 1126-27.

The Mose Group amended its complaint to name CFR Court Magistrate Judge Woodside Wright ("**Judge Wright**"), after which "[t]he matter was extensively briefed and the court held a two-day hearing." U.S. Bancorp v. Ike, No. 3:01-cv-00067-ECR-VPC at 2 (D. Nev. June 5, 2002) (order granting mot. dismiss) [U.S. Bancorp II]. The federal court's analysis and conclusion bear quoting at length:

> The Court of Indian Offenses has no jurisdiction over an election dispute, a suit against the Tribe, or an internal tribal dispute. 25 C.F.R. § 11.104(b). These jurisdictional limitations are established by federal regulations. Because the Te-Moaks have chosen the Court of Indian Offenses and not granted any additional authority to that court pursuant to a resolution, federal law has limited the powers of the court. Cf. National Farmers [Union] Ins. Co. v. Crow [Tribe], 471 U.S. 845, 852 (1984).
>
> . . .
>
> In both National Farmers, and the case before us, the source of possible jurisdictional limitation is federal law. Therefore, like National Farmers, a federal question is presented to us as to whether the Te-Moak Court of Indian Offenses exceeded its jurisdiction.
>
> ***Under section 1331 we have jurisdiction to consider this question. Our decision is supported by other courts that have accepted that a federal court can review an exercise of jurisdiction even if the underlying dispute is between two tribal members***. See Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990 (8th Cir. 1999); U.S. v. Tsosie, 92 F.3d 1037 (10th Cir. 1996); Tillet v. Lujan, 931 F.2d 636 (10th Cir. 1991); U.S. v. Tuttle [sic] Mountain Hous. Auth., 816 F.2d 1273 (8th Cir. 1987).
>
> We are urged by the Ike group to refrain from assuming jurisdiction at all because of tribal sovereignty. If this were a purely tribal court set up and run by the tribe with no federal government interference we would agree. But even though the Tribe has adopted the Court of Indian Offenses in its constitution,

[5] Defendant continues to mischaracterize this case as an intertibal dispute by suggesting in a footnote, but without so moving, that the Enyart Plaintiffs should be joined as defendants. Def.'s Mot. Dismiss 10 n.5. U.S. Bancorp I held otherwise. 171 F. Sup. 2d at 1126-27 ("A challenge to the jurisdiction of a court is properly made by naming the court or its representatives, not by naming the opposing party.").

> ***federal aspects of the court remain, including the federal limits on jurisdiction. It is these limitations that give rise to our jurisdiction***.
>
> . . . Our final conclusion is that we have subject matter jurisdiction to determine if the Court of Indian Offenses in this case exceeded its jurisdiction.

U.S. Bancorp II at 7-9 (emphasis added). Ultimately, the federal court granted the motion to dismiss Judge Wright after concluding that his TRO did not decide an election dispute, but instead was issued to keep the peace. Id. at 11-12. Nonetheless, the court was unequivocal in its finding that it had jurisdiction to decide whether Judge Wright had exceeded the authority granted him by the federal regulations governing CFR Courts.

D. The case law Defendant cites actually supports Plaintiff's argument that this Court has jurisdiction.

Defendant cites four cases for the proposition that this Court lacks jurisdiction over an internal tribal dispute, but not one of those cases suggests that this Court lacks jurisdiction to review Defendant's exercise of jurisdiction.

1. Kaw Nation v. Lujan

Defendant cites Kaw Nation v. Lujan, 378 F.3d 1139 (10th Cir. 2004), for the proposition that disputes over the meaning of tribal law do not confer federal jurisdiction under § 1331. Def.'s Mot. Dismiss 5 (*citing* Kaw Nation, 378 F.3d at 1143). That case involved a dispute over the appointment of tribal judges in a tribal court, not a CFR Court. See generally Kaw Nation, 378 F.3d 1139. In disclaiming jurisdiction, the Tenth Circuit noted that "[t]ribal law, ***not federal law***, dictates which personnel may exercise tribal judicial authority. ***Plaintiffs cite no federal law allegedly violated*** by the manner in which Lujan, Morris, and Tripp acquired their judgeships." Id. at 1143 (emphasis added). In the present case, Plaintiff's claims arise under the federal regulations that define and limit Defendant's jurisdiction.

Defendant argues that he "appropriately resorted to tribal law embodied in the language of the Tribal Constitution" in making his determination of jurisdiction. Def.'s Mot. Dismiss 6.

Defendant thereby suggests that, under Kaw Nation, because he relied upon the Tribe's Constitution, this Court lacks jurisdiction. However, even Defendant's reliance on tribal law is subordinate to federal law in this case. Federal regulations define and limit Defendant's jurisdiction, and those regulations contain specific limitations on expanding that jurisdiction to include election disputes and/or suits against the Tribe. 25 C.F.R. § 11.118(b), § 11.118(d). Whether a tribal law meets the requirements of those regulations is a question of ***federal law***, not tribal law.

Defendant also asks this Court to defer to the decision of the CFR Court's Appellate Division ("**Appellate Division**"), which affirmed Defendant's determination of jurisdiction. Def. Mot. Dismiss 6. Such deference is not required in a case, such as this one, where the Appellate Division's opinion turns on a question of federal law, not tribal law.[6] Moreover, such deference would run counter to the prudential rule that a party must exhaust tribal court remedies before asking this Court to review a CFR Court's determination of jurisdiction. See Tillett, 931 F.2d at 641 (allowing for federal court review of CFR Court jurisdiction only after plaintiff first appeals to Kiowa Tribe's CFR Court Appellate Division). Plaintiff exhausted its tribal court remedies, as required. See Iowa Mut., 480 U.S. 9 (1987). Doing so did not strip this Court of jurisdiction.

[6] Although Defendant states that the Appellate Division "appropriately resorted to tribal law embodied in the language of the Tribal Constitution," Defendant implicitly acknowledges that the Appellate Division primarily applied federal law when it "determined that the Tribal Constitution's grant of jurisdiction over tribal disputes ***met the requirements of 25 C.F.R. § 118.***" Def.'s Mot. Dismiss 6 (emphasis added). The Appellate Division, in affirming Judge Douthitt's determination of jurisdiction, similarly misapplied federal law, and this Court has jurisdiction to review that determination. Tillett, 931 F.2d at 641 (allowing for federal court review of CFR Court jurisdiction only after plaintiff first appeals to Kiowa Tribe's CFR Court Appellate Division).

Finally, although the Kaw Nation court dismissed the complaint because it was unrelated to jurisdiction, it expressly affirmed that federal courts have authority under § 1331 to review a tribal court's determination of jurisdiction:

> Plaintiffs contend that under the Supreme Court's decision in National Farmers Union Insurance Companies v. Crow Tribe a federal court is empowered to determine under 28 U.S.C. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. ***Plaintiffs are correct that under National Farmers the outer boundaries of tribal jurisdiction —*** particularly over non-members ***— may be a matter of federal law. But Plaintiffs do not contest the limits of tribal jurisdiction***; they challenge the right of Lujan, Morris and Tripp to exercise judicial authority.

Id. at 1142-43 (emphasis added, internal citations and quotations omitted). Far from divesting this Court of jurisdiction, as Defendant suggests, the Tenth Circuit's holding in Kaw Nation squarely affirms this Court's authority to review Defendant's exercise of jurisdiction.

2. Runs After and Sac & Fox Tribe

Additionally, in a footnote, Defendant cites to the Eighth Circuit's holdings in Runs After v. United States, 755 F.2d 347 (8th Cir. 1985), and Sac & Fox Tribe of the Mississippi in Iowa v. Bureau of Indian Affairs, 439 F.3d 832 (8th Cir. 2006), for the proposition that federal courts lack jurisdiction to interpret tribal law. Def.'s Mot. Dismiss 5 n.3 (*citing* Runs After, 755 F.2d at 352, and Sac & Fox Tribe, 439 F.3d at 835 (8th Cir. 2006)). However, the present case presents no tribal law to interpret. The federal regulations that define and limit Defendant's jurisdiction allow that a tribe may expand that jurisdiction to include election disputes by passage of a resolution, ordinance, or referendum. 25 C.F.R. § 11.118(b). In addition, those regulations allow that a tribe may waive its sovereign immunity by passage of a resolution or ordinance. 25 C.F.R. § 11.118(d). Defendant offers no such resolution, ordinance, or referendum***—because Plaintiff has never enacted such a resolution, ordinance or referendum***. The federal courts in Runs After and Sac & Fox Tribe found they lacked jurisdiction because those cases concerned

interpretation of *tribal* law. The present matter concerns interpretation of *federal* law, and whether a federal employee exceeded his authority under federal law.

3. Wheeler I and Wheeler II

Finally, Defendant's cites Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987) [Wheeler II], for the proposition that tribal plaintiffs must seek relief in a tribal forum, not the federal courts. Def.'s Mot. Dismiss 4-5 (citing Wheeler II, 835 F.3d 260-62). However, Defendant reads Wheeler II too broadly. Wheeler brought civil rights claims against Cherokee Nation officials, and Wheeler II rightly held that federal courts are not the appropriate venue for a tribal member's civil rights claim against his tribe. 835 F.2d 261-62. Wheeler *did not challenge a tribal court's exercise of jurisdiction*, as Plaintiff does; consequently Wheeler did not fall within the body of law holding that federal courts may review a tribal court's determination of jurisdiction. See supra Parts II(A)-(C). Wheeler II turned entirely on the nature of Wheeler's claims and, therefore, its holding concerning federal court jurisdiction over civil rights claims against an Indian tribe is wholly inapplicable to the present case.

However, a close reading of Wheeler II, and of "a companion case"[7] also decided by the Tenth Circuit, shows that those cases actually support Plaintiff's claim that Defendant lacked jurisdiction. Defendant cites with approval the Wheeler II court's conclusion that "[t]he right to conduct an election without federal interference is essential to the exercise of the right to self-government." Def.'s Mot. Dismiss 5 (*quoting* Wheeler II, 835 F.2d at 262). That very principle animates 25 C.F.R. § 11.118(b), which bars Defendant from adjudicating any tribal election dispute. The Tenth Circuit made the point more plainly in Wheeler I, in which the plaintiff

[7] Wheeler v. U.S. Dep't of Interior, 811 F.2d 549 (10th Cir. 1987) [Wheeler I]. The Tenth Circuit, in its Wheeler II opinion, described Wheeler I as "a companion case." Wheeler II, 835 F.2d at 260-61.

sought to compel Interior to stay certification of the Cherokee Nation's election results. Wheeler I, 811 F.2d at 550. Interior refused, arguing that "when the tribe provides a means for challenging elections, the Department has no authority to overrule the decision of the tribal government as to whether a candidate is legally elected." Id. at 552. The Tenth Circuit ruled in favor of Interior, holding that "when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere." Id. at 553.

In the present case, Defendant does not deny that the Tribe has a body, the Election Board, which hears election disputes. Cf. Pl.'s Ex. C (certifying results of the Referendum). In fact, the Enyart Plaintiffs appealed the results of the Referendum to the Election Board, which denied their challenge.[8] Because the validity of the Tribe's Referendum was affirmed by the Tribe's Election Board, and because Defendant is an employee of Interior, Wheeler I should have precluded the Defendants' unlawful exercise of jurisdiction.

E. The question of whether an Indian tribe has waived its sovereign immunity arises under federal common law and, therefore, is reviewable by the federal courts under Section 1331.

Although Plaintiff's claims arise under the federal regulations that limit the jurisdiction of CFR Courts, Plaintiff's claims concerning the abrogation of its tribal sovereign immunity need not rely on the federal regulations alone. The U.S. Supreme Court has determined that "[f]ederal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331." National Farmers Union, 471 U.S. at 850. Federal courts have described the doctrine of tribal sovereign immunity as one such area of federal common law. See, e.g., TTEA

[8] "The Petitioners sought to exhaust their administrative tribal remedies by filing a challenge of the election results, and they did file the same. On April 4th, 2009, the Election Board issued a letter which stated that: 'THE CHALLENGE PRESENTED REGARDING THE RESULTS OF THE REFERENDUM ELECTION HELD SATURDAY, MARCH 21, 2009, IS **DENIED**.'" Pl.'s Ex. D 4 (emphasis in original).

v. Ysletta Del Sur Pueblo, 181 F.3d 676, 680 (1999) (describing "federal common law doctrine of tribal sovereign immunity"). That doctrine holds that a tribe's waiver of its sovereign immunity, in order to be valid, must be express and unambiguous. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed" (citation and quotation omitted).); Native American Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1293 (10th Cir. 2008) (same).

The federal regulations that define and limit Defendant's jurisdiction specifically prohibit Defendant from hearing a suit against Plaintiff unless Plaintiff "explicitly waives its tribal immunity by tribal resolution or ordinance." 25 C.F.R. § 11.118(d). Defendant heard a suit against Plaintiffs, but can point to only an implied waiver, at best. Whether such a waiver is "unequivocally expressed" is a question of federal common law, which this Court has authority to resolve under § 1331.

III. Defendant's *ultra vires* acts strip him of his sovereign immunity; in the alternative, his sovereign immunity is waived by 5 U.S.C. § 702.

Defendant is a "federal officer[] or agent[]," and there is a general presumption that neither the United States nor its agencies and officers may be sued without the consent of the sovereign." Def.'s Mot. Dismiss 6-7. General jurisdictional statutes such as 28 U.S.C. § 1331 do not waive the Government's sovereign immunity. Id. at 7-8. Plaintiff does not dispute these general statements.[9] However, "[t]hese holdings do not end our odyssey. Although the government enjoys broad protection through the operation of the sovereign immunity doctrine, that doctrine does not necessarily shield federal officers to the same extent." Muirhead v.

[9] Plaintiff, however, notes the tension between Defendant's position in the previous section—that this is a mere intratribal dispute between two branches of the tribal government—and Defendant's emphatic insistence that he is a federal agent. Compare Def.'s Mot. Dismiss 1-2 (describing "quintessentially, an internal tribal dispute), Def.'s Mot. Dismiss 6-7 (describing Defendant as a federal agent).

Mecham, 427 F.3d 14, 18 (1st Cir. 2005). Sovereign immunity is no defense where, as here, Plaintiff alleges that Defendant acted outside of his legal authority, and Plaintiff seeks only prospective injunctive relief.

A. The *ultra vires* doctrine, or Larson-Dugan exception, lifts the shield of sovereign immunity where, as here, the Plaintiff alleges that Defendant acted outside the bounds of his legal authority.

Defendant quotes at length from Wyoming v. United States, 279 F.3d 1214 (10th Cir. 2002), for the proposition that sovereign immunity "generally" shields federal officers from suits seeking injunctive relief. Def.'s Mot. Dismiss 8 (quoting Wyoming, 279 F.3d at 1225). The sentences immediately following the quoted material explain that a suit alleging that a federal officer's "conduct is not within the officer's statutory powers" falls within one of "[t]wo narrow exceptions to the general bar against suits seeking specific relief from the United States,." Wyoming, 279 F.3d at 1225.

Under the *ultra vires* doctrine (also known as the Larson-Dugan exception), the U.S. Supreme Court has long held that sovereign immunity does not shield a federal official who has acted outside the scope of his legal authority:

> Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949); accord Dugan v. Rank, 372 U.S. 609, 621-22 (1963); Painter v. Shalala, 97 F.3d 1351, 1358 (10th Cir. 1996) ("the *ultra vires* doctrine allows a plaintiff to overcome the doctrine of federal sovereign immunity where it is alleged a federal officer has acted outside of his or her authority").[10] A plaintiff may

[10] See also Colorado v. Toll, 268 U.S. 228, 230 (1925); Amer. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 111 (1902); Noble v. Union River Logging Railroad Co., 147 U.S.

invoke the *ultra vires* doctrine either when alleging that "an officer of the United States . . . is acting in his official capacity but is acting outside his statutory authority,"[11] or when suing an officer in his individual capacity. Wildwood Child and Adult Food Care Program, Inc. v. Colorado Dep't of Pub. Health & Environment, 122 F.Supp. 2d 1167, 1171 (D. Colo. 2000). The *ultra vires* doctrine does not apply where a plaintiff's proposed remedy "will require affirmative action by the sovereign." Missouri State Highway Comm'n v. Volpe, 479 F.2d 1099, 1123 (8th Cir. 1973)(quoting Larson, 337 U.S. at 691 n.11). However, the doctrine does apply where "it requires only that the defendant officers cease unauthorized action." Volpe, 479 F.2d at 1123.

Plaintiff alleges that Defendant adjudicated an election dispute without a resolution, ordinance, or referendum as required by 25 C.F.R. § 11.118(b), and heard a suit against the Tribe without a resolution or ordinance waiving sovereign immunity as required by 25 C.F.R. § 11.118(d). The question before this Court is whether Defendant's exercise of jurisdiction was "business which the sovereign had not empowered him to do or he is doing it in a way which the sovereign has forbidden." Larson, 337 U.S. at 689. If Defendant's exercise of jurisdiction violated the regulations, "the Larson-Dugan exception would be triggered and hence no waiver of sovereign immunity is required here." Swan v. Clinton, 100 F.3d 973, 981 (D.C. Cir. 1996). In other words, "there is no sovereign immunity to waive—it never attached in the first place." Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1329 (D.C. Cir. 1996).

165, 171-72 (1893); The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 681 (1860); McQueary v. Laird, 449 F.2d 608, 611 (10th Cir. 1971) (quoting Harper v. Jones, 195 F.2d 705, 706 (10th Cir. 1952)). The *ultra vires* doctrine may apply either where a federal officer's authority is specifically limited and he nonetheless exceeds that authority, or where the grant of authority to the officer is itself unconstitutional. Muirhead, 427 F.3d at 19.

[11] Although some cases refer specifically to an officer's "statutory" authority, a plaintiff may invoke the *ultra vires* doctrine where a federal official's authority is defined by regulation. Cabeza de Vaca Land & Cattle Co. v Babbitt, 58 F. Supp. 2d 1226, 1230 (D. Colo. 1999) ("The scope of an official's delegated power is generally defined by reference to the statute ***or regulations*** setting out the official's duties" (emphasis added).).

B. Even if the *ultra vires* exception did not apply, which it does, the United States has waived its sovereign immunity for the purposes of this suit under 5 U.S.C. § 702.

Plaintiff alleges that Defendant acted under the guise of his legal authority, but beyond the bounds of that authority; and Plaintiff seeks nonmonetary relief. That brings Plaintiff's claims within the ambit of 5 U.S.C. § 702, which reads, in relevant part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. . . . Provided, That any mandatory or injunctive decree shall specify the federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

The Tenth Circuit has long interpreted this language as a broad waiver of federal sovereign immunity. Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1233 (10th Cir. 2005) ("Aware of the impact of the doctrine of sovereign immunity on vindication of constitutional and other legal rights, Congress passed legislation in 1976 to waive sovereign immunity in most suits for nonmonetary relief."); United States v. Murdoch Machine & Eng'g Co. of Utah, 81 F.3d 922, 930 n.8 (1996) (describing § 702 as "provid[ing] a general waiver of the government's sovereign immunity from injunctive relief"); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980) (en banc), *aff'd* 455 U.S. 130 (1982) (suit against the Secretary of Interior for nonmonetary relief properly brought in district court under § 702)).[12] In fact, the waiver in § 702 repeatedly has been found to be so broad as to encompass suits not brought under the Administrative Procedure Act. Simmant, 413 F.3d at 1233; Reich, 74 F.3d at 1328; Red Lake Band of Chippewa Indians v. Barlow, 846 F.2d 474, 476 (8th Cir. 1988). At least one federal district court has applied this holding to find that CFR Courts do not enjoy sovereign immunity against

[12] See also Black Hills Inst. of Geol. Research v. S.D. Sch. of Mines & Tech., 12 F.3d 737, 740 (8th Cir. 1996) (describing § 702 as a "broad waiver of sovereign immunity").

parties seeking declaratory and injunctive relief. Panther Partners, LLC, v. Lujan, No. CIV-09-1251-R, at 6-7 (W.D. Okla. Apr. 19, 2010) (order denying mot. dismiss). The Panther Partners court ultimately found it had "subject matter jurisdiction under 28 U.S.C. § 1331 and federal common law to determine whether [the CFR Court for the Kiowa Tribe, and that court's judge and clerk] were acting outside their authority in an ongoing violation of federal law, as alleged"). Id. at 7.

Because Defendant has no sovereign immunity from a suit seeking nonmonetary relief from his *ultra vires* acts, and because § 702 waives any immunity Defendant did enjoy, sovereign immunity does not bar this Court from exercising jurisdiction over this dispute.

IV. Conclusions

Contrary to Defendant's assertions, this case is not an intratribal dispute. It is a dispute between the Tribe's elected government, and a federal agent who has exceeded his jurisdiction as defined and limited by federal regulations. This Court has jurisdiction to hear such a suit, because it arises from violations of federal regulations and federal common law, and because the United States government, under both the common law and the APA, has waived its immunity from suit for declaratory and/or injunctive relief under such circumstances. For these reasons, Plaintiff respectfully requests this Court **DENY** Defendant's Motion to Dismiss.

Dated this 2nd day of April, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of April, 2012, I electronically transmitted the foregoing PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF Registrants:

Thomas Scott Woodward, United States Attorney
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BY: /s/ John G. Ghostbear
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