UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEYENNE AND ARAPAHO TRIBES, on its own behalf, and as *parens patriae* on behalf of its members; and CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH,	)	
Plaintiffs-Appellants,	)	**CASE NO. 13-6117**
v.	)	
FIRST BANK AND TRUST COMPANY; and DOUG HAUGHT, In his official capacity as a District Judge, State of Oklahoma,	)	
Defendants-Appellees.	)	

On Appeal from the United States District Court
for the Western District of Oklahoma
The Honorable Judge Stephen Friot
W.D. No. 5:12-cv-00514-F

APPELLANTS' CONSOLIDATED OPENING BRIEF

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Oral Argument is Requested.

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The Cheyenne and Arapaho Tribes ("Tribes"), on its own behalf, and as *parens patriae* on behalf of its members, and the Cheyenne and Arapaho Tribes' Executive Branch ("Executive Branch"), in support of their Consolidated Opening Brief state:

FED. R. APP. P. RULE 26.1. CORPORATE DISCLOSURE STATEMENT

There is no such corporation.

PRIOR OR RELATED APPEALS

The Tribes, Janice Prairie Chief-Boswell, Governor of the Tribes, nor its Executive Branch have a prior related appeal.

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction pursuant to: 28 U.S.C. § 1331 because Depositor presented federal questions arising under the Constitution, laws, and treaties of the United States; 28 U.S.C. § 1362 because Depositor is a federally-recognized Indian tribe asserting claims arising under the Constitution, laws, and treaties of the United States, and federal common law; and 28 U.S.C. § 1367 because Depositor presented state law claims and this Court has supplemental jurisdiction. The District Court issued a final order disposing of Depositor's claims on November 28, 2012. Depositor timely filed a notice of appeal in accordance with Rule 4(a)(1) on May 3, 2013.

This Court has jurisdiction under 28 U.S.C. § 1291, because it is an appeal of a final decision of the District Court which disposes of Depositor's claims. This Court also has jurisdiction pursuant to 28 U.S.C. § 1291 and the collateral order doctrine that

permits appeals of interlocutory orders so long as the order conclusively decides an issue separate from the merits but which are effectively unreviewable after final judgment. Here, questions of tribal sovereign immunity and of tribal rights pursuant to federal laws are issues separate from the merits of the case, but are effectively unreviewable after the final judgment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing Depositor's claims where there were due process violations.

2. Whether the District Court erred in its application of the Anti-Injunction Act.

3. Whether the District Court erred in dismissing Depositor's claims pursuant to *Inyo*.

4. Whether the District Court erred in dismissing claims for prospective injunctive relief.

5. Whether the dismissal without leave to amend was in error.

STATEMENT OF THE CASE

First Bank brought a declaratory judgment action in Custer County, Oklahoma to declare who the Cheyenne and Arapaho Tribes' ("Tribes") governor was as well as who was the proper signatory for depository accounts. Those accounts were opened by the Tribes' Governor, Janice Prairie Chief-Boswell, the sole signatore thereto.

Depositor filed its own declaratory action in Tribal Court and secured a judgment affirming Governor Boswell's signature authority over Depositor's accounts.

Doug Haught ("Haught"), a Custer County judge, assumed jurisdiction in *First Bank and Trust Co. v. Cheyenne and Arapaho Tribes, et al.*, Case No. CV-2011-53 ("State Court Action"), over Depositor's objections. First Bank placed an "administrative hold" on all funds in Depositor's accounts, pending a decision of the Custer County Court. Later, Haught issued what was effectively a *sua sponte* injunction on Depositor's funds, denied First Bank's *Application to Close Accounts* and distribute funds to Depositor ("Application") [Doc. 65], Aplt.App., vol. 12, 3307-10, and denied all requests to disburse the funds.

Depositor filed suit against First Bank and Haught in the United States District Court for the Western District of Oklahoma for illegal seizure of their funds, to enjoin Haught from proceeding with the State Court Action, and for a release of its funds. Haught and First Bank both moved to dismiss Depositor's claims. On November 28, 2012, the District Court granted the motions to dismiss, ruling there was no federal subject matter jurisdiction and that no claims were stated for which relief can be granted. Depositor subsequently filed a *Joint Motion to Vacate Judgment or, in the Alternative, to Alter or Amend Judgment and Memorandum in Support Thereof* [Doc. 65] ("Motion to Vacate"), requesting that the District Court reverse its November 28, 2012 *Order* [Doc. 63] in light of new evidence and subsequent events or, in the alternative, dismiss Depositor's federal claims without prejudice and allow it to amend its complaint.

Aplt.App., vol. 12, 3268-94. The District Court issued an *Amended Judgment* (1) allowing Depositor to supplement the record with new evidence, (2) altering its previous judgment to dismiss certain claims against Haught, and (3) denying Depositor's request to vacate the previous dismissals or, in the alternative, to dismiss remaining federal claims without prejudice and with leave to amend.

STATEMENT OF FACTS

1. The Tribes are a federally-recognized Indian tribe and are thereby entitled "to the immunities and privileges available to . . . federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.2.

2. In January 2010, Janice Prairie Chief-Boswell ("Governor Boswell") was sworn into office as Governor of the Tribes. Aplt.App., vol. 1, 176-79.

3. In February 2011, Governor Boswell opened the accounts with First Bank and Trust Company ("First Bank"), signed the contracts, the signature cards, and is the sole signatore. Aplt.App., vol. 8, 2165-74; *Id.* at 2179-83.

4. The contracts between First Bank and Depositor provide that *they are subject to applicable federal laws and the laws of the state of Oklahoma*. Aplt.App., vol. 1, 143, ¶ 2.

5. In the Depository accounts, Governor Boswell deposited funds for certain federal contracts and grants. The federal contracts provide:

- emergency paramedic services;
- "advanced pre-hospital services" with advanced level trained medics;

- critical care transport;
- medical equipment including diabetic supplies, wheelchairs, oxygen machines, and blood pressure monitors;
- critical life-saving drugs including insulin, high blood pressure medication, antibiotics, hypertension medication, as well as cancer medication;
- home health care services to the disabled and the bedridden;
- temporary shelters and emergency response during disasters;
- firefighter services;
- repair to dams and watersheds;
- investigation and provision of child and adult protective services for those physically, emotionally, sexually, or financially abused and neglected;
- substance abuse program services;
- food, clothing, shelter assistance;
- a head start at education for children;
- foster care placement for children who are homeless and in need of aid;
- already earned wages of the Tribes' employees;
- the Tribes' unemployment tax obligations;
- state and federal income tax withholdings;
- social security; and
- Medicare withholding.

Id. at vols. 1-6, 180-1690.

6. On April 15, 2011, First Bank indicated in its *Counterclaim and Cross-Claim*, in *Leslie Wandrie-Harjo v. Janice Prairie Chief-Boswell*, Case No. 5:11-cv-00171-F (W.D. Okla. 2011), that "Boswell is identified as the Governor of the Tribe" and indicated "under the agreements governing the accounts at First Bank, Governor Boswell is the authorized signor of items processed in such accounts and First Bank is entitled to rely upon the authorization of Boswell in paying funds from the accounts maintained by the Tribe at First Bank." Aplt.App. vol. 8, 2173, ¶ 7.

7. On October 27, 2011, First Bank sought a declaratory judgment in the State Court Action to declare the proper signatore for the accounts. *Id.* at vol. 6, 1691-95.

8. The Tribes have not waived their or Governor Boswell's sovereign immunity, nor have they consented to the State Court Action. *Id.*, vol. 1, 176-77, ¶ 5-8.

9. Congress has not waived the Tribes' or Governor Boswell's sovereign immunity nor has Congress consented that the State Court Action be brought against the Tribes or their Governor. Aplt.App., vol. 1, 176-77, ¶5-8.

10. On March 15, 2012, Depositor filed a *Joint Consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction* in the State Court Action and asserted their sovereign immunity from suit. *Id.* at vol. 6, 1698-1772.

11. On April 13, 2012, Depositor filed a *Complaint for Declaratory Relief* in the Cheyenne and Arapaho Tribal Court ("Tribal Court Action") regarding governorship and signatory issues. *Id.* at vol. 8, 2195-2200.

12. On April 16, 2012, Haught declined to dismiss the State Court Action. *Id.* at 2202-44; *Id.* at 2246.

13. On April 20, 2012, Defendant First Bank was personally served with the *Civil Summons* and the *Complaint for Declaratory Relief* from the Tribal Court. *Id.* at 2249.

14. On April 24, 2012, First Bank "place[d] an administrative hold on all funds in all of Depositor's accounts at First Bank." Such act froze the funds pending "a decision . . . by the Court." *Id.* at 2251-52.

15. The administrative freeze resulted in unpaid bills, fees and penalties associated with bounced checks, and closed accounts previously held by the Tribes with

various vendors to provide essential governmental services for the Tribes and its tribal members. *Id.* at vols. 8-9, 2274-3176.

16. On April 30, 2012, the United States expressed its concern about Depositor's ability to carry out the federal contracts and grants in light of First Bank's administrative freeze, and threatened that if services were discontinued or limited, the United States would reassume the contracts and grants administration. Aplt.App., vol. 8, 2269-70.

17. On May 4, 2012, Depositor brought suit against First Bank in the United States District Court for the Western District of Oklahoma for the illegal seizure of funds. *Id.*, vol. 1, 17-148.

18. On May 15, 2012, Depositor amended its complaint to add Haught to enjoin him from proceeding with the State Court Action, and for a release of its funds. *Id.* at vols. 1-6, 149-1817.

19. On May 24, 2012, the United States affirmed its government-to-government relationship for purposes of the federal contracts and grants was with Janice Prairie Chief-Boswell, the elected governor of the Tribes, and she was the only authorized signatore to approve federal contracts and grants payments. *Id.*, vol. 8, 2180-83.

20. First Bank did not file an Answer to the *Complaint for Declaratory Relief* filed in the Tribal Court. *Id.* at vol. 11, 3178-89.

21. On June 1, 2012, First Bank was personally served with a copy of the *Joint Motion for Default Judgment* in the Tribal Court Action. *Id.* at 3191.

22. On June 8, 2012, Haught conducted a trial on the merits in the State Court Action.

23. At trial, Depositor established that if there were any adverse claimants, they had not followed the adverse claims statute.

24. On June 15, 2012, Haught filed a *Motion to Dismiss*, in federal court and stated: "The dispute in this action is between two governing bodies." Aplt.App., vol. 7, 2045-46.

25. On June 21, 2012, the Tribal Court held Janice Prairie Chief-Boswell was the governor and as such was the proper signatory to the depository accounts. *Id*. at vol. 7, 2078-81.

26. On June 21, 2012, Haught issued an untitled document "den[ying]" the *Petition for Declaratory Relief* in the State Court Action. It also "convert[ed] this account to a court supervised account," and "direct[ed] the bank not to dispense these funds except on the court['s] order." There was no pleading for an injunction by affidavit or verified petition; no notice that an injunction would be considered; no bond posted by a moving party (there was not even a moving party); no opportunity for Depositor to discuss the issuance of an injunction; no facts shown that an injunction should be issued; no requirements for an injunction being met; no one established that the extraordinary

remedy and relief of an injunction should be granted. In fact, at a trial on the merits, an injunction was not mentioned. *Id*. at vol. 11, 3193-95.

27. On July 6, 2012, First Bank filed a *Motion to Dismiss* and clearly stated the State Court Action would decide who the Tribes' Governor is. *Id*. at vol. 8, 2097-98.

28. On August 15, 2012, the United States again affirmed its government-to-government relationship for purposes of the federal contracts and grants was with Janice Prairie Chief-Boswell. Aplt.App., vol. 12, 3296-97.

29. On August 24, 2012, First Bank filed an *Application* in the State Court Action to distribute the funds to Depositor and close the accounts. Depositor did not oppose closing the accounts. *Id*. at 3307-10.

30. On September 6, 2012, the Interior Board of Indian Appeals upheld the formal recognition of Governor Boswell's gubernatorial authority and placed its decision into immediate effect. *Id*. at 3299-3305.

31. On September 17, 2012, Haught considered First Bank's *Application* in the State Court Action to distribute the funds to Depositor. Despite Depositor not opposing that, he denied the application. *Id*. at 3312.

32. On October 5, 2012, the "Legislative Branch" filed an *Application for Disbursement of Funds* in the State Court Action. Haught considered that filing on November 19, 2012, and denied such disbursement.

SUMMARY OF THE ARGUMENT

The Court erroneously granted Haught and First Bank's Motions to Dismiss, and erroneously determined declaratory and injunctive relief was unavailable to Depositor. Federal questions were present. Depositor stated claims for Constitutional Due Process and claims arising under the Constitution, laws and treaties of the United States for deprivation of their property. The Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, does not bar Depositor's claims because they came within the following exceptions to the AIA: (1) Acts of Congress expressly authorized the type of injunctive relief Depositor sought and, (2) an injunction was necessary to aid in federal jurisdiction. The Court also erred in ruling Depositor did not qualify as a "person" for the purposes of a 42 U.S.C. § 1983 suit because Depositor brought suit to vindicate non-sovereign and quasi-sovereign rights, which fall in the purview of the relief available under the statute. The Court erred in ruling prospective injunctive relief was unavailable under § 1983, where Depositor pled and satisfied the requisite elements therefor, and in dismissing the claims without leave to amend.

ARGUMENT

This Court reviews *de novo* a district court's grant of a 12(b)(6) motion for failure to state a claim. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). A *de novo* review requires the court to accept all "well-pleaded allegations of complaint as true" and to "construe them in the light most favorable to the plaintiff," i*d.*, and includes

a *de novo* review of a district court's conclusions of law, *see Hausler v. Felton*, 457 F. App'x. 727, 730-731 (10th Cir. 2012).

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S DUE PROCESS CLAIMS

The issue is whether the court erred in dismissing Depositor's property claims where there were due process violations. Aplt.App., vol. 12, 3255; *Id.* at 3258.

The Fourteenth Amendment to the United States Constitution provides that no state, in enacting or enforcing any law, shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Every constitutionally protected liberty or property interest is protected against loss by the Due Process Clause. *See Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987). That Clause requires the state to afford certain procedural safeguards whenever it seeks to limit or withhold a liberty or property interest. *See Boddie v. Connecticut*, 401 U.S. 371 (1971).

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Swipies v. Kofica*, 419 F.3d 709, 715 (8th Cir. 2005). Normally, procedural safeguards guaranteed by the Due Process Clause, including the right to notice and hearing, must be afforded by the government prior to deprivation of liberty or property. *See Boddie*, 401 U.S. at 379; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.") Determining what process is due in any given situation requires balancing three interests:

> (1) [T]he private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Eighth Circuit applied the *Mathews* balancing test in *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994), to determine what post-deprivation process was due to the owner of a car that had been impounded under exigent circumstances by local officials. The owner was given a hearing seven (7) days after the impoundment, a delay the owner claimed violated his rights. The Eighth Circuit agreed with the owner that (1) automobiles "occupy a central place in the lives of most Americans;" (2) "a more expeditious hearing would significantly reduce the harm suffered" for owners wrongly deprived of their vehicles; and (3) the only interest the state has in delaying the hearing is the inconvenience of gathering the facts sooner, because the hearing "must be provided in any event." *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994).

Courts reject *sua sponte* injunctions as due process violations. In *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1249 (10th Cir. 2006), a district court, on its own and without providing any form of notice, issued its injunction against a tribe. There, the plaintiff had not requested an injunction nor had the court informed anyone in any public proceeding that it was considering issuing an injunction. *Id*. at 1252. This Court concluded that the *sua sponte* injunction was a clear abuse of discretion because the tribe had not been given notice that an injunction was being considered. *Id*. at 1253. *See, e.g.*,

Weitzman v. Stein, 897 F.2d 653, 658 (2d Cir. 1990) (holding that no notice prior to a hearing and a *sua sponte* order freezing party's assets, violates due process); *Tripati v. Beaman*, 878 F.2d 351, 354 (10th Cir. 1989) (holding that the litigant is "entitled to notice and an opportunity to oppose the court's order before it is instituted").

In *Solis v. Matheson*, 563 F.3d 425, 438 (9th Cir. 2009), the court vacated a district court decision to appoint a receiver when there was no notice, argument, briefing, or prayer for relief in the Complaint regarding such appointment. The court held that receivership could seriously interfere with the defendant's property rights by ousting him or her from control. 563 F.3d at 437. The *Solis* court also ruled that the Complaint did not mention or plead any facts supporting receivership, did not request receivership as a form of relief, and that the proposed judgment was the first instance in which a receivership was mentioned. *Id*. at 438. In addition, it found the court had not considered on the record any of the relevant factors before determining it would appoint a receiver. *Id*.

In this case, Depositor was deprived of procedural due process when the Court issued a *sua sponte* injunction "assum[ing] jurisdiction over these funds and direct[ing] the bank not to dispense those funds except on the court's order." Aplt.App., vol. 11, 3193-95. The depository accounts are clearly property interests, and no notice or opportunity to be heard was given. *Coleman v. Turpen*, 697 F.2d 1341, 1344 (10th Cir. 1982) (cash is a property right and the state's deprivation thereof is a violation within the meaning of the Fourteenth Amendment) (citing *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972)). There was no pleading for an injunction by affidavit or verified petition; no

notice that an injunction would be considered; no bond posted by a moving party (there was not a moving party); no opportunity for Depositor to discuss the issuance of an injunction and there were no facts shown that an injunction should be issued. Aplt.App., vol. 6, 1691-95, ¶¶ 16-17; *Id.* at vol. 11, 3193-95. In fact, at a trial on the merits, an injunction was not mentioned. *Id*. at vol. 11, 3193-95. Additionally, no notice was given that Haught would make himself the receiver of Depositor's funds. Such departure offends the standards of due process and deprived Depositor of fundamental rights to property.

The "private interest" at stake, namely Depositor's dominion and control over its property, is significant. *Mathews*, 424 U.S. at 335. And neither First Bank nor Haught had any cognizable interest in Depositor's property. Such oppressive interference in Depositor's property, especially for such an extended and indefinite duration, is precisely what the Fourteenth Amendment was designed to prevent.

The "risk of an erroneous deprivation" was unnecessarily high when Haught issued, without a request therefor by any party, a *sua sponte* order, 13 days after a trial had concluded. *Mathews*, 424 U.S. at 335. Aplt.App., vol. 6, 1691-95; *Id*. at vol. 12, 3452-65; *Id*. at vol. 11, 3193-95. There was no opportunity to challenge the evidence or law under these circumstances. Haught's decision to deprive Depositor of even rudimentary forms of procedural fairness has no basis in law.

The "fiscal and administrative burde[n]" of providing Depositor with notice that he would consider an unpled-for-request was so slight one has to wonder why Haught

refused to provide any. *Mathews* 424 U.S. at 335. *See Bliek v. Palmer*, 102 F.3d 1472, 1477 (8th Cir. 1997) (noting that where the state can provide meaningful notice "with little cost," it should be provided). As for providing Depositor an opportunity to be heard, it was not an undue burden in light of the safeguards it would have provided. As the Eighth Circuit stated in a related context, "[g]iven that a [meaningful] hearing must be provided in any event, the additional administrative and financial burden imposed by a prompt and expeditious hearing will be small." *Coleman* 40 F.3d at 261.

The District Court erred because violations of due process arise under the Constitution, laws, or treaties of the United States are federal questions reviewable by the Court. *U.S. v. Clark*, 84 F.3d 378, 381 (10th Cir. 1996).

II. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE ANTI-INJUNCTION ACT

The issue is whether the District Court erred in its application of the AIA to several of Depositor's claims and, thereby, erred in its dismissal of such claims pursuant to 12(b)(6). Aplt.App., vol. 12, 3259.

A. Declaratory Relief Was Available

The issue is whether the Court erred in dismissing claims for declaratory relief, ruling it would have the same effect as an injunction that would be barred by the AIA *Id*. at vol. 12, 3262-64.

It is well established that a state court judge who violates federal law can be sued in federal court for appropriate relief. *See Pulliam v. Allen*, 466 U.S. 522, 539 (1984) (authorizing issuance of a federal injunction against a state magistrate when "in the

opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm."). Under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, declaratory relief is available against judicial officials, regardless of the availability of injunctive relief after the enactment of the Federal Court Improvement Act ("FCIA"). *Lawrence v. Kuenhold*, 271 F. App'x. 763, 766 (10th Cir. 2008); 42 U.S.C. § 1983 (placing no limitations on declaratory relief); 28 U.S.C. § 2201 (same). *See Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 765 (9th Cir. 2010); *Tesmer v. Granholm*, 114 F.Supp. 2d 604 (E.D. Mich. 2000); *LeClerc v. Webb*, 270 F.Supp.2d 779, 793 (E.D. La. 2003) ("Defendants can make no colorable argument that the FCIA did anything to alter the landscape with respect to declaratory relief. Declaratory relief against judges acting in their judicial capacities was well-established before the FCIA.").

If federal declaratory judgments have injunctive effects they come within AIA's prohibition. This limitation, however, does *not* apply to federal courts issuing declaratory judgments where significant federal questions are present. *Thiokol Chemical Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328, 1332 (3d Cir. 1971) (declaratory judgment permitted on federal question); *see Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (declaratory judgment on constitutional question permitted in extraordinary circumstances); *Puerto Rico Int'l Airlines, Inc. v. Silva Recio*, 530 F.2d 1342 (1st Cir. 1975); *Absentee Shawnee Tribe of Okla. v. Combs*, 2009 WL 1752412, at * 7 (W.D. Okla. June 18, 2009). As discussed in detail *infra*, this case turns on questions of federal law more familiar to federal courts.

In this case, the Court had authority to issue declaratory relief against Haught because overwhelming federal questions were present. Further, relief from Haught's state action was "constitutionally required and necessary to prevent irreparable harm" to Depositor. *Pulliam*, 466 U.S. at 539. Because Haught violated federal law in the manner alleged in the *Amended Verified Complaint* [Doc. 16] ("Amended Complaint"), Aplt.App., vols. 1-6, at 149-1817, Depositor was entitled to an appropriate remedy to prevent future violations. Such an order, if granted, would constitute a form of prospective declaratory relief. *Lawrence*, 271 F. App'x. at 766 ("A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act."). Accordingly, it was not barred, and the District Court should not have summarily dismissed the declaratory judgment claims. *Crowe and Dunlevy, P.C. v. Stidham*, 609 F.Supp.2d 1211, 1218 (N.D. Okla. 2009), *aff'd* 640 F.3d 1140 (10th Cir. 2011).

B. Injunctive Relief Was "Expressly Authorized By Act of Congress"

The AIA provides three (3) exceptions that authorize a federal court to grant an injunction against state court proceedings: an injunction may be granted if "expressly authorized by Act of Congress, or where necessary in aid of federal jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

There is no prescribed formula for determining whether an act falls within the "expressly authorized by Act of Congress" exception to the AIA. *Mitchum v. Foster*, 407 U.S. 225, 237 (1972); *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511,

516 (1955). There are three criteria for determining if a federal law is "expressly authorized:" (1) the federal law does *not* need to contain an express reference to the AIA, (2) the federal law need *not* expressly authorize an injunction of state court proceedings, and (3) an act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. *Mitchum*, 407 U.S. at 237 (emphasis added). The test for this third prong to determine if a congressional act is "expressly authorized" under the AIA is:

> whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.

Mitchum, 407 U.S. at 238, (citing *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132-34 (1941)). Under the scrutiny of these criteria, both § 1983 and § 1362 satisfy the express authorization exception to the AIA.

42 U.S.C. § 1983 is an express congressional authorization for injunctive relief, and relief obtained under § 1983 is exempt from the AIA because it creates a federal remedy enforceable in federal court. Moreover, the language of § 1983 expressly authorizes injunctive relief against judicial officers where "a declaratory decree was violated or declaratory relief was unavailable." *Mitchum*, 407 U.S. at 242-43; 42 U.S.C. § 1983. *See* sections *infra* discussing declaratory decree and relief.

28 U.S.C. § 1362 expressly authorizes injunctive relief and provides that district courts "shall have original jurisdiction over *all* civil actions" brought by a federally

recognized Indian tribe under the Constitution and laws of the United States. 28 U.S.C. § 1362 (emphasis added); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757, 759 (7th Cir. 1991). Unlike the AIA, § 1362 *is* a jurisdictional statute which creates a federal right enforceable in a federal court of equity. This statute was "to eliminate the tribes' dependence upon the United States for the vindication of federal rights in the federal courts." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 793 (1991) (Blackmun, J., dissenting). In an action where a tribe is suing on its own behalf to protect its federal rights, immunity, and sovereignty, the action must be deemed the same *as if the United States itself had filed the action*.

The AIA does not bar actions for injunctive relief brought by the United States. *Leiter Minerals v. United States*, 352 U.S. 220, 225 (1957). In *Leiter*, the United States obtained an injunction in federal court against state court proceedings adjudicating the United States' interest in certain mineral bearing lands. *Id.* at 223-24. Justice Frankfurter explained:

> The [AIA] is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot possibly impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.

Id. at 225-26.

Indian tribes are accorded the same authority that the United States as trustee would have suing on their behalf. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475 (1976). The *Moe* Court held that the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits federal courts from enjoining or suspending state tax assessments where relief is available in state court, did not bar an action by tribes under 28 U.S.C. § 1362 to enjoin the collection of state taxes from Tribal members. *Moe*, 425 U.S. at 474-75. Construing § 1362, the Court identified a congressional intent "that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." *Id.* at 473. Because the federal government could have brought such an action on the tribes' behalf, *see Heckman v. United States*, 224 U.S. 413 (1912), the Court held that the Tribes were similarly empowered by § 1362. *Moe*, 425 U.S. at 474-75.

The determination that a tribe's action for injunctive relief is not barred by § 1341 applies equally to the would-be prohibitions of § 2283. In *Cayuga Indian Nation of New York v. Fox*, 544 F.Supp. 542, 551 n. 5 (N.D.N.Y. 1982), the court held that the Cayuga Tribe, suing under § 1362, was entitled to claim the same exemption from the requirements of the AIA as the United States could claim.

This case, like *Moe*, is an action brought by an Indian a tribe pursuant to § 1362 instead of the United States. The action stems from, and is designed to protect and enforce the national interests, namely, the Tribes' and the United States' interest in

protecting the Tribes' right to self-governance and sovereign immunity as guaranteed by the Constitution, and federal common law regarding Indians. The AIA would not bar the United States from filing this action. By virtue of the holdings in *Leiter* and *Moe*, Depositor was not barred from seeking the same injunctive relief either. Indeed, the Tribes' interest here is precisely the kind of "superior federal interest" that the Supreme Court has said justifies an exception to the proscription against state court injunctions in the AIA. *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138 (1971). The claims simply were not barred by the AIA because both § 1983 and § 1362 are express congressional authorizations for the relief sought by Depositor.

C. Injunctive Relief Was "Necessary In Aid of Federal Court Jurisdiction"

The issue is whether Depositor's claims for injunctive relief were necessary in aid of federal jurisdiction and, therefore, expressly permitted by the AIA.

In *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1302 (9th Cir. 1988), a tribal housing authority contracted a non-Indian company, Smith Plumbing ("Smith") for a housing project. When not paid, Smith filed suit in state court against a non-Indian insurance company, Aetna Casualty and Surety Company ("Aetna"), to enforce the payment bond Aetna issued for the project. *Id*. at 1303.

The Apache intervened, filed a motion to dismiss, and filed a motion in federal court to enjoin the state court proceedings, objecting to state court jurisdiction. The Apache argued that the suit against Aetna would eventually hale the tribe into state court

or would decide a matter appropriately within the jurisdiction of its tribal courts. *Id*. at 1304.

The Ninth Circuit framed the issue:

> This question turns upon the nature of the relationship of principal [the tribe] and surety [Aetna], and the effect of that relationship upon the *exclusive-jurisdiction law* that envelops tribal entities when they undertake to carry on business *off the reservation which has impact on the reservation*.

White Mountain Apoebe, 856 F.2d at 1304. (emphasis added). It then held the AIA did not bar the federal court from granting an injunction because "the district court has jurisdiction to preserve the integrity of tribal claims." *Id*. The court ultimately held the state court could exercise jurisdiction over the matter, the dispositive fact being that Aetna's money was non-Indian property. *Id*. at 1306 (emphasis added).

In *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1026 (D. Ariz. 1993), a non-Indian contractor sued a tribal housing authority for breach of contract. The contractor sought a writ of execution in state court against one of Tohono's off-reservation bank accounts to satisfy its award of attorneys' fees. *Id*. at 1027. Tohono sued in federal court, secured a temporary restraining order on the writ of execution and further proceedings in state court, and requested a permanent injunction. *Id*. The court held that pursuant to 28 U.S.C.§ 1362, federal courts have jurisdiction and authority to enjoin state court proceedings "when it is necessary to preserve the integrity of Indian sovereignty." *Id*. at 1027-28 (citing *White Mountain Apache*, 856 F.2d at 1304-06 and quoting 28 U.S.C. § 1362). The court then held that Tohono could maintain its suit as

necessary-in-aid-of-federal-jurisdiction because of the strong federal policy of encouraging tribal self-government and self-sufficiency, and Tohono's right to self-governance. *Id.* at 1029-30.

In *Pueblo of Santa Ana v. Nash*, 854 F.Supp.2d 1128, 1131 (D.N.M. 2012), a wrongful death claim was filed in state court against a tribal enterprise ("Tamaya"). Santa Ana Pueblo ("Santa Ana") and Tamaya sought declaratory and injunctive relief under § 1983 in federal court, including an order prohibiting the state district court judge from exercising jurisdiction over the case. The complaint alleged that, by presiding over a state court case without jurisdiction, the judge deprived Tamaya of its Fourteenth Amendment rights. *Santa Ana*, 854 F.Supp.2d at 1134. The judge filed a motion to dismiss, arguing the AIA barred injunctive relief against her. *Id*. The court ruled that the injunctive relief fit the expressly-authorized-exception to the AIA but acknowledged that several courts have held it fit the necessary-in-aid-of-federal-jurisdiction exception where the crux of a claim is that a state court lacks jurisdiction over a tribe or tribal matter. *Id.* at 1142.

The above rulings are consistent with basic tenets of Indian law. State courts presumptively lack jurisdiction over cases that adversely impact Indian-owned property. *See, e.g., Joe v. Marcum*, 621 F.2d 358, 361 (10th Cir. 1980) (state court jurisdiction to garnish such wages was preempted by the Navajo Nation's sovereignty); *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957) (federal court enjoins state court actions which threaten Indian land titles); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65

(1978) ("Tribal courts . . . are the 'appropriate forums for the exclusive adjudication of disputes affecting important personal and *property interest* [sic] of both Indians and *non-Indians,'*").

Also, state courts presumptively lack jurisdiction over matters that adversely impact tribal rights to self-governance or a tribe's rights secured by federal law. *See, e.g.*, *Sycuan Band of Mission Indians v. Roache*, 38 F.3d 402 (9th Cir. 1994), *modified* 54 F.3d 535 (9th Cir. 1994), *cert den.* 516 U.S. 912 (1995) (enjoining state criminal proceeding where jurisdiction over such proceeding was *exclusively federal*).

Questions regarding whether a state or a tribe have subject matter jurisdiction over a case are questions of federal law. *See Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 713 (10th Cir. 1989) ("The presumption and the reality . . . are that *federal law, federal policy, and federal authority are paramount* in the conduct of Indian affairs in Indian Country.") (emphasis added); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851-52 (1985). Accordingly, federal law mandates that non-Indian entities should bring actions over contract matters that affect personal and property interests of both Indians and non-Indians, based upon events occurring on the reservation, in *tribal court* to determine tribal court jurisdiction. *A & A Concrete v. White Mountain Apache Tribe*, 781 F.2d 1411, 1418 (9th Cir. 1986), *cert. den.*, 476 U.S. 1117 (1986)). The guiding principles of these cases are that federal law protects tribal sovereignty and the federal government's plenary power over Indian affairs.

In this case, the District Court erred in dismissing Depositor's claim for injunctive relief because such relief is necessary in aid of federal jurisdiction. The threshold issue in the State Court Action and the crux of *Amended Complaint* was that Haught lacked jurisdiction over Depositor and its property; therefore, an injunction was necessary in aid-of federal jurisdiction. Aplt.App., vol. 1, 149. Depositor's claims stated federal questions and triggered federal law presumptions that the state court lacked jurisdiction over the case, including: (1) that the property was tribal property, *Id.* at 151-56, ¶¶ 10-11; Aplt.App., vol. 1, at 159, ¶ 29; (2) the state court's jurisdiction violated federal law and Depositor's sovereign immunity from suit, *Id.* at 157-59, ¶¶ 19-26; *Id.* at 160-61, ¶ 34; (3) the frozen funds impacted Depositor's self-governance by obstructing its ability to provide essential governmental services to its members, *Id.* at 156, ¶ 12; *Id.* at 157, ¶ 16; *Id.* at 159, ¶¶ 27-29; *Id.* at 160-61, ¶ 34; (4) that they interfered with federal contracts and grants, *Id.* at 151- 56, ¶¶ 10-12; *Id.* at 157, ¶ 16; *Id.* at 160-61, ¶ 34; (5) affected tribal members, *Id.* at 156, ¶ 12; *Id.* at 159, ¶ 28, and (6) affected tribally-owned property, *Id.* at 157, ¶ 15; *Id.* at 159, ¶ 29. Indeed, the District Court acknowledged that at the foundation of the *Amended Complaint* are questions of federal law. *E.g.*, *Order*, Aplt.App., vol. 12, 3256-57. Moreover, all parties acknowledged the State Court Action was premised on an internal tribal governance matter, central to the Tribes' right of self-governance. *Id.* at vol. 11, 3195.

Thus, the critical questions were whether the state court has jurisdiction over a lawsuit that: (1) violates Depositor's sovereign immunity from suit; (2) implicates the

matters of tribal self-governance; and (3) adversely impacts tribal property. These questions are federal Indian law questions and should be resolved in federal courts. Reviewing the 12(b)(6) motion to dismiss under this Court's standard, the Court should have found that Depositor's facts demonstrate that Haught presumptively lacked jurisdiction over the State Court Action, and that the case required federal court interpretation of Indian law. Accordingly, Depositor's injunctive relief claim was within the necessary-in-aid-of-federal-jurisdiction-and expressly-authorized-exception permitted by the AIA.

III. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS BASED ON INYO

The issues are whether the District Court erred in holding that *Inyo Cnty, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 711 (2003) barred Depositor's claims, and erred in classifying Depositor's *parens patraie* claims as sovereign interest claims. Aplt.App., vol. 12, 3261-62.

The holding in *Inyo Cnty* only applies when a tribe seeks to use § 1983 to vindicate sovereign rights; if a tribe is seeking vindication of anything other than sovereign rights, a tribe is a person within the language of § 1983. A sovereign may possess: sovereign interests, non-sovereign interests, and quasi-sovereign interests. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-602 (1982). Discussing non-sovereign interests the Court provided:

> [L]ike other associations and private parties, a State is bound to have a variety of *proprietary* interests. . . . As a proprietor, it is likely to have the

> same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court.

Id. at 601-02. (emphasis added). "[Q]ualification of a sovereign as a person who may maintain a particular claim for relief depends...on the legislative environment in which the word appears." *Inyo Cnty*, 538 U.S. at 711 (citations omitted). The Court must analyze legislative intent of the federal statute at issue to determine whether a sovereign qualifies under the word "person" rather than squarely rejecting a sovereign as a "person" for the purposes of federal laws. Under such an inquiry, state or foreign nations can be "persons" for suits under various federal laws. *See Pfizer, Inc. v. Gout of India*, 434 U.S. 308, 318-19 (1978) (holding a foreign nation, in its capacity as a purchaser of pharmaceuticals, was a "person" for the purposes of antitrust law violations by a pharmaceutical manufacturer); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945) (citations omitted) ("Georiga [sic], suing for her own injuries, is a person within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof."); *Georgia v. Evans*, 316 U.S. at 162 (holding "a State, as purchaser of commodities shipped in interstate commerce," was a "person" under the Sherman Act).

Tribes, like states and foreign nations, are "persons" for some purposes. Even *Inyo Cnty* provided:

> The [Supreme] Court suggested, however, that an Indian tribe's status as a sovereign entity did not *per se* foreclose its ability to bring suit as a 'person' under § 1983. Instead, the viability of a tribe's § 1983 suit depended on whether the tribe's asserted right was *of a sovereign nature.*

Muscogee Nation v. Okla. Tax Comm'n, 611 F.3d 1222, 1234 (10th. Cir. 2010) (emphasis added). Similarly, in *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589 (6th Cir. 2009), the Keweenaw Bay Indian Community, a federally recognized tribe, brought suit against the State for, *inter alia*, withholding federal funds from the Tribe for failure to pay taxes. The tribe argued that its right to the federal funds stemmed from its status as a provider of healthcare and social services. *Id.* at 596. The Sixth Circuit set out the following inquiry in determining if the tribe could be a "person" under § 1983:

> [The court must] determine whether the Community was entitled to the federal funds (a) only as a result of its sovereignty, or (b) simply because it provides certain social services. *If it is the latter*, then Community's § 1983 suit would not be in any way dependent on its status as a sovereign, and *it should be considered a "person"* within the meaning of that statute, so long as other private, nonsovereign entities could likewise sue under § 1983.

Keneewah, 569 F.3d at 596 (emphasis added).

To sue in *parens patriae* a state must; (1) "articulate an interest apart from the interests of particular...parties, *i.e.*, the State must be more than a nominal party;" (2) the state must "express a quasi-sovereign interest;" (3) the state must allege that injured private individuals are "a sufficiently substantial segment of its population." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. "Quasi-sovereign interests," include interests that the state has in the well-being of its populace. *Id.* at 602. In other words, in a *parens patriae* action, the injury is not the aggregation of individual claims of the state's citizens but *an injury to the well-being of the state as a whole or a sufficiently large segment of the state*. *Id.*

Injunctive relief is available to tribes bringing *parens patriae* suits under § 1983. In *Dept. of Health and Social Services, Div. of Family and Youth Services v. Native Village of Curyung*, 151 P.3d 388 (Alaska 2006) ("Curyung"), the Supreme Court of Alaska held that an Alaska Native village is a person under § 1983 when bringing a *parens patriae* action. The court provided, "[W]hile it is true that only sovereigns may bring *parens patriae* claims, the injury the sovereign seeks to remedy is not to its sovereignty, but rather to its larger population. We think this injury is remediable under § 1983, even where the plaintiff is a sovereign." *Dep't of Health and Social Services*, 151 P.3d at 400.

In this case, Depositor owns the funds held by Haught and First Bank, is a service provider, and has non-sovereign, property interests that qualify it as a "person" under § 1983, much in the same manner as would a corporation or association. Depositor seeks redress from an illegal seizure of funds in its capacity as depositor and as federal contractor. As a result, the District Court erred in finding Depositor is barred from suing under § 1983 pursuant to *Inyo Cnty.*

Furthermore, Depositor alleged several causes of actions in their *Amended Complaint* in three different capacities: as sovereign, non-sovereign, and quasi-sovereigns. This is perfectly permissible under Rule 8(d)(2) which allows a plaintiff to plead alternative legal claims and "the pleading is sufficient if any one of them is sufficient."

Depositor asserted quasi-sovereign interests in the welfare of its tribal members in the *parens patriae* action, for placing "in imminent risk the health, safety and welfare of the Tribes' members and citizens of the state of Oklahoma, who depend on the Tribes' provision of essential governmental services." Aplt.App., vol. 1, 159, ¶ 28. The funds that are seized are vital to the health and welfare of Depositor's tribal members. Depositor has struggled to maintain and finance tribal programs and essential governmental services for over a year and is at risk of losing federal contracting grants. Without this injunctive relief, First Bank and Haught will continue to wrongfully exercise dominion and control over $7,000,000.00 and continue to infringe the health and welfare of the tribal members. Accordingly, Depositor's quasi-sovereign interests are actionable under § 1983.

IV. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS FOR PROSPECTIVE INJUNCTIVE RELIEF

A. Injunctive Relief Was Available Under 42 U.S.C. § 1983

The next issue is whether the District Court erred in dismissing claims for prospective injunctive relief pursuant to 42 U.S.C. § 1983. Aplt.App., vol. 12, 3258.

The Federal Courts Improvement Act of 1996 ("FCIA") does not prohibit an injunction where a judge acts in absence of all jurisdiction. In such a case, injunctive relief is available. *Huminski v. Rutland Cnty*, 134 F.Supp.2d 362 (D. Vt. 2001) (holding that judges who lacked authority to take the acts complained were still subject to suits for injunctive relief under § 1983); *Lawrence*, 271 F. App'x. at 765-66 (plaintiffs alleged that the judge acted outside his judicial capacity and thus injunctive relief could have been awarded). *See also Mireles v. Waco*, 502 U.S. 9, 12 (1991)(holding that "a judge is not

immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction"); *Stein v. Disciplinary Board of the Supreme Court of New Mexico*, 520 F.3d 1183, 1195 (10th Cir. 2008); *Guttman v. Khalsa*, 446 F.3d 1027, 1034 (10th Cir. 2006).

Tribes are immune from suit, absent Congressional or tribal consent. *Santa Clara Pueblo*, 436 U.S. 49; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 508 (1991); *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986); *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 172-73 (1977). The United States Supreme Court relied upon long-established traditional concepts of sovereignty to hold that consent alone creates jurisdiction over a sovereign. *United States v. Testan*, 424 U.S. 392 (1976). Without consent, any attempted exercise of judicial power over a tribal sovereign is void. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 , 514 (1940).

Moreover, the aforementioned issues have been decided, on strikingly similar facts to ours, in *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751. In that case a state court seized over $450,000.00 of Kiowa's tribal funds. Pet. for a Writ of Certiorari at 10, *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998) (No. 96-1037). Such funds included federal monies allocated for a housing improvement program, food distribution, and higher education. *Id*. None of the funds could be used by Kiowa. *Id*. While those cases were ongoing, Kiowa sought protection from garnishment of its assets with its own suit for injunctive and declaratory relief in federal court. *Id*. The United States District Court for the Western District of Oklahoma

and this Court refused to grant Kiowa a preliminary injunction and dismissed its suit in federal court. *Id*. at 10-11.

Kiowa petitioned for certiorari to the United States Supreme Court arguing:

> Stated strictly in legal terms, the State of Oklahoma refuses to recognize Constitutional limitations upon its power over Indian tribes. It plainly ignores federal law that provides that an Indian tribe is not subject to the jurisdiction of a state court, unless either the tribe or Congress has authorized that state jurisdiction. But, stating the issue as a legal problem drains the issue of the urgency that is gained from the press of daily reality. The problem is that Oklahoma, having declared its own jurisdiction over a federally recognized Indian tribe and having started seizing tribal funds to satisfy judgments, *is denying to the tribe the money it uses for self-government. In fact, Oklahoma is seizing federal funds appropriated for tribal self-government.* When the tribe loses its tax revenues, its federal judgment funds and its federal self-determination funds, the tribe loses its capacity to function as a sovereign entity. This result is destructive of Congress' overriding goal of encouraging tribal self-government.

Kiowa Tribe, 523 U.S. at 11 (emphasis added). The Supreme Court agreed. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756. Tribes possess immunity whether "contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id*. at 760. A state court's assertion of jurisdiction over an Indian tribe without an express waiver of sovereign immunity is an act in "the clear absence of jurisdiction," within the meaning of *Stump v. Sparkman*, 435 U.S. 349, 357 (1978).

In this case, Haught seized Depositors' funds. Those funds are for essential governmental services described in Fact 6 above. None of the funds have been available for use by Depositors since the issuance of his June 21, 2012, *sua sponte* injunction. Depositor sought injunctive and declaratory relief. Despite the lack of congressional

authorization, and tribal immunity being a matter of federal law not subject to diminution by the states, Haught exercised jurisdiction over Depositor. No assertion of jurisdiction that could be farther beyond the scope of his authority. In the complete absence of jurisdiction Haught was not immune from suit under § 1983. Declaratory and injunctive relief could be issued against him. *Lawrence*, 271 F. App'x at 766; 42 U.S.C. § 1983.

B. Injunctive Relief Is Available Because A Declaratory Decree Was Violated

The issue is whether the District Court erred in dismissing claims for injunctive relief under § 1983, concluding no "declaratory decree was violated" and no "declaratory relief was available." Aplt.App., vol. 12, 3261-62.

Federal common law limits the availability of declaratory judgments against an Indian tribe because a tribe's inherent sovereignty gives it the power to make determinations regarding internal tribal governance matters. *See Santa Clara Pueblo*, 436 U.S. 49. Only Congress can limit, modify or take away this power. *Id*. The Federal Government has a "longstanding policy of encouraging tribal self-government. . . . Indian tribes retain 'attributes of sovereignty over both their members and their territory,' *United States v. Mazurie*, 419 U.S. 544, 557 (1975)." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (citations omitted). A state has no authority to "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); Oklahoma Enabling Act, 34 Stat. 267 (1906) (state courts are prohibited from limiting or affecting "the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or

other rights by treaties, agreement, law"); Oklahoma Organic Act, 26 Stat. L. 81 (1890) ("nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians").

In this case, a Tribal Court decree recognized that Governor Janice Prairie-Chief Boswell as Governor and authorized signor for the First Bank account. Aplt.App., vol. 12, 3236, ¶¶ 1-3. Haught failed to comply with that decree, even though the Tribal Court is the only entity with jurisdiction over all tribal governance matters, thereby making injunctive relief available to Depositor under § 1983.

C. Injunctive Relief Is Available Because Haught Could Not Issue Declaratory Relief

The next issue is whether injunctive relief was available because Haught could not issue declaratory relief.

Pursuant to the Declaratory Judgment Act, Okla. stat. tit., 12 § 1651:

> in order to invoke the jurisdiction of the court under the declaratory judgment act *there must be an actual existing justiciable controvery* [sic] *between parties having opposing interests, which interests must be direct and substantial, and involve an actual, as distinguished from a possible, potential or contingent dispute.*

(emphasis added). Federal common law limits the availability of declaratory judgments against Indian tribes. One part of a tribe's inherent sovereignty, as stated *infra*, is the power to make a determination regarding an intratribal sovereign matter and only Congress can limit, modify or take away this power. *See Santa Clara Pueblo*, 436 U.S. 49.

Another part of a tribe's inherent sovereignty is its immunity from lawsuits. Tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief. *E.g.*, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). The only way a state court can exercise jurisdiction over a tribe is if there is an unequivocal and express waiver of sovereign immunity. *See*, *e.g.*, *In re Greene*, 980 F.2d 590, 597 (9th Cir. 1992); *Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377 (8th Cir. 1985); *Pan American*, 884 F.2d 416, 419 (9th Cir. 1989).

In this case, there was no existing justiciable controversy as required by the Declaratory Judgment Act. First Bank and Depositor do not have opposing interests in the funds. First Bank has no claim to such funds, and has always indicated that it was trying to save itself from a possible, potential or contingent dispute. Aplt.App., vol. 6, 1693. Further, Haught had no authority to decide an intratribal sovereign matter regarding who is the governor and thus the signatore. This is a power expressly reserved to the Tribes and not modified by Congress. Haught acknowledged the same in his June 21, 2012, decision. *Id.* at vol. 11, 3193-95.

Additionally, Depositor's sovereign immunity remained in effect so as to bar Haught from exercising jurisdiction. Neither the Tribes nor Congress waived the Tribes' sovereign immunity. Facts 8, 9. Haught reasoned that a choice of law provision in the bank contracts was a waiver of sovereign immunity. Haught interpreted the application of state law within the contracts as implicit waivers of immunity by the Tribes. However, *Kiowa* clearly recognizes the distinction between what law applies and what jurisdiction

can enforce them and that immunity waivers must be explicit. *Kiowa*, 523 U.S. at 755. A similar choice of law provision was interpreted in *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1381, n.4 (8th Cir. 1985): "[t]his note and the rights and obligations of all parties hereto shall be subject to and governed by the law of the District of Columbia." The *Standing Rock* court found that the promissory note "was a preprinted form agreement . . . designed for transactions involving individuals and not Indian tribes." *Standing Rock*, 780 F.2d at 1381, n.4. Therefore, a choice of law clause is not explicit enough to constitute a waiver of the tribe's sovereign immunity.

The denial of declaratory relief was correct, and therefore injunctive relief was available under § 1983, because (1) no case or controversy existed, (2) it is within the Tribes' sovereign power to determine who is governor, (3) Depositor enjoys tribal sovereign immunity from suit in state court, and (4) a county court simply had no authority to decide who the Tribe's governor is, nor who should administer its federal contract and grants.

D. First Bank Was Acting Under Color Of Law

The issues are whether the District Court erred in applying the wrong standard of review, ruling First Bank is not acting under color of state law, refusing to substantively evaluate Depositor's claims, and recasting all Depositor's claims as 42 U.S.C. § 1983 claims. Aplt.App., vol. 12, 3262-65.

Rule 8(a)(2) requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief...." Only a generalized statement of the facts from which the defendant may form a responsive pleading is necessary. *New Home Appliance Ctr., Inc. v. Thompson,* 250 F.2d 881, 883 (10th Cir. 1957). To state a claim under 42 U.S.C. § 1983, a plaintiff must (1) identify a federal right that defendants invaded, and (2) allege facts that the defendants acted under color of state law. *Olsen v. Aebersold*, No. 02-2288, 2003 WL 21580577, *9-10 (10th Cir. July 1, 2003) (citing *Polk Cnty v. Dodson*, 454 U.S. 312 (1981)). To determine if a private party has acted under "color of law" sufficient for a § 1983 claim, this Court employs a two-part test articulated in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). *Coleman,* 697 F.2d at 1345. First, it assesses "whether the claimed . . . deprivation resulted from the exercise of a right or privilege having its *source in state authority*," and, second "whether the private party charged with the deprivation could be described in all fairness as a *state actor*." *Lugar*, 457 U.S. at 937 (emphasis added).

A private party satisfies the first part of *Lugar* if it engages in "state action" and the "deprivation was caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state." *Coleman*, 697 F.2d at 1345. *See also Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001) (listing Supreme Court cases finding private party engaged in state action). In *Coleman*, a man was arrested and his truck and camper were impounded. The towing company sold his truck to satisfy a storage bill. The man brought a § 1983 claim against

the towing company for an unlawful deprivation of his property without due process of law.

A state statute created the right under which the towing company transferred title to the truck, therefore, the sale was undertaken pursuant to a right or privilege created by the state. *Coleman*, 697 F.2d at 1345. *See also Lugar*, 457 U.S. at 934, 940-42 (a creditor who invoked prejudgment attachment remedies requiring the participation of a court clerk and a sheriff, acted under color of state law); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (state action where private party invoked a court-ordered attachment that failed to afford due process to a debtor).

A private party is a *state actor* for purposes of a § 1983 claim where (1) he has *acted jointly with* or has obtained significant aid from state officials (*Coleman*, 697 F.2d at 1345); (2) the private actor is entwined with governmental policy or the government is entwined in the private actor's management or control; or (3) when it is performing a public function normally within the province of the state. *Brentwood*, 531 U.S. at 296 (collecting Supreme Court cases) (internal quotations omitted). In *Coleman*, the towing company's "joint participation with state officials in the seizure of the truck [was] sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Coleman*, 597 F.2d at 1345. In *Evans v. Newton*, 382 U.S. 296, 301 (1966), private trustees managed a park, but a municipality was involved in making management decisions for and controlling the park. Such "public entwinement" transformed the trustees into a state actor for purposes of a § 1983 claim. *Id*. at 301. *See*

also Brentwood, 531 U.S. at 297-98 (discussing that private association is state actor where state entity cloaks the private association with authority to make and apply state rules).

Where a *private actor* performs a function that is traditionally a sovereign function, he is a state actor for purposes of a § 1983 claim. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974); *Fuentes*, 407 U.S. 67. In *Fuentes* a replevin statute was unconstitutional because it allowed private parties to *indefinitely take* property without due process. 407 U.S. at 93. In *Flagg Brothers*, a warehouse storing the goods of an evicted tenant by city order threatened to sell the tenant's goods. The tenant sued the warehouse for deprivation of property without due process under 42 U.S.C. § 1983. The court held that solely because (1) the tenant did not name a public official as a defendant and (2) settling creditor-debtor disputes was not an exclusively public function, the warehouse was not liable for state conduct pursuant to Section 1983. 436 U.S. at 157, 161.

In this case, Depositor identified violations of federal rights in its *Amended Complaint*, including its right to due process, sovereign immunity, self-governance, and treaty rights. Aplt.App., vol. 1, at 157; *Id.* at 161-62; *Id.* at 159; *Id.* at 164. It also made out a claim against First Bank for state action when it exercised a right or privilege having its source in state authority by bringing a declaratory judgment action, Aplt.App., vol. 6, 1694, ¶¶ 16-18, and relied on state laws including state contract law, *Id.*, ¶ 16, and the Oklahoma Uniform Commercial Code. *See Appellee's Response in Objection to*

Joint Application to Stay Enforcement of Judgment, *First Bank and Trust Co. v. Cheyenne and Arapaho Tribes, et al.*, No. IN-110909 (Okla.S.Ct.), wherein First Bank states: "we have a court supervision structure"; the seizing the funds should "remain in effect during the pendency of the appeal"; and that Haught had "Solomon-like power to fashion protection for the interests of all parties."

Like the state law in *Coleman*, the state laws invoked by First Bank serve as the basis for its actions. Later, First Bank attempted to close the accounts and distribute the funds to Depositor but Haught *prohibited* First Bank from doing so. Aplt.App., vol. 11, 3194-95. These acts are quintessentially an exercise of a right or privilege having its source in state authority, as well as state action.

First Bank is a state actor because, like the towing company in *Coleman* who impounded and sold the truck acting in conjunction with law enforcement, First Bank acted jointly with the state to indefinitely deprive Depositor of its property. Further, First Bank is entwined with the state because Haught used a Custer County Court order to exercise dominion and control over Depositor's funds, and even went so far as to "convert this account to a court supervised account," and directed First Bank not to disburse the funds except on the court's order. Aplt.App., vol. 7, 2096.

Furthermore, First Bank exercised a sovereign power when it seized Depositor's funds indefinitely and cloaked the unlawful act with the imprimatur of law. It is hornbook law that an administrative freeze of this duration is *per se* unreasonable. Law of Bank

Dep., Coll. & Cr. Cards ¶ 3.09[2] (a reasonable freeze on a bank account in response to an adverse claims statute complaint is five (5) days).

The government, however, has the authority to permanently take, impound, or condemn private property, U.S. Const. amend. V; XIV. Nonetheless, as of the date of this filing, First Bank has held the funds for over 1 year 2 months and 18 days, transforming a temporary administrative freeze that it claims was permitted by the adverse claims statute for a reasonable duration, into an unlawful and indefinite deprivation of property, like a government could. A private entity cannot do this without criminal consequences.

Additionally, the Court erred in dismissing pendent party claims. It should have maintained such claims because the claim arises from the same transaction or occurrence as the claim against Haught. 28 U.S.C. § 1367 provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

"A claim is part of the same case or controversy if it derives from a common nucleus of *operative fact.*" *Price v. Wolford*, 608 F.3d 698, 702-703 (10th Cir. 2010) (quoting *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997)).

In this case, Depositor's claims against First Bank and the claims against Haught arise from the same acts: (1) First Bank froze Depositor's monies until it could get an order from Haught, and then (2) First Bank and Haught unlawfully imposed state law and state jurisdiction over Depositor. First Bank's choice to "administratively freeze"

Depositor's funds, the joint authority shared by First Bank and Haught to maintain dominion and control over such funds, and use of Custer County Court orders, demonstrate a single transaction and occurrence to support pendent jurisdiction.

Nevertheless, the court avoided a substantive analysis of common-law, non-1983 claims by holding that Depositor was vindicating solely sovereign interests and rights and bringing claims based solely on § 1983. *E.g.*, Aplt.App., vol. 12, 3256-57; *Id.* at 3261-3262. ("Plaintiffs have not alleged that a private right of action exists in their favor under the laws alleged"). Aplt.App., vol. 12, 3263. This conclusion ignored Depositor's non-1983 sources of relief. Moreover, it refused Depositor's request to amend complaint to clarify its non-1983 grounds for relief. *Id.* at 3258.

E. Section 1983 Did Not Bar Claims Against Haught

The issue is whether the District Court erred in concluding § 1983 barred injunctive relief against Haught, ruling such relief was unavailable because Haught was acting in his judicial capacity. *Id.* at 3558-59.

Depositor's *Amended Complaint* alleged that Haught lacked jurisdiction over the matter and Depositor. *Id.* at vol. 1, 157-160, ¶¶ 19-27, 31. Additionally, the *Amended Complaint* stated factual bases for why Haught lacked jurisdiction, including that the tribe was immune from suit and that the matters at bar were federal questions. *Id.* at 157-59, ¶¶ 19-27; *Id.* at 161-62, ¶ 38; *Id.* at 165, ¶ 55; *Id.* at 167, ¶ 75; *Id.* at 170, ¶ 87. Where a court lacks jurisdiction to adjudicate a claim, it is incapable of reaching the merits of the case, *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006); and the

inference therefrom is that the court is unable to provide relief. Further, where a judge is acting completely without jurisdiction, he is not acting in his judicial capacity. *See Mireles*, 502 U.S. at 11-12 (judges do not enjoy judicial immunity where he takes actions, judicial in nature, but in complete absence of jurisdiction); *Stump*, 435 U.S. at 362. As discussed *supra*, the limitations imposed by the FCIA on § 1983 claims for injunctive relief against judges do not apply to judges *acting without jurisdiction.*

Haught's lack of jurisdiction gives rise to two relevant inferences here: (1) that he *could not* provide declaratory relief, and (2) that he *was not* acting in a judicial capacity pursuant to § 1983. Thus, the Court erred when, instead of accepting Depositor's well-pled allegation that Haught lacked jurisdiction and instead of drawing inferences in their favor, it treated Haught as if he were acting in his judicial capacity and as if he could provide declaratory relief.

The Court further erred when it concluded that the Executive Branch could not maintain a § 1983 claim against Haught because it had not demonstrated it was an entity separate from the Tribes. Aplt.App., vol. 12, 3262. This conclusion does not accept facts and allegations in the *Amended Complaint* that were favorable to Depositor and that would afford it relief. The *Amended Complaint* demonstrated Governor Boswell is the Tribes' governor, *Id.* at vol. 1, 150, ¶ 4; that the Federal Government recognizes her as the official authorized to draw down, control, and administer federal contract dollars on the Tribes' behalf; and that Governor Boswell is the person who entered into contracts with First Bank, is the authorized owner of the accounts, and that First Bank indicated

such to the District Court. *Id.* at 163, ¶ 45, *Id.* at vols. 1-6, 180-1690. Further, the District Court prohibited Depositor from amending its Complaint to clarify this point, which would have afforded Depositor relief pursuant to § 1983. *Id.* at vol. 12, 3429, line 4; *Id.* at 3434.

F. Depositor's Non-1983 Claims Were Valid

The issue is whether the Court erred when it recast all of Depositor's claims as § 1983 claims and ignored non-1983 facts and allegations in Depositor's *Amended Complaint*. Aplt.App., vol. 12, 3259, 3262, 3264.

An ongoing violation of federal common law is sufficient to sustain a *common-law injunction* against a government official pursuant to the *Ex Parte Young* doctrine. *Crowe & Dunlevy*, 640 F.3d at 1155. Preliminary injunctions require a showing of: (1) irreparable harm unless the injunction issues; (2) a substantial likelihood of success on the merits; (3) the injury to the movant outweighs the irreparable-harm-in-absence-of-preliminary-injunction caused to the opposing party by issuance of the injunction; and (4) the injunction would not be contrary to the public interest. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998). A party that successfully establishes the other three factors is not required to demonstrate a substantial likelihood of success on the merits. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001). In that event, a party only has to prove there are "questions going to the merits ... so serious, substantial, difficult, and doubtful as to make the issue ripe for

litigation and deserving of more deliberate investigation." *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999).

A violation of a constitutional right satisfies three of the preliminary injunction prongs. *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) (Constitutional violation satisfies "irreparable harm prong"); *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 716. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WS 3216103, *25-26 (10th Cir. June 27, 2013) (A violation of constitutional rights is a threatened injury *that outweighs a state's interests* in imposing potentially unconstitutional laws.); *Okla. Corrections Prof'l Ass'n, Inc. v. Doerflinger*, No. 12-6238, 2013 WS 1189277, *2 (10th Cir. 2013) (citing *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)) (It is always in the *public interest* to prevent a violation of a party's constitutional rights). Also, interference with a tribe's right to self-government is "irreparable harm." *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250-1251.

Declaratory relief is available if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy any [sic] reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Schepp v. Fremont Cnty*, 900 F.2d 1448, 1452 (10th Cir. 1990).

In this case, the *Amended Complaint* stated claims pursuant to 42 U.S.C. § 1983, Aplt.App. vol. 1, 161 (title of Claim included 42 U.S.C. § 1983); federal and common law, *e.g., Amended Complain*t, *Id.* at 160, ¶ 32, 162, 167 (Constitutional basis), and other

statutes, *Id.* at 168-169. Depositor pled the required elements for a *common-law* injunction, *Id*. at 166-68, ¶¶ 70-80. It was vindicating common-law property rights, *Id.* at 150, ¶ 2, 159, ¶ 29, 160, ¶ 33, and contract rights, *Id.* at 151-56, ¶11-12, 157, ¶ 16, both of which give rise to private contract and tort damages.

Depositor satisfied three (3) preliminary injunction prongs by showing multiple violations of its Constitutional rights, including: due process, *Id.* at vol. 1, 157, ¶ 15; *Id.* at vol. 12, 3280, ¶ 3; self-governance, Aplt.App., vol. 1, 159, ¶¶ 27-28; and sovereign immunity from suit, *Id*. at 157-59, ¶¶ 19-24. The only potential injury to Haught and First Bank was limiting their ability to carry out unlawful conduct on Depositor; that is asserting state jurisdiction over a sovereign Indian tribe, interfering in its internal governance and its property, and depriving Depositor of access and use of its funds. It is surely in the public interest to prevent banks and the state from seizing anyone's depository accounts, especially for any unreasonable and unlimited duration.

Depositor pled and satisfied the substantial-likelihood prong because it alleged it (a) remained immune from suit and (b) presented questions appropriate for tribal or federal, but not state, jurisdiction. As discussed *supra*, both trigger federal jurisdiction.

Depositor pled and satisfied the requirements for declaratory relief pursuant to 28 U.S.C. § 2201. Aplt.App., vol. 1, 168-70, by demonstrating it is in controversy with Haught and First Bank . In the absence of jurisdiction and without any right to those funds, Haught and First Bank used state law to wrongfully exercise dominion and control over Depositor's $7 million. The immediacy and reality warrant declaratory judgment.

Such claims were made in 28 U.S.C. § 2201-2202, Aplt.App., vol. 1, 168-69; yet, the court did not process such declaratory judgment claims, mistakenly recasting them as 42 U.S.C. § 1983 claims and ruling they are barred by the AIA. *Id.* at vol. 12, 3260-62; *Id.* at 3264.

The court erred in ignoring Depositor's non-1983 sources of relief and claims. Moreover, it refused Depositor's request to amend complaint to clarify its non-1983 grounds for relief. Aplt.App. at vol. 12, 3285.

V. THE DISTRICT COURT ERRED IN DISMISSING CLAIMS WITHOUT LEAVE TO AMEND

The issue is whether the District Court erred in dismissing Depositor's claims with prejudice and without leave to amend.

This Court reviews a district court's denial of leave to amend for abuse of discretion. *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir. 1996). It is an error to dismiss a case with prejudice or without leave to amend if allowing a plaintiff to amend his complaint would not be futile. *E.g.*, *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990); *Brereton*, 434 F.3d at 1219. Denial of leave to amend is different than a dismissal with prejudice, *Brereton*, 434 F.3d at 1218–19; however, both analyses turn on whether a proposed amendment would be futile. A dismissal is a "harsh remedy" which must be exercised with caution to protect the liberal rules of pleading and the interests of justice. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989). The Federal Rules of Civil Procedure ("Fed. R. Civ. P.") contain a "powerful presumption against rejecting pleadings for failure to state a claim." *Id. See*

also Helm v. Kansas, No. 08-2459-JAR, 2009 WL 2168886, at *2 (D.Kan. July 21, 2009) ("[d]ismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interest of justice.")

Generally, a litigant should be afforded "the maximum opportunity for each claim to be decided on its merits." *Hardin v. Mantiwoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). *See also Bauchman v. West High School*, 132 F.3d 542, 559 (10th Cir. 1997). "[I]f it is all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Reynoldson*, 907 F.2d at 126 (quoting 6 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure*, Civil 2d § 1483 (West 1990)). A plaintiff generally "will not be precluded from amending a defective pleading." Wright, Miller & Kane, *supra*, § 1487.

Leave to amend will be futile "where a complaint fails to state a claim, and no amendment could cure the defect." *Brereton*, 434 F.3d at 1219 (citing *Curley v. Perry*, 246 F.3d 1278, 1281-82 (10th Cir. 2001)). To determine whether an amendment would be futile, courts evaluate whether: (1) there is a material difference in allegations between an original complaint and proposed amendments and (2) whether the proposed amendments will cure the deficiencies in the original complaint by (a) offering the new evidence or allegations relevant to the elements of the claim and that (b) would change the earlier analysis. *Bauchman*, 132 F.3d at 559-561.

In this case, Depositor desired to amend its complaint to reflect that since its initial filing, First Bank had secured a court order from Haught allowing it to keep the funds in First Bank's accounts for an unlimited duration. Aplt.App., vol. 12, 3276-77. This is directly relevant to whether Depositor could successfully assert a § 1983 claim against First Bank because it demonstrates that First Bank was acting under color of state law.

The second allegation that Janice Prairie Chief-Boswell is the person with whom the federal government maintains its government-to-government relationship and the person charged with federal contract and grants administration, is directly relevant to the fact that she could maintain the 42 U.S.C. § 1983 claims. Aplt.App., vol. 12, 3276-77. Courts "owe deference to the judgment of the Executive Branch as to who represents a tribe." *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012)(discussing cases holding the same). In *Timbisha*, two factions - the Kennedy faction and the Gholson faction - claimed to be a tribe's legitimate government. *Id*. at 937. The Government's recognition was so significant that on appeal, the D.C. Circuit dismissed the Kennedy complaint for lack of standing because, where the Government recognized the Gholson faction as the tribe's government, the Kennedy faction could not bring suit on the tribe's behalf. *Id.* at 938.

In this case, the Court reasoned that the Executive Branch is not an entity separate from the Tribes to maintain an action on the Tribes' behalf. Aplt.App. vol. 12, 3262. Under *Timbisha*, the Bureau of Indian Affairs ("BIA") recognition of Governor Boswell for purposes of administering federal contracts and grants is of such significance it

materially alters the facts in the first complaint by expressly recognizing Janice Prairie Chief-Boswell as the person with whom it maintains its government-to-government relationship and the only person authorized to expend funds therefor. This cures the court-identified deficiencies regarding the ability of the Tribe, the Executive Branch, and/or Janice Chief-Boswell's ability to assert a § 1983 claim.

Second, Depositor requested leave to amend its complaint to add Janice Prairie Chief-Boswell as a party, Aplt.App., vol. 12, 3410, lines 12-15, which would not be futile and would cure the court-perceived deficiency that Depositor was not a "person" under 42 U.S.C. § 1983. *Id.* at 3260-62. As discussed *supra* in Facts 5 and 6, Janice Prairie Chief-Boswell is the First Bank account owner and the federally-recognized tribal official for purposes of administering federal contract and grant monies.

Lastly, Depositor requested "leave to re-plead their claims" to identify private or non-1983 grounds for its claims, *Id.* at 3290, which would not be futile. Dismissal with prejudice is an error when it is based on perceived vagueness of factual allegations or for failure to specify a statute or private right of relief where such deficiency could be cured. *See Reynoldson*, 907 F.2d at 126-27 (finding dismissal with prejudice for failure to clearly identify relief statute was an error where he could possibly identify a regulation or procedure that afforded him relief). Depositor's claims were not based solely on § 1983, but also on common law and federal law, which includes private rights to relief. Aplt.App., vol., 162-171 (stating that the administrative freeze placed in jeopardy the Tribes' federal contracts). However, the court evaluated the claims as though they were

solely § 1983 claims and identified its perceived deficiency: "Plaintiffs have not alleged that a private right of action exists in their favor under the laws alleged." *Id.* at vol. 12, 3263, ¶ 1. Depositor proposed to cure the deficiency (lack of private right of action over non-1983 action) by clarifying and identifying a non-1983 right of action. Aplt.App., vol. 12, 3290, and such amendment would have changed the court's previous analysis based solely on § 1983 claims.

The District Court erred in dismissing Depositor's claims with prejudice and without leave to amend because Depositor's proposed amendments would have cured court-identified deficiencies, allowing Depositor's to, without question, maintain a § 1983 claim against First Bank as well as claims based on common law and federal law. Hence, the amendments would not have been futile.

CONCLUSION

Based upon the arguments and authorities cited herein, the District Court's dismissal of Depositor's claims for procedural and substantive violation of due process, declaratory relief, injunctive relief, prospective injunctive relief, and constitutional violations under color of state law, with prejudice or without prejudice but with no leave to amend should be reversed and the case remanded to the District Court to process Depositor's claims.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

First Bank sued a federally-recognized Indian tribe and its Governor in state court, for a declaratory judgment as to who the Tribes' governor is, and who the proper signatore is for their accounts.

The case was assigned to Haught who refused to dismiss the case despite the presence of overriding federal issues including tribal self-governance, tribal sovereign immunity, and tribal property.

Haught did not stop there. He proceeded against them ordering discovery, dispositive motions, and even conducted a trial. Thirteen days after the trial concluded, he released his court order. Despite the fact Governor Boswell opened the accounts, signed the contracts, signed the signature cards, was the sole person with signature authority, and First Bank had indicated that it had the authority to rely on her signature, Haught issued an untitled document "den[ying]" First Bank's *Petition for Declaratory Relief, sua sponte* "converted this account to a court supervised account," and "directed the bank not to dispense these funds except on the court['s] order." When approached for disbursements, he denied them all.

The Tribes and Governor Boswell filed suit in federal district court to enjoin First Bank and Haught from violating their constitutional, federal common law, and statutory rights. Nevertheless, the federal district court dismissed all claims concluding that despite the presence of overriding federal issues, Depositor's claims were barred by 42 U.S.C. § 1983, the AIA, federal common law, and Eleventh Amendment immunity.

The Tribal Officials and Governor Boswell filed their Notice of Appeal on May 3, 2013.

The Tribes and the Executive Branch respectfully request oral argument.

Respectfully submitted this 12th day of July, 2013.

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CERTIFICATE OF COMPLIANCE

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As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,770 words.

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I hereby certify that a copy of the foregoing **APPELLANTS' CONSOLIDATED OPENING BRIEF** as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec AntiVirus Corporate Edition version 10.0.0.359, Virus Definition File Dated: 3/1/2011 rev. 6 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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I hereby certify that the foregoing **APPELLANTS' CONSOLIDATED OPENING BRIEF, ATTACHMENTS,** and **INDEX OF APPENDIX - VOLUMES 1-12** was served on this 12th day of July, 2013, via the Court's CM/ECF system which will send notification of such filing to all parties of record below.

In addition, I hereby certify that on the 15th day of July, 2013, the original and seven (7) copies of the foregoing **APPELLANTS' CONSOLIDATED OPENING BRIEF, ATTACHMENTS,** and **INDEX OF APPENDIX - VOLUMES 1-12** were delivered to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals via personal delivery.

Additionally, I hereby certify that on the 15th day of July, 2013, a copy of the foregoing **APPELLANTS' CONSOLIDATED OPENING BRIEF, ATTACHMENTS,** and **INDEX OF APPENDIX - VOLUMES 1-12** was werved via U.S. Mail, postage prepaid, to all parties of record as follows:

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I hereby certify that a copy of the foregoing **APPELLANTS' CONSOLIDATED OPENING BRIEF, ATTACHMENTS,** and **INDEX OF APPENDIX - VOLUMES 1-12,** as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Court.

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ATTACHMENTS PURSUANT TO 10th CIRCUIT RULE 28.2

COURTROOM MINUTE SHEET

DATE 6-6-12

CIVIL NO. CIV-12-514 -F

Cheyenne and Arapaho Tribes, on its own behalf, and as *parens patriae* on behalf of its members; and Cheyenne and Arapaho Tribes' Executive Branch

-vs-

First Bank and Trust Company; and Doug Haught, in his official capacity as a District Judge, State of Oklahoma

COMMENCED 8:05 ENDED 8:35

TOTAL TIME 1 hr. 10 min.

COMMENCED 9:00 ENDED 9:40

PROCEEDINGS Hearing on motions for TRO and preliminary injunction

JUDGE STEPHEN P. FRIOT DEPUTY LORI GRAY REPORTER TRACY WASHBOURNE

PLF TRIBE COUNSEL Charles Morris, Kimberly Richey

PLF EXECUTIVE BRANCH COUNSEL Alvina Earnhart

DFT FIRST BANK & TRUST CO. COUNSEL Scott Meacham, John Thompson

DFT HAUGHT COUNSEL Nancy Zerr

INTERVENOR COUNSEL Jeremy Oliver

The court hears opening statements of counsel.

The Motion for Special Appearance for the Cheyenne and Arapaho Tribes, Tribes' Executive Branch, and Governor Leslie Harjo (doc. no. 50) is **DENIED**, for the reasons set forth on the record.

Following a short recess, the court announces its findings and conclusions, as set forth in detail on the record.

Plaintiff Cheyenne and Arapaho Tribes Executive Branch's Motion for Preliminary Injunction (as to state court action) (joined in by plaintiff Cheyenne and Arapaho Tribes) (doc. no. 25) is **DENIED**.

Plaintiffs' Joint Motion for Temporary Restraining Order and Preliminary Injunction (doc. no. 37) (as to administrative freeze by bank) is **DENIED**.

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

CHEYENNE AND ARAPAHO TRIBES, on its own behalf, and as *parens patriae* on behalf of its members; and CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-12-514-F
FIRST BANK AND TRUST COMPANY; and DOUG HAUGHT, in his official capacity as a District Judge, State of Oklahoma,	)	
Defendants.	)	

ORDER

Before the court are Defendant Doug Haught's Motion to Dismiss Plaintiff's Amended Complaint (doc. no. 53) and Defendant First Bank and Trust Company's Motion to Dismiss (doc. no. 55). Both defendants seek dismissal of all claims alleged in plaintiffs' Amended Verified Complaint pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P. Upon due consideration of the parties' submissions and applicable law, the court makes its determination.

Background

On October 27, 2011, defendant, First Bank and Trust Company ("First Bank"), filed a petition in the District Court of Custer County, State of Oklahoma, Case No. CV-2011-53, seeking declaratory relief and determination of the party authorized to

act on behalf of the tribal accounts of the Cheyenne and Arapaho Tribes.[1] The petition named as defendants, the Cheyenne and Arapaho Tribes, Janice Prairie Chief-Boswell ("Boswell") and Leslie Wandrie-Harjo ("Harjo").[2] First Bank specifically sought a declaration as to whether Boswell, who had established the tribal accounts in her undisputed capacity as governor of the tribes, should remain the authorized tribal signatory for the tribal accounts or whether the authorized tribal signatory should be changed to Harjo, who is now claiming to be the governor of the tribes. First Bank also sought a declaration absolving it from any liability concerning the signatory authority for the tribal accounts.

The tribes and Boswell filed a joint motion to dismiss First Bank's action on several grounds, including tribal sovereign immunity. The Honorable Doug Haught ("Judge Haught"), who was assigned the case, held a hearing on the motion on April 16, 2012. He overruled the motion, concluding that he must decide First Bank's duties and obligations with respect to the tribal accounts. He acknowledged that he did not have the jurisdiction to decide who the governing body of the tribes was but concluded that he would decide what the bank's duties and obligations were as to the tribal accounts. He then set the case for a bench trial on June 8, 2012.

On April 24, 2012, First Bank, after discovering an attempt to transfer funds from the tribal accounts to another bank, placed an administrative freeze on the tribal accounts. The "Notice of Administrative Freeze" stated that the freeze would remain

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[1] First Bank's petition was filed pursuant to 12 O.S. 2011 § 1651, which permits district courts to determine rights, status and other legal relations, including a determination of the construction or validity of any "contract . . . other instrument or agreement."

[2] Boswell and Harjo were each named "in her representative capacity, if any, as the alleged Governor of the Cheyenne and Arapaho Tribes." Ex. 58 to plaintiff's Amended Verified Complaint."

until a decision was rendered by the court on its petition or until otherwise ordered by the court.

Subsequently, on May 4, 2012, plaintiffs, the Cheyenne and Arapaho Tribes and the Cheyenne and Arapaho Tribes' Executive Branch, filed a Verified Complaint in this court against First Bank alleging deprivation of their due process rights under 42 U.S.C. § 1983 based upon the administrative freeze. They also alleged a violation of their privileges and immunities, specifically, tribal sovereign immunity, under § 1983 as well as a violation of their treaty rights. They sought money damages and an injunction. They also sought a declaratory judgment declaring that the administrative freeze violated their property and treaty rights and that the bank accounts were rights secured by the Indian Commerce Clause and the Supremacy Clause and were protected from seizure because they existed for the purpose of administration of contracts pursuant to Congressional authorization.

Plaintiffs then filed a motion for temporary restraining order and preliminary injunction seeking an injunction dissolving the administrative freeze. On May 9, 2012, the Honorable David Russell issued an order denying the temporary restraining order because plaintiffs could not show a likelihood of success on the merits due to the ongoing dispute regarding governance of the tribes and the potential liability for payment by First Bank of money to an unauthorized party. Judge Russell also stated that he would require a bond under Rule 65(c), Fed. R. Civ. P., and the tribes had no money to post a bond. Judge Russell also noted that the only basis for federal jurisdiction cited in the complaint was 42 U.S.C. § 1983 and there were no allegations of state action by First Bank. *See*, Order (doc. no. 13).

On May 15, 2012, plaintiffs filed an Amended Verified Complaint adding as a new defendant, Judge Haught, based on his decision to exercise jurisdiction over the

state court action. The Amended Verified Complaint alleges the following claims and counts:

- Count 1 - 42 U.S.C. § 1983 claim for damages for deprivation of rights secured by the Constitution and laws of the United States. The claim is alleged against First Bank for alleged deprivation of the tribes' rights in property by extra-judicially seizing the tribes' funds by way of the administrative freeze. Although the claim is not alleged against Judge Haught, the claim sets forth allegations against Judge Haught based upon his failure to dismiss the state court action and his allowing First Bank to place the administrative freeze on the tribes' accounts.

- Count 2 - Claim for damages for deprivation of privileges and immunities secured by the Constitution and laws of the United States. The claim is alleged against First Bank and Judge Haught for depriving plaintiffs of their rights to tribal sovereign immunity and self-government in filing and maintaining the state court action.

- Count 3 - Claim for damages for violation of the Indian Commerce Clause. The claim is alleged against First Bank and Judge Haught for violating plaintiffs' unspecified rights secured by the Indian Commerce Clause.

- Count 4 - Claim for damages for violation of treaty rights. The claim is alleged against First Bank and Judge Haught for violating plaintiffs' rights under government-to-government treaties with the United States by interfering with their rights to be free from state interference with the tribes' sovereignty, including the right of the tribes to be free from state lawsuits.

- Count 5 - Claim for damages for violation of the Oklahoma Enabling Act. The claim is alleged against First Bank and Judge Haught for deprivation of unspecified rights secured by the Oklahoma Enabling Act.

- Count 6 - Claim for damages for violation of the Supremacy Clause in Article VI of the United States Constitution. The claim is alleged against First Bank and Judge Haught.

- Count 7 - Claim for damages for intentional interference with contracts. The claim is alleged only against First Bank for interfering with contracts between the tribes and the federal and state governments involving the administration of various essential governmental services and programs for the tribes' members based upon First Bank's conduct in administratively freezing tribal accounts.

- Count 8 - Claim seeking a writ of prohibitory injunction against First Bank and Judge Haught. Plaintiffs seek to dissolve the administrative freeze and enjoin the state court proceeding.

- Count 9 - Claim seeking declaratory judgment against First Bank and Judge Haught. Plaintiffs seek a declaratory judgment determining that the administrative freeze (1) deprives the tribes of rights secured by Constitution; privileges and immunities secured by Constitution; rights secured by Indian Commerce Clause; rights secured by treaties; rights secured by Oklahoma Enabling Act; and rights secured by various Congressional acts; and (2) was taken under color of state law; jeopardizes tribal members' health, safety and welfare; was in excess of First Bank's authority; and interferes with the tribes' right to govern themselves.

- Count 10 - Claim seeking declaratory judgment against First Bank and Judge Haught. Plaintiffs seek declaratory judgment that First Bank's decision to file the state court action and Judge Haught's decision to exercise jurisdiction violates the tribes' rights, privileges and immunities secured by the Constitution and the laws of the United States, particularly the right to sovereign immunity.

- Count 11 - Claim for attorney fees under 42 U.S.C. § 1988 against First Bank and Judge Haught.

On May 29, 2012, plaintiff, the Cheyenne and Arapaho Tribes' Executive Branch, filed a motion for immediate temporary restraining order and preliminary injunction. Plaintiff sought to enjoin the state court proceedings, specifically, the bench trial scheduled in front of Judge Haught on June 8, 2012. The next day, plaintiff, the Cheyenne and Arapaho Tribes, moved to join in the motion, which the court granted.

The court denied the motion for temporary restraining order on May 31, 2012 because the motion sought a temporary restraining order without notice and there was no showing that immediate and irreparable injury would result before the adverse party, Judge Haught, could be heard. The motion for preliminary injunction was set for hearing before the court on June 6, 2012.[3] *See*, Order (doc. no. 33).

On June 1, 2012, plaintiffs also filed a joint motion for temporary restraining order and preliminary injunction seeking to dissolve First Bank's administrative freeze. That motion was also set for hearing on June 6th.

The Cheyenne and Arapaho Tribes, Cheyenne and Arapaho Tribes' Executive Branch and Harjo filed a motion on May 31, 2012, seeking to intervene in this action pursuant to Rule 24, Fed. R. Civ. P. The court entered an order on June 5, 2012 denying the motion. *See*, Order (doc. no. 49).

[3] In its order, the court also denied plaintiffs' motion for preliminary injunction seeking to dissolve First Bank's administrative freeze. The motion was denied because the motion was premised upon the filing of plaintiffs' Verified Complaint and the Verified Complaint was superseded by the filing of plaintiffs' Amended Verified Complaint, thereby rendering it a nullity, and for the additional reasons set forth in Judge Russell's order denying plaintiffs' motion for temporary restraining order. *See*, doc. no. 33.

On the same day, the Cheyenne and Arapaho Tribes, Cheyenne and Arapaho Tribes' Executive Branch and Harjo filed a motion for special appearance at the June 6th hearing.

On June 6, 2012, the court[4] held a hearing on the motions seeking to enjoin the bench trial before Judge Haught and to dissolve the administrative freeze effected by First Bank. During the hearing, the court denied the motion of the Cheyenne and Arapaho Tribes, Cheyenne and Arapaho Tribes' Executive Branch and Harjo seeking a special appearance. The court then denied plaintiffs' motions seeking to enjoin the bench trial and to dissolve the administrative freeze.

In reaching its decision, the court initially concluded that plaintiffs had not established that the jurisdiction of the court was invoked by tribal officials or other representatives who were duly authorized to do so. As to the injunction sought against Judge Haught, the court found that plaintiffs, even under a relaxed standard, had not shown a likelihood of success on the merits. Specifically, the court concluded that the tribes could not sue for relief against Judge Haught under § 1983 and that the *parens patriae* doctrine did not apply. The court also found that there was no showing that the executive branch was an entity which may bring a § 1983 action. In addition, the court found that plaintiffs had failed to show an exception to the Anti-Injunction Act and that the injunction sought was also precluded under the plain language of § 1983.

As to the injunction sought against First Bank, the court found plaintiffs could not meet their burden for obtaining injunctive relief because First Bank was not a state actor for purposes of § 1983. Additionally, the court concluded that to the extent that injunctive relief could be sought on the intentional interference with contract claim,

[4] This action was transferred to the undersigned on May 23, 2012. Doc. no. 20.

plaintiffs could not establish all of the elements of that claim because First Bank's conduct did not amount to malicious and intentional interference.

Subsequently, Judge Haught and First Bank filed their motions to dismiss plaintiffs' Amended Verified Complaint.[5]

Discussion

Federal Claims Against Judge Haught

In Count 1 of the Amended Verified Complaint, plaintiffs allege a § 1983 claim purportedly against First Bank. However, in the body of Count 1, plaintiffs have set forth allegations against Judge Haught based upon his failure to dismiss the state court action and his action in allowing First Bank to administratively freeze the tribal accounts. Although Count 2, Count 3, Count 4, and Count 6 do not indicate that those claims are brought under § 1983, it appears that, in those claims, plaintiffs seek monetary relief under § 1983 because plaintiffs have not alleged any other basis upon which those claims might be asserted. Plaintiffs have not alleged that a private right of action exists in their favor them under the laws alleged. The court therefore concludes that, in those claims, plaintiffs seek monetary relief under § 1983.

Plaintiffs allege in the Amended Verified Complaint that the state court action against the tribes and Boswell is barred by tribal sovereign immunity and that Judge

[5] Prior to the dismissal motions being at issue, plaintiffs filed a third motion for preliminary injunction. According to plaintiffs, Judge Haught entered an order on June 21, 2012 denying First Bank's petition and converting the tribal accounts with First Bank "to a court supervised account" and placing himself in the position of a "trustee" over the tribal accounts. Plaintiffs assert that in order for the funds to be dispersed, Judge Haught is requiring that tribal authorities make application with the court with notice to all contestants and "dispersement will be ordered based on a yet to be determined standard." In addition, plaintiffs assert that a default judgment was entered on June 21, 2012 by the tribal court against First Bank determining that Boswell, rather than Harjo, is the governor of the tribes and is the authorized signor of the tribes. The tribal court ordered First Bank to honor the signature of Boswell with regard to the tribal accounts. Plaintiffs request the court to issue a preliminary injunction ordering Judge Haught to cease and desist from serving as trustee and to cease and desist from exercising jurisdiction over plaintiffs and for First Bank to comply with the default judgment in tribal court.

Haught lacks subject matter jurisdiction over the action. The Supreme Court has held that "Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc., 523 U.S. 751 (1998). Plaintiffs allege that Judge Haught does not have jurisdiction over any activities concerning the tribes in the absence of a written, clear and unequivocal waiver of sovereign immunity authorized by the tribes' legislature and tribal council or by Congress. Plaintiffs assert that no such waiver has been made. Plaintiffs also contend that tribal sovereign immunity also extends to Boswell, who was sued in her official capacity. As tribal sovereign immunity bars the state court action, plaintiffs contend that Judge Haught cannot exercise jurisdiction over the tribes or Boswell.

Plaintiffs seek to recover damages in counts 1-4 and 6. Although Judge Haught, who is sued only in his official capacity, *see*, Amended Verified Complaint, ¶ 6, has not invoked the Eleventh Amendment, the court considers the issue *sua sponte*. U.S. ex rel. Burlbaw v. Orenduff, 548 F.3d 931, 942 (10th Cir. 2008) ("[A] court may raise the issue of Eleventh-Amendment immunity *sua sponte* but, unlike subject-matter jurisdiction, it is not obligated to do so.") The Eleventh Amendment bars action in federal court against states and also bar suits in federal court against state officers sued in their official capacities for money damages. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Eleventh Amendment immunity is not abrogated by 42 U.S.C. § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 66-67 (1989). In addition, Oklahoma has not waived any rights under the Eleventh Amendment. *See*, 51 O.S. 2011 § 152.1 ("it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.")

As a District Judge for the District Court of Custer County (as well as the other counties in his Judicial District), State of Oklahoma, Judge Haught serves as an officer

of the state. Jackson v. Loftis, 189 Fed. Appx. 775, 777-78 (10th Cir. July 25, 2006) (concluding that a county special district judge is regarded as an employee of the state rather than the county).[6] The court therefore concludes that plaintiffs' § 1983 claims for money damages are barred under the Eleventh Amendment. *See*, Gradle v. Oklahoma, 203 Fed. Appx. 179, 183 (10th Cir. Aug. 1, 2006) (upholding application of Eleventh Amendment immunity to a county district judge).[7] The court therefore concludes that plaintiffs' claims for monetary relief under § 1983 should be dismissed under Rule 12(b)(1), Fed. R. Civ. P. Ruiz v. McDonnell, 299 F.3d 1173, 1180-81 (10th Cir. 2002) (upholding dismissal under Rule 12(b)(1) of § 1983 claims barred by Eleventh Amendment immunity).[8]

Plaintiffs, in Count 8, seek a prohibitory injunction against Judge Haught. Plaintiffs allege that they are entitled to an injunction against Judge Haught, enjoining him from exercising jurisdiction in the state court action. Plaintiffs do not specify under what authority, statutory or otherwise, they seek such relief. To the extent that plaintiffs seek injunctive relief under § 1983, the court concludes that that relief is precluded by the plain language of § 1983. Injunctive relief is not available against a judicial officer under § 1983 "for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." *See*, 42 U.S.C. § 1983; Schepp v. Fremont County, 900 F.2d 1448,

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[6] Unpublished opinion cited as persuasive under 10th Cir. R. 32.1(A).

[7] Unpublished opinion cited as persuasive under 10th Cir. R. 32.1(A).

[8] In his motion, Judge Haught seeks dismissal of the § 1983 claims based upon the doctrine of judicial immunity. Judge Haught, however, has been sued in his official capacity and not in his individual capacity. *See*, Amended Verified Complaint (doc. no. 16), ¶ 6. Judicial immunity applies only to personal capacity cases. Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d. 1140, 1156 (10th Cir. 2011).

1452 (10th Cir. 1990). Plaintiffs have not shown that either condition is satisfied in this case.

In addition, Section 2283 of Title 28 of the United States Code, known as the Anti-Injunction Act, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. Plaintiffs have not shown that this action falls within any of the recognized exceptions to the Anti-Injunction Act. The court therefore concludes that plaintiffs' claim for injunctive relief should be dismissed under Rule 12(b)(6), Fed. R. Civ. P.

In Count 9 and Count 10, plaintiffs seek a declaratory judgment against Judge Haught. To the extent that plaintiffs seek declaratory relief under § 1983, the court concludes, under Ex Parte Young, 209 U.S. 123 (1908), that the Eleventh Amendment is not an impediment. Young avoids an Eleventh Amendment bar as long as the Amended Verified Complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. Muscogee (Creek) Nation v. Oklahoma Tax Com'n, 611 F.3d 1222, 1232 (10th Cir. 2010). Plaintiffs seek a declaration that Judge Haught's exercise of jurisdiction in the state court action violates their right to tribal sovereign immunity. The declaratory relief sought based upon the allegations in the Amended Verified Complaint is properly characterized as prospective. In Verizon Maryland Inc. v. Pub. Serv. Comm'n, 535 U.S. 635 (2002), the Supreme Court held that the Eleventh Amendment did not bar a telecommunication carrier's federal claim for both prospective declaratory and injunctive relief because "no past liability of the State, or of any of its commissioners,

is at issue." *Id*. at 646. It appears from the allegations in the Amended Verified Complaint that plaintiffs do not seek any declaratory relief based upon past liability.

Even though the declaratory judgment claim is not barred by the Eleventh Amendment, the court concludes that plaintiffs cannot seek the relief under § 1983. Section 1983 permits "citizen[s]" and "other person[s] within the jurisdiction" of the United States to seek legal and equitable relief from "person[s] who, under color of state law, deprive them of federally protected rights." 42 U.S.C. § 1983. State officials sued in their official capacity for declaratory and injunctive relief constitute persons acting under color of state law for purposes of § 1983. Muscogee (Creek) Nation, 611 F.3d at 1234. The question is whether the Indian tribe and the executive branch may bring the § 1983 action against Judge Haught.

In Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701 (2003), the Supreme Court addressed the sufficiency of an Indian tribe's suit seeking to establish the right, based on its sovereign status, to be free from a state's criminal process. The Court considered whether the tribe could sue under § 1983 to prevent law enforcement officers from executing state-issued search warrants to seize tribal records. The Court held under the facts presented that the tribe did not qualify as a "person" who may sue under § 1983. *Id*. at 704. The Court reasoned "Section 1983 was designed to secure private rights against government encroachment, not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation." *Id*. at 712. The Court concluded the tribe could not sue under § 1983 to vindicate its alleged sovereign right to be free from state law enforcement processes. *Id*. The Court suggested that an Indian tribe's status as sovereign entity did not *per se* foreclose its ability to bring suit as a "person" under § 1983. "There is in this case no allegation that the County lacked probable cause or that the warrant was otherwise defective. It is only by virtue

of the Tribe's asserted 'sovereign' status that it claims immunity from the County's processes." *Id*. at 711.

The tribes' claim under § 1983 seeking declaratory relief as to the state court proceedings is based upon its sovereign status. The tribes claim that they are immune from the state action because of tribal sovereign immunity. To the extent that the tribes bring § 1983 claims on their own behalf, they are not a "person" under § 1983 in light of the Inyo decision.

The tribes argue that they are not bringing their § 1983 claims as tribes but are asserting their claims under the doctrine of *parens patriae*. The doctrine of *parens patriae* is a standing doctrine that allows a sovereign such as a state to bring suit to protect its interests in matters of public concern. State, Dept. of Health and Social Services, Div. of Family and Youth Services v. Native Village of Curyung, 151 P.3d 388, 399 (Alaska 2006). In Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982), the Supreme Court identified three requirements that a state must satisfy for *parens patriae* standing. First, the state must "articulate an interest apart from the interests of particular private parties, i.e., the [plaintiff] must be more than a nominal party." *Id*. at 607. Second, the state must "express a quasi-sovereign interest" that it seeks to protect. *Id*. Finally, the state must "allege[] injury to a sufficiently substantial segment of its population." *Id*.

As to the second requirement, the Supreme Court has stated that the state has a quasi-sovereign interest "in the health and well-being-both physical and economic-of its residents in general" and "in not being discriminatorily denied its rightful status within the federal system." *Id*. at 607. An Indian tribe may sue as *parens patriae*, *e.g.* Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1137 (8th Cir. 1974), and the tribes rely upon the case of State, Dept. of Health and Social Services, Div. of Family and Youth Services v. Native Village of Curyung, 151 P.3d 388, 399 (Alaska

2006), to support their position that they may prosecute a § 1983 action as a *parens patriae* suit. The court concludes, however, that the tribes have not expressed a quasi-sovereign interest, but rather a sovereign interest. The tribes seek to enforce tribal sovereign immunity and the right to self-government. They seek recognition of their sovereignty from a state official. They seek to vindicate the tribal members' interest in their health and well-being and the interest in not being discriminatorily denied a federal right. The important point here is that the interests of the tribes and the people are identical: enforcement of tribal sovereign immunity and the right to tribal self-government. The court also concludes that the facts of the Alaska case, recognizing a right to bring a *parens patriae* action under § 1983, are clearly distinguishable from this case.

The tribes' executive branch has also asserted the § 1983 claims but the executive branch has not demonstrated that it is an entity, separate from the tribes, that may maintain an action under § 1983.

Furthermore, to the extent plaintiffs seek declaratory relief under 28 U.S.C. § 2201 and rely upon 28 U.S.C. §§ 1331 and 1362, the court finds that plaintiffs cannot recover declaratory relief where it would have the same effect as an injunction that would be barred by the Anti-Injunction Act. Gloucester M.R. Corp. v. Charles Parisi, Inc., 848 F.2d 12, 15 (1st Cir. 1988); 17A Wright & Miller, Federal Practice and Procedure, § 4222 (3d. ed. 2012) (citing cases).

In sum, the court finds that plaintiffs' claims for declaratory relief against Judge Haught should be dismissed under Rule 12(b)(6), Fed. R. Civ. P.[9]

Federal Claims Against First Bank

[9] In light of the court's finding that dismissal of the § 1983 claims is warranted, the court concludes that plaintiffs are also not entitled to attorney fees under 42 U.S.C. § 1988 as sought in Count 11 of the Amended Verified Complaint.

Plaintiffs seek money damages against First Bank in Count 1 of the Amended Verified Complaint based upon the administrative freeze of the tribal accounts. In Counts 2, 3, 4, and 6, plaintiffs also seek money damages against First Bank based upon the administrative freeze of the tribal accounts as well as First Bank's conduct in filing the state court action. Although, as stated, Counts 2, 3, 4, and 6, as pled, do not indicate that those claims are brought under § 1983, it appears that plaintiffs seek monetary relief under § 1983 on those claims because plaintiffs have not alleged any other basis upon which such claims might be asserted. Plaintiffs have not alleged that a private right of action exists in their favor under the laws alleged.

To state a claim for relief in an action under § 1983, plaintiffs must establish that they were deprived of a right secured by the Constitution or laws of the United States and that the alleged deprivation was committed under color of state law. The color of state law element of § 1983 excludes from its reach "merely private conduct, however discriminatory or wrongful." Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). To occur under color of state law, the deprivation of a federal right "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and "the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). In Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 485 (1988), the Supreme Court stated that "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action." In American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 51 (1999), the Supreme Court also held that a private

insurer's decision to withhold payment of disputed medical treatment cannot be fairly attributable to the state.

Here, First Bank administratively froze the tribal accounts on its own accord, as a private action by a private entity. Although First Bank stated that the freeze would remain in effect until further court order, it did not seek any order from Judge Haught allowing or approving the freeze. Plaintiffs cannot show that First Bank "acted together with or has obtained significant aid from [Judge Haught], or [that its] conduct is otherwise chargeable to the State." Lugar, 457 U.S. at 937.

In addition, First Bank's filing of its action in state court is not sufficient to show state action. In Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1325-27 (10th Cir. 1978), the Tenth Circuit held that a private litigant's use of state court proceedings to obtain an ex parte temporary restraining order did not satisfy the color of law requirement of § 1983. Also, in Read v. Klein, 1 Fed. Appx. 866, 871-872, 2001 WL 20818, at *5-6 (10th Cir. Jan. 9, 2001),[10] the Tenth Circuit concluded that a party and her attorney were not state actors merely because they obtained orders from the state court judge in a divorce proceeding. *See also*, Harvey v. Harvey, 949 F.2d 1127, 1133-34 (11th Cir. 1992) ("Use of courts by private parties does not constitute an act under color of state law.") In other words, there is no state action in a suit between private litigants where the state merely furnishes the forum for the dispute.

Plaintiffs, in the Amended Verified Complaint, seek injunctive and declaratory relief against First Bank. To the extent that plaintiffs seek the relief under § 1983, that relief is precluded because First Bank is not a state actor for purposes of § 1983. The court also finds that injunctive and declaratory relief as to the maintenance of the state

[10] Unpublished opinion cited as persuasive under 10th Cir. R. 32.1(A).

court action is barred by the Anti-Injunction Act, 28 U.S.C. § 2283. Gloucester M.R. Corp. v. Charles Parisi, Inc., 848 F.2d at 15; 17A Wright & Miller, Federal Practice and Procedure, § 4222 (3d. ed. 2012) (citing cases). Finally, the court finds that plaintiffs are not entitled to declaratory relief under § 2201 as to the administrative freeze because the Fourth Amendment's protection against unlawful seizures applies to governmental action, *see*, Burdeau v. McDowell, 256 U.S. 465, 475 (1921), and as discussed, First Bank's alleged conduct did not involve governmental action.

In sum, the court concludes that plaintiffs' § 1983 claims, as well as the claims for injunctive and declaratory relief against First Bank, should be dismissed under Rule 12(b)(6), Fed. R. Civ. P.[11]

State Law Claims

With the dismissal of all federal claims, the claims remaining for adjudication against Judge Haught (Count 5) and against First Bank (Count 5 and Count 7) are state law claims. Under 28 U.S.C. § 1367(c)(3), "district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." The Supreme Court has stated that "[a] district court's decision whether to exercise [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009). The Tenth Circuit has stated that "[w]hen all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." Smith v. City of Enid ex rel. Enid City Comm'n, 149 F.3d 1151, 1156 (10th Cir. 1998). Having disposed of the federal law claims against Judge Haught and First

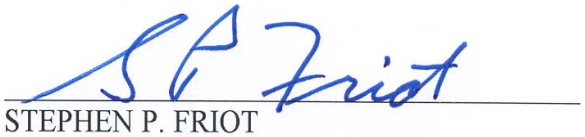
[11] In light of the court's finding that dismissal of the § 1983 claims is warranted, the court concludes that plaintiffs are also not entitled to attorney fees under 42 U.S.C. § 1988 as sought in Count 11 of the Amended Verified Complaint.

Bank prior to trial and finding no consideration requiring the court to retain and dispose of the state law claims, the court, in its discretion and pursuant to § 1367(c)(3), declines to exercise supplemental jurisdiction over the state law claims. The court shall dismiss the state law claims without prejudice.

Conclusion

Based upon the foregoing, Defendant Doug Haught's Motion to Dismiss Plaintiff's Amended Complaint (doc. no. 53) and Defendant First Bank and Trust Company's Motion to Dismiss (doc. no. 55), are **GRANTED** to the extent defendants seek dismissal of plaintiffs' federal law claims. The federal law claims alleged in the Amended Verified Complaint are **DISMISSED** pursuant to Rule 12(b)(1) or Rule 12(b)(6), Fed. R. Civ. P. As to the remaining state law claims, the court, in its discretion and pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over the state law claims and **DISMISSES WITHOUT PREJUDICE** the state law claims. Judgment shall be entered forthwith.

DATED November 28, 2012.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

12-0514p011.wpd

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

CHEYENNE AND ARAPAHO TRIBES, on its own behalf, and as *parens patriae* on behalf of its members; and CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-12-514-F
FIRST BANK AND TRUST COMPANY; and DOUG HAUGHT, in his official capacity as a District Judge, State of Oklahoma,	)	
Defendants.	)	

JUDGMENT

This matter having come before the court upon defendants' motions to dismiss and the court having granted the motions in regard to the federal claims and the court having declined to exercise supplemental jurisdiction over the remaining state law claims and having dismissed without prejudice those claims pursuant to 28 U.S.C. § 1367(c)(3),

IT IS HEREBY ORDERED that judgment is entered in favor of defendants Doug Haught and First Bank and Trust Company and against plaintiffs, Cheyenne and Arapaho Tribes and Cheyenne and Arapaho Tribes' Executive Branch.

DATED November 28, 2012.

S P Friot

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

12-0514p012.wpd

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

CHEYENNE AND ARAPAHO TRIBES, on its own behalf, and as *parens patriae* on behalf of its members; and CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-12-514-F
FIRST BANK AND TRUST COMPANY; and DOUG HAUGHT, in his official capacity as a District Judge, State of Oklahoma,	)	
Defendants.	)	

ORDER

This matter came for hearing on Friday, April 5, 2013 at 9:00 a.m., before the court upon Plaintiffs' Joint Motion to Vacate Judgment or in the Alternative, to Alter or Amend Judgment, filed on December 26, 2012 (doc. no. 65), Plaintiffs' Joint Motion for Leave to Supplement the Record, filed on February 14, 2013 (doc. no. 69) and Plaintiffs' Second Joint Motion for Leave to Supplement the Record, filed March 15, 2013 (doc. no. 73).

For the reasons set forth on the record, the joint motions for leave to supplement the record are granted. The joint motion to vacate judgment or in the alternative, to alter or amend judgment is granted to the extent that the monetary claims against defendant, Judge Doug Haught, under 42 U.S.C. § 1983 are dismissed without prejudice pursuant to Eleventh Amendment immunity. The remaining federal claims

are dismissed with prejudice under Rule 12(b)(6), Fed. R. Civ. P., without leave to amend. The facts presented by plaintiffs to supplement the Amended Verified Complaint, which occurred after the filing of this action, do not cure the deficiencies of plaintiffs' claims, and any supplement or additional amendment to the complaint would be futile as any supplemented or amended complaint would be subject to dismissal.

In their joint motion to vacate, plaintiffs state that Count 7 of the Amended Verified Complaint against defendant, First Bank and Trust Company, should not have been considered by the court under Rule 12(b), Fed. R. Civ. P. During the hearing, the court mentioned Count 7 and intended to point out to plaintiffs that Count 7 was not dismissed under Rule 12(b)(6), Fed. R. Civ. P. Count 7 is a state law claim and was dismissed, as indicated on page 17 of the court's November 28, 2012 order, without prejudice, pursuant to 28 U.S.C. § 1367(c)(3) because the court declined to exercise supplemental jurisdiction over the claim with the dismissal of all federal claims. The court's discussion during the hearing regarding Rule 12(b)(6) and Rule 12(c), Fed. R. Civ. P., related to the federal claims alleged against defendant, First Bank and Trust Company.

Accordingly, Plaintiffs' Joint Motion for Leave to Supplement the Record, filed on February 14, 2013 (doc. no. 69), and Plaintiffs' Second Joint Motion for Leave to Supplement the Record, filed March 15, 2013 (doc. no. 73), are **GRANTED**.

Plaintiffs' Joint Motion to Vacate Judgment or in the Alternative, to Alter or Amend Judgment, filed on December 26, 2012 (doc. no. 65) is **DENIED** in all respects, except that the court's November 28, 2012 order and judgment are amended to clarify that the monetary claims against defendant, Judge Doug Haught, under 42 U.S.C. § 1983 are **DISMISSED WITHOUT PREJUDICE** pursuant to the Eleventh Amendment immunity.

An amended judgment shall issue forthwith.

DATED at Oklahoma City, Oklahoma, this 5th day of April, 2013.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

12-0514p017.wpd

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

CHEYENNE AND ARAPAHO TRIBES, on its own behalf, and as *parens patriae* on behalf of its members; and CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-12-514-F
FIRST BANK AND TRUST COMPANY; and DOUG HAUGHT, in his official capacity as a District Judge, State of Oklahoma,	)	
Defendants.	)	

AMENDED JUDGMENT

This matter having come before the court upon defendants' motions to dismiss and the court having granted the motions in regard to the federal claims and having dismissed plaintiffs' monetary claims against defendant, Judge Doug Haught, under 42 U.S.C. § 1983 without prejudice and having dismissed all other federal claims with prejudice and the court having declined to exercise supplemental jurisdiction over the remaining state law claims and having dismissed without prejudice those claims pursuant to 28 U.S.C. § 1367(c)(3),

IT IS HEREBY ORDERED that judgment is entered in favor of defendants, Doug Haught and First Bank and Trust Company, and against plaintiffs, Cheyenne and Arapaho Tribes and Cheyenne and Arapaho Tribes' Executive Branch.

DATED April 5, 2013.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

12-0514p018.wpd

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

CHEYENNE AND ARAPAHO TRIBES, on its own behalf, and as parens patriae on behalf of its members; and CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH,

Plaintiffs,

vs. Case No. CIV-12-514-F

FIRST BANK AND TRUST COMPANY, and DOUG HAUGHT, in his official capacity as a District Judge, State of Oklahoma,

Defendants.

TRANSCRIPT OF HEARING

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

APRIL 5, 2013

APPEARANCES:

FOR THE PLAINTIFFS:	MS. ALVINA EARNHART MS. THOMASINA REAL BIRD Fredericks Peebles & Morgan 1900 Plaza Drive Louisville, CO 80027
	MR. CHARLES B. MORRIS Attorney General Cheyenne and Arapaho Tribes P.O. Box 32 Concho, OK 73022
FOR DEFENDANTS FIRST BANK AND TRUST COMPANY:	MR. ADAM HALL Crowe & Dunlevy 20 North Broadway Suite 1800 Oklahoma City, OK 73102
FOR DEFENDANT HAUGHT:	MR. M. DANIEL WEITMAN Assistant Attorney General Oklahoma Attorney General's Office Litigation Division 313 N.E. 21st Street Oklahoma City, OK 73105

(PROCEEDINGS HAD APRIL 5, 2013.)

THE COURT: Good morning. We're here in Civil 12-514, Cheyenne and Arapaho Tribes, and others, v. First Bank & Trust Company and Doug Haught. That would be, if I didn't say it, Civil 12-514.

Counsel will please give your appearances.

MS. EARNHART: Your Honor, Alvina Earnhart on behalf of Plaintiffs Cheyenne and Arapaho Executive Branch.

MS. REAL BIRD: Thomasina Real Bird on behalf of the Executive Branch of the Cheyenne and Arapaho Tribes.

MR. MORRIS: Charles Morris on behalf of Cheyenne and Arapaho Tribes, Attorney General.

MR. WEITMAN: Dan Weitman for Judge Haught.

MR. HALL: Adam Hall for First Bank & Trust Company.

THE COURT: Thank you.

I want to address two motions that I consider to be relatively uncomplicated and fairly quickly resolved preliminarily.

We have two motions for leave to supplement the record. That's Docket Entry Number 69 and Docket Entry Number 73. So far as I can tell, granting those motions is neither here nor there on the merits of the case, all it does is provide the plaintiffs the opportunity for -- to have the record show the matters that they consider to be of potential significance. Again, that's really neither here nor there in terms of the

merits of the case. And for that reason, I regard that as substantively inconsequential and procedurally fair.

With that rather pejorative introduction, do the defendants have anything more to say with respect to those motions to supplement the record?

MR. WEITMAN: No, Judge.

MR. HALL: No, Your Honor.

THE COURT: Very well. The motions at Docket Entry Number 69 and 73 will be granted.

Now, that brings us to the plaintiffs' joint motion to vacate the judgment, which is obviously just a bit more complicated.

And let me clear up one aspect of it. Again, preliminarily -- and that is I have, at least, preliminarily concluded that in my order last November, I should have more clearly indicated that the damage claims or the monetary claims against Judge Haught were being dismissed without prejudice.

The Court of Appeals has made it clear, among other cases, in the Korgich case, that's K-O-R-G-I-C-H case, 582 F.2d 549, that a dismissal based on the Eleventh Amendment immunity is a dismissal without prejudice. I did not make that very clear. And I -- for that reason, I have preliminarily concluded that that dismissal as against Judge Haught should have been clearly made a dismissal without prejudice.

Does either side care to be heard further on that score?

MR. HALL: No, Your Honor.

MR. WEITMAN: Well, Your Honor, to the extent --

THE COURT: Please work from the lectern.

MR. WEITMAN: I apologize.

Your Honor, to the extent that your order was based on the Eleventh Amendment immunity, I don't have anything further to say on that. Just want to point out that absolute immunity was argued, and although the Court didn't rule Oklahoma that, that would cause a dismissal with prejudice if the Court ruled that there was absolute immunity in the case.

THE COURT: Very well. Thank you.

Well, regardless of whatever else we do this morning, the judgment -- and I'll do this by separate order, this will be reflected by the minute sheet, but I'll also do this by separate order, the order and judgment will be altered and amended to reflect that the plaintiffs' monetary claims against Judge Haught under Section 1983 were dismissed without prejudice based on Eleventh Amendment immunity. And so that clears up one other aspect of the matter that I consider to be relatively uncomplicated.

Now we get into the -- if you will, the more substantive issues, and I'll be happy to hear from the plaintiffs in support of their motion.

MS. EARNHART: Good morning, Your Honor.

Your Honor, may it please the Court, again, my name is

Alvina Earnhart. I'm the attorney to the Plaintiff Cheyenne and Arapaho Executive Branch.

As you already covered the other two pending motions, Your Honor, with your permission, there are only two issues I wish to briefly review. The first is the Court's application of the Inyo case to this action, and why this Court should depart from Inyo and qualify Inyo.

THE COURT: That's I-N-Y-O?

MS. EARNHART: I-N-Y-O, Your Honor, yes.

And, secondly, the deprivation under color of state law of the Tribes' Executive Branch and Janice Prairie Chief Boswell, in her representative capacity, rights, privileges, and immunities secured by the Constitution fall within the exception of the Federal Anti-Injunction Statute.

With respect to the first issue of the Court's application of Inyo to this case, the facts of this case are distinguishable from Inyo.

We recognize that the U.S. Supreme Court's holding in Inyo explains that 42 USC Section 1983 is available only to secure private rights against government encroachment and cannot be used only to vindicate Indian tribes' sovereign rights.

However, as set forth in plaintiffs' amended complaint, the Tribes and Executive Branch seek redress against an illegal freezing of tribal funds, based on their status as an individual depositor, no different from any other depositor

with property rights and their funds.

The main issue here is the illegal freezing of nearly $7 million of tribal funds earmarked for financing tribal programs and providing essential governmental services for the tribal membership; specifically, tribal children and tribal elders.

The Tribes and the Executive Branch have struggled to maintain and finance these tribal programs and essential governmental services for nearly one year. And although they have made do with what they have, they should not be forced to continue to do so without the additional $7 million that rightfully belongs to them and that are --

THE COURT: Now that you've gotten off into that, let me ask you this very simple question: Where do these factions stand in getting -- in terms of just getting their own house in order?

I've said that in more than one hearing in this case. If we're talking about little children suffering, little children are suffering in the first instance because this Tribe can't get its own house in order. Where do you stand on that?

MS. EARNHART: Your Honor, we've provided documents to the Court in previous motions and briefings where the Tribal Council, which consists of all members of the Cheyenne and Arapaho Tribes, have acknowledged that Janice Prairie Chief Boswell is the governor of the Tribes.

There has also been a tribal court decision that was

issued which recognized Janice Prairie Chief Boswell as the official signatory of the Tribes as well.

THE COURT: You may proceed.

MS. EARNHART: Thank you, Your Honor.

In contrast to Inyo, under the facts of this case, plaintiffs are both a sovereign whose sovereign interests have been affected, and at the same time, an individual depositor in First Bank whose assets have been illegally frozen.

Plaintiffs' amended complaint alleges alternative legal claims seeking both to vindicate its sovereign interest and seeking to vindicate its private rights as an individual depositor.

Federal Rule 8(d)(2) allows the plaintiff to plead alternative legal claims. Plaintiffs allege different causes of actions in their amended complaint based on plaintiffs' different legal statuses under the facts.

On the one hand, plaintiffs are a sovereign entity that wants to vindicate its sovereign right. At the same time, plaintiffs are an individual depositor whose property has been illegally seized because the contract between the Tribes and First Bank does not permit it, Oklahoma law does not permit the seizure under the facts, and the Tribes were not provided with notice and an opportunity to be heard before the seizure.

Constitutional rights are recognized as distinguishable from the judge-made doctrine of tribal immunity by Justice

Stevens' concurrence in Inyo. In his concurrence, Justice Stevens argued that a Native American tribe is a person who can sue under Section 1983.

According to Justice Stevens, the ordinary meaning of the word "person," as used in federal statutes, as well as specific remedial purpose of Section 1983, support the conclusion that a tribe should be able to invoke the protections of the statute if its constitutional rights are violated, citing Will v. Michigan Department of State Police, 491 U.S. 58.

Although the basis of plaintiffs' claims stem from the state court's lack of jurisdiction and the waiver of sovereign immunity, plaintiffs' claims are based on violation of constitutional rights distinguishable from the claims asserted in Inyo.

Here, Your Honor, we ask the Court to hold, as Stevens did in his dissent, that the violation of -- that the Tribes and Executive Branch should have access to a 1983 remedy when they experience a violation of their constitutional rights to their property.

Here, the Tribes' monies were denied without due process, substantively and procedurally. There was no process when First Bank seized the funds and there was no due process when the state enjoined access to the funds. There was no claim made against First Bank. In the state case, there was no application for an injunction, no argument presented to the

Court on injunction, yet the Court decided sua sponte after the trial to enjoin access to the funds.

Here, we also have federal treaties that we are suing under. This overcomes Stevens' concern that the common law is not a law under Section 1983.

In Inyo, the Indian tribe and its wholly owned gaming corporation brought an action challenging the government's authority to seize casino employment records as part of a welfare fraud investigation.

The purpose of the assertion of sovereignty in Inyo was not in the well-being of its populous, but rather to avoid having to disclose employment records in a criminal investigation.

In contrast, the facts in this case have a direct bearing on the well-being of the Tribes' populous. It is in the well-being of tribal members to be led by a governor of their choosing, which has been demonstrated in both the Tribal Council resolution, which was provided to the Court, as well as the tribal court judgment that was issued recognizing Janice Prairie Chief Boswell as the official signatory of the Tribes, specifically for these banks held with -- for these accounts held with First Bank.

The courts in Alfred Allsnap & Son, Incorporated v. Puerto Rico and State of Alaska define "quasi sovereign interest" as those that the state has in the well-being and the populous.

Now, with respect to the second issue, the deprivation under color of state law of plaintiffs' rights, privileges, and immunities, secured by the Constitution, fall within the exception of the Federal Anti-Injunction Statute.

Specifically, Section 1983 provides an exception that states: Except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Judge Haught did, in fact, violate the declaratory decree contained in Kiowa Tribe of Oklahoma v. Manufacturing Tech, Incorporated. That held that, as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.

THE COURT: Now, let me make sure I understand your argument. You're saying that -- you're trying to bring yourself within the exception by saying Judge Haught violated what you characterize as a declaratory decree that was entered in some other case?

MS. EARNHART: Yes, Your Honor.

THE COURT: Okay. That's a new wrinkle for me. I need you to help me on that. I'm not sure that's what the statute contemplates on that.

MS. EARNHART: Let's see. It would be in the context

of also referring to the exception that's provided under 28 USC Section 2283, which states that, if expressly authorized by act of Congress -- if you would like -- I'd like to restate that, the full, I guess -- Section 2283 states: A court of the United States may not grant an injunction to state proceedings in a state court, except as expressly authorized by act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgment.

Here, I'm focusing primarily on the exception that's provided as expressly authorized by act of Congress. So, here, in the absence of a waiver or -- of a waiver provided by the tribe or where Congress has authorized the suit.

So under that context -- am I clarifying it at all? Is where I believe that we meet that exception where Judge Haught has violated that declaratory decree.

THE COURT: Proceed.

MS. EARNHART: Thank you, Your Honor.

The U.S. Supreme Court in Mitchell v. Foster noted that Title 42 USC Section 1983, which authorizes a suit in equity to redress the deprivation under color of a state law of any rights, privileges, or immunities secured by the Constitution is within the exception of the Federal Anti-Injunction Statute.

Therefore, the deprivation under color of state law of the Tribes' Executive Branch and Janice Prairie Chief Boswell, in her representative capacity, rights, privileges, immunities

secured by Constitution fall --

THE COURT: I'm going to ask you to please slow down just a bit.

MS. EARNHART: Okay. Fall within the exemption of the Federal Anti-Injunction Statute.

In conclusion, Your Honor, finally, plaintiff asks that the Court consider the matters we have raised today and the issues briefed before this Court in our pleadings and find in favor of plaintiffs on plaintiffs' joint motion to vacate judgment and permit plaintiffs to amend their complaint to resolve the issues raised in the Court's order and judgment issued by this Court on November 28, 2012, by clarifying the federal claims and adding Janice Prairie Chief Boswell as a plaintiff to this action.

In the alternative, if the Court does not wish to vacate its judgment to permit plaintiff to amend their complaint, plaintiffs request that the Court alter or amend the Court's order and judgment by dismissing plaintiffs' federal claims without prejudice.

THE COURT: Okay. Now, refresh my recollection. In your joint motion, do you say anything about adding Ms. Boswell as a plaintiff?

MS. EARNHART: If I could just double-check in my motion really quick, Your Honor.

THE COURT: Sure.

MS. EARNHART: I don't know if I specifically state that. Let me double-check.

Your Honor, on -- I guess beginning on page 5, we do reference and identify Janice Prairie Chief Boswell as --

THE COURT: That's page 5 of your December 26 motion; is that right?

MS. EARNHART: Yes, Your Honor. Document 65. It appears as page 10 of 27, actually, at the top of the page.

THE COURT: I'm there.

MS. EARNHART: Okay. We identify the governor as the plaintiff depositor and make reference to the rights she has in the accounts as being the individual named and identified in the signatory cards.

And I think this is where we had intended, just by reference, to indicate that the governor did have a right that should have been protected, as she was the official signatory, so she had the property ownership over that account on behalf of the tribes acting in her official capacity.

I don't see anything in here specifically that states that we had intended on including her as a plaintiff, but that section, along with part 4 on page 21, where we ask the Court in the alternative to permit us with the right to amend that we had anticipated on including her as a party.

THE COURT: Thank you.

I'm not going to consider any request to add Ms. Boswell

as a plaintiff. That's the sort of thing that raises its own set of issues that are distinct in -- I think I can confidently say from anything else that's before the Court. And the defendants would certainly have the right to respond to that. There's nothing in this brief that comes close to requesting this Court to permit an amendment to join an additional plaintiff, so you don't need to address that any further. I'm not going to consider that.

What I'm here to consider is what is in the motions, not what is not in the motions.

MS. EARNHART: Okay. Thank you, Your Honor.

Your Honor, just to conclude, we ask that the Court bear in mind, once again, that this case goes beyond the issue of sovereign immunity, realize that impacted day by day as the result of the illegal freezing of tribal funds --

THE COURT: Please slow down.

MS. EARNHART: First Bank has been permitted to withhold and unjustly benefit from the $7 million held in plaintiffs' accounts.

First Bank has been permitted -- I'm sorry -- at First Bank for nearly one year to the detriment of tribal members that are forced to make do without the additional $7 million that is earmarked for their benefit.

Notably, Your Honor, as discussed in plaintiffs' joint motion, First Bank attempted to release the funds in the state

court action on August 24, 2012, by filing an application to close the accounts and pay the proceeds to the Tribes.

First Bank actually requested to get out of the state court action and asked Judge Haught to let it mail a check to the Tribes' address.

No case or controversy existed at that time in the state case, Your Honor. And state court action held two unwilling parties in that instance when it determined to deny First Bank the application that he had submitted.

Defendant Haught denied First Bank's application on September 17, 2012. These actions cannot continue and plaintiffs' constitutional rights must be protected.

This Court is our only recourse for seeking justice on behalf of those harmed by defendants' actions, Your Honor.

THE COURT: Thank you.

I'll hear from the defendants.

MR. WEITMAN: Thank you, Your Honor.

Dan Weitman for Judge Haught.

I don't have a lot to say. We believe you got it right in your order, that plaintiffs are seeking to vacate or amend. I do want to address one thing the plaintiffs brought up, and that is violation of a declaratory judgment because of a ruling in another case, it would just be an absurdity to stretch the law that far, to say any time a state judge makes a ruling which may be in contradiction to some prior precedence

somewhere that he has violated a declaratory judgment and is subject to 1983 liability.

The plaintiffs are here arguing and asserting that they can sue Judge Haught because of a ruling that he made in a case where he determined that the state court has subject matter jurisdiction to determine the duties of a state bank and that's what this is all about.

And the Court correctly in its order found that an action could not be maintained against Judge Haught and we ask that the Court maintain that order.

Thank you.

THE COURT: Before I hear from the bank, let me make one more inquiry of the plaintiffs. I gather from the record as a whole that the plaintiffs still seek prospective relief based on the fact that Judge Haught is still assuming to exercise jurisdiction in the state court case by exerting control over the funds. Am I right about that?

MS. EARNHART: Yes, Your honor.

THE COURT: Very well.

I'll hear from the bank.

MR. HALL: Your Honor, I'm Adam Hall on behalf of First Bank & Trust Company.

I must admit I have very little in addition to offer the Court today, other than what Mr. Haught's counsel just offered.

It's our position that the plaintiffs' motion that is

being decided today is simply asking this Court to decide differently than it did in its order dated November the 28th of 2012.

As we sit here today, we know of nothing that's transpired from the date of entry of that order to today that has any impact or bearing on the Court's decision.

We believe that the Court properly concluded and decided not to exercise jurisdiction. And it was clearly detailed in the November 28, 2012, order the reasons for doing so.

And we would simply request that the Court maintain that order.

THE COURT: Let me change the subject a little bit.

The request to Judge Haught to send a check to the account holder at the address shown by the bank's records, that's a very understandable request that was made. It -- I guess, it fell into the nice-try category, in one sense, because of the tribal controversy, but am I right that the bank wants nothing more than to be extricated from all litigation related to this Tribe and these funds?

MR. HALL: I believe that is a fair statement.

THE COURT: Okay. Well, that being the case, then let me ask my next question. Again, this is very practical. I don't blame the bank for wanting to be extricated from litigation. This litigation is not what banks are about and have -- and the bank, certainly, represented by you,

represented by Mr. Meacham, has some very capable counsel.

What I halfway expected is that the bank would have tried to arrive at some sort of an arrangement for an alternative stakeholder or some sort of a mode of operation that would, at least, be workable for all concerned, rather than being constantly involved in litigation.

Has anything been attempted by way of any arrangement that would at least minimize the extent to which these funds would be in controversy?

Surely there are some things that this money could be used for that none of the parties in interest would object to. Has the bank attempted to arrive at any sort of a resolution along those lines so that the bank could wash its hands of the litigation?

MR. HALL: Other than the measures that you previously discussed, I do not believe so.

In essence, Judge Haught has simply acted as a receiver and has requested that the Tribe make requests to the Court for each disbursement that is to be made out of the tribal account and that the Court shall approve each of those.

And so my client, the bank, is in a position where it's -- it doesn't have a decision from the Court where there is finality as to which of the parties is the true recognized signatory authority, and it's simply a -- subjected to the Court's order as far as seeking -- seeking application by the

Tribe for each and every disbursement.

THE COURT: I don't know whether Judge Haught would rather praise me for recognizing his authority or wring my neck for dropping this in his lap. I tried a two-week case -- in my former life, I tried a two-week case to a jury in front of Judge Haught out in Beckham County, and he's an outstanding judge, but I'm not sure I want to come within 10 feet of him any time soon.

MR. HALL: Understandable.

THE COURT: Anything further?

MR. HALL: I have nothing further, Your Honor.

THE COURT: Very well. Thank you.

I'm going to -- preliminarily, let me emphasize that I think in the nature of things none of these matters are -- oh, go ahead.

MR. MORRIS: Yes, Your Honor. Charles Morris for the Tribe itself as Attorney General. May I address?

THE COURT: Sure. Go ahead.

MR. MORRIS: Thank you, Your Honor.

I'd like to address the Court, Your Honor. I'm the Attorney General speaking on behalf of the Tribe, separate from the Executive Branch, though our arguments, in a way, mirror and support the Executive Branch, but I'd like to address a couple of the questions you brought before counsel today.

One of your first questions is, as a tribe, what has the

tribe done to clean up its house. Okay. Before you in the motions and the exhibits, Council -- Tribal Council, a meeting of the people under the Constitution, have met and reconfirmed the election results of recognizing Governor Janice Boswell in this matter.

As you may remember, early on in these matters, we made reference to decisions of the Bureau of Indian Affairs when we were in hearings before and what they have decided.

They have also decided -- recognized Ms. Boswell's signature authority as governor of the Tribe on the federal contracts -- what we call the 638 contracts for federal funding the different programs of the Tribes. They've continually throughout this matter recognized her signature.

They've most recently, and I think it was before you, recognized her signature to execute oil and gas leases for the Tribes for trust land.

So they've continually -- and more importantly, more affirmatively, in the recent year recognized Janice Boswell. At first, it started as a 30-day recognition, then a 90-day recognition, well, now, it's a recognition about daily limits.

Through their administrative appeal process, they give notice to Ms. Harjo of their decision, the lady that's claiming to be the governor, and she has not answered her appeals. So --

THE COURT: What's the status of the day-to-day

operations of the Tribe now?

MR. MORRIS: It is going wonderful, Your Honor. I'm there -- I'm not full time. I'm a contract attorney representing it, but I'm there at least two to three days a week.

It is going as smooth as -- it's going really smooth. At the time of this money being held, the Tribe and the people did suffer and they have continued to suffer.

We've had to lay off people during this time to make up until our resources were -- and budget was made up. We've had to cut resources. Employees had to take 20 percent pay cuts initiated to meet immediate budgetary demands.

And this has hit -- we are building back, but the money is still there unattainable at this time. But the Tribe is functioning. It is an election year. November will decide a new governor for the Tribe and half of the legislature is up for election.

THE COURT: Just out of curiosity, is that under some sort of proctoring by the BIA?

MR. MORRIS: No. It was addressed -- off the record, Your Honor, there was a -- well, not off this record, but outside of the BIA addressing -- it was informally addressed by Mr. Kevin Washbourne, who is now the new Undersecretary of the Interior for the United States and for the BIA. It was offered to him or to his department and to take hold of the new

elections and run the new elections. And his stance and the Bureau's stance enters another controversy, no. If it's not in your Constitution, that's what sovereignty is. You run your own elections, you work them out. The Bureau will not take control unless there is some type of sovereignty. Let's see what happens, more or less, he says on the new elections, let's don't try to start something that's not there yet. So that's what his stance is on it, on the issue.

But the tribe is functioning. Like I said, it's election year, people are starting to, you know, look at who wants to run for these seats that are up. It's -- the morale of the people are a lot better. The people are starting to get some of the services back that had to be cut.

In this matter, Your Honor, this money that's being withheld, part of it is 638 funding for contracts. And as I stated earlier to you, the Bureau of Indian Affairs has continually recognized these -- the signature of Janice Boswell. So, thus, Judge Haught, in return, if the Bureau and the federal government's agencies recognize her signature, in return, that should have been enough for Judge Haught.

THE COURT: Well, if -- let me give you a hypothetical that you're probably not going to be happy with. But in the event that this matter stays with Judge Haught, what is the game plan for causing the matter to play out to a conclusion in the state district court?

MR. MORRIS: Well, that's where we're kind of at, Your Honor. As cited, as stated for you today, and you -- I'll make reference to Mr. Hall, the bank wanted out. The bank presented an application to Judge Haught, wanted out. And that was denied.

In Judge Haught's order, the bank did ask for a receivership, someone else to be placed in charge of the money. Judge Haught took it upon himself to be the receiver, to make applications to him, but in his order, he denoted that he would make a formula to -- upon application, he would make a formula on how he would decide or a way he would decide on how to distribute the money and come up with a solution, more or less, a plan to get -- that has never been developed by Judge Haught of how he wants to see the -- how we should approach and what his formula or what his means and reasons are on making proper application. He has never addressed that with any of the litigants on how he sees is the proper way of distributing money. Just believes that will be developed at some time in the future.

So there is no formula presented by the state court on our -- on ways and means to approach, other than we will make an application and give notice to all the parties of your application and I will decide. Well, his order said there would be some type of formula or basis on how he would decide, that is still left open.

THE COURT: Has that been tried? Has anybody made an application?

MR. MORRIS: Not -- not by the Tribe or the -- from what I've seen, from the Executive Department at this time. I'm still inquiring and waiting on -- okay, on what basis, you know, am I going to be on something -- I'm not -- I can't make the application as the Attorney General. I -- the money is under the Executive Department, under, you know, Ms. Prairie Chief Boswell's signature.

I was talking to the treasurer and finance for the Tribe, we've wanted to make an attempt but we don't know under what basis the formula would be and we don't want to get thrown out as frivolous, you know, and everything, but -- no -- sorry taking so long to answer. No.

THE COURT: So $7 million is tied up in round numbers; is that right?

MR. MORRIS: You're right at 7 million.

THE COURT: Again, I'm rising to the bait. Admittedly, this doesn't touch these issues, other than extremely tangentially, if that, but -- I mean, I can easily imagine that the people you work with would have no trouble coming up with a plan, for instance, that would say, Judge Haught, here is what we would like to do with a million dollars of this money, it's going to be distributed to serve educational and human needs and medical needs and maybe burial,

whatever, for people in the Tribe who have demonstrated that they could not otherwise get these essential services and we seek your authorization to direct the bank to release a million dollars for these specific purposes. Okay. You file the application, you serve a notice, if somebody wants to complain about it, they come in and complain about it. Judge Haught rules.

It seems to me that would be very commonsensical, especially in the months since last summer, to at least give that a try.

MR. MORRIS: Put it in those terms, I agree with you, Your Honor. I would agree with you on those terms.

With the practicality of it --

THE COURT: In other words, the people you give notice to don't necessarily need to agree to it. That's what courts are for. And so somebody who wants to be a fly in that ointment can come and be a fly and then Judge Haught can rule.

MR. MORRIS: Yes, Your Honor. My -- my problem with Judge Haught's decision on the Tribe was he made the statement of a formula that he was going to derive on approaching this, and it has never been derived to give to us on a formula that he had -- how to approach what your question to me is.

THE COURT: Thank you, sir.

MR. MORRIS: You're welcome.

THE COURT: Anything further from the defendant --

I'm sorry.

MS. REAL BIRD: I do have something in reply.

THE COURT: Surely.

MS. REAL BIRD: Thank you, Your Honor. I'll keep this short. I just want to add to what the Attorney General said and offer some reply.

The -- Governor Boswell has continued to provide services to tribal members, despite the freezing of the funds. She's made do, met those federal contract obligations, but that doesn't mean that it's right, that it's right that the money is frozen.

And I'm sure you can take judicial notice of the sequestration, federal monies will be increasingly tight, and if there's no 2014 budget, a compound reduction in federal funds.

Many of the funds that are frozen were awarded to the Tribe in Indian self-determination education assistance contracts. So she, through the Executive Branch and through authorization from Tribal Council, has applied to the federal government for these funds, were entrusted to her. She signed for the federal funds. And now they're being frozen by basically a third party who was entrusted from a depositor.

And I do want to emphasize that the Tribes' status and Executive Branch's status as a dual entity, it is a sovereign with sovereign rights and it provides for its members, but,

here, it's also a depositor, like any other depositor, and those rights under Inyo should be afforded to the Tribe and the Executive Branch, and if allowed, to amend the pleading to Janice Prairie Chief Boswell, and we are prepared to amend the pleading quickly to add Janice Prairie Chief Boswell.

But, here, the situation is distinct from Inyo, as pointed out earlier. And we feel that under Inyo and following some of what Justice Stevens said in his dissent, this situation fits perfectly within -- and wouldn't be barred by Inyo, but fits within the contours of what Inyo suggests could be acceptable under 1983.

And, here, it was mentioned earlier the state court has an unwilling plaintiff and unwilling defendant and that was demonstrated by First Bank's application to close the account. And the standard that the Court said it would come out with has not been announced, so it's an unknown standard for any of the parties to try to apply.

Now, there was one application from a non-party, a non-party to the state court case, and that was the legislature. I'm not sure if the Attorney General remembered that.

But it was unusual, quite unusual, because it was a non-party, and that non-party hadn't appeared in the case, in the pleadings, but yet did attend oral argument and was granted time to speak at the hearings before the judge.

So it's quite unusual he wasn't formally added as a party, yet to participate. And that was the "Legislative Branch." And, you know, the Legislative Branch -- the real legislature would say that that wasn't the correct one, but, nevertheless, there was an application, but that hadn't been ruled on, in part, because there is no announced standard.

Now, that application was opposed by Governor Boswell in the state court case, but as of yet, that has sort of been, you know, just not -- not granted. It wasn't granted.

And one of the main reasons why the governor wouldn't bring a petition before the Court is because, as a government, we're run by a Constitution and by a set of written laws, and those written laws don't -- don't provide for what the situation is here. Those funds are normally held by the tribal treasury and budgeted. They're not held by a third party, such as the judge, that is -- basically had control of the funds. It's just not called for and it's not announced in our Constitution what happens there.

And that's part of the problem. Obviously, that's part of the problem with the state court judge stepping in here and taking the -- you know, the extraordinary role that he has. It's not addressed in state court law. The process wasn't followed for seeking that relief even before his Court, but yet that was a sua sponte decision.

And so that is part of the problem with seeking those

funds in state court from the judge with such an application. That's just not a Constitutional process.

The Tribe went through the correct process and received the federal funds, now it's like another gatekeeper, when we just want to be treated as another depositor that should have access to those funds.

So that's all I have. Thank you, Your Honor.

THE COURT: Thank you. You and I have one thing in common and that is a very high opinion of a dissent by Justice Stevens. I can't help but mention, 36 years ago, one of my law partners and I took a case on behalf of the Kansas Delaware Tribe to the Supreme Court against the Cherokee Delaware Tribe, and it was argued in November of 1976. I was there, my partner was standing up arguing the case, and that was with Chief Justice Burger and his white hair looking down at us, and the problem is we lost 8-to-1. The one was Justice Stevens. That was Weeks v. United States. And we thought Justice Stevens had it right, but there were eight justices who did not think Justice Stevens had it right, so we've got that in common.

MS. REAL BIRD: He went to a great law school.

THE COURT: Where did he go to law school?

MS. REAL BIRD: Stanford, I believe.

THE COURT: Okay. Very well.

One thing that -- well, let me say preliminarily, I've heard a fair amount this morning that is not of -- contentions

and arguments that were not in the plaintiffs' brief. These things are hard enough to work through with the benefit of briefs and I -- I'm very hard-put to give consideration to arguments that are not one way or another articulated in the briefs and I've heard some -- a few things this morning that are clearly not in the briefs, and I'm -- certainly don't intend to address those or consider those arguments, and not the least of which is the request to add Ms. Boswell as a plaintiff, as I have already addressed.

One thing is also clear, and that is that the plaintiffs still do claim prospective relief as against Judge Haught and that, in my view, still brings the plaintiffs' squarely up against the Anti-Injunction Act and I certainly do adhere to my earlier ruling on that score.

To the extent that the plaintiffs seek declaratory relief, it is really declaratory relief that would have the same effect as an injunction and would likewise be barred by the Anti-Injunction Act. And I remain satisfied that the Tribes and the Executive Branch are not persons who are entitled to sue for relief under Section 1983.

The Anti-Injunction Act limits federal remedies, and dismissal under Rule 12(b)(6) of the federal claims is appropriate. Among many other things, I find persuasive the reasoning of the Court in Healthnet v. Wooley, W-O-O-L-E-Y, 534 F.3d 487, with a discussion on page 493. That's a Fifth

Circuit decision from 2008.

I do conclude that all claims, except Judge Haught, except the claims for damages under Section 1983, were properly dismissed with prejudice and without leave to amend, and that's the way it will remain.

There's one aspect of my November 28 order relating to Judge Haught that I've already mentioned, and that is the money claim against Judge Haught should have been dismissed without prejudice based upon Eleventh Amendment immunity. I did not reach absolute immunity. Eleventh Amendment immunity, in my view, is a threshold issue.

Eleventh Amendment immunity was the basis for the dismissal of the money damage claims against Judge Haught, and I will be entering a separate order showing that that dismissal is without prejudice.

And for that reason, my November 28 order and judgment is vacated to the extent but only to the extent to show -- necessary to show that the federal claims against Judge Haught for money relief under Section 1983 are dismissed without prejudice. I conclude that all other claims were properly dismissed with prejudice.

I should add, certainly, now that we have supplemented the record, by way of my granting of the two motions, that even if those new facts were considered, they do not cure the deficiencies in the amended complaint. The Executive Branch

and the Tribe are still not persons, in my view, within the meaning of Section 1983. The Anti-Injunction Act precludes injunctive and declaratory relief and the Eleventh Amendment bars any retrospective relief.

There's one other matter I should address, and that is the fact that, with respect to Count 7, the bank moved under Rule 12(b)(6). Procedurally, I think the appropriate avenue would have been Rule 12(c), since the pleadings were closed at the time the bank filed its motion.

Plaintiffs did not object in responding to the bank's motion. The plaintiffs did not object on this basis. That may well have been a conscious decision because the same standard is used under 12(c) as is used under Rule 12(b)(6), so the difference is purely procedurally, between moving under Rule 12(b)(6) and 12(c) is of no moment, the standard was the same, as was established by our Court of Appeals in the Corder, C-O-R-D-E-R, case, 566 F.3d 1219.

For that reason, I readily conclude that there is no basis to the Tribes in having addressed the motion under Rule 12(b)(6) rather than 12(c).

In Section 4 of the Tribes' briefing -- or the plaintiffs' briefing, the plaintiffs do contend that the judgment should be altered or amended, and I agree to the extent that I have already said. The motion to alter or amend is otherwise denied, because I do continue to conclude that -- as against

the bank, the plaintiffs simply cannot cure the deficiencies of the Section 1983 claims.

The plaintiffs have requested that the federal claims be dismissed without prejudice. That request is denied. I am well-satisfied that the avenue which is available, specifically through the state district court, remains available and is a viable avenue of relief which will provide an opportunity for all parties in interest to vindicate their rights.

The bottom line is that the plaintiffs simply have not shown that they can cure the deficiencies that were set forth in my November 28, 2012, order and the motion is denied in all respects, other than my conclusion that I should and will alter or amend the judgment to show that the money claims against Judge Haught are dismissed without prejudice.

Anything further in this matter this morning from either side?

MR. WEITMAN: Nothing by the judge.

THE COURT: Hearing nothing, court will be in recess.

(COURT IN RECESS.)

REPORTER'S CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF PROCEEDINGS:

S/Tracy Washbourne, RDR, CRR
United States Court Reporter
Western District of Oklahoma

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEYENNE AND ARAPAHO TRIBES, on its own behalf, and as *parens patriae* on behalf of its members; and CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH, *Plaintiffs-Appellants,* v. FIRST BANK AND TRUST COMPANY; and DOUG HAUGHT, in his official capacity as a District Judge, State of Oklahoma, *Defendants-Appellees.*	)	**CASE NO. 13-6117**

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APPELLANTS' APPENDIX (VOLUME 1) TO CONSOLIDATED OPENING BRIEF

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APPELLANTS' APPENDIX (VOLUME 2) TO CONSOLIDATED OPENING BRIEF

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APPELLANTS' APPENDIX (VOLUME 3) TO CONSOLIDATED OPENING BRIEF

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APPELLANTS' APPENDIX (VOLUME 4) TO CONSOLIDATED OPENING BRIEF

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