UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

PATRICK A. LEE, FLOYD HAND, WILLIAM J. BIELECKI, SR., each as Individuals, pro se,

Plaintiffs,

v.

ROBERT ECOFFEY, SUPERINTENDENT OF THE BUREAU OF INDIAN AFFAIRS, Pine Ridge Agency, Pine Ridge Indian Reservation, South Dakota, et al,

Defendants.

CIV. 13-5019

BRIEF IN SUPPORT OF MOTION TO DISMISS

Robert Ecoffey, in his capacity as Superintendent of the Bureau of Indian Affairs, by and through counsel, United States Attorney Brendan V. Johnson and Assistant United States Attorney Jan L. Holmgren, submits the following brief in support of his motion to dismiss the above-entitled action for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), and for failure to name an indispensable party pursuant to Fed. R. Civ. P. 19(b).

INTRODUCTION

Plaintiffs in the above-entitled action have filed suit alleging various violations of the tribal constitution of the Oglala Sioux Tribe ("OST") and the Indian Civil Rights Act of 1968 ("ICRA") as amended, codified at 25 U.S.C. § 1301 *et seq*. In addition to naming individual tribal council members in their personal capacities, ECF 9, the plaintiffs have named as a defendant an employee of the federal Bureau of Indian Affairs ("BIA"), Robert Ecoffey,

apparently in his official capacity as superintendent of the BIA's Pine Ridge Agency. ECF 1, 9. The amended complaint alleges Ecoffey[1] has been "derelict in enforcing eral Law", specifically the Indian Civil Rights Act of 1968 ("ICRA"). ECF 9, p. 4.

While the amended complaint itself is convoluted and difficult to decipher, the plaintiffs' claims appear to stem from an underlying dispute between the plaintiffs and OST tribal leaders regarding the meaning of the separation of powers provisions contained in the tribal constitution, other tribal laws and tribal personnel practices. The separation of powers dispute apparently was triggered by Plaintiff Patrick Lee's actions as chief judge of the OST tribal court in terminating the employment of Bette Goings, Assistant Court Administrator (named as a defendant in the amended complaint as "Betty" Goings).

The prayer for relief appears to seek prospective relief prohibiting the removal from OST employment of Plaintiff Lee and OST Secretary Rhonda Two Eagles, and prohibiting removal from the reservation of Plaintiff William Bielecki[2], who was adopted in the traditional manner by a tribal member. The prayer for relief also seeks a court order directing Ecoffey to "enforce the 'Civil Rights' of the people" as described in the OST constitution and ICRA.

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[1] It does not appear that the plaintiffs are alleging a constitutional claim against Ecoffey, but he would be entitled to raise the defense of qualified immunity to any such claim.

[2] Bielecki appears to be non-Indian, due to the amended complaints' reference to him as a "white man". ECF 9, p. 27. This fact may be relevant to tribal rights of disenrollment and banishment, but no such action has been taken.

The amended complaint against Ecoffey must be dismissed for lack of jurisdiction and failure to state a claim. Plaintiffs have not presented a cognizable legal theory for suit against Ecoffey. They have cited no provision of the ICRA which sets forth a duty of the BIA superintendent. Their claim of a trust duty owed by the BIA superintendent is bare and unsupported.

While the plaintiffs invoke mandamus as the basis for the federal court's jurisdiction, they have failed to establish the necessary elements for mandamus jurisdiction as a matter of law. Additionally, plaintiffs' other jurisdictional claims variously fail on the basis of standing, ripeness, failure to name an indispensable party, and failure to allege a substantive basis for suit. Therefore, the plaintiffs' action against the BIA superintendent must be dismissed.

ARGUMENT

I. FAILURE TO STATE A CLAIM

A motion to dismiss for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. "To avoid dismissal, a complaint must allege facts sufficient to state a claim as a matter of law and not merely legal conclusions." Young v. City of St. Charles, Mo., 244 F.3d 623, 627 (8th Cir. 2001). Dismissal of a claim under Rule 12(b)(6) is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A district court that dismisses an action for failure to state a claim may do so with or without prejudice. Orr v. Clements, 688 F.3d

463, 465 (8th Cir. 2012)(citing WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039, 1058 (9th Cir. 2011); Fed. R. Civ. P. 41.

Plaintiffs' claims against Ecoffey apparently stem from their claim that he has a duty to intervene in civil rights matters under the ICRA. However, plaintiffs have failed to state a claim for relief under the ICRA. The only private civil cause of action under the ICRA is a suit for habeas corpus relief.

> Indeed its description of the purpose of Title I, as well as the floor debates on the bill, indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303. These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69-70 (1978) (footnotes omitted). *See also* United States v. Wadena, 152 F.3d 831, 845 (8th Cir. 1998); Runs After v. United States, 766 F.2d 347, 353 (8th Cir. 1985). Plaintiffs in this case are not seeking habeas relief, and thus, they can have no claim for relief under the ICRA.

Additionally, plaintiffs have cited no statutory authority for the BIA superintendent to act under the ICRA. The only language in the ICRA regarding enforcement by the federal government is contained in the constitutional rights provision of 25 U.S.C. § 1302(f), which merely states that nothing in the provision affects the obligation of the United States to investigate and prosecute any criminal violation in Indian country. The only other provision of the ICRA that remotely invokes federal authority is 25 U.S.C.

§ 1341, which merely authorizes the Secretary to revise and compile documents.

The language of the ICRA is silent as to any other duties, and thus, the ICRA does not impose enforcement authority or a duty upon the Bureau of Indian Affairs or its employees. *See* Taylor v. Bureau of Indian Affairs, 325 F. Supp. 2d 1117, 1123 (S.D. Cal. 2004) (dismissing action because ICRA did not provide individual plaintiffs with private right of action against Indian Band or the BIA); *see also* Montgomery v. Flandreau Santee Sioux Tribe, 905 F. Supp. 740, 745-46 (D.S.D. 1995) (dismissing case for lack of subject matter jurisdiction because only remedy under the ICRA is habeas relief)

Further, plaintiffs have failed to articulate a trust duty they claim requires the BIA to interfere in what are essentially internal tribal affairs.

> There is a 'general trust relationship between the United States and the Indian People.' United States v. Mitchell, 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1983) (Mitchell II). But that relationship alone does not suffice to impose an actionable fiduciary duty on the United States. *See* United States v. Navajo Nation, 537 U.S. 488, 506, 123 S. Ct. 1079, 155 L.Ed.2d 60 (2003); United States v. Mitchell, 445 U.S. 535, 541–43, 100 S. Ct. 1349, 63 L.Ed.2d 607 (1980) (Mitchell I). Instead, to determine whether such a duty exists, we must look to 'specific rights-creating or duty-imposing statutory or regulatory prescriptions.' *See* Navajo Nation, 537 U.S. at 506, 123 S. Ct. 1079 . . . . The fact that a statute uses the word 'trust' does not mean that an actionable duty exists, for a 'bare trust' that does not impose upon the government the extensive and well-articulated duties described above falls short of creating such a duty. *See* Mitchell II, 463 U.S. at 224, 103 S. Ct. 2961; Mitchell I, 445 U.S. at 541, 100 S. Ct. 1349.

Ashley v. U.S. Dept. of Interior, 408 F.3d 997 (8th Cir. 2005).

In this case, there is no trust language in the ICRA (or any other statute cited by the plaintiffs) which imposes a trust duty upon the Bureau of Indian Affairs. In fact, the statutory history of the ICRA militates against federal interference in internal tribal disputes. *See, e.g.*, Timbisha Shoshone Tribe v. Kennedy, 687 F. Supp. 2d 1171 (E.D. Cal 2009) (quoting letter from BIA to the tribe, "It has long been the policy of the Department of the Interior and the BIA, in promoting self-determination, not to become involved in the internal affairs of tribal governments;" Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1465 (10th Cir. 1989)(rejecting claims of general trust duty of federal officials to intervene in tribal elections); Wasson v. Pyramid Lake Paiute Tribe, 2010 WL 4293349 *4(D. Nev. Oct. 20, 2010)(unreported) ("[t]he simple fact that the BIA approved the Tribe's constitution and/or bylaws does not make the BIA itself, or its officials, amenable to suit--as to the Tribe's allegedly unconstitutional actions thereunder"); Vizenor v. Babbitt, 927 F. Supp. 1193, 1202 (D. Minn. 1996) ("[P]laintiffs have pointed to no substantive law which imposes upon the government the duty to manage the day-to-day operations of the Bands. Indeed, such a document would be inconsistent with the federal government's commitment to tribal self-determination."); *see also* Milam v. U.S. Dep't of Int., 10 Indian L. Rep. 3013, 3015 (D.D.C.1982) (ordinarily, disputes "involving intratribal controversies based on rights allegedly assured by tribal law are not properly the concerns of the federal courts.").

When acting in its capacity to carry out the government-to-government relationship, the BIA must take care to avoid intruding on tribal sovereignty.

Holland v. Acting Muskogee Area Director, 33 IBIA 64 (1998). It is the BIA's well established position that Tribes have primary authority to interpret their own laws. *See, e.g.*, Brady v. Acting Phoenix Area Director, 30 IBIA 294 (1997). This dispute over an interpretation of tribal provisions regarding separation of powers, impeachment provisions and tribal personnel actions belongs in a tribal forum for resolution. *See, e.g.*, Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985).

Therefore, because plaintiffs cannot articulate a trust duty owed to them, because they have no claim under the ICRA, and because plaintiffs have failed to show any legal authority that requires BIA to interfere in internal tribal disputes, plaintiffs' suit against Ecoffey must be dismissed for failure to state a claim.

II. LACK OF JURISDICTION

Federal Rule of Civil Procedure 12(b)(1) allows for dismissal of a complaint where the court lacks jurisdiction. The jurisdiction of federal courts is limited to "cases and controversies". U.S. Const. art III, § 2. Therefore, a court is required, as a threshold matter, to determine whether it has jurisdiction. Godfrey v. Pulitzer Pub. Co., 161 F.3d 1137 (8th Cir. 1998). Federal court jurisdiction exists only where authorized by the Constitution or by statute. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). The plaintiff has the burden of establishing the court's jurisdiction by a preponderance of the evidence. *See* Lujan v. Defenders of Wildlife, 504 U.S.

555, 561(1992); DaimlerChrysler v. Cuno, 547 U.S. 332, 342 (2006); V S Ltd. P'ship v. Dep't of Hous. & Urban Dev., 235 F.3d 1109, 1112 (8th Cir. 2000); Shekoyan v. Sibley Int'l Corp., 217 F. Supp. 2d 59, 63 (D.D.C. 2002).

A. Standing

One of the most important jurisdictional doctrines of the case-or-controversy requirement is the doctrine of standing. Nolles v. State Committee for Reorganization of School Districts, 524 F.3d 892, 297 (8th Cir. 2008). Standing, as a jurisdictional prerequisite, must be resolved by the court before it reaches the merits of a suit. City of Clarkson Valley v. Mineta, 495 F.3d 567, 569 (8th Cir. 2007).

At a constitutional minimum, a plaintiff must prove three elements to establish standing to sue: (1) injury in fact; (2) causation (3) and redressability. Lujan, 504 U.S. at 560-61. An injury in fact requires the plaintiff to have "a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 743.

Plaintiffs' complaint does not even allege an injury fairly traceable to the BIA superintendent, and even the claim for relief, that the superintendent be ordered to enforce the civil rights of the people, cannot be said to be concrete and particularized. *See* ECF 9, p. 33. A court order requiring such an expansive, nonspecific directive would never be enforceable, so the plaintiffs also have failed to meet the redressability requirement.

In addition, there are prudential, court-made limitations to standing. Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 268, 290 (2008). One of the prudential limitations on standing is that, generally speaking, a plaintiff does not have standing to assert the rights of third parties. Id.

> Even if a plaintiff meets the minimal constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction. One such prudential limitation is the requirement that a litigant must assert his or her own legal rights and interest, and cannot rest a claim to relief on the legal rights or interests of third parties.

Jewell v. United States, 548 F.3d 1168 (8th Cir. 2008) (internal citations omitted). *See also* Warth v. Seldin, 422 U.S. 490, 498–99 (1975); Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1378 (8th Cir. 1997); Carter v. Romines, 560 F.2d 395, 395-96 (8th Cir. 1977).

OST Secretary Rhonda Two Eagles is not a party to the action, yet the claim for relief asserts her interests. ECF 9, p. 33. Plaintiffs also assert the interests of Treaty Council Members, their affiliates and associates, and the Oyate people, none of whom are parties to this action. ECF 9, p. 33. In order to show third-party standing, a plaintiff must show that the unnamed individuals are somehow hindered in asserting their own rights. Hodak v. City of St. Peters, 535 F.3d 899, 904 (8th Cir. 2008). No such showing has been made, nor has there been any showing that the unnamed individuals suffered a concrete, particularized injury that can be attributed to the BIA superintendent and could be redressed by an order of the court.

It is the burden of the party invoking the court's jurisdiction to establish that it has standing to sue. Lujan, 504 U.S. at 561. The elements of standing are not mere pleading requirements, but are an indispensable part of the complaint. Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996) (citing Lujan, 504 U.S. at 560-61.) Plaintiffs' claims against Ecoffey thus must be dismissed for lack of jurisdiction because the plaintiffs have failed to demonstrate they have standing to sue him.

B. Ripeness

The doctrine of ripeness is another prudential limit on the court's jurisdiction. *See* KCCP Trust v. City of N. Kan. City, 432 F.3d 897, 899 (8th Cir. 2005) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all.") A dismissal on the basis of ripeness is not an adjudication on the merits, and thus is not a bar to a later suit. Missouri Soybean Ass'n v. U.S. E.P.A., 289 F.3d 509, 513 (8th Cir. 2002). "Thus to be ripe for decision, a case must be fit for judicial resolution and the parties must experience hardship if the court withheld consideration of the case's merits." Missouri Soybean Ass'n, 289 F.3d at 512 (citing Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

In the case at bar, Plaintiffs' claims are hypothetical and seek only prospective relief, although it is unclear what injury and relief they are claiming against the BIA superintendent. They have demonstrated no hardship if the

court withholds consideration of the merits of the case until such time, if ever, that their claimed injury occurs.

C. Writ of Mandamus

The common law writ of mandamus is codified at 28 U.S.C. § 1361. It provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel and officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1361. A writ of mandamus is a drastic remedy to be invoked only in extraordinary circumstances. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980).

> A district court may grant a writ of mandamus only in extraordinary situations and only if: (1) the petitioner can establish a clear and indisputable right to the relief sought, (2) the defendant has a nondiscretionary duty to honor that right, and (3) the petitioner has no other adequate remedy.

Castillo v. Ridge, 445 F.3d 1057, 1060-61 (8th Cir. 2006). The defendant must have "a clear duty to perform the act in question." Borntrager v. Stevas, 772 F.2d 419, 420 (8th Cir. 1985). "[T]he party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable." Will v. United States, 389 U.S. 90, 96 (1967).

The plaintiffs have failed to meet all the elements of the requisite three-part mandamus test. As previously pointed out, plaintiffs have failed to establish a clear right to the relief they are requesting from Ecoffey under the ICRA or any other law. There is no clear and plainly described nondiscretionary duty described in the amended complaint that Ecoffey is

required to perform-- under the ICRA, under any other statute, or under a general trust responsibility. A petition for writ of mandamus that does not meet all three requirements fails to establish mandamus jurisdiction and should be dismissed. *See* Iredia v. Fitzgerald, 2010 WL 2994215 *3 (E.D. Pa. July 27, 2010) (dismissing because mandamus statute does not confer jurisdiction when there is no nondiscretionary duty the agency was compelled to perform); Weatherwax v. Fairbanks, 619 F. Supp. 294 (D. Mont. 1985) (dismissing for lack of jurisdiction plaintiffs' "improper" attempt to use the ICRA and mandamus to direct the Interior Secretary's exercise of discretion in suit alleging the BIA failed to affirmatively act to remedy the plaintiffs' civil rights complaints).

D. Other statutes

Plaintiffs cite various statutes in their amended complaint as a jurisdictional basis for their suit. ECF 9, pp. 2-3. However, none of the statutes provide the jurisdictional hook they need to avoid dismissal. The federal question jurisdiction statute, 28 U.S.C. § 1331, does not alone provide jurisdiction, but requires a separate, substantive law basis for filing suit.

> [Section] 1331 does not, in and of itself, create substantive rights in suits brought against the United States. *See* Hagemeier v. Block, 806 F.2d 197, 202-03 (8th Cir.1986). Thus, if § 1331 is to be used to secure relief against the United States, it must be tied to some additional authority which waives the government's sovereign immunity.

Sabhari v. Reno, 197 F.3d 938, 943 (8th Cir. 1999).

The ICRA does not provide such a basis for suit. As the Eighth Circuit explained, "the Supreme Court has held that Congress has not authorized civil

actions for injunctive or other relief to redress violations of the Indian Civil Rights Act." United States ex rel. Kishell v. Turtle Mountain Housing Auth., 816 F.2d 1273, 1275 (8th Cir. 1987) (citing Santa Clara, 436 U.S. at 72). Thus, § 1331 alone does not give the court jurisdiction to consider plaintiffs' claims.

Plaintiffs' citation to 28 U.S.C. § 1343 also is unavailing. Courts have held that "[t]he only avenue available to a party who seeks relief in the federal courts for an alleged violation of the ICRA is through an application for habeas corpus relief.... No other private cause of action may be implied from the ICRA." Boe v. Fort Belknap Indian Community of Ft. Belknap Reservation, 642 F.2d 276, 278-9 (9th Cir. 1981). *See also* Dubray v. Rosebud Housing Authority, 565 F. Supp. 462, 468 (D.S.D. 1983) ("In Santa Clara Pueblo, however, the Supreme Court held that the Indian Civil Rights Act does not imply a private cause of action for enforcement either in its own right, or in conjunction with 28 U.S.C. § 1343(4)"). Therefore, 28 U.S.C. § 1343 does not give the plaintiffs jurisdiction for this suit.

Plaintiffs additionally cannot claim jurisdiction under 42 U.S.C. § 1983. In order to state a civil rights action under 42 U.S.C. § 1983, a plaintiff must allege and prove that a person acting under color of state law deprived him of a right secured by the federal Constitution or laws of the United States. 42 U.S.C. § 1983. It is well established that § 1983 does not "apply to federal officials acting under color of federal law." Jones v. United States, 16 F.3d 979, 981 (8th Cir. 1994). Thus § 1983 does not apply to Ecoffey. Moreover, § 1983 alone does not confer subject matter jurisdiction. Id.

Plaintiffs also have no source of jurisdiction under 42 U.S.C. § 1985. "To satisfy the requirements of § 1985(3), plaintiffs must allege violations of statutory or constitutional rights that the federal courts have jurisdiction to redress." Montgomery, 905 F. Supp. at 745. "Plaintiffs must look to the [Indian Civil Rights Act] ICRA as the source of their alleged entitlement to the rights and privileges of tribal membership, because federal constitutional protections extend to individual Indians only to the extent incorporated in the ICRA." Id. (quoting Nero, 892 F.2d at 1462.) "[T]he plaintiffs cannot state a cause of action under the ICRA, Santa Clara Pueblo, 436 U.S. at 64–65, 98 S.Ct. at 1680–81, and thus, § 1985(3) does not provide an independent remedy." Id.

Plaintiffs inexplicably cite criminal statutes as a jurisdictional basis for their claims: 18 U.S.C. § § 241, 242, and 1153(661). ECF 9, p. 3. These criminal statutes cannot form the basis for plaintiffs' claims of jurisdiction, because enforcement of criminal statutes rests with the Attorney General and Justice Department, not with private individuals. *See, e.g.*, Mousseaux v. U.S. Com'r of Indian Affairs, 806 F. Supp. 1433, 1437 (D.S.D. 1992). Additionally, by their terms, 18 U.S.C. § § 241 and 242 protect rights protected "by the Constitution and the laws of the United States". The plain reading of the statutes indicates they are inapplicable to tribal constitutional provisions and tribal laws and ordinances. Further, § 1153, which incorporates by reference, 18 U.S.C. § 661, is a felony assault and personal property theft statute which is irrelevant to plaintiffs' jurisdiction.

Because plaintiffs have failed to state a jurisdictional basis for suit against the BIA superintendent under the mandamus statute, and the other statutes cited are insufficient to confer jurisdiction, plaintiffs' suit must be dismissed pursuant to F.R.Civ.P.12(b)(1) for lack of jurisdiction.

III. INDISPENSABLE PARTY

This suit must be dismissed in its entirety due to the failure to name an indispensable party, namely, the Oglala Sioux Tribe. The Tribe is an indispensable party because this dispute challenges inherent tribal sovereignty and the Tribe's exercise of self-governance.

The OST is a recognized tribal government that possesses sovereign immunity from suit, and thus, may not be joined. Therefore, the court would be called upon to decide whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed." Fed. R. Civ. P. 19(b). The factors to be considered are: (1) the prejudice to that party or those already parties, (2) the extent to which the prejudice can be lessened by protective provisions in the judgment, (3) whether the judgment will be adequate, and (4) whether the plaintiff will have an adequate remedy if the action is dismissed. Confederated Tribe v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991).

A review of the plaintiffs' prayer for relief makes it clear that these Rule 19(b) factors would weigh in favor of dismissal. Certainly the OST has an interest in defending a suit that challenges its interpretation of its own laws, its employment decisions, impeachment and the decisions of its tribal officials.

There is no way a court can craft an order giving the plaintiffs what they want-- a court-ordered prohibition of hypothetical tribal actions-- without prejudicing the absent Tribe's right to self-determination and its sovereign immunity. The relief sought by the plaintiffs is within the realm of tribal authority; it is relief that is not within the power of the defendants (a federal employee and tribal officials in their individual capacities) to grant. Further, plaintiffs have not shown they are without a remedy if the federal court dismisses the action; they have not shown they exhausted tribal remedies before bringing this action in federal court. *See* Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990, 991-92 (8th Cir. 1999). "The rule requiring exhaustion of tribal remedies in matters related to reservation affairs is an important aspect of the federal government's longstanding policy of supporting tribal self-government." Reservation Telephone Co-Op v. Three Affiliated Tribes of Fort Berthold Reservation, 786 F.3d 181, 184 (8th Cir. 1996).

Thus, the court should find that the amended complaint must be dismissed because the Tribe is an indispensable party which cannot be joined due to sovereign immunity. *See* Different Horse v. Salazar, 2011 WL 3422842 ** 3-4 (D.S.D. Aug. 4, 2011) (discussing Rule 19(b) factors and dismissing for lack of jurisdiction for inability to join sovereign tribes); Rosales v. United States, 2007 U.S. Dist. LEXIS 87368 (S.D. Cal. 2007) (a faction plaintiff will not be allowed to do an end-run around sovereign immunity by suing the United States to prevent or force tribal action).

CONCLUSION

Plaintiffs' suit against the BIA superintendent should be dismissed for the reasons stated above.

Dated June 13, 2013.

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