

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,

vs.

ROBERT ECOFFEY, Superintendent of
Bureau of Indian Affairs, Pine Ridge
Agency, Pine Ridge Indian Reservation,
South Dakota, as BIA Superintendent;

and

RUTH BROWN, JIM MEEKS,
CHARLES L. CUMMINGS, CRAIG
DILLON, STANLEY LITTLE WHITE
MAN, BERNIE SHOT WITH ARROW,
PAUL LITTLE, BARBARA DULL
KNIFE, JAMES CROSS, LYDIA BEAR
KILLER, DANIELLE "DANI" LEBEAU,
TROY "SCOTT" WESTON, DAN
RODRIGUEZ, JACQUELINE F. SIERS,
GARFIELD STEELE, KEVIN YELLOW
BIRDSTEELE, IRVING PROVOST,
ROBIN TAPIO, LAWRENCE "LARRY"
EAGLE BULL, JOHN HASS, BETTE
GOINGS, and TATEWIN MEANS,
each in their individual capacity,

Defendants.

CIV. 13-5019-JLV

OST TRIBAL DEFENDANTS'
REPLY BRIEF IN SUPPORT OF
THEIR MOTION
MOTION TO DISMISS

COME NOW Ruth Brown, Jim Meeks, Charles L. Cummings, Craig Dillon, Stanley
Little White Man, Bernie Shot With Arrow, Paul Little, Barb Dull Knife, James Cross, Lydia
Bear Killer, Danielle "Dani" Lebeau, Troy "Scott" Weston, Dan Rodriguez, Jacqueline F.

Siers, Garfield Steele, Kevin Yellow Bird Steele, Irving Provost, Robin Tapio, Lawrence "Larry" Eagle Bull, John Hass, Bette Goings, and Tatewin Means ("OST Tribal Defendants"), by and through their undersigned counsel of record, and respectfully submit this Reply to Plaintiffs' Response to OST Tribal Defendants' Motion to Dismiss. OST Tribal Defendants hereby re-assert and incorporate all positions taken, including all challenges to the Court's jurisdiction, as set forth in OST Tribal Defendants' Motion to Dismiss and the Response to Plaintiffs' Motion for Default Judgment and Declaratory and Injunctive Relief. Preserving OST Tribal Defendants' special and limited appearance, Plaintiffs' Motion for Default Judgment and Declaratory and Injunctive Relief should be denied in its entirety because it is moot. Further, the OST Tribal Defendants' Motion to Dismiss should be granted because the Plaintiffs fail to overcome the jurisdictional defects set forth in the Motion to Dismiss and also fail to respond to several points asserted by OST Tribal Defendants in the Motion to Dismiss, thereby conceding the OST Tribal Defendants' positions. Finally, the Plaintiffs Response further demonstrates conclusively that this a purely internal tribal matter over which this Court should not exercise jurisdiction.

As such, the OST Tribal Defendants respectfully request that the Court deny the Plaintiffs' Motion for Default Judgment and Declaratory and Injunctive Relief in its entirety.¹ OST Tribal Defendants also respectfully request that the Court grant their Motion to Dismiss.

¹ OST Tribal Defendants acknowledge that this is their Reply to Plaintiffs' Response to OST Tribal Defendants' Motion to Dismiss. However, Plaintiffs combined their Response with their Reply to Defendants' Response to Plaintiffs' Motion for Default Judgment and Injunctive and Declaratory Relief. As such, and for the sake of efficiency, OST Tribal Defendants reiterate here their request that Plaintiffs' Motion for Default Judgment and Injunctive and Declaratory Relief be denied.

I. Preliminary Matter – Rule 11 Requirements.

Pursuant to Fed. R. Civ. P. 11(a), a party must sign a filed document if the party is not represented by counsel. As noted in OST Tribal Defendants' Motion to Dismiss, it is believed that Mr. Bielecki is inappropriately acting as counsel for one, or more, of the *pro se* litigants. The fact that Plaintiff Floyd Hand did not sign the Plaintiffs' response brief further evidences that assertion. Also as noted in OST Tribal Defendants Motion' to Dismiss, Patrick Lee is a member of the bar of the State of South Dakota and the bar of this court and is aware of the rules of civil procedure. "Under Fed.R.Civ.P. 11(a), all pleadings by a *pro se* plaintiff must be signed by the party and, if not, must be stricken unless corrected promptly after being notified of the omission." *Maxwell v. Snow*, 409 F.3d 354, 356 (D.C. Cir. 2005); *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 498 U.S. 533, 545-46 (1991) ("Now, *all* signers, not just attorneys, are on notice that their signature constitutes a certification as to the contents of the document. ... The essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously.") (internal citations and quotations omitted).

II. The Plaintiffs' Motion for Default Judgment and Declaratory and Injunctive Relief is Moot.

To begin, OST Tribal Defendants note that Plaintiffs filed a Motion for Default Judgment and Declaratory and Injunctive Relief on May 13, 2013, based on allegations that the OST Tribal Defendants had not filed a timely Answer to Plaintiffs' Amended Complaint. On June 4, 2013, this Court ruled on OST Tribal Defendants' Motion for Extension of Time to answer, move, or otherwise plead, which motion was timely filed with the Court on April 24, 2013, and ordered that OST Tribal Defendants' answer or other responsive pleading be

filed on or before June 7, 2013 (Doc. 31). OST Tribal Defendants filed a Motion to Dismiss on May 23, 2013, in advance of the ordered date (Doc. 28). The Plaintiffs' Motion for Default Judgment and Declaratory and Injunctive Relief is thus moot. OST Tribal Defendants renew their request that the Court deny the Plaintiffs' Motion for Default Judgment and Declaratory and Injunctive Relief.

III. Plaintiffs' Primary Argument in Opposition to Defendants' Motion to Dismiss is Moot.

Relatedly, Plaintiffs' primary argument in their Response to the OST Tribal Defendants' Motion to Dismiss is their assertion that OST Tribal Defendants did not timely respond to Plaintiffs' Amended Complaint and, therefore, they ask the Court to "dismiss and strike" the OST Tribal Defendants' Motion to Dismiss. Plaintiffs' Response at 1-5.

However, OST Tribal Defendants filed their Motion to Dismiss on May 23, 2013, within the timeframe set by this Court in its June 4, 2013, Order. Plaintiffs' primary argument for dismissing or striking the OST Tribal Defendants' Motion to Dismiss is thus moot.

IV. Plaintiffs Fail to Overcome the Jurisdictional Deficiencies in Their Pleadings.

A. Plaintiffs Fail to Demonstrate Ripeness

Plaintiffs' Response at paragraph 19 states that their Exhibit 1 "clearly identifies ripeness of matters before this court" Plaintiffs indicate that their Exhibit 1 is incorporated into the pleadings by reference pursuant to Fed. R. Civ. P. 10(c). Exhibit 1 was intended to be used in the Impeachment or Ethics hearing that the Plaintiffs unsuccessfully sought before the OST Tribal Council, for the purpose of removing duly elected OST Tribal Council Members from office for taking collective action as a governing body and allegedly violating tribal law.

OST Tribal Defendants acknowledge that Rule 10(c), in certain circumstances, does allow "materials attached to the complaint as exhibits . . . [to] be considered in construing the sufficiency of the complaint." *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir.1986).

However, this rule does not apply when the attached exhibit is from a separate matter, and the Plaintiff offers no explanation of the exhibit other than repeatedly stating that it "clearly" supports Plaintiffs' position.² Including these materials from a separate action does not relieve the Plaintiffs of the obligation of demonstrating why or how their claims are ripe.³ This "district court . . . [is] under no obligation to resolve the issues in the complaint through materials outside the pleadings." *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2002). Plaintiffs' Exhibit 1 does nothing to clarify this issue of ripeness for the Court.

Plaintiffs do not even attempt to explain how the prospective relief they seek, which is wholly based on hypothetical contingent events, overcomes OST Tribal Defendants' argument that this Court has no jurisdiction over their non-ripe claims. *See* OST Tribal Defendants Brief in Support of Motion to Dismiss at 7-8. 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." *Texas v. United States*, 523 U.S. 296, 300 (1998).

² *Constellation Energy Commodities Group, Inc. v. Transfield ER Cape Ltd.* 801 F.Supp.2d 211, 223 (S.D.N.Y. 2011) ("A pleading may not adopt other pleadings from a wholly separate action). *See Texas Water Supply Corp. v. R.F.C.*, 204 F.2d 190, 196-97 (5th Cir.1953) (noting that while Fed.R.Civ.P. 10(c) permits reference to other pleadings in the same case, no rule permits adoption of statements from a pleading in a separate case); 3 MOORE'S FEDERAL PRACTICE § 10.04[3].

³ *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334 (Fed. Cir. 2006) ("Although materials attached to a complaint may be considered as exhibits that are part of the complaint for purposes of determining the sufficiency of the pleadings, court is under no obligation to resolve the issues in the complaint through materials outside the pleadings.")

This Court should dismiss Plaintiffs' claims in their entirety, because the relief requested is prospective and wholly dependent upon future occurrences. Plaintiffs' claims are not ripe and thus subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1).

B. Plaintiffs Fail to Demonstrate Standing

Again, Plaintiffs do not attempt to explain how they satisfy the threshold inquiry of standing which requires an evaluation of the elements of standing, as explained in OST Tribal Defendants Brief in Support of Motion to Dismiss at 8-10. Rather, they only offer a one sentence conclusory statement, asserting that a "review of the Amended Complaint and Exhibit 1 clearly establishes injury . . . as well as the imminent danger to the Plaintiffs and the Tribe at large." Plaintiffs' Response at 10. This statement does not satisfy the Plaintiffs' burden of establishing the elements of (1) injury, (2) causation, and (3) redressability. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs' entire argument is based on a series of conclusory statements which are insufficient to withstand the Motion To Dismiss.

Exhibit 1 offers no assistance in unraveling the mystery of Plaintiffs' claims, other than confirming that none of the Plaintiffs have suffered an injury-in-fact, which is "an invasion of a legally protected interest which is (a) concrete and particularized, actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61. (internal quotes and citations omitted). If there was any injury actually committed it could not have been committed by these OST Tribal Defendants. None of the 100+ alleged violations have any connection to Co-Plaintiffs William Bielecki or Floyd Hand. Plaintiffs complain that the OST Tribal Council allegedly *violated tribal law* by removing Pat Lee from office, even though the OST Tribal Council is specifically empowered to do so pursuant to the OST

Constitution, Article V, Section 6. *See* OST Tribal Defendants' Brief in Support of Motion to Dismiss at 20. Any alleged action taken by these OST Tribal Defendants could only have been taken as part of the OST Tribal Council, acting collectively as the governing body of the Tribe. Neither the Tribe, nor the Tribal Council is named as a party in this action.

The relief requested by the Plaintiffs has nothing to do with the alleged injury. "[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. The Plaintiffs have not attempted to explain how their requested prospective relief might satisfy this element. "If a litigant lacks Article III standing to bring his claim, then we have no subject matter jurisdiction." *Miller v. Redwood Toxicology Labs, Inc.*, 688 F.3d 928, 934 (8th Cir. 2012). Because standing is lacking as explained in OST Tribal Defendants' Brief in Support of Motion to Dismiss at 8-10, dismissal of the action is warranted.

C. Plaintiffs Fail to Overcome Sovereign Immunity

Plaintiffs' Amended Complaint should be dismissed on the grounds that the Plaintiffs' action is barred by sovereign immunity as set forth in OST Tribal Defendants' brief. Plaintiffs' Response does not overcome this jurisdictional defect.

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). Tribal sovereign immunity also protects tribal officials acting in their official capacity from suit. *Santa Clara Pueblo*, 436 U.S. at 71-72; *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997). The OST Tribal Defendants are all Tribal Council Members or employees or officials of the Tribe. OST Tribal Defendants' Brief in Support of Motion to Dismiss at 4. There is no waiver or congressional abrogation of tribal

sovereign immunity in this case. Sovereign immunity, therefore, is intact and Plaintiffs do not overcome it or get around it in their pleadings.

1. *Ex parte Young* Does Not Allow the Suit Against the Tribal Officials

Plaintiffs introduce an *Ex parte Young* argument in their Motion for Default Judgment and Injunctive and Declaratory Relief⁴ and in their Response to the OST Tribal Defendants' Motion to Dismiss. This conflicts with how the Plaintiffs brought forth their lawsuit in the first instance. Furthermore, their argument misses the mark and, thus, does not provide a basis for federal court jurisdiction.

Plaintiffs clearly and repeatedly state that they complain against each OST Tribal Defendant "in their individual capacity, and not their official capacity." Plaintiffs' Amended Complaint at 5-12. Plaintiffs' attempt to avoid sovereign immunity in this respect fails as explained in OST Tribal Defendants' Brief in Support of Motion to Dismiss at 19. OST Tribal Defendants could only have acted in the matters raised by Plaintiffs in their official capacity, as Tribal Council Members or Tribal Officials or Employees. None of the OST Tribal Defendants could have individually taken any action alleged by the Plaintiffs, or can individually take any future action feared by the Plaintiffs. It is only acting as a group in their official capacities as the Oglala Sioux Tribal Council that the OST Tribal Defendants can take actions to govern the Tribe and make personnel decisions under Tribal Law. Furthermore, it is only acting in their official capacities as the Oglala Sioux Tribal Council that the OST Tribal Defendants could have taken actions about which the Plaintiffs disagree. Tribal sovereign immunity extends to tribal officials when acting in their official capacity

⁴ OST Tribal Defendants reiterate their argument that Plaintiffs are not allowed to use a Motion for Default Judgment as a means to expand relief sought in their Amended Complaint or rectify jurisdictional deficiencies. OST Tribal Defendants' Response to Motion for Default Judgment and Injunctive and Declaratory Relief at 4-6, 8-9.

and within the scope of their authority. *Santa Clara Pueblo*, 436 U.S. at 71-72; *Fletcher*, 116 F.3d at 1324; *Smith v. Babbitt*, 875 F. Supp. 1353, 1363 (D. Minn. 1995), *judgment aff'd*, *appeal dismissed in part*, 100 F.3d 556 (8th Cir. 1996).

The OST Tribal Defendants were acting in their official capacities and acting within the scope of their authority as Tribal Council Members. At the crux of the Plaintiffs' claims appears to be Plaintiffs' disagreement with the removal of Pat Lee as the Judge of the Tribal Court. Yet, the Tribal Council has the authority under the Tribal Constitution to remove any justice of the Supreme Court or any judge of the inferior tribal courts by a two-thirds vote for various reasons. *See* OST Constitution, Article V, Section 6; OST Tribal Defendants' Brief in Support of Motion to Dismiss at 19. *See also* Memorandum from Rhonda Two Eagle to Patrick Lee, March 13, 2013 which evidences that the basis of this dispute is official tribal council action, taken by "utilizing Article V of the OST Constitution." No. 9-2 at 5. OST Tribal Defendants acted in their official capacities within the scope of their collective authority. Thus, the Tribe's sovereign immunity extends to them. That the Plaintiffs disagree with the Tribal Council's decision does not change this.

Ex parte Young established a limit on the sovereign immunity principle. It provides that in certain circumstances an individual may obtain a federal injunction or declaratory relief against a government official to force the officer to comply with federal law. *Ex parte Young*, 209 U.S. 123, 160 (1908). In *Ex parte Young*, a federal injunction was allowed against the Minnesota Attorney General for initiating an enforcement action under state law regarding railroad freight rates that was challenged as unconstitutional per the United States Constitution. The doctrine rests on the basis that:

[i]f the act which the [government official] seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment

comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ex parte Young, 209 U.S. at 159-60. The doctrine exists as necessary to "permit the federal courts to vindicate federal rights and to hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160). The premise is that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes." *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011).

In the case at hand, as stated above, Plaintiffs do not complain against the OST Tribal Defendants in their official capacity. Yet, Plaintiffs' Response attempts to change their pleading in this regard, which is impermissible. Plaintiffs' Response at 8. However, even if Plaintiffs complained against the OST Tribal Defendants in their official capacities, the issues Plaintiffs complain about in this case rest solely on Tribal law, not federal law. To determine whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, a court need only inquire if the complaint alleges an "ongoing violation of *federal law* and seeks relief properly characterized as prospective." *Virginia Office for Protection & Advocacy*, 131 S.Ct. at 1639 (internal citation omitted) (emphasis added). Plaintiffs cite *Vann et al v. U.S. Department of Interior*, 701 F.3d 927 (D.C. Cir. 2012), but the present action is clearly distinguishable from that case in that *Vann* involved a claim that a tribe and its Principal Chief were violating federal law, the 1866 Treaty with the Cherokee:

The claim here is that the Principal Chief . . . is violating federal law. The defense is that the Principal Chief . . . is not violating federal law. This case presents a typical *Ex Parte Young* scenario.

Vann, 701 F.3d at 920.

As far as OST Tribal Defendants can tell, the Plaintiffs' claims in this case, in essence, concern a difference of opinion of how the Tribal Constitution and Laws should be interpreted and implemented by the Tribal Council and, ultimately, stem from an internal employment dispute. *See* Plaintiffs' Response at 11. There is no ongoing violation of federal law that can be the basis of an injunction against the Tribal Officials under the *Ex parte Young* doctrine. The Plaintiffs clearly state that they are seeking enforcement of the Tribal Constitution and Tribal Laws. Plaintiffs' Response at 12. With this, there is no footing upon which the *Ex parte Young* doctrine can take hold for Plaintiffs' assertions. The sovereign immunity that extends to the OST Tribal Defendants acting in their official capacities as the Tribal Council⁵, which is the only way they could have taken any actions to implement tribal laws, is intact and bars the Plaintiffs' suit.

Whether the Tribal Council took actions as asserted by Plaintiffs and whether those actions are in accord with Tribal law is not a matter for this Court. *See, Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). There is no federal jurisdiction in this Court and the OST Tribal Defendants request that the Plaintiffs' action be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

⁵ It should be noted that the Plaintiffs only seek to remove the named Tribal Council Members, those with whom they have a disagreement, rather than the full Oglala Sioux Tribal Council including the Executive Committee. This is a thinly veiled attempt to remove a sitting government body and install a new tribal government that is apparently more suitable to the Plaintiffs' liking.

1. The Tribe is the Real Party in Interest and Sovereign Immunity Bars the Suit.

The *Ex parte Young* doctrine is limited to the precise situation of commanding a state official to refrain from violating federal law. *Virginia Office for Protection & Advocacy*, 131 S. Ct. at 1638. It does not apply "when 'the state is the real, substantial party in interest,'" *Pennhurst State School and Hospital*, 465 U.S. at 101 (quoting *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459 (1945)). Thus, "a suit is against a sovereign when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration," *Id.* at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). The *Ex parte Young* doctrine cannot be used when a suit in reality is against the state, itself. *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994).

An "inquiry into whether the *Ex Parte Young* fiction avoids the Eleventh Amendment's bar to suits against the States does not include an inquiry into the merits of the claim," but does allow us to "question whether the suit and the remedy it seeks 'implicate[] special sovereignty interests' such that an *Ex Parte Young* action will not lie." *Union Elec. Co. v. Mo. Dept. of Conservation*, 366 F. 3d 655, 658 (8th Cir. 2004) (internal citations omitted). The "general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Virginia Office for Protection & Advocacy*, 131 S.Ct. at 1639 (quoting *Pennhurst*, 465 U.S. at 107). The Court in *Coeur d'Alene Tribe* refused to allow the use of the *Ex parte Young* doctrine because it determined that the suit was in reality a suit against the State and would have implicated special sovereignty interests such as Idaho's control over land and water long-deemed to be a part of its territory. *Coeur d'Alene Tribe*, 521 U.S. at 282 (1997); *See also Larson v. Domestic & Foreign Commerce Corp.*, 337

U.S. 682, 688 (1949) ("[T]he compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred . . . because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction."). When the case is against the government itself, not the government officials to force them to comply with federal law, the *Ex parte Young* doctrine does not apply.

The Plaintiffs' Response makes clear that the Plaintiffs' claim is not one in which they seek the OST Tribal Defendants to follow federal law, but rather that they outright seek the removal of the members of governing body of the Oglala Sioux Tribe that they allege violated tribal law. Plaintiffs clearly state their intentions to have the Tribal Council Members suspended, have the Executive Committee of the Council govern the Tribe and have the "next highest vote getter" fill the vacancies on the Council. Plaintiffs' Response at 9-10. This action which, at best, stems from an employment dispute is brought forth by the Plaintiffs as an effort to remove the Tribe's governing body, a result that would clearly interfere with the public administration and the governance of the Tribe. *See Pennhurst*, 465 U.S. at 101. The relief requested would run against the Tribe itself. As such, the Tribe is the real, substantial party in interest and, therefore, *Ex parte Young* doctrine is inapplicable.

V. Plaintiffs Fail to Assert a Claim against the Defendants Upon Which Relief Can Be Granted.

OST Tribal Defendants moved for dismissal of the Plaintiffs' suit pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the Plaintiffs failed to state a claim against the Defendants in their individual capacities upon which relief can be granted. *See* OST Tribal Defendants' Brief in Support of Motion to Dismiss at 20-21. Plaintiffs' Response provides

no insights or additional information about their claims and how the Court might be able to provide relief for such claims. There is no claim the Plaintiffs put forth upon which relief can be granted by the OST Tribal Defendants. Plaintiffs fail to establish or even state the elements of their claims and do not set forth explanations of their claims that would overcome the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . ."). Furthermore, as explained, the OST Tribal Defendants in their individual capacities have no power to provide any of the relief Plaintiffs' request. See OST Tribal Defendants' Brief in Support of Motion to Dismiss at 20-21.

VI. Plaintiffs Fail to Respond to Certain OST Tribal Defendants' Points in the Motion to Dismiss, thereby Conceding Positions.

The Plaintiffs' Response confirms that this entire action is based on dueling interpretations of tribal law, and a bitter internal tribal dispute that originally developed as a result of a tribal personnel action and has since blossomed into an attempt to remove the OST Tribal Council. This further underscores the application of *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985), which stands for the proposition that "resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court." Plaintiffs' conclusory assertion that *Runs After* is inapplicable entirely fails to overcome OST Tribal Defendants' argument that this Court has no jurisdiction over this matter. See OST Tribal Defendants Brief in Support of Motion to Dismiss at 12-14.

Similarly, Plaintiffs confusingly state without explanation that since 25 U.S.C. 1302(f) is a federal law, it "supersed[es] . . . *Santa Clara Pueblo*." As thoroughly explained in Tribal Defendants' Brief in Support of Motion to Dismiss at 14-16, *Santa Clara* stands for

the proposition that the ICRA provides no federal cause of action in federal cases, except for habeas corpus.

Finally, by offering no response to several of Tribal Defendants' arguments Plaintiffs have conceded those arguments and such claims should be dismissed with prejudice. *See Siepel v. Bank of Am., N.A.*, 239 F.R.D. 558, 566 (E.D.Mo.2006) (because plaintiffs failed to address defendants' arguments raised in motion to dismiss relating to certain claims, court grants motion on such claims and dismisses those claims with prejudice). *See also, Iweala v. Operational Technologies Servs., Inc.*, 634 F. Supp. 2d 73, 80 (D.D.C. 2009) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."). Plaintiffs offer no response, or only conclusory statements with no explanation as their response, for the following arguments:

- Lack of Standing. *See* OST Tribal Defendants' Brief in Support of Motion to Dismiss at 8-10.
- Lack of Ripeness. *Id.* at 8.
- No diversity. *See Id.* at 11.
- No federal question. *Id.* at 10-11.
- This action is solely an internal tribal matter not within the jurisdiction of this Court. *Id.* at 11-14.
- ICRA is inapplicable. *Id.* at 14-16.
- Insufficient service of process. *Id.* at 21-22.

The OST Tribal Defendants set forth detailed arguments about each of the grounds upon which the Plaintiffs' action should be dismissed. For example, OST Tribal Defendants explain how Plaintiffs failed to serve the Defendants according to Fed. R. Civ. P. 4(c)(2) and,

therefore, the Plaintiffs' action should be dismissed pursuant to Fed. R.Civ.P. 12(b)(5).

Plaintiffs' Response, however, includes a cursory statement that Defendants were served by a process server. Plaintiffs do not even attempt to dispute that instead of providing personal service as required, that they chose to leave a copy of the Amended Complaint with the OST Secretary for 20 of the 22 OST Tribal Defendants, even though she is not authorized as an agent or designated by law to accept service for any of the Defendants who were named in their individual capacities.⁶ In line with the aforementioned cases, the Court should treat the above-listed issues to which the Plaintiffs failed to respond as conceded and the Court should dismiss the relevant claims of the Plaintiffs with prejudice.

VII. Plaintiffs' Alternative Request to Amend Pleadings Should be Denied.

Plaintiffs request in the alternative, leave to amend their pleadings. Such request should be denied. Plaintiffs have already amended their complaint. Furthermore, allowing the Plaintiffs' alternative request to amend the pleadings would be futile. Futility is a valid basis for denying leave to amend. *United States ex rel Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 822 (8th Cir. 2009). No matter how their argument is framed, Plaintiffs' dispute is essentially an internal tribal matter over which this Court has no jurisdiction and for which the Plaintiffs have no standing. Amendments to Plaintiffs' pleadings will not overcome the jurisdictional defects in their action. Plaintiffs' alternative request to amend pleadings should be denied. If this matter is to be pursued at all, it should be within the processes available under tribal law, in tribal court.

⁶ The OST Secretary, however, is named in the Request for Relief.

For the reasons stated, the OST Tribal Defendants respectfully request that the Court deny the Plaintiffs' Motion for Default Judgment and Declaratory and Injunctive Relief in its entirety and grant OST Tribal Defendants' Motion to dismiss this case.

Dated this 18th day of June, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing OST Tribal Defendants Reply to Plaintiffs' Response to OST Tribal Defendants' Motion to Dismiss upon the persons herein next named, on the date shown below, by mailing such copies as first class mail, postage prepaid, from the United States Post Office in Rapid City, South Dakota, to:

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and electronically by using the CM/ECF system which upon information and belief will send a notice of electronic filing to:

Jan L. Holmgren
Assistant U.S. Attorney
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Dated this 18th day of June, 2013.

/s/
Michael C. Loos