Case No. 14-2027

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PATRICK A. LEE, FLOYD HAND, and WILLIAM J. BIELECKI, SR.,

Plaintiffs/Appellants,

v.

CLEVE HER MANY HORSES, Acting Superintendent of Bureau of Indian Affairs, Pine Ridge Agency, Pine Ridge Indian Reservation, South Dakota; 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 BIRD STEELE, IRVING PROVOST, ROBIN TAPIO, LAWRENCE "LARRY" EAGLE BULL, JOHN HASS, BETTE GOINGS, and TATEWIN MEANS, each in their individual capacity;

Defendants/Appellees.

On Appeal from the United States District Court for the District of South Dakota,
Case No. 13-cv-5019-JLV

TRIBAL APPELLEES ANSWER BRIEF

Jennifer P. Hughes (D.C. Bar 458321)
Attorney for Tribal Appellees
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street N.W., Suite 700
Washington, D.C. 20037
Phone: (202) 822-8282
jhughes@hobbsstraus.com

Michael C. Loos (S.D. Bar 2367)
Attorney for Tribal Appellees
CLAYBORNE, LOOS & SABERS, LLP
2834 Jackson Blvd., Suite 201
Rapid City, SD 57709
Phone: (605) 721-1517
mloos@clslawyers.net

SUMMARY OF THE CASE

This case arose from an internal tribal employment dispute between certain of the Appellants and the elected officials of the Oglala Sioux Tribal Council and employees of the Oglala Sioux Tribe (OST) (Tribal Appellees).[1] The dispute is based on the competing interpretations of OST law. The District Court Order granted Appellees' Motion to Dismiss because Appellants did not "identif[y] any constitutional provision or federal statute which would place jurisdiction for their claims in federal district court." Add. at 27. Although not required to do so, the District Court provided a detailed explanation for granting the Appellees' Motion to Dismiss for lack of jurisdiction. *See id.* at 8. The Appellants seek review of the District Court's Order but cannot meet their burden of proving that federal jurisdiction exists in this case. Thus, the District Court's Order and Judgment should be affirmed. Further, Appellants' request for oral argument should be denied because: (1) the appeal is frivolous, (2) the dispositive issues have been authoritatively decided, and (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. *See* Fed. R. App. P. 34(a)(2); 8th Cir. R. 34A.

[1] "Tribal Appellees" include all Appellees except Mr. Cleve Her Many Horses, Acting Superintendent of the Bureau of Indian Affairs (BIA).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 8th Cir. R. 26.1A, the undersigned counsel for the Tribal Appellees states that all Tribal Appellees are or at the time this dispute arose were either elected members of the Tribal Council of the Oglala Sioux Tribe or employees of the Oglala Sioux Tribe, a federally recognized Indian tribe. 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014). As such, none of the Tribal Appellees either individually or collectively constitute a nongovernmental corporate party. Accordingly, no stock or shares exist that could be owned by any parent corporation or publicly held corporation.

Dated: July 23, 2014 Respectfully submitted,

s/ Jennifer P. Hughes
Jennifer P. Hughes
HOBBS, STRAUS, DEAN & WALKER LLP
Attorney for Tribal Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*Denotes cases upon which Tribal Appellees principally rely.

Statutes

Regulations

Rules

JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. 28(b) the Tribal Appellees provide the following required jurisdictional statement. On March 30, 2014, the District Court granted Tribal Appellees' Motion to Dismiss based on Fed. R. Civ. P. 12(b)(1) and (6), authoritatively finding that federal subject matter jurisdiction did not exist in the District Court for any of Appellants' asserted claims under the following statutes: 28 U.S.C. §§ 1331, 1332, 1343, and 1361; 42 U.S.C. §§ 1983 and 1985; 18 U.S.C. §§ 241, 242, and 1153; and 25 U.S.C. §§ 1301-1303.

On April 30, 2014, Appellants filed a Notice of Appeal to this Court seeking review of the District Court's Order and Judgment granting the Appellees' Motion to Dismiss. DCD 51.[2] This Court of Appeals has jurisdiction to review a final decision by the District Court pursuant to 28 U.S.C. § 1291.

Appellants assert that this Court also "has jurisdiction of this appeal pursuant to … [the] Collateral Order Doctrine…." Appellants' Br. at 8. Yet, that doctrine is inapplicable here as it authorizes appellate courts to hear appeals from interlocutory orders in certain circumstances. Because this case was dismissed by the lower court for lack of jurisdiction, Appellants are appealing a final disposition rather than an interlocutory order. Appellants cannot rely on the Collateral Order Doctrine.

[2] "DCD" is used throughout to refer to the District Court Docket. Page numbers referred to herein are to the page numbers assigned by the District Court.

STATEMENT OF ISSUES

Whether the District Court erred in granting Appellees' Motion to Dismiss by determining that it was without subject matter jurisdiction to hear Appellants' claims. *See Kokkonen v. Guardian Life Ins. Co. of Amer.*, 511 U.S. 375, 377 (1994); *In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985); *Gardner v. Schaffer*, 120 F.2d 840, 842 (8th Cir. 1941).

STATEMENT OF THE CASE

The Appeal involves an internal tribal dispute between the Appellants and the elected Oglala Sioux Tribal Council and tribal employees concerning personnel actions that Appellants feel were unjust, including the termination of Appellant, former Judge Patrick Lee. The dispute arose from differing interpretations of the Constitution and Bylaws of the Oglala Sioux Tribe, DCD 1-2 at 44-56, and several tribal laws including the "Oglala Sioux Tribe Revised Code of Ethics," *id.* at 57-67, "Court Personnel Procedure Code," and a "Tribal Court Organizational Chart." DCD 9 at 13-14. Rather than filing an action in the OST Tribal Court or the OST Tribal Supreme Court, Appellants chose to bring a federal action in the United States District Court for the District of South Dakota against 19 members of the Tribal Council and three Tribal employees (Tribal Appellees)[3] as well as the Acting

[3] We note that John Hass is no longer an employee with the Oglala Sioux Tribe.

Superintendent of the Bureau of Indian Affairs (Federal Appellee).

The genesis of Appellants' Amended Complaint is rooted in the revision of the Constitution and Bylaws of the Oglala Sioux Tribe in 2008 (OST Constitution) and the Appellants' interpretation of the language of the OST Constitution. The Appellants claim that the OST Constitution contains language that, based on a separation of powers doctrine, mandated the Oglala Sioux Tribal Council to promulgate regulations providing for the administration of the Tribal Court system. *See* DCD 9 at 13-14. The Appellants allege that the OST Constitution creates a separation between the Oglala Sioux Tribal Council and the Oglala Sioux Tribal Court system. The Appellants argue that the Oglala Sioux Tribal Council failed to promulgate tribal law providing for the supervision of Tribal Court employees. *Id.* Appellant Patrick Lee, who was serving as Chief Judge of the Oglala Sioux Tribal Inferior Courts in the fall of 2011, decided to act on his own and "assumed supervision of court personnel," terminating at least two Tribal Court officials. *Id.* What ensues after these terminations is a series of personnel actions whereby judges (including Judge Lee) and Tribal Court officials are removed or terminated, re-instated, and removed again.[4] Eventually, Judge Lee was terminated from his position. *Id.* at 28-29.

Shortly thereafter, the Appellants attempted to require the entire Oglala Sioux

[4] Tribal Appellees agree with the recount of the "Factual Allegations" provided in Judge Viken's March 30, 2014 Order. Add. at 8-16.

Tribal Council to impeach itself during a Tribal Council meeting, which would have effectively left the Tribe without a functioning government. *Id.* at 32 n.12. After Appellants' unsuccessful attempt to unseat the governing body of the Tribe, which appears to be their actual objective, DCD 36 at 11 & n.5, they brought this action in the District Court.

On April 3, 2013, the Appellants filed their "1st Amended Complaint" (Amended Complaint) seeking:

> writ of mandamus against all the defendants and includes the following request for relief: (1) protection for Mr. Lee, as Chief Judge of the Oglala Sioux Tribal Court, from removal by the Oglala Sioux Tribe ("OST") Tribal Council; (2) protection for Rhonda Two Eagles, as OST Tribal Secretary, from removal by the OST Tribal Council; (3) protection for Mr. Bielecki from removal from the Pine Ridge Indian Reservation by the OST Tribal Council; (4) protection of the Treaty Council Members from arbitrary arrest; (5) protection for the rights of the Oyate (people) against entrapment by a despotic form of government; (6) protection for freedom of the press and free speech pursuant to Article XII of the OST Bill of Rights; and (7) that defendant Cleve Her Many Horses, as Acting Superintendent of the Bureau of Indian Affairs of Pine Ridge Agency of the Pine Ridge Indian Reservation ("BIA"), be ordered to enforce the civil rights of the people pursuant to the Indian Civil Rights Act of 1968 and other federal statutes.

Add. at 2 (citation omitted).[5]

Tribal Appellees moved to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) based on lack of federal jurisdiction and pursuant to Rule

[5] "Add." refers to the Tribal Appellees' Addendum attached to this brief as Appellants failed to attach an addendum as mandated by 8th Cir Rule 28A(g).

12(b)(6) for failure to state a claim for relief. *Id.* at 3. Tribal Appellees also argued that Appellants were required to exhaust tribal remedies, but failed to do so. DCD 45 at 12-14. Additionally, Tribal Appellees argued that the Appellants have no standing, their claims are not ripe, and their claims are barred by sovereign immunity. DCD 29 at 7-10, 18-20.

The District Court construed the *pro se* Amended Complaint liberally, but, nevertheless, granted Appellees' Motion to Dismiss on March 30, 2014. Add. at 1-4, 30. The District Court found that resolution of Appellants' "claims against the individually named defendants involves interpretation and application of the OST Constitution and tribal law, those claims are 'not within the jurisdiction of the district court.'" *Id.* at 27 (quoting *Runs After*, 766 F.2d at 352). The District Court held that the Appellants "have not identified any constitutional provision or federal statute which would place jurisdiction for their claims in federal district court." *Id.* The District Court dismissed the Appellants' claims because it lacked subject matter jurisdiction. Since subject matter jurisdiction was the basis of the dismissal, the District Court only briefly mentioned that Appellants acknowledged, but never pursued, a tribal remedy. *Id.* at 27 ("[T]here is no allegation [Appellants] sought relief from the OST Tribal Court or the OST Supreme Court prior to commencement of this federal litigation. To suggest plaintiffs do not have a tribal remedy is simply their own conclusion unsupported by any factual allegation.")

(citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The District Court also granted Federal Appellee's Motion to Dismiss for lack of subject matter jurisdiction and Appellants' failure to exhaust federal administrative remedies. *Id.* at 29-30.

SUMMARY OF THE ARGUMENT

After a lengthy and thorough analysis of each of the bases for federal jurisdiction asserted by the Appellants, the District Court correctly determined that Appellants failed to identify any constitutional provision or federal statute that would place jurisdiction for their claims in federal district court and Appellants' claims were not within the jurisdiction of the federal court. The Court below, therefore, properly concluded that it did not have jurisdiction to hear Appellants' claims and granted both the Tribal Appellees' and the Federal Appellee's Motions to Dismiss.

Tribal Appellees continue to assert that the Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) based on lack of federal jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim for relief. *See id.* at 3. Tribal Appellees also assert that Appellants' arguments regarding exhaustion of tribal remedies are irrelevant and that even if exhaustion was relevant in these circumstances, the Appellants failed to exhaust tribal remedies. DCD 45 at 12-14. Additionally, it is Tribal Appellees' position that the Appellants have no standing,

their claims are not ripe, and their claims are barred by sovereign immunity. DCD 29 at 7-10, 18-20.

Appellants assert nothing in their brief that indicates error by the District Court and nothing that would change the District Court's correct conclusion resulting from its thorough legal analysis regarding lack of jurisdiction. For the aforementioned reasons, Tribal Appellees request that this Court affirm the District Court's Order and Judgment.

Similar to their tactics in the District Court, Appellants raise new, previously not asserted issues and arguments in its appeal to this Court. The general rule is that arguments raised for the first time on appeal will not be considered. Further, Appellants do not meet any exceptions for having their new arguments considered and no injustice would result if such new arguments were not considered by this Court. There is no federal jurisdiction over the Appellants' claims, and Appellants' new arguments do not change this fundamental matter.

The threshold inquiry in every federal case is whether the court has jurisdiction. Add. at 17 (citing *Rock Island Millwork Co. v. Hedges-Gough Lumber Co.*, 337 F.2d 24, 26-27 (8th Cir. 1964)). Despite Appellants' persistence in trying to persuade the Court otherwise, there simply is no federal jurisdiction in this case over Appellants' claims. The District Court was correct in granting all Appellees'

Motions to Dismiss, and the District Court's Order and Judgment should be affirmed.

ARGUMENT

I. Appellants' New Arguments Raised for the First Time on Appeal Should Not Be Considered by this Court.

Appellants seek to raise numerous new allegations and arguments for the first time on appeal, just as they have done with every pleading filed during the course of this litigation in the District Court. DCD 45 at 2-3 (noting that Appellants' claims have been a moving target). Appellants provide new citations to various statutes and regulations that are irrelevant, some with accompanying conclusory statements of law claiming a violation has occurred and some with no explanation at all. The newly cited laws and regulations are: 25 U.S.C. §§ 450j and 2802 and 25 C.F.R. §§ 1.2, 11.100, 11.406, 11.427, 11.428, 11.435, 11.448, 11.449, 81.1, 81.4-81.7, 81.24, and 900.247. The Appellants do not assert that the District Court erred in granting the 12(b)(1) and 12(b)(6) Motions to Dismiss. The new issues raised do not address the determination that no jurisdiction exists or the determination that Appellants have not exhausted tribal remedies. The new issues are not relevant to the appeal of the District Court's decision to dismiss for lack of subject matter jurisdiction.

A. Standard of Review for Raising New Issues on Appeal.

Although Appellants file *pro se*,[6] status as a *pro se* litigant does not entitle a party to disregard the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. *Pro se* pleadings are to be construed liberally, but *pro se* litigants are still expected to comply with procedural and substantive law. *See* Add. at 4 (citing *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984) and *Jiricko v. Moser & Marsalek, P.C.*, 184 F.R.D. 611, 615 (E.D. Mo. 1999), *aff'd*, 187 F.3d 641 (8th Cir. 1999)).

This Court has stated that "[o]rdinarily, this court will not consider arguments raised for the first time on appeal." *Wever v. Lincoln Cnty.*, 388 F.3d 601, 608 (8th Cir. 2004); *see also Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 875 (8th Cir. 2012). There are, however, "recognized exceptions" to the general prohibition on arguments raised for the first time on appeal. *Wever*, 388 F.3d at 608. The Court has stated "[w]e consider a newly raised argument only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result." *Orr v. Wal-Mart Stores*, 297 F.3d 720, 725 (8th Cir. 2002).

---

[6] We note that although Appellants file *pro se*, Appellant Patrick Lee has been licensed to practice law in the State of South Dakota for 40 years, a Tribal Court judge and a member of the bar of the District Court of South Dakota since 1975. DCD 9 at 4; DCD 29 at 5-6. Appellant William Bielecki is a licensed lay advocate in the Oglala Sioux Tribal Court. Add. at 9-10.

The Court has also characterized exceptions as existing only "where the proper resolution is beyond any doubt, or where injustice might otherwise result, or when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case." *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314-15 (8th Cir. 1991) (internal quotation marks and citations omitted). However, the Court's consideration of an argument raised for the first time on appeal is discretionary. *Id.*; *see also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("[T]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.") (quoted in *Hamilton v. Schriro*, 74 F.3d 1545, 1559 (8th Cir. 1996)).

B. The New Issues Raised Do Not Meet An Exception to the General Rule Against Considering New Arguments.

The exhaustive list of new issues and conclusions of law raised by Appellants will require significant factual development because there is little or no explanation of why Appellants believe the newly cited provisions of federal law are relevant to this appeal. The limited discussion provided by Appellants consists solely of conclusory or indecipherable statements that require Appellees to explain to the Court what the Appellants are trying to argue. Unfortunately, Appellants' standard modus operandi is to make as many arguments as possible whether or not

they make sense or are relevant, wasting the limited resources of the parties and the judicial resources of the federal court system. DCD 45 at 3.

As an example, Appellants provide the bare text of a 25 C.F.R. §§ 1.2, 81.1, and 81. 4 then state that "[c]learly [the cited regulations] demonstrate[] that the Secretary of Interior … has a clear duty to enforce the provisions of Tribal Governments, when necessary, to make certain that they govern within the framework as agreed upon." Appellants' Br. at 18-20. The cited provisions, however, never mention "enforcement." It is entirely unclear why Appellants cite to 25 C.F.R. § 1.2 – Applicability of Rules of the Bureau of Indian Affairs. This regulation simply provides for the "general application" of the regulations in chapter I of Title 25 of the Code of Federal Regulations and also recognizes the Secretary's power to waive regulatory requirements. *Id.* at 18-19. The Appellants provided the text of 25 C.F.R. § 81.1, which includes the definition of "constitution," and the text of § 81.4, which addresses the assistance available to Indian tribes when "drafting [or amending or revoking] a constitution and bylaws." *Id.* at 19-20. Again, the cited regulations do not mention "enforcement," nor do they indicate any duty of the United States to enforce tribal law.

It is also unclear whether or not Appellants' new citation to 25 U.S.C. § 2802 – Indian law enforcement responsibilities is made for the proposition that the Tribal Appellees have a duty pursuant to this statute. *Id.* at 24. In any event, that statute

is irrelevant as it provides for Bureau of Indian Affairs (BIA) law enforcement responsibilities in certain circumstances, including enforcement of tribal law "with the consent of the Indian tribe." 25 U.S.C. § 2802(c)(1).[7] Appellants' assertion of 25 U.S.C. § 2802 is of no avail in establishing federal court jurisdiction for Appellants' claims.

In an unexplained effort to demonstrate "evidence of the Secretary's authority," Appellants provide bare citations to 25 C.F.R §§ 81.5 – Request to Call Election, 81.7 – Adoption, ratification, or revocation by majority vote, and 81.24 – Approval, disapproval, or rejection action. Appellants' Br. at 20-21. The Appellants seem to imply that the OST Tribal Constitution has failed, *id.* at 21, and then provide a list of criminal offenses found at 25 C.F.R. §§11.406, 11.427, 11.428, 11.435, 11.448, 11.449. *Id.* at 21-24. Appellants assert that the cited regulations have been codified in OST law. *Id.* at 22. It is not clear whether Appellants are alleging a violation of these regulations, or whether their assertion is simply that the regulations apply to Tribal Appellees. In either case, the cited regulations are irrelevant and do not demonstrate that the District Court's Order was in error.

[7] We point out that one of the stated purposes of the Indian Law Enforcement Reform Act (ILERA), 25 U.S.C. § 2801 *et seq.*, is "to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country." Pub. L. 111-211, §201(b)(3).

The Appellants also raise a new argument that the tribal "council is in violation of its federal contract" under Pub. L. 93-638 Indian Self-Determination and Education Assistance Act (ISDA) (codified at 25 U.S.C. § 450j) and its implementing regulations at 25 C.F.R. § 900. *Id.* at 32-33. Appellants argue that ISDA "contains a provision" requiring the OST Tribal Council to "adhere to the Indian Civil Rights Act [ICRA] of 1968." *Id.* at 32. However, Appellants fail to explain how the newly asserted and unnamed ISDA contract establishes jurisdiction in the federal courts based on a violation of the ICRA. The District Court's Order states that the "ICRA does not grant jurisdiction in this court over the allegations of the amended complaint against … the individually named defendants…." Add. at 19. Quoting *Runs After v. United States*, 766 F.2d at 353, the District Court noted that "the ICRA does not impliedly authorize actions for declaratory or injunctive relief against either the tribe[] or tribal officers." *Id.* at 18. Additionally, the District Court explained that "the only federal relief available under the Indian Civil Rights Act is a writ of habeas corpus . . . and [t]hus, actions seeking other sorts of relief for tribal deprivations of rights must be resolved through tribal forums." *Id.* (quoting *Runs After*, 766 F.2d at 353).[8]

[8] Appellants cite 25 C.F.R. § 900.247, arguing that the Bureau of Indian Affairs has an obligation to "take action in the event of civil rights violations." Appellants' Br. at 33. These regulations, however, address the process for the Bureau of Indian Affairs to reassume functions contracted by a tribe under the ISDA.

Even construing the newly raised issues in the most favorable light for the *pro se* Appellants, this Court would be required to undertake significant factual development to determine what the Appellants are attempting to argue and how these matters might at all be relevant to the jurisdictional issues involved in this case. Further, no manifest injustice would occur if the Court does not consider Appellants' new issues because they do not change the District Court's correct conclusion that there is no federal court jurisdiction over Appellants' claims. As pointed out by the District Court, Appellants can pursue their claims against Appellees in the "OST Tribal Court or OST Supreme Court," Add. at 27, which the Appellants admit they have not done based on an unavailing futility argument, *see* Appellants' Br. at 31.

For the reasons stated above, Appellees request that this Court refuse to consider Appellants' arguments raised for the first time on appeal.

II. The District Court Correctly Held that It Lacked Jurisdiction to Hear Appellants' Claims and Correctly Granted the Motion to Dismiss.

The District Court properly found that jurisdiction over Appellants' claims in the federal court is lacking. As the District Court stated, "[t]he threshold inquiry in every federal case is whether the court has jurisdiction." Add. at 17 (quoting *Rock Island Millwork Co.*, 337 F.2d at 26-27). Further, "[l]ack of jurisdiction cannot be waived by the parties or ignored by the court." *Id.* (quoting *Rock Island Millwork*

Co., 337 F.2d at 27). After a lengthy and thorough analysis of each of the statutory provisions asserted by the Appellants, the District Court correctly concluded that none of them provided the Court with jurisdiction over the Appellants' claims. The District Court properly granted the Tribal Appellees' Motion to Dismiss based on Fed. R. Civ. P. 12(b)(1) and (b)(6).

A. Standard of Review.

A motion to dismiss for lack of jurisdiction under Rule 12(b)(1) that is limited to a facial attack on the pleadings is subject to the same standard as a motion brought under Rule 12(b)(6). *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). The Eighth Circuit has stated that it reviews *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6), *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 911 (8th Cir. 2002), construing the complaint in the light most favorable to the appellant, but giving no effect to conclusory allegations of law. *See Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1057-58 (8th Cir. 2002) (stating well-pleaded facts, not legal theories or conclusions, determine adequacy of complaint); *see also Farm Credit Servs. of Am., FLCA v. Haun*, 734 F.3d 800, 803-804 (8th Cir. 2013); *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003); *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001).

B. Appellants Fail to Identify Any Federal Constitutional Provision or Statute that Places Jurisdiction for their Claims in Federal Court.

The District Court properly concluded that none of the statutes Appellants asserted in their Amended Complaint and argument for federal jurisdiction provide the federal court jurisdiction over their claims. Add. at 27. Without meeting this primary necessary threshold, Appellants' claims must be dismissed.

Federal courts are of limited jurisdiction. They "possess only that power authorized by [federal] Constitution and statute[s]." *Kokkonen*, 511 U.S. at 337. It is "presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary is on the party asserting jurisdiction." *Id.* (internal citations omitted); *see also United States v. Afremov*, 611 F.3d 970, 975 (8th Cir. 2010). Federal court jurisdiction is based on diversity of the parties or the presence of a federal question. Appellants did not properly assert diversity and it does not exist in this case. The District Court agreed. Add. at 17. The District Court also agreed that there is no federal question presented in Appellants' claims against the Tribal Appellees. *Id.* at 27. Significantly, the Appellants do not argue otherwise as to the Tribal Appellees, and nothing offered in their brief affects the District Court's correct conclusion that federal jurisdiction does not exist in this case.

For a federal court to have federal question jurisdiction "a right or immunity created by the Constitution or laws of the United States must be an element, and an

essential one, of the plaintiff's cause of action." *Gardner*, 120 F.2d at 842. "A mere statement that a construction of certain federal statutes is involved in a case is not sufficient to bestow such jurisdiction." *Jefferson v. Gypsy Oil, Co.*, 27 F.2d 304, 305 (8th Cir. 1928); *see also Anderson v. Sixth Judicial Dist. Court*, 521 F.2d 420 (8th Cir. 1975) ("While pleadings in civil rights cases are to be liberally construed . . . they must contain more than mere conclusory statements and a prayer for relief." (citations omitted)). Thus, a federal question does not exist simply by citing federal statutes with mere conclusory statements and no analysis relating them to the claims alleged, which is what Appellants have provided. *See* Add. at 8 (stating amended complaint is "heavily laden with conclusory statements of law.").

Appellants do not contest the District Court's summary dismissal of a number of their jurisdictional claims. First, the Court correctly determined that the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, does not grant it jurisdiction over the Appellants' allegations against the Appellees. *Id.* at 18 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 72 (1978)). The Supreme Court decision in *Santa Clara Pueblo* makes it clear, as the Eighth Circuit has noted, that "the only federal relief available under the Indian Civil Rights Act is a writ of habeas corpus … and [t]hus, actions seeking other sorts of relief for tribal deprivations of rights must be resolved through tribal forums." *Runs After*, 766 F.2d at 353 (internal

quotation marks and citations omitted). Appellants are not pleading habeas corpus. Thus, the ICRA does not provide Appellants federal jurisdiction for their claims.

Second, the District Court correctly concludes that the criminal statutes cited by the Appellants, 18 U.S.C. §§ 241, 242, and 1153, do not grant the federal courts jurisdiction to consider the Appellants' allegations because these criminal statutes do not give rise to a private cause of action. Add. at 19-20 (citing *Frison v. Zebro*, 339 F.3d 994, 999 (8th Cir. 2003); *Gustafson v. City of W. Richland*, Nos. CV-10-5040-EFS, CV-10-5058-EFS, 2011 WL 5507201 at *4 (E.D. Wash. Nov. 7, 2011); *Newcomb v. Ingle*, 827 F.2d 675, 677 n.1 (10th Cir. 1987)).

Third, the District Court correctly concluded that 42 U.S.C. § 1983 does not provide it jurisdiction over the Appellants' claims because the Appellants allege violations of tribal law, not federal law, and there is no allegation that the Tribal Appellees were acting under state law. Add. at 21. The Supreme Court has made clear that in a 1983 claim the plaintiff must prove that (1) the defendant deprived him of a right secured by the "Constitution and laws of the United States," and (2) the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). The Eighth Circuit has held that "[s]ection 1983 does not confer subject matter jurisdiction"; it "simply provides a means through which a claimant may seek a remedy in federal court for a constitutional

tort when one is aggrieved by the act of a person acting under color of state law." *Jones v. United States*, 16 F.3d 979, 981 (8th Cir. 1994) (emphasis added); *see also Parker v. Boyer*, 93 F.3d 445, 447-48 (8th Cir. 1996) (citing *West v. Atkins*, 487 U.S. 42, 49 (1988)). Appellants do not allege that Tribal Appellees were acting under the color of state law, and they were not. Thus, the District Court correctly concluded that "[s]ection 1983 does not provide jurisdiction for plaintiffs' claims." Add. at 21.

Fourth, Appellants assert 42 U.S.C. § 1985 as a basis for federal jurisdiction. But, this statute requires the alleged violation of constitutionally guaranteed rights under the United States Constitution and the cause of action to be based in some sort of racial or class-based animus. *United Bhd. of Carpenters and Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-835 (1983). In the Appellants' claims, the rights allegedly violated all arise under tribal law and Appellants allege differing treatment against them by the Tribal Appellees based on political opposition, not racial or class-based animus. Appellants do not allege that actions of the Tribal Appellees are a private conspiracy premised on class or race. The District Court, therefore, properly concluded that section 1985 does not provide Appellants a remedy and 28 U.S.C. § 1343 does not establish jurisdiction in federal court. Add. at 25 (citing *Shortbull v. Looking Elk*, 677 F.2d 645, 649 (8th Cir. 1982) and *Runs After*, 766 F.2d at 353).

No federal question otherwise exists in the Appellants' claims. In the Eighth Circuit, "a federal question exists if the outcome is controlled or conditioned by Federal law, but does not exist if the real substance of the controversy centers upon something other than the construction of federal law." *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589-590 (8th Cir. 2005) (internal citations and quotation marks omitted). Relevant to this case, the Eighth Circuit also found that "[i]f an interpretation of tribal . . . law is necessary to establish or clarify a right sought to be enforced . . . then jurisdiction under Section 1331 does not exist. . . ." *Id*. at 590. Appellants seek intervention by the federal court into wholly internal tribal matters: Tribal Court personnel actions and interpretation of the Tribal Constitution and other laws of the Oglala Sioux Tribe. The outcome of Appellants' claims is not controlled or conditioned by federal law. Thus, pursuant to Eighth Circuit precedent there is no federal question jurisdiction in Appellants' claims and the federal court is without authority to review them. *Longie*, 400 F.3d at 589-590; *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d at 763 ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with the Indian tribes and not in the district courts."); *Runs After*, 766 F.2d at 352 ("[R]esolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."). Based on the aforementioned

precedent, the District Court properly found that "because the resolution of plaintiffs' claims against the individually named defendants involves interpretation and application of the OST Constitution and tribal law, those claims are 'not within the jurisdiction of the district court.'" Add. at 27 (quoting *Runs After*, 766 F.2d at 352).

After a thorough review of the Appellants' asserted jurisdictional bases, the District Court correctly determined that federal jurisdiction to hear Appellants' claims is lacking. Nothing in the Appellants' brief to this Court changes that outcome.

C. Tribal Constitutions are Not Federal Law.

Appellants incorrectly assert that tribal constitutions are federal law, arguing that the United States has a duty to enforce the Tribal Constitution and, therefore, that federal jurisdiction exists. Appellants' contention was wrong in the District Court and is no less wrong on appeal. Appellants cite 25 U.S.C. § 2802 as support for this proposition. Appellants' Br. at 24. However, 25 U.S.C. § 2802 merely provides that the Interior Secretary has the responsibility to provide or assist in providing law enforcement services in Indian country and that responsibilities of the Office of Justice Services in Indian country shall include "enforcement of Federal law and, with the consent of the Indian tribe, tribal law." 25 U.S.C. § 2802(c)(1). This authorization of law enforcement authority, however, does not

give the Secretary or federal courts broad authority to adjudicate disputes over interpretations of tribal constitutions. Rather, 25 U.S.C. § 2802 establishes the Office of Justice Services within the BIA and authorizes BIA law enforcement officers to provide law enforcement services, such as executing tribal exclusion orders. *See Penn v. United States*, 335 F.3d 786 (8th Cir. 2003); *see also, e.g.*, *Smith v. United States*, 496 F. Supp. 2d 1035, 1041 (D.N.D. 2007) ("25 U.S.C. § 2803 [of ILERA] provides the authority that may be given to BIA law enforcement employees but does not mandate the actions of BIA law enforcement officers. Similarly, the relevant provisions of the Code of Federal Regulations do not mandate the manner in which BIA officers investigate and enforce laws."). This authorization does not render tribal law into federal law and does not give the federal courts jurisdiction over disputes involving tribal constitutional law.

Further, the simple fact that the BIA approved the OST Tribal Constitution does not convert it into federal law so that a dispute over its interpretation becomes a federal question for federal court review. The Eighth Circuit has clearly stated that an action that "would necessarily require the district court to interpret the tribal constitution and tribal law … is not within the jurisdiction of the district court." *Runs After*, 766 F.2d at 352 (8th Cir. 1985); *see also Smith v. Babbitt*, 875 F. Supp. 1353, 1361-1362 (D. Minn. 1995), *judgment aff'd, appeal dismissed in part*, 100 F.3d 556 (8th Cir. 1996). The Eighth Circuit has also stated that "[j]urisdiction to

…interpret tribal constitutions and laws … lies with Indian tribes and not in the district courts." *In re Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d at 763-64 (discussing at length *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) ("[T]he district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute.")); *see also Sac & Fox Tribe of the Miss. in Iowa Election Bd. v. BIA*, 321 F. Supp. 2d 1055, 1063 (N.D. Iowa 2004) ("The court is without jurisdiction to resolve intra-tribal disputes requiring interpretation of a tribal constitution.") (citing *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *Runs After*, 766 F.2d at 352; *Goodface*, 708 F.2d at 339). Tribal constitutions are simply not federal law that a district court must interpret and apply. In fact, per the aforementioned cases, the Eighth Circuit has recognized that federal courts entirely lack jurisdiction to interpret and apply tribal constitutional law.

D. Appellants Acknowledge the Existence of Tribal Remedies.

At its roots, this case is one of interpretation of tribal law. The District Court found that Appellants' "amended response to the individually named defendants' motion to dismiss focuses upon alleged violations of the OST Constitution and the OST Law and Order Code." Add. at 26. This Court has stated 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." *Runs After*, 766 F.2d

at 352. Relying on this Court's precedent, the District Court dismissed the Appellants' claims on the grounds that it lacked subject matter jurisdiction over them because they are wholly based on interpretations of tribal law. Add. at 27. The Appellants cite to *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980), for the proposition that "there has to be a forum where the dispute can be settled …. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy." *See* Appellants' Br. at 24. As Tribal Appellees explained in the District Court, *Dry Creek Lodge* is not applicable here and even if it were, *Dry Creek Lodge* does not cure Appellants' fundamental jurisdictional problem. DCD 45 at 10-14. As the District Court explained at length, there is no subject matter jurisdiction in federal court for any of the Appellants' claims. Add. at 20-27. Therefore, all of Appellants' arguments on the existence or exhaustion of tribal remedies are irrelevant. Further, even if the existence of tribal remedies were relevant, Appellants themselves acknowledge the existence of a tribal forum but did not avail themselves of that forum, as the District Court noted. *Id.* at 27.

Appellants, two of whom are trained in tribal law, now appear to lack any knowledge about the existence of and process for exhaustion of tribal remedies by asserting that submittal of a complaint to the OST Tribal Council and the OST

Attorney General is all that is required to exhaust tribal remedies.[9] Appellants claim "they have exhausted their remedies." Appellants' Br. at 12. However, the complaint makes no allegation that they took the actual steps needed to exhaust tribal remedies, nor is there anything in the record to support such an assertion as the District Court found. Add. at 27. Appellants assert that they "did exhaust tribal remedies by filing the complaint with the Oglala Sioux Tribal Attorney General," requesting that she procure a Special Judge and a Special Prosecutor to prosecute the Tribal Appellees in Tribal Court. Appellants' Br. at 28. They also state that they attempted to exhaust tribal remedies when they filed their complaint with the Tribal Council, which dismissed it with prejudice. *Id*. at 30. Appellants make the confusing assertion that "[t]o further exhaust tribal remedies at any level of tribal government would be an act of futility based on the facts leading up to this case and after." *Id.* at 31 (emphasis added).

The assertion makes no sense on its own terms. Appellants have either exhausted tribal remedies or they have not—a party cannot "further" exhaust tribal remedies. In this case, Appellants have not exhausted tribal remedies. Appellants recognize that tribal remedies are available. However, they simply chose not to pursue them because of speculation that the outcome would be adverse to their

[9] One of the Appellants is a licensed attorney and former Tribal Court judge and one of the Appellants is a licensed lay-advocate in the OST Tribal Court system. Add. at 9-10.

positions. The District Court found "there is no allegation plaintiffs sought relief from the OST Tribal Court or the OST Supreme Court prior to commencement of this federal litigation. To suggest plaintiffs do not have a tribal remedy is simply their own conclusion unsupported by any factual allegation." Add. at 27 (citing *Twombly*, 550 U.S. at 555). Appellants' filing of their petition in other tribal forums outside of the Tribal Court system is of no consequence.

Interestingly, Appellants note they "agree with the … principle of adjudicating all tribal issues in the tribal forum" and "believe and appreciate that tribal forums should be available to adjudicate civil rights violations in tribal court." Appellants' Br. at 32. Despite this statement of agreement, Appellants did not file any complaint at any level of the Tribal Court system because they speculate that the OST Tribal Council may exert political pressure in some fashion on the Tribal Court which may lead to a biased result. However, "[s]peculative futility is not enough to justify federal jurisdiction." *Colombe v. Rosebud Sioux Tribe*, 747 F. 3d 1020, 1025 (8th Cir. 2014) (quoting *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984) and citing *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300-01 (8th Cir. 1994) (rejecting argument of futility based on "mere[] alleg[ation] that tribal courts will be incompetent or biased")).

Appellants further state that "the 'Doctrine of Exhaustion of Remedies' should be waived under the present circumstances in light of the constitutional violations complained about," and cite *Walker v. Southern Railway Company*, 385 U.S. 196 (1966), for the proposition that exhaustion is waived when the process would take too long. Appellants' Br. at 26. Tribal Appellees are unclear whether Appellants are referencing the federal or tribal process. Regardless, Appellants misconstrue *Walker*. First, the exhaustion of tribal remedies doctrine is simply not relevant in the present case because of the lack of federal subject matter jurisdiction over the claims themselves. Second, even if the doctrine were relevant, contrary to Appellants' assertion, *Walker* did not find that an employee was relieved from exhausting remedies because of the length of time involved. Rather, at the time the employee filed his case, applicable case law allowed him to go directly to court rather than exhausting his administrative remedies. *Walker*, 385 U.S. at 196. The appellate court relied on a case decided after entry of the district court judgment to require exhaustion, and the Supreme Court reversed. *Id*. at 197-199. Notably also, *Walker* is a federal administrative remedies case and is not applicable to the requirement that Appellants exhaust tribal remedies.

More to the point, the Eighth Circuit has stated that "[a] party must exhaust his or her *tribal court* remedies before a case may be considered by a federal district court." *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991

(8th Cir. 1999) (emphasis added); *see also Colombe*, 747 F.3d at 1024. In the Eighth Circuit: "It is now settled that principles of comity require that tribal-court remedies *must* be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land." *Krempel v. Prairie Island Indian Cmty*., 125 F.3d 621, 622 (8th Cir. 1997) (emphasis in original) (citing *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419-21 (8th Cir. 1996)); *see also Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1221 (D. Minn. 1995) (stating the Eighth Circuit interprets relevant Supreme Court cases to require exhaustion before a case may be considered by a federal district court). However, notwithstanding the tribal exhaustion requirement there needs to be a federal law basis for jurisdiction for the federal court to hear the case, as in the aforementioned cases. In this case, there is no basis for federal jurisdiction. Even if Appellants had exhausted the admittedly available tribal remedies, there still would be no subject matter jurisdiction for a federal court to hear their claims as the District Court concluded. *See* Add. at 27 ("[P]laintiffs have not identified any constitutional provision or federal statute which would place jurisdiction for their claims in a federal district court.").

There are, of course, some narrow exceptions to the exhaustion requirement: (1) where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith," (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21 (internal quotation marks and citation omitted); *see also Krempel*, 125 F.3d at 622-23; *Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 184 (8th Cir. 1996); *Duncan Energy Co.*, 27 F.3d at 1299-01 (8th Cir. 1994). None of these narrow exceptions to the general rule requiring exhaustion of tribal remedies apply in this case. *Krempel*, 125 F.3d at 622-23 (stating futility exception applies in situations where a tribal court was inoperable at the time a complaint was filed); *see also DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013) ("[T]he requirement to exhaust should be waived only when the issue of tribal court jurisdiction is invoked for 'no other purpose than delay.' … In other words, the exhaustion requirement should be waived only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law.") (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997)); *Davis v. Mille Lacs Band of Chippewa Indians*, 26 F. Supp. 2d 1175, 1178 (D. Minn. 1998) (demonstrating that courts have rejected arguments that tribal court jurisdiction is

asserted in bad faith or based on bias when no evidence of such bad faith or bias is produced); *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1204-05 (D. Minn. 1996) (finding that plaintiffs' arguments that a removal procedure was futile and elections were likely to be rigged, "while apparently not without some basis in historical fact, are not sufficient to excuse non-exhaustion, given the overwhelming ramifications for tribal self-government.").

Ignoring the weight of such precedent, Appellants instead rely on the Tenth Circuit's decision in *Dry Creek Lodge*, 663 F.2d 682, to assert that a federal court can exercise jurisdiction in such circumstances because there is no tribal forum where this dispute can be settled.

Yet, *Dry Creek Lodge* provides no help to Appellants. First, the Tenth Circuit has subsequently all but disavowed *Dry Creek Lodge*, repeatedly emphasizing the "minimal precedential value" of *Dry Creek Lodge* and stating that "in the twenty-six years since *Dry Creek*, with the exception of *Dry Creek* itself, we have never found the rule to apply." *See Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1278 (10th Cir. 2006) (citing *Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y*, 163 F.3d 1150, 1158-59 (10th Cir. 1998) (citing *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992)); *Olguin v. Lucero*, 87 F.3d 401, 404 (10th Cir. 1996); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1460 (10th Cir. 1989); *Enterprise Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 892

(10th Cir. 1989); *White*, 728 F.2d at 1309; *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982); *Ramey Const. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982)). Other federal circuits have outright rejected *Dry Creek Lodge*. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 884 n.14 (2d Cir. 1996) (stating that *Dry Creek Lodge*'s reasoning has been rejected by at least two other circuits and citing *Shortbull*, 677 F.2d 645; *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 981 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1983); and *Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980)). *See also Fields v. Salt River Pima-Maricopa Indian Cmty.*, 379 F. App'x 673, 674 (9th Cir. 2010) ("*Dry Creek* is inconsistent with Supreme Court and Ninth Circuit precedent."); *Demontiney v. United States*, 255 F.3d 801, 815 n.6 (9th Cir. 2001) ("In the past, we have declined to follow *Dry Creek*…."); *Whiteco Metrocom Div. v. Yankton Sioux Tribe*, 902 F. Supp. 199, 202 (D.S.D. 1995) ("The Court declines to follow the *Dry Creek* exception.").

Second, the Appellants do not even meet the *Dry Creek Lodge* requirements. Two of the Appellants are Indians. A tribal forum is available. This dispute only involves internal tribal affairs. Thus, even if *Dry Creek Lodge* were good law, which it is not, the Appellants cannot meet the narrow test employed by the Tenth Circuit.

Significantly and fundamentally, all of Appellants' arguments on exhaustion of tribal remedies are irrelevant. The District Court granted Appellees' Motion to Dismiss based on the lack of subject matter jurisdiction. It is undisputed that Appellees did not pursue the available tribal remedies they admit exist. Even if they did, which they did not, there still would be no federal subject matter jurisdiction over their claims because their claims are wholly based on interpretations of tribal law and Appellants identified no constitutional provision or federal statute that would place jurisdiction for their claims in federal court. *See* Add. at 27 (citing *Runs After*, 766 F.2d at 352). Therefore the District Court's Order and Judgment should be affirmed.

E. Sovereign Immunity Bars the Suit.

Appellees in this case are the individually elected members of the Tribal Council and three tribal employees. Appellants assert that the Oglala Sioux Tribe is not named as a defendant and that sovereign immunity does not extend to the individually named Tribal Council Members. Appellants' Br. at 32. They further argue that a "reasonable interpretation" of *Vann v. United States Department of the Interior*, 701 F.3d 927 (D.C. Cir. 2012), would vest the District Court with jurisdiction to adjudicate the case. Appellants' Br. at 28. Appellants are wrong and their efforts to contrive jurisdiction should be rejected. Although not specifically

addressed by the District Court, sovereign immunity provides further and additional grounds to affirm the court's order and judgment of dismissal.

1. *Ex Parte Young* Does Not Allow Suit Against Tribal Appellees.

By asserting the *Vann* case, Appellants again raise their *Ex parte Young* argument. Their argument, however, conflicts with how they brought forth their lawsuit.[10] Appellants' Amended Complaint clearly and repeatedly states that they complain against each Tribal Appellee "in their individual capacity, and not their official capacity." DCD 9 at 5-12. Appellants' attempt to avoid sovereign immunity in this respect fails. Tribal Appellees could only have acted in the matters raised by Appellants in their official capacity, as Tribal Council Members or Tribal Officials or Employees. None of the Tribal Appellees could have individually taken any action alleged by the Appellants, or can as individuals take any future action Appellants say they fear. It is only acting as a group in their official capacities as the Oglala Sioux Tribal Council that the Tribal Appellees can take actions to govern the Tribe and make personnel decisions under Tribal Law. Only acting in their official capacities as the Oglala Sioux Tribal Council could the Tribal Appellees have taken actions about which the Appellants disagree. Tribal

[10] Appellants claim below that they "inadvertently filed against" the Tribal Appellees in their "personal capacity" when what they really meant to do was file against the Tribal Appellees in both their personal and official capacities. *See* DCD 43 at 4. Regardless, the *Ex parte Young* doctrine does not allow their suit against the Tribal Appellees.

sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. *See Santa Clara Pueblo*, 436 U.S. at 71-72; *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Smith v. Babbitt*, 875 F. Supp. at 1363.

At the crux of the Appellants' claims is the Appellants' disagreement with the removal of Mr. Lee as the Judge of the Tribal Inferior Court, which was through official Tribal Council action, "utilizing Article V of the OST Constitution." DCD 9-2 at 5; *see also* DCD 29 at 19-20. The Tribal Appellees were acting in their official capacities and acting within the scope of their collective authority as Tribal Council Members. Thus, the Tribe's sovereign immunity extends to them.

Ex parte Young, 209 U.S. 123, 160 (1908), 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. The doctrine exists to "permit the federal courts to vindicate federal rights" and hold state officials responsible to the supreme authority of the United States. *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984), *superseded on other grounds by statute*, 28 U.S.C. § 1367). 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." *Id*. at 1638.

In the case at hand, Appellants did not originally complain against the Tribal Appellees in their official capacity. Yet, Appellants below stated that they were changing their pleading in this regard. DCD 43 at 4. Even if Appellants complained against the Tribal Appellees in their official capacities, the issues Appellants complain about in this case rest solely on tribal law, not federal law. There is no ongoing violation of federal law, a requirement for the *Ex parte Young* doctrine to apply. *Va. Office for Prot. & Advocacy*, 131 S.Ct. at 1639 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)); *Ex parte Young*, 209 U.S. at 159-160.

The *Vann* case is of no help to the Appellants as that case involved a claim that a tribe and its principal chief were violating federal law, the 1866 Treaty with the Cherokee. *See Vann*, 701 F.3d at 930 ("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."). The Appellants' claims 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. There is no ongoing violation of federal law that can be the basis of an injunction against the Tribal

Appellees under the *Ex parte Young* doctrine. The Tribe's sovereign immunity extends to the Tribal Appellees acting in their official capacities as the Tribal Council. Whether the Tribal Council took actions as asserted by Appellants and whether those actions are in accord with tribal law is not a matter for federal court, as the District Court properly concluded. Add. at 27 (citing *Runs After*, 766 F.2d at 352-353). There is no federal jurisdiction, and the Appellants' claims are barred by sovereign immunity.

2. The Tribe is the Real Party in Interest.

The *Ex parte Young* doctrine is limited to the precise situation of commanding a state official to refrain from violating federal law. *Va. Office for Prot. & Advocacy*, 131 S. Ct. at 1638. It "does not apply when 'the state is the real, substantial party in interest' as when the 'judgment sought would expend itself on the public treasury or domain, or interfere with public administration.'" *Id.* (quoting *Pennhurst State Sch. & Hosp.*, 465 U.S. at 101 & n.11) (internal citations omitted).

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 a court 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) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)). The "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Va. Office for Prot. & Advocacy*, 131 S.Ct. at 1639 (quoting *Pennhurst State Sch. & Hosp*, 465 U.S. at 107). 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. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 282-83; *see also Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 688 (1949).

The Appellants' claim is not one in which they seek the Tribal Appellees to follow federal law, but rather tribal law. Appellants outright seek the removal of the members of the governing body of the Oglala Sioux Tribe, which they allege violated tribal law.[11] This action which stems from an employment dispute is brought forth by Appellants 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, an obviously intrusive offense to the Tribe's sovereignty. The administration and staffing of the Tribal Court system are inherently the powers of a sovereign, in this case, the Oglala Sioux Tribe. The relief requested would run

[11] We note that the Appellants 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 the portion of the sitting government body that is not suitable to the Appellants' liking—a request well beyond the Court's jurisdiction and authority.

against the Tribe, itself. As such, in the Appellants' action the Tribe is the real, substantial party in interest and, therefore, the *Ex parte Young* doctrine is inapplicable. *See Coeur d'Alene Tribe of Idaho*, 521 U.S. at 282, 287-88.

CONCLUSION

The District Court properly held that it lacked jurisdiction to hear the Appellants' claims. Even construing the *pro se* Amended Complaint liberally, it found that the Appellants' failed to exhaust tribal remedies; that Appellants' asserted claims involve interpretation and application of tribal law and that such claims are not within the jurisdiction of the District Court; and that Appellants failed to identify any constitutional provision or federal statute which would place jurisdiction for their claims in federal court. Add. at 27. The District Court's granting of Tribal Appellees' Motion to Dismiss was warranted. Appellants assert nothing to this Court that affects or would alter the District Court's thorough legal analysis and correct conclusion. For the foregoing reasons, the District Court's Order and Judgment should be affirmed.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that this brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,380 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6)(B) this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman font.

By: s/ Jennifer P. Hughes
Jennifer P. Hughes

HOBBS, STRAUS, DEAN & WALKER LLP
2120 L Street N.W., Suite 700
Washington, D.C. 20037
Phone: (202) 822-8282
Attorney of Record for Tribal Appellees

Dated: July 23, 2014.

CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of July, 2014, I electronically filed the foregoing Appellee Answer Brief and Addendum with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit via the CM/ECF system and that for all participants in this case registered through CM/ECF that service will be accomplished by the appellate CM/ECF system. The non-ECF *pro se* litigants were served with this Appellee Answer Brief and Addendum on July 23, 2014, by first class United States certified mail, postage affixed and addressed as follows:

Patrick A. Lee
203 E. Oakland St.
Rapid City, SD 57701

Floyd Hand
P.O. Box 150
Pine Ridge, SD 57770

William J. Bielecki, Sr.
P.O. Box 1990
Pine Ridge, SD 57770

I further certify, pursuant to Eighth Circuit Rule 28A(h)(2) that the brief and addendum have been scanned for viruses and are virus-free.

Dated this 23th day of July, 2014.

s/ Jennifer P. Hughes