UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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| KEVIN WRIGHT, Acting Chairman, Lower Brule Sioux Tribal Council Member; SONNY ZIEGLER, Lower Brule Sioux Tribal Council Member; and DESIREE LaROCHE, Lower Brule Sioux Tribal Council Member,<br><br>Plaintiffs,<br><br>v.<br><br>ORVILLE (RED) LANGDEAU, Lower Brule Sioux Tribal Council Member; JOHN McCAULEY SR., Lower Brule Sioux Tribal Council Member; SALLY JEWELL, Secretary of United States Department of the Interior; JAMES TWO BULLS, Bureau of Indian Affairs Lower Brule Agency Superintendent, in his official capacity; and TIM LAPOINTE, Aberdeen Area BIA Director, in his official capacity,<br><br>Defendants. | Civ. 15-4097<br><br>**BRIEF IN SUPPORT OF UNITED STATES' MOTION TO DISMISS** |

Federal Defendants move to dismiss Plaintiffs' complaint because Plaintiffs have not alleged any statute that provides a grant of subject matter jurisdiction or waives the United States' sovereign immunity. Moreover, the majority of issues at dispute in the complaint are related to intra-tribal matters that invoke unique questions of tribal law that should be decided in Tribal Court, and Plaintiffs have not exhausted their Tribal Court remedies. For these reasons, dismissal is appropriate.

**FACTUAL BACKGROUND**

Plaintiffs are three members of one faction of the Lower Brule Sioux Tribal Council. Defendants consist of two other members of the Lower Brule Sioux Tribal Council (Orville Langdeau and John McCauley Sr.) in addition to three federal actors. The thrust of Plaintiffs' allegations is that they want both Tribal Defendants and Federal Defendants to account for funds that were given to the Tribe from the federal government. Docket 1 at 1-2. Plaintiffs allege the lawsuit is about "finding the missing federal funds or requiring accounting for the missing federal funds allotted to now named two federal defendants who are tribal council members and for the two federal defendants who are BIA officials to assist in accounting for the missing federal funds as it is their fiduciary duty to do so." *Id.* at 5-6.

Prior to Plaintiffs filing this federal cause of action, Langdeau and McCauley (then attempting to sue on behalf of the Lower Brule Tribe itself) filed an action in Tribal Court on May 1, 2015, to attempt to remove Plaintiffs from their positions on the tribal council and "to stop the acting tribal chairman Kevin Wright from trying to inquiry (sic) or find out about the missing or unaccountable federal funds in amount over (sic) 24 million dollars." Docket 1 at 2. There was a dispute in Tribal Court about who could sue on behalf of the Tribe when there were competing factions of tribal council members on either side. The Tribal Court Judge eventually allowed Langdeau and McCauley to intervene as Plaintiffs in the tribal action.

The issue of the whereabouts of the federal funds was raised in the Tribal

Court action by both competing factions. As a result, the Tribal Court eventually issued a TRO against the Tribal Defendants, or the Plaintiffs in this case, related to the federal funds. *Id.* at 2. Plaintiffs in this action then filed a petition for extraordinary writ of mandamus and interlocutory appeal to the Lower Brule Tribe Appellate Court. *Id.* at 4. The Tribal Appellate Court issued a remand order on May 22, 2015. *Id.* at 4-5. The Appellate Court directed the Tribal Court Judge to examine the jurisdictional basis of the suit because the Tribe had been dismissed as the Plaintiff in the original case. *Id.* Thus, the Tribal Court case is ongoing and has not reached a resolution.

Plaintiffs filed this federal lawsuit on or about May 27, 2015. Docket 1. Plaintiffs are alleging similar or identical allegations to issues that are being litigated in Tribal Court. On June 4, 2015, Plaintiffs moved for a temporary restraining order, asking this Court to prevent the Tribal Court from holding any hearings on June 11, 2015. Docket 12. The Court denied Plaintiffs' request for a TRO, finding Plaintiffs failed to provide proper notice to Defendants and that intervention would impede upon the Tribal Court's right to adjudicate the intra-tribal issues before it. Docket 16.

**LEGAL STANDARD**

A court may grant a motion to dismiss a complaint under Federal Rule Civil Procedure 12(b) for lack of subject matter jurisdiction and for a failure to state a claim. *Carney v. Houston*, 33 F.3d 893, 894 (8th Cir. 1994) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Pursuant to Fed. R. Civ. P. 12(b)(1), a plaintiff bears the burden of establishing by a preponderance of the evidence at

the onset of a case that the court possesses subject matter jurisdiction. Federal courts have limited jurisdiction, and the law presumes that a cause of action lies outside its jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

In deciding a motion to dismiss for lack of subject matter jurisdiction, a court is not limited to the allegations set forth in the complaint, but may consider material outside of the pleadings in an effort to determine whether it has jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). The Court must first distinguish between a facial attack and a factual attack. *Id.* at 729 n.6. For a facial attack, allegations in the complaint are taken as true and disputed issues are construed and all reasonable inferences drawn in favor of the complaint. However, under a factual attack, the non-moving party loses the benefit of such safeguards. *Id.*

If the court views the motion to dismiss under Rule 12(b)(6), however, then the court accepts as true the factual allegations in the complaint and draws all reasonable inferences in favor of the nonmoving party. *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436, 438 (8th Cir. 2013) (citation omitted). In addition to the complaint, the court may consider materials that are part of the public record and materials that may be embraced by the complaint. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v.*

*Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

**ANALYSIS**

This Court lacks jurisdiction over Federal Defendants because the federal government has not waived its sovereign immunity. Plaintiffs fail to allege which statute expressly waives the United States' sovereign immunity and provides this Court with a grant of jurisdiction. The only sources of jurisdiction cited by Plaintiffs are the general Arising Under or Federal Question statute, 28 U.S.C. § 1331, the Administrative Procedure Act, 5 U.S.C. §§ 5551-5559, and the Supplemental Jurisdiction statute, 28 U.S.C. § 1367.[1] As none of these statutes provide subject matter jurisdiction or waive sovereign immunity based on the allegations on the face of the complaint, dismissal is appropriate.

[1] To the extent Plaintiffs may later argue that the Federal Tort Claims Act may provide a jurisdictional basis for suit, this argument fails as Plaintiffs have neither alleged nor have they exhausted their administrative remedies. "The timely filing of an administrative claim and exhaustion of administrative remedies are jurisdictional prerequisites to suit under the [FTCA]." *Sanders v. United States*, 760 F.2d 869, 872 (8th Cir. 1985); *see also McNeil v. United States*, 508 U.S. 106 (1993) (dismissing FTCA action when plaintiff failed to exhaust administrative remedies prior to filing claim in district court); *Rucker v. U.S. Dep't of Labor*, 798 F.2d 891 (6th Cir. 1986). Moreover, it appears Plaintiffs are asking for non-monetary relief from the United States rather than a claim for damages, which makes the FTCA inapplicable. The Declaratory Judgment Act also would be insufficient to provide stand-alone jurisdiction absent another federal element. *See Dakota, Minn. & E. R.R. Corp. v. Schieffer*, 711 F.3d 878, 881 (8th Cir. 2013) ("The Declaratory Judgment Act is procedural; it does not expand federal court jurisdiction."); *Pub. Water Supply Dist. No. 10 of Cass Cnty., Mo. v. City of Peculiar*, 345 F.3d 570, 572 (8th Cir. 2003) ("The Declaratory Judgment Act did not extend federal court jurisdiction beyond the recognized boundaries of justiciability, but only 'enlarged the range of remedies available.'").

## I. Sovereign Immunity and Grants of Jurisdiction

"Sovereign immunity is jurisdictional in nature." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell* ("Mitchell II"), 463 U.S. 206, 212 (1983). "[S]overeign immunity protects the United States against judgment that would require an expenditure from public funds, that interfere with public administration or that would restrain the Government from acting, or to compel it to act." *Hensen v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 509 (10th Cir. 1994) (quotations and citations omitted). "Plaintiffs bear the burden of establishing the existence of subject matter jurisdiction." *Sac & Fox Tribe of Miss. in Iowa v. Bear*, 258 F. Supp. 2d 938, 940 (N.D. Iowa 2003) (citing *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990)). Plaintiffs also bear the burden of showing an express waiver of sovereign immunity. *VS Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000).

### A. Administrative Procedure Act

Plaintiffs state that this Court has jurisdiction under the APA, but fails to specify which agency action amounted to a legal wrong that was reviewable by statute or whether an agency decision became final such that this Court has the ability to review if the decision was arbitrary and capricious.

"The APA waives sovereign immunity for actions against the United States for review of administrative actions that do not seek money damages and provides for judicial review in the federal district courts." *Middlebrooks v. United*

*States*, 8 F. Supp. 3d 1169, 1174 (D.S.D. 2014) (citation omitted). "The APA is not an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 n.2 (8th Cir. 1996) (citation omitted). Instead, plaintiffs do not have a right to sue for a violation of the APA unless he or she can establish a "relevant statute whose violation forms the basis for [the] complaint." *Id.* at 792 (quotations and citations omitted). Thus, the waiver requirement in the APA "contains two separate requirements: 1) the person claiming a right to review must identify some agency action, and 2) the party seeking review must show that he has suffered a legal wrong or been adversely affected by that action within the meaning of a relevant statute." *Id.*

If the plaintiff cannot establish his or her claim is directly reviewable by statute then he or she must establish a "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). "An administrative action is final if it marks the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature—and it determines rights or obligations from which legal consequences will flow." *Crow Creek Sioux Tribe v. Bureau of Indian Affairs*, 463 F. Supp. 2d 964, 969 (D.S.D. 2006) (citations omitted). While federal district courts may eventually obtain subject matter jurisdiction under the APA to review agency actions once finality has occurred, "the APA may not be used as an independent grant of subject matter jurisdiction to review agency actions." *Id.* at 968 (citation omitted). "It is well settled that administrative

remedies must be fully exhausted before jurisdiction vests in the federal courts." *Edwards v. Dep't of the Army*, 708 F.2d 1344, 1346 (8th Cir. 1983) (citations omitted).

Plaintiffs fail both the finality test and the reviewable by statute test. Plaintiffs have not stated a relevant statute the violation of which forms the basis for their complaint. Plaintiffs also have not identified the specific agency action that is alleged to be wrong or shown how that adverse agency action is related to the relevant statute. Further, the Department of the Interior's definition of final agency action is found at 43 C.F.R. § 4.21(c) and the BIA's counterpart regulation is found at 25 C.F.R. § 2.6. Plaintiffs did not allege that they attempted to invoke an administrative process, they did not establish that DOI or BIA administrative procedures were followed, and they did not allege that any administrative process has reached the point of finality. Absent any allegations that Plaintiffs were victims of agency action that are "reviewable by statute" or are a "final agency action," and when strictly construing issues of sovereign immunity in favor of the sovereign, Plaintiffs have failed to state a claim for a cause of action under the APA.

Moreover, APA jurisdiction is based on an underlying premise that the relief requested by the plaintiff is available from the administrative agency. Not only did Plaintiffs fail to specify any statute or regulation that requires federal action here, but to the contrary, the relief Plaintiffs seek is available to them in a Tribal Court forum, which precludes APA review. *See Cathedral Square Partners Ltd. P'ship v. S.D. Hous. Dev. Auth.*, 679 F. Supp. 2d 1034, 1040 (D.S.D. 2009)

(stating that one of the three things a plaintiff must prove to establish waiver of sovereign immunity under the APA is "that there is no adequate remedy available elsewhere"). Accordingly, the APA cannot act as the source of jurisdiction in this case.

**B. Arising Under Jurisdiction**

Plaintiffs cited Federal Question or Arising Under Jurisdiction in their jurisdictional statement in the complaint. This is neither enough to establish a clear and unequivocal waiver of the United States' sovereign immunity nor sufficient to provide a stand-alone grant of jurisdiction to a federal court.

Section 1331 grants federal district courts jurisdiction over those "federal questions" that arise under the United States' laws, treaties, and the Constitution. 28 U.S.C. § 1331; *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999). Section 1331's general grant of federal question jurisdiction, however, "does not by its own terms waive sovereign immunity[.]" *Sibley v. Ball*, 924 F.2d 25, 28 (1st Cir. 1991); *see also Reed v. Reno*, 146 F.3d 392, 398 (6th Cir. 1998); *Smith v. Dep't of Agric.*, 888 F. Supp. 2d 945, 953 (S.D. Iowa 2012). Thus, section 1331 cannot act as a source of jurisdiction unless there is another statutory provision that waives the United States' sovereign immunity. Plaintiffs have provided no source of waiver.

The only other hint at a federal element is Plaintiffs' general statement that Federal Defendants owe a fiduciary duty. A general reference to the United States' trust responsibility fails to provide subject matter jurisdiction when Plaintiffs have not alleged a specific source of jurisdiction related to this trust

responsibility. Moreover, Plaintiffs have not attempted to establish how the United States owes a fiduciary duty to them as individuals.

The Eighth Circuit Court of Appeals has discussed the federal government's trust responsibility and has generally found it to be limited. "The existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute, treaty or other agreement, 'reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.'" *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989) (citations omitted).

Federal courts acknowledge "the distinctive obligation of trust incumbent upon the Government" when dealing with Native American tribes, which imposes upon the government "moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). This duty standing alone, however, is not sufficient to support a claim against the United States for breach of trust responsibilities. *See United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 893 (D.C. Cir. 2014) (stating that "neither the general trust relationship between the federal government and Indian Tribes nor the mere invocation of trust language in a statute . . . is sufficient to create a cause of action for breach of trust").

Plaintiffs did not allege that a duty exists through any statute, treaty, or other agreement. Relying solely on the existence of a general trust duty between the United States and Indian tribes is not enough to state a claim or to provide a source of jurisdiction. To the extent Plaintiffs assert a violation of a general

fiduciary duty to oversee the Tribe's business decisions on how to spend federal money, these claims must fail because they have not alleged any source of a trust duty. *See Navajo Nation*, 537 U.S. at 506-08; *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 58 Fed. Cl. 77, 82 (Fed. Cl. 2003) ("Under *Navajo Nation*, in order for a duty to be imposed on the government, there must be more than a general trust relationship between the United States and an Indian tribe."). Accordingly, 28 U.S.C. § 1331 does not waive sovereign immunity and cannot act as a source jurisdiction.

**C. Supplemental Jurisdiction**

First, supplemental jurisdiction does not provide a waiver of the federal government's sovereign immunity. *See Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 n.3 (9th Cir. 2007) (quotations and citations omitted) ("[Section 1367] merely grants federal courts supplemental jurisdiction over state claims related to certain federal claims in any civil action of which the district court has original jurisdiction, 28 U.S.C. § 1367(a), and that section cannot 'operate as a waiver of the United States' sovereign immunity.'"). Second, as there is no basis for jurisdiction for claims that might be considered federal in nature, there is no jurisdiction over issues that are purely based on tribal or state law. *See Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980) (citation omitted) ("Where the federal element which is the basis for jurisdiction is disposed of early in the case, as on the pleadings, it smacks of the tail wagging the dog to continue with the federal hearing of the state claim."). Supplemental jurisdiction cannot provide a grant of jurisdiction or a waiver of sovereign immunity.

## II. Issues of Comity

### A. Jurisdiction over Intra-tribal Disputes

An additional reason this Court lacks subject matter jurisdiction is because this action, however styled, is essentially an intra-tribal dispute that must be resolved in Tribal Court.[2]

"Civil Jurisdiction over tribal-related activities presumptively lies in tribal courts unless a specific treaty provision or federal statute affirmatively limits the jurisdiction." *Sac & Fox Tribe of Miss. in Iowa*, 258 F. Supp. 2d at 942 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994)).

The underlying issue in this federal lawsuit and the Tribal Court case is directly related to tribal leadership, an issue which would be within the exclusive purview of the Tribal Court. Ancillary issues related to tribal leadership are requests for an accounting of the Tribal Council's spending of federal funds and a request to open records and financials related to the Lower Brule Tribal Farm operations. These are inherently tribal issues and would require examination of tribal law; therefore, these issues should be resolved in the Tribal Court forum.

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[2] *See Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996) (holding federal courts have no jurisdiction over intra-tribal disputes); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (citations omitted) (affirming district court's determination that "resolution of . . . disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court"); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) (stating that when a tribe has a "functioning tribal court, which the parties recognized as a court of competent jurisdiction to resolve tribal election disputes . . . [it] is essential that the parties seek a tribal remedy . . . [because] substantial doubt exists that federal courts can intervene under any circumstances to determine the rights of the contestants in a tribal election dispute.").

Because Plaintiffs have failed to allege a treaty or federal statute that would limit the jurisdiction of the Tribal Court or that would provide jurisdiction over federal actors in federal court, dismissal is appropriate here.

**B. Failure to Exhaust Tribal Court Remedies**

Plaintiffs argue that they have exhausted their Tribal Court remedies and this forum is appropriate because it would be "not suitable for them" to submit to the ongoing authority of the Tribal Court. Docket 1 at 5. Plaintiffs continue that it would be "useless for them to return to the tribal court under the special judge where the in-Justice [sic] to them occurred[.]" *Id.*

However, this Court has already determined that "federal court intervention at this point in the tribal proceedings would cut short the Tribal Court's right to fully adjudicate issues before it." Docket 16 at 4. The Court also determined that exhaustion of Tribal Court remedies has not yet occurred when it stated exhaustion would exist "[o]nce the tribal court proceedings are completed, including tribal court appellate review, if any[.]" *Id.* Because the Tribal Court proceedings have not yet concluded and appellate review has not yet begun, exhaustion has not occurred. Failure to exhaust Tribal Court remedies is another factor weighing in favor of dismissal.

**CONCLUSION**

The Court lacks subject matter jurisdiction over the Federal Defendants because Plaintiffs have not established any federal statute that waives the United States' sovereign immunity or provides the Court with a grant of jurisdiction. Moreover, the majority of the allegations in the complaint are purely intra-tribal

disputes that must be resolved in Tribal Court, and there is no dispute that Plaintiffs have not exhausted their Tribal Court remedies. Finally, Plaintiffs failed to state a claim against Federal Defendants on all issues alleged against them.

Dated this 27th day of July, 2015.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on July 27, 2015, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, and addressed as follows:

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