CASE NO. 15-4170

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VANCE NORTON, et al.,

Plaintiffs/Appellees,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al.,

Defendants/Appellants.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Judge Dee Benson
Case No. 2:15-cv-00300

APPELLANTS' REPLY BRIEF

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July 5, 2016

Oral Argument Requested

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I. APPELLEES DID NOT PROPERLY SERVE THE TRIBE OR ITS BUSINESS COMMITTEE.

In its motion to the District Court, the Ute Tribe of the Uintah and Ouray Reservation and its Business Committee (the Tribe) asserted that service was improper because: 1) the method of service which the Tribal Court defendants employed was not in compliance with any law regarding service upon an Indian Tribe; and 2) the process server was knowingly committing trespass in order to "serve" the process.

The District Court denied that motion to dismiss based upon a one sentence conclusory statement that "The Ute Indian Tribe and Business Committee were services in accordance with [the Federal Rule of Civil Procedure.]" 3 App. 629, 635. The District Court did not state which of the many federal rules or subparts it was relying upon, or how service was "in accordance with" that unnamed subpart. Nor did the District Court explain how service which is being done during the commission of a trespass can be "in accordance with" federal court rules.

A. TRIBAL COURT DEFENDANTS' FAILURE TO SERVE ALL MEMBERS OF THE BUSINESS COMMITTEE REQUIRES DISMISSAL.

The Tribe's argument regarding the method which is legally required for valid service upon a tribe is very simple: Federal Rule of Civil Procedure 4 does not contain any rule specifying the method for serving process on tribes, and the only

law that does provide a lawful method for serving the Ute Tribe is the Tribe's own laws.

The Tribal Court defendants do not dispute, and appear to agree, that if FRCP 4, and more specifically FRCP 4(h), does not provide the method of service on tribes, then the Tribe is correct - service was ineffective. While they then make a shotgun of immaterial or unsupported arguments (briefly discussed below),[1] the only material response that any Tribal Court defendant makes is by Norton, Jensen, Campbell, Byron, Watkins and Slaugh (hereinafter the Norton group). Although there is absolutely no case in any federal court which supports their assertion, the Norton Group makes a bare conclusory assertion that tribes fit within the category of defendants listed in FRCP 4(h). Norton Resp. at 36-38, *see particularly* Norton Resp. at 36 n. 103 and 38 n. 109.

The Tribal Court defendants' sole material responsive argument is wrong. FRCP 4(h) provides the method of service upon "a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a

[1] As will become apparent in the pages below, the Tribal Court defendants make numerous undeveloped, often factually and/or legally frivolous arguments, usually without citation to any legal authority. To the extent the Tribe does not respond specifically to any of the many undeveloped arguments, the Tribes' view is that no response was necessary because the argument was not sufficiently presented and was also without the slightest merit.

The Tribe is not going to respond to the Tribal Court defendants' false and slanderous ad hominem arguments against the Tribe's attorneys and against Mr. Murphy.

common name." Rule 4(h) uses plain language for well-defined categories of defendants, and applying that plain language, tribes do not fit into any of these categories. They are not corporations or partnerships or unincorporated associations. They are tribes, and more generally are governments. At one point, this Court had incorrectly held that a tribe was an "association of citizens." *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973). In reversing this Court's decision in *Mazurie*, the United States Supreme Court countered that, "Cases such as *Worcester*, *supra*, and *Kagama*, *supra*, surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations,'" and that the case law establishes that tribes are sovereign governments. 419 U.S. 544, 557 (1975).

Federally recognized Indian tribes are governments that pre-date the United States and continue to exist. *United States v. Wheeler*, 435 U.S. 313, 322 (1978). There are two subsections of FRCP 4 which apply to governments: FRCP 4(i) and

4(j). Neither 4(i)[2] nor 4(j)[3] nor any other subpart of Rule 4 applies to tribal governments.[4]

There is no case from any federal court which holds that service on a tribe comes under FRCP 4(h), (i), (j) or any other subpart of FRCP 4, and the plain language in FRCP 4 does not specify the method for serving tribes. The Tribe, though, has developed law governing service on the Tribe which is consistent with the Tribe's Constitution and history. That law requires service on all six members of the Tribe's Business Committee. The Tribe's Business Committee, not any individual member thereof, is the Tribes' executive and legislative body. The Tribe, like many tribes, does not have a president or governor or other individual chief executive; and unless the Business Committee delegates responsibility to any subset

[2] FRCP 4(i) applies to service on the United States. Ironically and frivolously, the Norton group asserts that the Tribe is a "federal actor." If that were so, service would be insufficient because the Norton group did not attempt to serve the Tribe under the rule applicable to claims against the United States: they did not obtain summonses for the United States, nor did they serve the United States Attorney or the Attorney General.

[3] FRCP 4(j) defines the method of service on foreign governments and states. In some statutes Congress defines "state" to include federally recognized Indian tribes, but in FRCP 4(j)(2) and FRCP 81(d)(2), the term "state" is defined to exclude tribes. 28 U.S.C. § 1603 defines "Foreign governments" for purposes of the FRCP 4(j), and similarly excludes tribes from the definition.

[4] The basic rule of statutory construction here is expression or inclusion of one thing is exclusion of others. *E.g.*, 82 C.J.S. Statutory Construction § 421. Because Rule 4(i) and (j) contain provisions related to some governments, but not to tribal governments, that exclusion is interpreted as intentional.

of the Business Committee, the powers of the Committee are retained by that collective group. Ute Const. ART. IV § 1.

Earlier in American history, federal agents had difficulty understanding this tribal concept of government, and the United States frequently made the mistake of thinking that some "chief" had executive powers. Tribal court defendants, in their briefs, put forward that 19th century Anglo view of tribal government, asserting they do not have to notify all of the members who hold an undivided share of the Tribe's executive powers, and who represent each of the three bands of the Tribe.[5] Their current argument is contrary to their own understanding that service on all six Business Committee members was necessary. Based upon that understanding they had summons issued for all six. But then after their process server was unable to complete the contemplated service, the Tribal Court defendants chose not to correct the service error and adopted the strategy of making this a test case for their claim

[5] As part of their assertion, they claim that Ron Wopsock was served as the Business Committee Vice-Chair. They cite no evidence in support of this argument, and their assertion is also false. The Norton group sent its process server trespassing onto the Reservation to "serve" Business Committee members on inauguration day. The Chairman and Vice-Chairman of the Business Committee are chosen by the Committee at their first meeting after being sworn in. Ute Const. Art. III, §3. On the day in question, there was no Chair or Vice-Chair. As the Tribe also noted, by choosing to interrupt the inauguration, Plaintiffs then ended up "serving" former members after terms had expired or Committee members-elect, who under the Constitution did not become members until completing their oath of office. There is poetic justice in the Norton group creating problems for its case because of its disrespectful effort to disrupt the inauguration activities.

that tribes are "unincorporated associations" under FRCP 4(h). They must lose on their test case, and the District Court erred by denying the Tribe's motion to dismiss.

B. TRIBAL COURT DEFENDANTS' REMAINING ARGUMENTS THAT SERVICE WAS EFFECTIVE ARE WITHOUT MERIT.

In their separate response, the primary argument by Swenson, Chugg, Olsen, Young and Davis (hereinafter the Swenson group) to the Tribe's discussion of lack of service is a straw man argument that the federal rules of civil procedure apply to this case. Of course the federal rules apply to this matter. But as discussed above, that is not responsive to the Tribe's showing that the federal rules do not contain any provision defining a method for serving tribes. The only law which define a lawful method for serving the Ute Tribe is the Tribe's laws. And as is undisputed, Tribal Court defendants failed to effectuate service under the Tribe's laws, the only law which covers this issue.

Both groups of tribal court defendants assert, without citing any on-point case, that this Court cannot review the denial of the Tribe's motion to dismiss for want of service because this is an interlocutory appeal. All on-point cases that the Tribe has located directly contradict the Tribal Court defendants' conclusory legal assertion. *E.g.*, 13 Fed. Prac. & Proc. Juris. § 3921.1 (3d ed.) (citing 12 on-point reported federal appellate court decisions, each of which holds that a federal court of appeals can decide whether personal jurisdiction was lacking as part of a preliminary injunction appeal).

In the present matter, the Tribal Court defendants never served Mr. Murray's estate or parents, and if it also did not serve the Tribe. The District Court enjoined a Tribal Court proceeding without having any of the plaintiffs in that Tribal Court proceeding before the federal court. This Court therefore must determine whether the Tribe was properly served as part of its review of the injunction. *Id.*

The Norton Group asserts that the Tribe's motion to dismiss should be denied because the Tribe did not submit an affidavit in support of the motion. Again it cites no case which supports its assertion. The Tribe's motion to dismiss for lack of service was based upon the law, the admitted lack of service on Business Committee members, and the facts contained in the declarations of service which the process server filed. From those facts and the law, service was insufficient.

The Norton group asserts that although the first substantive document filed by the Tribe was a motion to dismiss, the Tribe waived challenges to personal jurisdiction by entering a notice of appearance, without adding the antiquated caveat that it was a "special appearance." One would have to go back several generations for their argument to have any merit.

> Thus, technical distinctions between general and special appearances have been abolished and the rulemakers wisely concluded that no end is accomplished by retaining those terms in federal practice. As Judge Maris stated in *Orange Theatre Corporation v. Rayherstz Amusement Corporation*:
>
> > … Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A

> defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in. This, of course, is not to say that such keys must not be used promptly.[8]

5B Fed. Prac. & Proc. Civ. § 1344 (3d ed.).

In support of their argument, the Norton group cites *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986). As with most of their case citations, the case actually supports the exact opposite of the Norton Group's interpretation. In *Benny*, a defendant had filed three motions to continue his date to submit an answer, and only the third of those motions stated that he was reserving his right to contest personal jurisdiction. The Ninth Circuit held that those three motions did not waive the defendant's right to then contest personal jurisdiction. Yet more clearly in the present matter, the Tribe did not waive arguments by filing a bare notice of appearance.

C. TRIBAL COURT DEFENDANTS WERE AWARE THAT THEIR PROCESS SERVER REQUIRED A PERMIT TO ENTER TRIBAL LAND, AND THIS COURT SHOULD NOT PERMIT FEDERAL COURT PROCESS TO BE "SERVED" DURING A KNOWING TRESPASS.

In their motion to dismiss, the Tribe and Business Committee showed that the Norton Group had prior knowledge that the person who it delegated to serve process would act in violation of the Tribe's well-established legal right to regulate access

and entry onto tribal lands[6] if that person did not obtain the required permit to conduct business on the Tribe's lands. App. 157-58, 159-60.[7] Despite this knowledge, Tribal Court defendants sent their process servers out without the legally required permit. Under these facts, this Court should hold that the alleged service of this Court's process during that trespass is invalid.

The Norton Group's primary response is the non-sequitur that the person it had commit the trespass was over 18 years of age, and therefore meets the requirement of FRCP 4(c)(2).[8] But the issue here is not whether the process server was over 18. Instead the issue is how that process server went about service—i.e. that the Norton Group knowingly had the process servers, while acting as agents for

[6] *See* Section III, *infra* (citing, *inter alia Plains Commerce Bank v. Long Family Land and Cattle Co*.)

[7] This case should be limited to the current facts—Tribal Court defendants' knowledge of the need for permission via permit to enter the land at issue, the process server's failure to obtain that permit, and the lack of any assertion by Tribal Court defendants that the process server was responsible for the failure to obtain a permit. That is, if Tribal Court defendants had been unaware of the applicable tribal trespass law, or if Tribal Court defendants had instructed the process server to obtain the required permit but the process server then failed to obtain the requisite permit to enter, the analysis would be different, but this Court should limit itself to the current narrow facts of a knowing trespass.

[8] Tribal Court defendants make a similarly illogical assertion that process servers are allowed to trespass or violate other laws because FRCP 4 does not expressly state that they cannot commit crimes. It offers no case supporting this assertion that process servers are above the law.

the Tribal Court defendants and as extensions of this Court, trespass and then "serve" process during that trespass. This Court should not permit that to be valid service.

The District Court erred in denying the Tribes' motion to dismiss for lack of personal jurisdiction, and the Tribal Court defendants have not even attempted to serve the other real parties in interest, the Murray estate and Mr. Murray's parents, with their federal court complaint. The District Court therefore should have granted the Tribe's motion to dismiss.

II. UNDER THE CURRENT POSTURE, THE CLAIM AGAINST THE TRIBE ARE BARRED BY THE TRIBE'S SOVEREIGN IMMUNITY FROM SUIT.

In their response briefs, the Tribal Court defendants confuse two distinct issues: general federal subject matter jurisdiction and tribal sovereign immunity. In fact sovereign immunity only needs to come into play if there would otherwise be federal subject matter jurisdiction. Here, Tribal Court defendants alleged federal jurisdiction under 28 U.S.C. § 1331. Compl. ¶26.

> While 28 U.S.C. § 1331 grants the court jurisdiction over all "civil actions arising under the Constitution, laws or treaties of the United States," it does not independently waive the Government's sovereign immunity; § 1331 will only confer subject matter jurisdiction where some other statute provides such a waiver. *City of Albuquerque v. United States Dep't. of the Interior*, 379 F.3d 901, 906–07 (10th Cir. 2004). Waiver of sovereign immunity must be explicit and cannot be implied. *Villescas v. Abraham,* 311 F.3d 1253, 1256–57 (10th Cir. 2002).

High Country Citizens All. v. Clarke, 454 F.3d 1177, 1181 (10th Cir. 2006). This Court then quoted this exact holding from *High County Citizens Alliance* to issue an

analogous holding that "in an action against an Indian Tribe, we conclude that §1331 will only confer subject matter jurisdiction where another statute provides a waiver of sovereign immunity or the tribe unequivocally waives its immunity." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (2007).

This rule of law is firmly established as it relates to Tribes. The Supreme Court's most recent decision on this issue was in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014). In *Bay Mills*, the State of Michigan had brought suit against the Bay Mills Indian Community, a federally recognized Indian Tribe. The State sought to enjoin the Community from operating an off-reservation casino in violation of 25 U.S.C. § 2710(d)(7(A)(ii), a provision of the Indian Gaming Regulatory Act (IGRA). The case therefore clearly presented a federal question, but the Supreme Court held that was not sufficient unless there was also an applicable waiver of the Community's sovereign immunity. The Court then analyzed a provision which waived tribal sovereign immunity for suits to enjoin on-Reservation gaming which is conducted in violation of the IGRA. Applying the rule that any waiver must be clear and unequivocal, and rejecting the State's numerous policy arguments, the Supreme Court held that the waiver did not extend to claims that the Community was violating the IGRA in off-Reservation gaming.

Throughout their briefs, Tribal Court defendants state, over and over and over again, the undisputed point that review of a tribal court's jurisdictional decision

raises a federal question under 28 U.S.C. § 1331. But they do not provide any argument that there is a waiver of sovereign immunity applicable to the Tribe. Under the firmly established law, the claims against the Tribe should therefore have been dismissed.

It is important to make sure the Court understands the limitations on the current issue. In many federal court suits requesting that a federal court determine whether a tribal court has exceeded the scope of federally imposed limits on tribal court jurisdiction, the tribe and tribal officers are not parties and therefore tribal sovereign immunity is not at issue. *E.g., Montana v. Gilham*, 127 F.3d 897 (9th Cir. 1997) (sole federal court defendant/tribal court plaintiff was decedent's estate). If the Tribe or tribal officers are neither named parties nor necessary parties in the federal court suit, the federal courts can proceed directly to whether exhaustion of tribal court remedies is required.

But, as in the present matter, where the Tribal Court defendants' claim is against the Tribe, and Plaintiff seeks relief against the Tribe, the Court cannot proceed to the exhaustion issue unless it first gets past whether the federal court defendants are properly before the court.

Both sets of Tribal Court defendants provide a laughably incorrect responsive argument that they can bring suits against the Tribe under this Court's holding in *Crowe & Dunlevy v Stidham*, 640 F.3d 1140 (10th Cir. 2011)! The Swenson group

clearly state their argument: "This Court held [in *Crowe*] that Indian tribes are not immune from claims for injunctive relief." Swenson Resp. at 19 (citing 640 F.3d at 1154.). The Norton group present the same argument, albeit with more obfuscation and with a number of additionally frivolous assertions and frivolous citations thrown in. Norton Resp. at 32.[9] The cited discussion from *Crowe* is directly contrary to the Tribal Court Defendants' argument: *Crowe* holds that tribes have immunity from such suits. It is hard to see how any attorney could miss that holding and it is therefore doubtful that the Tribal Court Defendants' experienced attorney did miss it.

[9] In support of its frivolous assertion that there is "obviously no tribal immunity applicable," the Norton group cites to the Supreme Court's syllabus in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 49 (1978). While that syllabus is not law, it does accurately summarize the Court's holding: "Suits against the tribe under the ICRA are barred by the tribe's sovereign immunity from suit, since nothing on the face of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief." *Id.* The Norton group also cites *Montana Department of Transportation v. King*, 191 F.3d 1108, 1111 (9th Cir. 1999) and *Montana v. Gilham* 133 F.3d 1133 (9th Cir. 1997). Both of those are *Ex Parte Young* suits, not suits directly against a tribe. In fact neither the Tribe nor even a tribal officer was a party in Gilham, as the injunction was against the tribal court plaintiff. The Norton group also asserts that *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) holds that "sovereign immunity is no impediment to enforcing civil rights cases against states." That is a frivolous reading of that case. *Burton* does not even mention sovereign immunity; and cases which are on point show that state sovereign immunity remains a substantial hurdle for suit directly against the sovereign. *See, e.g. Coll. Sav. Bank v. Fla Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Coleman v. Ct. App. of Md.*, 132 S.Ct. 1327 (2012). Because of these substantial hurdles, direct suit generally remains barred and the primary mechanism is *Ex Parte Young*.

This Court in *Crowe* held that because tribes have immunity, it would permit use of the fiction from *Ex Parte Young* by analogy to permit some suits against tribal officers. Tribal Court defendants either fail to understand or pretend that they do not understand the very core of the *Ex Parte Young* holding. The Supreme Court created the *Ex Parte Young* fiction to provide for suits against some government officers precisely because the plaintiff in such suits cannot sue the government directly.

> In *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court carved out an exception to Eleventh Amendment immunity for suits against state officials seeking to enjoin alleged ongoing violations of federal law. *See id.* at 159–60, 28 S.Ct. 441; *Hill v. Kemp*, 478 F.3d 1236, 1255–59 (10th Cir. 2007) (discussing rationale and subsequent history of *Ex parte Young*). The *Ex parte Young* exception proceeds on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state and, as a result, is not subject to the doctrine of sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (noting "fiction of *Young*"); *Hill*, 478 F.3d at 1256 (same). By adhering to this fiction, the *Ex parte Young* doctrine enables "federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst*, 465 U.S. at 105, 104 S.Ct. 900; *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495 (10th Cir. 1998) (internal quotation marks omitted).

Crowe, 640 F.3d 1140, 1154 (permitting suit against a tribal court judge where there the Judge had taken actions outside the scope of his authority).

Failing to understand or perhaps seeking to obfuscate from the issue they are discussing, the Norton group cites to *Arizona Public Services Co v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), another case which is directly contrary to its argument. *Aspaas*

was one of the earlier cases which applied *Ex Parte Young* by analogy to tribal officers, and in so doing it expressly and unequivocally stated that suits against the tribe itself were barred:

> Indian tribes may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity of Congress. Tribal sovereign immunity, however, does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.

Aspaas, 77 F.3d at 1133-34.

Based upon their misstatement of the core holding in *Crowe*, the Tribal Court defendants assert that if they cannot sue the Tribe directly, then they will not have a remedy. That argument is without merit for two obvious reasons. First, it is a policy argument which is contrary to all sovereign immunity case law. Sovereign immunity can, and often does, result in their being a right without a remedy. Second, their argument is simply contradicted by *Crowe*. *Crowe* holds that there is a remedy. It is true that the remedy cannot be invoked at the present time because Tribal Court defendants have not met the requirements of *Crowe*. But that remedy does exist if the Tribal Court defendants are dissatisfied with the Tribal Court's jurisdictional decision.

It is, of course, odd to see an attorney employed by a state and another attorney representing county employees in their individual capacity, both of whom argue that *Ex Parte Young* permits claims for declaratory and injunctive relief directly against the sovereign. This Court should save them from their own argument against

governmental immunity. *Ex Parte Young* does not provide for suit against the Tribe. The District Court erred when it denied the motion to dismiss the Tribe.

III. THE FEDERAL COURT COULD NOT PROCEED TO DETERMINE WHETHER TO ISSUE AN INJUNCTION BECAUSE TRIBAL COURT DEFENDANTS FAILED TO EXHAUST TRIBAL COURT REMEDIES.

Because Tribal Court defendants do not provide any non-frivolous argument on sovereign immunity, this Court does not even need to go on to the next issue: whether Tribal Court defendants are required to exhaust tribal court remedies. But even if this Court does proceed to that issue, Tribal Court defendants are, in fact, required to exhaust tribal court remedies.

In *National Farmers Union Insurance Cos v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987)*, the Supreme Court discussed that the correct rule of federal law is that unless tribal court jurisdiction over a case is not "automatically foreclosed," 471 U.S. at 855, Tribal Court defendants must create the necessary record related to jurisdictional facts in the Tribal Court and then permit the Tribal Court, through its highest court, to issue its legal decision. Once that is done, limited federal court review is possible, akin to appellate review.[10]

[10] The Tribal Court defendants imply that the federal court decisions in the *Jones v. Norton*, Utah case no. 2:09-cv-00730, are res judicata in the Tribal Court proceeding. If that were true, it would virtually establish the Tribe's claims that the Tribal Court defendants were committing trespass, resulting in the death of a tribal member. The federal court determined that the Tribal Court defendants were acting where "they

Based upon *National Farmers Union* and *Iowa Mutual*, every federal court which has reached the issue has determined that "[T]he *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the 'orderly administration of justice in the federal court.'" *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996)(citing *FMC*); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (citing *FMC*)

Tribal Court defendants' arguments to this Court are based upon their assertion, which is unsupported by any case citation and which is directly contrary

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did not have jurisdiction" and that they had no basis for suspecting Mr. Murray of any crime. *Jones v. Norton*, 3 F. Supp. 3d 1170, 1186 n. 38.

How res judicata would apply would be an issue for the Tribal Court to decide in the first instance, but it is unlikely to give the Tribal Court much pause as it relates to the Tribe's claims. Res judicata would not apply against the Tribe because, inter alia, the Tribe was not a party to the prior case; and the Tribe's claims were not even presented, and therefore obviously were not decided, in the prior case.

Whether the Murray Estate and Mr. Murray's family would be barred by res judicata is only slightly more debatable, but they are not even parties to this case since Tribal Court defendants made no attempt at all to serve them. Res judicata would not apply to them because, inter alia, their common law tort claims were not ruled on by either the State Court or the federal court.

Tribal Court defendants appear to believe that they can defeat Tribal Court jurisdiction by calling the Tribal Court suit the "*Re-filed Action*." They know that as relates to the Tribe, it is not in any way a refiled action; and that as relates to the Murray family it is the filing of claims similar to those which the federal and state courts did not resolve.

to *National Farmer Union*, *FMC*, *Mustang Production Company*, and *Duncan Energy Company*, that the "facts" for federal court review are the facts alleged in their federal court complaint. This argument, like all of their arguments, is simply wrong. First, it is contrary to each of the cases listed above. Those cases hold that the federal court review is based upon the factual record which is created in the Tribal Court.

Second, their argument is contrary to the core purpose of the firmly established exhaustion rule. That core purpose is to provide for an orderly determination of whether or not the Tribal Court actually has jurisdiction over the case that has been filed in the Tribal Court. Instead of seeking to answer that question, Tribal Court defendants, through a federal court complaint alleging vastly different facts, asked the District Court and now asks this Court to determine whether the Tribal Court would have jurisdiction over a set of facts which is simply not before the Tribal Court. The answer to their hypothetical question would not even be of use in the Tribal Court proceedings, since it is not based upon the facts which will be shown in that Court.

The Tribal Court defendants assert that they should not have to exhaust tribal court remedies because, they conjecture, the Tribe, its court, and its attorneys are corrupt and therefore the Tribal Trial Court and Court of Appeals proceedings would not be fair. Those unfounded, false, and improper allegations are simply not grounds

for defeating the general rule which requires exhaustion. "*Iowa Mutual* required a non-Indian party alleging bias and incompetence on the part of the tribal court to litigate these issues in tribal court." *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992).

Defendants' only remaining argument is based upon their extreme misrepresentation of the holding in *Nevada v. Hicks*, 533 U.S. 353 (2001). Their interpretation of that case fails for two independent reasons. First, it is wholly dependent upon their claim that the facts for current purposes are the facts as alleged in their federal court complaint, not the very different facts pled and to this point not factually challenge in the Tribal Court case.

As the Tribe discussed in detail in its opening brief, Tribal Court defendants are ***NOT***, for current purposes "State officers." They are private individuals, who illegally trespassed onto the Tribe's lands and who caused Mr. Murray's death while they were committing that trespass. As the Tribe discussed in its opening brief and as Tribal Court defendants do not dispute, if the facts as alleged by the Tribe are correct, there is not even a colorable claim that the Tribal Court defendants are police officers and not even a colorable claim that the officers are protected by the State's sovereign immunity. The Tribe cited multiple cases which establish this legal rule. Tribal Court defendants do not dispute the legal rule. Instead they claim that the facts are different than those alleged by the Tribe. Eventually that factual dispute

will get resolved, and then we can determine whether the Tribal Court defendants are tortfeasors or officers. Under the facts alleged in the Tribe's complaint, they are tortfeasors, not officers.

As also alleged in the Tribe's complaint, and as is neither disputed nor disputable, the Tribal Court defendants were not investigating any crime by Mr. Murray. Mr. Murray was a passenger in a vehicle which had been speeding, and to the extent the officers saw him do anything off the Reservation, it was sitting in the passenger seat of a speeding car. The Tribal Court defendants did not even start their illegal hunt of Mr. Murray until after they had already taken the speeding driver into custody, after the car had stopped in a location many miles inside the Reservation.

Second, Tribal Court defendants' assertion that the present matter is identical to *Hicks* is based upon their open misquotation of *Hicks*. The fact that they need to misquote *Hicks* in order to make their argument illustrates that they do not come within *Hicks'* very different, limited holding. *Hicks* states:

> Because the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties. Nor can the Tribes identify any authority to adjudicate respondent's § 1983 claim. And since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court. State officials operating on a reservation <u>to investigate off-reservation violations of state law</u> are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court.

Nevada v. Hicks, 533 U.S. 353, 374 (2001) (emphasis added). The officers in Hicks had in fact obtained multiple tribal warrants, authorizing them to search the property that they then entered. *Id.* at 356. As the Tribe discussed in its opening brief, some courts interpreted *Hicks* expansively (though not as expansively as the Tribal Court defendants here) and the Supreme Court, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), rejected those expansive interpretations. It clarified that on land that the Tribe has both beneficial ownership and governmental authority, tribes have plenary authority. Under that plenary authority on tribally owned land, a tribe has the "'traditional and undisputed power to exclude persons' from tribal land," *Plains Commerce*, 554 U.S. at 335 (quoting *Duro v. Reina*, 495 U.S. 676, 696 (1987)). There is no federal appellate court case after *Plains Commerce* which permits state officers to enter tribal trust land, other than for investigation of an off-Reservation offense.[11]

Tribal Court defendants cannot meet the emphasized qualification expressly contained in the holding in *Hicks*: they were not investigating an off-Reservation crime and they were on land owned by the Tribe, without lawful basis for being on

[11] Tribal Court defendants appear to suggest that Mr. Murray running away from Swenson might be a criminal offense. It is not because Swenson, who was not cross-deputized as a federal or tribal officer, had no legal authority to detain Mr. Murray, but more simply, even if there were any offense, it would be an on-Reservation offense, and therefore would not come within *Hicks* limited exception.

that land. To get around that fatal flaw in their argument, they simple delete that qualification. They misquote *Hicks* as follows:

> [T]here is no need to exhaust the jurisdiction dispute in tribal court [because] . . . state officials operating on a reservation . . . are properly held accountable for misconduct and civil rights violations in either State or Federal Court but not in Tribal Court."

Norton Resp. at 41.

To further support their argument, the Norton Group provides what can best be described as an anti-tribal-jurisdiction diatribe, in which it claims that its interpretation of *Hicks* is based upon older Supreme Court cases. Norton Resp. at 41-46. As with its misinterpretation of *Hicks*, it simply relies upon misquotations. It asserts that a concurring opinion in *Worcester v. Georgia*, 31 U.S. 515, 593-94 (1832) shows that the Supreme Court recognized that states have jurisdiction in Indian Country. *Worcester* holds exactly to the contrary. The Norton group quotes the concurring opinions' statement that:

> At best [tribes] can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.

Id. at 393-4.

Leaving off at that point creates a false impression that the concurring justice was suggesting that states have authority in Indian Country, but the quoted paragraph was merely the set up for the following paragraph:

> This state of things can only be produced by a co-operation of the state and federal governments. The latter has the exclusive regulation of intercourse with the Indians; and, so long as this power shall be exercised, it cannot be obstructed by the state. It is a power given by the constitution, and sanctioned by the most solemn acts of both the federal and state governments: consequently, it cannot be abrogated at the will of a state. It is one of the powers parted with by the states, and vested in the federal government. (emphasis added).

Id. at 394.

The concurrence in *Worcester* is plainly correct: by joining the Union, the States agreed to a constitutional scheme in which they gave up authority in Indian Country. Defendants do not like that part of the bargain, but it remains the law.

Under the current posture, the Tribal Court defendants are individual, non-governmental actors, and they therefore do not come within the narrow exception in *Hicks*. Even if they were considered governmental actors, they still would not come within that limited exception because they were not investigating an off-Reservation offense. For both reasons, the District Court erred when it held that this case was indistinguishable from *Hicks*. Its decision must be reversed and the general rule, requiring exhaustion of tribal court remedies, applies. The Tribal Court will then create the necessary factual record and issue its decision. Tribal Court defendants cannot even know whether they will disagree with the Tribal Court decision, and if

they do disagree, they can then have the federal courts perform their limited appellate-like review of the Tribal Court's jurisdictional decision. The District Court erred by enjoining the required development of the record and Tribal Court jurisdictional decision.

CONCLUSION

Under the current posture, the Tribal Court defendants failed to serve any of the Tribal Court plaintiffs. They have no argument that there is a waiver of the Tribe's sovereign immunity, and the Tribe therefore would have to be dismissed even if it had been served. They also have not exhausted Tribal Court remedies. Each of these is an independent reason why their motion for injunctive relief should have been denied. This Court therefore must reverse the District Court order and remand with instructions to dismiss and that the Tribal Court defendants cannot proceed in the federal court until they have exhausted Tribal Court remedies.

Respectfully submitted this 5th day of July, 2016.

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I hereby certify that a copy of the foregoing APPELLANTS' REPLY BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 7/5/16, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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