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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

Forsythe et al,

Plaintiffs

v.

Reno-Sparks Indian Colony et al,

Defendants

Case Number
2:16-CV-01867-GMN-VCF

PLAINTIFFS' RESPONSE TO DEFENDANTS WOOD RODGERS INC. AND MARK CENDAGORTA'S MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

In ruling on Defendants' motion to dismiss, the Court is presented with one straight-forward issue:

- **Color of State Law.** A 42 U.S.C. § 1983 *prima facie* case involves a defendant that deprives a plaintiff of rights secured by the constitution or federal statutes while acting under color of state law. Defendants are a private corporation and a design professional. They accepted federal funds to create bidder qualification specifications and bid procedures for procurement of a federal public works construction contract governed by federal regulations that stated Defendants' procurement procedures and policies "will reflect" Nevada public works contracting statutes. During the procurement Defendants exercised control over the public sector performing acts traditionally performed by a

State of Nevada public works agency, such as disqualifying a bidder and rejecting a bid.

Did Defendants act under color of state law for purposes of 42 U.S.C. § 1983?

INTRODUCTION

RSIC is a federally recognized Indian tribe. RSIC received money from an executive branch federal agency, Economic Development Administration ("EDA"), a bureau within U.S. Department of Commerce to pay for the project. RSIC contracted with Defendant Wood-Rodgers, Inc. ("WRI"), whose employee, Defendant Cendagorta, assisted RSIC with selecting a contractor during the EDA procurement. Plaintiffs Jana Forsythe and FEI Construction submitted the low bid for the EDA contract while meeting all published bidder qualification requirements in RSIC's advertised bid solicitations. When RSIC opened Plaintiffs' EDA bid and discovered they were low bidder, Defendant Cendagorta created twenty-four new bidder qualification requirements, in violation of federal statutes, knowing the new requirements would lead to Plaintiffs' disqualification and loss of the contract. Defendant Cendagorta was the prime moving force behind RSIC's effort to disqualify Plaintiffs and award the contract to a male-owned business. Plaintiffs brought this 42 U.S.C. § 1983 suit alleging Defendants deprived them of their rights under the constitution and federal statutes while acting under color of state law. Defendants filed a motion to dismiss claiming they did not act under color of state law, and that they are protected by RSIC's tribal sovereign immunity. This is Plaintiffs' request that the Court deny Defendants' motion.

ARGUMENT

I. PLAINTIFFS' 42 U.S.C. § 1983 CLAIMS

Section 1983 provides a cause of action against persons acting under color of state law who have violated rights guaranteed by the Constitution.[1] Section 1983 can provide a cause of action against persons acting under color of state law who have violated rights guaranteed by federal statutes.[2] Section 1983 can be used as a mechanism for enforcing the rights guaranteed

[1] Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995).

[2] Gonzaga Univ. v. Doe, 536 U.S. 273, 279 (2002).

by a particular federal statute only if (1) the statute creates enforceable rights and (2) Congress has not foreclosed the possibility of a 42 U.S.C. § 1983 remedy for violations of the statute in question.[3] To determine whether the federal statute has created rights enforceable through 42 U.S.C. § 1983, the court considers whether the statute (1) is intended to benefit the class of which the plaintiff is a member; (2) sets forth standards, clarifying the nature of the right, that make the right capable of enforcement by the judiciary; and (3) is mandatory, rather than precatory, in nature.[4] To determine whether the federal statute forecloses the possibility of a 42 U.S.C. § 1983 action, the court considers whether the statute contains (1) an express provision precluding a cause of action under 42 U.S.C. § 1983 or (2) a comprehensive enforcement scheme that is incompatible with individual enforcement under 42 U.S.C. § 1983.[5] Section 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.[6] A person deprives another of a constitutional right within the meaning of 42 U.S.C. § 1983 if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.[7] The requisite causal connection may be established when an official sets in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional harms.[8]

Section 1983 requires a causal relation between the conduct of defendants and the plaintiff's constitutional deprivation, the same personal involvement and causal relation are necessary, the use of the word "cause" in 42 U.S.C. § 1983 supports this conclusion.[9]

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[3] Dittman v. California, 191 F.3d 1020, 1027-28 (9th Cir. 1999).

[4] Day v. Apoliona, 496 F.3d 1027, 1035 (9th Cir. 2007).

[5] City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)); Dittman, 191 F.3d at 1028.

[6] Daniels v. Williams, 474 U.S. 327, 329-30 (1986).

[7] Preschooler II v. Clark Cty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)).

[8] Kwai Fun Wong v. U.S. INS, 373 F.3d 952, 966 (9th Cir. 2004); Gilbrook v. City of Westminster, 177 F.3d 839, 854 (9th Cir. 1999).

[9] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978).

II. PRIVATE PARTIES, CORPORATIONS, AND COLOR OF LAW

Generally, private parties are not acting under color of state law.[10] The hardest state action cases are those in which a private person or entity acts with some governmental involvement; the question then becomes whether such private conduct ought to be treated as if it were governmental conduct; there are no hard and fast rules for determining the presence of state action; the state action inquiry must be made on a case-by-case basis; it is impossible to fashion and apply a formula for state responsibility or action under the Equal Protection Clause.[11] State action exists where the state and the private party or entity maintain a sufficiently interdependent relationship.[12] State action exists where the state requires, encourages, or is otherwise significantly involved in nominally private conduct.[13] State action exists where the private person or entity exercises a traditional state function.[14] There must be a *nexus* between the challenged conduct and the state.[15] None of the state action approaches used by the Supreme Court is exclusive of any of the others; not only is there considerable overlap, but the Court itself frequently considers the applicability of all three in many state action cases.[16] The Court may in effect be using a balancing test in its state action cases. If this is so, then the importance of Plaintiffs' 42 U.S.C. § 1983 equal protection and free speech constitutional claims should be a significant factor in the Court's decision to dismiss the amended complaint.

In a case where the federal legislation that created Amtrak declared that it was not a government entity, the Supreme Court held that even though Congress declared that Amtrak was private, that declaration was not determinative of governmental status and thus, was not

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[10] Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991).

[11] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[12] Id. at 723.

[13] Lombard v. Louisiana, 373 U.S. 267, 273-74 (1963).

[14] Marsh v. Alabama, 326 U.S. 501, 504-05 (1946); Smith v. Allwright, 321 U.S. 649, 664-66 (1944).

[15] Jackson v. Metro. Edison Co., 419 U.S. 345, 350-52 (1974).

[16] Flagg Bros. v. Brooks, 436 U.S. 149, 154-66 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 305-58 (1974).

determinative for 42 U.S.C. § 1983 constitutional purposes either.[17] As applied to states and local governments, this means that it is power and control that are crucial for governmental status purposes, and not what states and local governments themselves say about the purportedly private status of their creation. Defendants WRI and Cendagorta say their status is a non-governmental corporation and employee. But the absolute power and control they exerted over a government funded public works contract procurement is really what defines their status for § 1983 purposes. The amended complaint describes the power and control they exerted over the private sector during the EDA procurement.[18] And eight counts based on those factual allegations and legal theories describe how Plaintiffs were deprived of their Fourteenth Amendment rights to Free Speech and Equal Protection, Interstate Travel, Substantive Due Process, Interstate Commerce, and Due Process. Because Plaintiffs are challenging the constitutionality of the procedures and bidder qualification requirements Defendants created, and not merely alleging their misuse or abuse, Plaintiffs were deprived of their rights through state action and the private Defendants therefore acted under color of law. This Court should apply the two-part test the Supreme Court used in *Luger*:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state, or by a rule of conduct imposed by the state, or by a person for whom the state is responsible .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor because he is a state official, or because he has acted together with or has obtained significant aid from state officials or because his conduct is otherwise chargeable to the state.[19]

Satisfying *Lugar's* first test, Plaintiffs' deprivation of rights occurred under color of Nevada law because EDA told Defendants that their procurement policies and procedures to

[17] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394-400 (1995).

[18] ECF No. 8, pp 2-139, ¶¶ 1-139.

[19] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

provide bidding assistance "will reflect" State of Nevada public works procurement policies and law for the EDA procurement action,[20] and must conform to (b) federal statutes and regulations and (c) EDA's federal procurement regulation 15 C.F.R. § 24.36.[21] Defendants provided bidding assistance to RSIC—who demonstrated that it knew it was acting under color of Nevada law—not tribal law. RSIC stated that it would only receive bids from "qualified Nevada licensed contractors.[22] RSIC required that all bidders and their bonding companies "must be licensed to do business in Nevada."[23] RSIC investigated Plaintiffs' Nevada bidder qualifications and licensing.[24] RSIC acknowledged that the construction contract was not governed by tribal law.[25] And cloaked under color of Nevada's public works procurement laws, Defendants WRI and Cendagorta had freedom to create and wield their qualification requirements and procedures to wrongfully disqualify Plaintiffs and steer award of contract to their favored contractor. Satisfying *Lugar's* second test, Plaintiffs' allege that employees of the State of Nevada, University of Nevada, Reno, played a significant role providing research and assistance to ensure that RSIC's EDA grant application met the EDA investment guidelines.[26] These and other factual allegations were compared to case law where private actors are considered to be state actors to show Defendants acted under color of state law.[27]

A professional gambler who was arrested by security guard at casino for trespassing and obstructing the duties of a police officer, sued casino and others alleging unconstitutional arrest; court found that casino's acts were state action under joint action test because of system of cooperation and interdependence with Las Vegas police department.[28] An ordinance granting

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[20] ECF No. 8, p 12, ¶ 50.
[21] ECF No. 8, p 12, ¶ 50.
[22] ECF No. 8-3, p 16, ¶ 1.
[23] ECF No. 8-3, p 16, ¶ 4.
[24] ECF No. 8-3, pp 9-12.
[25] ECF No. 8-3, p 20, ¶ 2.
[26] ECF No. 8, pp 6-7, ¶¶ 27-31.
[27] ECF No. 8, pp 35-43, ¶¶ 179-210.
[28] Tsao v. Desert Palace, Inc., 698 F.3d 1128 (9th Cir. 2012).

redevelopment powers, including the power of eminent domain, to a private redevelopment corporation; held that "the delegation under state law of powers possessed by virtue of state law and traditionally exercised by the City satisfies us that the City's action here is under color of state law".[29] A private corporation that did drug testing for Kentucky courts violated Fourth Amendment rights arising from "direct observation" method used.[30] Where challenge was to private apartment complex's adults only policy, there was a symbiotic relationship alleged between the complex and Los Angeles County.[31] Termination by public housing authority of the plaintiff was state action despite authority's claim that its action was mandated by federal regulations and was therefore federal action not governed by 42 U.S.C. § 1983.[32] Volunteer fire department's dismissal of fireman was state action, symbiotic relationship existed.[33]

> Plaintiff sued volunteer fire department alleging sex discrimination; court reversed district court's grant of summary judgment for the defendant on state action grounds because there were material issues of fact in dispute: even though there was no symbiotic relationship or nexus, still firefighting might be an exclusive public function; this public function inquiry was a very fact-specific one and its "outcome hinges on how a given state itself views the conduct of the function by the private entity;" in this case the parties should be allowed to introduce evidence as to the function of firefighting in the state of Maryland and not be bound by the district court's "own unexplained conclusions" that constituted "unsubstantiated judicial notice."[34]

III. COLOR OF TRIBAL LAW, COLOR OF STATE LAW

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[29] Williams v. St. Louis, 783 F.2d 114, 117 (8th Cir. 1986).

[30] Norris v. Premier Integrity Solutions, Inc., 641 F.3d 695 (6th Cir. 2011).

[31] Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).

[32] Lubcke v. Boise City/Ada Cty. Hous. Auth., 124 Idaho 450, 860 P.2d 653 (1993).

[33] Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979).

[34] Haavistola v. Cmty. Fire Co., 6 F.3d 211, 218 (4th Cir. 1993).

The RSIC Defendants' motion to dismiss (ECF No. 17) cited *Bressi v. Ford* [35] as authority for the "well established rule that a 42 U.S.C. § 1983 claim cannot be maintained against defendants who act under color of tribal rather than state law."[36] That is the rule, but *Bressi* more importantly illustrates how defendants acting under color of tribal law one minute can be deemed to be acting under color of state law the next. In *Bressi* a non-Indian sued tribal officers under § 1983 and the Fourth Amendment after he was stopped and cited at a roadblock on a state highway crossing the tribe's reservation. Disagreeing with the district court which had ruled that stopping the plaintiff was an exercise of tribal authority and thus not actionable under 42 U.S.C. § 1983, the Ninth Circuit observed that the roadblock was set up on a state highway, albeit within the reservation and thus part of Indian country. Here, the defendants were authorized under tribal law to stop and arrest Indian violators of tribal law traveling on the highway. They were also authorized to stop vehicles to determine whether the driver was Indian or non-Indian. If non-Indian, and a state or federal law was apparently violated, tribal officers could detain the non-Indian in order to turn him or her over to state or federal authorities. The tribal officers were authorized to enforce state law against non-Indian drivers on the state highway. Once the defendants went beyond determining that the plaintiff was a non-Indian, and treated his refusal to provide his driver's license as a violation of state law, they acted under color of state law; the roadblock functioned not merely as a tribal exercise, but also as an instrument for the enforcement of state law; on remand plaintiff could argue that the roadblock violated the Fourth Amendment.[37]

The *Bressi* contours align with Plaintiffs' factual allegations and the legal context in the amended complaint. Plaintiffs are non-Indians.[38] Defendants are a federally-recognized Indian

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[35] Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009).

[36] ECF No. 18, p. 14, ¶ 2.

[37] Bressi, 575 F.3d at 897.

[38] Bressi, 575 F.3d at 893 (motorist arrested by tribal police was a non-Indian), see ECF No. 8, ¶ 7-9 (FEI is a corporation and, not alleged, but Jana Forsythe is a non-Indian).

tribe and employees or agents.[39] Both deprivations of Plaintiffs' rights occurred exclusively or mostly on reservation land.[40] Employee/agents of both tribes have authorization or are directed to act under state law.[41] Employee/agents of both tribes act under state law or under their own rules that reflect state law and determined non-Indian Plaintiffs are in violation of those laws.[42] Tribes and employees/agents act under color of state law.[43] The *Bressi* court also held that summary judgment based on the § 1983 color of law test is inappropriate if there is a factual issue to determine if the tribal officers acted under color of tribal law and are protected by tribal sovereign immunity, or if they acted under color of state law and are not protected.[44]

IV. CORPORATIONS, RESPONDEAT SUPERIOR, AND 42 U.S.C. § 1983

Respondeat superior cannot be used to render private corporations that act under color of law liable under § 1983. In a Seventh Circuit case[45], the court reversed the district court's judgment against a department store whose detective allegedly detained the plaintiff for suspected shoplifting in violation of the Fourth Amendment. It asserted that, like a municipal corporation, "a private corporation is not vicariously liable under § 1983 for its employees'

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[39] Bressi, 575 F.3d at 893 (three officers and a police chief) see ECF No. 8, ¶ 10-13, 15 (three officials and a tribal chairman).

[40] Bressi, 575 F.3d at 894 (Indian tribe and employees operating roadblock on state highway that runs through reservation) see ECF No. 8, ¶ 28, 52-139, 140-174 (generally, most acts of Defendants alleged as deprivations of Plaintiffs rights occurred in RSIC offices located on tribal lands), ECF No. 8, Exhibit A, p. 10, (RSIC owns Spanish Springs and land is part of RSIC reservation).

[41] Bressi, 575 F.3d at 894-95 (Indian tribe and employees authorized to enforce tribal law and state law; could eject non-tribal members from tribally-controlled areas; certification from state board authorized Indian tribe and employees to investigate violations of state law and federal law) see ECF No. 8, ¶ 50a (Indian tribe and employees directed to use procurement policies and procedures that "reflect" state law) (Attachment F definition of "reflect").

[42] Bressi, 575 F.3d at 894 (Tribe and defendants determine facts and enforce their decision against non-Indian plaintiff for violations of state law: failure to provide driver's license or proof of identity and failure to comply with a police officer's lawful order) see ECF No. 8, ¶ 60-123, ¶ 140-174 (Tribe and defendants create rules and specifications that "embody" state law, determine facts and enforce their decisions against non-Indian Plaintiffs).

[43] Bressi, 575 F.3d at 895 (Tribal employees acted under color of state law) see ECF No. 8, ¶ 203-201 (Application of Tribal employees' acts to 42 U.S.C. § 1983 color of law claim elements, alternatively, for a local government and a non-sovereign private entity).

[44] Bressi, 575 F.3d at 895-99.

[45] Iskander v. Forest Park, 690 F.2d 126 (7th Cir. 1982).

deprivations of others' civil rights."[46] Citing Iskander, the Seventh Circuit stated: "For purposes of § 1983, we have treated a private corporation acting under color of law as though it were a municipal entity."[47] Jackson was followed by the Seventh Circuit in Woodward v. Corr. Med. Servs. of Ill., Inc., 368 F.3d 917, 927 (7th Cir. 2004), which involved a § 1983 damages action against a private corporation that acted "under color of law as a contractor performing the public function of running a jail. Therefore, it is treated the same as a municipality for purposes of § 1983." See also Johnson v. Dossey, 515 F.3d 778 (7th Cir. 2008), citing Iskander and Jackson for this proposition. Similarly, Minix v. Canarecci, 597 F.3d 824, 832 (7th Cir. 2010), cited Woodward for the proposition that "a corporation that contracted with the jail to perform the public function of providing mental health services to inmates . . . [is] treated the same as municipalities for liability purposes under § 1983." The Second[48] and Eighth[49] Circuits have followed the Fourth and Seventh Circuits on this issue. Resolving what it called an issue of first impression in its circuit, the Tsao, 698 F.3d 1128 joined the other circuits in holding that Monell requirements apply to a private corporation that is a state actor.

Plaintiffs assert claims against Defendant Cendagorta in his official and individual capacities. Plaintiffs do not assert respondeat superior-based claims against Defendant WRI in their 42 U.S.C. § 1983 counts. Instead, the amended complaint treats WRI as a local governing body and sues WRI directly under 42 U.S.C. § 1983 for monetary, declaratory, or injunctive relief because, "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's

[46] Iskander, 690 F.2d at 128.

[47] Jackson v. Ill. Medi-Car, Inc., 300 F.3d 760, 766 n.6 (7th Cir. 2002).

[48] Rojas v. Alexander's Dep't Store, Inc., 924 F.2d 406 (2d Cir. 1990) (suggesting that this was also the rule in the Fifth and Tenth Circuits).

[49] In Sanders v. Sears, Roebuck & Co., 984 F.2d 972 (8th Cir. 1993), the plaintiff sued a department store for the alleged unconstitutional conduct of its security guard in detaining him for shoplifting and thereafter turning him over to police. Affirming the district court's dismissal, the Eighth Circuit assumed arguendo that the department store acted under color of law, but held that it could be held liable under § 1983 only for its own unconstitutional policies, and not through respondeat superior. Plaintiff did not allege that the defendant had a policy of false arrests or malicious prosecution; its employment of the security guard, standing alone, was insufficient.

officers.[50]" A local government will be found to be liable under a ratification theory for the decision of a high-ranking official only when the local government ratifies the reasons for the decision in addition to the decision itself.[51]

Fed. R. Civ. P. 8 permits alternative statements of a claim, including inconsistent claims. Plaintiffs allege WRI is a "person" whose taxonomy under § 1983 is a local government or municipality exercising control over the public sector.[52] Plaintiffs allege WRI exercised control over the public sector while acting under color of state law—not tribal law, through its employee, Defendant Cendagorta.[53]

Municipalities are among those persons to whom § 1983 applies.[54] Municipal officials are also persons for purposes of § 1983.[55] A heightened pleading standard is not required unless required by the Fed. R. Civ. P.[56] There is no heightened pleading standard to meet the policy or custom requirement to demonstrate municipal liability in § 1983 suits.[57] A claim of municipal liability under § 1983 cannot be dismissed even if the claim is based on a bare allegation that the individual defendants' conduct conformed to official policy, custom, or practice.[58] Because vicarious liability is inapplicable to § 1983 suits, plaintiffs must plead that each official defendant of a municipality, through that official's own individual actions, deprived plaintiffs of rights under the Constitution or a federal statute.[59] A local governmental unit may not be held responsible for the acts of its employees under a respondeat superior theory of liability.[60]

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[50] Bressi, 575 F.3d at 690.

[51] St. Louis v. Praprotnik, 485 U.S. 112 (1988).

[52] ECF No. 8-3, p 32, ¶ 1.

[53] ECF No. 8, pp 38-43, ¶¶ 194-210.

[54] Monell, 436 U.S. at 690.

[55] Id. § 691.

[56] Empress L.L.C. v. City & Cty. of S.F., 419 F.3d 1052, 1056 (9th Cir. 2005).

[57] Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167-68 (1993).

[58] Karim-Panahi v. L.A. Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988) (quoting Shah v. County of L.A., 797 F.2d 743, 747 (9th Cir. 1986)).

[59] Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

[60] Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997); Collins v. City of Harker Heights, 503

Because vicarious liability is inapplicable to Bivens and 42 U.S.C. § 1983 suits, a plaintiff must plead that each government official defendant, through the official's own individual actions, has violated the Constitution.[61] When a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates; therefore, a plaintiff must go beyond the respondeat superior theory of liability and demonstrate that the alleged constitutional deprivation was the product of a policy or custom of the local governmental unit, because municipal liability must rest on the actions of the municipality, and not the actions of the employees of the municipality.[62] Section 1983 plaintiffs must prove that an action pursuant to official municipal policy caused their injury.[63] Regardless of what theory the plaintiff employs to establish municipal liability—policy, custom or failure to train—the plaintiff must establish an affirmative causal link between the municipal policy or practice and the alleged constitutional violation.[64] The policy or custom requirement for a 42 U.S.C. § 1983 claim against a municipality applies whether the remedy sought is money damages or prospective relief.[65] A policy of inaction may be a municipal policy within the meaning of *Monell*.[66] Ratification of the decisions of a subordinate by an official with final decision-making authority can also be a policy for purposes of municipal liability under 42 U.S.C. § 1983.[67] The plaintiff may also establish municipal liability by demonstrating that the alleged constitutional violation was caused by a failure to train municipal employees adequately.[68] Such a showing depends on

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U.S. 115, 121 (1992); City of Canton v. Harris, 489 U.S. 378, 385 (1989).

[61] Ashcroft, 556 U.S. at 676.

[62] Bd. of the Cty. Comm'rs, 520 U.S. at 403; City of Canton, 489 U.S. at 385.

[63] Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154, 1167-68 (9th Cir. 2014).

[64] City of Canton, 489 U.S. at 385-92; Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996).

[65] L.A. Cty. v. Humphries, 562 U.S. 29, 34 (2010).

[66] Waggy v. Spokane Cty. Wash., 594 F.3d 707, 713 (9th Cir. 2010).

[67] St. Louis, 485 U.S. at 127.

[68] City of Canton, 489 U.S. at 388-91; Price v. Sery, 513 F.3d 962, 973 (9th Cir. 2008); Blankenhorn v. City of Orange, 485 F.3d 463, 484-85 (9th Cir. 2007).

three elements: (1) the training program must be inadequate in relation to the tasks the particular officers must perform; (2) the city officials must have been deliberately indifferent to the rights of persons with whom the local officials come into contact; and (3) the inadequacy of the training must be shown to have actually caused the constitutional deprivation at issue.[69] The indifference of officials may be shown where, in light of the duties assigned to specific employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need.[70]

V. TRIBAL SOVEREIGN IMMUNITY NOT DERIVATIVE

Defendants say they are independent private contractors, hired by RSIC to be the civil engineers on the EDA Project; that civil engineering and general contracting bid reviews are not traditionally and exclusively governmental functions; that WRI is a private company, working for a sovereign entity on the sovereign entity's land; that WRI "is not engaged in a public function at all."[71] Defendants WRI and Cendagorta were in fact engaged in one of the most highly public functions there is: They accepted government money to create bidder qualification requirements—following state law—and used their requirements to award a federally funded contract. RSIC told EDA that Defendants would provide "project bidding assistance" to help RSIC procure the EDA construction contract.[72] The $950,000.00 EDA grant RSIC received for the construction project included money for engineering and inspection.[73] RSIC entered into a contract with Defendants who, according to the contract, received $157,850.00 in federal funds for their work.[74] The FOIA documents Plaintiffs received from EDA included a copy of the six-page design contract between RSIC and WRI. That contract references the attachment, "Fee

[69] Merritt v. County of L.A., 875 F.2d 765, 770 (9th Cir. 1989).
[70] City of Canton, 489 U.S. at 390; Berry v. Baca, 379 F.3d 764, 767 (9th Cir. 2004).
[71] ECF No. 19, p7, ¶ 2.
[72] ECF No. 8, p 10, ¶ 39; ECF No. 8-2, p 9, ¶ 3.
[73] ECF No. 8-2, p 3.
[74] ECF No. 8, p 10-11, ¶¶ 40-47; ECF No. 8-3, pp 2-7.

Proposal dated June 14, 2013."[75] The fee proposal was not included in the FOIA records but Defendants attached a copy of the missing fee proposal to their motion.

Defendants' entered into a six-page contract with RSIC, a contract where about half of the terms and conditions were federal requirements. Defendants' work scope included providing services to RSIC during the EDA bidding (procurement) phase.[76] According to the fee proposal, Defendants received $6,000.00 of federal money for their "bidding assistance."[77] Defendants said their services would result in a bidding environment that is fair to all bidders; that they would review bids for errors and conflicts, such as improperly licensed contractors, no bid bond; that they would make recommendations for award.[78] Defendants said, "The Special Conditions supplied by the EDA contain fairly specific and stringent requirements for bid solicitation and for the final contract documents that require special attention during this phase. Our recent, relevant experience with EDA projects allows us unique insight into this critical phase of the project."[79]

Defendants WRI and Cendagorta agreed to comply with federal laws and regulations.[80] One federal statue provides that "No requirement or obligation shall be imposed as a condition precedent to the award of a contract unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications."[81] After Plaintiffs' bid was opened, Defendant Cendagorta created twenty-four new bidder qualification requirements and used his **unpublished** qualification requirements to disqualify Plaintiffs and reject their bid.[82] Not one post-bid qualification requirement was in RSIC's published bid solicitation, therefore each one

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[75] ECF No. 8-3, p 2, ¶ 3.

[76] ECF No. 19-2, p 16, ¶ 3.

[77] ECF No. 19-2, p 20, (see "Phase 5 Bidding Services" near bottom of page.)

[78] ECF No. 19-2, p 16, fifth bullet.

[79] ECF No. 19-2, p 16, sixth bullet.

[80] ECF No. 8, pp 10-11, ¶¶45.

[81] ECF No. 8, pp 11-12, ¶ 49.

[82] ECF No. 8, pp 17-24, ¶¶ 71-111.

he wrote violated the 42 U.S.C. § 6705(e)(1) time of publication requirement.[83] And most on their face violate 42 U.S.C. § 6705(e)(1) because they are biased towards Washoe County contractors and were written purposely to disqualify Plaintiffs, who are Clark County contractors. Defendant Cendagorta violated 42 U.S.C. § 6705(e)(1) and every other federal statute and regulation applicable to the EDA contract procurement process.[84]

Defendants WRI and Cendagorta did all that while cloaked in the authority of the state. They went in a "federal" door to receive payment for their bidding assistance work that was supposed to "reflect" Nevada's public works contracting statutes, violated multiple federal statutes and regulations in the process, and now ask the Court to let them come back through a "tribal" door to receive immunity for depriving Plaintiffs of their rights under the constitution and federal statutes. Defendants say sovereign immunity protects RSIC and "it follows" that it protects them too.[85] But RSIC's tribal sovereign immunity does not make Defendants WRI and Cendagorta immune from this suit for the following reasons.

A. RSIC waived sovereign immunity

Absent express waiver and consent by an Indian tribe to suit, or congressional authorization for such a suit, a federal court is without jurisdiction to entertain claims advanced against the Indian tribe.[86] To relinquish its immunity, a tribe's waiver must be "clear."[87] In resolving a motion to dismiss, a district court may hear evidence regarding jurisdiction and resolve factual disputes where necessary.[88] Because court's very power to hear case is at issue in Fed. R. Civ. P. 12(b)(1) motion, trial court is free to weigh evidence to determine existence of its jurisdiction; no presumptive truthfulness attaches to plaintiff's allegations, and existence of disputed material facts will not preclude trial court from evaluating for itself merits of

[83] ECF No. 8-3, pp 16-20.

[84] ECF No. 8, pp 14-24, ¶¶ 60-111.

[85] ECF No. 19, pp 11-12.

[86] Evans v. McKay, 869 F.2d 1341, 1345 (9th Cir. 1989).

[87] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, (1991).

[88] Robinson v. United States, 586 F.3d 683 (9th Cir. 2009).

jurisdictional claims.[89]

RSIC did not waive immunity simply by accepting federal money and agreeing to comply with federal laws.[90] RSIC inserted a contract provision entitled "Limited Waiver of Sovereign Immunity" into the EDA construction contract.[91] Plaintiffs attached RSIC's waiver clause to the amended complaint.[92] In a separate motion to dismiss, RSIC said its waiver must be "clear," and "cannot be implied but must be unequivocally expressed," and assert that RSIC did not waive sovereign immunity for Plaintiff's suit.[93] Because a Fed. R. Civ. P. 12(b)(1) motion is a "speaking motion" and can include references to evidence extraneous to the complaint without converting it to a Fed. R. Civ. P. 56 motion, the district court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). If the court holds an evidentiary hearing to adjudicate the issue of whether the court has jurisdiction, the court determines the credibility of witness testimony, weighs the evidence, and finds the relevant jurisdictional facts.[94] When considering a motion to dismiss under Rule 12(b)(1), the court must determine whether the defendant is facially attacking the complaint or challenging the jurisdictional facts alleged by the plaintiff;[95] a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint; in reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true; or a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends; when reviewing a factual attack on subject matter jurisdiction, a district court may not presume the

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[89] Materson v. Stokes, 166 F.R.D. 368, 371 (E.D. Va. 1996).

[90] ECF No. 8, p 6-13, ¶¶ 24-51; p 30-32, ¶¶ 140-156.

[91] ECF No. 8, ¶ 71.

[92] ECF No. 8-3, p 32.

[93] ECF No. 17, p 7.

[94] Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1188 (10th Cir. 2010).

[95] Eaglesun Sys. Prods. v. Ass'n of Vill. Council Presidents, 2014 U.S. Dist. LEXIS 36659, 6 (ND Oka. 2014) (citing Clymore v. United States, 415 F.3d 1113, 1118 n.6 (10th Cir. 2005).

truthfulness of the complaint's factual allegations; in such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.[96]

B. RSIC officials acted outside of their authority under RSIC Constitution and Bylaws

In ECF No. 17, RSIC Defendants say Plaintiffs "purport" to sue individual Defendants in their individual capacities and Plaintiffs are using "pleading tricks" to use individual capacity as an indirect way to get around RSIC's tribal sovereign immunity. Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority.[97] Tribal defendants sued in their individual capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties.[98] As the Tenth Circuit has explained:

> The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities . . . . Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.[99]

"The principles reiterated in Maxwell foreclose the tribal defendants' claim to tribal sovereign immunity in this case. The gamblers have not sued the Tribe. The district court correctly determined that the gamblers are seeking to hold the tribal defendants liable in their individual rather than in their official capacities. They "seek[] money damages 'not from the [tribal] treasury but from the [tribal defendants] personally.'"[100] Even if the tribe agrees to pay

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[96] Eaglesun, 2014 U.S. Dist. LEXIS 36659, 6-7 (ND Oka. 2014) (quoting Holt v. United States, 46 F.3d 1000 (10th Cir. 1995).

[97] Pistor v. Garcia, 791 F.3d 1104, 1112 (9th Cir. 2015) (quoting Cook v. AVI Casino Enters., 548 F.3d 718, 727 (9th Cir. 2008)).

[98] Id. at 1112 (see Maxwell v. County of San Diego, 708 F.3d 1075, 1089 (9th Cir. 2013).

[99] Id. at 1112 (see Maxwell, 708 F.3d at 1089 (quoting Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1296 (10th Cir. 2008)).

[100] Id. at 1113 (citing Maxwell, 708 F.3d at 1088, quoting Alden v. Maine, 527 U.S. 706, 757 (1999)).

for tribal defendants' liability, that does not entitle them to sovereign immunity: "The unilateral decision to insure a government officer against liability does not make the officer immune from that liability."[101] Plaintiffs sue the individual Defendants in both their individual and personal capacities.[102] It is a form of alternate pleading permitted by Fed. R. Civ. P. 8 and cannot be the basis of dismissal of Plaintiffs' suit.

The RSIC Defendants and the WRI Defendants claim they were "acting under color of tribal law." That means they acted under authority of the RSIC Constitution and Bylaws, which expressly subjects their "Powers" "to any limitations imposed by the laws or the Constitution of the United States," (see ECF No. 24, Att. A, p 4). They acted beyond their authority every time they violated federal statutes and regulations applicable to the EDA procurement. Defendant Cendagorta, a major violator of those same federal statutes and regulations, acted beyond his authority because WRI is a corporation and not authorized to violate federal statutes and regulations.

Plaintiffs seek damages and declaratory relief. As a first principle, it is important to note that the capacity in which an official acts when engaging in the alleged unconstitutional conduct does not determine the capacity in which the official is sued.[103] Official capacity is best understood as a reference to the capacity in which the officer is sued, not the capacity in which the officer inflicts the alleged injury.[104] Tribal sovereign immunity ordinarily does not preclude prospective relief against tribal officers or employees when their actions are alleged to violate federal law, and it does not apply to actions taken by tribal members in their individual capacities. Tribal officers or other agents do not partake fully of the immunity possessed by tribes.[105] Tribal officers and other agents do not partake fully of the immunity possessed by

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[101] Id. at 1114 (quoting Maxwell, 708 F.3d at 1090).

[102] ECF No. 8, p 5, ¶17; p 5-6, ¶ 19.

[103] Hafer v. Melo, 502 U.S. 21, 31 (1991); Porter v. Jones, 319 F.3d 483, 491 (9th Cir. 2003).

[104] Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990).

[105] Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014).

tribes; analogizing to *Ex parte Young,* tribal immunity does not bar a lawsuit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct.[106] A broader range of relief may be available than the prospective relief normally associated with *Young*; we have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the state.[107] Tribal council members are not entitled to immunity in suits for declaratory relief.[108] Tribe's immunity may extend to tribal official in their official capacity, provided the tribe had the authority to take the action it delegated to the official.[109] A tribal chief sued in official and personal capacities enjoys immunity from suit only to the extent that he is sued in his official capacity for acts within the scope of his tribal authority.[110] Pueblo governor possessed immunity from damages verdict with respect to alleged discrimination in leasing relationship where trial evidence established that he acted within the scope of his authority as a Pueblo official when he issued the challenged directive.[111] A tribal official, even if sued in an individual capacity, is only stripped of tribal immunity when he acts "without any colorable claim of authority."[112] Tribal sovereign immunity does not project the RSIC Defendants, and it does not derivatively protect the WRI Defendants.

VI. OTHER ARGUMENTS

A. **Independent Claims.** Plaintiffs' 42 U.S.C. § 6709 cause of action exists independent of 42 U.S.C. § 1983. Defendants WRI and Cendagorta discriminated against Plaintiffs by denying them the benefit of the EDA contract. In order to bring a private action under 42 USCS § 2000d, plaintiff must be intended beneficiary of, or applicant for, or

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[106] Id. at 2035.

[107] Okla. Tax Comm'n, 498 U.S. at 514.

[108] T T E A v. Ysleta Del Sur Pueblo, 181 F.3d 676, 680 (5th Cir. 1999).

[109] Davids v. Coyhis, 869 F. Supp. 1401, 1410 (E.D. Wis. 1994).

[110] U.S. v. Yakima Tribal Court, 806 F.2d 853, 860 (9th Cir. 1986).

[111] Cook v. AVI Casino Enters., 548 F.3d 718, 727 (9th Cir. 2008).

[112] Oberloh v. Johnson, 768 N.W.2d 373, 376 (Minn. Ct. App. 2009).

participant in federally funded program.[113] Congress expressly created a right and remedies 42 U.S.C. § 6709 for sex discriminatees like Plaintiffs where the recipient RSIC received federal funds and used those funds to pay WRI Defendants to provide bidding assistance. Private individuals may not sue to enforce regulations, promulgated under Title VI of Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.), which proscribe activities that have disparate impact.[114] However, Plaintiffs do not allege disparate impact but specific acts of sex discrimination and demonstrate in the amended complaint that Defendant Cendagorta subjected Plaintiffs to harsh treatment while the male-owned contractor that became the awardee received preferential treatment.[115] Private individuals may sue to enforce § 601 of Title VI, 42 USCS § 2000d, and obtain both injunctive relief and damages for intentional discrimination.[116] Corporate status of construction contractor certified as minority-owned business did not preclude standing to seek remedy for alleged racial discrimination in housing construction project which received federal financial assistance since contractor had imputed racial identity.[117] Similarly, Defendant FEI is a DBE and has standing because it has an imputed sex identity. Private plaintiffs suing under Title VI (42 USCS §§ 2000d et seq.) do not need to allege defendants acted under color of law.[118] Defendant Cendagorta created his post-bid qualification requirements for only one purpose: to take the EDA contract away from the low bidder—Plaintiffs. In a Title VI action, once prima facie case has been established, burden is on defendant to demonstrate that criteria used was required by necessity.[119] The amended complaint, comprised of factual allegations and Defendants' records establish a prima facie case. Defendants WRI and Cendagorta now have the burden to show why their illegal, discriminatory post-bid qualification specifications were

[113] Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1235 (7th Cir. 1980).

[114] Alexander v. Sandoval, 532 U.S. 275 (2001).

[115] ECF No. 8, pp 27-30, ¶¶ 124-139.

[116] Franks v. Ross, 293 F. Supp. 2d 599, 606 (E.D.N.C. 2003)

[117] Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth., 745 F.3d 703, 726 (4th Cir. 2014).

[118] Concerned Tenants Asso. of Indian Trails Apts. v. Indian Trails Apts., 496 F. Supp. 522, 527 (N.D. Ill. 1980) (now superseded by statute).

[119] Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984).

necessary.

B. **Conspiracy.** It is necessary for a 42 U.S.C. § 1983 conspiracy claim that a constitutional deprivation be alleged and proved. A conspiracy standing alone is insufficient.[120] In retaliation cases, at least, adequate notice to a defendant might require some statement of the essential facts constituting the retaliation.[121] The Ninth Circuit rejected any pleading distinction between civil rights claims against individuals (even those involving improper motive and qualified immunity) and those against local governments.[122] Plaintiffs have alleged facts that meet the elements of conspiracy.

C. **Supplemental jurisdiction.** A federal court has the power to decide such claims where they are joined with a substantial federal claim over which the federal court has jurisdiction, provided that the substantial federal claim and the joined state or federal claim derive from a common nucleus of operative fact and the plaintiff would ordinarily be expected to try them all in one judicial proceeding.[123] Pendent jurisdiction has long been considered discretionary with the federal district court and could be exercised even though a plaintiff was ultimately unsuccessful on a substantial federal claim.[124]

D. **Costs.** A prevailing defendant may be awarded attorney's fees in the court's discretion only "upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith."[125] Simply because a defendant ultimately prevails, it does not follow that the 42 U.S.C. § 1983 claim was groundless at the

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[120] Dixon v. Lawton, 898 F.2d 1443, 1449 (10th Cir. 1990).

[121] Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002).

[122] Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

[123] Rosado v. Wyman, 397 U.S. 397, 405 (1970)

[124] The Supreme Court seemed to encourage the use of pendent jurisdiction and limit a district court's discretion to reject it in Hagans v. Lavine, 415 U.S. 528, 545-46 (1974), where it said: given advantages of economy and convenience and no unfairness to litigants, the doctrine contemplates adjudication of these pendent claims.

[125] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); see also Gen. Camera Corp. v. Urban Dev. Corp., 734 F.2d 468 (2d Cir. 1984) (per curiam) and Green v. Ten Eyck, 572 F.2d 1233, 1243 n.11 (8th Cir. 1978).

outset. This post hoc approach is not appropriate under the fee statute because it would discourage plaintiffs from bringing 42 U.S.C. § 1983 claims whose outcomes are not certain.[126]

Respectfully submitted,

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[126] The Sixth Circuit has cautioned against using a hindsight approach in awarding fees to defendants. "A plaintiff who continues to litigate claims after discovery has concluded, proceeds to summary judgment, and a judge thereafter rules that the claims are without merit, does not necessarily support the conclusion that the plaintiff's claims were frivolous, unreasonable, or groundless, especially if there are viable claims intertwined to the meritless claims." Riddle v. Egensperger, 266 F.3d 542, 551 (6th Cir. 2001), reh'g en bane denied (Nov. 16, 2001). In another Sixth Circuit case, Tahfs v. Proctor, 316 F.3d 584 (6th Cir. 2003), the court reversed the district court's award of fees to defendants under Rule 11 and 42 U.S.C. § 1988 where the plaintiff's complaint had correctly been dismissed for failure to properly allege state action. As to Rule 11, the plaintiff's state action allegation of corruption between the private defendants and government officials, while unsuccessful, was not completely unwarranted by existing law. In addition, district courts should hesitate to award Rule 11 sanctions where complaints are dismissed pursuant to Rule 12(b) (6). As to 42 U.S.C. § 1988, the plaintiff's complaint was not frivolous or groundless, even if it was "inadequate."

CERTIFICATE OF SERVICE

I certify that service of the foregoing PLAINTIFFS' RESPONSE TO DEFENDANTS WOOD RODGERS, INC. AND MARK CENDAGORTA'S MOTION TO DISMISS was made through the Court's CM/ECF system, which will automatically e-serve all case participants in the CM/ECF filing and service system, on December 1, 2016.

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