Case No. 17-4124

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Edson Gardner, et al. Plaintiffs/Appellants, v. Hon. William Reynolds, in his official capacity as Judge of the Ute Tribal Court, et al., Defendants/Appellees.	

On Appeal from the United States District Court
for the District of Utah, Central Division
The Honorable Judge Robert J. Shelby
Case No. 2:16-cv-01008

APPELLEES' BRIEF

Respectfully submitted,

J. Preston Stieff
J. Preston Stieff Law Offices
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@StieffLaw.com

October 2, 2017

Oral Argument not requested.
PDF FORMAT ATTACHMENTS ARE INCLUDED

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The Hon. William Reynolds, in his official capacity as Judge of the Ute Tribal Court; Shaun Chapoose, Edred Secakuku, Tony Small, Bruce Ignacio, Cummings J. Vanderhoop, and Ronald Wopsock, in their official capacities as current or former members of the Ute Tribal Council; and Cleve Hatch, in his official capacity as an employee of Ute Tribe Family Services, respectfully submit Appellees' brief.

STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Utah, the Honorable Robert J. Shelby presiding, dismissing with prejudice the case brought by the Plaintiffs-Appellants, Edson Gardner, Lynda Kozlowicz, Konna Oviatt, and Athenya Swain ("Plaintiffs"). (*Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44)[1].

Following the dismissal without prejudice of a first Amended Writ of Habeas Corpus, Plaintiffs filed a second Amended Writ of Habeas Corpus, dated April 12, 2017, in which they requested habeas corpus relief. Plaintiffs claimed subject matter jurisdiction pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1303. (*Amended*

[1] In this brief, Defendants refer to the record by identification of the title of the district court document, the district court docket number, the record volume, and the page number of the consecutively numbered pages within the record.

Writ of Habeas Corpus dated 4/12/2017, Vol II, Doc 35, at 6). Plaintiffs also sought relief for alleged violations of the First and Fourth Amendments of the United States Constitution and claimed federal question jurisdiction pursuant to 28 U.S.C. § 1331. (*Id.)*. Appellees-Defendants, the Honorable William Reynolds, Shaun Chapoose, Edred Secakuku, Tony Small, Bruce Ignacio, Cummings J. Vanderhoop, Ronald Wopsock, and Cleve Hatch ("Defendants"), moved to dismiss the second Amended Writ of Habeas Corpus, arguing that the district court lacked subject matter jurisdiction because Plaintiffs had not exhausted their tribal court remedies, Plaintiffs' claims of detention were moot, and Plaintiffs had failed to establish federal question jurisdiction. Defendants also moved to dismiss on the ground that Plaintiffs had failed to state a claim upon which relief could be granted. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 30). The district court granted Defendants' motion to dismiss pursuant to its Minute Order, dated July 18, 2017 (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42), and entered judgment on July 19, 2017 (*Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44). Copies of the *Minute Order* and *Judgment* are attached to this brief. Plaintiffs filed a Notice of Appeal on August 4, 2017. (*Plaintiffs' Notice of Appeal* dated 8/4/2017, Vol II, Doc 58, at 48). The notice of appeal was timely pursuant to Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 in

that this is an appeal from a district court of the United States. This is an appeal from a judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following issues are raised in this appeal:

1. Whether the appeal should be dismissed because Plaintiffs' brief includes no references to the record and violates the appellate rules in numerous other ways.

2. Whether the district court correctly dismissed the case because Plaintiffs failed to exhaust their tribal remedies.

This issue was raised in Defendants' Motion to Dismiss Amended Writ of Habeas Corpus at pp. 4-5. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 33-34). This issue was ruled on in the district court's Minute Order and its Judgment. (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42; *Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44).

3. Whether the district court correctly dismissed the case because Plaintiffs' claim of detention was moot.

This issue was raised in Defendants' Motion to Dismiss Amended Writ of Habeas Corpus at pp. 5-7. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 34-36). This issue was ruled on in the district court's

Minute Order and its Judgment. (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42; *Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44).

4. Whether the district court correctly dismissed the case because Plaintiffs failed to establish federal question jurisdiction.

This issue was raised in Defendants' Motion to Dismiss Amended Writ of Habeas Corpus at pp. 7-9. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 36-38). This issue was ruled on in the district court's Minute Order and its Judgment. (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42; *Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44).

5. Whether the district court correctly dismissed the case because Plaintiffs failed to state a claim upon which relief can be granted where Plaintiffs failed to state a claim under the Indian Civil Rights Act or the First or Fourth Amendments to the United States Constitution.

This issue was raised in Defendants' Motion to Dismiss Amended Writ of Habeas Corpus at pp. 10-11. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 39-40). This issue was ruled on in the district court's Minute Order and its Judgment. (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42; *Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44).

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the District of Utah, the Honorable Robert J. Shelby presiding, dismissing with prejudice Plaintiffs' Amended Writ of Habeas Corpus.

Statement of Facts

The Appellant-Plaintiffs ("Plaintiffs") are Edson Gardner, Lynda Kozlowicz, Konna Oviatt, and Athenya Swain. Some of the Plaintiffs are and some are not members of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"). (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 31-32). None of these individuals are subject to detention or physical custody, nor are they the subjects of a sentence of detention or physical custody at the hands of any Defendant. (*Amended Writ of Habeas Corpus* dated 4/12/2017, Vol II, Doc 35, at 6; *see also Appellants' Opening Brief*).

The Appellee-Defendants ("Defendants") are as follows. The Honorable William Reynolds is the Chief Judge of the Ute Indian Tribe Tribal Court. Shaun Chapoose, Edred Secakuku, Tony Small, Bruce Ignacio, Cummings J. Vanderhoop, and Ronald Wopsock are current or former members of the Tribe's Business Committee. Defendant Cleve Hatch is an employee of the Tribe who works in its

Family Services Department. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 32).

None of these individual Defendants are subjecting any Plaintiff in this action to detention or physical custody. (*Amended Writ of Habeas Corpus* dated 4/12/2017, Vol II, Doc 35, at 6; *see also Appellants' Opening Brief*).

Procedural History

Plaintiffs Gardner and Kozlowicz, along with Mary C. Jenkins, who is not a party to this appeal, initiated this case on September 28, 2016, by filing a Petition for Writ of Habeas Corpus. (*Petition for Writ of Habeas Corpus* dated 9/28/2016, Vol. I, Doc 1). On October 24, 2016, Defendants filed a Motion to Dismiss. (*Motion to Dismiss* dated 10/24/2016, Vol. I, Doc 3). Before responding to Defendants' motion and before the court ruled on it, Plaintiffs Gardner and Kozlowicz, along with Ms. Jenkins, filed an Amended Writ of Habeas Corpus on November 4, 2016. (*Amended Writ of Habeas Corpus* dated 11/4/2016, Vol. I, Doc 4). This is not the Amended Writ of Habeas Corpus the dismissal of which is the subject of this appeal. On November 16, 2016, Defendants filed a Motion to Dismiss the November 4, 2016 Amended Writ of Habeas Corpus. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 11/16/2016, Vol. I, Doc 10, at 10). The motion was fully briefed, and at the conclusion of a hearing on March 30, 2017 the court granted Defendants' motion,

dismissed the Amended Writ of Habeas Corpus without prejudice, and granted Plaintiffs leave to file a second amended pleading. (*Minute Entry* dated 3/30/2017, Vol. II, Doc 34, at 4).

Plaintiffs Gardner and Kozlowicz, along with Plaintiffs Oviatt and Swain, filed a second Amended Writ of Habeas Corpus on April 14, 2017. (*Amended Writ of Habeas Corpus* dated 4/14/2017, Vol. II, Doc 35, at 6). Ms. Jenkins withdrew from the case was not a party to the April 14, 2017 pleading. On April 28, 2017, Defendants filed a Motion to Dismiss Amended Writ of Habeas Corpus requesting dismissal of the April 14, 2017 Amended Writ of Habeas Corpus on the ground that the court lacked subject matter jurisdiction because Plaintiffs had not exhausted their tribal remedies, Plaintiffs' claim of detention was moot, and Plaintiffs had failed to establish federal question jurisdiction. Defendants also moved to dismiss on the ground that Plaintiffs had failed to state a claim upon which relief could be granted. (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 30). In response, Plaintiffs filed two documents, Indian Plaintiffs Reply Memorandum in Opposition to Defendants Tribal Officials Motion to Dismiss, filed May 2, 2017 (*Indian Plaintiffs Reply Memorandum in Opposition to Defendants Tribal Officials Motion to Dismiss* dated 5/2/2017, Vol. II, Doc 38), and Indian Plaintiff's Reply Motion in Opposition to Defendant Ute Tribal Officials Motion to

Dismiss, also filed May 2, 2017 (*Indian Plaintiff's Reply Motion in Opposition to Defendant Ute Tribal Officials Motion to Dismiss* dated 5/2/2017, Vol. II, Doc 39). On May 18, 2017, Defendants filed a reply in support of their motion. (*Reply in Support of Motion to Dismiss Amended Writ of Habeas Corpus* dated 5/18/2017, Vol. II, Doc 42). The district court held a hearing on the motion on July 18, 2017, at the conclusion of which it granted Defendants' motion to dismiss and dismissed the case with prejudice. The court's ruling is reflected in the court's Minute Order, dated July 18, 2017. (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42). The court then entered its Judgment in favor of Defendants and against Plaintiffs on July 19, 2017. (*Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44).

Rulings Presented for Review

Plaintiffs have appealed from the Minute Order and Judgment. (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42; *Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44).

SUMMARY OF THE ARGUMENT

Plaintiffs' appeal should be dismissed because their brief includes no references to the record and violates the rules of appellate procedure in numerous other ways. This is more than a technical deficiency. By failing to refer to the

record, Plaintiffs have failed to establish factual evidence of their having been detained which is an essential requirement for the habeas corpus relief they seek.

The judgment of the district court should also be affirmed on the merits. Plaintiffs seek a writ of habeas corpus pursuant to 25 U.S.C. § 1303. A federal court has no jurisdiction to hear a petitioner's petition for habeas corpus relief under section 1303 unless the petitioner is (1) in custody and (2) has exhausted all tribal remedies. *E.g., Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 2:12-CV-497 BSJ, 2013 U.S. Dist. LEXIS 49175, at *6 (D. Utah Apr. 4, 2013). Here, Plaintiffs satisfy neither of the requirements. Plaintiffs have available tribal remedies, including appeal to the Ute Indian Appellate Court, but have failed to exhaust their remedies.

Additionally, Plaintiffs have offered no evidence of their ever having been in custody; but even accepting as true Plaintiffs' vague allusions to their purported arrests, and overlooking the lack of evidentiary citations to support that claim, Plaintiffs do not dispute that they are no longer being detained. Their claim of detention is therefore moot.

Plaintiffs also claim federal question jurisdiction based upon their claim that Defendants violated their rights under the First and Fourth Amendments to the United States Constitution. That claim fails to establish subject matter jurisdiction,

however, because the constitutional claims do not apply against tribal governments and officials.

Plaintiffs' appeal should also be rejected pursuant to Fed. R. Civ. P. 12(b)(6) because they have failed to give fair notice of what their claim is and the grounds upon which it rests. They have also failed to state a claim that is plausible on its face because Plaintiffs have failed to allege circumstances constituting any ongoing detention. Moreover, Plaintiffs have failed to state a claim under the First and Fourth Amendments of the United States Constitution, because the Bill of Rights is inapplicable to Indian tribes and their officials.

Finally, Plaintiffs' arguments that their claims are ripe and do not involve political questions are spurious because Defendants did not move for dismissal on those grounds and the case was not dismissed on those grounds.

The judgment should therefore be affirmed.

ARGUMENT

I. The Appeal Should Be Dismissed Because Plaintiffs' Brief Includes No References to the Record and Otherwise Violates the Appellate Rules.

Standard of Review

The decision whether to dismiss an appellant's brief where it fails to abide by the rules of appellate procedure is within this Court's discretion. *MacArthur v. San Juan Cty.*, 495 F.3d 1157, 1161 (10th Cir. 2007).

Argument

This Court has held that, "It is indisputably within our power as a court to dismiss an appeal when the appellant has failed to abide by the rules of appellate procedure …." *MacArthur v. San Juan Cty.*, 495 F.3d 1157, 1161 (10th Cir. 2007). Here, Plaintiffs' brief violates numerous rules. Fed. R. App. P. 28(a)(6) requires the following:

> *Appellant's brief.* The appellant's brief must contain, under appropriate headings and in the order indicated:
>
> …
>
> (6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (Rule 28(e)).

Plaintiffs' Statement of the Case (*Appellants' Opening Brief* at 3-13) fails to include a statement of the relevant facts with references to the record. It contains, instead, Plaintiffs' arguments and their interpretations of the cases they cite. A court may dismiss an appeal when an appellant's brief does not include a statement of facts. *Slack v. St. Louis Cty. Gov't*, 919 F.2d 98, 99 (8th Cir. 1990) (appeal dismissed where brief contained no recitation of facts and otherwise violated appellate rules). The *Slack* court explained that "the facts underlying the substantive legal claims [are] facts which this court needs to decide the case properly." *Id.* (brackets added). The court went on to agree with the Ninth Circuit that:

> Appellate rules governing the form of briefs do not exist merely to serve the whimsy of appellate judges. Some of the requirements, such as what should be included in the statement of the case, are essential for the proper disposition of an appeal.

Id. (quoting *Hamblen v. Cty. of Los Angeles*, 803 F.2d 462, 464 (9th Cir. 1986)).

Plaintiffs also fail to describe the relevant procedural history or identify the rulings presented for review. Additionally, their arguments do not include "citations to … the parts of the record on which the appellant relies". Fed. R. App. P. 28(a)(8)(A). Plaintiffs have also ignored the requirement that, "[f]or each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on." 10th Cir. Rule 28.2(C)(2).

Defendants recognize that Plaintiffs are pro se litigants. This Court has repeatedly held that pro se parties are nevertheless required to follow the procedural rules.

> Although a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants. Thus, although we make some allowances for the pro se plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements, the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record.

Garrett v. Selby, Connor, Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (internal citations, quotation marks, and brackets omitted); *see also Baer v. Salt*

Lake City Corp., No. 16-4186, 2017 U.S. App. LEXIS 14892, at *6-7 (10th Cir. Aug. 11, 2017) (unpublished) ("[T]here are limits to our solicitous interpretation of a pro se litigant's filings."); *Banks v. Hickenlooper*, No. 16-1466, 2017 U.S. App. LEXIS 14134, at *1-2 (10th Cir. Aug. 2, 2017) (unpublished) ("[W]e cannot serve as Banks' attorney by constructing arguments and searching the record.").

Plaintiffs' failure to cite the record is fatal in the present case. They have provided no references to the record establishing evidence of their having been detained which, as discussed below, is a requirement for the habeas corpus relief they seek. Plaintiffs have left it to the Court to search the record for such evidence. The Court should decline to serve the role as advocate for Plaintiffs and should dismiss the appeal.

II. The District Court Properly Granted Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim, and the Judgment Should Be Affirmed.

Plaintiffs' Amended Writ of Habeas Corpus ("Amended Writ"), alleges one claim for relief arising under both the Indian Civil Rights Act ("ICRA") and the First Amendment of the United States Constitution, and two claims for relief under both the ICRA and the Fourth Amendment of the United States Constitution. (*Amended Writ of Habeas Corpus* dated 4/14/2017, Vol. II, Doc 35, at 6). Plaintiffs also refer to the Indian Child Welfare Act ("ICWA"), but set forth no allegations giving rise

to a claim for relief under that act. (*Id.* at 13-14). Similarly, Plaintiffs appear to allege "hostile work environment" and "retaliation" in employment, but fail to provide any factual support forming a basis for those allegations. (*Id.* at 14). Plaintiffs do not refer to their allegations under ICWA or employment law in their Claims for Relief. (*Id.* at 20). Their claims are therefore based entirely upon the ICRA and the First and Fourth Amendments of the United States Constitution.

Defendants moved the district court to dismiss the Amended Writ for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) based on Plaintiffs' failure to exhaust tribal remedies, lack of standing, and lack of a federal question. Defendants also asked the court to dismiss the Amended Writ for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). (*Motion to Dismiss Am. Writ of Habeas Corpus* dated 8/30/2017, Vol. II, Doc 37, at 30). The district court granted Defendants' motion and dismissed the case with prejudice. (*Minute Order* dated 7/18/2017, Vol II, Doc 56, at 42; *Judgment* dated 7/19/2017, Vol. II, Doc 57, at 44). For the reasons set forth below, the Judgment should be affirmed.

A. The District Court Lacks Subject Matter Jurisdiction, and the Amended Writ Was Therefore Properly Dismissed Pursuant to Fed. R. Civ. P. 12(b)(1).

Standard of Review

"Dismissal for lack of subject matter jurisdiction is reviewed *de novo*, applying the same standard used by the district court." *U.S. ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1278 (10th Cir. 2001). "We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001).

Argument

A motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges a court's subject matter jurisdiction. If a court determines that it lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3). "Because the jurisdiction of federal courts is limited, there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Marcus v. Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999) (internal quotation marks omitted). Plaintiffs thus bear the burden of proving subject matter jurisdiction here. *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Plaintiffs have failed to establish subject matter

jurisdiction, however, because they have failed to (1) exhaust their tribal remedies, (2) establish standing, and (3) establish federal question jurisdiction.

1. Plaintiffs Have Not Exhausted their Tribal Remedies.

Standard of Review

This Court's review of the district court's exhaustion decision is de novo. *Valenzuela v. Silversmith*, 699 F.3d 1199, 1205 (10th Cir. 2012). "We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001).

Argument

"[P]roper respect for tribal legal institutions requires that they be given a full opportunity to consider the issues before them and to rectify any errors." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (internal citations omitted). "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id.* at 17 "Congress is committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985). Tribal remedies must ordinarily be exhausted before a claim is asserted in federal court under the Indian Civil Rights Act. *LaVallie v. Turtle Mt. Tribal*

Court, No. 4:06-cv-077, 2006 U.S. Dist. LEXIS 87347, at *9 (D.N.D. Dec. 1, 2006) (citing *Necklace v. Tribal Court of Three Affiliated Tribes*, 554 F.2d 845, 846 (8th Cir. 1977)).

The *Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation* ("Constitution") vests the Tribe's Business Committee with the power "[t]o promulgate and enforce ordinances … providing for the maintenance of law and order and the administration of justice by establishing a Reservation Indian Court and defining its duties and powers." *Constitution*, art. VI, Section 1(k). Pursuant to this authority, the Business Committee adopted a Law and Order Code that established a Ute Indian Appellate Court "to handle all appeals from the Tribe Juvenile Court and Tribal Court." *Ute Law and Order Code*, 1-3-1, as amended by Ordinance 13-010.[2]

Plaintiffs have made it unclear whether there are any tribal court orders that are the subject of this case. Plaintiffs' Statement of the Issue identifies the sole issue on appeal as, "Whether Indian Plaintiff's [sic] case being removed from Ute Tribal court have presents [sic] the controversy under Article III of the United States Constitution …." (*Appellants' Opening Brief* at 3). This language suggests that

[2] Defendants ask that this Court take judicial notice of the Ute Constitution and the Ute Law and Order Code which available online at the Native Indian Law Library, http://www.narf.org/nill/codes/ute_uintah_ouray/t1.pdf (last visited on 10/1/17).

Plaintiffs are seeking relief based on the "removal" of a case from Ute Tribal court. Plaintiffs do not, however, identify the purported case anywhere in the record or discuss it elsewhere in their brief. For that reason, even assuming Plaintiffs intended to raise that issue, the Court should treat it as having been waived. "We do not consider merely including an issue within a list to be adequate briefing. Issues will be deemed waived if they are not adequately briefed." *Garrett v. Selby, Connor, Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002)) (internal citations and quotation marks omitted).

Additionally, even if Plaintiffs have had a case dismissed by the Ute Tribal Court, the Plaintiffs must exhaust their rights of appeal in tribal court before seeking relief in federal court. "The tribal exhaustion rule 'provides that, absent exceptional circumstances, federal courts typically should abstain from hearing cases that challenge tribal court [authority] until tribal court remedies, including tribal appellate review, are exhausted.'" *Valenzuela v. Silversmith*, 699 F.3d 1199, 1206 (10th Cir. 2012) (quoting *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011)). "Under the tribal exhaustion rule, '[u]ntil petitioners have exhausted the remedies available to them in the Tribal Court system, it [is] premature for a federal court to consider any relief.' *Nat'l Farmers*, 471 U.S. at 857 (citation

omitted); *see Superior Oil Co. v. United States*, 798 F.2d 1324, 1329 (10th Cir. 1986) ('[A]ll available tribal court remedies must first be exhausted.')." *Id.* at 1207. "Thus, before filing his § 1303 petition, Mr. Valenzuela was required to exhaust the Nation's available habeas relief to allow the tribal court 'a full opportunity . . . to rectify any errors it may have made.' *Nat'l Farmers*, 471 U.S. at 857." *Id*. at 1207-08 (affirming dismissal of 25 U.S.C. § 1303 petition where the petitioner had not exhausted tribal remedies).

Plaintiffs mention the tribal exhaustion issue in their Summary of the Argument (*Appellants' Opening Brief* at 13-14) where they also cite *Burrell v. Armijo*, 456 F.3d 1159 (10th 2006), a case providing certain exceptions to the requirement that plaintiffs exhaust tribal court remedies before turning to federal court. Plaintiffs also say, without elaboration or explanation, that "[t]he Ute tribal exhaustion are in bad faith". (*Appellants' Opening Brief* at 13). Plaintiffs do not, however, address this contention in the Argument section of their brief. An appellant's brief must include "the argument, which must contain: appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." *Garrett*, at 840-41 (citing Fed. R. App. P. 28). "Under Rule 28, which applies equally to pro se litigants, a brief must contain more than a generalized assertion of error, with citations to supporting authority."

Id. at 841 (internal quotation marks and ellipsis omitted). "When a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research." *Id*. (internal quotation marks omitted). Defendants are in the same position as the Court. Without an explanation of Plaintiffs' position with references to the record, Defendants are unable to respond. This Court should therefore deem Plaintiffs' argument waived and refuse to consider it.

2. Plaintiffs Lack Standing to Seek Habeas Corpus Relief Because even if Their Unsupported Claim of Detention Is Assumed to Be True, the Issue Is Now Moot.

Standard of Review

An appellate court reviews issues of standing de novo. *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003). An appellate court also reviews questions of mootness de novo. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). "We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001).

Argument

Although Plaintiffs do not discuss the Indian Civil Rights Act ("ICRA") in their Argument, they refer to it in their Statement of Jurisdiction and Statement of the Case. (*Appellants' Opening Brief* at 2, 4). Plaintiffs have only one avenue to seek relief in federal court under the ICRA, and that is by filing a petition for writ of habeas corpus pursuant to 25 U.S.C. § 1303. *Valenzuela v. Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012) (citing *White v. Pueblo of San Juan*, 728 F.2d 1307, 1311 (10th Cir. 1984) ("The only remedy in federal courts expressly authorized by Congress in the ICRA is a writ of habeas corpus.")). "Section 1303 states: 'The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.'" *Valenzuela*, at 1203. This Court has recognized that the "detention" language in § 1303 is analogous to the "in custody" requirement contained in the other federal habeas statutes. *Id.*

> Thus, federal court jurisdiction of a § 1303 habeas petition is only proper when the petitioner is somehow held "in custody." *Jeffredo,* 599 F.3d at 918 (citing *Moore*, 270 F.3d at 791); *see also Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 714 (2d Cir. 1998) ("Habeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and permanent banishment"). As precedent demonstrates, a writ of habeas corpus is a measure reserved for only the most severe restraints on individual liberty—restraints that amount to some form of detention. *Hensley v. Mun. Court, San Jose Milpitas Judicial*

> *Dist., Santa Clara County, California*, 411 U.S. 345, 351, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973).
>
> This concept of custody for habeas corpus proceedings is not coextensive with a denial of an individual's liberty interest under the Fourteenth Amendment—or under § 1302(8). Rather, the custody required in habeas corpus proceedings is actual, physical custody or a substitute for such custody, such as release on bond. *See Lawrence v. 48th Dist. Court*, 560 F.3d 475, 480 (6th Cir. 2009).

Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation, No. 2:12-CV-497 BSJ, 2013 U.S. Dist. LEXIS 49175, at *7-9 (D. Utah Apr. 4, 2013) (denying petition by the same Plaintiffs Gardner and Kozlowicz for habeas corpus relief under 25 U.S.C. § 1303 where they failed to satisfy the "in custody" requirement).

At some points in their brief, Plaintiffs seem to allege that they have been arrested. For example, they state that, "The authority over Indian's [sic] who commit crimes on Indian Reservation, resulting in the arrest and criminal prosecution of the Indian Plaintiff's [sic]". (*Appellants' Opening Brief* at 21). Plaintiffs offer no reference to the record to support the allegation, however. When an appellant provides no citations to the record to support its factual assertions, it is within the appellate court's power to refuse to consider an argument. *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1268 (10th Cir. 2008). This Court should reject Plaintiffs' argument on that basis.

Additionally, even assuming that all the Plaintiffs were arrested at some unspecified time and place, Plaintiffs lack standing to request habeas corpus relief because, as demonstrated below, the issue has been rendered moot. Mootness implicates federal subject matter jurisdiction. *Valenzuela*, at 1204. "Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996). Where there does not exist a live case or controversy, the Court "lack[s] jurisdiction to consider claims no matter how meritorious." *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 (10th Cir. 2008).

Plaintiffs do not allege that their arrest or any resulting detention is ongoing. They are no longer in custody, have not been convicted of a crime, and have not alleged any collateral consequences of their alleged detention. (*See Amended Writ of Habeas Corpus* dated 4/12/2017, Vol II, Doc 35, at 6; *see also Appellants' Opening Brief*). But unless there is some "collateral consequence" stemming from Plaintiffs' alleged detention, then Plaintiffs' release from detention renders their Amended Writ moot. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Failure to allege collateral consequences is dispositive, and there exists a presumption of collateral consequences only in cases where the petitioner is challenging the legality of an actual criminal conviction after his sentence has expired. *Id.* Plaintiffs have not

alleged that there was any criminal conviction resulting from their alleged arrest, nor have they alleged any concrete and continuing injury resulting from their alleged arrest that might make the alleged detention continue to be a live case or controversy. Accordingly, any issue of the legality of their alleged arrest is now moot, and Plaintiffs lack standing to raise the claim.

Plaintiffs also appear to allege that their "removal from tribal office and Ute Tribal Court" constitutes a detention for the purpose of habeas corpus review in that it "restricts physical freedom (geographic movement) of Plaintiffs." (*Amended Writ of Habeas Corpus* dated 4/14/2017, Vol. II, Doc 35, at 10). It is unclear whether Plaintiffs are alleging that their movement was restricted by their physical removal from tribal offices or by their removal from some office-holding position. If the former, Plaintiffs have made no allegation showing that this "removal" is ongoing or has led to any collateral consequences. Therefore, to the extent Plaintiffs are alleging that physical removal from tribal offices warrants habeas corpus review, this issue too is moot.

If Plaintiffs are alleging they were detained by being removed from an office-holding position, the argument is likewise without merit. While the existence of a "detention" within the purview of habeas corpus does not necessitate actual incarceration, there must be "severe restraints on individual liberty" before an

alleged detainee may seek habeas relief. The Supreme Court has spoken to this issue:

> The custody requirement of the habeas statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use had been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

Hensley v. Municipal Court, 411 U.S. 345, 351 (1973). Plaintiffs have not alleged severe restraint on individual liberty sufficient to meet this standard.

Plaintiffs contend that even if the case is moot with regard to injunctive relief, the court may still have jurisdiction to grant declaratory relief. (*Appellants' Opening Brief* at 27-28). However, "[d]eclaratory judgment actions must be sustainable under the same mootness criteria that apply to any other lawsuit." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010).

Finally, Plaintiffs discuss the issue of standing briefly and the issue of mootness at some length in their brief. There are, however, two fundamental problems with Plaintiffs' contentions. First, Plaintiffs do not tie their discussion to the facts of this case. This is due primarily to Plaintiffs' failure to set forth a statement of facts and refer to the record as required by Fed. R. App. P. 28(a)(6) and 28(a)(8)(A). Plaintiffs therefore provide no analysis of why the cases they cite have

a bearing on the issues presented here. Second, despite the length of their discussion, Plaintiffs nowhere allege that they are currently in detention. Plaintiffs' discussion of standing and mootness therefore misses the point.

3. Plaintiffs Have Not Established Federal Question Jurisdiction.

Standard of Review

This Court reviews de novo a dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *Butler v. Kempthorne*, 532 F.3d 1108, 1110 (10th Cir. 2008). "We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001).

Argument

Plaintiffs allege claims for relief under the ICRA and the United States Constitution. However, neither of those sources provides a basis for federal question jurisdiction in this case.

First, as discussed above, Plaintiffs have not asserted a colorable basis for habeas corpus relief under the ICRA. The ICRA makes such relief "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. The Tenth Circuit has interpreted the "detention" language to mean the same as the "in custody" requirement contained in

28 U.S.C. § 2241, which requires a showing of "severe restraints on [his or her] individual liberty." *Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1208 (10th Cir. 1999) (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973)); *Valenzuela v. Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012).

In this case, there is no Plaintiff in custody at the hands of any Defendant. The only alleged actions by Plaintiffs that might have given rise to a "detention" sufficient to trigger a right to obtain habeas corpus review are the alleged arrest and the alleged physical removal from tribal offices. As discussed above, however, claims based on those allegations are now moot because Plaintiffs do not allege they are currently in custody. Therefore, the court lacks jurisdiction over Plaintiffs' request for habeas corpus relief and no federal question jurisdiction is created on that basis.

Plaintiffs have also failed to establish federal question jurisdiction under their claims under the First and Fourth Amendments to the Unites States Constitution because such constitutional claims are inapplicable against tribal governments and officials. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) ("The Bill of Rights does not apply to Indian Tribes."); *U.S. v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011) ("Because the Bill of Rights does not constrain Indian tribes…prior uncounseled tribal convictions could not violate

the Sixth Amendment. Although a tribal prosecution may not *conform* to the requirements of the Bill of Rights, deviation from the Constitution does not render the resulting conviction constitutionally *infirm*.") (emphasis in original). Because the Bill of Rights does not apply to Indian tribes, Plaintiffs' claims arising under the First and Fourth Amendments provide an insufficient basis for federal question jurisdiction.

Plaintiffs do not address any of these points in their brief, and their claims should be dismissed for lack of subject matter jurisdiction.

B. Plaintiffs Have Failed to State a Claim upon Which Relief Can Be Granted, Warranting Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6).

Standard of Review

"This Court's standard of review for an order granting a motion to dismiss for failure to state a claim is *de novo*." *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1551 (10th Cir. 1992). "We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001).

Argument

"A motion to dismiss under Rule 12(b) admits all well-pleaded facts in the complaint as distinguished from conclusory allegations." *Smith v. Plati*, 258 F.3d

1167, 1174 (10th Cir. 2001) (internal quotation marks omitted); *see also Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 870 (10th Cir. 1992). A court should dismiss a cause of action for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *See Poole v. County of Otero*, 271 F.3d 955, 957 (10th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). To withstand a motion to dismiss, a complaint must have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Additionally, a plaintiff is required to give the defendant "fair notice of what the … claim is and the grounds upon which it rests." *Id*. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "The burden is on the plaintiff to frame a complaint with enough factual matter (taken as true) to suggest that he or she is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (internal quotation marks omitted).

Plaintiffs have failed to give fair notice of what the claim is and the grounds upon which it rests as required by *Twombly*. Plaintiffs make only vague and conclusory allegations of unlawful conduct on the part of the Defendants with no allegations whatsoever detailing the nature of this conduct, the time this conduct took place, the factual circumstances surrounding this conduct, or the role that each Defendant allegedly played in the alleged conduct. (*Amended Writ of Habeas*

Corpus dated 4/14/2017, Vol. II, Doc 35, at 6). Defendants are left attempting to decode a barrage of incoherent allegations. Plaintiffs have therefore failed to set forth factual allegations providing fair notice of the grounds upon which their claims for relief rest.

In addition, Plaintiffs have failed to state a claim that is "plausible on its face" because, for reasons explained above, Plaintiffs have failed to allege circumstances constituting any ongoing detention or custody, as is prerequisite to obtaining habeas corpus relief. Moreover, Plaintiffs have failed to state a claim under the First and Fourth Amendments of the Constitution because the Bill of Rights is inapplicable to Indian tribes. *Plains Commerce Bank*, 554 U.S. at 337.

Plaintiffs have not addressed this argument in their brief, and their claims should be dismissed.

III. Plaintiffs' Ripeness and Political Question Arguments Are Inapposite Because Defendants Did Not Move to Dismiss Plaintiffs' Case on Those Grounds and the Case Was Not Dismissed on Those Grounds.

Plaintiffs devote much of their brief to a discussion of why they believe their case should not have been dismissed on grounds of ripeness or on the ground that it involves a political question. For example, they contend that the Defendants are attempting "to cast the Indian Plaintiff's [sic] case as one that presents the political question and thus non-justifiable under case or controversy." (*Appellants' Opening*

Brief at 24). Plaintiffs point to nothing in the record, however, and there is nothing in the record suggesting that those issues were raised before the district court or that the district court dismissed the case under either of those doctrines. Plaintiffs' discussion of those issues is therefore inapposite.

CONCLUSION

For the reasons set forth above, the Judgment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Defendants do not believe that oral argument would materially assist the Court in deciding the appeal.

Respectfully submitted,

J. PRESTON STIEFF LAW OFFICES

/s/ J. Preston Stieff

J. Preston Stieff
110 South Regent Street, Ste. 200
Salt Lake City, Utah 84111
(801) 366-6002
jps@StieffLaw.com

Attorney for Defendants/Appellees
(Digital)

CERTIFICATE OF COMPLIANCE

Section 1. Word Count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,923 words.

Complete one of the following:

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/s/ J. Preston Stieff
J. Preston Stieff
Attorney for Defendants/Appellees
(Digital)

CERTIFICATE OF DIGIAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLEES' 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 McAffee AntiVirus Plus version 16.0.3 (2017), McAffeee VirusScan version 20.3, last updated 4/19/2017, and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

/s/ J. Preston Stieff
J. Preston Stieff (Digital)

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2017, a copy of the foregoing **APPELLEES' BRIEF** was sent via U.S. first class mail, postage prepaid, to the following:

Edson Gardner
Lynda Kozlowicz
Konna Oviatt
Athenya Swain
P.O. Box 472
Fort Duchesne, UT 84026

/s/ J. Preston Stieff
J. Preston Stieff (Digital)

ATTACHMENT INDEX

ATTACHMENT A

Minute Order
Doc. 56

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MIME-Version:1.0
From:utd_enotice@utd.uscourts.gov
To:ecf_notice@localhost.localdomain
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--Case Participants: J. Preston Stieff (jps@stiefflaw.com, office@stiefflaw.com), Judge
Robert J. Shelby (anneliese_booher@utd.uscourts.gov, erin_stjohn@utd.uscourts.gov,
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Case Name:	Jenkins et al v. Reynolds et al
Case Number:	2:16-cv-01008-RJS
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Document Number:	56(No document attached)

Docket Text:

Minute Order. Proceedings held before Judge Robert J. Shelby: Motion Hearing held on 7/18/2017, re: [37] MOTION to Dismiss *Motion to Dismiss Amended Writ of Habeas Corpus* filed by Cummings J. Vanerhoop, Edred Secakuku, Bruce Ignacio, Shaun Chapoose, Ronald Wopsock, Tony Small, William Reynolds, Cleve Hatch. The court hears oral argument. Mr. Edson Gardner hands the court a Tenth Circuit case to consider. The court takes a brief recess. Court resumes session and issues an oral ruling. The court GRANTS WITH PREJUDICE docket entry [37] Motion to Dismiss. The case is ordered DISMISSED WITH PREJUDICE. The court orders the case closed and informs the parties they have 30 days to file an appeal, if they wish to do so. Written Order to follow oral order: No. Appearing as Pro Se Plaintiffs: Edson Gardner, Lynda Kozlowicz, Konna Oviatt; Attorney for Defendant J. Preston Stieff. Court Reporter: Kelly Hicken. (mjm)

2:16-cv-01008-RJS Notice has been electronically mailed to:

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ATTACHMENT B

Judgment
Doc. 57

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

EDSON GARDNER, et al, Plaintiffs, v. WILLIAM REYNOLDS, in his official capacity as Judge of the Ute Trial Court, et al, Defendants.	**JUDGMENT** Case No. 2:16-cv-1008-RJS Judge Robert J. Shelby

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiffs.

SO ORDERED this 19th day of July, 2017.

BY THE COURT:

ROBERT J. SHELBY
United States District Judge