TYSON M. LIES
VICTORIA L. FRANCIS
Assistant U.S. Attorneys
U.S. Attorney's Office
2601 2nd Ave. N., Suite 3200
Billings, MT 59101
Phone: (406) 247-4632 – Tyson
Phone: (406) 247-4633 – Victoria
Email: Tyson.lies@usdoj.gov
Email: victoria.francis@usdoj.gov

ATTORNEYS FOR DEFENDANT
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JAMES LEACHMAN and SETH LEACHMAN, **Plaintiff,** **vs.** **UNITED STATES OF AMERICA,** **Defendant.**	**CV 19-82-GF-BMM** **BRIEF IN SUPPORT OF MOTION TO DISMISS**

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Plaintiffs filed a Complaint against the United States asserting as a basis for subject matter jurisdiction 42 U.S.C. § 1983, 28 U.S.C. § § 1331 and 1346. (Doc. 1, p. 1, ¶ 2) Plaintiffs seek compensatory damages, attorney fees, and costs and expenses of suit. Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction, no waiver of sovereign immunity, statute of limitations and failure to state a claim.

FACTS AS ALLEGED IN THE COMPLAINT

The facts as alleged in the Complaint assert that Plaintiff Seth Leachman is a citizen of the State of Washington and Plaintiff James Leachman is a citizen of the State of Montana. (Doc. 1, ¶ ¶ 4, 5) Plaintiffs allege that in early 2012 they entered into an oral contract with James Holen and Richard Holen for the Holens to provide daily care and maintenance of 62 horses owned by the Leachmans on the Holens' property on the Fort Peck Indian Reservation. (*Id.* at ¶ 7) James Holen is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. (*Id.* at ¶ 8) Plaintiffs allege that in June 2012, the Holens transported 66 additional horses owned by the Leachmans to the Holens' property on the Fort Peck Indian Reservation from a location off the reservation without notifying the Leachmans. (*Id.* at 9)

On June 19, 2012, the Holens sued the Leachmans in Fort Peck Tribal Court

alleging breach of contract and other claims and the Tribal Court issued a series of rulings in favor of the Holens. (*Id.* at ¶ ¶ 10, 11)

Plaintiffs allege in the Complaint that they appealed the Tribal Court rulings to the Fort Peck Tribal Court of Appeals. (*Id.* at ¶ 12) Plaintiffs' attach to their Complaint as Exhibit 1 the ruling issued by the Fort Peck Tribal Court of Appeals, wherein Plaintiffs allege the Tribal Appellate Court found that Plaintiffs' rights to due process and equal protection had been violated by the Fort Peck Tribal Court. (*Id.* ¶ 13, and Exh. 1, Doc. 1-1)

The Fort Peck Appellate Court set forth in its statement regarding "Background," that on April 2, 2013, Lay Advocate Mary G. Cleland filed a notice of appearance in Tribal Court on behalf of James and Seth Leachman. On that same date a Motion to Vacate Writ of Execution was filed along with a brief in support. Plaintiffs' asserted that the Fort Peck Tribal Court should vacate its writ of execution under 42 U.S.C. § 1983, violations of the Fifth and Fourteenth Amendment of the U.S. Constitution, that the Tribal Court did not have jurisdiction over violations of the Montana Code Annotated, that Holens had removed Plaintiffs' horses from a feedlot without first obtaining Plaintiffs' consent, and numerous abuses of discretion by the Fort Peck Tribal Court. (Doc. 1-1, p. 8-9, ¶ 23.) Plaintiffs also filed two affidavits in Tribal Court on April 2, 2013,

showing Plaintiffs were aware of the allegations of wrongdoing asserted in their Complaint (Doc. 1) in April of 2013. (Doc. 1-1, ¶ ¶ 24, 25) Leachmans further filed motions to stay a writ of execution pending appeal on May 2, 2013 seeking to prevent the sale of horses unlawfully taken. (Doc. 1-1, ¶ 33) Leachmans sought $5 Million in damages from the Fort Peck Appellate Court in May 9, 2013 and return of their horses. (Doc. 1-1, ¶ 35)

Plaintiffs allege that they filed a Federal Tort Claims Act claim on April 18, 2019, and that it was received by the Department of Interior on April 22, 2019. (Doc. 1, ¶ 6).

Plaintiffs allege the Tribal Court of Appeals ruled on May 10, 2017, and found that the Tribal Court had jurisdiction, but further found that Holens were required to return the Leachmans' horses or pay the Leachmans for the value of the horses. (Doc. 1, ¶ ¶ 13, 14, 15) Plaintiffs assert that the Holens sold many of Leachmans' horses from 2012 to 2017 and that Holens have not returned horses or compensated Leachmans for the value of the horses. (Doc. 1, ¶ ¶ 16, 17)

Plaintiffs' finally allege that the Tribal Court of Appeals ruled the Tribal Court violated Leachmans' rights to due process and equal protection (Doc. 1, ¶ 18), and assert that this violation caused Leachmans to lose control and management of the horses they owned and that they have suffered damages due to

the violations of due process and equal protection. (Doc. 1, ¶ ¶ 19, 22).

ARGUMENT

Plaintiffs' Complaint names the United States as the Defendant. Plaintiffs' Complaint should be dismissed against the United States for lack of subject matter jurisdiction because (A) Plaintiffs fail to invoke a valid waiver of sovereign immunity for the allegations made in the Complaint against the United States and (B) no subject matter jurisdiction exists in federal court to assert claims against the sovereignty of the Fort Peck Tribe. Plaintiffs' claims should similarly be dismissed for failure to state a claim because (A) Plaintiffs allege no act by a government employee that could form the basis for a claim under the Federal Tort Claims Act (FTCA); (B) in any event, Plaintiffs' claims are untimely under FTCA's statute of limitations; (C) Plaintiffs' claims are barred by judicial immunity; (D) Plaintiffs' fail to allege any private party analog as required under the FTCA; and (E) to the extent Plaintiffs assert claims for malicious prosecution, abuse of process, misrepresentation, deceit, or interference with contract rights, those claims are barred by 28 U.S.C. § 2680(h). This Complaint should therefore be dismissed for all of the reasons set forth below.

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I. The Complaint Should Be Dismissed for Lack of Subject-Matter Jurisdiction.

A. Plaintiffs Allege no Viable Waiver of Sovereign Immunity to Assert Claims Against the United States.

It is well settled that the United States, as a sovereign entity, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). Thus, suit against the United States can only be entertained when Congress has specifically waived the United States' immunity. *See id*. Furthermore, such waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. *See Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002). "'Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.'" *Harger v. Dep't of Labor*, 569 F.3d 898, 903 (9th Cir. 2009) (quoting *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260, (1999)). Sovereign immunity is jurisdictional in nature. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Therefore, if there is no waiver of sovereign immunity this Court lacks jurisdiction.

1. 28 U.S.C. § 1331 is not a Waiver of Sovereign Immunity.

Plaintiffs assert in paragraph 2 of their complaint that subject matter

jurisdiction exists under 28 U.S.C. § 1331. Section 1331 is not, however, a waiver of sovereign immunity for a suit against the United States. "A mere assertion that general jurisdictional statutes apply does not suffice to confer jurisdiction when, as in this case, the government did not waive its immunity." *Hughes v. United States*, 953 F.2d 531, 539 n. 5 (9th Cir. 1992); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). Section 1331, in and of itself, does not waive the sovereign immunity of the United States. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983). Thus, Plaintiffs must base a suit against the United States on a specific statutory consent to suit. The only other statutes cited as a basis for subject matter jurisdiction in the Complaint are 42 U.S.C. § 1983 and 28 U.S.C. § 1346. Neither provides jurisdiction for this case.

2. No Waiver of Sovereign Immunity to Sue the United States for Violations of the Constitution or Under 42 U.S.C. § § 1983, 1988.

Plaintiffs appear to be trying to base their Complaint on allegations that the Fort Peck Tribal Court violated their "rights to due process and equal protection." (Doc. 1, ¶ 18). This allegation is in the nature of a Constitutional tort. There is no waiver of sovereign immunity, however, to bring a suit against the United States for money damages based on the Constitution. *See Arnsberg v. United States*, 757 F.2d 971, 980 (9th Cir. 1985); *Clemente v. United States*, 766 F.2d 1358, 1363 (9th Cir. 1985); *Birnbaum v. United States*, 588 F.2d 319, 327 (2d Cir.

1978); *Pesnell v. United States*, 64 F. App'x 73, 74-75 (9th Cir. 2003). Such a suit for money damages also cannot be brought against a Federal agency or a Federal officer in his or her official capacity. *F.D.I.C. v. Meyer*, 510 U.S. at 486; *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2000). The United States has not rendered itself liable for a constitutional tort claim. *F.D.I.C. v. Meyer*, 510 U.S. at 478. Thus, the Fifth and Fourteenth Amendments (even assuming the Fourteenth Amendment applied to the United States) are not viable claims because there is no waiver of sovereign immunity for such claims.

Plaintiffs also asserted jurisdiction to bring suit against the United States under 42 U.S.C. § 1983, one of the Civil Rights Acts. Section 1983 does not waive sovereign immunity for suit against the United States. These statutes by their terms do not apply to actions against the United States. *Hohri v. United States*, 782 F.2d 227, 245 n. 43 (D.C. Cir. 1986), vacated on other grounds, 482 U.S. 64; *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) ("It is well established . . . that the United States has not waived its immunity to suit under the provisions of the [Civil Rights Act]"; *Unimex, Inc. v. HUD*, 594 F.2d 1060, 1061 (5th Cir. 1979) (none of the Civil Rights Acts waive sovereign immunity); *Dye v. United States*, 516 F. Supp. 2d 61, 71 (D.D.C. 2007) (42 U.S.C. § 1983 does not "authorize suits challenging actions taken under color of federal

law nor waive the United States' sovereign immunity") (internal citation and quotation marks omitted).

Nor does the 42 U.S.C. § 1983 create a claim that may be asserted against judges acting within their judicial capacities. Judicial or even quasi-judicial immunity is available to federal officers and is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief. *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996) (absolute immunity applied to bar suit based on allegations that judge violated due process and civil conspiracy in his conduct regarding defendant's bond); s*ee also Adkins v. Underwood*, 370 F. Supp. 510, 513-14 (N.D. Ill. 1974). A judge of whatever status in judicial hierarchy, is immune from suit for damages for any act performed in his or her judicial role. *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982) (judicial immunity barred claims based on fourteenth amendment and § 1983 brought against justice of the peace based on the issuance of an arrest warrant, but not dismissed for JP pursuing plaintiffs in his personal vehicle); *Harris v. Missouri Court of Appeals*, 787 F.2d 427, 429 (8th Cir. 1986) (affirming dismissal of § 1983 claim based on judicial immunity). Judges of courts of general jurisdiction are not liable in civil damages under § 1983 for judicial acts, even when such acts are alleged to have been done maliciously or corruptly. *Ross v. Arnold*, 575 F. Supp.

1494, 1495-96 (E.D. Wis. 1983). Finally, judicial immunity was not abrogated by passage of 42 U.S.C. § 1983. *Wiggins v. Hess*, 531 F.2d 920, 921 (8th Cir. 1976); *Blouin v. Dembitz*, 489 F.2d 488, 491 (2d Cir. 1973); *Byrne v. Kysar*, 347 F.2d 734, 736 (7th Cir. 1965).

Plaintiffs are also not entitled to attorney fees under 42 U.S.C. § 1988 as they claim in their prayer for relief (Doc. 1, p. 4, ¶ 2), because there is no waiver of sovereign immunity as to such fees against the United States. *See National Advancement of Colored People v. Civiletti*, 609 F.2d 514, 520-21 (D.C. Cir. 1979).

Therefore, no subject matter jurisdiction exists under 42 U.S.C. § 1983, to bring claims against the United States, or frankly to amend and seek to name the Tribal judge.

B. No subject Matter Jurisdiction Exists in Federal Court Due to Sovereignty of the Tribe.

Plaintiffs assert that the Tribal Court's actions have deprived them of their rights to equal protection and due process. (Doc. 1, ¶ 18) This argument ignores one of the most basic tenets of American constitutional law. Many important prohibitions, including the Bill of Rights of the United States Constitution, are limitations only on the power of the Federal Government. Other provisions limit the activities of state governments only, or of the Federal and State government,

yet are inapplicable to Indian tribes, which are not creatures of either the Federal or State governments. Most importantly, the provisions of the United States Constitution protecting personal liberty and property rights do not apply to Tribal actions. *See Talton v.* Mayes, 163 U.S. 376, 382-385 (1896); *see Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553, 556-57 (8th Cir. 1958), *cert. denied*, 358 U.S. 932, (1959) (court rejected claim that Fifth and Fourteenth Amendments applied to Indian tribes because tribes are not states and the amendments have no application to tribal legislation) .

As a result, no action under 42 U.S.C. § 1983 can be maintained in Federal court for persons alleging deprivation of Constitutional rights under color of Tribal law. Indian tribes are separate and distinct sovereignties, and are not constrained by the provisions of the Fourteenth Amendment. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *see United States v. Wheeler*, 435 U.S. 313, 331 (1978); *see Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967); *see Talton v. Mayes*, 163 U.S. 376 (1896); *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 919 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958). Where the United States Constitution levies particular restraints upon Federal courts or upon Congress, these restraints do not apply to the courts or legislatures of the Indian Tribes. *United States v. Seneca Nation of New York*

Indians, 274 F. 946 (D.C.W.D.N.Y. 1921).

As one of the purposes of 42 U.S.C. § 1983 is to enforce the provisions of the Fourteenth Amendment, it follows that actions taken under color of Tribal law are beyond the reach of § 1983, and may only be examined in Federal court under the provisions of the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341. *Monroe v. Pape*, 365 U.S. 167, 171 (1961); *Thompson v. New York*, 487 F. Supp. 212, 220 (N.D.N.Y. 1979). And while 25 U.S.C. § 1302(8), provides that no Indian tribe in exercising powers of self-government shall deprive any person of liberty or property without due process of law, Federal courts have recognized that the *Santa Clara Pueblo* holding "foreclosed any reading of the [Act] as authority for bringing civil actions in federal court to request ... forms of relief." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983); *accord Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278–79 (9th Cir. 1981); *Trans–Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 477 (9th Cir. 1980). ICRA may be enforced in Federal court only in criminal cases, and only then through a writ of habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at 61-68.

1. The Fort Peck Tribal Court and the Fort Peck Court of Appeals Decisions were Made Under the Color of Tribal Law

The Fort Peck Court of Appeals decision reversing the Fort Peck Tribal

Court was made under the color of tribal law and the Federal District Court lacks jurisdiction over the matter. In its May 9, 2017, decision attached to the Complaint (Doc. 1-1) the Fort Peck Court of Appeals clearly states that it has jurisdiction to review all final orders from the Fort Peck Tribal Court under the Fort Peck Tribe's Comprehensive Code of Justice (CCOJ), more specifically 2 CCOJ § 202. (Doc. 1-1, p. 15, ¶ 41) The Fort Peck Court of Appeals held that it had jurisdiction over the non-Indian Leachmans because they entered into a consensual commercial relationship with Fort Peck tribal members, Richard and James Holen. (Doc. 1-1, p. 16 - 17,¶ ¶ 44-46) The appellate court established that the contractual relationship between the parties fell within one of the exceptions giving Tribes jurisdiction over non-Indians as described in *Montana v. United States*. (Doc. 1-1, p. 17-18, ¶ 47), *See also Montana v. United States*, 450 U.S. 544, 565 (1981) ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). The appellate court also claims jurisdiction under 2 CCOJ § 107. (Doc. 1-1, p. 17, ¶ 46) Throughout its opinion, the Fort Peck Court of

Appeals makes clear that it used the Fort Peck CCOJ, the Fort Peck Tribal Rules of Civil Procedure, and ICRA as the basis for its decision. (Doc. 1-1, p. 17-25) Moreover, the Fort Peck Tribal courts were created by Article VII, Section 5 of the Constitution and Bylaws of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Constitution and Bylaws of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation art. VII, § 5 (1960) ("To provide, subject to the review of the Secretary of the Interior, or his authorized representative, for the maintenance of law and order and the administration of justice by establishing tribal courts ….").

As stated above, where the United States Constitution levies particular restraints upon Federal courts or upon Congress, these restraints do not apply to the courts or legislatures of the Indian Tribes. *Denny v. Trahart*, 2006 WL 3231283, *2 (D. Mont. 2006). The Tribal Court of Appeals decision was decided under the color of Tribal law and § 1983 does not apply. As a result, this is another reason this case must be dismissed.

Thus, while Plaintiffs may argue they have been deprived of equal protection and due process rights by the Tribal Court's action, they have no jurisdictional basis for asserting these claims in this Court and therefore their claims must be dismissed. In addition, nothing under ICRA waives the sovereign

immunity of the United States which is the named Defendant in this case.

II. Plaintiffs Fail to State a Claim Under the FTCA.

It is not entirely clear if Plaintiffs are seeking to assert a tort claim against the United States. They assert 28 U.S.C. § 1346 as a basis for jurisdiction, but do not assert jurisdiction under § 1346(b) specifically. (Doc. 1, ¶ 2) Plaintiffs do assert that they submitted a claim to the agency under the Federal Tort Claims Act in April of 2019. (Doc. 1, ¶ 6) But Plaintiffs do not allege negligence or other common law torts as a basis for their claim. Even if Plaintiffs are seeking to assert a tort claim, however, such a claim should be dismissed.

A. Plaintiffs Have Failed to Allege a Tort Claim Under the FTCA.

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. (FTCA), waives the United States' sovereign immunity in limited circumstances by providing exclusive federal district court jurisdiction of

> civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (emphasis added).

In this case Plaintiffs have made no allegations regarding any employee of

the United States acting within the course and scope of employment that performed any negligent or wrongful act for which a private person under similar circumstances would be liable. Therefore, Plaintiffs have failed to state a claim under the Federal Tort Claims Act.

B. FTCA Statue of Limitations bars Plaintiffs' tort claims.

The FTCA explicitly bars tort claims that are not timely presented to the Agency: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. 2401(b). Even though the statute states that a claim will be forever barred unless timely filed, the FTCA's statute of limitations is not a jurisdictional bar. *U.S. v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015). Instead, the FTCA's statute of limitations is "a mere claims-processing rule," and the time limits set forth in 28 U.S.C. § 2401(b) are subject to equitable tolling. *Id.* If a claim is filed after the two-year statute of limitations has run, a district court must determine whether the claimant is entitled to equitable tolling. *Id.*

Equitable tolling allows a court to "pause the running of a limitations statute," under "extraordinary circumstances." *Booth v. United States*, 914 F.3d 1199, 1207 (9th Cir. 2019). The Ninth Circuit has held that "[t]o obtain equitable tolling a litigant must establish '(1) that he has been pursuing his rights diligently,

and (2) that some extraordinary circumstances stood in his way.'" *Id.* (quoting *Wong v. Beebe*, 732 F.3d 1030,1052 (9th Cir. 2013), *aff'd* 135 S. Ct. 1625 (2015). The Ninth Circuit went on to further explain these two requirements, stating:

> The first element requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances, and asks whether the plaintiff was "without any fault" in pursuing his claims. The second element requires the litigant to show that extraordinary circumstances were the cause of his untimeliness and … made it impossible to file the document on time. Whether a particular untimely claim may be excused for a particular reason varies with the reason.

Id. (internal citations and quotations omitted). The party seeking equitable tolling has the burden of showing that equitable tolling is warranted. *Id.*

In this case one of the reasons that no claim exists under the FTCA is that the latest judicial decision of which Plaintiffs complain occurred on April 18, 2013, when Tribal Judge Jackson denied Plaintiff's April 2, 2013, Motion to Vacate Writ of Execution. (*See* Doc. 1-1, p. 11, ¶ 29) Plaintiffs filed their administrative claim on April 22, 2019, based on the allegations in their complaint (Doc. 1, ¶ 6), more than six years after the harm allegedly caused by the Tribal court.

In addition, even if the harm is considered to have occurred when the horses were sold by Holens, notice of that sale was provided to the Plaintiffs at the latest on May 3, 2013, when Holens filed a Notice of Sale and Deficiency Judgment with

the Fort Peck tribal court, and on May 9, 2013 Plaintiffs herein filed an Interlocutory Appeal to the Tribal appellate court which acknowledges notice of the harm. (Doc. 1-1, p. 12-13, ¶ ¶ 34-36) Again, this knowledge of harm occurred almost six years prior to Plaintiffs' administrative submission. Plaintiffs clearly had notice of the harm because they appealed the Tribal court's decision. A claim accrues "once a plaintiff becomes aware of her injury and its immediate cause. . . ." *Gallardo v. United States*, 755 F.3d 860, 864 (9th Cir. 2014) (citation omitted).

Therefore, tort claims against the United States, if that is indeed what Plaintiffs seek in their complaint, are barred by the statute of limitations.

C. Tort Claims are Barred by Judicial Immunity

FTCA claims in this case are also barred by judicial immunity. In Montana, judges are immune from suit, otherwise known as judicial immunity. Originally, judicial immunity was recognized under common law. *See Shampagne v. Keplinger*, 78 Mont. 114, 252 P. 803, 805 (1927). ("Having judicially determined that his authority extended over the particular offense, and jurisdiction being prima facie presumed, the defendant is protected in such act, as well as his subsequent judicial acts, against civil liability under the rule of judicial immunity.").

Montana eventually codified the judicial immunity principal. *See* MCA §

2–9–112(2) ("A member, officer, or agent of the judiciary is immune from suit for damages arising from the lawful discharge of an official duty associated with judicial actions of the court."). As recognized by the Montana Supreme Court, "[j]udicial immunity applies with no stated limitation, and judges are absolutely immune from suit for civil damages for acts performed in their judicial capacities." *Hartsoe v. Christopher*, 2013 MT 57, ¶ 12, 369 Mont. 223, 225, 296 P.3d 1186, 1188 (internal citations omitted). The principal behind judicial immunity in Montana, is that it "is a public policy designed to safeguard principles of independent decision making. *Id.*, 2013 MT 57, at ¶ 12.

This same immunity is recognized by the United States Supreme Court, observing: "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. " *Cleavinger v. Saxner*, 474 U.S. 193, 199 (1985) (quoting *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967)); *see also Dennis v. Sparks*, 449 U.S. 24, 27 (1980). The Court in *Cleavinger* summarized the breadth of the immunity, 474 U.S. at 199-200 (citations omitted):

> Such immunity applies "however erroneous the act may have been, and however injurious in its consequences [the judicial act] may have proved to the plaintiff." . . . "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." . . . And in *Stump v. Sparkman*, 435 U.S. 349 (1978), the Court once again enunciated this principle, despite any "informality with which [the judge]

proceeded," and despite any *ex parte* feature of the proceeding.

"A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-57 (citation omitted).

The United States is entitled to judicial immunity in FTCA cases:

> With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2674.

Courts have repeatedly found that the United States is entitled to assert the defense of absolute immunity in FTCA cases or cases for damages under § 1983 related to judicial or prosecutorial actions. *See Doe v. United States*, 210 F. Supp. 3d 1169, 1174-76 (W.D. Mo. 2016) (citing *Doe v. United States*, 829 F. Supp. 59, 61 (S.D.N.Y. 1993)); *Butz v. Economou*, 438 U.S. 478, 511-515 (1978); *McCreary v. Heath*, 2005 WL 3276257, *6 (D.D.C. Sept. 26, 2005). Under the FTCA, the United States is able to assert any defense that would be available to an employee of the United States in response to common law tort claims. *See Wilson v. United States*, 989 F.2d 953, 955 (1993). And, Montana courts have applied the doctrine

of judicial immunity to protect judges. *See Hartsoe v. Christopher*, 296 P.3d 1186, 1188 (Mont. 2013). To the extent Plaintiffs assert tort claims, those claims are based upon the judicial decisions of the Fort Peck Tribal Judge. These are the types of decisions shielded by judicial immunity under Montana law, and that immunity extends to the claims under the FTCA. Accordingly, judicial immunity should serve as a bar against Plaintiffs allegations as they relate to the decision of the Fort Peck Tribal Judge.

D. No Private Party analog.

In order to bring an FTCA claim, Plaintiffs must point to a private party analog under state law. *See* 28 U.S.C. § 1346(b); *Love v. United States*, 60 F.3d 642, 644 (9th Cir. 1995) ("To recover under the FTCA, the Loves must show the government's actions, if committed by a private party, would constitute a tort in Montana.") (citations omitted).

There is not a private party analog for judicial decision making. *Cf, Ferranti v. Heinemann*, 468 F. App'x 85, 85-86 (2d Cir. 2012) (finding no private party analog for a clerk's actions in referring a matter to a judge); *Casillas v. United States,* No. CV-07-395-TUC-DCB, 2009 WL 735188, at *4 (D. Ariz. Mar. 19, 2009) (no private party analog for law enforcement search warrant). Although unpublished, the District of Arizona found in 2017 that judicial decision making

does not have a private party analog. *See Opinion, Norman Begay v. United States*, No. 16-cv-08265 (D. Ariz., July 5, 2017) ("The question here is an interesting, but not difficult one. Could the judicial or legislative acts or omission alleged here be imagined as acts of a private party? . . . . The Court finds that Plaintiffs do not establish a private party analog to the circumstances here, and thus their FTCA claim should be dismissed on that basis.")

There is no common law tort second guessing judicial decisions in a separate suit. The remedy is to appeal, which is the remedy that Plaintiffs chose.

E. No Waiver of Immunity Under 28 U.S.C. § 2680(h).

Finally, the FTCA does not waive sovereign immunity for any claim arising out of malicious prosecution, abuse of process, misrepresentation, deceit, or interference with contract rights. *See* 28 U.S.C. § 2680(h). There is an exception to the exception in § 2680(h) regarding claims committed by a federal investigative or law enforcement officer. The courts have found, however, that judges are not considered to be law enforcement or investigative officers. *See Cao v. United States*, 156 F. App'x. 48, 50 (9th Cir. 2005) ("Both of these claims fail at the outset because Cao has not established that either the immigration judge or the INS attorneys are investigative or law enforcement officers under § 2680(h)."); *Arnsberg v. United States*, 757 F.2d 971, 978 (9th Cir. 1985) ("We can accept the

argument that magistrates and judges are 'investigative or law enforcement officers' . . . when actually apprehending a suspect. . . . A judge or magistrate when acting adjudicatively does not act in an investigative or law enforcement capacity."); *Gonzalez v. United States*, CV-12-01912, 2013 U.S. Dist. LEXIS 8629, at *7 (Dist. Fla. February 6, 2008) ("However, [a judge] is, by definition, not a law enforcement officer, because he is not 'empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.'"). And, the FTCA never waives sovereign immunity for claims of misrepresentation, deceit, or interference with contract rights. *See* 28 U.S.C. § 2680(h). Thus, to the extent Plaintiffs are asserting any of these tort claims, such claims are barred.

CONCLUSION

In summary, the United States is not liable for Plaintiffs' harm resulting from the Tribal Court's rulings against them. No action under 42 U.S.C. § 1983 can be maintained against the United States because there is no waiver of sovereign immunity, and absolute judicial immunity applies to § 1983 actions. Moreover, no action can be brought in Federal court for persons alleging deprivation of Constitutional rights under color of Tribal law under § 1983. The Federal District Court is also divested of jurisdiction because the dispute involves the exercise of the tribe's responsibility for self-government. Finally, no FTCA

claim may be brought against the United States for the reasons set forth above. Therefore, the Complaint filed herein should be dismissed.

DATED this 7th day of February, 2020.

KURT G. ALME
United States Attorney

/s/ Victoria L. Francis
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 5363 words, excluding the caption and certificates of service and compliance.

/s/ Victoria L. Francis
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2020, a copy of the foregoing document was served on the following person by the following means.

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1. Clerk of Court

2. Timothy M. Bechtold
BECHTOLD LAW FIRM, PLLC
317 East Spruce Street
P.O. Box 7051
Missoula, Montana 59807-7051
(406) 721-1435 – Phone
tim@bechtoldlaw.net
Attorney for Plaintiff

/s/ Victoria L. Francis
Assistant U.S. Attorney
Attorney for Defendant