No. 21-35230

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEWTOK VILLAGE AND NEWTOK VILLAGE COUNCIL

Plaintiff-Appellee,

v.

ANDY T. PATRICK, JOSEPH TOMMY, and STANLEY TOM,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Alaska

APPELLEE BRIEF

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INTRODUCTION

The gravamen of Appellants' argument is that the federal court lacks jurisdiction to resolve internal tribal election disputes as a matter of deference to tribal dispute resolution processes. However, Appellants ignore that the tribal election dispute was resolved in a tribal forum before the Tribe filed its complaint in federal court.[1] Rather, the Tribe requested the District Court, to abate Appellants fraudulent impersonation of tribal officials relating to federal contracting and grants. In so doing, the Tribe was seeking to give full force and effect to Bureau of Indian Affairs' (BIA) prior decision to recognize the Tribe's governing body under the Indian Self-Determination Act ("ISDA") (25 USC 5301 et. seq.) and other federal statutes. Incidentally, the Tribe was also asking the District Court to give full force and effect to the prior decision resolving tribe's leadership issues in a tribal forum under tribal law.

Appellants omission failing to acknowledge the tribe's election dispute resolution process and decision was no mere oversight. The omission was Appellant's conscious decision to "gaslight" the Federal District Court by recasting the "facts" to assert an otherwise inapplicable legal principle, which is why the District Court appropriately awarded attorney fees to the Tribe.

The Tribe didn't ask the federal court to resolve an internal tribal election dispute because the Tribe had already resolved the dispute in a tribal forum. Rather, the Appellants motion to vacate the prior judgment was asking the federal court to involve itself in an internal tribal election dispute by circumventing a tribal election dispute resolution process

1 ER-130-131 (para. 15-16)

and decision and ignore a BIA administrative decision.

STATEMENT OF THE ISSUES

1) Did the District Court have federal question jurisdiction over the case?

2) Did the District Court err in awarding the Tribe attorney fees?

STATEMENT OF CASE/FACTS

I. Statement of Facts.

The Tribe accepts Appellants' Statement of Facts with three (3) notable clarifications:

a) Name of Governing Body. The Tribe changed the name of the Tribal governing body to "Newtok Village Council." ER- 131 (para. 23)

b) Omission of Tribal Election Dispute Resolution Process and Decision.

Appellants' statement of facts omits that on June 14, 2013, the "Old Council" and "New Council" jointly held a community meeting about the election.[2] At that meeting, Mr. Stanley Tom, the former Tribal Administrator, proposed that the tribal election dispute be submitted to the tribal membership to resolve. His suggestion was accepted and the tribal membership confirmed the election of the "New Council" led by Mr. Paul Charles to be the legitimate governing body of the Tribe.[3] It is also important to note that the Appellant/Defendant Stanley Tom was never an elected Tribal official; rather he was a former Tribal employee.

c) IBIA Lifted Stay on Area Directors Decision Prior to Complaint. Appellants'

2 ER -101

3 ER- 130-131 (para. 15 &16); see also ER- 123 (para. 6)

Statement of Facts assert that the Complaint in this matter was filed while the "Old Council's" appeal was pending before the Interior Board of Indian Appeals (IBIA).[4] The statement is somewhat misleading. After Appellants filed their appeal, the IBIA entered a stay of the BIA Area Directors' decision to recognize the "New Council." On May 27, 2014 the IBIA lifted its stay, which allowed the Area Director's decision to become fully effective.[5] The Petition for Injunctive Relief was filed on April 4, 2015.[6] The Tribe's complaint was filed eleven (11) months after the IBIA's order made the Area Directors decision effective.

d) Fraud/Conversion and Relocation. Appellants Statement of Facts understates an important background facts and a key allegation. Newtok is the first Alaska Native Village in Alaska to relocate in order to avoid imminent destruction by the effects of climate change: i.e. riverine bank erosion and melting permafrost.[7] It is estimated that the relocation will require $130 million.[8] When Appellants were Tribal officials, they misappropriated funds resulted in a lingering federal debt of $195,853.53 in disallowed costs.[9] As alleged in the complaint,[10] Appellants continuing desire to impersonate Tribal officials is clearly rooted in Appellants efforts to defraud federal, state and other agencies of money intended to assist Newtok in its efforts to relocate as it faces climate induced destruction.[11] The Tribe alleged that Appellants

4 Appellants Br., at 5
5 See 61 IBIA 167, at 169 n 3.
6 ER- 129
7 Iverson, Jason (2013) "Funding Alaska Village Relocation Caused by Climate Change and Preserving Cultural Values During Relocation," Seattle Journal for Social Justice: Vol. 12 : Iss. 2 , Article 12. Available at: https://digitalcommons.law.seattleu.edu/sjsj/vol12/iss2/12 Appellants admission that "the village has come under severe ecological stress because of erosion caused by the Ninglick River," is a bit of understatement.
8 *Id. at 577 n. 89*
9 ER - 30
10 ER – 131, para 24
11 ER - 31

had wrongfully converted tribal property to their own use.[12] The District Court did not necessarily find the conversion raised a federal question, but did find that the fraudulent impersonation of tribal officials as alleged in the complaint may damage the Tribe. [13]

II. Procedural History.

The Tribe accepts Appellants' Statement of Facts with the following clarifications:

a) The Judgment at Issue Is Nearly Five Years Old. The default judgment at issue in this appeal was issued on November 4, 2015. ER- 122 The motion to set aside the default was made on December 29, 2020, over five years later. ER- 76

b) Appellants' Did Not Oppose Any Post-Judgment Motions. The Appellant's Statement of Procedural History omits the fact that the Appellants did not oppose the Tribe's Motion For A Writ Of Assistance (Docket 18), Motion For Attorney Fees (Docket 20), Application Of Writ Of Execution (Docket 32-34), nor Motion for Order to Show Cause-Contempt (Docket 54). Appellant's statement of procedural history implies that the Court issued an contempt order without allowing Appellants to oppose, which is not the case.

c) **Appellants Did Not Appeal The District Court's Decision to Exercise Supplemental Jurisdiction.** The Tribe presented several theories that its complaint raised "federal questions,"[14] but the District Court only ruled on one theory: i.e. that the complaint cited "the ISDA (Indian Self-Determination Act), in conjunction with the allegations that

12 ER - 132 (para 25)
13 ER- 42
14 See ER- 65-73

Defendants have interfered with contracts between the Tribe's legitimate governing body and the federal government, (which) is adequate to establish federal question jurisdiction." ER 43 The Court expressly did not rule on the Appellants arguments that claims for conversion of tribal property procured with federal funds "constitute [state law] claims for conversion and do not arise under federal law for jurisdictional purposes." ER 39 The District Court left open the question as to whether the Tribe's complaint raised claims arising under federal law other than the ISDA, assuming that the federal court would have jurisdiction over the other claim under either federal jurisdiction or supplemental jurisdiction over non-federal law claims. The Appellants did not appeal the decision of the District Court to exercise supplemental jurisdiction over these other claims if they should turn out to be non-federal claims.

ARGUMENT

I. THE FEDERAL DISTRICT COURT HAD FEDERAL QUESTION SUBJECT MATTER JURISDICTION

a) The Tribe Pled Federal Question Jurisdiction Generally. The Tribe's complaint affirmatively alleged that jurisdiction arose under both 28 USC §§ 1331 and 1362. See ER-129-130, para. 5 The first statute vests jurisdiction in the District Court for a "civil action rising under the Constitution, laws, or treaties of the United Staes." 28 USC § 1331. This is generally referred to as "federal question" jurisdiction. The second statute vests jurisdiction in the District Court for "all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 USC § 1362

The District Court did not distinguish between the statutes, but rather focused upon the common element of both statutes: i.e. the requirement that the action arises under federal law. As explained most recently in *Gunn v Minton,* 568 U.S. 251(2013), "a case can arise under federal law when federal law creates the cause of action asserted; i.e. the so-called "creation test."[15] Alternatively, under the so called *Grable* test, "federal jurisdiction over a state (i.e. non-federal) law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[16] The District Court did not rely upon the "creation

15 568 U.S., at 257 citing *American Well Works Co. v. Layne & Bowler Co.,* 241 U. S. 257, 260 (1916)

16 568 U.S., at 258 citing *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U.S. 308 (2005); See also, *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 699 (2006)

test." Rather, it appears that the District Court relied upon the *Grable* test. ER-73. While the Tribe raised a number federal law issues, the District Court focused upon the ISDA.

Appellants argue that a three (3) prong test should be applied, which conflates the "creation test" and the *Grable* test .[17] Specifically, Appellants argue that a federal question must be well pled, the federal question must be substantial, and central to resolving the case before the Court.[18] Appellants's cited authority pre-dates the clarifications provided by the Supreme Court in *Gunn,* and in one case, focuses on only a single prong of the *Grable* test.[19] As a result, this Court should be informed by the Court's more recent guidance in *Gunn* using the four prong test discussed above rather than the "three-prong test" advanced by Appellants.

b) The Indian Self Determination Act Generally. The ISDA mandates the BIA and other federal agencies to enter into contracts "to plan, conduct, and administer programs" previously operated by the Secretaries of the Interior and Health and Human Services " for the benefit of Indians because of their status as Indians". 25 USC §5321(a)(1) In enacting the ISDA, Congress made findings about the "historical and special legal relationship with, and resulting responsibilities to, American Indian people." 25 USC §5301(a) Additionally, the ISDA declares that

> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum

17 Appellants' Br., at 14-15
18 Id.
19 Id., see discussion of *International Union of Operating Eng. v City of Plumas* 599 F.3d 1041 (9th Cir., 2009), which focused on the second prong of the *Grable* test. Id., at 1045.

> Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.
>
> In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 USC §5302(a) & (b) Recently, the Secretary of the Interior reaffirmed that in enacting the ISDA, Congress expressly recognized the trust responsibility impacting Indian affairs.[20] Thus, ISDA program falls within the "contours of the United States fiduciary responsibilities (as) defined by the applicable federal statutes, regulations, treaties, and executive orders".

Contracting under the ISDA is initiated by a resolution of a Tribe's governing body.[21] As a result, the BIA has a trust responsibility to recognize and deal with the tribal governing body in the ISDA contracting process.[22] *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) In that case, the Court held that "[t]he BIA, in its responsibility for carrying on government to government relations with the tribe, is obligated to recognize and deal with some tribal

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20 Secretary of Interior Order No. 3335- Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries §3(c) (Aug. 20, 2014) The Secretary noted other Congressional enactments encompassed by the trust responsibility, stating

> Congress has expressly and repeatedly recognized the trust responsibility in its enactments impacting Indian Affairs. *See, e.g.,* Indian Education and Self- Determination and Assistance Act of 1975; Tribal Self-Governance Amendments of 2000; American Indian Trust Fund Management Reform Act of 1994; Federally Recognized Indian Tribe List Act of 1994; Tribally Controlled Schools Act of 1988 and Indian Education Act of 1972; Indian Child Welfare Act of 1978; Indian Mineral Development Act of 1982; Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act).

Congress has created other Indian programs in other federal departments expressly under the federal-Indian trust responsibility: e.g. HHSS- Indian Health Care Improvement Act 25 USC §1601(1) HUD-Native American Housing Assistance and Self-Determination Act, See 25 USC §4101 (2) & (3)

21 Id. See 25 CFR § 900.8 (d)

22 Docket 65, at 10

governing body." *id.* It is important to note that the mandatory provisions of 25 USC §5321(a)(1) means that a tribes's ability to contract under the ISDA is a right; not a governmental discretionary act.

While the principle purpose of BIA recognition of a tribal governing body is for ISDA purposes, that decision has import beyond the the BIA, and the Department of the Interior. The BIA plays a unique and special role in Federal Indian affairs in that the Agency is charged with "the management of all Indian affairs and of all matters arising out of Indian relations." 25 USC §2 As a result, Federal agencies and the Federal Courts defer to the BIA's recognition of governing body status when implementing other programs and services to Indians. *Cayuga Nation v. Tanner,* 824 F.3d 321, 330 (2d Cir. 2016).

c**) A Federal Question Arises Under *Grable* In The Case At Bar.** As noted above, *Grable* employs a four prong test to determine whether a complaint raises a federal question. In this case, all four prongs of the test are satisfied.

1. Federal Law Is Necessarily Raised. The complaint sought to abate the fraudulent impersonation of tribal officers relative to the ISDA, as well as the conversion of tribal assets. Even if the conversion claims are denoted as a "state law" claim, federal subject matter jurisdiction under § 1331 exists under the first prong of the *Grable* test where the state law claim necessarily requires the resolution of a federal law question. The complaint clearly raised a number of federal law issue that invokes §1331 jurisdiction.

i) Federal Law Governing The Recognition of a Tribe's Governing Body. In order to determine whether the Appellants engaged in unlawful/fraudulent impersonation of tribal officials as alleged in the Tribe's complaint, it is necessary to answer an obvious federal law question: i.e. who the Secretary's recognizes as the Tribe's governing body under 25 USC §5321(a)(2) & 25 USC §5304(1) Specifically, the ISDA authorizes "tribal organization" to contract with the BIA and Indian Health Service, and defines "tribal organization" as including the "the recognized governing body of any Indian tribe." See 25 USC §5321(a)(2) & 25 USC §5304(1) Thus, BIA recognition imbues that entity with rights to contract under the ISDA to the exclusion of other tribal members ability to contract under the ISDA and other federal statutes. *Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 F. App'x 606, 609 (9th Cir. 2014) (Unrecognized group is not entitled to act on behalf of a federally recognized 'Indian tribe,' because they are not the Tribe's recognized governing body"); *see also Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1031 (E.D. Cal. 2012) ("Deference to the BIA determination is the preferred course of action.

As noted above, the recognition of a group of tribal members as the governing body of the tribe for ISDA purposes is necessarily determined by the Bureau of Indian Affairs exercising its trust obligations and duties. *Goodface v. Grassrope*, 708 F.2d at, 339; See also *Wheeler v Dept. of Interior,* 811 F.2d 549, 552 (10th Cir., 1987); *Seminole Nation v Norton,* 223 F. Supp. 2d 122 (DDC 2002); *Ransom v Babbitt,* 69 F. Supp. 2d 141 (DDC 1999) Furthermore, since the Executive Branch as a whole defers to the BIA's decisions in this regard,[23] the BIA's

23 *Cayuga Nation v. Tanner, supra.*

decision implicates a host of other federal laws.[24] Equally, once the BIA has made this determination and the BIA decision is final, the recognized governing body has the exclusive right to enter into contracts under the ISDA and other applicable federal laws. Thus, the complaint's allegations that the Appellants were misrepresenting themselves as tribal officials governing body capable of receiving funding under federal statutes on behalf of the tribe turns entirely upon federal law and procedure. While the District Court may lack jurisdiction to determine the Tribe's governing body under *tribal law,* it does have jurisdiction to apply *federal* law which determines who the federal government recognizes as a Tribes governing body for ISDA contracting in cases in which the issues arises.

ii) *§ 1362.* Interestingly enough, the BIA recognition raises a collateral federal law issue under §1362. The statute creates original jurisdiction in District Court if the action is brought by a tribe "with a governing body duly recognized by the Secretary of the Interior...." Thus, the complaint expressly raises an issue as to whether the Plaintiff Tribe has a federally recognized governing body, which is clearly a federal law issue.

iii) Enforcement & Recognition of Tribal Judgment. Another claim in the complaint is the cognizablity and enforcement of the Tribal judgment: i.e. the Tribe's decision in the election dispute resolution process. In *Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052 (9th Cir. 2019) this Circuit held that actions in federal court seeking to enforce a tribal judgment raise a substantial question of federal law and such claims give rise to the Federal District Court's federal question jurisdiction. *Id*, at 1053-1054 Additionally, this Court noted that

24 For examples of other impacted programs, see footnotes 20, 28, and 32.

whether a tribal court has subject matter jurisdiction is a threshold federal law question. Id, at 1057 See also *Howlett v Salish and Kootenai Tribes,* 529 F. 2d 233 (9th Cir., 1976) (federal question jurisdiction in reviewing a tribal election dispute resolution process under the Indian Civil Rights Act.)

The District Court in this case distinguished *Coeur d'Alene Tribe* noting that the federal law question in that case was whether "Tribal Court's judgment against a nonmember" was enforceable. The Court appears to suggest that the a Tribal courts judgment applied to a member (i.e. the Appellants) would not be a federal law issue. This was wrong on two counts. First, the complaint sought to abate the Appellants fraudulent impersonations made to Federal, State and other agencies: i.e. non-members of Newtok Village. In this regard, the Tribe was seeking to regulate the interactions between tribal members and non-members, which is clearly within the ambit of *Coeur d'Alene Tribe.* As the U.S. Supreme Court recently held, the power of an Indian Tribe to regulate relations between tribal members, tribal officials, and non-tribal members is clearly an issue of federal law. *United States v Cooley,* ---- U.S. ------ (June, 1, 2021) (federal law permits a tribal police officer to detain and search non-tribal member). See also *Montana* v. *United States*, 450 U. S. 544 (1981) (Tribe has authority to regulate relations between non-members and tribal members with regard to the health and welfare of the Tribe).

Alternatively, the ability of a Tribe to regulate the behavior of tribal members can only be decided based upon federal law.[25] While a tribe's power to regulate its members behavior

25 See generally, COHEN, HANDBOOK OF FEDERAL INDIAN LAW, §6.02 (2005 Ed.)

arises out of it's pre-existing sovereignty, the parameters of those powers are delineated by federal law. In *Kelsey v Pope,* 809 F.3d 849 (6th Cir., 2016) the Court held that tribes have the power to try and punish tribal members on the basis of tribal membership. The Court explained "whether a tribal court has exceeded the lawful limits of its jurisdiction" is one **arising under federal law**. (emphasis added) *Id*, at 854, citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 853, (1985); *Iowa Moet. Ins. Co. v. LaPlante,* 480 U.S. 9, 19 (1987); *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 890-91 (2nd Cir.1996); Indian Civil Rights Act, 25 USC § 1303

iv) *Impeding a Tribes Right To Self-Determination By Fraud*. Judge Beistline's observed that "impersonating a recognized tribal governing body potentially falls under a variety of federal statutes, particularly in light of the fact that such misrepresentations interferes with federal government contracts."[26] Appellants take exception to these findings claiming that the Tribe never alleged interference with existing federal contracts governed by the ISDA[27] and that the mere existence of the federal contract is insufficient to establish federal question jurisdiction.[28] Both arguments are problematic.

First, the complaint clearly alleged that the Appellants misrepresented "themselves as the legitimate tribal governing body for Newtok in the solicitation of funds and contracts to which Newtok Village is rightfully eligible." ER-132 at para 28 Additionally, the Tribe alleged that the Defendants … created confusion and impeded efforts by the tribe to conduct

26 ER- 43
27 Appellants' Br., at 17
28 Id., at 17-20

the business of the Tribe …." Id, at para 30 While the complaint did not use the term "interference," the Court characterized these allegations as alleging "interference," which is a fair characterization. While the Court's term may be ambiguous, and the language in the complaint is clear. The Court's characterization could be read as a claim of tortious interference with a contract(s), which is clearly a state claim. But that is not precisely what paragraph 30 alleges. Rather paragraph 30 alleges that the Appellants "impeded efforts by the Tribe to conduct business," which when read with the rest of complaint clearly references the fact that the Appellants impeded the ability of the Tribe to exercise its federal statutory rights of self-determination as provided by federal law- i.e. the ISDA and other similar statutes.[29]

Second, impeding a tribes right to self-determination granted by federal statute is clearly a question of federal law. It is axiomatic that federal law determines whether the Tribe has a right to contact under a federal statute; who are the tribal officials empowered under the federal statute to exercise those rights on behalf of the tribe, and whether a third party may impede those rights through fraudulent misrepresentation. All of these issues are necessarily determined using *federal law.*

Appellants cite *Peabody Coal Co. v Navajo Nation,* 373 F.3d 945 (9th Cir., 2004) for the proposition that the existence of a federal contact, entered into under federal law, is insufficient to establish federal question jurisdiction. The case can be easily distinguished

29 E.g. HHSS- Indian Health Care Improvement Act 25 USC §1601(1) HUD- Native American Housing Assistance and Self-Determination Act, See 25 USC §4101 (2) & (3)

from the present case in that the Navajo Nation was being sued as opposed to suing, and the non-tribal plaintiff was attempting to enforce an arbitration award. No federal law issues were implicated in the claim. As the Court stated, "The only contract at issue in Peabody's claim is the arbitration settlement agreement, which is not a specialized type of contract that is subject to extensive federal regulation." 373 F.3d, at 951 In contrast, the contacts at issue in Newtok's case are contracts with the federal government which are subject to extensive federal regulation.

Notably, the Navajo Nation sued Peabody Coal Co. in 1999 under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and other related claims stemming from Peabody's alleged *ex parte* contacts with former Secretary Hodel. *Id.*, at 948. Federal question jurisdiction arose in those cases because Peabody was attempting to circumvent procedural and substantive federal law provisions governing leases of reservation lands. The present case is more similar to the RICO case rather than arbitration award case in that Peabody was interfering with tribal rights extensively governed by federal law, where the arbitration award did not require any interpretation of federal leasing laws. *Peabody Coal Co. v Navajo Nation,* simply doesn't apply where a tribe is suing to protect its rights under federal law and seeking to abate a third party impeding those federal law rights.

Alaska Native Tribal Health Consortium v. Settlement Funds Held For or to Be Paid on Behalf of E.R. ex rel. Ridley, 84 P.3d 418 (Alaska, 2004) provides an example of federal law issues raised by the ISDA. That case dealt with medical liens filed by a tribal consortium providing medical services to Indians under the ISDA. While Alaska has medical lien laws, the Alaska

Supreme Court held that the validity of the liens were governed by *federal law. 84 P.3d, 421.* It is the only reported Alaska Courts decision respecting the ISDA. It is clear that Alaska courts view that the application of federal law is necessary in deciding matters implicating the ISDA.

2) Federal Law Is Actually Disputed. Unfortunately, the Appellants never answered the complaint filed in this matter stating whether they disputed any of the Tribe's allegations. Equally, Appellant's brief fails to address the issue. The Appellants brief asserts a three (3) prong test, one of which is the second prong of the *Grable* test: i.e. that the federal law must actually be in dispute. See Appellant's Brief, citing *Int'l Union of Operating Eng. v City of Plumas* 599 F.3d 1041 (9th Cir., 2009). However, Appellants brief did not addressed this prong of the test, presumably because they contest whether there is any federal law issue at all.

In determining whether the the federal law is disputed, the Court looks to the allegations in the complaint. *Gunn v Minton,* 568 U.S., at 251. Appellant's actions alleged in the complaint speaks volumes. As noted above, the three (3) critical federal law issues are 1) whether the Secretary's recognition of a tribal governing body under 25 USC §5321(a)(2) & 25 USC §5304(1) imbues that entity with rights to contract under the ISDA to the exclusion of other tribal members ability to contract under the ISDA and other federal statutes, 2) whether the federal court must/may give full force and effect to a Tribal judgment, and 3) whether the Appellants unlawfully impeded the tribes right to self-determination. The complaint alleges, 1) the Appellants impersonated the legitimate (federally recognized) tribal government to solicit federal contracts and funds under the ISDA and related federal statutes after the BIA determined that they were not the federally recognized governing body, 2) the Appellants

refuse to comply with the resulting decision rendered in the Tribe's dispute resolution process, and 3) Appellant's action impeded the Tribe's rights to self-determination as provided by the ISDA and related federal statutes. While the Appellant's have not formally answered the complaints allegations, the complaint clearly supports a finding that Appellants disputed the Tribe's understanding of the federal law at issue was

3) The Federal Law Issues Is Substantial. As explained in *Gunn v Minton*, "the substantiality inquiry looks to the importance of the issue to the federal system as a whole." 568 U.S., at 252. In this regard, there can be no question that the federal issues presented by the Tribe's complaint has great importance to the federal Indian policy as a whole. Self-Determination has been the cornerstone of Federal Indian policy for the last six decades.[30] The ISDA is clearly the centerpiece of that policy.[31] And of course, as discussed above, the role of federally recognized tribal governing bodies is a critical and necessary driver in the current era of federal Indian self-determination policy in general, and in the operation of the ISDA in particular.

4) The Federal Law Issue Is Capable Of Resolution In Federal Court Without Disrupting The Federal-State Balance Approved By Congress. While this prong of the *Grable* test looks to federal-state relations, in a case involving a tribe, modern cooperative federalism[32] would suggest exploring the disruption of federal-state-*tribal* balance approved

30 COHEN, *supra,* at §.107

31 Id.

32 See *Hodel v. Virginia Surface Mining & Reclamation Association* 452 U.S. 264, 289 (1981) explaining that "cooperative federalism ... allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."

by Congress. There is an increasing trend in federal statutes to treat tribes as states and permitting Tribes to assume primacy in carrying out federal programs, functions, activities and services, subject to federal minimum standards and program adjustments related to tribal status and circumstances.[33] Most often, the federal statues are tied to federal recognition of the tribes and/or the tribal governing body.[34]

The "federal-state-tribal balance" is highly dependent upon the particular provisions of the relevant legislation. In some cases, Congress has created and defined in great detail the tribal-state relationship within the federal cooperative system. Skibine, A. *Indian Gaming and Cooperative Federalism* 42 Ariz. St. L.J. 253 (2010-2011) In other circumstances, Congress has provided no substantive guidance. E.g. 25 USC § 5342 (Secretary of the Interior discretionary contracts with states) However, the statutory scheme embodied in the ISDA provides for no role of States, or State law in the initiation, operation or termination of ISDA contracts. Additionally, States have no role in the federal recognition of a tribal governing body under the ISDA Congressional scheme.

As for enforcing tribal judgements, P.L. 280 clearly provides that Alaska Courts should give full force and effect to tribal law (28 U.S.C. § 1360(c)), the Alaska Courts have held that the provision- as well as all P.L. 280 – applies only to Indian country, which is not present in the current case. *John v Baker,* 982 P.2d 738, 748 (1999) It is equally clear that the cognizability

33 E.g. Stafford Act 42 USC §§ 5122(8), 5170(a), and 5191(c)(relating to declaration of national disaster/emergencies and other FEMA programs) Social Security Act- Temporary Assistance To Needy Families, 42 USC 612; Social Security Act, -Child and Family Services, 42 USC §628; Clean Air Act, 42 USC § 7602 (b)(5); Safe drinking Water Act, 42 USC §300f (10)

34 Id.

of Tribal judgments in Alaska Courts are governed by federal law. Id.

5) Summary. Applying the four-prong test enunciated in *Grable,* as explained in *Gunn,* it is clear that the Tribe's complaint necessarily raised a substantial federal law issue under the ISDA and related federal legislation that was actually disputed, and that the federal court is capable of resolving the matter without disrupting the federal-state balance approved by Congress in the ISDA and related legislation.

II. THE CASE DOES NOT REQUIRE THE FEDERAL COURT TO DECIDE AN INTERNAL TRIBAL ELECTION DISPUTE.

Appellants' try to conflate the Tribes allegations with the federal court policy of non-interference in tribal elections.[35] This is inappropriate because the underlying election dispute was over before the complaint in this matter was filed. Specifically, both the tribal election dispute resolution process and the BIA/IBIA administrative proceedings were over. As found by the District Court, there was no election dispute for the Court to decide.[36]

Merely because the Appellants dispute the election results does not mean a legally cognizable election dispute actually exists. There is no active election challenge in any tribal, federal, or state forum. The Appellants have not identified any election irregularities, but merely assert that they do not accept the election results. There is nothing in the record that

35 See Appellants' Br., at 21

36 ER- 40. The District Court found that

> This matter was not before this Court to settle a "tribal election dispute." That dispute previously had been addressed by the Tribe, as later determined by the BIA when the BIA stated that it "accepts the assertion of the members of the New Council that they constitute the Traditional Council which has the authority to act as the governing body of Newtok Village . . . ." citing BIA Area Director's Decision found at ER-95 (Docket 65-1)

would suggest that an active tribal election dispute exists.

The complaint very clearly notes that the tribal election process had concluded. Once the tribal election dispute resolution process concluded and the Appellants arguments failed in that process, the election result was final as to tribal law long before the federal lawsuit was filed. Equally, in the BIA administrative proceeding, the Area Director initially recognized the "New Council." Appellants appealed to the IBIA and the Area Director's decision was stayed pending the administrative appeal. That stay was lifted meaning the federal recognition of the New Council was effective long before the federal lawsuit was filed. Thus, the election dispute was concluded as a matter of both tribal and federal law prior to the federal lawsuit being filed. As the District Court noted, there was no active election dispute prior to the filing of the lawsuit.

In substance, it is not the Tribe that is asking the Federal court to decide an internal tribal election dispute. Rather, the Appellants are urging the District Court and this Court to find that an active tribal election dispute exists. This necessarily requires the District Court and this Court to ignore the final conclusion of the tribal election dispute resolution process and the BIA administrative process (including the IBIA appellate procedures). Essentially the Appellants are urging the Court to set aside a final tribal judgment resolving the tribal election dispute, and to overrule a BIA administrative decision, and the IBIA administrative appeal both of which were concluded and final over six years ago.

III. ANCILLARY JURISDICTION NOT APPEALED

The District Court noted that not all claims need to "arise under federal jurisdiction."

Rather, as the Court noted, the District Court "need find only one source of jurisdiction, which would allow it to assert jurisdiction over other non-federal claims." ER- 39-40[37] The Appellants have not appealed on this issue and have abandoned any objection to this aspect of the District Court's opinion. Thus, a finding by this Court that any of the above referenced claims are non-federal would not warrant reversal; rather this Court would have to find a total absence of federal questionS jurisdiction in order to reverse the District Court.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES.

The District Court awarded attorney fees because it found that the Appellants had engaged in bad faith.[38] Appellants claim that the District Court abused its discretion in awarding attorney fees against the Appellants.[39] In making this argument, Appellant's mischracterize the District Court's findings suggesting that the late filing of the motion to set aside the default five years after entry of judgment was the sole basis for finding bad faith. The argument is not correct.

Rather the Court found bad faith because the Appellants were clearly attempting to "gaslight" the District Court on a very basic factual matter. As the District Court explained

> "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." Even at this late juncture, Defendants' briefing continues to assert that "caselaw supports Defendants' position that courts typically lack subject matter jurisdiction to

37 A federal court properly exercising federal question jurisdiction over a matter may decide all questions presented, including supplemental state law issues, whether or not each has a federal component. *28 USC § 1367*

38 ER 8

39 Appellants' Br., at 37 et. seq.

> resolve intratribal election disputes like the one here," despite this Court's painstaking attempts to explain to Defendants that the "intratribal election dispute" was decided long before this lawsuit was filed. Plaintiffs' Reply underscores this flaw in Defendants' strategy, noting that "Defendants' argument is/was a deceptive and dishonest rhetorical device in which the conclusion is premised upon a lie . . . that the tribal election dispute was never resolved by the Tribe, when in truth, it had been."[40]

Sadly, the Appellants continue with this same line of attack before this Court, falsely representing that an active tribal election dispute existed when the complaint was filed, and now, six years after the election.

If anything, the District Court's use of restrained judicial language understated Appellants bad faith. It is facially absurd that Appellants continue to dispute a six year old election when the intervening tribal elections have resulted in peaceful and orderly transitions of tribal leadership.[41] It is more absurd given that one Defendant – Mr. Stanley Tom – was never an elected official, but was a former tribal employee.[42] But the absurdity turns when such impersonation was used in an attempt to facilitate a person's entry into the village and circumvent COVID travel restrictions in violation of the injunction.[43]

Finally, Appellants argue that the fraudulent impersonations of tribal officials that gave rise to the suit should not be considered in awarding attorney fees.[44] The Appellants cite to *Ass'n of Flight Attendants v Horizon Air Indus. Inc.* 976 F.2d 541, 549-50 (1992) for the proposition that a parties bad faith giving rise to the litigation, on its own, should not entitle NVC an award of attorney fees...."Appellants Br. at 42. Appellants argue that *Horizon Air*

40 ER 8-9
41 ER - 59-60
42 ER - 101
43 ER - 107
44 Appellants' Br., at 42

narrowed the holding in *Hall v Cole*, 412 U.S. 1, 15 (1973) in which the Supreme Court held that bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct that gave rise to the litigation...." Appellants mischaracterize the holding in that *Horizon Air* arose as an NLRB case, where bad faith was alleged in negotiating a collective bargaining agreement, which gave rise to the lawsuit. The Court held that "no federal appellate authority in or out of the Ninth Circuit has clearly approved an order shifting attorney fees based **solely** upon a finding of bad faith as an element of the cause of action...." (emphasis added) *Id*. In the present case, the District Court did not find bad faith "solely upon a finding of bad faith as an element of the cause of action...."

Of course the record is clear that Appellants bad faith (i.e. fraudulent impersonation of tribal officials) gave rise to the cause of action, however, the District Court also found bad faith in Appellants' conduct of the litigation. Specifically, the District Court focused on Appellants attempts to gaslight the court: i.e. that "Defendants' argument is/was a deceptive and dishonest rhetorical device in which the conclusion is premised upon a lie . . . that the tribal election dispute was never resolved by the Tribe, when in truth, it had been."[45] In other words, while the District Court noted Appellants fraudulent impersonation of tribal officials prior to the Tribe filing the suit, the key element of the District Court's finding was the assertion of a frivolous claim (i.e. an on-going election dispute) as a basis for bringing the motion to vacate the judgment. The Appellants continued asserting such after it became obvious that the election dispute was resolved by the tribal dispute resolution process and long over prior to the Tribe's initial complaint. Presenting a frivolous or vexatious claim is

45 ER 8-9

clearly a basis for assessing attorney fees.

CONCLUSION.

The District Court correctly determined that the Tribe's complaint raised a federal question. The Tribes' claims necessarily raised issues that required the application of the ISDA and other federal laws to resolve; that these issues were actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress." The Appellant's arguments that the Tribe's complaint inappropriately drew the federal courts into an intertribal dispute " is/was a deceptive and dishonest rhetorical device in which the conclusion is premised upon a lie . . . that the tribal election dispute was never resolved by the Tribe, when in truth, it had been."[46] Appellants did not appeal the District Court's ruling on ancillary jurisdiction, which is not before this Court. And finally the District Court's findings of bad faith are appropriate. This Court should not disturb the judgment or orders from the District Court in this matter.

Respectfully submitted this 23rd day of June, 2021

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CERTIFICATE OF COMPLIANCE

This Brief is filed pursuant to Ninth Circuit Rule 32-1. The Brief is 6,727 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Michael J. Walleri

STATEMENT OF RELATED CASES

Pursuant to the Ninth Circuit Rule 28-2.6, Appellees, through this undersigned counsel, inform this Court that we are unaware of any related cases currently pending in this Court.

/s/ Michael J. Walleri

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2021, I electronically transmitted the foregoing Brief to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants:

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