

1 Majel M. Russell
2 Georgette H. Boggio
3 Elk River Law Office, P.L.L.C.
4 2501 4th Avenue North
5 Billings, MT 59101
6 Phone: (406) 259-8611
7 Fax: (406) 259-3251
8 mrussell@elkriverlaw.com
9 gboggio@elkriverlaw.com

10 Attorneys for the Defendants Assinboine
11 and Sioux Tribes of the Fort Peck Indian Reservation,
12 and Doug Grandchamp

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF MONTANA
15 BILLINGS DIVISION

16 LANNY and KRIS TREASURE,

17 Plaintiffs,

18 v.

19 UNITED STATES OF AMERICA
20 BUREAU OF INDIAN AFFAIRS;
21 THE ASSINIBOINE AND SIOUX
22 TRIBES OF THE FORT PECK
23 INDIAN RESERVATION; DALE
24 GRANDCHAMP; DOUG
25 GRANDCHAMP; AND JOHN DOES
1-5

Defendants.

Civil Action No.
4:20-cv-00075-BMM-JTJ

**THE ASSINIBOINE AND SIOUX
TRIBES OF THE FORT PECK
INDIAN RESERVATION AND
TRIBAL AGENTS, including DOUG
GRANDCHAMP's REPLY TO
OPPOSITION TO MOTION TO
DISMISS**

COMES NOW, the Defendants the Assiniboine and Sioux Tribes of the Fort Peck Reservation and their agent Doug Grandchamp (referred hereafter collectively as “Fort Peck Tribes”), and hereby replies to Plaintiffs’ Response to Brief and Rule 56(d) Request in Opposition to Tribal Defendants’ Motion to Dismiss.

BACKGROUND

The Plaintiffs sued the Assiniboine and Sioux Tribes, Dale Grandchamp and Doug Grandchamp and John Does, who they categorized as “Tribal Defendants” for damages that they alleged occurred due to a fire that occurred on or about September 1, 2018, after a swather caught fire on the Fort Peck Tribes’ Turtle Mound Buffalo Ranch.

The Plaintiffs’ claim damage to real property, a portion of which is property they own in fee status, as well as land they lease from both individual tribal members and the Fort Peck Tribes, all of which is on information and belief, held in federal trust.

ARGUMENTS

I. Elk River Law Office does not represent Dale Grandchamp or the Bureau of Indian Affairs.

While the Plaintiffs have lumped all “Tribal Defendants” together, the ERLO did not appear on behalf of Dale Grandchamp or the Bureau of Indian Affairs

1 (“BIA”). The Elk River Law Office only acknowledged service on behalf of the Fort
2 Peck Tribes and Doug Grandchamp.

3 In addition, Elk River Law Office and the Fort Peck Tribes are not authorized
4 to answer on behalf of either Dale Grandchamp and the Bureau of Indian Affairs.
5

6 **II. The Plaintiffs Do Not Meet the Standard of Review for Jurisdictional**

7 **Discovery.**

8 Plaintiffs seek to conduct a fishing expedition under the guise of “limited
9 jurisdictional” discovery irrelevant to the Fort Peck Tribes’ entitlement to sovereign
10 immunity. Plaintiffs’ allegations reflect their misunderstanding of the fundamental
11 principles of tribal sovereign immunity. Sovereign immunity is an immunity from
12 suit rather than a mere defense to liability. It is an entitlement to avoid the costs and
13 burdens of litigation.
14

15
16 Thus, a heightened standard applies to a party seeking jurisdictional discovery
17 to ensure that sovereign immunity is not essentially lost. In the sovereign immunity
18 context, any discovery must proceed “with circumspection” and be limited only to
19 those facts “crucial to an immunity determination.” Plaintiffs’ wide and broad
20 possibilities do not meet this standard and are based on nothing more than a hunch
21 that they might uncover jurisdictionally relevant facts. The Fort Peck Tribes
22 entitlement to sovereign immunity would be effectively lost if forced to respond to
23 such general requests for discovery by Plaintiff.
24
25

1 A party seeking jurisdictional discovery bears the burden to show that
2 jurisdictional discovery is necessary. *Breakthrough Management Grp. Inc. v.*
3 *Chukanksi Gold Casino and Resort*, 629 F.3d 1173, 1190 (10th Cir. 2010). In the
4 context of sovereign immunity, the Plaintiffs’ burden “is greater . . . because
5 immunity is intended to shield the defendant from the burdens of defending the suit,
6 including the burdens of discovery.” *Davila v. United States*, 713 F.3d 248, 264 (5th
7 Cir. 2013).

8
9 Under this heightened standard, the Plaintiffs “must specifically indicate what
10 facts additional discovery could produce that would affect [the court’s] jurisdictional
11 analysis.” *Douglas Indian Ass’n v. Cent. Council of Tlingit & Haida Indian Tribes*
12 *of Alaska*, 403 P.3d 1172, 1180 (Alaska 2017). Jurisdictional discovery “should be
13 ordered circumspectly and only to verify allegations of specific facts crucial to an
14 immunity determination. *Packsy, S.A. de C.V. v. Exportada de Sal, S.A. de D.V.*,
15 899 F.3d 1081, 1094 (9th Cir. 2018). Courts deny jurisdictional discovery where the
16 discovery request is based on little more than a hunch that it might yield
17 jurisdictionally relevant facts.” *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir.
18 2008). By requiring specific and compelling factual justification for discovery
19 requests in the sovereign immunity context, courts ensure that sovereign immunity
20 is preserved, and that immunity is not effectively lost. *See Davila*, 713 F.3d at 264;
21
22
23
24
25

1 *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Plaintiffs fail to meet the
2 high standard regarding necessary for jurisdictional discovery.

3 **III. The Plaintiffs misconstrue the Fort Peck Tribes' Argument Regarding**
4 **Subject Matter Jurisdiction.**

5
6 Again, the Tribes assert that the Federal Tort Claims Act is not a grant of
7 jurisdiction over *Tribal entities* [emphasis added] to the federal courts and the
8 Motion requested dismissal of the case against the Assiniboine and Sioux Tribes of
9 the Fort Peck Reservation, Doug Grandchamp, and any John Does to the extent that
10 they are agents of the Fort Peck Tribes.
11

12 The Federal Tort Claims Act does not contain an express authorization to sue
13 tribes. Nor is the Act a congressional waiver of tribal sovereign immunity simply
14 because the Plaintiff asserts a federal question against the Bureau of Indian Affairs
15 in this case. Entities or others outside of the Federal Government only become
16 implicated under the Federal Tort Claims Act when they are acting as either an
17 “instrumentality or agency of the United States.” 28 U.S.C. §2671.
18
19

20 Because the Federal Tort Claims Act is limited in its application to acts
21 committed or omitted by or on behalf of the United States, the Fort Peck Tribes are
22 not subject to any duties or liabilities under the Federal Tort Claims Act for acts
23 taken in their management of the Turtle Mound Buffalo Ranch. There is no
24
25

1 allegation that the Fort Peck Tribes were acting as an instrumentality or agency of
2 the United States when its employees were swathing hay for the tribal buffalo herd.

3 The Plaintiffs assert jurisdiction over the Bureau of Indian Affairs based on
4 the Federal Tort Claims Act (28 U.S.C. §2671, et seq.), 28 U.S.C. §§ 1331, and 28
5 U.S.C. 1346(b)(1). Compl. at Paragraph 9. In their Response, the Plaintiffs throw
6 out the possibility that the Tribes acted as an instrumentality of the Bureau of Indian
7 Affairs in responding to the fire. The Federal Tort Claims Act does not extend to a
8 person who receives guidance from the United States but only to persons over whom
9 the United States exercises physical, day-to-day control. *United States v. Orleans*,
10 (1976) 425 U.S. 807. The mere presence of Doug Grandchamp at the site of the fire
11 while the BIA responded does not turn him into an instrumentality of the BIA, and
12 Federal Tort Claim Coverage cannot be imputed to him.

13
14
15
16 The Federal Torts Claim Act is extremely limited in scope and instrumentality
17 cannot be merely imputed to individuals or others who are not employees the Federal
18 Government, but must explicitly granted. By their argument, the Plaintiffs
19 themselves could be an instrumentality of the BIA when they responded to the fire.

20
21 Second, the Plaintiffs assert for the first time in their Response that the Tribes
22 could *plausibly* come under federal jurisdiction under the Federal Tort Claims Act
23 because of a possible agreement with Bureau of Indian Affairs. The Plaintiffs do not
24
25

1 even include Tribal Defendants in assertion of Claim 3 and merely list “(USA-
2 BIA).” Complaint, Page 12.

3 Any claim alleging that the Tribes are responsible under the Federal Tort
4 Claims Act would be subject to the administrative claim requirement of the Federal
5 Tort Claims Act. The Plaintiffs do not allege that they presented an administrative
6 claim to any Federal agency regarding the actions of any Fort Peck Tribal actors
7 with respect to the fire on September 1, 2018. This is a jurisdictional prerequisite to
8 suit under the Federal Tort Claims Act. *McNeil v. United States*, (1993) 508 U.S.
9 106, 113 S.Ct. 1980; 28 U.S.C. §2675.
10
11

12 Plaintiffs’ Complaint, including their jurisdictional recitation, did not plead
13 any assertion that would bring the Tribes within Federal jurisdiction pursuant to the
14 Federal Tort Claims Act. Thus, there is no federal claim against the Fort Peck Tribes.
15

16 Again, a party invoking the federal court’s jurisdiction has the burden of
17 proving the actual existence of subject matter jurisdiction.” *Thompson v. McCombe*,
18 99 F.3d 352, 353 (9th Cir. 1996). The Plaintiffs must demonstrate the existence of
19 this Court’s subject matter jurisdiction over claims against the Fort Peck Tribes,
20 including Doug Grandchamp.
21

22 **IV. Sovereign Immunity Must Be Explicitly Waived.**

23 It is true that the Tribes can waive sovereign immunity, including by contract.
24 However, the Plaintiffs have not alleged any facts to support a waiver of sovereign
25

1 immunity by the Fort Peck Tribes with respect to the Plaintiffs in the facts before
2 the Court.

3 Plaintiffs' Complaint and Reply do not support a compelling basis for
4 jurisdictional discovery, and actually support otherwise. See Complaint at ¶¶ 3, 9,
5 23, and 24.
6

7 The Plaintiffs seek to gut the Fort Peck Tribes' sovereign immunity
8 protections when the burden is on the Plaintiffs with respect to asserting subject
9 matter jurisdiction. Plaintiffs' jurisdictional discovery request falls far short of the
10 heightened standards required for jurisdictional discovery required for sovereign
11 immunity.
12

13 Most importantly, "[a]ny waiver of sovereign immunity . . . cannot be implied
14 but must be unequivocally expressed." *Bradley v. Crow Tribe of Indians*, 2003 MT
15 82, ¶7, 315 Mont. 75, 67 P.3d 306; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58
16 (1978); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006). A
17 "waiver of sovereign immunity must be strictly construed in favor of the sovereign."
18 *Orff v. United States*, 545 U.S. 596, 601-02 (2005). The Montana Supreme Court
19 has found "[t]here is a strong presumption against waiver of tribal sovereign
20 immunity." *Bradley*, ¶ 17.
21

22 The Plaintiffs assert the possibility that there might be some contract that the
23 Tribes have with another party that waives their sovereign immunity. The Plaintiffs
24
25

1 did not assert any facts to support that the Tribes have waived sovereign immunity
2 with respect to the Plaintiffs. Again, jurisdictional discovery can only be granted in
3 limited and circumspect instances. The Plaintiffs' thin foundation to request
4 jurisdictional discovery on possibility of waiver with a third party is the exact type
5 of attack on the Fort Peck Tribes' sovereign immunity that should be rejected,
6 particularly in light of the legal standards to find a waiver of Tribal sovereign
7 immunity.
8

9
10 Given that any wavier of Tribal sovereign immunity must be explicit and
11 unequivocally expressed, the Plaintiffs claim that they need to do jurisdictional
12 discovery on the Tribes to determine if the Tribes ever waived their sovereignty with
13 respect to the Plaintiffs borders on absurd.
14

15 **IV. The Plaintiffs Claim Suit in Individual Capacity Against Doug**
16 **Grandchamp but Fail to Factually Distinguish between the Tribes and the**
17 **Individuals.**

18 While the Plaintiffs assert that they have sued the individuals in their
19 individual capacity, and not in their official capacity, the Plaintiffs' Complaint does
20 not distinguish the difference between the Assiniboine and Fort Peck Tribes, Doug
21 Grandchamp or even Dale Grandchamp in any of their claims. All through Count
22 One and Count Two, they are all classified as "Tribal Defendants." Plaintiffs
23
24
25

1 acknowledge in their filing that the Turtle Mound Buffalo Ranch is owned and
2 operated by the Assiniboine and Sioux Tribes of Fort Peck. See Complaint, ¶ 15.

3 In the case cited by Plaintiffs, the Ninth Circuit also made it clear that
4 Plaintiffs cannot use the individual suit as a way to reach into the public treasury or
5 domain, and described the analysis as remedy focused to determine the difference
6 between an individual or official capacity suit. *Pistor v. Garcia*, 791 F.3d 1104,
7 1113-1114, (9th Cir. 2015) (citing *Maxwell v. County of San Diego*, 708 F.3d 1075,
8 1089 (9th Cir. 2013). This case is factually distinguishable, in that the Plaintiffs in
9 *Pistor* did not sue the Tribes. 791 F.3d at 1113.
10
11

12 Plaintiffs did not distinguish between the Defendants, just captioning them all
13 as the “Tribal Defendants.” This demonstrates the Plaintiffs’ intent to have the
14 Tribes as the real parties in interest. If that occurs, this suit could reach the Tribal
15 coffers and control how the Tribes manage the Turtle Mound Buffalo Ranch. It
16 would also reach the BIA as the other real party in interest as it relates to the fire
17 suppression claims brought under cover of the Federal Tort Claims Act. The Fort
18 Peck Tribes had to address Dale Grandchamp to the degree that the Plaintiffs’
19 complaint lumps all of the Tribal Defendants together as one entity.
20
21

22 The Ninth Circuit’s presumption of an individual suit when the parties are
23 named occurred when a complaint was brought under 42 U.S.C. § 1983, which has
24 specific requirements when requesting damages; the Court determined that only one
25

1 individual was named for damages under the 42 U.S.C.S. §1983, and claims against
2 the rest of the named individuals were barred. *Shoshone -Bannock Tribes v. Fish &*
3 *Game Comm’n*, 42 F.3d, 1278, 1284-1285 (9th Cir. 1994).

4 Because the relief requested by the Plaintiffs in this case, if granted, would
5 run against the Fort Peck Tribes itself, the Tribes’ sovereign immunity protects any
6 Tribal employees named and performing actions in their official capacities. *See*
7 *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Kenai Oil and Gas,*
8 *Inc. v. Department of the Interior*, 522 F. Supp. 521, 531 (D. Utah 1981) (“Tribal
9 immunity may not be evaded by suing tribal officers”), *aff’d*, 671 F.2d 383 (10th
10 Cir. 1982).

11 Because the Plaintiffs impute negligence by the Fort Peck Tribes based on
12 Dale Grandchamp, it was necessary to address his relationship with the Fort Peck
13 Tribes and along with his tribal status.

14 The case should be dismissed against the Fort Peck Tribes, including Doug
15 Grandchamp. The Complaint as written implies all the individuals are sued under
16 their official capacity with the Tribes, including Doug Grandchamp, and assert with
17 claims of liability running against the Assiniboine and Sioux Tribes of the Fort Peck
18 Reservation for their actions. The Fort Peck Tribes has not waived sovereign
19 immunity for the Plaintiffs’ claims in this case and to the degree that Complaint
20 alleges that individual actions implicate the Fort Peck Tribes, they are entitled to
21
22
23
24
25

1 tribal sovereign immunity. The Complaint against the “Tribal Defendants” in
2 Counts 1, 2, and 4 should be dismissed because the relief seeks to reach the Tribes’
3 internal management and coffers.

4 **V. The Plaintiffs Claim Continues to Fail to Raise Issues of Federal Law**
5
6 **against the Fort Peck Tribes**

7 Issues closely connected to tribal operations on the Fort Peck Reservation,
8 such as the work done on behalf of the Tribes on their Turtle Mound Buffalo Ranch
9 that Plaintiffs base their allegations of liability in this case with respect to the Fort
10 Peck Tribes and other tribal members are not a matter over which federal courts have
11 subject matter jurisdiction. *Ordinance 59 Ass’n v. Babbitt*, 970 F. Supp. 914, 925
12 (D. Wyo. 1997).
13

14 As noted in *Santa Clara* “[tribal courts have repeatedly been recognized as
15 appropriate forums for exclusive adjudication of disputes affecting important
16 personal and property interests of both Indians and non-Indians.]” 436 U.S. at 65
17 (citations omitted).
18

19 Plaintiffs plead that the Turtle Mound Buffalo Ranch is owned and operated
20 by the Fort Peck Tribes. The Plaintiffs plead that both Doug Grandchamp and Dale
21 Grandchamp are members of the Fort Peck Tribes.
22

23 The Plaintiffs fail to demonstrate how State of Montana civil regulatory
24 authority extends to the Tribes or tribal members in their Counts One, Two and
25

1 Four on alleged acts originating on tribal trust land under a Tribal Buffalo Program
2 run by the Tribes within the exterior boundaries of the Fort Peck Indian
3 Reservation. It is long-held precedent that the State has no authority to regulate the
4 affairs of the Tribes and Tribal members on the Reservation. *Williams v. Lee*, 358
5 U.S. 217, 220 (1959).
6

7 Further, Plaintiffs do not present any legal basis to support how these claims
8 against the Fort Peck Tribes under state law are subject to Federal jurisdiction.
9

10 Any complaint regarding the acts of the Fort Peck Tribes, their tribal
11 employees and their tribal citizens that occur with the exterior of the Fort Peck
12 Indian Reservation is squarely within the exclusive civil regulatory authority of the
13 Fort Peck Tribes, and any claim is subject to authority of the Fort Peck Code of
14 Comprehensive Justice, and the jurisdiction in the Fort Peck Tribal Court.
15

16 The Counts against the Tribes are not properly before the Federal District
17 Court.
18

19 **VI. Plaintiffs Rely on Conclusory Allegations in All State Claims**

20 Plaintiffs argue that the Tribes breached their duty to act in a reasonable
21 manner when they swathed hay without fire precautions, and use this to support
22 both liability under a negligence claim and Mont. Code Ann. § 50-63-103. The
23 Plaintiffs allegations fall short. The mere fact that a fire occurred does not support
24 that there was willful, wanton, or reckless conduct as defined under the statute.
25

1 They do not provide any information that the Tribes had any duty to swath with the
2 fire precautions they list.

3 Again, the facts in the Complaint must “raise a right to relief above the
4 speculative level,” and into the “realm of plausible liability.” *Twombly*, at 555.
5 Although properly alleged facts must be construed in favor of the plaintiff, a court
6 need “not accept as true conclusory allegations, unwarranted factual inferences, or
7 legal conclusions.” *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010); *see also*
8 *Iqbal*, at 678 (court is not required to accept mere legal conclusions as true).
9
10

11 The Plaintiffs submit only conclusory allegations, including the unwarranted
12 factual inference that the Fort Peck Tribes were actually able to operate a significant
13 piece of farm machinery without a tire, to support their claim that the Fort Peck
14 Tribes were negligent. The Plaintiffs offer no alleged facts to support that there were
15 any intentional actions to set a fire by the Fort Peck Tribes. The Plaintiffs fail to
16 sufficiently plead a claim under either prong of Mont. Code Ann. § 50-63-103, or to
17 demonstrate a violation of duty owed to the Plaintiffs to support a claim of
18 negligence, again assuming *arguendo* that Montana law is actually applicable to the
19 Fort Peck Tribes under the facts as plead (which it is not).
20
21

22 The Plaintiffs further allege that the Fort Peck Tribes or their agents swathed
23 hay as to create a nuisance. Under Montana Code Ann. § 27-30-10, a nuisance action
24 must be based on conduct of a defendant that is either intentional, negligent, reckless
25

1 or ultrahazardous. Again, the Plaintiffs' bare legal conclusion that swathing without
2 a fire truck, water tender or fire extinguisher was a nuisance fails to state an adequate
3 claim under the laws of Montana (if Montana laws are applicable, which they are
4 not). Plaintiffs' allegation of trespass also relies on bare legal conclusions to support
5 their claims of trespass.
6

7 In fact, the Plaintiffs contend an intervening cause of the fire, improper fire
8 suppression by the BIA, which the Tribes could not have reasonably foreseen.
9

10 CONCLUSION

11
12 The Plaintiffs have failed to demonstrate a federal question of law against the
13 Fort Peck Tribes under the Federal Tort Claims Act. The Fort Peck Tribes have not
14 waived expressly waived their sovereign immunity with respect to any of the claims
15 by the Plaintiff against "Tribal Defendants." Finally, the Fort Peck Tribes, and any
16 tribal members, which includes Doug Grandchamp, are not subject to Montana law
17 or Federal Jurisdiction for the acts alleged, so the Plaintiffs fail to state a claim for
18 which relief can be granted in Claims 1, 2, and 4. Even if the Court was to hold
19 Montana law as applicable, the Plaintiffs pled bare legal conclusions that are
20 insufficient to support their claims.
21

22
23 For the foregoing reasons, the Plaintiffs ask that this Court grant the Fort Peck
24 Tribes' (including Doug Grandchamp) Motion to Dismiss against the Plaintiffs.
25

Respectfully submitted,

/s/Georgette H. Boggio

Georgette H. Boggio
Elk River Law Office, P.L.L.C.
2501 4th Avenue North
P.O. Box 928
Billings, MT 59101
Phone: (406) 259-8611
Fax: (406) 259-3251
gboggio@elkriverlaw.com

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing **REPLY TO OPPOSITION TO MOTION TO DISMISS** contains 3209 words as calculated by Microsoft Word, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index.

ELK RIVER LAW OFFICE, PLLP

/s/ Georgette H. Boggio
Georgette H. Boggio

CERTIFICATE OF SERVICE

I certify that on July 7, 2021, I electronically filed the foregoing with the Clerk of Court via CM/ECF System, which will send notification of such filings to the attorneys of record.

ELK RIVER LAW OFFICE, PLLP

/s/ Georgette H. Boggio
Georgette H. Boggio