

NO. 10-15364

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In The  
United States Court of Appeals

For the Ninth Circuit

RICHARD LELAND NEAL; REX CARL SAGELY,

Plaintiffs – Appellants,

vs.

STATE OF ARIZONA, body Politic; ROBERT DEVRIES, Kingman Chief of Police;  
TOM SHEAHAN, Mohave County Sheriff; ROGER VANDERPOOL, Director of the  
Arizona Department of Public Safety; STACEY K. STANTON, Director of Arizona,  
Department of Motor Vehicle; GALE GARRIOTT, Director Arizona, Department of  
Revenue; all in their official capacities;

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISCTRICT COURT FOR THE  
DISTRICT OF ARIZONA  
CV09-08203-PCT-JAT

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**DEFENDANTS-APPELLEES' JOINT BRIEF**

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## STATEMENT OF JURISDICTION

Appellees Robert Devries, Tom Sheahan, and the State Defendants — Roger Vanderpool, Stacey K. Stanton, Gale Garriott and the State of Arizona — agree with Appellants Richard Leland Neal and Rex Carl Sagely that this Court has jurisdiction over appeals from final decisions of the district courts. 28 U.S.C. § 1291. “A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter.” *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009) (holding that a dismissal without prejudice is final for the purposes of appeal where the court entered a separate final judgment).

On January 14, 2010, the United States District Court for the District of Arizona ordered the dismissal of this action without prejudice because Neal and Sagely had failed to establish the district court's subject-matter jurisdiction. (ER pp. 10–14). The district court also entered a separate Judgment in favor of Defendants and against Neal and Sagely, which dismissed both the Complaint and the action. (ER p. 9). As in *Elliott*, the dismissal here was without prejudice, and the court issued a separate final judgment, rendering the decision final for the purposes of appeal.

Defendants agree that the appeal is timely. The required notice of appeal must be filed within thirty days of the entry of judgment. Fed. R. App. P.

4(a)(1)(A). Neal and Sagely filed their Notice of Appeal on February 12, 2010. (ER p. 1–8). Because the Notice of Appeal was filed within thirty days of the judgment, this appeal is timely.

The district court’s lack of jurisdiction is discussed extensively in this brief.

### **STATEMENT OF THE ISSUES**

Neal and Sagely identify seven issues for review. (Opening Brief at 19-33).

However, these issues overlap and are more succinctly stated as:

I. Did the district court properly dismiss the action for lack of subject-matter jurisdiction where the Complaint failed to establish the existence of a federal question necessary for jurisdiction pursuant to 28 U.S.C. § 1331?

II. Did the district court properly dismiss the action for lack of subject-matter jurisdiction where the Complaint failed to allege diversity of citizenship or an amount in controversy in excess of \$75,000 necessary for diversity jurisdiction pursuant to 28 U.S.C. § 1332?

III. Did the district court properly dismiss the state law claims where there was no federal jurisdiction?

IV. Did the district court lack jurisdiction over the Plaintiffs’ monetary claims against the State of Arizona and the State officials in their official capacities under principles of the Eleventh Amendment?

## STATUTORY PROVISIONS

Pertinent statutory provisions are set forth verbatim and with appropriate citation in the addendum bound with this brief.

## STATEMENT OF THE CASE

On October 7, 2009, Neal and Sagely filed their *pro se* Complaint in the United States District Court for the District of Nevada. (ER pp. 62–103). On October 9, 2009, the case was transferred to the District of Arizona. The Complaint sought to enjoin the Defendants from enforcing Arizona’s motor-vehicle licensing, registration, and titling requirements against Neal and Sagely because they claim membership in the Pembina Nation Little Shell Band of North America (“Pembina Nation”). (ER p. 69 ¶¶ 21–22). The Complaint further alleged a breach of contract/treaty, apparently in connection with the same refusal by Defendants to recognize the Pembina Nation driver’s licenses and license plates. (ER pp. 69–70 ¶ 23).

On November 19, 2009, Sheahan filed a Motion to Dismiss. (ER p. 108). On December 7, 2009, the State Defendants (the State of Arizona, Vanderpool, Stanton, and Garriott) filed a Motion to Dismiss. (ER p. 109). On December 18, 2009, Devries filed a Motion to Dismiss. (ER p. 111). On January 14, 2010, the United States District Court for the District of Arizona dismissed the lawsuit without prejudice for failure to establish the district court’s subject-matter

jurisdiction because the Pembina Nation is not a federally recognized tribe. (ER p. 12). The district court noted that “the unanimous authority of the federal courts appears to affirm that the Pembina Nation Little Shell Band of North America is not federally recognized.” (ER p. 12, listing cases and citing the BIA listing of federally recognized tribes at 74 Fed. Reg. 40218-02 (Aug. 11, 2009)). The district court also concluded that “because the Little Shell Band is not federally recognized, Defendants need not heed any such transportation codes; and, any such policy or custom, even as alleged by Plaintiffs, is not in violation of the United States Constitution or any of the treaties cited by Plaintiffs.” (ER p. 13 n.1).

Neal and Sagely contend that the district court abused its discretion in dismissing their claims for lack of subject-matter jurisdiction, asserting that federal jurisdiction lies under 28 U.S.C. §§ 1331, 1332, 1343, 1367, and 5 U.S.C. § 552. (Appellant Brief pp. 19–33).

### **STATEMENT OF THE FACTS**

The Complaint sought to enjoin Defendants from enforcing Arizona’s motor-vehicle licensing, registration, and titling requirements against Neal and Sagely. (ER p. 69 ¶¶ 21–22). Neal and Sagely claim membership in the Pembina Nation, (ER p. 66 ¶¶ 11–12; ER p. 9 ¶ 24; Appellant Brief p. 2 ¶ 1), a band which they admit is not a federally recognized tribe. (ER p. 71 ¶¶ 28–29; Appellant Brief p. 11 ¶ 11). They simultaneously claim that the tribe is federally recognized by

virtue of the common law. (ER p. 66 ¶ 13; ER p. 70 ¶ 25; ER p. 72 ¶¶ 32–34; Appellant Brief p. 12 ¶ 16). They assert that they are “naturalized” members of the tribe. (ER p. 66 ¶¶ 11–12). They allege that they have valid licenses under the Pembina Nation Transportation Code, but Defendants refuse to recognize the validity of the documents. (ER pp. 50–51; ER p. 80 ¶¶ 72, 74).

### **SUMMARY OF THE ARGUMENTS**

The district court correctly ruled that it lacked jurisdiction in this case because Neal and Sagely failed to set forth any valid basis on which the court could exercise subject-matter jurisdiction. Neal and Sagely have the burden to establish the existence of federal jurisdiction, yet they failed to do so. The Complaint does not articulate a federal cause of action, a substantial federal question, or diversity jurisdiction. Because the Pembina Nation is not a federally recognized tribe, it does not have the authority to issue driver’s licenses or license plates that the states must recognize, and therefore Defendants do not violate federal law by refusing to recognize them. Absent a federal question or diversity jurisdiction, the district court properly dismissed the action.

Although the district court did not rely on the Eleventh Amendment in dismissing the actions, it nonetheless deprived the district court of jurisdiction over any claim for money damages against the State Defendants. Although the Plaintiffs did not specifically seek damages in the Complaint’s prayer for relief, the

Plaintiffs did allege that they suffered damages. The principles underlying the Eleventh Amendment bar the federal courts from adjudicating any such claim against the State. And because suits against state officials in their official capacity are in reality suits against the State itself, the same principles bar the Plaintiffs' damages claims against the individual State Defendants.

## ARGUMENT

### I. STANDARD OF REVIEW

In their Opening Brief's section on Standards of Review, Neal and Sagely state that "the appellate court must examine factual determinations to assure that the lower court has not rested its decision on insupportable factual assumptions." (Appellant Brief, p. 19 ¶ 1). This is not a correct statement of the standard of review of subject-matter jurisdiction.

In their statement of the issues being raised on appeal, Neal and Sagely incorrectly claim an abuse-of-discretion standard of review, querying whether the dismissal was an abuse of discretion in each of their seven issues. The standard of review for the district court's determination of subject-matter jurisdiction is *de novo*. *Am. Fed'n of Gov't Employees, AFL-CIO Local 2152 v. Principi*, 464 F.3d 1049, 1052 (9th Cir. 2006) (citing *Campos v. Nail*, 940 F.2d 495, 496 (9th Cir. 1991)). This standard of review applies to all of the issues in this case.

## **II. THE DISTRICT COURT PROPERLY DISMISSED THE ACTION FOR LACK OF SUBJECT-MATTER JURISDICTION.**

Neal and Sagely asserted — yet failed to establish — jurisdiction in the district court pursuant to 28 U.S.C. §§ 1331, 1332, 1343(a)(3), 1367(a), and 5 U.S.C. § 552(g). (Appellant Brief, pp. 19–33). “The party asserting jurisdiction has the burden of proving all jurisdictional facts.” *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). The Court presumes lack of jurisdiction until plaintiffs prove otherwise. *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

### **A. Neal and Sagely Did Not Establish a Federal Question.**

The Complaint lacks a well-pleaded federal cause of action that could serve as a basis for Neal and Sagely’s lawsuit pursuant to 28 U.S.C. § 1331. Section 1331 states, “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” To “arise under” federal law, a “well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff’s asserted right to relief depends on the resolution of a substantial question of federal law.” *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004). Here, the Complaint fails to establish a federal question because it does not plead either a federal cause of action or a substantial question of federal law. Instead, the Complaint consists of a

series of conclusory allegations, most of which are nearly impossible to decipher. Attempting to establish a federal cause of action, Neal and Sagely cite 28 U.S.C. § 1343(a)(3) and 5 U.S.C. § 552(g). Their Complaint, however, does not establish jurisdiction under either of these statutes.

**1. The Complaint Failed to Plead a Federal Cause of Action for a Violation of Civil Rights under 28 U.S.C. § 1343.**

The Complaint failed to plead a federal-civil-rights cause of action. Though the Plaintiffs rely on 28 U.S.C. § 1343(a)(3), this section “does not create an independent basis for federal jurisdiction, but only serves to confer jurisdiction where a federal cause of action is provided by one of the substantive sections of the Civil Rights Act.” *Ellis v. Cassidy*, 625 F.2d 227, 229 (9th Cir. 1980), *abrogated on other grounds by Kay v. Ehrler*, 499 U.S. 432 (1991); *accord Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006).

Here, even liberally construing their *pro se* Complaint, Neal and Sagely do not identify any federally protected right or privilege that has been violated. (ER p. 84 ¶ 87). Rather, they contend that being subjected to the same laws as every other citizen is somehow discriminatory. (ER p. 76 ¶ 57; ER p. 77 ¶ 60; ER p. 83 ¶ 86). This is simply incorrect. Defendants need not make exceptions to the enforcement of Arizona law in favor of the Pembina Nation’s purported transportation codes. Neal and Sagely do not have a federally protected right to violate state motor-vehicle laws while driving in Arizona. *Wagnon v. Prairie Band*

*Potawatomi Nation*, 546 U.S. 95, 97 (2005) (holding that Indians going beyond reservation boundaries are subject to non-discriminatory state laws). Because the Pembina Nation is not federally recognized, refusing to extend reciprocity to Pembina Nation licenses and registration does not violate any federal rights. Neal and Sagely cannot articulate a federal cause of action for having been denied “equitable” treatment under the law because no such cause of action exists.

Further, Neal and Sagely’s claim of a civil-rights violation on the basis of their status as “naturalized” Indians fails to establish a federal cause of action. (Dkt. 1 at 5, ¶¶11-12). A plaintiff must allege that the defendants “acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166 (9th Cir. 2005). “[A] white man who at mature age is adopted in an Indian tribe does not thereby become an Indian.” *United States v. Rogers*, 45 U.S. 567, 572 (1846) (discussed in *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005)). The term “Indian” generally has been held to include “all of Indian ancestry who are also Indians by political affiliation.” *Eagle v. Yerington Paiute Tribe*, 603 F.3d 1161, 1164 (9th Cir. 2010) (quoting *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005)); *United States v. Maggi*, 598 F.3d 1073, 1077–80 (9th Cir. 2010).

Although Neal and Sagely may be politically affiliated with the Pembina Nation, they cannot establish membership in a protected class. They claim to be

naturalized Indians, (ER p. 5 ¶¶ 11–12), but naturalization only affects one’s political ties. Neal and Sagely did not become Indians by joining the Pembina Nation. Ancestral ties cannot be created through the Pembina Nation’s claimed authority to grant membership to “any person living in the United States or Canada.” (ER p. 16). Neal and Sagely are not Indians and cannot assert a civil-rights violation on the basis of this fabricated Indian ancestry. They are not members of a protected class; therefore, there is no federal cause of action.

## **2. The Complaint Does Not Establish Privacy Act Jurisdiction.**

Neal and Sagely inexplicably cite 5 U.S.C. § 552(g)(1)(D). No such subsection of 5 U.S.C. § 552 exists. Furthermore, section 552 is not relevant to Neal and Sagely’s claims, is silent as to jurisdiction, and does not create a federal cause of action.<sup>1</sup>

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<sup>1</sup> In full, 5 U.S.C. § 552 states:

The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

- (1) an index of all major information systems of the agency;
- (2) a description of major information and record locator systems maintained by the agency; and
- (3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

5 U.S.C. § 552(g).

Neal and Sagely probably intended to cite the Privacy Act, 5 U.S.C. §

552a(g)(1)(D), which states:

Whenever any agency . . . fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C.A. § 552a(g)(1)(D). In *Dittman v. California*, this Court held that section 552a(g)(1)(D) does not create a federal cause of action against state agencies or state and local officials. 191 F.3d 1020, 1026 (9th Cir. 1999). “[T]he private right of civil action created by the Privacy Act, is specifically limited to actions against agencies of the United States Government.” *Id.* Because Neal and Sagely are not asserting their claims against the federal government or its agencies (ER p. 62), the Privacy Act does not create an applicable federal cause of action. Further, the Privacy Act does not apply here because Neal and Sagely allege no facts constituting an alleged violation of the Act. (ER pp. 62–101). Thus, the Privacy Act is irrelevant to Neal and Sagely’s claims and does not grant jurisdiction.

**3. Plaintiffs Failed to Plead a Substantial Question of Federal Law.**

Neal and Sagely’s asserted right to relief does not depend on the resolution of a substantial question of federal law. They fail to establish federal-question jurisdiction because: (a) no federal trust relationship exists with unrecognized

tribes; (b) the applicability of tribal laws is not a federal question; (c) the Pembina Nation is not a party to either the Treaty with the Delawares or the “International Multilateral Driving Compact;” (d) the Complaint implicates only state law; and (e) Neal and Sagely’s claims are frivolous and insubstantial. Therefore, Neal and Sagely cannot establish federal-question jurisdiction.

**a. The United States Does Not Have a Trust Relationship with Unrecognized Tribes.**

Neal and Sagely argue that the federal trust relationship between the federal government and Indian tribes creates a federal question. (Appellants Brief, p. 19). The federal trust relationship describes the relationship between *recognized* tribes and the United States government. *See, e.g.*, 25 U.S.C. § 564q (terminating the federal trust relationship with a tribe when terminating federal recognition); 25 U.S.C. § 733 (restoring federal recognition and the federal trust relationship).

Without elaboration, Neal and Sagely assert that the Pembina Nation is a federally recognized tribe under the test set out in *Montoya v. United States*, 180 U.S. 266 (1901). (ER p. 72 ¶¶ 33–34; Appellants’ Brief, p. 22 ¶ 5). “As a general matter, the Supreme Court has described a tribe as ‘a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.’” *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272 (9th Cir. 2004) (quoting *Montoya*, 180 U.S. at 266). Thus, under *Montoya*, tribal existence requires a shared racial, political, and

territorial identity. This Court has further examined the factors needed to show that an Indian community is a tribe:

An Indian community constitutes a tribe if it can show that (1) it is recognized as such by the federal government, or (2) it is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." In addition, we have required that the group claiming tribal status show that they are "the modern-day successors" to a historical sovereign entity that exercised at least the minimal functions of a governing body.

*Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (internal citations omitted).

The Pembina Nation is not an officially recognized tribe. *See* 74 Fed. Reg. 40218-02 (Aug. 11, 2009). Despite their claim of a federal question based on the federal trust relationship, Neal and Sagely also disclaim any trust relationship between the federal government and the Pembina Nation, acknowledging the lack of federal recognition and stating that they "are not a domestic dependent nation in a state of pupilage nor under a ward of a guardian of the Bureau of Indian Affairs." (ER p. 73 ¶ 40). The Pembina Nation also is not a body of Indians of the same or a similar race because it permits anyone to join, regardless of ancestry. (ER pp. 16–17). Finally, the Pembina Nation does not have the requisite ancestral ties to be the modern-day successors to a historical sovereign entity. Thus, under the *Montoya* test, the Pembina Nation cannot be recognized as a tribe. Because the Pembina

Nation is not federally recognized, no trust relationship exists and no federal question is presented.

**b. The Applicability of a Tribal Ordinance Does Not Present a Federal Question.**

Neal and Sagely assert a right to be ruled by the laws of the Pembina Nation. (Appellant’s Brief, p. 18 ¶ 4). Even assuming, *arguendo*, that the Pembina Nation is a tribe, claiming that the Pembina Nation’s transportation code<sup>2</sup> should apply to Neal and Sagely in Arizona does not present a federal question. “An ordinance enacted by a federally recognized Indian tribe is not itself a federal law; the mere fact that a claim is based upon a tribal ordinance consequently does not give rise to federal question jurisdiction.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1077 (9th Cir. 1990) (citing *Boe v. Fort Belknap Indian Cmty.*, 642 F.2d 276, 279 (9th Cir. 1981)).

Even if the Pembina Band were federally recognized — and it is not — its transportation code, as a tribal ordinance, is not federal law. Further, because the tribe is not recognized by the federal government, any claim that the applicability of its ordinances creates federal question jurisdiction is even less plausible.

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<sup>2</sup> Given the complete lack of Indian country governed by the Pembina Nation, its purported transportation code could not apply in any locale; it would serve only as a thinly veiled attempt to avoid compliance with state motor-vehicle laws. (ER pp. 18–49).

Therefore, the applicability of the Pembina Band’s transportation code does not present a federal question.

**c. Treaties and Compacts to Which the Pembina Nation Is Not a Signatory Are Inapplicable.**

Neal and Sagely assert jurisdiction on the basis of the 1778 Treaty with the Delawares, (Appellants Brief, p. 22 ¶ 4), and the “International Multilateral Driving Compact” (Appellants Brief, p. 24 ¶ 2). Neither of these creates a federal question because the Pembina Nation is not a party to either.

Neal and Sagely argue that the failure to recognize the Pembina Nation transportation code is a violation of the 1778 Treaty with the Delawares. (Appellants Brief, p. 22 ¶ 4). They attached a copy as an Exhibit to their Motion for Temporary Restraining Order and Motion for Preliminary Injunction. (ER p. 61). This document states that it is an agreement between the United States and the Delaware Nation. (*Id*). Neal and Sagely do not, and cannot, claim that the Pembina Nation is a signatory. Therefore, this treaty confers no rights on members of the Pembina Nation and is inapplicable.

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Neal and Sagely also argue that the “International Multilateral Driving Compact”<sup>3</sup> requires the recognition of the Pembina Nation transportation code. (Appellants Brief, p. 24 ¶ 2). The Geneva Multilateral Road Traffic Convention is an international treaty that applies only between its signatories. (ER p. 60). Neal and Sagely do not, and cannot, claim that the Pembina Nation is a signatory: the Convention itself lists the signatories and the Pembina Nation is not among them. (ER p. 60). Therefore, the Geneva Road Traffic Convention is inapplicable here.

Neal and Sagely are unable to establish the applicability of the Treaty with the Delawares or the Geneva Road Traffic Convention. Therefore, neither document creates a federal question.

**d. The Complaint Implicates Only State Laws.**

It is well established that, “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Wagnon*, 546 U.S. at 97, 126 S.Ct. at 679 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973)); *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 698 (9th Cir. 2004).

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<sup>3</sup> They do not provide any citation for this document and the Defendants are unable to locate any document by this name. However, Neal and Sagely attached a copy of the Geneva Multilateral Road Traffic Convention as an Exhibit to their Motion for Temporary Restraining Order and Motion for Preliminary Injunction. (ER p. 60). Defendants will proceed on the assumption that it is this document to which Neal and Sagely refer in their Brief.

Neal and Sagely do not cite any express federal law requiring the Defendants to refrain from enforcing Arizona's laws with respect to members of the unrecognized Pembina Nation. (ER pp. 62–101). Neal and Sagely apparently believe that they can avoid compliance with the law by becoming "sovereign individuals," (ER p. 62 ¶ 1), who are naturalized, (ER p. 66 ¶¶ 11–12), in a non-existent tribe (ER p. 73 ¶ 40; ER pp. 16–17). They contend that this relieves them of the obligation to comply with traffic, licensing, and motor-vehicle laws. (ER p. 74 ¶¶ 42, 48; ER pp. 77–78 ¶¶ 63–64). It does not. Because tribal members must comply with state laws when they leave Indian country, Neal and Sagely subject themselves to the motor-vehicle laws of Arizona when they drive in the State. Arizona law — not federal law or the Pembina Nation's transportation code — governs motor-vehicle licensing and registration in Arizona. The recognition of driver's licenses, license plates, and registration from other jurisdictions is likewise a state-law issue. *See e.g.*, A.R.S. §§ 28-1821 to -1874 (setting forth Arizona's participation in multi-jurisdictional transportation agreements and recognition of driver's licenses from other jurisdictions).

Like the federal government, Arizona does not recognize the Pembina Nation or its motor-vehicle licensing scheme. Neal and Sagely complain only of the application of Arizona law in Arizona, which is obviously outside the bounds of Indian country. (ER pp. 69–70 ¶¶ 21–23). The enforceability of Arizona motor

vehicle licensing, registration, and titling requirements within the state of Arizona requires no resolution of federal law. Thus, the only laws implicated by the Complaint are state laws, and therefore, no federal question is presented.

**e. Frivolous Claims Do Not Confer Jurisdiction.**

Neal and Sagely assert only frivolous claims, attempting to assert federal jurisdiction based on the mere mention of a “tribe.” A federal court lacks jurisdiction over claims that are obviously frivolous or are so insubstantial that they are devoid of merit. *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974), *superseded by statute on other grounds*. Because the Pembina Nation is not a federally recognized tribe, Neal and Sagely’s claim that Arizona law-enforcement officers must recognize the Pembina Nation’s motor-vehicle code is so attenuated and insubstantial as to be absolutely devoid of merit. (ER p. 12; ER p. 71 ¶¶ 28–29). Neal and Sagely do not, and cannot, cite any federal authority requiring Defendants to recognize the transportation code of an unrecognized tribe. The district court correctly determined that it did not have subject-matter jurisdiction.

**B. Neal and Sagely Did Not Establish Diversity Jurisdiction.**

Neal and Sagely incorrectly assert that there is diversity jurisdiction pursuant to 28 U.S.C. § 1332. In relevant part, section 1332 states, “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is

between citizens of different States.” 28 U.S.C.A. § 1332(a)(1). Thus, there are two requirements that must be met: diversity of citizenship and the amount in controversy. Neal and Sagely have established neither.

The Complaint does not assert that Neal and Sagely are citizens of a different state than Defendants. (ER p. 66 ¶¶ 11–12). Although the Complaint lists the same mailing address for both Neal and Sagely in care of an address in Nevada (ER p. 66 ¶¶ 11–12), the documents that they have placed in the record list their addresses in Kingman, Arizona (*see e.g.*, ER pp. 51–59). Because the Complaint does not establish the state of citizenship for either Neal or Sagely, diversity cannot be presumed.

Further, the Complaint does not establish an amount in controversy sufficient for diversity jurisdiction. The party asserting diversity jurisdiction bears the burden of establishing that the amount in controversy exceeds \$75,000. *In re Ford Motor Co./Citibank (S.D.), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001). “The amount in controversy is normally determined from the face of the pleadings.” *Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 363 (9th Cir. 1986). The Complaint does not establish any amount in controversy. (ER pp. 62–101). Neal and Sagely have not met their burden of establishing the district court’s jurisdiction.

**C. The District Court Correctly Declined Supplemental Jurisdiction.**

Without a federal cause of action on which to base jurisdiction, the district court declined to exercise supplemental jurisdiction over Neal and Sagely's state-law claims of breach of contract. 28 U.S.C. §§ 1367(a), 1367(c)(3). Because Neal and Sagely cannot establish federal jurisdiction, the court properly dismissed their state-law claims.

**III. THE DISTRICT COURT LACKED JURISDICTION OVER THE PLAINTIFFS' CLAIMS FOR DAMAGES AGAINST THE STATE DEFENDANTS**

Although the district court did not rely on the Eleventh Amendment in dismissing the action, this Court may affirm on any basis supported by the record. *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992). As explained below, Eleventh Amendment principles support the dismissal of monetary claims alleged against the State Defendants.

The Complaint's request for relief does not specifically ask for money damages. (Dkt. 1 at 38-39). However, except for default judgments, a plaintiff is entitled to judgment for the "relief to which [the plaintiff] is entitled, even if the party has not demanded that relief in its [complaint]." Fed. R. Civ. P. 54(c). The Plaintiffs allege breach of contract (Dkt. 1 at 25-30, ¶¶ 92-119), and allege that they suffered damages in the form of "economic loss, emotional distress, mental anguish, loss of freedom, loss of reputation and loss of property" (*Id.* at 25, ¶ 98).

It is therefore appropriate to determine whether they may sue the State Defendants in federal court for money damages.

They may not do so. The Eleventh Amendment to the United States Constitution states:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

“While the Amendment by its terms does not bar suits against a State by its own citizens, . . . an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.” *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Therefore, to the extent that the Plaintiffs seek damages against the State of Arizona, the suit is barred.

Furthermore, “when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.” *Id.* at 663 (quoting *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 663 (1945)). “Thus . . . a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment” *Id.* The Complaint names Vanderpool, Stanton, and Garriott in their official capacities. (Dkt. 1 at 1 [caption]; *id.* at 3, ¶4; *id.* at 6-7, ¶¶ 16-18). “[A] suit against a state official in his or her official capacity is not a suit

against the official but rather is a suit against the official's office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Thus, the claim for damages against the individual State Defendants is also barred.

### CONCLUSION

The district court correctly ruled that it lacked jurisdiction in this case. Neal and Sagely failed to articulate a federal cause of action, a substantial federal question, or diversity jurisdiction. Absent a federal question or diversity

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jurisdiction, the district court properly dismissed the action. For the foregoing reasons, the Defendants respectfully request that the district court's judgment be affirmed.

DATED this 22nd day of July, 2010.

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## STATEMENT OF RELATED CASES

The following cases are related and were previously heard before this Court:

- *Neal v. State of Arizona, et al.*, CA9 Docket No. 07-16828

This is an appeal by Richard Leland Neal regarding the District Court's denial of a temporary restraining order in a previous lawsuit, 07-CV-08025-SMM.

That lawsuit raised the same or closely related issues against Rochelle Silva, the City of Kingman and all of Defendants in this action except Stacey K. Stanton.

That lawsuit also involved the same transaction or event: the application of state law by State and Local Defendants in refusing to recognize the authority of the Pembina Nation to issue driver's licenses and vehicle registration. On November 19, 2007, this Court dismissed the Appeal for lack of jurisdiction. This Court determined that the Notice of Appeal was not filed within thirty days of the order and that the remaining issues being appealed were neither final nor appealable.

- *Neal v. State of Arizona, et al.*, CA9 Docket No. 09-70479

This is an appeal by Richard Leland Neal regarding the District Court's dismissal without prejudice for lack of subject matter jurisdiction in a previous lawsuit, 07-CV-08025-SMM. That lawsuit raised the same or closely related issues against Rochelle Silva, the City of Kingman and all of Defendants in this action except Stacey K. Stanton. That lawsuit also involved the same transaction or event: the application of state law by Defendants in refusing to recognize the

authority of the Pembina Nation to issue driver's licenses and vehicle registration. Neal did not file an amended complaint in the District Court. On May 29, 2009, this Court denied Neal's petition for writ of mandamus.

- No other known cases in this Court are related.

DATED this 22nd day of July, 2010.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Defendant-Appellees' Joint Brief is proportionately spaced, has a typeface of 14 points or more and contains 5,535 words.

DATED this 22nd day of July, 2010.

**IAFRATE & ASSOCIATES**

By: s/Courtney R. Cloman

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 22nd, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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**ADDENDUM**

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**5 U.S.C. § 552a(g)(1) Civil remedies.**

Whenever any agency

- (A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
- (B) refuses to comply with an individual request under subsection (d)(1) of this section;
- (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
- (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

**25 U.S.C. § 564q Termination of Federal Trust.**

- (a) Publication; termination of Federal services; application of Federal and State laws

Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this subchapter, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

- (b) Citizenship status unaffected

Nothing in this subchapter shall affect the status of the members of the tribe as citizens of the United States.

**25 U.S.C. § 733 Restoration of the Federal trust relationship; Federal services and assistance.**

(a) Federal trust relationship

The Federal recognition of the tribe and of the trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984) [25 U.S.C.A. § 461 et seq.], and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation.

(b) Restoration of rights and privileges

All rights and privileges of the tribe and members of the tribe under any Federal treaty, Executive order, agreement, statute, or under any other authority of the United States which may have been diminished or lost under the Act approved August 23, 1954 [68 Stat. 768; 25 U.S.C.A. § 721 et seq.], are hereby restored and such subchapter shall not apply to the tribe or to members of the tribe after August 18, 1987.

(c) Federal benefits and services

Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after August 18, 1987, for all benefits and services furnished to federally recognized Indian tribes.

(d) Effect on property rights and other obligations

Except as otherwise specifically provided in this subchapter, the enactment of this subchapter shall not affect any property right or obligation or any contractual right or obligation in existence before August 18, 1987, or any obligation for taxes levied before such date.

**28 U.S.C. § 1291 Final Decisions of District Courts.**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**28 U.S.C. § 1331 Federal question.**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**28 U.S.C. § 1332(a) Diversity of citizenship; amount in controversy; costs.**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between--

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

**28 U.S.C. § 1343(a) Civil rights and elective franchise.**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

- (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
- (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

**28 U.S.C. § 1367 Supplemental jurisdiction.**

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled

while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.