

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON,
HATTIE CULLERS, CHARLENE WHITE,
and RALPH THREAT,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the United States
Department of the Interior; UNITED STATES
DEPARTMENT OF THE INTERIOR,

Defendants,

and

CHEROKEE NATION
P. O. Box 948
Tahlequah, Oklahoma 74465-0948,

Limited Intervenor.

Case No.: 1:03cv01711 (HHK)

Judge: Henry H. Kennedy

Docket Type: Civil Rights
(non-employment)

Date Stamp: 08/11/03

**LIMITED INTERVENOR'S REPLY TO PLAINTIFFS' OPPOSITION TO
INTERVENOR CHEROKEE NATION'S MOTION TO DISMISS**

October 11, 2005

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**LIMITED INTERVENOR'S REPLY TO PLAINTIFFS' OPPOSITION TO
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"Plaintiffs' Opposition to Intervenor Cherokee Nation's Motion to Dismiss" is based in material part upon action that has not yet occurred: that the Court will grant Plaintiffs' Motion for Leave to Amend Complaint, filed September 23, 2005. The proposed Amended Complaint, however, does not avoid or even affect the central issue presented by Limited Intervenor's Motion to Dismiss – that the Cherokee Nation is an indispensable party to this litigation and neither it nor its officers can be made parties in view of their sovereign immunity and the absence of federal jurisdiction over Plaintiffs' claims, conclusions that are compelled by the Supreme Court's seminal decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and the Tenth Circuit's decision in a virtually identical case, *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989).

The claims in Plaintiffs' proposed Amended Complaint are further subject to dismissal under *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), which require exhaustion of tribal remedies for claims arising on an Indian reservation even where a federal court might have jurisdiction. As discussed below, the law of the Cherokee Nation provides forums in which election challenges can be adjudicated. Plaintiffs' decision not to pursue such remedies does not provide a basis for federal jurisdiction, but, in fact, further supports dismissal under Fed. R. Civ. P. 19 because alternative forums exist for adjudication of the claims. Because the proposed Amended Complaint would neither cure the absence of an indispensable party, nor provide a basis for federal jurisdiction, this Reply is addressed to both the original Complaint and the proposed Amended Complaint.

I. The Cherokee Nation Has Not Waived or Otherwise Lost its Sovereign Immunity.

Plaintiffs concede the hornbook principle that the Cherokee Nation, as a recognized tribe of American Indians, is entitled to sovereign immunity from suit. Pl. Op. at 5, 14. In opposing Limited Intervenor's Motion to Dismiss, however, Plaintiffs argue that the Cherokee Nation waived its immunity or that its immunity was limited or lost by virtue of: treaty provisions, *id.* at 6-7; federal statutes, *id.* at 7-10; the Cherokee Nation and United States Constitutions, *id.* at 10-11; its "dependent status," *id.* at 11-14; analogy to unrelated cases, *id.* at 14-19; and "intervening in this action," *id.* at 23. In so doing, Plaintiffs completely disregard the well-settled, strict rules applicable to waivers of sovereign immunity, under which a waiver of tribal sovereign immunity, like waivers of federal and state immunity, "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). *Accord Puyallup Tribe, Inc. v.*

Dep't of Game of Wash., 433 U.S. 165, 172-73 (1977); *see also Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). This rule is rooted in the unique relationship between the United States and the tribes and “is a necessary corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). As the following discussion will show, none of Plaintiffs’ arguments overcome this formidable hurdle, and some are so obviously misplaced as to appear frivolous.

A. No Cherokee Nation treaty waives the Nation’s sovereign immunity.

Plaintiffs point to Article 7 of the Treaty of July 19, 1866, 14 Stat. 799, as authorizing their suit against the Cherokee Nation. Pl. Op. at 6. Not so. Article 7 provides for district court jurisdiction where “an inhabitant of the [so-called “Freedmens”] district . . . shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause” (Emphasis added). Article 7 of the 1866 Treaty plainly refers only to suits among individuals and confers no jurisdiction over suits against the Nation.

Plaintiffs also cite Article 9, Pl. Op. at 6, which provides that Freedmen “and their descendants, shall have all the rights of native Cherokees” But native Cherokees and their descendants also cannot sue the Cherokee Nation without its consent, so Plaintiffs are not being singled out for separate treatment. Moreover, as the Court of Appeals concluded with respect to Article 9 in *Nero v. Cherokee Nation of Oklahoma*, “this provision only places substantive constraints on the Tribe, it does not waive the Tribe’s immunity from a suit alleging non-compliance with these constraints.” 892 F.2d 1457, 1461 (10th Cir. 1989). Similarly, Article 6 authorizing the President of the United States “to adopt the means necessary to secure the impartial administration of justice,” does not open the door to any court for Plaintiffs, nor give Plaintiffs legal standing to

enforce its terms if the President, as here, has not acted.

Finally, Plaintiffs allege in the Amended Complaint, ¶ 15, that the Cherokee Nation's sovereign immunity "has been expressly waived" in Article 12 of the 1866 Treaty. Article 12, section 3, dealing with the Cherokee Council's legislative powers, says that "[n]o law shall be enacted inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States." Like Articles 1 and 2 of the Cherokee Constitution and Article 9 of the 1866 Treaty, this provision places substantive restrictions upon the Nation, but clearly does not modify its immunity from suit. *See Nero*, 892 F.2d at 1460.

B. The Cherokee Nation's sovereign immunity has not been waived by federal statute.

(1) The Civil Rights Act of 1866: At the time of its passage, non-citizen Indians were expressly excluded from coverage under the 1866 Civil Rights Act, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981-91). Whether Indian tribes are "persons" under any section of this Act is doubtful, *see, Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701, 708-12 (2003), and the Act certainly does not waive sovereign immunity. *See, e.g., Wills v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). In any event, in *Nero* the Tenth Circuit rejected, for lack of federal jurisdiction, identical claims by Cherokee Freedmen against the Cherokee Nation and its officials for alleged violations of 42 U.S.C. §§ 1981, 1985, 1986 and 2000d. *Nero*, 892 F.2d at 1460-63. As to the claims raised under sections 1985 and 1986, the Court of Appeals followed *Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir. 1987), and held that those statutes provide no independent substantive cause of action for a claimant and, as a result, did not provide a federal basis for challenging decisions by a tribal government concerning the tribal elections process. *Nero*, 892 F.2d at 1462. The *Nero* court also rejected Plaintiffs' claims against the Nation

and tribal officials brought under 42 U.S.C. § 1981 and § 2000d. The court explained that federal laws of general applicability that are silent as to their coverage of Indian tribes will not apply to tribes if, *inter alia*, “the law touches ‘exclusive rights of self-governance in purely intramural matters,’” *Nero*, 892 F.2d at 1463 (citations omitted). Tribal elections certainly raise quintessential rights of self-governance.¹

(2) The 1898 Curtis Act: Plaintiffs’ reliance upon sections 2 and 14 of the 1898 Curtis Act, ch. 504, 30 Stat. 495, is similarly misplaced. *See* Pl. Op. at 7-9. Section 2 authorizes the appropriate United States court to make a tribe party to a suit where it appears “that the property of [the] tribe is in any way affected by the issues being heard” (Emphasis added). Plaintiffs transmute “property” into “interest,” Pl. Op. at 8, and then say that the Court has jurisdiction over the Cherokee Nation because it has asserted an “interest” in the issues here presented. That slight-of-hand will not work. The Cherokee Nation’s interest in this case is protection of its sovereignty, not its property, and that governmental interest lies wholly outside section 2. Section 14 of the Curtis Act deals with the organization of cities and towns under Arkansas law. The Cherokee Nation is not a city or town, nor do Plaintiffs claim to be citizens of a city or town, so section 14 is irrelevant too.

(3) The 1924 Indian Citizenship Act: Plaintiffs next cite the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)), which granted citizenship to American Indians, as giving “Native Americans the same protections as any other U.S.

¹ Plaintiffs cannot avoid this result by restyling their claim as if it arose under a different portion of the statute. While Plaintiffs cite 42 U.S.C. § 1982, Pl. Op. at 9-10, that section deals exclusively with the right “to inherit, purchase, lease, sell, hold, and convey real and personal property.” Plaintiffs’ lawsuit does not involve any of these property rights. Section 2 of the 1866 Act, quoted in part by Plaintiffs, Pl. Op. at 10, addresses criminal penalties, and neither waives tribal sovereign immunity nor authorizes a civil cause of action in federal court against Indian tribes.

citizen.” Pl. Op. at 9. True. What the 1924 Act plainly did not do, however, either expressly or impliedly, is abrogate the sovereign immunity of the Cherokee Nation or any other Indian tribe.

(4) The 1970 Principal Chiefs Act: Finally, the Plaintiffs complain that the Cherokee Nation did not comply with section 1 of the 1970 Principal Chiefs Act, Pub. L. No. 91-495, which states that tribal election procedures are “subject to approval by the Secretary of the Interior.” Pl. Op. at 7. But the facts are that the 1975 Cherokee Nation Constitution, which establishes election procedures, was approved by the Secretary, and the Nation made its current election code available to the Department. *See* Proposed Am. Compl. at Ex. 5. That this submission was considered adequate is evidenced by the Department’s recognition of Chad Smith as the duly elected Principal Chief of the Cherokee Nation, *id.* at Ex. 16 and Ex. 18, just as the Secretary has recognized the results of all prior elections held under the 1975 Cherokee Constitution.²

C. The Cherokee Nation Constitution and the United States Constitution do not abrogate or limit the Nation’s sovereign immunity.

Plaintiffs observe that the Cherokee Nation’s Constitution declares that “[t]he Constitution of the United States is the Supreme law of the land,” Pl. Op. at 10, and argue from this that the Nation has no sovereign immunity from suit in federal court. But the United States Constitution is

²Moreover, even if the Nation had not complied with the Principal Chiefs Act – although it did – the Plaintiffs have not shown that they, rather than the Secretary, would have a private right of action or other legal standing to enforce the Act’s provisions in federal court. *See Santa Clara Pueblo*, 436 U.S. at 59-72 (refusing to imply a federal cause of action to enforce the Indian Civil Rights Act against a tribe or its officials). Indeed, as established by *Harjo v. Kleppe*, 420 F. Supp 1110, (D.D.C. 1976), *aff’d sub. nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978), the five affected Tribes, including the Cherokee Nation, retained their sovereign authority over the selection of their Principal Chiefs and the limited power that had been granted to the Secretary under section 6 of the Act of April 26, 1906, 34 Stat. 137, was restricted to appointments only as necessary to fill a vacancy in office. *Harjo*, 420 F. Supp. at 1127 and n. 41. If the 1906 Act did not give the Secretary power to select Nation officials, then clearly the 1970 Principal Chiefs Act, which reaffirmed the Tribes’ sovereign authority to elect those officials, had no such effect.

also the supreme law of the land for the United States and the 50 States, and that has not stopped these governmental entities from successfully asserting their sovereign immunity. *See United States v. Testan*, 424 U.S. 392, 400-01 (1976); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The Cherokee Nation for this purpose is no different. Indeed, the district court in its unpublished decision in *Nero* rejected the same argument here, holding that the same provision of the Cherokee Nation Constitution “does not rise to the level of an express waiver.” *Nero v. Cherokee Nation of Oklahoma*, No. 84-C-557-C, slip op. at 4 (N.D. Okl. Jan 14, 1986) (Ex. 1).

Plaintiffs’ claims against the Cherokee Nation and its officials under the United States Constitution also fail because, as the Supreme Court held in *Santa Clara Pueblo*, 436 U.S. at 56, and the Tenth Circuit found in *Nero*, 892 F.2d at 1462, and *Swimmer*, 835 F.2d at 261-62, the federal Constitution is, in fact, not a restriction on tribal governments. The principle that the Constitution restrains only federal and state governments, not tribal governments, is well-established. *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896); *see also United States v. Kagama*, 118 U.S. 375, 382 (1886) (declaring that Indian tribes are not “brought under the laws of the Union or of the state within whose limits they reside[.]”). “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Clara Pueblo*, 436 U.S. at 56. Applying those decisions, the federal courts regularly have dismissed, for lack of federal jurisdiction, claims brought against tribes and tribal officials alleging violations of constitutional rights. *Id.* at n. 7 (citing cases); *see also United States v. Bird*, 287 F.3d 709, 713 (8th Cir. 2002) (noting that “[t]he Bill of Rights and the Fourteenth Amendment . . . do not apply directly to tribes”); *Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000) (dismissing “*Bivens*” constitutional tort claims brought against tribal

defendants acting in their official and individual capacities, finding that the tribal defendants were not acting under color of federal law so as to be subject to a constitutional tort claim as “the tribal defendants are not bound by the United States Constitution”); *Fletcher v. United States*, 116 F.3d 1315, 1324 n.12 (10th Cir. 1997) (observing that tribes are “unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority”); *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 673 (10th Cir. 1980) (“[T]he Fifth Amendment acts as a limit on federal government action only. The Fifth Amendment does not apply to actions of Indian tribes.”).

D. Congress has not otherwise limited the Cherokee Nation’s sovereignty.

Under the general heading “Tribes’ dependent status,” Plaintiffs appear to argue that the Cherokee Nation’s sovereign immunity is limited simply because of its status as a recognized tribe of American Indians – *i.e.*, by virtue of its special relationship with the United States. Pl. Op. at 11-14. Plaintiffs misconstrue the applicable rule of law. The key question here is not whether Congress has plenary power in the field of Indian affairs (a principle in effect since the earliest days of this Nation), but rather whether Congress has exercised that plenary power to limit the Cherokee Nation’s sovereign immunity. As already discussed, *supra* at 3-6, none of the treaties or federal statutes upon which the Plaintiffs rely, Pl. Op. at 12, even comes close to intending, much less achieving, that result, and none of the cases they cite holds otherwise.

Plaintiffs describe *Seminole Nation of Okla. v. Norton*, 223 F.Supp. 2d 122 (D.D.C. 2002), as “an almost identical situation” to the facts here presented. Pl. Op. at 13; *see also*, Proposed Am. Compl. ¶ 5 (“There is thus no principled distinction between this litigation and that involving the Seminoles.”). Actually, this particular *Seminole* case could not be more completely inapposite. First, there it was the Seminole Nation that instituted the lawsuit and thus voluntarily subjected itself

to the jurisdiction of the court – *i.e.*, waived its sovereign immunity, 223 F. Supp. 2d at 125; here the Cherokee Nation intervened solely for the purpose of denying the Court’s jurisdiction by asserting its sovereign immunity. Second, the Seminole Nation sued to force the Secretary to approve a tribal action which adversely affected the Freedmen’s voting rights, *id.* at 125-26; here the Cherokee Nation Constitutional Amendment pending before the Secretary has nothing to do with voting rights, and would only eliminate Secretarial approval of future Constitutional amendments. Proposed Am. Compl. at Ex. 2.

The Seminole case which really is comparable to this litigation is *Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003), *cert. denied*, 124 S.Ct. 2907 (2004). In *Davis*, certain Seminole Freedmen sued the Secretary and various Bureau of Indian Affairs officials to block implementation of a tribal plan for the use of judgment funds. *Id.* The Court of Appeals affirmed the district court’s dismissal of the suit under Rule 19 because the Seminole Nation was an indispensable party that possessed sovereign immunity. *Id.* at 1288-1294. There is, indeed, “no principled distinction between this litigation and that involving the Seminoles,” Proposed Am. Compl. ¶ 5, but not for the reason the Plaintiffs give.

II. Plaintiffs’ Argument that the Cherokee Nation “Cannot Invoke Sovereign Immunity” Is Not Supported by the Caselaw Cited or Any Other Judicial Precedent.

In a further effort to defeat Limited Intervenor’s Motion to Dismiss, the Plaintiffs contend that the Cherokee Nation is precluded from invoking its sovereign immunity in light of various past court decisions. Pl. Op. at 14-23. There are two answers to this dubious proposition: (1) Plaintiffs’ attempt to distinguish *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989), is specious; and (2) the other cases Plaintiffs cite are either inapplicable or clearly inapposite.

A. Nero is directly on point.

In *Nero*, certain Cherokee Freedmen brought a class action against the Nation and a number of its officials for, *inter alia*, alleged violations of their voting rights. *Id.* at 1458. The plaintiffs asserted jurisdiction under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (“ICRA”), Articles 1 and 2 of the Cherokee Nation Constitution and Article 9 of the 1866 Cherokee Nation Treaty. *Nero*, 892 F.2d at 1458-61; *see also* Ex. 1 at 4. The Court of Appeals affirmed the district court’s dismissal of the suit on sovereign immunity grounds, citing *Santa Clara Pueblo* and *Swimmer*. 892 F.2d at 1459-61. That holding should be dispositive here; after all, Plaintiffs concede that *Nero* “arose from an almost identical factual situation as the current case,” Pl. Op. at 21, and they disavow any intent to relitigate the issues there decided.

Plaintiffs try to distinguish *Santa Clara Pueblo* and *Nero* on the ground that they are not now alleging jurisdiction under the ICRA, but rather are here claiming jurisdiction under Article 1 of the Cherokee Nation Constitution and Article 7 of the 1866 Treaty.³ Pl. Op. at 22. But as has already been demonstrated, *supra* at 3-4, 6-8, neither of these provisions effects a waiver of the Nation’s sovereign immunity any more than did the same and related provisions at issue in *Nero*. Plaintiffs have thus raised a purported distinction with no measurable difference.

B. The cases upon which the Plaintiffs rely are inapplicable and/or inapposite.

(1) Plaintiffs discuss *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973), *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974), and *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975), as if these cases reflected still good

³ In their proposed Amended Complaint, Plaintiffs expressly refer to the ICRA as one of the federal statutes upon which they rely. *See* Proposed Am. Compl. at ¶¶ 12, 53, and 64.

law. Pl. Op. at 17-18. The rationale of these cases, of course, was repudiated in 1978 by the Supreme Court in *Santa Clara Pueblo*, as the Plaintiffs later reluctantly concede: “the Court in [*Santa Clara Pueblo v. Martinez* restricted the holdings in *Johnson*, *Crowe*, and *Dry Creek Lodge*.” Pl. Op. at 20. The Tenth Circuit in *Nero* also destroyed any continuing vitality to its fluke opinion in *Dry Creek*. See *Nero*, 892 F.2d at 1460 and n.5. Plaintiffs’ attempt to save district court jurisdiction under 28 U.S.C. § 1343(4) from the impact of *Santa Clara Pueblo* is also unavailing, since the Supreme Court rejected the lower court’s finding of jurisdiction under that section. 436 U.S. at 54-55.⁴ As a plain reading of the statute makes clear, section 1343(4) grants jurisdiction only where a separate “Act of Congress provid[es] for the protection of civil rights,” and the Plaintiffs have pointed to no such Act. Section 1343 does not provide an independent basis for a claim.⁵

(2) Four other cases relied upon by the Plaintiffs deserve passing mention. In *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001), for example, cited at Pl. Op. 15, the Supreme Court found that the Tribe had waived its sovereign

⁴ Plaintiffs base their argument upon a truncated quotation from the Supreme Court’s opinion. Pl. Op. at 20. The full quote is: “For purposes of this case, we need not decide whether § 1343(4) jurisdiction can be established merely by presenting a *substantial question* concerning the availability of a particular form of relief.” 436 U.S. at 53, n.4. Plaintiffs’ truncated quotation omits every word in the sentence after “established,” thus substantially changing the Court’s meaning.

⁵ As illustrated by *Santa Clara Pueblo*, 436 U.S. at 53-55, 72, although plaintiff there alleged that the federal court had jurisdiction under section 1343, the absence of a federal cause of action under ICRA required dismissal. Similarly, in *Nero* the district court’s unpublished decision, Ex. 1, makes clear that plaintiffs relied on section 1343 in support of their claim of federal jurisdiction, but that jurisdictional provision did not cure the absence of a federal cause of action. *Nero*, 892 F.2d at 1461-63. Those decisions apply settled law. “The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct.” *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 n.4 (1991) (holding that grant of jurisdiction under 28 U.S.C. § 1362 did not waive the State’s immunity from suit in federal court under the Eleventh Amendment).

immunity when it agreed by a construction contract clause to submit disputes with its builder to binding arbitration and to enforcement of the arbitral awards “in any court having jurisdiction thereof.” 532 U.S. at 414. The relevance here of this decision is hard to perceive since the Cherokee Nation has not agreed by contract or otherwise to arbitrate disputes with Plaintiffs, much less submit any such dispute to this Court.

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), cited at Pl. Op. 16, involved the application of 42 U.S.C. § 1982. As previously noted, *supra* at 4 n.1, that statute covers rights to real and personal property, not the governmental interests at issue in this case.

In *Osage Tribal Council v. United States Dep’t of Labor*, 187 F.3d 1174 (10th Cir. 1999), cited at Pl. Op. 18, the Court of Appeals found that Congress waived tribal sovereign immunity from suit under the whistle-blower provision of the Safe Drinking Water Act when it granted agency jurisdiction over all “persons” who were defined to include “municipalities,” which, in turn, were defined to include Indian tribes. *Id.* at 1181. Plaintiffs’ problem in relying upon this decision is that they have not found, and cannot find, any comparable statute containing an express waiver of tribal immunity covering their claims here—other than, once again, the clearly inapplicable Treaty of 1866, *supra* at 3-4, and the equally inapplicable Curtis Act, *supra* at 5. Pl. Op. at 18-19.

United States v. Wadena, 152 F.3d 831 (8th Cir. 1998), cited at Pl. Op. 20-21, involved the criminal prosecution of corrupt tribal officials where federal court jurisdiction was authorized under an express federal criminal statute. The tribal officials there advanced a basketful of defenses, including some based upon *Santa Clara Pueblo*. The Court of Appeals rejected them all, pointing out, *inter alia*, the difference between criminal and civil suits, the fact that the ICRA was not being invoked as a basis for jurisdiction, and that “tribal immunity is not at issue in the present criminal

case.” 152 F.3d at 845. These statements provide no support for the Plaintiffs’ suggestion that the Cherokee Nation’s sovereign immunity is compromised in this civil case.

In short, the cases upon which Plaintiffs rely are wholly unpersuasive.

C. The Cherokee Nation did not waive its sovereign immunity by intervening.

Plaintiffs’ argument that, “by intervening in this action, the Cherokee Nation has conceded to the jurisdiction of the federal court,” Pl. Op. at 23, ignores the critical distinction between an unconditional intervention and the limited intervention that the Nation requested and this Court granted. In *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), upon which the Plaintiffs solely rely, the Yakima Tribe intervened in the litigation without conditions, made itself a full party to the suit and thereby waived its sovereign immunity. *Id.* at 1012-14. The applicable rule in this case, on the other hand, is that a sovereign, such as the Cherokee Nation, may seek and obtain limited intervention in litigation for the sole purpose of moving to dismiss the action on indispensable party grounds, and such action consistently has been held not to effect a waiver of the sovereign’s immunity for any other purpose. *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 667-68 (7th Cir. 1992), *aff’g in part* 746 F. Supp. 1334, 1350 (N.D. Ill. 1990) (allowing State to intervene for limited purpose of moving to dismiss suit for lack of jurisdiction which did not result in a waiver of its immunity); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff’d*, 422 F.3d 490 (7th Cir. 2005) (tribe’s limited intervention for purpose of moving to dismiss suit for lack of jurisdiction and failure to join an indispensable party did not result in waiver of the tribe’s immunity). Interestingly, the most recent application of this rule occurred in *United Keetoowah Band of Cherokee Indians v. United States*, –Fed. Cl.–, 2005 WL 2333294 (Ct. Fed. Cl. Sep. 16, 2006), where the Cherokee Nation had been

granted limited intervention for purposes of moving for dismissal and where the Court then dismissed the complaint under Rule 19 for failure to join an indispensable party.

III. The Cherokee Nation is Both a Necessary and an Indispensable Party to this Case.

A. Necessary party.

Plaintiffs do not argue seriously that the Cherokee Nation is not a necessary party to this litigation pursuant to Rule 19(a), devoting less than two pages to that discussion. *See* Pl. Op. at 24-25. The facts are that Plaintiffs' suit is a direct attack upon the validity of the Cherokee Nation's May 24, 2003, election and upon the ability of the Nation's officers to speak for and represent its government. It could hardly be more clear, in the words of the Rule, that the Nation "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may . . . as a practical matter impair or impede [its] ability to protect that interest" ⁶ Fed. R. Civ. P. 19(a). For a further discussion of the Cherokee Nation's status as a "necessary party," in response to which the Plaintiffs cite not a single case, *see* Memorandum in Support of Limited Intervenor Cherokee Nation's Motion to Dismiss ("Lim. Int. Mem.") at 4-9.

B. Indispensable party.

Plaintiffs challenge the Cherokee Nation's status as an indispensable party under Rule 19(b) almost exclusively by reference to *Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003). Pl. Op. at 26-29. The Cherokee Nation readily agrees that *Davis* represents good law – a suit by the Seminole Freedmen against federal officials that was dismissed because the Seminole Tribe was an indispensable party that could not be joined because of its sovereign immunity. *Davis*, 343 F.3d at

⁶ Plaintiffs allege that the "BIA can protect the rights of the Freedmen" Pl. Op. at 25. That argument stands the Rule on its head, for the key consideration under Rule 19 is that the Defendants cannot protect the rights of the absent Cherokee Nation.

1291-94. The place to begin a Rule 19(b) analysis in this Circuit, however, is not with *Davis*, but instead with *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995). In *Kickapoo Tribe*, the District of Columbia Circuit determined that the State “was both a necessary party under Rule 19(a) and immune from suit, thereby cabin[ing] the district court’s discretion to consider factors under Rule 19(b).” 43 F.3d at 1500. Earlier in its opinion, the court declared:

While Rule 19(b) sets forth four non-exclusive factors for the court to consider . . . , this court has observed that “there is very little room for balancing of other factors” set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests “compelling by themselves.”

Id. at 1496, quoting *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777, n. 13 (D.C. Cir. 1986); *see also* cases to the same effect cited in Lim. Int. Mem. at 15, n.16. In short, under *Kickapoo Tribe*, Plaintiffs bear a heavy, and in this case insurmountable, burden to show that the sovereign Cherokee Nation is not indispensable.

Even if a district court’s determination were not so “cabin[ed],” application of Rule 19(b)’s four factors here readily establishes that a judgment in favor of Plaintiffs would indisputably overturn the Cherokee Nation’s laws and procedures for conducting Tribal elections, throw sitting Council members and the Principal Chief out of office, and undo an amendment to the Cherokee Constitution. In response, Plaintiffs assert that, “[s]ince the current principal chief was the former principal chief, this will effect [sic] very little within the tribal government.” Pl. Op. at 26. This assertion is akin to saying that the “potential prejudice is slight,” *id.*, if the 2004 election were nullified because George W. Bush was the prior President. Interference with the Cherokee Nation’s governing processes necessarily is “prejudicial” to the Nation, and, contrary to Plaintiffs’ thesis, Pl. Op. at 27, that prejudice is not mitigated by having the BIA rewrite the Nation’s laws rather than the

Court. As pointed out in *Davis*, Plaintiffs’ “argument goes to the merits of their claim, rather than the potential harm to the Tribe if Defendants lose.” 343 F.3d at 1292. “Their challenge, therefore, must fail.” *Id.*

As also pointed out in *Davis*, Plaintiffs “misconstrue the nature of the adequacy inquiry.” *Id.* This factor “is not intended to address the adequacy of the judgment from the plaintiff’s point of view,” but rather “the adequacy of the dispute’s resolution.” *Id.* at 1293. Plaintiffs’ contention that a judgment entered in the absence of the Cherokee Nation – a judgment which throws out the Nation’s election and provides for the rewriting of the Nation’s election laws by federal officials – would not result in further litigation is far-fetched to say the least.

Finally, Plaintiffs assert that “pursuing remedies through tribal means would be futile” because the Curtis Act abolished the Cherokee Nation’s courts. Pl. Op. 27-28. That argument is foreclosed by *Wheeler v. United States Dep’t of Interior*, 811 F.2d 549, 553 (10th Cir. 1987), holding with respect to an election dispute that “the Cherokee Nation provides a tribal forum for resolving such disputes.” *See also Swimmer*, 835 F.2d at 262. Moreover (and as pointed out elsewhere, *see* Lim. Int. Mem. at 11-12), even if the Plaintiffs lacked an adequate remedy under Rule 19(b), that absence alone would not permit a district court to retain jurisdiction when the absent and indispensable entity possesses sovereign immunity from suit. *Kickapoo Tribe*, 43 F.3d at 1499.

In short, all four factors to be considered under Rule 19(b) point to dismissal of this lawsuit.

IV. This Court Lacks Jurisdiction Over Plaintiffs’ Claims Against Nation Officials.

A. Plaintiffs’ claims against Nation officials are barred by sovereign immunity.

Seeking to sidestep the bar of sovereign immunity, the Plaintiffs propose to name the Principal Chief and other Cherokee Nation officials as defendants. Pl. Op. 29-31; Proposed Am.

Compl. at ¶ 16. But that will not work because sovereign immunity also bars suits against government officials where the relief sought is effectively against the sovereign. Sovereign immunity cannot be avoided simply by naming tribal officials, and the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not apply “to an action that is in reality against the sovereign.” *Bowen v. Doyle*, 880 F. Supp. 99, 129 (W.D.N.Y. 1995), *aff’d*, 230 F.3d 525 (2d Cir. 2000). *Accord Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Kenai Oil and Gas, Inc. v. Dep’t of Interior*, 522 F. Supp. 521, 531 (D. Utah 1981), *aff’d*, 671 F.2d 383 (10th Cir. 1982); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418, 424-25 (D. Ariz. 1981), *aff’d in part and rev’d in part on other grounds*, 710 F.2d 587 (9th Cir. 1983) (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)). Nor can a plaintiff avoid dismissal on indispensable party grounds by naming tribal officials, instead of a tribe, as defendants. *Shermoen v. United States*, 982 F.2d 1312, 1317-19 (9th Cir. 1992).

As the Supreme Court explained in *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963), “[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” The test is pragmatic. Whether or not the sovereign itself is named as a defendant, “a suit is against the sovereign if ‘the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,’ or if the effect of the judgment would be ‘to restrain the Government from acting, or to compel it to act.’” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). *See also Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 281-87 (1997) (barring tribe’s use of *Ex parte Young* to enjoin state officials from exercising sovereign authority over land in derogation of tribal rights under federal law where claim was functional equivalent of an action

to quiet title against the State).

These principles have been applied to suits naming tribal officials as defendants, including those involving the exercise of tribal governmental authority in internal tribal affairs. Thus, a suit against a Tribal Council, the Principal Chief and the Assistant Principal Chief, involving the alleged right of the plaintiffs to participate in the election process of that Tribe, was found barred by the Tribe's sovereign immunity. *Fletcher*, 116 F.3d at 1324. This is so because the relief sought "concerning rights to vote in future tribal elections and hold tribal office, if granted, would run against the Tribe itself." *Id.*

Likewise, *Bowen* involved a state court action against the Tribal President, in which it was alleged that the President, "in his individual capacity" and "acting outside the scope of his authority," sought to remove various Tribal officials from their positions and conducted an "improper Council meeting." 880 F. Supp. at 107, 129. The Court found that the case was one that "operate[s] directly against the government of the Nation [Tribe]," and so the action was held barred by the Tribe's sovereign immunity. *Id.* at 129.

The same rule has been applied where the tribe is found to be indispensable under Rule 19. Thus, in *Shermoen*, certain individuals sued the United States challenging the constitutionality of a statute that partitioned an Indian reservation between two tribes. The Ninth Circuit found that because the suit would affect the rights of the absent tribes, those tribes were necessary and indispensable parties which could not be joined because of their sovereign immunity. 982 F.2d at 1317-19. The court rejected plaintiffs' proposed amendment to their complaint to name individual tribal officials as defendants, finding that, "[a]lthough the amended complaint names individual tribal council members as defendants, it is clear from 'the essential nature and effect' of the relief

sought that the tribe ‘is the real, substantial party in interest.’” *Id.* at 1320 (quoting *Ford Motor Co. v. Dep’t of Treasury of Ind.*, 323 U.S. 459, 464 (1945)). That claim for relief would have “prevent[ed] the absent tribes from exercising sovereignty over the reservations,” *id.*, and worked an ““intolerable burden on governmental functions.”” *Id.* at 1320 (quoting *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969)).

These cases control here. Although Plaintiffs propose to amend their complaint to add the Principal Chief of the Cherokee Nation as a defendant, alleging that he violated the law by “refusing to submit the CNO [*sic*: Cherokee Nation] Voting Regulations to the Secretary of Interior,” Proposed Am. Compl. at ¶ 5, and “allowing his subordinate officers to violate the laws,” *id.* at ¶ 16, all of the relief that the Plaintiffs seek would operate directly against the Cherokee Nation as a Nation. Thus, Plaintiffs seek an order from this Court (1) enjoining all Defendants from recognizing the results of a Cherokee Nation election held more than two years ago, *id.* at ¶¶ 17, 67, 70, (2) directing who may govern the Cherokee Nation by requiring that those officials who held office prior to the May 2003 election remain in office until another election is held, *id.* at ¶ 68, and (3) requiring that the BIA appoint a “Trustee” who apparently would oversee operations of the Cherokee Nation government to “ensure that the civil rights of the Freedman are not violated.” *Id.* at ¶ 69. This is precisely the kind of relief sought against tribal officials in *Fletcher* and *Bowen*. If the claims were allowed to proceed against the Principal Chief and any other Nation officials, this suit would unquestionably interfere with the Cherokee Nation’s “sovereignty over the reservation[.]” and work an “intolerable burden on governmental functions.” *Shermoen*, 982 F.2d at 1320. In sum, because any judgment against the tribal officials would operate against the Cherokee Nation itself, sovereign immunity bars

the claims and *Ex parte Young* does not apply.⁷

B. In addition to the bar of sovereign immunity, Plaintiffs' claims against Nation officials fail to state a claim within the jurisdiction of the federal courts.

All of Plaintiffs' claims against the Principal Chief and other Nation officials fail for the additional reason that none state a claim within the jurisdiction of the federal courts. Like their claims against the Cherokee Nation, all of the Plaintiffs' claims against Nation officials are based on alleged violations of the United States Constitution and laws which either do not apply to Indian tribes and their officials, or do not provide a basis for claims that can be made against a tribe or its officials in federal courts.

As established by *Santa Clara Pueblo*, 436 U.S. at 59, 72, the doctrine of *Ex parte Young* cannot be used to bring a federal action against tribal officials for alleged violations of federal laws that do not authorize a cause of action against a tribe or its officials in federal court, or which do not apply to Indian tribes. The Court there dismissed *Ex parte Young* claims against tribal officials for alleged violations of the Indian Civil Rights Act on the ground that the ICRA created no private right of action in federal court for declaratory or injunctive relief against tribal officials in civil cases. The Court reasoned "that providing a federal forum for issues arising under §1302 constitutes an interference with tribal autonomy and self-government," *id.* at 59, and would "undermine the

⁷ Plaintiffs' bare allegations that the Principal Chief "acted beyond the scope of his authority," Proposed Am. Compl, ¶ 16, and that the claims are alternatively made against him "individually," *id.* at ¶¶ 1, 18, 71, do not alter this conclusion. None of the allegations contained in the Plaintiffs' proposed Amended Complaint relate in any way to actions taken by the Principal Chief or other Nation officials in their individual capacity. To the contrary, all of Plaintiffs' allegations arise from the proceedings relating to the Nation's May 2003 election, and all actions taken by Nation officials in connection with that election were and could only have been taken by them in their official capacities – not as individuals. Plaintiffs' bare assertion that they make their claims "individually" thus is wholly ineffective to divest the Nation's officials of their immunity.

authority of tribal forums,” *id.* at 64.

The courts have followed *Santa Clara Pueblo* and repeatedly held that the federal courts lack jurisdiction over civil causes of action against tribes and their officials arising under the ICRA⁸. Most relevant once again is *Nero*, where the Court of Appeals considered and dismissed virtually identical claims brought by Cherokee Freedmen. As previously discussed, *supra* at 4-5, 10, in *Nero* the plaintiffs alleged that the Cherokee Nation, its Principal Chief and other officials violated their rights to vote in Cherokee elections, and sought declaratory and injunctive relief under the ICRA, the 13th and 15th amendments to the United States Constitution, the 1866 Treaty, and various civil rights statutes, including 42 U.S.C. §§ 1981, 1985, 1986 and 2000d. 892 F.2d at 1458. All claims against the Cherokee Nation and its officials were dismissed on the grounds of sovereign immunity and lack of federal jurisdiction. *Id.* at 1466. The same result follows here.

Finally, to the extent that Plaintiffs’ claims against Nation officials arise under provisions of the Cherokee Nation’s Constitution, *see* Proposed Am. Compl. at ¶¶ 5, 10, 15, 16, 53, 64, those claims cannot be adjudicated in this Court because *Ex parte Young* does not apply to claims based on alleged violations of non-federal law, and the federal courts do not have jurisdiction over claims arising under tribal law. While the *Ex parte Young* doctrine provides that sovereign immunity does not bar certain actions seeking to enforce federal law against state officials, it is limited to alleged violations of federal law. A claim that a state official violated state law is not within *Ex parte Young*, and such an action is barred by sovereign immunity. *Pennhurst*, 465 U.S. at 106. For the same

⁸ *See, e.g., Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1142 (10th Cir. 2004); *Ordinance 59 Ass’n v. United States Dep’t of Interior*, 163 F.3d 1150, 1153-55 (10th Cir. 1998); *Olguin v. Lucero*, 87 F.3d 401, 403-04 (10th Cir. 1996); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318-19 (10th Cir. 1982); *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278 (9th Cir. 1981).

reason, a claim that a tribal official violated tribal law is not within the doctrine of *Ex parte Young*, and remains barred. *Bowen*, 880 F. Supp. at 129. Plaintiffs' allegations here, that the Principal Chief acted in violation of the Cherokee Nation's Constitution, raise questions of tribal law to which *Ex parte Young* has no application and over which federal courts have no jurisdiction. *See, e.g., Kaw Nation*, 378 F.3d at 1143 ("A dispute over the meaning of tribal law does not 'arise under the Constitution, laws, or treaties of the United States'"); *Olguin*, 87 F.3d at 403 (federal court has no jurisdiction over claim that elected officials have violated a member's free speech rights under a tribal constitution); *Boe*, 642 F.2d at 279 (claimed violations of a tribal constitution that was adopted pursuant to federal law, did not arise under federal law for purposes of federal jurisdiction). A plaintiff cannot, by artful pleading, convert a dispute arising under tribal law into one arising under federal law. *See Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996) (allegations against tribal officials that they violated federal laws, including those requiring approval of a tribal plan for distribution of tribal income to members, failed to create federal jurisdiction where plaintiffs' claims in fact arose from the tribe's membership determinations, which are issues of tribal law).

That the Cherokee Nation Constitution incorporates by reference principles of federal law does not create federal jurisdiction to adjudicate alleged violations of those laws. To the contrary, any alleged violation of the Cherokee Nation Constitution can only be raised in the Nation's courts. The court in *Nero* rejected a nearly identical argument, holding that the provision in the Cherokee Nation Constitution which expressly applied the ICRA did not waive the Cherokee Nation's sovereign immunity for ICRA claims in federal court. 892 F.2d at 1460. *Nero* controls here.

V. The Tribal Court Exhaustion Doctrine Requires that Plaintiffs' Claims Be Addressed in Tribal Forums.

Finally, even if a basis for federal jurisdiction could somehow be found, the claims here would have to be dismissed for failure to exhaust tribal remedies. The Supreme Court has held that exhaustion of tribal court remedies is required in civil actions arising on the reservation – even in cases where a federal court has jurisdiction over the claim. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-57 (1985). The Supreme Court reaffirmed its adherence to the doctrine of tribal court exhaustion in the context of a diversity case, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987), on the ground that “[i]n diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter’s authority over reservation affairs.” The Court explained that “proper respect for tribal legal institutions requires that they be given a ‘full opportunity’ to consider the issues before them and ‘to rectify any errors.’” *Id.*

The federal courts routinely have required tribal court exhaustion in cases involving tribes or Indians and arising on reservations.⁹ “The issue is not whether the plaintiffs’ claims would be successful in these tribal forums, but only whether tribal forums exist that could potentially resolve

⁹ *Lewis v. Norton*, – F.3d –, 2005 WL 2209921, at *3 (9th Cir. Sep. 13, 2005); *Hartman v. Kickapoo Tribe Gaming Comm’n*, 319 F.3d 1230, 1233-34 (10th Cir. 2003); *Gaming World Int’l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 851-52 (8th Cir. 2003); *Bank One, N.A. v. Shumake*, 281 F.3d 507, 510-15 (5th Cir. 2002); *Bowen v. Doyle*, 230 F.3d 525, 529-30 (2d Cir. 2000), *aff’g* 880 F. Supp. 99, 125-26 (W.D.N.Y. 1995); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33-35 (1st Cir. 2000); *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991-92 (8th Cir. 1999); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1076 (9th Cir.), *as amended by* 197 F.3d 1031 (9th Cir. 1999); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66-69 (2d Cir. 1997); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996); *Smith v. Moffett*, 947 F.2d 442, 444-45 (10th Cir. 1991); *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169-71 (10th Cir. 1992).

the plaintiffs' claims." *Lewis v. Norton*, – F.3d –, 2005 WL 2209921, at *3 (9th Cir. Sep. 13, 2005).

The tribal court exhaustion doctrine has equal application here. Plaintiffs do not contend that they raised their claims before the Cherokee Nation's election commission or in the Nation's courts. Instead (and as previously noted, *supra* at 16), they make the extraordinary allegation that because the Cherokee Nation did not organize under the Oklahoma Indian Welfare Act, the Cherokee Nation's "court system is not an authorized tribal court as it was abolished under the Curtis Act and the 1901 Agreement." Proposed Am. Compl. at ¶ 48; *see also* Pl. Op. at 9. Plaintiffs' allegations have already been flatly refuted by the courts, which have consistently rejected arguments that the Cherokee Nation's right of self-government was "diminished by their failure to reorganize under the Oklahoma Indian Welfare Act." *Wheeler*, 811 F.2d at 551 (citation omitted).¹⁰ As the court in *Wheeler* held, "the Cherokee Nation still possesses an inherent right to self government," *id.*, and for that reason the Cherokee Nation's courts are the proper forum to resolve disputes relating to tribal elections. *Id.* at 552 (finding that the Cherokee Nation, pursuant to its Constitution, adopted election laws which provide procedures for addressing election disputes, with rights of review by the Cherokee courts, and concluding that "[a]ny election dispute can be resolved by Cherokee tribal forums, without any Department involvement"). The laws of the Cherokee Nation in effect at the

¹⁰ *Accord Swimmer*, 835 F.2d at 261 ("[T]he Cherokee Nation possesses an inherent right to self-government that is not diminished by its failure to reorganize under the Oklahoma Indian Welfare Act . . ."). *See also Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir.) (holding that the "the tribal governments still exist," and observing that section 28 of the 1906 Act "provides for the continuation of tribal existence and tribal government for all purposes authorized by law"), *cert. denied*, 409 U.S. 1039 (1972); *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971) ("Cherokee tribal existence continues by virtue of § 28 . . ."); *Harjo v. Kleppe*, 420 F. Supp. at 1129 (holding that the "unmistakable" legal effect of section 28 was that Congress "declined to terminate the tribal existence or dissolve the tribal governments [of the Five Tribes], despite all of its earlier intentions to do so, and despite the fact that its failure to do so rendered some of the other provisions of the Five Tribes Act ineffective.")

time of the May 2003 election and in effect today provide forums for the adjudication of disputes relating to the Nation's elections. Accordingly, even if some basis for federal jurisdiction could otherwise be found (and the Nation submits that is not possible), the Plaintiffs' claims would still have to be dismissed for failure to exhaust tribal remedies. The Federal Defendants agree. *See* Defendants' Response to the Cherokee Nation's Motion to Dismiss at 2-5.¹¹

Conclusion

For all of the foregoing reasons, this action should be dismissed.

Respectfully submitted this 11th day of October 2005,

/s/ Lloyd B. Miller

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¹¹ The Federal Defendants also agree with the Cherokee Nation that this action should be dismissed on the grounds that there is no final agency action that is subject to review under the Administrative Procedure Act, 5 U.S.C. §701. Def. Resp. at 6-7. Plaintiffs' contrary argument, Pl. Op. at 31-33, fails as Plaintiffs completely ignore the fact that the Secretary has taken no action whatsoever on the Cherokee Nation's Constitutional amendment. Plaintiffs' reliance on *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1556 (11th Cir. 1985), for their contention that exhaustion would be futile, fares no better. In *Panola*, exhaustion was not required because the plaintiffs there challenged the lack of administrative procedures to address their grievance and the constitutionality of the statute. *Id.* at 1557. No such questions are presented here.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2005, a true and correct copy of the foregoing Limited Intervenor Cherokee Nation's Reply to Plaintiffs' Opposition to the Cherokee Nation's Motion to Dismiss was served on the following counsel of record via first-class United States mail, postage prepaid, at the following address:

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