

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (Northern (Jackson))**

HOWARD BROWN and	)	
BRANDON SIBLEY,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	Civil Action No. 3:22-cv-00256-DPJ-FKB
	)	
CHOCTAW RESORT	)	
DEVELOPMENT ENTERPRISE,	)	
ET AL.,	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS’ SUPPLEMENTAL BRIEFING PER THE COURT’S ORDER OF
AUGUST 16, 2022 (DOC. 16)**

COME NOW the Defendants by and through their counsel of record, C. Bryant Rogers, VanAmberg, Rogers, Yepa, Abeita, Gomez & Wilkinson, LLP, and hereby submit their Supplemental Briefing per the Court’s August 16, 2022 Order (Doc. 16) on the questions whether (1) in the circumstances of this case the Choctaw Tribal Court has been stripped by the ruling in *Nevada v. Hicks*, 533 U.S. 353 (2001) of even a colorable basis for the exercise of subject matter jurisdiction over the claims Plaintiffs have sought to plead in this suit under 42 U.S.C. § 1983; and, (2) if not, whether the Defendants can waive Plaintiffs’ duty to exhaust their tribal remedies as to those attempted § 1983 claims.

QUESTION ONE

Defendants originally concluded that *Nevada v. Hicks* did strip tribal courts (including the Choctaw Courts) of the right to adjudicate § 1983 claims, filed in federal court, even if they were not otherwise validly pled; and, that *Hicks* thus also triggered one of the *National Farmers*

Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) the exceptions to the duty to exhaust tribal remedies. *See, National Farmers Union, supra* at 856, n. 21:

We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction “is motivated by a desire to harass or is conducted in bad faith,” cf. *Judice v. Vail*, 430 US 327, 338, 51 L ED 2d 376, 97 S Ct 1211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction. (Emphasis added).

Nevada v. Hicks, supra, held *inter alia* that the Fallon Paiute-Shoshone Tribe and the Fallon Tribal Court did not have authority to adjudicate § 1983 claims arising from the actions “of state officials for causes of action relating to their performance of official duties” (*Id.* at 369) and which involved an official’s on-reservation conduct in investigating off-reservation violations of state law (*Id.* at 371) which the court characterized as arising from the officials “performance of their law enforcement duties” involving a suspected off-reservation crime. (*Id.* at 373).

The court in *Nevada v. Hicks* went on to twice limit the reach of its holding:

Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the questions of tribal-court jurisdiction over nonmember defendants in general.

Id. at 369, n.2

We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that potentially subject to tribal control depending on the outcome of *Montana* analysis.

Id. at 373

The court in *Hicks* also referenced another exception to the duty to exhaust set out in *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 459-460 and n. 14 (1997) (exhaustion of tribal remedies is excused where it “would serve no purpose other than delay) and held:

Since it is clear, as we have discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties,

adherence to the tribal exhaustion requirement in such cases “would serve no purpose other than delay,” and is therefore unnecessary.

Hicks, supra at 369

Thus, looking back, it is clear that the Clerk’s statements in the introductory synopsis to the *Hicks* opinion that “(2) tribal court did not have authority to adjudicate § 1983 claim; and, (3) exhaustion of claims in tribal court was not required before seeking federal court relief,” are overbroad and do not reflect the court’s actual, more limited holding; and, that Defendants’ erred is not probing *Hicks* more deeply at the outset.

In retrospect, Defendants gave *Hicks* an unduly expansive reach and on that basis Defendants originally sought dismissal of all Plaintiffs’ claims for failure to exhaust tribal remedies except for Plaintiffs’ § 1983 claims (Doc. 6) separately seeking dismissal by this Court of those § 1983 claim. (Doc. 4).

In follow up to the Court’s Doc. 16 Order, Defendants have undertaken a deeper look at the impact of *Nevada v. Hicks* on the Choctaw Court’s jurisdiction in regard to the kind of attempted § 1983 claim as here set out in Plaintiffs’ Complaint.

In relooking at this matter, it now seems clear that *Nevada v. Hicks* does not strip a tribal court of subject matter jurisdiction over such an attempted § 1983 claim where (as here), if the Complaint were refiled in the Tribal Court per Plaintiffs’ duty to exhaust tribal remedies:

- a) no actual state official would be sued and joined as a party defendant in the tribal court, and/or
- b) where the factual allegations of the Complaint do not identify any state law, policy or regulation that could support a claim that the action complained of was taken “under color of state law,” and/or

c) the claims set out in the Complaint do not seek § 1983 relief based on on-reservation action by a state officer in aid of an off-reservation criminal investigation based on state law.

This narrower reading of *Hicks* is supported by the court's express limitations on its holding as set out above and other case law; see, *Window Rock Unified School District v. Reeves*, 861 F.3d 894 (9th Cir. 2017) (*Nevada v. Hicks* does not strip tribes of colorable jurisdiction to adjudicate employment disputes between Navajo employees and a state school district at an on-reservation state-funded school since no school official involved in the case was being sued for actions taken to enforce state criminal law for a suspected off-reservation crime as was involved in *Hicks*; hence, exhaustion of tribal remedies was required); *Pais v. Sinclair*, 2006 WL 3230035 (W.D. Tx) (plaintiff had duty to exhaust tribal remedies on a purported 42 U.S.C. § 1983 claim where plaintiff failed "to allege facts sufficient to state a valid claim under § 1983" and in those circumstances *Nevada v. Hicks* did not bar the exercise of tribal court jurisdiction or excuse exhaustion of tribal remedies); see, *Tiessen v. Capital*, 2016 WL 6782776, pp. 3-6 (D. Mn.) (declining to excuse plaintiff's duty to exhaust tribal remedies over a Fair Debt Collection Practices Act claim based on *Nevada v. Hicks* because no state official was joined as a defendant).

Defendants clearly showed (Docs. 4 and 5) that Plaintiffs' Complaint did not identify or join any state official as a defendant in this suit and did not identify any state law, policy or regulation that could give rise to a finding that the actions complained of were actions taken "under color of state law" as required to state a valid § 1983 claim, much less that any on-reservation investigation of an off-reservation crime was involved.

Instead, Defendants showed that all the officials and employees whose actions Plaintiffs complain of were tribal officials and employees, not state officials and employees, and that the law and policy Plaintiffs' claim violated their rights was tribal law and policy, not state law and policy.

Thus, on reconsideration of this matter per the Court's Doc. 16 Order, it is now apparent (1) that *Nevada v. Hicks* does not deprive the Choctaw Tribal Court of a colorable basis for the exercise of subject matter jurisdiction, (2) that (as shown here and in Docs. 6, 7 and 12) a colorable basis for the Choctaw Court's jurisdiction over Plaintiffs' claims in fact exists separately under *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959) and under *Montana, supra*, even over Plaintiffs' attempted § 1983 claims; hence, (3) Plaintiffs are also required to exhaust their tribal remedies as to their attempted § 1983 claims just as for their other claims.

QUESTION TWO

There is very little case law expressly addressing the question whether a tribe can waive the duty to exhaust tribal remedies in circumstances where a colorable basis for tribal court jurisdiction exists and where the factors triggering the duty to exhaust tribal remedies also exist. The few cases Defendants can locate which expressly address this issue are from the Tenth Circuit. All hold that this duty is not waivable. *Amerind Risk Management Corporation*, 2016 WL 9415477 (D. N.M.) (in the Tenth Circuit "application of the tribal exhaustion rule may not be waived"); *Navajo Nation v. Intermountain Steel Buildings, Inc.*, 42 F.Supp.2d 1222, 1228 (D.N.M. 1999) (since plaintiff's duty to exhaust tribal remedies is not "a mere defense to be raised or waived by the parties," Navajo Nation could not waive duty to exhaust tribal remedies); *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (since "the requirement of exhaustion of tribal remedies" is not "a mere defense to be raised or waived by the parties" compliance is

mandatory); *see*, other cases cited at pp. 6-8 (Doc. 7). Defendants have not found any Fifth Circuit case law directly on point.

In this regard, if the duty to exhaust tribal remedies was held to be waivable that would fundamentally undermine the whole point of the exhaustion doctrine as articulated in *National Farmers Union, supra* and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

PROCEDURAL OPTIONS

Thus, Defendants now believe that the proper course is for the Court to grant Defendants' Motion to Dismiss for failure to exhaust tribal remedies at Doc. 6 and for the Court to also *sua sponte* dismiss Plaintiffs' spurious § 1983 claim on that same ground. The Court clearly has the power to resolve this matter in that manner (without—in consideration of judicial economy and party litigation cost factors—requiring Defendants to file a motion to amend their Doc. 6 motion or to withdraw their Doc. 4 motion) where, as here, the Court has given Plaintiffs notice that Court might dismiss Plaintiffs' attempted § 1983 claims for failure to exhaust tribal remedies and has given Plaintiffs an opportunity to submit argument against any such *sua sponte* dismissal. *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006) (a district court may *sua sponte* dismiss a claim per Rule 12(b)(6) so long as the plaintiff is given notice of that intent and an opportunity to respond); *Whatley v. Coffin*, 496 Fed. Appx. 414 (5th Cir. 1012) (district court properly dismissed § 1983 claim *sua sponte* after giving plaintiff notice and an opportunity to respond in opposition to such proposed dismissal); *accord, KLLM Transport Services, LLC v. Margh USA, Inc.*, 450 Fed. Appx. 406 (5th Cir. 2011).

If the Court proceeds in this manner, the Court could also deny Defendants' Doc. 4 motion as moot. *Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Mootness in this context is the doctrine of standing set in a time frame: The requisite personal interest that must exist at the

commencement of the litigation (standing) must continue throughout its existence (mootness).”); *National Rifle Association of America v. McCraw*, 719 F.3d 338, 344 (5th Cir. 2013) (federal courts lack jurisdiction to decide claims and rendered moot by subsequent events); *Hestep v. Stephens*, 2019 WL 1084181 (N.D. Tx.) (pending motion for TRO is denied as moot); *Williamson v. Wells Fargo Bank N.A.*, 2017 WL 4573694 (E.D. Tx.) (pending motion may be dismissed as moot where the matters it addressed have been disposed of or rendered irrelevant by rulings on other motions), and cases there cited.

In the alternative, Defendants could file an amended Doc. 6 motion with leave of the Court seeking dismissal of Plaintiffs entire Complaint for failure to exhaust tribal remedies and move to withdraw its pending Doc. 4 motion. Defendants will await the rulings of the Court on these issues before filing anything further regarding Plaintiffs’ § 1983 claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the Plaintiffs by United States Mail, postage prepaid, on August 25, 2022.

/s/ C. BRYANT ROGERS
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