12-17-13 A11:24 IN

IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

ST. GERMAIN, *et al.*, Plaintiffs, v. KELLY, *et al.*, Defendants.	Case No. 2013-CI-CL-005 DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER Date: December 18, 2013 Time: 12:30 PM

COPY

COME NOW Defendants in the above-entitled action, by and through the Office of Tribal Attorney, without waiving other defenses and objections, and provide this response in opposition to Plaintiffs' Motion for Temporary Restraining Order (TRO).

I. INTRODUCTION

On December 9, 2013, Plaintiffs initiated a fourth lawsuit against Defendants in Tribal Court for equitable relief and a Motion for TRO. The Tribal Court has dismissed two related lawsuits against Defendants based on sovereign immunity and standing. *See Roberts, et al. v. Kelly, et al.*, Case No. 2013-CI-CL-003, Order Granting Defendants' Motion to Dismiss (2013);

Lomeli, et al. v. Kelly, et al., Case No. 2013-CI-CL-001, Amended Order Granting Defendants' Motion to Dismiss Second Amended Complaint (2013). Plaintiffs' Motion for TRO alleges that Defendants have violated Due Process and Equal Protection through passage of Resolution No. 13-171 related to Christmas Support funds.[1] Motion for TRO. 3-7.

Defendants oppose Plaintiffs' Motion for TRO, because Plaintiffs are not likely to succeed on the merits, there is no irreparable injury, and injunctive relief is not in the public interest. As this Court has held in *Roberts* and *Lomeli*, Defendants are immune from suit when they act within the scope of their authority. Defendants have acted within the scope of their authority, and Defendants have not violated Due Process or Equal Protection principles. If the Court were to find that Defendants are not immune and find an Equal Protection violation, the Court could only enjoin Defendants from actions in furtherance of Resolution No. 13-171.

II. FACT STATEMENT

On December 3, 2013, the Tribal Council passed Resolution No. 13-171, which provides Christmas Support funds to Nooksack Tribal members in the amount of $250. Decl. of M. Roberts, Exh B. On December 13, 2013, the Council superseded Resolution No. 13-171 through passage of Resolution No. 13-181. *See* Exh. A, Resolution 13-181. Resolution No. 13-181 makes clear that while Disenrollees are not immediately eligible to receive Christmas Support funds, any Disenrollee whom the Council ultimately decides should not be disenrolled will receive the funds at that time. *See* Exh. A, Resolution 13-181.

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[1] Plaintiffs also state that Defendants have not scheduled a special meeting requested on December 8, 2013. The Bylaws do not require the Council to schedule special meetings within any timeframe. *See* Bylaws, art. II, § 5. If this Court finds that the Council must respond to special meeting requests within a reasonable time; a reasonable time surely allows the Council at least 90 days to respond.

III. LEGAL ARGUMENT

The standard for issuing a TRO is essentially the same as that for issuing a preliminary injunction. *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir. 2011). To be entitled to injunctive relief, a movant must demonstrate (1) that s/he is likely to succeed on the merits, (2) that s/he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his or her favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion falls on the movant, and the movant must make "a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*). An injunction is an "extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24.

A plaintiff may obtain a preliminary injunction by demonstrating either: "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). Plaintiffs cannot meet their high burden.

A. Plaintiffs Are Not Likely to Succeed on the Merits.

There is no likelihood that Plaintiffs will prevail on the merits. Black's Law Dictionary defines the "likelihood-of-success-on-the-merits test" as "[t]he rule that a litigant who seeks [preliminary relief] must show a reasonable probability of success . . . ." Black's Law Dictionary 1012 (9th ed. 2009).

1. Defendants are immune from suit.

This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and tribal officials are immune from suit. An Indian tribe is immune from suit because it is a sovereign entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-6 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress has authorized the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59; *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of immunity must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6 NICS App. 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign immunity also applies to tribal officials and employees acting within the scope of their authority. *Cline*, Case No. NOO-CIV-02-08-5, at 6 (citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)); *see also Mitchell v. Pequette*, CV-07-38, 2008 WL 8567012 at *7-9 (Leech Lake Tribal Court May 9, 2008) (holding that tribal employees retained sovereign immunity even though the plaintiff alleged that the employees acted outside the scope of their authority, because the plaintiff failed to legally or factually support this allegation). Tribal sovereign immunity "extends to actions brought against tribes in tribal court." *Olson*, 6 NICS App. at 51.

Plaintiffs misconstrue *Cline*; they allege that the *Cline* Court applied a different test, because it was a "personal capacity" suit. *See* Motion for TRO 5 n.3. This attempt to dismiss

Cline fails, as there was no legislative immunity at issue in *Cline*.[2] On the contrary, the Nooksack Court of Appeals found that the Council members and the Council Chairman retained *sovereign immunity* because there was no waiver, they did not act beyond the scope of their authority, and the plaintiff-appellants' conclusory allegations did not suffice to strip them of sovereign immunity. *Cline*, Case No. NOO-CIV-02-08-5, at 5-8.

Plaintiffs further confuse matters by misconstruing *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 27 n.5 (Ho-Chunk Trial Ct. 2009); Plaintiffs assert that it stands for the proposition that a tribal official does not share in tribal sovereign immunity in tribal court. Motion for TRO 5 n.3. *Cleveland*, however, analyzed the Ho-Chunk Constitution to determine whether the defendants, tribal officials, retained sovereign immunity, which entailed determining whether the defendants acted within the scope of their duties. 8 Am. Tribal Law at 31-35. In note 5, the *Cleveland* Court merely explained that a federal case did not address sovereign immunity of tribal officials and instead dealt with absolute executive immunity. *Id.* at 27 n.5.[3] Similarly, *Seven Arrows, L.L.C. v. Tulalip Tribes of Washington*, No. TUL-CI-4/96-499, 1997 WL 34706747, at *1 (Tulalip Ct. App. July 14, 1997), simply states that the Tulalip Court will not adopt federal law; it is inapplicable to the point for which it is cited. *See* Motion for TRO 5 n.3.

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[2] Plaintiffs allege that the question in legislative immunity cases is whether an individual as acted beyond the scope of his or her authority (Motion for TRO 5 n.3), but in fact, the questions involved in legislative immunity cases are: (1) whether the action involves ad hoc decision making; (2) whether the action applies to a few individuals or the general public; (3) whether the action is legislative; and (4) whether the action bears all the hallmarks of legislation. *Schmidt v. Contra Costa County*, 693 F.3d 1122, 1135 (9th Cir. 2012).

[3] Plaintiffs also cite *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quinault Tribal Ct. Dec. 5, 2013) in support of a straightforward application of *Ex parte Young*. Motion for TRO 5:1-3. Plaintiffs' counsel, Gabriel Galanda, authored *Schlender* and filed it on December 6, 2013, which, conveniently, was the Friday before Plaintiffs' Motion for TRO was filed. *See Schlender*, No. CV-12-078, attached as Exh. B.

Defendants retain sovereign immunity.

2. Resolution No. 13-171 Complies with Due Process.

Due Process protections only attach to entitlements. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577; *see also Perry v. Sindermann,* 408 U.S. 593, 601 (1972); *Khan v. Bland*, 630 F.3d 519, 528 (7th Cir. 2010). Here, the Council created a Resolution defining eligibility for discretionary Christmas Support funds. There is no law or understanding that turns these discretionary funds into an entitlement, which means Due Process protections do not attach. *See Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 942 (D. Wyo. 1976) (finding that the plaintiffs were not entitled to a tribal liquor license, because applicable state law clearly established that there is no vested right to a liquor license).

Even if Due Process protections did attach, however, Defendants have provided sufficient Due Process. The *Matthews* test requires the Court to balance three factors: (1) the private interest at stake, (2) the risk of erroneous deprivation and any value in providing additional safeguards, and (3) the government's interest, which includes the function involved and any monetary and administrative burdens in providing additional procedures. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Matthews*, the plaintiff's social security benefits had been terminated, and the plaintiff alleged that due process considerations required a pre-termination hearing. *Id.* at 323-25. The federal Supreme Court held that no pre-termination hearing was necessary, because the procedures provided the plaintiff: (1) an adequate opportunity to assert his

claim prior to any administrative action, (2) a post-deprivation hearing, and (3) judicial review before denial of the claim became final. *Id.* at 349.

Plaintiffs' interest in Christmas Support funds is minimal compared to a person's interest in social security benefits. Here, there is no risk of erroneous deprivation, because Plaintiffs will receive the Christmas Support funds if they are not ultimately disenrolled. *See* Exh. A, Resolution 13-181. There is no value in additional procedures either, because Plaintiffs' membership status is uncertain. The Council must determine whether Plaintiffs are erroneously enrolled before they are eligible for these benefits.[4] Lastly, providing notice and a hearing to each Disenrollee prior to dissemination of Christmas Support funds would constitute an incredible burden on the Tribe; such a burden is far from warranted when purely discretionary benefits are involved.

3. Resolution No. 13-171 Complies with Equal Protection.

Plaintiffs appear to conflate Substantive Due Process and Equal Protection,[5] but they protect different interests. *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004). Substantive Due Process "'provides heightened protection against government interference with certain fundamental rights and liberty interests[]' even when the challenged regulation affects all persons equally." *Id.* (quoting *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997)) (internal citations omitted). However, "the essence of the equal protection requirement is that the state treat all those similarly situated similarly[.]" *Id.* (quoting *Bartell v. Aurora Pub. Schs.,* 263 F.3d 1143, 1149 (10th Cir. 2001)).

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[4] Plaintiffs' membership status remains uncertain, because the disenrollment proceedings have been unduly delayed due to Plaintiffs' actions.

[5] Motion for TRO 7.

Plaintiffs fail to adequately allege a violation of Substantive Due Process. The federal Supreme Court has explained that "only the most egregious executive action can be said to be 'arbitrary' in the constitutional sense,... [and] the cognizable level of executive abuse of power is that which shocks the conscience[.]" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834-35 (1998). For example, only an extreme intrusion such as forced stomach pumping has been found to violate Substantive Due Process. *See Rochin v. California*, 342 U.S. 165, 172-73 (1952).

Here, the Council determined that persons subject to pending disenrollment proceedings would not be immediately eligible for discretionary Christmas Support funds until the Council makes a final decision that such a person will not be disenrolled. *See* Exh. A, Resolution 13-181. This decision fulfills the Council's authority to "administer any funds or property within the control of the tribe...." *Const.* art. VI, §1(K). This decision is not arbitrary, and it does not shock the conscience, because the Council is administering funds in a responsible manner by reserving them for eligible recipients; if the potential Disenrollees are not disenrolled, then they will be able to receive these benefits.

Plaintiffs also assert Equal Protection claims related to Christmas Support funds. Motion for TRO 7. Importantly, "the equal protection clause of the ICRA is not coextensive with the equal protection clause of the fourteenth amendment to the United States Constitution." *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975). Federal Equal Protection analyses may not be forced upon Tribes. *Id.* at 1083. Even if federal Equal Protection principles are applied, however, there has not been an Equal Protection violation here.

Under federal law, when a suspect class is not involved, Equal Protection review requires

that legislation "be rationally related to a legitimate governmental purpose." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Under rational basis review, legislation must not be "enacted for arbitrary or improper purposes." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012). A law that does not involve fundamental rights or a suspect class "is accorded a strong presumption of validity[,]" and it "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification[.]" *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) (internal citations omitted).

Here, the Council determined that persons subject to pending disenrollment proceedings are not immediately eligible for the Christmas Support funding. *See* Exh. A, Resolution 13-181. Plainly, only properly enrolled members of the Tribe are eligible to receive tribal funding, and limiting disbursement of funds to those members who are not subject to disenrollment proceedings is at least rationally related to responsibly administering tribal funds. *See Const.* art. VI, § 1(K). The Council did not intend any harm by this limitation, as evidenced by the fact that those subject to disenrollment proceedings who are found to be properly enrolled will receive the Christmas Support funds at that time. *See* Exh. A, Resolution 13-181. The Council has not targeted Plaintiffs; rather, the Council's actions fulfill its duty to govern responsibly.

B. Plaintiffs Fail to Demonstrate Irreparable Harm.

Plaintiffs have not demonstrated irreparable harm. The alleged irreparable injury "must be both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991)

(a plaintiff seeking injunctive relief must do more than merely allege imminent harm sufficient to establish standing; s/he must demonstrate immediate, threatened injury as a prerequisite). Plaintiffs make conclusory allegations of irreparable harm but fail to include any facts demonstrating actual harm. Additionally, Plaintiffs cannot be irreparably harmed when any Disenrollee who is not ultimately disenrolled will receive the Christmas Support funds at that time. *See* Exh. A, Resolution 13-181.

C. The Public Interest Weighs in Favor of Denying Injunctive Relief.

The public interest also weighs heavily in favor of denying injunctive relief here. Plaintiffs ask this Court to enjoin Defendants from acting in furtherance of Resolution 13-171, but this would stop pending Christmas Support payments to properly enrolled Nooksack members. Properly enrolled Nooksack members should not be punished in this manner.

Here, there are no serious questions going to the merits, and the balance of equities tips in Defendants' favor when Plaintiffs ask the Court to enjoin action in furtherance of Resolution 13-171. Plaintiffs fail even the less stringent test for injunctive relief.

D. An Injunction Would Stop Pending Payments to Properly Enrolled Nooksack Members.

This Court requested briefing on which legal or equitable remedies are available if the Court finds an Equal Protection violation. Order on Mot. for TRO and Scheduling (December 12, 2013), at 2:15-18. If the Court finds an Equal Protection violation, the only remedy available at this stage would be to enjoin Defendants from taking action in furtherance of Resolution 13-171. *See Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians,* 177 F.3d 1212, 1226 (11th Cir. 1999) ("It is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require

the sovereign's specific performance of a contract."). The court cannot grant relief that would operate against the sovereign. *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005); *Imperial Granite Co. v. Pala Band*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992).

Under Nooksack law, there is no mechanism for obtaining damages against the Council or tribal officials even if there has been a constitutional violation. Federal law provides certain limited means of obtaining damages against the government or governmental officers, but these means have been developed very slowly over the course of U.S. history. For example, the Court of Claims was created in 1855, but it was not until 1887 that it could hear basically all legal claims except equitable, tort, and admiralty claims against the government. *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962); the Tucker Act, ch. 359, § 1, 24 Stat. 505 (1887) (codified at 28 U.S.C. § 1491 (1982)). Similarly, the Federal Tort Claims Act was not created until 1948, and it only constitutes a limited waiver of sovereign immunity. *See* 28 U.S.C. §§ 2674, 1346(b).

Section 1983, providing for relief in certain circumstances when federal constitutional or statutory rights are violated, is inapplicable here. *See* 42 U.S.C. § 1983. No Nooksack Tribal Council has created a statute similar to Section 1983, and even if such a statute existed, Defendants have not violated any of Plaintiffs' rights. Section 1983 deals with "'rights, privileges, or immunities," not violations of federal law. In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981)).

Additionally, the federal Supreme Court asks whether 'the provision in question was "intend[ed] to benefit' the putative plaintiff." *Id.* (quoting *Wright v. Roanoke Redevelopment and Housing Authority,* 479 U.S. 418, 430 (1987)). Here, there is no right to discretionary Christmas Support funds, and any Disenrollee found to be properly enrolled will receive the funds at such time. *See* Exh. A, Resolution No. 13-181.

Under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), federal courts have applied damages against federal agents who violate a plaintiff's constitutional rights in certain cases, but this federal court-created remedy does not apply in Nooksack courts. Prior to recognizing a *Bivens* remedy, federal courts ask whether there is any alternative remedy, but even if there is no alternative, "a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Minneci v. Pollard,* 132 S. Ct. 617, 621 (2012) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (internal citations omitted)). This Court should not fashion a new remedy for Plaintiffs—especially when no properly enrolled Nooksack member will ultimately be deprived of Christmas Support funds. *See* Exh. A, Resolution No. 13-181.

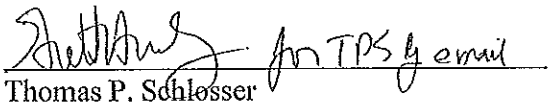
This Court cannot require the Council to provide Christmas Support funds to Disenrollees. The only remedy available would be an injunction against action in furtherance of Resolution No. 13-171 (as superseded by Resolution No. 13-181), which may stop pending Christmas Support payments to properly enrolled Nooksack members.

IV. CONCLUSION

For the foregoing reasons, Defendants request that the Court deny Plaintiffs' Motion for

TRO.

Respectfully submitted this 17th day of December, 2013.



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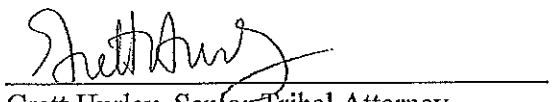

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NOOKSACK TRIBAL COUNCIL

4979 Mt. Baker Hwy, Suite G.
PO Box 157
Deming, WA 98244

POLLING
RESOLUTION #13-181
December 13, 2013

TITLE: APPROVING POLLING RESOLUTION FOR 2013 CHRISTMAS DISTRIBUTION SUPERSEDING POLLING RESOLUTION NO. 13-171

WHEREAS, the Nooksack Tribal Council is the governing body of the Nooksack Tribe of Indians, a recognized tribe under the Treaty of 1855, in accordance with its Constitution and By-Laws approved by the Deputy Assistant Secretary of Indian Affairs on September 24, 1973, and in accordance with the Indian Reorganization Act of June 18, 1934; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of the Nooksack Indian Tribe; and

WHEREAS, on December 3, 2013, the Tribal Council approved Polling Resolution No. 13-171 which approved the 2013 Christmas Distribution (Option C); and

WHEREAS, after review of Polling Resolution No. 13-171, the resolution omitted a necessary clause pertaining to the Tribal Council's directive and intent that persons subject to pending disenrollment proceedings be eligible for such support if Tribal Council's final determination is to retain the person's membership status ; and

WHEREAS, pursuant to Polling Resolution No. 13-171, the Tribe issued a great number of Christmas Support checks for members; and

WHEREAS, currently the Tribal Council is unable to convene because of an emergency and the Tribe requires immediate action and approval of **APPROVING POLLING RESOLUTION FOR 2013 CHRISTMAS DISTRIBUTION SUPERSEDING POLLING RESOLUTION NO. 13-171;**

NOW THEREFORE BE IT RESOLVED, that due to the previously stated omission, the Tribal Council hereby replaces Polling Resolution No. 13-171; and

BE IT FURTHER RESOLVED THAT the Council hereby approves the 2013 Christmas Support in the amount of **$250.00** to be made available to each currently enrolled Nooksack Tribal member, not subject to pending disenrollment proceedings, who have not already received 2013 Christmas Support checks pursuant to Polling Resolution No. 13-171; and

Ph: (360) 592-5164 Fx: (360) 592-4506

EXHIBIT A

BE IT FURTHER RESOLVED THAT currently enrolled Nooksack Tribal members whose disenrollment proceedings are subsequently concluded to a final decision by the Tribal Council and that do not result in disenrollment will receive said 2013 Christmas Support following a favorable final decision of Tribal Council; and

BE IT FURTHER RESOLVED THAT each Christmas Support check issued on behalf of a minor child whose parents were: (1) never married, (2) are divorced; (3) are separated; or (4) have had their parental rights suspended or terminated, shall be issued to the parent or guardian: (1) having court-ordered decision-making authority, (2) a signed and notarized Parental Acknowledgment Form from the other legal parent, or (3) any other documentation evidencing the individual has full decision-making authority for the minor; and

BE IT FURTHER RESOLVED THAT the following Tribal Council members approve the following action by way of this polling resolution subject to ultimate ratification: **APPROVING POLLING RESOLUTION FOR 2013 CHRISTMAS DISTRIBUTION SUPERSEDING POLLING RESOLUTION NO. 13-171** ; and

BE IT FURTHER RESOLVED THAT the Chairman (or Vice-Chairman in his/her absence) is hereby authorized and directed to execute this resolution and any documents connected here within, and the Vice Chairman (or other councilperson in his/her absence) are authorized and directed to execute the following certification.

Chairman Robert Kelly

_____

Date: _____
[ ] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [ ]Email [ ]Phone
Date of Notice: _____

Vice Chairman Rick D. George

_____

Date: 12-13-13
[✓] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [✓]Email [ ]Phone
Date of Notice: 12-13-13

Treasurer Agripina Smith

_____

Date: 12-13-13
[✓] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [✓]Email [ ]Phone
Date of Notice: 12-13-13

Secretary Rudy St. Germain

_____

Date: _____
[ ] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [ ]Email [ ]Phone
Date of Notice: _____

Ph: (360) 592-5164 Fx: (360) 592-4506

Councilmember Lona Johnson

(See attached)

Date: _____
[ ] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [ ]Email [ ]Phone
Date of Notice: _____

Councilmember Katherine Canete

Date: 12/13/13
[✓] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [✓]Email [ ]Phone
Date of Notice: 12/13/13

Councilmember Robert Solomon

Date: 12-13-2013
[✓] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [✓]Email [ ]Phone
Date of Notice: 12-13-2013

Councilmember Michelle Roberts

Date: _____
[ ] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [ ]Email [ ]Phone
Date of Notice: _____

CERTIFICATION

I, the undersigned do hereby certify that the Nooksack Tribal Council is composed of eight (8) members, of which the following members were polled and voted in accordance with this poll on this 13 day of December 2013, and that the above Polling Resolution #13-181 **APPROVING POLLING RESOLUTION FOR 2013 CHRISTMAS DISTRIBUTION SUPERSEDING POLLING RESOLUTION NO. 13-171** was duly enacted by the Council Members vote of: 5 **FOR,** ____ **OPPOSED,** and ____ **ABSTENTIONS,** subject to the ratification of such action at the next Tribal Council meeting, and since its approval this polling resolution has not been altered, rescinded, or amended in any way.

Dated this 13th *day of* December *2013.*

Robert Kelly, Jr., Chairman
Nooksack Tribal Council

ATTEST:

Rick D. George, Vice Chairman
Nooksack Tribal Council

Ph: (360) 592-5164 Fx: (360) 592-4506

Councilmember Lona Johnson

Date: 12/13/13
[✓] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [✓]Email [ ]Phone
Date of Notice: 12/13/13

Councilmember Katherine Canete

Date: _____
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Councilmember Robert Solomon

Date: _____
[ ] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [ ]Email [ ]Phone
Date of Notice: _____

Councilmember Michelle Roberts

Date: _____
[ ] Approve [ ] Deny [ ]Abstain
Notice: [ ]Mail [ ]Email [ ]Phone
Date of Notice: _____

CERTIFICATION

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Dated this ___ *day of* _____ *2013.*

Robert Kelly, Jr., Chairman
Nooksack Tribal Council

ATTEST:

Rick D. George, Vice Chairman
Nooksack Tribal Council

Ph: (360) 592-5164 Fx: (360) 592-4506

IN THE TRIBAL COURT OF

OF THE

QUINAULT INDIAN NATION

E. LEE SCHLENDER
Plaintiff,

v.

QUINAULT INDIAN NATION,
Defendant.

Case No. CV-12-078

ORDER OF DISMISSAL

This matter comes before the Tribal Court on remand from the Quinault Indian Nation Court of Appeals pursuant to an Order issued on September 9, 2013. Opinion, *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quin. Ct. App. Sept. 9, 2013) [hereinafter "Opinion"]. For the reasons discussed below, this matter is hereby **DISMISSED.**

I. Facts and Procedural History

Pro se Plaintiff E. Lee Schlender – a former judge of this Court – filed a Complaint in this matter on June 25, 2012, alleging that the Quinault Indian Nation ("Nation") had breached an employment contract executed between the parties on August 26, 2008. Complaint, Exhibit A [hereinafter "Employment Agreement"]. According to Plaintiff, the Nation terminated his

EXHIBIT B

employment (1) "without cause" and in violation of the terms of the Employment Agreement, and (2) in circumvention of Title 5 of the Quinault Tribal Code. Complaint at ¶ XV; *see also generally id.* Exs. A(1), B (Quinault Business Committee Resolutions authorizing the appointment of Plaintiff pursuant to Title 5). Plaintiff named the Nation proper as a defendant, *id.* at ¶ 2, seeking the following relief:

> 1. [A]ll sums due the Plaintiff and to become due in the future, as both accrued and future amounts payable per the terms and conditions of the Employment Agreement in a sum of not less than $300,000.00.
>
> 2. Interest and costs in a sum to be determined upon trial and entered upon a Judgment of th[e] Court.
>
> 3. Such other and further relief as the Court deems proper in this proceedings [sic] including but not limited to re-instatement of Plaintiff as Chief Judge with an award of all accrued back salary and benefits.

Id. at ¶ XXIV. On August 9, 2012, Plaintiff filed a First Amended Complaint, adding the following additional relief:

> 4. [T]hat the Court enter an Order re-instating Plaintiff to the office of Judge of the Quinault Nation with all Title 5 powers and authority provided therein until his removal as per Title 5, with an award of accrued salary and benefits until he is so removed.

First Amended Complaint at ¶ XVII.

On November 16, 2012, the Nation filed a Motion to Dismiss Plaintiff's First Amended Complaint, arguing that Plaintiff had (1) failed to comply with the pre-filing requirements of Q.T.C. § 99.02.040(a); (2) failed to comply with the service

requirements of Q.T.C. § 30B.05.020; (3) was barred by the statue of limitations, Q.T.C. § 99.01.010; and (4) was barred by tribal sovereign immunity. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, at 2.

On January 22, 2013, this Court granted Defendant's Motion to Dismiss, holding that:

1. Initial Notice of the claim was not served on the Quinault Business Committee as required under a strict reading of Q.T.C. § 99.02.040; and

2. The Contract between the parties was not clear and unambiguous as to a waiver of sovereign immunity. In addition, the Quinault constitutional requirement of security was not met. Thus, the action was barred by tribal sovereign immunity.

Order to Dismiss, *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quin. Tribal Ct. Jan. 22, 2013).

On February 1, 2013, Defendant appealed the Court's Order of Dismissal, arguing that (1) the Defendant was properly served; (2) tribal sovereign immunity does not render the Nation immune from Title 5; and (3) the Nation is not immune from declaratory relief. Notice of Appeal at 2.

On September 10, 2013, the Quinault Court of Appeals issued an Opinion and Order that partially affirmed and partially reversed this Court's Order of Dismissal. As to this Court's holding on Plaintiff's failure to comply with the pre-filing requirements of Q.T.C. § 99.02.040(a), the Court of Appeals reversed, holding that separate service on the President of the

Quinault Indian Nation *and* the Secretary of the Quinault Business Committee, in addition to service upon the Office of Reservation Attorney, is not required. Opinion at 5. Rather, service is sufficient under Q.T.C. § 99.02.040(a) if it is made upon only "'the president and the Office of Reservation Attorney.'" *Id.* (quoting *Quinault Indian Nation v. Hendricks*, Nos. CV-11-093, CV-11-110, at 4 (Quin. Ct. App.)).

As to the Tribal Court's holding on sovereign immunity, the Court of Appeals affirmed, holding that Article V, Section 3(d) of the Quinault Constitution, "a provision seemingly unique to the Nation, requires that a waiver of sovereign immunity must be accompanied by a pledge of collateral." *Id.* at 6 (citing *Pura v. Quinault Housing Authority*, No. CV-12-002 (Quin. Ct. App. Aug. 27, 2013)). The Court of Appeals went on, however, to hold that this does not necessarily dispose of Plaintiff's nonmonetary prospective claims for relief. *Id.* at 7. The Court of Appeals found that "[t]he availability of the Quinault judiciary to award declaratory relief in an action against the sovereign appears to be a matter of first impression" and instructed this Court to make findings of fact and conclusions of law on this matter of "significant importance." *Id.*

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II. Law and Analysis

A. Legal Standard

"Sovereign immunity is a jurisdictional question, because courts do not have authority to hear a case against a government unless it has expressly consented to that exact suit." *Kalantari v. Spirit Mountain Gaming, Inc.*, 6 Am. Tribal Law 94, 99 (Grand Ronde Ct. App. 2005). In reviewing a challenge based on lack of jurisdiction, a trial court "must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Nichole Medical Equipment & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340, 347 (3d Cir. 2012) (quotation omitted). In so doing, "the court must consider the allegations of the complaint as true." *Parenti v. U.S.*, No. 03-5457, 2003 WL 23200011, at *1 (W.D. Wash. Dec. 22, 2003).

Where jurisdiction is properly alleged, a claim may be dismissed "only if it clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous."[1] *Gould Electronics Inc. v. U.S.*, 220 F.3d 169, 178 (3rd Cir. 2000). (internal quotations omitted). As stated by the U.S. Supreme Court in *Bell v. Hood*, 327 U.S. 678 (1946):

[1] A claim is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Dismissal is only appropriate "for a claim based on an indisputably meritless legal theory." *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006).

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682 (citing *Swafford v. Templeton*, 185 U.S. 487, 493-94 (1902); *Binderup v. Pathe Exchange*, 263 U.S. 291, 305-308 (1923)).

Thus, although the Court of Appeals instructed this Court to "complete findings of fact and conclusions of law" in determining the availability of declaratory relief, this Court holds that the jurisdictional analysis requested *necessarily* omits any analysis of the merits or evaluation of the facts. Opinion, at 7. *See e.g. Cronin v. Browner*, 898 F.Supp. 1052, 1058 n.5 (S.D.N.Y.,1995) (citing *Bell*, 327 U.S. 678, and holding that "a subject matter jurisdiction analysis . . . does not involve addressing the merits").

B. Analysis

The Court begins with the presupposition that "sovereign immunity does not shield wrongdoing" and that it is not "fair and just for one to have a right but their only remedy is barred

by sovereign immunity." *Ft. Peck Sioux Council v. Ft. Peck Tribes*, 4 Am. Tribal Law 292, 298 (Fort Peck Ct. App. 2003). Responsible tribal governments owe a duty to their membership; and that duty entails, at minimum, that the Tribal Court be empowered to hear grievances that allege acts repugnant to the Tribe's own constitution and law. *See generally Menefee v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 97-12-092-CV, 2004 WL 5714978, at *3 (Grand Traverse Tribal Ct. May 5, 2004); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *Crater v. Galaza*, 508 F.3d 1261, 1267 (9th Cir. 2007); *U.S. v. Sampson*, 275 F.Supp.2d 49, 68 (D. Mass. 2003); *Seattle School Dist. No. 1 of King County v. State*, 585 P.2d 71, 87 n.7 (Wash. 1978).

At the same time, though, tribal governments must be allowed to protect their "public treasury, financial integrity, autonomy, [and] decision making ability" from constant subjection to legal attack. *Kalantari*, 6 Am. Tribal Law at 98 (citing *Alden v. Maine*, 527 U.S. 706, 750-51 (1999)). As noted in an extremely well-reasoned opinion of the Fort Peck Court of Appeals:

> [S]overeign immunity essentially boils down to substantial bothersome interference with the operation of government. . . . Sovereign immunity protects tribes against unconsented lawsuits that would drain tribal treasuries, interfere with tribal government operations, and handicap the tribe's ability to provide much-needed services to its people. . . . There is no doubt that the doctrine of sovereign immunity is the singular most important issue facing

> all Indian governments today. . . . Tribes are afforded the dignity consistent with sovereign entities; they are protected from unconsented lawsuits which drain their treasuries, interfere with daily governmental operations and handicap their ability to provide necessary services to their people. In short, sovereign immunity allows tribal governments to take their limited resources and run a more efficient, effective and productive entity; all of which ultimately inures to the benefit of its people. Recognizing the great need for services on Indian Reservations there should be no one unmindful of the importance of sovereign immunity, without which Tribal governments would be severely handicapped if not incapacitated. Thus, when the invocation of sovereign immunity advances the benefits of its purpose and rationale [courts should] continue to strongly support the doctrine.

Ft. Peck Sioux Council, 4 Am. Tribal Law at 288-98.

"On the one hand, sovereign immunity is an important shield against outside attacks on the Tribe's resources and ability to govern itself. However, that shield should not deny . . . the right to question the actions of [the] government in a tribal judicial forum." *Oneida Internal Security Dept. v. Somers*, No. 06-0011, 2006 WL 6469430, at *3 (Oneida Ct. App. May 23, 2006). The Court's decision today seeks to balance these two elements by espousing a test that, on the one hand, invocates sovereign immunity where it advances the benefits of its purpose, and, on the other, provides a much-needed forum for dispute resolution. *See generally* Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Conundrum:* Michigan v. Bay Mills Indian Community, 123 Yale L.J. Online 311 (2013).

1. The *Ex parte Young* Exception to Sovereign Immunity.

The doctrine known as the "*Ex parte Young* exception" derives from the U.S. Supreme Court case of *Ex parte Young*, 209 U.S. 123 (1908). In that case, the Supreme Court ruled that Edward T. Young, as attorney general of the State of Minnesota, could properly be enjoined in from enforcing unconstitutional state penalties against the railroad. The Court held:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Id. at 155-56.

The *Ex parte Young* doctrine has since spawned numerous federal appellate cases upholding, explaining, and recognizing its fundamental principles – most recently in the U.S. Supreme Court case of *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, where it was held that "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of [a superior] law[2] and seeks relief properly characterized as prospective.'" 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)).

[2] *See generally Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105-106 (1984).

Every Indian judiciary that this Court is aware of has found that this test strikes the proper balance between the sword of justice and the shield of sovereign immunity. *See e.g. Arendt v. Ward*, 9 Am. Tribal Law 443 (Ho-Chunk Trial Ct. 2011) (holding that the *Ex parte Young* exception applies, but only when a plaintiff requests nonmonetary relief); *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 35 (Ho-Chunk Trial Ct. 2009) (same); *Honyaoma v. Nuvamsa*, 7 Am. Tribal Law 320, 324 (Hopi Ct. App. 2008) (citing the *Ex parte Young* exception and holding that "where a tribal official acts and such action is based upon an unconstitutional law, then that official is not protected by the doctrine of sovereign immunity."); *Fox v. Brown*, 6 Am. Tribal Law 446, 449 n.2 (Mohegan Trial Ct. 2005) ("A limited exception to the general principle of sovereign immunity has long been recognized, where prospective injunctive or declaratory relief is sought challenging the actions of state officials.") (citing *Ex parte Young*, 209 U.S. 123); *Kirkwood v. Decorah*, 6 Am. Tribal Law 188 (Ho-Chunk Trial Ct. 2005) (same); *Whiteagle v. Cloud*, 5 Am. Tribal Law 178 (Ho-Chunk Trial Ct. 2004) (same); *Fletcher v. Grand Traverse Band Tribal Council*, 2004 WL 5714967, at *9 (Grand Traverse Tribal Ct. Jan. 8, 2004) (discussing the *Ex parte Young* exception); *Olson v. Nooksack Indian Housing Authority*, 6 NICS App. 49, 54 (Nooksack Ct. App. 2001) (noting that "[v]arious tribal courts as well as the Ninth Circuit have

adopted" the *Ex parte Young* exception); *McDade v. Individual Members of Te-Moak Council*, No. SF-CV-004-99, 2000 WL 35782656, Nev. Inter-Tribal Ct. App. Mar. 8, 2000 ("Because the Appellant alleged unconstitutional acts by Appellees, they have no immunity through the doctrine of sovereign immunity.") (citing *Ex parte Young*, 209 U.S. 123); *Lynch v. Yomba Shoshone Tribe*, Nos. CVC-YT-003-96, CVC-YT-004-96, CVC-YT-005-96, 1997 WL 34704354, at *4 (Nev. Inter-Tribal Ct. App. Jul. 16, 1997) ("Because the appellant alleged unconstitutional acts by Appellees . . . , they have no immunity through the doctrine of sovereign immunity.") (citing *Ex parte Young*, 209 U.S. 123).

Today, we join our sister courts in adopting the *Ex parte Young* exception to tribal sovereign immunity.

2. *Ex parte Young* Fiction.

Although, in reality, *Ex parte Young* is an "exception" to sovereign immunity, the doctrine employs a **fiction** to obtain this result. *See Elephant Butte Irrig. Dist. of N.M. v. Dep't of the Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998)("The *Ex parte Young* doctrine is not actually an exception to [sovereign] immunity because it applies only when the lawsuit involves an action against state officials, not against the state."). Thus, in order to properly plead an *Ex parte Young* suit - in order to employ this fiction - a plaintiff must name the officer that is "clothed with some duty in regard to the enforcement of the

laws," regulations, or policies that violate a superior law. *Ex parte Young*, 209 U.S. at 155; *see also Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) ("The *Ex parte Young* exception proceeds on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state . . . ."); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1046 (9th Cir. 2000) ("The *Young* doctrine is premised on the fiction that such a suit is not an action against a 'State' and is therefore not subject to the sovereign immunity bar."); *Turano v. Board of Ed. of Island Trees Union Free School Dist. No. 26*, 411 F.Supp. 205, 213 (E.D.N.Y. 1976) ("The fiction upon which the *Young* decision is supported is that a suit against a state officer to restrain him from taking action in his official capacity is a suit against the individual officer and not against the state."); *Hercules Inc. v. Minnesota State Highway Dept.*, 337 F.Supp. 795, 800 (D. Minn. 1972) ("[E]veryone knew that the Court [in *Ex parte Young*] was engaging in fiction when it regarded the suit as one against an individual named Young rather than against the state of Minnesota.") (quotation omitted).

Suits that do not properly employ this fiction are barred by sovereign immunity. *See Santiago v. N.Y. State Dep't of Corr. Servs.*, 945 F.2d 25, 32 (2d Cir.1991) (dismissing equitable claims for prospective relief because plaintiff did

not use *Ex parte Young* "fiction," but instead named state agency); *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F.Supp.2d 1037, 1042 (N.D. Cal. 2011) ("Plaintiffs have named a state entity . . . as a Defendant. However, because *Ex parte Young* only enables suit against state officials, it does not permit Plaintiffs to sue [the state entity]."); *Cheek v. Garrett*, No. 10-0508, 2011 WL 839860, at *3 (D. Utah Mar. 8, 2011) ("Because Plaintiffs have named the State as the Defendant, rather than an individual state officer, the Ex parte Young exception does not apply."); *Harris v. N.Y.*, 419 F.Supp.2d 530, 534 (S.D.N.Y.2006) (dismissing the plaintiff's claims for injunctive relief because the plaintiff did not name state officials as required by *Ex parte Young*); *Sandoval v. Department of Motor Vehicles State of New York*, 333 F.Supp.2d 40, 43 (E.D.N.Y. 2004) ("[A]lthough Plaintiff is requesting prospective injunctive relief, this action does not fall within the confines of the *Ex parte Young* doctrine, because Plaintiff has not named a state official as a defendant.").

The Court thus comes to the first step of a properly plead *Ex parte Young* suit: **A plaintiff must name the officer that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy.**

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3. Official v. Personal Capacity Suits.

Another caveat to the *Ex parte Young* fiction is that the plaintiff must specify that he or she is suing the "official capacity" of the named tribal officer. The explicit naming of the official in this capacity is important because, generally, unless specified, a suit against an official is assumed to be against his or her "personal capacity." *Ali v. Barry*, No. 94-0518, 1995 WL 350788, at *2 (D.D.C. May 22, 1995) (assumed to be named in personal capacities); *Cheyenne-Arapaho Gaming Com'n v. National Indian Gaming Com'n*, 214 F.Supp.2d 1155, 1164 (N.D. Okla. 2002) (noting that "immunity is assumed until proven otherwise"). A personal capacity suit does not evoke the *Ex parte Young* exception because there is no need. The government is not implicated - the suit is against the named official personally. As described by the U.S. Supreme Court in *Kentucky v. Graham*:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's

> personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate. In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office.

473 U.S. 159, 165-66 & n.11 (1985) (citation omitted); *see also Rodriguez v. Cook County, Ill.*, 664 F.3d 627, 632 (7th Cir. 2011) (holding that "[i]ndividual-capacity claims against [officials] are not covered" by sovereign immunity).

An **official** capacity suit, on the other hand, is not actually against the official, but "against the sovereign the official represents." *Derrickson v. City of Danville, Ill.*, 845 F.2d 715, 719 (7th Cir. 1988); *see also Welch v. Laney*, 57 F.3d 1004, 1009 (11th Cir. 1995) ("[W]here a plaintiff brings an action against a public official in his official capacity, the suit is against the office that official represents, and not the official himself."); *Langweiler v. Borough of Newtown*, No. 10-3210, 2010 WL 5393529, at *3 (E.D. Pa. Dec. 29, 2010) ("[A]n official-capacity suit is against the entity itself."); *Wallace v. City of Montgomery*, 956 F.Supp. 965, 976 (M.D. Ala. 1996) ("It is well established that 'suits against an official in his or her official capacity are suits against the entity the individual represents.'") (quoting *Parker v. Williams*, 862 F.2d

1471, 1476 n.4 (11th Cir. 1989)). It is thus that an official capacity suit is the only way to obtain the relief requested by the *Ex parte Young* exception - a personal capacity suit enjoins a person, but an official capacity suit enjoins the government.

If a **personal** capacity suit is brought against a tribal official, he or she may raise a **personal** immunity defense whereunder, depending upon the defense raised, the court must decide whether the official "act[ed] outside the scope of his authority" in committing the alleged act. *Cline v. Cunanan*, No. NOO-CIV-02/08-5, at 6 (Nooksack Ct. App. Jan. 12, 2009); *see also Butz v. Economou*, 438 U.S. 478, 480 (1978) (certain government officials are "entitled to absolute immunity for all discretionary acts within the scope of their authority.").[3] But

[3] Although often confused with "sovereign immunity," certain defenses, such as legislative, prosecutorial, judicial, and presidential immunity defenses are actually "absolute immunity" defenses. *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 32 n.13 (Ho-Chunk Trial Ct. 2009). These types of defenses are available "to insure independence of action on their part, so that they may exercise discretion in the performance of their duties without harassment or intimidation, and without fear that their actions might result in personal liability." Barbara J. Van Arsdale, et al., *Persons or Acts Entitled to Absolute Immunity*, 15 Am. Jur. 2d Civil Rights § 102 (2013). Other government officials are entitled to an immunity defense, too, but not "absolute immunity." Instead, they are entitled to "qualified immunity," which is available "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz*, 438 U.S. at 506; *see also Ratte v. Corrigan*, No. 11-11190, 2013 WL 6185259, at *5-8 (E.D. Mich. Nov. 26, 2013) (distinguishing between qualified and absolute (judicial) immunity). Tribal Councilmembers often act as the executive and legislative branch, they are therefore entitled to an absolute immunity defense when sued in their personal capacities and performing these functions. *See e.g. Cline*, No. NOO-CIV-02/08-5, at 7-8; *In re Nuvumsa*, 7 Am. Tribal Law 305, 308 n.2 (Hopi Ct. App. 2007); *see also generally Schmidt v. Contra Costa County*, 693 F.3d 1122, 1135-38 (9th Cir. 2012) (applying the legislative immunity test). Other tribal officials, though, depending on their role, are merely entitled to "qualified immunity." *See generally Butz*, 438 U.S. 478. A qualified immunity determination involves three inquiries: (1) identification of the

this is not sovereign immunity, because the sovereign has not been implicated; *Ex parte Young* does not apply.[4] *See e.g. Magyar v. Kennedy*, No. 12-5906, 2013 WL 6119243 (E.D. Pa. Nov. 20, 2013) (applying the personal immunity defense test, but not *Ex parte Young*).

The Court thus comes to the second step of a properly plead *Ex parte Young* suit: A plaintiff must name the officer that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy **in his or her "official capacity."**

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right that has allegedly been violated, (2) the determination of whether that right was clearly established such that a reasonable official would have known of it, and (3) the determination of whether a reasonable officer would have believed that the challenged conduct was lawful. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). "The first two questions are issues of law; the third, although ultimately a legal question, may require fact finding as well." *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1285-86 (9th Cir. 1994).

[4] This is not to be confused with a second "scope of authority" question often raised in federal courts. In federal courts, tribal sovereignty itself has been held as inferior to the laws of the federal government. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). In these instances, where the tribe itself adopts a law or policy that conflicts with a "superior" federal law, the tribe itself is said to have "acted beyond the scope of [its] authority" such that sovereign immunity will not apply to *anyone* acting in furtherance of that law or policy. *See Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984) ("If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit."); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (same). This test is not applicable in the context of tribal courts, however, as the supremacy of federal law should not be at issue. *Seymour v. Colville Confederated Tribes*, No. AP96-022, 2001 WL 36243309, at *2-3 (Colville Ct. App. Oct. 18, 2001); *Seven Arrows, L.L.C. v. Tulalip Tribe of Washington*, No. TUL-CI-4/96-499, 1997 WL 34706747, at *1 (Tulalip Ct. App. Jul. 14, 1997); *see also Cleveland*, 8 Am. Tribal Law at 27 n.5 (applying *Ex parte Young* and noting that a tribal official does not share "the sovereign immunity of the tribe" when sued in tribal, as opposed to federal, court in his or her official capacity).

4. Prospective v. Retrospective Relief.

Finally, because the *Ex parte Young* exception is meant "to address a 'continuing violation'" of superior law, "[t]he relief requested must be prospective" and, for the most part, nonmonetary. *Corrigon v. Kron*, No. 13-0116, 2013 WL 5442176, at *2 (E.D. Wash. Sept. 27, 2013) (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996)); *see also generally Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012). But to say that the relief requested must be completely nonmonetary would not be *entirely* true. What is important is that the relief be prospective, so that the fiction of *Ex parte Young* can be maintained.

"When a state official is asked to make a payment directly from the public fisc," for example, "courts will no longer close their eyes to the fact that such relief is in fact relief against the [government]." *Harkless v. Sweeny Independent School Dist.*, 388 F.Supp. 738, 747 (D.C. Tex.), *aff'd in part, rev'd in part*, 554 F.2d 1353 (5th Cir. 1977). Nor will the exception apply where the relief requested is the "functional equivalent" to a "retroactive levy upon funds in [the government's] Treasury," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287, 289 (1997),[5] or "when the relief requested

[5] *But see In re Deposit Ins. Agency*, 482 F.3d 612, 620-21 (2nd Cir. 2007) (noting that *Coeur d'Alene* was limited to its facts); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610, 616-17 (6th Cir. 2003) (same); *Agua Caliente*

would, in effect, require the sovereign's specific performance of a contract." *Tamiami Development Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1226 (11th Cir. 1999).

These types of relief are all barred because they are retrospective - not necessarily because they are monetary. Administrative expenses that are ancillary to the prospective relief, therefore, are not barred. This includes, for example, the "'payment of state funds . . . as a necessary consequence of compliance in the future.'" *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). Hence, in *Milliken* the U.S. Supreme Court held an order "to eliminate a *de jure* segregated school system" by requiring the state to "share the future costs" of certain "educational components" did not violate the *Ex parte Young* exception because the payments were "part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system." *Id.* at 289-90; *see also generally Quern v. Jordan*, 440 U.S. 332, 346-48 (1979) (administrative costs); *Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988) (increased funding for indigent services); *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979) (obligation to pay for medical services).

Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1048 (9th Cir.2000) (same); *American Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F.Supp.2d 556, 569-71 (D.N.J. 2010) (same); *Gila River Indian Community v. Winkelman*, No. 05-1934, 2006 WL 1418079, at *2-3 (D. Ariz. May 22, 2006) (same).

The Court thus comes to the third and final step of a properly plead *Ex parte Young* suit: A plaintiff must name the officer that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy in his or her "official capacity," and **the relief requested must be prospective rather than retrospective.**

5. Application to the Case at Bar.

Here, Plaintiff has failed to properly plead the *Ex parte Young* exception. First, Plaintiff has named the Quinault Indian Nation proper as a defendant, instead of evoking the *Ex parte Young* fiction by **naming the officer** that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy in his or her "official capacity." First Amended Complaint, at 1. Second, the relief sought by in the Complaint is barred to the extent that Plaintiff seeks **retrospective** relief in the form of monetary damages, interest, and/or specific performance of the Employment Agreement. *Id.* at 6-7.

Because all claims made in Plaintiff's First Amended Complaint are claims over which this Court lacks jurisdiction, Plaintiff's First Amended Complaint must be dismissed. The Court lacks the jurisdiction to evaluate the merits of Plaintiff's grievance and thus cannot render any findings of fact. *Bell*, 327 U.S. at 682.

III. Conclusion

Today, we join our sister courts in adopting the *Ex parte Young* exception to tribal sovereign immunity. This test invocates sovereign immunity where it advances the benefits of its purpose, while at the same time providing a much-needed forum for grievances against the Quinault Indian Nation.

But, unfortunately for Plaintiff, *Ex parte Young* was not properly pled in this instance. As such, the Quinault judiciary lacks jurisdiction over Plaintiff's First Amended Complaint and, therefore, Plaintiff's First Amended Complaint must be **DISMISSED.**

The Court cannot, however, summarily pronounce that Plaintiff is incapable of pleading some combination of claims and relief for which the *Ex parte Young* exception applies.

Accordingly, the Court grants Plaintiff leave to file an amended complaint, consistent with the above rulings, within **THIRTY (30) DAYS** of the date this Order is entered by the Clerk.

NOW THEREFORE, IT IS ORDERED:

1. Plaintiff's First Amended Complaint is hereby **DISMISSED**, without prejudice.

2. **Plaintiff is granted leave to file an amended complaint**, consistent with the above rulings, within thirty (30) days of the date this Order is entered by the Clerk.

//

DATED this 5th day of December, 2013.

Gabriel S. Galanda
Judge

12-17-13 A11:24 IN

IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

ST. GERMAIN, et al., Appellants, v. KELLY, et al., Appellees.	Case No. 2013-CI-CL-005 DECLARATION OF SERVICE COPY

I Declare:

That I am over the age of 18 years and competent to be a witness.

On December 17, 2013, I duly mailed by first class mail, a copy of Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order to Galanda Broadman PLLC, Attn: Gabriel Galanda, P.O. Box 15146, Seattle, WA 98115.

Also, on December 17, 2013, I emailed Gabriel S. Galanda at gabe@galandabroadman.com a courtesy copy of the above-referenced document.

I declare under the penalty of perjury, under the laws of Nooksack Indian Tribe, that the foregoing is true and correct.

Signed at Deming, Washington on December 17, 2013.

C Bernard

Charity Bernard, Paralegal
Office of Tribal Attorney, Nooksack Indian Tribe

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