Filed
7/5/2011
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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE,

Plaintiff,

v.

ARLENE VENTURA,

KANIUM VENTURA,

Defendants.

NO. SNO-CR-0022-2010

SNO-CR-0021-2010

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

These cases came before the undersigned Judge of the Snoqualmie Tribal Court on March 31, 2011 for hearing on Defendant Arlene Ventura's and Kanium Ventura's Motions to Dismiss ("Defendants Motions"), and again on April 22, 2011 for oral argument of Plaintiff's Motion for Reconsideration of the Tribal Court's oral ruling granting Defendants Motions. The Court, having heard argument, considered the following pleadings:

- Tribe's Response to Defendant's Second Motion for Bill of Particulars and Motion to Compel (filed December 13, 2010);

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- Tribe's Response to Defendant's Supplemental Demand for Discovery (filed February 7, 2011);
- Defendant Kanium Ventura's Motion to Dismiss;
- Defendant Arlene Ventura's Joinder in Kanium Ventura's Motion to Dismiss;
- Tribe's Response to Defendant's Motion to Dismiss;
- Defendant Arlene Ventura's Reply in Support of Motion to Dismiss;
- Defendant Kanium Ventura's Reply in Support of Motion to Dismiss;
- Defendant Kanium Ventura's Supplemental Motion to Dismiss Based on Prosecutorial Misconduct;
- Tribe's Response to Defendant's Motion to Dismiss For Prosecutorial Misconduct;
- Defendant Kanium Ventura's Motion to Dismiss Based on Due Process Violations;
- Tribe's Response to Defendant's Motion to Dismiss Based on Due Process Violations;
- Defendant Arlene Ventura's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds;
- Tribe's Response to Defendant's Supplemental Motion to Dismiss;
- Addendum to Defendant Arlene Ventura's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds;
- Tribe's Response to Addendum to Supplemental Motion to Dismiss;

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- Defendant Arlene Ventura's Supplemental Motion to Dismiss on Legislative Immunity Grounds;
- Defendant Kanium Ventura's Supplemental Motion to Dismiss on Legislative Immunity Grounds;
- Defendant Arlene Ventura's Supplemental Motion to Dismiss on Spoliation of Evidence Grounds;
- Declaration of Ernest C. Barth, CLI in Support of Defendant Arlene Ventura's Supplemental Motion to Dismiss;
- Tribe's Motion for Reconsideration;
- Defendant Arlene Ventura's Response to Tribe's Motion for Reconsideration;
- Defendant Kanium Ventura's Response to Tribe's Motion for Reconsideration;
- Tribe's Reply to Defendants' Answers to Tribe's Motion for Reconsideration;

and having considered the arguments of counsel, and being fully advised in the premises, makes and enters the following:

FINDINGS OF FACT

1. Defendants Arlene Ventura and Kanium Ventura (herein collectively "Defendants") are duly elected members of the Snoqualmie Tribal Council (the "Council") and Arlene Ventura is the Council's Secretary. Both have served in that capacity at all times from December, 2008 until the present;

2. The Council is the Snoqualmie Tribe's sole legislative body;

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanim (dob: June 12, 1967) Defendant.	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S RESPONSE TO DEFENDANT'S SECOND MOTION FOR BILL OF PARTICULARS AND MOTION TO COMPEL**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S RESPONSE TO DEFENDANT'S SECONG MOTION FOR BILL OF PARTICULARS AND MOTION TO COMPEL**

A. INTRODUCTION

Pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, the Tribe, through its undersigned attorney, hereby voluntarily responds to *Defendants Arlene Ventura and Kanim Ventura's Supplemental Motion for Bill of Particulars and Motion To Compel.* The defendants have already received a complete and concise complaint in the case as well as all discovery that is currently in the Tribe's possession. Pursuant to Fed. R. Crim. P. 16, the Tribe has made available to the defendants documents produced by the Tribal Investigation Team, various co-conspirators, and third parties, such as Tribal Council members, Tribal employees, Tribal General Members and Special Advisors, that relate to the charges contained within the complaint. Furthermore, the defendants have access to the Snoqualmie Tribal Code along with all the Snoqualmie Tribal Council Resolutions referred to in the pending matter. All of these materials are more than sufficient to fully apprise defendants of the charges pending against them and to enable them to prepare for trial. However, the Tribe again in this second response, voluntarily, provides the defendants with further details regarding the charges filed against the defendants.

The Tribe makes a third demand for discovery as it has still not received any discovery from the defendants. Defendant *Arlene Ventura* alleged that 5 resolutions had been passed on December 29, 2008 and the Tribe has not received even one of those alleged resolutions. Such discovery is past

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due as the deadline for exchanging initial discovery was November 22, 2010 per the case management scheduling order. Unless the Tribe receives its requested discovery by Friday, December 17, 2010, it will have no choice but to seek an order compelling discovery.

B. PURPOSES AND REQUIREMENTS OF A BILL OF PARTICULARS

The general purposes of a bill of particulars are to inform the defendant of the charges against him with sufficient precision to: (1) enable him to prepare his defense, (2) obviate surprise at trial, and (3) enable him to plead his acquittal or conviction in the case as a bar to subsequent prosecution for the same offense. United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979).

A bill of particulars should not be expanded into a device to circumvent the restrictions on pretrial discovery of specific evidence contained in Fed. R. Crim. P. 16. Cooper v. United States, 282 F.2d 527, 532 (9th Cir. 1960). The complaint itself, the discovery materials specified in the Discovery Production Receipt filed by the Tribe and this bill of particulars supplied by the Tribe provide the defendant(s) with adequate information with which to conduct his/her defense. Harlow v. United States, 301 F.2d 361, 367-68 (5th Cir.), cert. denied, 371 U.S. 814 (1962).

Again, in this response, the Tribe has voluntarily provided the defendants with additional details. Taken together, the information provided herein, the clearly and concisely-worded complaint, along with the extensive discovery made available to the defendants in advance of trial, are more than sufficient to apprise them of the charges against them and to enable them to adequately prepare for trial.

B. TRIBES' VOLUNTARY BILL OF PARTICULARS

The Tribe, once again, voluntarily discloses the following information, corresponding in number to the requests in defendant Arlene Ventura's Motion:

Specification for the charge: ***Official Misconduct***

A. Which Resolution is at issue;

B. What other documents are alleged to be intentionally falsified;

C. In what specific manner is the Resolution alleged to have been falsified;

D. What duty or duties did defendant intentionally refrain from performing;

E. Was the performance of this duty mandatory or discretionary;

F. What law imposed this duty on defendant;

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Response

A. Resolution 2003-2008;

B. Not Applicable;

C. It was certified to have been voted on and passed on December 29, 2008 at the December 29, 2008 Tribal Council Meeting(s) when in fact it had not been passed during such meeting(s);

D. Not Applicable;

E. Not Applicable;

F. Not Applicable;

Specification for the charge: *Conspiracy to Commit Official Misconduct*

A. Is the offense conduct alleged in this count the same conduct alleged in Charge 1;

B. If not, which Resolution is at issue;

C. What other documents are alleged to be intentionally falsified;

D. Why was Tribal Council approval required for the December 11, 2008 meeting with Moss Adams;

E. Was Tribal Council approval required for negotiation of scope of work prior to Moss Adams' submission of its engagement letter to members of the Tribal Council;

F. Which Tribal Council Resolution was falsely certified and by whom;

G. How was the certification false;

H. What misrepresentation was made to or concerning the Snoqualmie Tribe's legal counsel;

I. Who is referred to as the Snoqualmie Tribe's legal counsel;

J. What duty or duties did defendant violate;

K. Is this duty mandatory or discretionary;

L. What law imposes this duty on defendant;

Response

A. No, the conduct alleged in this charge is not the same conduct alleged in charge 1. See Conspiracy, *Snoqualmie Tribe Code Act 7 Section 16.6*;

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B. Not applicable;

C. Not applicable;

D. Rules, Requirements and process for Tribal Council approval of actions are available in the Snoqualmie Tribal Code;

E. Rules, Requirements and process for Tribal Council approval of actions are available in the Snoqualmie Tribal Code;

F. See Response to Charge 1;

G. See Response to Charge 1;

H. The discovery in the Tribe's possession has been provided to the defendants and such information is readily ascertainable by reviewing said discovery. Co-conspirators falsely represented Thomas B. Nedderman of Floyd & Pflueger as the Snoqualmie Tribe's legal advisor when in fact Thomas B. Nedderman is not the Tribe's legal advisor;

I. See response above;

J. This information has been provided on multiple occasions, both in the Criminal Complaint and the Tribe's Voluntary Response to Defendants' Bill of Particulars, See **TAB 1** (attached);

K. This information has been provided on multiple occasions, both in the Criminal Complaint and the Tribe's Voluntary Response to Defendants' Bill of Particulars, See **TAB 1**;

L. Rules and Requirements for Tribal Council Members are available in the Snoqualmie Tribal Code. Further, this information has been provided on multiple occasions, both in the Criminal Complaint and the Tribe's Voluntary Response to Defendants' Bill of Particulars, See **TAB 1**;

Specification for the charge: *Obtaining a Signature by Deception or Duress*

A. The acts of defendant that are alleged to have deceived Mr. Mullen;

B. The manner in which Mr. Mullen was deceived;

C. What were the false pretenses presented to Mr. Mullen to obtain his signature to the Resolution and the Moss Adams engagement letter;

Response

A. Defendant intentionally lied to Mr. Mullen;

B. See response above;

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C. Defendant obtained Mr. Mullen's signature on the Moss Adams engagement letter by falsely misrepresenting to Mr. Mullen that the 2003-2008 Resolution approving Moss Adams had been passed when Defendant knew it had not been passed;

Specification for charge: *Conspiracy to Obtain a Signature by Deception or Duress*

A. Is the conduct alleged the same conduct alleged in a preceding charge? If so, which one;

B. How did defendant's conduct defraud or deprive the Tribal Council of its rights and powers;

C. Which rights or powers did defendant intend to deprive the Tribal Council of;

D. What acts of defendant are alleged to have deceived Mr. Mullen;

E. The manner in which Mr. Mullen was deceived;

F. What false pretenses were presented to Mr. Mullen to obtain his signature to the Tribal Resolution and the Moss Adams engagement letter;

Response

A. No, the conduct alleged in this charge is not the same conduct alleged in a preceding charge. See Conspiracy, *Snoqualmie Tribe Code Act 7 Section 16.6;*

B. Defendant caused Tribal Council Chairman Joe Mullen to sign or execute the engagement letter by falsely misrepresenting to Chairman Mullen that the 2003-2008 Resolution approving Moss Adams had been passed by the Tribal Council in an exercise of their rights and power to make such decisions when in fact Defendant knew it had not been passed, thus depriving the Council of their rights and power to make that decision.

C. The rights and powers of the Snoqualmie Tribe are contained in the Snoqualmie Tribal Code;

D. See Response B;

E. See Response A to Specification for Obtaining a Signature by Deception or Duress;

F. See Response A to Specification for Obtaining a Signature by Deception or Duress;

G. See Response B;

Specification for charge: *Conspiracy to Commit Forgery*

A. Are the acts alleged in this charge the same conduct alleged in a preceding charge? If so, which one(s);

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B. Which written instrument(s) were forged;

C. The manner in which the written instrument(s) were forged or falsified;

D. The acts in furtherance of the conspiracy;

E. How the conduct defrauded the Snoqualmie Tribe and/or Moss Adams;

Response

A. No, the conduct alleged in this charge is not the same conduct alleged in any preceding conspiracy charge.

B. In this conspiracy, the Casino Access letter;

C. The Access letter was altered and/or falsified by obtaining Tribal Councilman Joe Mullen's signature from a previous document and later presenting it on the Casino Access letter as if had signed the Casino Access letter;

D. The specific acts in furtherance of the conspiracy calls for the details of the Tribe's evidence and its legal theories, and, therefore, is beyond the scope of a Bill of Particulars.

E. The actions of the co-conspirators caused injury and or loss to the Snoqualmie Tribal Council by: deprivation of their rights and powers to vote on and select an audit firm; disclosing confidential casino documents to unauthorized outside service vendors; damaging the professional relationships between Snoqualmie Tribe and the professional service firm of Moss Adams; and loss of approximately $3500 in cash resources.

C. CONCLUSION

To the extent the defendant seeks additional details, the Tribe objects to the request, because the Tribe has no obligation to disclose in a bill of particulars the precise manner in which the crimes alleged in the complaint were committed. See United States v. Remy, 658 F. Supp. 661, 669 (S.D.N.Y. 1987), citing United States v. Andrews, 381 F.2d 377, 377-78 (2d Cir. (1967) (per curiam), cert. denied, 390 U.S. 960 (1968). A bill of particulars should only be required where the charges of an indictment are so general that they do not advise defendant of the specific acts of which he is accused. See *United States v. Rosenwasser Brothers*, 255 F.2d 233 (E.D.N.Y.1919).

Furthermore, there is no requirement in conspiracy cases that the government disclose all the overt acts in furtherance of the conspiracy. *United States v. Giese*, 597 F.2d 1170, 1181 (9th Cir. 1979). Finally, to the extent the defendants request for the "when, where, and how" of every act in furtherance of the conspiracy is equivalent to a request for complete discovery of the government's evidence, which is not a purpose of the bill of particulars. *United States v. Giese*, *supra*, 597 F.2d at 1181 citing *United States v. Armocida*, 515 F.2d 49, 54 (3d Cir.), Cert. denied, 423 U.S. 858, 96 S. Ct. 111, 46 L. Ed. 2d 84 (1975).

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The defendants have access to extensive information in this case through (1) the detailed and precisely-worded complaint; (2) voluminous discovery afforded them under Rule 16; and (3) details summarized in this response. This information is more than sufficient to fully apprise defendants of the charges pending against him and her and to enable him and her to prepare for trial. To the extent defendants seeks evidentiary details in excess of these needs, defendants' requests exceed the proper scope of a bill of particulars.

RESPECTFULLY SUBMITTED this 13th of December, 2010.

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Snoqualmie Tribal Prosecutor

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanim (dob: June 12, 1967) Defendant.	)	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL DEMAND FOR DISCOVERY**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	)	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL DEMAND FOR DISCOVERY**

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the Tribe, through its undersigned attorney, hereby responds to Defendants Arlene Ventura and Kanim Ventura's Supplemental Demand for Discovery.

Defendants seek discovery pursuant to Fed R. Cr. P. 16(a) and as set out in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). But *Brady* does not open the door to discovery of anything and everything the defendant would like to see. On the contrary, *Brady*'s progenitors define the parameters of material subject to disclosure: "[T]he government has the obligation to turn over evidence in its possession that is both *favorable to the accused* and *material to guilt or punishment.*" *U.S. v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392 (1976); *Brady v. Maryland,* 373 U.S., at

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87, 83 S.Ct., at 1196 (emphasis added). For the evidence to be material, there must exist "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 1001 (1987), quoting *United States v. Bagley,* 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of BLACKMUN, J.) and *id.*, at 685, 105 S.Ct., at 3385 (opinion of WHITE, J.). The prosecutor, then, is required "only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *U.S. v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380 (1985).

The defendants do not get to go on a fishing expedition with discovery demands. Discovery should not be ordered "based upon mere speculation as to whether the material would contain exculpatory evidence...." *U.S. v. Arias-Izquierdo,* 449 F.3d 1168, 1189 (11th Cir.2006). Rather, the defendants must make a plausible showing that the discovery is both material and favorable to the defense. *Pennsylvania v. Ritchie,* 480 U.S. at 58 n. 15, citing *U.S. v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, (1982).

Pursuant to Fed R. Cr. P. 16(a) and as set out in *Brady v. Maryland, U.S. v. Agurs, U.S. v. Bagley, Pennsylvania v. Ritchie, et.al.,* the Tribe responds to the Supplemental Demand for Discovery as follows:

1. The tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and it is not demonstrably favorable to the defense. Peter Connick is not a witness in these cases, and is not involved in their prosecution. Further, the defense has made no showing of any favorability to the defense in Mr. Connick's correspondence. The correspondence demanded does not concern these cases at all, but does concern the defendants' civil suit against the Tribe. The demand for this correspondence is yet another attempt by defendants to conflate the criminal charges with their civil lawsuit, this time attempting to use their constitutional rights as criminal defendants to facilitate their civil court action.

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2. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. Matt Mattson is an employee of the Tribe and a prosecution witness. The information contained in the documents concerns his financial arrangements with his employer, and has no connection to the charges against defendants. Mr. Mattson's testimony, based on statements that have been fully disclosed to defendants, is not concerned in any way with the information contained in the demanded documents, or with any of his financial arrangements with the Tribe. Further, the defense has made no showing of favorability to the defense in Mr. Mattson's financial arrangements with his employer.

3. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases and is not demonstrably favorable to the defense, for the reasons stated in No. 2 above.

4. The Tribe has no agreements, oral or written, with any prosecution witness in these cases.

5. The Tribe agrees to this disclosure and the requested documents are attached as ATTACHMENTS A, B, C, D, E and F. The Tribe notes that these documents are and have been available to defense as Public Documents.

6. The Tribe declines to disclose the evidence demanded because the information is outside the scope of discovery. The investigative actions taken by the Tribe are exempt from discovery, pursuant to Fed R. Cr. P. 16(a)(2). Further, pursuant to Fed R. Cr. P. 16(a)(1)(E), the Tribe has fully disclosed all documents and electronic files that it intends to use in its case-in-chief or that belonged to defendants.

7. The Tribe has previously disclosed all video and audio recordings and paper documents relating to Tribal Council and General Membership meetings held in December 2008. The Tribe agrees to disclose documents relating to Tribal Council and General Membership meetings held in November 2008.

8. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

9. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

10. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the

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actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

11. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

12. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

13. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

14. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. The 2009 resumes of potential judges for this Court cannot possibly reflect in any way on the whether or not the defendants committed the crimes with which they are charged, nor on the punishment they could receive if found guilty; nor can it be asserted with a straight face that those resumes somehow favor the defense. Surely, the defendants are not in any jeopardy of receiving less than a fair trial because they do not have access to the history of the judges who were considered for the tribal court bench two years ago.

15. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

16. The Tribe declines to disclose the evidence demanded because it is not material to the defendants' guilt or punishment in these criminal cases, and is not demonstrably favorable to the defense. This document involves events that took place well after the actions that gave rise to the criminal charges, and the defendants have made no showing that the document is favorable to the defense.

17. The Tribe declines to disclose the document demanded because it is exempt from discovery, is not material to the defendants' guilt or punishment, and the defendants have made no showing that the document is favorable to the defense. Under Fed R. Cr. P. 16(a)(2), "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with

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investigating or prosecuting the case" are not subject to disclosure. To the extent that the report concerns prosecutions of cases other than those before this Court, it is still an internal report subject to Fed R. Cr. P. 16(a)(2).

Because defendants have not shown that the discovery demanded in Nos. 1-3, 6, and 8 - 17 of Defendants' Supplemental Demand for Discovery is both material and favorable to their defense, and because the discovery demanded in Nos. 6 and 17 is additionally exempt from discovery under Fed R. Cr. P. 16(a)(2), the Tribe asks the Court to deny the discovery thereby demanded.

Respectfully submitted this 7th day of February, 2011.

Cynthia Tomkins

Cynthia Tomkins
Snoqualmie Tribal Prosecutor

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The Honorable Raquel D. Montoya-Lewis

IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. KANIM VENTURA, (d.o.b. 06/12/1967) Defendant.	NO. SNO-CR-0021-2010 MOTION TO DISMISS

I. INTRODUCTION AND RELIEF REQUESTED

Defendant, Kanium Ventura, moves to dismiss the indictment pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure. This motion is made on the following grounds:

a) Kanium Ventura is immune from suit for actions carried out in his official capacity as a Tribal Council member; and

b) The question before the court is a political question and is, therefore, non-justiciable.

Therefore, based upon the above, the Tribal Court should dismiss this matter because it lacks jurisdiction to hear the present matter. Or, in the alternative, should this Court find that it has jurisdiction over the matter, this case should be dismissed because the questions pending before the Court are non-justiciable political questions.

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II. RECORD ON MOTION

This motion is based on this document, the papers and records on file in this action and on whatever evidence and argument is presented at the hearing on this action.

III. SOVEREIGN IMMUNITY AND LEGISLATIVE IMMUNITY

This Court should dismiss all charges against Councilman Ventura because he is immune from suit for actions carried out in his official capacity as a Tribal Council member who acted in his role as a legislator and as an official imbued with the sovereign immunity of the Tribe.

The case law regarding sovereign immunity of Tribes is well-known. *See Kiowa Tribe of Oklahoma v. Manufacturing Tech.*, Inc. 523 U.S. 751, 754, 118 S. Ct. 1700 (1998). The Snoqualmie Tribal Council, as the governing body of the Snoqualmie Tribe of Indians, is protected by the Tribe's sovereign immunity and thus, a waiver of that immunity must be unequivocal and expressly granted. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000). The courts have also ruled that the individual Tribal Council members, as representatives of the Tribe, have sovereign immunity for their actions within their duties as Tribal officials. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *See also Madison v. The Tulalip Tribe*, 2004 WL 5752597 (Tulalip Tribal Court of Appeals, Nov. 18, 2004). The key inquiry "turns on whether the government official was empowered to do what he did; i.e., whether even if he acted erroneously, it was within the scope of his delegated power." *United States v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986). Tribal Councilman Ventura is granted broad legislative powers as contained within Article VIII of the Tribal Constitution and within Tribal Council Act 8.2, which established the Snoqualmie Entertainment Authority that manages and supervises the Casino operation. Tribal Councilman Ventura was acting within the scope of

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his delegated powers at all times and in all circumstances. The burden is upon the Tribal prosecutor to demonstrate that there is a clear and explicit waiver of the Tribe's sovereign immunity in order to prosecute Tribal Councilman Ventura and that burden has not been satisfied in this instance.

The claims against Councilman Ventura pertain to actions he undertook with the understanding that the Tribal Council had expressly approved the retention of an audit firm as expressed in numerous acts of the Tribal Council including a Tribal Council resolution, discussions and meetings by and between Tribal Council members, and an access letter signed by the Tribal Council Chairman permitting Moss Adams the ability to enter Tribal property to conduct its audit actions. The investigation conducted by the Tribe demonstrates that the Tribal Council discussed hiring an audit firm beginning in October 2008 and continued discussing the topic until Resolution 2003-2008 was passed on December 29, 2008. Councilman Ventura undertook his contact with Moss Adams as a result of numerous discussions at Tribal Council meetings, culminating in the approval of Resolution 2003-2008 which authorized the hiring of Moss Adams to conduct an audit of the Tribal casino.

Under the doctrine of tribal sovereign immunity, neither a Tribe nor its officials may be sued without a clear and explicit waiver of immunity. *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S. Ct. 1589 (2001). Further, within Article I, Section 3, of the Tribal Constitution, the Tribe asserts its sovereign immunity except in the instance when the *Tribal Council* has "expressly and unambiguously" waived its immunity. Neither the Tribe nor Councilman Ventura have expressly and unambiguously waived their sovereign immunity in this case. In fact, the Tribal Council adopted a resolution, 2003-2008, which expressly approved of the retention of Moss Adams to conduct an audit and is the best evidence that privileged Tribal Council discussions were later reduced to Tribal law in the form of a resolution. The Tribal prosecutor has produced no evidence showing that the Tribal

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Council or Councilman Ventura expressly and unambiguously waived the Tribe's sovereign immunity from suit such that the Tribal prosecutor may maintain the present criminal proceedings against Tribal Councilman Ventura. Further, the alleged resolution passed by a select group of Tribal members claiming to be elders, which attempts to ex-post facto make the actions undertaken by Councilman Ventura illegal, does not and cannot waive Councilman Ventura's sovereign immunity. The Court should therefore dismiss the present charges against Councilman Ventura because he is immune from suit for his actions carried out in his official capacity as a Tribal Councilman.

IV. POLITICAL QUESTION

The issues before the Court are non-justiciable political questions between the members of the legislative branch and the executive branch of the Snoqualmie Tribal government. In *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962), the Supreme Court identified the following hallmarks of a non-justiciable case: (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) A lack of judicially discoverable and manageable standards for resolving it; (3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) An unusual need for unquestioning adherence to a political decision already made; (6)The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Constitution of the Snoqualmie Tribe of Indians provides a textually demonstrable constitutional commitment of the issues before the Court to the Tribal Council. Article VIII of The Constitution of the Snoqualmie Tribe of Indians delineates the powers given to the Tribal Council. Those powers include the power:

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> (a) To negotiate with and enter into agreements with . . . corporations or private organizations or persons on behalf of the Tribe; (b) To employ legal counsel . . . (e) to manage all economic affairs and enterprises of the Tribe in accordance with the terms of this Constitution and the laws of the Tribe . . . (j) To safeguard and promote the peace, safety, moral, and general welfare of the members of the Tribe by regulating the behavior of all persons within the jurisdiction of the Tribe, and to provide for the enactment and enforcement of the laws of the Tribe . . . (o) To adopt laws or resolutions regulating the procedure of the Council itself and of other Tribal agencies and Tribal officials.

The charges brought against Councilman Ventura regarding retention of an outside audit firm to conduct an audit of the Tribal casino are decisions that are constitutionally committed to the legislative branch and, thus, undoubtedly implicate all of the above Constitutional powers delineated as legislative powers. *See Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962); *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 106 S. Ct. 2860(1986).

Further, this dispute, at its heart is a political attack brought by one faction of the Snoqualmie Tribal council against another under the auspices of the Tribal prosecutor's office. Due to the sensitive political nature of the charges, the Snoqualmie Tribal Court lacks a judicially discoverable and manageable standard for resolving it and could not decide the present matters without an initial policy determination of a kind clearly for nonjudicial discretion. The interviews conducted during the investigation into the charges brought against the Venturas show that the Tribal Council members are still not in agreement as to the authority granted to the Venturas regarding the retention of Moss Adams. There does appear to be agreement amongst all interviewed that the Tribal Council discussed the need for an audit of the casino and the need to retain an outside auditor to conduct the audit. Further, the Council members believed that the Tribal Council had authority to conduct such an audit. To rule on the merits of this case, the Court would have to interject itself into a political decision made nearly two years ago.

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It would be an exercise in judicial futility for this Court to try to opine on the authority the Council bestowed on the Venturas since the Council members themselves cannot agree as to whether Councilman Ventura was authorized to speak to Moss Adams. The Article VIII Tribal Council powers possessed by Councilman Ventura are not subject to diminishment, modification, or restriction by the Tribal judiciary. The Constitution clearly commits such an analysis of these issues to the legislative branch of the government, which is the Tribal Council, to determine the manner and the method of exercising Article VIII Tribal Council powers. Any such resolution or determination by the Court on the matter would express a lack of the respect due to the legislative branch of the Tribal government. This Court, therefore, should decline to address the merits of the issues presented in the criminal charges against Councilman Ventura and dismiss all charges brought against Councilman Ventura as non-justiciable. *See Dickson v. Ford*, 521 F.2d 234 (5th Cir. 1975); *U.S. Dept of Commerce v. Montana*, 503 U.S. 442, 112 S. Ct. 1415 1992).

V. CONCLUSION

This Court should dismiss all charges against Kanium Ventura.

DATED this 29th day of November, 2010.

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	No. SNO-CR-0022-2010 DEFENDANT ARLENE VENTURA'S JOINDER IN KANIUM VENTURA'S MOTION TO DISMISS

I. INTRODUCTION

Defendant Arlene Ventura hereby joins in Defendant Kanium Ventura's Motion to Dismiss. Defendant reserves the right to file a supplemental brief in support of the motion to dismiss and to file a separate response to the reply brief of the prosecution, if any is filed.

DATED this 29th day of November, 2010.

GARVEY SCHUBERT BARER

By _____
David H. Smith, Member #STC201023
Attorney for Plaintiff Arlene Ventura

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanim (dob: June 12, 1967) Defendant.	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

COMES NOW the prosecutor, Cynthia Tomkins, and asks the Court to deny the defendants' motions to dismiss, as sovereign immunity does not apply to the defendants in these cases, and therefore does not defeat jurisdiction by this Court; and the questions at issue in the charges are not political ones and are justiciable.

ARGUMENT

1. **SOVEREIGN IMMUNITY DOES NOT APPLY TO THE DEFENDANTS CHARGED IN THE CRIMINAL COMPLAINTS.**

A. Sovereign immunity does not apply to criminal charges.

Sovereign immunity in federal law arises from the Eleventh Amendment to the United States Constitution. That amendment reads: "The Judicial power of the United States shall not be construed to extend to *any suit in law or equity*, commenced or prosecuted against one of the United States by

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Citizens of another State, or by Citizens or Subjects of any Foreign State." *U.S. Const., amend. XI (emphasis added)*. Federal case law has both expanded and refined the doctrine. For example, sovereign immunity now protects a state from suit by one of its own citizens (*Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890); *Employees v. Missouri Public Health & Welfare Dep't*, 411 U.S. 279, 294, 93 S.Ct. 1614, 1622-1623, 36 L.Ed.2d 251 (1973)). The doctrine also protects a representative of a sovereign state from suit when that representative is acting on behalf of the sovereign state (*Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-102, 104 S.Ct. 900, 908-909 (1984), citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347 (1945); *In re Ayers*, 123 U.S. 443, 487-492, 8 S.Ct. 164, 173-176, 31 L.Ed. 216 (1887); *Louisiana v. Jumel*, 107 U.S. 711, 720-723, 727-728, 2 S.Ct. 128, 135-137, 141-142, 27 L.Ed. 448 (1882)).

However, at no time has the United States Supreme Court expanded the doctrine of sovereign immunity to include protection from criminal charges. Rather, the jurisprudence that expanded the doctrine to include individuals is based on the concept that when an individual who acts on behalf of the sovereign entity is sued because of those actions, it is the state who is being sued. Sovereign immunity, then, is granted to individuals only when "the state is the real, substantial party in interest." *Ford Motor Co.*, 323 U.S. at 464. The relief sought is determinative: "The general rule is that 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 School & Hosp.* at 102, citing *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963). Thus, immunity protection for an individual only exists when the relief sought, whether in law or equity, would run against the governmental entity on whose behalf the individual acted. *Pennhurst State School & Hosp.* at 102, citing *Cory v. White*, 457 U.S. 85, 91, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694 (1982);

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Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); and *Hawaii v. Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed.2d 191 (1963) (per curiam).

Here, as in all criminal cases, the action is the opposite of that required for sovereign immunity. The sovereign here is the Snoqualmie Tribe. The action here is not against the sovereign in any way; on the contrary, the sovereign is prosecuting the cases. No relief is sought, either as damages or injunction, that could or would run against the Snoqualmie Tribe. The doctrine of sovereign immunity has never applied to criminal charges, and it does not apply to these.

B. Sovereign immunity is not applicable because defendants' acts charged in the Criminal Complaints were outside the scope of their duties as Tribal Council Members.

Even if sovereign immunity did apply to criminal charges, the defendants would not have sovereign immunity because of the *ultra vires* doctrine. The doctrine distinguishes between conduct that was illegal, yet was conducted within the scope of the official's duties, and conduct outside the scope of those duties. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir.1985); *See also United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir.1981). Whether or not an official is immune from suit depends on whether she was acting within the scope of her delegated power. If she was, sovereign immunity applies and she is protected from suit, because official action is still action of the sovereign, even if it is wrong, so long as it "do[es] not conflict with the terms of [the officer's] valid statutory authority...." *Aminoil U.S.A., Inc. v. California State Water Resources Control Board*, 674 F.2d 1227, 1234 (9th Cir.1982), citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695; 69 S.Ct. 1457, 1464; 93 L.Ed. 1628 (1949). However, if that official was acting *ultra vires*, or outside the scope of her authority, sovereign immunity does not apply, and the court may sustain a lawsuit against her for her actions. *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986). Here, there is a direct conflict between the defendants' actions and the terms of the Tribal Council members' statutory authority.

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Scope of authority turns on whether the government official was empowered to do what she did; i.e., whether, even if she acted erroneously, it was within the scope of her delegated power. *Pennhurst,* 465 U.S. at 112 n. 22, 104 S.Ct. at 914 n. 22. While members of the Snoqualmie Tribal Council are granted broad legislative authority under the Snoqualmie Tribal Code, that authority is defined by provisions of law that establish the procedures of the Tribal Council. *Snoqualmie Tribal Code (STC) Act 2.* Act 2 provides required procedures for general Tribal Council Meetings, Special Meetings, requirements to pass Ordinances and Acts and finally, requirements to pass Resolutions. Here, the defendants were clearly acting outside the scope of their authority when they deliberately circumvented those required procedures by falsifying a Tribal Council Resolution and presenting it to Moss Adams as legitimate; then lying to the Tribal Chairman to get him to sign an engagement letter with Moss Adams and presenting that letter to Moss Adams as legitimate; and falsifying the Tribal Chairman's signature on a letter granting casino access to Moss Adams.

Defendants' claim of sovereign immunity rests on the assertion that they were acting on the "understanding that the Tribal Council had expressly approved the retention of an audit firm as expressed in numerous acts of the Tribal Council including a Tribal Council resolution...and an access letter signed by the Tribal Council Chairman..." *Defendants' Motion to Dismiss, p.3, ll.6-10.* This is the epitome of begging the question. In order to prove the assertion that they were acting under Tribal Council authority, the defendants ask this Court to assume that which is at issue: the validity of the 2003-2008 Resolution and the authenticity of the Chairman's signatures. Defendants go even further, misstating the results of the Tribe's investigation into their conduct to make it appear as though the Tribal Council passed Resolution 2003-2008. However, the investigation clearly shows that Resolution 2003-2008 was not passed by the Tribal Council on December 29, 2008; that, in fact,

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Such a resolution did not even come up for a vote at that meeting, a meeting at which both defendants were present.

Defendants also make much of their assertion that the Tribal Council discussed hiring an audit firm. However, even if defendants believed that such a discussion gave them the authority to engage Moss Adams in negotiations, by no stretch of the imagination did it enlarge the scope of the defendants' authority to include criminal conduct such as falsifying a Tribal Council Resolution, or forging the Tribal Chairman's signature.

As sovereign immunity does not apply to any action brought against defendants for the conduct at issue here, no waiver of immunity by defendants is required for this Court to maintain jurisdiction.

II. THE CASE DOES NOT INVOLVE A POLITICAL QUESTION.

Once again, defendants attempt to inject inapposite civil law jurisprudence into a criminal case. Once again the concepts are inapplicable, and even if they were applicable, the argument fails. Contrary to defendants' assertion, the issues before this court are justiciable questions and the Snoqualmie Tribal Court does have the authority to consider the merits of the case and adjudicate accordingly.

A. The concept of non-justiciability of political questions does not apply to criminal charges.

The jurisprudence on the justiciability of criminal charges is nonexistent for a reason. In *Baker v. Carr*, the Supreme Court stated emphatically that the issue of non-justiciability arises because of a political *question*, not because the *case* has political overtones: "The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise

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facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962). Many criminal cases have political overtones, and often political consequences. Laws are made and changed by the legislative branch because of the outcome of a politically hot criminal case. But that does not make the crime at issue a political question. As the Supreme Court noted in *Baker v. Carr*, every type of political question "has one or more elements which identify it as essentially a function of the separation of powers." *Baker v. Carr*, 369 U.S. at 217. There is no issue of separation of powers in a criminal prosecution, under federal law or Snoqualmie Tribal law. The legislative branch cannot adjudicate a criminal charge, nor can the executive. Under the Constitution of the Snoqualmie Tribe of Indians, the judiciary, and only the judiciary, has that power. *Constitution of the Snoqualmie Tribe of Indians, Article X.*

B. Non-justiciability of a political question does not apply to the charges against defendants because the questions in the case are not political ones.

Even if the jurisprudence of *Baker v. Carr* were applicable to criminal charges, defendants' argument that the issues before this Court are political and non-justiciable fails. None of *Baker v. Carr*'s six formulations for the existence of a non-justiciable political question are present here, and "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker v. Carr*, 369 U.S. at 217.

The defendants deliberately conflate the political context surrounding their actions with the issues before this Court. The result is exactly that circumstance the Supreme Court warned against in *Baker v. Carr*: confusing a political case with a political question. There is no doubt that the duties and powers of the Tribal Council are committed to the legislative branch, not the judicial one. However, neither the substance nor the basis of those duties and powers are at issue in these cases.

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Defendants' claim that the "charges brought against [them]...are decisions that are constitutionally committed to the legislative branch" (*Defendants' Motion to Dismiss, p.5, ll.7-9)* is precisely the sort of "semantic cataloguing" disfavored by the Supreme Court. *Baker v. Carr*, at 217. The charges here are not questions for the Tribal Council, because they do not involve the Tribal Council's authority in any way, including its authority to enact laws and negotiate with corporations on behalf of the Tribe pursuant to Article VIII of The Constitution of the Snoqualmie Tribe of Indians. The defendants are charged with taking action in violation of the Snoqualmie Tribal Code, as enacted by the Tribal Council. The courts have authority to construe and to interpret legislation. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-230 (1986). This Court has such authority, and is empowered by the Constitution of the Snoqualmie Tribe to interpret the constitution, laws and resolution of the Snoqualmie Tribal Council. *Constitution of the Snoqualmie Tribe of Indians, Article X.*

Defendants' claim that the "sensitive political nature of the charges" (*Defendants' Motion to Dismiss, p.5, l.14)* deprives this Court of judicially discoverable and manageable standards for resolving the case is without merit: the Snoqualmie Tribal Code supplies such standards, it is eminently discoverable and manageable, and neither the Code nor this Court's ability to interpret it is defeated by the political overtones of this case. As for the claimed nonjudicial policy determination this Court must make before resolution can be had, Defendants fail to identify it. Instead, they once again conflate a case with political overtones and a case turning on a political question, embarking upon a lengthy attempt to frame the charges as issues involving the authority and discretion of the Tribal Council, and opining as to the meaning of the evidence in the case. Yes, the case undoubtedly has political overtones and exists in a political context. But the questions at issue are not political ones, no matter how hard the defendants try to frame them as such. *See Baker v. Carr.*

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Finally, the Tribal prosecutor protests defendants' claim that the criminal prosecution is a "political attack brought by one faction of the Snoqualmie Tribal council against another under the auspices of the Tribal prosecutor's office." *Defendants' Motion to Dismiss, p.5, ll.12-13.* The Tribal prosecutor assures this Court that no influence or pressure was brought to bear by any member of the Snoqualmie Tribal Council or staff whatsoever. The prosecution of charges against the defendants resulted from the evidence, and only from the evidence, that gave rise to probable cause that the crimes charged have been committed by the defendants.

III. CONCLUSION

As the defendants are not protected by sovereign immunity, and the charges do not involve a non-justiciable political question, this Court has jurisdiction over the defendants and the subject matter, and should not dismiss any or all charges against the defendants Arlene Ventura and Kanim Ventura.

RESPECTFULLY SUBMITTED this 13TH of December, 2010.

Snoqualmie Tribal Prosecutor

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	No. SNO-CR-0022-2010 DEFENDANT ARLENE VENTURA'S REPLY IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The Tribal Prosecutor misapprehends the basis of defendant's Motion to Dismiss. As stated in Defendant Kanium Ventura's Motion to Dismiss, defendants assert they are immune from suit for actions arising out of their official duties as a Tribal Council Member. Either intentionally or out of carelessness, the prosecution ignores this fundamental issue and instead offers spurious arguments regarding sovereign immunity. Because the prosecution's entire theory of the case rests on unsupported legal conclusions, rather than facts, the Motion to Dismiss should be granted.

II. LAW AND ARGUMENT

A. The History of Legislative Immunity

The concept of Legislative Immunity is rooted in English history. As stated by Justice Harlin in *United States v. Johnson*, 383 U.S. 169 (1966), the immunities of the Speech or Debate Clause of the United States Constitution were:

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> "[t]he culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during successive monarchs utilize the criminal and civil laws to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature."

Id. at 178.

In *United States v. Johnson, supra*, the court reviewed the conviction of a former United States Representative on seven counts of violating the federal conflict-of-interest statute, 18 U.S.C. § 281 and one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The Court of Appeals overturned the conspiracy conviction based on the Speech or Debate Clause. In the Supreme Court's opinion, Justice Harlin quoted passage of Mr. Justice Lush in *Ex Parte* Wason, L.R.4Q.D. 573 (1869):

> "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions or members of either house cannot be inquired into by criminal proceedings with respect to anything they may do or say in the house."

Id. at 577.

The conclusion the court reached in *Johnson* stands for the proposition that legislative members are protected from inquiry into legislative acts or their motivation for the performance of legislative acts. *Kilboum v. Thompson*, 103 U.S. 168 (1881). *Kilboum* was the first case in which the U.S. Supreme Court interpreted the Speech or Debate clause. In *Kilboum*, the court said the clause is to be read broadly to include anything "generally done in a session of the house by one of its members in relation to the business before it." *Id.* at 204. This statement, too, was cited in approval in *Johnson*. *Id.*, 383 U.S. at 179. The court went on to note that its decision precluded prosecutions that draw into question "the legislative acts of the defendant member of congress or his motives for performing them." *Id.* at 185. The Constitution of the Snoqualmie Tribe of Indians recognizes this same privilege by virtue of adoption of the rights

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and powers granted by the Constitution and laws of the United States in Article I, Section 4.(b). The prosecutor's entire case is founded on allegations that overreach because they interfere with the internal workings of the Tribal Council concerning the adoption of Resolution 2003-2008.

B. The Prosecution's evidence only encompasses legislative actions.

The allegations made in Charges 1, 2, 3, 4 and 5, charging Official Misconduct, Obtaining a Signature by Deception or Duress or Conspiracy to Commit these offenses or Forgery, all arise from the same legislative acts: the passage of Snoqualmie Indian Tribe Resolution 2003-2008. This statement is supported by close examination of the statement of various Snoqualmie Tribal Council members and the Tribal Administrator provided to the prosecution.

To allow the Venturas to be prosecuted for carrying out their duties would violate the Speech or Debate privilege which, as described above, is a long standing tenet of democratic government. The Speech or Debate privilege is designed to preserve and protect legislative independence. *U.S. v. Brewster*, 408 U.S. 501, 507-508, 92 S. Ct. 2531 (1971). In *U.S. v. Brewster*, the Supreme Court held that "a member of Congress may be prosecuted under a criminal statute provided that the government's case does not rely on legislative acts or the motivation for legislative acts." Importantly, a legislative act is "defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *U.S. v. Brewster*, 408 U.S. 501, 511-512, 92 S. Ct. 2531 (1971).

The Prosecution invites this court to intrude into the Council's passage of Resolution 2003-2008 by requiring the defendants and Tribal Council members to testify regarding discussions and voting conducted at Tribal Council meetings and/or through Tribal Council polls. The Tribal Prosecutor's charges against the Venturas, therefore, cannot be prosecuted

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without relying on inquiries into legislative acts and communications surrounding the legislative acts. *See U.S. v. Brewster*, 408 U.S. at 509-510 (discussing *Kilboum v. Thompson,* 103 U.S. 168 (1881), wherein the U.S. government was precluded from prosecuting a sitting U.S. representative based on facts obtained through inquiries into speeches made in the U.S. House of Representatives). The charges against the Venturas and the factual inquiry necessary to support those charges are a blatant violation of the Speech or Debate Clause.

As Council Member Kathy Barker indicated during her May 13, 2009 interview, she raised the issue at hiring a firm to audit the Snoqualmie Casino in October 2008. Declaration of David H. Smith in Support of the Defendant's Motion to Dismiss (hereinafter "Smith Decl"), Ex. A.

In his June 11, 2009 interview Tribal Administrator Matt Mattson acknowledged that he prepared Resolution 2003-2008 at Arlene Ventura's request as a part of the normal legislative process. Smith Decl., Ex B. Council Member Margaret Mullen stated during her May 29, 2009 interview this about Resolution 2008-2008: "We did authorize one [an audit of the Casino], but I don't know if this would be it. Maybe that would have been after the Moss Adams group came here and talked to all of us." Smith Decl., Ex C. In his May 27, 2009 interview, the then Tribal Council Chairman Joe Mullen stated the following regarding placement of his signature on Resolution 2003-2008:

> ...I signed on the date that I received it. I can't explain the time discrepancy because the Council part wasn't filled in when I signed the Resolution. When it was brought to me, it was only my signature that was on it. Certification dates weren't there. Arlene hand-delivered this to me on December 8 at the office. She told me the phone poll took place about a week before the document was brought to me.

Smith Decl., Ex. D. The prosecution does not dispute these actions were part of the Tribal Council's normal legislative process.

In a statement that explains the political dispute at the heart of this case, Council Member MaryAnne Hinzman said this on May 20, 2009 about the adoption of Resolution

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2003-2008:

> I called Chairman Joe Mullen and told him that what was going on up there and here at the Chambers, I just want to tell you, please, Joe, I am asking you please do not sign any resolutions, anything that has to do with the Casino because the Council said no interference with the Casino ... Well, he went ahead and signed it anyhow ... And he said to me that when he came back to the office, on his bulletin board, there was a resolution asking him to sign it. He went to Arlene's office and signed it ...

Smith Decl., Ex E. This statement betrays the secret the prosecution has long tried to deny; this case is the outgrowth of a political dispute among Tribal Counsel members about oversight of the Snoqualmie Casino. These statements from uncharged Tribal Council Members make clear that this case is inextricably intertwined in the legislative activities of the Venturas.

C. Recent Decisions Limit the Reach of Criminal Prosecutions of Legislators

What is lacking – because it does not exist – is any evidence of official corruption in the execution of Resolution 2003-2008. In keeping with the historical immunity legislators enjoy, the United States Supreme Court has limited the application of the so-called "honest services" provision of the federal postal fraud statute, 18 U.S.C. § 1346. The "honest services" statute was passed by Congress in 1988 in response to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed 2d 292 (1987) which rejected the concept that citizens had intangible rights to have public officials perform their duties honestly. Because Congress did not define the concept of honest services in § 1346, the Supreme Court ultimately limited its reach to "core misconduct," e.g., taking a bribe for a legislative vote." *Skilling v. United States*, ____U.S. _____, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). Core misconduct has also been defined by the Ninth Circuit Court of Appeals in the criminal prosecution of an Alaskan legislator as either (1) taking a bribe or otherwise being paid for a decision or (2) non-disclosure of private but material financial information by a public official. *United States v. Weyhrauch*, 548 F. 3d 1237, 1247 (2008).

Moreover, the vague allegations in this case require the application of the "Rule of Lenity." Under a long line of decisions, the rule of lenity requires ambiguous criminal laws to

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be interpreted in favor of defendants subject to them. *See*, e.g., *United States v. Santos*, 128 S. Ct. 20 (2008). Here the crime of Official Misconduct is so vague that it could apply to fringe conduct such as purported irregularly in the adoption of a tribal resolution. Therefore, its reach should be limited to the core misconduct discussed above.

D. The acts alleged in the Complaint were performed as part of defendants' constitutional duties and responsibilities.

In its response, the Prosecution cites several cases in support of the proposition that sovereign immunity does not apply because defendants were charged with conduct outside the scope of their duties as Tribal Council Members. See, Response to Motion to Dismiss, page 3. The authority cited by the prosecutor is inapplicable to the issue raised in this case. More importantly, the prosecution also misstates the holdings of those cases. Federal courts have long held that suits that charge federal officers with unconstitutional acts are not barred by sovereign immunity while claims that allege a violation of a statute or regulation are barred. See, e.g. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S., 682 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). In *U.S. v. Yakima Tribal Court*, 806 F.2d 853 (1986) the court noted that a different analysis applies to claims based on an official's violation of federal statutes or regulations. In *Aminoil U.S.A., Inc. v. California State Water Resources Control Board*, 674 F.2d 1227 (9th Circuit 1982), a case cited by the Prosecutor, the question presented was whether a government agent's decision that *Aminoil* violated a statute was "beyond the scope of his authority and [was] therefore not barred by sovereign immunity. The court held that a simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority. Official action is still action of the sovereign, even if it is wrong, if it do[es] not conflict with the terms of [the officers] valid statutory authority. *Aminoil* at 1234 (quoting *Larson*, 337 U.S. at 695.)

In this case, rather than offer facts showing that Arlene Ventura's actions or Kanium Ventura's actions were outside the scope of their duties, the prosecution has offered nothing but

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improper legal conclusions to support its argument that defendants were acting outside the scope of their authority.

In point of fact, defendants have repeatedly requested specific information from the prosecution concerning the duty or duties defendant is alleged to have intentionally failed to perform and the laws which impose this duty on them. See defendant's original, Amended and Second Motion for Bill of Particulars. In her Motion to Compel Bill of Particulars defendant again explained the inadequacy of the language used in the Amended Criminal Complaint and the prosecution's first response to the Motion for Bill of Particulars. In response to all five charges, defendant repeatedly demanded that the prosecution explain what duty or duties she allegedly violated, whether the duty was mandatory or discretionary, and what law imposed this duty upon the defendant. In its Second Response to the Motion for Bill of Particulars and Motion to Compel, the prosecution makes this vague statement:

> "Rules, Requirements and process for Tribal Council approval of actions are available in the Snoqualmie Tribal Code."

See, Response to Second Motion for Bill of Particulars and Motion to Compel, page 4. The prosecution's argument seems to be, in essence, that there were irregularities in the way Resolution 2003 – 2008 was enacted and/or certified. Even if this were true, these actions would not strip Arlene Ventura of the immunity she holds as the Tribal Council's Secretary as the acts complained of are undisputedly within her statutory authority under Article V Section 4 and Article IX of the Constitution of the Snoqualmie Indian Tribe.

E. Political questions are not judiciable as criminal offenses.

Contrary to the prosecutor's assertions, the political question doctrine is directly applicable in the present matter. The prosecutor has relied in large part upon the findings of an "Investigative Team" that was composed of the Tribe's attorneys, Tribal Administrator, and Tribal Security officer. The Constitution of the Snoqualmie Tribe did not empower these individuals to do what they did, nor is there statutory authority that any of them can rely upon

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to justify their actions with regard to impugning the power of Tribal Council officials to legislate. This impermissible infringement upon the Tribe's legislature to scrutinize the actions taken by the Venturas in the official discharge of their legislative duties is repugnant to the power conferred upon them as Tribal Council legislators and is an unconstitutional exercise of the prosecutorial authority. The jurisprudence surrounding political question and the protections afforded by the Speech or Debate Clause dictate that the judiciary not interfere or attempt to scrutinize the internal rules and procedures of the Tribal Council. *See U.S. v. Brewster*, 408 U.S. 501, 507-508, 92 S. Ct. 2531 (1971); *Blackwell v. City of Philadelphia*, 546 Pa. 358, 364, 684 A.2d 1068 (PA Sup. Ct. 1996).

Political question jurisprudence supports defendants' argument that "a non-justiciable political question is presented where there is a challenge to legislative power which the Constitution commits exclusively to the legislature." *Blackwell v. City of Philadelphia*, 546 Pa. 358, 364, 684 A.2d 1068 (PA Sup. Ct. 1996). By definition, this is a non-justiciable political question. Arlene Ventura is a duly elected member of the Snoqualmie Tribal Council and its Secretary. The Snoqualmie Tribal Council passed Resolution 2003-2008 under the Snoqualmie Tribal Constitution. Conducting an audit of the Snoqualmie Casino is a power reserved to the Snoqualmie Tribal Council under Article VIII of the Snoqualmie Constitution.[1] The actions taken by the Venturas that form the basis for the prosecutor's charges, *e.g.* the passage of a resolution to audit a Tribal business, is a power that is committed exclusively to the legislature. The resulting Resolution is in the proper form as required by the Snoqualmie Tribal Code.

The charges brought are undeniably an attempt to look at the process and procedure by which the Tribal Council passed resolution 2003-2008 and criminalize constitutionally protected actions. The supposed basis for the prosecution's charges requires a direct inquiry

[1] Article VIII, section 1(e) empowers the Tribal Council "to manage all economic affairs and enterprises of the Tribe in accordance with the terms of this constitution and the laws of the Tribe."

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into defendant's actions as a member of the Tribal Council and the carrying out of an official legislative act. The charges as drafted are a disguised attempt to call into question the procedures and internal rules by which the Tribal Council passed resolution 2003-2008. The prosecutor does not have a duty or a right to investigate the internal processes or internal rules of the Tribal Council. The prosecutor's attempts to proclaim that the politics of this case are disengaged from the trumped up charges presently before the Court is either naïve or bordering on prosecutorial misconduct.

Defendants agree that the " determination of whether a complaint involves a non-justiciable political question requires making an inquiry into the precise facts and posture of that complaint, since such a determination cannot be made merely by semantic cataloguing." *Baker v. Carr.* However, the prosecutor neglects to acknowledge that "under the political question doctrine, courts generally refuse to scrutinize the legislature's choice of, or compliance with, internal rules and procedures." *Blackwell*, 546 Pa. 358, 364. A criminal prosecution pertaining to the manner or procedure for the passage of Resolution 2003-2008 directly violates the principles outlined in *Blackwell.* The charges themselves present non-justiciable claims and this Court should, therefore, dismiss them.

III. CONCLUSION

For the reasons stated herein, Defendants' Motion to Dismiss should be granted.

DATED this 21st day of December, 2010.

GARVEY SCHUBERT BARER

By */s/ David H. Smith*
David H. Smith, Member #STC201023
Attorney for Defendant

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The Honorable Raquel D. Montoya-Lewis

IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. KANIM VENTURA, (d.o.b. 06/12/1967) Defendant.	NO. SNO-CR-0021-2010 DEFENDANT KANIUM VENTURA'S REPLY IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The Tribal Prosecutor misapprehends the basis of defendant's Motion to Dismiss. As stated in Defendant Kanium Ventura's Motion to Dismiss, defendants assert they are immune from suit for actions arising out of their official duties as a Tribal Council Member. Either intentionally or out of carelessness, the prosecution ignores this fundamental issue and instead offers spurious arguments regarding sovereign immunity. Because the prosecution's entire theory of the case rests on unsupported legal conclusions, rather than facts, the Motion to Dismiss should be granted.

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II. LAW AND ARGUMENT

A. The History of Legislative Immunity

The concept of Legislative Immunity is rooted in English history. As stated by Justice Harlin in *United States v. Johnson*, 383 U.S. 169 (1966), the immunities of the Speech or Debate Clause of the United States Constitution were:

> [t]he culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during successive monarchs utilize the criminal and civil laws to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.

Id. at 178.

In *United States v. Johnson, supra*, the court reviewed the conviction of a former United States Representative on seven counts of violating the federal conflict-of-interest statute, 18 U.S.C. § 281 and one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The Court of Appeals overturned the conspiracy conviction based on the Speech or Debate Clause. In the Supreme Court's opinion, Justice Harlin quoted passage of Mr. Justice Lush in *Ex Parte* Wason, L.R.4Q.D. 573 (1869):

> I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions or members of either house cannot be inquired into by criminal proceedings with respect to anything they may do or say in the house.

Id. at 577.

The conclusion the court reached in *Johnson* stands for the proposition that legislative members are protected from inquiry into legislative acts or their motivation for the performance of legislative acts. *Kilboum v. Thompson*, 103 U.S. 168 (1881). *Kilboum* was the first case in which the U.S. Supreme Court interpreted the Speech or Debate clause. In *Kilboum*, the court said the clause is to be read broadly to include anything "generally done in a

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session of the house by one of its members in relation to the business before it." *Id.* at 204. This statement, too, was cited in approval in *Johnson*. *Id.*, 383 U.S. at 179. The court went on to note that its decision precluded prosecutions that draw into question "the legislative acts of the defendant member of congress or his motives for performing them." *Id.* at 185. The Constitution of the Snoqualmie Tribe of Indians recognizes this same privilege by virtue of adoption of the rights and powers granted by the Constitution and laws of the United States in Article I, Section 4.(b). The prosecutor's entire case is founded on actions that overreach because it investigated the methods and procedures that the Tribal Council utilized to adopt Resolution 2003-2008.

B. The Prosecution's evidence only encompasses legislative actions.

The allegations made in Charges 1, 2, 3 and 4 charging Official Misconduct, Conspiracy to Commit Official Misconduct, Conspiracy to Obtain a Signature by Deception or Duress and Conspiracy to Commit Forgery all arise from the same legislative acts: the passage of Snoqualmie Indian Tribe Resolution 2003-2008. This statement is supported by close examination of the statement of various Snoqualmie Tribal Council members and the Tribal Administrator obtained by the prosecution.

To allow the Venturas to be prosecuted for carrying out their duties would violate the Speech or Debate privilege which, as described above, is a long standing tenet of democratic government. The Speech or Debate privilege is designed to preserve and protect legislative independence. *U.S. v. Brewster*, 408 U.S. 501, 507-508, 92 S. Ct. 2531 (1971). In *U.S. v. Brewster*, the Supreme Court held that "a member of Congress may be prosecuted under a criminal statute provided that the government's case does not rely on legislative acts or the motivation for legislative acts." Importantly, a legislative act is "defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate clause prohibits inquiry only into those things generally said or done in the House or the Senate in the

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performance of official duties and into the motivation for those acts." *U.S. v. Brewster*, 408 U.S. 501, 511-512, 92 S. Ct. 2531 (1971).

The "Investigative Team's" intrusion into the Council's passage of Resolution 2003-2008 specifically required that the "Investigative Team" interrogate Tribal Council members without legal counsel regarding discussions and voting conducted at Tribal Council meetings and on Tribal Council phone polls. The Tribal prosecutor's charges against the Venturas, therefore, cannot be prosecuted without relying on inquiries into legislative acts and communications surrounding the legislative acts. *See U.S. v. Brewster*, 408 U.S. at 509-510 (discussing *Kilboum v. Thompson,* 103 U.S. 168 (1881), wherein the U.S. government was precluded from prosecuting a sitting U.S. representative based on facts obtained through inquiries into speeches made in the U.S. House of Representatives). The charges against the Venturas and the factual inquiry necessary to support those charges are a blatant violation of the Speech or Debate Clause.

As Council Member Kathy Barkes indicated during her May 13, 2009 interview, she raised the issue at hiring a firm to audit the Snoqualmie Casino in October 2008. Declaration of David H. Smith in Support of the Defendant's Motion to Dismiss (hereinafter "Smith Decl"), Ex. A.

In his June 11, 2009 interview Tribal Administrator Matt Mattson acknowledged that he prepared Resolution 2003-2008 at Arlene Ventura's request as a part of the normal legislative process. Smith Decl., Ex B. Council Member Margaret Mullen stated during her May 29, 2009 interview this about Resolution 2008-2008: "We did authorize one [an audit of the Casino], but I don't know if this would be it. Maybe that would have been after the Moss Adams group came here and talked to all of us." Smith Decl., Ex C. In his May 27, 2009 interview, the then Tribal Council Chairman Joe Mullen stated the following regarding placement of his signature on Resolution 2003-2008:

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> ...I signed on the date that I received it. I can't explain the time discrepancy because the Council part wasn't filled in when I signed the Resolution. When it was brought to me, it was only my signature that was on it. Certification dates weren't there. Arlene hand-delivered this to me on December 8 at the office. She told me the phone poll took place about a week before the document was brought to me.

Smith Decl., Ex. D. The prosecution does not dispute these actions were part of the Tribal Council's normal legislative process.

In a statement that explains the political dispute at the heart of this case, Council Member MaryAnne Hinzman said this on May 20, 2009 about the adoption of Resolution 2003-2008:

> I called Chairman Joe Mullen and told him that what was going on up there and here at the Chambers, I just want to tell you, please, Joe, I am asking you please do not sign any resolutions, anything that has to do with the Casino because the Council said no interference with the Casino ... Well, he went ahead and signed it anyhow ... And he said to me that when he came back to the office, on his bulletin board, there was a resolution asking him to sign it. He went to Arlene's office and signed it ...

Smith Decl., Ex E. This statement betrays the secret the prosecution has long tried to deny; this case is the outgrowth of a political dispute among Tribal Council members about oversight of the Snoqualmie Casino. These statements from uncharged Tribal Council Members make clear that this case is inextricably intertwined in the legislative activities of the Venturas. In short, pursuing a political agenda as an elected official is not a crime.

C. Recent Decisions Limit the Reach of Criminal Prosecutions of Legislators

What is lacking – because it does exist – is any evidence of official corruption in the execution of Resolution 2003-2008. In keeping with the historical immunity legislators enjoy, the United States Supreme Court has limited the application of the so-called "honest services" provision of the federal postal fraud statute, 18 U.S.C. § 1346. The "honest services" statute was passed by Congress in 1988 in response to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed 2d 292 (1987) which rejected the

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concept that citizens had intangible rights to have public officials perform their duties honestly. Because Congress did not define the concept of honest services in § 1346, the Supreme Court ultimately limited its reach to "core misconduct," e.g., taking a bribe for a legislative vote." *Skilling v. United States*, ____U.S. _____, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). This has been defined by the Ninth Circuit Court of Appeals in a criminal prosecution of an Alaskan legislator as either (1) taking a bribe or otherwise being paid for a decision or (2) non-disclosure of private but material financial information by a public official. *United States v. Weyhrauch*, 548 F. 3d 1237, 1247 (2008).

Moreover, the vague allegations in this case require the application of the "Rule of Lenity." Under a long line of decisions, the rule of lenity requires ambiguous criminal laws to be interpreted in favor of defendants subject to them. *See*, e.g., *United States v. Santos*, 128 S. Ct. 20 (2008). Here the crime of Official Misconduct is so vague that it could apply to fringe conduct such as purported irregularly in the adoption of a tribal resolution.

D. The acts alleged in the Complaint were performed as part of defendants' constitutional duties and responsibilities.

In its response, the Prosecution cites several cases in support of the proposition that sovereign immunity does not apply because defendants were charged with conduct outside the scope of their duties as Tribal Council Members. See, Response to Motion to Dismiss, page 3. The authority cited by the prosecutor is inapplicable to the issue raised in this case. More importantly, the prosecution also misstates the holdings of those cases. Federal courts have long held that suits that charge federal officers with unconstitutional acts are not barred by sovereign immunity while claims that allege a violation of a statute or regulation are barred. See, e.g. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S., 682 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). In *U.S. v. Yakima Tribal Court*, 806 F.2d 853 (1986) the court noted that a different analysis applies to claims based on an official's violation of federal statutes or

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regulations. Citing *Aminoil U.S.A., Inc. v. California State Water Resources Control Board*, 674 F.2d 1227 (9th Circuit 1982) the question presented was whether a government agent's decision that *Aminoil* violated a statute was "beyond the scope of his authority and [was] therefore not barred by sovereign immunity. The court held that a simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority. Official action is still action of the sovereign, even if it is wrong, if it do[es] not conflict with the terms of [the officers] valid statutory authority. *Aminoil* at 1234 (quoting *Larson*, 337 U.S. at 695.)

In this case, rather than offer facts based on personal knowledge establishing that Venturas' actions were outside the scope of their duties, the prosecution has offered nothing but improper legal conclusions on the subject to support its argument that defendants were acting outside the scope of their authority. In point of fact, defendants have repeatedly requested specific information concerning the duty or duties defendants are alleged to have intentionally failed to perform and the laws which impose this duty on the defendants in their original, Amended and Second Motion for Bill of Particulars. In Defendant's Motion to Compel Bill of Particulars, defendant explained the inadequacy of the language used in the Amended Criminal Complaint and the prosecution's first response to the Motion for Bill of Particulars. In response to all five charges, defendant repeatedly demanded that the prosecution explain what duty or duties the defendant was alleged to have violated, whether the duty was mandatory or discretionary, and what law imposed this duty upon the defendant. In its Second Response to the Motion for Bill of Particulars and Motion to Compel, the prosecution makes this vague statement:

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See, Response to Second Motion for Bill of Particulars and Motion to Compel, page 4. On their face, the prosecution's arguments, in essence, are that there were irregularities in the way Resolution 2003 – 2008 was enacted and/or certified. Even if true, these actions would not strip Kanium Ventura of his immunity for acting in his official capacity as a Tribal Council member or Arlene Ventura of the immunity she holds as the Tribal Council's Secretary as the acts complained of are undisputedly within their statutory authority under Article V Section 4, Article VIII and Article IX of the Constitution of the Snoqualmie Indian Tribe.

E. Political questions are not justiciable as criminal offenses.

Contrary to the prosecutor's assertions, the political question doctrine is directly applicable in the present matter. The prosecutor has relied in large part upon the findings of an "Investigative Team" that was composed of the Tribe's attorneys, Tribal Administrator, and Tribal Security officer. The Constitution of the Snoqualmie Tribe did not empower these individuals to do what they did, nor is there statutory authority that any of them can rely upon to justify their actions with regard to impugning the power of Tribal Council officials to legislate. This impermissible infringement upon the Tribe's legislature to scrutinize the actions taken by the Venturas in the official discharge of their legislative duties is repugnant to the power conferred upon them as Tribal Council legislators and is an unconstitutional exercise of the prosecutorial authority. The jurisprudence surrounding political question and the protections afforded by the Speech or Debate Clause dictate that the judiciary not interfere or attempt to scrutinize the internal rules and procedures of the Tribal Council. *See U.S. v. Brewster*, 408 U.S. 501, 507-508, 92 S. Ct. 2531 (1971); *Blackwell v. City of Philadelphia*, 546 Pa. 358, 364, 684 A.2d 1068 (PA Sup. Ct. 1996).

Political question jurisprudence supports defendants' argument that "a non-justiciable political question is presented where there is a challenge to legislative power which the Constitution commits exclusively to the legislature." *Blackwell v. City of Philadelphia*, 546

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Pa. 358, 364, 684 A.2d 1068 (PA Sup. Ct. 1996). By definition, this is a non-justiciable political question. Kanium Ventura is a duly elected member of the Snoqualmie Tribal Council. The Snoqualmie Tribal Council passed Resolution 2003-2008 properly under the Snoqualmie Tribal Constitution. Conducting an audit of the Snoqualmie Casino is a power reserved to the Snoqualmie Tribal Council under Article VIII of the Snoqualmie Constitution.[1] The actions taken by the Venturas that form the basis for the prosecutor's charges, *e.g.* the passage of a resolution to audit a Tribal business, is a power that is committed exclusively to the legislature. The resulting Resolution is in the proper form as required by the Snoqualmie Tribal Code.

The charges brought are undeniably an attempt to look at the process and procedure by which the Tribal Council passed resolution 2003-2008 and criminalize constitutionally protected Speech and Debate. The supposed basis for the prosecution's charges require a direct inquiry into Councilmen Ventura's actions as a member of the Tribal Council and the carrying out of an official legislative act. The charges as drafted are a disguised attempt to call into question the procedures and internal rules by which the Tribal Council passed resolution 2003-2008. The prosecutor does not have a duty or a right to investigate the internal processes or internal rules of the Tribal Council. The prosecutor's attempts to proclaim that the politics of this case are disengaged from the trumped up charges presently before the Court is either naïve or bordering on prosecutorial misconduct.

Defendants agree that the " determination of whether a complaint involves a non-justiciable political question requires making an inquiry into the precise facts and posture of that complaint, since such a determination cannot be made merely by semantic cataloguing." *Baker v. Carr.* However, the prosecutor neglects to acknowledge that "under the political

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question doctrine, courts generally refuse to scrutinize the legislature's choice of, or compliance with, internal rules and procedures." *Blackwell*, 546 Pa. 358, 364. Investigation and prosecution pertaining to the manner or procedure for the passage of Resolution 2003-2008 directly violates the principles outlined in *Blackwell.* The charges themselves present non-justiciable claims and this Court should, therefore, dismiss the claims against the Venturas.

III. CONCLUSION

This Court should dismiss all charges against Kanium Ventura because he is immune from suit, he acted within his Constitutional duties and because the controversy is non-justiciable.

DATED this 21ST day of December, 2010.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
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Attorneys for Defendant Kanium Ventura

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The Honorable Judge Richard Woodrow

IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. KANIUM VENTURA, (d.o.b. 06/12/1967) Defendant.	NO. SNO-CR-0021-2010 DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS BASED ON PROSECUTORIAL MISCONDUCT

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Kanium Ventura respectfully moves the Court to dismiss the indictment pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, Article Eleven of the Constitution of the Snoqualmie Tribe of Indians, the Fifth Amendment to the Constitution of the United States, and the Indian Civil Rights Act of 1968 (28 USC §1302). This motion is made on the grounds of prosecutorial misconduct. The declaration of Mr. Quanah Spencer, attached to this motion, shows that:

1) On August 12, 2010, the Snoqualmie Tribal Prosecutor briefed the Snoqualmie Tribal Council on timing, potential charges, and her philosophy regarding charging decisions in the present case against Mr. Ventura. Spencer decl. ¶2, Exhibit 1.

2) On August 12, 2010, the Snoqualmie Tribal Council debated whether to proceed with disciplinary or legal action against Tribal Administrator Matthew Mattson due to alleged

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misuse of a Tribal credit card. The Council determined that no action would be pursued. Spencer decl. ¶3, Exhibit 1.

3) On September 8, 2010, the Tribe filed a criminal complaint against Ms. Repin on charges of theft and official misconduct. On October 11, 2010, the Tribe entered into a deferred prosecution against Ms. Repin. Spencer decl. ¶4, Exhibits 2-3.

4) On September 8, 2010, the Tribe filed a criminal complaint against Ms. Hinzman on charges of forgery, theft, and official misconduct. On October 11, 2010, the Tribe entered into a deferred prosecution against Ms. Hinzman. Spencer decl. ¶4, Exhibits 4-5.

5) On September 8, 2010, the Tribe filed a criminal complaint against Mr. Gary Hinzman, son of Ms. Hinzman, on charges of fraud and theft. On October 11, 2010, the Tribe entered into a deferred prosecution against Mr. Hinzman. Spencer decl. ¶4, Exhibits 6-7.

6) On September 16, 2010, the Tribe filed a criminal complaint against Mr. Kanium Ventura, on charges of Official Misconduct and Criminal Impersonation. These charges were subsequently amended on November 8, 2010, to comprise one charge of Official Misconduct and three charges related to Conspiracy. Spencer decl. ¶2.

7) A defense discovery request was filed in this case on October 11, 2010. Spencer decl. ¶5, Exhibit 8.

8) On December 21, 2010, the Tribe filed a witness list. Among the witnesses specified are Mr. Matthew Mattson, Ms. Mary Anne Hinzman, and Ms. Nina Repin. Spencer decl., Exhibit 12.

9) On December 23, 2010, the Court granted Mr. Ventura's motion to permit inspection of his office located at the Snoqualmie Tribal Headquarters in Snoqualmie, WA. Spencer decl. ¶6, Exhibit 13.

10) A defense motion to compel discovery was filed in this case on December 28, 2010. Spencer decl. ¶5, Exhibit 9.

11) On December 30, 2010, the Tribe filed a motion to reconsider Judge Montoya-Lewis' order of December 23, 2010 granting Mr. Ventura the right to inspect his office as part of discovery. Spencer decl. ¶6.

12) On December 31, 2010, Judge Montoya-Lewis withdrew from the case. Spencer decl. ¶6.

13) On January 20, 2011, counsel for Mr. Ventura filed a Supplemental Demand for Discovery. Spencer decl. ¶5, Exhibit 18.

II. FACTS

The facts of this case are lengthy, but merit review. On August 12, 2010, the Snoqualmie Tribal Council (Council) conducted a session where the Snoqualmie Tribal

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Prosecutor (Prosecutor) provided an update to the Council on pending criminal charges against Mr. Ventura and co-defendant Arlene Ventura. Spencer decl., ¶2. During the Prosecutor's brief to the Council, the Prosecutor discussed potential charges, timing, current case status, and the Prosecutor's philosophy on charging decisions. Among other comments, the Prosecutor remarked that the Tribe is "likely to file charges" and that "I don't bring a charge that I think I can't win." Spencer decl., Exhibit 1. At that same meeting, the Council debated disciplinary and/or legal action against Tribal Administrator Matt Mattson for misuse of a Tribal credit card. The Council declined to act in any manner against Mr. Mattson. *Id.*

Approximately three weeks after the August 12, 2010 Council meeting, two Council members were charged in Snoqualmie Tribal Court (Court) on charges of theft, forgery, and official misconduct. On September 8, 2010, the Prosecutor entered into a deferred prosecution with Ms. Nina Repin and Ms. Mary Anne Hinzman, both Council members. Spencer decl. ¶4, Exhibits 3, 5, and 7. Mr. Ventura was subsequently charged with criminal impersonation and official misconduct on September 16, 2010. A defense discovery request in this case was made on October 11, 2010. Spencer decl. ¶5, Exhibit 8. This discovery request included a demand for "disclosure of all evidence within the knowledge of or in the possession of the prosecuting authority which is favorable to the defendant or which tends to negate defendant's guilt." *Id.* This same discovery request included a demand for all "books, papers, documents, photographs, or tangible objects which the prosecuting authority intends to use at trial or hearing which were obtained from or belong to the defendant." *Id.* A defense motion to compel discovery was made in this case on December 28, 2010. Spencer decl. ¶5, Exhibit 9. This Motion requested the Court to order disclosure of "All information subject to disclosure

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subject to Rule 16(a) of the Federal Rules of Criminal Procedure. All evidence that is both favorable to the accused and material either to guilt or to punishment pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963)." *Id.* Finally, on January 20, 2011, counsel for Mr. Ventura filed a Supplemental Demand for Discovery that, again, demanded production of all materials required by *Brady* as well as "All documents relating to Tribal Administrator Matt Mattson's use of a Tribal credit card to pay for repairs to his sailboat...[and]...for expenses relating to his hockey team..." Spencer decl., ¶5, Exhibit 18. To date, no response has been received from the Tribe on the January 20, 2011 Supplemental Demand for Discovery.

In a related discovery matter, after a telephonic hearing on December 23, 2010, the Court granted Mr. Ventura's motion for an order permitting Defense to conduct an inspection of his office space at Tribal Headquarters as part of discovery. Spencer decl., ¶6, Exhibit 13. On December 30, 2010, the Tribe filed a Motion to Reconsider. *Id.* On December 31, 2010, Judge Montoya-Lewis recused herself from the case. *Id.* On January 13, 2011, counsel for Mr. Ventura was informed that Mr. Richard Woodrow has been appointed Judge Pro Tem to preside over the present case. At a telephonic hearing held on January 13, 2011, Judge Woodrow informed counsel that the next scheduled action on the case would be oral arguments on a variety of motions on January 28, 2011. To date, the inspection ordered by Judge Montoya-Lewis has not yet occurred.

III. ARGUMENT

A fair trial in this case is rendered impossible by ongoing prosecutorial misconduct. This misconduct includes failure to disclose significant evidence required by *Brady v.*

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Maryland, the Prosecutor's effective defiance of a court order, and extrajudicial comments made by the Prosecutor. *See Brady v. Maryland*, 373 U.S. 83 (1963); *See also* Spencer decl., ¶¶2-6. These actions fatally prejudice Mr. Ventura's Fifth Amendment due process right to a fair trial and ability to prepare a defense. Consequently, the charges must be dismissed with prejudice under Article Eleven of the Constitution of the Snoqualmie Tribe of Indians and the Fifth Amendment to the Constitution of the United States of America, applied to the Tribes through the Indian Civil Rights Act of 1968. (28 USC §1302). Conversely, the charges must be dismissed under the Court's inherent supervisory powers. This motion initially examines the multiple *Brady* violations, proceeds to review the Prosecutor's defiance of the Court order, and continues to examine the Prosecutor's extrajudicial comments. It concludes with analysis of why the charges must be dismissed with prejudice, or, in the event charges are not dismissed, result in other appropriate sanctions.

A. The Prosecutor's failure to disclose crucial impeachment evidence comprises multiple *Brady* violations.

The case against Mr. Ventura must be dismissed as the prosecution to date comprises a series of violations of Mr. Ventura's right to due process. Article Eleven of the Constitution of the Snoqualmie Tribe of Indians includes a due process clause. It reads, in relevant part, "The Snoqualmie Indian Tribe shall not in exercising powers of self-government...deprive any person of liberty...without due process of law." CONSTITUTION OF THE SNOQUALMIE TRIBE OF INDIANS, ART. XI, §8. This language mirrors almost exactly the Fifth Amendment to the Constitution of the United States. The Fifth Amendment to the United States Constitution reads, in relevant part, "No person...shall be compelled in any criminal case to be a witness

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against himself, nor be deprived of life, liberty, or property, without due process of law..." U.S. CONST. AMDT. V. The due process protection, in addition to being found in the Tribal Constitution, is also imposed on the Tribe through the Indian Civil Rights Act of 1968. (28 USC §1302).

One of the central protections offered by the due process clause is found in the landmark 1967 case *Brady v. Maryland,* 373 U.S. 83 (1963). *Brady* stands for the proposition that the Due Process Clause requires the prosecution to disclose any evidence that is material either to guilt or to punishment. *Id.*, at 87. A *Brady* violation occurs when the prosecution fails to disclose evidence that is (1) favorable to the accused, (2) suppressed by the government and (3) "material to the guilt or innocence of the defendant." *United States v. Jernigan,* 492 F.3d 1050, 1053 (9th Cir. 2007) (en banc). Evidence is "favorable" if it is either exculpatory or impeachment evidence. *United States v. Bagley,* 473 U.S. 667, 676 (1985). Evidence is "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 682. This analysis is supplemented by *Kyles v. Whitley* which states that, once error has been established, the error necessarily had "substantial and injurious effect or influence in determining the jury's verdict." *Kyles*, 514 U.S. at 436 (*citing Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). Although *Brady* does not necessarily require the Prosecution to turn over exculpatory information before trial, "disclosure must be made at a time when [the] disclosure would be of *value to the accused* (emphasis added)." *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991). Failure to disclose *Brady* materials may be grounds for dismissal of charges, among other potential sanctions. *See e.g. U.S. v. Chapman*, 524 F.3d 1073 (9th Cir. 2008).

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In this case, the Prosecution has repeatedly failed in its *Brady* obligations. The Prosecution listed Mr. Mattson, Ms. Hinzman, and Ms. Repin as witnesses against Mr. Ventura on December 21, 2010, but failed to disclose the crucial impeachment evidence that the Prosecutor entered into deferred prosecutions with two of these witnesses on subjects involving the witnesses' honesty and candor,[1] and was aware of allegations of criminal wrong-doing against the third. These damaging omissions occurred despite the discovery request of October 11, 2010, the motion to compel discovery of December 29, 2010, and the most recent Supplemental Demand for Discovery filed on January 20, 2011. The latest demand for discovery, filed on January 20, 2010, specifically demands the Prosecutor disclose all materials required under *Brady* and requests information pertaining to Matt Mattson's alleged misuse of a Tribal credit card. What little evidence regarding the deferred prosecution and allegations of criminal misconduct the defense *does* have access to has come through channels other than the Prosecutor's office.

The information regarding Ms. Repin's and Ms. Hinzman's deferred prosecutions, as well as the allegations of Mr. Mattson's criminal misconduct, is clearly favorable impeachment testimony for Mr. Ventura, and was either intentionally or unintentionally suppressed. This meets the first two prongs of the *Jernigan* analysis for *Brady* violations. The third *Jernigan* prong is that the evidence must be "material to the guilt or innocence" of Mr. Ventura in that "the government's evidentiary suppression undermines confidence in the outcome of the trial." *Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007). Additionally, *Kyles* requires the Court to

[1] Defendant also notes the charging and subsequent defense-favorable disposition of fraud and theft charges against Mr. Gary Hinzman, son of Ms. Hinzman. These charges, like those for Ms. Repin and Ms. Hinzman, were resolved by the Prosecutor with a deferred prosecution. Spencer Decl., Exhibits 6-7.

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consider the materiality of *Brady* violations collectively, rather than item-by-item. *Kyles*, 514 US at 419. As the criminal trial has not yet occurred, it is impossible to determine with certainty the prospective impact of the suppressed evidence. It is clear at this stage, however, that Mr. Ventura has been significantly prejudiced by the *Brady* violations.

As an initial matter, the deferred prosecutions and allegations of potential criminal wrongdoing are material as they demonstrate a motive to cooperate with the Prosecutor. Additionally, the Prosecutor's *Brady* violations place the defense in the untenable position of executing the Prosecutor's discovery obligations, while simultaneously preparing a criminal defense. The lack of information about this impeachment information from the Prosecutor's office requires the defense to engage in the laborious process of researching and investigating the details and scope of the allegations against Mr. Mattson, as well as the background facts surrounding the deferred prosecutions against Ms. Repin and Ms. Hinzman. These are actions that are rightly the province of the Prosecutor's office, and Mr. Ventura's defense is harmed by the necessity of his legal counsel to conduct the Prosecutor's duties while simultaneously preparing a criminal defense. Additionally, as a result of the Prosecutor's omissions, defense must now review the criminal backgrounds for the nearly thirty witnesses on the Prosecutor's witness list submitted on December 21, 2010 for similar omissions on the Prosecutor's behalf. As a result of the Prosecutor's omission, defense is placed in the unacceptable position of being forced to prepare for trial with potentially vast amounts of information related to impeachment evidence remaining undisclosed. The lack of timely disclosure, and the resulting void of information for the remaining witnesses, places defense in the position of engaging in

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significant, and potentially fruitless, work that is properly the province of the Prosecutor's office.

The fact that the *Brady* material was ultimately discovered by defense, through means other than the Prosecutor's office, is no escape from the requirements of *Brady*. Analysis of the omitted *Brady* materials, considered collectively as required by *Kyles*, clearly undermines confidence in the proceedings. This case has already been subject to numerous delays due to the repeated interference in the Court's operations and independence by the Council. The overtly political background of this prosecution, combined with the omitted *Brady* materials, fatally undermines confidence in the outcome of the proceedings to this point. Consequently, the third *Jernigan* prong is met, and the omitted materials comprise significant *Brady* violations.

B. The Prosecutor effectively defied the Court order of December 28, 2010 permitting an inspection of Mr. Ventura's office.

In addition to the multiple *Brady* violations outlined above, the Prosecutor ignored and effectively defied the Court's December 23, 2010 order granting Mr. Ventura's motion to permit inspection of his offices. On December 23, 2010, the Court granted Mr. Ventura's motion to permit inspection of his office space at Tribal Headquarters located in Snoqualmie, WA at some point prior to the close of business on December 31, 2010. Counsel for Mr. Ventura contacted the Prosecutor to arrange access to the spaces. In response, the Prosecutor informed defense counsel by email that the order was "vague on it's [sic] face raising more questions than answers." Spencer decl., Exhibit 16. The Prosecutor also stated that she forwarded the order to Tribal Law Enforcement and was subsequently informed that

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the Tribal offices were closed until January 3, 2011. *Id.* Later that day, in response, counsel for co-defendant Arlene Ventura sent an e-mail to the Prosecutor stating as follows: "As an officer of the court and the Tribal Prosecutor you are required to assist defendants and the Court in implementing the Court's Order." Spencer decl., Exhibit 17. On December 30, 2010, the Prosecutor filed a Motion to Reconsider the order granting the office inspection. As of today's date, the ordered inspection has still not occurred.

Like all Washington attorneys, the Prosecutor is an officer of the Court. *Preamble, Washington Rules of Professional Conduct.* The Prosecutor has an obligation to assist in executing the orders of the Court. Additionally, the Prosecutor possesses unique obligations in the legal system. Among these, the Prosecutor has a "sworn duty...to assure that the defendant has a fair and impartial trial," and her "interest in a particular case is not necessarily to win, but to do justice." *N. Mariana Islands v. Bowie*, 236 F.3d 1083, 1089 (9th Cir. 2001). Here, the Prosecutor failed to assist executing the December 23, 2010 order of the Court permitting inspection of the office. When contacted by counsel for Mr. Ventura and counsel for the co-defendant, the Prosecutor merely responded that the order "rais[es] more questions than answers" and referred to an automatic email response from Tribal Law Enforcement indicating that the offices were closed until after the expiration of the Court's order. Spencer decl., Exhibit 16. Further efforts by counsel for Mr. Ventura to enlist the assistance of the Tribal Prosecutor to aid in executing the Court's order were fruitless. Consequently, the Prosecutor effectively defied the Court's order with the result that the window for the ordered inspection has long since expired. Additionally, since the Prosecutor's refusal to implement the Court's order, there is a good faith basis to believe that the offices have been entered by unknown

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individuals and potentially important evidence removed. Spencer decl. The appearance of evidence tampering, coupled with the multiple *Brady* violations examined above, significantly undermines confidence in the fairness of the proceedings to date. Consequently, the charges against Mr. Ventura must be dismissed due to the Prosecutor's failure to comply with a court order, and the accompanying prejudice to Mr. Ventura's ability to prepare a full and complete defense.

C. The Prosecutor engaged in inappropriate extrajudicial commentary by briefing the Council on the status, potential charges, and weight of the evidence in Mr. Ventura's case.

In addition to the multiple *Brady* violations and the defiance of the December 23, 2010 court order outlined above, the Prosecutor also engaged in inappropriate extrajudicial commentary regarding this case. Washington Rules of Professional Conduct 3.8 outlines the special responsibilities of a Prosecutor. Rule 3.8(f) addresses extrajudicial commentary:

> The Prosecutor in a criminal case shall...(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments *that have a substantial likelihood of heightening public condemnation of the accused*...(emphasis added). RPC 3.8(f).

The comment to Rule 3.8 clarifies the purpose of this provision by stating:

> In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused...a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Comment, RPC 3.8.

On August 12, 2010, the Council held a session where the Prosecutor attended and briefed the Council members on the pending filing of criminal charges against Mr. Ventura and co-defendant Arlene Ventura. During this briefing, the Prosecutor impliedly acknowledged the political context of this case by stating "I understand the urgency" regarding the filing of

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potential charges. *See* Spencer decl., Exhibit 1. Throughout the brief, the Prosecutor avoided referring to Mr. Ventura or co-defendant Arlene Ventura by name. The Prosecutor did, however, discuss the likely course of trial and potential charges in a manner that made clear who the defendants were. In explaining where the case currently stood, the Prosecutor explained, "the Tribe has probable cause and likely will file charges..." *Id.* In discussing the finding of probable cause, the Prosecutor reiterated the finding by stating "I truly believe it has probable cause." *Id.* Going on, the Prosecutor stated that the finding of probable cause meant as follows: "It means I have a case that I believe that, based on the evidence, is likely to prevail at trial. I don't bring a charge that I think I can't win." *Id.* Additionally, the Prosecutor editorialized that these charges "will have serious repercussions, both for the Tribe itself and for the individuals..." *Id.*

The August 12, 2010 briefing by the Prosecutor to the Council, by including details such as likely charges, trial timeline, and stating "I don't bring a charge that I think I can't win," comprises inappropriate extrajudicial commentary on Mr. Ventura's case. In a Tribe comprising only 350 voting members and made up of five main families, statements made before the Snoqualmie Tribal Council are much more likely to become general knowledge throughout the body politic than statements made before the governing political entity of a larger and more diverse jurisdiction. As the Tribe possesses notably few members, the Prosecutor's comments to the Council likely became common knowledge throughout the Tribe in a short period of time. Consequently, they have a higher likelihood of leading to increased "public condemnation of the accused," in contravention of RPC 3.8.

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In addition to the small size of the applicable public for purposes of RPC 3.8, the Prosecutor's comments are inappropriate because she is in a uniquely powerful position to influence public opinion and increase, or decrease, public opprobrium toward Mr. Ventura. By publicly stating that the Tribe is likely to file charges, and further stating that she does not "bring a charge that I think I can't win," the Prosecutor is, essentially, stating that Mr. Ventura is guilty. In addition, the Prosecutor is doing so in the most inappropriate of places: A Council meeting attended by numerous witnesses in the present criminal case. Additionally, Mr. Ventura remained (and presently remains) a lawfully elected member of the body the Prosecutor was briefing on potential criminal charges. The Prosecutor's vouching for Mr. Ventura's guilt before the Council, combined with the small number of enrolled Tribal members, only serves to increase public opprobrium on Mr. Ventura in an already highly polarized community. Rule 3.8 exists precisely to avoid this situation. The Prosecutor's appearance at the Council, and subsequent comments, were inappropriate, and, combined with the *Brady* violations above, merit dismissal of the charges with prejudice.

D. The prosecutorial misconduct merits dismissal of the charges with prejudice under the Court's inherent supervisory powers, or, alternatively, as a due process violation.

As examined above, this case involves multiple *Brady* violations, the Prosecutor's effective defiance of a court order, and the Prosecutor making inappropriate extrajudicial commentary regarding the guilt or innocence of Mr. Ventura. Taken collectively, ample grounds exist for this Court to dismiss the charges with prejudice under the Court's supervisory power, or, as an alternative, as a result of due process violations. If the Court elects not to dismiss the charges, however, alternative sanctions should be imposed.

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A court may dismiss charges under one of two theories: 1) As a result of the Court's supervisory powers; or 2) As a result of due process violations due to "outrageous government conduct." *U.S. v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). Here, both theories are supported by the facts. The Court may dismiss the charges under its supervisory powers "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991). A court may dismiss charges under its supervisory powers only when the defendant has suffered "substantial prejudice" and where "no lesser remedial action is available." *US. v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008). Additionally, the sanction of dismissal is merited in cases of "flagrant prosecutorial misconduct." *Id.* "Flagrant misconduct" or "flagrant misbehavior" may embrace "reckless disregard for the prosecution's constitutional obligations." *Id.*

Here, the collective facts amply support dismissal under the Court's supervisory powers as an example of "flagrant misbehavior" causing "substantial prejudice" to Mr. Ventura where no lesser remedial action is sufficient. *Id.* Regarding the *Brady* violations, the substantial prejudice suffered by Mr. Ventura is that counsel for Mr. Ventura is placed in the unacceptable position of executing the Prosecution's discovery duties. This, while simultaneously preparing for a criminal defense, significantly prejudices Mr. Ventura's defense. Additionally, the record of defense discovery requests, combined with the closeness in time of the deferred prosecutions involving Ms. Repin and Ms. Hinzman to the filing of charges against Mr. Ventura, raises the possibility that the omission of this information was deliberate. "...[O]ur circuit has

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recognized that dismissal with prejudice may be an appropriate remedy for a *Brady* or *Giglio* violation using a court's supervisory powers where prejudice to the defendant results and the prosecutorial misconduct is flagrant." *US v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010). The *Brady* violations, taken collectively as required by *Kyles*, requires dismissal of the charges with prejudice.

In addition to the *Brady* violations, the Prosecutor's disregard for the Court's order of December 23, 2010, coupled with the inappropriate extrajudicial comments of August 12, 2010, also necessitate dismissal. The prejudice suffered by Mr. Ventura as a result of the Prosecutor's disregard of the court order is clear: Mr. Ventura remains unable to inspect his office. Additionally, there is a good faith basis to believe that, since the Court's order, the offices have been entered and important evidence disturbed. The nature of the charges involves evidence that is in Mr. Ventura's office. Unfortunately, the Prosecutor's failure to promote enforcement of the Court's order results in potentially compromised evidence. If true, the tampering of evidence in Mr. Ventura's office severely undermines confidence in these proceedings and leave no alternative but dismissal of the charges, with prejudice.

Finally, the prejudice suffered by Mr. Ventura regarding the Prosecutor's extrajudicial comments is that he is subject to increased opprobrium and the comments have likely influenced the preconceived notions of the case by potential jurors. In a community as small as the enrolled members of the Snoqualmie Tribe, extrajudicial comments, such as those made by the Prosecutor, have the impact of unacceptably influencing potential jury members.

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In this case, there are no lesser remedial actions available sufficient to salvage the Prosecution's actions, whether deliberate or inadvertent. Regarding the *Brady* violations, exclusion of the witnesses does not remove the appearance of willful withholding of information from Mr. Ventura, with the accompanying undermining of confidence in these proceedings such actions engender. Additionally, the defense remains in the position of being forced to examine criminal backgrounds and histories for every government witness, an action that is appropriately within the province of the Prosecutor's office. Regarding the effective defiance of the court order, it appears that evidence may have been subsequently tampered with in Mr. Ventura's office. A further Court order that redirects the Prosecutor to make the office available for inspection, although welcomed by defense, does not undo the potential damage done by the potential evidence tampering. This action has a devastating impact in the appearance of fairness of the proceedings to date. Finally, regarding the Prosecutor's extrajudicial comments, a limiting instruction is insufficient to negate the harm from the Prosecutor's comments. In a small, highly divided community, comments such as the Prosecutor's frame the case in such a manner where Mr. Ventura's guilt is presupposed. In such a case, additional instructions are of little use. Consequently, the only remaining avenue to address the Prosecutor's unacceptable misconduct is to dismiss the charges with prejudice under the Court's supervisory powers.

As an alternative to dismissing under the Court's supervisory powers, the Court may dismiss based solely on due process grounds. The due process violations in this case are well documented and comprise the necessary "outrageous government conduct" to warrant dismissal. The multiple *Brady* violations alone comprise grounds for a due process-based

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dismissal. Additionally, the refusal of the Prosecutor to comply with the Court's order permitting inspection of Mr. Ventura's office results in Mr. Ventura being unable to prepare a full and adequate defense. Taken together, the Prosecutor's actions deeply undermine any semblance of confidence in the proceedings to this point and exacerbate a politically-charged case. Consequently, the charges may also be dismissed as due process violations.

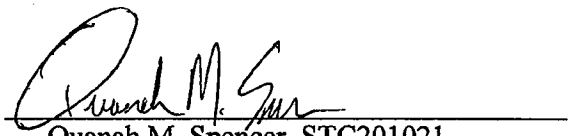
Finally, although it is Mr. Ventura's contention that lesser sanctions will not cure the prejudice caused by the Prosecutor's actions, if the Court elects not to dismiss the charges, alternative sanctions should be imposed. Such alternative sanctions, while not remedying the significant harm done to Mr. Ventura's due process rights, may have the salutary effect of deterring further misconduct by the Prosecution.

IV. CONCLUSION

The Prosecutor's actions throughout this criminal case have led to fatal prejudice to Mr. Ventura's due process rights. The actions lead to fundamental concerns about fairness of any forthcoming trial and present the Court with no available remedy other than dismissal. For the reasons stated herein, Defendant's Supplemental Motion to Dismiss Based on Prosecutorial Misconduct should be granted.

DATED this 31st day of January, 2011.

WILLIAMS KASTNER & GIBBS



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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanium (dob: June 12, 1967) Defendant.	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT**

COMES NOW the Snoqualmie Tribe, by and through its prosecutor, Cynthia Tomkins, and hereby responds to Defendant Kanium Ventura's Motion to Dismiss for Prosecutorial Misconduct.

This is merely the latest in defendants' ongoing barrage of misstatement and innuendo. It's regretful that the defendants have failed to maintain the high standards of behavior and the civility due the gravity of these proceedings.

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ARGUMENT

Defendants' claim that the prosecutor has failed in her duty to disclose significant evidence under *Brady v. Maryland* is untimely and premature, as there are discovery motions and responses to those motions that have not yet been decided by the Court. Discovery is an ongoing pre-trial process. After receiving initial discovery from the Tribe at defendant Kanim Ventura's arraignment on November 8, 2010, the defendant made discovery demands in numerous motions, to which the Tribe has responded. *See* Exhibits 1 - 3: Tribe's Response to Defendant's Motion for Bill of Particulars, November 22, 2011; Tribe's Response to Defendants' Second Request for Bill of Particulars and Motion to Compel, December 13, 2011; and Tribe's Response to Supplemental Demand for Discovery, February 7, 2011. The Tribe notes that it has filed four Requests for Discovery from defendants, and defendants have so far ignored them, submitting only their lists of witnesses and exhibits. *See* Exhibits 4 – 7: Tribe's Request for Discovery and Discovery Production Receipt, November 18, 2011; Tribe's Second Request for Discovery and Discovery Production Receipt, November 24, 2010; Tribe's Third request for Discovery and Discovery Production Receipt, December 30, 2011; and Tribe's Fourth request for Discovery and Discovery Production Receipt, January 6, 2011.

As the Tribe noted in its most recent Response, just because the defendant wants something does not mean the prosecution must automatically supply the information. The defendant must make a plausible showing to the Court that the requested evidence is material to his guilt or punishment, and is favorable to his defense. *Pennsylvania v. Ritchie,* 480 U.S. 39, 58 (1987) citing *U.S. v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, (1982). The Tribe has properly disputed the materiality and the favorability of a number of defendant's discovery demands, and has disputed whether certain information is subject to discovery under

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Fed R. Cr. P. 16(a)(2). *See* Exhibit 3, Tribe's Response to Supplemental Demand for Discovery. The Court has not yet heard these motions and responses, and has issued no discovery orders. Until then, there is, and can be, no discovery misconduct by the prosecutor or the defense, and no prejudice to defendants. Disputation does not constitute suppression, disagreement does not constitute misconduct, and a hearing requirement does not constitute prejudice.

Further, the insinuation that the prosecutor offered deferred prosecutions to potential witnesses against defendants as a motive to cooperate with the prosecution in these cases approaches libel. The prosecutor has never linked the disposition of any case to anything other than the conditions of that disposition, and any inference that she has is completely unfounded. In fact, the defendant Kanium Ventura was also offered a deferred prosecution of the initial charges against him, with no more of a link to the dispositions of the other Tribal Council members' cases than theirs are linked to his. *See* Exhibit 8, Tribe's Offer to Kanium Ventura, September 23, 2010.

The defendant's allegation that the prosecutor defied a court order is a misstatement of the plain facts. The Tribe timely filed a Motion to Reconsider the order at issue on December 30, 2010, before the original order's deadline for inspection. This motion has not yet been heard by the Court. Until the Court hears and decides the Motion to Reconsider, the prosecutor is not defying that order. In the meantime, the Prosecutor cannot facilitate the execution of the court order as it is written, because the order as written is in conflict with Snoqualmie tribal law, and the prosecutor is required to uphold that law. The order allows the defendants to remove documents from the office, including public records, with the only requirement that they make a list of what they remove. Article 5-3, Section 14 of The Snoqualmie Tribal Code prohibits the removal of tribal records from tribal offices. *STC 5-3, §14.* The defendants have been unwilling

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to agree to modify their inspection to comply with Snoqualmie Tribal law, so that the inspection could take place without violating the law. See Exhibit 9 The prosecutor has found herself between the veritable rock and hard place, with conflicting and mutually exclusive duties. Failing defendants' voluntary agreement to abide by the law in their inspection of the office, it rests with the Court to reconcile the conflicting legal obligations created by the ill-conceived order. Further, Mr. Spencer gives no supporting information whatsoever for his claim of a good-faith reason to believe evidence has been removed from the office, and utterly fails to identify what that evidence might be.

Finally, the prosecutor has made no inappropriate extrajudicial comments, and there has been no violation of RPC 3.8(f). The prosecutor's comments to the Tribal Council did not constitute inappropriate extrajudicial comments, as they were entirely appropriate to the place and their lawful purpose. Those comments were made to the people likely to be charged, not to the public. The charges discussed by the prosecutor at that meeting were charges against a number of Tribal Council members, including Mr. Ventura. However, as the defendant notes, no names were used by the prosecutor. If it was clear to the Tribal Council who the defendants were, it was because they were themselves the defendants.

The prosecutor's statements served a law enforcement purpose: they provided an explanation of the judicial process for Tribal Council members, the governing body of the Snoqualmie Tribe. Bringing criminal charges against Tribal Council members is very serious, and necessitates an explanation of what, how and why, including probable cause and the basis for filing criminal charges. The prosecutor explained how the prosecutor works, not just in these cases, but in all cases, including those involving members of the Tribal Council. That some of the people present were not defendants, but rather potential witnesses, does not make the comments

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inappropriate, because their presence was not prejudicial to these defendants. It would only be prejudicial if the Tribal Council members were potential jurors, which they are decidedly not.

Finally, if the prosecutor's informational statements have been spread to the public, as defendant claims is "likely," then the result is simply the generally negative impression the public always gets when someone is brought up on criminal charges. This prosecutor did nothing to advance that impression, but no prosecutor can prevent it.

CONCLUSION

For the reasons stated above, the Tribe respectfully requests this Court deny defendant's Motion to Dismiss for Prosecutorial Misconduct.

Respectfully submitted this 7th day of February, 2011.

Cynthia Tomkins
Snoqualmie Tribal Prosecutor

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The Honorable Richard Woodrow

IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. KANIUM VENTURA, (d.o.b. 06/12/1967) Defendant.	NO. SNO-CR-0021-2010 **DEFENDANT'S MOTION TO DISMISS BASED ON DUE PROCESS VIOLATIONS**

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Kanium Ventura hereby appears through counsel and respectfully moves this Court to dismiss the charges with prejudice pursuant to its supervisory powers, due to violations of Mr. Ventura's right to due process in accordance with the Snoqualmie Tribal Constitution and the Indian Civil Rights Act of 1968 (28 USC §§1301-1303). As demonstrated below, Mr. Ventura, a duly elected member of the Snoqualmie Tribal Council (Council), has been denied his due process rights as he is being criminally prosecuted in a Snoqualmie Tribal Court (Tribal Court) system that is suffering repeated interference from the Council, leaving the Tribal Court with an irreparable loss of appearance of impartiality. Accordingly, the charges against Mr. Ventura must be dismissed with prejudice.

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II. STATEMENT OF FACTS AND CASE

The Declarations of Mr. Ventura and Ms. Suzanne Ventura, attached, shows that:

1) Mr. Ventura is a duly elected member of the Council and was elected in September, 2007. Mr. Ventura is also a member of the Snoqualmie Entertainment Authority, the agency responsible for ensuring annual audits of the Snoqualmie Tribe's casino. Mr. Ventura is a member of the Kanim family, one of the five primary families comprising the Tribe. The Tribe comprises approximately 650 enrolled members and 350 voting members. The five families have experienced significant internal political turmoil in recent years. Ventura decl., ¶¶1-2.

2) December 29, 2008; the Snoqualmie Tribal Council passed Resolution 2003-2008 authorizing the Tribal Chairman to execute a consulting agreement with Moss Adams, LLC, not to exceed $22,000.00. On January 12, 2009, the Snoqualmie Tribal Council rescinded this authorization passing Resolution 01-2009. Mr. Ventura was subsequently charged with Official Misconduct and Criminal Impersonation on September 16, 2010 and arraigned on November 8, 2010. Ventura decl., ¶¶3-5.

3) November 13, 2010; the Snoqualmie General Membership suspended Mr. Ventura from his duties as a Council member by Resolution 02-2010, and prohibited Mr. Ventura from entering the property encompassing the Tribal Headquarters until cleared of all charges pending in the Snoqualmie Tribal Court. The meeting agenda made no notice of suspension proceedings. Mr. Ventura was not informed of the suspension proceedings, and only became aware of his suspension on November 15, 2010. Ventura decl., ¶6-7.

4) November 15, 2010; Mr. Ventura was cited for trespass for attempting to enter his official offices. Ventura decl., ¶7.

5) November 18, 2010; Mr. Ventura, through counsel, filed a civil lawsuit against Shelley Burch, Matt Mattson, and Nina Repin seeking injunctive and declaratory relief. On December 8, 2010, Mr. Ventura, through counsel, filed a motion which moved the Snoqualmie Tribal Court to strike Defendant's council in the related civil action. Ventura decl., ¶8, 10.

6) November 26, 2010; the Snoqualmie Tribal Council "recused" the Tribal Court Clerk from her duties by Resolution 277-2010. This position remained vacant until approximately December 13, 2010, when the Council authorized the Northwest Intertribal Court System to appoint a new clerk. At that time, Ms. Bobbie Jo Norton assumed the duties of Court Clerk. Ventura decl., ¶9.

7) December 23, 2010; The Tribal Court granted Mr. Ventura's motion to strike Defendant's council in the related civil action. Ventura decl., ¶10.

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8) December 26, 2010; the Tribe filed a motion for Judge Montoya-Lewis to recuse herself in the pending criminal matter. On December 30, 2010, the Tribal Council removed Judge Montoya-Lewis from hearing the related pending civil matter by Resolution 304-2010. On December 31, 2010; Judge Montoya-Lewis removed herself from hearing the present criminal action, stating:

> *The intervention of the Tribal Council into these matters* has created a situation that makes it impossible for the Court to act without creating the perception that it is subject to inappropriate outside influences (emphasis added).

Ventura decl., ¶12-14, Exhibit 7, at page 5/6.

9) January 5, 2011; Ms. Suzanne Ventura observes Tribal officials entering and removing potential evidence from the shared office space of Kanium and Arlene Ventura. Suzanne Ventura decl., ¶3.

10) January 12, 2011; Mr. Ventura, through counsel, filed an Amended Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Washington. Ventura decl., ¶15.

11) January 13, 2011; Mr. Ventura and counsel are informed that Judge Richard Woodrow has been appointed to hear the case against Mr. Ventura. Ventura decl., ¶16.

12) January 24, 2011; The United States District Court for the Western District of Washington issued an Order dismissing the Petition on subject matter jurisdiction. Ventura decl., ¶15.

13) January 26, 2011; The Council passes Resolution 22-2011 which "recognizes the importance of the separation of the Legislative and Judicial branches of the Tribal government." Ventura decl., ¶17.

14) February 8, 2011; Ms. Suzanne Ventura observes that co-defendant Arlene Ventura's desk has been removed from the shared office spaces of Kanium and Arlene Ventura and placed in a common area. Suzanne Ventura decl., ¶5.

III. LAW AND ARGUMENT

The charges must be dismissed with prejudice as a result of the denial of Mr. Ventura's due process rights in violation of the Constitution of the Snoqualmie Tribe of Indians (Tribal Constitution) and the Indian Civil Rights Act (ICRA) of 1968. (28 USC §§1301-1303). This

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Motion examines the circumstances leading to the present time, Mr. Ventura's claims of due process violations, and concludes with the justifications for dismissal.

A. The Council repeatedly interfered with the actions of the Tribal Court.

Mr. Ventura was charged with Official Misconduct and Criminal Impersonation on September 16, 2010. These charges were subsequently amended to one charge of Official Misconduct and three charges related to Conspiracy. Ventura decl., ¶5, Exhibit 1. On November 18, 2010, Mr. Ventura filed a civil action against Shelley Burch (Tribal Chairperson), Matt Mattson (Tribal Administrator), and Nina Repin (Acting Tribal Secretary) seeking declaratory and injunctive relief. Ventura decl., ¶8. On November 26, 2010, the Council "recused" Ms. Veronica Port, the Tribal Court clerk. Ventura decl., ¶9, Exhibit 3. As Judge Montoya-Lewis, the then-trial judge in this matter, observed:

> At that time, [I] was unaware of who recused the Court Clerk, although [I] later learned that the Tribe had recused the Court Clerk, though no reason was ever ascertained.

Ventura decl., Exhibit 7, at page 2/6. This action precluded the Tribal Court from functioning for approximately seventeen days. On or around December 13, 2010, the Council authorized the Northwest Intertribal Court System to appoint a new clerk. Ventura decl., ¶9. Subsequently, Ms. Bobbie Jo Norton was appointed as Tribal Court Clerk. *Id.*

In the absence of a functioning Tribal Court, and with no Court Clerk, counsel, of necessity, communicated by email sent directly to the judge. These emails were copied to all parties. Additionally, letters and faxes were sent to the Tribal Court, but were not transmitted to the judge due to the lack of a Tribal Court Clerk. Ventura decl., Exhibit 7, at page 2-3/6. In response, Judge Montoya-Lewis notified all parties that they should submit filings through the Tribal Court rather than directly with her and that, once a new clerk was appointed, she would review all the filings and proceed as soon as practicable. *See Id.* at page 3/6. In an "all

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counsel" email dated December 17, 2010, Judge Montoya-Lewis addressed the communications she had received by stating "While I do not believe any of it was Ex Parte communication, it was extraordinary communication with the Court." Ventura decl., Exhibit 4. Counsel for the Tribe subsequently filed a Motion to Recuse Judge Montoya-Lewis on the grounds that ex parte contact had occurred. *See Id.* at page 4/6.

In the meantime, counsel for Mr. Ventura filed a motion on December 8, 2010 to disqualify Mr. Peter Connick, Legal Counsel for the Tribe, from representing Shelley Burch, Matt Mattson, and Nina Repin, in the related civil matter, due to ethical conflicts stemming from Mr. Ventura's service on the Council. Ventura decl., ¶10. The Snoqualmie Court granted Mr. Ventura's motion on December 23, 2010. *See* Ventura decl., ¶10, Exhibit 5. In response, on December 30, 2010, the Council passed Resolution 304-2010 which removed Judge Montoya-Lewis from "hearing any civil matters in lawsuits against the tribe, its elected officers and employees, while acting in their official capacities, an immunity specifically set out in Section 10.0 of the Tribe's Judiciary Act." *See* Ventura decl., ¶13, Exhibit 6. As Judge Montoya-Lewis noted in her later order recusing herself from the criminal matter, "The basis of the removal appears to be based upon the removal of Mr. Connick from representing the Defendants in the civil matter and the entry of orders without a hearing an opportunity to be heard." Ventura decl., Exhibit 7 at page 4/6. Judge Montoya-Lewis subsequently recused herself from the present criminal matter to prevent conveying "the impression that any person or organization is in a position to influence the judge." *Id.* at pages 4-5/6. In elaborating, Judge Montoya-Lewis explained:

> [T]he Court has two pending Motions to Dismiss in both the civil and criminal matters. If the Court were to grant the Motion to Dismiss in the criminal matters, that ruling could easily be viewed as a ruling made in response to the Court's removal from the civil matters. If the Court were to grant the Motion to dismiss in the civil matters, that ruling could easily be viewed as a ruling made to appease the Tribal Council. *The intervention of the Tribal Council into these matters has created a situation that makes it impossible for the Court to act*

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without creating the perception that it is subject to inappropriate outside influences (emphasis added). *Id.* at page 5/6.

In the meantime, as a result of there being no Tribal Court judge to hear the case, counsel for Mr. Ventura filed an Amended Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Washington on January 12, 2011. Ventura decl., ¶15. On January 24, 2011, the court issued an order denying the writ on grounds of subject matter jurisdiction. *Id.* In denying the Writ, Judge Richard Jones noted "The court takes no position on whether the Tribe has violated ICRA or the Tribe's Constitution in the pursuit of criminal and other sanctions against Petitioners. It merely holds that the court has no jurisdiction to interfere in that pursuit." Ventura decl., Exhibit 9, at page 7/8. On January 13, 2011, counsel for Mr. Ventura were informed that Judge Richard Woodrow had been subsequently appointed to address both the pending criminal and civil cases. On January 26, 2011, the Council passed Resolution 22-2011 which "recognizes the importance of the separation of the Legislative and Judicial branches of the Tribal government." Ventura decl., ¶17, Exhibit 8.

B. The Council's repeated interference with the Tribal Court violates Mr. Ventura's due process rights.

The Council's extraordinary interference with the Tribal Court's activities raise significant due process concerns. While Judge Jones' ruling of January 12, 2011 made no finding on Constitutional and/or ICRA-based claims due to lack of subject matter jurisdiction, the Tribal Court is not similarly constrained. Accordingly, Mr. Ventura now brings those claims before the Tribal Court.

The applicable due process protections in this case are well known. Article Eleven of the Constitution of the Snoqualmie Tribe of Indians includes a due process clause. It reads, in relevant part, "The Snoqualmie Indian Tribe shall not in exercising powers of self-government...deprive any person of liberty...without due process of law." CONSTITUTION OF

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THE SNOQUALMIE TRIBE OF INDIANS, ART. XI, §8. Additionally, Section 1302 of the ICRA, with some exceptions, applies the Bill of Rights to the United States Constitution to the Tribes. Section 1302, in relevant part, reads as follows: "No Indian tribe in exercising powers of self government shall...(8)...deprive any person of liberty or property without due process of law." 28 USC §1302(8).

The tribunal's appearance of impartiality is an element of due process. *See Caperton v. A.T. Massey Coal Company*, 129 S. Ct. 2252 (2009). Indeed, the impartiality, and appearance of impartiality, of the tribunal "is an interest of vital importance." *U.S. Civil Serv. Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564 (1973). Under various circumstances, the appearance of partiality may comprise a due process violation sufficient to warrant overturning a criminal conviction. *See e.g. Taylor v. Hayes*, 418 U.S. 488 (1974) (personal animosity by judge toward counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (personal pecuniary interest by judge in the defendant's conviction); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (judge also responsible for municipality's revenue collection). In other cases, a judge's refusal to recuse from the proceeding may be grounds for overturning an adverse verdict in a civil action on due process grounds. *See e.g. Caperton* (party had significant and disproportionate influence in judge's election). The grounds for disqualifying a judge whose impartiality is in question must be evaluated objectively, as opposed to subjectively. *Liteky v. United States*, 510 U.S. 540 (1994). This objective analysis is governed by the "reasonable person test." *Yagman v. Republic Ins.*, 136 F.R.D. 652, 656 (D.Cal. 1991), aff'd., 987 F.3d 842, 844 (9th Cir. 1994).

The repeated interference by the Council in the workings of the Tribal Court results in an irreparable destruction of the Tribal Court's appearance of impartiality. To Judge Montoya-Lewis, as well as to the "reasonable person" required by *Yagman*, there is no ruling the Tribal

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Court can issue on the pending motions to dismiss without presenting an appearance of partiality. Judge Montoya-Lewis put it succinctly:

> If the Court were to grant the Motion to Dismiss in the criminal matters, that ruling could easily be viewed as a ruling made in response to the Court's removal from the civil matters. If the Court were to grant the Motion to dismiss in the civil matters, that ruling could easily be viewed as a ruling made to appease the Tribal Council. Ventura decl., Exhibit 7, at page 5/6.

This impasse was through no fault of Mr. Ventura or the Tribal Court. Instead, as Judge Montoya Lewis explained, "*The intervention of the Tribal Council* into these matters has created a situation that makes it impossible for the Court to act without creating the perception that it is subject to inappropriate outside influences (emphasis added)." *Id.* The situation was a result of the repeated actions taken by the Council to bend this Tribal Court to its desired outcome. The Council brought the activities of the Tribal Court to a standstill for approximately 17 days by effectively firing the Tribal Court Clerk. Ventura decl., ¶9. The Council placed Judge Montoya-Lewis in a position where it was not possible for her to rule on the pending motions to dismiss without presenting an appearance of partiality. Ventura decl., ¶14, Exhibit 7.

Now, despite Judge Montoya-Lewis' recusal, the Tribal Court faces the same impasse, but with significantly worsened facts. Now, the Tribal Court must confront and consider the immediate past example of the Council's treatment of Judge Montoya-Lewis when examining the pending motions to dismiss and reexamining the issue of Mr. Connick's ethical conflicts in the related civil matter. In doing so, the Tribal Court finds itself in precisely the same position that Judge Montoya-Lewis found herself in: unable to rule on the pending motions to dismiss without presenting an appearance of being influenced by the Council's actions. Unfortunately, the situation has significantly worsened from when Judge Montoya-Lewis examined the matter. Now, the Tribal Court finds itself with the added spectacle of the previous judge and

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court clerk having been effectively fired. This action has the appearance of being retaliation for Judge Montoya-Lewis' rulings adverse to the Tribe. For the objective, reasonable observer, the facts clearly demonstrate that Mr. Ventura cannot receive an apparently impartial decision in a clash of government branches within the Snoqualmie Tribe.

Available case law on appearance of impartiality demonstrates the necessity of dismissal in this case. *Taylor* involved perceived leverage arising from professional and personal distaste between a judge and an attorney. *Tumey*, *Ward*, and (most recently) *Massey* all involved perceived leverage over the judge due to outside financial considerations. The present circumstances are most akin to that faced in *Tumey*, *Ward*, and *Massey* in that a party to the litigation enjoys perceived leverage over the judge due to factors outside the courtroom and beyond the scope of the litigation. Whereas *Tumey*, *Ward*, and *Massey* dealt with perceived financial leverage, however, the present case involves perceived institutional leverage. This is illustrated by the summary removal of Judge Montoya-Lewis from hearing the related civil matter, and the resulting impasse that decision created regarding the motions to dismiss. While not involving financial leverage or personal distaste, the perceived institutional leverage in this case is real and has already resulted in two terminated employments. As such, it is clearly sufficient to convince an objective, reasonable person that, whatever the decision on the motions to dismiss, there will be an appearance of partiality due to the Council's interference. Additionally, because this perceived partiality exists due to institutional activity, as opposed to existing unique to a single judge as in *Taylor*, *Tumey*, *Ward* and *Massey*, recusal by the Tribal Court is not a sufficient remedy. Due to the Council's actions, all successors are placed in the same untenable position as Judge Montoya-Lewis. It is for that reason that the case cannot be tried in a manner that comports with due process.

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C. Important policy considerations support dismissal of the charges with prejudice.

There are important policy considerations supporting dismissal of the case with prejudice. Among these is the fact that the Council's extreme actions comprise a frontal attack on the principle of separation of powers and risks a dangerous chilling effect on the actions of the Tribal Court.

In analyzing the violation of Mr. Ventura's due process rights, it is illuminating to further examine case law involving the underlying violation of separation of powers by the Council. Doing so places the Council's actions in proper context and provides additional support for the dismissal of charges with prejudice. The Constitution of the Snoqualmie Tribe of Indians (Tribal Constitution) independently addresses the powers of the General Council (Article III) and the Tribal Judiciary (Article X). Among the powers given the Tribal Court is the ability to "Interpret, construe and apply the Constitution, laws and regulations of the Tribe." CONSTITUTION OF THE SNOQUALMIE TRIBE OF INDIANS, Article X, §3(a). Additionally, the Tribal Court is given the power to "Declare the laws and regulations of the Tribe void if such laws or regulations conflict with the Tribal Constitution or traditions of the Snoqualmie Indian Tribe." Id. at §3(b). Finally, the Tribe's Judiciary Act specifies that the purpose of the Act is to "create a fair and impartial judicial system to interpret and apply the laws and constitution of the Snoqualmie Indian Tribe." Tribal Council Act 3-1, §3.0.

Snoqualmie Tribe, federal, and state legal materials all reiterate the crucial importance of separation of powers. Indeed, the Council itself recently memorialized this crucial concept in the passage of Resolution 22-2011: "WHEREAS, the Tribal Council recognizes the importance of the separation of the Legislative and Judicial branches of the Tribal government..." Ventura decl., Exhibit 8. Precedent at the federal level provides further guidance on when, as here, an act of the legislature comprises a violation of separation of

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powers: "An act of Congress violates separation of powers if it requires federal courts to exercise their Article III power 'in a manner repugnant to the text, structure, and traditions of Article III.'" *Schiavo ex. rel. Schindler v. Schiavo*, 404 F.3d 1270 (11th Cir. 2005) *quoting Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Case law restricting the power of Congress to interfere in the acts of the judiciary stretches back centuries. In the post-Civil War case *United States v. Klein*, for example, the United States Supreme Court examined a congressional enactment which forbade the consideration of a pardon or loyalty oath as admissible in evidence in a claim against the United States. *United States v. Klein*, 80 U.S. 128, 143 (1871). In reviewing the act, and the Court's limited options, the Court noted:

> We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not...*Id.*

After examining the "vital importance" of separation of powers, the Court in *Klein* proceeded to affirm the lower court's judgment and consider the congressional enactment as inadvertent. *Id.* at 148. Here, as in *Klein*, the Council has acted to "decide in its own favor" by effectively firing Judge Montoya-Lewis in the related civil matter, necessitating her withdrawal in the present criminal matter, and rendering the Snoqualmie Court non-functioning for a period of at least seventeen days by removing the Court Clerk. The resulting untenable position requires the Tribal Court to exercise its judicial powers in a manner "repugnant," as discussed above in *Schiavo*, to the text and structure of the Snoqualmie Tribal Constitution and the Tribal Judiciary Act. Such actions decisively undermine the Tribal Court in carrying out its independent obligations. Separation of powers violations, whether they occur at the Tribal,

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state, or federal level, lead to pernicious results, including, as here, significant due process violations.

In addition to the separation of powers concerns, the Council's actions also raise the specter of a dangerous chilling effect on the actions of the Tribal Court. It cannot be ignored that Resolution 304-2010, removing Judge Montoya-Lewis from hearing the related civil matter, was passed because the Council disagreed with Judge Montoya-Lewis' rulings. As such, Resolution 304-2010 possesses the distinct appearance of a retaliatory measure. Judges and staff who work with the Northwest Intertribal Court System (NICS) may now observe the consequences for personnel whose actions upset the Council in the example of Judge Montoya-Lewis. This has the unavoidable result of subjecting Tribal Court decisions to a new political scrutiny from the Council, the defendant, the Tribal community, and, even subconsciously, the bench. The Tribal Court must now, even unwillingly, consider its decisions in light of the Council's likely political response. This has the toxic impact of, not only raising the appearance of impartiality issues experienced by Mr. Ventura, but restricting the Tribal Court's freedom of action to "say what the law is." (*Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803)). The Council's actions create an unacceptable risk of a chilling effect on the actions of the Tribal Court.

D. The *Randall* balancing test is not necessary in this case.

Having demonstrated the violation of Mr. Ventura's due process rights, it remains to consider the balancing test in *Randall v. Yakama Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988). When analyzing court procedures that differ significantly from those employed in Anglo-Saxon society, *Randall* requires that "...courts must weigh the 'individual right to fair treatment' against 'the magnitude of the tribal interest [in employing those procedures]' to determine whether the procedures pass muster under the [Indian Civil Rights] Act." *Id.* at 900.

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Here, the *Randall* balancing test is not necessary for two reasons: 1) Mr. Ventura has demonstrated that the Council's actions independently violate the Snoqualmie Tribal Constitution and, as a result, are not subject to the *Randall* balancing test analyzing the ICRA; and 2) When examining Mr. Ventura's claims under the ICRA, the due process analysis for an ICRA-based claim is identical to that under the Snoqualmie Tribal Constitution, rendering the *Randall* balancing test unnecessary. The present case involves identical due process provisions of the Snoqualmie Tribal Constitution, the ICRA, and the U.S. Constitution. Due process interests, particularly those implicated in the current fact pattern, are equally applicable in the Tribal context as in the state or federal. The Tribe itself acknowledges the importance of separation of powers, which is intricately related to Mr. Ventura's due process claim, through the passage of Resolution 22-2011. Ventura decl., Exhibit 8. There are no known "historical, governmental, and cultural values" (*Randall* at 900) possessed by the Tribe that countenance interference by the Council experienced by Mr. Ventura. The Tribe's extreme actions in prosecuting this case must not be confused with the virtually identical underlying due process analysis that controls for purposes of *Randall*. The fact the Council repeatedly interfered with the Tribal Court is more an unfortunate reflection of the extreme political nature of this case, than an indication of any significant *Randall*-oriented differences in process.

Assuming, *arguendo*, the *Randall* balancing test applied, however, it is clear that Mr. Ventura's individual right to fair treatment clearly outweighs any legitimate Tribal interests. Mr. Ventura faces criminal prosecution with the possibility of confinement for over three months in jail and significant fines. Additionally, the interests are extremely weighty for Mr. Ventura as a present and future leader of the Tribe. Consequently, the *Randall* balancing test, if it applies, weighs decisively in favor of Mr. Ventura.

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E. The violation of Mr. Ventura's due process rights merits dismissal of the charges with prejudice under the Tribal Court's supervisory powers.

As examined above, this case involves significant due process violations. Taken collectively, ample grounds exist for this Court to dismiss the charges with prejudice under the Court's supervisory power.

A court may dismiss charges as a result of the court's supervisory powers. *U.S. v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). The court may dismiss the charges under its supervisory powers "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991). A court may dismiss charges under its supervisory powers only when the defendant has suffered "substantial prejudice" and where "no lesser remedial action is available." *US. v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008).

Here, the facts support dismissal under the Court's supervisory powers on a number of bases outlined in *Simpson*. Initially, the facts support dismissal as a "remedy for the violation of a recognized statutory or constitutional right." *Simpson*, 1090. As examined extensively in Part B of this Motion, the Council's repeated interference in the actions of the Tribal Court comprises a violation of Mr. Ventura's Constitutional due process rights. Secondarily, dismissal is warranted to ensure a "conviction rests on appropriate considerations validly before a jury." *Id.* The actions taken by the Council against the first Tribal Court Clerk assigned to this case, as well as Judge Montoya-Lewis, appear retaliatory. In a small community, with an available jury pool of only approximately 350 voting members, the Council's actions create the unacceptable risk of similar retaliation, or fear of retaliation, for individuals who serve on Mr. Ventura's jury. The Tribe comprises a tight network of family, business, and political relations, creating a situation where retaliation is possible. *See* Ventura

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decl., ¶2. Dismissal under the Court's supervisory powers prevents any such situation. Finally, the third *Simpson* basis for dismissal under the Court's supervisory powers is to deter future "illegal" conduct. This ground for dismissal is rooted in the policy of deterring unacceptable government activity. Here, the Council's actions have violated Mr. Ventura's due process rights and, in that context, comprise Constitutionally impermissible government conduct. Accordingly, the current situation provides a similar policy justification for dismissal under the Court's supervisory powers.

Having demonstrated the multiple *Simpson* grounds for dismissal under the Court's supervisory powers, it remains to demonstrate the "substantial prejudice" suffered by Mr. Ventura and to further explain why no lesser remedial action is available. The "substantial prejudice" suffered by Mr. Ventura in this matter is obvious: his tribunal labors under the irreparable appearance of partiality due to the Council's repeated interference in the actions of the Tribal Court, and the impasse the Council's actions created for the Court regarding the pending motions to dismiss. *See e.g.* Ventura decl., ¶¶9, 13, 14, Exhibits 10-11. This has the effect of poisoning the validity of the proceedings in the eyes of Mr. Ventura and, in all likelihood, a substantial amount of the Snoqualmie community. A conviction before a tribunal that is tainted, or perceived to be tainted, undermines confidence in the judiciary and forecloses the possibility of reconciliation between parties.

Mr. Ventura suffered additional "substantial prejudice" by the unnecessary lengthening of these proceedings due to the effective firing of the Tribal Court Clerk and Judge Montoya-Lewis, and the resulting spoliation of evidence. *See* Suzanne Ventura decl., ¶3, Exhibits 1-3. The effective firing of Judge Montoya-Lewis resulted in numerous motions remaining unresolved or unexecuted, including Mr. Ventura's Joint Motion for Inspection of his office. Ventura decl., ¶11. Since that time, Mr. Ventura's office has been entered by Tribal Council

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member Nina Repin, Tribal Chief of Police Benito Cervantes, and at least one other Tribal employee, and computer equipment removed. Suzanne Ventura decl., ¶3, Exhibits 1-2. Additionally, co-Defendant Arlene Ventura's desk was subsequently removed from her office by unknown individuals and placed in a common area. Suzanne Ventura decl., ¶5, Exhibit 3. These activities were carried out by Tribal officials and/or employees, despite the existence of Judge Montoya-Lewis' order of December 23, 2010, permitting Kanium Ventura and Arlene Ventura to inspect their office for evidence. To date, despite Defendant's repeated efforts to carry out Judge Montoya-Lewis' order, the inspection has not yet occurred. The contamination of evidence is a direct result of the prolongation of the case brought about by the Tribal Council's interference. If the inspection had occurred as ordered, this potential spoliation may not have occurred.

Finally, Mr. Ventura is "substantially prejudiced" by being placed in the unenviable position of not knowing whether the speedy trial deadline has expired. This has the effect of, not only leaving him in suspense regarding this prosecution, but likely coloring the upcoming Tribal Council elections, scheduled to take place in May, 2011. In a politically-charged case, Mr. Ventura can not help but notice that delay continues to be a significant detriment in his efforts to clear his name with his people and may play a role in the upcoming elections. For all the reasons above, "substantial prejudice" exists sufficient to warrant dismissal.

Having demonstrated the prejudice caused by the Council's actions, it remains only to demonstrate the lack of available lesser remedial actions. As alluded to above, any available lesser remedial action fails to eliminate the appearance of partiality created by the Council's actions. A change of venue, although providing an important remedy for the issues with the limited jury, does nothing to address the perceived institutional leverage exercised on the Tribal Court by the Tribal Council. Furthermore, a change of venue does nothing to remedy

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the impasse on the motions to dismiss and Mr. Connick's ethical woes. Finally, a change of venue cannot undo the spoliation of evidence caused by the Council's interference. Ventura decl., ¶11; Suzanne Ventura decl., ¶¶3,5. Other lesser remedies (jury instructions, excluding testimony, etc.) are not related to the present situation. The only available remedy to address the Council's extraordinarily inappropriate behavior is dismissal of the charges with prejudice.

IV. CONCLUSION

Mr. Ventura's Motion for Dismissal Based on Due Process Violations must be granted as a result of the denial of his due process rights in violation of the Snoqualmie Tribal Constitution and the ICRA. Consequently, the charges against Mr. Ventura must be dismissed with prejudice.

DATED this 16th day of February, 2011.

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanium (dob: June 12, 1967) Defendant.	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS BASED ON DUE PROCESS VIOLATONS**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS BASED ON DUE PROCESS VIOLATONS**

COMES NOW the Tribe, through its prosecutor, Cynthia Tomkins, and hereby responds to Defendant Kanium Ventura's Motion to Dismiss Based on Due Process Violations and moves this Court to deny defendant's Motion to Dismiss Based on Due Process Violations.

Yet again, defendant is attempting to confuse the Court by conflating the criminal charges against defendants with defendants' civil suit against certain tribal officials. Yet again, the Tribe points out that the defendants' civil suit is a distinct and separate action from the criminal charges against defendants. While the attempt by Judge Montoya-Lewis to preside over both cases may have been ill-advised, the pro-tem judge now presiding over the criminal cases does not bear that

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burden, and as a result the Court does not now suffer from any loss of impartiality, in appearance or in actuality. Further, the court clerk handling the defendants' criminal cases is also pro-tem and independent of any tribal connections, so the Tribal Court system does not suffer from any loss of impartiality in these criminal cases, in appearance or in actuality. Additionally, there has been no violation of the separation of powers, as the Tribal Council has taken no actions that define a rule of decision, the standard for such a violation; and has made no incursions at all into the criminal proceedings at issue here. Finally, there is no basis in law or fact for the Court to dismiss the charges under its supervisory powers, as there has been no conduct that even approaches the required level of injustice the law demands for such a drastic action by the Court.

FACTS

The Tribe objects strenuously to Statement #2, and its inclusion in defendant's Statements of Fact. It is not fact, and is not true. The Tribal Council did not pass Resolution #2003-2008. Defendants are charged with falsifying Resolution #2003-2008, and presenting it as authentic to Moss-Adams. See Exhibit 2, Resolution #2003-2008. Resolution #01-2009, passed by the Tribal Council, did not rescind Resolution #2003-2008; rather, it memorialized the fact that the Tribal Council had never authorized hiring Moss Adams, as Resolution #2003-2008 or in any other way. *See* Exhibit 3, Resolution #01-09. The Tribe also does not understand why defendant omits the fact that the original charges were amended before arraignment, except perhaps that amended charge, "Conspiracy to Obtain a Signature by Deception or Duress", sounds as bad as it is, and reflects the Tribe's assertion that Resolution #2003-2008 was a complete fabrication by defendants.

Statement #6 is so incomplete as to be misleading. The court clerk who was recused under Tribal Council Resolution #277-2010 (see Exhibit 4, Resolution #277-2010), Veronica Port, was

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not the Lead Tribal Court Clerk; Ms. Port was, and is, assistant to the Lead Tribal Court Clerk, Shawna Ventura, defendant Kanium Ventura's wife and an unindicted co-conspirator in the criminal cases at issue. Neither Shawna Ventura nor Veronica Port were terminated from their positions with the Tribal Court. In fact, Ms. Port was recused to avoid exactly that of which defendant complains: the appearance of a conflict (see Exhibit 4, ¶4). Finally, the defendant fails to state that the replacement court clerk is experienced, independent, with no connection to any of the parties in the case.

Statement #8 requires clarification. When Judge Montoya-Lewis refers to "the Court" in her Notice of Withdrawal, she is referring to herself specifically, not the Tribal Court in general. This is made evident at the very beginning of the Notice, when she states:

> However, after reviewing recent filings by the Snoqualmie Tribe's General Counsel and reviewing the ABA Judicial Code of Ethics, *the Court* has decided that *she* must withdraw from presiding over these matters. *(Emphasis added).*
>
> Exhibit 5, Decision and Notice of Withdrawal of Judge, ¶1, at page 2.

This reflects the common grammatical practice of court documents. Thus, when she stated that it was impossible for "the Court to act without creating the perception that it is subject to inappropriate outside influences" (Exhibit 5, Decision and Notice of Withdrawal of Judge, ¶12-14, at page 5-7), Judge Montoya-Lewis was referring to herself specifically, not the entirety of the Tribal Court. Further, the reasons the Tribal Council stated for its removal of Judge Montoya-Lewis from the civil case were not connected in any way with the criminal case. *See* Exhibit 6, Resolution #403-2010 at p.2.

Statements #9 and #14 are also deliberately misleading. The entry into the Tribal Secretary's office on January 5, 2011, referred to in Statement #9, was to retrieve and secure a

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malfunctioning computer, in accordance with tribal administration policy. *See* Exhibit 1, Cynthia Tomkins decl, ¶4, and Exhibit 9, Kelli Kvasnikoff email.

Suzanne Ventura's observation that Arlene Ventura's desk had been removed from her office and placed in a common area as of February 8, 2011, makes Statement #14 an understatement of almost comical proportions. On February 7, 2011, the head of facilities management for the tribe, Joe Mullen, did remove a desk from the Tribal Secretary's office. During that move, defendant Arlene Ventura's husband and defendant Kanium Ventura's father, David Ventura, entered the Tribal Secretary's office, packed and removed several boxes and bags of items and files from that office, including a file marked "Resolutions 2010." *See* Exhibit 1, Cynthia Tomkins decl., ¶6 – 16; and Exhibit 9, Description of Video Surveillance Contents.

ARGUMENT

No matter how many times defendants repeat the litany of events that have transpired, no matter how many times defendants insist on recounting the maneuvers in their civil case as part of that litany, the reality remains the same: The criminal proceedings are separate and distinct from the civil proceedings.

Defendant attempts to create a relationship between the civil and the criminal proceedings by using the phrase "in the meantime" to transition between discussion of the criminal proceedings and discussion of the civil case. But this is no more than a semantic ruse, just another of defendant's continual efforts to conflate the two proceedings. In fact, the Tribal Council resolutions cited by defendant all concern the civil suit filed by defendants against tribal officials, not the criminal proceedings against defendants. Except for the recusal of the court clerk to avoid actual or perceived conflict of interest, the Tribal Council has passed no resolutions concerning the criminal proceedings whatsoever. In all of defendant's lengthy recitation of the

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Tribal Council's actions in the *civil* case, defendant fails to specify how those actions have robbed the defendants of due process in the *criminal* proceedings.

Defendants point to Judge Montoya-Lewis's withdrawal from the criminal case as evidence that the Court cannot be impartial. They make much of Judge Montoya-Lewis's statement in her Notice of Withdrawal that the Tribal Council's actions made it "impossible for *the Court* to act without creating the impression that it is subject to inappropriate outside influences" (Exhibit 5, ¶17-19, at p. 5, *emphasis added*), and her comment that "If *the Court* were to grant the Motion to Dismiss in the criminal matters, that could easily be viewed as a ruling made in response to *the Court's* removal from the civil matters." (Exhibit 5, ¶15-16, at p.5, *emphasis added*). But as noted above, in context "the Court" means Judge Montoya-Lewis herself, not the Tribal Court in general, and not another judge who might step in after her withdrawal. It was Judge Montoya-Lewis who was removed by the Tribal Council, and that removal was from the civil case, for reasons unconnected to the criminal case. See Exhibit 6, Resolution #403-2010 at p.2. Defendant provides no basis whatsoever to believe that the current Court finds itself in any such predicament.

Appearance of Impartiality

Here, defendant again attempts to transmute the law for his own benefit. All of the case law defendant cites is about the standards for withdrawal of an *individual judge* who has a conflict of interest, either financial or personal (*See, inter alia, Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Liteky v. United States*, 510 U.S. 540 (1994)). Defendants may aptly apply this law to Judge Montoya-Lewis' withdrawal. They may not, as they attempt to do here, extend it to

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the Tribal Court as an institution. If defendant believes that Judge Woodrow has a conflict that destroys the Court's appearance of impartiality, let them come forward with it.

Defendant claims that the Tribe has something defendants call "institutional leverage" over the Court. Defendant reaches far to compare this so-called institutional leverage to the financial leverage held over the judges in *Tumey* (where the mayor presiding as judge only got paid if the defendant was convicted); *Ward* (where the mayor trying the case was responsible for the town's finances, which benefited by the convicted defendant's fine), and *Massey* (where a company president, in anticipation of the West Virginia State Supreme Court of Appeals hearing an appeal of a $50 million damage award against his company, contributed $3 million to the election campaign of a successful judicial candidate who subsequently refused to recuse himself from the appeal).

The law in these cases is clear. It addresses individual judges, as defendants concede. The law also presents a solution to such judicial conflict, in the recusal of the conflicted judge. See *Massey,* 129 S. Ct. 2252. Defendant's extension of this jurisprudence to encompass their purported institutional leverage stretches credulity to the breaking point. Still, defendant demands a dismissal of charges based on this unsupported extension of the law, claiming that a reasonable observer would conclude that any Tribal Court judge must necessarily succumb to this ill-defined institutional leverage, a conclusion as groundless in fact as it is in law.

But even without this unjustified expansion of the law, defendant's argument fails because its basis is false. The justification for defendant's conclusion that the Court must necessarily appear partial to a reasonable observer, is that the Tribal Council terminated two people over the case. But that is not true. Neither Judge Montoya-Lewis nor court clerk Veronica Port was terminated from her job. Ms. Port, still a Tribal employee, simply no longer has responsibilities

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for any cases involving these defendants. Judge Montoya-Lewis, who never was an employee of the Tribe, but a pro-tem judge appointed by NICS, is still a NICS judge. The justification for a reasonable observer's perception of the Court's partiality is false, and so is the conclusion that such a perception must necessarily exist.

Separation of Powers

Defendant's separation of powers argument suffers a like fatal flaw: it is dependent on a conflation of the criminal and civil cases. Whether the Tribal Council's removal of Judge Montoya-Lewis was justified or not, that action does not equate to an unconstitutional intrusion into the criminal proceedings. The simple fact is that the Tribal Council has made no unwarranted intrusions into the criminal proceedings.

Even if the Court finds that the Tribal Court's removal of Judge Montoya-Lewis from the civil case had an indirect effect on the criminal proceedings, that effect falls far short of the requirements for a constitutional violation of the separation of powers. *United States v. Klein,* quoted so reverently by defendant, sets that standard: a law "...passed the limit which separates the legislative from the judicial power" when it dictated a rule of decision in a pending case. *United States v. Klein,* 80 U.S. (13 Wall.) 128, 146 (1871). In *Plaut v. Spendthrift Farm, Inc.,* another case cited by defendant, the U.S. Supreme Court found that Securities Exchange Act § 27A(b) was unconstitutional because it instructed federal courts to reopen final judgments. *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 115 S.Ct. 1447 (1995). The *Schiavo* case cited by defendants is quite on point. It found an unconstitutional violation of the separation of powers in a law passed by the United States Senate giving the federal district court jurisdiction over the fate of Terry Schiavo, and her parents the standing to bring suit. *Schiavo ex rel. Schindler v. Schiavo,* 404 F.3d 1270, 1273 -1274 (11th Cir. 2005). The law was an effort by certain senators to help Ms.

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Schiavo's parents prevent her husband from removing her feeding tube. *Pub.L. 109-3.* But it was not the senate's desire to influence the judicial outcome that created the constitutional violation. It was that the law specified *how* the district court would do its work: it set a standard of review, and denied the court the ability to exercise abstention or inquire as to exhaustion or waiver under State law. "Because these provisions constitute legislative dictation of *how* a federal court should exercise its judicial functions (known as a "rule of decision"), the Act invades the province of the judiciary and violates the separation of powers principle." (emphasis added) *Schiavo ex rel. Schindler v. Schiavo,* 404 F.3d 1270 at 1273 -1274.

Here, there is nothing in any action by the Tribal Council that even approaches an attempt to set a rule of decision in these criminal proceedings. Whatever the effect of Judge Montoya-Lewis's removal from the civil case may be, and whatever the justification for recusing Veronica Port from acting as court clerk in these cases, there is nothing in either resolution that constitutes the legislative dictation of a rule of decision in this criminal case.

Defendant's claim that the Tribal Council's actions have a chilling effect on the Tribal Court is pure speculation, with not a shred of evidence to back it up. To suggest, without any substantiation whatsoever, that NICS and its professional personnel are intimidated by the actions of any Tribal Council, is approaching libel.

The Tribe admits its puzzlement at defendant's invocation of the *Randall* balancing test, and agrees that it is not relevant to this case. As defendant accurately states, his due process rights under the United States Constitution, the Snoqualmie Tribal Constitution, and the Indian Civil Rights Act are virtually identical; and neither the criminal charges nor the criminal proceedings at issue here contain any significant cultural differences. No matter which law provides the vocabulary, the defendant's due process rights have simply not been violated.

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The Court's Power to Dismiss

The Court does have the supervisory power to dismiss a case in certain circumstances. But under the law, dismissal with prejudice is disfavored as the most drastic of steps. *United States v. Rogers,* 751 F.2d 1074, 1076 (9th Cir.1985), *United States v. Blue,* 384 U.S. 251, 255 (1966). And there is absolutely no basis here for such a drastic step.

There are indeed three circumstances under which a court may dismiss an indictment under its supervisory powers, and they are, as defendant cites, articulated in *Chapman.* But defendant fails to include the necessary corollary, the next sentence in that *Chapman* quote. The full quote reads:

> A district court may exercise its supervisory power 'to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct.' *United States v. Simpson,* 927 F.2d 1088, 1090 (9th Cir.1991). *However, because '[d]ismissing an indictment with prejudice encroaches on the prosecutor's charging authority,' this sanction may be permitted only 'in cases of flagrant prosecutorial misconduct.'* *Id.* at 1091. (emphasis added)
>
> *U.S. v. Chapman,* 524 F.3d 1073, 1085 (9th Cir. 2008)

But to deal briefly with those three *Simpson* circumstances. For a dismissal for a due process violation, "the Government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Smith,* 924 F.2d 889, 897 (9th Cir.1991) (citing *United States v. Ramirez,* 710 F.2d 535, 539 (9th Cir.1983); *United States v. Citro,* 842 F.2d 1149, 1152 (9th Cir.1988)). For all of defendant's storm and fury about the Tribal Council's actions involving the civil cases, there has been no government conduct concerning the criminal cases that even comes close to the required standard of iniquity.

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Defendant once again extends the law to cover his claims without any authority to do so, in his assertions regarding the second circumstance, the need to ensure that a conviction rests on appropriate considerations validly before a jury. Under the law, that second circumstance concerns evidence put before the fact-finder at trial. See *McNabb v. United States*, 318 U.S. 332, 341, (1943) (where incriminating statements unlawfully obtained were put before the jury); *Elkins v. United States*, 364 U.S. 206, 222 (1960) (where evidence unlawfully seized was put before the jury). Nowhere in the jurisprudence is that concern extended to the environment outside the courtroom, as defendant would have the Court do here.

The third claim, that dismissal with prejudice of the criminal charges against defendant is warranted to deter future "illegal conduct" by the Tribal Council, is baseless. The Tribal Council's conduct does not rise to the "flagrant prosecutorial misconduct" level required by *Simpson*. Even if it did, it would certainly not warrant a dismissal of this case, because the conduct was apart from, and not even on the subject of, this criminal case.

Just as defendant has not shown cause for his charges to be dismissed, so his claim of substantial prejudice fails. The Court does not labor under an appearance of partiality; nor is there an impasse regarding the motions to dismiss, which are, and have been, scheduled to be heard by the Court. But the Tribe would like to address the defendant's claim of prejudice due to contamination or spoliation of evidence.

Defendant's claim is a blatant attempt to deflect his own, and his co-defendant's, culpability for spoliation of evidence. The Tribal Secretary's office is at the heart of defendant's claim, and access to it has been a source of conflict. Judge Montoya-Lewis issued an order giving defendants access to that office for inspection, but the terms of that order contradicted Tribal law, and she withdrew from the case before hearing the Tribe's Motion for Reconsideration of that

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order, a motion that the Tribe believes is still before the Court for consideration. Early in the case, the Prosecutor issued a Preservation Letter requiring tribal administration to preserve the evidence, including the evidence in that office. *See* Exhibit 8, Preservation Letter. Tribal administration has kept the office locked and unused, with the few necessary incursions into it supervised by the Chief of Tribal Police to ensure compliance with that letter (*see* Exhibit 1, Cynthia Tomkins decl., ¶3). However, all of those efforts were destroyed on February 7, 2011, when a tribal employee, Joe Mullen, and the defendant's father (and co-defendant's husband) David Ventura entered the office without permission and without police supervision. David Ventura removed files and items from the office, and took them home, the home he shares with co-defendant Arlene Venutra. *See* Exhibit 1, Cynthia Tomkins decl., ¶6 – 16; Exhibit 10, Description of Video Surveillance Contents; Exhibit 11, Transcript of Interview. As a result, defendant has no one to blame but himself and his co-defendant for the spoliation of evidence he so condemns.

CONCLUSION

For the reasons stated above, the Tribe respectfully requests this Court deny defendant's Motion to Dismiss.

RESPECTULLY submitted this 23, day of February, 2011.

Cynthia Tomkins

Cynthia Tomkins
Snoqualmie Tribal Prosecutor

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	NO. SNO-CR-0022-2010 DEFENDANT ARLENE VENTURA'S SUPPLEMENTAL MOTION TO DISMISS ON ETHICAL, EQUAL PROTECTION AND SELECTIVE/MALICIOUS PROSECUTION GROUNDS

I. INTRODUCTION

COMES NOW Defendant Arlene Ventura ("Mrs. Ventura") and respectfully submits this supplemental memorandum in support of her Motion to Dismiss. The additional grounds for dismissal arise from the Tribal Prosecutor's violation of her ethical duties under RPC 3.8(d), and the ongoing violations of Mrs. Ventura's due process and equal protection rights. Given the pervasive nature of the abuses in this case, dismissal of the charges is appropriate and necessary to protect Mrs. Ventura's constitutional rights, to uphold the independence of the Tribal Court and hold the Tribal Prosecutor accountable for her ethical lapses.

II. SUMMARY OF ARGUMENT

This Court should dismiss the charges pending against Mrs. Ventura based on the Tribal

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Prosecutor's ethical violations and violations of her constitutional rights to equal protection and due process of law. The Tribal Prosecutor's failure to discharge her duty to produce evidence that negates guilt, including spoliation of material exculpatory evidence taken from defendant's office, has risen to such a level as to violate RPC 3.8(d). In addition, these discovery abuses deny defendant's right to due process under the Tribal Constitution and offend general notions of fair play. Finally, as a member of a politico-familial party, Mrs. Ventura has been discriminatorily targeted based on her affiliation. Pursuant to the foregoing violations, this Court should protect Mrs. Ventura's rights, uphold the Tribal Constitution and ensure compliance with ethics rules by dismissing the pending charges.

III. EVIDENCE RELIED UPON

1. Declaration of Arlene Ventura in Support of Supplemental Motion to Dismiss, with exhibits thereto;

2. Declaration of Lesa Olsen in Support of Supplemental Motion to Dismiss, with exhibits thereto; and

3. Supplemental Declaration of David H. Smith in Support of Motion to Dismiss, with exhibits thereto.

This memorandum also relies on the Court Records and Pleadings filed in Snoqualmie Tribal Court Cases CR-0019-2010 and CR-0020-2010.

IV. FACTUAL BACKGROUND

A. Overview.

Arlene Ventura is an enrolled member of the Snoqualmie Tribe of Indians, a duly elected member of the Snoqualmie Tribal Council (the "Council") and the Council's Secretary. Declaration of Arlene Ventura in Support of Supplemental Motion to Dismiss (hereinafter "Ventura Decl."), ¶ 1. By virtue of her position, she is also a member of the Tribe's Snoqualmie Entertainment Authority (the "SEA") Board, the entity that oversees the Tribe's largest asset, the Snoqualmie Casino. *Id.* Mrs. Ventura is also a member of one of the five

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main families of the Tribe. *Id.* Defendant has been charged with five criminal offenses arising from her efforts, on behalf of the Council and SEA Board, to arrange for the engagement of an independent accounting firm to audit the Casino and certifying the Resolution authorizing the hiring of Moss Adams. Based solely on the filing of criminal charges, she was suspended from her Council position on November 13, barred from entering Tribal property and threatened with arrest and prosecution by the City of Snoqualmie on November 15, 2010. Ventura Dec., ¶4 and Exs. 5 and 6.

B. Historical Disputes among Council Members.

Since 2008, the Tribe has been striven by internal political disputes. See, Findings of Facts, Conclusions of Law and Order, *Bill T. Sweet, et al. v. Maryanne Hinzman*, 2009 U.S. Dist. LEXIS 36716 (W.D. Wash. 2009).[1] The Tribe held a Council election on May 9, 2009 which resulted in the election of Shelly Burch as Council Chairperson and the re-election of Nina Repin. Ventura Decl., ¶ 12, Ex. 8. Certain tribal members challenged the legality of the May 9, 2009 election and the Tribal Court granted a temporary injunction against the seating Ms. Burch and two alternative Council Members. *Id.* It is of note that the Tribal Court rejected claims that sovereign immunity prevented it from ruling on Council compliance with the Tribal Constitution or Tribal Codes.[2] *Id.* On October 16, 2009, the Tribal Council ruled the May 9, 2009 elections invalid. *Id.* New elections were held April 12, 2010. *Id.* Ms. Burch was again elected Council Chairperson and Ms. Repin was re-elected to a four year term. *Id.* Subsequently, Ms. Burch was finally seated as Council Chairperson. *Id.*

A General Membership meeting was held on May 8, 2010 at which Ms. Burch, acting as "Chairman of the General Membership Meeting," purported to allow the recall all the other Council Members (except Ms. Repin) for "neglect of duty." Ventura Decl., Ex. 8. Ms. Burch sent letters to the other Council Members notifying them of their recall. Ventura Decl., Ex. 9.

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[1] A courtesy copy of the Order is attached at Appendix A.
[2] Mr. Connick withdrew as the Tribe's counsel based on conflicts of interest.

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The Council had previously determined there were defects in the May 8, 2010 General Membership Meeting Notice and decided to postpone it. In response to the illegal meeting and the failure to follow the recall procedures contained in the Tribe's Constitution and Council Code, the Council passed Resolution 83-2010 declaring the May 8, 2010 meeting invalid. Ventura Decl., Ex. 12. Certified letters and email were sent to Ms. Burch and Ms. Repin, among others, notifying them they faced sanctions for their actions. Ventura Decl., Exs. 10 and 11. Peter Connick also advised BIA that the May 8, 2010 General Membership meeting was invalid. Ventura Decl., Ex. 13.

Pursuant to Resolution, Ms. Repin and Ms. Burch were suspended from the Council for two years on May 25, 2010. Ventura Decl., Ex. 14. Subsequently, their suspensions were vacated and they were censured for the letters sent to Tribal employees and Council Members that claimed they had been fired. Ventura Decl., Exs. 15 and 16.

C. <u>The Moss Adams Engagement.</u>

The Council received several complaints regarding casino operations in November and December 2008. The Council held an emergency meeting regarding casino issues on November 25, 2008. Supp. Smith Decl., Ex. 8. The Council held a total of four meetings during December 2008. Supp. Smith Decl., Ex. 7. In addition, Mrs. Ventura conducted telephonic polling of Council Members regarding hiring Moss Adams to conduct an audit of certain parts of the Casino's operations. Such audits are required by the Tribe's contract with the State of Washington. Supp. Smith Decl., Ex. 9 (p. 21). Subsequently, Mrs. Ventura asked Mr. Mattson to prepare what became Resolution 2003-2008. It was duly executed by the Tribal Chairman Joseph Mullen and certified by defendant as Tribal Secretary on December 29, 2008. Ventura Decl., Ex. 4.

Subsequently, two Council Members took Mr. Mattson to lunch to lobby against the hiring of Moss Adams. Olsen Decl., Ex. B. The same day, Kanium Ventura sent an email to Mr. Mattson and all Council Members imploring them to allow the "independent audit" to

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proceed. Ventura Decl., Ex. 19. However, the Council voted on January 12, 2009 to cancel the contract with Moss Adams. Ventura Decl., Ex. 17.

D. Post Engagement Actions.

In the following year, the Tribe conducted an internal inquiry into the passage of Resolution 2003-2008. No evidence was found indicating that the Resolution's passage was the result of bribery or the actions of persons motivated by personal financial gain. However, things changed after Shelly Burch was elected Council Chairperson and Ms. Tomkins hired as Tribal Prosecutor.

On November 13, 2010 Snoqualmie General Membership Resolution #02-2010 was issued. Ventura Decl., Ex. 5. It purported to suspend Mrs. Ventura from her duties as a Tribal employee and Council Secretary, and prohibited her from entering Tribal property until she was cleared of the criminal charges by Tribal Court. *Id.* Mrs. Ventura received no notice this action was on the agenda for the General Membership meeting, was not represented during the meeting and only became aware of General Membership Resolution #02-2010 after it was passed. Ventura Decl, ¶4 and Ex. 5. She became aware of its passage on November 15, 2010 when she attempted to enter the Tribal office building where her office is located. On the foregoing date, Mrs. Ventura was refused entry into the building, threatened with arrest by non-tribal law enforcement officers, criminal prosecution in a non-tribal court and was issued a "Trespass Warning" by the Police Department for the City of Snoqualmie that prevents her from entering Tribal property for one year. Ventura Decl. *Id.* and Ex. 6.

On November 18, 2010 Mrs. Ventura and Kanium Ventura filed a declaratory judgment action in the Tribal Court seeking a judicial determination that General Membership Resolution #02-2010 was invalid. They also sought injunctive relief. Supp. Smith Decl., Ex. 1. Subsequently, Mrs. Ventura filed a motion to remove Attorney Peter Connick, who appeared as defense council in the declaratory judgment action.

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On November 26, 2010 the Council "recused" the Tribal Court Clerk from her duties. Supp. Smith Decl., Ex. 2. This recusal essentially shut down the Tribal Court. As a result, Mrs. Ventura's motions to dismiss the criminal charges and for injunctive and declaratory relief from General Membership Resolution could not be heard until a new clerk was appointed to assist the Tribal Court Judge. The Tribal Court was unable to proceed with either the criminal or civil cases until December 13 when a new Tribal Court Clerk was appointed. On December 22 the Tribal Court issued a scheduling order in the criminal case, setting a hearing on Mrs. Ventura's motion to dismiss for January 3, 2011, confirming her jury trial for January 10, and her speedy trial expiration date as January 19. On December 23, the Tribal Court issued an order authoring Mrs. Ventura to inspect her office to recover evidence material to her defense. Also on December 23 the Court ordered Mr. Connick removed from the civil case based on conflicts of interest in violation of the RPCs.

In response, the Council passed Resolution 304-2010 which claimed to remove the Judge presiding over the civil case. In addition, Mr. Connick filed a motion asking the Judge to recuse herself from the criminal matter. On December 31, 2010, the Judge removed herself from hearing the civil and criminal cases, stating:

> The intervention of the Tribal Council into these matters has created a situation that makes *it impossible for the Court to act without creating the perception that it is subject to inappropriate outside influences* (emphasis added).

V. ARGUMENT

A. The Tribal Prosecutor has violated her ethical duty to disclose exculpatory evidence.

1. Ethical standards.

Prosecutors are:

> the representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall

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> win a case, but that justice shall be done. As such, [s]he is in a peculiar and a very definitive sense the servant of the law, the twofold aim of which is that guilt shall not escape nor shall innocence suffer. [S]he may strike with earnestness and vigor – indeed, [S]he should do so. But, while [s]he may strike hard blows, [s]he is not at liberty to strike foul ones. It is as much [her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. U.S., 295 U.S. 78, 88 (1935). The special ethical responsibilities of a prosecutor are also described in RPC 3.8 which adopts the ABA's model Rules of Professional Conduct. Comment 1 to RPC 3.8 states:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

RPC 3.8(d) extends the prosecutors a special ethical responsibility to the area of discovery as well. It states:

> The prosecutor in a criminal case shall: (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information under the prosecutor, except when the prosecutor is relieved of this responsibility by a productive order of the tribunal.

On July 8, 2009, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion regarding the scope of a prosecutor's ethical duty under Model Rule 3.8(d) to disclose exculpatory evidence and information. ABA Formal Opinion 09-454.[3] The opinion concludes that a prosecutor's duty under Rule 3.8(d) is independent and broader than that imposed pursuant to *Brady* and the Due Process Clause. Focusing on the history of the rule, the opinion notes:

[3] A courtesy copy of the ABA Formal Opinion 09-454 is attached as Appendix B.

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- "It is not limited to evidence that is "material" and there is not a "de minimis" exception." Thus, the prosecutor must turn over all information even if they believe that it "has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable."

- The duty to disclose is not limited to admissible evidence, and includes information that may be inadmissible.

- Disclosure must be made "as soon as reasonably practical" once it is known to the prosecutor.

- Rule 3.8 (d) is non-waivable, and a "prosecutor may not solicit, accept or rely on the defendant's consent" as a means to avoid their ethical obligation.

The opinion notes the obligation extends to favorable evidence known to the prosecutor, and knowledge is defined as actual knowledge that may be inferred from the circumstances. While the rule does not impose a duty to ascertain exculpatory evidence, prosecutors are warned they may not ignore the obvious.

B. Spoliation

In a criminal matter, a court may award sanctions for spoliation of evidence based on: (1) regard for the defendant's due process rights; and (2) the court's inherent power and authority to control litigation. Available sanctions include: outright dismissal; preclusion orders; orders deeming specified facts to be established; instructions to the jury that it may draw an inference adverse to the party responsible for the absence of the evidence; and monetary awards. 7 James WM. Moore, Moore's Federal Practice § 37.121 (3d ed. 2010). The Prosecutor's repeated abuses of the discovery process have risen to such a level as to merit outright dismissal of the charges.

1. The Prosecutor has withheld exculpatory evidence in violation of her ethical responsibilities.

From the beginning, Mrs. Ventura has sought discovery concerning the factual and

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legal basis for the charges against her. At her arraignment hearing, defendant objected to a determination of probable cause as she had not been provided discovery. Even after discovery was provided, defense counsel contended the materials submitted by the Tribal Prosecutor were insufficient to establish probable cause. Within ten days of arraignment, Mrs. Ventura had filed her Bill of Particulars which sought to make the charges against her more definite and certain. In the Tribe's response, the Tribal Prosecutor refused to provide the requested information and has yet to respond to Defendant's Motions to Compel a Bill of Particulars. The Tribal Prosecutor has long been aware that Mrs. Ventura contends her prosecution was politically motivated and the charges against her baseless. The Tribal Prosecutor was also aware that information material to Mrs. Ventura's defense was located in her office at the Tribal Administration Building. Despite this knowledge, the Tribal Prosecutor failed to protect this information from removal, loss and destruction. Of critical importance to Mrs. Ventura's defense were the discovery and production of emails between Tribal Council Members regarding Tribal Council oversight of the Casino.

Despite the Tribal Prosecutor's provision of two disks that appear to contain copies of e-mails taken from Mrs. Ventura and Kanium Ventura's computers, the disks do not contain e-mails from the relevant time period. Olsen Decl. ¶ 6-9. It is beyond despite that the Tribal Prosecutor has failed to produce e-mails between Council Members and Mr. Mattson during the critical period in December 2008; the days between December 1 and 23. The Tribal Prosecutor further failed to produce the exculpatory e-mails concerning responses, if any, to Mr. Ventura's January 7, 2009 e-mail.

Emails produced by the co-defendant Kanium Ventura's counsel and other Tribal

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Members confirm that Kanium Ventura was raising concerns regarding funding for an auditor for as early as December 16, 2008. *See*, Ventura Decl., Ex. 19. The email chain between Matt Mattson and Mr. Ventura contains several discussions of the hiring of Moss Adams between January 5 – 7, 2009. On Wednesday, January 7, Kanium Ventura sent an email to all Council Members with copies to Mr. Mattson, in which he states:

> "Part of getting at the bottom of these issues is to make sure our own independent audit goes through immediately. In the Memorandum of Notes contract it is the SEA Board/Tribal Council's responsibility to do so to protect the future of our members. If others are saying otherwise, they will jeopardize the unity of the council, which could cause internal controversies leading to the investors taking control and freezing the money from the casino to the tribe until the notes are paid in full. Please stay united on your original decisions of the audit, Kanium."

Ventura Decl., Ex. 19. It is logical to believe that if Mr. Ventura's statement were untrue, other Council Members would have responded to his statement. Yet, not only did the Tribal Prosecutor fail to produce the emails referenced above, although clearly responsive to Mrs. Ventura's discovery requests, she failed to include emails from other Council Members, all of whom are listed as witnesses on the Tribal Prosecutor's Witness List, showing they received Mr. Ventura's January 5, 2009 email. The existence of this email is the type of exculpatory evidence that the Tribal Prosecutor was ethically required to produce but failed to do. Moreover, evidence that other Council Members received this email and did not object or challenge Mr. Ventura's statements is, at a minimum, circumstantial evidence that his statement was accepted as true.

The Prosecutor's failure to discharge her ethical duties regarding discovery is sanctionable by both the Washington State Bar Association and this Court. The appropriate sanction for the purposes to this motion is dismissal with prejudice.

2. The Prosecutor breached her duty to preserve material exculpatory evidence.

Like their federal counterparts, tribal prosecutors have "a special duty not to impede the

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truth." *U.S. v. Reyes*, 577 F.3d 1069, 1077 (9th Cir. 2009) (discussing the duties of federal prosecutors). As an attorney for the Tribe, the Prosecutor does not represent an ordinary party to a controversy. Rather, the Prosecutor represents a sovereign whose "obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it win a case, but that justice shall be done." *U.S. v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002).

In both criminal and civil matters, the Prosecutor is obligated to preserve materials that she knows, or reasonably should know: (1) might be relevant to the action, (2) could lead to the discovery of admissible evidence, (3) are likely to be requested during discovery, or (4) are the subject of a pending discovery request. The duty to preserve material evidence arises not only during litigation but also extends to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. *Kounelis v. Sherrer*, 529 F. Supp. 2d 503, 518 (D.N.J. 2008) (duty to preserve arises when party in possession of evidence knows that litigation is pending or probable and that party can foresee harm or prejudice if evidence were to be discarded).

3. This Court may issue sanctions for spoliation based on due process violations.

The Prosecutor's treatment of the evidence in this case has violated Mrs. Ventura's due process rights by frustrating her attempts to obtain material exculpatory evidence. Mrs. Ventura's ability to defend herself has been compromised by the Prosecutor's subversive tactics and negligent disregard for Mrs. Ventura's due process rights. As explained below, the Court should address Mrs. Ventura's predicament by (1) enforcing the Tribal Constitution's due process guarantees; (2) adopting a well-considered test to determine when spoliation violates a defendant's due process rights; and (3) sanctioning the Prosecutor by dismissing the charges against Mrs. Ventura.

a. The Supreme Court has designed a test for determining when spoliation violates a defendant's due process rights.

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Two Supreme Court cases, *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988), developed a controversial test to determine whether the government's failure to preserve evidence significant to the defense violates a defendant's due process rights under the federal constitution. It is clear that if the prosecuting authority has failed to preserve "material exculpatory evidence," criminal charges must be dismissed. In order to be considered material exculpatory evidence, the "evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. Recognizing that the right to due process is limited, however, the Court has been unwilling to "impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance to a particular prosecution." *Youngblood*, 488 U.S. at 58. Under the *Youngblood* bright-line bad faith test, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* As discussed below, several state courts have analyzed and rejected the *Youngblood* test as an affront to defendants' due process rights.

b. The Supreme Court's test is critically flawed.

The *Youngblood* test is flawed in at least two related ways. First, as explained by the Vermont Supreme Court, the *Youngblood* approach is too narrow "because it limits due process violations to only those cases in which a defendant can demonstrate bad faith, even though the negligent loss of evidence may critically prejudice a defendant." *State v. Delisle*, 648 A.2d 632, 643 (Vt. 1994). These sentiments concur with Justice Stevens' oft-quoted concurrence in *Youngblood*, where he writes: "In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Youngblood*, 488 U.S. at 61. Second, proving bad faith on the part of the police or

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prosecutor can be a very difficult task. The Supreme Court of Delaware has observed:

> [The *Youngblood*] "bright line" test suffers from at least two deficiencies. First, under a bad faith standard the defendant is required to prove that the police were: (1) aware of the significance of the evidence in question (2) under an acknowledged duty to gather or preserve such evidence and (3) deliberately refused to perform their duty. The practical difficulty in proving these elements is obvious. *Short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith.*

Lolly v. State, 611 A.2d 956, 960 (Del. 1992) (emphasis added). The *Youngblood* test can prove an almost insurmountable barrier to defendants who have been wrongfully deprived of material exculpatory evidence. This Court is charged with interpreting and protecting the Tribal Constitution. Accordingly, this Court is not required to abide by *Youngblood* and may adopt its own, functional standard.

c. This Court must interpret and apply the Tribal Constitution's due process guarantees.

The *Youngblood* case set a precedent for federal cases; it did not set a precedent for state interpretations of state constitutions and guarantees of due process under state law. A number of states have since held that the *Youngblood* bright-line bad faith test is an inappropriate standard. The Tribe is a sovereign entity and this Court is charged with the duty of interpreting and enforcing the Tribal Constitution. Accordingly, this Court should not blindly follow federal precedent, especially where that precedent is laden with flaws.

The circuit courts' more flexible treatment of spoliation prior to *Youngblood* provides insight as to how this Court may interpret the Tribal Constitution's due process guarantees. Prior to *Youngblood*, some federal circuits made sanctions determinations based upon a balancing of "the magnitude of the State's failure to perform its duty to preserve evidence against the degree of prejudice thereby sustained by the defendant." *State v. Fain*, 774 P.2d 252, 265 (Idaho 1989). For instance, in *U.S. v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979), the Ninth Circuit noted:

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> The proper balance [applied in determining whether lost evidence results in a violation of the defendant's right to due process] is that between the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice.

Unlike the *Youngblood* test's unworkable "bad faith" standard, the Ninth Circuit's preexisting test prioritizes the defendant's due process interests by placing the informational burden on the Government. The fairness of the Ninth Circuit's approach is underscored by the fact that the Government usually enjoys control of evidence material to the defendant's case.

Many of the states that have rejected the *Youngblood* test (including Tennessee in *State v. Ferguson*, S.W.3d 912, 917 (Tenn 1999)) have adopted the balancing test set forth by the Delaware Supreme Court in *Debarry v. State*, 457 A.2d 744 (Del. 1983) and affirmed in *Lolly*. Under the *Debarry* test, the court looks at three factors: (1) the type and nature of evidence destroyed; (2) the conduct of the police or prosecution, including good or bad faith; and (3) the significance of the lost evidence as compared to that adduced at trial. *Lolly*, 611 A.2d at 959. This balancing test is more workable than the *Youngblood* test because it does not hinge solely upon bad faith. As such, the *Debarry* test does not further punish the defendant for existing at an inherent informational disadvantage. Further, the *Debarry* test provides a court with greater flexibility to protect a defendant's due process rights.

This Court should adopt a test that prioritizes and protects the strong due process rights guaranteed by the Tribal Constitution. Both the standard provided by the Ninth Circuit in *Loud Hawk* and the *Debarry* balancing test used in Tennessee and Delaware functionally recognize the importance of a defendant's due process rights rather than humoring defendants with trivial "bad faith" lip service. This Court should recognize the importance of the Tribal Constitution's due process guarantees by following the lead of the foregoing state courts or the Ninth Circuit.

d. This Court's independent power to control litigation includes the

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ability to impose sanctions for spoliation.

This Court's inherent power and authority to control litigation includes the ability to impose sanctions in response to abusive litigation practices. See *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (district court imposed sanctions under its inherent authority because plaintiff's conduct was not in violation of any discovery order governed by Federal Rule of Civil Procedure 37); see also *U.S. v. $40,955.00 in U.S. Currency*, 554 F.3d 752, 758 (9th Cir. 2009) ("Under its inherent power to control litigation, a district court may levy sanctions, including dismissal of the action, for spoliation of evidence."). As the Fourth Circuit explained in *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001): "[t]he policy underlying [the] inherent power of the courts" to impose sanctions for spoliation "is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."

The circuit courts have developed various criteria to guide courts in deciding when to sanction a party by dismissing the case. In *Leon*, the Ninth Circuit advised the district courts to consider the following factors before dismissing a case due to spoliation: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Leon*, 464 F.3d at 958 (citing *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337 (9th Cir. 1995)). Other courts have resisted this multi-factor approach. For example, the Eleventh Circuit has held that a court has broad power to impose spoliation sanctions, but it may dismiss a case only if "there is a showing of bad faith and where lesser sanctions will not suffice." *Flury v. Daimler Chrysler Corp.*, 427 f.3d 939, 944 (11th Cir. 2005).

In this case, several of the *Leon* factors strongly militate in favor of dismissing the charges against Mrs. Ventura. Charges were brought twenty one months after Resolution 2003-2008 was enacted. They were brought after the contentious election of Chairperson

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Shelly Burch, who previously had used her position in a failed effort to fire Mrs. Ventura and other Council Members (except Nina Repin) in May 2010. Despite numerous Motions for Bill of Particulars to make the charges more definite and certain, the Tribal Prosecutor has failed to provide an adequate response. More importantly, she has allowed material evidence to be removed, lost or destroyed, denying Mrs. Ventura her due process and equal protection rights. All of these abuses have allowed the Council to approve an outrageous buyout payment to the Snoqualmie Casino's CEO without an independent audit.

D. Equal Protection

The selective prosecution of Mrs. Ventura has violated her Indian Civil Rights Act (ICRA) guaranteed right to equal protection right. Section 1302 of the ICRA, applies the Bill of Rights of the United States Constitution to the Tribes. Section 1302 of the ICRA, in relevant part, reads: "No Indian tribe in exercising powers of self government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws . . . ." *Id.* at § 1302. In broad strokes, equal protection requires that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920)). The Clause is intended to secure and safeguard equality of right and treatment against intentional and arbitrary discrimination and to work nothing less than the abolition of all caste and invidious class-based legislation. *Plyler at* FN 14. In *Bill T. Sweet, et al., v. Maryanne Hinzman*, 2009 U.S. Dist. LEXIS 36716 (W.D. Wash. 2009), the federal district court considered facts similar to those presented here and analogized the Tribe's actions to selective prosecution. *Hinzman supra* at 17-18. The *Hinzman* court explained the Ninth Circuit's position on selective prosecution as follows:

> To prevail on its claims under the equal protection clause of the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the police were motivated by a discriminatory purpose. To establish a discriminatory effect, the claimant must show that similarly situated individuals were not prosecuted. To show discriminatory purpose, a plaintiff must establish that the

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> decision-maker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.

Hinzman, supra at 18 (quoting *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142 (9th Cir. 2007) (internal citations and quotation marks omitted). Here, Mrs. Ventura can demonstrate both discriminatory effect and that the Tribe's action against her was motivated by the desire to impose "adverse effects upon an identifiable group." *Id.*

Mrs. Ventura is a member of one of the five main families of the Tribe. Ventura Decl., ¶ 1. She is a prominent member of the Enick family, which is involved in significant internal political tension with other families within the Tribe. *Id.* All five families comprising the Tribe were represented on the Council until passage of General Membership Resolution #02-2010 which suspended both members of the Enick family, Mrs. Ventura and her son, Kanium Ventura. The Resolution provides, in part:

> ...the General Membership of the Tribe hereby suspends Arlene Ventura and Kanium Ventura from the Snoqualmie Tribal Council and prohibits them from being in the Tribal Center and bars them from participating in Tribal Council meetings unless or until they are cleared of all charges related to the Moss Adams incident and altering or changing and producing Tribal Council Resolutions without the body of the Council....

Ventura Decl., Exhibit 5. Since passage of General Membership Resolution #02-2010, Mrs. Ventura has been issued a trespassing notice barring her from carrying out her official duties as Council Secretary and denied the compensation she would receive from attending Council meetings. In marked contrast to Mrs. Ventura's treatment, two other Council members who admitted engaging in acts of official misconduct, theft and forgery have not been suspended or denied compensation for their services[4]. One Council member, who is the Council's Acting Secretary, admitted on October 11, 2010 that she had stolen official Council records and

[4] To protect the privacy interests of these Council members, their names have not been used. In addition, documents regarding their Tribal Court cases have been filed under seal.

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destroyed them as part of her deferred prosecution agreement with the Tribal Prosecutor. The same date another Council member admitted she had approved her son's inflated time records as part of her deferred prosecution agreement. The suspension of Mrs. Ventura, coupled with the continued service of two Council members who admitted acts of theft, forgery and official misconduct, indicate discriminatory effect, as required by *Rosenbaum*, and raise significant equal protection concerns. The discriminatory purpose is evidenced by the years of political tension between the Enick family and other members of the Tribe, combined with the fact that the suspensions and subsequent mistreatment involved solely members of the target family.

Finally, when this Court analyzes the equal protection argument in the Tribal context, it becomes clear that this case requires a different analysis than is typically applied at the state or federal level. In light of the Snoqualmie Tribe's small size and lack of familial diversity, actions against members of distinct families invite equal protection analysis. The cases involving Mrs. Ventura and two other Council Members are similar in nature in that they all purport to involve official misconduct. Additionally, they all took place in the same general time frame. The results, however, were markedly different as evidenced by continued service on the Council by the other two Council Members. Consequently, the present suspension of Mrs. Ventura from the Council raises significant equal protection concerns, particularly in light of the Tribe's history of internal political battles. As a result, Mrs. Ventura's suspension from her position as Council Secretary violates her right to equal protection.

V. CONCLUSION

In light of the foregoing, this Court should grant this Motion and dismiss the charges against Mrs. Ventura.

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DATED this 23rd day of February, 2011.

GARVEY SCHUBERT BARER

By _____
David H. Smith, Bar # 10721
Member #STC201023

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanium (dob: June 12, 1967) Defendant.	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS**

COMES NOW the Snoqualmie Tribe, by and through its prosecutor, Cynthia Tomkins, and hereby responds to Defendant Arlene Ventura's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds.

The Tribe has already answered a Motion to Dismiss for Prosecutorial Misconduct as well as a Motion to Dismiss for Due Process Violations, and will not repeat its response here as the defendant's accusations regarding the terrible persecutions they are suffering do not raise any new facts or evidence. The Tribe will, however, answer defendant's new accusations of spoliation of evidence. The Tribe will also answer defendant's equal protection and selective/malicious prosecution claims.

Defendant spends five pages reciting a version of events that mixes criminal with civil, fact with fiction. As the Tribe has addressed defendants' conflation of civil matters with criminal matters several times in previous filings, in the interest of judicial economy, the Tribe will not address them yet again. Additionally, the Tribe refers the Court to the Tribe's previous responses

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to defendants' motions to dismiss where the accusations in this most recent pleading present no new evidence or facts.

1. Spoliation and Withholding of Evidence

Defendant's lengthy argument about withholding and spoliating evidence comes down to some supposedly missing emails. The Tribe has supplied both defendants with copies of all existing emails defendants have requested. If defendants want emails from more time periods, or from more people's email accounts, all defendants have to do is ask for them.

Defendant's claim that the Prosecutor has deliberately withheld important, and even exculpatory, emails presumes that the Prosecutor knows what and whose emails are important to defense. While the Prosecutor is very aware that the defense claims the charges are politically motivated, the Prosecutor is *not* politically motivated, and does not participate in the political maneuverings of the Tribe. The Prosecutor cannot be expected to know, or even guess, which emails, sent when, and between which Tribal Council members, are important to show the political motivation claimed by defendants. Theoretically, the Prosecutor could have produced every email ever sent between Tribal Council members in response to defendants' nonspecific discovery demands, but it did not, and that was within Prosecutorial discretion. "[W]here a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). This defendant may ask the Court to require the Tribe to disclose other emails in its possession, but that is all. Sanctions for prosecutorial misconduct are simply not supported by the law.

Defendant asks for the most extreme sanction for spoliation of evidence, dismissal with prejudice, but shows no evidence that the Tribe is responsible for any spoliation. Defendant does

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not specify what evidence has been destroyed, but rather insinuates that the prosecutor destroyed emails, using Lesa Olsen's declaration as evidence. That declaration requires a response. First and foremost, all requested emails and files were copied as they existed at the time of the discovery request, and provided defendants on the CD. The empty folders that were provided were copied to the CD exactly as they were. There is no record of who deleted the contents of the folders, just as there is no record of who deleted any particular email, or when any deletions happened. *See* Exhibit A, Cynthia Tomkins decl, ¶ 2. *See* Exhibit B, Kellie D. Kvasnikoff's email. While it may be true that the prosecution has not provided all the emails Arlene Ventura *would have* received in any particular period, the prosecution has provided all the emails that *still exist* in Arlene Ventura's email files. Furthermore, defendants Arlene Ventura and Kanium Ventura are still in possession of their tribal laptops and any information on them is inaccessible by the Tribe. If there are emails missing, that only shows that some emails were deleted at some time by someone. Ms. Olsen cites an email from Matt Mattson to Arlene Ventura as an example of an email missing from Arlene Ventura's email files as provided to defendant. That email states that certain Tribal Council members denied ever voting to hire Moss Adams. The most likely scenario is that the defendant herself deleted it as incriminating sometime before November 13, 2010, when she still had access to her email. But whoever deleted it from defendant's email account, it obviously was not withheld from defendant; the prosecutor provided it from Mr. Mattson's account.

The Prosecutor has fulfilled its duty to preserve material evidence. The Prosecutor submitted a preservation letter to tribal administration that, to the best of its knowledge, had been observed by the Tribe until David Ventura and Joe Mullen's unauthorized incursion into the Tribal Secretary's office, and David Ventura's removal of items and documents from that office, on February 7, 2011 (*see* Tribe's Response to Motion to Dismiss Based on Due Process Violations, p. 10-11). But as defendant has repeatedly noted, some time has passed between the

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events at issue and the pressing of criminal charges, and emails get deleted for all kinds of reasons, including simple housekeeping. Even if emails were deleted that defendant now considers important, there is no evidence at all that it was done in bad faith, by the Prosecutor or the police or anyone else. And whether the defendant accepts it or not, *Youngblood* is the prevailing law. While it is certainly true that this Court is not bound by a U.S. Supreme Court decision, and need not be persuaded by the fact that Washington State follows *Youngblood* (*see State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994)), defendant cites no authority nor any reason that this Court should not follow it.

Further, the *Loud Hawk* balancing test defendant would have this Court apply to impose the most extreme of sanctions, dismissing the charges with prejudice, was never intended to be such a test. "The test proposed here is not of constitutional dimensions...The rule advanced here is simply a judicially-created rule designed to prevent police misconduct and permit as fair a trial as possible." *U.S. v. Loud Hawk*, 628 F.2d 1139, 1153 -1154 (9th Cir. 1979). The Ninth Circuit clearly articulated the applicable standards in a very recent case about corrupted computer-data evidence, citing *Youngblood*'s bad-faith standard for a constitutional violation, and noting that *Loud Hawk*'s balancing test is applied only when lesser sanctions are under consideration:

> The government's failure to preserve potentially exculpatory evidence rises to the level of a due process violation if a defendant can show that the government acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Bad faith requires more than mere negligence or recklessness. *Id.* If the government destroys evidence under circumstances that do not violate a defendant's constitutional rights, the court may still impose sanctions including suppression of secondary evidence. *Loud Hawk*, 628 F.2d at 1152 (Kennedy, J., concurring). In so doing, the court must balance "the quality of the Government's conduct and the degree of prejudice to the accused." *Id.*
>
> *U.S. v. Flyer*, 2011 WL 383967, 3 (9th Cir., Feb. 8, 2011)

But even if the Court were to ignore defendant's misapplication of the law, and decide not to follow *Youngblood*'s requirement of bad faith, the facts here do not rise to the constitutional level required for dismissal with prejudice; they do not even rise to the level required for much

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milder sanctions under *Loud Hawk*'s balancing test. The defendant fails to show bad faith by the Prosecutor or Tribe, fails to show any evidence of negligence, recklessness, or error on their part, and fails to show any police misconduct or error. All defendant has shown is the possibility that emails were deleted at some point by somebody, but who or when or what is anybody's guess.

2. Equal Protection/Selective Prosecution

Neither Defendant Arlene Ventura nor her co-defendant Kanium Ventura were selectively prosecuted, and neither defendants' equal protection rights have been violated by the criminal charges against them. A prosecutor has broad discretion in decisions about who and what to prosecute (*see Bordenkircher v. Hayes*, 434 U.S. 357 (1978)). That discretion is subject to constitutional restraints, including equal protection. *United States v. Batchelder*, 442 U.S. 114, 125 (1979). But, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). To rebut the presumption that a prosecutor has not violated equal protection, "a criminal defendant must present 'clear evidence to the contrary.' *Chemical Foundation, supra*, at 14-15, 47 S.Ct., at 6." *U.S. v. Armstrong*, 517 U.S. 456, 465 (1996). There is no evidence at all that the prosecutions at issue here are discriminatory. To the contrary, there is ample evidence that they are not.

The Prosecutor was appointed by NICS as Snoqualmie Tribal Prosecutor in late 2009 (an event unrelated to Shelly Burch's election as Tribal Chair, contrary to defendant's insinuation). At that time, the Prosecutor was presented with five case files of Tribal Police investigations into malfeasance by Tribal Council members. The Prosecutor found probable cause to file criminal charges in four of those cases. Everyone charged in those cases were given plea offers. Everyone except Arlene Ventura and Kanium Ventura took those plea offers, settled their cases and made restitution to the Tribe. Arlene Ventura and Kanium Ventura chose instead to go to trial. *See* Exhibit A, Cynthia Tomkins decl, ¶ 3. Both of these defendants started out similarly situated to

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the other criminal defendants, and were similarly treated by the Prosecutor. That they are no longer similarly situated is the result of differing choices that were made by them and by the other defendants, not because of any prosecutorial discrimination in treatment or purpose.

Defendant is not entitled to a dismissal of the charges for an equal protection violation arising from her suspension from the Tribal Council, because that suspension is not this Court's concern. That suspension was not, and is not, part of the criminal proceedings against the defendants. Any alleged irregularity is the sole concern of the civil lawsuit filed by defendants, and is not before this Court.

Finally, a word on the politics. Defendants have done everything they can to politicize this case. They have falsely accused the Prosecutor of conspiring with their political enemies to fabricate criminal charges. They have made those accusations not just in Tribal Court documents, but in federal court filings, in the *Seattle Times*, and in mass emails sent to tribal members, including one sent just this past week by co-defendant Kanium Ventura, and attached here as Exhibit C and Exhibit D. Conversely, the prosecution has done everything it can to maintain the dignity and decorum warranted by such serious Court proceedings in spite of the lack of civility shown by defendants through their repeated personal insults and attacks on the professional and personal integrity of the Prosecutor's office.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests this Court to deny defendant's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds.

RESPECTFULLY SUBMITTED this 1 day of March, 2011.

Cynthia Toonkens
Snoqualmie Tribal Prosecutor

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	NO. SNO-CR-0022-2010 ADDENDUM TO DEFENDANT ARLENE VENTURA'S SUPPLEMENTAL MOTION TO DISMISS ON ETHICAL, EQUAL PROTECTION AND SELECTIVE/MALICIOUS PROSECUTION GROUNDS

I. INTRODUCTION

Defendant Arlene Ventura ("Mrs. Ventura") respectfully submits this addendum to her supplemental memorandum in support of Defendant's Motion to Dismiss. In order to understand the inherently political nature of this matter, the Court must consider that the facts of this case are inextricably intertwined with an internal dispute over the control of the Snoqualmie Casino. These facts are confirmed by the February 16, 2011 declaration of Snoqualmie Casino CEO Michael Barozzi.

II. SUPPLEMENTAL STATEMENT OF FACTS

Mrs. Ventura, her son Kanium and other Council members have long expressed concerns regarding the operation of the Snoqualmie Casino. *See*, Declaration of Arlene Ventura in Support of Supplemental Motion to Dismiss (hereinafter "Ventura Decl.), Ex. 19.

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Due to her unlawful suspension from the Council, Mrs. Ventura has been unable to attend Council meetings since November 13, 2010. Thus, she was unaware of the Council's approval of Mr. Barozzi's $14 million buy-out agreement. Ventura Decl., ¶23 and Ex. 18.

In response to a lawsuit filed in Tribal Court to overturn the buy-out because it exceeded the Council's authority under the Snoqualmie Constitution[1], Mr. Barozzi filed his own declaration on February 16, 2011. 2nd Suppl. Smith Decl., Ex. 11. Mr. Barozzi's declaration and a letter signed by Shelly Burch and Nina Repin have been posted on the Tribe's website. 2nd Suppl. Smith Decl., Ex. 13. In his declaration, Mr. Barozzi blames Mrs. Ventura and the entire Enick family for spreading "rumors of graft and corruption" concerning his management of the Casino. *Id.*(¶ 5). He tells the Council that the Enick family should never be allowed to have "any control over casino operation." *Id.*(¶ 9). He also acknowledges that various regulations require annual audits of the Casino. *Id.*(¶ 8). These allegations are repeated in Ms. Burch and Ms. Repin's February 28, 2011 letter to the Tribe posted on the Tribal website. *Id.*, ¶6.

III. ARGUMENT

A. Political Disputes Are Non-Justiciable

As noted in Defendant Kanium Ventura's Motion to Dismiss, political questions are non-justiciable. *See*, Motion to Dismiss, p. 4. Contrary to the Prosecution's argument, as members of the SEA Board and Council, overseeing the Casino was part of Kanium and Mrs. Ventura's official duties.

The proposed buyout agreement requires the approval of seventy-five percent of General Council (Membership) pursuant to Article III, Section 3 of the Snoqualmie Constitution. This section reserves to the General Membership the power "[t]o sell, encumber, pledge or dispose of non –trust land or assets when the transaction is in excess of two million dollars…No exercise of these powers by the Tribal Council or any other agency

[1] See, Section III, A herein.

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or officer of the Snoqualmie Tribe shall be effective unless the General Council has consented to such action." *Id.* This consent would require the approval of seventy-five percent of the General Membership. The Snoqualmie Entertainment Authority Act of 2006 (the "SEA Act") limits the powers of the SEA Board to those granted "in accordance to the Constitution." SEA Act, Section 6.0.

As stated in the SEA Act, codified as Tribal Council Act 8.2, the Casino was to be operated by the Tribe as required by the Indian Gaming Regulatory Act, the Compact between the Tribe and the State of Washington, and the Snoqualmie Gaming Act. 2nd Suppl. Smith Decl., Ex. 12 (Section 3.0). Under the SEA Act, Mrs. Ventura was designated Secretary of the SEA Board and specifically authorized to employ accountants without "prior Council approval." *Id.* (Section 6.0). As Mr. Barozzi freely admits, the Casino was required to undergo annual audits. 2nd Suppl. Smith Decl., Ex. 11. Yet, the Tribal Prosecutor has charged Mrs. Ventura with official misconduct for trying to perform her official duties on behalf of the Council and SEA Board. The Tribal Prosecutor's position is both unreasonable and violative of the basic tenets of democratic government. *See*, Defendant Arlene Ventura's Reply in Support of Motion to Dismiss, pp. 3-5. As the fact that Casino audits are required is undisputed, the Motion to Dismiss must be granted as the charges in this case involve strictly legislative actions.

B. Mr. Barozzi's Declaration Establishes Equal Protection Violations

Mr. Barozzi's expression of personal enmity against Mrs. Ventura and the entire Enick family regarding the operation of the Snoqualmie Casino, the Tribe's largest asset, underscores the existence of internal political tension with other families within the Tribe. Mr. Barozzi's statements demonstrate the discriminatory effect, as required by *Rosenbaum*, and raise significant equal protection concerns. The discriminatory purpose is evidenced by Mr. Barozzi's attack on the entire Enick family and explicit demand to the Council that they be denied their rightful authority to oversee the Casino's operations.

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When the prosecution is seen in this light, it becomes clear that this case involves purely political and legislative issues. The allegations in this case arise from protected legislative activities. They show that members of distinct families within the Tribe receive unequal treatment. Given the Tribe's history of internal political battles, the facts presented in this case can lead to only one conclusion; Mrs. Ventura is being prosecuted based on familial association rather than criminal misconduct.

C. Mr. Barozzi's Declaration Demonstrates Prosecutorial Misconduct

In her Motion to Compel Bill of Particulars, Mrs. Ventura specifically demands that the Tribal Prosecutor explain what duty or duties she intentionally refrained from performing as alleged in Charge 1, Official Misconduct. *See*, Defendant Arlene Ventura's Motion to Compel Bill of Particulars, pp. 2-3. She also demanded the same information regarding the remaining charges. Mr. Barozzi's declaration confirms that annual audits of the Casino were required by various regulations as well as the Casino's bond agreements. 2nd Suppl. Smith Decl., Ex. 11 (¶ 7). This presents the obvious question; how can carrying out a duty required by regulation, contract, the Tribal Constitution and Tribal Council Act 8.2 be official misconduct or any other crime? This remains one of the central questions the Tribal Prosecutor refuses to answer, denying Mrs. Ventura the Sixth Amendment's guarantee of the right to a vigorous and well-prepared defense. *See*, Defendant Arlene Ventura's Motion to Compel Bill of Particulars, pp. 7-8. The Tribal Prosecutor's failure to address this issue and produce the exculpatory evidence demonstrating Mrs. Ventura's duty to ensure audits of the Casino are performed in her capacity as Secretary of the Council and SEA Board is another example of the misconduct that requires dismissal of the charges in this case.

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IV. CONCLUSION

In light of the foregoing, this Court should dismiss the charges against Mrs. Ventura.

DATED this 1st day of March, 2011.

GARVEY SCHUBERT BARER

By _____

David H. Smith, Bar # 10721
Member #STC201023
Attorney for Defendant Arlene Ventura

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanim (dob: June 12, 1967) Defendant.	)	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S RESPONSE TO ADDENDUM TO SUPPLEMENTAL MOTION TO DISMISS**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	)	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S RESPONSE TO ADDENDUM TO SUPPLEMENTAL MOTION TO DISMISS**

COMES NOW the Tribe, through its prosecutor, Cynthia Tomkins, and hereby responds to Defendant Arlene Ventura's Addendum to Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds.

The Tribe objects to the barrage of motions that offer no new law, nor any new facts that would justify dismissal under the law. The facts of the criminal case may well be intertwined with the battle over control of the casino, since the early stages of that fight may well have driven the defendants to the criminal behavior that gave rise to the charges. But that does not excuse the crimes. Defendants may believe that their ends justify the means, but when they crossed the line into criminal misconduct to accomplish their ends, that belief turned into motive. All they have offered here is evidence of *why* they wanted a supplemental audit of the casino so badly that they were willing to fake a resolution and signatures to get one.

1. Non-justiciable political question.

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The Tribe refers the Court to pages 5-8 of the Tribe's Response to Motion to Dismiss, dated 12/13/2010, for the distinction between a non-justiciable political question and a case with a political context. Here, however, defendant goes further, and attempts to validate the claim with misstatements of law and fact so extreme as to be deliberate.

Defendant's assertion that she is legally empowered to hire an accountant is plainly false. The SEA (Authority) Act (the "Act") makes clear that it is the SEA Board, acting as a Board, that has such power. First, the Act gives the Authority the power to hire accountants "in its own name." *Section 6.0(c)(5).* The Act defines the Authority as "the Snoqualmie Entertainment Authority...vested with specific powers delegated hereunder by the Tribal Council." *Section 4.0.* The Act determines *who* in the Authority can wield the power delegated to it: the Authority Board, the "Purpose of which is to carry out the duties and powers of the Authority as set forth in this Act." *Section 8(a).* Finally, the Act defines *how* the Authority Board acts: with a majority vote by a quorum of its members. *Section 8(g).* This is statutory interpretation at its most basic, and no possible reading vests any individual authority or power in any person, even the one who sits as Secretary of the Authority Board.

In any case, defendant attributed the falsified resolution to the Tribal Council, not the SEA Board. But the Tribal Council has no direct power over the casino at all; that power is reserved by the Act exclusively to the SEA Board. *Section 6.0(g).* Finally, the claim that the charges involve legislative actions flies in the face of the Act, which states specifically that "The SEA Authority...shall have no authority to exercise any regulatory or legislative power." *Section 6.0(g).* Defendant is caught in her own tangled web, trying to validate her claim of authority: her actions were legislative acts empowered by her role on the SEA, a body that is specifically denied legislative authority; or, alternatively, her power to hire a supplemental casino auditor arose from the Tribal Council, a legislative body specifically excluded from any power over casino audits.

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Further, the implication that defendant's actions were part of her official duty to enforce the "annual audit" requirement is absurd. In fact, since the beginning, BDO Seidman has been the casino auditor performing an annual audit and quarterly reviews. Additionally, the casino opened November 7, 2008, less than a month before defendants started on their campaign to hire Moss Adams.

2. Equal Protection.

Defendant gives no new facts or information, but merely repeats previous allegations, and twists the law in an attempt to support them. But repetition does not turn fiction into fact, and twisting the law does not change it. There is no evidence at all of selective prosecution, much less the "clear evidence" required (*see United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)) of the prosecution's discriminatory effect and discriminatory purpose. *Rosenbaum v. City and County of San Francisco,* 484 F.3d 1142, 1152 -1153 (9th Cir. 2007). Discriminatory effect and purpose concern prosecution of offenses, and Mr. Barrozzi's statements are not about that at all. The statements have nothing to do with discriminatory effect: that requires a showing that similarly situated individuals were not prosecuted, where the defendant was (*United States v. Armstrong,* 517 U.S. 456, 465 (1996); *Rosenbaum,* at 1152 -1153). Discriminatory purpose in a prosecution requires a showing that "the decision-maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte v. United States,* 470 U.S. 598, 610 (1985); *Rosenbaum* at 1153. Mr. Barrozzi's statements have nothing to do with the reasons that the Prosecutor pursued the criminal charges against defendants. Any connection between the defendants' actions and their conflict with Mr. Barrozzi goes to their motive in committing the criminal acts, not to the Prosecutor's in charging them.

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The Prosecutor's motive for charging the defendants, as stated in past filings, were the same as the motives for charging any other defendant in any court: probable cause that they had committed the crimes charged. No more, no less. If there is exculpatory evidence related to defendant's official duty to ensure that all audits of casino are performed, the Prosecutor does not know of it, other than the readily-available SEA Act that defendant has already so liberally misconstrued.

CONCLUSION

For the reasons stated above, the Tribe respectfully requests this Court deny defendant's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds, Addendum and all.

Respectfully submitted this 7th day of March, 2011.

Cynthia Tomkins

Cynthia Tomkins
Snoqualmie Tribal Prosecutor

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	NO. SNO-CR-0022-2010 DEFENDANT ARLENE VENTURA'S SUPPLEMENTAL MOTION TO DISMISS ON LEGISLATIVE IMMUNITY GROUNDS

I. INTRODUCTION

COMES NOW Defendant Arlene Ventura ("Mrs. Ventura") and respectfully submits this supplemental memorandum in support of her Motion to Dismiss. The additional grounds for dismissal arise from the Snoqualmie Tribal Council's (the "Council") legislative immunity. This Court must dismiss the charges against Mrs. Ventura because each charge constitutes a judicial and prosecutorial intrusion into the protected inner sphere of the Tribal Council. The doctrine of legislative immunity prohibits this Court and the Tribal Prosecutor from engaging in such an untoward venture.

II. EVIDENCE RELIED UPON

1. Snoqualmie Indian Tribe's Response to Defendant's Request for Bill of Particulars.

2. This motion also relies on all evidence relied upon by Defendant's Supplemental

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Motion to Dismiss on Ethical, Equal Protection, and Selective/Malicious Prosecution Grounds.

III. FACTUAL BACKGROUND

This Supplemental Motion incorporates by reference all facts set forth in Defendant's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds.

IV. ARGUMENT

This Court should dismiss the charges pending against Mrs. Ventura because the allegations require this Court to delve into the Council's protected legislative sphere. Such penetration violates the sacrosanct boundaries that protect legislative bodies from untoward intrusion and abuse. Any lesser reaction to the present charges risks chilling the Council's future internal operations and its ability to represent its tribal constituents.

A. The Council must function independently of the Tribe's judicial and prosecutorial branches.

The Council is a legislative body whose essential independence requires precluding the judicial and prosecutorial branches from questioning the motivation and conduct of Council members when carrying out their core legislative responsibilities. Council members demand the same gravity as federal Congressmen who are immune from suit for their legislative work and enjoy an absolute privilege against compelled questioning (including document production) concerning their core legislative activities. This privilege, formally inscribed at the federal level by the United States Constitution's Speech or Debate Clause, Article 1, § 6, cl. 1, helps to preserve the necessary balance between the three branches of tribal government.

Courts have repeatedly recognized the application and importance of legislative immunity in the tribal context. *See, e.g.*, *Shea v. Mashantucket Pequot Tribal Council*, No. MPTC-EA-94-100 (Feb. 15, 1996), http://www.tribal-institute.org/opinions/1996.NAMP.0000011.htm (Exhibit A) (upholding the application of legislative immunity to tribal council members); *Runs After v. U.S.*, 766 F.2d 347, 354-55 (8th

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Cir. 1985) (recognizing the application of legislative immunity in the Tribal context); *see also Gardner v. Littlejohn*, CV 10-47, 13-15, (HCN Tr. Ct., Feb. 2, 2011) (Exhibit B) (acknowledging the similarities between legislative immunity and a Ho-Chunk Nation "traditional privilege"). The Tribe itself has acknowledged the necessity of maintaining separation between its branches of government. In Snoqualmie Indian Tribe Resolution No. 22-2010: Resolution Clarifying Tribal Council Resolution No. 304-2010: Resolution Clarifying Tribal Council Resolution No. 304-2010 (Exhibit C) the Tribe recognized "the importance of the separation of the Legislative and Judicial branches of the Tribal Government." This statement affirmatively embraces the importance of maintaining separation of powers as well as the supporting doctrine of legislative immunity. The Tribe's treatment of this issue lends further support to the proposition that the doctrine applies to the Council.

B. The Federal Constitution's analogous Speech or Debate Clause is instructive.

The Federal Speech or Debate Clause (the "Clause"), and the U.S. Supreme Court's construction and application thereof, provides a fully developed jurisprudence of legislative immunity on which many tribal cases have (*e.g., Gardner*, CV 10-47 and *Shea*, No. MPTC-EA-94-100)—and this Court should—rely on for guidance. Members of Congress have immunity for their legislative acts under the Clause, which provides in part that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." The Clause is intended to "insure that the legislative function that the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 502. As the Supreme Court has explained:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

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Tenney v. Brandhove, 341 U.S. 367, 377, 71 S. Ct. 783, 95 L. Ed. 2d 1019 (1951). The Clause maintains legislative immunity by protecting "[t]he wisdom of congressional approach or methodology . . . [from] judicial veto." *Eastland*, 421 U.S. at 509.

The privilege provided by the Clause extends to all of a member's "legislative acts." *U.S. v. Brewster*, 408 U.S. 501, 512 (1972) (further discussed below). Once it is determined that the activities of a legislator or legislative staff fall within the "legislative sphere," the Clause's protection is absolute. *See Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 503 (1975). Where it is applicable, the Clause affords not only substantive immunity but also a complementary evidentiary privilege. In other words, the Clause provides both immunity from liability (in civil and criminal proceedings) and a testimonial privilege. Rotunda and Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 1, § 8.8, at p. 113 (2d ed., 1999 Supp.).

1. The scope of the privilege is properly tailored.

This Court should not hesitate to protect the Council from judicial and executive intrusion based on an unjustified fear of stimying prosecutorial efforts. The aperture of legislative immunity is appropriately narrow. Although legislative immunity must be robust where it applies, it only applies to core legislative acts. In *Brewster*, the Supreme Court explained:

> A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.

Brewster, 408 U.S. at 512. Lawmakers may not use the privilege to shield official but non-legislative activities from inquiry. *Id.* (explaining that the Clause does not protect "political" activity, including constituent service, press releases, and speeches delivered outside the legislative sphere). In this sense, the scope of the legislative privilege is bridled such that lawmakers are debarred from employing the privilege as an insulated platform from which to

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engage in criminal misconduct.

A robust legislative privilege need not and should not preclude enforcement of criminal laws focused on potential abuses of legislative and government power. At the same time, prosecutors may face some inherent obstacles in pursuing these charges because of the legislative privilege. For instance, if a legislator takes a bribe to vote in a certain way, both the fact of the legislator's vote and the motivation for doing so is privileged. *See, e.g., Brewster*, 408 U.S. at 526. To conclude otherwise would render elected representatives too vulnerable to politically motivated prosecutions challenging the very core of the legislative activities that the privilege is designed to protect. On the other hand, proof of the legislator's receipt of the bribe should not be so protected from judicial inquiry because "[t]aking a bribe is . . . not a legislative act." *Id.* at 526. Moreover, such proof would suffice for the purposes of criminal conviction. *Id.* at 529-30 (prosecution of senator for soliciting and accepting bribes was not prohibited by Clause).

2. The privilege applies where lawmakers follow improper formalities.

The legitimacy of a legislative act does not hinge upon whether a lawmaker or a legislative body observed prescribed formalities. Whether or not a legislative body's procedures were properly observed on a particular occasion is an issue of internal concern that must be addressed from within the legislative sphere. This is not a cause for concern; even if a legislator's actions are protected by the Clause, he or she remains accountable to the legislative body in which he serves and to the electorate. *Gregg v. Barrett*, 771 F.2d 539, 542 (D.C. Cir. 1985) ("Our constitutionalists were convinced that regular and frequent elections would hold members of Congress to all the accountability that was necessary for their legislative actions."). The executive and judicial branches may not sit in judgment of a legislative act merely because the act may have been established via extraordinary internal processes.

C. The charges demand an improper inquiry into the Council's operations.

As evidenced by Tribe's Response to Defendant's Request for Bill of Particulars (the

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"Bill of Particulars") (Exhibit D), each of the charges against Mrs. Ventura (i.e., official misconduct; obtaining a signature by deception or duress; and conspiracy to commit forgery) require this Court to violate the Council's legislative independence. In order to prove each of the charges, the Tribal Prosecutor must introduce evidence of the Council's internal operations. As specified in the Bill of Particulars, in order for the Tribal Prosecutor to prove any of the charges, she must establish what occurred at specific Council meetings (see illustrative table, below). The actions that occurred therein epitomize the type of operations that the doctrine of legislative immunity was designed to protect. The Tribal Prosecutor is prohibited from compelling Council members to testify about what occurred at Council Meetings and may not introduce internal documents (e.g., Council member notes) regarding the same. In the absence of this evidentiary linchpin, the Tribal Prosecutor is incapable of proving the charges against Mrs. Ventura. Accordingly, this Court must end Mrs. Ventura's persecution by dismissing the pending charges.

The below table uses the specifications provided in the Bill of Particulars to show what the Tribe must prove in order to successfully prosecute Mrs. Ventura. As shown in the third column, the evidence that each charge relies upon is protected by the doctrine of legislative immunity.

Charge	Tribe's Required Showing	Legislative Evidence Charge Relies Upon
Official Misconduct	Tribe must show that Mrs. Ventura "falsely certified a document to be Tribal Council Resolution 2003-2008, as voted on and passed on December 29, 2008."	• What occurred at Council Meetings, including whether and how the Resolution was voted on.
Obtaining a Signature by Deception or Duress	Tribe must show that Mrs. Ventura caused "Council Chairman Joe Mullen to sign or execute the engagement letter by falsely misrepresenting to Chairman Mullen that the 2003-2008 Resolution approving Moss Adams had been passed by the Tribal Council in an exercise of their rights and power to make such decisions when in fact [Mrs. Ventura] knew it had not been voted on let alone passed."	• What occurred at Council Meetings, including whether and how the Resolution was voted on. • The character and substance of Mrs. Ventura's legislative discussion with Chairman Mullen regarding Council Meetings and the Resolution.

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Conspiracy to Commit Forgery	Tribe must show that Mrs. Ventura conspired with co-defendant Kanium Ventura to falsify the January 2, 2009 Casino Access letter.	• What occurred at Council Meetings, including whether and how the Resolution was voted on.

If this Court chooses not to dismiss the charges against Mrs. Ventura, this Court should nonetheless order that the Tribal Prosecutor may not introduce any evidence protected by the Council's legislative immunity. As indicated above, this includes any evidence regarding the character and substance of Council Meetings and any other evidence regarding the Council's core legislative acts. If this Court institutes such a proper limitation, the detrimental effect on the pending charges will merely forestall outright dismissal via Mrs. Ventura's inevitable motion for dismissal after the Tribe rests.

V. CONCLUSION

In light of the foregoing, this Court should grant this Motion and dismiss the charges against Mrs. Ventura.

DATED this 30th day of March, 2011.

GARVEY SCHUBERT BARER

By */s/ David H. Smith*
David H. Smith, Bar # 10721
Member #STC201023

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The Honorable Richard Woodrow

IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. KANIUM VENTURA, (d.o.b. 06/12/1967) Defendant.	NO. SNO-CR-0021-2010 DEFENDANT KANIUM VENTURA'S SUPPLEMENTAL MOTION TO DISMISS ON LEGISLATIVE IMMUNITY GROUNDS

I. INTRODUCTION

COMES NOW Defendant Kanium Ventura ("Councilman Ventura") and respectfully submits this supplemental memorandum in support of his Motion to Dismiss. The additional grounds for dismissal arise from the Snoqualmie Tribal Council's (the "Council") legislative immunity. This Court must dismiss the charges against Councilman Ventura because each charge constitutes a judicial and prosecutorial intrusion into the inner sphere of the legislative acts of the Tribal Council. The doctrine of legislative immunity prohibits this Court and the Tribal Prosecutor from engaging in such an investigation and prosecution.

II. EVIDENCE RELIED UPON

1. Snoqualmie Indian Tribe's Response to Defendant's Request for Bill of Particulars.
2. This motion also relies on all evidence relied upon by Defendant's Motion to Dismiss based on Sovereign Immunity, Legislative Immunity and Political Question (filed on

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November 29, 2010) and Defendant's Reply in Support of Motion to Dismiss (Filed December 21, 2010).

III. FACTUAL BACKGROUND

This Supplemental Motion incorporates by reference all facts set forth in Defendant's Motion to Dismiss based on Sovereign Immunity, Legislative Immunity and Political Question (Filed November 29, 2010) and Defendant's Reply in Support of Motion to Dismiss (Filed December 21, 2010).

IV. ARGUMENT

A. The charges compel this court to violate the Councilman's legislative immunity.

This Court should dismiss the charges pending against Councilman Ventura because the allegations require this Court to delve into the Council's protected legislative sphere and requires prying into the legislative actions of Councilman Ventura. This includes investigating the Council and Councilman Ventura's legislative deliberations, legislative voting and actions taken surrounding the legislative actions. Such penetration violates the boundaries that protect legislative bodies from untoward intrusion and abuse. Any lesser reaction to the present charges risks chilling the Council's future internal operations and its ability to represent its tribal constituents.

1. The Council must function independently of the Tribe's judicial and prosecutorial branches.

The Council is a legislative body whose essential independence requires precluding the judicial and prosecutorial branches from questioning the motivation and conduct of Council members when carrying out their core legislative responsibilities. Tribal Council members, as representatives of the Tribe, have sovereign immunity for their actions within their duties as Tribal officials. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *See also Madison v. The Tulalip Tribe*, 2004 WL 5752597 (Tulalip Tribal Court of Appeals, Nov. 18,

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2004). Tribal Councilman Ventura is granted broad legislative powers as contained within Article VIII of the Tribal Constitution and within Tribal Council Act 8.2, which established the Snoqualmie Entertainment Authority that manages and supervises the Casino operation. Tribal Council members demand the same immunities as federal Congressmen who are immune from suit for their legislative work and enjoy an absolute privilege against compelled questioning concerning their core legislative activities. This privilege, formally inscribed at the federal level by the United States Constitution's Speech or Debate Clause, Article 1, § 6, cl. 1, helps to preserve the necessary balance between the three branches of tribal government.

Courts have repeatedly recognized the application and importance of legislative immunity in the tribal context. *See, e.g.*, *Shea v. Mashantucket Pequot Tribal Council*, No. MPTC-EA-94-100 (Feb. 15, 1996), available at: http://www.tribal-institute.org/opinions/1996.NAMP.0000011.htm (upholding the application of legislative immunity to tribal council members); *Runs After v. U.S.*, 766 F.2d 347, 354-55 (8th Cir. 1985) (recognizing the application of legislative immunity in the Tribal context); see also *Gardner v. Littlejohn*, CV 10-47, 13-15, (HCN Tr. Ct., Feb. 2, 2011)(acknowledging the similarities between legislative immunity and a Ho-Chunk Nation "traditional privilege"). Tribal courts recognize that legislative immunity protects individual council members from any litigatory proceedings, be it criminal or civil, so long as the actions are within the sphere of their legitimate functions. *Hayward v. Mashantucket Pequot Tribal Council*, No. MPTC-CV-2003-100 (Sept. 17, 2003), available at: http://www.tribal-institute.org/opinions/2003.NAMP.0000017.htm.

Indeed, the Tribe itself has acknowledged the necessity of maintaining separation between its branches of government. In the Tribe's Resolution Clarifying Tribal Council Resolution No. 304-2010, in which the Tribe purported to recuse Judge Montoya-Lewis, the Tribe recognized "the importance of the separation of the Legislative and Judicial branches of

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the Tribal Government." Resolution Clarifying Tribal Council Resolution No. 304-2010. This statement embraces the importance of maintaining separation of powers as well as the supporting doctrine of legislative immunity.

2. The Speech or Debate Clause of the US Constitution is instructive.

The Federal Speech or Debate Clause (the "Clause"), and the U.S. Supreme Court's construction and application thereof, provides a fully developed jurisprudence of legislative immunity on which many tribal cases have (*e.g., Gardner*, CV 10-47 and *Shea*, No. MPTC-EA-94-100)—and this Court should—rely on for guidance. Members of Congress have immunity for their legislative acts under the Clause, which provides in part that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." The Clause is intended to "insure that the legislative function that the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 502. As the Supreme Court has explained:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney v. Brandhove, 341 U.S. 367, 377, 71 S. Ct. 783, 95 L. Ed. 2d 1019 (1951). The Clause maintains legislative immunity by protecting "[t]he wisdom of congressional approach or methodology . . . [from] judicial veto." *Eastland*, 421 U.S. at 509.

The privilege provided by the Clause extends to all of a member's "legislative acts," *U.S. v. Brewster*, 408 U.S. 501, 512 (1972) (further explained below). Once it is determined that the activities of a legislator or legislative staff fall within the "legislative sphere," the Clause's protection is absolute. *See Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 503 (1975). "The issue is not whether the information sough might reveal illegal acts, but whether

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it falls within the legislative sphere." MINIPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 860-861 (D.C. Cir. 1988). Where it is applicable, the Clause affords not only substantive immunity but also a complementary evidentiary privilege. In other words, the Clause provides both immunity from liability (in civil and criminal proceedings) and a testimonial privilege. Rotunda and Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 1, § 8.8, at p. 113 (2d ed., 1999 Supp.).

a. The scope of the privilege is properly tailored.

This Court should not hesitate to protect Councilman Ventura from judicial and executive intrusion based on an unjustified fear of stymieing prosecutorial efforts. The aperture of legislative immunity is appropriately narrow. Although legislative immunity must be robust where it applies, it only applies to core legislative acts. In *Brewster*, the Supreme Court explained:

> A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.

Brewster, 408 U.S. at 512. Lawmakers may not use the privilege to shield official but non-legislative activities from inquiry. *Id.* (explaining that the Clause does not protect "political" activity, including constituent service, press releases, and speeches delivered outside the legislative sphere). In this sense, the scope of the legislative privilege is bridled such that lawmakers are debarred from employing the privilege as an insulated platform from which to engage in criminal misconduct.

A robust legislative privilege need not and should not preclude enforcement of criminal laws focused on potential abuses of legislative and government power. At the same time, prosecutors may face some inherent obstacles in pursuing these charges because of the legislative privilege. For instance, if a legislator takes a bribe to vote in a certain way, both the

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fact of the legislator's vote and the motivation for doing so is privileged. *See, e.g.*, *Brewster*, 408 U.S. at 526. To conclude otherwise would render elected representatives too vulnerable to politically motivated prosecutions challenging the very core of the legislative activities that the privilege is designed to protect. On the other hand, proof of the legislator's receipt of the bribe should not be so protected from judicial inquiry because "[t]aking a bribe is . . . not a legislative act." *Id.* at 526. Moreover, such proof would suffice for the purposes of criminal conviction. *Id.* at 529-30 (prosecution of senator for soliciting and accepting bribes was not prohibited by Clause).

b. The privilege applies where lawmakers follow improper formalities.

The legitimacy of a legislative act does not hinge upon whether a lawmaker or a legislative body observed prescribed formalities. Whether or not a legislative body's procedures were properly observed on a particular occasion is an issue of internal concern that must be addressed from within the legislative sphere. This is not a cause for concern; even if a legislator's actions are protected by the Clause, he or she remains accountable to the legislative body in which he serves and to the electorate. *Gregg v. Barrett*, 771 F.2d 539, 542 (D.C. Cir. 1985) ("Our constitutionalists were convinced that regular and frequent elections would hold members of Congress to all the accountability that was necessary for their legislative actions."). Tribal Courts agree that the ultimate recourse for elected officials should be at the ballot box and not in the Court. *See*, Smith v. Confederated Salish and Kootenai Tribes, Cause No. AP-94-027-CV (July 1996 Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation) (Spencer Decl., Exh. 1). The executive and judicial branches may not sit in judgment of a legislative act merely because the act may have been established via extraordinary internal processes.

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B. The charges demand an improper inquiry into the Council's operations.

As evidenced by Tribe's Response to Defendant's Request for Bill of Particulars, each of the charges against Councilman Ventura (i.e., official misconduct; and conspiracy to commit forgery) require this Court to violate the Council's legislative independence. In order to prove each of the charges, the Tribal Prosecutor must introduce evidence of the Council's internal operations. As specified in the Tribe's Response to Defendant's Request for Bill of Particulars (the "Bill of Particulars"), in order for the Tribal Prosecutor to prove any of the charges, the Tribe must establish what occurred at specific Council meetings (see illustrative table, below). The actions that occurred therein epitomize the type of operations that the doctrine of legislative immunity was designed to protect. The Tribal Prosecutor is prohibited from compelling Council members to testify about what occurred at Council Meetings and may not introduce internal documents (e.g., Council member notes) regarding the same. In the absence of this evidentiary linchpin, the Tribe is incapable of proving the charges against Councilman Ventura. Accordingly, this Court must end the Tribe's prosecution by dismissing the pending charges.

The below table uses the specifications provided in the Bill of Particulars to show what the Tribe must prove in order to successfully prosecute Councilman Ventura. As shown in the third column, the evidence that each charge relies upon is protected by the doctrine of legislative immunity.

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Charge	Tribe's Required Showing	Legislative Evidence Charge Relies Upon
Official Misconduct	Tribe must show that Councilman Ventura "falsely misrepresented to moss Adams that Resolution 2003-2008 had been passed on December 29, 2008."	• What occurred at Council Meetings, including whether and how the Resolution was voted on. • The use of phone polls to pass Tribal Resolutions. • Interrogation of individual Council members to determine their "recollection" of Council meetings. • The methods and procedures employed by the Tribal Council in passing resolutions. • Enquiring into deliberations between Tribal Council Members leading up to the hiring of Moss Adams.
Conspiracy to Commit Forgery	Tribe must show that Councilman Ventura conspired with co-defendant Arlene Ventura to falsify the January 2, 2009 Casino Access letter.	• What occurred at Council Meetings, including whether and how the Resolution was voted on.

If this Court chooses not to dismiss the charges against Councilman Ventura, this Court should nonetheless order that the Tribal Prosecutor may not introduce any evidence protected by the Council's legislative immunity. As indicated above, this includes any evidence regarding the character and substance of Council Meetings and any other evidence regarding the Council's core legislative acts. If this Court institutes such a proper limitation, the detrimental effect on the pending charges will merely forestall outright dismissal via Councilman Ventura's inevitable motion for dismissal after the Tribe rests.

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V. CONCLUSION

In light of the foregoing, this Court should grant this Motion and dismiss the charges against Councilman Ventura.

DATED this 30th day of March, 2011.

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By _____
Quanah M. Spencer, STC201021
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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	NO. SNO-CR-0022-2010 DEFENDANT ARLENE VENTURA'S SUPPLEMENTAL MOTION TO DISMISS ON SPOLIATION OF EVIDENCE GROUNDS

I. INTRODUCTION

COMES NOW Defendant Arlene Ventura ("Mrs. Ventura") and respectfully submits this supplemental memorandum in support of her Motion to Dismiss. The additional grounds for dismissal arise from the Snoqualmie Indian Tribe's (the "Tribe") spoliation of evidence. The Tribe's acts of destroying evidence have severely prejudiced Mrs. Ventura and her ability to defend herself against the pending charges. The egregious character of the Tribe's transgressions justifies the imposition of fines and an adverse inference instruction, or outright dismissal.

III. EVIDENCE RELIED UPON

1. Declaration of Allison Goodman in Support of Defendant Arlene Ventura's Supplemental Motion to Dismiss.
2. Declaration of Ernest C. Barth, CLI in Support of Defendant Arlene Ventura's

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Supplemental Motion to Dismiss on Spoliation of Evidence Grounds.

3. Supplemental Declaration of Lesa Olsen in Support of Defendant Arlene Ventura's Supplemental Motion to Dismiss.

IV. FACTUAL BACKGROUND

A. Facts relating to the inspection of Arlene Ventura's computer.

Mrs. Ventura's computer was removed from her office on or about January 5, 2010. Declaration of Allison Goodman in Support of Defendant's Motion to Dismiss (hereinafter "Goodman Decl."), ¶7.

On December 21, 2010, Judge Montoya-Lewis issued an oral order allowing inspection of Mrs. Ventura's office. On December 22, 2010, counsel for Mrs. Ventura submitted a proposed order for inspection; Judge Montoya-Lewis issued a written order allowing the same on December 23, 2010.

On March 22, 2011, Allison Goodman ("Ms. Goodman"), a technological consultant of eDiscovery, participated in an audio interview with Chief Information Officer Kellie Kvasnikoff ("Mr. Kvasnikoff") at the Snoqualmie Tribe offices. Goodman Decl., ¶5. During that interview, Mr. Kvasnikoff advised that he had been the one that had previously provided email from the server for the Defendants Kanium and Mrs. Ventura. Goodman Decl., ¶6. When questioned as to whether he had looked other placed for email, Mr. Kvasnikoff stated that all of the email existed on the server. *Id.* Mr. Kvasnikoff also acknowledged that he has been the only person that has had possession of the computer used by Mrs. Ventura since he removed it from her office on or about January 5, 2011. *Id.* at ¶7.

According to Mr. Kvasnikoff, a few days after he removed the computer from Mrs. Ventura's office, he "fired it up." Goodman Decl., ¶8. Mr. Kvasnikoff alleges he observed a "blue screen" so he reinstalled the operating system at that time. *Id.* When questioned why he found it necessary to turn on the computer, Mr. Kvasnikoff said it was "based on the request for email." *Id.* When Ms. Goodman reminded Mr. Kvasnikoff what he said earlier that email was

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not stored on individual computers, he reiterated that it was not. *Id.* Mr. Kvasnikoff further claimed he had not done anything other than reinstalling the operating system on the computer on or about January 5,2011, he replied that he had not. *Id.* at 9.

The results of Ms. Goodman's forensic analysis of Mrs. Ventura's hard drive are in direct conflict with Mr. Kvasnikoff's account. According to Ms. Goodman's analysis, there was no activity on the computer between November 13, 2010 and December 22, 2010. *Id.* at ¶14. On December 22, 2010—the day after Judge Montoya-Lewis issued her oral order allowing the inspection of Mrs. Ventura's office—the computer was powered up for approximately 20 minutes. *Id.*

On January 7, 2011, a remote desktop session was started on the computer. *Id.* at ¶15. This session started at 8:13 am and lasted 7 minutes. *Id.*

Ms. Goodman's analysis shows that the operating system was reinstalled on February 25, 2011, not on or about January 5, 2011 as Mr. Kvasnikoff claimed in his interview with Ms. Goodman. *Id.* at ¶16. Ms. Goodman's analysis also indicates that the computer date and time may have been changed as well. *Id.* Both the hard drive's software registry hive (the location where the operating system stores basic underlying data about the configuration of the machine) and the hard drive's event logs show activity on February 25, 2011 that is consistent with the reinstallation of the operating system. *Id.* at ¶ 17-18.

Ms. Goodman's analysis further indicates that the computer's date was changed to July 13, 2009, most likely at or near February 25, 2011. *Id.* at ¶ 20. System event logs record activity in the order it occurs on the computer, regardless of the date on the computer. *Id.* There are numerous entries in the hard drive's event logs for July 13, 2009 that appear to occur simultaneously with activity on February 25, 2011. *Id.* This, along with additional forensic analysis strongly suggests that the computer's date was changed on February 25, 2011 to July 13, 2009. *Id.* at ¶ 21-22.

When the computer date was set to July 13, 2009, there is evidence that somebody

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logged into the computer using Remote Desktop. *Id.* at ¶ 23. Remote Desktop is an application that is contained within the Windows operating system. *Id.* at ¶ 25. This means that the computer would have had to be operating for this activity to have occurred. *Id.*

B. Facts relating to the inspection of Arlene Ventura's office.

On March 22, 2011, Ernest Barth ("Mr. Barth"), CLI was present and assisted in the Court-Ordered Inspection of the Defendants' former offices at Snoqualmie Tribal Administrative Offices. Declaration of Ernest C. Barth, CLI in Support of Defendant Arlene Ventura's Supplemental Motion to Dismiss (hereinafter "Barth Decl."), ¶ 3.

During that inspection, Mrs. Ventura described for the record her usual manner of maintaining Snoqualmie Tribal Council Meeting Folders, which included the meeting roster, at the far left of the file, followed by the agenda, a plastic folder or sleeve with the audio recording, which was followed by the minutes (or notes if the minutes had not been completed) and any attachments from the meeting. *Id.* at ¶ 4.

There were six filing cabinets that contained office files. The sixth cabinet from the right, top drawer contained meeting minute folders from September 25, 2008 through August 13, 2009. This drawer, therefore, should have contained the folders for all December, 2008 Tribal Council Meetings. *Id.* at ¶ 5.

According to Mrs. Ventura, and to the 2008 Council/General Membership Meeting Folder Check List that had been provided, there were four meetings in December 2008 – December 4, 18, 20 and 29. The drawer only contained folders for the December 29 emergency meeting and the December 18 meeting. Mrs. Ventura reviewed the folders and indicated that there were documents in the December 29 folder that were not in that folder when she was last in her office on November 15, 2010. *Id.* at ¶ 6.

Upon review of the second file cabinet from the left, in the top drawer, we located a file folder entitled "Snoqualmie Tribal Council meeting attachments date unknown 2008." This folder was immediately behind a folder entitled "Colleen Barker Extra Grievance Documents

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2008" and was immediately in front of a folder entitled "Snoqualmie Tribal Council Meeting Attachments August 28, 2008." This folder included minutes, resolutions presented, a number of original resolutions and all the apparent complete documents for the Snoqualmie Tribal Council meeting of December 20, 2008. It also included a Minutes synopsis for December 12, 2008. *Id.* at ¶ 7.

This folder also contained a document that listed in chronological order council dates for 2008, with notes, starting 1/31/08 and through 4/9/09. Noted in this list is a December 4, 2008 emergency meeting and a December 29, 2008 meeting. Absent from the list are the other meetings identified, i.e, December 18 and 20, 2008. *Id.* at ¶ 8.

Based on Mr. Barth's inspection and his discussion with Mrs. Ventura, Mr. Barth reached the opinion that the file cabinets and file folders in the Snoqualmie Tribal Secretary's offices are not in the same condition as existed on November 13, 2010. *Id.* at ¶ 9.

C. Facts relating to Tribe's inconsistent disclosure of discovery materials.

On January 6, 2011, Counsel for Mrs. Ventura received two disks, labeled "Arlene.ost" and "Kanium.ost," from the Tribal Prosecutor's office. Declaration of Lesa Olsen in Support of Defendant Arlene Ventura's Supplemental Motion to Dismiss (hereinafter "Olsen Decl."), ¶ 2. According to the accompanying Discovery Production Receipt, the disks contained ".OST files from the database available from the tribal secretaries [sic] office." *Id.*

On March 25, 2011, Counsel for Mrs. Ventura received a DVD from Ms. Goodman which contains a copy of the hard drive that Mr. Kvasnikoff represented was the hard drive he had taken from Mrs. Ventura's computer on or about January 5, 2011. *Id.* at ¶ 3.

There are two files on this DVD, one entitled "archive.pst" and one entitled "converted OST.pst." *Id.* at ¶ 4.

The "archive.pst" file contains the following main folders: "Calendar;" "Deleted Items;" "Inbox;" "Journal;" "Sent Items," and "Tasks." *Id.* at ¶ 5. The "Deleted Items" folder contains 5,711 emails dated from January 2007 through May 18, 2009. *Id.* None of these items

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were contained in the original disk we received in January. *Id.* The "Sent Items" folder contains 2,761 emails dated from January 2007 through November 17, 2009, which also were not contained on the original disk. *Id.*

The "converted OST.pst contained some sub-folders that overlapped with the original disk received in January. *Id.* at ¶ 6. However, the main files contained items that were all dated between October 2009 and November 2010. *Id.* It is unclear as to how, if at all, the "converted OST.pst" relates to the file on the disk received in January. *Id.*

II. LEGAL STANDARD

This Court's "right to impose sanctions for spoliation arises from [this Court's] inherent power to control the judicial process and litigation." *Pension Committee v. Banc of America Securities*, 685 F.Supp.2d 456, 465 (S.D.N.Y. 2010). The duty to preserve evidence, especially material exculpatory evidence, "arises when a party reasonably anticipates litigation." *Id.* at 466. "[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Id.* (citing *Treppel v. Biovail*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008) (collecting cases)). In the context of electronically stored information, "[s]poliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit." THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (SECOND EDITION) 48 (2007).

In the area of electronic discovery, federal courts considering criminal matters rely on the more developed body of civil case law and the standards set forth by the Federal Rules of Civil Procedure (FRCP). *See, e.g., U.S. v. O'Keefe*, 537 F. Supp. 2d 14, 18-19 (D.D.C.)

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(holding that document production by the government in a criminal matter must adhere to standards similar to those set forth in FRCP 34). The federal courts proactively responded to growing demand and complexities of electronic discovery in the civil context by amending the FRCPs in 2006. *See* Fed. R. Civ. P. 16, 26, 33, 34, 37, 45. Unfortunately, no such amendments have been made to the Federal Rules of Criminal Procedure and there is a dearth of criminal case law regarding electronic discovery. In considering sanctions for electronic discovery abuses, this court should follow the lead of the federal courts (e.g., *O'Keefe*) and rely on civil precedent.

Several federal district courts have provided well-hewn guidance regarding discovery obligations and the more specific issue of sanctions for spoliation, most notably the courts in *Pension Committee, Rimkus Consulting Group v. Cammarata*, 688 F.Supp.2d 598, 613 (S.D.Tex. 2010) and *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). These decisions make clear that where a party's "breach of a discovery obligation is the non-production of evidence, a court has broad discretion to determine the appropriate sanction." *Pension Committee*, 685 F.Supp.2d at 469 and 471 (noting that the decision to "award sanctions [in this regard] is inherently subjective" and appropriately turns on a court's "gut reaction" to the conduct at issue). An appropriate sanction should "(1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party." *Id.* at 469 (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Available sanctions include dismissal, preclusion, special jury instructions, fines, cost shifting, and further discovery. *Id.*

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A court may award a terminating sanction where a party has tampered with evidence or intentionally destroyed evidence by wiping out computer hard drives. *Id.* at 470 (citing *Gutman v. Klein*, No. 03 Civ. 1570, 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008) (granting default judgment where defendants had tampered with a computer to permanently delete files and conceal the chronology of deletions)). Dismissal is appropriate where "the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability tot defend the claim." *Rimkus*, 688 F.Supp.2d at 618.

The sanction of an adverse inference instruction may be awarded where the following is established: "(1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Rimkus*, 688 F.Supp.2d at 615-616. As further explained in *Rimkus*:

> The 'relevance' and 'prejudice' factors of the adverse inference analysis are often broken down into three subparts: 'whether the evidence is relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the nondestroying party has suffered prejudice from the destruction of the evidence.'

Id. at 616 (quoting *Consol. Aluminum corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 346 (M.D.La. 2006)). Due to the difficulty and potential unfairness to the innocent party seeking discovery, "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." *Pension Committee*, 685 F.Supp.2d at 467.

A party's "failure to adhere to contemporary standards [for preservation of electronic evidence] can be considered gross negligence." *Pension Committee*, 685 F.Supp.2d at 471.

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Relying on its prior decisions for authority, the *Pension Committee* court advised future courts and litigants of the following:

> [These] failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control . . . .

Id. Because the relevant standard of care is based in negligence, a party's unreasonable technological incompetence does not excuse failure to uphold the foregoing duty.

Monetary sanctions may be awarded to serve the remedial purpose of compensating the aggrieved party "for the reasonable costs it incurred in bringing [a motion for sanctions]." *Id.* at 471 (quoting *Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 291 (S.D.N.Y. 2009)). "Monetary sanctions are appropriate 'to punish the offending party for its actions [and] to deter the litigant's conduct, sending the message that egregious conduct will not be tolerated." *Id.*

A court should extend the discovery timeline where further discovery may be fruitful. Additional discovery is warranted where a party failed to take adequate measures to prevent discoverable materials. A sanction of this type does not require a showing of bad faith; mere negligence is sufficient. *See, e.g., Treppel*, 249 F.R.D. at 123-124 (S.D.N.Y. 2008) (refusing to provide an adverse inference instruction but, based on a finding of negligence, ordering additional discovery, including forensic search of adversary's computer at adversary's expense).

V. ARGUMENT

The Tribe's campaign of spoliation has denied Mrs. Ventura her right to a fair trial. This Court should sanction the Tribe for the Tribal Prosecutor's pervasive failure to discharge her duty to preserve and produce evidence that negates guilt. This includes spoliation of discoverable materials located on Mrs. Ventura's computer and in her office. These discovery abuses have risen to such a level that they clearly constitute gross negligence and strongly

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indicate bad faith. The Tribe's abuses have thereby undermined Mrs. Ventura's right to a fair trial.

There is sufficient evidence from which a reasonable juror could find that emails, documents and other records were intentionally deleted, destroyed, or otherwise suppressed to prevent their use in anticipated litigation. With regard to the Tribe's electronic discovery abuses, the evidence suggests that the Tribe's Chief Information Officer, Mr. Kvasnikoff, repeatedly accessed Mrs. Ventura's computer after Judge Montoya-Lewis had granted the initial inspection order. Ms. Goodman's analysis shows that such tampering was far from benign. Mr. Kvasnikoff's act of installing a new operating system and other activities may have irreparably changed the hard drive such as to hide traces of past deletions of material evidence. The fact that the computer's date was changed suggests nefariousness and a guilty conscience on the part of the user who accessed Mrs. Ventura's computer. Indeed, the evidence suggests intentional conduct that surges past simple negligence, rises above gross negligence, and strongly indicates bad faith.

The stark asymmetry between the Tribal Prosecutor's initial disclosures on January 6, 2011 and Ms. Goodman's findings pursuant to her analysis of the hard drive further indicate the negligence with which the Tribal Prosecutor responded to Mrs. Ventura's discovery requests. The Tribal Prosecutor failed to disclose a total of 8,472 emails dated from January 2007 to November 17, 2009 (5,711 emails from the "Deleted Items" folder and 2,761 emails from the "Sent Items" folder). It is difficult to how the Tribal Prosecutor could have reasonably believed that the foregoing emails—all from a temporal period relevant to this case—were not subject to Mrs. Ventura's discovery requests.

Finally, Mr. Barth's inspection of Mrs. Ventura's office casts a further cloud of doubt over the Tribal Prosecutor's conduct. Based on Mr. Barth's inspection of Mrs. Ventura's office, it is clear that the file cabinets and file folders are not in the same condition as existed on November 13, 2010. Documents and records have been removed and it is probable that they

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will never be located. Consequently, Mrs. Ventura will be denied her right to use any evidence formerly contained therein for the purposes of her defense.

Mrs. Ventura's ability to defend herself against the pending charges has been undermined by the Tribal Prosecutor's ironically destructive evidentiary preservation tactics. This Court should respond with a sanction that is appropriately calibrated to deter similarly abusive conduct and restore Mrs. Ventura to the position she would have occupied absent the Tribe's subversive treatment: dismissal. Nonetheless, if this Court finds that the proposed dismissal sanction is too harsh, this Court should allow the jury to hear evidence of the conduct in question—including deleting emails and attachments and providing inaccurate or inconsistent testimony about them—and to give the jury a form of adverse inference instruction. The instruction should inform the jury that if it finds that the defendants intentionally deleted evidence to prevent its use in anticipated or pending litigation, the jury may infer that the lost evidence would have been unfavorable to the defendants. In addition, Mrs. Ventura should be awarded fees and costs reasonably incurred in identifying and revealing the Tribal Prosecutor's spoliation and in litigating the consequences.

As indicated by Mrs. Ventura's IT Consultant, Ms. Goodman, Mr. Kvasnikoff lacks the competency necessary to preserve discoverable electronic evidence. Indeed, the Tribe's very reliance on Mr. Kvasnikoff to discharge its electronic discovery duties constitutes negligence. A reasonable party would not have trusted Mr. Kvasinikoff for such purposes due to his lack of appropriate training and demonstrated incompetency. Accordingly, this Court should compel the Tribe to allow Ms. Goodman—on Mrs. Ventura's behalf—to conduct additional discovery. The additional discovery should include a search of the computer hard drives belonging to all Council members and Tribal Administrator Matt Mattson. This Court should also provide Mrs. Ventura with additional time sort through the numerous emails that the Tribe initially failed to disclose.

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V. CONCLUSION

In light of the foregoing, this Court should grant this Motion and dismiss the charges against Mrs. Ventura.

DATED this 30th day of March, 2011.

GARVEY SCHUBERT BARER

By _____
David H. Smith, Bar # 10721
Member #STC201023

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	No. SNO-CR-0022-2010 DECLARATION OF ERNEST C. BARTH, CLI IN SUPPORT OF DEFENDANT ARLENE VENTURA'S SUPPLEMENTAL MOTION TO DISMISS

I, Ernest C. Barth, CLI, state:

1. I am the General Manager of Barth & Associates, LLC, an investigative services firm that has provided criminal and civil investigative services for plaintiffs and defendants since 1991. I also have over eight years experience as a Sheriff's Officer in Washington State. I also hold (since 1995) a nationally accredited Board Certification as a "Legal Investigator". A copy of my curriculum vitae is attached. I am over the age of 18 years, have personal knowledge of the information contained in this declaration and am competent to testify thereto if called as a witness.

2. I have been retained by the law firms of Williams Kastner Gibbs and Garvey Schubert Barer on behalf of Defendants Kanium Ventura and Arlene Ventura to assist in Defendants' pre-trial investigation.

3. I was present and assisted in the Court-Ordered Inspection of the Defendants' former offices at Snoqualmie Tribal Administrative Offices on March 22, 2011.

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4. During that inspection, Ms. Ventura described for the record her usual manner of maintaining Snoqualmie Tribal Council Meeting Folders, which included the meeting roster, at the far left of the file, followed by the agenda, a plastic folder or sleeve with the audio recording, which was followed by the minutes (or notes if the minutes had not been completed) and any attachments from the meeting.

5. There were six filing cabinets that contained office files. The sixth cabinet from the left, top drawer contained meeting minute folders from September 25, 2008 through August 13, 2009. This drawer, therefore, should have contained the folders for all December, 2008 Tribal Council Meetings.

6. According to Ms. Ventura, and to the 2008 Council/General Membership Meeting Folder Check List that had been provided, there were four meetings in December 2008 – December 4, 18, 20 and 29. The drawer only contained folders for the December 29 emergency meeting and the December 18 meeting. Ms. Ventura reviewed the folders and indicated that there were documents in the December 29 folder that were not in that folder when she was last in her office on November 15, 2010.

7. Upon review of the second file cabinet from the left, in the top drawer, we located a file folder entitled "Snoqualmie Tribal Council meeting attachments date unknown 2008." This folder was immediately behind a folder entitled "Colleen Barker Extra Grievance Documents 2008" and was immediately in front of a folder entitled "Snoqualmie Tribal Council Meeting Attachments August 28, 2008. This folder included minutes, resolutions presented, a number of original resolutions and all the apparent complete documents for the Snoqualmie Tribal Council meeting of December 20, 2008. It also included a Minutes synopsis for December 12, 2008.

8. This folder also contained a document that listed in chronological order council dates for 2008, with notes, starting 1/31/08 and through 4/9/09. Noted in this list is a December 4, 2008 emergency meeting and a December 29, 2008 meeting. Absent from the list are the other

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meetings previously identified, i.e, December 18 and 20, 2008.

9. Based on my inspection and my discussion with Ms. Ventura, the file cabinets and file folders in the Snoqualmie Tribal Secretary's offices do not appear to be in the same condition as reportedly existed on November 13, 2010.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Seattle, Washington this 30th day of March, 2011.

/s/
Ernest C. Barth

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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanim (dob: June 12, 1967) Defendant.	)	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S MOTION FOR RECONSIDERATION**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	)	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S MOTION FOR RECONSIDERATION**

COMES NOW the Tribe, by and through its prosecutor, Cynthia Tomkins, and respectfully asks the Court to reconsider its decision to dismiss the above cases on legislative immunity grounds. Defendants' actions that gave rise to the criminal charges were performed outside of the legislative sphere of the Tribal Council and thus are not protected by legislative immunity, and the proof requires no evidence of how or why any legislative act was performed. Further, the limited inquiry required to determine the lack of a specific Tribal Council action is not barred by general legislative immunity.

I. FACTS

The Tribe objects to the representation of Defendants' allegations as facts. The assertions stated by Defendants in their previous Motions to Dismiss are the very issues to be decided by a fact-finder at trial. In their assertions that they were acting as Tribal Council members and

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legislators in the creation of Resolution 2003-2008, Defendants have repeatedly engaged in *petitio principii* – the art of assuming in one's premise that which one has to establish in one's conclusion. The Tribe's contrary assertion, and the basis of the criminal charges, is that Resolution 2003-2008 was not a creation of the Tribal Council at all, but of the Defendants themselves acting as individuals. The Defendants' positions on the Tribal Council gave them the means to create the deceptive document, and the authority to convince others of its authenticity.

II. ARGUMENT

Legislative immunity protects Tribal Council members, as legislators, from having to answer for their legislative acts. *Smith v. The Confederated Salish and Kootenai Tribes*, Cause No. AP-94-027-CV (July 1996 Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation). But the threshold question is whether the acts for which the legislator is being called to answer are legislative or not. *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491 (1975). The Court can, and should, look at a legislative record to make that necessary determination. *Eastland v. U. S. Servicemen's Fund*, 421 U.S. at 503-504.

A. Tribal Law

The Tribal Court cases brought to this Court's attention address the application of legislative immunity to Tribal Council members, but they are all distinguishable on one simple fact: in every case, the threshold question of whether the acts at issue were legislative acts was established. In no case was there any doubt that it was the Tribal Council who took the action at issue. In *Smith v. The Confederated Salish and Kootenai Tribes*, the Appeals Court found that Tribal Council members were immune not just from damages, but from "having to defend in court the decisions they make as members of the Council." *Smith*, p. 5. There, however, the fact of the decisions at issue, and the resultant Tribal Council actions, were not in dispute. That the

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decisions and resolutions were in fact decisions and actions taken by Tribal Council members, acting as legislators, was not at issue. Here, that is exactly the issue: whether the Defendants were acting within the Tribal Council, as legislators, when Resolution 2003-2008 was created. If they were, then the Court may not inquire into how the Resolution was passed, or why, and must accept the Resolution on its face. But if, as the Tribe contends, Defendants acted entirely on their own in the creation of Resolution 2003-2008, Defendants were not acting as legislators, and the protections afforded by legislative immunity do not apply.

It is settled law that legislative immunity applies regardless of the way the action at issue was taken by the Tribal Council. But *how* the action was taken by the Tribal Council is not the issue here; it is *whether* the action was taken by the Tribal Council at all. In *Runs After v. U.S.*, where members of the Cheyenne River Sioux Tribal Council were sued for civil right violations in two of the Council's resolutions, the Eighth Circuit Appellate Court assumed the resolutions to be invalid, and still applied legislative immunity to Tribal Council members who passed it. *Runs After v. U.S.*, 766 F.2d 347 (8th Cir., 1985). But there was never any question that the legislative action, however erroneous, actually took place and that the Tribal Council actually passed those two resolutions. In contrast, the Snoqualmie Tribal Council never took any action at all on Resolution 2003-2008, proper or improper.

Even in the cases presented by Defendants that only marginally (if at all) concern legislative immunity, there was no dispute that the actions at issue actually were done by the actors at issue. There was no question that the defamatory statements at issue were actually made by the Ho-Chunk warriors in *Gardner v. LittleJohn*, CV-10-47, 13-15 (HCN Tr.Ct., Feb 2, 2011); the resort-buildout program at issue was in fact adopted by the Tribal Council in *Hayward v. Mashantucket Pequot Tribal Council*, No. MPTC-CV-2003-100 (Mashantucket Pequot 09/17/2003).

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The Court has applied the doctrine of legislative immunity to any and all judicial inquiry into the actions of the Tribal Council regarding Resolution 2003-2008, including any evidence of whether any such action happened at all. But legislative immunity does not necessarily bar evidence from Tribal Council meetings. In *Shea v. Mashantucket Pequot Tribal Council*, the tribal court's jurisdiction hinged on the interpretation of a tribal employment statute. In order to properly construe the statute, the court endeavored to ascertain the Tribal Council's intent in passing it. The court found Tribal Council members had legislative immunity that barred only their depositions on the subject, and for two reasons: to maintain their independence, and to spare them the time and effort required to respond to litigation. But that immunity did not extend to evidence of their actions as Tribal Council members. Minutes from the Tribal Council meetings where the statute was discussed and passed were allowed into evidence, and those minutes were extensively cited in the court's decision. *Shea v. Mashantucket Pequot Tribal Council,* No. MPTC-EA-94-100 (Feb. 16, 1996) (Exhibit A to Defendant Arlene Ventura's Supplemental Motion to Dismiss on Legislative Immunity Grounds).

B. Federal Law

The federal jurisprudence on the Speech and Debate Clause of the United States Constitution and legislative immunity is well-developed, clear, and supports the Tribe's position that the Defendants are not protected by legislative immunity for the actions at issue here.

This Court has ruled that Resolution 2003-2008 was a legislative act; therefore, it must accept Resolution 2003-2008 on its face, and cannot even look at the record of Tribal Council meetings to determine whether it is in fact a falsity. But it is the Court's obligation to look into the meeting to make that determination, because if the Tribal Council did not create Resolution 2003-2008, the Resolution was not a legislative act. Determining whether a particular act is legislative, and the legislator responsible for it therefore subject to legislative immunity, is a

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threshold question for the application of legislative immunity, one that the U.S. Supreme Court has addressed in a century of jurisprudence. The Court has consistently looked into the legislative record to determine what happened there. Only "...*once it is determined* that Members are acting within the 'legitimate legislative sphere'" is the Speech or Debate Clause brought to bear. *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (emphasis added), quoting *Doe v. McMillan*, 412 U.S. 306, 314 (1973). *See also Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 749 (1966); *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531 (1972). The *Eastland* Court provided guidance on how that determination is made, and specified that the Court is to look at the legislature's activities:

> In determining whether particular activities other than literal speech or debate fall within the 'legitimate legislative sphere' we look to see whether the activities took place 'in a session of the House by one of its members in relation to the business before it.'
>
> *Eastland*, 421 U.S. at 503-504, quoting *Kilbourn v. Thompson*, 103 U.S. at 204.

Much that happens on the legislative floor is protected, but not all. "In sum, the Speech or Debate Clause prohibits inquiry only into those things generally *said or done* in the House or the Senate in the performance of official duties and into the *motivation* for those acts." *U. S. v. Brewster*, 408 U.S. at 512 (emphasis added). An inspection of the record of a Tribal Council meeting, to determine whether or not a specific action occurred, does not encroach upon the forbidden territory of an inquiry into the Council's action. There is no bar to looking at the record solely to determine *if* an action was taken. This Court not only may, but must, look into the Tribal Council meeting to determine whether or not the creation of Resolution 2003-2008 was an act of the Tribal Council.

There is also no bar in either federal or tribal court to the admission of evidence of the Council meeting's record. In *Gravel v. United States*, 408 U.S. 606 (1972), the Supreme Court

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found U.S. Senator Mike Gravel's legislative immunity protected him from criminal liability for reading classified documents (the Pentagon Papers) into the public record at a Congressional Subcommittee meeting. But it also found that his legislative immunity did not protect him from liability for arranging their private publication. In discussing that liability, the Court specifically allowed evidence of that Congressional meeting in a footnote: "If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose." *Gravel v. United States,* FN 18 at 629. The Tribal Court in *Shea* went even farther, allowing Tribal Council minutes into evidence to determine the Council's intent, even as it invoked legislative immunity to spare the Tribal Council from being deposed on those same questions. *Shea v. Mashantucket Pequot Tribal Council, Supra.* Here, the Court need only review the Tribal Council Meeting records to establish the fact that the Tribal Council did not create Resolution 2003-2008. Those are public records under Snoqualmie law. *Snoqualmie Tribal Code, Act 2.0, §5.0(j) and §9.0.* The Tribe has no need, nor desire, to inquire into what was actually said or done in the Tribal Council, or into any motivations for any legislative acts.

In fact, this Court has already made such an inquiry into a Tribal Council meeting, when it reviewed the recording of the August 12, 2010 meeting to find that the Tribal Council impermissibly determined which of many criminal investigations to refer for prosecution. If the Court can review the record of a meeting to determine what the Tribal Council actually did, it certainly can review a meeting to determine what the Tribal Council did not do.

The question before this Court, then, is whether the Defendants were acting within that "legitimate legislative sphere" when they performed the actions that gave rise to the criminal charges. In order for that to be true, the Resolution must be the result of action taken by the Tribal Council. If, as the Tribe asserts, Resolution 2003-2008 is not the result of any Tribal

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Council action at all, then the creation of the document claiming to be Resolution 2003-2008 was not a legislative act. If Resolution 2003-2008 is not the result of any Tribal Council action, then the creation of the document purporting to be a Tribal Council Resolution was an act by private individuals who are Tribal Council members, and legislative immunity does not protect them from criminal liability for those acts.

Legislators are not protected by legislative immunity when they use their position and power as legislators to commit acts that are beyond their authority as legislators. The seminal case on point is *Gravel v. United States,* 408 U.S. 606, 626 (1972). When U.S. Senator Mike Gravel, read the classified Pentagon Papers into the Congressional record during a subcommittee meeting, and then arranged for its publication by the private press, the U.S. Supreme Court distinguished between the two actions. Good or bad, legal or illegal, Senator Gravel's reading of classified documents in the Senate Subcommittee meeting was protected by legislative immunity. However, arranging for private publication of the Papers was not so protected, because it did not take place in the confines of a Congressional meeting, and it was not authorized by Congress:

> Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication. We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.
>
> *Gravel v. United States,* 408 U.S. 606, 626 (1972).

While a legislator doing a legislative act is not subject to criminal sanction for that act under laws of general application (*United States v. Johnson,* 383 U.S. 169), the Supreme Court made clear in *Gravel* that once a legislator's action is found *not* to be a legislative act, it is subject to criminal laws of general application:

> Article I, s 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech

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> or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, *it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.* If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause.
>
> *Ibid.*, at 626 (emphasis added).

Nor is testimony about non-legislative acts barred, even when there is a strong connection to protected legislative acts. "The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Brewster*, at 528. While the *Gravel* Court found that Senator Gravel's legislative immunity extended to his aide, the Court also made clear that testimony about these non-legislative actions was not barred by legislative immunity:

> The Speech or Debate Clause does not in our view extend immunity to [the] Senator's aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the alleged transaction, so long as legislative acts of the Senator are not impugned.
>
> *Ibid.*, at 626 - 627.

Much like Senator Gravel used his position on the Senate Subcommittee to access classified information and publish it outside of the legislative process, Defendants here used their positions on the Tribal Council to access the instruments of Tribal Council legislation, and employed them outside of the legislative process.

III. POLICY

This Court's ruling will have a major impact beyond its effect on the defendants. It will have precedential value in the Snoqualmie Tribal Court, and will be strongly persuasive in other

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Tribal Courts. Those effects should not be ignored. The Court's decision, if let stand as is, opens the door to further abuses of power and even more internal conflict in Tribal Councils.

The existing Tribal Court cases on this subject share the common theme of tribal members' dissatisfaction with decisions made by their Tribal Councils. But in each and every case, the Tribal Council actually passed the resolutions at issue. Good or bad, legal or illegal, the Councils actually took the actions. The situation here is qualitatively different. Here, the Tribal Council members did not pass the resolution at issue. It was created by a Tribal Secretary and her Council-member son, using the advantages and instrumentalities of their positions for their own purposes.

The Snoqualmie Tribal Secretary is a very powerful position. Not only the official custodian of the Tribe's records (*Snoqualmie Tribal Constitution, Article V, § 4*), the Tribal Secretary has important enumerated powers under the Tribal Constitution. In addition to very important non-Council duties such as administering Tribal elections, membership, Tribal archives, and public records, the Tribal Secretary has enormous responsibility for the Tribal Council meetings. She creates the agenda, records and prepares minutes, and maintains those records. She is the one who prepares and records the official acts of the Tribal Council, and she is the one who certifies the Tribal Council's official acts. *Snoqualmie Tribal Constitution, Article IX, §1.*

Because she was the Tribal Secretary, Defendant Arlene Ventura had the means to create the document without being questioned. It was her job to create resolution documents. She could ask the Tribal Administrator to create the language, without raising suspicion; that was part of her job. She could convince the Tribal Chairman to sign a blank resolution form for her (though she could not prevent him from dating it the day he signed it). She could sign and certify the false

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resolution as voted on and passed, and no one would be the wiser, because that was her job for real resolutions.

When, a few days later, the Tribal Council discovered the false resolution, it came together long enough to repudiate the agreement with Moss Adams, but not in time to prevent a bill owing the firm. It takes the votes of seven of nine members of the Snoqualmie Tribal Council to remove a member from office (*Snoqualmie Tribal Constitution, Article VII, §2)*; not surprisingly, since the Defendants are members of a powerful family, the Council could not come together to agree on sanctions against the perpetrators of the ruse.

Now this Court has said that it cannot look beyond the face of that false document, even into the public record. This decision opens the door to similar deceit by anyone in that very powerful position. If this decision stands, all it takes to get away with this criminal act is a Tribal Council in disarray - a situation that this Court has acknowledged is all too common.

IV. CONCLUSION

For the reasons stated above, the Tribe respectfully requests this Court reconsider its oral decision of March 31, 2011, to dismiss the charges on legislative immunity grounds.

RESPECTFULLY SUBMITTED this 6th day of April, 2011

Cynthia Tomkins

Snoqualmie Tribal Prosecutor

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ORAL ARGUMENT REQUESTED

IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. ARLENE VENTURA, Defendant.	NO. SNO-CR-0022-2010 DEFENDANT ARLENE VENTURA'S RESPONSE TO TRIBE'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

COMES NOW Defendant Arlene Ventura ("Mrs. Ventura") and respectfully submits this response to the Snoqualmie Indian Tribe's (the "Tribe") Motion for Reconsideration (the "Tribe's Motion") filed on April 6, 2011. This Court should deny the Tribe's Motion because it fails to meet the high standard this Court should use in considering such extraordinary requests. The Tribe's Motion encourages this Court to reexamine the narrow question of a legislative act's legitimacy—an issue that this Court expressly considered during oral argument on March 31, 2011 (the "Hearing"). Further, even if this Court felt compelled to reexamine the issue of Resolution 2003-2008's legitimacy, the Tribe's pervasive efforts to spoliate evidence related to this matter has rendered such an endeavor unworkable. Undertaking an operatively impossible reexamination would only serve to condone the Tribe's misconduct and undercut this Court's prior effort to promote fair prosecutorial tactics. If this Court is so inclined, Counsel for Mrs.

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Ventura would welcome oral arguments of the issues raised by the Tribe's Motion.

II. EVIDENCE RELIED UPON

1. Declaration of David H. Smith in Support of Defendant Arlene Ventura's Opposition to Motion for Reconsideration.

III. FACTUAL BACKGROUND

This Response incorporates by reference all facts set forth in the following:

1. Defendant's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds.
2. Defendant's Supplemental Motion to Dismiss on Spoliation of Evidence Grounds.

IV. LAW AND ARGUMENT

A. The Tribe's disfavored Motion does not establish grounds meriting reconsideration.

This Court should treat motions for reconsideration with disfavor. This Court has only adopted the Federal Rules of Criminal Procedure (FRCrP), which do not address motions for reconsideration. Nonetheless, this Court should refer to the Local Rules for the Western District for guidance on this specific matter. Local Rule 12(c)(11) provides:

> Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Fed. R. Crim. P. 12(c)(11) (Local Rules, W.D. Wash.). This Court should further be encouraged to adopt such a high bar based on the policy consideration of promoting judicial efficiency and finality.

The Tribe's Motion asserts that this Court's prior ruling was manifestly erroneous, but cites no new legal authority in support of its contention. Each of the cases cited in the Tribe's Motion were either cited in Mrs. Ventura's briefings or provided to this Court in response to its

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request for supplemental authority. In attempting to show manifest error, the Tribe argues that this Court failed to inquire into the threshold question before raising the shield of legislative immunity. Unfortunately for the Tribe, and as further discussed below, its argument evidences its poor comprehension of the relevant case law rather than any error by this Court.

B. This Court has already affirmed the legitimacy of Resolution 2003-2008.

The Tribe asserts—and Mrs. Ventura does not contest—that the doctrine of legislative immunity only applies to *legitimate* legislative acts. Mrs. Ventura also concurs that, in determining whether certain acts are protected by the doctrine of legislative immunity, this Court must first determine whether such acts are legitimate. This Court apparently agrees with this threshold requirement, because it expressly addressed Resolution 2003-2008's legitimacy at the Hearing.

The first case this Court cited at the Hearing, *Field v. Clark*, 143 U.S. 649 (1892), provides a simple test for determining whether a legislative act is legitimate. In *Field*, the appellants challenged the legitimacy of a tariff law. The appellants contended that the act, which appeared "upon its face, to have become a law in the mode prescribed by the constitution," was illegitimate. *Id.* at 698. Specifically, the appellants alleged that "a section of the bill, as it finally passed, was not in the bill authenticated by the signatures of the presiding officers of the respective houses of congress, and approved by the president." *Id.* at 699. The appellants sought to support the foregoing contention with several types of parol evidence, including "reports of committees of each house, reports of committees of conference, and other papers printed by authority of congress." *Id.* 669. The Supreme Court refused to engage in such a searching inquiry into Congress' internal operations, holding that federal courts must accept the certification of the presiding officers of the House and Senate that a bill passed both houses as "conclusive evidence" of the act's legitimacy. *Id.* at 673. The Supreme Court explained that once a bill is signed by the leaders of the House and Senate, it is an attested enrolled bill that "should be deemed complete and unimpeachable" for purposes of the Constitution's

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bicameralism requirement. *Id.* at 672. In other words, as a preliminary test, the Supreme Court looked to the *face of the bill* in order to determine its legitimacy. *Id.* at 672 ("[A]n enrolled act, thus authenticated, is *sufficient evidence of itself*—nothing to the contrary appearing upon its face—that it passed congress." (emphasis added)).

The *Field* court's reluctance to probe Congress' inner mechanics was motivated by significant concerns regarding separation of powers. *See, e.g., Field* at 675 ("Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should, at any and all times, be liable to be put in issue and impeached by the journals, loose papers of the evidence, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable.") (quoting *Sherman v. Store*, 30 Cal. 253, 276 (1866)). The Supreme Court recognized the dangers inherent in allowing the judiciary to reach past the face of a facially legitimate act where questions arise regarding the instruments. *Id.* at 498 (acknowledging that "[t]he evils that may result" from a facial legitimacy test "would be far less than those that would certainly result from a rule making the validity of congressional enactments depend" on Congress' internal procedural requirements). Endorsing the Judiciary's capacity in this manner would upset the essential balance of power between the coequal branches of government and would convert the courts into a projectile of political aggression.

This Court used the *Field* facial test to determine the legitimacy of Resolution 2003-2008 before raising the shield of legislative immunity. An extensive discussion of the *Field* test and its application to Resolution 2003-2008 was unnecessary; the test is relatively simple and the Tribe has never called the instrument's *facial* legitimacy into question. Applying the *Field* test, the resolution's outward manifestations of having been passed by the Tribal Council (e.g., the resolution's form, representations and signatures) is "sufficient evidence of itself" and the inquiry is at its end. *Field*, 143 U.S. at 672. Further, as the Mrs. Ventura has underscored numerous times, the Tribe's own discovery confirms that Tribal Administrator Matt Mattson—

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not Mrs. Ventura—drafted Resolution 2003-2008. Declaration of David Smith in Support of Defendant Arlene Ventura's Response to Tribe's Motion for Reconsideration (hereinafter "Smith Decl."), ¶ 8. This extrinsic fact only serves to further establish the facial validity of the resolution. The Tribe's Motion makes no additional effort to question this Court's application of the doctrine of legislative immunity.

While this Court abstained from exhaustively instructing the parties on *Field* during oral argument, the Tribe had an independent and reasonable duty to review the case before assailing this Court's ruling. The Tribe's unbridled haste in submitting its Motion before this Court has even issued a written order further wastes judicial resources and frustrates Mrs. Ventura's attempt to fulfill her legislative duties. This Court should deny the Tribe's Motion because it falls far short of establishing the required manifest error and blatantly ignores the ground upon which this Court has already trod.

C. The Tribe's spoliation of evidence would prevent an improperly extensive inquiry into Resolution 2003-2008's legitimacy.

Even if this Court could look beyond the face of Resolution 2003-2008 to determine its legitimacy, the Tribe's spoliation of evidence has undermined the practicality of such an undertaking. The Tribe's suggestion that this Court could rely on the integrity of the Council's records and other parol evidence at this juncture—in light of the Tribe's serial discovery abuses—is farcical. As explained below, the Tribe has allowed so many of the key documents related to Resolution 2003-2008 to be removed, altered or destroyed that the evidentiary record is unreliable. In a self-defeating development, the Tribe's own misconduct has eroded the very route down which it now encourages this Court to proceed.

The Tribe's failure to preserve material evidence relevant to the passage of Resolution 2003-2008 dates to the beginning of Mrs. Ventura's persecution. The following examples provide a brief but frustrating glimpse of the Tribe's campaign of spoliation:

- ***Disappearance or Destruction of Council Records***: In a decision that resonates

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with impropriety, the Tribe allowed Council member Nina Repin to occupy Mrs. Ventura's office after Mrs. Ventura was barred from entering the same. Smith Decl., ¶2. Ms. Repin has previously admitted to having hidden or destroyed official Tribal records. *Id.* at ¶ 3. Ms. Repin has admitted that these actions were criminal. *Id.* The politico-familial tension between Mrs. Ventura's and Ms. Repin's families is well known. *Astonishingly*, the official files for the Council meetings held during December 2008 and maintained by Mrs. Ventura in her role as Council Secretary have been removed, altered or destroyed in the wake of Ms. Repin's new tenancy. *Id.* at ¶ 4.

- ***Disappearance or Destruction of Council Correspondence***: Despite ample opportunity, the Tribe failed to produce material exculpatory emails sent by Mrs. Ventura's co-defendant, Kanium Ventura ("Mr. Ventura"). During January 2009, Mr. Ventura sent an email to all Council members discouraging them from recanting on their decision to proceed with the Moss Adams audit. *Id.* at ¶ 5. Such emails are strong circumstantial evidence that the Council in fact voted on Resolution 2003-2008. The Tribe has never produced these emails or any other emails that controvert Mr. Ventura's assertion that the Council passed this resolution.
- ***Defiance of this Court's Inspection Order***: The Tribe's parade of abuse has proceeded in the face of this Court's effort to manage the discovery process and provide Mrs. Ventura with a fair trial. After this Court issued its December 2010 oral inspection order, the Tribal Prosecutor and tribal representatives accessed and ultimately removed Mrs. Ventura's computer from the premises. *Id.* at ¶ 6. At the time of this removal, the Prosecutor was fully aware of Mrs. Ventura's contention that the computer contained information material to Mrs. Ventura's defense. *Id.* at ¶ 6. The Prosecutor had a clear duty to preserve such evidence

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and this duty would have been simple to execute. Subsequent forensic analysis confirms that the contents of Mrs. Ventura's hard drive have been deliberately altered or destroyed. *Id.* at ¶ 7.

In the long shadow of the foregoing abuses (further explained in Defendant's Supplementary Motion to Dismiss on Spoliation of Evidence Grounds) the Tribe cannot propose—in good faith—that this Court can now determine the legitimacy of Resolution 2003-2008 based on such a sullied evidentiary record.

This Court sent a clear message to the Tribe at the Hearing: if the Tribe wishes to act as a valid government, it must prosecute defendants fairly. This Court has already determined that the Prosecutor engaged in misconduct and that the Council interfered with this Court's operations. The Tribe's evidentiary abuses further underscore the unfairness that has embraced this case from its outset. This Court should now recognize the Tribe's Motion as a valuable opportunity to champion judicial consistency and further encourage stable governance. In order for this Court to accomplish this task, the Tribe's Motion must be denied.

V. CONCLUSION

In light of the foregoing, this Court should grant this Motion and dismiss the charges against Mrs. Ventura.

DATED this 11th day of April, 2011.

GARVEY SCHUBERT BARER

By */s/ David H. Smith*
David H. Smith, Bar # 10721
Member #STC201023

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The Honorable Richard Woodrow

IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. KANIUM VENTURA, (d.o.b. 06/12/1967) Defendant.	NO. SNO-CR-0021-2010 DEFENDANT'S RESPONSE TO TRIBE'S MOTION FOR RECONSIDERATION

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Kanium Ventura hereby appears through counsel and respectfully moves this Court to deny the Tribe's Motion for Reconsideration filed on April 6, 2011. The Tribe's Motion for Reconsideration fails to demonstrate the "manifest error" or "new facts or legal authority which could not have been brought [to the court's] attention earlier with reasonable diligence," as required by Fed. R. Crim. P. 12(c)(11) (Local Rules, W.D. Wash.). Instead, the Tribe's Motion for Reconsideration merely restates previously-argued theories and offers questionable policy considerations. Additionally, new defense evidence, not previously laid before the Court, reaffirms the role that a Tribal Council Member, the Tribal Prosecutor, and the Tribal Police Chief had in spoliation of evidence. For all these reasons, the Motion for Reconsideration should be denied.

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II. STATEMENT OF FACTS AND CASE

On March 8, 2011, the Tribal Court heard oral arguments on a series of defense motions to dismiss pertaining to legislative immunity, prosecutorial misconduct, and due process violations. At the conclusion of oral arguments, the Tribal Court preliminarily denied all of the Defendants' pending motions to dismiss, but requested additional briefing. On March 31, 2011, the Tribal Court issued a verbal decision that dismissed the charges against the Defendants based on legislative immunity and the repeated interference by the Tribal Council in the execution of this case. On April 6, 2011, the Tribe filed a Motion for Reconsideration.

The declaration of Mr. Quanah Spencer, attached, shows that:

1. On December 21, 2010, Judge Montoya-Lewis verbally granted the defense motion to permit inspection of his shared office space located at the Snoqualmie Tribal Administration Building in Snoqualmie, WA. This ordered inspection was to occur before the close of business on December 31, 2010. This verbal order was supplemented with a written order on December 23, 2010. Spencer decl., ¶2.

2. To effectuate Judge Montoya-Lewis' order, Mr. Spencer made multiple contacts with the Snoqualmie Tribal Prosecutor and officials in Tribal Law Enforcement. On December 27, 2010, Mr. Spencer wrote a letter to the Tribal Prosecutor seeking access to the office on December 29, 2010. On December 28, 2010, the following day, Mr. Spencer wrote an email to the Tribal Prosecutor similarly seeking access to the office on December 29, 2010. The email also noted that Mr. Spencer had left messages for her on her office telephone. Spencer decl., ¶3.

3. In response to Mr. Spencer's letters of December 27, 2010 and December 28, 2010, the Tribal Prosecutor wrote Mr. Spencer by email on December 28, 2010 stating that the order permitting inspection was "vague on it's face raising many more questions than answers." Additionally, the Tribal Prosecutor stated that an email inquiry to Tribal Law Enforcement had resulted in an automated response indicating that the offices were closed until January 3, 2011. Spencer decl., ¶4.

4. In response to the Tribal Prosecutor's email of December 28, 2010, David Smith, counsel for Co-Defendant, wrote an email to the Tribal Prosecutor urging her to effectuate the court's order. Spencer decl., ¶5.

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5. On January 6, 2011, after the expiration of the court's time for inspection and the recusal of Judge Montoya-Lewis, the Tribal Prosecutor wrote counsel for both Defendants stating that the office would be available for inspection on January 10th, 2011 or January 12th, 2011. Spencer decl., ¶6.

6. In response to the Tribal Prosecutor's letter of January 6, 2011, Mr. Spencer wrote a letter dated January 7, 2011, where Mr. Spencer informed the Tribal Prosecutor that the proposed dates for inspection did not comprise sufficient time to arrange for the presence of experts and placed unacceptable conditions on the access to the office. Spencer decl., ¶7.

7. On February 16, 2011, Mr. Spencer filed a Motion to Dismiss Based on Due Process Violations on behalf of his client, Mr. Kanium Ventura. On March 8, 2011, the Tribal Court preliminarily dismissed all of the Defendant's pending motions to dismiss, but requested additional briefing and/or information on the subject. Spencer decl., ¶8.

8. On March 22, 2011, Mr. Spencer participated in interviews with Snoqualmie Police Chief Benito Cervantes and Snoqualmie Tribal IT Director Kellie Kvasnikoff. These interviews occurred at the Snoqualmie Tribal Headquarters in Snoqualmie, WA. Spencer decl., ¶9.

9. In addition to the interview subjects, also present at the March 22, 2011 interviews were co-counsel for Kanium and Arlene Ventura, Mr. Ernest Barth (a private investigator for Kanium and Arlene Ventura), Ms. Allison Goodman (a technician with eDiscovery, Inc., retained by Kanium and Arlene Ventura for computer forensics), and the Tribal Prosecutor. Spencer decl., ¶10.

10. The interviews of Chief Cervantes and Mr. Kvasnikoff were audio recorded. Spencer decl., ¶11.

11. During the interviews with Chief Cervantes, Chief Cervantes made the following statements:

a.
Q) "Mr. Cervantes, were you aware that in December of 2010, the Tribal Court had issued an order in the cases involving Kanium and Arlene Ventura allowing the defendants to inspect their offices?
A) "Are we – are we talking about the order by Judge – um – Montoya?"
Q) "Yes."
A) "Yes, sir." Spencer decl., ¶12a.

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b.
Q) "In your capacity as the Chief of Police for the Tribe, are you able to immediately tell me right now where all of your sovereign Tribal property is located?"
A) "No."
Q) "Do you have a map of that somewhere?"
A) "No." Spencer decl., ¶12b.

c.
Q) "So there's a question as to whether this building here within the four walls of this property is sovereign Tribal property."
A) "The only way that I can describe this issue is many of the lawyers have taken on this exact task and I have asked that question – um – a few times as even recently and it is a gray area. I do not know how to answer that question." Spencer decl., ¶12c.

d.
Q) "I'm asking specifically if you know whether or not people had access to Arlene Ventura's office sometime after November 13 through February when you obtained a master key."
A) "Yes, during – I was – I was present during a public disclosure request in December. I did not have access, a key to the office. I did not possess a key to the secretary's office until – and I – Joe Mullen would have the exact date of our – the bids for our rekeying much of the building and the issuance of our master keys." Spencer decl., ¶12d.

e.
[Regarding office entry in December]
Q) "What did you do?"
A) "Uh, basically just copied documents that I was directed to copy."
Q) "Who directed you to copy them?"
A) "Uh, Nina Repin, our Secretary." Spencer decl., ¶12e.

f.
[Regarding office entry in December]
Q) "Who participated in the public disclosure inspection?"
A) "Uh, myself, Nina Repin. Fuzzy Fletcher was present but he did not enter the office. Um, Cynthia Tompkins and Christian, they were present." Spencer decl., ¶12f.

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g.
[Regarding office entry in December]
Q) "So what day was that?"
A) "I believe it was the 19th of December, I think. I could be wrong. It's – it was our Christmas party and I think it was a Wednesday." Spencer decl., ¶12g.

h.
[Regarding office entry in December]
Q) "So while you were copying these documents, do you know what was going on in the office?"
A) "No." Spencer decl., ¶12h.

i.
[Regarding office entry in December]
Q) "The documents you – how many times did you leave the office to copy?"
A) "Oh several times."
Q) "More than three?"
A) "Oh yes, absolutely."
Q) "More than five?"
A) "Yes."
Q) "More than ten?"
A) "Yes."
Q) "More than twenty?"
A) "Uh – possibly."
Q) "So you made over – in excess of 20 trips out of the office with documents in your hand elsewhere on the floor to copy documents."
A) "Yes."
Q) "While you were doing that, the others remained in the office."
A) "Yes."
Q) "You don't know what they were doing while you were outside the office."
A) "No." Spencer decl., ¶12i.

j.
[Regarding office entry in December]
Q) "When you copied these documents, what did you do with them?"
A) "I gave them – I returned them to Nina Repin."
Q) "Okay. The copies and the originals."
A) "Yes."
Q) "What did Nina do with the originals?"
A) "I could not begin to tell you what happened with every single request."
Q) "Did you see her return documents to their original locations if any?"
A) "Oh I'm sure I must have but I – I can't specifically say File 1 was returned to – to any specific location or cabinet or..." Spencer decl., ¶12j.

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k.
[Regarding office entry in December]
Q) "Did someone make a record?"
A) "There were – um – I made a – uh – a record of how many copies I copied for her on specific things."
Q) "And where is that record?
A) "That was – uh – left in the Secretary's office."
Q) "And do you know if it's still there?"
A) "I have no idea." Spencer decl., ¶12k.

l.
Q) "Do you know why access was allowed without defense counsel for the defendants being present?"
A) "I have no idea." Spencer decl., ¶12l.

m.
Q) "So we have two separate events. And who was present at the February 11th event?
A) "No one but myself."
Q) "And what did you do when you went in there?"
A) "Videotaped, photographed, just documented as best I could the contents of – not the contents, the condition of the office." Spencer decl., ¶12m.

n.
Q) "Were the computers for the – there were desktop computers in the room when you went in to do the public disclosure access, right?"
A) "Yes."
Q) "Were they still there when you came back on February 11th?"
A) "No."
Q) "They had been removed?"
A) "Yes."
Q) "Do you know who removed them?
A) "Yes."
Q) "Who removed them?"
A) "Our – uh – IT director."
Q) "Kelly – um – um [inaudible]?"
A) "Yes."
Q) "Is that – is that who?"
A) "That's correct."
Q) "How did you know that he removed them?"
A) "I was present for that, that day. I was preset during that day."
Q) "What day did that take place?"
A) "I believe that took place on the 5th of January." Spencer decl., ¶12n.

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o.
Q) "How many times have you been in that office since the December Christmas party?"
A) "To be honest with you, I couldn't tell you whether it would be four or five." Spencer decl., ¶12o.

p.
Q) "So – at the risk of confusing everybody even more, so I – I've got the dates as around December 19th, that would be the day of the Christmas party."
A) "The Christmas party."
Q) "Right?"
A) "Mm-hmm."
Q) "We have January 5th. That was when Kelly went in and removed the PCs."
A) "Mm-hmm."
Q) "Then we have February 11th."
A) "Mm-hmm."
Q) "Which was the – I thought you said it was the inspection where you went in and – and videotaped."
A) "The inventory, David."
Q) "The inventory."
A) "I'm not sure why we're using the word inspection for public disclosure request. If we could just use public disclosure request..."
Q) "Okay."
A) "...and leave inventory to the resolution, the Order of the resolution. And – to be honest with you, I could not tell you that honestly those were the only times." Spencer decl., ¶12p.

q.
Q) "Okay. Well, can you tell me who you suspect or believe may have had access?"
A) "I believe there were other people that had access, a key to the Tribal Secretary's office. I cannot tell you who was issued a key to that office."
Q) "There is no key control? Do you have a key control policy, program, inventory, how many keys are issued for this by number? Is anybody in control of the keys?"
A) "Um, our facilities director would be." Spencer decl., ¶12q.

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r.
Q) "Um, there's two things we want to – let me start with – uh – quickly on procedure. You guys have – uh – you conduct investigations in your capacity as chief of police, or you're supposed to, correct?"
A) "That's correct."
Q) Do you have an investigation protocol documented for the department or for you?"
A) "Currently we don't."
Q) "Do you have any kind of a guideline as to what you will and will not investigate?"
A) "Yes."
Q) "And where is that at?"
A) "Through our Tribal Prosecutor."
Q) "And is that a written guideline, or simply verbal?"
A) "Simply verbal." Spencer decl., ¶12r.

13. During the interviews with Mr. Kvasnikoff, Mr. Kvasnikoff made the following statements:

a.
Q) "Can you give me a date of when this happened?"
[Multiple people talking and inaudible comments]
A) "December – actually it was like – um – December 23rd I believe. It was during our Christmas party." Spencer decl., ¶13a.

b.
Q) "What was the impetus? I-I guess I missed this? What was the impetus for actually going and physically and taking Arlene's computer?"
A) "Um, our policy. The um – the Tribe's – um – IT policy – um – and there is a – um – reasonable grounds to believe that the security of the account itself has been jeopardized or to seal an account in evidence within because there's reason to believe that criminal or other charges will be laid against you or the account." Spencer decl., ¶13b.

c.
Q) "Have you heard of the concept of what lawyers would call a litigation hold or a preservation request?"
A) "I-I-I would be familiar with that. Yeah."
Q) "Okay, is there a policy for how one would implement a litigation hold or a preservation request?"
A) "Not that I'm aware of. There – there - there may be in – um – in the administrative – uh – the higher levels, but as far as – um – the IT department goes, we don't have anything specifically designed – um – towards – uh – legal requests." Spencer decl., ¶13c.

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III. LAW AND ARGUMENT

The Tribal Court's ruling on March 31, 2011, dismissing the charges against the Defendants, was well-grounded in law and fact. The Tribe's Motion for Reconsideration fails to meet the high standard necessary for a successful reconsideration of a thoroughly-briefed and argued question. Accordingly, it should be denied.

A. The Motion for Reconsideration fails the threshold tests of Fed. R. Crim. P. 12(c)(11).

The Tribe's Motion for Reconsideration fails on a number of grounds. Initially, it fails because it does not meet the requirements of Fed. R. Crim. P. 12(c)(11) (Local Rules, W.D. Wash.). Rule 12(c)(11) outlines the requirements for a motion for reconsideration and explicitly states "Motions for reconsideration are disfavored." The Rule goes on to state that "The court will ordinarily deny such motions in the absence of a showing of *manifest error* in the prior ruling or a showing of *new facts or legal authority* which could not have been brought to its attention earlier with reasonable diligence" (emphasis added). Fed. R. Crim. P. 12(c)(11)(A). The Rule's text outlines two threshold requirements for reconsideration: 1) "Manifest error"; or 2) "new facts or legal authority which could not have been brought to [the court's] attention earlier with reasonable diligence." Neither of these two thresholds are satisfied by the Tribe's Motion for Reconsideration.

The Motion for Reconsideration, while somewhat unspecific, does not appear to argue that the Tribal Court engaged in "manifest error" in making its previous decision. Nor does the Motion for Reconsideration offer any "new facts." Instead, the Tribe's Motion for Reconsideration relies upon the argument that *if* the defendants were acting outside the scope of their legislative duties, *then* their alleged acts are not protected legislative acts. *See Tribe's Motion for Reconsideration,* at 3 ("But if, as the Tribe contends, Defendants acted entirely on their own in the creation of Resolution 2003-2008, Defendants were not acting as legislators,

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and the protections afforded by legislative immunity do not apply"). This argument, however, does not comprise new "legal authority," or, indeed, even a new legal theory. Instead, the Tribe has argued that the Defendants acted outside the scope of their duties and, consequently, that their actions are not protected by legislative immunity, since the beginning of this case. *See e.g. Tribe's Response to Defendant's Motion to Dismiss*, at 3 ("Sovereign immunity is not applicable because defendants' acts charged in the Criminal Complaint were outside the scope of their duties as Tribal Council members"). Indeed, the Tribe's theory of the case rests on the presumption that the Defendants acted outside their scope of authority. The Tribe's Motion for Reconsideration builds again on this faulty premise to argue that the alleged acts are not protected by legislative immunity. In addition to being incorrect, as demonstrated in Section C below, this argument has been oft-repeated throughout this case and, as such, does not comprise the new "legal authority" necessary for reconsideration under Fed. R. Crim. P. 12(c)(11). Consequently, the Motion for Reconsideration should be denied.

B. The Motion for Reconsideration does not address the Tribal Council's interference in the actions of the Tribal Court.

The Tribe's Motion for Reconsideration requests the Tribal Court to "reconsider its decision to dismiss the above cases on legislative immunity grounds." *Tribe's Motion for Reconsideration*, at 1. The Motion for Reconsideration further explains that fears of precedential value and policy considerations demand reconsideration. *Id.*, at 8-10. The Motion for Reconsideration is not clear, however, whether it seeks *only* reconsideration of the case based on legislative immunity, or whether it also seeks reconsideration of the grounds for dismissal rooted in the Tribal Council's interference with the Defendants' ability to receive a fair and impartial trial. If the former, even if reconsideration were successful, the dismissal of the charges based on the Tribal Council's interference with the actions of the Tribal Court

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remains unimpaired. If the latter, the Tribe offers no "new facts" or new "legal authority" for this argument. In either event, the charges appropriately remain dismissed.

If the Tribe is urging the Court to reconsider the grounds for dismissal based on the Tribe's interference with the Defendants' ability to receive a fair and impartial trial, there is newly-discovered defense evidence that pertains to this issue. A strongly litigated point in this case has been the Defendants' inspection of their shared office space and the claims of evidence spoliation by the Tribe that are related to it. Throughout this case, the Tribe was intimately aware of the importance placed by defense on the materials contained in the office shared by Kanium and Arlene Ventura. *See* Spencer decl., ¶¶4-7, Exhibits 1, 3-8. Indeed, defense engaged in oral arguments on the subject, which resulted in Judge Montoya-Lewis' order granting inspection of the office. *See* Spencer decl., ¶2, Exhibit 2. Furthermore, defense sent multiple letters on the subject to the Prosecutor in the days and weeks following the entry of Judge Montoya-Lewis' order requesting access to the office. *See* Spencer decl., ¶¶3-7, Exhibits 3-8.

Despite the Tribe's understanding of the importance of this evidence, recent interviews with Tribal Police Chief Cervantes and Tribal IT Director Kvasnikoff conclusively demonstrate intimate involvement by at least one member of the Tribal Council, the Tribal Prosecutor, and the Tribal Police Chief in evidence spoliation. Additionally, Chief Cervantes' and Director Kvasnikoff's statements demonstrate that an unknown series of entries were made by Tribal employees into the shared office of Kanium and Arlene Ventura *after* the entry of Judge Montoya-Lewis' order permitting inspection of the office by the Defendant and Co-Defendant. *See* Spencer decl., ¶¶12f, 12g, 12m, 12o, 12p. Among these entries included at least one involving Tribal Council Member Nina Repin, the Tribal Prosecutor, and Chief Cervantes. *See* Spencer decl., ¶¶12d, 12e, 12f. During this entry, Council Member Repin

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reportedly directed Chief Cervantes to make in excess of twenty trips out of the room to photocopy select, unknown documents. *See* Spencer decl., ¶¶12e, 12i. During these absences, Council Member Repin and the Tribal Prosecutor's activities in the office were unobserved. *See* Spencer decl., ¶12i. Furthermore, there was no record of what documents were copied, where they went, or what became of the originals. *See* Spencer decl., ¶¶12j, 12k.

This entry by Chief Cervantes, the Tribal Prosecutor, and Council Member Repin is not the only entry into the office. In fact, Chief Cervantes' and Mr. Kvasnikoff's statements make clear that numerous other entries into the office occurred subsequent to Judge Montoya-Lewis' December 21, 2010 order granting inspection of the office by the Defendants.[1] *See* Spencer decl., ¶¶12m, 12n, 12o, 12p, 13a. These acts of spoliation are rendered even more damaging as Chief Cervantes' and Mr. Kvasnikoff's statements reveal that the Tribal Police Department possesses no established procedures or protocol for carrying out criminal investigations, while the Tribal IT Department possesses no policy regarding implementing a preservation of evidence request in lieu of impending litigation. *See* Spencer decl., ¶¶12r, 13b, 13c. Taken together, the statements indicate that, not only did spoliation of evidence occur at the highest levels of Tribal leadership, but that there were no institutional protections in place to prevent such spoliation.

The statements by Chief Cervantes and Mr. Kvasnikoff provide important support for the order dismissing the charges against the Defendants. They conclusively demonstrate the intimate involvement in evidence spoliation by Tribal leadership, the Tribal Prosecutor, and Tribal employees. Of particular concern to the Defendants is the fact that the Tribal

[1] Chief Cervantes' statements indicate some confusion about the date of the December entry involving Council Member Repin and the Tribal Prosecutor. While he states he that "it was the 19th of December, I think. I could be wrong. It's – it was our Christmas party and I think it was a Wednesday," December 19th was, in fact, a Sunday. Mr. Kvasnikoff's statement, however, clarifies that the Tribe's Christmas party occurred on December 23rd – two days after Judge Montoya-Lewis' order granting the requested inspection. *See* Spencer decl., ¶¶12g, 13a.

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Prosecutor, while aware of Judge Montoya-Lewis' order and the Defendants' oft-repeated demand for access to the office, was, according to Chief Cervantes, herself involved in the entry to the office and removal of documents. Taken together, this evidence strongly supports the dismissal of charges against the Defendants due to the interference in the ability of the Defendants to receive and fair and impartial trial.

C. The Tribe's argument fails to recognize the scope of legislative immunity.

Even if the Tribal Court liberally construes the Tribe's Motion for Reconsideration as comprising new "legal authority," the Tribe's argument fails. As noted above, the Tribe's argument throughout this case may be summarized by stating that *if* the Defendants acted outside the scope of their legislative duties, *then* their alleged acts are not protected legislative acts. As examined earlier, this is not a novel claim by the Tribe. Now, however, the Tribe claims that the threshold question is whether the acts are "legislative acts" and, from there, attempts to backtrack to the question of whether the Defendants acted outside the scope of their authority. *Tribe's Motion for Reconsideration*, at 2. Regardless of how the Tribe packages and repackages this argument, however, it still fails because it does not recognize the proper scope of legislative authority.

Regardless of which version of its case theory the Tribe presents, legislative immunity provides absolute immunity for the Defendants in this case. The scope of protected legislative duties is very broad. *See e.g. Smith v. Confederated Salish and Kootenai Tribes*, AP-94-027-CV (1996); *U.S. v. Johnson*, 383 U.S. 169, 179-180 (1966). Indeed, the language cited by the Tribe in the Motion for Reconsideration from *U.S. v. Brewster* is applicable: "In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts." *U.S. v. Brewster*, 408 U.S. 501, at 512 (1972). Rephrased to be applicable in the current

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context, the *Brewster* holding may be properly understood to mean that the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the Tribal Council in the performance of official duties and into the motivation for those acts. Here, the Defendants are indisputably elected members of the Tribal Council and the alleged acts are intimately related with core legislative activity. Consequently, the Defendants possess the broad legislative immunity afforded by the Speech and Debate clause.

The legislative immunity possessed by the Defendants is not defeated by a hostile executive or judiciary's claim of bad faith. *See Johnson*, 383 U.S., at 180 ("The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry."). *Id.* Much of the Tribe's argument seems to rest on the precept that the Defendants must have done something wrong and, therefore, must be prosecutable. In addition to being incompatible with the facts of this case, this fails to recognize that the appropriate remedy for situations like this rests, not with the courts, but with the ballot box or with the internal disciplinary procedures afforded the Council by Article VII of the Snoqualmie Tribal Constitution.

D. Strong policy considerations support dismissal with prejudice.

Finally, the Tribe offers a variety of policy considerations that, in its view, warrants reconsideration. These policy considerations include the specter of future Tribal Council leaders abusing their position and the Prosecutor's office rendered powerless to seek justice. These fears are unfounded and ignore the significant policy considerations that support the ruling to dismiss.

As an initial matter, as indicated by the relative scarcity of cases addressing this issue, situations involving the prosecution of legislators and protected legislative immunity are

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comparatively rare. As a result, the dangers cited by the Tribal Prosecutor are minor. Additionally, the policy considerations cited by the Tribe are more than outmatched by the significant policy considerations supporting application of the Speech and Debate Clause. Absent this protection, legislators are subject to the whims of a hostile executive or judiciary. As the Tribal Council itself has acknowledged through passage of Tribal Council Resolution #22-2011, separation of powers is important. ("WHEREAS the Tribal Council recognizes the importance of the separation of the Legislative and Judicial branches of the Tribal government."). Essential to any separation of powers scheme is the protection for legislators to act as legislators. As such, the policy considerations are weighty, applicable, and strongly support dismissal of the charges.

IV. CONCLUSION

For all of the reasons identified above, the Tribe's Motion for Reconsideration must be denied.

DATED this 8th day of April, 2011.

s/Quanah M. Spencer
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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Kanim) (dob: June 12, 1967) Defendant.	No. SNO-CR-0021-2010 Police # STPS-10-0014 **TRIBE'S REPLY TO DEFENDANTS' ANSWERS TO TRIBE'S MOTION FOR RECONSIDERATION**

SNOQUALMIE INDIAN TRIBE Plaintiff, vs VENTURA, Arlene (dob: August 5, 1942) Defendant.	No. SNO-CR-0022-2010 Police # STPS-10-0015 **TRIBE'S REPLY TO DEFENDANTS' ANSWERS TO TRIBE'S MOTION FOR RECONSIDERATION**

COMES NOW the Tribe, by and through its prosecutor, Cynthia Tomkins, and respectfully asks the Court to grant its Motion for Reconsideration of its decision to dismiss the above cases on legislative immunity grounds. The Tribe's Motion for Reconsideration was the Tribe's first opportunity to present the legal arguments and authority concerning legislative immunity to the Court. Further, as federal law is not binding on this Court, and as the circumstances of Tribal governance differ significantly from United States governance as reflected in the United States Supreme Court's decision in *Marshall Field & Co. v. Clark* (143 U.S. 649 (1892)), the tribe respectfully asks this Court to reconsider its reliance on that case.

Defendant Kanium Ventura's Reply misstates the actions of this Court. This Court did not ask for additional briefings after it made its initial motions rulings on March 8, 2011. On the contrary, when the Court asked for additional case law on legislative immunity, Judge Woodrow

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specifically stated that he did *not* want any additional briefing. In spite of this request, each Defendant filed a Motion to Dismiss on Legislative Immunity Grounds on the evening of March 30, 2011, the night before the scheduled status hearing at 10 a.m. on March 31. At the opening of that March 31 hearing, Judge Woodrow acknowledged that the Tribe had not had the opportunity to respond to those motions, and stated that the Tribe could do so. Because of the subsequent dismissal, the Tribe was left with arguing the issue of legislative immunity in a Motion to Reconsider.

1. Legislative Immunity

Defendant Kanium Ventura's claim that the issue of legislative immunity has been argued "since the beginning of this case" (*Def. Reply, p.10, l.4*) results from Defendant's confusing legislative immunity with sovereign immunity. The issue of sovereign immunity was indeed raised by the defense in its earliest Motion to Dismiss (*see Defendant Kanium Ventura's Motion to Dismiss*, dated November 29, 2010, denied on March 8, 2011). While the title "Legislative Immunity" was used in that motion, the motion contained no legal argument for legislative immunity at all. All the case law and argument concerned sovereign immunity. But legislative immunity is a very different issue, as Defendant's Motion to Dismiss filed on March 30, 2011 demonstrates.

There are a number of distinctions between the two legal concepts, including the fact that sovereign immunity applies to any Tribal employee or official when acting within their scope of employment (see *See Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir.1985), and legislative immunity applies only to members of the Tribe's elected legislative body. *Runs After v. U.S.*, 766 F.2d 347 (8th Cir. 1985). The essential difference here, however, is the threshold determination of applicability. Sovereign immunity covers a Tribal employee for any act done that was within the employee's scope of authority. *United States v. Yakima Tribal*

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Court, 806 F.2d 853 (9th Cir. 1986). Legislative immunity, in contrast, covers the Tribal legislator only for those acts that are done within a legislative meeting, as part of the legislative process. *United States v. Brewster,* 408 U.S. 501, 512 (1972). To ascertain the applicability of either sort of immunity, the act at issue, and its context, must be examined. But the legal criteria are very different.

For sovereign immunity, the question at issue was: were the acts with which Defendants were charged within the scope of their authority as Tribal Council members? The Court rightly found that they were not, and in fact Defendants have never claimed that they were. Defendants did not, and do not, argue that forgery and deception are within the scope of their authority. Their sole argument is that they did not engage in those acts of forgery and deception.

For legislative immunity, the question at issue is: was Resolution 2003-2008 created within a Tribal Council meeting? The scope of protected legislative duties may be very broad, but the immunity only applies to acts performed on the floor of the legislature. Acts involving legislative duties performed outside of the legislature itself are not protected, even when done by an elected legislator: Legislative immunity ends at the Council chamber door. *See Gravel v. United States,* 408 U.S. 606 (1972); *Eastland v. U. S. Servicemen's Fund,* 421 U.S. 491, 503 (1975); *Kilbourn v. Thompson,* 103 U.S. 168, 26 L.Ed. 377 (1881). It makes no difference that Defendants are elected members of the Tribal Council, if they created Resolution 2003-2008 outside of a Tribal Council meeting. Nor does it matter how closely related to real legislation that Resolution may be, if it was not itself a legitimate legislative act. *Gravel v. United States,* 408 U.S at 626; *see also United States v. Johnson,* 383 U.S. 169, 86 S.Ct. 749 (1966).

2. Legitimate Legislative Acts

Defendant Arlene Ventura argues that the Tribe did not address the Court's reliance on *Marshall Field & Co. v. Clark,* 143 U.S. 649 (1892). In fact, the *Marshall Field* test is not only

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distinguishable, it is an excellent example of federal law that is incompatible with the realities of Tribal governance and should not be followed by this Court.

The issue in *Field v. Clark* is distinguishable from the issue before this Court. In *Field*, the question was whether a bill had actually passed the U. S. Congress in the form that it was finally authenticated. The U.S. Supreme Court found that, although the Constitution required passage by Congress for a bill to be valid regardless of the attestations attached to it (*Marshall Field v. Clark*, 143 U.S. 649 at 673), it could not examine the legislative record to determine *what* exactly had been passed by Congress. *Marshall Field v. Clark*, 143 U.S. 649 (emphasis added). This "enrolled bill rule" is distinguishable from the present case on two grounds. First, the application of the rule invariably concerns one of two issues: a challenge to the contents of a bill, or as the Second Circuit put it, "a claim that seeks to impeach the authenticated text of an enrolled bill." (*OneSimpleLoan v. U.S. Secretary of Educ.*, 496 F.3d 197, 207 (2nd Cir. 2007), where the House and Senate versions of the challenged bill did not contain exactly the same text). The other issue the enrolled bill cases concern is whether proper procedure was followed in their passage (*see U.S. v. Farmer*, 583 F.3d 131 (2nd Cir. 2009), claiming that a proper quorum was not present in Congress; *U.S. v. Stahl*, 792 F.2d 1438 (9th Cir. 1986), one of a line of income tax evasion cases challenging the validity of the Sixteenth Amendment on procedural grounds). But the actual *existence* of the challenged legislation is not in doubt. Here, the question is whether the bill, Resolution 2003-2008, ever existed in the Snoqualmie Tribal Council at all.

Second, *Field v. Clark* and its progeny concern a legislative structure that differs significantly from that of the Snoqualmie Tribe. The United States Congress is a bicameral legislature, and the Snoqualmie Tribal Council a unicameral one. The enrolled bill rule states that courts must "'accept, as having passed Congress, all bills authenticated' by the signatures of the presiding officers of the House *and* Senate" *OneSimpleLoan*, 496 F.3d at 207, quoting *Field v.*

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Clark, 143 U.S. at 672 (*emphasis added*). Here, there is not the added security of two separate legislative bodies with two different presiding officers, both of whom must sign off on a bill before sending it to yet another separate entity, the Executive. Here, there is only the Tribal Council.

Of primary concern in *Field v. Clark* was the separation of powers, and "[t]he respect due to coequal and independent departments [of government]." *Field v. Clark*, 143 U.S. at 672. Again, the structure of the United States government differs from that of the Snoqualmie Tribe in an essential way: there is no independent Executive Branch in the Snoqualmie Tribe. The Snoqualmie Tribal Council holds both legislative and executive power. *Snoqualmie Tribal Constitution, Article VIII.* Thus, while the judiciary must certainly respect the independence of the Tribal Council, the danger is not that the Tribal Council's power will not be sufficiently respected, but that it will be unchecked.

In *Field*, the issue was the contents of a real bill, not whether someone made the whole thing up. It would have been close to impossible to do such a thing in the United States government in 1892, and it was that impossibility that motivated the U.S. Supreme Court to adopt its ruling in *Field*:

> It is said that, under any other view, it becomes possible for the speaker of the house of representatives and the president of the senate to impose upon the people as a law a bill that was never passed by congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the constitution.
>
> *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892).

That possibility is not too remote for this Court to consider in its present inquiry. The Snoqualmie Tribe is not the United States government. There is no bicameral legislature with

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separate presiding officers and committees; there is only the Tribal Council, who made themselves the SEA Board, too. *Snoqualmie Tribal Council Act 8.2, §8.0(b).* There are no legislative clerks who have responsibility for documents and record-keeping; there is only the Tribal Secretary, who both prepares and attests to legislative records and documents. *Snoqualmie Tribal Constitution, Article V, § 4; Snoqualmie Tribal Constitution, Article IX, §1; Snoqualmie Tribal Council Act 1-1, §5.*

There is no separate Executive branch with its own powers. There is only the Tribal Administrator and his staff, employees who serve at the pleasure of the Tribal Council. *Snoqualmie Tribal Council Act 5.5, §6.1(a).* That the Tribal Administrator wrote the text of Resolution 2003-2008 is inconsequential; he did so at the express command of the Tribal Secretary. The only authentication a Tribal Resolution requires is certification by that same Tribal Secretary; the Tribal Chairperson signs it, but has no other power over it. *Snoqualmie Tribal Council Act 1-1, §5; Snoqualmie Tribal Constitution, Article V, §2.* The *Field* Court decided a conspiracy by the leaders of the United States Congress was too remote for it to consider. But here, all it takes is a Tribal Council Secretary and a complicit or careless Tribal Chairperson. While the people of 1892's United States may not have required protection from legislative conspiracies, the people of today's Snoqualmie Tribe do.

In *OneSimpleLoan v. U.S. Secretary of Educ.*, the Second Circuit Appellate Court responded to allegations that the presiding officers of Congress and the President of the United States conspired to violate the Constitution by enacting legislation that had not passed both the House and Senate. It concluded:

> Whether the enrolled bill rule has come to serve as an incentive for politicians to avoid the rigors of constitutional law-making is a different question... In the last analysis, even if plaintiffs' arguments support the creation of exceptions to the enrolled bill rule in some circumstances (or militate toward abandoning the rule altogether), we

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are not at liberty to depart from binding Supreme Court precedent.

OneSimpleLoan v. U.S. Secretary of Educ., 496 F.3d 197 at 208 (2nd Cir. 2007).

This Court is at liberty to depart from United States Supreme Court precedent. This Court can, and should, decline to follow *Field v. Clark*.

3. Spoliation of Evidence

On March 8, 2011, the Court denied Defendants' Supplemental Motion to Dismiss for Prosecutorial Misconduct, including defense's claim of spoliation of evidence. No new evidence of intentional spoliation of evidence by the Tribe has come to light since (though there is ample evidence of intentional spoliation by the defendant's husband). The defense's protestations that the Tribe failed to preserve evidence because of its lack of procedural protections is insufficient, even if it were true. The standard for a dismissing a case for spoliation of evidence is *Arizona v. Youngblood*, 488 U.S. 51 (1988); it requires bad faith by the government, and "Bad faith requires more than mere negligence or recklessness." *Arizona v. Youngblood*, 488 U.S. at 58.

The Tribe and its Prosecutor vehemently object to Defendant Arlene Ventura's false statement that the Court has found the Prosecutor guilty of misconduct. The Court did no such thing, and defense counsel knows it. The Court specifically stated in its oral findings on March 31, 2011, that the Prosecutor did not engage in misconduct. Defendants have presented no new evidence to the contrary, because there is none to be had.

The Tribe and its Prosecutor object just as strongly to Defendant Kanium Ventura's assertion that the Tribal Prosecutor removed documents from the Tribal Secretary's office, resulting in spoliation of evidence. There is no factual basis for that allegation whatsoever, and defense counsel knows it. He is simply acting on the adage that when there is no evidence, make

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a lot of noise and maybe someone will buy it. In fact, the Prosecutor's actions were at all times within the ethical bounds of the Snoqualmie Tribal Prosecutor's position. The Tribe's Prosecutor has supplied Defendants with a discovery copy of every document copy made during that monitored office entry (if the Prosecutor had not retrieved copies of documents from the office, it is doubtless Defendants would have asserted that the prosecution was not providing discovery); and, in spite of the defense's protestations to the contrary, there was nothing in Judge Montoya-Lewis' order that precluded the Prosecutor (or any Tribal employee) from entering that office. **SEE ATTACHMENTS A AND B (Third Request for Discovery and Discovery Production Receipt and Fourth Request for Discovery and Discovery Production Receipt respectively).**

Because these continued groundless accusations have the potential to sully the Prosecutor's professional reputation, the Prosecutor respectfully requests this Court make a specific written finding that she did not engage in spoliation of evidence or other misconduct.

Conclusion

For the reasons stated above, the Tribe respectfully requests this Court reconsider its oral decision of March 31, 2011, to dismiss the charges on legislative immunity grounds.

RESPECTFULLY SUBMITTED this 13th day of April, 2011.

Cynthia Tomkins

Cynthia Tomkins
Snoqualmie Tribal Prosecutor

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