

EVERETT B. COULTER, JR.

Evans, Craven & Lackie, P.S.

818 W. Riverside, Suite 250

Spokane, WA 99201-0910

(509) 455-5200; fax (509) 455-3632

E-mail: ecoulter@ecl-law.com

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

SHAWN LAWRENCE DESAUTEL,
TAMARA DESAUTEL DAVIS, and
TONIA RENE DESAUTEL,

Plaintiffs,

vs.

ANITA B. DUPRIS, ET AL.

Defendants.

Case No. CV-11-301-EFS

**DEFENDANTS' MEMORANDUM
OF LAW IN SUPPORT OF
MOTION TO DISMISS**

COME NOW the Defendants, by and through their attorneys, and herewith submit the following Memorandum of law in support of the Motions to Dismiss.

PLEADINGS BEFORE THE COURT & BACKGROUND

Plaintiffs' Complaint and the exhibits filed with the Complaint indicate the Plaintiffs are seeking to challenge the intramural affairs of the Colville Tribe in respect to membership enrollment.

**DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
DISMISS**

Page 1

Evans, Craven & Lackie, P.S.

818 W. Riverside, Suite 250

Spokane, WA 99201-0910

(509) 455-5200; fax (509) 455-3632

1 Plaintiffs are of Indian blood and sought to be enrolled as Colville Tribal
2 Members. All three (3) Plaintiffs allege that they sought to be enrolled as infants,
3 and the Colville Tribal Council rejected the enrollment requests submitted by the
4 Plaintiffs' parents based upon a lack of sufficient Indian blood. Many years later,
5 Plaintiffs pursued enrollment and were subsequently enrolled as tribal members
6 pursuant to the Colville Tribal Code on the basis of the Code's adoption
7 enrollment procedures. Lead Plaintiff Shawn Lawrence DesAutel, apparently
8 being dissatisfied with his enrollment date, filed suit in the Colville Tribal Court
9 challenging the Tribe's enrollment ruling. Shawn Lawrence DesAutel (hereinafter
10 referred to as " Mr. DesAutel") pursued all of his remedies through the tribal trial
11 court and through appeal. At every juncture in the tribal court system litigation
12 when Mr. DesAutel lost, he then proceeded to file a litany of suits against tribal
13 council members, judges, and attorneys representing the Tribe.

16 Tamara DesAutel Davis (hereinafter "Ms. Davis") and Tonia Rene DesAutel
17 (hereinafter "Ms. DesAutel") did not pursue an appeal of their adoption enrollment
18 date. That is, Mr. DesAutel pursued all of his appeal rights through the Colville
19 Tribal Court system whereas Ms. Davis and Ms. DesAutel did not pursue their
20 appeal rights through the tribal court system.

22 Mr. DesAutel's enrollment appeal action as well as collateral actions against
23 trial court judges and appellant court judges reached the point that the tribal court
24 system would not accept any further filings on the part of Mr. DesAutel in relation
25 to the enrollment appeal or collateral suits against tribal council members, judges,
26 and attorneys.

28 **DEFENDANTS' MEMORANDUM OF**
29 **LAW IN SUPPORT OF MOTION TO**
30 **DISMISS**

Page 2

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

1 Plaintiffs now file in the United States District Court for the Eastern District
2 of Washington, naming six (6) judges/justices of the Colville Tribal Court system,
3 eleven (11) tribal council members, four (4) attorneys that represented the Tribe in
4 the various tribal court actions brought by Mr. DesAutel, and lastly the Colville
5 Business Council and Colville Tribal Court itself.

6
7 Defendants Anita B. Dupris, Dennis L. Nelson, David C. Bonga, and Gary
8 F. Bass are all Colville Tribal Appellate Court justices who decided the underlying
9 enrollment litigation appeals as well as the collateral litigation appeals. Trudy
10 Flamand and Steven D. Aycock were Colville Tribal Trial Court judges.

11 Lee Adolph, Ted Bessette, Terry Finley, Margie Hutchinson, Jeanne Jerred,
12 Andy Joseph, Gene Joseph, Cherie Moomaw, Brian Nissen, Doug Seymour, and
13 Virgil Seymour are all past or present Colville Business Council Members who
14 acted in their official capacity as council members in respect to enrollment
15 decisions or decisions relating to the underlying tribal court litigation.

16
17 Thomas W. Christie, Timothy W. Woolsey, Juliana C. Repp, and Wayne
18 Svaren are all attorneys that at one point or another represented the Tribe in respect
19 to the underlying tribal court litigation.

20 The Colville Business Council is the governing body of the Colville Tribe.
21 The Colville Tribal Court is a constitutionally established tribal court system for
22 the Colville Tribe.

23 PLAINTIFFS' JURISDICTIONAL STATEMENT

24
25 Plaintiffs' Complaint contains five paragraphs asserting federal jurisdiction
26 and venue. **(See Plaintiffs' Complaint, ECF No. 1 at page 3, paragraphs 3-7)**

27
28 **DEFENDANTS' MEMORANDUM OF**
29 **LAW IN SUPPORT OF MOTION TO**
30 **DISMISS**

Page 3

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

1 Plaintiffs allege their claims create a claim under the United States
 2 Constitution and that a federal question jurisdiction exists under 28 U.S.C.
 3 1331 premised upon Civil Rights claim under 42 U.S.C. §1983, *et seq.* Plaintiffs'
 4 jurisdiction statement cites 18 U.S.C. §1985, which appears to be a typographical
 5 error in that Defendants are unable to find any code section cite for 18 U.S.C.
 6 §1985.
 7

8 LEGAL AUTHORITY & ARGUMENT

9 **1. Summary of Argument** – The extensive Complaint and exhibits
 10 appended to the Complaint set forth Plaintiffs' dissatisfaction with tribal
 11 enrollment decisions of the Colville Business Council and the tribal court system.
 12 Defendants in this case have tribal sovereign immunity and when tribal sovereign
 13 immunity exists, federal jurisdiction does not exist. None of the immune
 14 Defendants have waived the tribal sovereign immunity.
 15

16 Plaintiffs Tamara DesAutel Davis and Tonia Rene DesAutel have failed to
 17 exhaust all of their remedies in tribal court, and as such federal jurisdiction is
 18 lacking.

19 Plaintiffs' 92-page Complaint plus the exhibits and appendences are
 20 excessive and violate FRCP 8(a) requirement of short and concise allegations.
 21

22 All Plaintiffs have failed to state a claim upon which relief can be granted
 23 pursuant to FRCP 12(b)(6).

24 **2. Federal Subject Matter Jurisdiction** – In order to establish federal
 25 jurisdiction, Plaintiffs are required to sufficiently plead that there is federal
 26 jurisdiction for the action otherwise the court is compelled to dismiss Plaintiffs'
 27

28 **DEFENDANTS' MEMORANDUM OF**
 29 **LAW IN SUPPORT OF MOTION TO**
 30 **DISMISS**

Page 4

Evans, Craven & Lackie, P.S.
 818 W. Riverside, Suite 250
 Spokane, WA 99201-0910
 (509) 455-5200; fax (509) 455-3632

1 suit. *See Gibbs v. Buck*, 307 U.S. 66, 77, 59 S.Ct. 725, 83 L. Ed. 1111(1939). The
 2 court itself is permitted to dismiss for lack of subject matter jurisdiction *sua sponte*
 3 whether at the trial court level or on an appeal. *See Arbaugh v. Y & H Corp*, 546
 4 U.S. 500, 506, 126 S.Ct. 1235, 1240, 163 L. Ed.2d 1097 (2006).

5
 6 **3. Sovereign Immunity** – Tribal sovereign immunity is a limit on
 7 federal subject matter jurisdiction when the action is brought against a sovereign.
 8 *See Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir.
 9 2007).

10 Plaintiffs seemingly recognize the significance of the United States Supreme
 11 Court holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56
 12 L.Ed.2d 106 (1978). Plaintiffs refer to *Santa Clara Pueblo v Martinez, supra*, on a
 13 number of occasions. The Santa Clara Pueblo court was faced with somewhat of a
 14 similar legal issue involving Martinez bringing suit against the Santa Clara Pueblo
 15 Tribe for enrollment discrimination. The court held the Tribe's immunity defeated
 16 federal subject matter jurisdiction, and secondly the Indian Civil Rights Act
 17 (hereinafter "ICRA") did not create a private cause of action against the Tribe, nor
 18 did ICRA create a private cause of action for declaratory injunctive relief against
 19 tribal officers. More recently the 9th Circuit addressed a similar issue in *Lewis v.*
 20 *Norton*, 424 F.3d 959 (9th Cir. 2005). This case involved plaintiffs suing the
 21 United States seeking to enforce tribal enrollment rights. The trial court dismissed
 22 for lack of federal subject matter jurisdiction, and the court of appeals affirmed.
 23 The court of appeals held that the Tribe's sovereign immunity could not be avoided
 24 by suing the United States Department of Interior & Bureau of Indian Affairs. The
 25
 26
 27

28 **DEFENDANTS' MEMORANDUM OF**
 29 **LAW IN SUPPORT OF MOTION TO**
 30 **DISMISS**

Page 5

Evans, Craven & Lackie, P.S.
 818 W. Riverside, Suite 250
 Spokane, WA 99201-0910
 (509) 455-5200; fax (509) 455-3632

1 court recognized the importance of *Santa Clara Pueblo v. Martinez*, *supra*, as
2 holding that Indian Tribes as sovereign Indian Nations were to be left to their own
3 political decisions as it related to purely intramural tribal enrollment issues, and as
4 such there was a lack of subject matter jurisdiction in federal court over tribal
5 membership disputes. *See also Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d
6 1113, 1116 (9th Cir. 1985).

7
8 In *Alvarado v. Table Mountain Rancherias*, 509 F.3d 1008 (9th Cir. 2007)
9 Plaintiffs were unsuccessful in their enrollment application and brought suit in
10 federal court. The court of appeals very clearly and succinctly ruled tribal
11 sovereign immunity prohibited federal subject matter jurisdiction on actions
12 relating to tribal government and tribal enrollment.

13
14 **4. Constitutional Claim** - Plaintiffs seemingly have sought to assert
15 federal subject matter jurisdiction by claiming there has been a violation by the
16 Tribal Defendants of the Plaintiffs' constitutional rights in respect to enrollment
17 and tribal court procedures. "Indian Tribes are 'distinct, independent political
18 communities, retaining their original natural rights' in matters of local self
19 government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 citing *Worcester*
20 *v. Georgia*, 6 Pet. 515, 559, 8 L.Ed.483 (1832). Stated another way, the Supreme
21 Court in *Santa Clara Pueblo v. Martinez*, *supra*, reiterated that Indian Nations
22 predated the United States Constitution and have been historically regarded as
23 unconstrained by the United States constitutional provisions, and specifically as to
24 limitations on federal or state authority. *Santa Clara Pueblo v. Martinez*, 436 U.S.
25 56.
26

27
28 **DEFENDANTS' MEMORANDUM OF**
29 **LAW IN SUPPORT OF MOTION TO**
30 **DISMISS**

Page 6

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

1 **5. Individual Immunity** - Plaintiffs have named individual defendants
 2 alleging they were acting in their individual capacity in an effort to invoke federal
 3 jurisdiction. A tribe's sovereign immunity extends to individual tribal officials
 4 who were acting in their representative capacity and within the scope of their
 5 authority. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th
 6 Cir. 1985). Thus, when the Tribe itself is not subject to suit based upon immunity,
 7 tribal officials, officers, judges, and attorneys all acting on behalf of the Tribe
 8 cannot be sued on the basis of tribal obligations. Further, *Santa Clara Pueblo v.*
 9 *Martinez*, 436 U.S. 58-59 held, "It is settled that a waiver of sovereign immunity
 10 cannot be implied but must be unequivocally expressed" citing *United States v.*
 11 *Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). Plaintiffs
 12 seemingly have acknowledged that the Tribe and tribal court have immunity.
 13 Whereas Plaintiffs have not alleged a waiver of the individual sovereign immunity
 14 of the individually named Defendants.

15 The record before the Court specifically the exhibits and appendices to the
 16 Complaint clearly demonstrate the individual Defendants were acting within their
 17 official representative capacity on behalf of the Tribe. Appellate Court Justices
 18 Dupris, Nelson, and Bonga were clearly acting in their representative capacity.
 19 **See ECF No.1-4 at pages 280-291** of Plaintiffs' exhibits. Further, after Mr.
 20 DesAutel did not prevail on appeal, he filed suit in tribal court naming Justices
 21 Dupris, Nelson and Bonga as justices of the Colville Appellate Court. See ECF
 22 No. 1-6 at page 314 of Plaintiffs' exhibits. **See also ECF No. 1-7 at page 393** of
 23
 24
 25
 26
 27

28 **DEFENDANTS' MEMORANDUM OF**
 29 **LAW IN SUPPORT OF MOTION TO**
 30 **DISMISS**

Page 7

Evans, Craven & Lackie, P.S.
 818 W. Riverside, Suite 250
 Spokane, WA 99201-0910
 (509) 455-5200; fax (509) 455-3632

1 Plaintiffs' exhibits wherein Mr. DesAutel denominates Justices Dupris, Nelson,
2 and Bonga as appellate justices.

3 Justice Gary F. Bass was acting in his official and representative capacity
4 when he entered an order dismissing Mr. DesAutel's second appeal wherein Mr.
5 DesAutel sued the appellate court Justices, trial court judges, and tribal court
6 members. This is set forth in **ECF No. 1-7 at pages 416-424** of Plaintiffs'
7 exhibits.

8
9 Trial court judges Trudy Flamand and Steven D. Aycock were acting in their
10 judicial, official representative capacity when they made trial court decisions
11 adverse to Mr. DesAutel's various suits. **See ECF No. 1-3 at pages 207-215** of
12 Plaintiffs' exhibits in respect to Judge Aycock (**ECF No. 1-3 at pages 259-260**)
13 and (**ECF No. 1-6 at pages 375**) of Plaintiffs' exhibits in respect to Judge
14 Flamand.

15
16 Colville Business Council Members, Adolph, Bessette, Finley, Hutchinson,
17 Jerred, Joseph, Joseph, Moomaw, Nissen, Seymour, and Seymour were all acting
18 as Colville Business Council Members in their official capacity and Mr. DesAutel
19 filed suit in tribal court against these council members designating them as
20 business council members. (**See ECF No. 1-6 at pages 341-358** of Plaintiffs'
21 exhibits)

22
23 Attorneys Svaren, Repp, Christie, and Woolsey were all acting within their
24 representative capacity as attorneys representing the Tribe. (**See ECF No. 1-3,**
25 **Answer of Colville Business Council prepared by Attorney Svaren at pages 188-**
26 **192** of Plaintiffs' exhibits; See Attorney Repp's Notice of Appearance (**ECF No. 1-**

27
28 **DEFENDANTS' MEMORANDUM OF**
29 **LAW IN SUPPORT OF MOTION TO**
30 **DISMISS**

Page 8

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

3 at pages 199, 220, 259); See Attorney Christie pleadings in tribal court, (ECF No. 1-6 at pages 328, 329 of Plaintiffs' exhibits); See Attorney Woolsey pleadings, (ECF No. 1-6 at pages 362,363 of Plaintiffs' exhibits.)

Mr. DesAutel chose to sue tribal judges, business council members, and tribal attorneys in tribal court designating them in their official and representative capacity, and now cannot claim to sue the same individuals in their individual capacity in an effort to pursue federal claims in federal court.

6. Federal Civil Rights Claims - The Plaintiffs in this case have alleged federal Civil Rights claims under 42 U.S.C. §1983, *et seq.* as a basis for federal subject matter jurisdiction. As a matter of law, there is no subject matter jurisdiction because federal Civil Right claims are not actionable arising out of Indian Country. In *Evans v. McKay* 869 F.2d 1341 (9th Cir. 1989) suit was brought against individuals of the Blackfeet Tribe. Plaintiff asserted a federal Civil Rights claim under 42 U.S.C. §1983, and the court of appeals held that there was no jurisdiction in that Civil Rights claims arise only under color of state law and tribes are not states. *Accord R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985).

7. Exhaustion – None of the named Defendants in this action admit federal jurisdiction exists for the claims being asserted. However, an additional ground for lack of subject matter jurisdiction is found in the doctrine of failure to exhaust tribal court remedies. "Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a

**DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
DISMISS**

Page 9

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

1 pending matter in a tribal court is complete." *Attwood v. Fortpack Tribal Court*
 2 *Assiniboine* 513 F.3d 943, 948 (9th Cir. 2008) (citing *Iowa Mut. Ins. Co. v.*
 3 *Laplante*, 480 U.S. 9, 17, 107 Sup. Ct. 971, 94 L.Ed.2d 10 (1987)). In addition, "A
 4 federal court must give the tribe a full opportunity to determine its own
 5 jurisdiction, which includes exhausting opportunities for appellate review in tribal
 6 courts." *Boozer v. Wilder*, 381 F.3d 931, 935-37 (9th Cir. 2004).

8 The exhaustion doctrine is applicable to Tamara DesAutel Davis and Tonia
 9 Rene DesAutel. The exhibits and appendices to the Complaint clearly show these
 10 two Plaintiffs did not pursue appeals in the appropriate tribal court.

11 **8. Dismissal Per Federal Rule 8(a)** – Federal Rule 8(a) provides that
 12 pleadings, such as Plaintiffs' Complaint, are required to contain a short and plain
 13 statement of the grounds for the court's jurisdiction and the relief being sought. In
 14 *Mann v. Boatright*, 477 F.3d 1140, 1147-48 (10th Cir. 2007), the court of appeals
 15 held that a 99-page Complaint that was a single spaced pleading violated the short
 16 and plain statement requirement of Rule 8. Complaints are appropriately
 17 dismissed when the Complaint is "patently verbose, confusing, and rambling." *See*
 18 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1105 n.4 (9th Cir. 2008).
 19

20 Defense counsel readily admits Plaintiffs are *pro se* and are entitled to some
 21 latitude. However, a 92-page Complaint and exhibits, such as the present
 22 Complaint, do violate the essence of Rule 8(a) in respect to a short, concise
 23 statement without extensive confusion of verbosity.
 24

25 / / / / /
 26
 27

28 **DEFENDANTS' MEMORANDUM OF**
 29 **LAW IN SUPPORT OF MOTION TO**
 30 **DISMISS**

Page 10

Evans, Craven & Lackie, P.S.
 818 W. Riverside, Suite 250
 Spokane, WA 99201-0910
 (509) 455-5200; fax (509) 455-3632

2) Plaintiffs Tamara DesAutel Davis and Tonia Rene DesAutel have failed to exhaust their tribal court remedies in respect to enrollment, and as such federal subject matter jurisdiction is lacking.

3) Plaintiffs have failed to appropriately plead claims against the Defendants, and have further failed to allege claims upon which relief can be granted and as such dismissal is required.

The Complaint must (should) be dismissed.

RESPECTFULLY SUBMITTED this 21st day of September, 2011.

EVANS, CRAVEN & LACKIE, PS

/s/ Everett B. Coulter, Jr.

By _____

EVERETT B. COULTER, JR.

WSBA #6877

Attorneys for Defendants

Evans, Craven & Lackie, P.S.

818 W. Riverside Ave., Ste. 250

Spokane, WA 99201

Telephone: (509) 455-5200

Fax: (509) 455-3632

E-mail: ecoulter@ecl-law.com

**DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
DISMISS**

Page 12

Evans, Craven & Lackie, P.S.

818 W. Riverside, Suite 250

Spokane, WA 99201-0910

(509) 455-5200; fax (509) 455-3632

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2011, I electronically filed the foregoing with the Clerk of the Court using CM/ECF System, which will send notification of such filing to the following:

No Known Electronic Notifications

I hereby further certify that I have caused to be served a true and correct copy of the foregoing document(s) on the non-CM/ECF participants as indicated:

Shawn Lawrence DesAutel 1005 W. North Ave. Chewelah, WA 99109	Via Regular Mail <input checked="" type="checkbox"/> Via Certified Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Hand Delivered <input type="checkbox"/>
Tamara DesAutel Davis 7315 W. Lund Rathdrum, ID 83858	Via Regular Mail <input checked="" type="checkbox"/> Via Certified Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Hand Delivered <input type="checkbox"/>
Tonia Rene DesAutel 19029 E. Boone Ave. #20 Spokane Valley, WA 99016	Via Regular Mail <input checked="" type="checkbox"/> Via Certified Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Hand Delivered <input type="checkbox"/>

/s/ Everett B. Coulter, Jr.

**DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
DISMISS**

Page 13

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632