

Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

MICHELLE RIVERA,

Plaintiff,

vs.

PUYALLUP TRIBE OF INDIANS; ROLEEN
HARGROVE; SYLVIA MILLER; NANCY
SHIPPENTOWER GAMES; and WILLIAM
STERUD,

Defendants.

No. 3:12-cv-05558-RBL

DEFENDANTS' REPLY TO PLAINTIFF'S
OPPOSITION TO FRCP (12) (B) (1)
MOTION TO DISMISS

**NOTED FOR HEARING AUGUST 24,
2012**

Defendants Puyallup Tribe of Indians ("the Tribe") and Tribal Council members Roleen Hargrove, Sylvia Miller, William Sterud and Nancy Shippentower Games ("Council members") submit the following in reply to Plaintiff's Opposition.

INTRODUCTION

Defendants disagree with many of the alleged "facts" contained in plaintiff's "Statement of the Case." However, without regard to the many hearsay statements and erroneous, unsubstantiated allegations, the fact remains that this court lacks federal question

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION
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jurisdiction and the doctrine of tribal sovereign immunity is a bar to this suit. There is no federal statute or provision of the United States Constitution at issue. The Indian Civil Rights Act (ICRA) is not a basis for jurisdiction since habeas corpus relief is not at issue. Plaintiff seeks monetary damages in this wrongful termination lawsuit.

Further, it is undisputed that plaintiff is a tribal member who consented to tribal court jurisdiction when she filed her original and Amended Complaints¹ in Puyallup Tribal Court. This case does not involve a plaintiff non-Indian who was haled into tribal court but wishes to proceed in federal court. It is also undisputed that: (1) neither the Tribe nor its Council members expressly waived tribal sovereign immunity and (2) plaintiff does not allege Congressional abrogation of this immunity.

All “facts” alleged demonstrate that the individual Council members passed official Tribal Council Resolutions, directly related to the operation of the Tribal Council Office, while acting in their official capacity as the elected, governing body of the Tribe. Accordingly, this lawsuit should be dismissed. The lawsuit filed by tribal member Michelle Rivera in Puyallup Tribal Court should be permitted to proceed to a conclusion before Judge Pro Tem Doucet.² This federal court should be dismissed with prejudice because this court lacks subject matter jurisdiction.

I. THE TRIBE HAS A FUNCTIONING TRIBAL COURT.

This court may take judicial notice of the July 23, 2012 order issued by the Puyallup

¹ Olson Decl. in Opposition: Exh. 3, 4.

² See Rivera Puyallup Tribal Court Complaint and Amended Complaint: Olson Decl.: Exh. 3,4.

1 Tribal Court appointing Judge Randy Doucet as Judge Pro Tem to preside over the lawsuit
 2 filed by Plaintiff in Puyallup Tribal Court involving the same parties and claims. Second
 3 Supplemental McCormick Decl.: Exh. D-2; McCormick Decl.: Exh D. It was unprecedented
 4 to have all three Puyallup Tribal Court judges recuse themselves in a matter. However, a
 5 judge has now been appointed and counsel have been contacted by the tribal court clerk. The
 6 tribal court matter is on track and ready to proceed. Second Supplemental McCormick Decl.

7 **II. THE TRIBE HAS A FUNCTIONING COURT OF APPEALS.**

8 Plaintiff erroneously advised this court that the Puyallup Tribal Court does not
 9 have a functioning Court of Appeals. Olson Decl.: Para. 10, pg. 3; Third McCormick Decl.
 10 As set forth in the Declaration of Court Administrator Fryberg, Northwest Intertribal Court
 11 System ("NICS") provides panels of judges for civil matters tried in Puyallup Tribal Court
 12 that are appealed. NICS has done so on a continuous basis for several years. Fryberg Decl.
 13 Counsel for defendants did not tell plaintiff's counsel Mark Olson that NICS does not provide
 14 appellate judges to the Tribe. In fact, the source of appellate panels for matters tried in
 15 Puyallup Tribal Court was never discussed. Further, the Tribe's page on the NICS website
 16 includes several Puyallup Tribal Court of Appeals 2010 and 2011 decisions by NICS judges.
 17 <http://www.nics.ws/Puyallup/puyallup.htm>. Third McCormick Decl. Thus, since the Tribe
 18 has a fully functional appellate court, the "futility" exception to tribal court jurisdiction cited
 19 in plaintiff's opposition and discussed in *Johnson v. Gila River Community*, 174 F. 2d 1032,
 20 1036 (9th Cir.1999) is not relevant.

21 **III. THIS COURT LACKS JURISDICTION TO HEAR THIS MATTER.**

22 **A. Plaintiff Has the Burden of Establishing Jurisdiction.**

The court is not restricted to the face of the pleadings when considering a motion to dismiss under Rule 12(b)(1). The Court may review any evidence to resolve factual disputes regarding the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir.1983). A federal court is presumed to lack subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.1989). Plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir.1979).

B. The Puyallup Tribal Tort Claims Act Does Not Contain an Express Waiver of The Tribe's Sovereign Immunity.

Indian tribes and tribal officials acting within the scope of their authority are immune from lawsuits in the absence of congressional abrogation or tribal waiver. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir.1986). On its face, the Puyallup Tribal Tort Claims Act (PTTCA) does not contain an express waiver of sovereign immunity for this federal court action³. The PTTCA provides:

The Tribe may be sued solely in Tribal Court. Nothing contained in this Act shall be construed as a waiver of the Tribe's immunity in state or federal court. (emphasis added).

PTTCA §4.12.030 (b).

³ A waiver of immunity must be expressed unequivocally and cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

1 The PTTCA expressly affirms the immunity of individual Tribal Council members as
 2 follows:

- 3 (a) The Tribe's immunity shall remain in full force and effect except to the extent
 4 that it is waived by this Act. **Members of the Tribal Council shall remain**
 5 **immune from suit for actions taken during the course of and within the**
 6 **scope of their duties as members of Tribal Council, and nothing contained**
 7 **in this Act shall be construed otherwise.** (emphasis added).

8 PTTCA §4.12.030 (a).

9 The PTTCA does not provide an express waiver of immunity from suit.

10 C. Plaintiff Does Not Seek Habeas Corpus Relief under the Indian Civil Rights Act.

11 Plaintiff seeks monetary damages, not habeas corpus relief, in this wrongful
 12 termination lawsuit. The only recognized exception to a sovereign immunity defense under
 13 the ICRA is a habeas corpus action. *See Santa Clara*, 436 U.S. at 59; *Pink v. Modoc Indian*
 14 *Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir.1998). Congress has limited federal court
 15 review of a claimed violation of the ICRA to this single remedy. 25 U.S.C. § 1303. *Boe v.*
 16 *Fort Belknap Indian Community*, 642 F.2d 276, 278 (9th Cir.1981). A civil suit to enjoin
 17 violations of the ICRA is not permitted in federal court. *Santa Clara Pueblo*, 436 U.S. at 67-
 18 70, 98 S.Ct. at 1681-1683; *accord R.J. Williams*, 719 F.2d at 981. Thus, Congress did not
 19 generally abrogate the immunity of tribes to unconsented suit but instead limited enforcement
 20 of the ICRA in federal court to criminal cases in which the relief sought is a writ of habeas
 21 corpus. 25 U.S.C. § 1303; *see also Santa Clara Pueblo*, 436 U.S. at 58-59. In light of the
 22 important interest of tribal self-government, the Supreme Court refused to imply a cause of
 23 action to enforce the ICRA in the absence of clear direction from Congress abrogating tribes'

immunity to suit. *Id.* at 72. Neither the U.S. Constitution nor the ICRA provides a basis for a federal cause of action in this matter.

D. 28 USC 1331 Does Not Authorize This Court to Assert Jurisdiction.

Plaintiff cites *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 US 845, 852-853 (1985) (default judgment entered by Crow Tribal Court against non-consenting, non-Indian property owner school district) and 28 USC 1331 in support of her claim that this court has jurisdiction in this matter. The decision is not relevant because: (1) unlike the non-Indian School District and its insurer National Union, plaintiff Michelle Rivera is a member of the Puyallup Tribe who worked for the Tribe and consented to the jurisdiction of the Puyallup Tribal Court when she filed her original suit there, and (2) the Puyallup Tribal Court has not had the opportunity to adjudicate anything let alone adjudicate a claim against a non-Indian haled into a tribal court against his wishes as in *National Farmers Union*.

Further, this court should not disregard the right of the governing body of this sovereign Indian nation to govern its own internal affairs, including the right to have its tribal court adjudicate an internal personnel dispute involving the claims of (1) a Puyallup tribal member, (2) that arose on the Reservation and involve (3) the Puyallup Tribe, (4) Tribe's Constitution, (5) Tribal Council, and (6) the Tribal Council Office and Secretary. The instant case does not involve a federal question under 28 USC 1331.

E. The Ninth Circuit Has Clearly Rejected the Dry Creek Lodge Decision.

As conceded at page 8 in plaintiff's opposition, the 9th Circuit has repeatedly refused to follow the 10th Circuit decision in *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F. 2d 682 (10th Cir. 1980), cert. den., 119 U.S. 1118 (1981) which did not follow the U.S.

1 Supreme Court decision in *Santa Clara Pueblo*. At issue was a hunting lodge owned by non-
 2 Indians located on land owned by non-Indians. Access to the Lodge was blocked by the
 3 Tribe's road. In contrast to our case in which plaintiff tribal member Rivera filed her original
 4 lawsuit in tribal court, plaintiff Dry Creek Lodge was actually denied access to the tribal
 5 court. Further, the matter in dispute involved "*a matter outside of internal tribal affairs*" and
 6 "*an issue with a non-Indian*" *Dry Creek Lodge*, 623 F. 2d 682, 684-685. In the instant case,
 7 the matter concerns a tribal member, her Tribe and its Tribal Council, and the internal affairs
 8 of the government of the Puyallup Tribe, including interpretation of the Puyallup Tribe's
 9 Constitution. Thus, even the *Dry Creek Lodge* decision is of no assistance to plaintiff.

10 F. Ex Parte Young Does Not Apply.

11 This case does not involve tribal officials, trying to enforce a possessory interest tax or
 12 other statute or regulation, against a non-Indian in violation of federal law as in *Burlington*
 13 *Northern & Santa Fe Railway Company v. Vaughn*, 509 F. 3d 1085 (2007). This case
 14 involves an internal tribal government personnel dispute on the Reservation involving
 15 members of Tribal Council and a Tribal Council Office Secretary who was also a member of
 16 the Tribe. Among the many powers granted to Tribal Council in the Puyallup Tribe's
 17 Constitution⁴ is the authority: "(q) To adopt resolutions regulating the procedure of the
 18 Council itself and of other Tribal agencies and Tribal officials of the reservation." Thus, on
 19 its face, passage of Tribal Council Office Resolutions regarding appointment of Tribal
 20 Council Secretaries was clearly within the scope of the job duties and authority of the Tribal
 21 Council granted in the Puyallup Constitution and not a violation of federal law that would

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 23 ⁴ Puyallup Constitution: <http://www.codepublishing.com/WA/puyalluptribe/>

1 prevent sovereign immunity from protecting the individual Council members. "Sovereign
2 immunity shields the Tribe from any suit arising out of the proceeding. *See Tenneco Oil Co.*
3 *v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d at 574. This tribal immunity extends
4 to individual tribal officials acting in their representative capacity and within the scope of
5 their authority. *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir.1981)." *Hardin v.*
6 *White Mountain Apache*, 779 F.2d 476, 478 (9th Cir. 1985). Because the individual Council
7 member defendants were acting within the scope of their delegated authority, this suit is
8 barred by the Tribe's sovereign immunity.

9 G. There Is No Bad Faith.

10 Leaving aside the fact that this case does not involve a non-Indian haled into tribal
11 court, Plaintiff has alleged "bad faith" based upon allegations of delay in the appointment of a
12 Judge Pro Tem following the order of recusal. It was unprecedented to have the entire bench,
13 consisting of three Tribal Court Judges, recuse themselves in a matter. We can only speculate
14 as to the reason(s). As a tribal member, Michelle Rivera may have had close familial and/or
15 "friend" relationships with one or more judges that may have been a factor. We do not know
16 as the recusal order involves an internal judicial matter and decisions by judges with ethical
17 obligations. "Delay alone is not ordinarily sufficient to show that pursuing tribal remedies is
18 futile." *Johnson v. Gila River Indian Community*, 174 F. 3d 1032, 1034 (9th Cir. 1999).
19 Defendants submit that delay is also not evidence of bad faith. Michelle Rivera is a tribal
20 member who voluntarily chose to work for the Tribal Council and the Puyallup Tribe on the
21 Puyallup Reservation. Under tribal law, plaintiff's claims against defendant Tribe and its
22 Council member must be tested in Puyallup Tribal Court.

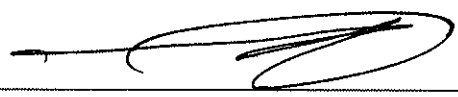
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IV. CONCLUSION

There is no federal question jurisdiction and all claims against all defendants are barred by tribal sovereign immunity. Plaintiff consented to tribal court jurisdiction when she filed suit in the Puyallup Tribal Court. Accordingly, this lawsuit should be dismissed with prejudice and the tribal court lawsuit allowed to proceed to a conclusion.

DATED this 24th day of August, 2012.

FORSBERG & UMLAUF, P.S.

By 
Ann C. McCormick, WSBA #15832
Attorneys for Defendants

CERTIFICATE OF SERVICE

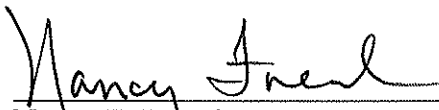
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS, DECLARATION OF PUYALLUP TRIBAL COURT ADMINISTRATOR; THIRD DECLARATION OF ANN C. MCCORMICK on the following individuals in the manner indicated:

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SIGNED this 24th day of August, 2012, at Seattle, Washington.


Nancy E. French