

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,
WASHINGTON DEPARTMENT
LICENSING, et al.

Plaintiffs,

v.

THE TRIBAL COURT FOR THE
CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA
NATION, and its CHIEF TRIBAL
COURT JUDGE TED STRONG, and
the CONFEDERATED TRIBES
AND BANDS OF THE YAKAMA
NATION, a Federally Recognized
Tribe,

Defendants.

NO. CV-12-3152-LRS

**ORDER DENYING
MOTION TO DISMISS
FOR INEFFECTIVE SERVICE**

BEFORE THE COURT is the Fed. R. Civ. P. 12(b)(5) Motion To Dismiss For Ineffective Service (ECF No. 108) filed by Defendant Confederated Tribes And Bands Of The Yakama Nation (referred to herein as “Yakama Nation” or “Nation”). The motion is heard without oral argument.

The parties agree that per Fed. R. Civ. P. 4, Revised Yakama Code (R.Y.C.) Section 7.01.05 provides how service is to be accomplished upon each Defendant (Yakama Nation Tribal Court, Chief Tribal Court Judge Ted Strong, and the Yakama Nation). Section 7.01.05 provides:

The summons and complaint shall be served on the respondent by personal service or by mail. Service by mail shall be made by the Clerk by registered or certified mail,

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1 return receipt requested. The summons and complaint may
2 be served personally by delivery to the respondent in person,
3 by leaving copies thereof on the door of such abode. Any person
4 designated by the Clerk, over twenty-one (21) years of age
5 other than the plaintiff, may make personal service. The
6 return receipt on mail delivery shall be kept in the docket as
7 evidence of the receipt of notice and an affidavit of service
8 shall be returned to the Clerk and filed in the docket which
9 shall constitute proof of personal service.

10 It is agreed that "Clerk" is a reference to the Yakama Nation Tribal Court
11 Clerk.

12 Plaintiffs contacted a process server, Legal Couriers, Inc., to arrange for
13 service on the Defendants. Legal Couriers, Inc., had previously served process
14 on the Yakama Reservation and holds a business license from the Yakama
15 Nation for that purpose. Indeed, the Nation acknowledges that Legal Couriers,
16 Inc., has been designated by the Tribal Court Clerk under R.Y.C. Section
17 7.01.05 as an entity which may make personal service. On December 18, 2012,
18 the Legal Couriers, Inc., process server obtained three summonses from the U.S.
19 District Court in Yakima, one for each Defendant, and then traveled to the Tribal
20 Court Clerk's Office where he delivered those summonses, along with three
21 copies of the Plaintiffs' Complaint, to "tribal court clerk employee, Zoretta
22 Westfield." (ECF No. 115 at p. 3). While the Yakama Nation Tribal Court is
23 housed in offices located 11 Wishpoosh Road in Toppenish, Washington, the
24 offices of the Yakama Nation are located in a separate building at 401 Fort Road
25 in Toppenish.

26 The "Return Of Service" prepared by the process server (ECF No. 115-1)
27 indicates he delivered the summonses and complaints to "Zoretta Westfield as
28 Tribal Court Clerk at the address of Yakama Nation, Fort Road, Toppenish, WA
98948, who stated they are authorized to accept service for the Tribal Court For
The Confederated Tribes And Bands Of The Yakama Nation" The
statement by the process server does not indicate that "they" (presumably the

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1 Tribal Court) were also authorized to accept service for The Confederated Tribes
2 And Bands Of The Yakama Nation. In the “Return Of Service,” the process
3 server further states:

4 We received documents to be served on the Tribal Court For
5 The Confederated Tribes And Bands Of The Yakama Nation
6 and it’s (sic) Chief Tribal Court Judge, Ted Strong (In His
7 Official Capacity) and The Confederated Tribes And Bands
8 Of The Yakama Nation, a federally-recognized Indian tribe,
9 Defendant(s) on 12-18-12. At 11:20 a.m. on 12-18-12, I
10 went to into the tribal court located at 11 Wishpoosh Road
11 in Toppenish, Washington. **I spoke to a receptionist that**
12 **directed me to Zoretta Westfield, a clerk for the tribal court.**
13 I explained to her what I had. She said she would take care
14 of it, including giving a copy to Judge Strong and Chairman
15 Smisken (sic).

16 (ECF No. 115-1)(Emphasis added).

17 The Nation claims that Ms. Westfield is an administrative clerk for the
18 tribal court, and not the Tribal Court Clerk. The statement by the process server
19 is not to the contrary. The record does not firmly establish that Ms. Westfield
20 was “designated” by the Tribal Court Clerk to personally serve the documents
21 on Chairman Smisken or otherwise authorized to accept service on behalf of the
22 Nation in accord with R.Y.C. Section 7.01.05.

23 That said, the Plaintiffs’ argument that the Nation has waived the defense
24 of insufficiency of service of process is not lightly disregarded. The “Notice[s]
25 Of Limited Special Appearance” filed on December 21, 2012 (ECF Nos. 18, 19
26 and 20), by counsel for the Nation recite that “[t]his Notice incorporates a
27 continuing objection to the sufficiency of Plaintiffs’ alleged service of process
28 under Fed. R. Civ. Proc. 12(b)(5),” citing *Tonasket v. Sargent*, 830 F.Supp.2d
1078, 1082 (E.D. Wash. 2011) and quoting therefrom that “[T]ribal officials
acting within the scope of their authority[] are immune from court process.”
This suggested the defense was based on an immunity from process as opposed
to some defect in the service of process.

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1 On January 6, 2013, the Nation filed a Motion To Dismiss (ECF No. 67)
2 seeking dismissal of Plaintiffs' Complaint on the basis of lack of subject matter
3 and personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and (2), and on the
4 basis of failure to state a claim upon which relief can be granted pursuant to Fed.
5 R. Civ. P. 12(b)(6). The motion was not brought pursuant to Fed. R. Civ. P.
6 12(b)(5), although in a footnote in its opening memorandum (ECF No. 68 at p.
7 2), the Nation repeated its "continuing objection to the sufficiency of Plaintiffs'
8 alleged service of process under Fed. R. Civ. Proc. 12(b)(5)," again citing
9 *Tonasket v. Sargent*, and quoting therefrom that "[T]ribal officials acting within
10 the scope of their authority[] are immune from court process." In a footnote in
11 its reply memorandum (ECF No. 82 at p. 2), the Nation once more reasserted its
12 "continuing objection to the Plaintiffs' alleged service of process under Fed. R.
13 Civ. Proc. 12(b)(5)," but this time, instead of citing *Tonasket v. Sargent*, simply
14 added that "Plaintiffs did not properly effect service." There was no further
15 elaboration, however, on how service may not have been properly effected.

16 At the January 7, 2013 hearing on the Plaintiffs' motion for preliminary
17 injunction, counsel for the Nation, while acknowledging that he was appearing
18 only on behalf of the Nation, asserted that Chief Judge Strong had not been
19 properly served because "simply handing documents to a court clerk does not
20 effect service under the chief judge, meaning he was not personally served," and
21 because he was also "immune from service of process." (ECF No. 77 at pp. 35-
22 36) . Counsel did not, however, specifically argue how there was insufficiency
23 of service of process with regard to the Nation.

24 On January 11, 2013, after this court had entered its order preliminarily
25 enjoining further proceedings in Tribal Court (ECF No. 75), the Nation filed a
26 "Limited Answer" (ECF No. 76), asserting as an affirmative defense that
27 "Plaintiffs['] claims are barred by insufficient process and service of process."
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1 In its March 3, 2013 order denying the Nation's Motion To Dismiss, this
2 court, in a footnote (ECF No. 98 at p. 4, n. 1), acknowledged the Nation's
3 objection to the sufficiency of service of process and stated that "[a]s this
4 objection is based on the Nation's assertion of sovereign immunity, it is
5 overruled because of the court's finding that the Nation has waived said
6 immunity." As is apparent, based on the limited information previously
7 provided to it in the Nation's papers, this court perceived the Nation's defense to
8 be one of immunity from process as opposed to improper service of process. It
9 was not until the Nation filed its instant Motion To Dismiss For Ineffective
10 Service, over three months after the action was commenced and after extensive
11 motion practice, that it became clear the Nation contends it was improperly
12 served with process and why that is so.

13 If any Rule 12 motion is made, a failure to join with it a motion
14 challenging process waives the defect. Fed. R. Civ. P. 12(h)(1). Rule 12(h)(1)
15 provides that a party waives a 12(b)(5) defense by omitting it from a motion in
16 the circumstances described in 12(g)(2). Rule 12(g)(2) provides that a party who
17 makes a motion under Rule 12 must not make another motion under Rule 12
18 raising a defense or objection that was available to the party but omitted from its
19 earlier motion. Arguably, the Nation's earlier Rule 12 motion to dismiss for lack
20 of jurisdiction and failure to state a claim upon which relief can be granted
21 "omitted" a 12(b)(5) defense or objection based on insufficient service of
22 process. This is so notwithstanding the footnoted references in the memoranda
23 in support of the earlier Rule 12 motion to a continuing objection under Rule
24 12(b)(5), particularly so when accompanied by a cite to a case standing for the
25 proposition that Indian tribes and tribal officials acting within the scope of their
26 authority are entitled to sovereign immunity from lawsuits, which, in turn,
27 makes them immune from court process. *Tonasket*, 830 F.Supp.2d at 1082

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1 (“Indian tribes, and tribal officials acting within the scope of their authority, are
2 immune from lawsuits or court process in the absence of congressional
3 abrogation or tribal waiver”).

4 While the court will not deem the Nation to have waived its defense of
5 insufficiency of service of process, it certainly will not dismiss the action. The
6 equities clearly do not favor such a result. Over 120 days have now passed since
7 the complaint was filed in this matter. If a defendant has not been served within
8 120 days after the complaint is filed, the court must dismiss the action without
9 prejudice against the defendant or order that service be made within a specified
10 time. Fed. R. Civ. P. 4(m). Under Rule 4(m), the court must extend the time for
11 service for an appropriate period if good cause is shown for the failure to effect
12 service. Moreover, even where good cause cannot be shown for failure to timely
13 serve a defendant, a district court is to consider whether a permissive extension
14 of time is warranted under the equities of the case. *Horenkamp v. Van Winkle &*
15 *Co., Inc.*, 402 F.3d 1129, 1131-33 (11th Cir. 2005); *Mann v. American Airlines*,
16 324 F.3d 1088, 1090 n. 2 (9th Cir. 2003); *Panaras v. Liquid Carbonic Indus.*
17 *Corp.*, 94 F.3d 338, 340-41 (7th Cir. 1996); *Espinoza v. United States*, 52 F.3d
18 838, 840-41 (10th Cir. 1995); and *Petrucelli v. Boehringer & Ratzinger, GmbH*
19 *Ausdereitungsanlagen*, 46 F.3d 1298, 1305-06 (3rd Cir. 1995). Assuming there
20 was defective service on the Nation, the equities here warrant an extension of
21 time: the Nation has not been prejudiced; it has obviously received actual notice
22 of the lawsuit; and finally, it was not until over three months after the action was
23 commenced and after extensive motion practice had already been engaged in
24 that the nature and the accompanying specifics of the Nation’s 12(b)(5)

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1 objection became clear.¹

2 The Nation's Motion To Dismiss For Ineffective Service (ECF No. 108) is
3 **DENIED**. Within a reasonable time, the Plaintiffs shall effect service of a new
4 summons and complaint upon the Nation (i.e., by requesting a waiver of service
5 pursuant to Fed. R. Civ. P. 4(d)(1) and, if the Nation does not waive service,
6 have Legal Couriers, Inc., personally serve Chairman Smiskin with the summons
7 and complaint).²

8 The court finds no reason to await completion of corrected service upon
9 the Nation to proceed with this litigation. **Accordingly, within seven (7) days**
10 **of the date of this order, the Nation and the Plaintiffs shall serve and file**
11 **proposals regarding a litigation schedule**. The proposals shall identify the
12 scope of anticipated discovery and a deadline by which it can be completed;
13 proposed dispositive motion deadline; proposed trial dates including an estimate
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15 ¹ In their brief filed in response to the Nation's Motion To Dismiss for lack
16 of jurisdiction and failure to state a claim, Plaintiffs acknowledged the Nation's
17 objection to the sufficiency of service of process, but noted "the basis for
18 that objection is unclear," as indeed it was. (ECF No. 78 at p. 6, n. 1).

19 ² No appearance has been made on behalf of the Tribal Court or Chief
20 Judge Strong and therefore, those entities currently do not have standing to
21 challenge the sufficiency of service of process upon them. The court makes no
22 ruling as to whether the service on either of them was defective, although it is
23 noted that Plaintiffs are not precluded from effecting new service of
24 summonses and complaints upon them. At the January 7 hearing, counsel for
25 the Nation represented to this court that Judge Strong was not taking the
26 position that a preliminary injunction would not be binding on him in spite of
27 alleged defective service. (ECF No. 77 at p. 36).
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1 of the length of trial; and any other matters the parties wish the court to consider
2 in crafting a scheduling order. Plaintiffs have previously suggested the need for
3 some interim arrangement while this litigation is pending, but the court will not
4 consider the same absent the filing of a motion.

5 **IT IS SO ORDERED.** The District Court Executive is directed to enter
6 this order and provide copies of the same to counsel of record.

7 **DATED** this 14th day of May, 2013.

8 *s/Lonny R. Suko*

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10 LONNY R. SUKO
11 United States District Judge
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