IN THE NOOKSACK TRIBAL COURT

FOR THE NOOKSACK INDIAN TRIBE

DEMING, WASHINGTON

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled members of the Nooksack Indian Tribe, Plaintiffs, vs. ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY Defendants.	Case No.: 2013-CI-CL-001 **DECISION AND ORDER DENYING PLAINTIFFS' *EMERGENCY MOTION FOR STAY PENDING APPEAL***

THIS COURT held a hearing on the Plaintiff's *Emergency Motion for Stay Pending Appeal*. At the Plaintiff's request, this Court held the hearing with telephonic appearances from the Plaintiff's attorneys, Gabe Galanda, Anthony Broadman and Ryan Dreveskracht. Defendants' counsel Thomas Schlosser also appeared by telephone, with tribal attorneys Grett Hurley and Rickie Armstrong appearing in person. Several of the Plaintiffs and family members were present in the courtroom.

DECISION

The Plaintiffs' attorney filed an *Emergency Motion for Stay Pending Appeal* on May 22, 2013, following the Court's Order and Decision denying the Plaintiff's *Emergency Motion for Temporary Restraining Order* on May 20, 2013. On May 31, 2013, the Plaintiffs filed a *Notice of Appeal and For Permission to File an Interlocutory Appeal.* The Plaintiffs argue that this Court must grant a stay on its Order to "preserve the status quo pending appeal." They argue further that this Court should grant a stay, arguing that the factors for issuing a stay "substantially overlap" with the factors governing a preliminary injunction. The Court agrees that the factors for granting a stay

of an order are virtually the same as those for granting a preliminary injunction, which it already denied on May 20, 2013.

This Court denied the Plaintiffs' *Emergency Motion for a Temporary Restraining Order* utilizing the standard and factors the Plaintiffs' cited from *Winters v. Natural Res. Def. Council,* 555 U.S. 7 (2008). Under that standard, the movant must show a likelihood of prevailing on the merits, that irreparable harm will come to the Plaintiffs should the motion not be granted, and that granting the motion is in the public interest. The standard for granting an appeal maintains those identical standards, but adds that "granting the stay would not substantially harm the other parties." *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011). The Court denied the Plaintiffs' *Motion* in finding that the Plaintiffs' failed to meet the *Winters* threshold because the Court could not conclude that the Plaintiffs were likely to prevail on the merits of the case.

Plaintiffs briefing on this issue revisits the same arguments as in the original *Motion for Temporary Restraining Order.* The Plaintiffs appear to argue that this Court should find itself in error in its Order and Decision filed on May 20th, which would be the only possible means by which the Court could find the Plaintiffs likely to prevail on the merits of the claim. As the Court noted in that Order, the Court views that Order as based upon its *preliminary* analysis of the Plaintiffs' and Defendants' arguments. That preliminary analysis led the Court to find that the Plaintiffs were not likely to prevail on the merits.

As the Court noted in the May 16th hearing, it is not clear to this Court that the Nooksack Court of Appeals adopted the reasoning of *Ex Parte Young* and its progeny in its entirety, but it is clear that the Court of Appeals recognized the reasoning behind sovereign immunity itself and sought to protect the tribal government from constant suit. As already stated by this Court, *Ex Parte Young* carves out, at most, a narrow exception to sovereign immunity.

The Plaintiff argues that this Court has confused sovereign immunity, the narrow exception to it, and qualified immunity. This Court declines to so find that has confused these doctrines. The Court has not applied a qualified immunity rule to this case, nor does it intend to do so in its May 20th decision.

Ex Parte Young's exception to sovereign immunity stems from the complex interaction between the states, the federal government, and the Eleventh Amendment. The U.S. Supreme Court has held that the exception serves the purpose of vindicating the supremacy of federal law when it conflicts with state law and a state officials' attempt to enforce a state law that violates federal law. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 89-90 (1984). The complexity of the *Young* analysis renders application in the tribal situation somewhat unwieldly as the cases that apply this doctrine generally recite principles like Eleventh Amendment immunity that do not apply in the instant situation. The Court's attempt to simplify the doctrine for the purposes of clarity and application to this case appears to have confused rather than simplified.

Thus the Court finds it necessary to clarify the *Young* doctrine. The *Young* exception provides a plaintiff a means to sue a state official in his official capacity when his actions in enforcing state law violate federal law. State officials are normally protected by the Eleventh Amendment, which bars suits against states in federal court. When a state official takes action under state law that violates federal law or the federal Constitution, the *Young* exception allows a plaintiff to sue that state official for a violation of federal law, despite the official's sovereign immunity protection.

The application of this doctrine in tribal court remains controversial because *Young* seeks, among other things, to enforce federal law against state officials, which requires tribal courts to apply *Young* by analogy. The case law analyzing the *Young* doctrine often requires complex analyses of the interaction between federal and state law and raises arcane issues of federalism. The analogy to situations like those raised in *Olson v. Nooksack Housing Authority and Nooksack Tribal Council,* 6 NICS App. 49 (2001) and *Cline v.* Cunanan, NOO-CIV-02-08-5 (2009) is not always a perfect one.

The Nooksack Court of Appeals in *Olson* expressly declined to adopt *Ex Parte Young,* though it devoted a discussion to *Young* in its opinion. Similarly, in *Cline,* the Court of Appeals does not expressly adopt the *Young* analysis, but does hold that "[t]he fact that Plaintiffs named individual officer in their complaint does not automatically give rise to the right to proceed." *Cline* at

7. In *Idaho v. Couer d'Alene Tribe of Idaho,* 521 U.S. 261, (1997), the U.S. Supreme Court discusses the goals and intentions behind the *Young* doctrine extensively. In that discussion, the Court writes:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Id. at 269. The Court goes on to identify the two situations in which *Young* is applied, neither of which apply here: 1) "where there is no state forum available to vindicate federal interests", *Id.* at 270, and 2) "when the case calls for the interpretation of federal law." *Id.* at 274. The *Pennhurst* case also identifies the *ultra vires* exception. In that case, the Court held that when a state official violates *state* law, the *Young* exception does not apply because the "vindication of the supremacy of federal law" disappears. *Pennhurst,* 465 U.S. at 106. The majority decision in that case declines to adopt Justice Stevens' dissenting view that would apply the *Young* exception when a state official violates state law but does not violate federal law. Had the Court adopted that reasoning, the Court would have held that "official action based upon a reasonable interpretation of any statute might, if the interpretation turned out to be erroneous, provide the basis for injunctive relief against the actors in their official capacities". The Court expressly rejects the notion that an error of law could provide the basis for a *Young* exception:

> *Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override sovereign immunity of the State where the relief effectively is against it . . . Any resulting disadvantage to the plaintiff was 'outweighed' by the 'necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention' . . .The reason is obvious. Under the dissent's view of the *ultra vires* doctrine, the Eleventh Amendment would have force only in the rare instance in which a plaintiff foolishly attempts to sue the State in its own name, or where he cannot produce some state statute that has been violated to his asserted injury. Thus, the *ultra vires* doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief is against it.

Pennhurst, 465 U.S. at 113-116 (string citations omitted).

The Court questions utility of the *Young* doctrine in tribal court because so much of the complexity of this line of cases analyzes the interaction between the states, the federal government, and the Eleventh Amendment, applying an analysis that does not apply to tribes. The Court in this case has followed the Nooksack Court of Appeals' decisions regarding its finding of the intent behind *Young* and the limited ways in which the *Young* line might apply in a tribal situation. In doing so, the Court could not find a *Young* exception that would apply in this case.

As this Court noted in its May 20th decision, a mere error of law does not itself open the door to stripping an official of his or her sovereign immunity. Notably, the Court has not found that the Defendants have committed any error of law at this point in this litigation and, as such, has not conducted an analysis of the merits as to the *Young* exception(s) as the Plaintiffs argue. Rather, the Court reviewed the facts as presented by the Plaintiffs in their *Motion for a Temporary Restraining Order* for the purposes of clarity as to the law it applied and the facts that gave rise to the analysis of the Court's conclusion that the Plaintiffs were not likely to prevail at trial.

That analysis has not changed. Thus, the Court would not grant a stay based upon the same set of arguments presented at the May 16th hearing, given that the standard for a stay is virtually identical to the standards for granting a TRO/Preliminary Injunction. Plaintiffs make the same arguments for the basis of the stay as they made in that hearing and the Court has denied the TRO.

However, the Court must further analyze whether the Plaintiffs have filed their *Motion for Stay Pending Appeal* in the correct forum. The Defendants raise this as an additional objection to the Plaintiffs' *Motion* arguing that the Plaintiffs must file their motion for a stay with the Court of Appeals. The Plaintiffs argue that the power to grant a stay falls within the Court's "regular equipment" and common law powers.

As the Court noted in an earlier ruling, the Nooksack Code of Civil Procedure has minimal detail and the Court ordered that it would use the Federal Rules when the Nooksack Code failed to provide them. The Court has done so, as the Plaintiffs pointed out during the hearing. As stated in

the May 20th decision, when the Code provides a rule, the Court will follow that Rule. Here, the Rules of Civil Procedure do not speak to the issue of staying a judgment, but the Nooksack Appellate Code does.

Under Title 80, an appellant may seek permission to file an interlocutory appeal to the Nooksack Court of Appeals. NTC 80.03.020. The Plaintiffs filed a document seeking such permission on May 31, 2013. Chapter 80.06, entitled "Stay of Judgment" sets out the procedures under which an appellant may seek a stay. It reads, in pertinent part, "The judgment or order of the Nooksack Tribal Court appealed from shall not be carried out unless and until the Court of Appeals upholds the judgment or dismisses the appeal. . .Either party may petition the court to be heard on the issue of staying the orders and judgments of the trial court prior to the case being heard on appeal under 80.080.50."

Under the Appellate Code, once an appeal has been taken, whether interlocutory or otherwise, the Court of Appeals obtains jurisdiction over the issues raised in the appeal. This Court's decision on May 20th has been appealed to the Court of Appeals on an interlocutory basis. The Appellate Code clearly identifies the power to stay as belonging to the Court of Appeals when a case has been appealed: "Either party may petition **the court** to be heard on the issue of staying the orders and judgments of the trial court prior to the case being heard on appeal." The Code here differentiates between the "trial court" and "the court." In that sentence, it is apparent that "the court" refers to the Court of Appeals. While this Court may indeed have the authority to stay judgments in its equitable powers in other situations, the Court cannot find it does so when the Code explicitly grants that authority to the Court of Appeals when a case has been appealed. Therefore, the Court cannot grant the relief the Plaintiffs' seek here as the power to stay the judgment of the Court lies with the Court of Appeals.

Therefore the Plaintiffs' *Emergency Motion for Stay Pending Appeal* is denied.

IT IS SO ORDERED.

DATED this __3___ day of _June_____, 2013__.

Raquel Montoya-Lewis
Chief Judge, Nooksack Tribal Court

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