

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REBECCA SWEARINGER and KIM  
FREEMAN,

Plaintiffs,

v.

PASKENTA BAND OF NOMLAKI INDIANS  
TRIBAL BUSINESS COUNCIL,

Defendant.

No. C 13-2642 CW

ORDER GRANTING  
MOTION TO DISMISS  
(Docket No. 4)

Plaintiffs Rebecca Swearinger and Kim Freeman brought this action against Defendant Paskenta Band of Nomlaki Indians (PBNI).<sup>1</sup> Defendant moves to dismiss the complaint. Plaintiffs oppose the motion. After considering the parties' submissions, the Court finds this matter suitable for decision without oral argument and now grants the motion with leave to amend.

BACKGROUND

The following facts are taken from Plaintiffs' complaint or statutes cited therein.

Plaintiffs are "enrolled members of the Paskenta Band of Nomlaki Indians," a federally recognized Indian tribe with "approximately 240 members." Docket No. 1, Compl. ¶¶ 11, 13-14. Although Congress revoked PBNI's status as a federally recognized

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<sup>1</sup> Defendant is named in this lawsuit as the "Paskenta Band of Nomlaki Indians Tribal Business Council" but asserts that its true name is the Paskenta Band of Nomlaki Indians.

1 tribe in 1958, it later restored the tribe's federally recognized  
 2 status in 1994 by enacting the Paskenta Band Restoration Act  
 3 (PBRA), Pub. L. No. 103-454, §§ 301-03, 108 Stat. 4791 (codified  
 4 as amended at 25 U.S.C. §§ 1300m et seq.). Compl. ¶ 21. The PBRA  
 5 directed the Secretary of the Interior to conduct an "election for  
 6 the purpose of adopting a constitution and bylaws for the Tribe."  
 7 25 U.S.C. § 1300m-6. The PBRA further states that, after the  
 8 tribe adopts a constitution, "such tribal constitution shall  
 9 govern membership in the Tribe." Id. § 1300m-4(b).

10 Plaintiffs allege that Defendant violated this provision of  
 11 the PBRA. Compl. ¶¶ 1, 31-32. They further allege that Defendant  
 12 violated their rights to due process and free speech under the  
 13 Tribal Constitution and the United States Constitution. Id. ¶¶ 6,  
 14 22-35.

#### 15 DISCUSSION

16 Defendant moves to dismiss on sovereign immunity grounds, for  
 17 lack of subject matter jurisdiction, and for failure to state a  
 18 claim. Each of these grounds for dismissal is addressed in turn.

#### 19 I. Sovereign Immunity<sup>2</sup>

20 "Indian tribes have long been recognized as possessing the  
 21 common-law immunity from suit traditionally enjoyed by sovereign  
 22 powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).  
 23 "Absent congressional or tribal consent to suit, state and federal  
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25 <sup>2</sup> Defendant suggests in its brief that sovereign immunity provides  
 26 a basis for dismissing the complaint for lack of subject matter  
 27 jurisdiction. This order, however, addresses sovereign immunity  
 28 separately from subject matter jurisdiction. "Although the concepts are  
 related, sovereign immunity and subject matter jurisdiction present  
 distinct issues." United States v. Park Place Associates, Ltd., 563  
 F.3d 907, 923 (9th Cir. 2009).

1 courts have no jurisdiction over Indian tribes; only consent gives  
2 the courts the jurisdictional authority to adjudicate claims  
3 raised by or against tribal defendants." Pan Am. Co. v. Sycuan  
4 Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989).

5 Here, Plaintiffs do not allege that PBNI has waived its  
6 immunity from suit. Accordingly, their claims against the tribe  
7 must be dismissed.

8 Plaintiffs note in their opposition brief that sovereign  
9 immunity does not shield individual members of PBNI's tribal  
10 council from certain suits for injunctive relief. See Salt River  
11 Project Agr. Imp. & Power Dist. v. Lee, 672 F.3d 1176, 1181 (9th  
12 Cir. 2012) (noting that the doctrine of sovereign immunity  
13 "permits actions for prospective non-monetary relief against state  
14 or tribal officials in their official capacity to enjoin them from  
15 violating federal law, without the presence of the immune State or  
16 tribe"). While this may be true, it still does not preclude  
17 dismissal here because Plaintiffs have not named any individual  
18 members of the tribal council as Defendants. Their complaint only  
19 identifies one Defendant, stating, "The Defendant is the Paskenta  
20 Band of Nomlaki Indians." Compl. ¶ 12.

21 Accordingly, Plaintiffs' complaint must be dismissed on the  
22 basis of sovereign immunity. Plaintiffs are granted leave to file  
23 an amended complaint that identifies, by name, specific members of  
24 PBNI's tribal council capable of providing the relief Plaintiffs  
25 seek. Plaintiffs may seek injunctive relief against these  
26 individuals to prevent them from violating the PBRA, provided that  
27 they cure the various other pleading deficiencies identified in  
28 this order. Salt River Project, 672 F.3d at 1181 (noting that

individual members of a tribal leadership council can be enjoined "from violating federal law").

Plaintiffs may not challenge any action that these individuals took pursuant to any tribal ordinance. United States v. Oregon, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981) (noting that tribal sovereign immunity "also extends to tribal officials when acting in their official capacity and within their scope of authority"). Nor may Plaintiffs seek to circumvent tribal sovereign immunity by relying on the Indian Civil Rights Act (ICRA). "Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." Santa Clara Pueblo, 436 U.S. at 59. "The only recognized exception to a sovereign immunity defense under the ICRA is a habeas corpus action," which may be brought only to challenge an order of detention. Johnson v. Gila River Indian Cmty., 174 F.3d 1032, 1035 (9th Cir. 1999).

## II. Lack of Subject Matter Jurisdiction

### A. Legal Standard under Rule 12(b)(1)

Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction must exist at the time the action is commenced. Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case. Therefore, a Rule 12(b)(1) challenge should be decided before other grounds for dismissal, because they will become moot if

1 dismissal is granted. Alvares v. Erickson, 514 F.2d 156, 160 (9th  
2 Cir. 1975).

3 A federal court is presumed to lack subject matter  
4 jurisdiction until the contrary affirmatively appears. Stock  
5 West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.  
6 1989). An action should not be dismissed for lack of subject  
7 matter jurisdiction without giving the plaintiff an opportunity to  
8 amend unless it is clear that the jurisdictional deficiency cannot  
9 be cured by amendment. May Dep't Store v. Graphic Process Co.,  
10 637 F.2d 1211, 1216 (9th Cir. 1980).

11 B. Analysis

12 Plaintiffs assert that federal subject matter jurisdiction  
13 exists under 28 U.S.C. § 1331, which gives district courts  
14 original jurisdiction over all civil actions arising under federal  
15 law. Compl. ¶ 8.

16 "A case arises under federal law within the meaning of § 1331  
17 . . . if a well-pleaded complaint establishes either that federal  
18 law creates the cause of action or that the plaintiff's right to  
19 relief necessarily depends on resolution of a substantial question  
20 of federal law." Empire Healthchoice Assurance, Inc. v. McVeigh,  
21 547 U.S. 677, 689-90 (2006) (quotation marks omitted). Thus,  
22 Plaintiffs here must show that the PBRA gives rise to the cause of  
23 action they have asserted. Because the PBRA does not create such  
24 a cause of action expressly, Plaintiffs must show that the statute  
25 does so impliedly.

26 Courts typically use a four-factor test to "determine whether  
27 a private right of action is implied in a federal statute."  
28 Townsend v. Univ. of Alaska, 543 F.3d 478, 486 (9th Cir. 2008)

(citing Cort v. Ash, 422 U.S. 66, 78 (1975)). Under that test, the court considers first whether "the plaintiff [is] one of the class for whose especial benefit the statute was enacted." Cort, 422 U.S. at 78. Second, the court searches for "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." Id. Third, the court examines whether the remedy the plaintiff seeks is "consistent with the underlying purposes of the legislative scheme." Id. Finally, the court asks whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." Id. "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." Santa Clara Pueblo, 436 U.S. at 72 n.32.

In this case, it is impossible to determine whether the PBRA gives rise to the cause of action Plaintiffs have asserted because Plaintiffs have failed to articulate their claim clearly. As explained in greater depth below, Plaintiffs' complaint does not contain enough factual details to discern exactly how PNBI, or its tribal council, is alleged to have violated the PBRA. As such, it remains unclear whether the statute gives rise to a cause of action or provides for the type of relief that Plaintiffs seek.

Because Plaintiffs' claims must be dismissed for other reasons, the Court does not decide whether or not the PBRA creates a private cause of action. Similarly, because Plaintiffs have not identified a factual basis for their due process or free speech

claims, the Court need not resolve the scope of Plaintiffs' rights under the Tribal or U.S. Constitutions at this time. See Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

If Plaintiffs file an amended complaint, they must clearly identify a specific basis for subject matter jurisdiction. Plaintiffs may not rely on the ICRA as a jurisdictional basis for challenging the actions or decisions of any tribal official. See Santa Clara Pueblo, 436 U.S. at 72 (holding that § 1302 of the ICRA "does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers"). As noted above, Plaintiffs may only invoke the ICRA as a basis for federal question jurisdiction if they have been subject to detention and seek to challenge their detention by means of a petition for habeas corpus.

### III. Failure to State a Claim

#### A. Legal Standard under Rule 12(b)(6)

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most

1 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
2 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
3 to legal conclusions; "threadbare recitals of the elements of a  
4 cause of action, supported by mere conclusory statements," are not  
5 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
6 (citing Twombly, 550 U.S. at 555).

7 When granting a motion to dismiss, the court is generally  
8 required to grant the plaintiff leave to amend, even if no request  
9 to amend the pleading was made, unless amendment would be futile.  
10 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
11 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
12 amendment would be futile, the court examines whether the  
13 complaint could be amended to cure the defect requiring dismissal  
14 "without contradicting any of the allegations of [the] original  
15 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
16 Cir. 1990).

17 B. Analysis

18 Plaintiffs do not allege sufficient facts to support their  
19 claims. Most importantly, their complaint does not specify how  
20 Defendant violated the PBRA. The complaint alleges only that  
21 Defendant "enacted an Ordinance in violation of federal law" and  
22 subsequently "employed said Ordinance in order to deprive  
23 Plaintiffs of their rights pursuant to the Tribal Constitution."  
24 Id. ¶¶ 31-32. Plaintiffs do not describe the specific terms of  
25 this ordinance, when it was enacted, how it violates federal law,  
26  
27  
28



1 or how it deprived them of their rights under the Tribal or U.S.  
2 Constitutions.<sup>3</sup>

3 The complaint also fails to provide any specific factual  
4 details to support the allegation that "Defendant punished the  
5 Plaintiff's [sic] for appealing a Tribal Election and petitioning  
6 for redress of grievances, both rights guaranteed under the Tribal  
7 Constitution." Id. ¶ 26. Plaintiffs do not explain, for  
8 instance, what Defendant did to punish them, why they filed an  
9 election appeal, which election they sought to appeal, when they  
10 petitioned for redress of grievances, to whom they directed the  
11 petition, and on what grounds they did so. Instead, the complaint  
12 simply alleges that "Defendant created a series of penalties  
13 against [PBNI] members for exercising rights guaranteed under the  
14 Tribal Constitution." Id. ¶ 25. This is insufficient to state a  
15 claim.

16 Thus, because Plaintiffs' complaint lacks sufficient factual  
17 allegations to discern the basis for this dispute, their claims  
18 must be dismissed. Plaintiffs are granted leave to amend provided  
19 that their amended complaint contains sufficient factual  
20 allegations to address the deficiencies outlined above.

21 CONCLUSION

22 For the reasons set forth above, Defendant's motion to  
23 dismiss (Docket No. 4) is GRANTED with leave to amend. Plaintiffs  
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25 <sup>3</sup> Plaintiffs assert in a footnote to their opposition brief that  
26 they were "each suspended [from tribal membership] for 360 consecutive  
27 months." Opp. 3 n.1. However, it is not clear whether these alleged  
28 suspensions were issued pursuant to the ordinance identified in the  
complaint. Furthermore, Plaintiffs' suspensions are not mentioned  
anywhere in the complaint itself. Thus, Plaintiffs cannot rely on this  
allegation to avoid dismissal here.

1 may file an amended complaint within twenty-one days of this  
2 order. The amended complaint must (1) name individual members of  
3 PBNI's tribal council as Defendants; (2) contain sufficiently  
4 detailed factual allegations to cure the deficiencies identified  
5 in this order; and (3) clearly identify a basis for federal  
6 subject matter jurisdiction, including any statutes that give rise  
7 to their federal causes of action and any specific waivers of  
8 sovereign immunity on which they intend to rely. The amended  
9 complaint may not name PBNI as a Defendant. If Plaintiffs fail to  
10 file an amended complaint within twenty-one days, this action  
11 shall be dismissed for failure to prosecute.

12 Plaintiffs' attorney, Joseph Kitto, does not appear to be a  
13 member of the bar of this Court, as required by the local rules.  
14 See Civil L.R. 11-1(a)-(b) (requiring any attorney who practices  
15 in this district to be an active member of the California bar or  
16 an attorney who was admitted to another state's bar before  
17 September 1995 and who remains an active member of that bar).  
18 Accordingly, within three days of this order, Kitto must either  
19 seek admission to practice in this district or move to be admitted  
20 pro hac vice.

21 IT IS SO ORDERED.

22  
23 Dated: 8/27/2013

24   
25 CLAUDIA WILKEN  
26 United States District Judge  
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