The Honorable Ronald B. Leighton
United States District Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHERRI BLACK, individually and as Personal Representative for the Estate of Thomas Anthony Black,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.

Defendants.

Case No. C13-5415-RBL

PLAINTIFF'S RESPONSE TO DEFENDANT TRIBES' JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

NOTED FOR CONSIDERATION: MAY 23, 2014

I. INTRODUCTION

This case involves a fatal incident involving tribal police officers from both Suquamish and Port Gamble S'Klallam tribes acting collaboratively with Kitsap County Sheriff deputies in an attempt to arrest Stacy Stanley Callihoo at the home of Thomas Anthony Black which is located in Kitsap County, Washington. Upon arrival by police, detective Greg Graves entered the residence without consent or a search warrant and immediately shot and killed Thomas Black, a diabetic man as he lay in his bed. Police then exited the residence leaving Mr. Black to bleed to death. Police were equipped

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with body cameras that filmed the unlawful detention of Sherri Black, the entry of the Black home and the shooting of Thomas Black. Plaintiff has filed an action for damages brought pursuant to 42 U.S.C. § 1983 alleging violations of the First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. This Court dismissed the United States as a named Defendant in this matter on September 17, 2013, the remaining Defendants are the Suquamish Indian Tribe, the Suquamish Tribal Police, Port Gamble S'Klallam Tribe, and the Port Gamble S'Klallam Tribal Police, and 1983 claims against Detective Graves and the John Doe officers. The Defendant Tribes now moves pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss the complaint for lack of subject matter jurisdiction on the ground that they are immune from suit by the doctrine of tribal sovereign immunity arguing that all tribal defendants in this case are entitled to immunity. Plaintiff resists the Tribes Motion and asserts that the Tribes have waived their immunity through Treaty and that Detective Graves and the John Doe officers Defendants 1-25 should remain in their individual capacity because A Tribal sovereign immunity defense is only appropriate where tribal officials are acting in their representative capacity and within the scope of their authority; *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985). The defense is lost where a tribal official acts beyond the scope of his/her authority. See e.g., *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida,* 177 F.3d 1212 (11th Cir. 1999)(tribal officials are "subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority."). It is well established that tribal officials act beyond their authority when they work in concert with state actors who, under color of state law, deprive an individual of his/her civil rights. See e.g., *Evans v. McKay,* 869 F.2d 1341, 1348 (9th Cir. 1989). *Evans* denied sovereign immunity to individual tribal defendants sued under § 1983 and alleged to have acted in concert with state officers accused of constitutional violations. Here the tribal defendants

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were acting in concert with Kitsap County Deputies in the planning of the arrest of Stacy Callihoo, the detainment of Sherri Black, the unlawful raid and entry of the home, and the excessive force used to commence these acts. Plaintiff has sought leave to amend her pleadings naming the individual DOE defendants in their individual capacities. Nonetheless Detective Graves should remain because it is alleged that he acted outside the scope of his delegated authority that was vested in the tribe, as is the same with all DOE Defendants.

II. ARGUMENT

A. It matters not that Tribal Police were enforcing a Tribal Warrant.

The Court in *Evans* gave no deference to Tribal Police Defendants who were acting in concert with State police while enforcing a tribal warrant. The Ninth Circuit held that suits against tribal officials acting in concert with federal officials are not precluded by tribal official immunity. It is well established that tribal officials act beyond their authority when they work in concert with state actors who, under color of state law, deprive an individual of his/her civil rights. Tribal officials are not cloaked in immunity from federal civil rights suit to the extent they acted in concert with police officers, who in turn were acting under color of state law. See *Evans v. McKay,* 869 F.2d 1341, 1348 (9th Cir 1989). The Court wrote:

> While officials and agents of an Indian tribe do not have the same immunity as the tribe itself, *Kennerly,* 721 F.2d at 1259, tribal immunity nevertheless extends to individual tribal officials while "acting in their representative capacity and within the scope of their authority," *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir. 1985). **Although the allegedly unconstitutional arrests and seizures of which the Evanses complain were accomplished pursuant to orders of the Tribal Court, we disagree with the district court's conclusion that the individual tribal defendants were "at all times pertinent to this action, acting within their official capacities and under authority of tribal law."** See *Evans v. Little Bird,*

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656 F. Supp. at 875. If appellants are able to prove that the individual tribal defendants acted in concert with the police defendants, whose actions we have here held to be "under color of state law," their actions cannot be said to have been authorized by tribal law. *Cf. Ex parte Young,* 209 U.S. 123, 159-60 (1908).

B. It matters not which officers led and which provided coverage when officers from both the County and the Tribes violated Plaintiffs constitutional rights.

Defendants argue that there was no agreement between Kitsap County Sheriff's Office and Tribal Police and therefore the conduct of officers can be authorized by tribal law because Kitsap County Sheriff deputies only provided coverage. Plaintiff alleges that the tribal police acted in concert with Kitsap County deputies to violate the Black's rights. Federal case law does not indicate a need for any written agreement to be in place but only that they worked "in concert" to violate a person's rights. Tribal defendants admit that Kitsap had provided deputies to assist tribal officers on previous occasions. Dkt. #52 at p. 5. This is customary in Kitsap County because of the checkerboard of Native and non-native land ownership in Suquamish, Washington. The Ninth Circuit has held federal officials may act under the color of state law if there is a "symbiotic relationship" between federal and state actors, such that the "challenged action can fairly be attributed to the state." *Cabreera v. Martin,* 973 F.2d 735, 742-43 (9th Cir. 1992). Here Plaintiff is alleging that both police departments acted in unison to violate the rights of Sherri and Thomas Black. Kitsap County Sheriff deputies were required to be there because the residence belonged to non-natives and the tribe does not have criminal jurisdiction over them. *see* Olmstead Dec., Ex. A (Sanchez Dep.) at p. 17-18, Defendants contend that Kitsap County Sheriff's Department did not play any role in the execution of the arrest warrant. However they did. When asked why was Kitsap County involved in the incident, under direct examination Sergeant Sanchez replied "we needed more officers to provide backup for the incident. I also knew there was a possibility that Sherri was nontribal…" see Olmstead Dec., Ex. A (Sanchez Dep.) at p. 67-69. Two Kitsap County deputies

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were involved in the planning of the raid on the home and Kitsap County Deputy Michael Grant followed detective Graves and other tribal defendants into the home with weapons drawn. This constitutes a violation to Plaintiff's right to be free from unreasonable search and seizure and enough to assert that the County was working in concert with the Tribal defendants to enforce the arrest warrant against Stacy Callihoo. If a valid search warrant would have been properly obtained it would have been issued through the Kitsap County Superior Court due to the fact that the arrest warrant was criminal in nature, the residents of the home were non-native and that the residence was located on fee-simple land which is outside the jurisdiction of the tribe. *see* Olmstead Dec., Ex. A (Sanchez Dep.) at p. 67-69.

C. Sovereign Immunity does not immunize Defendant Graves or other DOE officers:

It is undeniable that Indian Tribes are not subject to suit unless a Tribe explicitly and unequivocally waives its sovereign immunity or Congress expressly authorized the action. However in the Tribes motion they request a complete dismissal of all claims against all tribal defendants, it is their contention that this immunity extends to Detective Graves and other Tribal Defendants which Plaintiff feels is not the case. Although Tribal Sovereign immunity bars Plaintiff's claims against The Tribes themselves Tribal Sovereign immunity does not bar claims asserted against the tribal officers in their individual capacities. The protection of sovereign immunity is subject to the well-established exception described in *Ex parte Young,* 209 U.S. 123, 159-60, 28 S. Ct. 441; 52 L. Ed. 714 (1908). *Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity. See *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Nation,* 498 U.S. 505, 514, 111 S. Ct. 905. 112 L. Ed.2d 1112 (1991). The 9th Circuit strongly implied, without deciding, that Ex parte Young does apply to tribal officials in *Chemehuevi Indian Tribe v. Calif. Bd. Of Equalization,* 757 F.2d 1047, 1051-52 (9th Cir. 1985), rev'd in part on other grounds, 474 U.S. 9, 106 S. Ct. 289, 88 L.Ed.2d 9 (1985) and *California v. Harvier*, 700 F.2d 1217, 1218-20, 1220 n. 1 (9th Cir 1983). "We now reach and conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." *Id.* at 1221, 1224. Tribal sovereign

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immunity, however, does not bar claims asserted against tribal officials in their individual capacities. *Fletcher v. United States,* 116 F.3d 1315, 1324 (10th Cir. 1997). Thus to the extent that Plaintiff has asserted her claims against defendants in their individual capacities, such claims would not be subject to dismissal under Fed. R. Civ. P. 12(b)(1). The complaint does allege that Defendant Graves is being sued in his individual and official capacities; the complaint also request claims for punitive damages which are only available in individual capacity suits. Individual capacity suits related to an officer's official duties are generally permissible. As the Tenth Circuit has explained: "The general bar against official-capacity claims…does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities…" *Native Am. Distrib. Co. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1296 (10th Cir. 2008). Several Ninth Circuit cases have referred to the "scope of authority" principle in individual capacity suits against tribal officers. In these cases the "scope of authority" language refers to the principle that allegations of acts outside an officer's authority are by definition individual capacity claims. *See Chemehuevi Indian Tribe v. Cal. State Bd. Of Equalization,* 757 F.2d 1047, 1051 (9th Cir. 1985)(overruled on other grounds by *Cal. State Bd. Of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9, 106 S. Ct. 289, 88 L.Ed.2d 9 (1985)). The Ninth Circuit also reversed the district court's decision to dismiss based on sovereign immunity in *Maxwell et. al. v. County of San Diego et. al.* 697 F.3d 941, (9th Cir. 2012) and concluded that sovereign immunity does not bar a suit against individual tribal officials because the tribe "is not the real party in interest…any damages will come from their own pockets, not the tribal treasure." *Id.* at 955. The United States Supreme Court has suggested that the doctrine of *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441; 52 L. Ed. 714 (1908), could (and perhaps should) apply to tribal officials acting outside the scope of their official capacities, or in violation of federal law, as a means to avoid tribal immunity. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Nation,* 498 U.S. 505, 514, 111 S. Ct. 905. 112 L. Ed.2d 1112 (1991), the Court stated:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We

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have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *Young,* 209 U.S. at 123.

In fact, in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed.2d 106 (1978), the Supreme Court held that Lucario Padilla, a defendant in the civil rights complaint and an officer of the Pueblo, "is not protected by the tribe's immunity from suit." *Id.* (citing *Puyallup Tribe, Inc. v. Washington Dept. of Game,* 433 U.S. 165, 171-72, 97 S. Ct. 2616, 53 L.Ed.2d 667 (1973)). The Court in *Puyallup*, remarked, "The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894, does not immunize the individual members of the Tribe." There is also the question as to whether a tribal official may be sued for acting beyond a scope of authority that federal law confers on the tribe. In such a scenario, tribal law might authorize actions of tribal officials, but federal law might limit the tribe's underlying authority – that is, the source of the tribal officials' authority – and thereby obviate tribal official immunity. Most federal circuits find that an allegation that a tribal officer acted beyond the valid authority of the tribe, as defined by federal Indian law, is sufficient to circumvent tribal official immunity.

"When a federal officer – or state officer for that matter – VIOLATES THE CONSTITUION, He exercises a power that his sovereign does not enjoy. That is the rationale for stripping him of his authority and immunity as a federal or state officer: viz., he has exercised a power that his sovereign was powerless to convey to him. *See Young*, an official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power that his tribe was powerless to convey to him." The extension of the Ex parte Young doctrine to tribal officials is well established in the courts of appeals as well. The Ninth Circuit has endorsed the idea categorically. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.,* 276 F.3d 1150 1159-60 (9th Cir. 2002) (recognizing that "suits against tribal officials allegedly acting in contravention of federal law" are "permitted". For this reason the Court should not dismiss Defendant Graves or DOES 1-25.

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D. The Tribe had no Jurisdiction on fee simple land, thus Kitsap County deputies worked in concert with Tribal officers.

In 1855, the Suquamish Tribe entered into the Treaty of Point Elliott (Treaty), Jan. 22, 1855, 12 Stat. 927, and agreed to settle on a 7,276-acre reservation near Port Madison, Washington. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 193, 55 L.Ed.2d 209, 98 S. Ct. 1011 (1978). According to *Oliphant,* approximately 37 percent of the Reservation is Indian land, subject to the trust status of the United States. The other 63 percent is owned in fee simple by non-Indians. *Id.* at 193.

The United States Supreme Court has addressed the issue of jurisdiction over an injury to a tribal member occurring on non-Indian-owned fee land within the boundaries of the reservation was not within the description of Indian tribal jurisdiction. *Montana v. United States,* 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). The Black's home is on fee land, not trust land, the question in *Montana* was whether the tribe could regulate hunting and fishing by nonmembers on lands owned in fee simple by non-Indians within the reservation. The answer was no. The tribe could prohibit nonmembers from hunting and fishing on lands belonging to the tribe or held by the United States in trust for the tribe, but its inherent sovereignty was not so broad as to support regulatory authority over non-Indian fee lands. The general rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana* 450 U.S. at 565. Indian tribal courts do not have inherent jurisdiction to try and punish non-Indians who commit crimes on their land. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 212, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978). Because the Tribe did not have any jurisdiction to regulate any wrongdoings at the Black home they were required to act in concert with Kitsap County to execute any arrests at the Black home. Tribal deputies' act to enforce the laws of the State of Washington, and in joint operations outside the reservation are led by the County's sheriff or designee. As a tribal deputy Defendant Graves authority derives from Kitsap County rather than the tribes, and as such the tribes' sovereign immunity does not protect him, as he lacked authority to act on fee-simple land outside of the jurisdiction of the reservation against nonnative Americans. The Court should find that there are sufficient facts to support that Defendant Graves acted outside the scope of his delegated authority.

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E. Defendant Tribes have waived Sovereign Immunity through treaty

The Treaty of Point Elliott and the Treaty of Point no Point by which both Defendant Tribes abide both have a similar clause which should be viewed as an express waiver of Sovereign Immunity, therein Article 9 it is unequivocally expressed that "The said tribes and band acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens." Such language should be construed as an express waiver of Sovereign Immunity when coupled with the actions of the Defendants. Because the Tribe acted outside the scope of its immunity and thus is subject to liability. For this reason the Court should find that the Tribes have waived their immunity and are subject to suit. Allowing unrestricted rights to allow tribal officers to enter the homes of nonnatives outside the reservation and then in turn shoot and kill a person violates the treaty and the Tribe should not be able to hide behind their sovereign shield. When interpreting Indian treaties, it is well established that certain canons are of special importance and the courts are required to consider the treaties' central purpose and construe the treaties as they were originally understood by the tribal representatives. *Nez Perce Tribe v. Idaho Power Co,* 847 F. Supp. 791, 806. These Treaties impose a duty to both of the tribes which if breached should waive immunity.

F. Subject Matter Jurisdiction & Tribal Sovereign Immunity

i. Rule 12(b)(1) Analysis: On a motion to dismiss based on lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the court should accept as true all the factual allegation in the complaint and must draw all reasonable inferences in favor of the non-moving party. Subject matter jurisdiction is not defeated by the possibility that the complaint might fail to state a cause of action.

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> Rather, the district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another… unless the claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction. *Steel Co. v. Citizens for a Better Environment, 523* U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d. 210 (1998).

A court may dismiss a claim only when it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations found in the complaint. *Hishon v. King & Spaulding,* 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). A motion to dismiss should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him or her to relief. *Campbell v. Wells Fargo Bank,* 781 F.2d 440, 442 (5th Cir. 1986). The Defendant's motion should be denied. Contrary to Defendant's assertion, this court has subject matter jurisdiction over Plaintiff's claims against Defendant Graves and other officers in their individual capacity.

G. Subject Matter Jurisdiction Exists:

This Court has original jurisdiction over the case because it is a civil action arising out of a law of the United States, 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331 (2012). Subject Matter Jurisdiction exists for questions involving the extent of tribal jurisdiction against non-members . The application of Tribal Sovereign immunity raises questions that arise under federal law within the meaning of 28 U.S.C. §1331 which provides: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. This Court also has jurisdiction under *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441 52 L. Ed. 714 (1908).

H. Conclusion.

In determining a motion to dismiss for lack of subject matter jurisdiction the Court must resolve factual questions in favor of the non-moving party. *Autery v. U.S.,* 424 F.3d 944, 956 (9th Cir.

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2005). A court's review must focus on the allegations of the complaint, and construe the allegations in the light most favorable to the plaintiff. *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989).

For the reasons set forth herein, Plaintiff respectfully requests this Honorable Court to deny defendant's motion to dismiss pursuant to 12(b)(1) and find that tribal sovereign immunity does not extend to tribal officers when they act in concert with state police to violate a person's constitutional rights. It is well established that private parties who act in concert with officers of the state are acting under the color of state law within the meaning of section 1983. *Lugar v. Edmondson Oil Co., Inc.,* 457 U.S. 922, 930-31, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

Dated this 12th day of May, 2014.

/s/Thomas S. Olmstead

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on May 12, 2014 I caused to be served Plaintiff's Response to Defendant Tribes' Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction by way of ECF filing which will notify the following parties:

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