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6 SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF WHATCOM

7 RABANG,

8 Plaintiff

No. 17-2-00163-1

9 v.

10 GILLILAND, et al.,

Defendants.

DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO  
DISMISS

11  
12 COME NOW, Defendants in the above-entitled action, by and through the Office of  
13 Tribal Attorney, and provide this Reply in Support of their Motion to Dismiss.

14  
15 **I. INTRODUCTION**

16 This Court must deny the Plaintiffs' claims and dismiss this case because of two fatal  
17 defects. First, Washington Courts lack jurisdiction to hear cases when invoking jurisdiction  
18 would infringe upon the rights of the tribe to make its own laws and be ruled by them.  
19 *Outsource Services Management v. Nooksack Business Corporation*, 181 Wn.2d 272, 277, 333  
20 P.3d 380 (2014). Second, Defendants are tribal employees cloaked with the Nooksack Indian  
21 Tribe's immunity from suit and the Defendants' immunity from suit similarly acts as a  
22 jurisdictional bar preventing this Court from asserting jurisdiction over the claims. *See Hardin v.*  
23 *White Mountain Apache Tribe*, 779 F.2d 476, 479 (9<sup>th</sup> Cir. 1985).  
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1 A. The Washington State Supreme Court has made clear that Washington Courts lack  
2 jurisdiction over civil disputes in Indian Country if asserting jurisdiction would infringe  
3 on the rights of the tribe to make its own laws and be ruled by them.

4 In 2014, the Washington State Supreme Court held that: Washington State courts  
5 generally have jurisdiction over civil disputes in Indian country if either (1) the state has  
6 assumed jurisdiction pursuant to Public Law 280 or (2) asserting jurisdiction would not infringe  
7 on the rights of the tribe to make its own laws and be ruled by them. *Outsource Services*  
8 *Management, LLC v. Nooksack Business Corp.*, 181 Wn.2d 272, 277 (2014). In the Plaintiffs'  
9 former incarnation to this case, the Plaintiffs' claim that the state of Washington's assumption of  
10 PL-280 jurisdiction conferred jurisdiction to the state courts to adjudicate the Plaintiffs' trespass  
11 claims regarding Tribal Trust lands was dismissed for lack of jurisdiction. *Rabang v. Gilliland,*  
12 *et. al.*, No. 16-2-02029-9, Dkt. # 27 (Whatcom Cty. Sup. Ct. Jan. 27, 2017). Now, the Plaintiffs  
13 seek to change the jurisdictional analysis by changing their claim of relief; this attack on the  
14 Tribe's sovereignty must fail.

15 This Court lacks jurisdiction in this case because the Plaintiffs' alleged harm is directly  
16 tied to the manner in which the Tribe makes and enforces its own laws – topics of unique tribal  
17 concern – topics the state court cannot infringe upon. The Plaintiffs are simply dissatisfied with  
18 a Tribal Court order stemming from a proceeding the Plaintiffs participated in, but did not  
19 appeal, wherein the Tribe obtained an order regarding the right to use tribal trust property. An  
20 Indian tribe is free to maintain or establish its own laws, which include the power to determine  
21 membership<sup>1</sup>, to legislate civil and criminal laws<sup>2</sup>, to exclude<sup>3</sup>, to regulate the right to use its  
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23  
24 <sup>1</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

25 <sup>2</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982).

<sup>3</sup> *Id.*

1 property<sup>4</sup>, and to administer justice<sup>5</sup>. The Plaintiffs' claims go to the core of tribal sovereign  
2 rights. This Court cannot insert itself into the fray, as to do so would infringe on the rights of the  
3 Tribe to make its own laws and be ruled by them.

4 B. Tribal Sovereign Immunity extends to, and protects, Tribal Employee Defendants acting  
5 within the scope of their authority.

6 The Nooksack Indian Tribe is a domestic dependent sovereign, possessed of all the  
7 sovereignty under American law not otherwise limited by federal law. The United States  
8 Supreme Court has repeatedly recognized that Indian tribes "retain[ ] their original natural  
9 rights" as sovereign entities. *Worcester v. Georgia*, 31 U.S. at 559; *United States v. U.S. Fid. &*  
10 *Guar. Co.*, 309 U.S. 506, 512-13 (1940). In keeping with their sovereign status, it is well settled  
11 that Indian tribes enjoy the common-law immunity from suit traditionally accorded to sovereign  
12 entities. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. ***Whether tribal sovereign immunity***  
13 ***applies is a question of federal law.*** *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751,  
14 754 (1998)(emphasis added). Absent the tribe's express waiver of immunity or congressional  
15 authorization, an Indian tribe may not be subjected to suit in state or federal courts. *Id.*  
16 Sovereign immunity extends to tribal officials and employees acting within the scope of their  
17 authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9<sup>th</sup> Cir. 1985); *U.S. v.*  
18 *Yakima Tribal Court*, 806 F.2d 853, 861(9<sup>th</sup> Cir. 1998); *Cook v. AVI Casino Enterprises, Inc.*,  
19 548 F.3d 718, 727 (9<sup>th</sup> Cir. 2008); *Miller v. Wright*, 705 F.3d 919 (9<sup>th</sup> Cir. 2012).

20  
21 The Tribe codified that its immunity extends to the named Defendants. The Nooksack  
22 Tribal Code, Title 10, § 10.00.100 states that:  
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25 <sup>4</sup> *Id.*

<sup>5</sup> *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

1           “the sovereign immunity of the Nooksack Indian Tribe shall be enforced  
2           to its fullest extent, and nothing in this Ordinance is intended or shall be  
3           construed as a waiver of the sovereign immunity of the Nooksack Indian  
          Tribe, its officials, its entities, or employees acting within their official or  
          individual capacities.”

4           The issue of whether a tribal employee acted within his or her official tribal capacity is,  
5           fundamentally, the right of the Tribe. *See supra* at 2.

6           Here, despite the Plaintiffs’ attempts to characterize the lawsuit as one against certain  
7           individuals, the Tribal employee Defendants retain the Tribe’s immunity. The Plaintiffs’  
8           arguments to the contrary are unpersuasive and not supported by law. First, the Plaintiffs argue  
9           that simply naming the tribal employee is his or her capacity on the complaint is sufficient to  
10          avoid sovereign immunity. This is not the case. In a 2016 case cited by the Plaintiffs, the U.S.  
11          District Court in Western Washington quickly dispatched with a similar attempt to circumvent  
12          sovereign immunity by characterizing a tribal court order as “invalid”. *Pearson v. Director of*  
13          *Department of Licensing*, 2016 WL 3386798 at 4 (W.D. Wn. 2016). The Court dismissed the  
14          claims on sovereign immunity grounds. *Id.*

15          Second, the Plaintiffs’ argument that the Tribal Defendants were not acting in an official  
16          capacity because the underlying order was invalid also fails. Here, the Plaintiffs fully litigated  
17          the unlawful detainer issue in Tribal Court, but failed to appeal the decision to the Tribal Court  
18          of Appeals. The Plaintiffs’ “name-calling” the order as “invalid” does not make the order  
19          invalid, the Plaintiffs must seek redress to a higher (not a foreign) court and obtain a favorable  
20          decision. The Tribal employee Defendants compliance with the Tribal Court order, and other  
21          tribal law, does not strip them of the defense of sovereign immunity, it reinforces the importance  
22          of that immunity.

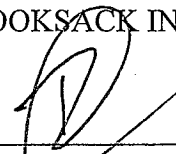
23          Third, the Plaintiffs’ claim that no sovereign exists, therefore the Tribal employee  
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1 Defendants cannot claim immunity derived from the sovereign is mistaken, and, blatantly  
2 misrepresents the law. A federally-recognized Indian tribe continues to exist until terminated.  
3 See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] at 133-34 (Nell Jessup  
4 Newton ed., 2012). The Bureau of Indian Affairs currently recognizes the Nooksack Indian  
5 Tribe. See Fed. Reg. 4915, 4917 (January 17, 2017). Once recognized, the Tribe retains its  
6 immunity regardless of the Plaintiffs' continued attacks upon the Tribe. *Id.*

7 Lastly, the Plaintiffs' claim that recovery in the current case would run against the  
8 individually-named Tribal employee Defendants ignores common sense. If the effect of the  
9 judgment restrains the sovereign from acting, or compels it to act, the remedy issued by the  
10 Court runs against the sovereign and sovereign immunity applies. *Maxwell v. Cty. of San Diego*,  
11 708 F.3d 1075, 1088. Here, the alleged harm stems from the Tribal employee Defendants'  
12 compliance with a Tribal Court order regarding tribal rental housing located on Tribal trust  
13 lands. Here, an order from this Court would restrict or restrain the Tribe from using Tribal trust  
14 lands consistent with a Tribal Court order. This attack on the Tribe, masquerading as an  
15 individual capacity lawsuit against various individuals who would otherwise have no contact  
16 with the Plaintiffs, must be dismissed.

17  
18 Respectfully submitted this 4<sup>th</sup> day of April, 2017.

19  
20 NOOKSACK INDIAN TRIBE

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22   
23 Charles Hurt, WSBA No. 46217  
24 Rickie Armstrong, WSBA No. 34099  
25 Tribal Attorney, Office of Tribal Attorney

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF  
WHATCOM

8 MARGRETTY RABANG,

9 Plaintiff,

10 vs.

11 RORY GILLILAND, et al.,

12 Defendant.

Case No. 17-2-00163-1

DECLARATION OF SERVICE

13  
14 I Declare: That I am over the age of 18 years and competent to be a witness.

15 On April 5, 2017, I duly mailed by first class mail, a copy of:

- 16 1. Defendants' Reply in Support of Motion to Dismiss

17 to the following persons:

18 **Gabriel Galanda, Attorney**  
19 **Bree Blackhorse, Attorney**  
20 **Galanda Broadman**  
21 **8606 35th Ave NE, Suite L1**  
22 **Seattle, WA 98115**

**Rob Roy Smith, Attorney**  
**Rachel Saimons, Attorney**  
**Kilpatrick Townsend & Stockton LLP**  
**1420 Fifth Ave, Suite 3700**  
**Seattle, WA 98101**

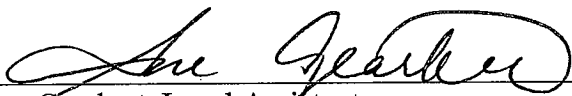
23 I declare under the penalty of perjury, under the laws of Nooksack Indian Tribe, that the  
24 foregoing is true and correct.

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DECLARATION OF SERVICE – Page 1 of 2

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COPY

1 Signed at Deming, Washington on April 5th, 2017.

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3 Sue Gearhart, Legal Assistant  
4 Office of Tribal Attorney  
5 Nooksack Indian Tribe  
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