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COPY

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

RABANG,

Plaintiffs

No. 17-2-00163-1

v.

DEFENDANTS' REPLY BRIEF IN
SUPPORT OF MOTION FOR STAY

GILLILAND, et al.,

Defendants.

COME NOW, Defendants Gilliland, Ashby and Garcia ("Tribal Employee¹ Defendants"), in the above-entitled action, by and through the Office of Tribal Attorney, without waiving defenses and objections, and provide this Reply Brief in Support of Motion for Stay.

I. INTRODUCTION

Following this Court's quick dismissal of the Plaintiffs' initial complaint against employees of the Nooksack Indian Tribe, the Plaintiffs re-styled their complaint and filed it before this Court. Additionally, the Plaintiffs severed some of their claims, added certain

¹ At all times relevant prior to the Plaintiffs' filing of the Complaint herein, Defendants Gilliland, Ashby, and Garcia were tribal employees of the Nooksack Indian Tribe. Former Chief Rory Gilliland retired after a distinguished career in law enforcement following the filing of the complaint herein. For ease of reference, Defendants Gilliland, Ashby, and Garcia are termed Tribal Employee Defendants without reference to Former Chief Gilliland change in employment status.

1 additional parties, and filed a complaint before the federal court. *Rabang v. Kelly, et. al.* No. 17-
2 cv-00088 (W.D. Wn. 2017). In early 2017, the Tribe commenced litigation against the
3 Department of Interior, challenging certain administrative actions. *Nooksack Indian Tribe. v.*
4 *Zinke*, No. 17-CV-00219 (W.D.Wn.). Meanwhile, the Defendant Tribal Employees herein
5 sought dismissal of this action on several jurisdictional bases. Docket #21. Following hearing,
6 this Court withheld ruling on the Defendants' motions to dismiss. Docket #41.

7
8 Currently, both federal matters remain unresolved. The District Court renoted the Tribe's
9 Motion for Reconsideration for June 16, 2017. The Plaintiffs herein have again amended their
10 federal complaint following a dismissal in the related RICO matter. Now, the Plaintiffs
11 commenced submitting various discovery requests and continue their pursuit to harass Tribal
12 Employee Defendants while their motion to dismiss remains undecided. The Tribal Employee
13 Defendants seek an order from this Court which stays discovery, or otherwise enters a protective
14 order, until final disposition of the Tribal Employee Defendants' Motion to Dismiss.

15 II. AUTHORITY AND ARGUMENT

16 A. A Stay or Protective Order is Warranted.

17
18 A stay is warranted until final disposition of the Tribal Employee Defendants' Motion to
19 Dismiss. Trial Courts have broad authority and wide discretion to grant a stay of proceedings or
20 other protective order regarding discovery in order to avoid undue prejudice, or in order to
21 protect a party from annoyance, embarrassment, oppression, or undue burden or expense. CR
22 26; *see also King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 348 (2000).
23
24
25

1 Where a defendant claims official immunity from suit, discovery will not be allowed until
2 the threshold immunity question is resolved because “inquiries of this kind can be peculiarly
3 disruptive of effective government”. *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). A
4 government officer’s immunity from suit is “not limited to liability for money damages; [it] also
5 include[s] ‘the general costs of subjecting officials to the risks of trial—distraction of officials
6 from their governmental duties, inhibition of discretionary action, and deterrence of able people
7 from public service.’” *Id.* at 816.

8
9 Likewise, tribal sovereign immunity “is an *immunity from suit* rather than a mere defense
10 to liability; and ... it is effectively lost if a case is erroneously permitted to go to trial.” *See P.R.*
11 *Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143–44 (1993)(quoting *Mitchell*,
12 472 U.S. at 526); *Osage Tribal Council v. U.S. Dep’t of Labor*, 187 F.3d 1174, 1179–80 (10th
13 Cir. 1999); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050
14 (11th Cir. 1995). Tribal sovereign immunity would be rendered meaningless if a suit against a
15 tribe asserting its immunity were allowed to proceed to trial. *Burlington Northern & Santa Fe*
16 *Ry. Co. v. Vaughn*, 509 F.3d 1080, 1090 (9th Cir. 2007). Tribal sovereign immunity extends to
17 individual capacity suits against tribal employees *when the real party of interest is the Tribe.*²
18 *Lewis v. Clark*, 581 U.S. ___, 137 S.Ct. 1285, 1292 (2017).

19
20 Here, the Defendant Tribal Employees assert, and continue to assert: (1) they are immune
21 from suit and (2) this Court lacks subject matter jurisdiction. Until these dispositive issues are
22

23 ² The recent Supreme Court opinion did not depart from the 9th Circuit approach in *Maxwell v. County of San Diego*,
24 708 F.3d 1075 (2013). The Supreme Court affirmed: “[o]ur cases establish that, in the context of lawsuits against
25 state and federal employees or entities, courts should look to *whether the sovereign is the real party in interest* to
determine whether sovereign immunity bars the suit.” *Lewis v. Clark*, 137 S.Ct. at 1292 (quoting *Hafer v. Melo*, 502
U.S. 21, 25 (1991)(emphasis added). The Court went on further to hold “[t]here is no reason to depart from these
general rules in the context of tribal sovereign immunity.” *Id.*

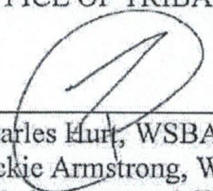
1 finally adjudicated, this suit and all discovery must be stayed. Any discovery subjects the Tribal
2 Employee Defendants to undue prejudice, unnecessary annoyance, possible embarrassment,
3 oppression, undue burden or expense, and more importantly, distracts them from their
4 governmental duties. Further, future discovery obligations strip the Tribal Employee Defendants
5 of their primary defenses in this matter, resulting in irreparable and undue prejudice to their case.
6

7
8 **V. CONCLUSION**

9 For the above stated reasons, the Tribal Employee Defendants, upon good cause shown,
10 respectfully request that this Court enter a temporary stay until at least such time as the courts
11 can issue a final determination as to the Tribal Employee Defendants' Motion to Dismiss.
12

13 Respectfully submitted this 7th day of June, 2017.
14

15 NOOKSACK INDIAN TRIBE
16 OFFICE OF TRIBAL ATTORNEY

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

RABANG,

Plaintiff,

Case No. 17-2-00163-1

vs.

GILLILAND, *et al.*,

Defendant.

DECLARATION OF SERVICE

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

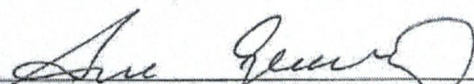
On June 6, 2017, I caused to be served a copy of the **Defendants' Reply Brief in Support of Motion for Stay** on the following partie(s) at the following address, by first class mail:

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

Signed at Deming, Washington on June 6, 2017.


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

DECLARATION OF SERVICE – Page 1 of 1

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