Case No.: 18-35711

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGRETTY RABANG, OLIVE OSHIRO, DOMINADOR AURE, CHRISTINA PEATO, and ELIZABETH OSHIRO,

Plaintiffs-Appellants,

v.

ROBERT KELLY, JR., RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, LONA JOHNSON, KATHERINE CANETE, ELIZABETH KING GEORGE, KATRICE ROMERO, DONIA EDWARDS, RICKIE WAYNE ARMSTRONG, and RAYMOND DODGE,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington
Case No.: 2:17-cv-00088-JCC

ANSWERING BRIEF OF DEFENDANTS-APPELLEES KELLY, R. GEORGE, SMITH, SOLOMON, JOHNSON, ROMERO (FORMERLY CANETE), E. GEORGE, ROMERO, EDWARDS, AND ARMSTRONG

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I. JURISDICTIONAL STATEMENT

The District Court properly dismissed the claims below for lack of subject matter jurisdiction, because this case arises from an intra-tribal dispute over membership in the Nooksack Indian Tribe.

This Court has jurisdiction under 28 USC § 1291 to review the District Court's final order of dismissal for lack of subject matter jurisdiction.

II. STATEMENT OF THE ISSUE

Whether this Court should affirm the dismissal for lack of subject matter jurisdiction claims arising from an intra-tribal dispute over membership in the Nooksack Indian Tribe, and benefits that flow from membership?

III. STATEMENT OF THE CASE

Margretty Rabang, Olive Oshiro, Dominador Aure, Christina Peato, and Elizabeth Oshiro (collectively, "Rabang") have fought to forestall or overturn the Tribe's decision to disenroll them since 2013. K-SER 363 ¶ 2; K-SER 369-373. The suit below is the latest iteration of Rabang's fight to remain enrolled members of the Nooksack Tribe and to receive the benefits of Tribal membership including education, health care, and housing.

In November 2016, the Tribe disenrolled 289 individuals, who had been

erroneously enrolled and who failed to satisfy the membership criteria established under the Tribe's amended Constitution and enrollment code. This included the majority of Rabang K-SER 365, ¶ 9; K-SER 527-532.[1]

The eligibility criteria for membership of the Nooksack Indian Tribe are a matter of Nooksack law and the Tribe's Constitution. Nooksack Tribal Const. Art. II, Sec. 1 [K-SER 380-381]. The Tribal Council is authorized to enact ordinances concerning future membership in the Tribe, adoption into the Tribe, and loss of membership, subject to the approval of the Secretary of Interior. Nooksack Tribal Const. Art. II, Sec. 2 [K-SER 381].

After the Tribe disenrolled Rabang, Rabang no longer qualified for services provided by Tribal departments and agencies, including but not limited to housing, social services, health care, and educational services. The Tribe, acting through the heads of appropriate departments, took steps to effectuate their disenrollment by ending their participation in various programs available to Tribal members by virtue of their membership. ER 203-204, ¶¶ 81-84, 87-88.

The Tribe also took steps through the Tribal Court to evict Margretty

[1] Those disenrolled on November 22, 2016 include Aure, Peato, and Olive Oshiro. ER 187 ¶ 9; K-SER 527-532. Rabang and Elizabeth Oshiro had been previously disenrolled, on June 3, 2016. ER 187 ¶ 9; ER 197, ¶ 58.

Rabang and Elizabeth Oshiro from residences on Nooksack Tribal trust property for failure to pay rent. ER 199, ¶¶ 66-67; ER 201, ¶ 73; ER 204-205, ¶¶ 89-90. The Nooksack Indian Housing Authority (NIHA) is a division of the Nooksack Tribal Administration. NIHA was empowered by the Tribe to manage the Nooksack public housing stock, including to enter into lease agreements and pursue evictions. NIHA obtained writs to evict Elizabeth Oshiro, who complied, and Margretty Rabang, who contested an enforcement action. K-SER 365, ¶ 10; K-SER 534-547; ER 198-199, ¶¶ 63-67; ER 201, ¶ 73; ER 204-205, ¶¶ 89-90.

Rabang involved the United States in their disenrollment fight, soliciting aid from the Bureau of Indian Affairs' (BIA's) Regional Director at the time, Stanley Speaks, the then-Acting Assistant Secretary of the Department of Interior-Indian Affairs (DOI), Lawrence Roberts, and even the United States Attorney for the Western District. K-SER 323-361. In response to Rabang's entreaties and without first contacting the Tribal government to ascertain the validity of the complaints, Mr. Roberts sent Chairman Kelly three letters, dated October 17, 2016 [ER 174-175], November 14, 2016 [ER 171-172], and December 23, 2016 [ER 177-178] (collectively, the "Roberts letters") articulating the DOI's position that it did not believe the Tribal

Council had a quorum to act, and therefore for purposes of the government-to-government relationship between the Tribe and the United States, the Tribal Council's actions after March 24, 2016 would not be recognized. ER 3, 174, 171, 177.[2]

The Tribe rejected the DOI letters as an affront to its sovereignty and a misinterpretation of (or willful failure to recognize) Nooksack ordinances and Tribal Court decisions from the mid-1990s that allowed for holdover of incumbent members of the Tribal Council under certain circumstances. K-SER 429-430, 512-515. Significantly, the Tribe never had an opportunity to contest Rabang's allegations to the DOI, either before or after the DOI took action.

Eventually, to restore the Tribe's government-to-government relationship and funding, then-Chairman Kelly and then-Acting Assistant Secretary-Indian Affairs, Michael Black, entered into a Memorandum of Agreement dated August 25, 2017 ("MOA"). ER 142 – 147. The MOA outlined a procedure by which the federal government would recognize a

[2] "Under Federal law, the United States has a duty to ensure that tribal trust funds, Federal funds for the benefit of the Tribe, and our day-to-day government-to-government relationship is with a full quorum of the Council as plainly stated in the Tribe's Constitution and Bylaws." ER 175.

Tribal Council, elected through a Special Council Election under Nooksack law, as the governing body of the Nooksack Indian Tribe. ER 142-143 ¶¶ A, B.

The MOA also recognized then-Chairman Kelly as the person of authority within the Tribe with whom the DOI would maintain government-to-government relations, and restored the Tribe's funding for essential governmental services, including its Tribal Court. ER 143 ¶ C, ER 144-145 ¶ F.

The Special Election contemplated in the MOA was conducted in December 2017, with BIA observers. K-SER 006-014 After the unofficial results of the election were released, four losing candidates filed unsuccessful challenges with the Election Board. K-SER 150-154. The BIA thereafter conducted a nearly three-month long investigation of the election, in response to claims of election fraud by Rabang's counsel. K-SER 134-138; K-SER 016-100. As a consequence of DOI's delay in acknowledging the election results, the Tribe postponed the March 2018 regularly-scheduled election, and advised DOI that it would recommence the election process after DOI acted, a delay to which DOI agreed. K-SER 115-116 ¶¶ 4-8; K-SER 120-121.

By letter dated March 9, 2018, the DOI recognized the validity of the

Special Election. K-SER 223 The DOI also acknowledged the postponement of the regularly-scheduled election pending DOI's recognition of the Special Election. *Id.*

On March 15, 2018, because it believed that the Roberts letters had created unnecessary doubt as to the validity of Resolutions adopted by the Tribal Council after March 24, 2016, the Council passed a series of resolutions adopting, approving, ratifying, and confirming as valid and binding all actions taken by the holdover Council from March 24, 2016 through March 9, 2018. K-SER 116, ¶ 9; K-SER 123-124, 126-127, 129-130. The ratification retroactively validated all actions taken by the prior Council that the DOI contended were invalid because of the alleged lack of a quorum.

On April 5, 2018, Rabang's counsel filed an appeal of the BIA's March 7, 2018 endorsement of the Special Election results to the DOI Board of Indian Appeals (IBIA). The appeal made the same allegations of voter fraud that the BIA had already investigated and determined lacked merit. *Doucette v. Acting Director,* 65 IBIA 183, 185 (April 17, 2018) [K-SER 103-105].

The postponed General Election was completed in May, 2018. By letter dated May 21, 2018 the BIA acknowledged and congratulated newly-elected Chairman Roswell Cline. By letter dated June 11, 2018 the Acting Assistant

Secretary of DOI also acknowledged and congratulated Chairman Cline on his election, and stated his desire that the transition would allow the Tribe and DOI to resolve past disputes and forge a new relationship. ER 47.

On June 12, 2018, counsel for Rabang filed yet another appeal, this time challenging the BIA's May 21, 2018 acknowledgement of Chairman Cline as the elected leader of the Tribe. On June 21, 2018 the IBIA issued an Order dismissing the appeal, piercing the claimants' allegations and concluding that the appeal "is, at its core, a tribal enrollment dispute, which the Board lacks authority to adjudicate." *Belmont v. Acting Director,* 65 IBIA 283 (June 21, 2018) [K-SER 107-112].

The ongoing and protracted disenrollment dispute was the backdrop to the District Court's decisions regarding its jurisdiction over this matter. In its April 26, 2017 Order [ER 229 – 247] on the Motion to Dismiss of Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Romero (formerly Canete), Elizabeth King George, Katrice Romero, Donia Edwards, Rickie Wayne Armstrong (collectively, "Kelly") [ER 275-299], the District Court deferred to the opinion of the DOI regarding the lack of a quorum as described in the Roberts letters, holding that it had jurisdiction "in the interim period where the tribal leadership is considered

inadequate by the DOI." ER 238-239. The Order noted that the court's jurisdiction over the matter was not "permanent or inflexible" and "if the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have jurisdiction and the issues will be resolved internally." ER 239.

Following the execution of the MOA, the District Court *sua sponte* ordered the parties to provide briefing regarding the effect of the MOA on the court's jurisdiction. ER 168-169. In a subsequent Order dated October 25, 2017 [ER 133 – 140], the District Court ordered a stay of the proceedings "to allow for the completion of the process outlined in the MOA and to await the DOI's recognition decision." ER 137. "The Court's primary reason for ordering a stay of proceedings is that DOI's recognition of the Tribal Council after elections could represent an event of jurisdictional significance." ER 140.

The District Court weighed in again by Order dated January 29, 2018 [ER 82 – 85], after the Special Election had occurred but prior to the DOI's completion of its investigation [*supra*, at 5], to extend the stay of proceedings until April 30, 2018, due in part to conserve resources because "DOI's recognition decision could affect the Court's continued jurisdiction over this case." ER 85.

On June 7, 2018 the District Court lifted the stay and ordered Rabang to show cause why their complaint should not be dismissed, in light of the DOI's recognition decision and the court's prior rulings. ER 57-58. The District Court thereafter dismissed Rabang's claims, citing the DOI's acknowledgment of the December 2017 Special Election and the postponed March 2018 General Election results, and holding that the basis for its exercise of jurisdiction during the interim when the DOI did not recognize the Tribal Council no longer existed. ER 4-5. The District Court concluded that "the heart of Plaintiffs' RICO claims is a dispute about their membership in the Nooksack Indian Tribe and the actions taken by tribal leadership to renounce their membership" over which it did not have subject matter jurisdiction." ER 6.

Rabang's appeal followed.

IV. SUMMARY OF ARGUMENT

This case is about Tribal membership. The heart of Rabang's claim is that they were disenrolled from the Tribe through the actions of the Chairman and Tribal Council, and then Tribal department heads denied them benefits they would otherwise have been entitled to as members of the Tribe. As Rabang allege in their Second Amended Complaint, "RICO Defendants' acts

and omissions were deliberate and part of a scheme that began by December 2015 to defraud Plaintiffs of money, property, and benefits of monetary value by depriving them of Tribal citizenship through false pretenses and representations." ER 185, ¶ 2

If this Court were to reverse and remand to the District Court for trial, as Rabang request, the District Court would have to determine multiple issues under Nooksack law, including that (1) under Nooksack law, there is no provision for holdover of Council positions in the absence of an election; (2) the delay of the Nooksack elections was a violation of Nooksack law; (3) the Tribal Council lacked a quorum after March 24, 2016 and its actions were void under Nooksack law; (4) the disenrollment of Rabang violated Nooksack law; (5) the eviction of Margretty Rabang and Elizabeth Oshiro violated Nooksack law; and (6) Kelly lacked authority under Nooksack law to deny benefits to Rabang. Only after resolving those issues of Nooksack law in Rabang's favor could the District Court reach the issue of whether or not the deprivation of Tribal benefits to Rabang could give rise to RICO liability.

Although Rabang contend that their RICO suit can be resolved without addressing the issue of membership, that contention is a fiction. Rabang cannot prevail below, and be awarded the relief they seek, without first

resolving multiple issues of tribal law. The District Court did not err in dismissing Rabang's claims. That dismissal should be affirmed.

The Tribe's sovereign immunity is an additional basis for affirming the District Court's dismissal. Sovereign immunity prevents a lawsuit against Kelly for their acts specifically alleged as acts on behalf of the Tribe and when, as here, the relief sought would operate against the Tribe.

Rabang may not avoid the sovereign immunity doctrine simply by asserting in their complaint that Rabang sue Kelly individually. The substance of the allegations in the complaint control, not Rabang's unsupported characterization of the nature of the suit. The allegations show that Rabang put at issue the official acts of Kelly as actors for the Tribe. Kelly are the arms and instrumentalities of the Tribe that took the action on its behalf. Rabang sue Kelly "because of" their official capacities. By initiating this RICO action, Rabang sought to stop, discredit and reverse the Tribal acts of disenrollment and denial of membership benefits with which they disagree. Rabang may not hail these individuals to federal court under the guise of a RICO action to accomplish that.

V. ARGUMENT

A. Standard of Review

The standard of review of the District Court's dismissal for lack of subject matter jurisdiction is de novo. *Skokomish Indian Tribe v. United States*, 332 F.3d 551, 556 (9th Cir. 2003); *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). This Court may affirm the District Court's dismissal on any ground supported by the record. *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir. 2008); *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam).

The standard of review of the District Court's factual findings relevant to its determination of subject matter jurisdiction is clear error. *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002); *Dweck v. Japan CBM Corp.*, 877 F.2d 790, 792 (9th Cir. 1989). "The clear error standard is significantly deferential and is not met unless the reviewing court is left with a 'definite and firm conviction that a mistake has been committed.'" *In re Cohen v. United States Dist. Court for the N. Dist. of Cal.*, 586 F.3d 703, 708 (9th Cir. 2009), *quoting Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623, 113 S. Ct. 2264, 124 L. Ed. 2d

539 (1993).

Rabang have not met their burden of demonstrating clear error by the District Court in its factual findings relevant to the determination of subject matter jurisdiction. ER 3–4, 82-83, 133-134, 229-234. Nor have Rabang demonstrated that the *de novo* review of the District Court's dismissal warrants reversal; it is black letter law that federal courts do not have subject matter jurisdiction to resolve issues of tribal law including tribal membership, the authority of a tribal council to act on behalf of the tribe, and the enforcement of a tribe's own tribal laws against members, even when clothed in the guise of a RICO suit. *See, e.g., Montana v. U. S.*, 450 U.S. 544, 564, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); *Williams v. Gover*, 490 F.3d 785, 790 (9th Cir. 2007); *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978); *In re: Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003); *Smith v. Babbitt*, 875 F. Supp. 1353 (D. Minn. 1995), *judgment aff'd, appeal dismissed in part*, 100 F.3d 556, 559 (8th Cir. 1996).

B. Federal Courts Lack Jurisdiction over Intra-Tribal Disputes Such as This One

A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.1989). Rabang, as the party invoking the court's

jurisdiction, have the burden of establishing subject matter jurisdiction. *Id.* The trial court concluded that Rabang failed to meet their burden. ER 6 – 9.

"Federal courts do not have jurisdiction to resolve tribal law disputes. . . These disputes are within the exclusive jurisdiction of the Community's tribal court." *Smith v. Babbitt*, 875 F. Supp. at 1362 (citing cases); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (holding that federal courts do not have jurisdiction to interpret a tribal constitution or tribal laws); *Miccosukee Tribe of Indians v. Cypress,* 975 F. Supp. 2d 1298 (S.D. Fla. 2013) ("*Miccosukee I*") (federal court lacked subject matter jurisdiction over intra-tribal dispute alleging the misuse of broad and unfettered power bestowed on Tribe's chief.).

An intra-tribal dispute is one that affects matters of trial self-government and sovereignty. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Some such matters include (but are not limited to) the inherent power to determine tribal membership, to regulate domestic relations among members, to prescribe rules of inheritance for members, and the power to punish tribal offenders. *Montana v. U. S.*, 450 U.S. at 564 ("Indian tribes retain their inherent power to determine tribal membership"). The enforcement of a tribe's own tribal laws against members

of the tribe – here, the Tribe's Constitution, its Enrollment Ordinance, its Election Ordinance, and its Unlawful Detainer Ordinance - is clearly within the scope of the tribe's inherent sovereignty. *Boney v. Valline*, 597 F. Supp. 2d 1167, 1175 (D. Nev. 2009).

1. Disputes over membership and the authority of a tribal council to act are immune from review by a federal court.

The Tribe's right to determine who is, and is not, a member, is immune from review by a federal court. *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Williams*, 490 F.3d at 790 ("Under *Santa Clara Pueblo*, Mooretown Rancheria had the power to squeeze the plaintiffs out, because it has the power to define its own membership. It did not need the BIA's permission and did not ask for it, and the BIA never purported to tell it how to define its membership."); *see, also, Adams*, 581 F.2d at 1320 ("[U]nless limited by treaty or statute, a Tribe has the power to determine tribal membership."), *accord, Apodaca v. Silvas*, 19 F.3d 1015 (5th Cir. 1994) (per curiam); *Ordinance 59 Assn. v. United States Dept. of the Interior*, 163 F.3d 1150 (10th Cir. 1998).

Santa Clara Pueblo also stands for the proposition that a federal statute does not waive tribal sovereign immunity and create a cause of action against

an Indian tribe unless it states so unequivocally:

> It is settled that a waiver of sovereign immunity "cannot be implied, but must be unequivocally expressed." *United States v. Testan*, 424 U. S. 392, 424 U. S. 399 (1976), *quoting United States v. King*, 395 U. S. 1, 395 U. S. 4 (1969). 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.

436 U.S. at 58-59.

In *In re: Sac & Fox Tribe*, 340 F.3d 749, the court dismissed for lack of subject matter jurisdiction a RICO claim centering on a dispute (like Rabang's suit) concerning the authority of a tribal council to act on behalf of the tribe. In *Smith*, 100 F.3d at 558, the Eighth Circuit rejected an attempt to bring an intra-tribal dispute to federal court through artful use of federal statutes. Members and nonmembers of the Mdewakanton Sioux Tribe sued the tribe and the federal government disputing payments of gaming profits to certain members whose status within the tribe was disputed. The alleged violations of RICO and other federal statutes were insufficient to establish jurisdiction over what the Eight Circuit determined was—at its core—an intra-tribal dispute over membership. *Id*. at 559.

The Eight Circuit was clear that the attempt to challenge the membership determinations in federal court could not be sustained, stating,

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of IGRA, ICRA, IRA, RICO, and the Tribe's Constitution. However, upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.

Id.

Although the plaintiffs had alleged claims under IGRA, ICRA, IRA, RICO (none of which authorizes claims against Indian tribes for injunctive or declaratory relief), and the tribe's constitution, the complaint overtly concerned acts of tribal government that could not be resolved in federal court. *Id*. ("The facts of this case further show that this dispute needs to be resolved at the tribal level."). The same is true here. This Court has cited *Smith v. Babbitt* favorably. *See Williams*, 490 F.3d at 789 n. 6; *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005).

In *Sac & Fox Tribe of Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003), the District Court held it lacked subject matter jurisdiction because resolution of the case would require it to determine whether the defendants unlawfully took control of the Tribe, stating,

> With the exception of the two predicate acts based on state law, which the Court finds inapplicable in this case, each of the predicate acts alleged above requires a finding that defendants' acts in taking control of the Tribal Council are unlawful. If the Appointed Tribal Council is properly in place, their actions would not constitute predicate offenses. Therefore, in order to rule on plaintiffs' RICO claims, this Court would have to first determine whether defendants are unlawfully in control of the Tribe. As previously discussed, this Court does not have jurisdiction to determine which Tribal Council is properly in place under the Tribal Constitution. This is [an] intra-tribal dispute over which this Court has no subject matter jurisdiction.

Id. at 944. *See also Miccosukee I*, 975 F. Supp. 2d at 1306 ("The Miccosukee Tribe is bootstrapping what is discontent with the prior leadership onto alleged federal claims that are better resolved in another venue.").

Rabang pursue the same impermissible strategy through this lawsuit: scrutiny of an intra-tribal dispute and relief from Tribal governmental decisions concerning membership and self-government including a determination whether the Tribal Council is properly constituted according to the governing documents of the Tribe. Rabang cannot use otherwise applicable federal statutes "to force tribes to comply with their membership provisions" or "to change their membership provisions." *Lewis v. Norton*,

424 F.3d at 961. The federal courts have no place making this decision. Rabang cannot create jurisdiction to force the dispute into federal court in the guise of RICO claims.

2. Rabang's own allegations demonstrate that this is a lawsuit about disenrollment.

Rabang allege that "RICO Defendants carried out their scheme to defraud Plaintiffs, through their official positions in or other affiliations with the Tribe. . ." ER 185, ¶ 3. According to Rabang, the purpose of Kelly's alleged conspiracy "was to defraud Plaintiffs of money, property, and benefits of monetary value **by fraudulently depriving Plaintiffs of their membership in the Tribe**." ER 225-26, ¶ 152. [emphasis added].

As the complaint demonstrates, the issues in this lawsuit relate solely to "purely intramural matters touching exclusive rights of self-government." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

As the district court concluded, Rabang cannot avoid the fact that "[a]t the heart of Plaintiffs' RICO claims is a dispute about their membership in the Nooksack Indian Tribe and the actions taken by tribal leadership to renounce their membership. . . While Plaintiffs are correct that federal courts have jurisdiction over RICO claims, they refuse to acknowledge that the resolution of their claims . . . would ultimately require the Court to render a decision

about Plaintiffs' enrollment status." ER 6. The district court correctly concluded that it lacked jurisdiction, and dismissal was warranted.

3. RICO does not confer federal question jurisdiction over an intra-tribal dispute.

Rabang contends that regardless of the fact that this matter is, at its heart, an intra-tribal dispute over membership, RICO confers subject matter jurisdiction. Rabang's position is contrary to well-settled law.

In *In re: Sac & Fox Tribe*, *supra*, the Court dismissed for lack of subject matter jurisdiction a RICO claim centering on a dispute (like the case at bar) concerning the authority of a tribal council to act on behalf of the tribe. In *Smith*, *supra*, the district court concluded it had no basis to assert jurisdiction over a claim arising from an intra-tribal dispute regarding membership—a subject matter governed by tribal code—despite the reference to RICO and mail fraud. 875 F. Supp. at 1366, *judgment aff'd*, *appeal dismissed in part*, 100 F.3d 556, 559 (8th Cir. 1996).

The two cases on which Rabang rely are not persuasive. *Paskenta Band of Nomlaki Indians v. Crosby*, 122 F. Supp.3d 982 (E.D. Cal. 2015) involved claims brought by a tribe against former employees of the tribe (the treasurer, environmental director, tribal administrator, economic development director, and other employees of the tribe's casino) along with numerous non-tribal

financial services entities and individuals. K-SER 240-245, ¶¶ 27-52.

Unlike Kelly (the governing body of the Nooksack Tribe and directors of Tribal departments during the operative timeframe), the *Paskenta* defendants were overwhelmingly non-tribal financial services individuals and entities. The court there was not required, as the District Court would be here, to resolve issues of tribal law in order to determine the RICO claim. Here, before the Court could even reach the RICO claims, it would have to determine that (1) under Nooksack law, there is no provision for holdover of Council positions in the absence of an election; (2) the delay of the Nooksack elections was a violation of Nooksack law; (3) the Tribal Council lacked a quorum after March 24, 2016 and thus its actions thereafter were void under Nooksack law; (4) the January 2017 Nooksack elections that seated the current Council were void under Nooksack law; (5) the disenrollment of Rabang violated Nooksack law; (6) the eviction of Rabang and Oshiro violated Nooksack law; and (7) Kelly lacked authority under Nooksack law to deny benefits to Rabang. Each issue is one that is outside the jurisdiction of the District Court.

Rabang's citation to *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988) for the proposition that RICO grants subject matter jurisdiction to

federal courts in all circumstances is puzzling. That case actually held that removal from state court to federal court was improper, notwithstanding the assertion of a RICO claim, because of additional claims asserted under the Securities Exchange Act of 1934. The court remanded the case back to state court. *Id.*, at 1200.

4. RICO does not provide subject matter jurisdiction where the underlying matter is an intra-tribal dispute.

Contrary to Rabang's broad assertions, RICO has not "been repeatedly applied to tribes and tribal members" under circumstances where the underlying dispute is intra-tribal in nature and would require the court to resolve questions of tribal law. RICO does not create jurisdiction where other circumstances, such as the absence of jurisdiction over matters of tribal membership and governance, would prevent the court from adjudicating the matter.

The cases relied upon by Rabang do not support their assertion. *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1096 (9th Cir. 2017) mentioned RICO only in passing (the Nation brought suit claiming the defendants were selling untaxed cigarettes and tobacco products, alleged breach of contract and RICO violations for defrauding the Nation of cigarette

taxes). The court did not reach whether or not RICO applied or whether there had been a RICO violation, as the issue before it was whether a counterclaim against the Nation was barred by sovereign immunity. *Id.*, at 1095.

United States v. Fiander, 547 F.3d 1036 (9th Cir. 2008) addressed RICO only in the context of whether Fiander could be guilty of RICO when the underlying act Fiander violated – the Contraband Cigarette Trafficking Act (CCTA) – had been found to violate the Yakama Treaty of 1855 when applied to Yakama Indians. Fiander, who had pleaded guilty to conspiracy to violate RICO, related to trafficking in contraband cigarettes, is a Yakama member. *Id.* at 1037. The other members of the conspiracy included non-members of the Yakama Nation. The issue that was before the Court was one of federal law, not tribal law, and thus *Fiander* is inapplicable here.

United States v. Baker, like *Fiander*, dealt with the interplay between RICO and the CCTA as applied to Indian tribal members. 63 F.3d 1478, 1484 (9th Cir. 1995). As in *Fiander*, although certain of the criminal defendants in *Baker* were tribal members, none of the issues the court had to address in order to reach the RICO claim involved questions of tribal law.[3]

[3] The unpublished Opinion and Order in *Gingras v. Rosette*, 2016 WL 2932163 (D. Vt. May 18, 2016) is similar. Certain of the defendants were tribal members, but the conduct at issue was an online payday loan venture

The second *Miccosukee Tribe of Indians of Florida v. Cypress* case is consistent with the premise that where a RICO case involves a dispute regarding tribal law, the intra-tribal dispute doctrine bars a proceeding in federal court:

> Our jurisdiction over an otherwise justiciable RICO claim does not fail merely due to the suggestion that an issue of tribal law may arise based on the presence of an errant, unclear, and potentially inconsistent statement in an extensive pleading. The facts of this case do not require us to decide whether the intra-tribal-dispute doctrine may ever find application in this or a similar case. We hold merely that more than the speculative assertion of undefined Tribal law and reference to a vague and seemingly errant statement in a pleading is required to introduce a genuine question of Tribal law into the case and convert the otherwise justiciable RICO claim into a non-justiciable matter of internal Tribal affairs.

814 F.3d 1202, 1210 (11th Cir. 2015) ("*Miccosukee II*").

The court concluded that a single statement in the complaint about the scope of former tribal chairman Cypress's authority to undertake certain acts was insufficient to create an issue of tribal law, while acknowledging that in other cases, a genuine question of tribal law could, indeed, make a RICO claim

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that charged usurious interest rates in violation of state and federal law. There were no issues of tribal law involved.

non-justiciable in federal court. *See Miccosukee I,* 975 F. Supp.2d at 1306 (dismissing tribe's RICO claims because they were based on an intra-tribal dispute that required the interpretation of the tribe's constitution to resolve).

Here, the basis of Rabang's claims are that Kelly wrongfully disenrolled them from the Tribe and then stripped them of benefits that flow from membership, including healthcare services provided by the Tribe, the right to occupy tribal housing, Temporary Assistance for Needy Families ("TANF") benefits, and education assistance. In order for a court to reach the issue of whether or not Kelly's conduct violated RICO, it must first decide whether Rabang were wrongfully disenrolled. That is a genuine issue of tribal law precluding federal court jurisdiction.

C. The Tribe's Sovereign Immunity Also Supports Affirmance

Rabang allege that Kelly all held positions in Tribal government or were actors of the Tribe based on employment or leadership positions, and that the acts underlying the claims were taken in their official capacities. Rabang attempt to use this conduct performed on behalf of the Tribe—the conduct through which the Tribe conducted its governmental affairs—to support RICO claims. Each of the alleged acts that Plaintiffs contend were predicate acts in a RICO conspiracy were acts of the governing body of the

Tribe, and Rabang's claims are barred by the Tribe's sovereign immunity. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (plaintiffs' complaint against tribal officials barred by sovereign immunity).

1. The basis of Rabang's claims are official actions of the Tribe, executed by Kelly in their leadership positions.

Rabang urge the Court to accept the proposition that the Tribal Council was delegitimized by virtue of the Roberts letters, and thus the actions of the holdover Council were acts of individuals and not the official actions of the Tribal Council. That is nonsensical. The acts complained of (elections, disenrollment, eviction from Tribal property, and the denial of benefits afforded to enrolled Tribal members) could not have been carried out but for the fact that Kelly were acting in their official capacity and carrying out the ***Tribe's*** power and authority.

As this Court held in *Imperial Granite Co.*, 940 F.2d at 1271, "the [officials'] votes individually [had] no legal effect" and it was "the official action of the Band, following the [officials'] votes, that caused [plaintiff's] injuries."

2. The relief Rabang seek is from the Tribe.

The relief Rabang seek are further proof that Rabang's claims are asserted against the Tribe itself, not the individuals. Although inartfully pled as a prayer for unspecified injunctive relief [ER 227 ¶ 1], the alleged harm from which Rabang seek relief is the ongoing deprivation of services and benefits that flow from being an enrolled member of the Tribe, that would have to be reinstated by the Tribe if the District Court ordered restitution [ER 227 ¶ 5]: healthcare services provided by the Tribe [ER 186 ¶¶ 5-7; ER 203 ¶¶ 82-83; ER 204 ¶¶ 87-88], the right to occupy tribal housing [ER 185-86 ¶ 4; ER 187 ¶ 8; ER 198 ¶ 60; ER 204-205 ¶ 89-90], TANF benefits [ER 186 ¶¶ 6-7; ER 203-204 ¶¶ 81, 84], and education assistance [ER 187 ¶ 8, ER 206 ¶ 94].

Based on the allegations of their complaint, the unspecified declaratory relief Rabang seek [ER 227 ¶ 2] is a declaration that their disenrollment was wrongful and they have been wrongfully deprived of the benefits of Tribal membership. ER 225-26 ¶¶ 152, 155.

Rabang's allegations put at issue the official acts of persons through whom the Tribe or Tribal entities and subdivisions conducted governmental activities. The complaint uses the officials and employees as a stand-in for

the Tribe, alleging that the Tribe acted improperly in disenrolling Rabang, in implementing that disenrollment, and in denying them the benefits that inure to membership. Rabang may not avoid the Tribe's sovereign immunity by suing the individual actors through whom the Tribe necessarily acted.

3. The Supreme Court's decision in *Lewis v. Clarke* supports a conclusion that Kelly's acts were acts of the Tribe, insulated from liability.

Rabang contend that, under *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017), sovereign immunity is not an issue here because Kelly were sued in their individual capacity. Rabang's reliance on *Lewis v. Clarke* is misplaced. The principles and tests in that case support affirmance of dismissal.

Lewis v. Clarke arose from a tort committed by individual defendant Clarke on a Connecticut interstate, i.e., a negligent automobile collision. *Id.* at 1292. The U.S. Supreme Court characterized the issue presented as "whether the sovereign immunity of an Indian tribe bars individual-capacity damages against tribal employees for torts committed within the scope of their employment." *Id.* at 1291. The Court had no trouble concluding, "This is not a suit against Clarke in his official capacity." *Id.* at 1292. The Court reasoned that the suit seeks recovery from Clarke "for his personal actions," and "will

not require action by the sovereign or disturb the sovereign's property." *Id.* at 1292-93. Nothing suggested to the Court that tribal immunity was being circumvented. *Id.*

The U.S. Supreme Court reiterated that when the sovereign is the real party in interest, sovereign immunity bars the suit. 137 S. Ct. at 1291. Justice Sotomayor, writing for a majority of six, explained that the plaintiff's characterization in a complaint of official or personal capacity is not controlling, but rather courts must examine "the remedy sought." *Id.* "If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke [immunity]." *Id.* "Similarly, lawsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent, and they may also be barred by sovereign immunity." *Id.* at 1291-92. Thus, a court must determine whether the action is brought against employees in their official capacity, i.e., as an agent of the government, and whether the government is the real party in interest. This requires a court disregard characterizations in the complaint and focus on whether the individuals are merely arms or instrumentalities of the government and the remedy sought. *Id.*

These tests are not different than this Circuit's existing case law. Applying these tests, this Court should conclude that the action as pleaded and as shown by the factual record is in essence against the Tribe. Kelly are merely arms or instrumentalities of the Tribal government. Rabang sued the individuals based on their official acts, i.e., the Tribal action to disenroll Rabang and deny Rabang the benefits of Tribal membership. The essence of Rabang's action is alleged fault with the actions of the Tribe for whom the individuals are agents. Rabang seek remedies that will operate against the Tribe and bind the Tribe, and provide "restitution" for the Tribal benefits denied.

This is similar to the allegations in *Edelman v. Jordan*, 415 U.S. 651, 664-65, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974), where the plaintiff sought an award of retroactive benefits wrongly denied by the federal government. The U.S. Supreme Court determined that this remedy would operate against the government, not the individual officers who administered the federal program, and therefore governmental immunity applied. *See also Larson v. Domestic and Foreign Commerce Corp*., 337 U.S. 682, 687-88 (1949) (a lawsuit for the recovery of specific property or monies, including an injunction against the officers administering a government contract, was really a suit against the

sovereign that sovereign immunity barred).

Rabang are not seeking a remedy for injury that arose from an actor's personal negligent conduct while coincidentally on government business, like the driver in *Lewis v. Clarke* who negligently caused an accident while employed by a tribe. Rabang seek a remedy for the governmental acts of disenrollment and withdrawal of Tribal services and benefits. Rabang request "equitable, injunctive and ancillary relief" to "prohibit the illicit conduct" and "restitution" of the "money, property, and benefits" deprived by the Tribe. These are remedies to the actions of the Tribal government. Rabang cannot hail the Nooksack Tribe into federal court for this relief, and neither can Rabang hail its representatives, agents and actors into court for this relief.

The principles of *Lewis v. Clarke* support affirmance of the dismissal of Rabang's claims, even where the outcome of the case is factually distinguishable. Rabang allege no individual tort but seek relief to undo the actions of the Tribe, declare its government actions invalid, restore Rabang's membership and services, and recompense Rabang for assets and benefits that the Tribe maintained in its accounts (not that the individuals allegedly stole or possess) because the Tribe declined to provide the benefits to Rabang.

These circumstances contrast sharply with the circumstances of *Lewis*

v. Clarke. The circumstances also indicate an attempt to evade the Tribe's own sovereign immunity. The correct application of *Lewis v. Clarke* supports an alternative basis for affirming the dismissal.

4. The Roberts letters were not dispositive of the legitimacy of the Tribal Council or its actions.

"As the BIA itself notes . . . it is not for the federal government to adjudicate disputed tribal leadership according to tribal law." *Winnemucca Indian Colony v. United States ex rel. DOI*, 837 F. Supp. 2d 1184, 1192 (D. Nev. 2011), *citing* Cohen's Handbook of Federal Indian Law § 5.03[3][c], at 411 (2005 ed.); *Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549, 551-52 (10th Cir. 1987).

While the BIA may at times be obliged to recognize one side or another in a dispute *as part of its responsibility for carrying on government relations with a tribe*, as the *Goodface* court noted, once the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself. *See Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). *See also Wheeler,* 811 F.2d at 551-53 ("[W]hen a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere.").

The effects of the Roberts letters were limited in scope to issues related

to "tribal trust funds, Federal funds for the benefit of the Tribe, and [the] day-to-day government-to-government relationship" between the Tribe and the United States. *See Cayuga Nation v. Tanner*, 824 F.3d 321, 329 (2nd Cir. 2016) (recognized official "for purposes of the ISDA contract modifications and related drawdown requests"); *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 937 (Dist. D.C. 2012) (recognized one faction for limited purpose of conducting government-to-government relations and tribal election).

The Roberts letters are not binding on the Tribe and the Tribe does not require action by DOI to invalidate, reverse, or withdraw them. While the agency asserted that it did not *recognize* the legislative and judicial actions of the Tribe after March 24, 2016, the agency has no power to *invalidate* those actions. *See, e.g., Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010) (BIA's recognition of member or faction not binding on tribe because it is matter of tribal law).

The Tribe has at all times remained a federally recognized Indian Tribe with all its inherent powers and authority as a sovereign government, despite DOI's extraordinary and unusual interference with its self-governance. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019, 5022 (January 29, 2016);

82 Fed. Reg. 4915, 4917 (January 17, 2017); 83 Fed. Reg. 4235, 4237 (January 30, 2018). Although DOI has the power to manage all Indian affairs and all matters arising out of Indian relations, only Congress can abrogate tribal sovereignty. *United States v. Lara*, 541 U.S. 193, 196, 124 S. Ct. 1628, 158 L.Ed.2d 420 (2004).

5. The recognized Council's ratification of the holdover Council's actions affirm that such actions were the actions of the Tribe.

The Roberts letters caused the Tribe significant injury by disrupting its funding, harming its government-to-government relationships, and effectively creating a hiatus in tribal government which jeopardized the continuation of necessary day-to-day services on the reservation. To fully and finally resolve any lingering doubt about the authority of the holdover Council's actions, after the Special Election results were acknowledged by the DOI and the Tribal Council was recognized, Council issued a series of resolutions ratifying all actions taken by the prior Council that the DOI contended had been taken in the absence of a quorum. K-SER 116, ¶ 9; K-SER 123-124, 126-127, 129-130. The recognized Council's actions retroactively validated all actions taken by the holdover Council. *See*, *e.g., United States v. Arredondo*, 31 U.S. 691, 713-14, 8 L.Ed. 547, 555-56 (1832) ("a legislative ratification of an act

done without previous authority . . . is of the same force as if done by pre-existing power and relates back to the act done."); *Purvis v. United States*, 501 F.2d 311, 314 (9th Cir. 1974) ("[T]he [Supreme] Court early recognized the power of Congress to ratify unauthorized Executive action taken in the area reserved to Congress, and thus retroactively to validate such action.").

Rabang argues that "fraudulent or illegal acts cannot be ratified" and therefore the recognized Council's ratifications of the holdover Council's actions are ineffectual. The two out-of-circuit cases on which Rabang rely for that proposition, *Gen. Fin. Corp v. Cas. Co. of New York*, 439 F.2d 981, 986 (8th Cir. 1971) and *Midland Bank & Trust Co. v. Fid. & Deposit Co. of Maryland*, 442 F. Supp. 960, 973 (D. N.J. 1977), involved attempts by insureds to recover on fidelity bonds. A fidelity bond insures a company against losses arising from fraudulent or dishonest acts committed by its employees. *Gen. Fin. Corp.*, 439 F.2d at 983.

The insurers in these cases were trying to avoid paying out on the bonds by asserting that conduct that would otherwise be fraudulent or dishonest (self-dealing) had been ratified by the insured and thus was not fraudulent or dishonest, and therefore not a covered loss. The court in each case rejected that argument, concluding based in part on the general principal that the

insured could not ratify fraudulent or dishonest conduct. *Gen. Fin. Corp.*, at 986; *Midland Bank & Trust*, 442 F. Supp. at 973 (citing *Gen. Fin. Corp*.).

Here, the allegation is that the acts of Kelly were "fraudulent or illegal" because there was no quorum of the Council and thus the Council lacked the authority to take the legislative actions to disenroll Rabang, and then strip them of their tribal benefits. Deciding the veracity of that assertion requires the interpretation of Nooksack law. In addition, even if the action of the legislative body is ultra vires, that does not render it void, but, rather voidable, subject to ratification and retroactive validation. *See Arredondo*, 31 U.S. at 713-14; *Purvis*, 501 F.2d at 314. The recognized Council's ratification has settled the issue.

6. Kelly are entitled to sovereign immunity for their actions which resulted in the disenrollment of Rabang and the denial of tribal benefits to them.

Suits against tribes are barred by sovereign immunity in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress. *Santa Clara Pueblo,* 436 U.S. at 58. The Tribe's sovereign immunity can be meaningful only if this Court enforces the bar of sovereign immunity to Rabang's claims against those individuals through whom the Tribe acted.

Kelly are entitled to sovereign immunity because the acts alleged are plainly official acts on behalf of the Tribe. "Tribal sovereign immunity extends to individual tribal officers where… they are acting in their representative capacity and within the scope of their authority." *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013), citing *Cook v. AVI Casino Enters*., 548 F.3d 718, 727 (9th Cir. 2008).

In *Cook*, this Court articulated the concern plaintiffs not be allowed to "circumvent" tribal immunity through a pleading device. 548 F.3d at 727. It noted that tribal sovereign immunity protects officials where a plaintiff sues individuals "in name" to establish vicarious liability of the tribe where these individuals were acting in their official capacity and within the scope of their authority. *Id.* The Court noted that the principle that recognizes tribal immunity of individuals acting in their official capacity applies to officials and tribal employees. *Id.* ("The principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official—apply just as much to tribal employees when they are sued in their official capacity.")

"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 . . . ." *Maxwell* at 1088, citing *Native Am. Distrib. Co. v. Seneca-Cayuga Tobacco Co*., 546 F.3d 1288, 1296 (10th Cir. 2008) (emphasis in original). "Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Id.* (emphasis in original). Here, Rabang sue the individuals *because* they were the ones through whom the tribal government acted. They are sued based on their official acts as part of Rabang's effort to challenge *the Tribe's* government and actions.

The Tenth Circuit in *Fletcher v. United States* applied sovereign immunity to bar a suit where the Osage Tribe itself was not named as a defendant, but where the Tribal Council and its individual members and officials of the Tribe were named. 116 F.3d at 1324. The Tenth Court observed that the relief requested concerning "rights to vote in future tribal elections and hold tribal office" would, if granted, "run against the Tribe itself," demonstrating that sovereign immunity prevented the lawsuit. 116 F.3d 1315, 1324 (10th Cir. 1997), *citing Kenai Oil and Gas, Inc. v. Department of the*

Interior, 522 F. Supp. 521, 531 (D. Utah 1981) ("Tribal immunity may not be evaded by suing tribal officers . . . ."), *aff'd*, 671 F.2d 383 (10th Cir. 1982). "[T]ribal immunity protects tribal officials against claims in their official capacity." *Fletcher*, at 1324. The same is true here. The injuries alleged by Rabang all arise out of the inherently sovereign action of disenrolling Rabang from the Tribe and discontinuing benefits and services tied to membership As in *Fletcher*, dismissal is the proper result.

In *Maxwell*, *supra*, this Court recognized that "in any suit against tribal officers, we must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" 708 F.3d at 1088 citing *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) (internal citations and quotation marks omitted). *See also Stock West Corp. v. Taylor*, 942 F.2d 655, 664 (9th Cir. 1991); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *accord Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994); *Smith*, 875 F. Supp. at 1363. Here, the lawsuit would interfere with the administration and acts of the sovereign Tribe and potentially reverse official acts regarding status and

benefits.

Rabang seek a remedy against the Tribe for their disenrollment and denial of Tribal benefits and services. Dismissal is proper as shown by cases that include *Cook,* 548 F.3d at 722, *Maxwell*, 708 F.3d 1075, *Fletcher,* 116 F.3d at 1323-26, and *Imperial Granite Co.*, 940 F.2d at 1271. The Court should hold that sovereign immunity bars the suit, and is an additional basis for affirming the dismissal.

D. Subject Matter Jurisdiction is Not Fixed as of the Time of Filing

Rabang argue that the relevant time for determining the District Court's subject matter jurisdiction was at the time of filing, and events occurring after that time have no bearing. Rabang's argument ignores the plain, mandatory language of Rule 12(h)(3): "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." As this language makes clear, "[t]he objection that a federal court lacks subject-matter jurisdiction may be raised . . . at any stage in the litigation, even after trial." *Arbaugh v. Y & H Corp*., 546 U.S. 500, 506 (2006); see also 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1350 ("[I]t has long been well-established that the court's lack of subject matter jurisdiction may be asserted at any time," including after trial and "prior to final

judgment," because "Rule 12(h)(3) . . . preserv[es] the defense throughout the action.").

The reason for this "'springs from the nature and limits of the judicial power of the United States,'" which are "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (*quoting Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.*, 523 U.S. at 94 (*quoting Ex parte McCardle*, 7 Wall. 506, 514 (1868)); see also *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) and Fed. R. Civ. P. 12(b)(1).

Neither of the cases cited by Rabang support a contrary conclusion. *Smith v. Campbell*, 450 F.2d 829, 831-32 (9th Cir. 1971) is a habeas corpus case addressing whether a court retained jurisdiction over a petition when the petitioner was involuntarily removed from the federal district after the petition was filed. The jurisdiction at issue there was in rem and personal, not subject matter. *Smith,* 450 F.2d at 831-32.

Anderson v. Duran, 70 F. Supp.3d 1143 (N.D. Cal. 2014) involved a

challenge by the Madera County, California Sheriff of the authority of the Picayune Rancheria Tribal Court over him. One leadership faction filed suit in tribal court and obtained orders compelling the Sheriff (who was not a member of the tribe) to take action against two other leadership factions.

The Sheriff filed suit in federal court seeking declaratory and injunctive relief that the tribal court had exceeded its authority. The basis for the court's jurisdiction was federal question, 28 U.S.C. § 1331 (*see Strate v. A-1 Contractors*, 520 U.S. 438, 448, 117 S. Ct. 1404, 1411, 137 L.Ed.2d 661, 672 (1997); whether a tribal court has exceeded the limits of its jurisdiction is a matter "arising under" federal law).

The factions opposing the Sheriff contended that because actions occurring after the suit was filed called into question the authority of the first leadership faction, the order that faction obtained could not be deemed an action of the tribe so as to reach the question of whether the tribal court exceeded its authority. The district court rejected that argument, holding that whether or not the faction and its court constituted the legitimate tribal authority at the time, they held themselves out as such at the time of filing of the lawsuit and for some time thereafter, and jurisdiction was assessed on the facts as they existed when the lawsuit was filed. *Anderson*, 70 F. Supp.3d. at

1151. "On that basis, Anderson has satisfied his burden to establish federal court jurisdiction over this matter so long as relief may be issued without implicating non-justiciable issues of tribal governance." *Id.*

Smith and *Anderson* present very unique circumstances, not present here, where manipulative actions by a defendant could defeat jurisdiction: by removing the "corpus" from the district against the petitioner's will (*Smith*) or by seeking to delegitimize a tribal court in order to prevent the district court from determining whether the tribal court had exceeded its authority (*Anderson*). The same principle applies to diversity cases, which employ a time-of-filing rule to challenges to jurisdiction:

> This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure. **It measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing**--whether the challenge be brought shortly after filing, after the trial, or even for the first time on appeal. (**Challenges to subjectmatter jurisdiction can of course be raised at any time prior to final judgment**.

Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 570-71 (2004) [emphasis added].

E. The District Court Properly Considered Facts Outside of the Complaint in Assessing Subject Matter Jurisdiction

Kelly moved to dismiss under both Rule 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim. ER 275-276. The dismissal was granted under Rules 12(b)(1) and 12(h)(3). ER 9.

Under Rule 12(b)(1), a court must dismiss claims over which it lacks subject matter jurisdiction. *Chapman*, 631 F.3d at 954. The party asserting jurisdiction bears the burden of proving that the Court has subject matter jurisdiction over the asserted claims, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); though, even if a defendant does not move for dismissal under Rule 12(b)(1), the Court has a duty to establish subject matter jurisdiction *sua sponte*. *See United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 967 (9th Cir. 2004).

When determining the existence of subject matter jurisdiction, "the district court is not confined by the facts contained in the four corners of the complaint—it may consider [other] facts and need not assume the truthfulness of the complaint." *Americopters, LLC v. F.A.A.*, 441 F.3d 726, 732 n.4 (9th Cir. 2006).

In reviewing a factual attack on a complaint, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts, and a court's reference to evidence outside the pleadings does not convert the motion into a Rule 56 motion. *Gemtel Corp. v. Community Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994). A court resolving a motion to dismiss under Rule 12(b)(1) must give the complaint's factual allegations closer scrutiny than required for a motion to dismiss pursuant to Rule 12(b)(6) for failure to state claim. *Lipsman v. Sec'y of the Army*, 257 F Supp. 2d 3 (D. D.C. 2003).

Motions to dismiss for lack of subject matter jurisdiction based on the sovereign immunity of an Indian Tribe, or because the case involves an intra-tribal dispute, are Rule 12(b)(1) matters. *Fletcher,* 116 F.3d 1315 (sovereign immunity); *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 917 (D. Wyo. 1997) (sovereign immunity); *Miccosukee I*, 975 F. Supp. 2d at 1307 (intra-tribal dispute).

Rabang appear to rely on the *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004) case for the proposition that the District Court should have ruled on the Rule 12(b)(6) motion rather than the Rule 12(b)(1) motion and, because it relied on factual matters beyond the complaint, the Rule 12(b)(6)

motion should have been converted to a summary judgment motion with the appropriate standard. But that is not what *Poulos* stands for.

Poulos involved the extraterritorial application of RICO. The specific issue addressed was whether the Court had subject matter jurisdiction over a certain class of defendants – cruise ship operators – where the cruise ship operators' alleged RICO violation occurred in international waters, "extraterritorially, beyond RICO's reach." *Id.*, at 662. The Court concluded that, because the RICO statute provided the basis for both the subject matter jurisdiction of the court (as a matter arising under the laws of the United States, 28 U.S.C. §1331) and the substantive relief, the Court need not examine the issue of extraterritoriality (i.e., subject matter jurisdiction) too closely but, rather, need only assure itself that the RICO claim was not made solely for the purpose of obtaining jurisdiction and is not wholly insubstantial and frivolous. *Id.*, at 662.

Where, as here, a claim is made under a federal statute such as RICO for the sole purpose of bringing what is an otherwise nonjusticiable case into the jurisdiction of a federal court, dismissal for lack of subject matter jurisdiction is proper. *Poulos*, at 662; *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 602 (9th Cir. 1977); *see, also, Bell v. Hood*, 327 U.S. 678, 682-

83, 66 S. Ct. 773, 776, 90 L.Ed. 939, 943 (1946)("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.").

The circumstances that the *Bell* court found would warrant dismissal for want of jurisdiction are present here. Rabang assert RICO claims to create federal jurisdiction over an intra-tribal dispute over membership and benefits. Rabang's invocation of RICO was "solely for the purpose of obtaining jurisdiction" where jurisdiction does not lie. *Bell*, at

As noted *supra* at 44, the District Court properly considered facts outside the complaint when determining the existence of subject matter jurisdiction. While 12(b)(6) motions look only at the complaint, and are converted into summary judgment motions upon the filing of additional documents, a party making a 12(b)(1) motion may submit extra-pleading materials without converting the motion into one for summary judgment. *Assoc. of American Medical Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000). Federal courts are courts of limited jurisdiction, and may rely on factual evidence to determine whether they have jurisdiction. *Id.*; *see also*

McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) ("Moreover, when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.").

The District Court's consideration of information outside the complaint and the resolution of disputed facts was within its discretion when considering its jurisdiction under Rules 12(b)(1) and 12(h)(3), and the court properly imposed the burden of establishing jurisdiction on Rabang. *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

VI. CONCLUSION

A tribe's right to determine who is, and is not, a member is immune from review by a federal court. *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Adams*, 581 F.2d at 1320. That is true even when otherwise cloaked in the guise of a RICO suit. *Smith*, 875 F. Supp. at 1366. The Court should affirm the District Court's dismissal for lack of jurisdiction because the lawsuit seeks to continue an intra-tribal dispute regarding membership in the Tribe, disenrollment, and Rabang's disagreement with the leadership of Chairman Kelly and the Nooksack Tribal Council. The dispute is not subject to

resolution in the federal courts.

As an alternative basis for affirming, this Court should hold that the individual Kelly Appellants are protected by sovereign immunity from these RICO claims, and the claims were properly dismissed. *Imperial Granite*, 940 F.2d at 1271.

Dated this 21st of November, 2018.

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STATEMENT OF RELATED CASES

Kelly are aware of a case pending in the United States District Court for the Western District, *Doucette v. Zinke*, Case No. 2:18-cv-00859-TSZ, that raises closely related issues and generally involves the same events. FRAP 2802.6(c), (d).

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,241 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

DATED this 21st day of November, 2018.

Respectfully Submitted,

By: /s/ Connie Sue Martin
Connie Sue Martin, WSBA #26525

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 21st day of November, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Connie Sue Martin
Connie Sue Martin, WSBA #26525