The Honorable Theresa L. Fricke

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT LEWIS, individually; TINA ARMSTRONG, and individual, Plaintiffs, vs. RYAN SALES, an individual law enforcement officer of the Puyallup Tribal Police; LT. WILLIAM LOESCHER, an individual law enforcement officer of the Puyallup Tribal Police, CHIEF JOE DUENAS, an individual and as Chief of Police for the Puyallup Tribal Police Department in his official capacity; and DOES 2-6 inclusive; Defendants.	NO. 3:18-CV-05196-TLF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT NOTED ON MOTION CALENDAR: FEBRUARY 15, 2019

I. RELIEF REQUESTED

Puyallup Tribal Police Officer Ryan Sales, Lieutenant William Loescher, and Chief Joe Duenas respectfully request that the Court dismiss Plaintiffs' remaining claims for § 1983 civil

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rights violations and *Monell* liability.[1] The § 1983 claims against Officer Sales are meritless because it is undisputed that his alleged actions were performed under color of tribal—not state—law. Likewise, Lieutenant Loescher and Chief Duenas cannot be held liable under § 1983 simply because they, as supervisors, allegedly failed to adequately investigate the incident. Finally, Plaintiffs' *Monell* liability claims are without merit because: (1) no municipality has been sued; and (2) their claim for injunctive relief is barred because the Puyallup Tribe is a sovereign entity that has not waived its immunity. Finally, they lack standing to bring such a claim.

II. STATEMENT OF FACTS[2]

A. Background.

This case arises out of an alleged excessive force incident at the Emerald Queen Casino parking lot in Puyallup, Washington on June 18, 2016. (*See* Dkt. #16). The casino is located on tribal property and is owned and operated by the Puyallup Tribe. Officer Sales is a Puyallup Tribal Police ("Tribal Police") officer who was working security detail at the casino at the time of the alleged incident. (Declaration of Ryan Sales, ¶ 2). He was not enforcing any state or federal laws during his interaction with the Plaintiffs that evening. (*Id.*, ¶ 6). Both Lieutenant Loescher and Chief Duenas were supervising personnel for the Tribal Police and were not present at the time of the alleged incident.

B. Alleged excessive force incident.

At approximately 10:15 p.m. on June 18, 2016, Plaintiffs allege they were circling the Emerald Queen Casino parking lot in their vehicle attempting to find a parking space. (Dkt. #16 at 4). They then noticed two women walking to their car, after which they put on their blinker

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[1] Previously, the United States appeared for these defendants and all other claims were dismissed via a stipulation with prejudice. *See* Dkt. #37.

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indicating they intended to take the space. (Dkt. #16 at 4). One or both of the women then attempted to allow another driver to take the space while Plaintiffs continued to wait. (Dkt. #16 at 4). One woman then walked into the casino and exited with an unidentified Puyallup Tribal Police officer. (Dkt. #16 at 4). Plaintiffs apparently spoke with this officer, who "seemed to agree with plaintiffs." (Dkt. #16 at 5).

Plaintiffs allege they then waited an additional five minutes, after which Officer Sales came out of the casino. (Dkt. #16 at 5). When the space's occupant moved her car from the spot, Officer Sales allegedly walked into the spot yelled "move" at Plaintiffs. (Dkt. #16 at 5). Plaintiffs did not abide by this direction. Plaintiffs allege that Officer Sales, standing in the disputed parking space, "again yelled for the plaintiffs to 'MOVE,'" which they again disregarded. (Dkt. #16 at 5). They then contend Officer Sales "upholstered [sic] his gun and drew down on the plaintiffs, pointing the gun directly at them," and "yelled 'I SAID MOVE.'" (Dkt. #16 at 5). The plaintiffs then "immediately left the area and looked for another slot." (Dkt. #16 at 5).

Defendants vigorously dispute these allegations. In a sworn declaration, Officer Sales states "at no point did I draw or point my gun (or any other weapon) at anyone or anything" during the encounter with Plaintiffs. (Sales Decl., ¶ 4) (emphasis in original). He says the same of his colleague acting Chief Lieutenant Jeff Berys, who was also present at the time of the alleged incident. (*Id.*, ¶ 4). Acting Chief Lieutenant Berys has provided a sworn declaration attesting to the same: at no point did either of the officers draw or point their guns (or any other weapons) at anyone or anything during the encounter. (Declaration of Jeff Berys, ¶ 3). Lieutenant Berys witnessed the entire encounter between Plaintiffs and Officer Sales. (*Id.*, ¶ 3).

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[2] Defendants strongly dispute Plaintiffs' characterization of their conduct that allegedly gives rise to liability. But, given that this is a summary judgment motion, Defendants will repeat Plaintiffs' allegations for purposes of this Motion. *See Thomas v. Ponder*, 611 F.3d 1144, 1149 (9th Cir. 2010).

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Plaintiffs allege that, immediately after the incident, they complained to casino security. (Dkt. #16 at 5). They also allege that they and their attorneys sought information from the Tribal Police, including Lieutenant Loescher and Chief Duenas, in the weeks thereafter. (Dkt. #16 at 5-6). They say these requests went unacknowledged. (Dkt. #16 at 5-6).

But Plaintiffs are not aware of the investigation that did occur. Lieutenant Loescher did, indeed, investigate Plaintiffs' complaint. (Declaration of William Loescher, ¶ 3). In addition to reviewing the Plaintiffs' statements, Lieutenant Loescher spoke with Officers Sales and Berys. (*Id*., ¶ 4). He also reviewed casino surveillance footage which depicts the encounter. (*Id*., ¶ 5). He determined that Plaintiffs' allegations were without merit, and that Officer Sales and Berys acted properly and lawfully. (*Id*., ¶ 6). This was reported to Chief Duenas. (*Id*., ¶ 6). Armstrong admitted that she did not know whether the department investigated the complaint. (*See* Nedderman Decl., Ex. 1 at 16).

C. This litigation.

Plaintiffs filed this case against Lieutenant Loescher, Chief Duenas, and officer John Doe 1 on March 13, 2018. (Dkt. #1). They later amended, substituting Officer Sales for Doe 1. (Dkt. #16). The Amended Complaint pleads two causes of action: (1) excessive force in violation of the Fourth Amendment and *Monell* liability, and (2) tort claims for assault and intentional infliction of emotional distress. With respect to their constitutional claims, they allege Officer Sales used excessive force "under color of authority."[3] (Dkt. #16 at 7). They moreover allege Lieutenant Loescher and Chief Duenas "took no action" and "in effect ratified the use of the firearm." (Dkt. #16 at 7). They also request "injunctive relief in that the [Puyallup Tribal Police] be required to train their officers in the proper use of force…" (Dkt #16 at 7).

[3] Plaintiffs make several references to actions taken "under color of law," but never specifically state which law applied to any specific actions. (*See* Dkt. #16 at 3-4).

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Plaintiffs responded to discovery requests on August 23, 2018. In response to an interrogatory requesting the facts supporting Plaintiffs' claims against Lieutenant Loescher and Chief Duenas, Plaintiff Armstrong wrote:

> "After speaking with Lt. Loesher and writing out a formal complaint I was completely ignored. My phone messages and voicemails were never returned. A complaint was made legal action was taken and nothing was done by anyone in the department. We then sought out legal advice and at that time legal action were then taken by our attorneys. The department took no steps, to my knowledge, to investigate or look into the event. I felt as though the department's failure to respond to my communications or to let me know whether the officer acted properly was a ratification on their part. PPD condoned their officers Sales. In my opinion Lt. Loesher's actions or should I say "LACK THEREOF" was utterly disrespectful and a complete indifference to my Civil rights. The Chief is responsible for the actions of his department and to the extent that he approves of unconstitutional behavior or allows his officers to go untrained there is liability under Monell."

(Nedderman Decl., Ex. 1 at 15-16).

Plaintiff Lewis answered similarly, "Upon their having been provided my formal complaint, their neglect to respond and attempts to avoid responding/communicate with us. They condoned their officer's behavior, therefore holding them liable in this suit." (Nedderman Decl., Ex. 2 at 14).

The United States of America substituted on behalf of defendants on December 4, 2018 pursuant to the Federal Tort Claims Act. (Dkt. #32). This substitution was related to Plaintiffs' tort claims only. On December 31, 2018, Plaintiffs and the United States filed a stipulation agreeing that "Plaintiffs' claims against the United States are dismissed with prejudice and Plaintiffs' tort claims are dismissed with prejudice from this action." (Dkt. #33 at 2). Only Plaintiffs' Fourth Amendment and *Monell* remain. (Dkt. #37). Those claims are the subject of this Motion.

Trial is set for January 21, 2020, and the discovery cutoff is September 20, 2020. (Dkt. #41). To date, only written discovery has been exchanged; no depositions have been taken.

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III. EVIDENCE RELIED UPON

In bringing this motion, Defendants rely upon the declaration of their attorney Thomas B. Nedderman, as well as the declarations of Officer Sales, Acting Lieutenant Jeff Berys, and Lieutenant Loescher.

IV. AUTHORITY AND ARGUMENT

A. Standard of review.

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the non-moving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Asso.*, 809 F.2d 626, 630 (9th Cir. 1987). Instead, the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Id.* At the summary judgment stage, a party no longer can rely on allegations alone, however plausible they may be. *Lopez v. Pac. Mar. Ass'n*, 657 F.3d 762, 768 (9th Cir. 2011).

A party who merely files a complaint setting forth a valid cause of action is not entitled to a full-dress trial in the absence of significant probative evidence supporting the complaint. *See First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L.Ed.2d 569 (1968). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). It is the plaintiff's burden to prove his or her § 1983 claim by a preponderance of the evidence. *See* 9th Cir. Model Civ. Jury Inst. 9.3 (2017).

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B. Plaintiffs' 42 U.S.C. § 1983 claims against Officer Sales fail because there is no reasonable dispute that his alleged acts or omissions, if any, were taken under color of tribal law.

42 U.S.C. § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L.Ed.2d 420 (1981) (emphasis added). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L.Ed.2d 40 (1988) (citations omitted). Courts "start with the presumption" that conduct is not state action, and plaintiffs bear the burden of establishing state action. *See Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011). Actors must be "jointly engaged with state officials in the prohibited action" or a "willful participant in joint activity with the State or its agents" to be deemed acting "under color" of state law for purposes of § 1983. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982).

With respect to suits against the officers in their "individual capacities," federal courts have held that "Native American tribes and those acting under tribal law do not act under color of state law within the meaning of § 1983." *Chapoose v. Hodel*, 831 F.2d 931, 934-35 (10th Cir. 1987) (tribal action cannot be equated to state or territorial action in order to satisfy the state action requirement which is a pre-requisite to suit under § 1983) (emphasis added); *see also Stanko v. Oglala Sioux Tribe*, 2017 U.S. Dist. LEXIS 149120, at *12 (D.S.D. Sep. 14, 2017) (holding that because there was no allegation Indian Tribal Defendants acted under color of state law, § 1983 does not provide jurisdiction for Plaintiffs' claims); *Alexander v. New York*, 2017 U.S. Dist. LEXIS 108745, at *14 (N.D.N.Y. July 12, 2017) (discussing issue and allowing individual capacity excessive force suit against tribal officer to the extent it was

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taken under state, rather than tribal, law). Indeed, the Ninth Circuit has repeatedly held that "actions under § 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law." *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015); *see also Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989) (§ 1983 claim could proceed because officers arrested plaintiffs on state law obstruction of justice charges); *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983); *Jones v. Tulalip Tribes Fin. & Members & Emples.*, 2017 U.S. Dist. LEXIS 126198, at *3 (W.D. Wash. Aug. 8, 2017) ("The tribal defendants can thus be held liable under § 1983 only if they were acting under color of state, not tribal, law at the time of the alleged violation of Mr. Jones's constitutional rights.") (Tsuchida, Mag. J.)

The Ninth Circuit has affirmed the right of an Indian tribe to "employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power." *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). A tribe's inherent sovereignty allows tribal police "to restrain those who disturb public order on the reservation." *Duro v. Reina*, 495 U.S. 676, 697, 110 S. Ct. 2053, 2065, 109 L.Ed.2d 693 (1990). A tribe's power to exclude nonmembers entirely or condition their presence on the reservation is equally well established. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 103 S. Ct. 2378, 76 L.Ed.2d 611 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-47, 102 S. Ct. 894, 71 L.Ed.2d 21 (1982) (tribal nonmember's "presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose"). Indeed, "when a nonmember has entered into a consensual commercial relationship with the Tribe or its members the Tribe retains 'inherent power to exercise civil authority over the conduct of [the nonmember] on fee lands within its reservation.'" *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (citing *Montana v. United States*, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981)).

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Plaintiffs have, at no point, alleged that Officer Sales' actions were taken under color of state law, rendering their § 1983 claim void. Nor could they reasonably do so—the whole incident arose out of a parking dispute at the Tribe's casino on tribal land. Officer Sales was working security for a tribal event at the casino when the incident occurred, and has denied enforcing or acting under color of state law at the time of the incident. Indeed, Mr. Lewis's own alleged statement that he "didn't know [they] were also parking lot attendants" further underscores the limited (tribal-only) nature of Officer Sales's actions during the encounter (Nedderman Decl., Ex. 2 at 17). Thus, because there is no real dispute that Officer Sales was acting under tribal authority only, Plaintiffs cannot establish the state action needed to prevail against him under § 1983. Dismissal is therefore proper.

C. Plaintiffs' theory of supervisory liability under § 1983 is unsupported by the evidence, justifying dismissal.

Plaintiffs' Complaint makes clear that the sole basis for their § 1983 claim against Lieutenant Loescher and Chief Duenas is that they took no action upon receiving Plaintiffs' complaints, in effect "ratifying" Officer Sales' conduct. (Dkt. #16 at 7:13-16). Their discovery responses also only blame these supervisors for alleged subsequent inaction. (*See* Nedderman Decl., Exs. 1-2). But Plaintiffs themselves admit that they lack knowledge regarding the investigation and conclusions reached by Lieutenant Loescher and Chief Duenas. (*See* Nedderman Decl., Ex. 1 at 16, Ex. 2 at 14). And the only admissible testimony—as to that issue—is from Lieutenant Loescher, who states he undertook an investigation, found no wrongdoing, and reported his conclusions to Chief Duenas. (*See* Loescher Decl.) Thus, Plaintiffs' claim that these supervisory officials in effect ratified, and somehow then became responsible for, the alleged conduct, is factually incorrect; the only competent evidence is that the supervising officers, conducted an investigation and found no wrongdoing. The Court should disregard Plaintiffs' admittedly uninformed testimony to the contrary as merely

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speculative. *See Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1061 (9th Cir. 2011) ("To survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations."). Summary judgment is therefore warranted because Plaintiffs lack evidence to prove their own supervisory liability theory.

D. Plaintiffs' theory of supervisory liability under § 1983 is not allowed under federal law in any event.

Nevertheless, even if Plaintiffs' ratification/inaction theory is taken as true, the supervisory defendants' alleged investigatory failure does not impute § 1983 liability.

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). A plaintiff must instead plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution. *Id.* A supervisor may be held liable under § 1983 if (1) he or she was personally involved in the constitutional deprivation or (2) a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation. *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir. 2001). A supervisor may be liable if the supervisor knew of the violations and failed to act to prevent them. *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir. 2012). "A plaintiff seeking to establish liability of a supervisory defendant must also demonstrate that the supervisor's conduct was so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury." 9th Cir. Model Civ. Jury Inst. 9.4 (comment) (2017) (citing *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992)).

"A supervisor's isolated and subsequent ratification of an officer's conduct . . . can never be sufficient to show that the supervisor caused the officer's conduct." *Kaur v. City of Lodi*, 263 F. Supp. 3d 947, 986 (E.D. Cal. 2017) (citing *Jones v. Cty. of Sacramento*, 2010 U.S. Dist. LEXIS 72795, at *7 (E.D. Cal. July 20, 2010)). In *Jones*, an unpublished but repeatedly

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cited case, the Court noted that evidence of the officers' alleged mishandling of plaintiff's subsequent complaint "cannot be said to have caused [Jones's] incident." *Jones*, 2010 U.S. Dist. LEXIS 72795, at *25-26. In Hawaii, the court noted that even if an "after-the-fact internal investigation here was somehow a 'coverup' (and there is no such evidence), it would not have prevented the shooting of Long." *Long v. City & Cty. of Honolulu*, 378 F. Supp. 2d 1241, 1248 (D. Haw. 2005). Similarly, in a Florida case, the court held that "[a]n inadequate investigation following the subject incident will not sustain a claim of municipal liability, because the after-the-fact inadequate investigation could not have been the legal cause of the plaintiff's injury." *See Feliciano v. City of Miami Beach*, 847 F. Supp. 2d 1359, 1367 (S.D. Fla. 2012) (citing *Mettler v. Whitledge*, 165 F.3d 1197, 1205 (8th Cir. 1999)).

Plaintiffs' supervisory liability claims against Lieutenant Loescher and Chief Duenas draw from the same flawed theory—that these defendants can somehow be liable for failing to discipline or investigate Plaintiffs' alleged incident after it occurred. But an isolated, subsequent "ratification" of officer misconduct, even if taken as true, cannot be said to have caused the preceding alleged constitutional injury, as federal courts have repeatedly recognized. Indeed, the Ninth Circuit has rejected such a theory under similar facts. *See Haugen v. Brosseau*, 351 F.3d 372, 393 (9th Cir. 2003), *rev'd on other grounds*, 543 U.S. 194, 160 L. Ed. 2d 583, 125 S. Ct. 596 (2004). Accordingly, any claim against Lieutenant Loescher or Chief Duenas under such a theory should be dismissed as both factually and legally deficient.

E. Any claim for *Monell* liability fails because the Puyallup Tribe, which enjoys sovereign immunity, is not a defendant.

Plaintiffs also, apparently, seek *Monell* liability. *Monell* liability refers to a U.S. Supreme Court holding that a government as an entity can be held responsible under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."

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Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). In order to plausibly assert a claim against a municipality under *Monell*, a plaintiff must allege (1) that a municipality employee violated a constitutional right; (2) that the municipality has customs or policies that amount to deliberate indifference of that right; and (3) those customs or policies were the "moving force" behind the constitutional right violation. *See Board of County Com'rs v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). There is no authority for the notion that a municipality can be liable under *Monell* simply because its employee is named in his official capacity. *Hofschneider v. City of Vancouver*, 182 F. Supp. 3d 1145, 1150 (W.D. Wash. 2016). Additionally, *Monell* does not concern liability of individuals acting under color of state law. *Guillory v. Cty. of Orange*, 731 F.2d 1379, 1382 (9th Cir. 1984) (emphasis added).

Here, Plaintiffs' apparent *Monell* claim fails because they have not sued a municipality, but rather tribal officials in their individual capacities. Moreover, Plaintiffs cannot obtain *Monell* liability simply by suing the individual officers in their official capacity. *See Hofschneider*, 182 F. Supp. 3d at 1150. Even if they had standing, Plaintiffs lack evidence of a tribal policy or custom that was the "moving force" of their alleged constitutional right violation. And, most importantly, even if they had such evidence, any *Monell* claim against the Tribe would be barred because it not expressly waived its sovereign immunity. *See Evans v. McKay*, 869 F.2d 1341, 1345-46 (9th Cir. 1989) ("Absent express waiver, consent by the Tribe to suit, or congressional authorization for such a suit, a federal court is without jurisdiction to entertain claims advanced against the Tribe.").

F. Plaintiffs' claim for injunctive relief also fails on multiple grounds.

The Court should additionally dismiss any claim for injunctive relief against the Puyallup Tribal Police, such as that they "be required to train their officers in the proper use of force and in particular the law surrounding the use of firearms." (Dkt. #16 at 7:19-20).

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First, the Ninth Circuit has rejected suits "when the requested relief will require affirmative actions by the sovereign or disposition of unquestionably sovereign property." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002); *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) ("[A] suit may fail, as one [versus] the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.").

Here, injunctive relief against the individual defendants is nothing more than a roundabout attempt to require affirmative action by the Puyallup Tribe in violation of tribal sovereign immunity. There is a reason the Puyallup Tribe is not a named defendant herein: Plaintiffs understand it cannot be sued. Plaintiff cannot circumvent these principals and require affirmative action by the Tribal Police simply by suing its supervisors. As such, the Court should dismiss any claim for injunctive relief against the defendants.

Second, Plaintiffs lack standing to bring an injunctive relief claim. Article III of the U.S. Constitution authorizes the judiciary to adjudicate only "cases" and "controversies." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). A plaintiff bears the burden of demonstrating that his or her injury-in-fact is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010). A plaintiff must demonstrate constitutional standing separately for each form of relief requested. *Davidson*, 889 F.3d at 967.

For injunctive relief, which is a prospective remedy, the threat of injury must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009). In other words, the "threatened injury must be

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certainly impending to constitute injury in fact" and "allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (internal quotation marks and alteration omitted). Past wrongs, though insufficient by themselves to grant standing, are "evidence bearing on whether there is a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (internal quotation marks omitted). Where standing is premised entirely on the threat of repeated injury, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way." *Id.* at 111.

Plaintiffs cannot meet their burden of establishing any threat of repeated injury. More than two-and-a-half years have passed since the alleged encounter, and there is no evidence any similar incident occurred to Plaintiffs or anybody else. Indeed, this is a disputed liability case—the two officers at the scene vehemently deny Plaintiffs' characterization of events. Plaintiffs' injunctive relief claim is premised on the notion that Puyallup Tribal Police training will prevent repeated instances, but they cannot show that any similar (disputed) incident is "actual and imminent." *See Summers*, 555 U.S. at 493. As a result, they lack standing to bring an injunctive relief claim, warranting dismissal.

V. CONCLUSION

Based on the foregoing, Officer Sales, Lieutenant Loescher, and Chief Duenas respectfully request that the Court dismiss Plaintiffs' remaining claims against them. Plaintiffs' § 1983 claim against Officer Sales fails because it is beyond dispute that all his acts and omissions arose under color of tribal, and not state, law. Additionally, the only § 1983 theory Plaintiffs have alleged against Lieutenant Loescher and Chief Duenas is contradicted by the record and ample federal precedent. Finally, Plaintiffs' *Monell* and injunctive relief claims fail as a matter of law for several reasons. Defendants, therefore, respectfully request the Court

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dismiss this action with prejudice and without costs or fees awarded to any party. A proposed order accompanies this Motion.

Dated this 24th day of January, 2019.

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By: /s/Thomas B. Nedderman

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DECLARATION OF SERVICE

Pursuant to 28 U.S.C § 1746" and the laws of the United States of America, I declare under penalty of perjury and the laws of the State of Washington that on the below date, I delivered a true and correct copy of DEFENDANTS' MOTION FOR SUMMARY JUDGMENT via the method:

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DATED this 24th day of January, 2019.

/s/Monica Howard
Monica Howard, Legal Assistant

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