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Tribal Health Board, Hon. Chief Justice Kenneth Pitt,
and Hon. Judges Dennis Bear Don't Walk and Michelle Wilson*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

**BIG HORN COUNTY ELECTRIC
COOPERATIVE, INC.,**

Plaintiff,

v.

**ALDEN BIG MAN, UNKNOWN
MEMBERS OF THE CROW TRIBAL
HEALTH BOARD, HONORABLE
CHIEF JUSTICE KENNETH PITT,
HONORABLE JUDGES DENNIS
BEAR DON'T WALK AND
MICHELLE WILSON**

Defendants.

Case No. CV 17-00065-SPW-TJC

**TRIBAL DEFENDANTS'
REPLY IN SUPPORT OF
MOTION FOR JUDGMENT ON
THE PLEADINGS PURSUANT
TO RULE 12(C) WITH
RESPECT TO TRIBAL
HEALTH BOARD
DEFENDANTS**

Pursuant to L.R. 7.1(d)(1)(C), Defendants Unknown Members of Crow Tribal Health Board, the Honorable Chief Justice Kenneth Pitt, and the Honorable Justices Dennis Bear Don't Walk and Michelle Wilson (collectively, "Tribal Defendants"), file this reply in support of their motion for judgment on the pleadings in favor of Defendants Unknown Members of Crow Tribal Health Board ("Tribal Health Board Defendants") against Plaintiff Big Horn County Electric Cooperative ("BHCEC").

BACKGROUND

In May 2017, BHCEC filed this action against the Tribal Defendants, seeking declaratory and injunctive relief related to a pending civil case filed by Defendant Alden Big Man against BHCEC in Crow Tribal Court. ECF No. 1. On April 22, 2019, Tribal Health Board Defendants filed their motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) with respect to Tribal Health Board Defendants. ECF No. 78. BHCEC responded to Tribal Defendants' motion on May 8, 2019 (ECF No. 80), to which the Tribal Defendants now reply.¹

ARGUMENT

I. INTRODUCTION AND SUMMARY

Federally recognized Indian tribes, including the Crow Tribe, have sovereign

¹ In opposing Tribal Defendants' Motion for Judgment on the Pleadings, BHCEC does not take issue with Tribal Defendants' arguments regarding the timeliness, propriety, and standard of review for the motion.

immunity from suit absent affirmatively and expressly stated congressional abrogation of that immunity, or a clear waiver by the Tribe, and that immunity extends to tribal officials acting within the scope of their authority. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir. 1986). BHCEC makes no allegation that Congress has abrogated, or that the Crow Tribe has waived, tribal sovereign immunity here. BHCEC instead urges this court to apply a very narrow exception to tribal sovereign immunity, the *Ex Parte Young* doctrine. BHCEC's complaint, however, fails to allege the requisite enforcement connection to the challenged tribal law on the part of Tribal Health Board Defendants for the application of this doctrine. This action thus must proceed without the Tribal Health Board Defendants, as their immunity is retained and requires their dismissal.

II. BHCEC'S COMPLAINT DOES NOT ALLEGE SUFFICIENT ENFORCEMENT CONNECTION TO A VIOLATION OF FEDERAL LAW ON THE PART OF TRIBAL HEALTH BOARD DEFENDANTS

Relying primarily on *Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007), BHCEC asserts that the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), applies in this case to overcome the sovereign immunity of Tribal Health Board Defendants.² The *Ex Parte Young* doctrine, a

² BHCEC's arguments rely extensively on cases from other jurisdictions that are not binding on this Court, and are irrelevant or inconsistent with the jurisprudence of this Circuit. For example, BHCEC cites extensively to *Crowe & Dunleavy, P.C.*

“narrow exception” to the well-established rule of sovereign immunity from suit, *Salt River Project Agricultural Improvement and Power Dist. v. Lee*, No. CV-08-08028, 2013 WL 321884, at *4 (D. Ariz. Jan. 28, 2013), has been extended to tribal officials sued in their official capacities for prospective relief. *Vaughn*, 509 F.3d at 1092 (citations omitted). To determine whether *Ex Parte Young* applies, the relevant threshold inquiry is whether the complaint alleges an ongoing violation of federal law by the tribal officials named and seeks prospective relief against them. *Id.*

BHCEC’s Complaint states that “[t]he actions of Defendants imposing or seeking to impose tribal regulation or power over Big Horn, its agreements and

v. Stidham, 640 F.3d 1140 (10th Cir. 2011), in support of claims against Tribal Health Board Defendants and this Court’s jurisdiction to rule on those claims. The *Crowe & Dunleavy* case, like this one, examined the lawfulness of tribal court jurisdiction. In *Crowe & Dunleavy*, a tribal court judge asserted judicial and tribal official immunity as a defense, and the court in that case rejected those defenses. Here, BHCEC’s case will continue against the Tribal Court Justices and Mr. Big Man, once the Tribal Health Board Defendants are properly dismissed. BHCEC also relies heavily on *Baker Electric Co-op v. Chaske*, 28 F.3d 1466 (8th Cir. 1994), apparently in support of its general theory of the case regarding tribal authority over non-member utilities, but that case and others like it involved very different and far more extensive regulatory efforts by the Tribe. *Baker* did not foreclose tribal jurisdiction, but rather remanded to the lower court to conduct a more appropriate inquiry. *Id.* at 1478. Furthermore, *Baker* is not consistent with current Ninth Circuit case law analyzing the extent of tribal jurisdiction over non-members. *See, e.g., Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017); *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). BHCEC’s proffered cases are not binding and, therefore, need not be considered.

relations with its members, violates federal law” ECF No. 1 at 12. Arguably, this very general allegation may suffice to meet *Vaughn*’s threshold inquiry. Compare *Jamul Action Comm. v. Stevens*, No. 2:13-cv-01920, 2014 WL 3853148, at *13 (E.D. Cal. Aug. 5, 2014) (tribal official retains immunity from suit where complaint fails to allege that the official violated federal law). However, although BHCEC’s Complaint seeks prospective relief, it notably contains no prayer for specific prospective relief against Tribal Health Board Defendants. ECF No. 1 at 14-15. See *Wells Fargo Bank v. Maynahonah*, No. CV-11-648, 2011 WL 3876255, at *5 (W.D. Okla. Sept. 2, 2011) (examining complaint for purposes of *Ex Parte Young* application and noting that in the prayer section “[p]laintiff expressly seeks a permanent injunction to prohibit the [named tribal agency] from enforcing its order or from taking any further action to reverse or nullify [an] arbitral award”); see also *Moore v. Miss. Gaming Comm’n*, No. 1:15-CV-13, 2016 WL 5477673, at *9 (N.D. Miss. Sept. 29, 2016) (citation omitted) (finding that generic prayer for relief fails to trigger *Ex Parte Young* where plaintiff failed to specify the type of injunctive relief sought against specific named defendant officials).

Vaughn also calls for the named tribal officials to have “the requisite enforcement connection” to the challenged law. 509 F.3d at 1092. In *Vaughn*, the court recognized the “long history” of tribal officials’ efforts to impose and collect

the tribal tax at issue. The tax administration and collection efforts alleged included transmitting tax registration forms. *Id.*

In contrast to *Vaughn* on this point is *South Fork Livestock Partnership v. United States*, No. 3:15-CV-0066, 2015 WL 4232687 (D. Nev. July 13, 2015). There, the plaintiff alleged that tribal defendants prevented it from exercising its federally permitted grazing rights by restricting access to the land designated in the plaintiff's grazing permits. The sole allegations in the entire complaint regarding three named tribal defendants were that two were elected officials and one was an administrator. 2015 WL 4232687, at *3. The court found this insufficient to apply

Ex Parte Young:

Other than these passing, generic references, there are no allegations of wrongdoing that give rise to any cause of action or injunctive relief. SF Livestock must allege some conduct, action, threat of conduct, or control by the individual tribal defendants related to the alleged denial of access to federal land and water to fall under the *Ex Parte Young* doctrine. However, SF Livestock's complaint is devoid of any such allegations. Therefore, the court shall dismiss the individual tribal defendants from the complaint.

Id.

South Fork Livestock is instructive. Like the complaint in *South Fork Livestock*, BHCEC's complaint contains no allegations of misconduct, action, threat of misconduct or control by Tribal Health Board Defendants. For *Ex Parte Young* to apply, it must be clear "*from the complaint*" what, if any, actions are alleged that tribal officials took that were outside the scope of their authority or in

violation of federal law. *Grand Canyon Skywalk Dev. LLC v. Hualapai Indian Tribe*, 966 F. Supp. 2d 876, 885-86 (D. Ariz. 2013) (emphasis added). The existence of tribal law does not *per se* meet the enforcement connection test. For *Ex Parte Young* to apply there must be *facts* alleged from which the court can infer some connection by the officials with the enforcement of the challenged tribal law. *Grand Canyon*, 966 F. Supp. 2d at 885-86.

BHCEC has not and cannot allege that Tribal Health Board Defendants acted under the Crow Tribal Law and Order Code (“CTLOC”) section at issue at least in the underlying dispute between BHCEC and Big Man because BHCEC chose not to seek their approval before disconnecting Big Man’s electric service. Not *all* tribal officials lose their immunity from suit when a violation of federal law is alleged, as there must also be some alleged factual connection to the challenged law. *Vaughn*, 509 F. 3d at 1094 (granting motion to dismiss as to tribal chairman.) Significantly, the Tribal Court of Appeals Justices are also named Defendants in this action and they are not raising immunity from suit. *See Salt River Project* 2013 WL 321884, at *7 (allegations that Tribal Supreme Court Justices have taken action by making decisions directly relating to the alleged ongoing violation of federal law are enough of an enforcement connection to the challenged law such that *Ex Parte Young* applies to defeat their sovereign immunity from suit).

CONCLUSION

For the reasons set forth above in this reply and the memorandum in support of Tribal Defendants' Motion for Judgment on the Pleadings under Rule 12(c), Tribal Defendants' motion should be granted.

Respectfully submitted this 22nd day of May, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced except for footnotes and for quoted and indented material. Pursuant to Local Rule 7.1(d)(2)(E), I certify that the word count calculated by Microsoft Word for Windows is 1,589 words, excluding the caption and certificates of service and compliance.

/s/ Heather D. Whiteman Runs Him

PRO HAC VICE COUNSEL FOR
THE TRIBAL DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2019, a true and correct copy of the foregoing TRIBAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(C) WITH RESPECT TO TRIBAL HEALTH BOARD DEFENDANTS was served upon the following via the Court's electronic filing system:

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