No. 20-

IN THE

Supreme Court of the United States

SUSAN PIERSON,

Petitioner,

v.

HUDSON INSURANCE COMPANY,
A NEW YORK CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Issue 1. Did the resolution of the tort claim against Thorne in Pearson v. Thorne decide the same issue or claim that plaintiff raises in the present suit against Hudson, such that the present lawsuit is barred by collateral estoppel? No.

Issue 2. As it relates to the litigation in the prior lawsuit, is Hudson in privity with Thorne to be able to avail itself of the affirmative defense of issue and/or claim preclusion? No.

Issue 3. Collateral estoppel is not to be applied when the result is against public policy. Plaintiff alleges that the failure of Hudson to write a waiver of the sovereignty defense into its policies (up to the limit of the policy) is a pattern of conduct that nullifies the operation of 25 USC 5321 (c) (3) (A), thereby depriving tort victims of the recovery that Congress intended should be available. Hudson has never answered this allegation, instead urging the court to stretch collateral estoppel to prevent plaintiff from exposing an illegal and lucrative practice of collecting premiums for liability policies under which it is very unlikely that any plaintiff will be able to obtain a recovery. Because the plaintiff has never had a full and fair opportunity to litigate this claim, does public policy require allowing plaintiff to go forward with her claim against Hudson in the present case? Yes.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Appellant Susan Pierson, a resident of Washington State, is the appellant in this Court. She was the plaintiff in the United States District Court for the Western District of Washington.

Hudson Insurance, a New York corporation is the respondent in this Court and was the defendant before the United States District Court for the Western District of Washington.

PARTIES TO PROCEEDING AND RELATED CASES

Parties Defendant in this case:

Hudson Insurance Company, a New York Corporation, Odyssey Reinsurance Company, a Connecticut corporation, Odyssey Re Holdings Corp; a Delaware corporation, Alliant Insurance Services Inc., a California corporation, and Alliant Specialty Insurance Services Inc., a California Corporation, a subsidiary of Alliant Insurance Services Inc.,a California corporation, dba Tribal First, Defendants.

Susan Pierson, Plaintiff, v. Hudson Insurance Company, a New York Corporation, Odyssey Reinsurance Company, a Connecticut corporation, Odyssey Re Holdings Corp, a Delaware corporation, Alliant Insurance Services Inc., a California corporation, and Alliant Specialty Insurance Services Inc., a California Corporation, a subsidiary of Alliant Insurance Services Inc.,a California corporation, dba Tribal First, Defendants; United States Court of Appeals for the Ninth Circuit, Cause No. 20-25185 decided December 17, 2020.

Susan Pierson, Plaintiff v. Hudson Insurance Company, a New York Corporation, Odyssey Reinsurance Company, a Connecticut corporation, Odyssey Re Holdings Corp, a Delaware corporation, Alliant Insurance Services Inc., a California corporation, and Alliant Specialty Insurance Services Inc., a California Corporation, a subsidiary of Alliant Insurance Services Inc., a California corporation, dba Tribal First, United States District Court for the Western District of Washington at Seattle, Cause No. C19-0289-JCC decided February 6, 2020.

Susan Pearson, a single person v. Director of the Department of Licensing, a subdivision of the State of Washington, in his/her official capacity and J. Schwahn, H. Kleinman, M. Radley, A. Thorne, Larry Yonally, Tribal Officers and General Authority Police Officers Pursunt to RCW. 10.92 in their official capacity and in their individual capacity and all officers , now unknown, who were involved in the seizure and forfeiture of 1999 GMC S-10 pickup truck, defendants, United States District Court for the Western District of Washington at Seattle, Cause No. C15-0731-JCC, decided June 20, 2016.

Candee Washington v. Washington State Department of Licensing, Skagit County Superior Court dismissed on July 2, 2015; dismissal affirmed at 199 Wash. App. 1039 (Div. 1, June 26, 2017) rev. denied 189 Wn2d 1040 (2018).

Jordynn Scott v. John Doe, Director of the Department of Licensing, Whatcom County Superior Court Cause No. 15-2-00301-8, dismissed on August 10, 2015; dismissal affirmed at 199 Wash. App. 1039, (Div. 1, June 26, 2017) rev. denied 189 Wn2d 1040 (2018).

Wilson v. Horton's Towing, 2016 WL 1221655, W. D., Wash. (2016), 906 F.3d 773 (9th Cir. 2018), affirmed in part, vacated in part and remanded, cert. denied 139 S. Ct. 1603 (2019).

Susan Pierson v. John Doe, Director of the Department of Enterprise Services, Washington Supreme Court Cause No. 93643-9, dismissed on Janaury 25, 2017.

Lafferty v. Liu and David Heenan, United States District Court for the Western District of Washington at Seattle, Cause No. 2-17-CV-00749-RSM, dismissed on September 17, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Susan Pierson respectfully requests that this court grant a writ of certiorari to review the order and the judgment and opinion of the United States Court of Appeals for the 9th Circuit entered December 17, 2020, an unpublished opinion reported at 2020 WL 7398999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the 9th Circuit affirming the dismissal of petitioner's breach of contract claim was issued on December 17, 2020 and not reported (App., 1a-6a).

The order of the United States District Court for the Western District of Washington dismissing the case on February 6, 2020 is reported at 2020 WL 583825 (App., 7a-15a).

JURISDICTION

The opinion of the United States Court of Appeals for the 9th Circuit affirming the dismissal of petitioner's breach of contract claim was issued on December 17, 2020. Under this court's order of Thursday, March 19, 2020, extending the deadline for filing to 150 days from the date of the lower court judgment, this petition is timely filed. This court has jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

25 U.S.C.A. § 5321

Formerly cited as 25 USCA § 450f

§ 5321. Self-determination contracts

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this chapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises (as defined in section 1452 of this title), except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

PRELIMINARY STATEMENT

The instant case is one of four cases in which automobiles owned by non Native Americans were seized and held for forfeiture by tribal police officers for violation of tribal drug laws. In three of the four cases, the automobiles were ordered forfeited by the Swinomish Indian Tribal Court for violation of tribal drug laws. The three cases are (1) Candee Washington v. Washington State Department of Licensing, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040 (2018), (2) Jordynn Scott v. John Doe, Director of the Department of Licensing, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040(2018), and (3) Susan Pearson (sic) Pierson v. Director of Department of Licensing and Andrew Thorne, Swinomish tribal police officer, 2016 WL 3386798, (Western District of Washington, June 20, 2016). Pearson was adjudicated by John C. Coughenour, United States District Judge who also adjudicated the instant case.

In the Washington and Scott cases, the Swinomish Tribe was able to sell the cars and have the certificates of title transferred to the buyer at public auction. In the Pearson case, the motor vehicle was not sold because as a result of the Washington and Scott cases, the Washington State Department of Licensing agreed not to honor tribal orders of forfeitures in the future to change certificates of

title to automobiles. The Department of Licensing did this to avoid entry of an injunction prohibiting the Department from doing so.

The fourth case in which an automobile owned by a non Native American was seized and held for forfeiture by tribal police officers for violation of tribal drug laws is Wilson v. Horton's Towing, 2016 WL 1221655, W. D., Wash. (2016), 906 F.3d 773 (9th Cir. 2018), cert. denied 139 S. Ct. 1603 (2019). Wilson involved the Lummi Tribe. Wilson sued Brandon Gates, a Lummi Tribal police officer who traveled into Bellingham and seized Wilson's truck. Gates towed it to the Lummi Reservation where a forfeiture proceeding was initiated against the truck. The 9th circuit dismissed Wilson's claim that the Lummi Tribe lacked jurisdiction to forfeit his truck, without prejudice, but directed that Wilson first had to exhaust his claim before the Lummi Tribal Court before the court would decide the jurisdictional question as to whether the tribe had authority to forfeit property of non Native Americans for violation of tribal drug laws.

Two other related cases referenced in the Appellant's Excerpts of Record are (5) Susan Pierson v. John Doe, Director of the Department of Enterprise Services, Washington Supreme Court Cause No. 93643-9; and (6) Lafferty v. Liu and David Heenan, United States District Court for the Western District of Washington at Seattle, Cause No. 2-17-CV-00749-RSM.

Susan Pierson v. John Doe, Director of the Department of Enterprise Services, was commenced after Pearson v. Thorne was dismissed. Before the Washington Supreme Court rendered its decision, the Swinomish Tribe

presented the Director of the Department of Enterprise Services (DES) with an endorsement of the Hudson insurance policy covering the liabilty of the Swinomish Tribe. The endorsement amended the insurance policy to make it compliant with RCW 10.92.020 and waived the right to plead Indian sovereignty as a defense. The waiver states "pursuant to Revised Code of Washington 10.92.020 (2) (a) (11), to the extent of policy coverage neither the named Assured nor Hudson will raise the defense of sovereign immunity to preclude an action for damages under state or federal law, the determination of fault in a civil action, or the payment of a settlement or judgment arising from the tortious conduct." The waiver material is found at Appellant's Excerpts of Record Vol. II, 97-117.

Scrutiny of the waiver contained in the endorsement submitted by the Swinomish Tribe reveals that the Hudson policy does not contain the waiver required by 25 USC 5321 © (3) (A). The waiver submitted only waives the right to assert the defense of Indian sovereignty to defeat a claim under the policy if the tribal officer is acting under state law or federal law, RCW 10.92.020. The endorsement required under RCW 10.92.020 preserves the right of the insurer to plead Indian sovereignty as a defense to a claim covered under the policy if the officer was acting in his capacity to enforce tribal law. Notice that this limited waiver fits in with the result reached in Pearson v. Thorne, where the court found that Thorne was acting as a tribal officer and not as a state or federal law enforcement officer.

25 USC 5321 (c) (3) (A) makes no such distinction and requires a complete waiver. That is, the analysis is simple. Is the claim covered under the policy? If so, no defense of Indian sovereignty can be asserted to defeat the claim.

The waiver mandated by 25 USC 5321 (c) (3) (A) does not allow the insurer to defeat a claim covered under the policy by assertion of Indian sovereignty because the officer was acting as a tribal officer. The only deduction to be taken from the submission of the waiver in Pierson v. DES was that, prior to the submission of the Washington state based waiver required by RCW 10.92.020, the Hudson policy had no waiver of any type because if it did contain the all encompassing waiver required by 25 USC 5321 (c) (3) (A), no submission of the lesser state waiver would have been necessary.

Hudson's position that submission of the Washington state conforming waiver was adequate is consistent with the postion taken by Hudson, that no federal conforming waiver is required based upon case law, principally Evans v. McKay 869 F.2d 1341 (1989), see Appellant's Excerpts of Record,Volume II, pages 118,119.

But a careful read of Evans v. McKay reveals that Evans holds to the contrary. It specifically states that Indian sovereignty cannot be used as a defense against any claim covered under the policy. The following is taken from Evans v. McKay, 869 F2d at 1346:

> The ISDA permits the various Indian tribes, inter alia, to contract with the Secretary of the Interior to furnish services previously administered by the federal government. 25 U.S.C. § 450f. The ISDA further vests the Secretary with discretion to require any tribe requesting such a contract to obtain adequate liability insurance. Specifically, the Act provides that:

> The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to obtain adequate liability insurance: Provided, however, That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's coverage and limits of the policy of insurance.
>
> 25 U.S.C. § 450f(c) (codified as 25 USC 5321 © (3) (A) (emphasis added). It is this section of the ISDA upon which the appellants primarily rely to support their argument that the Tribe has waived its sovereign immunity.
>
> While requiring a tribe to obtain liability insurance as a condition precedent to contractual performance authorized by the Secretary, section 450f(c) clearly addresses, as is evident in the caveat of that subsection, the rights and limitations of the insurance carrier, not the Tribe. This provision expressly precludes the insurer from defeating a claim covered by the policy by an invocation of the tribe's sovereign immunity.

The fact remains Thorne and Pierson were covered under the Hudson policy and the only lawyer involved in

the litigation was a defense attorney hired by Hudson to defend a person covered under its policy. There was no lawyer representing the tribe and asserting tribal sovereignty on behalf of the tribe. Hudson's lawyer asserted the defense of Indian sovereignty on behalf of a named tribal officer sued in his individual capacity who was covered under the policy and thereby achieved dismissal of the claim.

The second related case is Lafferty v. Liu and David Heenan, United States District Court for the Western District of Washington at Seattle, Cause No. 2-17-CV-00749-RSM. At Appellant's Excerpts of Record 118, 119 is the letter from William W. Spencer which is the only record of a legal position taken by Hudson Insurance relating to the challenge that 25 USC 5321 © (3) (A) applies to the Hudson Insurance policy at issue and requires a written waiver in the policy itself forsaking the right to assert the defense of Indian sovereignty as a defense to a claim covered under the policy.

The opinion of the District Court in Lafferty v. Heenan and Hudson Insurance is found at Appellant's Excerpts of Record 39, 40.

On February 27, 2019, Lafferty sued Heenan, a Swinomish tribal police officer, and named Hudson as a party defendant seeking an injunction compelling Hudson to take steps to insure that the defense of Indian sovereignty was not asserted as a defense to the tort claim against Heenan. Pierson cites DKT #50(citing DKT #46) as pointing out that after Lafferty noted his motion to enjoin Hudson, Hudson replied and argued in court pleadings that Indian sovereignty was not pleaded as a

defense to Lafferty's tort claim against Heenan. Therefore Hudson argued that the issue was moot and the request for the injunction groundless. Hudson requested terms and the imposition of monetary sanctions against Lafferty. Lafferty replied that Indian sovereignty had been pleaded and cited Heenan's answer. After this took place, Heenan filed a document withdrawing his defense of Indian sovereignty to the tort claim brought by Lafferty against Hennan. This resulted in the court's dismissing Lafferty's request for an injunction as moot; see Appellant's Excerpts of Record 39,m lines 17-28, 40, lines 1-4.

This outcome shows a coordination between Heenan's lawyer (appointed by Hudson) and Hudson itself to prevent the court reaching the issue of the absence of the waiver required by 25 USC 5321 © (3) (A) from Hudson's policy, and preventing what would have been the logical next step – an injunction requiring Hudson to include in its policies a waiver so that appointed lawyers would not be able to assert the defense of Indian sovereignty in a tort suit.

STATEMENT OF THE CASE

A. Background of Prior and Instant Cases involving Susan Pierson

On January 21, 2015 Ms. Pierson's truck was seized and held by Swinomish tribal police officer Kleinman and other Swinomish Tribal Police Officers, M. Radley and Larry Yonally. Those police officers stopped Ms. Pierson at a stop sign at the intersection of Swinomish Avenue and 1st Street on the Swinomish Reservation in Skagit County. Two days after the seizure, Pierson asked Swinomish Tribal Police Officer Andrew Thorne to return

her truck. He refused, saying the truck was being held to be searched.

It took the Swinomish Police Department over a week to seek a search warrant. The warrant was applied for and issued by a Washington state court. Yet Thorne and other Swinomish police officers referred to in the complaint seized the truck for forfeiture under the tribal drug code.

Pierson did not get her truck back. She sued Thorne for damages for conversion. She argued that she was entitled to recover for actual damages, loss of truck and use of truck and damages for violation of her civil rights by the police officers and reasonable attorneys' fees and costs pursuant to 42 USC 1983 and 1988.

Thorne, whose attorney was provided by Hudson under an insurance policy issued to the Tribe, removed the case to federal court. Thorne moved to dismiss the case. The court granted the motion to dismiss, essentially on the ground that Thorne was immunized by Indian sovereignty as will be more fully discussed below. Pearson v. Thorne, C15-0731-JCC, 2016 WL 3386798, W. D. Wash. (2016). No appeal was taken from this decision.

On February 27, 2019, Pierson filed the present suit against Hudson Insurance alleging that Hudson's insurance policy with the Swinomish tribe was purchased by the federal government pursuant to 25 USC 5321 © (3) (A) and was required to have a waiver of the right to assert the defense of Indian sovereignty written into the policy. Pierson alleged that she was the third party beneficiary under the policy and because the policy was paid for with federal funds, the Hudson policy was required by federal

law, 25 USC 5321 © (3)(A)… Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit up to the limits of the policy. Pierson argued that she and all other persons whose claims against employees of the Swinomish Tribe were covered under the Hudson insurance policy with the Swinomish Tribe were entitled to pursue their claims without interference by assertion of the defense of Indian sovereignty. Again, Pierson acknowledges that a tribe can always assert sovereignty. Pierson's argument is that a defense attorney appointed by Hudson under a federal funded contract of insurance may not assert the defense.

B. Proceedings Below in the Present Case

Hudson Insurance filed its motion to dismiss under Rule 12.b (6). Hudson wrote in its motion to dismiss, "Although Plaintiff premises her claims on the notion that her rights in Pierson I were violated because the Swinomish Tribe relied on the defense of sovereign immunity, plaintiff's claims in Pierson I were dismissed pursuant to summary judgment on grounds other than the defense of sovereign immunity."Dkt 31, page 3 lines 4-5. Shortly thereafter at page 3, lines 11 to 16, Hudson wrote,"With this lawsuit Plaintiff aims to do nothing more than relitigate Pierson 1 using the defendant Insurance Companies as surrogates for the Swinomish Tribe and its police officer. The courts have already decided those issues, holding not only that sovereign immunity applied but that Plaintiff also had neglected to exhaust her tribal remedies." See also the 7th affirmative defense in the answer filed by Hudson.

The 8th affirmative defense states: "these defendants were not parties in Pierson 1 and therefore could have not violated any of plaintiff's civil or due process rights during the course of that litigation."

C. Basis for Decision in the Prior Lawsuit

Pearson v. Thorne was a lawsuit for damages against Thorne in his individual capacity. It was dismissed for three reasons stated in the district court opinion. First, the court found that Thorne was acting in his official capacity as a tribal officer and was thus immune because of Indian sovereignty. This finding is final. Thus, Pierson is now barred from suing Hudson for damages caused by tribal officer Thorne.

The second finding was that Thorne was acting as a tribal officer and was therefore immune from a claim under 42 USC 1983. The third finding was that Pierson had waived any claim that the seizure of the car and its confiscation were illegal because she failed to exhaust her remedies in tribal court. These findings are dictated by the first finding that Thorne is entitled to the defense of Indian sovereignty. These findings are also final, but like the first finding, they only mean that Pierson is precluded from suing Hudson for damages caused by officer Thorne.

The theory of damages in the present case in Pierson v. Hudson Insurance Company is different. Pierson is suing Hudson for damages caused by its own actions. Under the federal statute, 25 USC 5321 (c) (3) (A), Pierson has a right as a third party beneficiary to pursue tort litigation against persons covered under the insurance policy issued by Hudson, free from and uninhibited by the assertion of the defense of Indian tribal sovereignty—a defense that

is virtually unassailable. Hudson interfered with this right by failing to include in the insurance contract the federally required waiver of the sovereignty defense up to the limit of the policy issued to the Swinomish Tribe. The damages are not the loss of the truck and its use. The damages are the cost of litigation against Thorne that, but for Hudson's omission, would have proceeded in state court like an ordinary tort lawsuit, uncomplicated by Thorne's status as a tribal officer.

Defendant Hudson is not entitled to the defense of Indian sovereignty for its own actions. The District Court should have stayed its hand and required Hudson to answer Pierson's interrogatories.

If this court grants this petition and reverses the dismissal and allows this case to go forward against Hudson, two results are possible. First, the court might (incorrectly in Pierson's view) rule on the merits that Hudson is not obligated by 25 USC 5321 © (3) (A) to include a written waiver forsaking the right to assert the defense of Indian sovereignty to defeat a claim covered under the policy, see cases cited in letter of William Spencer, Appellant's Excerpts of Record 118, 119.[1] Hudson's remedy would be to seek terms.

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1. 25 USC 5321 © (3) (A) requires a waiver written into an insurance policy purchased by the Secretary of the Interior for the benefit of an Indian tribe receiving a Self Determination Grant. For Hudson to prevail under its case law argument that Hudson is not prohibited by 25 USC 5321 © (3) (A) from asserting the defense of Indian sovereignty to defeat a claim covered under its policy, it logically follows that Hudson would have to show the court which insurance policy the 25 USC 5321 © (3) (A) written waiver applies to, if not the instant Hudson insurance policy covering the liability of the Swinomish Tribe.

But, more likely, the court would decide that Hudson did break the law by failing to include a written waiver in its policy. If the policy issued by Hudson had included a written waiver, Thorne would not have been able to assert that his status as a tribal officer made him immune from suit. The lawyer Hudson hired to defend Thorne in the prior lawsuit would have realized that 25 USC 5321 (c) (3) (A) prevented the assertion of all the defenses that allowed Thorne ultimately to prevail.

SUMMARY OF ARGUMENT

Certiorari should be granted because the Ninth Circuit's decision erroneously interprets Washington State issue preclusion law to deny petitioner the right to sue Hudson Insurance Company as a third party beneficiary of its contract of insurance with the Swinomish Tribe purchased by federal funds pursuant to 25 USC 5321 (c) (3) A). This claim by Pierson was not raised or addressed by the District Court in prior litigation. In addition, this case raises a significant question as to whether federal law, specifically 25 USC 5321 (c) (3) A), has been violated by Hudson Insurance Company to its financial benefit in the administration of tort claims covered under its policies and whether the application of collateral estoppel to deny petitioner the opportunity to litigate her claim would work an injustice. Dismissal under 12.6 (b) entitles petitioner to the assumption that her factual claim is true, that Hudson Insurance, the biggest insurance carrier insuring native American Indian tribes, is systemically ignoring its obligations under 25 USC 5321 (c) (3) A). The 9th circuit's affirmance of the dismissal of petitioner's contract claim against Hudson under 25 USC 5321 (c) (3) works an injustice upon petitioner and those

other persons who were entitled to protection by vigorous enforcement of 25 USC 5321 (c) (3) (A). The 9th circuit's opinion vindicates Hudson's use of the legal system to keep concealed its complete disregard of 25 USC 5321 (c) (3) A which was passed specifically to protect petitioner and other persons in her situation.

ARGUMENT

The 9th circuit opinion affirming the District Court is six (6) pages. Two issues under the generic label of Issue Preclusion are addressed: (a) Identity of Issues (at bottom of page 2 and page 3) and (b) Whether Application of Issue Preclusion Would Cause Injustice (page 5 and top of page 6).

As to issue (a) the 9th circuit cites on page 4, Scholz v. Wash. State Patrol 416 P.3d 1261,1267 (Wash. Ct. App. 2018) quoting Shoemaker v. City of Bremerton 745 P.2d 858, 860 (Wash. 1987) (enbanc) for the premise the issue decided in the earlier proceeding must have been "actually litigated and necessarily determined" in that proceeding. The facts of both cases involve policemen. Scholz was fired for lying in an investigation. Shoemaker was demoted. Each officer asserted his right to challenge the termination or demotion under the collective bargaining agreement. Both lost, after which they sued. The suits were dismissed upon collateral estoppel but the facts were absolutely identical. In Scholz and Shoemaker, the common nucleus of facts involved in the litigation were the same, i.e. was the termination or demotion based upon just cause. It truly was a "rehash" of the prior litigation.

The Scholz and Bremerton cases are unlike the instant case because the legal theory of liabilty is different, breach of contract against Hudson for its actions in not including a written waiver in its insurance policy as required by 25 USC 5321 (c) (3) (A) versus a tort suit against Tribal Officer Thorne based upon his actions in seizing and forfeiting petitioner's truck. The instant case focuses on the conduct of a different party, Hudson, in breaching federal law by not putting a written waiver of the right to assert the defense of sovereign immunity to defeat a claim covered under the policy. The common nucleus of fact required for claim preclusion under Lucky Brand Dungarees v. Marcel Fashions (140 S. Ct. 1589 (May 14, 2020) is not satisfied.

The 9th circuit opinion is also deficient because it does not address privity which is one of the four requirements which must be satisfied under Scholz v. Wash. State Patrol and Shoemaker v. City of Bremerton. The requirement of privity was squarely presented in Appellant's Opening Brief and there is no privity under Washington law.

Next, the 9th circuit focussed on the fact that the District Court ruled Pierson's claim against Swinomish Tribal police officers involved in the seizure and forfeiture of her truck was barred by Indian sovereign immunity. The crux of the 9th circuit's opinion is found in the following language:

> In the instant proceeding the district court concluded that although Appellant had asserted that Appellee insurance companies violated 25 USC 5321 (c) (3) (A) by failing to include a waiver of the tribal sovereign immunity defense

> in policies it issued to tribes and therefore deprived her of her due process right to litigate tort claims, she was really trying to rehash the issue of tribal sovereign immunity.
>
> Appellant argues her claims in this case are different and that the prior proceeding did not address her claim under 25 USC 5321. But Appellant's claims in both the prior proceeding and the instant proceeding turn on the identical issue of whether the tribal officers were entitled to immunity. This issue has already been decided against Appellant. Thus, as the district court correctly recognized, the issues are identical. See 9th circuit opinion in Pierson v. Hudson, 2020 WL 7398999 at page 1, bottom.

The 9th circuit also found no injustice would flow from the application of Issue Preclusion because "at its core, Appellant's argument is grounded in her belief that the prior proceeding was wrongly decided and that tribal immunity was improperly applied to dismiss her claim."

Because in petitioner's view, the 9th circuit did not address all of her claims and arguments, most of petitioner's argument herein is taken from petitioner's Opening Brief to the the 9th circuit.

1. The District Judge erred in concluding the issues in Pearson v. Thorne were identical and the Appellate Court erred in affirming that result.

The District Court opinion concludes that the "issue" raised in both lawsuits is the same. See opinion heading

re "Identical Issues", Appellant's Excerpts of Record at 4, lines 23-26, and 5, lines 1-13. These sixteen lines contain the reasoning of the opinion and hence will be quoted in full.

> The purpose of collateral estoppel is not "to deny a litigant his day in court, but to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation."[Citation omitted.] If a new argument is raised in the second action regarding something already raised and litigated in the first action, "the prior determination of the issue is conclusive " even if the new "argument relevant to the issue was not in fact expressly pleaded". 18 Moore Federal Practice &132.02(2)(c); see also Paulo v. Holder, 669 F.3d 911, 917- 918("The fact that a particular argument against [a particular issue] was not made …and not addressed…does not mean that the issue…was not decided.)
>
> In Pearson v. Thorne, Plaintiff argued that Thorne could not assert sovereign immunity under RCW 10.92, which requires insurance companies to waive tribal sovereignty for their insureds. Pearson, Case No. C15-0731-JCC Dkt No.32 at 2-3. Now, Plaintiff asserts that Thorne should not have been protected by sovereign immunity because of 25 USC 5321 – a statute bearing a strong resemblance to RCW 10.92. (DKT. No. 1 at 9.) Specifically, Sec. 5321 (c) (3) (A) provides that an insurance company insuring a tribe must include a provision within the policy

> that"waive[s] any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit" to the extent of the coverage. Although Plaintiff raises a new argument in support of her assertion, she is litigating the same issue-namely whether Thorne should have been protected by sovereign immunity in the original lawsuit."

The reference above to Pearson case No. C15-0731-JCC Dkt No. 32 at 2-3 is to the Reply Memorandum of the plaintiff to the Motion for Summary Judgment made by Sergeant Thorne. Thorne was both a Washington State Law Enforcement Officer and a Swinomish Tribal Officer. Plaintiff sued him alleging that for purposes of 42 U.S.C. 1983, he acted as a state officer when he applied for a search warrant from the state court to search Plaintiff, who is not a native American. (In this counsel's experience of 47 years practice, I have never seen a tribal officer appear in state court and get a search warrant against a non Native American). Thorne and other tribal officers searched Plaintiff's truck pursuant to the state warrant, discovered illegal drugs and used this uncovering of evidence to achieve the forfeiture of the truck in tribal court.

Thorne had argued that he was acting as a tribal officer. The purpose of the reply memorandum was to point out that if the District Court found that Thorne acted as a state law enforcement officer, he was subject to RCW 10.92.020. Under this state statute, officers of the Swinomish Tribe must have insurance which prohibits the use of Indian sovereignty as a defense to defeat a tort claim against the officer when he has acted as a state

officer. This argument in the reply memorandum was never addressed or decided because the District Court in the prior lawsuit held that Thorne always and only acted as a tribal police officer.

Thus, the District Court opinion in the present lawsuit is incorrect when it states that the issue plaintiff is litigating is identical to the issue litigated in the prior lawsuit. As noted above, plaintiff agrees the judgment in the prior case establishes that Thorne was protected by sovereign immunity from a lawsuit seeking damages for his confiscation of the truck. The judgment does not in any way resolve the issue whether Hudson violates the law when it fails to include in its policies the written waiver of a sovereignty defense required by a federal statute. That issue was not decided in the prior lawsuit.

Moreover, Washington law requires that the party estopped have had a fair and full opportunity to litigate the issue. Because the issue was raised in a reply brief, and had a limited application to Thorne's liability for his actions as a state police officer and the application of RCW 10.92.020, the use of issue preclusion to prohibit Pierson's later suit against Hudson for violation of application of 25 USC 5321 is untenable. The application of 25 USC 5321 was not raised or argued in the prior lawsuit.

The opinion of the district court purports to apply the law of collateral estoppel, also termed issue preclusion. The opinion, citing federal cases even though the court in diversity jurisdiction should be applying state law, recites that collateral estoppel precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment. That analysis is not applicable here.

Petitioner is not attempting to relitigate whether Thorne as an individual is susceptible to suit for tort damages. The issue in the present case was not actually litigated or decided in the prior lawsuit.

The appellate court affirmed the District Court's conclusion that the issues were identical in the prior litigation Pearson v. Thorne, supra. This aspect of issue preclusion- identity of issues- was addressed in the 9th circuit opinion in about two pages of analysis.

Petitioner raised the specific argument that as it relates to the prior lawsuit, Pearson v. Thorne, Hudson could not avail itself of the defense of issue preclusion under Washington law because Hudson was not in privity with Thorne, see Appellant Opening Brief before 9th circuit, Issue 2, "As it relates to the litigation in the prior lawsuit, is Hudson in privity with Thorne to be able to avail itself of the affirmative defense of issue preclusion? No.", see pages 2, 17, 18 of appellant's opening brief before the 9th circuit.

The 9th circuit did not address petitioner's argument that Hudson was not in privity with Thorne and therefore could not assert issue preclusion to bar petitioner's claim. Also, petitioner's breach of contract claim against Hudson was not a claim identical to Pierson's tort claim against Thorne under Washington law, Thompson v. King County 163 Wa. App. 184 (2011).

2. The issue and/or claim upon which the estoppel is based does not meet the definition of issue claim set forth in Lucky Brand Dungarees v. Marcel Fashions (140 S. Ct. 1589 (May 14, 2020).

The specifics of this argument under Lucky Brand Dungarees v. Marcel Fashions was not addressed by the 9th circuit in its opinion.

The District Court eliminated the right of the plaintiff to pursue her claim against Hudson because she did not present her claim against Hudson and join Hudson at the same time and in the same tort case against Thorne. In effect, the court created a mandatory joinder rule under the rubric of collateral estoppel.

Hudson may argue that the dismissal is justified by res judicata, sometimes called claim preclusion. Unlike issue preclusion, claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated. If a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979); see also Wright & Miller § 4407. Suits involve the same claim (or "cause of action") when they " 'aris[e] from the same transaction,' " United States v. Tohono O'odham Nation, 563 U.S. 307, 316, 131 S.Ct. 1723, 179 L.Ed.2d 723 (2011) (quoting Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482, n. 22, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)), or involve a "common nucleus

of operative facts," Restatement (Second) of Judgments § 24, Comment b, p. 199 (1982) (Restatement (Second)).

Because this case is before the court on diversity jurisdiction, the federal court applies state law. The general doctrine was first reported in Sayward v. Thayer, 9 Wash. 22, 24, 36 P. 966 (1894) as follows:

> [T]he plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Recent federal guidance is found in Lucky Brand Dungarees v. Marcel Fashions Group Inc., 140 S. Ct. 1589 (May 14, 2020). Lucky Brand shows how to ascertain what constitutes a claim or a defense that is precluded in a second lawsuit because it should have been asserted in the prior lawsuit.

Lucky Brand vindicates Pierson's argument that her third party beneficiary cause of action against Hudson based upon 25 USC 5321 (c) (3) (A) is not a claim that had to be litigated in Pearson v. Thorne. Pierson's third party beneficiary cause of action, derived from 25 USC 5321 (c) (3) (A), meets the three pronged test set out in Lucky Brand to determine whether a claim or defense must be asserted.

The first criterion of Lucky Brand is that the causes of action that were resolved in the prior litigation must share a common nucleus of facts with the facts presented in the new litigation to support an estoppel. The United States Supreme Court did not find that to be the circumstance in Lucky Brand, stating:

> Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a "common nucleus of operative facts." Restatement (Second) § 24, Comment b, at 199, 140 S. Ct. at 1595.

The second criterion used to measure where claim preclusion applies is to ask whether " 'a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action.' " Wright & Miller § 4407." Stated differently, if a different outcome in the second action "would nullify the initial judgment or would impair rights established in the initial action," preclusion principles would be at play. Restatement (Second) § 22(b), at 185; Wright & Miller § 4414.

The third criterion was explained as follows:

> Claim preclusion generally "does not bar claims that are predicated on events that postdate the filing of the initial complaint." Whole Woman's Health v. Hellerstedt, 579 U.S. ––––, ––––, 136 S.Ct. 2292, 2305, 195 L.Ed.2d 665 (2016) (internal quotation marks omitted); Lawlor v. National Screen Service Corp., 349 U.S. 322, 327–328, 75 S.Ct. 865,

> 99 L. Ed. 1122 (1955) (holding that two suits were not "based on the same cause of action," because "[t]he conduct presently complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case"). This is for good reason: Events that occur after the plaintiff files suit often give rise to new "[m]aterial operative facts" that "in themselves, or taken in conjunction with the antecedent facts," create a new claim to relief. Restatement (Second) § 24, Comment f, at 203; 18 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Federal Practice § 131.22[1], p. 131–55, n. 1 (3d ed. 2019) (citing cases where "[n]ew facts create[d a] new claim").

Lucky Brand, 140 S. Ct. at 1595-96.

Pierson's suit as a third party beneficiary of 25 USC 5321 © (3) (A) against Hudson meets all of the tests of Lucky Brand. Pierson v. Hudson and Pearson v. Thorne, the two suits here, are grounded on different conduct, by different defendants. They thus did not share a "common nucleus of operative facts."

Pierson also meets the standard that a different judgment in the second action will not impair or destroy rights or interests established by the judgment entered in the first action. The damages Pierson seeks to recover from Hudson are different and have nothing to do with the nucleus of facts at issue in Pearson v. Thorne-- Pierson's loss of her truck and attendant damages. The Swinomish tribe's right to keep the truck and Hudson's right to be free

of any monetary damages that could have been assessed against Thorne will not be impaired if Pierson prevails in the present action.

Pierson also meets the third criterion of Lucky Brand because her suit against Hudson is predicated on events that postdate the filing of the initial complaint in Pierson v. Thorne. Pearson's suit against Thorne was based upon his action in seizing and forfeiting her truck and the resulting damages, loss of use of truck and deprivation of value of truck. Pierson's suit against Hudson is based on her contention that her right as a third party beneficiary of 25 USC 5321 (c) (3) (A) was breached when Hudson did not insert into the Swinomish policy a waiver of the right to assert the defense of Indian sovereignty in the defense of a tort claim against a person covered under the Hudson policy. This omission by Hudson enabled Thorne's attorneys, hired by Hudson, long after January 21, 2015 when Pierson's truck was seized by Swinomish tribal police, to plead the defense of Indian sovereignty and thereby obtain dismissal of the suit against Thorne. The pleading of that defense, which occurred after the filing of the complaint, is the proximate cause of the plaintiff's injuries. These are the actions that Hudson is responsible for. They are events separate and apart from Thorne's action in seizing and participating in the forfeiture of Pierson's truck. Hudson's violation of 25 USC 5321 (c) (3) (A) was a breach of an obligation owed to Pierson as a third party beneficiary of that statute. The breach denied her statutory right to litigate against persons covered by Hudson's policy without having to contend with the defense of tribal sovereignty. Thus the damages Pierson seeks to recover from Hudson are different and have nothing to do with Pierson's loss of her truck. The damages Pierson seeks include her loss of time

and attorney fees expended in "fake" litigation, where the court and plaintiff's counsel had to struggle mightily with the defense of Indian sovereignty when Congress' intention was that the defense not be asserted.[2]

3. The issue and/or claim and privity upon which the estoppel is based does not meet the definition of issue/ claim and privity as set forth in Thompson v. King County 163 Wa. App. 184 (2011).

The appropriate analysis under Washington State law is shown by Thompson v. King County, 163 Wa. App. 184 (2011). There, the court held that inmate Thompson's action against King County for damages resulting from sexual assault was not barred by the prior dismissal on the merits of Thompson's lawsuit against two guards, even though the county would have been vicariously liable if the suit against the guards had been successful. The Court of Appeals wrote:

> The nature of Thompson's claim brings him within these exceptions. With respect to the first exception, the present action alleges that the county is responsible for the maintenance and operation of the jail. This amounts to a colorable claim that as a custodian, the county is liable for breach of a duty that arises independently of its vicarious liability for negligence by its correctional officers. See, e.g., Shea v. City of Spokane, 17 Wash.App. 236, 562 P.2d 264 (1977), aff'd, 90 Wash.2d 43, 578 P.2d 42 (1978). With respect to the second exception, officers

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2. It should be noted that the defense of Indian sovereignty was a complete defense until April of 2017 when the Supreme Court decided Lewis v. Clarke, 137 S. Ct.1285 (2017).

> McMillen and Weirich were dismissed in the first action on the basis of a defense personal to themselves: that they had no knowledge of Thompson being harassed or raped. Their defense does not rule out the possibility that other correctional officers did have knowledge and did fail to protect Thompson, 163 Wa. App. at 196.

Like the county in Thompson, Hudson has a duty that arises independently of any obligation it might have had to cover Thorne—the defendant in the first lawsuit—for his alleged tort liability. The independent duty of Hudson is to comply with the statutory mandate to include in its policies a specific provision requiring waiver of a sovereignty defense.

Pierson is entitled to relief for the additional reason that Hudson is not in privity with Thorne except insofar as Thorne might have been held liable under the policy. In that circumstance, Hudson would have privity, just as there was privity between the two officers in Thompson and King County. But like King County, Hudson is solely liable for its own actions—in this case, the breaching of 25 USC 5321 (c) (3) (A).

4. The application of collateral estoppel cannot satisfy the 4th component to the application of collateral estoppel, that is, that the application of the estoppel would not work an injustice, because the court did not resolve the issue/or claim and plaintiff was not afforded a full and fair opportunity to be heard on the issues and claims she raises against Hudson in Pearson v. Thorne.

Finally, Hudson cannot satisfy the 4th component to the application of collateral estoppel, that is, that the application of the estoppel would not work an injustice. The federal statute in play, 25 USC 5321 (c) (3) A), is specially passed to allow tort claimants to pursue litigation against persons covered under the policy without the difficulties that arise when the defense of Indian sovereignty is injected into the litigation. The doctrine of collateral estoppel has to be stretched considerably to justify its application in this case, and to do so nullifies the intention of Congress to create a system that allows tort victims to obtain compensation readily while at the same time preserving the sovereignty of Indian tribes. If the insurance policies issued to the tribes do not contain the required waiver, tort victims will not be able to recover, and Hudson will be able to keep the premiums it receives without ever having to make a payout.

In connection with the fourth factor—estoppel must not work an injustice—Washington cases emphasize that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. Christensen v. Grant County Hospital, 152 Wash2d 299, 306 (2004); Nielson v. Spanaway Gen.

Med. Clinic, Inc., 135 Wash. 2d 255, 264-65 (1998). If not, the estoppel works an injustice. Nielson is the only case counsel is aware of where collateral estoppel was applied to dismiss a cause of action against a litigant who was not a party in the original action. But it is distinguished from the present case because the injured plaintiff did have the opportunity in the first case to argue for and obtain the full measure of damages caused by a series of acts of medical malpractice. Such is not the case here where the damages Pierson seeks from Hudson were not litigated or determined in the earlier litigation against Thorne. Pierson has not had a full and fair opportunity to be heard on the issues and claims she raises against Hudson.

CONCLUSION

This case is the culmination of many cases in which litigants have sought and been denied recovery for tort claims against tribal police officers engaged in the practice of seizing and forfeiting automobiles owned by nontribal members. At long last, petitioner discovered 25 USC 5321 (c) (3) (A) and reasoned that Hudson breached its obligation to write into its policies a waiver of any right it might otherwise have to raise as a defense the sovereign immunity of an Indian tribe from suit.

At its core, this case raises the issue of whether 25 USC 5321 (c) (3) (A) has been ignored by Hudson Insurance, which has and continues to dominate the tribal liability insurance market, since Congress passed the law in 1990. This case presents the story of a series of tort lawsuits against tribal officers brought by non Native Americans whose automobiles were seized and confiscated. The tribal officers sued were represented by

lawyers appointed by Hudson. The officers were covered under the Hudson policy for liability. The Hudson policy was purchased by the Secretary of the Interior pursuant to 25 USC 5321 (c) (3) (A) for the benefit of the Swinomish Tribe and the United States. All tort plaintiffs suing tribal officers covered under the policy have been dismissed when attorneys hired by Hudson to defend the claim have obtained dismissal based upon the assertion of the defense of Indian sovereignty.

Because the successful application of the doctrine of collateral estoppel would vindicate the use by Hudson to conceal its systematic violation of federal law, the application would work an injustice under Washington law. The 9th circuit opinion incorrectly interpreted and applied Washington law. Because Hudson is violating federal law, it should be barred the use of res judicata or issue preclusion to conceal its systematic violation of federal law which has nullified the effect of federal remedial legislation mandated by 25 USC 5321 (c) (3) (A).

This case warrants review under this court's Rule 10 (c) because both Washington State appellate courts and this instant 9th circuit opinion have not decided and resolved an important question of federal law that has not been, but should be, settled by this Court, namely the operation of a federal remedial statute 25 USC 5321 (c) (3) (A).

For this reason, this case meets the criteria for review.

Petitioner's breach of contract claim against Hudson is not identical to the claims decided in prior litigation. This claim was not decided in prior litigation. Petitioner did not

have a full and fair opportunity to litigate this issue. In addition, Hudson is not in privity with Thorne. Petitioner's claim is distinct and petitioner is entitled to prevail under Thompson v. King County, 163 Wa. App. 184 (2011).

Dated this 21st day of April, 2021 at Bellingham, Washington

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 17, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35185

SUSAN PIERSON, A SINGLE PERSON,

Plaintiff-Appellant,

v.

HUDSON INSURANCE COMPANY, A NEW YORK CORPORATION; ODYSSEY REINSURANCE COMPANY, A CONNECTICUT CORPORATION; ODYSSEY RE HOLDINGS CORP., A DELAWARE CORPORATION; ALLIANT INSURANCE SERVICES, INC., A CALIFORNIA CORPORATION; AND ALLIANT SPECIALTY INSURANCE SERVICES, INC., A CALIFORNIA CORPORATION, A SUBSIDIARY OF ALLIANT INSURANCE SERVICES, INC., DBA TRIBAL FIRST;

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
D.C. No. 2:19-cv-00289-JCC
John Coughenour, District Judge, Presiding

Appendix A

MEMORANDUM[*]

December 7, 2020[**], Submitted, Seattle, Washington
December 17, 2020, Filed

Before: MILLER and BRESS, Circuit Judges, and BASTIAN,[***] Chief District Judge.

Susan Pierson appeals the district court's dismissal of her case for failure to state a claim on issue preclusion and statute of limitations grounds. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

(1) Standard of Review

"We review the district court's grant of a motion to dismiss *de novo*." *Garity v. APWU Nat. Lab. Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)). "When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Id.* at 854 (quoting *Knievel*, 393 F.3d at 1072). "A Rule 12(b)(6) dismissal may be based on either a 'lack of cognizable legal theory' or

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Stanley Allen Bastian, United States Chief District Judge for the Eastern District of Washington, sitting by designation.

'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

(2) Issue Preclusion

Appellant argues that the district court improperly dismissed certain of her claims on the basis of issue preclusion. A federal court sitting in diversity jurisdiction applies the preclusion law of the state in which it sits. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001). Under Washington law, a party asserting issue preclusion "must show (1) the issue in the earlier proceeding is identical to the issue in the later proceeding; (2) the earlier proceeding ended with a final judgment on the merits; (3) the party against whom [issue preclusion] is asserted was a party, or in privity with a party, to the earlier proceeding; and (4) applying [issue preclusion] would not be an injustice." *Schibel v. Eymann*, 189 Wn.2d 93, 399 P.3d 1129, 1132 (Wash. 2017).

The parties agree that the prior proceeding ended in a final judgment on the merits and that Appellant was a party to the prior proceeding. They dispute only whether the issues in the two cases were identical and whether application of the doctrine would cause injustice.

(a) Identity of Issues

For issue preclusion to apply, the issue decided in the earlier proceeding must have been "actually litigated and necessarily determined" in that proceeding. *Scholz v. Wash. State Patrol*, 3 Wn. App. 2d 584, 416 P.3d 1261, 1267 (Wash. Ct. App. 2018) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858, 860 (Wash. 1987) (en banc)). In the prior proceeding, the district court concluded that tribal sovereign immunity barred Appellant's claims against Swinomish tribal police officers arising out of the seizure and forfeiture of her truck. In the instant proceeding, the district court concluded that, although Appellant asserted that Appellee insurance companies violated 25 U.S.C. § 5321(c)(3)(A) by failing to include a waiver of the tribal sovereign immunity defense in policies issued to tribes and therefore deprived her of her due process right to litigate tort claims, she was really trying to rehash the issue of tribal sovereign immunity.

Appellant argues that her claims in this case are different and that the prior proceeding did not address her claim under § 5321. But Appellant's claims in both the prior proceeding and the instant proceeding turn on the identical issue of whether the tribal officers were entitled to immunity. This issue has already been decided against Appellant. Thus, as the district court correctly recognized, the issues are identical.

(b) Whether Application of Issue Preclusion Would Cause Injustice

Appellant argues that applying issue preclusion would cause an injustice because she would be denied her right to pursue her tort litigation without interference from the tribal sovereign immunity defense. She argues that she did not have a full and fair opportunity to litigate her claim under § 5321(c)(3)(A).

For this element, "Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question." *Schibel*, 399 P.3d at 1133-34 (quoting *Thompson v. Wash. Dep't of Licensing*, 138 Wn.2d 783, 982 P.2d 601, 608 (Wash. 1999) (en banc)). A party has a full and fair opportunity to litigate the contested issue if the party had "sufficient motivation for a full and vigorous litigation of the issue." *Weaver v. City of Everett*, 4 Wn. App. 2d 303, 421 P.3d 1013, 1019 (Wash. Ct. App. 2018) (quoting *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600, 604 (Wash. 2001)). Application of issue preclusion here will not cause injustice. At its core, Appellant's argument is grounded in her belief that the prior proceeding was wrongly decided and that tribal sovereign immunity was improperly applied to dismiss her claim. That argument should have been raised via a direct appeal of that case. Appellant had a full and fair opportunity to litigate her claim based on 25 U.S.C. § 5321(c)(3)(A) and to join the insurance companies in the prior proceeding. She chose not to. This is not an injustice sufficient to avoid application of issue preclusion.

Accordingly, because all four elements of issue preclusion are satisfied, Appellant's claims are barred.

(3) Other Arguments

In their responding brief, Appellees raise a number of other grounds on which the Court could affirm the district court. Appellant did not challenge the district court's dismissal of her other claims on statute of limitations grounds, and that argument is waived. *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016). We need not consider Appellees' other asserted grounds for affirmance.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED FEBRUARY 6, 2020

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

SUSAN PIERSON,

Plaintiff,

v.

HUDSON INSURANCE COMPANY,
A NEW YORK CORPORATION, *et al.,*

Defendants.

February 6, 2020, Decided;
February 6, 2020, Filed

HONORABLE JOHN C. COUGHENOUR, UNITED STATES DISTRICT JUDGE.

CASE NO. C19-0289-JCC

ORDER

This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 31). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

On January 21, 2015, Plaintiff was pulled over and arrested by a Swinomish police officer while driving on tribal land. (Dkt. No. 2 at 19–20.) Swinomish police officers subsequently seized Plaintiff's pickup truck because it had been used to transport illegal narcotics onto tribal land. (*Id.* at 20.) Officer Thorne, a Swinomish police officer, told Plaintiff that she would be unable to retrieve her pickup because the department was procuring a search warrant for the vehicle and the tribe was initiating forfeiture proceedings. (*Id.*) Plaintiff failed to challenge the tribe's forfeiture proceedings in tribal court and subsequently brought suit against Officer Thorne in Skagit County Superior Court, seeking an injunction and damages under 42 U.S.C. § 1983. *See Pearson v. Thorne*,[1] Case No. C15-0731-JCC, Dkt. No. 2-1 (W.D. Wash. 2015). The case was later removed to this Court. *Id.*, Dkt. No. 1. Thorne filed a motion for summary judgment in March 2016, which was granted by this Court in June 2016. *Id.*, Dkt. Nos. 24, 33. This Court dismissed Plaintiff's complaint against Thorne because (1) Officer Thorne enjoyed sovereign immunity, (2) Officer Thorne was not an appropriate defendant under § 1983 because he was not acting under the color of state law, and (3) Plaintiff failed to exhaust her tribal remedies. *Id.*, Dkt. No. 33 at 6–8. Plaintiff attempted to challenge Officer Thorne's assertion of sovereign immunity in that

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1. In her complaint, Plaintiff refers to her first case as *Pierson v. Thorne* rather than *Pearson v. Thorne*. Plaintiff states her name was spelled incorrectly in the first lawsuit. (Dkt. No. 1 at 5.) For purposes of this order, the Court refers to the first case by its official name—*Pearson v. Thorne*.

suit, alleging that it was contrary to Washington Revised Code Chapter 10.92, a Washington state law that requires that insurance companies insuring tribes waive sovereign immunity in relevant insurance policies. *See id.*, Dkt. No. 32 at 2–3. No insurance companies were named as defendants in the prior lawsuit.

Plaintiff brought this suit in February 2019, alleging that (1) Hudson's insurance contract was implicitly amended by 25 USC § 5321(c)(3)(A) to contain a waiver of sovereign immunity, it breached that contract by asserting sovereign immunity, and Plaintiff is the intended third-party beneficiary to that contract, and (2) Hudson is liable to Plaintiff for its violation of 25 U.S.C. § 5321(c)(3)(A). (Dkt. No. 1 at 10–12.) Plaintiff also asserts that her rights were violated under 42 U.S.C. §§ 1981, 1982, 1983, 1984, 1985, and 1988. (*Id.* at 13–14.)

II. DISCUSSION

A. Standard of Review

A defendant may move for dismissal when a plaintiff "fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 678. Although

the Court must accept as true a complaint's well-pleaded facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The plaintiff is obligated to provide grounds for her entitlement to relief that amount to more than labels and conclusions or formulaic recitation of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A dismissal under Federal Rule of Civil Procedure 12(b)(6) "can [also] be based on the lack of a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

B. Collateral Estoppel

When a federal court sits in diversity jurisdiction, the court must apply the state's law of collateral estoppel. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001). Under Washington law, collateral estoppel applies where: "(1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice." *Schibel v. Eymann*, 189 Wn.2d 93, 399 P.3d 1129, 1132 (Wash. 2017).

1. Identical Issues

The purpose of collateral estoppel is not “to deny a litigant his day in court,” but to “prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.” *Luisi Truck Lines, Inc. v. Wash. Utils. and Transp. Comm’n*, 72 Wn.2d 887, 435 P.2d 654, 659 (Wash. 1967). If a new argument is raised in the second action regarding something already litigated in the first action, “the prior determination of the issue is conclusive” even if the “argument relevant to the issue was not in fact expressly pleaded.” 18 Moore’s Federal Practice § 132.02(2)(c); *see also Paulo v. Holder*, 669 F.3d 911, 917–18 (“The fact that a particular argument against [a particular issue] was not made . . . and not addressed . . . does not mean that the issue . . . was not decided.”).

In *Pearson v. Thorne*, Plaintiff argued that Thorne could not assert sovereign immunity under RCW 10.92, which requires insurance companies to waive tribal sovereign immunity for their insureds. *Pearson*, Case No. C15-0731-JCC, Dkt. No. 32 at 2-3. Now, Plaintiff asserts that Thorne should not have been protected by sovereign immunity because of 25 U.S.C. § 5321—a statute bearing a strong resemblance to RCW 10.92. (Dkt. No. 1 at 9.) Specifically, § 5321(c)(3)(A), provides that an insurance company insuring a tribe must include a provision within the policy that “waive[s] any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit” to the extent of the coverage. Although Plaintiff raises a new argument in support of her assertion, she is litigating the same issue—namely, whether Thorne

should have been protected by sovereign immunity in the original lawsuit.

2. Final Judgment on the Merits

"[A] grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn. App. 226, 983 P.2d 1144, 1148 (Wash. Ct. App. 1999). The previous lawsuit, *Pearson v. Thorne*, was decided on summary judgment on the merits.

3. Same Party

Both parties to the lawsuit do not have to be the same for collateral estoppel to apply—rather, only the party against whom collateral estoppel is asserted must be the same. *See Schibel*, 399 P.3d at 1132. Pierson was the Plaintiff in the prior lawsuit and is the party against whom collateral estoppel is being asserted in this case. *Compare Pearson*, Case No. C15-0731-JCC, Dkt. No. 1 *with* (Dkt. No. 1.) Therefore, this element is satisfied.

4. Injustice

If the application of estoppel would be unjust under the circumstances, preclusion need not apply. This element of collateral estoppel is generally concerned with procedural unfairness. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957, 962 (Wash. 2004). In determining whether collateral estoppel applies, "whether

the decision in the earlier proceeding was substantively correct is generally not a relevant consideration in determining whether application of collateral estoppel would work an injustice." *Id.* at 966.

In this case, there is nothing to suggest that the previous litigation was procedurally unfair. Plaintiff argues that estoppel would work an injustice on her because (1) Plaintiff had a right to pursue her tort claim without the defense of sovereignty, (2) Hudson would benefit from its violation of § 5321(c)(3)(A), and (3) applying collateral estoppel would undermine the enforcement of federal law. (Dkt. No. 32 at 11.) But these considerations are improper in collateral estoppel analysis. This Court cannot pass judgment on whether sovereign immunity was properly asserted in the previous action. Rather, the relevant consideration is whether Plaintiff received a "full and fair" opportunity to be heard. *Schibel*, 399 P.3d at 1134. Plaintiff's failure to raise § 5321(c)(3)(A) in the prior lawsuit is not a sufficient reason to overcome collateral estoppel because Plaintiff had a full and fair opportunity to dispute sovereign immunity in the prior litigation.

Sovereign immunity is essential to Plaintiff's § 5321 claim, therefore Plaintiff is collaterally estopped from bringing her claims under § 5321 in this case. Likewise, sovereign immunity is essential to Plaintiff's § 1983 claim, which was explicitly decided in Plaintiff's previous lawsuit. Therefore, Plaintiff's claim under § 1983 is also barred by collateral estoppel.

C. Statute of Limitations

"Because the federal civil rights statutes lack statutes of limitations of their own, the U.S. Supreme Court has directed the lower federal courts in such cases to apply the general state law limitations period for personal injury claims." *Cloud ex rel. Cloud v. Summers*, 98 Wn. App. 724, 991 P.2d 1169, 1173 (Wash. Ct. App. 1999). Washington has a personal injury statute of limitations of three years. Wash Rev. Code § 4.16.080.

Defendants argue that the statute of limitations on Plaintiff's civil rights claims began to run on May 20, 2015, the day Officer Thorne filed his answer in *Pearson v. Thorne* asserting sovereign immunity. (Dkt. No. 31 at 13–14.) Plaintiff does not dispute Defendants' claim that the statute of limitations has run on Plaintiff's civil rights claims. (*Id.* at 12.) Nor does Plaintiff state exactly how or why she is entitled to relief from Defendant under these provisions. Plaintiff's claims under 42 U.S.C. §§ 1981, 1982, 1983, 1984, 1985, and 1988 are thus time-barred. *See* Wash. Rev. Code § 4.16.080.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 31) is GRANTED and the case is DISMISSED with prejudice. The Court hereby STRIKES Plaintiff's motion to compel (Dkt. No. 34) and Defendants' motion to stay (Dkt. No. 38) and DIRECTS the Clerk to close the case.

DATED this 6th day of February 2020.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES
DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED JUNE 20, 2016

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

SUSAN PEARSON,

Plaintiff,

v.

DIRECTOR OF THE DEPARTMENT OF LICENSING, A SUBDIVISION OF THE STATE OF WASHINGTON, IN HIS/HER OFFICIAL CAPACITY, *et al.*,

Defendants.

June 20, 2016, Decided;
June 20, 2016, Filed

HONORABLE John C. Coughenour,
UNITED STATES DISTRICT JUDGE.

CASE NO. C15-0731-JCC

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the motions for summary judgment by Defendants Director of the

Department of Licensing (Dkt. No. 21) and Sergeant Andrew Thorne (Dkt. No. 24). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motions for the reasons explained herein.

I. BACKGROUND

The relevant facts are not in dispute. On January 21, 2015, Swinomish Police Department Officer Hans Kleinman pulled over Plaintiff Susan Pearson for failing to obey a stop sign. (Dkt. No. 25-1 at 1.) Both the traffic violation and the traffic stop occurred on tribal trust land within the external boundaries of the Swinomish Reservation. (*Id.*) Officer Kleinman ran Pearson's name through a driver's check and learned that her license was suspended three days earlier for unpaid tickets. (*Id.*) Officer Kleinman arrested Pearson. (*Id.*) During the search incident to arrest, Officer Kleinman found evidence of controlled substances on Pearson's person. (*Id.*) The tribal police officers subsequently seized Pearson's 1999 GMC S-10 pickup truck. (Dkt. No. 2-1 at 3; Dkt. No. 25-2 at 2.)

Two days after Pearson's arrest, Defendant Andrew Thorne, a sergeant with the Swinomish Police Department, received a call from Pearson. (Dkt. No. 26-1 at 2.) Pearson asked where she should pick up her vehicle. (*Id.*) Sgt. Thorne responded that Pearson could not retrieve her vehicle because the Swinomish Police Department was procuring a search warrant. (*Id.*) Pearson then asked when her vehicle would be returned. (*Id.*) Sgt. Thorne responded

that the Tribe intended to initiate forfeiture proceedings because the vehicle was used to transport illegal narcotics on tribal land. (*Id.*) Sgt. Thorne advised that Pearson would be receiving a seizure notice from the Swinomish Tribal Court with a hearing date and that Pearson could retain an attorney if she wished. (*Id.*)

Upon obtaining a warrant, the Swinomish Police Department searched Pearson's vehicle and discovered evidence of controlled substances. (Dkt. No. 25-3 at 2.)

The Swinomish Tribe gave Pearson notice of the proceeding to forfeit her vehicle pursuant to tribal law. (Dkt. No. 25-4 at 2; Dkt. No. 25-5 at 2; Dkt. No. 25-6 at 2.) Pearson contacted the Swinomish Tribal Court and indicated that she was aware of the matter. (Dkt. No. 25-8 at 2.) Ultimately, though, no attorney entered an appearance on her behalf, and Pearson did not file an answer. (*See id.* at 3.) After 20 days, the Swinomish Tribal Court entered an order forfeiting Pearson's ownership pursuant to Swinomish tribal laws. (*Id.* at 2-3.)

Meanwhile, Pearson requested that the Washington State Department of Licensing (Department) place a hold on her certificate of title. (Dkt. No. 23 at 2.) Based on this request, the Department flagged Pearson's certificate of title, indicating to the Department that ownership of the vehicle could not be transferred without a request by Pearson or a Washington State court order. (*Id.*) The Department has no records indicating that the Swinomish Tribe has attempted to transfer title to Pearson's vehicle. (*Id.*) As of the time of filing of these motions, Pearson's

truck was still in the custody of the Swinomish Police Department. (Dkt. No. 25 at 3.)

On March 14, 2015, Pearson filed a complaint for damages and declaratory and injunctive relief against the Director of the Department in her official capacity and against several Swinomish tribal police officers, including Sgt. Thorne. (Dkt. No. 2-1.) Pearson asks this Court to enjoin the Department from transferring the certificate of ownership to itself pursuant to the Swinomish Tribe's forfeiture order, and to award judgment against the tribal police officers for damages under 42 U.S.C. § 1983. (Dkt. No. 2-1 at 6.)

II. DISCUSSION

A. Summary Judgment Standard

The Court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once a motion for summary judgment is properly made and supported, the opposing party must present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Material facts are those that

may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49. Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Motion by Director of Department of Licensing

Pearson alleges that the Department has a practice of transferring vehicle ownership to itself pursuant to tribal forfeiture orders, which violates the law and the Department's own protocols. (Dkt. No. 2-1 at 4.) Pearson asks the Court to enjoin the Director of the Department from changing the certificate of title of Pearson's truck, because the Swinomish Tribe had no authority to seize the vehicle. (*Id.*)

The Director moves for summary judgment, arguing that (1) Pearson lacks standing, because she fails to show past injury or a significant possibility of future harm and (2) the Director is immune from civil suits arising from actions in connection with vehicle registration.[1] (Dkt. No. 21 at 5.) The Court agrees on both counts.

1. The Director also argues that, to the extent Pearson alleges a § 1983 claim against her, the complaint does not sufficiently plead a claim. (Dkt. No. 21 at 5.) Pearson's response brief acknowledges that she "only seeks a declaration or injunction against the Director," not damages under § 1983. (Dkt. No. 27 at 10.)

1. Standing

The Director first argues that Pearson lacks standing to seek an injunction against transfer of her vehicle title. (*Id.*) Article III requires all litigants to establish a case and controversy in order to invoke this court's jurisdiction. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). Standing has three requirements: (1) an injury in fact, meaning "a harm suffered by the plaintiff that is concrete and actual or imminent"; (2) causation, meaning "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3) redressability, meaning "a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (internal quotations omitted). Where a plaintiff seeks only declaratory and injunctive relief, he or she must also show a "very significant possibility of future harm." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

Here, the future harm is the transfer of title from Pearson to the Department. But, Pearson has not shown a "very significant possibility" that this harm will occur. The Tribe has not attempted to transfer the title. The Department has flagged Pearson's certificate of title, meaning that the title cannot be transferred unless Pearson authorizes it or a Washington State court orders it. These limitations are encapsulated in the Department policy requiring "that the tribal court order be 'converted to judgment' in a Washington Superior Court that the

tribal offer is enforceable." (Dkt. No. 23 at 2.) Factually speaking, it seems very unlikely that the Department will unlawfully obtain title to Pearson's truck.

Pearson protests that the Department has previously argued that its policy would prevent transfer of title, yet it still assumed title to the subject vehicles. (Dkt. No. 27 at 4.) She cites two cases as examples: *Candee Washington v. Director Skagit County*, Skagit County Cause No. 15-2-00293-0 and *Jordynn Scott v. Director of Department of Licensing*, Whatcom County Cause No. 15-2-00301-8. (Dkt. No. 27 at 2.) These cases involve the transfer of a certificate of title pursuant to a tribal court order that was not converted to judgment in a Washington superior court. But, as the Director explains, these cases triggered the Department to more stringently enforce its policy and the corresponding regulations. (Dkt. No. 23 at 3; Dkt. No. 21 at 4.) This further negates the likelihood that the same harm will befall Pearson.

Pearson also asserts that there is another case involving a non-Native American, Narin Sin, whose vehicle was seized by the Tulalip Tribe and whose certificate of title was transferred by the Department. (Dkt. No. 27 at 2.) Pearson provides no evidence of this occurrence, nor any explanation of when the alleged seizure and transfer occurred. In response, the Department submits an affidavit showing that Narin Sin had a vehicle forfeited by the Tulalip Tribe, but that there is no record of the vehicle's title being transferred pursuant to a tribal forfeiture. (Dkt. No. 31 at 2.) This fact does not make it significantly likely that Pearson's title will be impermissibly transferred. In

sum, Pearson fails to demonstrate a sufficient possibility of future harm to establish standing.

2. Immunity

The Director further argues that Pearson's suit is barred by immunity established under Washington State law. (Dkt. No. 21 at 5.) Wash. Rev. Code 46.01.310 states:

> *No civil suit or action may ever be commenced or prosecuted against the director* [of the Department of Licensing], the state of Washington, any county auditor or other agents appointed by the director, any other government officer or entity, or against any other person, *by reason of any act done* or omitted to be done *in connection with the titling or registration of vehicles* or vessels while administering duties and responsibilities imposed on the director or as an agent of the director, or as a subagent of the director.

(Emphasis added.)

Pearson brought a civil suit against the Director based on the Department's alleged practice of improperly transferring titles—*i.e.*, acts "done . . . in connection with the titling or registration of vehicles." It is thus clear that the Director is immune from the present suit.

Pearson's claims against the Director are DISMISSED with prejudice

C. Motion by Sergeant Andrew Thorne

Pearson alleges that Sgt. Thorne's involvement in seizing and forfeiting her vehicle violated her rights under the federal and Washington State constitutions. (Dkt. No. 2-1 at 5-6.) She further asserts that Sgt. Thorne was acting under color of Washington State law and is thus liable for damages under § 1983. (Dkt. No. 2-1 at 6.)

Sgt. Thorne argues that the Court should dismiss Pearson's claims with prejudice, because (1) Pearson's claims is actually an official capacity suit that is foreclosed by sovereign immunity; (2) Sgt. Thorne was acting under color of tribal law, not state law; and (3) Pearson failed to exhaust her tribal remedies. (Dkt. No. 24 at 2-3.) Again, the Court agrees on all counts.

1. Sovereign Immunity

Sgt. Thorne first asserts that Pearson's claim is barred by sovereign immunity. (*Id.*) Tribal sovereign immunity bars suits against a tribe itself, as well as suits against the tribe's employees in their official capacities. *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 20 13). Tribal sovereign immunity generally does not protect tribal employees who are sued in their individual capacities for money damages, even if the employees were acting in the course and scope of their employment. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086-90 (9th Cir. 2013). However, a "plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Miller*, 705 F.3d at 928 (internal quotations omitted). In such

cases, "the sovereign entity is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *See Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).

Pearson's suit rests solely on her argument that the Swinomish Tribe lacked jurisdiction to seize and forfeit her truck. Thus, although she sued the tribal officers in their individual capacity, it is clear that the true defendant is the Tribe itself. Because Pearson's suit is "in reality an official capacity suit," it is barred by sovereign immunity. *See Maxwell*, 708 F.3d at 1089.

2. Acting Under Color of Tribal Law

Sgt. Thorne further argues that he was not acting under color of state law. (Dkt. No. 24 at 2-3.) To establish liability under § 1983, a plaintiff must demonstrate that (1) the defendant acted under color of state law and (2) the defendant deprived the plaintiff of a right secured by the Constitution or laws of the United States. *Learned v. City of Bellevue*, 860 F.2d 928, 933 (9th Cir. 1988). The plaintiff bears the burden of showing that the defendant's conduct was performed under color of state law. *See id.* "[A]ctions taken under color of tribal law are beyond the reach of § 1983." *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).

Pearson alleges that Sgt. Thorne " act[ed] beyond any authority [he] ha[s] as [a] Swinomish tribal police officer" and was "acting under color of state law and as [a] General Authority Washington State Police Officer." (Dkt. No. 2-1 at 6.) However, she fails to support this assertion. First,

her argument that the tribal police officers exceeded their authority is based on the Tribe's alleged lack of jurisdiction, which again demonstrates that sovereign immunity bars this suit. Moreover, the only evidence of Sgt. Thorne's involvement in this matter shows that he merely answered a phone call from Pearson and relayed information to her. Apart from the fact that this conduct was related to the forfeiture—which, again, is challenged on grounds barred by sovereign immunity—Pearson has not shown that Sgt. Thorne's actions exceeded his authority as a tribal officer.

3. Exhaustion of Tribal Remedies

Finally, Sgt. Thorne asserts that Pearson's suit is precluded by her failure to exhaust her tribal remedies. (Dkt. No. 24 at 2-3.) A party may not challenge tribal court jurisdiction in federal court until he or she has first exhausted its remedies in tribal court. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999). This requirement is "mandatory," not discretionary. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008) (internal quotation omitted); *see also Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) ("Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete.").

As discussed above, Pearson's suit is unquestionably a challenge to tribal court jurisdiction. It is also undisputed that Pearson was aware of the forfeiture proceeding, but

never filed an answer or otherwise responded. She has not appealed the forfeiture order. She thus has failed to exhaust her tribal remedies and cannot bring this challenge in federal court.

4. Pearson's Response

As a final note, the Court acknowledges Pearson's lackluster—and very late—response to Sgt. Thorne's motion. Pearson did not directly acknowledge Sgt. Thorne's arguments, instead reiterating her blanket statement that Sgt. Thorne "is a Washington State police officer" and confusingly citing a Washington insurance statute. (Dkt. No. 32 at 2-3.) This was far from sufficient to survive summary judgment.

Pearson's claims against Sgt. Thorne are DISMISSED with prejudice.

III. CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment (Dkt. Nos. 21, 24) are GRANTED. Pearson's claims against the Director of the Department of Licensing and Sergeant Andrew Thorne are DISMISSED with prejudice.

DATED this 20th day of June 2016.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES
DISTRICT JUDGE