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**Advising – and Suing – Tribal Officers: On the Scope
of Tribal Official Immunity**

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ADVISING – AND SUING – TRIBAL COUNCIL OFFICIALS: ON THE SCOPE OF TRIBAL OFFICIAL IMMUNITY

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In July 2008, the D.C. Circuit held that the Cherokee Nation of Oklahoma was immune from suit by the Cherokee Freedmen in their long-running dispute, but that the elected officials of the Cherokee Nation were not. *See Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008). The decision effectively circumvented tribal sovereign immunity in important ways, in that the Cherokee Nation would be forced to defend its officers in federal court despite the court's recognition that the Nation was immune. But the outcome of the case should not have been a surprise.

These materials, prepared for the 34th Annual Federal Bar Association Indian Law Conference, will offer an overview of the contours of tribal official immunity in federal, state, and tribal courts, and attempt to identify issues for tribal lawyers advising – and suing – tribal officials.

Part I offers a brief introduction to the *Ex parte Young* Doctrine, and how it might apply to tribal officials as a waiver (of sorts) of tribal immunity in federal court (and perhaps state court). Part II provides a detailed overview, focusing on federal court cases, of the application of tribal official immunity to various kinds of claims. Part III offers a brief survey of tribal court cases analyzing tribal official immunity.

I. Overview on the Application of *Ex parte Young* to Tribal Officials

The Supreme Court in numerous cases has held that Indian tribes possess immunity from suit in federal and state courts. *E.g.*, *Kiowa Tribe v. Mfg. Technologies, Inc.*, 532 U.S. 751, 754 (1998); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a], at 635-36 (2005); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 98-99 (4th ed. 2004). *See generally* Andrea M. Sielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661 (2002).

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In at least three cases strongly affirming tribal sovereign immunity, the United States Supreme Court has suggested that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), could (and perhaps should) apply to tribal officials acting outside of the scope of their official capacities, or in violation of federal law, as a means to avoid tribal immunity. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Nation*, 498 U.S. 505, 514 (1991), the Court stated:

In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. [citing *Young*, 209 U.S. 123]

In fact, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), the Supreme Court held that Lucario Padilla, a defendant in the civil rights complaint and an officer of the Pueblo, “is not protected by the tribe’s immunity from suit.” *Id.* (citing *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171 (1973); *Young*, 209 U.S. 123). After making this finding, the Court concluded that there was no federal forum to adjudicate Indian Civil Rights Act civil claims. *See Martinez*, 436 U.S. at 71. Finally, the Court in *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171-72 (1973), remarked, “The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894, does not immunize the individual members of the Tribe.”

The so-called *Ex parte Young* Doctrine allows for a suit against officers of a sovereign government where the plaintiffs allege continuing unlawful conduct, and where the plaintiffs seek declaratory and injunctive relief only. *See Seminole Tribe of Florida v. Florida*, 516 U.S. 44, 73 (1996); *Keweenaw Bay Indian Community v. Kleine*, 546 F. Supp. 2d 509, 517 (W.D. Mich. 2008) (“The Community’s claims challenging Defendants’ enforcement of the Sales and Use Tax Acts can proceed under the *Ex parte Young* exception. The Community seeks declaratory relief concerning future enforcement of sales and use taxes. The conduct alleged is continuing in nature, and the relief sought is prospective. Thus, the Eleventh Amendment does not bar the Community from asserting that Defendants are violating federal law in their application of the Sales and Use Tax Acts. Likewise, the Eleventh Amendment does not bar the Community’s claim that it has the right to perform its own offset, for it too is prospective.”).

The D.C. Circuit recently quoted *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), as providing the proper recitation of the doctrine:

There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign.... [W]here the officer’s powers are

limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.... His actions are *ultra vires* his authority and therefore may be made the object of specific relief.... A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional.... Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign.... These two types have frequently been recognized by this Court as the only ones in which a restraint may be obtained against the conduct of Government officials.

Vann v. Kempthorne, 534 F.3d 741, 750-51 (D.C. Cir. 2008) (quoting *Larson*, 337 U.S. at 689-90).

As a general matter, tribal official immunity applies for activities undertaken off-reservation, suits brought for money damages, can include both members and nonmembers and unelected tribal officials, and derives from a tribal sovereignty that predates the Constitution. See *James Joseph Morrison Consultants, Inc. v. Sault Ste. Marie Tribe of Chippewa Indians*, 1998 WL 1031492, at *3-4 (W.D. Mich., Aug. 6, 1998).

II. An Overview of Tribal Official Immunity in the Non-Tribal Courts

A. Early Cases – Reliance on Federal Indian Law “Principles”

Prior to *Martinez*, federal courts long had recognized that tribal officials may be sued, largely because plaintiffs would sue tribal officials to avoid the general rule that Indian tribes may not be sued absent Congressional consent. *E.g.*, *Haile v. Saunooke*, 246 F.2d 293, 297-98 (4th Cir. 1957); *Adams v. Murphy*, 165 F. 304, 309 (8th Cir. 1908); *Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 48, 50 (W.D. N.Y. 1972); *Barnes v. United States*, 205 F. Supp. 97, 100 (D. Mont. 1962). Cases in this vein hold that tribes and tribal officials are under the “tutelage” of the United States, and therefore immune absent a Congressional waiver. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 340 F.2d 529, 532 (8th Cir. 1967); *Leech Lake Citizens Community v. Leech Lake Band of Chippewa Indians*, 355 F. Supp. 697, 700 (D. Minn. 1973).

Some early decisions following *Martinez* suggested that whether a tribal official could be sued could depend on the doctrine of implicit divestiture, or whether the “interests of the National Government,” as announced by federal courts, might divest a tribal official of immunity. For example, in *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572 (10th Cir. 1984), the Tenth Circuit addressed the question of whether a non-Indian lessee of mineral rights in Indian Country can seek federal court review of newly-implemented tribal mineral leasing laws and regulations. The Tribe raised sovereign immunity, but the rejected the argument, noting that, in general, a challenge to a law may not be turned away on immunity grounds. See *Tenneco Oil*, 725 F.2d at 574 (citing *State of Wisconsin v. Baker*, 464 F. Supp. 1377 (W.D. Wis. 1978)). In

analysis that appears to be antiquated and never adopted in the context of sovereign immunity by the Supreme Court, the court also asserted that tribal immunity may be limited by the “interests of the National Government,” invoking the Supreme Court’s analysis in its implicit divestiture cases. *Id.* at 575 (citing *Montana v. United States*, 445 U.S. 544, 564 (1981), and quoting *Washington v. Colville Confederated Tribes*, 447 U.S. 134, 153 (1980)). *Accord Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Spp. 418, 425 (D. Ariz. 1981) (following a similar analysis), *rev’d on other grounds*, 710 F.2d 587 (9th Cir. 1983).

Recent decisions have paid lip service to the implicit divestiture theory while focusing on the *Ex parte Young* Doctrine. *See Village of Hotvela Traditional Elders v. Indian Health Services*, 1 F. Supp. 2d 1022, 1028 (D. Ariz. 1997) (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)), *aff’d without opinion*, 141 F.3d 1182 (9th Cir., March 13, 1998), *cert. denied*, *Evehema v. Indian Health Service*, 525 U.S. 1107 (1999).

B. Alleging Violations of Federal Law

1. Claims Tied to Tribal Authority over Non-Indians

As a general matter, tribal official immunity prevails in federal court even before a court will engage in the *Ex parte Young* analysis unless two critical circumstances are present: (1) allegation of a violation of federal law; and (2) a federal cause of action exists to provide federal subject matter jurisdiction.

The Supreme Court’s holding in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), recognizing a federal common law cause of action to review the jurisdiction of tribal courts to adjudicate cases involving non-Indian defendants served as a kind of waiver of tribal official immunity for such cases, and meets these two requirements. As such, any non-Indian person claiming that a tribe or tribal court has taken jurisdiction over them (and has met the tribal remedy exhaustion requirements of *National Farmers Union*) automatically defeats tribal official immunity.

The Ninth Circuit recently held that the *Ex parte Young* Doctrine allows a suit against a tribal official alleging an ongoing violation of federal law by the tribal officer. *See BNSF v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (“In determining whether *Ex Parte Young* is applicable to overcome the tribal officials’ claim of immunity, the relevant inquiry is only whether BNSF has *alleged* an ongoing violation of federal law and seeks prospective relief.”) (citing *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645-46 (2002) (emphasis in original)). The *Vaughn* Court held that the chairman of the Hualapai Tribe was immune from suit in federal court, but that a tribal official charged with collecting tribal taxes against the non-Indian-owned railroad was not immune. *See Vaughn*, 509 F.3d at 1093 (chairman immune); *id.* at 1092 (tribal finance director not immune). The court reasoned that the chairman’s scope of tax collection and enforcement authority was not close enough to the tribal statute, rendering the chairman immune. *See id.* at 1093 (citing *National Audubon Society, Inc. v.*

Davis, 307 F.3d 835, 847 (9th Cir. 2002)). But this seems like an overly formalistic decision because it is irrelevant whether the finance director (or the chairman, for that matter) is sued, it is the Tribe in reality that is the defendant.

The holding in *Vaughn* follows from two other Ninth Circuit decisions appear to follow the rule that tribal officials may be sued if the tribal law they are following violates federal law. First, in *Burlington Northern Railroad Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1991), *overruled on other grounds by Big Horn County Elec. Co-op, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), the Ninth Circuit held that tribal officials enjoy immunity only to the extent of the tribe's valid authority. *See id.* at 901-02. The court wrote:

But sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-57 n. 6 ... (1978); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690 & n. 22 ... (1949); *Ex parte Young*, 209 U.S. 123, 159-60 ... (1908). No reason has been suggested for not applying this rule to tribal officials, and the Supreme Court suggested its applicability in *Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677. We strongly implied, without deciding, that *Ex parte Young* does apply to tribal officials in *Chemehuevi Indian Tribe v. Calif. Bd. of Equalization*, 757 F.2d 1047, 1051-52 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) and *California v. Harvier*, 700 F.2d 1217, 1218-20, 1220 n. 1 (9th Cir.1983). We now reach the issue, and conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. *Harvier*, 700 F.2d at 1221, 1224 (Norris, J., dissenting). Accordingly, tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect. *Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir.1984); *Wisconsin v. Baker*, 698 F.2d 1323, 1332-33 (7th Cir.1983).

Id. at 901-02.

Similarly, the Ninth Circuit held in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), that Navajo Nation officials could not avoid suit to contest the assertion of jurisdiction by the Nation over the plaintiff. *See id.* at 1133-34. The court wrote:

As a final jurisdictional contention, appellees argue that they enjoy sovereign immunity from suit. *See Chemehuevi Indian Tribe v. California St. Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9 ... (1985) (noting that question of tribal sovereign immunity is jurisdictional in nature). Indian tribes may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity of

Congress. See *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir.1991), *cert. denied*, 505 U.S. 1212 ... (1992). Tribal sovereign immunity, however, does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. *Id.* Here, APS has alleged that certain Navajo officials violated federal law by acting beyond the scope of their authority. See *National Farmers*, 471 U.S. at 845 ... (noting that in all cases before the Supreme Court involving questions as to the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians, “the governing rule of decision has been provided by federal law”). That is essentially all that this case involves at the present stage. Injunctive relief is sought; damages are not.

Id.

Following *Blackfeet Tribe*, the Ninth Circuit held in *Big Horn County Elec. Co-op, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), that tribal officials engaged in collecting taxes on non-Indians in violation of federal law were not immune from suit:

This court recognized in *Blackfeet Tribe*, in a part of the opinion not overruled by *Strate*, that suits for prospective injunctive relief are permissible against tribal officers under the *Ex Parte Young* framework. See *Blackfeet Tribe*, 924 F.2d at 901 (“[T]ribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect.”). As a result, the district court’s decision to permanently enjoin the defendants from applying RUTC to Big Horn’s utility property did not violate principles of sovereign immunity because, as stated above, the officials acted in violation of federal law in enforcing the tax.

Id. at 954.

And in a very recent unpublished opinion, the Ninth Circuit held that tribal official immunity does not foreclose a claim that a tribal court has no jurisdiction over a non-Indian company. See *BNSF Ry. Co. v. Ray*, 2008 WL 4710778, at *1 (9th Cir., Oct. 27, 2008). The court wrote:

This action is permissible under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), because it seeks prospective injunctive relief against the tribal officers acting in their official capacities. See *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir.2000) (“[S]uits for prospective injunctive relief are permissible against tribal officers under the *Ex Parte Young* framework.”); see also *BNSF Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir.2007) (“Issues of tribal sovereign immunity are reviewed de novo.”). Because Plaintiffs have alleged an ongoing violation of federal law-the unlawful exercise of tribal court jurisdiction-and seek prospective relief only, tribal sovereign immunity does not bar this action. See *id.* at 1092 (“In determining whether *Ex*

Parte Young is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether [the plaintiff] has alleged an ongoing violation of federal law and seeks prospective relief." (emphasis omitted)).

Id.

Other circuits follow the same route in holding tribal official immunity inapplicable. A panel of the Eighth Circuit held in *Baker Electric Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471-72 (8th Cir. 1994), that tribal official immunity did not extend to cases in which the tribe acted beyond its federal Indian law authority. *See id.* The court stated:

Applying *Northern States Power*, the dispositive issue before this court is whether the Tribe had the authority to enact the Tribal Utilities Code: If yes, the tribal officers are clothed with the Tribe's sovereign immunity; if no, then the sovereign immunity defense must fail. *See id.* We decline, however, to decide in the first instance whether the Tribe had this authority. *See Tenneco*, 725 F.2d at 576 (remanding case back to district court to give Tribe an opportunity to prove that it had authority to enact an ordinance). Further, we reject the Tribe's contention that officer suits are inappropriate where the officers have not acted. Tribe's Br. Nos. 93-1696, 93-1699, at 3-5. The RECs seek to enjoin the members of the Tribal Utilities Commission from enforcing the Tribal Utilities Code, and therefore their suits are squarely of the type recognized and approved of by this court in *Northern States Power*. *See* 991 F.2d at 460 (approving of suit that sought to enjoin tribal officers from enforcing tribal ordinance); *see also South Dakota v. Bourland*, 949 F.2d 984, 989 (8th Cir.1991) (upholding propriety of suit seeking injunctive relief against tribal officers), *rev'd on other grounds*, 508 U.S. 679 ... (1993).

Id.

A district court in the Eighth Circuit followed this reasoning as well. In *Melby v. Grand Portage Band of Chippewa Indians*, 1998 WL 1769706 (D. Minn., Aug. 13, 1998), the court held that tribal officials could be sued in federal court for enforcing tribal law against non-Indians:

On the other hand, tribal sovereign immunity does not bar a federal cause of action for prospective injunctive relief against the Band's Land Use Administrator. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (citing *Ex Parte Young* in holding that a tribal officer does not share the tribe's immunity from a suit for declaratory and injunctive relief); *Baker Electric Cooperative, Inc. v. [Chaske]*, 28 F.3d 1466, 1471 (8th Cir.1994) ("[t]he Tribe's sovereign immunity, however, is subject to the well-established exception described in *Ex Parte Young*.").

No officer of the Tribal Court has been named as a Defendant in this matter, and yet injunctive relief is sought against not only the Land Use Administrator, but also against the Tribal Court which has sovereign immunity as an entity of the tribal government. Nonetheless, the Supreme Court in *Strate* remarked that “as to nonmembers ... a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” 117 S.Ct. at 1413. Therefore, any ruling regarding the scope of the Tribal Land Use Administrator’s authority would appear to resolve any dispute as to the tribal court’s jurisdiction, and the Court is confident that the tribal court will afford due deference to any such federal questions which this Court may ultimately resolve.

Id. at *3.

2. General Claims Alleging Lack of Tribal Authority under Federal Law

A somewhat closer question is whether tribal officials may be sued for acting beyond a scope of authority that federal law confers on the tribe. In such a scenario, tribal law might authorize actions of tribal officials, but federal law might limit the tribe’s underlying authority – that is, the source of the tribal officials’ authority – and thereby obviate tribal official immunity. Most federal circuits find that an allegation that a tribal officer acted beyond the valid authority of the tribe, as defined by federal Indian law, is sufficient to circumvent tribal official immunity.

However, there must be more than a mere allegation that tribal officials violated federal law. If the claim is actually a claim against the tribe, federal courts will analyze the case to determine whether tribal official immunity might still apply.

Moreover, there still must be a federal cause of action, although the federal common law cause of action in *National Farmers Union*, 471 U.S. 845 (1985), would cover some of these cases discussed below.

Tenth Circuit

The Tenth Circuit held that tribal official immunity fails where the tribal official is acting in accordance with a tribal law that itself violates federal law. *See Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984). The court wrote:

The situation is different, however, when the law under which the official acted is being questioned. *State of Wisconsin v. Baker*, 464 F.Supp. 1377 (W.D.Wis.). When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 ...[1949]. If the sovereign did not have the power to make a law, then the official by necessity acted outside

the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess.

Id.

Years later, the Tenth Circuit appeared to reject much of the *Tenneco Oil* reasoning, albeit in simplified form, in *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997). The plaintiffs in *Fletcher* sued several tribal officials and the United States over Osage headrights and tribal voting rights, alleging federal equal protection violations. *See id.* at 1319-20. The court noted that the real remedy ran against the tribe itself, and found that the tribal officers were therefore immune:

The Osage Tribe itself is not named as a defendant in this case. However, Individual Plaintiffs sued the Tribe's principal governing body Defendant Osage Tribal Council as well as each individual member, and Defendants Charles Tillman, Principal Chief and Geoffrey Standing Bear, Assistant Principal Chief in their official capacities. Because the relief requested by Individual Plaintiffs, concerning rights to vote in future tribal elections and hold tribal office, if granted, would run against the Tribe itself, the Tribe's sovereign immunity protects these defendants in their official capacities. *See Kenai Oil and Gas, Inc. v. Department of the Interior*, 522 F.Supp. 521, 531 (D.Utah 1981) ("Tribal immunity may not be evaded by suing tribal officers...."), *aff'd*, 671 F.2d 383 (10th Cir.1982). This principle has been applied to protect state and federal officials sued in their official capacity. *See, e.g., Hafer v. Melo*, 502 U.S. 21 ... (1991) (state); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-90 ... (1949) (federal). Because there is no reason to treat tribal immunity differently from state or federal immunity in this sense, tribal immunity protects tribal officials against claims in their official capacity. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 ... (1982) (employing same rules for waiver of tribal immunity as are employed for waiver of state and federal immunity because no principled reason required different treatment). Thus, Tribal Defendants were entitled to sovereign immunity as far as the official capacity claims, unless there is an unequivocally expressed waiver either by the Tribe or abrogation by Congress.

Id. at 1324.

Seventh Circuit

The Seventh Circuit held that tribal officials who asserted the authority to regulate all hunting and fishing on their reservation could be sued to determine whether the tribe had a treaty right to do so. *See Wisconsin v. Baker*, 698 F.2d 1323, 1333 (7th Cir. 1983), *cert. denied*, 463

U.S. 1207 (1983). The appellate court concluded that the district court was correct to determine first whether or not the tribe had such an exclusive treaty right, and then once it concluded that it did not, it found that tribal officials could be sued to stop them from enforcing a tribal ordinance purporting to exclusively regulate reservation hunting and fishing. *See id.* The tribe had argued that the tribal constitution authorized the tribal officials to pass such a resolution, effectively immunizing the officials in federal court. *See id.* The court rejected the argument, noting that:

At a superficial level, defendants' argument is appealing. A federal official is immune from suit unless a plaintiff alleges either that the United States did not delegate to the official the power to act as he did or that his exercise of that power violates the federal Constitution. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 [1949]. By analogy, defendants should be immune from suit unless the State alleges in its complaint either that the Band did not delegate to defendants the power to restrict public fishing and hunting or that the exercise of that power violates that Constitution.

But the argument has a fatal flaw: The argument assumes that common law sovereign immunity protects a sovereign's officials from suit even when they set out to do what their sovereign lacks the power to do. It does not. When a federal officer – or state officer for that matter – violates the federal Constitution, he exercises a power that his sovereign does not enjoy. That is the rationale for stripping him of his authority and immunity as a federal or state officer: *viz.*, he has exercised a power that his sovereign was powerless to convey to him. *See Ex Parte Young*, 209 U.S. 123, 160 [1908]. By analogy, an official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power that his tribe was powerless to convey to him.

Id.

Eighth Circuit

The Eighth Circuit followed the *Tenneco Oil* analysis in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir. 1993). There, the court stated:

We first address the tribe's argument that the district court erred in denying the tribe's motion to dismiss. The tribe argues that tribal sovereign immunity precludes the suit and protects the tribal officers. In dismissing the tribe's motion, the district court focused on the issue of the ordinance's likely preemption by federal statute and ruled that sovereign immunity did not protect the tribal officers because they had acted beyond the scope of the authority the tribe was capable of bestowing upon them. 781 F.Supp. at 617-18.

The protection of sovereign immunity is subject to the well established exception described in *Ex parte Young*, 209 U.S. 123, 159-60 ... (1908). *Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 ... (1991). The Tenth Circuit applied this exception in *Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir.1984).

[quoting *Tenneco Oil*]

In the November 19, 1991 resolution, the tribal officers clearly indicated their intent to enforce the ordinance. See 781 F.Supp. at 614. If the tribe did not have the power to enact this ordinance, then the tribal officers were not clothed with the tribe's sovereign immunity. Both NSP and the United States (as amicus curiae) argue that the tribe lacks the power to enact the ordinance because it is preempted by the Hazardous Materials Transportation Act, 49 U.S.C.A.App. §§ 1801-1819 (West Supp.1992). The sole question before us then is whether this particular ordinance runs afoul of the Act's preemption rules.

Id. (footnote omitted).

First Circuit

The First Circuit in *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006) (en banc), *cert. denied*, 549 U.S. 1053 (2006), held that: "Whatever the scope of a tribal officer's official capacity, it does not encompass activities that range beyond the authority that a tribe may bestow." *Id.* at 16 (citing *Tamiami III*, 177 F.3d at 1225; *Tamiami II*, 63 F.3d at 1045, 1050-51). The question arose after the infamous Narragansett Tribe smokeshop raid, when the Tribe sought a ruling that the State's raid was invalid on the grounds (in part) that the State had violated the Tribe's sovereign immunity. See *id.* at 20-21. The dissent strongly criticized the majority opinion, arguing:

As Judge Torruella indicates, the State had options for enforcing its cigarette tax laws that would have been compatible with the Tribe's sovereign immunity. For example, the State could have sought an injunction, pursuant to *Ex parte Young*, 209 U.S. 123 ... (1908), against the tribe's Chief Sachem and any other relevant official, for violating the federal law giving Rhode Island the ability to tax cigarette sales on the settlement lands.

In *Oklahoma Tax Comm'n*, a case involving cigarette tax enforcement, the Supreme Court explicitly left open the *Ex parte Young* door. 498 U.S. at 514 In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 ... (1978), the Court allowed a suit to enjoin enforcement of a purportedly illegal tribal ordinance to proceed

against a tribal official, even though tribal sovereign immunity barred the same suit against the tribe itself. *See id.* at 59, 98 S.Ct. 1670. *See also Puyallup Tribe*, 433 U.S. at 173 The extension of the *Ex parte Young* doctrine to tribal officials is well established in the courts of appeals as well. The Ninth Circuit has endorsed the idea categorically. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159-60 (9th Cir.2002) (recognizing that “suits against [tribal] officials allegedly acting in contravention of federal law” are “permitted”). The Eighth Circuit has recognized that state *Ex parte Young* suits against tribal officials are available with “mutuality” to the same extent as tribal *Ex parte Young* suits against state officials. *See Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 256-57 (8th Cir.1995). The Eleventh Circuit has held similarly. *See Tamiami Partners v. Miccosukee Tribe of Florida*, 63 F.3d 1030, 1050-51 (11th Cir.1995).

Here, nothing barred the State from taking the *Ex parte Young* route. The search warrant was issued on the first day the tribal smoke shop opened. The search happened two days later. The officer who swore out the search warrant admitted that he had known for weeks about the Tribe’s plans to sell tax-free cigarettes. An action for injunctive relief could have addressed the State’s concerns (this was not a case where the State was seeking to recoup a large sum in uncollected taxes). Further, an *Ex parte Young* action would have placed this matter in federal court at the outset, where it could have been decided in peaceful fashion, according to the federal law principles that govern Indian law. Instead, the State encroached upon the Tribe’s sovereign immunity with its unwise and unlawful resort to criminal process and seizure of tribal property.

Id. at 38-39 (Lipez, C.J., dissenting); *see also id.* at 45 (Torruella, C.J., dissenting) (“Rhode Island instead chose the confrontational alternative of a Rambo-like raid, totally invasive of those core tribal interests.”).

Fifth Circuit

Somewhat similarly, the Fifth Circuit held that tribal officials were subject to suit in federal court for injunctive relief in an action arising out of a contract with an Indian tribe that might be subject to 25 U.S.C. § 81 Secretarial approval requirements. *See TTEA v. Tsleta del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999). The Fifth Circuit’s superficial finding – that any suit for prospective, non monetary relief, can be circumvent tribal official immunity – is suspect:

Kiowa, however, was an action for damages, not a suit for declaratory or injunctive relief. This difference matters. In *Puyallup Tribe v. Department of Game of the State of Washington*, 433 U.S. 165, 171 ... (1977), the Court reaffirmed that “whether or not the Tribe itself may be sued in a state court

without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible.” Though the defendants in *Puyallup* were not tribal officials, the Court cited it the next Term in finding a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 ... (1978). Years later, Justice Stevens suggested that tribal sovereign immunity might not extend “to claims for prospective equitable relief against a tribe.” *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515 ... (1991) (Stevens, J., concurring).

The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young*, 209 U.S. 123 ... (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44 ... (1996). In any event, *Santa Clara Pueblo* controls. Thus, while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its order dismissing the actions seeking declaratory and injunctive relief.

Id. at 680-81. *See also Hollynndi’lil v. Cher-Ae Heights Indian Community of Trinidad Rancheria*, 2002 WL 33942761, at *6, n. 7 (N.D. Cal., March 11, 2002) (noting the conflict between *TTEA* and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985)). The case had arisen out of a tribal court action in which the party suing the tribe was losing, but refused to exhaust tribal court remedies. *See id.* at 679-80. In fact, the suit against tribal officials arose exclusively out of tribal law, and so the Fifth Circuit concluded that the tribal court had jurisdiction. *See id.* at 685.

In 2001, the Fifth Circuit followed the simplistic reasoning of the *TTEA* court in *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002). There, the court held that non-Indian-owned businesses could sue the tribe and its officers for a declaratory judgment that oil and gas leases on Indian lands were in effect. *See id.* at 568. The court wrote:

The tribal council members have incorrectly characterized the import and applicability of *TTEA* to the case at bar. It is binding authority on this dispute. Therefore, the sundry cases that the tribal council members cite from other circuits to buttress their immunity claim, based on their allegedly having been acting within the scope of their authority, are unpersuasive and irrelevant. The district court correctly concluded that the tribal council members were not entitled

to tribal sovereign immunity because, in the Fifth Circuit, tribal officials are not immune from suits for declaratory and injunctive relief. *TTEA*, 181 F.3d at 680-81 (reasoning that the “distinct but similar concept” of tribal sovereign immunity should not extend “further than the now-constitutionalized doctrine of sovereign immunity,” which encompasses the proposition that: “State sovereign immunity does not preclude declaratory or injunctive relief against state officials”). Thus, the district court did not err in concluding that the tribal council members are not entitled to sovereign immunity against the oil companies’ declaratory judgment action.

Id. at 570.

Second Circuit

In *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2nd Cir. 2001), the Second Circuit suggested that tribal officers are immune in federal court from wrongful termination of employment claims, but that plaintiffs might be able to bring actions for prospective relief, if they can. *See id.* at 87-88. The court wrote:

Although the AHA itself cannot be made to pay damages and cannot even be named as a defendant, Garcia can still obtain injunctive relief against it by suing an agency officer in his official capacity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 59 ... (citing the doctrine of *Ex parte Young*, 209 U.S. 123 ... (1908)); *Puyallup Tribe v. Dep’t of Game*, 433 U.S. 165, 171-72 ... (1977); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d at 358-59 (2d Cir.2000); *cf. Board of Trustees v. Garrett*, 531 U.S. 356 ... (2001) (even though state sovereign immunity precludes damages suits against states under Title I of the Americans with Disabilities Act, the doctrine of *Ex parte Young* permits private plaintiffs to sue a state “for injunctive relief”).

There are (at least) two important qualifications. First, any law under which Garcia seeks injunctive relief must apply substantively to the agency. For example, she would not be permitted to pursue injunctive relief if she had sued the AHA under Title VII of the Civil Rights Act, because that law specifically exempts “an Indian tribe” from its prohibitions. 42 U.S.C. § 2000e(b). Second, Garcia must have a private cause of action to enforce the substantive rule. The Indian Civil Rights Act, for instance, imposes numerous substantive obligations on tribal governments but does not explicitly provide a private cause of action in federal court except via the writ of habeas corpus. *See Poodry v. Tonawanda Band*, 85 F.3d 874 (2d Cir.1996). Garcia should be granted leave to amend her complaint to clarify her claims for injunctive relief against the agency in conformance with these principles, if she can.

Id. The Second Circuit’s confusing opinion and remand settled very little, and suggested that somehow an individual plaintiff can sue for wrongful termination, seeking prospective relief. But the *Ex parte Young* Doctrine requires *ongoing* violations of federal law. *See, e.g., Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393-94 (E.D. Wis. 1995) (dismissing a wrongful termination claim against tribal officials).

District courts in the Second Circuit have more accurately applied tribal official immunity. For example, in *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185 (E.D. N.Y. 2007), the court held that tribal officials are not immune from suit for violations of federal law “so long as plaintiff can maintain a cause of action under the applicable statute.” *Id.* at 298. The court wrote:

Finally, even if the Shinnecock Indian Nation had tribal immunity when sued by the State, its tribal officials could be sued in their official capacities for prospective equitable relief. Specifically, the Second Circuit and other courts have held that a suit for injunctive relief can be pursued against a tribal official in his official capacity so long as plaintiff can maintain a cause of action under the applicable statute. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87-88 (2d Cir.2001); *see also Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 310 (N.D.N.Y.2003) (“*Ex parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities ... but only to enjoin conduct that violates federal law.”); *Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc.*, 221 F.Supp.2d 271, 278-79 (D.Conn.2002) (“[U]nder the doctrine of *Ex parte Young*, prospective injunctive or declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact.”). In the instant case, although the State commenced the action alleging violations of New York anti-gaming and environmental law, Judge Platt held in his denial of the State’s remand motion that the lawsuit raised federal claims related to IGRA, possessory interests of an Indian tribe with respect to Indian land, and the tribal status of the Shinnecock. (Memorandum and Order, at 3-5.). Thus, given the federal questions found by Judge Platt, the State may sue tribal officials for prospective injunctive relief pursuant to *Ex parte Young* and such defendants do not have a defense of sovereign immunity.

Id. at 298-99 (footnote omitted).

Ninth Circuit

In the Ninth Circuit, there has been a clash of confused opinion on this question, with the Circuit eventually reaching a conclusion that the *Ex parte Young* Doctrine applies to circumvent

tribal official immunity in several cases. However, the Ninth Circuit does recognize instances where tribal official immunity remains viable – that is, where the allegedly federal claim is actually a claim against the tribe.

The Ninth Circuit does apply tribal official immunity where a plaintiff may be alleging violations of federal law, but the relief runs against the tribe. In *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), the Ninth Circuit held that tribal officials were immune from suit, but only after concluding that the tribal official action (excluding a non-Indian from the reservation), was permissible under federal law. *See id.* at 479-80. The court wrote:

Sovereign immunity shields the Tribe from any suit arising out of the proceeding. *See Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d at 574. This tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority. *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir.1981). Because all the individual defendants here were acting within the scope of their delegated authority, Hardin’s suit against them is also barred by the Tribe’s sovereign immunity.

Id.

One early post-*Martinez* decision, *Swift Transp., Inc. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated*, 574 F. Supp. 710 (D. Ariz. 1983), suggested that tribal official immunity is “co-extensive” with tribal sovereignty. *Id.* at 1188. The court wrote:

The tribe’s immunity also extends to tribal officials acting in their official capacity and within their scope of authority. *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981). Yet the tribe’s sovereign immunity is not absolute. *Id.* at 1013. Given that the sovereign immunity is like all other aspects of tribal sovereignty, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 ... (1978) (Santa Clara), this Court concludes that tribal sovereign immunity is coextensive with tribal sovereignty. *Babbitt Ford*, *supra*, 519 F.Supp. at 425. This Court perceives no principled basis why sovereign immunity should bar an action if the conduct complained of is determined to be beyond the scope of the tribe’s sovereign powers. This is especially true in a case, such as this, where tribal officials are named as defendants and only non-monetary relief is requested. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 ... (1949); *see also Beller v. Middendorf*, 632 F.2d 788, 797 (9th Cir. 1980).

Id. at 1188-89.

Elsewhere, the Ninth Circuit held that suits against tribal officials acting in concert with federal officials are not precluded by tribal official immunity. *See Evans v. McKay*, 869 F.2d 1341, 1348 n. 9 (9th Cir. 1989). The court wrote:

While officials and agents of an Indian tribe do not have the same immunity as the tribe itself, *Kennerly*, 721 F.2d at 1259, tribal immunity nevertheless extends to individual tribal officials while “acting in their representative capacity and within the scope of their authority.” *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir.1985). *See also United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir.1986), *cert. denied*, 481 U.S. 1069 ... (1987). Although the allegedly unconstitutional arrests and seizures of which the Evanses complain were accomplished pursuant to orders of the Tribal Court, we disagree with the district court’s conclusion that the individual tribal defendants were “at all times pertinent to this action, acting within their official capacities and under authority of tribal law.” *See Evans v. Little Bird*, 656 F.Supp. at 875. If appellants are able to prove that the individual tribal defendants acted in concert with the police defendants, whose actions we have here held to be “under color of state law,” their actions cannot be said to have been authorized by tribal law. *Cf. Ex parte Young*, 209 U.S. 123, 159-60 ... (1907) (enforcement of unconstitutional act by state official is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity).

Id.

A few years later, Judge Canby wrote that a tribe does not lose its immunity merely by acting outside of the scope of its authority under federal law, one of the very few federal circuit panels to reach this result. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271-72 (9th Cir. 1991). In *Imperial Granite*, the plaintiffs alleged that the Pala Band had “blocked” a road through the reservation, a road the plaintiffs argued they had a right to use. *See id.* at 1270. The plaintiffs alleged that the Pala Band’s actions violated federal law, the Indian Civil Rights Act, and state law. *See id.* at 1270-71. However, the plaintiffs did not sue tribal council officials (though they did sue the entire membership of the tribe):

The complaint alleges no individual actions by any of the tribal officials named as defendants. As far as we are informed in argument, the only action taken by those officials was to vote as members of the Band’s governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial’s alleged injury.

Id. at 1271. Helpfully, Judge Canby construed the plaintiffs claim liberally so as to allow analysis on whether a suit against tribal officials could conceivably proceed:

Even if the complaint is liberally construed to allege that the tribal officials themselves “blocked” the road, Imperial’s claim that they exceeded their authority fails. There is no allegation that closing the road to Imperial exceeded the officials’ authority granted by the Band; quite the contrary, the Band clearly authorized the closure. Imperial does allege that the blocking of the road constitutes a “taking” of its property in violation of the due process and equal protection clauses of the Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302(5) and (8). These claims are fraught with substantive and jurisdictional problems of their own, but we need not reach them. Imperial’s complaint fails to allege facts giving it any property right in the road at all. It follows that the defendant tribal officials acted within the proper scope of their authority in exercising jurisdiction over the road.

Id. at 1271-72. The *Imperial Granite* decision strongly suggests that a plaintiff alleging a violation of tribal law could not proceed – Judge Canby’s analysis focuses exclusively on whether the tribal officials were acting outside of the scope of tribal law. *See id.* at 1271 (“There is no allegation that closing the road to Imperial exceeded the officials’ authority granted by the Band; quite the contrary, the Band clearly authorized the closure.”). Moreover, Judge Canby suggested that the plaintiff’s proper course of action in alleging violations of tribal law was to seek a remedy in tribal court:

The absence of any colorable claim that the tribe or its officials exceeded the scope of their proper jurisdiction is also fatal to the contention of Imperial that it may seek to enjoin the action of the tribe and its officials under federal common law. Imperial relies on *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 ... (1985). There, the Supreme Court held that a case arose under federal law, for purposes of federal question jurisdiction, when the complaint alleged that a tribal court was exceeding limits placed on the power of the tribes by the federal common law. Here, Imperial has alleged no facts stating a colorable claim that the tribe’s action in closing the road exceeded the tribe’s powers under federal law, common or otherwise.

Id. at 1271 n. 5. However, it should be noted that Judge Canby did go into significant analysis on whether the plaintiffs had claims under federal or state law, *see id.* at 1272, perhaps rendering his tribal official immunity analysis mere dicta. Moreover, the Ninth Circuit has not appeared to follow the *Imperial Granite* dicta. *See* Part II(A)(2)(a) (collecting cases assuming that tribal official immunity does not extend to cases where plaintiffs allege that the tribe has exceeded its authority over non-Indians).

Ninth Circuit's Confusion on Tribal Immunity and *Ex parte Young*

The Ninth Circuit's earlier post-*Martinez* cases developed an unfortunate confusion in relation to how the *Ex parte Young* Doctrine applies to Indian tribes, as opposed to tribal officials. The cycle of cases – and the confusion – began in *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984), where the court seemed to suggest that an *Indian tribe* may be sued for “[t]ribal conduct ... beyond the scope of sovereign powers....” *Id.* at 1321 n. 1. But a few years later, a different Ninth Circuit panel criticized the *Snow* Court for seemingly extending the *Ex parte Young* Doctrine to the tribe itself, noting:

Snow held that tribal sovereign immunity barred an action by non-Indian business owners challenging a tribal business tax. Although unnecessary to its holding, the *Snow* panel suggested a mode of analysis for tribal immunity cases that, if taken literally, would eliminate the important distinction between suits brought directly against a sovereign entity and suits against officers and employees of the sovereign. The *Snow* court correctly noted that Indian tribes are immune from suit, 709 F.2d at 1321, that Congress or the tribe may waive this immunity, *id.*, and that this immunity “extends to tribal officials acting in their representative capacity and within the scope of their authority,” *id.* But in asserting that “tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe’s sovereign powers,” *id.* (footnote omitted), the *Snow* court apparently inadvertently portrayed the *Ex parte Young/Larson* test as extending to the tribe itself. It has long been the rule that *Ex parte Young* and *Larson* are applicable only in the case of suits against officials, where the inquiry is whether an official is protected by the immunity of the sovereign. We reiterate that rule here: in the case of suits against a tribe the *Ex parte Young/Larson* test is not applicable. The tribe remains immune from suit regardless of any allegation that it acted beyond its authority or outside of its powers.

Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047, 1052 (9th Cir.), *rev’d on other grounds*, 474 U.S. 9 (1985).

Recent cases reaffirm the validity of the *Chemehuevi* rule that a *tribe* does not lose its immunity even if plaintiffs allege a violation of federal law. *See Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150, 1159-60 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002); *Thomason v. Nez Perce Tribe*, 2005 WL 2077780, at *2 (D. Idaho, Aug. 29, 2005). The *Thomason* court stated:

The Tribe maintains sovereign immunity bars this case. While recognizing this may be a case of first impression, Plaintiffs argue that the Tribe acted outside the scope of its immunity and, thus, is subject to liability. The Plaintiffs’ response

states “Allowing unrestricted hunting rights violates the treaty and the Tribe should not be able to hide behind their sovereign shield.”

The Plaintiffs’ argument appears to have been previously considered and rejected by the Ninth Circuit. *See Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 (9th Cir.1985) *rev’d on other grounds* (discussing *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir.1983); *see also Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460-61 (10th Cir.1989). In a general discussion of sovereign immunity, the Ninth Circuit stated that tribal immunity does not preclude “actions which allege conduct that is determined to be outside the scope of a tribe’s sovereign powers.” *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir.1983) *opinion receded*. In a later decision, the Ninth Circuit, quoted the same language. *Hardin v. White Mountain Apache Tribe*, 761 F.2d 1285, 1287 (9th Cir.1985) *superseded by* 779 F.2d 476 (1985). The *Snow* language, however, was later determined to be an inadvertent application of the *Ex parte Young/Larson* test, which is applicable only to suits against tribal officials, not the tribe itself. *Chemehuevi Indian Tribe*, 757 F.2d at 1052 (discussing *Snow*); *see also Nero*, 892 F.2d 1460-61. In *Chemehuevi Indian Tribe* the Ninth Circuit made the distinction between suits brought against the tribe and those against tribal officials and concluded that “The tribe remains immune from suit regardless of any allegation that it acted beyond its authority or outside of its powers.” *Id.* Subsequently, the *Hardin* opinion was superseded by a decision omitting the *Snow* quote from the sovereign immunity discussion. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478-79 (9th Cir.1985). Thus, Plaintiffs’ argument here that tribal actions beyond the scope of their immunity are subject to suit fails.

Id. The *Dawavendewa* Court stated:

Dawavendewa, undaunted, argues that tribal sovereign immunity does not exist because the suit could be sustained against tribal officials. We disagree.

To support this proposition, Dawavendewa relies heavily on *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir.1991), and *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128 (9th Cir.1996). In *Blackfeet Tribe*, we extended the doctrine of *Ex Parte Young*, 209 U.S. 123 ... (1908), to tribal officials. In particular, we held that, in cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute. *See Blackfeet Tribe*, 924 F.2d at 901.

In *Aspaas*, the Navajo Supreme Court determined that the Arizona Public Service Company’s (“APS”) anti-nepotism policy violated Navajo employment

discrimination law. APS then filed suit in federal district court seeking injunctive relief against the Navajo Nation, its executive agencies, Navajo Supreme Court Justices, and tribal officials challenging their authority to regulate APS's employment practices. The defendants argued that they enjoyed sovereign immunity from suit. We held that the Nation and its executive agencies were immune from suit, but reaffirming our decision in *Blackfeet Tribe*, we held that sovereign immunity did not bar prospective relief against the individual tribal officials acting beyond the scope of their authority in violation of federal law. *See Aspaas*, 77 F.3d at 1133-34.

Dawavendewa's argument strikes us as an attempted end run around tribal sovereign immunity. Neither *Blackfeet Tribe* nor *Aspaas* insinuated that a plaintiff may circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe. Rather, the doctrine announced in *Blackfeet Tribe* and reaffirmed in *Aspaas* permitted suits against officials allegedly acting in contravention of federal law. That doctrine is inapplicable to Dawavendewa's suit. Unlike the complaints in *Blackfeet Tribe* or *Aspaas*, Dawavendewa's complaint never mentions tribal officials. Neither does it allege that tribal officials acted in contravention of constitutional or federal statutory law, nor has it named any tribal officials as parties to this litigation. Indeed, when pressed at oral argument, Dawavendewa could not even specify which tribal officials he would join, if permitted to do so.

Dawavendewa, 276 F.3d at 1159-60 (footnotes omitted).

5. Wrongful Termination Cases

Claims against tribal officials for backpay, wages, and other damages resulting from an allegedly wrongful termination are generally covered by tribal official immunity. *E.g.*, *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2nd Cir. 2001); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393-94 (E.D. Wis. 1995) (dismissing a wrongful termination claim against tribal officials); *Chayoon v. Sherlock*, 877 A.2d 4, 15 (Conn. App. 2005), *appeal denied*, 888 A.2d 83 (Conn. 2005), *cert. denied*, 547 U.S. 1138 (2006).

The Second Circuit in *Garcia* suggested that a plaintiff could bring a wrongful termination action seeking prospective relief; perhaps reinstatement? *See Garcia*, 268 F.3d at 88 (“*Garcia* should be granted leave to amend her complaint to clarify her claims for injunctive relief against the agency in conformance with these principles, if she can.”).

In a wrongful employment termination claim brought under tribal and federal law in Connecticut courts, the Connecticut Court of Appeals held that the *Ex parte Young* doctrine is not applicable to Foxwoods Casino managers. *See Chayoon*, 877 A.2d at 15. The plaintiff's

claims arose under tribal casino policy and under the federal Family Medical Leave Act. *See id.* at 6. The court held:

[T]he complaint against the defendants in the present matter patently demonstrates that in terminating the plaintiff's employment, the defendants were acting as employees of Foxwoods within the scope of their authority. It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. *See Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, [221 F. Supp. 2d 271, 280-81 (D. Conn. 2002)]. Such an interpretation would eliminate tribal immunity from damages actions because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief.

In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted "without any colorable claim of authority".... [*Id.* at 281].

Chayoon, 877 A.2d at 9-10. The Connecticut court refused to decide whether or not the *Ex parte Young* Doctrine applies in state courts. *See id.* at 10.

4. The Cherokee Freedmen Case

The D.C. Circuit in *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008), recently parsed through the *Ex parte Young* Doctrine in relation to tribal immunity to suits alleging violations of federal law in some detail. The Cherokee Nation raised numerous claims in defense of tribal official immunity, each of which the D.C. Circuit rejected. First, the Nation argued that footnote 11 of the *Larsen* opinion, which appeared to state that sovereign immunity "may" still require dismissal of a suit against illegal governmental action of the requested relief "will require affirmative action by the sovereign...." *Vann*, 534 F.3d at 751 (quoting *Larsen*, 337 U.S. at 691 n. 11). The Nation argued that the relief requested by the Cherokee Freedmen would require the tribe to hold an election to amend its constitution. *See id.* The D.C. Circuit dismissed the argument, noting that footnote 11 was mere dicta, and never followed by the Supreme Court in later cases. *See id.* at 752-55.

Second, the Cherokee Nation argued that *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), foreclosed the Freedmen's claim. *Seminole Tribe* held that the *Ex parte Young* exception was inapplicable to the State of Florida in relation to good faith lawsuits brought to force Class III compact negotiations because the Indian Gaming Regulatory Act provided a comprehensive remedial scheme that preempted the *Ex parte Young* suit. *See Vann*, 534 F.3d at 755 (citing *Seminole Tribe*, 517 U.S. at 73-76). The Nation argued that the 1866 treaty at issue included a remedial scheme, but the D.C. Circuit concluded that it did not, and rejected the overall argument. *See id.*

Third, and perhaps most interestingly, the Cherokee Nation argued that *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), foreclosed the Freedmen's claim. In *Coeur d'Alene*, the Supreme Court noted that the *Ex parte Young* exception would be trumped in cases involving "the core sovereign interest" or a "special sovereignty interest" – in that case, title to submerged lands. See *Vann*, 534 F.3d at 755 (citing *Coeur d'Alene*, 521 U.S. at 281). The D.C. Circuit held that the Thirteenth Amendment had "whittled away the tribe's sovereignty with respect to slavery and left it powerless to discriminate against the Freedmen on the basis of their status as former slaves." *Id.* at 756. Moreover, the court noted, a state's claim to ownership of lands was far more "compelling" than the Cherokee Nation's "newfangled interest in controlling its tribal elections...." *Id.*

5. Other Cases

In *United States v. Finn*, 919 F. Supp. 1305 (D. Minn. 1995), the court held that tribal council officials defending against a federal criminal tax indictment could not assert tribal official immunity as a justification for filing false state and federal tax returns. See *id.* at 1341. The court stated:

Under the doctrine espoused in *Ex parte Young*, 209 U.S. 123 ... (1908), moreover, tribal immunity does not preclude actions against tribal officials, when they are acting outside of their authority. See, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 ... (1978) (as an officer of the tribe, the petitioner was not protected by the tribe's immunity from suit); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir.1993) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity."). Of special relevance, however, is the fact that the Supreme Court, in the *Oklahoma Tax Commission* case, relied upon the doctrine in *Ex parte Young* to conclude that, in enforcing its right to collect taxes on Reservation sales, Oklahoma was not precluded from commencing an action for damages against the tribal agents or officers.

Based upon these authorities, we conclude that the referenced tax Agreement foreclosed the Defendants' ability to invoke the protection of sovereign immunity as a defense against the enforcement of the State sales tax laws. If the acts alleged in the Indictment are proven, the Defendants clearly acted outside their capacity as tribal officers if they caused false sales tax returns to be filed, as the Indictment alleges.

Nor is our view changed by the Defendants' assertion that nothing in the Agreement reflects that the Leech Lake Band authorized the State to levy its taxes upon Band members. The Agreement specifically provides that the State sales tax "will be imposed on all sales made on the reservation * * * [,] shall be collected

and remitted by all vendors on the reservation * * * [,] and shall be subject to the same penalties, interest, and enforcement provisions [as provided in the State Sales Tax Act].” Moreover, the Agreement specifically contemplates a method of refunding “taxes collected on sales to Leech Lake Band Indians occurring on the Indian reservation.”

As a consequence, we conclude that, if the alleged acts are proven at Trial, the Defendants unlawfully deprived the State of Minnesota of certain sales tax revenues to which the State was entitled. Therefore, we recommend that the Defendants’ Motion to Dismiss Count 20, and to strike all references, in the Indictment, to the Defendants’ attempts to defraud the State of its sales tax revenues, should be denied.

Id. at 1341-42.

C. Alleging Violations of Tribal Law

The Ninth Circuit held that intra-tribal disputes alleging illegal conduct by tribal officials may not be brought in federal court, even where the plaintiffs alleged that the federal government conspired with tribal officials. *See Kennerly v. United States*, 721 F.2d 1252, 1259-60 (9th Cir. 1983). The court wrote:

The situation with respect to the individual tribal defendants is different; the officials of the Tribe do not have the same immunity as the Tribe itself. *See Santa Clara Pueblo*, 436 U.S. at 59 The district court held that these officials had immunity, however, on the ground that the dispute in this case is intra-tribal and that such controversies are, under the Supreme Court’s decision in *Santa Clara Pueblo*, beyond the jurisdiction of the federal courts. 534 F.Supp. at 277-78. The court stated that redress should be sought in tribal court under the Indian Civil Rights Act, 25 U.S.C. §§ 1301- 1303. *Id.* at 278.

Plaintiff on appeal emphasizes that the tribal officials were acting in conjunction with the federal government in this case, and that this is not purely an intra-tribal dispute. He seeks to fashion a federal remedy against the tribal officials by applying principles developed in cases brought against private individuals under 42 U.S.C. § 1983, and against federal officials under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388. ...

Here, too, we may assume without deciding that a *Bivens* action may be brought against private individuals who have acted in concert with federal agents so as to have been “acting under color of federal law.” The district court’s order

was still proper. As plaintiff acknowledges, under his theory the individual tribal officials would be entitled to claim the same qualified immunity accorded state and federal officials in section 1983 and *Bivens* actions; they are immune insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 ... (1982). The district court found that these tribal officials unquestionably were acting within the scope of their official capacities, and pursuant to the opinions of the BIA as to the validity and propriety of the assignments under federal regulations. Their actions were fully consistent with these government regulations and the deficiencies with respect to the hearing procedures were matters wholly beyond their control or direct knowledge. The district court therefore did not err in dismissing the complaint as to all tribal defendants.

Id. at 1259-60.

In a case contemporaneous to *Kennerly*, the Ninth Circuit appeared to hold that a tribal official could not be sued in federal court where the plaintiffs only alleged violations of tribal law. *See California v. Harvier*, 700 F.2d 1217, 1219 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983). In *Harvier*, the State of California sued the Quechan Tribal Council over a tribal law allowing non-Indians to hunt and fish on the reservation without a state license. *See id.* at 1217. Apparently, the State assumed that tribal officials simply were not immune from suit by a state government. *See id.* at 1218-19. The Ninth Circuit dismissed the appeal (2-1) on the grounds that the district court order was not a final order subject to appeal, *see id.*, but the majority judges also rejected the arguments made by the dissenter to “decide important and complex issues of law regarding the sovereign immunity of Indian officials for actions taken pursuant to the valid constitution, bylaws and ordinances of the Indian nation.” *Id.* The dissent would have required the district court to determine the validity of the tribal ordinance. *See id.* at 1222 (Norris, C.J., dissenting).

In *Bowen v. Doyle*, 880 F. Supp. 99 (W.D. N.Y. 1995), the Western District of New York held that the *Ex parte Young* Doctrine does not apply to claims that a tribal official violated tribal law. *See id.* at 128-29. Complainants had brought a state court action alleging violations of tribal law; namely, the removal of tribal council members. *See id.* at 105. Defendants in the state court action brought a federal court action to enjoin the state court action. *See id.* The federal court plaintiffs argued that the state court action could not succeed because of tribal official immunity. *See id.* at 128. The court rejected the application of the *Ex parte Young* Doctrine, writing:

The defendants-intervenors argue that the doctrine of tribal sovereign immunity is not implicated in the State Court action because that action is brought against Bowen in his individual capacity for acts allegedly committed by Bowen outside the scope of his tribal authority. In other words, defendants-intervenors

contend that Bowen is not immune from suit under the theory enunciated by the Supreme Court in *Ex parte Young*, 209 U.S. 123 ... (1908). The Court finds this argument without merit.

The Supreme Court's decision in *Santa Clara Pueblo* suggests that federal law is enforceable against tribal officials under the doctrine of *Ex parte Young*, 209 U.S. 123 ... (1908), but only if a cause of action exists to enforce the federal law claimed to have been violated. 436 U.S. at 59 While the holding in *Santa Clara Pueblo*, that an implied cause of action to enforce the Indian Civil Rights Act, 25 U.S.C. § 1302, does not exist, made it unnecessary to decide the issue, the lower federal courts have held the *Young* doctrine applicable in actions alleging that tribal officials violated federal law. *See, e.g., Burlington N. R.R. v. Blackfeet Tribe*, 924 F.2d 899, 902 (9th Cir.1991), *cert. denied*, 505 U.S. 1212 ... (1992); *Wisconsin v. Baker*, 698 F.2d 1323, 1332-33 (7th Cir.1983), *cert. denied*, 463 U.S. 1207 ... (1983). The Court has not located, however, any federal cases holding that the *Young* doctrine is applicable where, as here, the tribal official is alleged to have violated tribal, not federal, law.

The *Young* doctrine applies only to cases where it is alleged that the government official's action violates the "supreme authority of the United States." *Young*, 209 U.S. at 160 Indeed, the central premise of *Young* is that "[t]he State has no power to impart to [a state official] any immunity from responsibility to the supreme authority of the United States." *Id.* As the Supreme Court explained in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 ... (1984), "*Ex parte Young* was the culmination of efforts by [the United States Supreme Court] to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Id.* at 105 ... (citations omitted). "[T]he *Young* doctrine rests on the need to promote the vindication of federal rights." *Id.* (citations omitted).

The Court's rationale in *Pennhurst* compels the same result when tribal law is at issue. In this context, as in *Pennhurst*, "it is difficult to think of a greater intrusion" on tribal sovereignty than when a state court instructs Nation officials "on how to conform their conduct" to Nation law. In *Pennhurst*, such a result was held to "conflict[] directly with the principles of federalism that underlie the Eleventh Amendment." *Id.* at 106 In the tribal context, this result conflicts directly with the tribal right of self-government. In sum, there is no state or federal interest served by providing a forum other than the tribal court for the resolution of internal tribal disputes, and as a matter of federal law, the *Pennhurst*

rule bars the state and federal courts from applying the *Young* doctrine to a tribal law claim.

Id. at 128-29. Importantly, as the court noted, it could not find a case in which the *Ex parte Young* Doctrine would apply to allegations of violations of tribal law. *See id.* at 128 (“The Court has not located, however, any federal cases holding that the *Young* doctrine is applicable where, as here, the tribal official is alleged to have violated tribal, not federal, law.”). Moreover, the court also noted that the proper forum for such allegations of tribal law is tribal court:

As stated earlier, the Nation’s courts have, in effect, recognized and applied the *Young* doctrine in actions against tribal officials, but have held that such actions are within the exclusive jurisdiction of the Nation’s courts. *See Abrams v. Snyder*, Civil Action No. 0518-94 (Seneca Nation of Indians Peacemakers Court August 22, 1994).

Id. at 129 n. 37.

Like *Bowen*, the court in *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council*, 72 F. Supp. 2d 717 (E.D. Tex. 1999), held that a party may not succeed on an *Ex parte Young* theory even where the plaintiff alleges that tribal council officials did not act in accordance with tribal council procedures:

Plaintiff attempts to circumvent this by asserting claims against the tribal [council] individually. Tribal [council], like state officials, are protected by sovereign immunity. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 ... (1982) (applying state and federal sovereign immunity rules to determine whether tribe had waived its sovereign immunity); *Fletcher*, 116 F.3d at 1324 (finding individual tribal [council] members were entitled to sovereign immunity in their official capacities). Here, Plaintiff claims tribal [council] did not follow tribal procedure in declaring the contract null and void and thus the individual [council] members are subject to suit because they exceeded the scope of their official capacity. Even if it is true that defendants acted without following the proper formalities, the defendants nevertheless were acting as the decision making body of the tribe. Plaintiffs assert individual defendants, who make up the tribal council, conspired to breach the contract. First, members of a tribal council cannot conspire amongst themselves. *See Runs After*, 766 F.2d at 354. Second, even if plaintiffs asserted valid claims as to conspiracy and tortious interference with contract, these causes of action do not raise federal questions-they are Texas state law claims.

Id. at 720.

Suits against tribal officials for violating a fiduciary duty created by a tribal constitution and tribal laws are barred. *See Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D. S.D. 1995). The court wrote:

Plaintiffs allege that tribal officials violated a fiduciary duty to plaintiffs and “acted outside the scope of their official duties and in direct violation of the power entrusted to them by the corporate charter, by federal law, and by ordinary notions of fairness to the tribal members at large.” Complaint at ¶ 51-52. Plaintiffs seek damages for these violations. The Court construes the pro se complaint to allege in Count X that the individual defendants acted outside the scope of their authority in denying enrollment to certain of the plaintiffs, as otherwise qualified tribal members, so that they may receive per capita payments and in failing to comply with the Tribe’s Gaming Revenue Allocation Ordinance in deciding how net gaming revenues are spent.

Any fiduciary duty tribal officials would owe to plaintiffs would arise from the Tribal Constitution, Tribal By-Laws, Corporate Charter, or tribal ordinances, including the Gaming Revenue Allocation Ordinance. Whether any fiduciary duty exists and the source of that duty is a matter for the Tribal Court to decide. Because plaintiffs point to sources of tribal law and not federal law, this Court does not have subject matter jurisdiction to consider a claim of breach of fiduciary duty. *See Burlington Northern R.R. Co.*, 924 F.2d at 901. Plaintiffs must bring such a claim in Tribal Court.

Id.

Similarly, suits brought against tribal officials alleging wrongful termination in violation of tribal law are subject to tribal official immunity. *See Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393-94 (E.D. Wis. 1995). The court wrote:

As noted by the defendants, the Tribe is a sovereign Indian tribe recognized by the United States government under 25 U.S.C. § 903a *et seq.* (Miller Aff. ¶ 6); therefore, its governing body, the Legislature, possesses “the common law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara*, 436 U.S. at 58, 98 S.Ct. at 1677. The Commission and Casino, in turn, were issued a corporation charter by the Legislature through a tribal ordinance and pursuant to the Tribal Constitution (*Id.* at ¶ 3); because “an action against a tribal enterprise is, in essence, an action against the tribe itself,” *see Local IV-302 Int’l Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D.Wis.1984) (Warren, J.), the Commission and Casino are likewise immune from suit unless Congress or the Legislature has waived its sovereignty for purposes of this type of action. *Id.*; *accord Altheimer & Gray*, 983 F.2d at 812

(noting that a provision of the Sioux Tribe’s tribal charter creating a subsidiary tribal manufacturing subdivision explicitly stated that sovereign immunity “is hereby expressly waived with respect to any written contract entered into by the Corporation”).

Id. at 393-94.

In dicta, a district court located in the Ninth Circuit asserted that the *Martinez* decision foreclosed suits against tribal officials based on diversity jurisdiction, as opposed to subject matter jurisdiction. *See Johnson v. Chilkat Indian Village*, 457 F. Supp. 384, 387 n. 4 (D. Alaska 1978). The court noted:

The *Santa Clara* decision also held that the only procedural device available to enforce the Indian Civil Rights Act in federal court is habeas corpus, 98 S. Ct. at 1677, and that the Act does not create a cause of action for violations of civil rights against tribal officials analogous to those made possible by *Ex parte Young*, 209 U.S. 123 ... (1908). The *Santa Clara* decision forecloses the plaintiff from using the Indian Civil Rights Act against either the Village or individual defendants acting as officials in a diversity case such as this one.

Id. As such, if *Martinez* did not extend true *Ex parte Young* analysis to tribal officials the same as federal officials, then one could argue the only means by which a plaintiff could sue a tribal official in federal court is for a violation of federal, not tribal, law.

A district court in the Ninth Circuit specifically held that tribal officials alleged to have violated tribal law may not be sued in federal courts, even if the underlying question might involve a violation of federal law. *See Village of Hotvela Traditional Elders v. Indian Health Services*, 1 F. Supp. 2d 1022, 1028-29 (D. Ariz. 1997), *aff’d without opinion*, 141 F.3d 1182 (9th Cir., March 13, 1998), *cert. denied*, *Evehema v. Indian Health Service*, 525 U.S. 1107 (1999). The court wrote:

The Tribal Defendants argue that the Hopi Tribal Council, as the recognized governing body of the Tribe according to the Indian Reorganization Act of 1934, acted at all times within the scope of its authority. The Court agrees.

Plaintiffs concede that the Tribal Council is the appropriate governing body of the Hopi Tribe, but maintain that the Council and its Chairman acted beyond their power. The Council has power to speak for the welfare of the Tribe and its members, Hopi Const. art. VI, § 1(a), along with accepting any grants from the United States Government. *Id.* at art. VI, § 1(e). Also, the Council has a right and duty to protect the traditions of the Hopi culture. *Id.* at art. VI, § 1(k). The Tribal Council Chairman may exercise any authority delegated by the Council. Hopi By-laws, art. I, § 1.

After carefully examining the Complaint and the attached exhibits, none of the Council's or Chairman's actions can be construed to be beyond the authority delineated within the Hopi Constitution and By-laws. By democratic vote, the Council and its Chairman negotiated with and accepted funds from the federal government in order to procure modern sanitation facilities for Hotevilla. The MOA and subsequent agreements embody these negotiations and bargained-for terms.

The Tribal Defendants' actions, rendered on behalf of all Hopi members and, more specifically, the Village of Hotevilla, seem to be well within the power set forth in the Hopi Constitution. Any further analysis would require interpretation of Hopi law, and this court declines to do so. *See Runs After v. United States*, 766 F.2d 347, 351 (8th Cir.1985) (interpretation of a tribal constitution and law is not within jurisdiction of a district court). Therefore, the Court finds that the Tribal Council and its Chairman remain protected by the shield of sovereign immunity to suit.

Id.

D. Alleging that Tribal Law Itself Violates Federal Law

1. ICRA Claims

The classic cases in this vein are cases in which the plaintiffs alleged violations of the Indian Civil Rights Act, as did the plaintiffs in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), where there is no federal cause of action save habeas. Take, for example, *Anderson v. Las Vegas Tribe of Paiute Indians*, 103 F.3d 137, 1996 WL 713235 (9th Cir., Dec. 6, 1997), in which the Ninth Circuit held in an unpublished opinion that claims that a tribe violated ICRA when it denied the plaintiffs' membership petitions were barred by tribal official immunity. *See id.* at *2. The court wrote:

Tribal officials acting in their official capacities and within the scope of their authority share the Tribe's sovereign immunity. *Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir.1991). Although the Andersons purported to sue the various defendants in their individual and official capacities, the complaint alleged that the defendants acted at all relevant times within the scope of their official duties. Sovereign immunity therefore bars suit against the defendant officials as well as the Tribe itself and the district court properly held that it lacked jurisdiction over the officials.

Sovereign immunity does not shield from suit government officials who commit unconstitutional acts. *See, e.g., Ex Parte Young*, 209 U.S. 123, 158 (1908); *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244, 1251 (9th Cir.1994)

(“any action on the part of state officials that violates federal law cannot be attributed to the state.”). However, tribal officials are not bound by those provisions of the U.S. Constitution that limit federal or state authority. *Santa Clara Pueblo*, 436 U.S. at 56. Thus, even if the officials acted outside their authority and discriminated against the Andersons, the Andersons’ due process and equal protection claims can arise only under the ICRA.

Id.

Another example is *Gallegos v. Jicarrilla Apache Nation*, 97 Fed. Appx. 806, 2003 WL 22854632 (10th Cir., Nov. 28, 2003), in which the Tenth Circuit, in an unpublished opinion, relied upon the rule that ICRA does not confer a federal court cause of action against tribal officials. *See id.* at *2. The court wrote:

Congress has waived tribal immunity under the ICRA solely for habeas corpus relief. *Santa Clara Pueblo*, 436 U.S. at 60-61; *Ordinance 59 Ass’n v. United States Dept. of Interior Sec’y*, 163 F.3d 1150, 1154 (10th Cir.1998). Federal courts, therefore, lack subject matter jurisdiction to hear claims under the ICRA against Indian tribes for declaratory relief, *Ordinance 59 Ass’n*, 163 F.3d at 1153, or monetary damages, *Olguin v. Lucero*, 87 F.3d 401, 404 (10th Cir.1996). Further, in addition to the tribes themselves, this immunity from suit under the ICRA protects tribal officers acting in their official capacity. *Santa Clara Pueblo*, 436 U.S. at 71-72; *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir.1997) (“Tribal Defendants [are] entitled to sovereign immunity as far as the official capacity claims”).

Id. The court also noted that tribal official immunity precludes suit under more general federal civil rights statutes. *See id.* at *3. The court noted:

We also affirm the dismissal of the 42 U.S.C. §§ 1985-1986 claims contained in Count I. The district court dismissed these claims against the Nation on immunity grounds. We concur with this result for substantially the same reasons presented above. *See* 42 U.S.C. §§ 1985-1986 (containing no express Congressional waiver of tribal immunity). Similarly, the Individual Defendants acting in their official capacities are immune from suit under §§ 1985-1986. *See Fletcher*, 116 F.3d at 1324.

Id. Accord E.F.W. v. St. Stephen’s Mission Indian School, 51 F. Supp. 2d 1217, 1228 (D. Wyo. 1999) (“Plaintiffs also contend that defendants Kennah and Lone Bear are named in their individual capacities. The Tribal defendants contend that the Complaint seeks to recover against defendants Kennah and Lone Bear only in their official capacities and that even if the Complaint is construed as naming them in their individual capacities, they acted under color of Tribal law

and not “state law” as provided in 42 U.S.C. § 1983.”); *Brown on Behalf of Brown v. Rice*, 760 F. Supp. 1459, 1464 (D. Kan. 1991) (similar case).

In one of the many Cherokee Freedmen cases, the Tenth Circuit held that federal courts had no subject matter jurisdiction over an ICRA claim. *See Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1497, 1461-62 (10th Cir. 1989). The court stated:

As with plaintiffs’ ICRA claims against the Tribe, we need look no farther than the Supreme Court’s opinion in *Santa Clara Pueblo* and our decision in *Swimmer* to conclude that plaintiffs have failed to state a claim against the Cherokee tribal officials under the ICRA. The Supreme Court in *Santa Clara Pueblo*, expressly invoking concerns about preserving tribal autonomy and self-government, reasoned that the statutory scheme and the legislative history of Title I of the ICRA indicate Congress deliberately decided not to provide federal remedies other than habeas corpus in order to limit the Act’s intrusion into tribal sovereignty. *Santa Clara Pueblo*, 436 U.S. at 59-72 For this reason, the Court held that other causes of action against tribal officials could not be implied from the ICRA. *Id.* at 69 In *Swimmer*, we rejected plaintiffs’ efforts to secure federal relief against tribal officials for an alleged violation of the ICRA. The holdings in *Santa Clara Pueblo* and *Swimmer* preclude plaintiffs’ claims against the Cherokee tribal officials.

Id. (footnote omitted).

In *Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334 (W.D. Mich. 1994), the court noted in dicta:

Sections 1301 through 1341 of Title 25, which constitute the Indian Civil Rights Act, provide neither a basis for federal jurisdiction nor an implied cause of action against an Indian tribe or its officials. Indian tribes “exercise inherent sovereign authority over their members and territories,” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 ... (1991), and generally possess a common law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 ... (1978). Tribal immunity extends to individual tribal officials acting in their representative capacity within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir.1985). Federal district courts do not have jurisdiction to review the actions of tribal councils under any statute, including the Indian Civil Rights Act. Congress did not provide a private right of action in the Indian Civil Rights Act, but provided only the remedy of habeas corpus, which is not applicable here. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 70, 98 S.Ct. at 1683.

Id. at 336.

2. IGRA Claims

There are several cases in which a party alleges that a tribal official violated IGRA, but these cases tend to be dismissed because no private cause of action exists in IGRA. In this regard, the cases are closer to *Martinez*, in which the Supreme Court held that there was an allegation of a violation of federal law, but no federal cause of action. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). The Eleventh Circuit supported an argument in dicta that tribal officials acting in accordance with tribal law that itself violates federal law, but rejected the application of the *Ex parte Young* Doctrine on the grounds that the plaintiffs really were suing the tribe to force specific performance with contract terms. *See Tamiami Partners, Ltd. ex rel. Tamiami Development Corp. v. Miccosukee Tribe of Florida*, 177 F.3d 1212, 1225-26 (11th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000). The court wrote:

Turning to the individual defendants' claims of immunity as tribal officers, we begin with the proposition that tribal officers are protected by tribal sovereign immunity when they act in their official capacity and within the scope of their authority; however, they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority. In *Tamiami II*, 63 F.3d at 1050-51, we relied on *Ex parte Young* in affirming the district court's ruling that the Tribe's sovereign immunity did not shield the individual defendants from Tamiami's suit. Our holding pertained to the third count of Tamiami's amended complaint, which was brought under IGRA and its regulations. This count essentially alleged that the individual defendants, by abusing the licensing authority conferred by IGRA, had acted beyond the authority that the Tribe was capable of bestowing upon them. Tamiami's claims against the individual defendants in its present (second amended) complaint, however, do not mention IGRA or licensing at all. Instead, in counts one (b) and four through six, Tamiami merely offers various theories under which the individual defendants must pay it forty percent of MIB's net revenues. In our view, these claims against the individual defendants are simply a thinly-disguised attempt by Tamiami to obtain specific performance of the Tribe's obligations under the Agreement, which allocates forty percent of MIB's net revenues to Tamiami. The doctrine of *Ex parte Young* may not be used in this fashion. It is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract. *See, e.g., Ex parte Young*, 209 U.S. 123, 151 ... (1908) (citing *Ex parte Ayers*, 123 U.S. 443, 504 ... (1887); *Hagood v. Southern*, 117 U.S. 52, 67-68 ... (1886)); *MSA Realty Corp. v. Illinois*, 990 F.2d 288, 294-95 (7th Cir. 1993). We hold, therefore, that the district court erred in rejecting the individual defendants' claims of sovereign immunity under the doctrine of *Ex parte Young*.

It should be noted that the court cited its own decision in *Tamiami II* for this proposition – “This court essentially alleged that the individual defendants, by abusing the licensing authority conferred by IGRA, had acted beyond the authority that the Tribe was capable of bestowing upon them.” *Id.* at 1225. But that decision specifically left open the question of whether a tribal official acting in accordance with tribal law that may be in violation of federal law is automatically subject to suit in federal court under the *Ex parte Young* Doctrine. See *Tamiami Partners, Ltd. By and Through Tamiami Development Corp. v. Miccosukee Tribe of Florida*, 63 F.3d 1030, 1050-51 & n. 72 (11th Cir. 1995) (“We note that the district court must answer a similar question with respect to Tamiami’s claims against the tribal officers: If, as Tamiami argues, the tribal officers have violated the authority the Tribe is capable of granting them, can a cause of action against those officers be found, either implicitly or explicitly, in IGRA?”). In fact, that court seemed to suggest that the answer might be no unless a cause of action could be found in a federal statute.

In an unpublished opinion, the District of Nevada held exactly that – that since there is no private cause of action in IGRA, there is no *Ex parte Young* Doctrine exception to tribal official immunity. See *Crosby Lodge, Inc. v. National Indian Gaming Association*, 2007 WL 2318581, at *4 (D. Nev., Aug. 10, 2007). The court wrote:

Crosby attempts to employ the doctrine set forth in *Ex Parte Young*, 209 U.S. 123 (1908), to suggest that, in the very least, Tribal officials are not immune from suit because they have in some way acted in excess of the authority given them by the Tribe or the IGRA. However, the record does not indicate that Tribal agencies and officials were doing anything other than acting on behalf of the Tribe in attempting to enforce a purportedly valid regulation that the Tribe believed entitled it to a certain percentage of Crosby’s gaming-related profits. Regardless, even if Tribal officials did exceed their authority, Crosby may not bring a private cause of action against Tribal Defendants for alleged non-compliance with IGRA. *Hein*, 201 F.3d at 1258-60. IGRA contemplates a multitude of specific causes of action that may be brought by specific entities or persons. None of these provisions are applicable in this case. Accordingly, all claims against the Tribal Defendants shall be dismissed, and the Tribal Defendants shall be dismissed from this suit.

Id.

In *Dauids v. Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994), the court concluded that a party may not sue tribal officials under IGRA. See *id.* at 1410-11. The court wrote:

Assuming the truth of the allegations in the plaintiffs’ complaint, as I must in determining a motion to dismiss, see, e.g., *Kernats v. O’Sullivan*, 35 F.3d 1171, 1175 (7th Cir.1994), if the defendants’ actions are in violation of the IGRA, then

the defendants have acted outside the scope of their authority, because tribes are not authorized to conduct Class II and III gaming in violation of the IGRA's provisions. *See* 25 U.S.C. § 2713 (providing authority for NIGC to levy civil fines against or order temporary closure of Indian gaming for violations of the IGRA's provisions). Once again, unfortunately, my analysis does not end there. Even assuming that the defendants acted in violation of the IGRA and therefore outside the scope of their authority, plaintiffs cannot sue the defendants for violations of the IGRA unless such a cause of action is implicit in the IGRA. *See Santa Clara Pueblo*, 436 U.S. at 59 ... (“As an officer of the Pueblo, petitioner ... is not protected by the tribe's immunity from suit.... We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the [Indian Civil Rights Act], is nonetheless implicit in its terms.”).

Id. at 1410. The court went into detailed analysis on whether an implied private right of action exists in IGRA, and concluded it did not, rejecting the holdings of two other district courts:

Both *Ross* and *Maxam* seem to assume that without a federal cause of action against the tribes, the regulations imposed by the IGRA would be “a nullity.” *Maxam*, 829 F.Supp. at 281; *Ross*, 809 F.Supp. at 745. The IGRA, however, is not without enforcement provisions. It creates the National Indian Gaming Commission (NIGC), which has the power to approve (and therefore disapprove) tribal gaming ordinances and management contracts, issue temporary or permanent orders to close gaming, and to levy and collect civil fines. 25 U.S.C. §§ 2705, 2713. The NIGC also has authority to monitor and inspect Class II gaming. *Id.* § 2706(b). The NIGC's decisions are final agency decisions for purposes of appeal in federal district court. *Id.* § 2714. Additionally, the IGRA provides for federal jurisdiction over three types of actions: (1) any cause of action initiated by a tribe for failure of a state to enter into or conduct in good faith Tribal-State compact negotiations; (2) any cause of action initiated by a state or tribe to enjoin Class III gaming conducted in violation of the Tribal-State compact; and (3) any cause of action initiated by the Secretary of the Interior to enforce Tribal-State compact mediation. *Id.* § 2710(d)(7)(A)(ii). And, of course, presumably the Community has its own enforcement procedures in place to ensure compliance with its ordinances. Thus, I find it difficult to conclude that a federal cause of action, initiated by individual tribal members against other tribal members, is necessary to enforce the IGRA's provisions.

Given all of these considerations, I find it “highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement” of the IGRA's provisions, other than those actions specifically provided for in the IGRA. *Santa*

Clara Pueblo, 436 U.S. at 69, 98 S.Ct. at 1682. Congress certainly has the power to authorize civil actions by private parties against tribal officers under the IGRA, but it has chosen not to do so. I will not take it upon myself, without a clearer direction from Congress, to permit the intrusion on tribal sovereignty that adjudication of this action would represent.

Id. at 1412 (footnote omitted).

In an interesting case where individual Indians alleged that an Indian tribe was engaged in gaming in violation of IGRA, the court still held that tribal officials were entitled to official immunity. *See Smith v. Babbitt*, 875 F. Supp. 1353, 1364 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997). The court wrote:

In Count Seven of their Amended Complaint, Plaintiffs allege that Defendants Crooks, Anderson and McNeal are individually liable for damages caused by their purportedly illegal conduct. Tribal sovereign immunity extends to individual tribal officers acting in their representative capacity and within the scope of their authority. *Stock West Corp. v. Taylor*, 942 F.2d 655, 664 (9th Cir.1991); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir.1985); *accord Cameron v. Bay Mills Indian Community*, 843 F.Supp. 334, 336 (W.D.Mich.1994.) Sovereign immunity does not, however, bar actions for prospective relief against individual tribal officials who have allegedly acted outside the scope of their permissible authority. *Burlington Northern R.R. v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 924 F.2d 899, 901 (9th Cir.1991), *cert. denied*, 505 U.S. 1212 ... (1992); *Davids v. Coyhis*, 869 F.Supp. 1401 (E.D.Wis.1994.) A sovereign official's immunity is removed in this case because the official exercised a power that his or her sovereign was powerless to convey. *State of Wisconsin v. Baker*, 698 F.2d 1323, 1332-33 (7th Cir.1983), *cert. denied*, 463 U.S. 1207 ... (1983) (holding that "an official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power his tribe was powerless to convey to him"). Thus the individual Community Defendants are not immune from suit to the extent they violated federal law. *Burlington Northern R.R.*, 924 F.2d at 901.

Plaintiffs' claims predicated on the individual Defendants' alleged violations of IGRA present a more difficult question. As the *Davids* court recognized, tribes do not have authority to conduct gaming in violation of IGRA, and as a result, individual tribal officials are not immune from suit for IGRA violations. *Davids*, 869 F.Supp. at 1410-11. On the other hand, the mere allegation that tribal officials violated IGRA does not by itself strip them of

sovereign immunity. *See Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir.1991) (dismissing plaintiff's claims against individual tribal officials on the grounds of sovereign immunity when complaint failed to allege facts demonstrating officials' scope of authority was exceeded).

To determine whether the individual Community Defendants are stripped of their immunity for violating IGRA in this case, a more careful review of the allegations in the Complaint is necessary. In Count Seven of their Complaint, Plaintiffs allege that the individual Community Defendants are individually liable because they:

- (1) unlawfully have permitted non-members to vote at and participate in General Council meetings, and to receive benefits and exercise rights reserved only to constitutionally qualified members;
- (2) knowingly and willfully have distributed tribal gaming revenues to non-members; and
- (3) knowingly and willfully have prevented qualified voters from exercising rights and receiving benefits, including per capita payments, to which they are entitled, in violation of IGRA, the Community Gaming Ordinance, the Community Constitution and the ICRA.

(Amend.Compl. ¶ 150.) These actions do not constitute a violation of federal law. IGRA requires that tribes engaging in gaming have a distribution plan approved by the Secretary of the Interior as adequate, and the Community has complied with that requirement.

Instead, Plaintiffs' claims are predicated on their belief that the Community has improperly conferred the benefits of membership upon individuals who do not meet the Community's constitutional membership requirements. The Court cannot assess the validity of these claims without determining who the members of the tribe are. However, whether an individual is a "member" of the Community is a legal conclusion, the resolution of which belongs exclusively with the Community, and a federal court does not have jurisdiction to second-guess that determination. As discussed in greater detail above, IGRA does not abrogate that sovereign power. Thus this Court does not have jurisdiction to adjudicate claims against the individual Defendants acting pursuant to Community and Business Council's membership determinations.

Id. at 1363-64.

E. Alleging Violations of State Law

The Supreme Court suggested in *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171-72 (1973), that tribal officials may be sued for violations of state law. *See id.* (“[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible.”). In what court, the Supreme Court did not suggest. And, this dicta has not been picked up by many courts.

The court in *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295 (N.D. N.Y. 2003), held that a plaintiff’s allegations that tribal officials violated state privacy laws were insufficient to circumvent tribal official immunity. *See id.* at 310-11. The court wrote:

Finally, with respect to Plaintiffs’ claims for injunctive relief against the individual Defendants in their official capacities, such claims cannot be maintained insofar as they relate to their duties as officials of the Oneida Nation and the Casino. Although *Ex Parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities, it only allows an official acting in his official capacity to be sued in a federal forum to enjoin conduct that violates federal law. *See CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir.2002) (quoting *Ex Parte Young*, 209 U.S. at 154 ...). “However, a federal court’s grant of injunctive relief against a state official may *not* be based on violations of state law.” *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 595 (2d Cir.1990) (citing *Pennhurst*, 465 U.S. at 106 ...) (emphasis added). In the present case, the amended complaint only asserts violations of state law and, thus, the *Ex Parte Young* exception is inapplicable. Accordingly, the Court dismisses Plaintiffs’ claims for injunctive relief against the individual Defendants for acts taken in their official capacities as agents of the Oneida Nation and the Casino.

Id. (footnote omitted).

However, one federal district court asserted that tribal officials, especially those of non-federally recognized tribes, could be sued for equitable relief for violations of state law. *See New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 299 n. 75 (E.D. N.Y. 2007). The court wrote (again, in dicta):

Moreover, with respect to tribal officials, the Supreme Court has also held that a suit for equitable relief against tribal officials for violation of state law may be brought in state court. *See Puyallup Tribe, Inc. v. Dep’t of Game of Wash.*, 433 U.S. 165, 171-72 ... (“[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible.”). In addition, in *Garcia*, the Second Circuit cited *Puyallup Tribe* in concluding that lawsuits for injunctive

relief may be brought against tribal officials. 268 F.3d at 87. Therefore, pursuant to *Puyallup Tribe*, the lawsuits in the instant case could have proceeded in state court against tribal officials and a defense of sovereign immunity would have been unavailable. There is no basis for concluding that the removal of these claims against individual tribal members to federal court should alter this analysis.

Id.

F. Suing Tribal Officials to Get at the Tribe's Coffers or Compel Tribal Government Action

Efforts to compel action by a tribal government are not covered by the *Ex parte Young* Doctrine. A pre-*Tenneco Oil* decision from the District of Utah followed the *Ex parte Young* Doctrine by holding that tribal officials could not be sued to force the officials to execute a mineral communitization agreement. *See Kenai Oil & Gas, Inc. v. Dept. of Interior*, 522 F. Supp. 521, 531 (D. Utah. 1981), *aff'd on other grounds*, 671 F.2d 383 (10th Cir. 1982). The court wrote:

The court is of the opinion that the claims against the members of the Business Committee are essentially against the tribe itself and are thus barred from this court's jurisdiction by the tribe's sovereign immunity. This is not a case appropriate for the application of the *Ex parte Young* doctrine. *Puyallup* is similarly inapplicable. The issue there dealt with the amenability to suit of individual tribal members. The issue in the present case is whether the court has jurisdiction to grant an injunction ordering the members of the Business Committee to sign the communitization agreements something the court would be powerless to order the tribe to do because of the immunity doctrine. Tribal immunity may not be evaded by suing tribal officers, as plaintiffs have done in this suit. *Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 48, 50 (W.D. N.Y. 1972); *Barnes v. United States*, 205 F. Supp. 97, 100-01 (D. Mont. 1962).¹

In *Bowen v. Doyle*, 880 F. Supp. 99 (W.D. N.Y. 1995), the Western District of New York held that some suits against tribal officials are really suits to compel a tribal government to act. *See id.* at 129. The court wrote:

Even if it is assumed, *arguendo*, that the *Young* doctrine is applicable where a tribal official is alleged to have violated only tribal law, the doctrine of sovereign immunity would still bar the State Court action in this instance. The *Young* doctrine does not apply to an action that is in reality against the sovereign.

¹ The court reached this question because it could not determine the proper defendants: a tribal corporation, the tribe, or the tribal officials. *See Kenai Oil*, 522 F. Supp. at 527-28.

Pennhurst, 465 U.S. at 101-02 “[A] suit is against the sovereign if the judgment would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.” *Id.* at 101 n. 11, 104 S.Ct. at 909 (citations omitted).

Applying this standard, the Court finds that the State Court action is effectively against the Nation. The Orders issued by the State Court operate directly against the government of the Nation, interfere with the public administration of the Nation, restrain and compel action by the Nation’s government, and require the expenditure of the Nation’s treasury. Specifically, the Orders purport to: (a) decide who is a member of the Nation’s Council; (b) direct when the Council, as constituted by the State Court, is to meet and how the Council is to conduct its business; (c) void actions taken by the Council and the President; (d) order the Nation’s police officers to enforce the State Court’s Orders against the President; and (e) require the payment of salaries and continued employment of Nation employees. Thus, because the State Court action is effectively against the Nation, it is barred by the doctrine of tribal sovereign immunity.

Id.

Transparent attempts to sue an Indian tribe for money by suing tribal officials generally fail. A decision involving the firing of a tribal police officer by an Indian tribe followed the same analysis. *See Miller v. Coyhis*, 877 F. Supp. 1262, 1266 (E.D. Wis. 1995). The court stated:

The defendants maintain that the federal claim asserted against them is barred by the doctrine of sovereign immunity because it is, in fact, a claim against the Community itself. According to the complaint and the arguments made by counsel in their respective briefs, the only action taken by the four tribal council members which gives rise to the plaintiff’s claim that his termination violated his first amendment rights was to draft resolutions and vote as members of the Community’s governing body. The activity of the tribal administrator-Mr. Burr-was limited merely to informing Mr. Miller of the tribal council’s actions. Without more, I am unable to view the suit against the officials or against Mr. Burr as anything other than a suit against the Community. This is so because the actions of the four tribal members individually and the action of Mr. Burr had no independent legal effect; rather, it was the official action of the Community-termination of Mr. Miller-that caused Mr. Miller’s alleged injury. *See Imperial Granite Co.*, 940 F.2d at 1271 (action could only be viewed as a suit against the tribe as opposed to the individual tribal officials where the complaint failed to allege individual actions by any of the tribal officials named as defendants; the

only action taken by those officials was to vote as members of the tribe's governing body). Because I have concluded that the doctrine of tribal sovereign immunity applies in this case as the action is essentially one against the Community, I need not determine whether the actions of the individual plaintiffs were within the scope of his or her authority. *See Imperial Granite Co.*, 940 F.2d at 1271 (a tribe's immunity is not defeated by an allegation that it acted beyond its powers) (citing *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 ... (1985)).

Id.

Similarly, a claim seeking monetary damages from a breach of contract may not invoke the *Ex parte Young* Doctrine to circumvent tribal immunity in federal court. *See Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council*, 72 F. Supp. 2d 717, 720 (E.D. Tex. 1999).

Plaintiffs also may not recover damages under the Family and Medical Leave Act from a tribal employer by suing tribal officials. *See Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004). There, the Second Circuit wrote:

Furthermore, Chayoon cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority. *See Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 169 (2d Cir.2003). Finally, Chayoon did not request any injunctive or declaratory relief and therefore no exception to sovereign immunity is applicable. *See Ex parte Young*, 209 U.S. 123 ... (1908); *see also Garcia*, 268 F.3d at 87-88.

Id.

And, according to the Eleventh Circuit, suing tribal officials under Section 1981 fails against tribal official immunity. *See Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1036 (11th Cir. 2001), *cert. denied*, 535 U.S. 1066 (2002). The court wrote:

Also, we recognize that the complaint names two AIC board members as individuals, and therefore might be interpreted to raise claims under *Ex Parte Young* against these individuals. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1050 (11th Cir.1995) (permitting *Ex Parte Young* claim against members of tribal organization). However, a review of the claim shows that the action has been brought against the board members in their official capacity, as there is no question that the AIC is the real party of interest in

this action: any judgment paid by the individual board members would be drawn from the AIC fisc, and any equitable and injunctive relief provided (such as reinstatement) would conflict with the AIC's right to hire persons in accordance with its desire to promote Indian self government. *cf. ACLU v. Finch*, 638 F.2d 1336, 1341-42 (5th Cir.1981) (discussing principles in context of state sovereign immunity).

Id. (footnote omitted).

Finally, following the Supreme Court's decision in *Citizen Band Potawatomi*, the Ninth Circuit held in *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), that utility taxes collected by a tribe in violation of federal law are not refundable:

In contrast, the district court's decision to refund all past utility taxes paid by Big Horn does violate the Tribe's sovereign immunity. The Supreme Court has recognized that a retrospective award of taxes is barred by sovereign immunity. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 514 ... (1991) (recognizing that tribal sovereign immunity prevents a state from collecting taxes from a tribe); *Green v. Mansour*, 474 U.S. 64, 68 ... (1985) ("We have refused to extend the reasoning of *Young*, however, to claims for retrospective relief."); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462-63 ... (1945) (holding that a taxpayer cannot maintain an action against a state official for a refund of taxes paid). Because the tax refund is the type of retrospective relief that the Supreme Court has struck down as a violation of sovereign immunity, we reverse the district court's order awarding retrospective relief to Big Horn.

Id. at 954.

G. Officials Recognized as Immune from Suit

Tribal elected officials fit well within the protections of official immunity, but it is a closer question whether tribal employees are also immune. The Ninth Circuit held in *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969), that the Navajo Nation's General Counsel possessed "executive privilege," akin to tribal official immunity. *See id.* Following *Davis*, the Arizona Supreme Court held that executive officers of the Fort Apache Timber Company are immune from suit. *See White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 658 (Ariz. 1971). The court wrote:

It is the opinion of this court that petitioners DeRose and Butler, as officers of FATCO, are entitled to executive immunity for their actions on behalf of FATCO which are within the scope of their respective duties as general counsel and general manager of FATCO. They are not immune from being sued

individually, however, for any actions in excess of their duties as general counsel and general manager, respectively.

Id.; see also *id.* at 657-58 (quoting *Davis*, 398 F.2d at 85).

Tribal judges are also immune, under the federal court doctrine of absolute judicial immunity. See *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003), *cert. denied*, 541 U.S. 987 (2004). The court wrote:

Penn urges us to deny the defendants' immunity claims by finding that tribal judges have no absolute judicial immunity and thus that no absolute quasi-judicial immunity can attach to the service or execution of tribal court orders. We recognize that tribal judges are insulated from removal or discipline by nonmembers and that tribal court orders may not be appealed to federal court. As Penn's petition demonstrates, however, an order excluding a nonmember from a reservation is subject to review in federal district court under the habeas corpus provisions of 25 U.S.C. § 1303. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67-68 ... (1978). We have recognized "the long-standing federal policy supporting the development of tribal courts" for the purpose of encouraging tribal self-government and self-determination. *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 850 (8th Cir.2003). Accordingly, a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges. See *Sandman v. Dakota*, 816 F.Supp. 448, 452 (W.D.Mich.1992).

Id.

Conversely, a Foxwoods Casino attorney could not invoke tribal official immunity where the plaintiff alleged she engaged in concert with state actors to violate plaintiff's constitutional rights. See *Wallett v. Anderson*, 198 F.R.D. 20, 24 (D. Conn. 2000). The court noted:

Anderson first moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of federal subject matter jurisdiction. Specifically, she argues that, as an employee of a federally recognized Indian tribe, she is immune from suit by the doctrine of tribal sovereign immunity and consequently, the court does not have subject matter jurisdiction with respect to the claims asserted against her. The plaintiff responds that, to the contrary, Connecticut courts have held that tribal employees are not entitled to sovereign immunity because they are not, by themselves, sovereign entities. In support of his argument, the plaintiff directs the court to *Drumm v. Brown*, No. CV 960079971, 2000 WL 73277 (Conn.Super.Ct., Jan. 10, 2000), in which the Connecticut superior court, in deciding a motion to dismiss a series of tort claims asserted against several Foxwoods' employees, declined to accord tribal sovereign

immunity to them because they had failed to cite any authority holding that tribal employees are “absolutely immune” from suit. *Id.* at *2.

While this court agrees with the superior court that tribal employees are not “absolutely” immune from suit, there are circumstances where tribal employees may legitimately assert the defense. The defense is appropriate where tribal employees are “tribal officials acting in their representative capacity and *within the scope of their authority.*” *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D.Conn.1996), *aff’d* 114 F.3d 15 (2d Cir.1997) (*quoting Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985)(emphasis added)). Hence, the defense is lost where a tribal official acts beyond the scope of his/her authority. *See e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212 (11th Cir.1999) (tribal officials are “subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority.”). It is well established that tribal officials act beyond their authority when they work in concert with state actors who, under color of state law, deprive an individual of his/her civil rights. *See e.g., Evans v. McKay*, 869 F.2d 1341, 1348 and n. 9 (9th Cir.1989).

In this case, the court will assume for purposes of discussion only that Anderson, as attorney employed by Foxwoods office of legal counsel, is a tribal official. *See e.g., Stock West Corp. v. Taylor*, 942 F.2d 655, 664-65 (9th Cir.1991), *modified on reh’g*, 964 F.2d 912 (9th Cir.1992) (*en banc*) (citing cases and discussing issue of when tribal attorney is acting as a tribal official). The court will also assume that Anderson’s alleged actions were taken in a representative capacity for the tribe. The court, however, cannot assume that Anderson’s alleged actions were taken within the scope of her authority. At this juncture, the allegations of the complaint must be accepted as true. The allegations specifically allege that Anderson “acted jointly and in concert [with Delaney]” (Compl. ¶ 6) to violate the plaintiff’s constitutional rights. If this allegation is proven to be true, it is conduct that cannot be within the scope of Anderson’s authority. *See Evans*, 869 F.2d at 1348 and n. 9 (the scope of a tribal official’s authority cannot include acting in concert with state actors to violate an individual’s constitutional rights). Accordingly, Anderson may not invoke tribal sovereign immunity as a defense and hence, the motion to dismiss based on want of subject matter jurisdiction is denied.

Id. at 23-24.

And in *Stock West Corp. v. Taylor*, 942 F.2d 655 (9th Cir. 1991), *aff’d in part and vacated in part*, 964 F.2d 912 (9th Cir. 1992) (*en banc*), the Ninth Circuit refused to affirm the lower court’s dismissal of the defense of tribal official immunity by a tribal attorney – who had

written an opinion letter in relation to a business deal between his client (the tribe) and a non-Indian company – because the record was insufficient to determine whether or not the attorney acted according to his “within his representative capacity, and whether he was within the scope of his delegated authority.” *Id.* at 664. The court did recognize, however, that the attorney could have been cloaked under tribal official immunity if he was acting within his “delegated authority.” *Id.* The court wrote at great length:

We need not determine whether Taylor’s position as Reservation Attorney qualifies him for “tribal official” immunity in the usual performance of his duties, because we conclude that the district court was premature in granting immunity status in this case. Taylor’s argument that his position with the Colville Tribes is analogous to a state attorney general has at least surface appeal. However, even conceding the analogy, we cannot say on the record before us whether Taylor was acting within his representative capacity, and whether he was within the scope of his delegated authority. *See Hardin*, 779 F.2d at 479-80; *see also Burlington Northern v. Blackfeet Tribe*, 924 F.2d at 902.

Stock West’s allegation in this case is that Taylor was acting as an attorney, rather than as a tribal official, and owed duties to the bar and to interested third parties to issue a letter reflecting his best legal judgment. This presents a closer question than *Puyallup Tribe*, because it appears that Taylor’s issuance of the letter was a portion of his “job responsibilities,” at least as broadly construed. However, it is not clear that Taylor’s role as counsel to the tribal corporations party to the sawmill contracts is necessarily a function of Taylor’s role as a possible “tribal official.” *Cf. Evans v. McKay*, 869 F.2d 1341, 1348 n. 9 (9th Cir.1989) (tribal officials are not cloaked in immunity from federal civil rights suit to the extent they acted in concert with police officers, who in turn were acting under color of state law).

The district court did not permit Stock West to pursue detailed discovery into the nature of Taylor’s duties, whether those duties qualify him as a tribal official, and any connection between Taylor’s “official” duties and the opinion letter. There is also the possibility that Taylor would not be deserving of immunity under tribal law if the delivery of a legal opinion to which he did not subscribe could be considered “egregious.” *See Stone v. Somday*, 10 Indian L.Rep. (Am.Indian Law.Training Program) 6040, 6041 (Colville Tribal Ct.1983). We think that Stock West is entitled to explore those issues before summary judgment on immunity is appropriate.

Id. at 664-65 (footnote omitted).

Other tribal employees may also invoke tribal official immunity. In *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F. Supp. 2d 271 (D. Conn. 2002), the court recognized that the director and projects manager of a tribal museum may also be immune from suit in federal court, assuming they are acting as proper “representatives” of the tribal government. *See id.* at 278. The court wrote:

The plaintiffs contend that tribal immunity for tribal officials extends only to high-level officers or officials who are performing governmental functions and exercising discretion. *See Turner v. Martire*, 82 Cal.App.4th 1042, 99 Cal.Rptr.2d 587 (2000); *Otterson v. House*, 544 N.W.2d 64 (Minn.Ct.App.1996); *Baugus v. Brunson*, 890 F.Supp. 908, 911 (E.D.Cal.1995). However, district courts within the Second Circuit have not held that such a limitation exists. *See Romanella*, 933 F.Supp. at 167 (extending tribal immunity to tribal members in charge of maintenance of parking lot on which plaintiff slipped), *aff'd on other grounds*, 114 F.3d 15 (2d Cir.1997); *Wallett v. Anderson*, 198 F.R.D. 20, 24 (D.Conn.2000) (assuming for purposes of immunity inquiry that attorney employed by Indian casino is “tribal official”), *cf. Kiowa*, 523 U.S. at 755, 758, 118 S.Ct. 1700 (declining to distinguish between a tribe’s commercial and governmental activities). Moreover, Connecticut state courts have not limited the scope of tribal immunity in this way. *See Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 794 A.2d 498, 505 (2002) (applying principles of tribal sovereign immunity to director of facilities operation and building official); *Paszkowski v. Chapman*, 2001 WL 1178765, at *4 (Conn.Super. Aug. 30, 2001) (“[T]he defendants who are employees of the Tribe are being sued for their conduct in their official capacities as a ‘Director of Facilities Operations’ and a ‘building official at the Mohegan Sun Casino.’ There is no basis for distinguishing between the actions of ‘officials’ or ‘employees’ unless the consequence of the ‘official’s’ conduct is different in legal effect from the consequences of the conduct of a ‘mere’ employee.”). These decisions hold that tribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority. The Court agrees and finds that tribal immunity applies to Bell, as Executive Director of the Museum, and Campisi, as projects director for the Museum, for the conduct alleged in the Second Amended Complaint. The Court will next examine whether such immunity for Bell and Campisi applies to the plaintiffs’ claims for injunctive relief and damages.

Id. at 277-78.

And, in *Romanella v. Howard*, 933 F. Supp. 163 (D. Conn. 1996), *aff'd on other grounds*, 114 F.3d 15 (2d Cir. 1997), the court recognized tribal official immunity applies to tribal maintenance workers, in a slip-and-fall tort claim against the casino in state court. *See id.* at 168. The court wrote:

The doctrine of tribal immunity “extends to individual tribal officials acting in their representative capacity and within the scope of their authority.” *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985); *see, e. g., Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir.1984). *See also* Cohen, *Handbook on Federal Indian Law*, at 284 (“[I]t has been held that where the tribe itself is not subject to suit, tribal officers cannot be sued on the basis of tribal obligations.”) (footnote omitted).

Romanella does not allege that the individual defendants acted beyond the scope of their authority as tribal officers. Consequently, her action against the tribal officers is a suit against the tribe. As such, the individual defendants’ immunity from suit is coextensive with the Tribe’s immunity from suit.

Romanella’s argument, however, is unsupported by the allegations contained in her complaint. Reviewing the Second Amended Complaint, the court finds that the negligence claims asserted against Hayward and Libby directly relate to their performance of their official duties. Indeed, Romanella alleges that “Hayward was an officer [of the Tribe] and he and/or defendant Libby were responsible for the maintenance of [the parking lot.]” (Second Am.Compl. at 3, ¶ 1.) She then alleges several different ways in which Hayward and Libby were negligent in maintaining the parking lot. (*See id.* at 4, ¶ 4.) Each of these purported negligent acts relate to duties arising from their positions as tribal officials responsible for the maintenance of the parking lot.

In sum, the court concludes that Hayward and Libby are entitled to assert the Tribe’s immunity from suit against Romanella’s claims.

Id. at 167-68.

H. Situs of Alleged Claims

Prior to *Kiowa Tribe*, which recognized tribal sovereign immunity extends beyond the reservation, *see Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998), the California Supreme Court held that tribal officials are not immune from suit for alleged tortious acts committed off the reservation. *See Boisclair v. Superior Court*, 801 P.2d 305, 316 (Cal. 1990). The court wrote:

In the case at bar it is alleged that the Indian defendants conspired to commit tortious actions on non-Indian land. Any discussion of sovereign immunity in this context must begin with the principle that the authority of a tribal government to act beyond the confines of its own territory is severely

circumscribed. “[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” (*Montana v. United States*, *supra*, 450 U.S. at p. 564, 101 S.Ct. at p. 1258.) In the cited decision the United States Supreme Court held that Indian tribes could not regulate hunting and fishing on non-Indian lands, although the lands were within the boundaries of the Indian reservation. (See also *Brendale v. Confed. Tribes & Bands of Yakima Indian Nation*, *supra*, 492 U.S. 408, 109 S.Ct. 2994 [Indians may not impose land use regulations on non-Indian land within reservation boundaries].) The sovereign power of Indian tribes to act on land that is neither tribal land nor within the confines of the reservation is a fortiori minimal.

From the present record, however, we are unable to determine whether the alleged tortious or conspiratorial acts by the Indian defendants are beyond the scope of tribal self-government. If their acts were nothing more than those appropriate for excluding Imperial from tribal territory, and were taken within tribal boundaries, the Indian defendants acted with the scope of their sovereign immunity. If, however, they committed or conspired to commit tortious acts the primary situs of which was outside Indian territorial boundaries, they have acted beyond their sovereign authority and are not protected by sovereign immunity. Determination of the sovereign immunity issue thus requires a greater elaboration of the facts that underlie Imperial’s allegations, in further proceedings at the trial court level.

Id.

Post-*Kiowa Tribe*, however, courts are more likely to recognize that tribal official immunity extends to off-reservation activities. In *Romanella v. Howard*, 933 F. Supp. 163 (D. Conn. 1996), *aff’d on other grounds*, 114 F.3d 15 (2nd Cir. 1997), the court surveyed the recent cases in finding that tribal official immunity extends off-reservation:

Romanella does not contend that the Tribe has expressly or impliedly waived its immunity from suit or that Congress has abrogated it. Rather, she asserts that the Tribe’s sovereign immunity does not extend to activities or areas beyond the reservation’s boundaries. To support this argument, Romanella cites *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied*, 490 U.S. 1029, 109 S.Ct. 1767, 104 L.Ed.2d 202 (1989).

Although the Supreme Court has not addressed the issue directly, two federal circuit courts have held that the doctrine of tribal immunity extends to

tribal activities conducted beyond the reservation's borders. *See, e.g., Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir.) (affirming district court's conclusion that tribe immune from suit in state court for commercial activities occurring off the reservation), *cert. denied sub nom.*, 516 U.S. 810 ... (1995); *In re Greene*, 980 F.2d 590, 598 (9th Cir.1992) (holding that bankruptcy trustee may not maintain adversary proceeding against tribal business entity for conduct occurring off-reservation), *cert. denied*, 510 U.S. 1039 ... (1994). The court finds the reasoning of *In re Greene*, and its criticism of *Padilla*, persuasive and holds that the Tribe's immunity from suit extends to commercial activities occurring off the reservation.

Id. at 167.

I. The Increasing Importance of FRCP 19

The D.C. Circuit in *Vann* remanded the case back to the district court to make a determination whether the case could proceed under Rule 19; that is, "whether 'in equity and good conscience' the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself." *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008).

It is doubtful that federal courts will dismiss a claim against tribal officials in which the tribe is absent due to sovereign immunity. *See generally* Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZAGA L. REV. 1, 125-26 (2005) (finding that federal and state courts disregard tribal interests in the Rule 19 analysis). For example, in *Nisqually Indian Tribe v. Gregoire*, No. 08-5069, 2008 WL 1999830 (W.D. Wash., May 8, 2008), the court dismissed a claim by the Nisqually Indian Tribe for failure to join an indispensable sovereign – the Squaxin Island Community – under FRCP 19; but the court allowed the plaintiffs to file an amended complaint naming tribal officials, noting:

Although Squaxin is an indispensable party, Nisqually may name as a defendant an official of the tribe pursuant to *Ex Parte Young*, 209 U.S. 123, 157 ... (1908). To cure the indispensability of the Squaxin, Nisqually moves to amend its complaint to name Jim Peters, chairman of the Squaxin tribe, as a defendant. Nisqually argues that because it is seeking only declaratory and injunctive relief, Chairman Peters is not immune from suit and may be joined as a defendant in his official capacity pursuant to the doctrine of *Ex Parte Young*. Because Nisqually has alleged in its proposed amended complaint [Dkt. # 46] that Chairman Peters's actions are a continuing violation of federal law, the Court agrees that *Ex Parte Young* can be invoked, and tribal sovereign immunity does not shield Chairman Peters from suit.

Id. at *5. The court's reasoning is instructive:

Nisqually seeks declarative and injunctive relief and alleges in its proposed amended complaint ... that Chairman Peters actions in entering into and implementing the Addendum to the Squaxin cigarette compact, and in making or permitting sales of improperly taxed cigarettes at the Frank's Landing smoke shop are ongoing violations of federal law. These allegations satisfy the requirements set forth in *Ex Parte Young* and *Burlington Northern v. Vaughn*[, 509 F.3d 1085, 1092 (9th Cir. 2007),] and Chairman Peters is not protected by tribal immunity.

Furthermore, a suit against Chairman Peters will not operate against the Squaxin as a tribe. If the injunctive relief is granted, Squaxin's sovereign authority to tax and to contract will be impaired but not completely divested; the tribe could still exercise its taxing authority on economic activity occurring on its reservation land and other tribal allotments, and its original cigarette compact with Washington State would still be valid.

Id. at *6.

III. A Selection of Cases Regarding Tribal Official Immunity in Tribal Courts

Tribes have adopted the language of *Ex parte Young* in both tribal court cases and in tribal laws. Generally tribal officials are immune from suit so long as they act within their scope of authority, and in compliance with tribal law. Some tribal laws which address this include tribal sovereign immunity acts or tribal tort claims acts. For example, the Navajo Nation Code states

A public entity is not liable for any injury or damage resulting from an act or omission of any public officer, employee or agent if that party is not liable; nor for the actions or omissions of public officers, employees or agents which are determined to be contrary to or without authorization or otherwise outside or beyond the course and scope of such officer's, employee's or agent's authority.

This section does not immunize a public officer, employee or agent from individual liability, not within Navajo Nation insurance coverage, for the full measure of the recovery applicable to a person in the private sector, if it is established that such conduct was outside the scope of his or her employment and/or authority.

1 NNC § 554(E)(1)(2)

The Ho-Chunk Nation includes an article on Sovereign Immunity in its Constitution, stating “Sec. 2. *Suit Against Officials and Employees.* Officials and employees of the Ho-Chunk Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only

for declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its jurisdiction for purposes of enforcing rights and duties established by this constitution or other applicable laws.” HO-CHUNK NATION CONSTITUTION, Art. XII, sec. 2. Finally, official immunity language may also appear tribal tort claims acts. For example, the Tulalip Tort Claims ordinance “preserves the defenses of qualified or absolute immunity to actions for monetary damages against . . . officers of the Tribe in their individual capacities.” Tulalip Ord. 122 (Tort Claims).

A recent Navajo Supreme Court case interpreting the Sovereign Immunity Act of the Navajo Nation Code was *Chapo v. Navajo Nation*, No. SC-CV-68-00 (Navajo 2004) (available at www.tribal-institute.org). The parents of a child “in need of supervision” sued the Navajo Nation, Ramah Navajo Social Services, Ramah Navajo Behavioral Health Services as well as a number of tribal officials involved with the case. *Id.* at ¶16. The Court found additional facts needed to be determined by the lower court, holding,

[44] The court erred. In *McDonald*, supra, this Court required that the district court make findings concerning the capacity of the defendants before this Court could decide whether the defendants were protected by the sovereign immunity of the Navajo Nation. 6 Nav. R. at 96. This Court declined to make the conclusion itself, indicating it was not empowered to make the necessary findings of fact. *Id.* Under Sections 554(E)(1) and (2) of the Sovereign Immunity Act it must be “determined” or “established” that the actions of governmental officials were not in the scope of their employment or authority for the Navajo Nation to be free from any liability. See also 2 N.N.C. § 1964(1) (authorizing the Attorney General to represent an official sued in their personal capacity until “it is established” as a matter of law that the official’s activities were not in the scope of his or her “duty or employment”). We read these provisions to require an explicit determination by the district court that the actions of the official or employee were or were not in the scope of his or her authority or employment before moving forward to consider immunity defenses.

[46] We set the following guidelines to determine the capacity of the official. As indicated in *McDonald*, the district court must decide whether the official acted in the scope of authority or employment “after carefully reviewing documents, legal arguments, witness testimony, . . . Navajo cultural and traditional factors, and the public interest in having the dispute resolved.” *Id.* at 96. We expand on *McDonald* by stating that whether an official acts within the scope of his or her authority or employment depends on the following factors: (1) the official’s position, (2) the action the official took, (3) the official’s authority and restrictions on that authority defined by applicable statute or regulation, (4)

the official's responsibilities as defined in a job description or departmental policies and procedures, (5) any valid instructions to act or not act received from a supervisor or other superior official, and (6) responsibilities and restrictions on the authority of leaders under Navajo Common Law. If there are insufficient facts in the complaint or documents supplied with the motions to dismiss to weigh these factors, the court can hold an evidentiary hearing on the issue of scope of authority or employment and make a ruling.

Id.

The Colville Tribe also has a Sovereign Immunity Act in its code, which protects tribal officials from suit “for any liability arising from the performance of their official duties.” Colville Tribal Law and Order Section 1.1. The Colville Confederated Tribal Court of Appeals, however, adopted language closer to *Ex parte Young* after surveying both tribal and federal law. *Stone v. Somday*, 1 CCAR 9, ¶ 21 (Colville Confederated Court of Appeals, 1984)(available on www.versuslaw.com). In a case of employment discrimination, two parties sued three tribal officials. The Tribal Court found that the Colville Tribal Law and Order Code Sovereign Immunity clause barred the action. *Id.* at ¶ 14. While both sides briefed the Appellate Court extensively on tribal sovereign immunity and the role of the ICRA, the Court took up the issue of tribal *official* immunity sua sponte. *Id.* at ¶16. The Court held, as to tribal official immunity,

[21] “[E]ach sovereign may define the limits of immunity afforded itself and its officers and agents, at least in its own courts...” *fn10 Appellee was entirely right to state in his appeals brief that this Court should not decide policy for the Tribe. On the other hand, it is well within the purview of a court to interpret the statutes and legislative acts of the Tribal Council absent clear legislative direction.

[21] The Trial Court set the standard for official immunity as “... unless an officer’s acts are unrelated to his official duties or are somehow related but are so egregious that they can be said to be outside his official capacity, then he is immune from suit.” *fn11 In setting this standard, the Trial Court judge admitted that this standard was “unusually narrow.” *fn12 We agree. However, it was not an easy task to find a standard which protects all interests involved. This Court reviewed other tribal standards of official immunity *fn13 as well as federal *fn14 standards.

[22] After reviewing case law and that Tribal custom law that is known to us, this Court now holds that a Colville Tribal official enjoys a qualified immunity under Tribal Law and Order Code § 1.1.06. If a Tribal official, while performing official duties, exceeds the scope of his authority or, while acting within the scope of authority, exercises a power delegated to him by the Tribe which the Tribe is powerless to delegate, official immunity will not bar actions against the official

for such conduct. Implicit in this standard is a sense of reasonableness in that an official should know or could have reasonably ascertained whether or not his conduct was within the bounds of his official duties, explicit or delegated. On the other hand, because of his obligations not only to his employer, the Tribe, but to the individual representatives of the Tribe itself, a Tribal officer has a higher standard of duty to ascertain what his duties and powers are vis-à-vis his official capacity than an ordinary person would have. Whether or not an official acted within the scope of his authority or exercised a power he was powerless to exercise and the reasonableness of such action are questions of fact to be decided by triers of facts.

Id.

The Puyallup Tribal Court decision, *Satiacum v. Sterud*, No. 82-1157, 1982.NAPU.0000001 (Puyallup 1982) (followed by *Bellue v. Puyallup Tribe of Indians*, No. 94-3045, 1994.NAPU.0000004 (Puyallup, 1994) (also cited by *Youvella v. Dallas*, No. 96-AP-00002 (Hopi Appellate Court, 1998); *Stone v. Somday*, 1CCAR 9, ¶ 21 (Colville Confederated Court of Appeals 1984)), found similarly, though in this case, the tribe did not have a Sovereign Immunity Act or provision in its code. The *Satiacum* case involved an internal tribal dispute regarding an election recall. The Chair, subject to a recall petition which had been approved by the Tribal Council, sued for injunctive relief to prevent the Council from conducting the election. *Id.* at ¶10-11. The Puyallup Tribe did not have a sovereign immunity clause in its Constitution or Bylaws, but nonetheless enjoyed sovereign immunity based on its “inherent attributes of sovereignty.” *Satiacum* at ¶46. In shaping the Tribe’s official immunity, the Court found that,

[59] Tribal officers, who perform all of the acts of the Tribal Government, must be able to exercise their duties free from intimidation, harassment and the threat of lawsuits resulting from acts performed in the course of their official duties. Against these policy considerations the Court weighs the interests of the community, which expects and deserves protection against malicious and unlawful acts.

[60] Accordingly, the following standard is to be applied in this and future litigation against tribal officials. First, the Tribe’s immunity from suit shall extend only to persons acting in their official capacity at the time the act complained of occurred. Second, the officer must have acted in good faith to enjoy the immunity. Third, an official shall be liable for acts that a reasonable person would know were in excess of his or her lawful authority.

[61] Applying this standard to the case at bar, the Court finds that the defendants were acting in their official capacities as members of the Puyallup Tribal Council. The plaintiff did not allege otherwise in his Complaint or Brief.

After careful review of the pleadings this Court finds no allegations that the defendants acted in bad faith or in a manner in which a reasonable person would know violates his or her lawful authority.

[62] The Complaint does allege that the defendants violated a Resolution governing recall procedures. ^{*fn23} However, it is clear from the pleadings that Tribal Council, pursuant to the law governing the recall of a member of Council,^{*fn24} reviewed the recall petitions, found them to be in compliance with the requirements for a recall election, ^{*fn25} and set the recall election for April 24, 1982. Nowhere does the Complaint make allegations, which if proven, would bring the defendants outside of the protection of official immunity described above. And nowhere does the Complaint allege that under any circumstances were there an insufficient number of signatures on the recall petition of plaintiff to require a recall election.

Id.

Other tribal courts follow similar reasoning either implicitly or explicitly. For example, though the Mashantucket Pequot court does not reach the question of tribal official immunity in the case, the court noted that tribal officials enjoy governmental immunity so long as they act within “the scope of the government’s authority.” *Reising v. Mashantucket Pequot Tribal Nation*, 2008 WL 2048827, n. 3 (Mash. Pequot Tribal Ct. 2008). The Oklahoma Court of Indian Affairs also found that tribal officials for the Wichita Tribe enjoy official immunity but “such immunity does not protect a tribal officer if he acts beyond the scope of his authority in a manner contrary to tribal law. Such ultra vires actions are not protected by the tribe’s cloak of sovereign immunity.” *Executive Committee of Wichita Tribe v. Bell*, 2 Okla. Trib. 107, 112 (1990) (citing *Ponca Tribal Election Board v. Snake*, 1 Okla. Trib. 209, 242 (1988)). The Coughatta Tribal Court found that in order for a tribal official to be subject to suit as a result of acting outside of his or her scope of authority, the petitioner must show “the legal authority that has been alleged to have been violated or exceeded. In applying the rule established in *Youvella v. Dallas*, the Petitioner must show that the Council clearly had no jurisdiction or authority over the subject matter.” Because without that “If the actions of the Council do not conflict with their valid statutory authority, then they are the actions of the sovereign, which cannot be enjoined.” *Pitre v. Coughatta Tribal Council*, No. 2000 11 C 0197 at ¶52, ¶53 (Coughatta Tribal Court, 2001) (available at www.tribal-institute.org).

