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Washington State
Supreme Court

75664-8

No. 92458-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Jordynn Scott,

Appellant,

v.

John or Jane Doe, Director of the Department of Licensing, a subdivision of the State of Washington, in his/her official capacity and the State of Washington and Peters Towing, a Washington Corporation and John and/or Jane Doe unidentified Swinomish Tribal Police Officers and General Authority Police Officers pursuant to RCW 10.92 in their official capacity and tribal police officers involved in the seizure and forfeiture of automobiles owned by Non Native American as individuals,

Respondents.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
FOR WHATCOM COUNTY

HONORABLE RAQUEL MONTOYA-LEWIS

REPLY BRIEF OF APPELLANT

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REPLY SUMMARY OF ARGUMENT

Jordynn Scott responds to the Department of Licensing's brief by attaching two recent decisions of Judge Coughenour of the United States District Court for the Western District of Washington in *Wilson v John or Jane Doe, Director of Department of Licensing and Horton's Towing, and the United States of America*, Case No. C15-629JCC and *Pearson v. Director Department of Licensing and numerous Swinomish Police officers in their individual capacities and as General Authority Police Officers pursuant to RCW 10.92 including Sergeant Andrew Thorne*, No. C15-0731-JCC. The *Wilson* decision is attached as Appendix 1, and *Pearson* as Appendix 2.

These cases were mentioned in Jordynn Scott's opening brief at page 12 and are relevant to this appeal because each involves the issue of whether an Indian tribe can prosecute a forfeiture action against a non tribal member for violation of its drug laws on the Indian reservation.

1. The impact of the *Wilson* case, if any, on the resolution of the instant case.

The timing of the announcement of these two decisions, *Wilson* and *Pearson*, involving very similar facts is fortuitous because it lets this court see into the future as to the consequences of this court's upholding the Superior Court's

dismissals based upon CR 19. The Wilson decision, attachment as Appendix 1, presages that all tort cases coming out of any litigation surrounding the seizure and forfeiture of motor vehicles owned by non Indians and subsequent reissuance of new Certificates of Titles by the Department of Licensing must start in tribal court. This is because the doctrine of comity requires that the state court or the federal court defer to the Lummi Nation the opportunity to first address the question of its legal jurisdiction. Judge Coughenour holds that the Lummi Nation has a “colorable claim” that it has jurisdiction because the underlying act- use of the motor vehicle- is on the reservation. Thus the Indian Nation is entitled to make the first ruling on the ultimate issue of Indian authority to forfeit property of non Indians for violation of Indian drug laws. The legacy of the Wilson Slip Opinion dismissal based upon comity is the same in effect as the Superior’s Court’s acceptance of the Department’s CR 19 indispensable party objection - that justice for these litigants must come through tribal court and then on to federal court.

But the soundness of Judge Coughenour’s deferral of the case to the Lummi Court under the comity doctrine so it could first rule is called into question because Judge Coughenour also granted Horton’s motion for summary judgment on the merits. By granting Horton’s Motion for Summary Judgment on the merits, Judge Coughenour of logical necessity usurped the rightful authority (under his line of comity reasoning) to reserve to the Lummi Tribal Court

exclusively the right to make the first decision on the scope and the power of the Lummi legislature to confiscate the motor vehicles owned by nonIndians for violation of Indian drug laws on the Indian reservation. Judge Coughenour's finding of lawful justification was a vindication of any future Lummi Tribal Court ruling that it possessed, not only jurisdiction to forfeit cars owned by non Native Americans for violation of reservation drug laws, but also the authority to seize, pursuant to its tribal court process, the suspect motor vehicle off reservation.

Horton's successfully cited *Judkins v. Sadler-MacNeil* 61 Wn2d 1, 3, (1962) for the definition of the tort of conversion as "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is devoid of possession of it." By granting Horton's motion for summary judgment, Judge Coughenour found that service of the Lummi Notice of Seizure form, which is attached as Appendix 3 upon Horton's in Bellingham, which resulted in Horton's decision to release Wilson's truck to Gates, the Lummi police officer, mandated dismissal of Wilson's conversion claim because such conduct constituted "lawful justification" under Washington state tort law.

2. Analysis of Judge Coughenour Reasoning in Wilson

Judge Coughenour acknowledges Horton's Motion for Summary Judgment at page 2, Slip Opinion lines 20-22. "Defendant Horton's moves for summary judgment, claiming the release of the vehicle was pursuant to a Notice

of Seizure and therefore with lawful justification. Plaintiff argues in response that the Notice of Seizure is invalid or not enforceable off the reservation.”

Then at page 4, lined 5, the Slip Opinion references a footnote 4 which reads as follows:

Plaintiff asserts additional legal questions, that “the question presented is whether the service of Lummi Notice of Seizure upon Horton’s was a lawful justification for its action in releasing Plaintiff’s truck to the Lummi police officer,”Dkt. No. 61 at 2) based upon the alleged “lack of legal basis for civil jurisdiction of forfeitures and that “a secondary question could be whether the 1999 Ram Pickup was lawfully seized by Lummi Police Officer Gates by his service of the Lummi Nation forfeiture process upon Horton’s outside the territorial limits of the Lummi Nation.” These questions need not be reached because dismissal is warranted based upon principles of comity.

Then at page 5, lines 10 -17, Judge Coughenour wrote:

The Lummi Nation has a “colorable” claim of jurisdiction as it is undisputed that the transactions forming the basis for plaintiff’s claim “occurred or were commenced on Tribal territory.” Stock W. Corp, 964 F2d at 919. In sum, the court may not hear Plaintiff’s case as it requires the court to challenge the Lummi Nation’s jurisdiction without providing the tribe the opportunity to first examine the case. Accordingly as there remains no genuine issue of material fact and Horton is entitled to judgment as a matter of law, summary judgment for Horton’s is warranted.” Page 5, lines 10-17.

The court is saying that the Lummi Nation must first address the question of whether it has authority under its drug forfeiture code to seize and forfeit motor vehicles owned by non Native American whose vehicles are used on the Lummi reservation in violation of the Lummi Code and, for this reason, the court dismissed the claim against Horton’s. The first rudimentary judicial act that has to

be executed to determine Horton's liability is to determine whether Horton is excused from conversion because its release of Wilson's truck to Lummi officer Gates came after service of the Lummi Notice of Seizure establishes that Horton's acted with legal justification under *Judkins v. Sadler-MacNeil* 61 Wn2d 1, 3, (1962). And it makes logical sense that before any court determines whether service of process might excuse what would otherwise be a conversion in the release of property, the court must address the underlying root legal issue - the question of whether an Indian tribe has the authority, in the first instance, to forfeit cars owned by non Indians on the theory that those vehicles were used to violate tribal drug laws while said vehicles are on the reservation. In addition, the court would have to consider those secondary issues such as whether the 1999 Ram Pickup was lawfully seized by Lummi Police Officer Gates by his service of the Lummi forfeiture process upon Horton's outside the territorial limits of the Lummi Nation.

But then things change in the opinion when Judge Coughenour states "Plaintiff's Argument that the Order would not have been enforceable even if valid fails." Page 8, line 22. The Judge concludes his reasoning commenting:

Plaintiff's citation makes clear that Superior Courts must carry out Tribal orders, but offers no authority to support the idea that private entity may not voluntarily comply with a tribal order¹ off of

¹ Reference to order is a mistake. The notice served is Notice of Seizure attached as Appendix 3. The opinion uses Notice and Order interchangeably but the correct assessment and description of the facts is that a Notice of Seizure was served.

Indian Country. In brief, the rule cited by plaintiff only further weakens his case. Page 9, lines 4-7.

And then the Judge concludes, “For all of the foregoing reasons, Defendant Horton’s Motion for Summary Judgment (dk, No. 57) is GRANTED. Page 9, line 8. A copy of Horton’s Motion for Summary Judgment is attached as Appendix 4. It clearly establishes that Horton’s asked for summary judgment of dismissal based upon the establishment of “the legal justification” that Horton’s released the truck in response to the Notice of Seizure.

3. Jordynn Scott’s option in contradistinction to Wilson

The option presented by Jordynn Scott in this case is to permit state court lawsuits against towing companies that facilitate the transfer of the to be forfeited motor vehicles, and against present owners of the cars on the theory that no legal title was transferred and the property must be returned to original owner. Judge Coughenour’s comity holding in the Wilson case would require all plaintiffs who sue non Indian defendants in some way involved in the seizure, transportation and later change of ownership of motor vehicles affected by Indian forfeiture, to a new owner via public cash auction, must first do so in Indian court. Horton’s is a good example showing how a non Indian defendant, sued for actions taken off the reservation, can get the case dismissed because it should have been started in Indian court. Similarly situated defendants through insurance defense counsel can

make this comity objection successfully because Wilson is a United States District Court decision of the Western District of Washington. Wilson is precedent at this point.²

The dismissal of the state tort claim in the Wilson case comes at the expense of Washington sovereignty. This court must preserve its constitutional jurisdiction. The Wilson Slip Opinion is also directly at odds with Smith Plumbing v. Aetna Casualty, 149 Ariz. 524 (1986); cert denied 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed2d 581 (1986); see also White Mountain Apache v. Smith Plumbing Company 856 F2d 1301 (9th Cir. 1988) which affirmed the result reached in Smith Plumbing v. Aetna Casualty, 149 Ariz. 524 (1986); cert denied 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed2d 581 (1986). The Wilson holding also contravenes Washington judicial policy to “shape” a judgment which would minimize any prejudice flowing to the tribe and separate those claims from those, which must be foreclosed because of Indian sovereignty; see Aungst v. Robert’s Construction, 95 Wn2d 439 (1981).

Jordynn Scott respectfully submits that Judge Coughenour has sub silencio overruled State v. Eriksen 172 Wn2d 506 (2011) and has pushed Indian power beyond the limit allowed by the federal courts heretofore as in Settler v. Lameer, 507 F.2d 231 (9th Cir.1974). There the 9th circuit recognized tribal

² Horton’s did not argue comity and limited its argument that it was entitled to dismissal on the merits because its actions were “legally justified.” “Wilson is on appeal to the 9th circuit.

jurisdiction at traditional treaty hunting and fishing grounds and authorized tribal officials to seize and arrest tribal members for violation of Indian regulatory schemes enacted by the tribe. Inconsistent with this precedent is Judge Coughenour's ruling that the presentation of Lummi tribal process in Bellingham, is as a matter of fact and law, "legal justification" under Washington state tort law for Horton's to release the truck to Lummi Police Officer Gates.

Judge Coughenour professes not to decide whether the Lummi Nation can legislate and extend its jurisdiction inside Washington and authorize seizure of suspect motor vehicle off reservation by service of its forfeiture notice. But actually, he does decide that issue on the merits. By granting the motion of Horton's Towing for summary judgment, Judge Coughenour found that Horton's release of Wilson's truck to Lummi Police Officer Gates in Bellingham was lawfully justified under Washington law. Logically, that ruling is predicated upon acceptance of the principle that the Lummi Nation did in fact and in law possess the power to authorize its officers to go off reservation to seize cars owned by non Native Americans. Because Lummi Police Officer Gates served the Notice of Seizure form on Horton's in Bellingham, Judge Coughenour found lawful justification and dismissed the damage action against Horton's on the merits.

Implicit in that finding is that the Lummi Nation has civil jurisdiction to forfeit non Native American cars, and furthermore, has the jurisdiction to seize

automobiles off reservation. Judge Coughenour rejects, without analysis, the scholarly legal reasoning of Judge H. Dale Cook in *Miner Electric v. Creek Nation* 464 F.Supp2d 1130 (2006). Judge Coughenour's decision endorsed a policy of encouragement of the Lummi Nation and other Indian Nations, not only to enforce their drug forfeiture laws with impunity against non Native Americans, but also to authorize tribal police to go off reservation and seize cars owned by nonnative Americans for past alleged drug violations of Indian Tribal law occurring when the desired motor vehicle was on the particular Indian reservation.

The lesson for this case is that Judge Coughenour rejected finding CR 19 as a basis to dismiss. This supports Jordynn Scott's argument that dismissal under CR 19 for failure to join an indispensable party is unfounded. Instead, Judge Coughenour dismissed after having decided that the Lummi Seizure Notice constituted legal justification for Horton's to release the vehicle.

Judge Coughenour, a federal court sitting as a state court, applied Washington state law and decided a conversion claim concluding that Horton's had shown sufficient evidence for summary judgment purposes facts which entitled it to dismissal based upon lawful justification. In this, he erred.

Wilson's conversion action should have been allowed to proceed because Horton and Wilson were both non Indians and the act of conversion alleged, was

the transfer of Wilson's truck in Bellingham to Gates. That is where and when the conversion tort by Horton was committed. The breadth of Judge's Coughenour dismissal based upon comity pulls a routine state based conversion claim to tribal court so that the Lummi Tribal Court can address the legal issue of whether the presentation of its Notice inside Bellingham constituted a legal justification within the meaning of that term in Washington state law- yet the court has already decided this issue while professing in footnote 4 that the question is reserved to the tribal court based upon comity.

A Washington court can decide the issue of whether service of the notice of seizure inside Washington was a lawful justification under Washington State law. The correct ruling is that service of the Notice of Seizure by Gates in Bellingham was a nullity and thus could not qualify as legal justification to excuse conversion. The Washington court would be free to decide the issue of whether service of the Lummi Tribal Notice was lawful inside Washington and decide that it was not. The Washington court is free to adopt the reasoning of *Miner's Electric v. Creek* 464 F. Supp.2d 1130 (N.D. Okla. 2006) and conclude that the Lummi Nation had no authority to seize and forfeit the cars of nonnative Americans under federal law, for the express purpose to resolve Horton's defense of conversion. Under Washington law, specifically *State v. Eriksen* 172 Wn2d 506 (2011) and *Settler v. Lameer*, 507 F.2d 231 (9th Cir.1974) cited herein,

Indian tribes have the legal basis to seize only tribal members on reservation and outside reservation at the accustomed fishing and hunting grounds.

The Washington State court should be free to decide the issue of whether service of the Lummi Tribal Notice was lawful inside Washington under *Aungst v. Robert's Construction*, 95 Wn2d 439 (1981) a case where suit was brought against many parties and the Superior Court dismissed upon the assertion that the Indian Tribe was an indispensable party. The Aungst court reversed and wrote:

Regardless of their status as contracting parties, we hold that neither the Tribe nor the camping club must be joined as parties under appellants' allegations. It would seem a judgment rendered against Roberts, if such is found to be appropriate, would be adequate even if limited to those remedies available through the statutes alleged to have been violated. Rescission, in this instance, is not available to appellants because of the prejudice to nonjoinable parties, the Tribe, and the camping club. Thus, if the facts so warrant, it is possible in this case for the court to shape a judgment, which would minimize any prejudice flowing to the Tribe or camping club from this litigation.

After considering all the factors included in CR 19(b), we hold there is no reason in equity and good conscience to dismiss appellants' complaint. It follows that the Tribe and the camping club are not indispensable parties to this action.

4. The impact of the Pearson case, if any, on the resolution of the instant case.
 - a. Should the court decide to follow the argument of the Department of Licensing and remand Jordynn Scott's case to the Indian courts for resolution first, the Pearson case shows what will happen.

The Pearson case is even more poignant in its application to resolution of Jordynn Scott's case. Pearson sued Andrew Thorne, a Swinomish Police officer and alleged that he deprived her of her property rights and her constitutional rights in violation of 42 USC 1983. This case is important because it makes real, instead of hypothetical, what happens to litigants who try to redress an unlawful forfeiture of a non Indian owned vehicle and sue a Swinomish Police officers officer in his individual capacity and in his capacity as a Washington State law enforcement officer under RCW 10.92.

Pearson's suit against Thorne under RCW 10.92 and 42 USC 1983 sets forth the blueprint of what would happen if this court sends Jordynn Scott's case back to start in Indian court on through the federal courts. All of Pearson's claims were dismissed by Judge Coughenour based upon the assertion of Indian sovereignty.³

b. Analysis of Pearson Opinion

1. Rejection of Request for an Injunction against the Department

³ At the conclusion for the Pearson opinion, Judge Coughenour berates counsel for "confusingly citing a Washington insurance statute. This was far from sufficient to survive summary judgment." Slip Opinion page 8, lines 18-19. The statute cited was RCW 10.92.020 and the specific provision was the following: (ii) Each policy of insurance issued under this chapter must include a provision that the insurance shall be available to satisfy settlements or judgments arising from the tortious conduct of tribal police officers when acting in the capacity of a general authority Washington peace officer, and that to the extent of policy coverage neither the sovereign tribal nation nor the insurance carrier will raise a defense of sovereign immunity to preclude an action for damages under state or federal law, the determination of fault in a civil action, or the payment of a settlement or judgment arising from the tortious conduct. Wilson's counsel cited RCW 10.92.020 (2) (ii) as authority to bar the Swinomish Nation from asserting Indian sovereignty as a defense to Pearson claim against Thorne as a state law enforcement officer.

The first portion of the opinion rejects Pearson's claim for an injunction. The opinion says the issue is moot because as a result of challenges brought by Pearson and others, the Department of Licensing has stepped up and announced it will no longer honor tribal orders of forfeiture of cars owned by non Native Americans.⁴

2. Grant of Immunity to Department of Licensing

After denying Pearson's request for an injunction, Judge Coughenour then held that the state was immune and that suit had to be dismissed for that reason page 6, lines 1-8. Pearson based her claim for an injunction on her contention that she was deprived of her property by the Department's established practice of honoring tribal judgments of forfeiture as a basis to transfer ownership on the Department Certificate of Ownership. She alleged that the transfer was done in violation of her due

⁴ It is undisputed that the actions of plaintiffs such as Candee Washington, Jordynn Scott, Susan Pearson and Curtis Wilson in suing the Department of Licensing and seeking an injunction prohibiting it from transferring title to motor vehicle of nonnative American persons based upon presentation of a tribal order of forfeiture challenged the Department. These cases brought to the attention the Department that it was not honoring CR 82.5 and its own protocols, which are consistent with CR 82.5, and that Indian tribes were presenting tribal orders of forfeiture to agents of the department who transferred title at the behest of the Swinomish Police Department. These lawsuits, all of which denied plaintiffs' request against the Department for an injunction and attorney fees, in fact, accomplished the desired result. the Department promised it would never change a title based upon a tribal order of forfeiture again. In all such cases, plaintiffs' claims for an injunction or declaration were proper under Washington State Commc'n Access Project v. Regal Cinemas, Inc., 173 Wash. App. 174, 204, 293 P.3d 413, 429 (2013)

process and 5th and 14th amendment right against confiscation of property without payment of just compensation. Pearson asked only for an injunction against the Department and a declaration that the practice of honoring tribal judgments to change title of non Native American owners was unlawful and in violation of non Native American owners' property and due process rights. Judge Coughenour did not address the application *Ex Parte Young*, 209 U. S. 123 (1908), which empowers litigants to obtain injunctive relief to prevent violation of constitutional rights in the face of the assertion of state immunity.

3. Dismissal of Damage action against Sergeant Andrew Thorne based upon various sovereignty defenses

Judge Coughenour's opinion at page 6, lines 15-18 sets forth the three pronged reasoning of the court dismissing Pearson's action for money damages action against Sergeant Thorne: (1) Pearson's claim is actually an official capacity suit that is foreclosed by sovereign immunity, (2) Sgt. Thorne was acting under color of tribal law, not state law and (3) Pearson failed to exhaust her tribal remedies. Judge Coughenour accepted all of the arguments presented by Thorne's attorney. A copy of Thorne's Motion for Summary Judgment is attached as Appendix 5.

Judge Coughenour dismissed Pearson's claims based upon sovereignty of the Swinomish Nation holding that the sovereignty is the real party in interest, citing *Cook v. Avi Casino* 548 F.3d 718, 727 (9th Cir. 2008). But Pearson sued Thorne in his individual capacity to insulate the lawsuit in federal or state court from removal to Swinomish Tribal Court on the basis of Indian sovereignty justifying dismissal under CR 19 as an indispensable party or on comity. This is the precise line of remedy endorsed by the 10th circuit in *Miner Electric, Inc. v. Muscogee (Creek) Nation* 464 F. Supp.2d 1130, N. D. Okla. (2006). Although the District Court opinion was vacated at 505 F3d 1007 (2007), the 10th circuit suggested a remedy might be available if the tribal officers were sued in their individual capacities. After these remarks, then came the holdings in *Pistol v. Garcia* 91 F.3d 1104 (9th Cir. June 30, 2015) and *Maxwell v. County of San Diego*, 697 F3d 941 (9th Cir. 2012). *Cook v. Avi Casino*, relied on by Judge Coughenour, predates *Pistol v. Garcia* and *Maxwell v. County of San Diego*.

The point is that Judge Coughenour held without explanation that the suit against Thorne was a suit against the Swinomish Nation when in fact Sergeant Thorne was sued individually, which does not impinge on Indian sovereignty. Pearson contends her allegations that Thorne acted illegally under color of state law under RCW 10.92 implicates only the

liability of the Hudson and Livingston Insurance Companies. These companies contracted with the Swinomish Nation and the State of Washington, to provide insurance coverage for lawsuits against Swinomish Police Officers, claiming that the police officers acted illegally while acting as Washington state law enforcement officer under RCW 10.92.

The Swinomish Nation did not so tender Pearson's lawsuit but rather chose to have Thomas Nedderman, employed by Tribal Insurance, defend the suit and prevail by assertion of the Swinomish Tribes sovereign immunity. Had the Swinomish Nation done what RCW 10.92 had intended, Pearson's claim would have been tendered to the Hudson and Livingston Insurance Companies. Those insurance policies are restricted by the language contained in RCW 10.92.020 (2) (a) (ii) which restricts the attorney from asserting Indian immunity up the limits of the policies. Mr. Nedderman and his insurance company were not so constrained.⁵

⁵ The 10th circuit, before dismissing Miner's claim on Indian sovereignty, stated the following:

The Miner parties argue that the district court properly relied on *Tenneco*, 725 F.2d 572, in denying the Nation's motion to dismiss. The non-Indian plaintiff in *Tenneco* filed an action in district court against an Indian tribe and tribal officers, seeking declaratory and injunctive relief with respect to certain tribal ordinances it contended were unconstitutional, preempted by federal regulation, or exceeded the scope of Indian sovereignty over non-Indians. *Id.* at 574. We noted that Indian tribes' "limited sovereign immunity from suit is well-established" and that the tribe in that case "ha[d] not chosen to waive that immunity." *Id.* We then proceeded to consider whether the tribe's sovereign immunity extended to the tribal-officer defendants, holding: 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

The second basis for summary judgment dismissal of Pearson’s claims against Thorne was that the facts presented established as a matter of law that Sergeant Thorne was acting in only a tribal capacity. Judge Coughenour’s entire analysis is found at Slip Opinion page 7, lines 9-26. In short, the court notes the burden is on plaintiff to show Sgt. Thorne acted under color of state law and states that actions taken under color of tribal law are beyond the reach of 1983, citing *R. J. Williams Co. V. Fort Belknap Hous. Auth.* 719 F2d 979, 982, (9th Cir. 1983). The critical portion is Slip Opinion page 7, lines 17-26 which reads as follows:

Pearson alleges that Sgt. Thorne “acted beyond any authority he has as a Swinomish tribal officer police officer” and was “acting

immunity is invoked. 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 *1012 in the exercise of power it does not possess.

Id. (citation omitted). Thus, we concluded that the tribal officer defendants were not protected by the tribe’s immunity and that the suit could go forward *against them*. *Id.* at 575. We noted that our holding was consistent with *Santa Clara Pueblo*, where the Supreme Court held that a tribal officer was not protected by the tribe’s immunity from suit. See *Tenneco*, 725 F.2d at 574–75 (citing *Santa Clara Pueblo*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106). We also concluded that, in the suit against the tribal officers, the extent of the tribe’s sovereignty to enact the challenged ordinances raised a federal issue sufficient for federal-question jurisdiction in the district court. See *id.* at 575. Like this case, *Tenneco* involved two different aspects of an Indian tribe’s “sovereignty”: its immunity from suit and the extent of its power to enact and enforce laws affecting non-Indians. But it does not stand for the proposition, as the Miner parties suggest, that an Indian tribe cannot invoke its sovereign immunity from suit in an action that challenges the limits of the tribe’s authority over non-Indians. On the contrary, we held in *Tenneco* that the tribe was immune from suit. See *id.* at 574. Here, because the Miner parties named only the Nation itself as a defendant, we do not reach the question whether any of the Nation’s *officials* would be subject to suit in an action raising the same claims.

Pistol v. Garcia 91 F.3d 1104 (9th Cir. June 30, 2015) and *Maxwell v. County of San Diego*, 697 F3d 941 (9th Cir. 2012) came after *Cook v. Avi Casino* 548 F.3d 718, 727 (9th Cir. 2008) and specifically endorsed suit against tribal employees in individual capacity as a means to avoid sovereignty immunity defenses.

under color of state law and as a General Authority Washington officer. “ However she fails to support this assertion. First her argument that the tribal officers exceeded their authority is based upon the tribe’s alleged lack of jurisdiction, which again demonstrates that sovereign immunity bars suit. Moreover the only evidence of Sgt. Thorne’s involvement in this matter shows that he merely answered the phone call from Pearson and relayed information to her. Apart from the fact that this conduct was related to forfeiture –which again is challenged on grounds barred by sovereign immunity—Pearson has not shown that Sgt. Thorne’s actions exceeded his authority as a tribal officer. Slip Opinion page 7, lines 17-26.

What was acknowledged to be in the record was Sergeant Thorne’s declaration in which he recounted the phone call he received from Pearson two days after her arrest and the seizure of her vehicle. Pearson asked when she should pick up her vehicle. Sgt. Thorne explained that she couldn’t retrieve her vehicle because the Swinomish Police Department was in the process of procuring a search warrant. See Thorne’s Motion for Summary Judgment page 4, lines 16-18. Pearson then asked when the vehicle was to be returned to which Sgt. Thorne responded that the Tribe intended to initiate forfeiture proceedings because the vehicle was used to transport drugs on tribal land. Thorne explained the forfeiture procedure.

How the court determined that Thorne was acting only as a tribal officer is not disclosed in the opinion.

Whether to characterize Thorne’s actions as tribal or state law enforcement is for a state court to determine. First, the court must

adjudicate whether a tribal court has authority to seize and forfeit the car of a nonIndian for violation of Indian drug law on a reservation. If the court so finds that the tribal police officer who engaged in the forfeiture of the motor vehicle has no authority to do so under federal or state law, that officer, necessarily is acting under color of state law and because he is acting in violation of his authority as a state police officer and by virtue of his participating in the illegal seizure and forfeiture, he is acting in violation of federal and state law, and liable. A state police officer is charged with upholding state and federal law, not violating it. The waiver provisions of RCW 10.92.020 (2) (a) (ii) specifically free the court to make such a determination.

This analysis is consistent with what Jordynn Scott would postulate is the appropriate way to advise tribal police officers such as the Swinomish Police officers to conduct themselves. The decision of *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009) concludes with this advice as to the authority of tribal police to interact with non Indians on Indian reservations.

We conclude that a roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond

Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians 575 F.3d at 896, 897.

Absent a grant of state authority, which Sergeant Thorne possessed by virtue of his certification as a Washington state police officer under RCW 10.92, he was unable to interact and take action against Ms. Pearson. Thorne was empowered by his tribal authority only to find out if Pearson was a tribal member, and when he found that she was not, his authority ended.

On the record of the Pearson case, Thorne's actions in cooperating and facilitating the forfeiture of Pearson's truck under tribal law is sufficient to establish his liability under RCW 10.92, for by his remarks on the telephone, he was able to deny Ms. Pearson access to her truck and hold it for future forfeiture. If, as concluded in the District Court later vacated opinion of Miner's Electric, the tribe has no jurisdiction, then the conclusion is inexorable that Pearson's legal rights were violated by Thorne and others who participated in the illegal seizure and forfeiture of Pearson's vehicle. That the Swinomish Police Officers were only acting pursuant to tribal law and were thus immune, is error.

The error in the decision is that the Swinomish Nation waived sovereignty up to the limits of the insurance that the Swinomish Nation was required to post as a condition for receiving and maintaining their

privilege to be Washington State law enforcement officers. On the contrary, rather than establishing summary judgment grounds to dismiss, the facts establish a summary judgment basis to conclude that Thorne acted in violation of federal and state law and is liable under RCW 10.92.020 (2) (a) (ii) without any consideration as to the application of Indian sovereign immunity.

CONCLUSION

The Department of Licensing argued that the principles of fairness embodied in CR 19 require dismissal of Ms. Scott's claims because litigation of those claims would be inequitable without joinder of the Swinomish Nation.

The purpose of this reply brief is to refute that argument. The reality Jordynn Scott wants the court to see in Judge Coughenour's decisions, is the inequitable consequence of pretending that the Indian Nation is an indispensable party. The better course of action is to let the suit go forward.

The purpose of RCW 10.92, agreed to by the Swinomish Nation where and when their officers were sworn in, as Washington State law enforcement officers, is to permit Swinomish Nation to exercise state authority under the accountability standard set out in RCW 10.92.020 (2) (a) (ii). RCW 10.92 generously provided Indian tribes the option of

having tribal officers become Washington State law enforcement officers but insisted that when suits are brought alleging violation by their officers of their state granted authority, a clear remedy is provided. The clear purpose of the statute requires that any such lawsuits must be tendered to the RCW 10.92 insurance carriers. Those insurance carriers were constrained by statute from asserting the defense of Indian sovereignty. This was the essence of accountability for tribal officers given the privilege and authority to enforce Washington State and federal law, the assurance that plaintiffs alleging violation of civil rights by Swinomish Police officer while acting in their capacity as Washington State Police officer shall have available to them an sufficient insurance policy to compensate them for the injuries, should they prevail in litigation.

The fracture of the intent of RCW 10.92 is demonstrated by the assertion by the Swinomish Nation Police Officer Thorne that he was acting in official capacity as a tribal police officer thus mandating the lawsuit against him be dismissed. Through his insurance attorney, Thomas Nedderman, Thorne argued 1) Pearson's claim is actually an official capacity suit that is foreclosed by sovereign immunity, (2) Sgt. Thorne was acting under color of tribal law, not state law and (3) Pearson failed to exhaust her tribal remedies. Mr. Nedderman successfully raised and argued that Swinomish sovereignty mandated dismissal of Pearson's

claim against Thorne in his individual capacity and as a Washington State Law enforcement officer empowered by RCW 10.92 for actions taken in his capacity as a Washington state law enforcement officer and thereby seeking money damages.

RCW 10.92 bars both the Swinomish Nation and its insurers, the Hudson and Livingston Insurance Companies, who are obliged by statute to defend these claims, identical to Pearson's, without raising Indian sovereignty as a defense.

How then was Sergeant Thorne able to decimate Pearson's claim against Thorne under RCW 10.92? Focus on the reference in the Pearson Opinion at page 8, "confusingly citing a Washington insurance statute." This reference was cited to support the proposition that the federal court should honor the waiver of sovereign immunity the Swinomish agreed to abide in RCW 10.92.020 (2) (a) (ii) and not raise the defense of sovereign immunity to impede Pearson's tort case and thus to reject any motion to dismiss based upon Indian sovereignty; see Pearson Memorandum in Reply to Motion for Summary Judgment of Sergeant Thorne, page 2 one quarter down the page. A copy of the Memorandum is attached as Appendix 6.

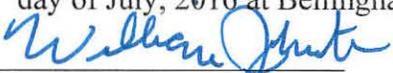
Jordynn Scott believes the explanation for the defense presented by Swinomish Police Officer Thorne in Pearson was because the Swinomish

Nation's attorneys decided not to tender the defense of Pearson's suit to the Hudson and Livingston Insurance companies, who are constrained by waiver of immunity provision of RCW 10.92.020 (2) (a) (ii). Instead, the Swinomish Nation tendered the defense of the Pearson lawsuit to their regular insurance company, who is not constrained from raising the sovereign immunity defense.

Pearson's dismissal was procured by an express breach of RCW10.92.020 (2) (a) (ii) by the Swinomish Nation. The conscious decision of the Swinomish Nation and its attorneys not to tender the defense of Pearson's RCW 10.92 claim to the Hudson and Livingston Insurance companies was a breach of the Swinomish's Nation's obligation to comply with RCW 10.92. This decision establishes bad faith and supports rejection of indispensable party argument of the Department because it shows that there will be no recourse in Indian court and later in the federal courts.

This court should act decisively to assert and protect Washington judicial sovereignty to adjudicate disputes within its jurisdiction where the tortious actions take place inside Washington. This case should be reversed and remanded with instructions that this case should proceed to trial against the Livingston and Hudson Insurance Companies. If said insurance companies attorneys cannot obtain cooperation of the

Swinomish Nation, which is likely, and should said insurance companies move to abdicate their financial responsibilities under their insurance policy liability because lack of cooperation with the Swinomish Nation, then this court order should direct the Superior Judge issuing such a order, to also enter an order that all state jurisdiction that Swinomish police officers have under RCW 10.92 be revoked.


Signed this day of July, 2016 at Bellingham


WILLIAM JOHNSTON WSBA 6113
Attorney for Appellant Jordynn Scott

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Jordynn Scott,)	
Appellant,)	No. 92458-9
v.)	
John or Jane Doe, Director of the)	APPENDICIES TO REPLY
Department of Licensing, a subdivision)	BRIEF OF APPELLANT
of the State of Washington, in his/her)	
official capacity and the State of)	
Washington and Peters Towing, a)	
Washington Corporation and John)	
and/or Jane Doe unidentified)	
Swinomish Tribal Police Officers and)	
General Authority Police Officers)	
pursuant to RCW 10.92 in their official)	
capacity and tribal police officers involved))	
in the seizure and forfeiture of automobiles))	
owned by Non Native American as)	
individuals,)	
)	
Respondents.)	

Appendix 1 Copy of decision of Judge John Coughenour in of the United States District Court for the Western District of Washington in Wilson v John or Jane Doe, Director of Department of Licensing and Horton's Towing, and the United States of America, Case No. C15-629JCC

Appendix 2 Copy of decision of Judge John Coughenour in Pearson v. Director Department of Licensing and numerous Swinomish Police officers in their individual capacities and as General Authority Police Officers pursuant to RCW 10.92 including Sergeant Andrew Thorne, No. C15-0731-JCC.

Appendix 3 Copy of Lummi Nation Notice of Seizure and Intent to Institute Forfeiture

Appendix 4 Copy of Horton's Motion for Summary Judgment in Wilson v John or Jane Doe, Director of Department of Licensing and Horton's Towing, and the United States of America, Case No. C15-629JCC

Appendix 5 Copy of Defendant Thorne's Motion for Summary Judgment in in Pearson v. Director Department of Licensing and numerous Swinomish Police officers in their individual capacities and as General Authority Police Officers pursuant to RCW 10.92 including Sergeant Andrew Thorne, No. C15-0731-JCC

Appendix 6 Copy of Defendant Pearson Memorandum in Reply to(sic) Motion to Summary Judgment of Sergeant Thorne

THE HONORABLE JOHN C. COUGHENOUR
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CURTISS WILSON,

Plaintiff,

v.

JOHN OR JANE DOE, Director of the
Department of Licensing, et al.,

Defendants.

CASE NO. C15-629 JCC

ORDER GRANTING
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant Horton's Towing Motion for Summary Judgment (Dkt. No. 57), Plaintiff's Opposition (Dkt. No. 61), and Defendant's Reply (Dkt. No. 62), as well as Plaintiff's Motion for Summary Judgment (Dkt. No. 60), Horton's Response (Dkt. No. 64), the United States' Response and Cross-Motion for Summary Judgment and/or to Dismiss (Dkt. No. 65), and Plaintiff's Reply (Dkt. No. 66). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Defendant Horton's motion, DENIES Plaintiff's motion, and GRANTS the United States' Motion for the reasons explained herein.

I. BACKGROUND

On October 22, 2014, Plaintiff Curtiss Wilson was stopped by a Lummi Tribe police officer while driving on the Lummi Reservation¹ after drinking at the Lummi Casino. (Dkt. No. 4-1 at 2.) Lummi Tribal Police Officer Grant Austick stopped Plaintiff, searched his 1999 Dodge Ram Pickup, and developed probable cause that Plaintiff was committing a DUI. (Dkt. No. 4-1 at 2.) Officer Austick then called the Washington State Patrol and Plaintiff was arrested. (*Id.* at 3.)

¹ The Lummi Tribe of the Lummi Reservation is a federally recognized tribe. *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5021 (Jan. 29, 2016).

1 Plaintiff's truck was towed by Defendant Horton's Towing and impounded at the direction of the
2 Washington State Trooper. (*Id.*)

3 The following day, Lummi Tribal Police Officer Brandon Gates presented a "Notice of
4 Seizure and Intent to Institute Forfeiture" ("Notice of Seizure") from the Lummi Tribal Court of
5 the Lummi Tribe to Horton's Towing. (Dkt. No. 4-1 at 3-4, 9.) The seizure and intent to institute
6 forfeiture of Plaintiff's vehicle was based on violations of the Lummi Nation Code of Laws
7 ("LNCL") 5.09A.110(d)(2) (National Indian Law Library 2016) (Possession of Marijuana over 1
8 ounce), and authorized by LNCL 5.09B.040(5)(A) (National Indian Law Library 2016) (Civil
9 forfeiture section addressing Property Subject to Forfeiture, specifically motor vehicles used, or
10 intended for use, to facilitate the possession of illegal substances.) (Dkt. No. 4-1 at 9.) Horton's
11 Towing released the truck to the Lummi Tribe. (*Id.* at 3-4).

12 Plaintiff brought suit in Whatcom County Superior Court and the case was removed.
13 (Dkt. No. 1.) Plaintiff originally brought claims for outrage, conversion, and relief under 42
14 U.S.C. §§ 1983 and 1988. (Dkt. No. 4-1 at 7-8.) All of Plaintiff's claims, save conversion, have
15 been previously dismissed either voluntarily or by Court order. (*See* Dkt. Nos. 25, 35, and 53.)
16 Plaintiff's conversion claim against both Horton's and the United States is based on Horton's
17 release of the vehicle to the Lummi Tribe pursuant to the order served by Gates.² (Dkt. No. 4-1 at
18 6.)

19 Defendant Horton's moves for summary judgment, claiming the release of the vehicle
20 was pursuant to the Notice of Seizure, and therefore with lawful justification. (Dkt. No. 57.)
21 Plaintiff argues in response that the Notice of Seizure is invalid or not enforceable off the
22 reservation. (Dkt. No. 61.)³ The United States moves for summary judgment based on, *inter alia*,

24 ² The United States has been substituted as a party for Defendant Brandon Gates. (Dkt. No. 53.)

25 ³ Plaintiff proffers a header apparently regarding negligent bailment in Dkt. No. 61 at 6. *See Jama v.*
26 *United States*, No. C09-0256-JCC, 2010 WL 1980260, at *15 (W.D. Wash. May 17, 2010) *aff'd in part*
sub nom. Jama v. City of Seattle, 446 F. App'x 865 (9th Cir. 2011) (explaining the differences between

1 Plaintiff's failure to exhaust his administrative remedies. (Dkt. No. 65.) In response, Plaintiff
2 regurgitates failed arguments from previous briefing, relying on an overturned, out-of-Circuit
3 case and "maintaining" a line of reasoning with respect to Brandon Gates and the scope of
4 employment that this Court has already ruled against. (Dkt. No. 66.)

5 II. DISCUSSION

6 A. Standard of Review

7 A court may enter summary judgment "if the movant shows that there is no genuine
8 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
9 Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable
10 inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly
12 made and supported, the opposing party "must come forward with 'specific facts showing that
13 there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
14 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the
15 outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence
16 for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49.
17 Ultimately, summary judgment is appropriate against a party who "fails to make a showing
18 sufficient to establish the existence of an element essential to that party's case, and on which that
19 party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

20 Conversion, the sole remaining claim in this case, is (1) the act of willfully interfering
21 with any chattel, (2) without lawful justification, (3) whereby any person entitled thereto is
22 deprived of the possession of it. *Judkins v. Sadler-MacNeil*, 376 P.2d 837 (Wash. 1962),
23 *Davenport v. Wash. Educ. Ass'n.*, 197 P.3d 686 (Wash. Ct. App. 2008).

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26 conversion and negligent bailment in under Washington State law). The court will not consider new
claims on summary judgment. (Dkt. No. 49 at 2.)

ORDER GRANTING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

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B. Horton's Towing Motion for Summary Judgment

The parties are in agreement as to the facts reviewed above. Plaintiff asserts that "the legal question presented is whether a tribal court has jurisdiction over a non-tribal member to forfeit his automobile if the tribal prosecutorial authorities can establish probable cause to believe that he has used his automobile to transport illegal drugs inside an Indian reservation." (Dkt. No. 61 at 2-3.)⁴ This question of law requires a determination of the Lummi Tribe's jurisdiction. However, Plaintiff has not exhausted his tribal remedies with regard to this exercise of jurisdiction. (See Dkt. No. 4-1.)

1. Plaintiff was Required to Exhaust Remedies in Tribal Court

A federal court has subject-matter jurisdiction to determine whether a tribal court has exceeded the lawful limits of its jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). However, exhaustion of the issue is required in the tribal court prior to pursuing a remedy for judicial over-reaching in federal court under comity principles. *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 578 (9th Cir. 1987). The Supreme Court held in *National Farmers Union Insurance Companies v. Crow Tribe of Indians* that a challenge to the exercise of civil jurisdiction by a tribe "should be conducted in the first instance in the Tribal Court itself." 471 U.S. 845, 856 (1985). In so determining, the Supreme Court emphasized the understanding that "Congress is committed to a policy of supporting tribal self-government and self-determination." *Id.* The *National Farmers Union* exhaustion requirement holds true whether the court's jurisdiction is based on diversity or a federal question. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

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⁴ Plaintiff asserts additional legal questions, including that "the question presented is whether the service of Lummi Notice of Seizure upon Horton's was a lawful justification for its action in releasing [P]laintiff's truck to the Lummi Police Officer," (Dkt. No. 61 at 2) based on the alleged lack of "legal basis for civil jurisdiction of forfeitures." (*Id.*), and that "A secondary question could be whether the 1999 Ram Pickup was lawfully seized by the Lummi Nation Officer Brandon Gates by his service of the Lummi Nation forfeiture process upon Horton's outside the territorial limits of the Lummi Nation." (*Id.* at 3). These questions need not be reached because dismissal is warranted based on principals of comity.

1 The Ninth Circuit has reiterated this stringent exhaustion requirement. *Marceau v.*
2 *Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008). "Principles of comity require federal
3 courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is
4 'colorable,' provided that there is no evidence of bad faith or harassment." (*Id.*) (emphasis
5 added.) This requirement is not discretionary, but "mandatory." *Id.* The Ninth Circuit in *Stock W.*
6 *Corp. v. Taylor* held that "the orderly administration of justice in the federal court will be served
7 by allowing a full record to be developed in the Tribal Court before either the merits or any
8 question concerning appropriate relief is addressed." 964 F.2d 912, 919 (9th Cir. 1992).

9 Here, there is no indication of bad faith or harassment, and nothing pled that would
10 support a departure from Ninth Circuit and Supreme Court precedent. The Lummi Nation has a
11 "colorable" claim of jurisdiction as it is undisputed that the transactions forming the basis of
12 Plaintiff's case "occurred or were commenced on tribal territory." *Stock W. Corp.*, 964 F.2d at
13 919 (internal quotations omitted). In sum, the Court may not hear Plaintiff's case as it requires
14 the Court to challenge the Lummi Nation's jurisdiction without providing the tribe the
15 opportunity to first examine the case. Accordingly, as there remains no genuine dispute of
16 material fact and Horton's towing is entitled to judgment as a matter of law, summary judgment
17 for Horton's is warranted.

18 2. Further Support for Summary Judgment

19 a. Plaintiff's Cited Authority is Irrelevant

20 Plaintiff relies on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) as authority
21 for the premise that forfeiture of his truck was impermissible. (Dkt. No. 61 at 3.) However,
22 *Oliphant* does not apply to civil matters, and the forfeiture, though instigated by Plaintiff's
23 criminal activity, was civil in nature. *National Farmers Union*, 471 U.S. 845, 855-57 (1985).

24 It is undisputed that Plaintiff violated tribal law by possessing approximately three
25 pounds of marijuana, on tribal land, using his vehicle to transport the marijuana. (See Dkt. No. 4-
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1 1 at 9.) The forfeiture of a vehicle used for illegal purposes is a civil matter under Lummi law.
2 See LNCL 5.09B.040(5)(A) (National Indian Law Library 2016) (Civil forfeiture section
3 addressing "Property Subject to Forfeiture," specifically motor vehicles used, or intended for
4 use, to facilitate the possession of illegal substances.). The statute also makes clear that
5 "Criminal prosecution under Chapter 5.09A of this Title is neither precluded by, nor required for,
6 civil forfeiture under Chapter 5.09B of this Title." LNCL 5.09B (National Indian Law Library
7 2016).⁵ Accordingly, *Oliphant* is of no use to Plaintiff's position.

8 Moreover, Plaintiff doubles-down on his use of out-of-circuit authority already rejected
9 by this court (*see* Dkt. No. 53 at 3-4), bewilderingly acknowledging that the opinion has been
10 vacated and going on to state: "Plaintiff embraces and adopts its reasoning." (Dkt. No. 66 at 2)
11 (citing *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 464 F. Supp. 2d 1130 (N.D. Okla.
12 2006), vacated, 505 F.3d 1007 (10th Cir. 2007)).

13 **b. Plaintiff Does Not Qualify for an Exception to the Exhaustion**
14 **Requirement**

15 While the exhaustion of tribal remedies requirement has several exceptions, Plaintiff has
16 not validly asserted any of them. Exhaustion is not required where: (1) an assertion of tribal
17 jurisdiction is "motivated by a desire to harass or is conducted in bad faith," (2) the action
18 patently violates express jurisdictional prohibitions, (3) exhaustion would be futile because of a
19 lack of adequate opportunity to challenge the court's jurisdiction, or (4) it is plain that no federal
20 grant provides for tribal governance of nonmembers' conduct on land as established by the
21 Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981). *Iowa Mut. Ins. Co.*, 480 U.S.
22 at 19 n.12;

23 _____
24 ⁵ Under Washington State law, forfeiture of a vehicle used to transport illegal substances is also a civil
25 matter, contrary to Plaintiff's outdated and inapplicable citation to *Deeter v. Smith*, 721 P.2d 519 (Wash.
26 1986). If the law were persuasive in any way, Plaintiff's characterization of the nature of forfeiture in this
case as "quasi-judicial" on one page and "civil in nature" on the following page, without explanation for
the contradiction, would likely defeat such persuasion. (Dkt. No. 61 at 4-5.)

1 *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013).

2 Plaintiff attempts to argue that an exception to the exhaustion requirement applies under
3 *Montana v. United States*. (Dkt. No. 61 at 5) (citing 450 U.S. 544 (1981)). *Montana* set out the
4 general rule that, absent congressional direction to the contrary, Native tribes lack civil authority
5 over the conduct of nonmembers on non-Tribal land within a reservation. 450 U.S. 544 (1981).
6 In *Strate v. A-1 Contractors*, the Supreme Court clarified the relationship between the *Montana*
7 case and the exhaustion requirement of *National Farmers Union and Iowa Mutual*. 520 U.S. 438
8 (1997). "Recognizing that our precedent has been variously interpreted, we reiterate that
9 *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement . . . These
10 decisions do not expand or stand apart from *Montana's* instruction on the inherent sovereign
11 powers of an Indian tribe." *Id.* at 453. *Strate* went on to examine whether an action arising out of
12 a traffic accident on a state highway that ran through tribal land was subject to tribal jurisdiction,
13 finding that it was not. *Id.* at 455-56.

14 To fall within the exhaustion exception of *Montana*, it must be "plain that no federal
15 grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's*
16 main rule," and "equally evident that tribal courts lack adjudicatory authority over disputes
17 arising from such conduct." *Strate*, 520 U.S. at 459 n.14 (1997). However, when "*Montana's*
18 main rule is unlikely to apply to the facts of this case," the *Strate* exception does not apply
19 because "[T]he tribal court does not plainly lack jurisdiction." *Grand Canyon Skywalk Dev.,*
20 *LLC*, 715 F.3d at 1204.

21 This case is factually distinct from *Montana* and *Strate* such that the exhaustion
22 requirement must be enforced. The Lummi Tribe's jurisdiction is based on events that occurred
23 on federal trust land and a state highway. The Ninth Circuit recently held that a state highway is
24 still within Indian country. *Bressi v. Ford*, 575 F.3d 891, 896 (9th Cir. 2009) ("the state highway
25 is still within the reservation and is part of Indian country . . . The tribe therefore has full law
26 enforcement authority over its members and nonmember Indians on that highway"). Indian

1 country means "all land within the limits of any Indian reservation under the jurisdiction of the
2 United States Government . . . including rights-of-way running through the reservation. 18
3 U.S.C. § 1151. Under Ninth Circuit precedent, Plaintiff's violations of tribal law occurred within
4 Indian country, and the exception to the exhaustion requirement established by the main rule in
5 *Montana* does not apply. *Grand Canyon Skywalk Dev., LLC v. 'Sai' Nyu Wa Inc.*, 715 F.3d 1196,
6 1205 (9th Cir. 2013). Accordingly, the exhaustion rule established in *Farmers Union and Iowa*
7 *Mutual* applies, and Plaintiff is not excused from this requirement.

8
9 **c. Adjudicating Lummi Tribal Court Jurisdiction Without the Nation as a
Party May Violate Fed. R. Civ. Pro. 19**

10 By seeking relief from a tribal forfeiture order on the basis that the Lummi Tribal Court
11 lacked jurisdiction, in the context of a conversion claim against an unrelated third party, Plaintiff
12 seeks a determination of a sovereign nation's jurisdiction without joining the Nation as a party.
13 This raises questions of whether the case is permissible under Fed. Rul. Civ. Pro. 19. *See, e.g.*,
14 *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (In reviewing a district court decision to
15 dismiss a case where tribal interests were at stake, but the tribe was not joined, "The district
16 court determined that, although the factors were not clearly in favor of dismissal, the concern for
17 the protection of tribal sovereignty warranted dismissal."); *Shermoen v. United States*, 982 F.2d
18 1312, 1317 (9th Cir. 1992) ("[T]he absent tribes have an interest in preserving their own
19 sovereign immunity, with its concomitant "right not to have [their] legal duties judicially
20 determined without consent." *Enterprise Mgt. Consultants v. U.S. ex rel. Hodel*, 883 F.2d 890,
21 894 (10th Cir. 1989).

22 **d. Plaintiff's Argument That the Order Would Not Have Been Enforceable
23 Even if Valid Fails**

24 Finally, Plaintiff appears to argue that even if the Lummi order were valid, it should not
25 have been enforceable off the reservation without a Superior Court determination, citing "CR
26 82.5" (apparently Wash. CR 82.5(c)). Wash. CR 82.5(c) reads:

1 "The superior courts of the State of Washington shall recognize,
2 implement and enforce the orders, judgments and decrees of Indian tribal
3 courts in matters in which either the exclusive or concurrent jurisdiction
4 has been granted or reserved to an Indian tribal court of a federally
5 recognized tribe under the Laws of the United States"

6 Plaintiff's citation makes clear that Superior Courts must carry out Tribal orders, but
7 offers no authority to support the idea that a private entity may not voluntarily comply with a
8 Tribal order off of Indian Country. In brief, the rule cited by Plaintiff only further weakens his
9 case.

10 For all of the foregoing reasons, Defendant Horton's Motion for Summary Judgment
11 (Dkt. No. 57) is GRANTED.

12 C. Government's Motion for Summary Judgment

13 The United States similarly moves for summary judgment based on, *inter alia*, Plaintiff's
14 failure to exhaust his administrative remedies with the Bureau of Indian Affairs ("BIA"). (Dkt.
15 No. 65.) Plaintiff may only assert his conversion claim against the United States under the
16 Federal Tort Claims Act ("FTCA"), which requires an exhaustion of administrative remedies
17 prior to filing suit. 28 U.S.C. § 2675.

18 In relevant part, the FTCA provides:

19 "An action shall not be instituted upon a claim against the United States
20 for . . . injury or loss of property . . . unless the claimant shall have first
21 presented the claim to the appropriate federal agency and his claim shall
22 have been finally denied by the agency in writing and sent by certified or
23 registered mail."

24 The Court has already ordered that, for the purposes of this case, Officer Brandon Gates
25 is deemed to have been an employee of the BIA in carrying out his law enforcement duties for
26 the Lummi Nation. (Dkt. No. 53.) Accordingly, Plaintiff was required to present his claim to the
BIA prior to bringing a claim for conversion under the FTCA.

It is undisputed that Plaintiff has not presented his claims to the BIA. (Dkt. No. 27 at 2.)
The law in this area is clear: the Court does not have jurisdiction to hear Plaintiff's case against

1 the United States. *McNeil v. United States*, 508 U.S. 106, 112–113 (1993) (“The FTCA bars
2 claimants from bringing suit in federal court until they have exhausted their administrative
3 remedies. Because petitioner failed to heed that clear statutory command, the District Court
4 properly dismissed his suit.”)

5 While Plaintiff may object to this ruling because his original complaint named Officer
6 Gates, and not the United States, as a party, this question will not be relitigated for a third time.
7 The Court considered the appropriateness of this substitution during previous rounds of briefing.
8 (Dkt. Nos. 39, 53, and 55.) However, Plaintiff may present his claim to the BIA within sixty (60)
9 days of this order pursuant to 28 U.S.C. § 2679(d)(5).

10 The Government’s Motion for Summary Judgment and/or to Dismiss (Dkt. No. 65) is
11 GRANTED.

12 **D. Plaintiff’s Motion for Summary Judgment**

13 Finally, Plaintiff’s cursory Motion for Summary Judgment and attached declaration does
14 nothing to rebut the appropriateness of summary judgment in Defendants’ favor. (Dkt. No. 60.)
15 Rather, Plaintiff repeats the circumstances of his DUI and loss of his truck. The Court
16 appreciates that the temporary loss of his vehicle caused Mr. Wilson—who has a limited, fixed
17 income—great inconvenience, even distress. However, this does not establish a genuine dispute
18 of material fact in his case: rather, the facts are essentially undisputed. Not only has Plaintiff has
19 not established that his truck was seized without legal justification; he has not established that
20 this Court has the jurisdiction to hear his case.

21 Accordingly, Plaintiff’s Motion for Summary Judgment (Dkt. No. 60) is DENIED.

22 **III. CONCLUSION**

23 For the foregoing reasons, both Defendants’ Motions for Summary Judgment (Dkt. Nos.
24 57 and 65) are GRANTED and Plaintiff’s Motion (Dkt. No. 60) is DENIED. The above-
25 captioned matter is hereby dismissed with prejudice.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN PEARSON,

Plaintiff,

v.

DIRECTOR OF THE DEPARTMENT
OF LICENSING, a subdivision of the
State of Washington, in his/her official
capacity, *et al.*,

Defendants.

CASE NO. C15-0731-JCC

ORDER GRANTING MOTIONS
FOR SUMMARY JUDGMENT

This matter comes before the Court on the motions for summary judgment by Defendants Director of the Department of Licensing (Dkt. No. 21) and Sergeant Andrew Thorne (Dkt. No. 24). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motions for the reasons explained herein.

I. BACKGROUND

The relevant facts are not in dispute. On January 21, 2015, Swinomish Police Department Officer Hans Kleinman pulled over Plaintiff Susan Pearson for failing to obey a stop sign. (Dkt. No. 25-1 at 1.) Both the traffic violation and the traffic stop occurred on tribal trust land within the external boundaries of the Swinomish Reservation. (*Id.*) Officer Kleinman ran Pearson's name through a driver's check and learned that her license was suspended three days earlier for

Appendix 2

1 unpaid tickets. (*Id.*) Officer Kleinman arrested Pearson. (*Id.*) During the search incident to arrest,
2 Officer Kleinman found evidence of controlled substances on Pearson's person. (*Id.*) The tribal
3 police officers subsequently seized Pearson's 1999 GMC S-10 pickup truck. (Dkt. No. 2-1 at 3;
4 Dkt. No. 25-2 at 2.)

5 Two days after Pearson's arrest, Defendant Andrew Thorne, a sergeant with the
6 Swinomish Police Department, received a call from Pearson. (Dkt. No. 26-1 at 2.) Pearson asked
7 where she should pick up her vehicle. (*Id.*) Sgt. Thorne responded that Pearson could not retrieve
8 her vehicle because the Swinomish Police Department was procuring a search warrant. (*Id.*)
9 Pearson then asked when her vehicle would be returned. (*Id.*) Sgt. Thorne responded that the
10 Tribe intended to initiate forfeiture proceedings because the vehicle was used to transport illegal
11 narcotics on tribal land. (*Id.*) Sgt. Thorne advised that Pearson would be receiving a seizure
12 notice from the Swinomish Tribal Court with a hearing date and that Pearson could retain an
13 attorney if she wished. (*Id.*)

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

16 The Swinomish Tribe gave Pearson notice of the proceeding to forfeit her vehicle
17 pursuant to tribal law. (Dkt. No. 25-4 at 2; Dkt. No. 25-5 at 2; Dkt. No. 25-6 at 2.) Pearson
18 contacted the Swinomish Tribal Court and indicated that she was aware of the matter. (Dkt. No.
19 25-8 at 2.) Ultimately, though, no attorney entered an appearance on her behalf, and Pearson did
20 not file an answer. (*See id.* at 3.) After 20 days, the Swinomish Tribal Court entered an order
21 forfeiting Pearson's ownership pursuant to Swinomish tribal laws. (*Id.* at 2-3.)

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

1 transfer title to Pearson's vehicle. (*Id.*) As of the time of filing of these motions, Pearson's truck
2 was still in the custody of the Swinomish Police Department. (Dkt. No. 25 at 3.)

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

9 II. DISCUSSION

10 A. Summary Judgment Standard

11 The Court shall grant summary judgment if the moving party shows that there is no
12 genuine dispute as to any material fact and that the moving party is entitled to judgment as a
13 matter of law. Fed. R. Civ. P. 56(a). In making such a determination, the Court must view the
14 facts and justifiable inferences to be drawn therefrom in the light most favorable to the
15 nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Once a motion for
16 summary judgment is properly made and supported, the opposing party must present specific
17 facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus.*
18 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Material facts are those that may affect the
19 outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence
20 for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49.
21 Ultimately, summary judgment is appropriate against a party who "fails to make a showing
22 sufficient to establish the existence of an element essential to that party's case, and on which that
23 party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

24 B. Motion by Director of Department of Licensing

25 Pearson alleges that the Department has a practice of transferring vehicle ownership to
26 itself pursuant to tribal forfeiture orders, which violates the law and the Department's own

1 protocols. (Dkt. No. 2-1 at 4.) Pearson asks the Court to enjoin the Director of the Department
2 from changing the certificate of title of Pearson's truck, because the Swinomish Tribe had no
3 authority to seize the vehicle. (*Id.*)

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

8 1. Standing

9 The Director first argues that Pearson lacks standing to seek an injunction against transfer
10 of her vehicle title. (*Id.*) Article III requires all litigants to establish a case and controversy in
11 order to invoke this court's jurisdiction. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37
12 (1976). Standing has three requirements: (1) an injury in fact, meaning "a harm suffered by the
13 plaintiff that is concrete and actual or imminent"; (2) causation, meaning "a fairly traceable
14 connection between the plaintiff's injury and the complained-of conduct of the defendant"; and
15 (3) redressability, meaning "a likelihood that the requested relief will redress the alleged injury."
16 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (internal quotations omitted).
17 Where a plaintiff seeks only declaratory and injunctive relief, he or she must also show a "very
18 significant possibility of future harm." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d
19 1121, 1126 (9th Cir. 1996).

20 Here, the future harm is the transfer of title from Pearson to the Department. But, Pearson
21 has not shown a "very significant possibility" that this harm will occur. The Tribe has not
22 attempted to transfer the title. The Department has flagged Pearson's certificate of title, meaning
23

24
25 ¹ The Director also argues that, to the extent Pearson alleges a § 1983 claim against her,
26 the complaint does not sufficiently plead a claim. (Dkt. No. 21 at 5.) Pearson's response brief
acknowledges that she "only seeks a declaration or injunction against the Director," not damages
under § 1983. (Dkt. No. 27 at 10.)

1 that the title cannot be transferred unless Pearson authorizes it or a Washington State court orders
2 it. These limitations are encapsulated in the Department policy requiring "that the tribal court
3 order be 'converted to judgment' in a Washington Superior Court that the tribal offer is
4 enforceable." (Dkt. No. 23 at 2.) Factually speaking, it seems very unlikely that the Department
5 will unlawfully obtain title to Pearson's truck.

6 Pearson protests that the Department has previously argued that its policy would prevent
7 transfer of title, yet it still assumed title to the subject vehicles. (Dkt. No. 27 at 4.) She cites two
8 cases as examples: *Candee Washington v. Director Skagit County*, Skagit County Cause No. 15-
9 2-00293-0 and *Jordynn Scott v. Director of Department of Licensing*, Whatcom County Cause
10 No. 15-2-00301-8. (Dkt. No. 27 at 2.) These cases involve the transfer of a certificate of title
11 pursuant to a tribal court order that was not converted to judgment in a Washington superior
12 court. But, as the Director explains, these cases triggered the Department to more stringently
13 enforce its policy and the corresponding regulations. (Dkt. No. 23 at 3; Dkt. No. 21 at 4.) This
14 further negates the likelihood that the same harm will befall Pearson.

15 Pearson also asserts that there is another case involving a non-Native American, Narin
16 Sin, whose vehicle was seized by the Tulalip Tribe and whose certificate of title was transferred
17 by the Department. (Dkt. No. 27 at 2.) Pearson provides no evidence of this occurrence, nor any
18 explanation of when the alleged seizure and transfer occurred. In response, the Department
19 submits an affidavit showing that Narin Sin had a vehicle forfeited by the Tulalip Tribe, but that
20 there is no record of the vehicle's title being transferred pursuant to a tribal forfeiture. (Dkt. No.
21 31 at 2.) This fact does not make it significantly likely that Pearson's title will be impermissibly
22 transferred. In sum, Pearson fails to demonstrate a sufficient possibility of future harm to
23 establish standing.

24 2. Immunity

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

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

5 (Emphasis added.)

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

9 Pearson's claims against the Director are DISMISSED with prejudice

10 **C. Motion by Sergeant Andrew Thorne**

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

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

19 **1. Sovereign Immunity**

20 Sgt. Thorne first asserts that Pearson's claim is barred by sovereign immunity. (*Id.*)
21 Tribal sovereign immunity bars suits against a tribe itself, as well as suits against the tribe's
22 employees in their official capacities. *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 20 13).
23 Tribal sovereign immunity generally does not protect tribal employees who are sued in their
24 individual capacities for money damages, even if the employees were acting in the course and
25 scope of their employment. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086-90 (9th Cir.
26 2013). However, a “plaintiff cannot circumvent tribal immunity by the simple expedient of

1 naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Miller*, 705 F.3d
2 at 928 (internal quotations omitted). In such cases, "the sovereign entity is the real, substantial
3 party in interest and is entitled to invoke its sovereign immunity from suit." *See Cook v. AVI*
4 *Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).

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

9 2. Acting Under Color of Tribal Law

10 Sgt. Thorne further argues that he was not acting under color of state law. (Dkt. No. 24 at
11 2-3.) To establish liability under § 1983, a plaintiff must demonstrate that (1) the defendant acted
12 under color of state law and (2) the defendant deprived the plaintiff of a right secured by the
13 Constitution or laws of the United States. *Learned v. City of Bellevue*, 860 F.2d 928, 933 (9th
14 Cir. 1988). The plaintiff bears the burden of showing that the defendant's conduct was performed
15 under color of state law. *See id.* "[A]ctions taken under color of tribal law are beyond the reach
16 of § 1983." *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).

17 Pearson alleges that Sgt. Thorne "act[ed] beyond any authority [he] ha[s] as [a]
18 Swinomish tribal police officer" and was "acting under color of state law and as [a] General
19 Authority Washington State Police Officer." (Dkt. No. 2-1 at 6.) However, she fails to support
20 this assertion. First, her argument that the tribal police officers exceeded their authority is based
21 on the Tribe's alleged lack of jurisdiction, which again demonstrates that sovereign immunity
22 bars this suit. Moreover, the only evidence of Sgt. Thorne's involvement in this matter shows
23 that he merely answered a phone call from Pearson and relayed information to her. Apart from
24 the fact that this conduct was related to the forfeiture—which, again, is challenged on grounds
25 barred by sovereign immunity—Pearson has not shown that Sgt. Thorne's actions exceeded his
26 authority as a tribal officer.

1 3. Exhaustion of Tribal Remedies

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

11 As discussed above, Pearson's suit is unquestionably a challenge to tribal court
12 jurisdiction. It is also undisputed that Pearson was aware of the forfeiture proceeding, but never
13 filed an answer or otherwise responded. She has not appealed the forfeiture order. She thus has
14 failed to exhaust her tribal remedies and cannot bring this challenge in federal court.

15 4. Pearson's Response

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

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

22 **III. CONCLUSION**

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

26 //

1 DATED this 20th day of June 2016.
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5 **A**
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7 _____
8 John C. Coughenour
9 UNITED STATES DISTRICT JUDGE
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LUMMI TRIBAL COURT
LUMMI NATION

2014 OCT 23 PM 4: 10

FILED BY BB CLERK: ag

LUMMI TRIBAL COURT
LUMMI NATION

Case No.:

**NOTICE OF SEIZURE AND INTENT TO
INSTITUTE FORFEITURE**

**1999 BLUE DODGE RAM PICK UP
3B7HF16Y1XM576675
Respondent**

**CURTIS WILSON,
C/O Whatcom County Jail
311 Grand Ave
Bellingham WA 98225**

also resides at **CURTIS WILSON
3224 Sunset Way
Bellingham, WA 98226**

510-23499

And to: CLERK OF COURT

YOU ARE HEREBY NOTIFIED that an object of the following description was seized and intent to institute forfeiture proceedings will follow:

**1999 BLUE DODGE RAM PICK UP, VIN: 3B7HF16Y1XM576675, registered to CURTIS WILSON,
3224 Sunset Way, Bellingham, WA 98226**

The above-described property was seized by Lummi Nation Law Enforcement Officer Grant Assink on or about the 22nd day of October, 2014 at or near 2100 block Lummi Shore Road, Bellingham, WA 98226. Ofc Assink had probable cause to believe that the property was used in a manner that facilitated an illegal activity under Chapter 5.09B. The property was seized during a traffic stop for a DUI investigation. A large 3 lb coffee can full of marijuana was located during a consensual search of this vehicle. The driver and registered owner, Curtis Wilson was arrest by Washington State Patrol for DUI. After initially seizing the vehicle, the Lummi Nation Police Department permitted the Washington State Patrol to impound the vehicle. The Nation is now seizing the vehicle and seeking its forfeiture under 5.09B.

The Lummi Nation has seized and intends to forfeit the property to the Lummi Nation, under LCL 5.09B, because it was used to transport an illegal substance. LCL 5.09A.110 (d)(2) and 5.09B.040(5)(A).

OWNER'S ANSWER TO NOTICE. You must answer to the allegations that give rise to forfeiture by complying with the instructions as set forth in the attached copy of The Lummi Nations Code of Laws, Chapter 5.09B.

Presented by:

[Signature]
Lummi Nation Police Officer

10-23-14
Date

Lummi Tribal Court
Lummi Nation
2016 Kwina Road
Bellingham, WA 98226
(360) 384-2305

NOTICE OF SEIZURE AND INTENT TO FORFEIT -
TITLE 5.09B

Appendix 3

Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CURTISS WILSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA, JOHN OR
JANE DOE, Director of the Department of
Licensing, a subdivision of the State of
Washington, in his/her official capacity and the
STATE OF WASHINGTON, and HORTON'S
TOWING, a Washington Corporation,

Defendants.

No. 2:15-cv-00629-JCC

DEFENDANT HORTON'S TOWING'S
MOTION FOR SUMMARY JUDGMENT

WHATCOM COUNTY SUPERIOR
COURT CAUSE NO.: 14-2-02821-7

NOTE ON MOTION CALENDAR:

FEBRUARY 26, 2016

I. INTRODUCTION AND RELIEF REQUESTED

COMES NOW Defendant Horton's Towing ("Horton's") by and through its undersigned counsel, and hereby respectfully requests that this Court grant summary judgment and dismiss plaintiff's claim of conversion with prejudice. All actions taken by Horton's Towing, as alleged by plaintiff in the Complaint, were pursuant to lawful authority. Indeed, the plaintiff can present no set of facts upon which a claim for conversion may be established against Horton's.

Appendix 4

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II. STATEMENT OF FACTS

This matter arises as a result of events which occurred after plaintiff, Curtiss Wilson, was arrested for DUI in Bellingham, Washington. Wilson's vehicle was impounded at the direction of the Washington State Patrol and subsequently seized pursuant to a Lummi Nation Notice of Seizure approximately 24 hours after it had been impounded. (Dkt. #4-1, p.9). With respect to Horton's Towing, the plaintiff initially brought three claims under theories of outrage, deprivation of civil rights under 42 U.S.C. §1983, and conversion. (Dkt. # 4-1). On September 17, 2015, the Court dismissed plaintiff's outrage and civil rights (§1983) claims, leaving conversion as the sole remaining cause of action. (Dkt. #25). Defendant Horton's Towing now brings this motion seeking dismissal with prejudice of plaintiff's conversion claim.

As set forth in Plaintiff's Amended Complaint and prior briefing to the Court, Wilson had been driving on the Lummi Reservation when he was stopped by a Lummi Nation Officer under suspicion of driving while intoxicated. (Dkt. #4-1, p.9). Pursuant to applicable jurisdictional procedure, the Washington State Patrol ("WSP") was notified and called out to make the arrest. *Id.* Plaintiff's vehicle was impounded at the direction of the WSP. The WSP Trooper contacted Horton's Towing to tow the plaintiff's vehicle away from the scene. *Id.* The following day, Lummi Nation Officer Brandon Gates appeared at Horton's Towing and presented an official Lummi Tribal Court Notice of Seizure. *Id.* Horton's Towing complied with the Lummi Nation Notice of Seizure and released the vehicle to Officer Gates. *Id.* Horton's Towing was in possession of the vehicle for less than 24 hours before it was seized by

1 Lummi Tribal Officer Gates. The plaintiff does not contend that a demand for return was made
2 at any time during that short period. *Id.*

3 Plaintiff alleges that Horton's compliance with the Lummi Nation Notice of Seizure,
4 releasing the vehicle to Officer Gates, constituted the tort of conversion. (Dkt. #4-1). Horton's
5 Towing disputes this contention because the alleged tortious actions of Horton's Towing,
6 including both the towing of plaintiff's vehicle (at the direction of WSP) and complying with
7 an official Notice of Seizure (issued by the Lummi Nation) were done pursuant to lawful
8 authority. Under such circumstances, a claim for conversion cannot stand and dismissal is
9 therefore appropriate.

10 III. STATEMENT OF ISSUE

11 1. Should the Court grant summary judgment and dismiss plaintiff's conversion
12 claim where the facts do not establish a required element that Horton's acted without lawful
13 justification? Yes.

14 IV. AUTHORITY AND ARGUMENT

15 A. Summary Judgment Standard.

16 Summary judgment is appropriate if, after viewing the evidence in the light most
17 favorable to the nonmoving party, the Court determines there are no genuine issues of material
18 fact. Fed.R.Civ.P. 56(c)(2). There is no genuine issue of fact for a trial where the record, taken
19 as a whole, could not lead a rational trier of fact to find for the nonmoving party. Matsushita
20 Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d
21 538 (1986). The Court must inquire into "whether the evidence presents a sufficient
22 disagreement to require submission to a jury or whether it is so one-sided that one party must
23 prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct.

1 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of showing that there
2 is no evidence which supports an element essential to the nonmovant's claim. Celotex Corp. v.
3 Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has met
4 this burden, the nonmoving party then must show that there is in fact a genuine issue for trial.
5 Anderson, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine
6 issue of material fact, "the moving party is entitled to judgment as a matter of law." Celotex,
7 477 U.S. at 323-24.

8 **B. The Plaintiff Cannot Fulfill The Elements of Conversion.**

9 The tort of conversion is "the act of wilfully interfering with any chattel, without
10 lawful justification, whereby any person entitled thereto is deprived of the possession of it."
11 Judkins v. Sadler-MacNeil, 61 Wn.2d 1, 3, 376 P.2d 837 (1962)(emphasis added). In some
12 circumstances, one in possession of a chattel as bailee (or otherwise) can be held liable for
13 conversion, if on demand he refuses to surrender possession of the chattel to another entitled
14 to immediate possession thereof. *Id.*, 61 Wn.2d at 5 (citing Restatement, Torts (First), § 237
15 (1934)(emphasis added).

16 The case law on conversion is clear and straightforward: The commission of an act
17 without lawful justification is a required element of the claim. Here, reasonable minds cannot
18 disagree that Horton's Towing acted under lawful authority when the vehicle was: (a)
19 impounded and towed at the direction of the WSP, and (b) released to Lummi Nation Officer
20 Gates pursuant to a Lummi Nation Trial Court Notice of Seizure. Horton's was in possession
21 of the vehicle for less than 24 hours before it was released to Officer Gates pursuant to the
22 Notice of Seizure. During that short time, there was no demand made by plaintiff to surrender
23

1 possession. Plaintiff has presented no evidence which could possibly lead a rational trier of
2 fact to conclude that Horton's Towing acted without lawful justification. Where there is no
3 such evidence on record, plaintiff's conversion claim fails as a matter of law.

4
5 **V. CONCLUSION**

6 For all of the foregoing reasons, defendant Horton's Towing respectfully requests that
7 the Court grant summary judgment and dismiss plaintiff's conversion claim. The facts do not
8 establish that Horton's acted without lawful justification either by towing the vehicle at the
9 direction of the Washington State Patrol and/or releasing the vehicle pursuant to the Lummi
10 Nation Notice of Seizure. A proposed order accompanies this motion.

11 DATED this 3rd day of February, 2016.

12 FORSBERG & UMLAUF, P.S.

13
14 By: /s/Robert W. Novasky
15 Robert W. Novasky, WSBA #21682
16 FORSBERG & UMLAUF, P.S.
17 One North Tacoma Ave. Suite 200
18 Tacoma, WA 98403
19 Email: rnovasky@forsberg-umlauf.com
20 Attorneys for Defendant Horton's Towing
21
22
23

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing DEFENDANT HORTON'S TOWING'S MOTION FOR SUMMARY JUDGMENT on the following individuals in the manner indicated:

Mr. Thomas B. Nedderman
Floyd, Pflueger & Ringer, P.S.
200 W. Thomas St., Suite 500
Seattle, WA 98119-4296
Facsimile: 206-441-8484
 Via U.S. Mail
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Annette L. Hayes
United States Attorney
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, WA 98101
 Via U.S. Mail
 Via Facsimile
 Via Hand Delivery
 Via ECF

SIGNED this 3rd day of January, 2016, at Tacoma, Washington.

/s/Myia McMichael
Myia O. McMichael

HONORABLE JOHN C. COUGHENOUR

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Attorneys for Defendant Andrew Thorne

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SUSAN PEARSON, a single person,

Plaintiff,

vs.

Director of the Department of Licensing, a
subdivision of the State of Washington, in his/her
official capacity and J. Schwahn, H. Kleinman,
M. Radley, A. Thorne Larry Yonally Tribal
Police Officers and General Authority Police
Officers pursuant to RCW 10.92 in their official
capacity and in their individual capacity and all
police officers, now unknown who were involved
in the seizure and forfeiture of 1999 GMC S-10
Pickup truck,

Defendants.

NO. 2:15-cv-00731-JCC

DEFENDANT ANDREW
THORNE'S MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
April 22, 2016
Without Oral Argument

INTRODUCTION

Plaintiff Susan Pearson¹ ("Plaintiff") filed this action in Skagit County Superior Court
against the Washington State Department of Licensing ("DOL") and several officers of the

¹ According to official documents, including documents from the Washington Department of Licensing, Plaintiff's
name is actually spelled Susan Pierson. It appears she misspelled her name on the caption to this lawsuit.

DEFENDANT ANDREW THORNE'S MOTION FOR SUMMARY JUDGMENT - 1
(2:15-cv-00731-JCC)

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119
TEL 206 441-4455
FAX 206 441-8484

Appendix - 5

1 police department for the Swinomish Indian Tribal Community ("Swinomish Tribal Police
2 Department").² Her sole claim is under 42 U.S.C. § 1983.

3 In January 2015, Swinomish police officers initiated a traffic stop and arrested Plaintiff
4 within the external boundaries of the Swinomish Reservation, seized her vehicle, instituted a
5 forfeiture proceeding, and obtained a default judgment after Plaintiff did not answer or file a
6 claim of interest. Plaintiff, who is not Native American, alleges that the seizure of her vehicle
7 and the forfeiture proceeding violated her rights under the Fifth and Fourteenth Amendments to
8 the United States constitution, as well as her rights under the Washington constitution.³
9 Although she names multiple officers in her Complaint, Plaintiff has only properly served
10 Defendant Sergeant Andrew Thorne. This action was removed to this Court immediately after
11 he was served. Since then, Plaintiff has not made any initial disclosures under Fed. R. Civ. P.
12 26(a)(1) or meaningfully prosecuted this case.

13 This Court should dismiss Plaintiff's claim against Sgt. Thorne with prejudice for three
14 reasons. *First*, her claim is barred by tribal sovereign immunity. Although she has sued Sgt.
15 Thorne in his individual capacity for money damages, Plaintiff's lawsuit is essentially a
16 challenge to the tribe's jurisdiction to seize and to forfeit a non-Indian's vehicle. Thus,
17 Plaintiff's claim is "in reality an official capacity suit." *Maxwell v. County of San Diego*, 708
18 F.3d 1075, 1089 (9th Cir. 2013). Because official-capacity claims are suits against the tribe
19 itself, they are foreclosed by sovereign immunity. *Miller v. Wright*, 705 F.3d 919, 927-28 (9th
20 Cir. 2013).

21 ² The Swinomish Indian Tribal Community is a federally recognized tribe. *Indian Entities Recognized and*
22 *Eligible To Receive Services From the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5021 (Jan. 29, 2016).

23 ³ Because Washington courts have refused to recognize a cause of action in tort for violation of the state
constitution, see *Janaszak v. State*, 173 Wn. App. 703, 723-24, 297 P.3d 723 (2013), this motion does not address
that component of her claim.

1 During the search incident to arrest, Officer Kleinman "discovered 2 small syringes in
2 [Plaintiff's] right vest pocket along with a small clear unmarked bottle full of a variety of pills."
3 *Id.* He also found suspected heroin inside containers in Plaintiff's front pants pockets. *Id.*
4 Officer Kleinman placed Plaintiff in the back of his patrol vehicle and transported her to the
5 Swinomish Police Department. *Id.* Subsequent testing confirmed the substance inside the
6 containers was heroin. *Id.* Plaintiff was then transported to the Skagit County Jail and was
7 booked on controlled-substance related charges. *Id.*

8 Approximately one hour after she was stopped, a tow-truck company arrived on the
9 scene at the tribal officers' request and transported Plaintiff's vehicle to the Swinomish Police
10 Department impound lot. *Nedderman Decl.*, Ex. B. The next day, a K9 sniffed the air around
11 the exterior of Plaintiff's vehicle and "alerted/responded positive for the presence of an odor of
12 an illegal narcotic emitting from the vehicle." *Id.* Approximately one week later, the
13 Swinomish Police Department searched Plaintiff's vehicle pursuant to a warrant and discovered
14 pills in unlabeled bottles and a hypodermic needle. *Nedderman Decl.*, Ex. C.

15 Two days after Plaintiff's arrest, Sgt. Thorne was working at the Swinomish Police
16 Department when he received a call from Plaintiff. *Declaration of Andrew Thorne* ("*Thorne*
17 *Decl.*"), Ex. A. Plaintiff asked where she should pick up her vehicle. *Id.* Sgt. Thorne
18 responded that Plaintiff could not retrieve her vehicle because the Swinomish Police
19 Department was in the process of procuring a search warrant. *Id.* Plaintiff then asked when her
20 vehicle would be returned; Sgt. Thorne responded that the Tribe intended to initiate forfeiture
21 proceedings because the vehicle was used to transport illegal narcotics on tribal land. *Id.* Sgt.
22 Thorne advised that Plaintiff would be receiving a seizure notice from the Swinomish Tribal
23 Court with a hearing date and that Plaintiff could retain an attorney if she wished. *Id.* Other
than this phone call, Sgt. Thorne had no other contact or involvement with Plaintiff. *Id.*, ¶4.

1 On February 3, Detective Larry Yonally signed a "Notification of Seizure of a Vehicle
2 Used in Controlled Substance Violations," which was filed with the Swinomish Tribal Court.
3 *Nedderman Decl.*, Ex. D. This notice cited Swinomish Indian Tribal Code 4-10.050, which
4 provides that "[t]he interest of the legal owner . . . of record of any vehicle used to transport
5 unlawfully a controlled substance, or in which a controlled substance is unlawfully kept,
6 deposited, used, or concealed . . . shall be forfeited to the Swinomish Indian Tribal
7 Community." *Id.* Section 4-10.050 also provides an officer may seize the subject vehicle and
8 hold it as evidence "until forfeiture is declared or a release ordered." *Id.*

9 On February 13, the Tribal Court issued a "Clerks Notice to Respond to Seizure of
10 Vehicle." *Nedderman Decl.*, Ex. E. The notice advised Plaintiff that an answer must be filed
11 within 20 days after receiving the notice, or a default judgment would be entered. *Id.* Plaintiff
12 received the notice on March 12.⁴ *Nedderman Decl.*, Ex. F.

13 On April 14, Plaintiff called the Swinomish Tribal Court to discuss the forfeiture
14 proceeding. *Nedderman Decl.*, Ex. E. Plaintiff mistakenly thought a hearing was scheduled for
15 that date. *Id.* The Clerk's Office advised that no hearing was scheduled, but informed her that
16 her attorney (the same attorney in this action) could contact the Clerk's Office to receive
17 instruction on requesting membership to the Swinomish Tribal Court Bar. *Id.*

18 On July 23, after receiving no answer or claim of interest, the Swinomish Tribal Court
19 issued an order that forfeited Plaintiff's vehicle. *Nedderman Decl.*, Ex. H. The order states:

20 Registered Owner was sent notice Notification of Seizure and the Clerk's Notice
21 to Respond to Seizure by Certified Mail at her Department of Licensing address.
22 Pierson contacted the Court and indicated she was aware of the above-referenced
23 matter. The Clerk provided her with information on filing a claim in this matter
and with information on the process for an attorney to be admitted to appear in
this Court.

⁴ The notice was also mailed to Reliable Credit Association, Inc., ("RCA") who was listed with the DOL as the legal owner of Plaintiff's vehicle. The tribe subsequently determined that RCA did not have any interest in the vehicle. RCA provided the tribe with a release of interest in the vehicle. *Nedderman Decl.*, Ex. G.

1 *Id.* The order then reads that “[m]ore than twenty days have passed [and] Pierson has not filed
2 an Answer or any claim in this matter.” *Id.* Because Plaintiff did not appear in the forfeiture
3 proceeding, the forfeiture order was not mailed to her. As with other jurisdictions, forfeiture
4 proceedings in the Swinomish Tribal Court are *in rem* actions. The owner of the property is not
5 a party to the proceeding unless the owner files an answer asserting a legal interest in the
6 property. Because Plaintiff never filed an answer, she was not a party of record who would
7 have received the forfeiture order. As of the time of this motion, Plaintiff’s vehicle is still in
8 the custody of the Swinomish Police Department. *Nedderman Decl.*, ¶12.

9 **B. Procedural Background**

10 Plaintiff filed an action in Skagit County Superior Court on March 31. *Nedderman*
11 *Decl.*, Ex. I. Plaintiff initiated her state-court action even though the forfeiture proceeding was
12 still pending in tribal court. Indeed, Plaintiff had received the “Clerks Notice to Respond to
13 Seizure of Vehicle” approximately two weeks before she filed in state court. Although her
14 complaint names a number of tribal officers, Plaintiff did not serve any of them initially.
15 Instead, Plaintiff served only the DOL. Plaintiff’s state-court complaint was also accompanied
16 by a motion for preliminary injunction, which sought to prohibit the “Director of the
17 Department of Licensing . . . from changing the certificate of title of plaintiff’s 1999 GMC S-
18 10 Pickup truck based upon any Indian court order of forfeiture because plaintiff is not an
19 Indian.” *Nedderman Decl.*, Ex. J. The motion was denied.

20 On April 29, Plaintiff used a process server to personally serve Sgt. Thorne with a
21 summons and complaint. *Thorne Decl.*, ¶2. Among the papers given to Sgt. Thorne were
22 copies of the summons and complaint intended for the other tribal officers named in the
23 complaint. *Id.*, ¶3. The process server asked Sgt. Thorne to distribute the other copies of the
summons and complaints to his colleagues. *Id.* Sgt. Thorne did not distribute copies to his
colleagues. *Id.*

1 Sgt. Thorne's counsel entered a notice of appearance in the state-court action and
2 promptly removed it to this Court based on federal-question jurisdiction. Dkt. #1, #2.
3 Plaintiff's sole cause of action is 42 U.S.C. § 1983 claim. She alleges that she is "not a Native
4 American" and that her vehicle was "seized for forfeiture . . . in Skagit County, Washington
5 within the confines of the Swinomish Indian Reservation." Dkt. #2-1 at ¶¶4, 5. Plaintiff asserts
6 that Sgt. Thorne and other tribal officers acted "under color of state law" to deprive Plaintiff of
7 her "due process rights under the United States and Washington Constitutions." *Id.*

8 To date, Plaintiff has not properly served any tribal officers other than Sgt. Thorne.
9 Plaintiff has not provided initial disclosures under Fed. R. Civ. P. 26(a)(1) or otherwise
10 meaningfully prosecuted this case. Sgt. Thorne now moves for summary judgment.

11 ARGUMENT

12 A. Summary Judgment Standard

13 Summary judgment shall be granted if the moving party shows that there is no genuine
14 dispute as to any material fact and that the moving party is entitled to judgment as a matter of
15 law. Fed. R. Civ. P. 56(a). In making such a determination, the Court should view the facts
16 and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving
17 party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202
18 (1986). Once a motion for summary judgment is properly made and supported, the opposing
19 party must present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P.
20 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348,
21 89 L. Ed. 2d 538 (1986). Material facts are those that may affect the outcome of the case, and a
22 dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to
23 return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49. Ultimately, summary
judgment is appropriate against a party who "fails to make a showing sufficient to establish the
existence of an element essential to that party's case, and on which that party will bear the

1 burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.
2 Ed. 2d 265 (1986).

3 **B. Plaintiff’s Claim is Barred by Tribal Sovereign Immunity**

4 The Swinomish Tribe is a domestic dependent sovereign, possessed of all sovereignty
5 under American law except that which has been limited by its dependency on the United States,
6 explicitly limited by Congress, or waived by the tribe. *Oliphant v. Suquamish Indian Tribe*,
7 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978); *Santa Clara Pueblo v. Martinez*, 436
8 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); *C&L Enterprises v. Citizen Band of*
9 *Potawatomi Indian Tribe*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001). Sovereign
10 immunity is a necessary corollary of tribal sovereignty. *Three Affiliated Tribes of the Ft.*
11 *Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881
12 (1986). Tribal sovereign immunity bars suits against the tribe itself, as well as suits against the
13 tribe’s employees in their official capacities.⁵ *Miller*, 705 F.3d at 927-28.

14 In the Ninth Circuit, tribal sovereign immunity generally does not protect tribal
15 employees who are sued in their individual capacities for money damages, even if the
16 employees were acting in the course and scope of their employment. *Maxwell*, 708 F.3d 1086-
17 90.⁶ Here, Plaintiff seeks money damages again Sgt. Thorne and the other tribal officers in
18 their individual capacity. Dkt. #2-1, ¶17. However, the *Maxwell* exception to tribal sovereign

19 ⁵ Tribal sovereign immunity does not preclude official-capacity suits that seek prospective non-monetary relief
20 against tribal employees acting in violation of federal law. *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct.
21 441 (1909). Plaintiff does not seek any such relief against Sgt. Thorne or the other tribal officers. Instead,
22 Plaintiff seeks money damages. Dkt. #2-1, ¶17 (alleging that Sgt. Thorne and other tribal officers are “liable as
23 individuals for damages”).

⁶ *But see Phillips v. Salt River Police Dep’t*, No. CV-13-798-PHX-LOA, 2013 U.S. Dist. LEXIS 60730, at *14 (D.
21 Ariz. Apr. 29, 2013) (“It is also well-settled in this circuit that this immunity protects tribal officials acting within
22 the scope of their valid authority.”) (internal quotation and alteration omitted); *Francisco v. Navajo Nation Police*
23 *Dep’t*, No. CV-14-8059-PCT-DGC, at *6 (D. Ariz. Jan. 14, 2015) (recognizing conflict between *Phillips* and
Maxwell).

1 immunity does not apply here: Plaintiff's suit is individual-capacity in name only; it is "in
2 reality an official capacity suit" that is barred by tribal sovereign immunity. *Maxwell*, 708 F.3d
3 at 1089.

4 "A plaintiff cannot circumvent tribal immunity 'by the simple expedient of naming an
5 officer of the Tribe as a defendant, rather than the sovereign entity.'" *Cook v. AVI Casino*
6 *Enters.*, 548 F.3d 718, 727 (9th Cir. 2008) (quoting *Snow v. Quinalt Indian Nation*, 709 F.2d
7 1319, 1322 (9th Cir. 1983)). In such cases, "the sovereign entity is the 'real, substantial party
8 in interest and is entitled to invoke its sovereign immunity from suit even though individual
9 officials are nominal defendants.'" *Cook*, 709 F.3d at 727 (quoting *Regents of the University of*
10 *California v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)). Plaintiff has
11 sued Sgt. Thorne and other officers in their individual capacities, but the gravamen of her
12 lawsuit is a challenge to the authority of the tribal court to issue an order forfeiting the vehicle
13 of a non-Indian. In effect, Plaintiff is attempting to hold the Swinomish Tribe liable for its
14 judicial functions. This betrays her claim as "an official capacity suit." *Maxwell*, 708 F.3d at
15 1089; see *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) (holding that
16 plaintiff's individual-capacity claims for money damages were barred by tribal sovereign
17 immunity because the claims challenged the "legislative functions" of the tribe and would have
18 "attacked the very core of tribal sovereign immunity").

19 Plaintiff's attempt to circumvent case law regarding tribal sovereign immunity exposes
20 another problem with her suit. Plaintiff seeks relief from a tribal forfeiture order on the basis
21 that the Swinomish Tribal Court lacks jurisdiction. Yet she has not joined the tribe as a party,
22 even though she seeks a determination of the tribe's jurisdiction. Not only does this cast doubt
23 on the permissibility of Plaintiff's suit under Fed. R. Civ. P. 19, see *Kescoli v. Babbitt*, 101
F.3d 1304, 1311 (9th Cir. 1996); *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir.
1992), but it further establishes that Plaintiff's individual-capacity suit against Sgt. Thorne and

DEFENDANT ANDREW THORNE'S MOTION FOR
SUMMARY JUDGMENT - 9
(2:15-cv-00731-JCC)

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1 the other officers is a thinly-disguised action against the tribe itself. Accordingly, this Court
2 should dismiss Plaintiff's claim with prejudice on tribal sovereign immunity grounds.

3 **C. Plaintiff Cannot Satisfy the Elements of a § 1983 Claim**

4 This Court should dismiss Plaintiff's claim on the additional ground that she cannot
5 meet the basic elements of a § 1983 claim. To establish liability under § 1983 against Sgt.
6 Thorne, Plaintiff must demonstrate that (1) Sgt. Thorne acted under color of state law; and (2)
7 Sgt. Thorne deprived the plaintiff of a right secured by the Constitution or laws of the United
8 States. *Learned v. City of Bellevue*, 860 F.2d 928, 933 (9th Cir. 1988). Even assuming that
9 Plaintiff suffered a deprivation of her constitutional rights (and she did not),⁷ Plaintiff cannot
10 show that Sgt. Thorne acted under color of state law during any relevant period.

11 Plaintiff bears the burden of establishing that Sgt. Thorne's conduct was performed
12 under color of state law. *Learned*, 860 F.2d at 933; *Evans v. McKay*, 869 F.2d 1341, 1347 (9th
13 Cir. 1989). Put differently, Plaintiff must show that Sgt. Thorne "may fairly be said to be a
14 state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). "[I]t is the
15 plaintiff's burden to plead, and ultimately establish, the existence of 'a real nexus' between the
16 defendant's conduct and the defendant's 'badge' of state authority in order to demonstrate
17 action was taken 'under color of state law.'" *Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir.
18 1995). Absent this showing, Plaintiff's § 1983 claim must be dismissed. *R.J. Williams Co.*,
19 719 F.2d at 982 ("[A]ctions taken under color of tribal law are beyond the reach of § 1983.")

20 Plaintiff completely fails to carry her burden of demonstrating that Sgt. Thorne was a
21 state actor with regard to the seizure and forfeiture of her vehicle. As an initial matter, Sgt.

22 ⁷ Plaintiff alleges that she suffered a deprivation of her rights under the Washington state constitution. Dkt. #2-1 at
23 ¶ 10. Because no such claim exists, this motion does not address it. *Janassak v. State*, 173 Wn. App. 703, 723-24,
297 P.3d 723 (2013) ("Washington courts have consistently refused to recognize a cause of action in tort for
violations of the state constitution."). Further, § 1983 affords relief only for alleged violations of the United States
constitution.

1 Thorne's role in this case was extremely narrow, limited only to answering a telephone call
2 from Plaintiff about the status of her vehicle after it had been seized. As such, it is doubtful
3 whether Sgt. Thorne's actions are cognizable in the context of Plaintiff's claim. In any event,
4 Plaintiff's Complaint contains only the bald assertion that Sgt. Thorne and the tribal officers
5 acted "under color of state law." Dkt. #2-1, ¶13. Nothing in the record would create a triable
6 issue of fact to support this point. Plaintiff's vehicle was seized by tribal officers on tribal trust
7 land within the exterior boundaries of the Swinomish Reservation. The seizure and forfeiture
8 were carried out pursuant the Swinomish Tribal Code and by the Swinomish Tribal Court.
9 There is simply no evidence that Sgt. Thorne or any other named officers were acting under
10 authority of any local or state agency in the context of the seizure and forfeiture. *Young v.*
11 *Duenas*, 164 Wn. App. 343, 356, 262 P.3d 527 (Wash. Ct. App. 2011) (holding that, in the
12 context of the "actual function of the action taken by the officers . . . [t]here were no facts
13 demonstrating that [the tribal police officers] acted jointly with, or under authority of any
14 agency of the Washington State government" and that the plaintiff also could not show that the
15 tribal police officers were "enforcing Washington state laws."). Plaintiff's complaint fails to
16 allege—and the evidence refutes—that the seizure and forfeiture of Plaintiff's vehicle can
17 "fairly be attributed to the state," *Cabrera v. Martin*, 973 F.2d 735, 743 (9th Cir. 1992), or that
18 Sgt. Thorne or the other tribal officers were acting "in furtherance of the business" of the state.
19 *Romero v. Peterson*, 903 F.2d 1502, 1507 (10th Cir. 1991). As such, Plaintiff's § 1983 claim is
20 fatally deficient.

21 **D. Plaintiff Failed to Exhaust Her Tribal Remedies**

22 This Court should also dismiss Plaintiff's claim because she has not exhausted her tribal
23 remedies. A federal court has subject-matter jurisdiction to determine whether a tribal court
has exceeded the lawful limits of its jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 451,
117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). However, a party may not sue in federal court to

1 challenge tribal court jurisdiction until it has first exhausted its remedies in tribal court.
2 *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56, 105 S.Ct.
3 2447, 2453-54, 85 L.Ed.2d 818 (1985); *Allstate Indem. Co. v. Stamp*, 191 F.3d 1071, 1073 (9th
4 Cir. 1999) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 94 L. Ed. 2d 10, 107 S. Ct.
5 971 (1987)). "Principles of comity require federal courts to dismiss or to abstain from deciding
6 claims over which tribal court jurisdiction is 'colorable,' provided that there is no evidence of
7 bad faith or harassment." *Marceau v. Blackfoot Hous. Auth.*, 340 F.3d 916, 920 (9th Cir. 2008).
8 This requirement is not discretionary but "mandatory." *Id.*; *Atwood v. Fort Peck Tribal Court*
9 *Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) ("Under the doctrine of exhaustion of tribal
10 court remedies, relief may not be sought in federal court until appellate review of a pending
11 matter in a tribal court is complete."); *Stock W. Corp. v Taylor*, 964 F.2d 912, 919 (9th Cir.
12 1992) ("[T]he orderly administration of justice in the federal court will be served by allowing a
13 full record to be developed in the Tribal Court before either the merits or any question
concerning appropriate relief is addressed.")

14 Here, the tribe has a "colorable" claim of jurisdiction because the transactions forming
15 the basis of Plaintiff's claim "occurred or were commenced on tribal territory." *Stock W.*
16 *Corp.*, 964 F.2d at 919 (quoting *A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d
17 1411, 1416 (1986)). Moreover, Sgt. Thorne's failure-to-exhaust argument is not motivated by
18 bad faith or harassment. Plaintiff was clearly aware of the pending forfeiture proceeding, as
19 she received the "Clerks Notice to Respond to Seizure of Vehicle" in the mail and subsequently
20 called the tribal court to inquire about a possible hearing. Additionally, Plaintiff's attorney in
21 this case is the same one she reported to the tribal court. Despite having knowledge of the
22 proceeding, Plaintiff never filed an answer or claim of interest. She also has not appealed the
23 forfeiture order. Consequently, she failed to exhaust her tribal remedies and her claim against
Sgt. Thorne should be dismissed. *Fry v. Colville Tribal Court of the Confederated Tribes of*

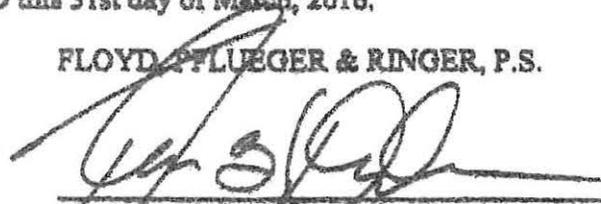
1 *the Coiville Reservation*, No. CV-07-0178-EFS, 2007 U.S. Dist. LEXIS 60570 (E.D. Wash.
2 Aug. 17, 2007) ("Here, Plaintiff Richard Fry failed to appear at the tribal court hearing on his
3 own motion to dismiss based on lack of subject matter jurisdiction. Plaintiff also failed to
4 appeal the tribal court's order denying Plaintiff's motion, thus denying the tribal appellate court
5 the opportunity to review the lower court's determination of jurisdiction. Based on Plaintiff's
6 own action, whether or not conducted in good faith, Plaintiff's tribal court remedies were never
7 exhausted. Therefore, this Court is directed by Supreme Court precedent to stay its hand, and
8 thus dismisses the instant action.")

9 **CONCLUSION**

10 For the reasons above, Sgt. Thorne respectfully requests this Court dismiss Plaintiff's
11 claim against him with prejudice.

12 RESPECTFULLY SUBMITTED this 31st day of March, 2016.

13 FLOYD, PFLUEGER & RINGER, P.S.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the United States of America, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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Counsel for Plaintiff

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DATED this 31st day of March, 2016.



April Magruder, Legal Assistant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN PEARSON, an individual,

Plaintiff,

vs.

Director of the Department of
Licensing,
a subdivision of the State of
Washington, in his/her official
capacity and J. Schwahn, H.
Kleinman, M. Radley, A. Thorne
Larry Yonally Tribal Police Officers
and General Authority Police
Officers pursuant to RCW 10.92
in their official capacity and in
their individual capacity and all
police officers, now unknown who
were involved in the seizure and
forfeiture of 1999 GMC S-10 Pickup
truck,

Defendants.

Case No: 2:15-cv-00731-JCC

MEMORANDUM IN REPLY TO
MOTION TO SUMMARY
JUDGEMENT OF SERGEANT
THORNE

THIS MEMORANDUM is submitted in reply to the motion for summary judgment of
Sergeant Thorne. Pierson concedes she is late.

PLAINTIFF'S MEMORANDUM IN REPLY
TO THE MOTION FOR SUMMARY
JUDGMENT OF SERGEANT THORNE

1

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Appendix - 6

The difference between this case and Curtis Wilson v. United States of America Case No: 2:15-cv-00629-JCC is that Sergeant Thorne is a Washington State police officer. RCW 10.92 contemplates that this case should have been referred to the Hudson and Livingston Insurance companies since the allegations are that Thorne acted under color of state law when he was dealing with Ms. Pierson, who is not a Native American. Thorne aided and abetted violation of Ms. Pierson's rights under state and federal law. Plaintiff's counsel believes that Tribal Insurance employs Mr. Neddman and plaintiff believes this case was never referred to the Hudson and Livingston Insurance companies. Those companies insure Swinomish police officers for any liability arising out of their actions as state police officers.

RCW 10.92 prevents the Swinomish Nation from raising sovereign immunity defense up to the limits of the insurance posted.

(ii) Each policy of insurance issued under this chapter must include a provision that the insurance shall be available to satisfy settlements or judgments arising from the tortious conduct of tribal police officers when acting in the capacity of a general authority Washington peace officer, and that to the extent of policy coverage neither the sovereign tribal nation nor the insurance carrier will raise a defense of sovereign immunity to preclude an action for damages under state or federal law, the determination of fault in a civil action, or the payment of a settlement or judgment arising from the tortious conduct.

Plaintiff contends Thorne is a state law enforcement officer and involved in the illegal confiscation of Ms. Pierson's motor vehicle. Plaintiff's claim to pursue Thorne in state court, or upon removal, to federal court is based upon Smith Plumbing Company v. Aetna Casualty & Surety, 149 Ariz. 524(1986), cert. denied 479 U.S. 987 (1986) and White Mountain Apache Tribe v. Smith Plumbing 856 F2d 1301 (9th Cir. 1988).

Under the precedent of Wilson Case No: 2:15-cv-00629-JCC, plaintiff urges the court this court not to dismiss based upon CR 19 or comity. A referral to the tribal court based upon

comity in substance is a ruling that in effect eliminates Ms. Pierson right to litigate this case against Thorne. Plaintiff asserts comity is not appropriate because of RCW 10.92, unless the legislative intent is to create two classes of Washington State police officers. The Swinomish are special because the Swinomish police officers, if sued under Washington state law, plaintiffs have to go tribal court first and then through the federal courts. Such is not and could not be the legislative intent of RCW 10.92 because, again, the legislative intent was to create equality between Indian police officers certified under RCW 10.92 and all other Washington state law enforcement officers.

CONCLUSION

Plaintiffs in this case and in similar litigation have uncovered a systematic breakdown in the operation of RCW 10.92. That statute was designed to grant the Swinomish Nation the privilege of empowering its police officers as Washington State law enforcement officers. It was designed to grant equality to tribal officers under RCW 10.92 and all other Washington State police officers. Plaintiff should be permitted to litigate her case against Thorne individually and as a Washington State police officer up to the limits of the coverage under the Hudson and Livingston Insurance policies without interference from the Swinomish Tribe and its attorneys. The Washington State Attorney General should join in plaintiff's motion because his job is to enforce Washington state law, not to frustrate it. Lastly, plaintiff's counsel believes that the Tulalip Tribe has confiscated at least fifty or more automobiles owned by non Native Americans.

Dated this 27th day of April, 2016 at Bellingham, Washington


WILLIAM JOHNSTON 4567614
Attorney for Plaintiff SUSAN PIERSON

PLAINTIFF'S MEMORANDUM IN REPLY
TO THE MOTION FOR SUMMARY
JUDGMENT OF SERGEANT THORNE

3

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