No. 18-

IN THE

Supreme Court of the United States

CURTISS WILSON,

Petitioner,

v.

HORTON'S TOWING, A WASHINGTON CORPORATION; UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an Indian Tribe have authority under the second exception of *Montana v. United States*, 450 U.S. 544 (1981), to forfeit automobiles owned by non Native Americans for violation of tribal drug laws while on tribal land?

2. If so, does the Tribe have authority to seize a motor vehicle off reservation if it has probable cause to believe that the automobile previously contained illegal drugs while on tribal lands?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Curtiss Wilson, a resident of Washington State, is the petitioner in this Court. He was the appellant in the United States Court of Appeals for the Ninth Circuit.

Horton's Towing, a Washington corporation, is the respondent in this Court and was the respondent before the United States Court of Appeals for the Ninth Circuit.

The United States of America was a respondent before the United States Court of Appeals for the Ninth Circuit. Petitioner is not seeking certiorari to review the portion of the Ninth Circuit's opinion ratifying the substitution of the United States for Officer Brandon Gates.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases:

Page

Cited Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Curtiss Wilson respectfully requests that this court grant a writ of certiorari to review the order denying petitioner's petition for rehearing entered on November 16, 2018 and the judgment and opinion of the United States Court of Appeals for the 9th Circuit entered October 9, 2018.

OPINIONS BELOW

The order of the United States District Court for the Western District of Washington granting summary judgment and dismissing the case (Pet. App. 21a-36a) is reported at 2016 WL 1221655 (March 29, 2016).

The opinion of the United States Court of Appeals for the 9th Circuit affirming the dismissal (Pet. App. 1a-18a) is reported at 906 F.3d 773 (9th Cir. October 9, 2018).

Petitioner's petition for rehearing was denied on November 16, 2018 (Pet. App. 37a-38a).

JURISDICTION

The opinion of the United States Court of Appeals for the 9th Circuit affirming the dismissal of petitioner's tort claim was issued on October 9, 2018. Petitioner's petition for rehearing was denied on November 16, 2018. Petitioner's petition is timely filed. This court has jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor shall be deprived of life liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT X provides

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

PRELIMINARY STATEMENT

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

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

This was pointed out to the 9th circuit court in oral argument in the instant case. Washington's Superior court rule, Cr 82.5 (c) provides that tribal judgments are enforceable in Washington unless the Washington Superior Court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington.

In all of the above cases, the Swinomish tribe did not file its forfeiture judgments in the Superior Court pursuant to CR 82.5. In the Washington case, her automobile was seized on tribal land, a parking lot at the Swinomish Tribe's Casino. In the case of Jordynn Scott and Susan Pearson, the automobiles were seized on a state road inside the Swinomish Tribe's reservation. Counsel of record in this case also represented Candee Washington, Jordynn Scott and Susan Pearson.

In the instant case, petitioner Wilson's truck was returned to him by the Lummi Nation after approximately four months after which this conversion lawsuit was filed

against Brandon Gates in his individual capacity for his seizure of Wilson' truck in Bellingham and against Horton's for releasing the truck to Gates in the Whatcom County Superior Court.

The instant case was selected for a certiorari application because Curtiss Wilson's truck was seized in Bellingham, Washington miles away from the Lummi Reservation, raising in petitioner's view a case which is similar to Lewis v. Clarke, –– U.S. –––, 137 S.Ct. 1285, 1289, 197 L.Ed.2d 631 (April 25, 2017) because of the conflict between Washington's sovereignty to adjudicate torts committed inside Washington and Indian sovereignty.

STATEMENT OF THE CASE

There are misstatements of fact which distort the analysis applied by the 9th Circuit Court of Appeals in its decision. Those misstatements are the statements of fact in the circuit court's opinion affirming that the Lummi police officer Grant Assink seized petitioner's truck for forfeiture on the night of his DUI arrest on the Lummi reservation. Such is not the case.

In the 9th circuit's opinion, in the SUMMARY short synopsis of the court's decision, is found the following statement, "After a search of the truck revealed marijuana, the truck was seized and the tribal court issued a notice of civil forfeiture." The mistakes of fact are first, the truck was not seized for forfeiture by Lummi police officer Grant Assink on the night of petitioner's arrest for DUI and, second, the tribal court did not issue a notice of civil forfeiture.

These mistakes are repeated in the first paragraph of the circuit court's decision where the court wrote the following:

> This appeal concerns the seizure of Plaintiff Curtiss Wilson's truck by Brandon Gates, a police officer of the Lummi Indian Tribe. After visiting a casino on the Lummi reservation, *Wilson was stopped by Lummi police and found with marijuana in his truck. Citing a violation of tribal drug laws, the Lummi Tribe issued a notice of civil forfeiture and took possession of Wilson's truck.* see Appendix A 2a.

Actually, the decision to forfeit Wilson's truck was made the day after Wilson was arrested for DUI when the Notice of Seizure and Intent to Institute Forfeiture of Wilson's truck was prepared and signed by another Lummi police officer, Brandon Gates, a police officer whose duties include enforcement of the tribe's drug laws. Gates took his Notice of Seizure and Intent to Institute Forfeiture form and travelled off reservation into Bellingham , where he presented it to Horton's Towing, which had possession of the truck, and in response thereto, Horton's released Wilson's truck to Gates who took the truck back to the Lummi reservation. Appellant's Excerpts of Record at 23.

For reasons hereinafter stated, these misstatements of fact undermine the correctness of the 9th circuit's decision. The facts in the record show the Washington State Superior Court had jurisdiction over a tort committed inside Washington by a tribal police officer tort feasor in his individual capacity and the non Indian

owned Horton's Towing Company. The 9th circuit's holding requiring Wilson to refile his tort claim against Horton's in the Lummi tribal court conflicts with Lewis v. Clarke, Smith Plumbing Company 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). and infringes upon Washington's sovereignty and the authority granted to the States under the 10th amendment.

Later in the court's opinion, in the FACTUAL AND PROCEDURAL BACKGROUND section, the circuit court corrected its first mistake of fact that Wilson's truck was seized on the night of his arrest for forfeiture for violation of the Tribe's drug laws.

> On October 22, 2014, Plaintiff Curtiss Wilson drove his 1999 Dodge Ram pickup to a casino located on the Lummi Indian Reservation.1 After drinking at the casino, Wilson travelled onto a Washington state road crossing through the reservation. Wilson was stopped on this road by Grant Assink, a Lummi tribal police officer, who suspected that Wilson was driving while intoxicated.
>
> Officer Assink searched Wilson's pickup truck and found several containers of marijuana inside. Officer Assink then alerted the Washington State Patrol, who arrested Wilson for driving under the influence. At the direction of the Washington State Patrol, Horton's Towing impounded the truck and towed it off the reservation.

> The next day, the Lummi Tribal Court issued a "Notice of Seizure and Intent to Institute Forfeiture." The notice cited Section 5.09A.110(d)(2) of the Lummi Nation Code of Laws, which prohibits the possession of marijuana over one ounce, as the grounds for civil forfeiture. Lummi Tribal Police Officer Brandon Gates presented Horton's Towing with the forfeiture notice, and Horton's Towing released the truck to Officer Gates. see Appendix A 3a, 4a.

The second mistake of fact, namely, that it was the Lummi Tribal Court that issued a "Notice of Seizure and Intent to Institute Forfeiture" was never corrected. The record clearly shows that the Notice of Seizure and Intent to Institute Forfeiture form was prepared and signed by Lummi police officer Brandon Gates, a Lummi police officer whose duties including enforcement of the tribe's drug laws.

Both mistakes of fact were presented to the circuit court in petitioner's petition for rehearing which was denied without comment.

Both mistakes of fact are critical to the resolution of the case. Petitioner argued before the United States District Court that the Lummi tribal police officer Gates falsely represented that Wilson's truck was seized for forfeiture for violation of the Lummi Drug Code on the night of Wilson's arrest for DUI on the Lummi reservation. Actually the record shows that the Notice for the Seizure and Forfeiture of Wilson's truck was prepared and signed by Gates who represented that Grant

Assink, the Lummi tribal officer who stopped Wilson and called the Washington State Patrol to arrest him for DUI had in fact seized Wilson's truck for forfeiture on the Lummi reservation on the night of Wilson's arrest for DUI. That written statement of Gates was false as was the succeeding paragraph that Lummi police officer Assink "gave permission to the Washington State Patrol to impound the truck." None of this is true.

The record shows that Wilson subpoenaed Gates to testify in a pretrial hearing in his criminal DUI case to establish that Gates had written false statements of fact in his forfeiture notice to establish a false factual basis to seize and forfeit Wilson's truck. After the Lummi tribe appeared in the Washington state criminal prosecution and quashed the subpoena by the assertion of Indian sovereignty, the criminal prosecution against Wilson in the Whatcom County Disrict Court was dismissed because Whatcom County District Judge Matt Elich ruled Wilson's confrontation right to call Gates as a witness was abridged; see State v. Youde, 174 Wash. App. 873, 875, 301 P.3d 479, 480 (2013).

Because this case was before the United States District Court on review of a summary judgment order, all inferences flow in favor of petitioner. All of the above professions of fact by petitioner are true. Petitioner pointed out that Assink testified that he did not seize Wilson's truck for forfeiture; see Reply Brief of Appellant, page 4.[1]

1. In footnote 3 of the 9th circuit's opinion, the court wrote, "Plaintiff argues that the bad faith exception has been triggered. However because this argument was made below but not raised in Plaintiff's Opening brief, we deem it waived." Court of Appeals opinion at page 7. Petitioner presents these mistakes

The fact that the Lummi tribe's seizure of the truck for forfeiture did not take place on the Lummi Reservation, but rather the Indian forfeiture was commenced upon seizure of the truck from Horton's Towing in Bellingham is very relevant to resolution of the question of whether Washington sovereignty was violated by the Lummi tribe's seizure of Wilson's truck in Bellingham and, for that reason, Washington courts have jurisdiction over Horton's for its conversion of his property by releasing his truck to the Lummi Police officer Gates.

SUMMARY OF ARGUMENT

Certiorari should be granted because the Ninth Circuit's decision is in conflict with Lewis v. Clarke, __ U.S. ___, 137 S. Ct. 1285 , 197 L.Ed2d 631 (2017) which envisions state court tort suits for money damages against tribal employees for torts committed in the state off reservation. The tort system authorized in Lewis v. Clarke granted Wilson an automatic right to seek redress for money damages against Brandon Gates in his individual capacity in Washington State court. Had not the United States intervened and certified Gates as a federal employee acting within the scope of his 25 USC 5321 Self Determination Contract, Gates in his individual capacity would have remained a named defendant. Lewis v. Clarke provided authority to withstand any assertion of Indian sovereignty, requiring the remand of the Wilson's conversion tort suit against Gates in his individual

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of fact to support his argument that the Lummi Tribal forfeiture proceedings commenced the day after the petitioner's arrest for DUI in Bellingham, not on the Lummi Reservation as represented by Gates in ER 23.

capacity case back to tribal court. As in Lewis v. Clarke, the attempt of Indian tribes and insurance companies representing non Indian defendants, like Horton's, to draw the tort litigation back to tribal court or outright dismiss it, should have failed. Horton's assertion of Indian sovereignty as a defense to Wilson's tort claim for money damages fails because Horton's lacks standing to assert the defense of Indian sovereignty and also because of no adverse effect to Indian sovereignty. The insurance company defending Horton's should pay the judgment.

Respectfully, Horton's lacked standing before the announcement of Lewis v. Clarke to assert tribal sovereignty as a defense. See pages 6, 15 and 16 of appellant's opening brief in which petitioner cited Smith Plumbing Company 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). Wilson argued before the United States Disrict Court and the 9th Circuit that Horton's lacked standing to assert tribal sovereignty, which is a personal defense available to the tribe, not Aetna Insurance Company, nor to the insurance company which insures Horton's. The 9th circuit court in its opinion did not address Smith Plumbing, ratified by White Mountain Apache, holding that Aetna Insurance lacked standing to assert Indian sovereignty as a defense because Indian sovereignty is a defense personal and available only to the tribe, not insurance companies. Thus the 9th circuit court decision is, in the opinion of Wilson's counsel, in conflict with other decisions of the 9th circuit court, specifically White Mountain Apache v. Smith Plumbing Company, supra, and Smith Plumbing Company v. Aetna Casualty. Neither the District Court or the 9th Circuit addressed the

relevance or lack of relevance of White Mountain Apache v. Smith Plumbing Company and and Smith Plumbing Company v. Aetna Casualty in their opinions.

It was not possible for petitioner to advance the Lewis v. Clarke argument in either his opening or reply brief because Lewis v. Clarke was decided on April 25, 2017 after all of the briefing had been completed.Petitioner's petition for rehearing before the 9th Circuit, which was primarily based upon Lewis v. Clarke, was denied without comment.

ARGUMENT

This case meets the criteria for review because the Ninth Circuit's decision is in conflict with Lewis v. Clarke, 137 S. Ct. 1285 (April 25, 2017), Smith Plumbing Company 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). It is also important for this court to grant certiorari because the forfeiture of automobiles owned by non Native Americans for violation of tribal drug laws is most likely ongoing throughout the country and, so far state and federal courts, have not acted to restrain this illegal practice of Indian tribes; see Miners Electric v. Muscogee Creek Nation, 464 F. Supp.2d 1130 (N. D. Okla. 2007), 505 F.3d 1007, rev. on grounds of Indian sovereignty, 10th Cir, (2007); Candee Washington v. Washington State Department of Licesning, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040 (2018) and Jordynn Scott v. Doe Department of Licensing, 199 Wash. App. 1039 (Div. 1, 2017) rev. denied 189 Wn2d 1040(2018) and Susan Pearson (sic) Pierson v. Director of

Department of Licensing and Andrew Thorne, Swinomish tribal police officer, 2016 WL 3386798, (Western District of Washington, 2016).

Lewis v. Clarke is a landmark Supreme Court decision. It holds that an Indian tribal employee who commits a tort while acting within the scope of his employment as a tribal employee off reservation is liable to suit in state court for the tort because the tribal employee is sued in his individual capacity. The Supreme Court opinion discusses the underpinnings of individual capacity liability. A tort suit for money damages against the tribal employee working within the scope of his employment in his individual capacity does not implicate Indian sovereign immunity. Thus in Lewis v. Clarke, the tribal employee driver was liable to suit in Connecticut Superior Court for the tort of negligent operation of a motor vehicle. The negligent tort of the tribal motor vehicle driver took place off reservation inside Connecticut.

Lewis v. Clarke is material to scrutiny of the 9th circuit's decision. The 9th Circuit upheld the District Judge's abstention in favor of comity to the Lummi Tribe. Wilson perceives this tribal interest to be whether the Lummi tribe's ordinance authorizing the seizure and forfeiture of automobiles owned by non Native Americans for violation of tribal drug laws is within the authority of an Indian tribe. If the Lummi Nation has a possible legitimate legal principle, here the Indian tribes' inherent authority under the second exception of Montana v. United States, 450 U.S. 544 (1981) to enact its tribal forfeiture ordinance and enforce it off reservation by the seizure of suspect motor vehicles owned by nonnative Americans, then the tribe has "colorable jurisdiction" thus mandating exhaustion first through the Indian courts.

Petitioner asserts the "colorable jurisdiction" standard is inapposite because Wilson's suit is a suit for money damages. A separate independent ground to repel any application of Indian sovereign immunity to this case is the fact that Wilson's truck was not seized for forfeiture on the night of his arrest on the Lummi reservation but rather the Indian forfeiture of the truck commenced upon seizure of the truck in Bellingham ---- which is off reservation.

Generally accepted principles of forfeiture law provide that the forfeiture commences upon seizure of the property for forfeiture. Seizure and possession of the res of forfeiture is essential to acquiring jurisdiction over the res.

Washington 's forfeiture statute, RCW 69.505.505, provides for commencement of forfeiture upon seizure of the motor vehicle, see RCW 69.50.505 (c). The federal court discussion of forfeiture reaches the same result; see *Scarabin v. Drug Enforcement Admin.* 966 F.2d 989, 994 (5th Cir.1992),

In the United States District Court, Wilson argued that the seizure took place in Bellingham and not on the Lummi Indian reservation. Petitioner insists the dispositive legal question to be resolved is the question expressly avoided by the District Court in footnote 4 of its opinion, i.e. " 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." This dispositive legal question can be decided by the state or federal court

hearing Wilson's conversion claim against Horton's.[2] The District Court's analysis and the analysis of the 9th circuit court of appeals requiring exhaustion would be stronger had the Lummi police officer seized the truck on the night of the arrest and the Lummi Nation kept possession of the truck but, in this case, the seizure of the truck first took place inside Washington rendering this case on all fours with Lewis v. Clarke. Because this is a review of a summary judgment order, petitioner is entitled to all of the inferences of fact.

The sole foundation upon which an Indian tribe could assert civil jurisdiction over property owned by non Native Americans, is the second exception under Montana v. United States 450 U.S. 544 (1981). The 9th Circuit stated in its opinion:

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2. The merits of the initial defense raised here by Horton's, was that because Horton's released the truck under its belief that the service of the Lummi Notice of Forfeiture compelled it to release Wilson's truck to the Lummi police. Horton's argued this provided a legal defense to the tort suit for conversion against it. How a state or federal court would address a tort suit against a tribal employee in his/her individual capacity is addressed in Lewis v. Clarke where the Supreme Court cites Kentucky v. Graham 473 U.S. 159 (1985) for the premise that sovereign immunity for tribal employees is no broader than the common law immunities for state and federal employees. See Lewis v. Clarke, 137 S. Ct. at 1292. This means for example had Gates remained as a defendant in his individual capacity in the tort suit, whether the Lummi forfeiture statute would be a defense would be decided on the same legal basis as other governmental police officers have available, i.e., qualified good faith immunity applicable to all other police officers. The state or federal forum hearing the tort lawsuit would decide this issue. It would not remand back to the tribal court so it would have the first opportunity to rule on this issue.

> Off tribal lands, however, a tribe generally lacks such authority unless one of the two exceptions set forth in Montana applies. *Id.* at 898. First, a tribe may exercise control over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565, 101 S.Ct. 1245. Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. 1245.

In Montana, the Crow Indian tribe argued that its inherent authority provided a legal basis to regulate hunting activities of non tribal members on fee patent land (state land) inside the Crow reservation. The Crow tribe lost. Montana cannot and does not support any Indian claim that an Indian tribe can legally authorize its police to travel off reservation to seize private property of non Native Americans.[3] No theory of Indian sovereignty can authorize, under any circumstances, Indian police traveling outside an Indian reservation to seize private

3. Notice that in Miners Electric v. Muscogee Creek Nation, 464 F. Supp.2d 1130 (N. D. Okla. 2007), 505 F.3d 1007, rev. on grounds of Indian sovereignty, 10th Cir, (2007) the Indian police did not travel off reservation to seize Miners' very expensive Hummer automobile. Instead the tribe waited for the unsuspecting owner to return to the reservation to pay a civil infraction ticket when the Creek Indian police seized the Hummer. The seizure and forfeiture was commenced on the Indian reservation.

property of non Native Americans. Tribal police must comply with Washington law, CR 82.5, which requires a tribal court judgment be filed in the Washington State Superior Court for review to determine the adequacy of the tribal court's jurisdiction over the person and subject matter jurisdiction.

Petitioner reaffirms and restates that no theory of Indian sovereignty can authorize ***under any circumstances*** Indian police traveling outside an Indian reservation to seize private property of non Native Americans. Such action conflicts with state sovereignty and the rights guaranteed to the states under the 10th amendment.

CONCLUSION

As was documented in oral argument before the 9th circuit, the instant case was just one of many tort cases brought by non Native Amercians whose automobiles were seized by tribal police, forfeited and sold at public auction. Candee Washington, for example, lost her expensive SUV automobile to the Swinomish Tribal police, who had title changed into its name and used the expensive SUV. Ms. Washington committed no criminal act under US and Washington state law but the automobile was subject to forfeiture because the possesion by any occupant of a motor vehicle of any illegal drug, whether the owner is aware of this fact or not, is subject to forfeiture under Swinomish Tribe's Criminal Code Chapter 10 Offenses Involving Controlled Substances including 4-10.050, see Appendix F-Swinomish Tribe, Title 4- Criminal Code. The Swinomish Indian Tribes' forfeiture law, is draconian and far more severe than any comparable state or federal forfeiture statute.

Justice Thomas, concurring in the judgment in Lewis v. Clarke. remarked "I remain of the view that tribal immunity does not extend to suits arising out of a tribe's commercial activities conducted beyond its territory, 137 S.Ct. at 1294 (Thomas, J. concurring). The seizure of Wilson's truck was off the reservation. There is no authority to support the proposition that an Indian tribe by virtue of its inherent authority under Montana can use this tribal authority to seize property outside the Indian reservation. The 9th Circuit's endorsement of the inherent authority of Indian tribes under the second exception under Montana to justify seizure of property owned by non Native Americans off reservation is unprecedented. The 9th Circuit's opinion effectively overrules State v. Eriksen, 172 Wn2d 506 (2011) which held the Lummi Tribe's inherent authority did not justify the pursuit and stop of a motorist followed off the reservation by tribal police for commission of a traffic offense while on the Indian reservation.[4]

The holding advanced by the district court and the 9th circuit opinion has no limiting principle. The 9th circuit decision endorses a practice where tribal police do not seize the motor vehicle for forfeiture while it is located inside the Indian reservation, but release it. Then later, tribal police travel off reservation, seize the motor vehicle, and serve a tribal Notice of Forfeiture upon the party in

4. Eriksen was controversial, generating law review articles on the extent of inherent authority to justify assertion of Indian authority off reservation; Fleeing East from Indian Country: State v. Eriksen and Tribal Inherent Sovereign Authority to Continue Cross-Jurisdictional Fresh Pursuit, 87 Wash. Law Rev. 1251; see also Fresh Pursuit from Indian Country: Tribal Authority to Pursue Suspects onto state Land, 129 Harv. L. Rev. 1686.

possession of the motor vehicle. The decision to forfeit and the legal notice justifying the seizure off reservation here is one made by the Lummi Tribe's executive branch of government, the decision of a tribal police officer. The Lummi Tribal Court is not involved in this decision and even if it were, it is immaterial to the result because no tribal court can authorize under any circumstances Indian police traveling outside an Indian reservation to seize private property of non Native Americans.

The legacy of the 9th circuit's decision is the endorsement of the practice, perhaps ongoing by Indian tribes throughout the country, of the seizure and forfeiture of automobiles owned by non Native Amercians, including the power to enforce its tribal drug forfeiture law against non Native Americans by traveling off reservation and seizing motor vehicles.

This pernicious illegal practice which deprives non Native Americans of their private property continues. It is ongoing in other parts of the country outside of Washington state; see Miners Electric v. Muscogee Creek Nation, supra. This exercise of tribal authority by the seizure of private property off reservation also deprives citizens of redress in state courts and abridges the jurisdiction of state courts and thereby conflicts with the sovereign power of states to adjudicate tort claims committed within state jurisdiction. This practice is also in violation of the rights granted to the States under the 10th amendment.

For the above reasons, Petitioner asserts that this case meets the extraordinarily high standard for review by this Honorable Court. Petitioner requests that the

court grant certiorari, reverse the 9th circuit court and reinstate petitioner's conversion claim against Horton's Towing; or alternatively remand for reconsideration in light of Lewis v. Clarke and Smith Plumbing Company v. Aetna Casualty, supra. and White Mountain Apache v. Smith Plumbing Company supra.

Dated this 14th day of February, 2019 at Bellingham, Washington.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35320
D.C. No.2:15-cv-00629-JCC

CURTISS WILSON,

Plaintiff-Appellant,

v.

HORTON'S TOWING, A WASHINGTON CORPORATION; UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington.
John C. Coughenour, Senior District Judge, Presiding.

June 11, 2018, Argued and Submitted,
Seattle, Washington
October 9, 2018, Filed

Before: Dorothy W. Nelson and Paul J. Watford, Circuit Judges, and Dean D. Pregerson,* District Judge

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Appendix A

OPINION

PREGERSON, District Judge:

This appeal concerns the seizure of Plaintiff Curtiss Wilson's truck by Brandon Gates, a police officer of the Lummi Indian Tribe. After visiting a casino on the Lummi reservation, Wilson was stopped by Lummi police and found with marijuana in his truck. Citing a violation of tribal drug laws, the Lummi Tribe issued a notice of civil forfeiture and took possession of Wilson's truck.

Wilson sued Officer Gates, who had served the forfeiture notice, and Horton's Towing, the towing company that had released the car to Officer Gates. The district court then substituted the United States as a defendant for Officer Gates pursuant to the Westfall Act, 28 U.S.C. § 2679(d).

At the summary judgment phase, Wilson's sole remaining claim was one for conversion against Horton's Towing and the United States (collectively, "Defendants"). The district court entered summary judgment against Wilson and dismissed the action with prejudice. It held that Wilson had failed to exhaust his tribal remedies against Horton's Towing, and that Wilson had also failed to exhaust his administrative remedies against the United States.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's order entering summary judgment. However, we vacate the judgment of dismissal and remand with instructions to dismiss this action

without prejudice to refiling after Plaintiff has exhausted the appropriate remedies.

FACTUAL AND PROCEDURAL BACKGROUND

On October 22, 2014, Plaintiff Curtiss Wilson drove his 1999 Dodge Ram pickup to a casino located on the Lummi Indian Reservation.[1] After drinking at the casino, Wilson travelled onto a Washington state road crossing through the reservation. Wilson was stopped on this road by Grant Assink, a Lummi tribal police officer, who suspected that Wilson was driving while intoxicated.[2]

Officer Assink searched Wilson's pickup truck and found several containers of marijuana inside. Officer Assink then alerted the Washington State Patrol, who arrested Wilson for driving under the influence. At the direction of the Washington State Patrol, Horton's Towing impounded the truck and towed it off the reservation.

The next day, the Lummi Tribal Court issued a "Notice of Seizure and Intent to Institute Forfeiture." The notice cited Section 5.09A.110(d)(2) of the Lummi Nation Code of Laws, which prohibits the possession of marijuana over one ounce, as the grounds for civil forfeiture. Lummi

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1. Plaintiff is not a member of the Lummi Tribe, which is a federally recognized Indian tribe. *See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5021 (Jan. 29, 2016).

2. Although the district court's order and Plaintiff's brief refer to Officer Assink as "Grant Austick," the underlying documents in this case, including the Notice of Seizure, all name him as "Grant Assink."

Tribal Police Officer Brandon Gates presented Horton's Towing with the forfeiture notice, and Horton's Towing released the truck to Officer Gates.

On the basis of these events, Plaintiff brought suit against Horton's Towing and Officer Brandon Gates. After the filing of a certification by the Attorney General, the district court substituted the United States as a party for Officer Gates pursuant to the Westfall Act, 28 U.S.C. § 2679(d).

Subsequently, Defendants filed motions for summary judgment. The district court entered summary judgment in Defendants' favor. It held that principles of comity required Wilson to exhaust his tribal remedies against Horton's Towing. It also held that Wilson had failed to exhaust his administrative remedies against the United States pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2675(a).

Plaintiff timely appealed. *See* Fed. R. App. P. 4(a)(1).

STANDARD OF REVIEW

We review *de novo* a district court's decision to grant summary judgment. *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1135 (9th Cir. 2001).

ANALYSIS

This appeal turns on two separate determinations of the district court. The first concerns its decision to dismiss Wilson's case against Horton's Towing for failure to

exhaust tribal remedies. The second concerns the district court's decision to substitute the United States for Officer Gates as a party defendant, pursuant to the Westfall Act, 28 U.S.C. § 2679(d).

We address each issue in turn.

A. Exhaustion of Tribal Remedies against Horton's Towing

"Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is colorable, provided that there is no evidence of bad faith or harassment." *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008) (quotations omitted). If tribal jurisdiction is "colorable" or "plausible," a plaintiff must first exhaust any remedies before the tribal court. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). This exhaustion requirement provides "the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[3] *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

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3. In addition to situations where tribal jurisdiction is plainly lacking, the exhaustion requirement is excused when the defendant asserts tribal jurisdiction in bad faith; when exhaustion would be futile; or when tribal jurisdiction is barred by "express jurisdictional prohibitions." *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). Plaintiff argues that the bad faith exception has been triggered. However, because this argument was made below but not raised in Plaintiff's opening brief, we deem it waived. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

Applying this exhaustion of remedies requirement, the district court concluded that principles of comity warranted the dismissal of Wilson's conversion claim against Horton's Towing. The district court ruled that tribal jurisdiction was colorable because "the transactions forming the basis of Plaintiff's case" happened or began on tribal lands. Specifically, the district court found that the stretch of state road upon which Plaintiff was arrested was tribal land, and therefore subject to the tribe's civil jurisdiction.

We agree with the district court's ultimate conclusion that tribal jurisdiction is colorable in this case. For the reasons discussed below, however, we part ways with the district court on why tribal jurisdiction is colorable and whether the state road is properly deemed tribal land.

1. A Tribe's Civil Jurisdiction over Non-Members

Broadly speaking, a tribe's source of authority may stem from statutory and treaty rights or, as relevant here, a tribe's "inherent sovereignty." *Montana v. United States*, 450 U.S. 544, 563, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). The foundational case on the scope of a tribe's inherent sovereign authority is *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). *Montana* voiced the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers."[4] *Id.* at 565.

4. *Montana* addressed the scope of a tribe's civil jurisdiction over nonmembers. *See Strate v. A-1 Contrs.*, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). Separately, in the criminal context, the Supreme Court has held that tribes have no jurisdiction

Subsequent decisions have clarified that *Montana*'s rule "ordinarily applies only to non-Indian land."[5] *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011). "[T]ribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contrs.*, 520 U.S. 438, 454, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). The question of "whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1132 (9th Cir. 2006) (en banc). For this reason, land status is often dispositive of the issue of a tribe's civil jurisdiction over non-members. *See Nevada v. Hicks*, 533 U.S. 353, 360, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

On tribal lands, a tribe generally retains the inherent sovereign "right to exclude," together with regulatory and adjudicative authority that flows from that right. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898, 899 (9th Cir. 2017), *as amended* (Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648, 199 L. Ed. 2d 586 (2018).

Off tribal lands, however, a tribe generally lacks such authority unless one of the two exceptions set forth in *Montana* applies. *Id.* at 898. First, a tribe may exercise

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over non-Indians. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

5. That is, in the absence of the competing state interests at issue in *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), tribes generally maintain civil adjudicative authority over non-members on tribal land. *See Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898-99 (9th Cir. 2017), *as amended* (Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648, 199 L. Ed. 2d 586 (2018).

control over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

Although *Montana* does not address the issue of exhaustion of tribal remedies, its reasoning informs our inquiry into whether tribal jurisdiction is colorable. Specifically, when "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule," then "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Strate*, 520 U.S. at 459 n.14. Under these circumstances, the exhaustion requirement "must give way, for it would serve no purpose other than delay." *Id.*

In this case, the threshold question is whether Plaintiff's claim "bears some direct connection to tribal lands," such that tribal jurisdiction is colorable. *Smith*, 434 F.3d at 1135. Our inquiry is not narrowly focused on "deciding precisely when and where the claim arose." *Id.* Rather, we must examine "how the claims are related to tribal lands." *Id.* at 1132. Tribal jurisdiction is colorable, for example, when the events that "form the bases for [Plaintiff's] claims occurred or were commenced on tribal territory." *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416 (9th Cir. 1986).

If Plaintiff's claim is directly tied to events that occurred on tribal land, then tribal jurisdiction is colorable and the exhaustion of tribal remedies is required. Conversely, if those events did not take place on tribal land, we must ask whether either of *Montana*'s two exceptions could confer an alternative basis for tribal jurisdiction.

2. Whether Tribal Civil Jurisdiction Is Colorable

In granting summary judgment, the district court reasoned that tribal jurisdiction over Plaintiff's claim was colorable because the Washington state road on which the traffic stop occurred was tribal land.

Under similar circumstances, the Supreme Court has deemed a state highway running through a reservation to be "alienated, non-Indian" land. *Strate*, 520 U.S. at 454. In *Strate*, it was the tribe's right to "exercise dominion or control over the right-of-way" that determined the status of the land.[6] *Id.* at 455 ; *see McDonald v. Means*, 309 F.3d 530, 538 (9th 2002).

The district court did not properly consider the factors articulated in *Strate* when it concluded that the

6. The *Strate* Court acknowledged that it did not question a tribe's authority to "patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law." 520 U.S. at 456 n.11. Thus, a tribe's authority to patrol state highways on reservation lands does not mean that events occurring on those highways necessarily take place on tribal land, and are subject to a tribe's civil jurisdiction.

state road was tribal land. However, we need not decide, on this record, whether the roadway is tribal land. That is because jurisdiction is colorable for other reasons. Specifically, Wilson's conversion claim may still "bear[] some direct connection to" his conduct on tribal lands. *Smith*, 434 F.3d at 1135.

Immediately after leaving the casino, Wilson was found with several containers of marijuana in his truck. Lummi law prohibits the possession of over one ounce of marijuana, and makes the vehicle used to transport this contraband the target of civil forfeiture. Although Wilson was stopped on the state road, one could logically conclude that the forfeiture was a response to his unlawful possession of marijuana while on tribal land. So interpreted, the events giving rise to the conversion claim reveal a "direct connection to tribal lands," *id.*, and provide at least a colorable basis for the tribe's civil jurisdiction over the dispute.[7]

Therefore, we affirm the district court's decision to dismiss the case for comity reasons, but we do so for reasons different from the ones that the court had articulated. *See Cigna Prop. & Cas. Ins. Co. v. Polaris*

7. Plaintiff argues that the focus of his conversion claim is the seizure of the truck itself, which took place off tribal lands. However, "[o]ur inquiry is not limited to deciding precisely when and where the claim arose, a concept more appropriate to determining when the statute of limitations runs or to choice-of-law analysis." *Smith*, 434 F.3d at 1135. Furthermore, the conversion claim involves a determination of whether the seizure was made with "lawful justification." *W. Farm Serv., Inc. v. Olsen*, 151 Wash. 2d 645, 648 n.1, 90 P.3d 1053 (2004) (en banc). This determination may implicate Plaintiff's prior conduct on tribal lands.

Pictures Corp., 159 F.3d 412, 418 (9th Cir. 1998) ("If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning.").

Our holding leaves open the question of whether the Lummi Tribal Court has civil jurisdiction over Plaintiff's action. Plaintiff, in his briefing, conflates the issue of jurisdiction with the issue of exhaustion. But we need not reach the ultimate issue of whether tribal jurisdiction exists before resolving the threshold question of whether exhaustion is required because tribal jurisdiction is colorable. We therefore conclude that, because tribal jurisdiction is colorable here, the Lummi Tribal Court must be given an opportunity to address the jurisdictional question first. *See Nat'l Farmers Union Ins. Companies*, 471 U.S. at 856.

B. The Substitution of the United States for Officer Gates

Next, Wilson challenges the district court's decision to substitute the United States as a party for Officer Gates, the Lummi tribal police officer who executed the forfeiture. Under the Westfall Act, 28 U.S.C. § 2679(d), the Attorney General may certify that a "defendant employee was acting within the scope of his office or employment [for the United States government] at the time of the incident out of which the claim arose."[8] *Id.* § 2679(d)(1). In such cases,

8. This Act, officially the Federal Employees Liability Reform and Tort Compensation Act of 1988, is commonly referred to as the Westfall Act. *See Osborn v. Haley*, 549 U.S. 225, 229, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

the action "shall be deemed an action against the United States," and "the United States shall be substituted as the party defendant." *Id.*

The substitution leads, in effect, to "a single avenue of recovery" against the United States under the Federal Tort Claims Act. *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993). In this manner, the Westfall Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007).

This process, however, does not leave a plaintiff without recourse. Rather, the Attorney General's certification is "prima facie evidence that a federal employee was acting within the scope of her employment at the time of the incident," and shifts the burden to the plaintiff to "disprov[e] the Attorney General's certification by a preponderance of the evidence." *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995).

Under the circumstances presented here, where the United States is substituted for an employee *and* where that employee is a tribal employee, there is an additional step. The tribal employee must also be deemed to have acted as a federal employee in carrying out the allegedly tortious activity.

In *Shirk*, we delineated a two-step test for determining whether a tribal employee can be deemed a federal Bureau of Indian Affairs ("BIA") employee for the purposes of

FTCA liability. *Shirk v. United States*, 773 F.3d 999, 1006 (9th Cir. 2014). Although *Shirk* did not involve a certification challenge, the parties do not dispute, and consistency favors, the application of *Shirk*'s two-step analysis to the present case.

In general, tribal employees may be deemed to be acting as federal BIA employees when they carry out certain agreements between a tribe and the federal government. *Id.* at 1002-03. The Indian Self-Determination and Education Assistance Act ("ISDEAA") provides for the creation of agreements, commonly known as "638 contracts," whereby tribes may administer programs formerly provided by the BIA. *Id.* at 1002. Following ISDEAA's enactment, Congress extended FTCA liability to tribal employees acting under a "638 contract," or any other federal agreement authorized under ISDEAA. *See* Department of Interior and Related Agencies Appropriation Act, Pub. L. 101-512, § 314, 104 Stat. 1915 (1990)). In these situations, tribal employees "are deemed employees of the Bureau [of Indian Affairs] . . . while acting within the scope of their employment in carrying out the contract or agreement." *Id.* at 1960.

Parsing this language, *Shirk* held that, to be considered BIA employees, tribal employees must act "within the scope of their employment where the relevant 'employment' is 'carrying out the contract or agreement.'" 773 F.3d at 1008 n.6. *Shirk* distills the analysis into two parts. *Id.* at 1006. First, does the language of the federal contract "encompass the activity that the plaintiff ascribes to the employee"? *Id.* at 1007. Second, did the employee's

activity fall "within the scope of employment"? *Id.* A tribal employee is only deemed a federal employee if, "while executing his contractual obligations under the relevant federal contract, his allegedly tortious conduct falls within the scope of employment as defined by state law." *Id.* at 1005.

In this case, the Attorney General's certification contained two representations. First, the Attorney General represented that Officer Gates had acted "within the course and scope of a Compact of Self-Governance with the United States" adopted by the Lummi Tribe. Secondly, the Attorney General maintained that Officer Gates had acted "within the scope of his employment in carrying out the Compact."[9] The Attorney General's certification having issued, the burden then shifted to Plaintiff to rebut the government's representations with evidence. As the district court properly concluded, Plaintiff failed to meet this burden.

First, Plaintiff did not rebut the presumption that the tribal self-governance agreement encompassed the law enforcement duties performed by Officer Gates. Plaintiff

9. The Attorney General's certification creates a presumption that the challenged activity falls within the scope of the individual's employment. *See, e.g., Saleh v. Bush*, 848 F.3d 880, 889 (9th Cir. 2017); *see also* 28 U.S.C. § 2679(d). In this case, we find it appropriate that the presumption should extend to each of the representations certified by the Attorney General here, including the representation that the federal contract encompasses the challenged activity. *Cf. Billings*, 57 F.3d at 800 (applying the presumption to the question of "whether a defendant is a federal employee.").

submitted as evidence a Multi-Year Funding Agreement for 2011-2015 between the Lummi Nation and the United States. This funding agreement served as a 638 contract for the tribe's "assumption of responsibilities" for various programs and services that would otherwise be provided by the BIA.

One of these services was law enforcement. By statute, BIA employees may be authorized to perform law enforcement duties, including executing or serving "orders relating to a crime committed in Indian country and issued under" tribal law. 25 U.S.C. § 2803(2)(B). These law enforcement duties may be reassigned, as here, to tribal employees pursuant to 638 contracts. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185, 132 S. Ct. 2181, 183 L. Ed. 2d 186 (2012). As the district court acknowledged, the funding agreement "specifically contemplated that the tribe would provide for its own law enforcement."[10]

Next, Plaintiff failed to rebut the presumption that Officer Gates acted within the scope of his employment when he executed the forfeiture. Instead, Plaintiff speculated that the forfeiture exceeded the authority of the Lummi Tribe. As the district court observed, however, "Plaintiff appears to have confused the question of tribal jurisdiction (and whether Defendant Gates's actions were

10. Because the funding agreement provides sufficient basis to conclude that the government contemplated the Lummi Tribe's assumption of law enforcement duties under a 638 contract, we deny the government's motion for judicial notice of the Compact of Self-Governance.

legally authorized) with the question of whether Defendant Gates acted within the scope of his employment" when he effected the forfeiture.[11]

To answer the question of whether Officer Gates was acting within the scope of his employment, we look to Washington law.[12] Washington courts have held that an employee acts within the scope of employment when performing duties required by the contract of employment or by "specific direction of [the] employer," or "in furtherance of the employer's interest." *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wash. 2d 133, 160, 177 P.3d 692 (2008) (en banc). By failing to come forward with evidence, Plaintiff has not met his burden of showing that the execution of the forfeiture was not within the scope of Officer Gates' employment duties.

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11. Similarly, Plaintiff claims that the agreement cannot encompass Officer Gates' conduct because it does not expressly authorize the execution of law enforcement duties off the reservation. In support of this proposition, Plaintiff cites a concurring opinion in *Shirk*. *See Shirk*, 773 F.3d at 1009 (Sack, J., concurring). The concurrence reasoned that certain tribal officers had the authority to enforce state law off the reservation because the agreement required the tribal officers to be certified as state peace officers. *Id.* Plaintiff argues that the "reverse premise applies." However, Plaintiff's argument commits the logical fallacy of mistaking a sufficient factor for a necessary one. In addition, the concurrence acknowledged that it addressed an issue that "the panel's opinion need not and, properly . . . does not reach." *Id.*

12. We recognize, however, that the federal agreement "defines the relevant 'employment' for purposes of the scope of employment analysis at step two." *Shirk*, 773 F.3d at 1006.

On both prongs of *Shirk*'s analysis, Plaintiff has not rebutted the presumptions created by the Attorney General's certification. Accordingly, we hold that the district court properly substituted the United States as a party for Officer Gates pursuant to the Westfall Act.

C. Dismissal with Prejudice

The district court dismissed this action as a result of Wilson's failure to meet exhaustion requirements. Although we hold that dismissal on this ground was proper, we conclude that the district court erred by dismissing the entire action with prejudice.

When a party has not exhausted tribal remedies, a district court may elect to "dismiss a case or stay the action while a tribal court handles the matter." *Atwood*, 513 F.3d at 948. The exhaustion process leaves open "the possibility that the exercise of [tribal] jurisdiction [can] be later challenged in federal court." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 427 n.10, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989). Here, the district court dismissed Plaintiff's case against Horton's Towing with prejudice, but did not specify the reason why pursuing the case would be futile if, at a later date, Plaintiff returned to federal court after exhausting his remedies before the Lummi Tribal Court.

Similarly, the district court did not adequately explain the basis for its dismissal with prejudice of Plaintiff's suit against the United States. When a plaintiff fails to exhaust administrative remedies against the United States, as

required by the FTCA, the proper route is dismissal. *See McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993). However, a plaintiff may generally return to federal court after timely exhausting administrative remedies before the relevant federal agency. *See* 28 U.S.C. § 2679(d)(5)(B); *see also Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988).

Because Plaintiff can potentially renew his claims in federal court after the appropriate remedies have been exhausted, we hold that dismissal with prejudice was improper.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's order entering summary judgment against Plaintiff. We **VACATE** the district court's judgment dismissing Plaintiff's action with prejudice and **REMAND** to the district court. On remand, the district court shall enter judgment dismissing this action without prejudice to refiling after Plaintiff has exhausted his remedies. Each party shall bear its own costs.

AFFIRMED IN PART; VACATED IN PART; and REMANDED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED APRIL 28, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C15-0629-JCC

CURTISS WILSON,

Plaintiff,

v.

JOHN OR JANE DOE, DIRECTOR OF THE DEPARTMENT OF LICENSING, HORTON'S TOWING, AND THE UNITED STATES OF AMERICA,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

This matter comes before the Court on Plaintiff's motion for reconsideration and corresponding memorandum (Dkt. No. 69). Motions for reconsideration are disfavored. Local Civ. R. W.D. Wash. 7(h)(1). Absent a showing of "manifest error," or "new facts or legal authority," the Court will ordinarily deny a motion for reconsideration. *Id.*

Appendix B

In the present motion, Plaintiff urges the Court to reconsider its order holding that Plaintiff's challenge to tribal authority to effectuate a seizure of his truck should first be determined by the Lummi Tribal Courts. (Dkt. No. 67.) In so moving, Plaintiff does not raise new facts or legal authority, but reiterates his original and ongoing position that the seizure of his truck was impermissible and outside the Lummi Nation's legal authority. Simply put, this question has already been litigated and decided by the Court. In the absence of manifest error, new facts, or new legal authority, Plaintiff's motion for reconsideration (Dkt. No. 69) is DENIED.

DATED this 28th day of April 2016.

/s/
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED MARCH 29, 2016

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

CASE NO. C15-629 JCC

CURTISS WILSON,

Plaintiff,

v.

JOHN OR JANE DOE, DIRECTOR OF THE DEPARTMENT OF LICENSING, *et al.*,

Defendants.

March 29, 2016, Decided
March 29, 2016, Filed

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

The following day, Lummi Tribal Police Officer Brandon Gates presented a "Notice of Seizure and Intent to Institute Forfeiture" ("Notice of Seizure") from the

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).

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

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

Defendant Horton's moves for summary judgment, claiming the release of the vehicle was pursuant to the Notice of Seizure, and therefore with lawful justification. (Dkt. No. 57.) Plaintiff argues in response that the Notice of Seizure is invalid or not enforceable off the reservation.

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

(Dkt. No. 61.)[3] The United States moves for summary judgment based on, *inter alia*, Plaintiff's failure to exhaust his administrative remedies. (Dkt. No. 65.) In response, Plaintiff regurgitates failed arguments from previous briefing, relying on an overturned, out-of-Circuit case and "maintaining" a line of reasoning with respect to Brandon Gates and the scope of employment that this Court has already ruled against. (Dkt. No. 66.)

II. DISCUSSION

A. Standard of Review

A court may enter summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for

3. Plaintiff proffers a header apparently regarding negligent bailment in Dkt. No. 61 at 6. *See Jama v. United States*, No. C09-0256-JCC, 2010 U.S. Dist. LEXIS 48133, 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 conversion and negligent bailment in under Washington State law). The court will not consider new claims on summary judgment. (Dkt. No. 49 at 2.)

trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49. Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Conversion, the sole remaining claim in this case, is (1) the act of willfully interfering with any chattel, (2) without lawful justification, (3) whereby any person entitled thereto is deprived of the possession of it. *Judkins v. Sadler-MacNeil*, 61 Wn. 2d 1, 376 P.2d 837 (Wash. 1962), *Davenport v. Wash. Educ. Ass'n.*, 147 Wn. App. 704, 197 P.3d 686 (Wash. Ct. App. 2008).

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, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (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, 105 S. Ct. 2447,

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.

85 L. Ed. 2d 818 (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, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

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

Here, there is no indication of bad faith or harassment, and nothing pled that would support a departure from Ninth Circuit and Supreme Court precedent. The Lummi Nation has a "colorable" claim of jurisdiction as it is undisputed that the transactions forming the basis of Plaintiff's case "occurred or were commenced on tribal territory." *Stock W. Corp.*, 964 F.2d at 919 (internal quotations omitted). 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 dispute of material fact and Horton's towing is entitled to judgment as a matter of law, summary judgment for Horton's is warranted.

2. Further Support for Summary Judgment

a. Plaintiff's Cited Authority is Irrelevant

Plaintiff relies on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978) as authority for the premise that forfeiture of his truck was impermissible. (Dkt. No. 61 at 3.) However, *Oliphant* does not apply to civil matters, and the forfeiture, though instigated by Plaintiff's criminal activity, was civil in nature. *National Farmers Union*, 471 U.S. 845, 855-57, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

It is undisputed that Plaintiff violated tribal law by possessing approximately three pounds of marijuana, on tribal land, using his vehicle to transport the marijuana. (*See* Dkt. No. 4-1 at 9.) The forfeiture of a vehicle used for illegal purposes is a civil matter under Lummi law. *See* LNCL 5.09B.040(5)(A) (National Indian Law Library 2016) (Civil forfeiture section addressing "Property Subject to Forfeiture," specifically motor vehicles used, or intended for use, to facilitate the possession of illegal substances.). The statute also makes clear that "Criminal prosecution under Chapter 5.09A of this Title is neither

precluded by, nor required for, civil forfeiture under Chapter 5.09B of this Title." LNCL 5.09B (National Indian Law Library 2016).[5] Accordingly, *Oliphant* is of no use to Plaintiff's position.

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

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

While the exhaustion of tribal remedies requirement has several exceptions, Plaintiff has not validly asserted any of them. Exhaustion is not required where: (1) an assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bad faith," (2) the action patently violates express jurisdictional prohibitions, (3)

5. Under Washington State law, forfeiture of a vehicle used to transport illegal substances is also a civil matter, contrary to Plaintiff's outdated and inapplicable citation to *Deeter v. Smith*, 106 Wn. 2d 376, 721 P.2d 519 (Wash. 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.)

exhaustion would be futile because of a lack of adequate opportunity to challenge the court's jurisdiction, or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land as established by the Supreme Court in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). *Iowa Mut. Ins. Co.*, 480 U.S. at 19 n.12; *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013).

Plaintiff attempts to argue that an exception to the exhaustion requirement applies under *Montana v. United States*. (Dkt. No. 61 at 5) (citing 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)). *Montana* set out the general rule that, absent congressional direction to the contrary, Native tribes lack civil authority over the conduct of nonmembers on non-Tribal land within a reservation. 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). In *Strate v. A—1 Contractors*, the Supreme Court clarified the relationship between the *Montana* case and the exhaustion requirement of *National Farmers Union* and *Iowa Mutual*. 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). "Recognizing that our precedent has been variously interpreted, we reiterate that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement . . . These decisions do not expand or stand apart from *Montana*'s instruction on the inherent sovereign powers of an Indian tribe." *Id.* at 453. *Strate* went on to examine whether an action arising out of a traffic accident on a state highway that ran through tribal land was subject to tribal jurisdiction, finding that it was not. *Id.* at 455-56.

Appendix C

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

This case is factually distinct from *Montana* and *Strate* such that the exhaustion requirement must be enforced. The Lummi Tribe's jurisdiction is based on events that occurred on federal trust land and a state highway. The Ninth Circuit recently held that a state highway is still within Indian country. *Bressi v. Ford*, 575 F.3d 891, 896 (9th Cir. 2009) ("the state highway is still within the reservation and is part of Indian country . . . The tribe therefore has full law enforcement authority over its members and nonmember Indians on that highway"). Indian country means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . including rights-of-way running through the reservation. 18 U.S.C. § 1151. Under Ninth Circuit precedent, Plaintiff's violations of tribal law occurred within Indian country, and the exception to the exhaustion requirement established by the main rule in *Montana* does not apply. *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013). Accordingly, the exhaustion rule established in *Farmers Union* and *Iowa Mutual* applies, and Plaintiff is not excused from this requirement.

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

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

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

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

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

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

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

C. Government's Motion for Summary Judgment

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

In relevant part, the FTCA provides:

Appendix C

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

The Court has already ordered that, for the purposes of this case, Officer Brandon Gates is deemed to have been an employee of the BIA in carrying out his law enforcement duties for 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 the United States. *McNeil v. United States*, 508 U.S. 106, 112-113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies. Because petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit.")

While Plaintiff may object to this ruling because his original complaint named Officer Gates, and not the United States, as a party, this question will not be relitigated for a third time. The Court considered the appropriateness of this substitution during previous rounds of briefing.

(Dkt. Nos. 39, 53, and 55.) However, Plaintiff may present his claim to the BIA within sixty (60) days of this order pursuant to 28 U.S.C. § 2679(d)(5).

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

D. Plaintiff's Motion for Summary Judgment

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

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

III. CONCLUSION

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

DATED this 29th day of March 2016.

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

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 16, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35320

D.C. No. 2:15-cv-00629-JCC
Western District of Washington, Seattle

CURTISS WILSON,

Plaintiff-Appellant,

v.

HORTON'S TOWING, A WASHINGTON CORPORATION; UNITED STATES OF AMERICA,

Defendants-Appellees.

ORDER

Before: D.W. NELSON and WATFORD, Circuit Judges, and PREGERSON,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judge Watford votes to deny the petition

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* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

for rehearing *en banc*, and Judges Nelson and Pregerson so recommend. The full court has been advised of the petition for rehearing *en banc*, and no judge requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35. The petition for panel rehearing and rehearing *en banc*, filed October 22, 2018, is DENIED.

APPENDIX E — EXCERPTS OF TITLE 5 LUMMI NATION CODE OF LAWS CODE OF OFFENSES

TITLE 5
LUMMI NATION CODE OF LAWS
CODE OF OFFENSES

***

5.09A.100 Proof of Paraphernalia Character and Purpose

Proof of usage or purposeful design for usage of an object as drug paraphernalia may be established by any commonly acceptable method of identification, including, but not limited to, identification by a trained officer, by field tests, or by laboratory tests.

5.09A.110 Prohibited Acts

(a) Manufacture of an Illegal Substance. A person who knowingly manufactures or possesses with intent to manufacture any of the substances listed in LCL § 5.09A.050 shall be found guilty of the offense of manufacture of an illegal substance. Manufacture of an Illegal Substance is a class A offense.

(b) Delivery of an Illegal Substance. A person who knowingly delivers any of the substances listed in LCL § 5.09A.050 shall be found guilty of the offense of delivery of an illegal substance and sentenced as follows:

(1) for a class B offense,or

(2) for class A offense when charged and convicted of delivery of an illegal substance in conjunction with an Aggravated Factor listed in LCL § 5.09A.140.

(c) Possession of an Illegal Substance with Intent to Deliver. A person who knowingly possesses with intent to deliver any of the substances listed in LCL § 5.09A.050 shall be found guilty of the offense of possession of illegal substance with intent to deliver. Possession of an Illegal Substance with Intent to Deliver is a class A offense.

(d) A person who knowingly administers to a human body, or who otherwise possesses any substance listed in LCL § 5.09A.050 is guilty of an offense as follows

(1) Possession of Marijuana (up to 1 ounce). Possessing up to one (1) ounce of marijuana is a class D offense.

(2) Possession of Marijuana (over 1 ounce). Possessing over one (1) ounce of marijuana is a class C offense. This is a lesser included offense of Possession of an Illegal Substance with Intent to Deliver, LCL § 5.09A.110(c).

(3) Possession of Illegal Substance (up to 25 grams). Possessing a combination of up to 25 grams of any substance or combination of substances listed in LCL § 5.09A.050 (excluding marijuana) is a class B offense. This is a lesser included offense of Possession of an Illegal Substance with Intent to Deliver, LCL § 5.09A.110(c).

(4) Possession of Illegal Substance (over 25 grams) Possessing over 25 grams of any substance listed in LCL § 5.09A.050 (excluding marijuana) is a Class A offense.

If charged with a violation of LCL § 5.09A.110(d), a person may raise the affirmative defense that, at the time of the offense, the person had a valid prescription issued by a health professional authorized by law to dispense or prescribe the substance unless the substance was prescribed or dispensed as a result of fraud, deceit, misrepresentation, or subterfuge by the person, except as prohibited by LCL § 5.09A.050(c).

(e) A person who knowingly possesses an item of drug paraphernalia is guilty of an offense as follows:

(1) Possession of Paraphernalia. A person who possesses any item of drug paraphernalia used, or intended to be used, to ingest, inject, inhale, consume or otherwise introduce illegal substances into the human body shall be found guilty of the offense of possession of paraphernalia. Each item of drug paraphernalia is a separate criminal act. Possession of Paraphernalia is a class D offense

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APPENDIX F — SWINOMISH TRIBE TITLE 4 – CRIMINAL CODE

SWINOMISH TRIBE

TITLE 4 – CRIMINAL CODE

Chapter 10- Offenses Involving Controlled Substances

4-10.050 Seizure of Vehicles Used in Controlled Substance Violations.

(A) Forfeiture of interest. The interest of the legal owner or owners of record of any vehicle used to transport unlawfully a controlled substance, or in which a controlled substance is unlawfully kept, deposited, used, or concealed, or in which a narcotic is unlawfully possessed by an occupant, shall be forfeited to the Swinomish Indian Tribal Community.

(B) Police officer to seize vehicle. Any peace officer making or attempting to make an arrest for a violation of this Chapter may seize the vehicle used to transport unlawfully a controlled substance, or in which a controlled substance is unlawfully kept, deposited, used, or concealed, or unlawfully possessed by an occupant and shall immediately deliver the vehicle to the tribal police chief, to be held as evidence until forfeiture is declared or a release ordered.

(C) Police officer to file notice of seizure. A peace officer who seizes a vehicle under the provisions of this Section shall file notice of seizure and intention to institute forfeiture proceedings with the clerk of the Tribal Court and the clerk shall serve notice thereof on all owners of the vehicle, by one of the following methods:

(1) Upon an owner or claimant whose right, title or interest is of record in the division of motor vehicles of the state in which the automobile is licensed, by mailing a copy of the notice by registered mail to the address on the records of the division of motor vehicles of said state;

(2) Upon an owner or claimant whose name and address are known, by mailing a copy of the notice by registered mail to his last known address; or

(3) Upon an owner or claimant, whose address is unknown but who is believed to have an interest in the vehicle, by publication in one issue of a local newspaper of suitable size and general circulation. Title 4, Chapter 10 Page 4 of 7

(D) Owner's answer to notice. Within twenty (20) days after the mailing or publication of a notice of seizure, as provided by Subsection (C) hereof, the owner of the seized vehicle may file a verified answer to the allegation of the use of the vehicle

contained in the notice of seizure and of the intended forfeiture proceedings.

(E) Procedure for hearing.

(1) If a verified answer to the notice given as prescribed by this Section is not filed within twenty (20) days after the mailing or publication thereof, the court shall hear evidence upon the charge of unlawful use of the vehicle, and upon motion shall order the vehicle forfeited to the Swinomish Indian Tribal Community.

(2) If a verified answer is filed, the forfeiture proceedings shall be set for a hearing on a day not less than thirty (30) days after the answer is filed, and the proceedings shall have priority over other civil cases. Notice of the hearing shall be given in the manner provided for service of the notice of seizure.

(3) At the hearing any owner or claimant who has a verified answer on file may show by competent evidence that the vehicle was not used to transport controlled substances illegally, or that a controlled substance was not unlawfully possessed by an occupant of the vehicle, or that the vehicle was not used as a depository or place of concealment for a controlled substance.

(4) A claimant of any right, title or interest in the vehicle may prove his or her lien, mortgage or conditional sales contract to be bona fide, and that his or her right, title, or interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, and without knowledge that the vehicle was being, or was to be used for the purpose charged; but no person who has the lien dependent upon possession for the compensation to which he or she is legally entitled for making repairs or performing labor upon and furnishing supplies and materials for, and for the storage, repairs, safekeeping of any vehicle, and no person doing business under any law of any state or the United States relating to banks, trust companies, credit unions or licensed pawnbrokers or money lenders or regularly engaged in the business of selling vehicles shall be required to prove that his or her right, title or interest was created after a reasonable investigation of the moral responsibility, character and reputation of the owner, purchaser, or person in possession of the vehicle when it was brought to the claimant. Title 4, Chapter 10 Page 5 of 7

(F) Judgment.

(1) If proper proof is presented at the hearing, the Tribal Court shall order the vehicle

released to the bona fide owner, lien holder, mortgagee or vendor, if the amount due him or her is equal to or in excess of the value of the vehicle as of the date of seizure, it being the purpose of this Section to forfeit only the right, title or interest of the purchaser.

(2) If the amount due a claimant or claimants is less than the value of the vehicle, the vehicle shall be sold at public auction by the tribal police chief after due and proper notice has been given.

(3) If no such claimant exists, and the confiscating agency wishes to retain the vehicle for its official use, it may do so. If such vehicle is not to be retained, it shall be disposed of as provided in Subsection 4-10.050(F)(2) of this Section.