

FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEP 29 2023

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

EDWARD J. STEINER,

Plaintiff-Appellant,

v.

BRENT KEMPSTER, Officer, La Push  
Police Department; et al.,

Defendants-Appellees,

QUILEUTE TRIBE,

Real-party-in-interest-  
Appellee.

No. 23-35445

D.C. No. 3:22-cv-05526-RJB  
Western District of Washington,  
Tacoma

ORDER

Before: BADE, LEE, and VANDYKE, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked leave to proceed in forma pauperis. *See* 28 U.S.C. § 1915(a). On July 19, 2023, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the opening brief, and the responses to the July 19, 2023 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 8) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EDWARD J. STEINER ,

Plaintiff,

Case No. C22-5526-RJB-SKV

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## REPORT AND RECOMMENDATION

BRENT KEMPSTER,

Defendant.

## INTRODUCTION

15 This is a civil rights action proceeding under 42 U.S.C. § 1983. Plaintiff Edward J.  
16 Steiner is a state prisoner who is currently confined at the Washington State Penitentiary in  
17 Walla Walla, Washington. Plaintiff alleges Defendant Brent Kempster, a police officer with the  
18 La Push Police Department (“LPPD”),<sup>1</sup> violated Plaintiff’s Fourth Amendment rights by using  
19 excessive force to detain him on August 22, 2021, in the Lonesome Creek Store<sup>2</sup> in La Push,  
20 Washington. Dkt. 7 at 4–5. On April 4, 2023, Defendant Kempster filed the present Motion to

<sup>1</sup> Defendant Kempster is now employed as a police officer with the Suquamish Police Department. Dkt. 35 ¶ 2.

<sup>2</sup> In the Amended Complaint, Plaintiff refers to the store where the alleged incident of excessive force occurred as both the “Lone Creek Store” and the “Lonesome Creek Store.” *See* Dkt. 7 at 4–5. The “Lonesome Creek Store” is the correct name. *See* Dkt. 40 ¶¶ 2–3, 5.

1 [Plaintiff's] injuries" and Plaintiff "was relieved a bit[,]" *id.* at 7. Per Plaintiff, the "transporting  
 2 officer" took Plaintiff to the hospital. *Id.* at 8.

3 At the time of the alleged incident, Defendant Kempster was on duty as a LPPD police  
 4 officer, was wearing a LPPD police uniform, and was driving a marked LPPD vehicle. Dkt. 35  
 5 ¶ 6. The Lonesome Creek Store is wholly owned and operated by the Quileute Tribe and is  
 6 located within the boundaries of the Quileute Reservation, on land held in trust by the United  
 7 States for the tribe. Dkt. 40 ¶¶ 2–7. At the relevant time, there existed no cross-deputization or  
 8 cooperative law enforcement agreement between LPPD and the State of Washington, Clallam  
 9 County, or the City of Forks. Dkt. 35 ¶ 9; Dkt. 36 ¶ 6; Dkt. 37 ¶¶ 6–7; Dkt. 38 ¶¶ 3–4.

10 Defendant Kempster detained Plaintiff under Section 13.7.4 of the Quileute Tribe's Law  
 11 & Order Code. Dkt. 35 ¶ 18. Following this detention, a Clallam County sheriff's deputy  
 12 arrived and transported Plaintiff to Clallam County Jail. Dkt. 40 at 10–12. Plaintiff was  
 13 charged, prosecuted, and convicted in Clallam County Superior Court with Assault in the Third  
 14 Degree—Law Enforcement Officer and Harassment (Bodily Injury). *Id.* ¶ 8; *id.* at 14–18.

15 On April 4, 2023, Defendant Kempster filed the present Motion to Dismiss, arguing  
 16 (among other things) that the Court lacks subject-matter jurisdiction over this case because  
 17 Defendant Kempster was acting under color of tribal law, not state law, at the time of the alleged  
 18 incident.

19 DISCUSSION

20 A. Legal Standards

21 To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he suffered a  
 22 violation of rights protected by the United States Constitution or created by federal statute, and  
 23 (2) the violation was proximately caused by a person acting under color of state law. *See*

1 When a defendant raises a factual challenge to the court's subject-matter jurisdiction, as  
2 Defendant Kempster does here, the Court "need not presume the truthfulness of the plaintiff's  
3 allegations," *White*, 227 F.3d at 1242, and its consideration of evidence beyond the complaint  
4 does not convert the motion into one for summary judgment, *Safe Air*, 373 F.3d at 1039. In such  
5 instances, "the plaintiff must support her jurisdictional allegations with 'competent proof,' under  
6 the same evidentiary standard that governs in the summary judgment context." *Leite*, 749 F.3d at  
7 1121 (internal citation omitted). "The plaintiff bears the burden of proving by a preponderance  
8 of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Id.*  
9 "[I]f the existence of jurisdiction turns on disputed factual issues, the district court may resolve  
10 those factual disputes itself." *Id.* at 1122.

11       B.     Defendant Kempster's Motion to Dismiss

12       To establish subject-matter jurisdiction over Plaintiff's § 1983 claim, Plaintiff must  
13 demonstrate that Defendant Kempster was acting under color of state law at the time of the  
14 alleged incident of excessive force. *West*, 487 U.S. at 49. In other words, Plaintiff must  
15 demonstrate that Defendant Kempster was exercising power granted to him by the state. *See*  
16 *Johnson*, 113 F.3d at 1117. Because the undisputed evidence demonstrates that Defendant  
17 Kempster was exercising power granted to him by the tribe, and not the state, Plaintiff has failed  
18 to make such a showing.

19       It is undisputed that the LPPD is the police department for the Quileute Tribe—a  
20 sovereign tribal entity. Dkt. 35 ¶ 7; Dkt. 36 ¶ 5. It is further undisputed that Defendant  
21 Kempster was acting in his capacity as a LPPD police officer when detaining Plaintiff, Dkt. 35  
22 ¶¶ 6–11; Dkt. 36 ¶¶ 8–9, that the incident occurred on tribal land, Dkt. 40 ¶¶ 2–7, and that  
23 Defendant Kempster detained Plaintiff exclusively under the Quileute Tribe's Law and Order

Finally, Plaintiff argues that Defendant Kempster charged him with violations of Washington law. Dkt. 42 at 9. While it is true that Plaintiff was tried and convicted under Washington law, it was Clallam County—not Defendant Kempster, the LPPD, or the Quileute Tribe—that charged and prosecuted him. Dkt. 40 at 8–25. Defendant Kempster only detained Plaintiff under Quileute tribal law. Dkt. 35 ¶¶ 17–18; Dkt. 36 ¶¶ 8–9.

6 Because the evidence demonstrates that Defendant Kempster acted under color of tribal  
7 law, not state law, Plaintiff cannot maintain a § 1983 claim against him.<sup>4</sup> As a result, this matter  
8 should be dismissed for lack of subject-matter jurisdiction. Plaintiff's pending Motion for All  
9 Video, Photos, Audio, Property, Booking Sheet, Clothes, and Court Recordings, Dkt. 18; Motion  
10 for All Video, Audio, and Property, Dkt. 23; and Motion for Expert Witness Video and Audio,  
11 Dkt. 29, should be denied as moot.

## CONCLUSION

13       Based on the foregoing, this Court recommends that this matter be dismissed for lack of  
14 subject-matter jurisdiction. Further, Plaintiff's pending Motion for All Video, Photos, Audio,  
15 Property, Booking Sheet, Clothes, and Court Recordings, Dkt. 18; Motion for All Video, Audio,  
16 and Property, Dkt. 23; and Motion for Expert Witness Video and Audio, Dkt. 29, should be  
17 denied as moot. A proposed order accompanies this Report and Recommendation.

<sup>4</sup> Beyond this, the undisputed evidence demonstrates that Plaintiff was not deprived of any right under the United States Constitution, as required to state a claim under § 1983. The Court has concluded that Defendant Kempster acted exclusively under color of tribal law. Because tribes are not constrained by the Constitution, “no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law.” *R.J. Williams Co. v. Fort Belknap Hsg. Auth.*, 719 F.2d 979, 981–82 (9th Cir. 1983). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

Defendant Kempster also argues that, in the alternative, the Court should dismiss this action for failure to exhaust tribal court remedies. Dkt. 34 at 13–15. However, because the Court has determined that it lacks subject-matter jurisdiction for the reasons stated above, it does not reach this issue.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EDWARD J. STEINER ,

Plaintiff,

Case No. C22-5526-RJB-SKV

V.

## ORDER

BRENT KEMPSTER,

## Defendants.

Having reviewed the Report and Recommendation of the Honorable S. Kate Vaughan, United States Magistrate Judge, any objections or responses, and the remaining record, the Court finds and ORDERS:

(1) The Court ADOPTS the Report and Recommendation;

(2) This action is dismissed for lack of subject-matter jurisdiction under Fed. R. Civ.

P. 12(b)(1);

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United States District Court  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EDWARD J. STEINER ,

Plaintiff,

v.

BRENT KEMPSTER,

Defendant.

**JUDGMENT IN A CIVIL CASE**

Case No. C22-5526-RJB-SKV

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is approved and adopted. This case is dismissed for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

RAVI SUBRAMANIAN  
Clerk of Court

\_\_\_\_\_  
Deputy Clerk

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

EDWARD J. STEINER,

Plaintiff,

V.

## BRENT KEMPSTER.

Defendant.

CASE NO. 22-5526-RJB-SKV

ORDER ADOPTING REPORT AND  
RECOMMENDATION AND  
DISMISSING CASE

This matter comes before the Court on the Report and Recommendation of U.S.

Magistrate Judge S. Kate Vaughn. Dkt. 44. The Court has considered the Report and Recommendation, Plaintiff's Objections to the Report and Recommendation, Defendant's Response to the Objections and the remaining file.

On May 10, 2023, the Report and Recommendation (Dkt. 44) was filed recommending that the Defendant's motion to dismiss (Dkt. 34) be granted and Plaintiff's claims be dismissed for lack of subject matter jurisdiction. Dkt. 44. The Report and Recommendation also recommends that all remaining motions be stricken and the case be dismissed. *Id.*

The Clerk is directed to send uncertified copies of this Order to Magistrate Judge Vaughn, all counsel of record, and to any party appearing pro se at said party's last known address.

Dated this 22nd day of June, 2023.

Robert F. Bryan

ROBERT J. BRYAN  
United States District Judge