IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, PABLO, MONTANA

KATHY SMITH, d/b/a FROSTY'S Plaintiff/Appellant vs. CONFEDERATED SALISH AND KOOTENAI TRIBES, THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, HANK BAYLOR, LAWERENCE KENMILLE, JOHN LOZEAU, SONNY MORIGEAU, PAT LEFTHAND, MICKEY PABLO, LOUIE ADAMS, LLOYD IRVINE FRED MATT and TONY INCASHOLA, Individually and in their capacity as Tribal Council Members of the CONFEDERATED SALISH AND KOOTENAI TRIBES, JOSEPH DUPUIS, Individually and in his capacity as Executive Secretary of the CONFEDERATED SALISH AND KOOTENAI TRIBES, CAROLE MCCREA, Individually and in her capacity as Recording Secretary for the CONFEDERATED SALISH AND KOOTENAI TRIBES, ANITA DUPUIS, Individually and in her official capacity for the CONFEDERATED SALISH AND KOOTENAI TRIBES, and JOHN DOES 1, 2, and 3, Defendants/Appellees	CAUSE NO. AP-94-027-CV OPINION Argued April 23, 1996. Decided July , 1996.

Counsel for the Appellant: Benjamin R. Anciaux, Polson, Montana

Counsel for the Appellees: Daniel F. Decker (argued) and Ranald McDonald, Tribal Legal Department, Pablo, Montana.

This is an appeal from the trial court's dismissal of an action for failure to state a claim against the Tribes, the members of the Tribal Council and various tribal officials and employees. We affirm the trial court.

Background

In 1993 the Confederated Salish and Kootenai Tribes sought a partial retrocession by the State of Montana of state jurisdiction on the Flathead Reservation under PL 83-280. The Tribes anticipated passage of the retrocession bill since the Governor and the Attorney General had both agreed to support it. The bill passed the Montana Senate. However, in the House, the representative from Lake County was successful in having the bill killed in committee. After the legislative defeat, the Tribal Council passed a resolution requiring removal of tribal bank accounts from banks in Lake County and authorized the Tribes' participation in a voting rights/redistricting law suit. Resolution 93-122. That resolution was adopted March 26, 1993. The economic sanctions were lifted by Council action on April 15, 1993.

Facts

Contemporaneously with the passage of 93-122, a list of businesses owned by tribal members was developed by Anita Dupuis, a tribal employee. The list was distributed within the Tribal government for the purpose of giving a preference in tribal purchases to those businesses. For the purpose of this action, we will assume that the list was distributed outside of the tribal government as well. Additionally, radio advertisements featuring

Chairman Pablo were run, urging people to patronize businesses owned by the Tribes or tribal members. Those advertisements did not mention specific businesses by name.

Kathy Smith is the owner of Frosty's, a fast food restaurant in Polson. She is an enrolled member of the Tribes, although that fact is apparently not common knowledge. When she learned that a list of "approved" businesses was being prepared and distributed, she requested that she not appear on the list. She did not appear on the first version of the list. The name and address of her business, but not her name, appeared on a revised list[1]. She was promised by the Tribes' executive secretary that her business would be removed from the list and she would be given a confirming letter. This did not happen.

In June 1993, she appeared before the Council in open session to complain. She was told by the Council's recording secretary that a special closed session would be held to address her concerns. This was not done.

Many persons who did not agree with the Tribes' position apparently did not shop at the "approved" businesses and thus did not eat at Frosty's. Those that did support the "approved" businesses apparently shopped somewhere other than the City of Polson, thus not frequenting Frosty's. As a result, Smith lost business.

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[1]Smith alleges that her name did appear on the list, but the exhibit she provided showed only the name and address of the business. Whether her name was disclosed is not essential to our decision.

Action Below

Smith filed an action in the trial court naming as defendants the Tribes, the Tribal Council, all members of the Council, the executive secretary to the Council, the recording secretary for the Council, one named tribal employee and three John Does employees, all in their official and individual capacities. In the complaint, Smith enumerated seven causes of actions which alleged various violations of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, violations of the federal privacy act, 5 U.S.C. § 552a, and violations of the Tribal Constitution. Smith sought unspecified monetary damages. The trial court dismissed for failure to state a claim, ruling that only declaratory and injunctive relief is available against Tribal officials.

STANDARD OF REVIEW

Motions to dismiss are not favored. The trial court and this court will accept as true the facts alleged in the complaint. *Stiesberg v. California*, 80 F.3d 353 at 356 (9th Cir. 1996). "However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In Re Stac Electronics Security Litigation*, 82 F.3d 1480 at 1485 (9th Cir. 1996); *see also*, Wright & Miller, *Federal Practice and Procedure*, § 1357.

DISCUSSION

The defendants in this action can be categorized into three classes, the Tribes and the Tribal Council, the individual members of the Council and the tribal officers and employees. It is helpful to analyze the case by looking to the different classes of defendants.

1. The Tribes and Tribal Council Are Immune From Suit.

The first two named defendants in the action are the Tribes and the Tribal Council, so we look to the whether a claim can be maintained against the Tribes or the Council. It cannot. While this appeal was pending, this court rendered its decision in *Moran v. Confederated Salish and Kootenai Tribes*, 18 ILR 6149 (1995). In that action this court held, "As sovereign governments, Indian Tribes possess common law immunity from suit. This immunity encompasses the governing bodies of tribes." *Moran*, at 6156. Both the Tribes and the Tribal Council are immune.

In addition to Chief Justice Peregoy's extensive and well reasoned decision in *Moran*, there is a substantial body of federal case law that holds tribes are immune to actions in the federal courts. See, e.g. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 at 59 (1978). The immunity is so extensive that it even prevents the involuntary subpoena of tribal records. *United States v. James*, 980 F.2d 1314 (9th Cir. 1992). It makes no difference whether injunctive, monetary or other relief is sought; the Tribes are immune from all actions to which they have not consented.

2. Members of the Council Are Immune.

The members of the Tribal Council enjoy legislative immunity for all actions taken within the scope of their legislative duties. *Tenny v. Brandhove,* 341 U.S. 367 (1951); *see also, Chappell v. Robbins,* 73 F.3d 918 (9th Cir. 1996). We view the scope of legislative duties with great breadth. The establishment of an Indian preference policy is clearly within the scope of legislative duties. Legislative decisions establishing an Indian preference have been enacted or approved by Congress in many areas, including governmental purchases, 25 U.S.C. § 47, public employment, 25 U.S.C. §§ 46, 472 and private employment, 42 U.S.C. § 2000e-2(i). Any action by the Council establishing or enforcing similar tribal policies is within the scope of legislative duties. The creation of such policies are within the scope of legislative duties whether the policies extend only to tribal actions or to encouraging the public at large to exercise such preferences.

Members of the Council should be immune not only from damages, but from even having to defend **in court** the decisions they make as members of the Council. The ultimate remedy against Council members is in the ballot box, not the courts.

3. Tribal Officers and Employees Have a Good Faith Immunity to Claims For Money Damages.

Individual tribal officers and employees do not enjoy the same absolute immunity that is extended by the Tribes and Council members. These defendants have a good faith immunity in actions for monetary damages and no immunity to declaratory and injunctive

relief. *Moran, supra.*

In taking as true the allegations of the complaint, we must find that the individual officers and employees were acting in good faith. The complaint alleges that all defendants, which includes the Tribal Council, engaged in the conduct leading to the implementation of the Indian preference. There were no allegations that any of the individuals acted alone or contrary to Council policies. If the individual officers and employees were following Council policies, as is alleged, they were acting in good faith.

To deny good faith immunity to tribal officers, a plaintiff would have to show specific facts that demonstrate the officers violated a "clearly established" right. It is not sufficient simply to make a conclusory allegation of a general violation of a broad right. "The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing is wrong." *Anderson v. Creighton,* 483 U.S. 635 at 640 (1987). *See also, Sinola Lake Owner's Ass'n. v. City of Simi Valley,* 70 F.3d 1095 (9th Cir. 1995). The Ninth Circuit has set forth a three step test to determine if an official is entitled to qualified immunity. That test requires:

> (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue.

Newell v. Sauser, 79 F.3d 115 (9th Cir. 1996).

Applying *Anderson* and *Newell* to this action shows that plaintiff fails to overcome the qualified immunity of the

individual officers. Smith fails to show that the specific rights allegedly violated were "clearly established" or that the tribal officials could not have believed them to be lawful.

Encouraging the public to give an Indian preference in local purchases does not fall within those things that a reasonable officer would understand to be wrong. To the contrary, Indian preferences have been upheld by federal courts. E.g. *Morton v. Mancari*, 417 U.S. 535 (1974).

The other alleged violations of rights were more legal conclusions than an allegation of facts to show the denial of an established right. There is no dispute that there is a right to petition for redress of grievances. However, it is not established that the right includes a requirement that a legislative body convene in special session at the request of a citizen.

Smith also alleged she had been denied the right to notic and opportunity to be heard. The right to notice and opportunity to be heard is well established in the field of litigation. However, that right is not established in the field of legislation. The Tribal Council can pass legislation without service of process on every individual that is potentially affected by the legislation.

Smith also alleged a 5th Amendment type taking of Smith's property for tribal use. While we accept as true the allegation that her business suffered after passage of Resolution 93-122, we do not accept the legal conclusion that the alleged actions constitute a taking. A taking requires an actual physical invasion or complete prohibition of all economic use. Economic harm caused

by legislation that does not prohibit current economic use does not constitute a taking. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The alleged a violations of the Equal Protection Clause of ICRA and the tribal constitutional provision guaranteeing equal rights to share in tribal resources are also conclusory allegations. The argument advanced by Smith is that only business owners were mentioned in the lists or radio advertisements. Business owners are not a protected class. The Tribes would need only a rational basis to treat businesses differently. From the preamble to Resolution 93-122, the individual officers could assume that there was a rational basis for the action taken by the Council and that their actions were lawful.

Injunctive Relief is Moot.

To be technically correct, this court should also look to see if there is any relief, not just the relief requested, to which plaintiff would be entitled under the facts alleged. *See* Wright and Miller, *Federal Practice and Procedure*, § 1357. As noted previously, the tribal officers are not immune to an action for declaratory or injunctive relief. If plaintiff could show that the Council policies were contrary to federal law or the Tribal Constitution, she would be entitled to injunctive relief against the individuals charged with enforcement of the policies. However, the economic sanctions were lifted and the actions complained of do not appear to be continuing. An action for declaratory and

injunctive relief is now moot.

CONCLUSION

The judgment of the trial court dismissing the action is AFFIRMED.

D. MICHAEL EAKIN, Acting Associate Justice

We Concur.

MARGARET HALL, Associate Justice

JAMES WHEELIS, Associate Justice

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 8th day of August, 1996.

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