

CHAPTER 2
TRIBAL AUTHORITY

Subchapter 2 – The Powers of Indian Tribes

§ 33. Immunity of Tribal Officials and Employees in Federal and State Courts

(a) The immunity of tribal officials and employees from claims brought in the federal and state courts depends in part on whether the tribe is the real party in interest. That determination in turn depends upon whether the suit against the official or employee is an official-capacity suit or an individual-capacity suit.

(b) The following principles generally govern claims brought against tribal officials or employees in their official capacity:

(1) A tribe is the real party in interest as to claims brought against a tribal official or employee in an official capacity seeking retroactive monetary relief, relief that would have a direct effect on the tribe’s property, or prospective relief that would require the tribal officer or employee to act or refrain from acting;

(2) Claims for retrospective damages and claims directly affecting the tribe’s property are barred by the tribe’s sovereign immunity to the same extent that such claims would be barred if brought against the tribe; and

(3) Claims for prospective injunctive or declaratory relief to prevent violations of federal law are generally not barred by the tribe’s sovereign immunity.

(c) The following principles generally govern claims brought against tribal officials or employees in their individual capacity:

(1) An individual tribal official or employee, rather than the tribe, is the real party in interest as to claims brought against the official or employee in a personal capacity seeking either prospective relief or retroactive monetary relief;

(2) Tribal sovereign immunity does not apply;

(3) The fact that a tribe has voluntarily bound itself to indemnify officers or employees held individually liable for claims will not cloak the individual with the tribe’s sovereign immunity; and

(4) Personal immunity defenses may shield the individual from liability.

1 **Comment:**

2 *a. Real party in interest determines capacity sued and available immunities.* In a lawsuit
3 brought in the federal or state courts naming a tribal official or employee as defendant,
4 determination of whether the Indian tribe is the real party in interest to the claims asserted
5 dictates what immunities may be available. When the tribe is not the real party in interest to a
6 claim, the tribal official or employee is not entitled to sovereign immunity. When the tribe is the
7 real party interest to a claim, the tribal official or employee is entitled to the immunity. Federal
8 statutes may affect the immunities available to tribal officials or employees sued in the federal or
9 state courts.

10 *b. Tribal sovereign immunity in official-capacity suits.* When the remedy sought requires
11 the tribe to take action or refrain from taking action, directly affects the tribe’s property interests,
12 or interferes with the exercise of tribal sovereign authority, the tribe is the real party in interest
13 and the tribal official or employee is entitled to sovereign immunity. Tribal sovereign immunity
14 bars claims for retrospective damages against tribal officials or employees in their official
15 capacity because the money judgment sought is from the sovereign. Tribal sovereign immunity
16 does not, in general, bar actions for prospective, injunctive, or declaratory relief against tribal
17 officials or employees in their official capacities to prevent violations of federal law. However,
18 such claims will be barred by tribal sovereign immunity if they are the functional equivalent of
19 an action against the tribe to quiet title to land or for specific performance of a contract.

20 *c. Personal liability of tribal officials and employees and immunity defenses.* Tribal
21 officials and employees sued for damages in their individual capacities are not imbued with tribal
22 sovereign immunity, and a tribe’s voluntary decision to indemnify a tribal official or employee
23 held individually liable will not shield the officer or employee with tribal sovereign immunity. In
24 certain circumstances, tribal officials or employees may, however, assert personal immunity
25 defenses, such as absolute prosecutorial immunity, to tort claims brought against them in their
26 individual capacities.

REPORTERS’ NOTES

27 *Comment a.* The Supreme Court applies the law governing the sovereign immunity of
28 state and federal officers and employees to tribal officers and employees sued for negligence in
29 state courts. See *Lewis v. Clarke*, 137 S.Ct. 1285 (2017). Thus, whether the tribe is “the real
30 party in interest dictates what immunities may be available.” *Id.* at 1291. “In making this

1 assessment, courts may not simply rely on the characterization of the parties in the complaint,
2 but rather must determine in the first instance whether the remedy sought is truly against the
3 sovereign.” *Id.* at 1290. Stated another way,

4 In any suit against tribal officers, [courts] must be sensitive to whether the judgment
5 sought would expend itself on the public treasury or domain, or interfere with the public
6 administration, or if the effect of the judgment would be to restrain the [sovereign] from
7 acting, or to compel it to act.

8 *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (citation and quotations
9 omitted). This is a “remedy-focused analysis,” turning on whether the relief sought runs against
10 the sovereign or the individual. *Id.*

11 When, in an action brought against a tribal officer or employee in the state or federal
12 courts, the Indian tribe is the real party in interest, the defendant tribal official or employee is
13 entitled to sovereign immunity. See *Lewis*, 137 S. Ct. at 1290-1291; *Pistor v. Garcia*, 791 F.3d
14 1104, 1112 (9th Cir. 2015). Otherwise, the lawsuit proceeds against the tribal official or
15 employee in his or her “individual capacity” (or sometimes referred to as “personal capacity”);
16 the remedy is sought only against the individual. See *Lewis*, 137 S. Ct. at 1291-1292; *Pistor*, 791
17 F.3d at 1112-1113; *Maxwell*, 708 F.3d at 1088.

18 Federal statutes may affect the immunities available to tribal officials or employees. See,
19 e.g., 25 U.S.C. § 5321(d) (tort claims against tribal medical personnel performing work under
20 contracts with Indian Health Services governed by Federal Tort Claims Act, 28 U.S.C. §§
21 1346(b), 2671-2680); 25 U.S.C. § 2804(f) (tort claims against certain tribal law-enforcement
22 personnel subject to Federal Employees Liability Reform and Tort Compensation Act of 1988,
23 Pub. L. No. 100-694, 102 Stat. 4563).

24 *Comment b.* Sovereign immunity bars suits for money damages against tribal officials or
25 employees when they are sued in their official capacities, i.e., when the tribe is the real party in
26 interest because the judgment will legally bind it. See, e.g., *Cook v. AVI Casino Enterprises*,
27 *Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Native American Distrib. v. Seneca-Cayuga Tobacco*
28 *Co.*, 546 F.3d 1288, 1296-1297 (10th Cir. 2008); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir.
29 2004), cert. denied, 543 U.S. 966 (2004).

30 As the Ninth Circuit has explained:

31 [O]fficial capacity suits ultimately seek to hold the entity of which the officer is an agent
32 liable, rather than the official himself: they “ ‘generally represent [merely] another way of
33 pleading an action against an entity of which an officer is an agent.’ ” [*Kentucky v.*
34 *Graham*, 473 U.S. 159,] 165–66, 105 S.Ct. 3099 (quoting *Monell v. N.Y.C. Dep’t of Soc.*
35 *Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). For this reason,
36 an officer sued in his official capacity is entitled to “forms of sovereign immunity that the
37 entity, qua entity, may possess.” *Id.* at 167, 105 S.Ct. 3099

38 *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (citations, quotation, and alterations in
39 original). As discussed in the Reporters’ Notes to *Comment c*, the test for immunity is not

1 whether the alleged wrongdoing occurred when the officer or employee acted within the scope of
2 his or her duties, but whether the remedy is sought against the tribe.

3 In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court, citing *Ex*
4 *parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), held that a tribal official could be
5 sued for prospective injunctive relief to prevent a violation of federal law, the Indian Civil Rights
6 Act. See *id.* at 59. The federal courts of appeals that have considered the issue, uniformly hold
7 that the principles of *Ex parte Young* apply, by analogy, to tribal officials and, therefore, that
8 tribal sovereign immunity does not bar claims for prospective, injunctive relief against a tribal
9 official allegedly acting in violation of federal law. See, e.g., *Crowe & Dunlevy, P.C.*, 640 F.3d
10 1140, 1154-1155 (10th Cir. 2011) (alleging violation of “federal common law”); *Vann v.*
11 *Kemphorne*, 534 F.3d 741, 749 (D.C. Cir. 2008) (alleging violation of Indian treaty); *Burlington*
12 *Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092-1093 (9th Cir. 2007) (alleging
13 that enforcement of tribal tax would violate federal law); *Tamiami Partners, Ltd. v. Miccosukee*
14 *Tribe of Indians of Florida*, 63 F.3d 1030, 1050-1051 (11th Cir. 1995) (alleging violation of
15 federal Indian gaming statute); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian*
16 *Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) (alleging tribal ordinance preempted by federal law).
17 See generally Richard B. Collins, *To Sue and Be Sued: Capacity and Immunity of American*
18 *Indian Nations*, 51 CREIGHTON L. REV. 391, 414-416 (2018) (discussing Supreme Court cases
19 involving declaratory or injunctive relief against tribal officials and the application of the *Ex*
20 *parte Young* doctrine).

21 In the same way that there are limitations upon the use of the *Ex parte Young* doctrine
22 when paramount sovereign interests of a state are at stake, see, e.g., *Idaho v. Coeur d’Alene*
23 *Tribe of Idaho*, 521 U.S. 261, 282 (1997) (holding that *Ex parte Young* doctrine did not extend to
24 claims against state officials concerning ownership of submerged lands under navigable waters
25 because the declaratory and injunctive relief sought was the functional equivalent of quiet-title
26 action against the State, which would result in the State’s loss of substantially all benefits of
27 ownership and control), there are limits on the use of the *Ex parte Young* doctrine when similar
28 tribal sovereign prerogatives may be affected. See *Tamiami Partners, Ltd. ex rel. Tamiami*
29 *Development Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1225-1226 (11th Cir.
30 1999) (“It is well established that *Ex parte Young* does not permit individual officers of a
31 sovereign to be sued when the relief requested would, in effect, require the sovereign’s specific
32 performance of a contract.”) (citations omitted). See also *Shermoe v. United States*, 982 F.2d
33 1312, 1320 (9th Cir. 1992) (“The relief sought in this case would prevent the absent tribes from
34 exercising sovereignty over the reservations allotted to them by Congress. It is difficult to
35 imagine a more intolerable burden on governmental functions.”) (citation and quotations
36 omitted).

37 *Comment c.* In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Supreme Court held that a
38 tribal employee who caused an off-reservation motor-vehicle accident in Connecticut while in
39 the scope of his employment for the tribe could not raise sovereign immunity to bar a state-court
40 negligence action brought by the injured parties because the employee was sued in his individual

1 capacity; the tribe was not the real party in interest. *Id.* at 1290-1292. The Court applied
2 sovereign-immunity principles governing state and federal officers and employees, and
3 explained that:

4 “Personal-capacity suits . . . seek to impose *individual* liability upon a government
5 officer for actions taken under color of state law.” *Hafer*, 502 U.S., at 25, 112
6 S.Ct. 358 (emphasis added); see also *id.*, at 27–31, 112 S.Ct. 358 (discharged
7 employees entitled to bring personal damages action against state auditor
8 general); cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91
9 S.Ct. 1999, 29 L.Ed.2d 619 (1971). “[O]fficers sued in their personal capacity
10 come to court as individuals,” *Hafer*, 502 U.S., at 27, 112 S.Ct. 358, and the real
11 party in interest is the individual, not the sovereign.

12 *Id.* at 1291 (emphasis in original). Additionally, the fact that the tribe had enacted a law requiring
13 the tribe to indemnify tribal employees in these circumstances was not sufficient to make the
14 tribe the real party in interest. *Id.* at 1292-1294.

15 Other cases recognizing that tribal officers or employees are subject to suit for damages
16 when sued in their individual capacities include *Maxwell v. County of San Diego*, 708 F.3d
17 1075, 1088-1090 (9th Cir. 2013) (plaintiff’s state-law tort claims against tribal paramedics in
18 their individual capacities for “allegedly grossly negligent acts committed outside tribal land
19 pursuant to an agreement with a non-tribal entity” not barred by sovereign immunity); *Pistor v.*
20 *Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (tribal officers sued in their individual capacities for
21 alleged unconstitutional detention and seizure “under color of state law” and “in concert with”
22 with state law-enforcement officials cannot assert sovereign immunity from suit); *Garcia v.*
23 *Akwesasne Hous. Auth.*, 268 F.3d 76, 88 (2d Cir. 2001) (allowing tort and discrimination claims
24 for money damages against tribal employee in his individual capacity to proceed).

25 The Supreme Court and lower federal courts have separately made clear that individual
26 tribal members do not enjoy sovereign immunity from suit. See *Puyallup Tribe, Inc. v.*
27 *Washington Dept. of Game*, 433 U.S. 165, 171-172 (1977) (holding individual tribal members
28 are not protected by tribal sovereign immunity); *United States v. James*, 980 F.2d 1314, 1319
29 (9th Cir.1992) (“Tribal immunity does not extend to the individual members of the tribe.”).

30 The terminology has led to much confusion. See *Kentucky v. Graham*, 473 U.S. 159, 165
31 (1985) (the distinction “between personal- and official-capacity action suits . . . continues to
32 confuse lawyers and confound lower courts”). As the Ninth Circuit has explained, the fact that a
33 lawsuit seeks damages arising out of the actions of a tribal official or employee within the scope
34 of his or her employment is of no moment for the purposes of determining whether sovereign
35 immunity bars the action. *Pistor*, 791 F.3d at 1114 (noting that the parties “misapprehend” that
36 whether an official acts under color of state or tribal law “is wholly irrelevant to the tribal
37 sovereign immunity analysis”). The Court continued:

38 By its essential nature, an individual or personal capacity suit against an officer seeks to
39 hold the officer personally liable for the wrongful conduct taken *in the course of her*

1 *official duties*. As the officer *personally* is the target of the litigation, she may not claim
2 sovereign immunity – and that is so regardless of whether she was acting under color of
3 tribal or state law at the time of the wrongful conduct in question.

4 Id. (emphasis in original). See also *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d
5 1288, 1296 (10th Cir. 2008) (“The general bar against official-capacity claims . . . does not mean
6 that tribal officials are immunized from individual-capacity suits arising out of actions they took
7 in their official capacities.”). Cf. *Hafer v. Melo*, 502 U.S. 21, 26-29 (1991) (former state
8 employees sued newly elected state auditor general for damages for wrongful termination in
9 violation of state and federal law, claiming that she conspired with U.S. Attorney to falsely
10 accuse them of “buying” their positions under former auditor general; defendant incorrectly
11 asserted that she could “not be held liable in her personal capacity for actions taken in [her]
12 official capacity”).

13 In *Lewis*, the Supreme Court announced that the common law *personal-immunity*
14 defenses (as distinguished from *sovereign-immunity* defenses) that are available to state and
15 federal officers and employees may be available to tribal officers and employees when sued for
16 money damages in their personal capacities, “such as, for example, absolute prosecutorial
17 immunity in certain circumstances,” *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) (citing *Van*
18 *de Kamp v. Goldstein*, 555 U.S. 335, 342-344 (2009)). See also *id.* at 1292 n.2 (“There are, of
19 course, personal immunity defenses distinct from sovereign immunity.”) (citing *Harlow v.*
20 *Fitzgerald*, 457 U.S. 800, 811-815 (1982)); *id.* (stating that *Clarke* sought to raise “one particular
21 form of personal immunity . . . – official immunity”) (citing *Westfall v. Erwin*, 484 U.S. 292,
22 295-97 (1988)). While the full contours of these common law personal-immunity defenses to
23 individual-capacity claims against tribal officials and employees have yet to be fully developed,
24 the Court’s language in *Lewis v. Clarke* points to the availability of established personal-
25 immunity defenses: (1) “absolute immunity” from state tort claims for tribal judges in their
26 judicial functions, tribal prosecutors and similar officials, and tribal executive officers engaged in
27 adjudicative functions, see *Harlow v. Fitzgerald*, 457 U.S. at 807, and (2) “official immunity”
28 from state tort claims for tribal officials when exercising discretionary judgments in carrying out
29 their official duties, see *Westfall v. Erwin*, 484 U.S. at 295-297. This conclusion flows from the
30 personal-immunity cases cited by the Supreme Court in *Lewis*. See *Van de Kamp*, 555 U.S. at
31 341-343 (state prosecutor absolutely immune from federal statutory claims for damages for
32 failing to disclose impeachment material; state prosecutors, like state legislators and judges,
33 “have long enjoyed absolute immunity for their official actions” as a matter of common law;
34 “absolute immunity may not apply when a prosecutor is not acting as an officer of the court, but
35 is instead engaged in other tasks, say, investigative or administrative tasks”) (citations and
36 quotations omitted); *Westfall*, 484 U.S. at 295-298 (federal employee brought state-law tort
37 claims against his supervisors for negligently causing him to be exposed to toxic chemicals;
38 absolute immunity does not attach to the supervisors “solely because conduct is within the outer
39 perimeter” of their duties, but only when the conduct also “is the product of independent
40 judgment” on their part); *Harlow*, 457 U.S. at 811-815 (“absolute immunity” exists for officials

Ch. 2. Tribal Authority, § 33

1 “whose special functions or constitutional status requires complete protection from suit,”
2 including “legislators, in their legislative functions, . . . judges, in their judicial functions, . . .
3 executive officers engaged in adjudicative functions, . . . and the President of the United States”)
4 (alterations, and quotations omitted).