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

No. AP-95-282-CV

WILLIAM JOSEPH MORAN,

Plaintiff

vs.

THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, MICHAEL T. PABLO, individually, and as Chairman, and JOSEPH E. DUPUIS, individually,

Defendants.

Appeal from the Trial Court
of the Confederated Salish and Kootenai Tribes
No. 95-282-CV--Louise Burke, Trial Judge

Decided June 9, 1995

Before GAUTHIER, HALL, and PEREGOY, Civil Appellate Judges

ORDER

PEREGOY, Chair, Civil Appellate Panel:

BACKGROUND

This litigation arises out of a dispute between the parties regarding the relative authority of the Tribal Court and Tribal Council over certain tribal government procedures, processes and

power related to executive clemency. It further raises the issue of separation of powers between the branches of the tribal government. Joseph Moran, then Chief Judge of the Tribal Court, filed the instant action after the Tribal Council granted executive clemency to a defendant in a criminal case while the matter was under active review by the Criminal Appellate Panel of the Tribal Court. The Council's executive clemency order was subsequently upheld by the Criminal Appellate Panel.[1]

The instant dispute centers in significant part on Plaintiff's employment contract with the Tribes. Moran seeks a declaratory judgement, in part, that: the executive clemency and related actions of the Tribal Council and Chairman Pablo were illegal; the Tribes breached their contract with Moran; the Tribes tortiously interfered with the contract; the Tribes intentionally interfered with prospective contractual relations with Moran; and the Tribes negligently and intentionally inflicted emotional harm on him. In addition to declaratory relief, Moran seeks compensatory and punitive damages. The trial court has not yet adjudicated the merits of the underlying action.

On May 19, 1995, Moran moved ex parte for a temporary restraining order and preliminary injunction. Judge Louise Burke granted the motion, in relevant part as follows:

> Defendants are restrained and enjoined, until hearing can be held, from any acts, outside regular Court process, which interfere with this Court's ability to decide this case according to the Court's rules and processes...

On May 22, 1995, the Tribes moved for an expedited appeal of the ex parte order. The instant appeal is limited to this particular issue.

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[1] See Confederated Salish and Kootenai Tribes v. Crossguns, AP-CR-239-93, AP-CR-284-92, Order of May 11, 1995.

The Tribes contend the ex parte order temporary restraining order was improperly issued and is appealable as an injunction. They seek a stay order.[2] Moran asserts the temporary restraining order is not a final order and is therefore not appealable.

DISCUSSION

Generally, an order granting or denying a temporary restraining order is not appealable as the grant or denial of an injunction. See 9 Moore's Federal Practice, ¶110.20[5], Appealability of Temporary Restraining Orders, (1992) at 259. The reasoning is that a request for a temporary restraining order is heard ex parte, the order may be of short duration, and it is usually followed by a hearing on the request for a preliminary injunction. Id. However, labels do not control. When a temporary restraining order is granted or denied after full hearing, it is treated as a preliminary injunction and is appealable as such. Id. Rule 65(b) of the Federal Rules of Civil Procedure requires that a temporary restraining order cannot remain in force more than ten days after entry, although an extension of up to ten days may be ordered if good cause is shown, or the party restrained may consent to an extension beyond that period. A restraining order that by its terms extends beyond the twenty-day period allowed by Rule 65(b) is treated as a preliminary injunction, and is appealable. Id. at 260.

Rule 65(b) directs the district court to set a time for the expiration of the restraining order. Where no time is fixed, and therefore the order is indefinite, such orders have been characterized as temporary injunctions. It has been held in such circumstances the order expires

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[2] The Tribes' request to the Civil Court of Appeals for a stay is improperly placed. Rule 2, Part 4 of the Tribal Court Appellate Procedures directs a party seeking a stay of execution of a judgment or order to apply to the Chief Judge of the Tribal Court. In this case, the request for stay would have been properly filed with the Acting Chief Judge.

in ten days by the terms of Rule 65(b), and therefore when ten days has elapsed, any appeal will be dismissed as moot. Id. See also, Benitez v. Anciani, 127 F.2d 121, 125 (1st Cir. 1942), cert. denied 317 U.S. 699 (1943) (temporary restraining order expired after ten days under Rule 65, became moot and appeal as to it dismissed where application was never set down for hearing and adverse party did not receive notice within the meaning of Rule 65, even though copies of petition were mailed to restrained party); Southard & Co. v. Salinger, 117 F.2d 194, 195-96 (7th Cir. 1941) (restraining order in question did not provide any time for its expiration, and therefore in all events, expended its force after expiration ten days from its entry; court was without power to give it vitality for a longer period, except upon certain conditions not present).

In the instant case, the trial court did not set a date for expiration of the temporary restraining order, nor has it been scheduled for hearing. In light of the foregoing authority, we hold the temporary restraining order at issue expired under Rule 65(b) ten days after it was issued, i.e., on June 5, 1995. We further hold the above-quoted portion of the temporary restraining order was effective during such ten day period, as it was properly issued pursuant to Rule 10.4 of the Rules of Practice in Civil Actions and Proceedings in the Tribal Court, which provides in relevant part:

> Nothing in this rule limits the equitable powers of the court to issue, upon proper petition, such emergency orders as may be necessary to preserve the status quo or to maintain law and order in the context of a civil case or controversy until the earliest time that the matter may be heard...

APPEAL DISMISSED; CASE REMANDED

Robert M. Peregoy, Chair
Civil Appellate Panel

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

WILLIAM JOSEPH MORAN, Plaintiff/Respondent, vs. THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, MICHAEL T. PABLO, individually, and as Chairman of the Tribal Council, and JOSEPH E. DUPUIS, individually, Defendants/Appellants.	CAUSE NO. AP 95-282-CV EN BANC OPINION REGARDING TEMPORARY RESTRAINING ORDER

Argued September 25, 1995

Decided October 23, 1995

James A. Manley, Manley Law Office, Polson, Montana for William Joseph Moran.

John B. Carter and Marion J. Yoder, Tribal Legal Department, Confederated Salish and Kootenai Tribes, Pablo, Montana, for the Tribal Council, Michael T. Pablo and Joseph E. Dupuis.

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes.

Before: BROWN, GAUTHIER, HALL, PEREGOY AND WHEELIS, Justices.

PEREGOY, Chief Justice:

I. INTRODUCTION

Defendants, the Tribal Council of the Confederated Salish and Kootenai Tribes ("CS&KT" or "Tribes"), tribal chairman Michael T. Pablo and Joseph Dupuis, appeal a temporary restraining order (TRO) issued *ex parte* by the trial court on May 19, 1995. Appellants

contend that the trial court lacked personal and subject matter jurisdiction to issue the TRO, and that in any event it was procedurally and legally deficient. We granted en banc review after the Civil Appellate Panel of the CS&KT Court of Appeals upheld the TRO pursuant to orders dated June 9 and 14, 1995. We now hold that the trial court was vested with the requisite jurisdiction to issue the TRO, and that the *ex parte* order was deficient as a matter of law. Accordingly, we vacate the temporary restraining order, as well as the June 9 and 14 orders of the Civil Appellate Panel.

II. BACKGROUND

The roots of the instant dispute are embedded in a companion criminal case previously adjudicated by the Tribal Court. See *Confederated Salish and Kootenai Tribes v. Crossguns*, AP-CR-239-92, AP-CR-284-92 (App. Ct. CS&KT 1992, 1995). There, defendant Anthony Crossguns was convicted on three counts of domestic violence against his common law wife. The trial judge, the Honorable William Joseph Moran, sentenced Crossguns to tribal jail for a period of three years, one year for each conviction to run consecutively. The Criminal Appellate Panel of the CS&KT Court of Appeals upheld the sentence on February 10, 1995. Thereafter, the Panel took the matter under reconsideration in response to Crossguns' petition. Before the Panel issued its decision on re-hearing, Crossguns petitioned the Tribal Council for an order of executive clemency.

The clemency petition raised the issue of cruel and unusual

punishment relating to the length of incarceration and the condition of the tribal jail. Crossguns' attorney had previously raised these matters with the Tribal Court, including a request for banishment as an alternative sentence. On March 10, 1995, the Tribal Council voted 5-3 to issue Crossguns a "conditional Executive Order of Clemency."[1] It based its decision on Crossguns' "petitions" which had been considered by the Tribal Court, and "the seriousness of the offenses, and issues of due process and equal protection."

On March 11, 1995, Michael T. Pablo, chairman of the Tribal Council, executed the clemency order, whereupon Crossguns was released from jail and banished from the Reservation for the remainder of his sentence.[2] Defendants/appellants submit that the

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[1] The minutes of the March 10, 1995 meeting indicate the Council's decision to grant executive clemency was accomplished pursuant to a motion:

> to grant executive clemency to Anthony Crossguns, with conditions to be proposed which would include, but not be limited to; exclusion from the Reservation for the period remaining in the individuals [sic] sentence, payment of any fines and fees which may be due, and other conditions to be determined by the Tribal Chairman with consultation of legal counsel.

[2] The order was captioned "Confederated Salish and Kootenai Tribes, Appellee vs. Anthony Crossguns, Appellant." It was given the same cause number (No. CR-239-92, CR-284-92) as that in the Tribal Court, and was entitled "Executive Order of Clemency." It provided in its entirety:

> Upon application to the Tribal Council of the Confederated Salish and Kootenai Tribes by the above-named Appellant's attorney, Roberta Hoe, on behalf of the Appellant the Tribal Council makes the following order of Clemency:

order of executive clemency constituted "an alternative sentence of exclusion from the Reservation..."

On May 4, 1995, Judge Moran, then chief judge of the CS&KT trial court, filed the underlying action challenging the legality of the executive clemency order issued by the Tribal Council. Moran seeks certain declaratory, compensatory and punitive relief associated in large part with his employment contract with the Tribes to serve as chief judge of the lower court. As to declaratory relief, Moran seeks a judgment holding in essence that: (1) the Council's clemency order is illegal; (2) the Tribal Court is a separate and independent department or branch of tribal government; and (3) the Tribal Court is the exclusive forum of the CS&KT tribal government for the interpretation of tribal laws and the employment contract at issue. The compensatory and punitive relief Moran seeks is tied largely to contract and tort claims associated with breach of contract allegations.

> In exercising its inherent governmental powers as a sovereign nation, the Tribal Council chooses to apply its exclusionary powers to the above-named Appellant, pursuant to this Order. Anthony J. Crossguns is hereby excluded from the region within the exterior boundaries of the Flathead Reservation of Montana for a period of two and one half (2 1/2) years, to end on September 11, 1997. If he chooses to return prior to the end of the term of this exclusionary period without obtaining prior written permission from the Tribal Council, he will be subjected to the entire term of incarceration of his original sentences not served (two and one half years). Mr. Crossguns has twenty-four (24) hours from the date and time of the signing of this Order to remove himself from the region within the exterior boundaries of the Flathead Reservation of Montana.

The order was signed by Michael T. Pablo as "Tribal Council Chairman" on March 11, 1995 at 2:15 P.M.

After Moran filed suit, the case was assigned to the Honorable Louise Burke, CS&KT trial court judge.[3] Thereafter, correspondence ensued between the parties regarding Moran's position as chief judge. On May 17, 1995, the Council wrote to Moran's attorney stating:

> ...the status of the Chief Judge as plaintiff against the Tribal government is inconsistent with his judicial duties in hearing cases to which the Tribal government, its agencies or departments is a party. Furthermore, it is inconsistent with his duties to assign and oversee other judges of the Tribal Court and to administer the Court.

The Council therein requested that Moran temporarily relinquish his administrative duties as chief judge and refrain from hearing any cases to which the Tribes were a party, during the pendency of the instant action. The Council proposed to designate a chief judge *pro tempore* to serve during this interim period.

Moran replied by letter May 19 that he did not believe he was engaged in any activity that constituted a conflict of interest, and that he therefore intended to continue to perform as chief judge. Notwithstanding, he evinced a willingness to discuss any cases or activities which the Council believed may raise a conflict. He further indicated that he was "willing to remove himself from any cases or activities which give even a distant appearance of conflict of interest." Based thereon, Moran concluded that the Council had no basis to remove him as chief

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[3] The parties disagree as to the specifics of this assignment. The Council contends Moran assigned the case to Judge Burke. Moran maintains that he notified Judge Burke that she, as the next senior judge, would be responsible for assigning the presiding judge, and that she assigned herself to the case.

judge, and asked it to reconsider taking its pending action.

In his May 19 letter, Moran alleged that the Council wanted to temporarily appoint the Honorable Gary Acevedo as chief judge so that Judge Acevedo could reassign the case from Judge Burke to another judge, to be selected from a list of judges which the Council had allegedly "pre-selected" and "pre-approved." Moran also claimed that defendants had instructed numerous tribal attorneys to investigate past files of Judge Moran and Judge Burke, and to interview tribal employees "in an attempt to find wrongdoing."

These allegations served in large part as the basis for a motion Moran filed May 19 seeking the temporary restraining order at issue. Moran alleged as a further ground that the Council was considering legislation which would "give Defendant the power to reassign the Appellate Judges who would decide this case."[4]

The record indicates that Moran served a copy of the motion for the TRO on defendants around noon on May 19, just prior to the time he filed it with the Tribal Court. Moran indicated in his supporting brief that he had information that the Council would consider a resolution for his removal during the afternoon of May 19. He accordingly sought a "temporary or emergency order" to

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[4] The Court takes judicial notice that such legislation was a proposed amendment to Ordinance 90A, the tribal statute which established the former tribal appellate court system and procedural rules. The Court takes further notice that such legislation, subsequently enacted as Ordinance 90B on May 30, 1995, had been under consideration for a significant period prior to the time the Crossguns controversy ripened. This includes the provision to expand the Court of Appeals from three to five justices.

maintain the status quo and thereby prevent his removal as chief judge, which he asserted would constitute "irreparable harm." Moran concluded:

> ...The defendant by extrajudicial process, attempts to give itself unilateral power to pre-select Judges who will control this case. This is a denial of the most fundamental concepts of due process and equal protection guaranteed to Plaintiff.

Shortly after noon on May 19, Judge Burke issued the challenged *ex parte* order, which in relevant part provided:

> Plaintiff having filed a motion, and it appearing that irreparable harm may result unless this Court grants temporary relief until a hearing can be held, and good cause appearing therefore,
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> The Court enters the following order:
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> 1. Defendants are restrained and enjoined, until hearing can be held, from any acts, outside regular Court process, which interfere with this Court's ability to decide this case according to this Court's rules and usual processes...

Seeking expedited consideration, defendants appealed the *ex parte* TRO on May 22 to the Civil Appellate Panel under Ordinance 90A, the statute then governing CS&KT appellate court procedures. On May 30, 1995, the Council terminated its contractual relationship with Judge Moran, effective June 30, 1995.[5]

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[5] The Council placed Judge Moran on administrative leave for the remaining 30 days, ordering him to vacate his office by June 2. On June 2, Moran filed a motion for another TRO seeking to restrain defendants/appellants from: (1) removing him as chief judge; (2) diminishing his salary; and (3) appointing any other person to serve as chief judge. Moran also contemporaneously sought an order commanding defendants to show cause why the acting tribal chairperson should not be held in contempt and punished for firing Moran and thereby violating the May 19 TRO instantly at issue. On June 28, this Court stayed Moran's June 2 motion for *ex parte* and show cause orders, pending an appellate ruling on the Council's petition for rehearing en banc and any related subsequent

On June 8, 1995, the Civil Appellate Panel, without hearing oral argument, ruled that the TRO expired by its own terms ten days after it was issued, and dismissed the Council's appeal as moot. On June 14, the Panel amended its order for reasons not here relevant. On June 23, the Tribal Council moved for rehearing en banc. On July 20, we granted rehearing en banc on the questions of the lower court's jurisdiction to enter the May 19 TRO, and the procedural and substantive propriety thereof. Oral argument was heard en banc September 25.

On appeal, the Tribal Council argues as a threshold matter that the Tribal Court lacks authority to review all Council actions.[6] Accordingly, this case presents the overriding question

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proceedings. On August 18, 1995, Moran withdrew his motion for the show cause order, as well as his motion to restrain the Council from removing him as chief judge, diminishing his salary, and appointing another person as chief judge. Simultaneously, Moran moved to dismiss the instant appeal on the ground that it was moot since he had withdrawn his motions for the above-referenced show cause and restraining orders. On August 29, this Court denied Moran's motion to dismiss this appeal.

[6] The Tribal Council's argument is broadly stated here and the Court recognizes that alleged limitations on the Court's power of judicial review are stated differently at different junctures in these proceedings. Often, the Tribal Council's emphasis is specifically upon the alleged lack of Tribal Court authority to review its executive orders. More broadly, the Council also argues that the Tribal Court lacks authority to review matters of "internal tribal structure," and interprets passages in two cases as standing for the proposition that official Council action is beyond review. See infra, Howlett v. Confederated Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976), and Wells v. Blaine, 21 ILR 6129 (N. Plns. Intertr. Ct. App., 1994). The Court notes, however, that upon questioning during oral argument, counsel for appellants stated that it was not the Tribal Council's position that it was above judicial review, and that the Tribal Court was vested with the power to review the constitutionality of statutes and ordinances enacted by the Tribal Council.

of whether the Tribal Court has the power of judicial review of tribal legislative and executive action. The Tribal Council further argues that the Tribal Court lacked subject matter and personal jurisdiction to enter the temporary restraining order, and that this case presents a non-justiciable political question. Appellants assert that in any event, issuance of the ex parte TRO was an error of law and procedure.

We hold that the Tribal Court is vested with the necessary power to review Tribal Council actions to determine if they are constitutional or otherwise lawful. We further hold that this case does not present a non-justiciable political question, and that the Tribal Court had the requisite subject matter and personal jurisdiction to issue the challenged TRO. Finally, we rule that the *ex parte* order cannot stand as a matter of law.

III. DISCUSSION

A. Jurisdiction to Hear Appeal of TRO

An appellate court must "satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Mauer*, 293 U.S. 237, 244 (1934). In harmony with this basic principle of appellate jurisdiction, we must as a threshold matter determine whether we have jurisdiction to review the Tribal Council's appeal of the temporary restraining order.

Ordinarily, a grant or denial of a temporary restraining order is not appealable as the grant or denial of an injunction. *See* 9 Moore's Federal Practice ¶110.20[5] (1992). This is because a motion for a temporary restraining order is heard *ex parte*, the

order is normally of short duration, and it is usually followed by a hearing on the request for a preliminary injunction. *Id.*

However, where a temporary restraining order has the practical effect of a preliminary injunction, it is immediately appealable. *See* Moore, *supra*, ¶110.20[4-1]; 42 Am. Jur. 2d, *Injunctions* §§9, 10, and 14 (1969); *see also, Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685, 686 (11th Cir. 1991) (TRO is appealable where it has the effect of a preliminary injunction, and a court of appeals is not bound by the district court's designation of the order). A TRO may also be treated as appealable if it has the effect of granting the moving party full temporary relief within the applicable time frame. Moore, *supra*, ¶110.20[5].

Orders which have no time limit and are therefore of indefinite duration have been characterized as temporary injunctions, and are appealable. *See e.g., Sampson v. Murray*, 415 U.S. 61, 85-87 (1974) (temporary restraining order continued beyond the time permissible under Rule 65 of the Federal Rules of Civil Procedure must be treated as a preliminary injunction).

Although not all of the Federal Rules of Civil Procedure are binding on the Tribal Court, this Court has recognized that they provide "important guidelines for the Tribal Court in matters not specifically covered by either the Law and Order Code or by the Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish and Kootenai Tribes." *See Hitchcock v. Shaver Manufacturing Co., et al.*, Cause No. AP-94-284-CV, "Order Denying Triple W Equipment's Motion to Dismiss" at 4,

(CS&KT App. Ct., Sept. 22, 1995). We find Rule 65 to be most instructive in this instance, given the Supreme Court's admonition that "A court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders rather than as preliminary injunctions, would have virtually unlimited authority over parties in an injunctive proceeding." *Sampson v. Murray*, 415 U.S. at 185.

The TRO at issue had the practical effect of a preliminary injunction since it purported to restrain the Tribal Council and chairman from conducting a broad range of unspecified activities. Moreover, the *ex parte* order sought to grant Moran full relief during its duration, which was indefinite. We therefore conclude that the temporary restraining order at issue in substance constituted a preliminary injunction, and that it is appealable as such. We accordingly have jurisdiction to review the challenged order. *See* Ordinance 90B, Tribal Court Appellate Procedures, Rule 3-2-303(2) ("The Court of Appeals has exclusive jurisdiction over appeals by an aggrieved party from a judgment or order...granting or dissolving an injunction.").

B. Standard of Review

1. Subject Matter Jurisdiction

Appellate courts review independently the trial court's assertion of subject matter jurisdiction. "'The existence of subject matter jurisdiction is a question of law which we review de novo.'" *American International Enterprises, Inc., v. F.D.I.C.*, 3 F.3d 1263, 1266 (9th Cir. 1993), *quoting Abbott Bldg. Corp. v.*

United States, 951 F.2d 191, 193 (9th Cir. 1991).

In determining subject matter jurisdiction, courts look to the original complaint, rather than to amended ones. *Morongo Band of Mission Indians, v. California St. Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). Subject matter jurisdiction must exist when the action is commenced. *Id.* It depends on the facts when the complaint is filed, not on later facts. "Jurisdiction cannot be acquired retroactively." *See Newman-Green v. Alfonzo-Larrain R., et al.*, 854 F.2d 916, 918 (7th Cir. 1988), *rev'd on other grounds* 490 U.S. 826 (1989), *quoting Denberg v. United States Railroad Retirement Bd.*, 696 F.2d 1193, 1197 (7th Cir. 1983), *cert. denied* 466 U.S. 926 (1984). If the trial court lacks subject matter jurisdiction at the time the action is filed, it is powerless to do anything except dismiss the action,[7] and any other order is a nullity. 858 F.2d at 1380.

Accordingly, we must examine Moran's original complaint filed May 4, 1995 to determine whether certain claims alleged therein were ones over which the trial court lacked jurisdiction, as the Tribal Council contends. If jurisdiction was lacking, then the temporary restraining order was null and void, as was any other order the trial court issued.

2. Temporary Restraining Order

The standard of review applicable to the challenged *ex parte*

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[7] Once lack of jurisdiction is raised, the court has no discretion to proceed to determine the merits. See e.g., Melo v. United States, 505 F.2d 1026 (8th Cir. 1974).

temporary restraining order is the same as that for a preliminary injunction. The trial court is vested with discretion in deciding whether to issue a preliminary injunction. Its decision will be reversed only if it abused its discretion, or based its decision on clearly erroneous findings of fact or on an erroneous legal standard. *America West Airlines, Inc., v. National Mediation Bd.*, 986 F.2d 1252, 1258 (9th Cir. 1993); *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 (9th Cir. 1989). Review is plenary where it is alleged that the trial court relied on erroneous legal premises. "'[U]nless the district court's decision relies on erroneous legal premises, it will not be reversed simply because the appellate court would have arrived at a different result.'" *America West Airlines Inc.*, 986 F.2d at 1258, *quoting Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). However, the trial court's application of law to the facts regarding a preliminary injunction will only be reviewed for an abuse of discretion. *America West Airlines, Inc.*, 986 F.2d at 1258-59.

Findings of fact are reviewed for clear error. *Id.* at 1259. "A finding of fact is clearly erroneous when 'the reviewing court on the entire evidence is left with the definite impression that a mistake has been committed.'" *Zepeda v. United States I.N.S.*, 753 F.2d 719, 725 (9th Cir. 1983), *quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Pablo v. Confederated Salish and Kootenai Tribes*, Slip. Op., at 12 (C.S.&K.T. Ct. App., April 20, 1994).

C. Subject Matter Jurisdiction

Appellants contend that the Tribal Court lacked subject matter jurisdiction to issue the temporary restraining order at issue. The gravamen of their argument is that the Tribal Court lacks subject matter jurisdiction over the underlying case, i.e., to issue the declaratory judgment sought, and therefore, that it was without authority to issue the TRO. The Council grounds this assertion on the material fact determinative of subject matter jurisdiction in the underlying case, i.e., promulgation and execution of the Crossguns clemency order. The Council claims that it was properly vested with the "inherent retained sovereign power" of pardon, and therefore with the lesser included power to issue the clemency order; and that such Council or executive action is not subject to Tribal Court review. Accordingly, to determine whether the lower court had subject matter jurisdiction to issue the TRO, we must first decide whether it was properly vested with the requisite jurisdiction to review the legality of the underlying executive clemency order.

1. Appellants' Claims Regarding Judicial Review

As a threshold and general matter, the Tribal Council argues that the Tribal Court lacks the power to review all council actions. Reasoning that it established the Tribal Court pursuant to an enumerated constitutional power, the Council contends that it never authorized the Court to review all its actions, and that the Court lacks "inherent authority" to do so. To support their contention, appellants rely on *Quechan Tribe of Indians v. Rowe*,

531 F.2d 408 (9th Cir. 1976), *Howlett v. Confederated Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976), and *Wells v. Blaine*, 21 ILR 6129 (N. Plns. Intertr. Ct. App. 1994). These decisions do not support their position.

The Council relies on *Quechan* for the proposition that the Tribal Court lacks "inherent authority" arising out of "general Indian law," and that it has no authority "independen[t] of the Tribal Council."[8] Appellants maintain that *Quechan* held that the tribal court in that case "did not possess inherent sovereign authority but only the authority granted by the Tribal government pursuant to constitutional authority." Appellants misread *Quechan*.

In the first instance, the Ninth Circuit expressly recognized that tribal courts, including those of IRA tribes, possess inherent sovereign authority "as a matter of general Indian law." *See Quechan, supra*, 531 F.2d at 411, n.4 ("As a matter of general Indian law, tribal courts are residuals of each tribe's semi-sovereign existence..."). *Quechan* therefore does not stand for the proposition cited and relied upon by appellants.

In any event, *Quechan* involved a dispute about the extent of tribal court jurisdiction over non-Indians who enter the reservation to hunt or fish. The tribe argued that the tribal court had "inherent authority" to assert criminal jurisdiction over non-members who violate tribal laws while on the reservation,

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[8] The Quechan Tribe is organized under the Indian Reorganization Act of 1934 (IRA, 25 U.S.C. §476). The Quechan tribal court was established by the tribal council pursuant to a tribal constitutional provision similar to that authorizing the CS&KT Council to establish the Tribal Court.

asserting that such power was grounded in "general Indian law." 531 F.2d at 411. However, the *Quechan* court expressly refrained from deciding this question, finding it unnecessary to resort to general Indian law to determine the extent of tribal court jurisdiction over non-members. *See* 531 F.2d at 411, n. 4. Instead, the Ninth Circuit found the answer in the Quechan constitution, which facially provided for criminal jurisdiction over members only. *Quechan*, 531 F.2d at 411. Thus, although *Quechan* does not support the Council's argument, it does affirm the principle that IRA tribal courts enjoy inherent sovereign judicial authority as a matter of general Indian law, and that the extent of tribal court jurisdiction may be determined by examining tribal law in the first instance.

Appellants next cite *Howlett v. Confederated Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976) to suggest that the Tribal Council is the exclusive tribal governmental body constitutionally empowered to interpret the tribal Constitution, and that the Tribal Court lacks authority to review or reverse council decisions. Appellants misunderstand *Howlett*.

Howlett was an Indian Civil Rights Act (ICRA) and exhaustion of tribal remedies case decided before *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[9] In *Howlett*, the plaintiffs challenged the CS&KT Tribal Council's refusal to declare them

[9] Finding that it would have been futile to seek redress in Tribal Court, the *Howlett* court ruled that the plaintiffs were not required to exhaust Tribal Court remedies before seeking federal court review of their ICRA claims. 529 F.2d at 240.

eligible to run for Council. *Id.* at 235. *Howlett* turned on Article III, §7 of the CS&KT Constitution which expressly provides that the Tribal Council "shall be the sole judge of the qualifications of its members." *Id.* at 240.

In this context the Ninth Circuit stated that "...Nothing precludes the Indians from vesting, as they did, the power of interpretation in a tribal council rather than in a tribal court." *Id.*[10] Appellants frame this non-authoritative dictum as an all-encompassing rule to suggest that a federal circuit court of appeals ruled nearly two decades ago that the Council is the sole branch of the CS&KT tribal government empowered to interpret the tribal Constitution, and concomitantly, that the Tribal Court lacks the power to review Council actions. However, *Howlett* does not make the quantum leap appellants urge: the Ninth Circuit clearly confined this dictum to Article III, §7, which provides only for Council review of matters limited to Council membership qualifications. *Id.*

Appellants next rely on an excerpt from *Wells v. Blaine*, 21 ILR 6129 (N. Plns. Intertr. Ct. App. 1994) to support their argument that the Tribal Court does not have the power to review Tribal Council actions. Appellants argue that *Wells v. Blaine* is

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[10] Grounding its holding on Article III, §7, the Ninth Circuit found that the "Tribal Council is the body which exercises appellate authority over matters decided by the Election Committee." 529 F.2d at 240. The court also found that a tribal judge had stated to the *Howlett* plaintiffs over the telephone in an apparent *ex parte* contact that "...he did not believe that the Tribal Court could reverse a decision rendered by the entire Tribal Council." *Id.* Appellants erroneously rely on these findings as holdings in an attempt to escape the narrow confines of *Howlett*.

"similar" to the instant controversy, and that other tribal appellate courts "have recognized the same limits [as *Howlett*] on Tribal Court jurisdiction over official acts of the Tribal Council." Appellants misinterpret *Wells*.

In *Wells*, the plaintiff, while a council member, induced the tribal council to pass a resolution allocating $10,000 to pursue his state court claim asserting that South Dakota should honor his tribal court divorce decree. Subsequently, the leadership of the council changed hands. The new council rescinded the prior council's action, and the state court lawsuit was dropped for lack of funding. Wells filed suit in tribal court to recover damages and assert his claim against the Crow Creek Council.

The Northern Plains Intertribal Court of Appeals held that the action of one council to rescind the action of a previous council amounted to an unreviewable political decision. *Id.* The *Wells* court reasoned, in part, that it was reluctant to disturb tribal legislative actions involving the appropriation and expenditure of funds, suggesting that such was committed to the province of the council. In this light, the *Wells* court looked unfavorably on the "assumption" that the tribal court serves as a "check on the actions of council, except to the extent that such actions of individual council members are *ultra vires*." *Id.* at 6129. Appellants seize this dictum absent context to shore up their stance.

However, the alignment of parties, facts, issues and equities in *Wells* bears no resemblance to those here. Unlike *Wells*, this

case does not involve tribal council members aligned against one another in litigation to determine whether one council had the requisite authority to overturn an action of a previous council, i.e., to determine the authority of a single branch of government to rescind its own decisions. Rather, this is a suit involving tribal government officials from different divisions of the tribal government, brought to determine the lawfulness of an act of the legislative/executive branch which overturned an adjudicated decision of the judicial department. Significantly, the instant case, unlike *Wells*, does not concern, nor does it turn on, a non-justiciable political question, as discussed below. However it does, unlike *Wells*, involve cognizable claims of *ultra vires* conduct, also discussed below. *Wells* therefore provides no support for appellants' position.

2. A Court of "General Jurisdiction"

The Council claims that the Tribal Court lacks subject matter jurisdiction in this case allegedly because it has never expressly granted the Court authority to review its executive orders. It thus asserts that the Tribal Court is clearly a court of "limited jurisdiction."

This is a case of first impression in this jurisdiction. As a result of lack of federal and state court jurisdiction over internal tribal matters, there is virtually no federal or state case law on point. *See e.g., Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994) (federal district courts do not have jurisdiction to review actions of

tribal councils under any statute, including the Indian Civil Rights Act); *Wacondo v. Concha*, 873 P.2d 276 (N.M. App. Ct. 1994) (disputes which involve only tribal members or internal tribal policy must generally be maintained in tribal forums). We therefore find it both necessary and helpful to turn to the decisions of courts of other tribes for guidance.

Because the Tribal Court was established by the Tribal Council, it is in fact a "legislative court," rather than a "constitutional court." However, that the Tribal Court is a legislative court does not control whether it possesses judicial review authority over council actions or orders. That inquiry turns on whether the Tribal Court is limited to exercising only that subject matter jurisdiction expressly and specifically conferred upon it by the Council.[11]

In adjudicating a closely analogous controversy, the Puyallup Tribal Court characterized the issue as whether the tribal court was one of "limited jurisdiction" or "general jurisdiction." *See Satiacum v. Sterud, et al.*, 10 ILR 6013, 6014 (Puy. Tr. Ct., 1982). The *Satiacum* analysis is instructive, as the facts, issues, arguments and tribal law are strikingly similar to those at bar. Moreover, as here, the *Satiacum* case presented "important sensitive issues and has stirred extraordinary community interest." *Id.* at 6013.

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[11] The contention that the Tribal Council has not expressly granted the Tribal Court review authority over its executive orders is tantamount to arguing that the Tribal Court is a court of "limited jurisdiction."

The plaintiff in *Satiacum*, the tribal chairman, sued the council seeking injunctive relief to enjoin the Puyallup council from conducting a recall election for a certain period of time. The defendants argued the Puyallup Nation court lacked subject matter jurisdiction to hear an action against the Puyallup tribal council. The defendants asserted virtually the same arguments that the Council is making in the case at bar, specifically that: the Puyallup constitution conferred authority on the council to create the tribal court;[12] as a "statutory court," the Puyallup court had only those powers conferred by the tribal council; the council had not conferred upon it the authority to review council actions; and the court had "'no inherent authority to review and void legislative acts.'" *Id.* at 6013.

The *Satiacum* court flatly rejected this argument. It

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[12] Article VI of the Constitution of the Confederated Salish and Kootenai Tribes vests the Tribal Council with authority to establish the Tribal Court:

> Section 1. The Tribal Council shall have the power, subject to any limitations imposed by the Statutes or Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached Bylaws:
> ...
> (l) to promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Confederated Tribes, and providing for the maintenance of law and order and the administration of justice by the establishment of an Indian Court, and defining its powers and duties.

The Puyallup constitutional language virtually mirrors the Tribes' in this case. The only difference is that the operative term in the Puyallup constitution is "reservation court," while in the Tribes' Constitution, the term is "Indian court."

distinguished between courts of general and limited jurisdiction. Courts of limited jurisdiction, such as federal courts, are presumed to lack subject matter jurisdiction unless it is expressly granted. Courts of general jurisdiction, such as state courts, are presumed to have jurisdiction unless limited by statute or "unless a showing is made to the contrary."[13]

After reviewing the decisions of other tribal courts, the Puyallup court held that it was a court of general jurisdiction. *Id.* at 6014. It emphasized that a "tribal court derives its authority from the inherent sovereign power of the tribe" and, that as an integral institution of the tribe, it properly exercised the tribe's inherent judicial powers. *Id.* at 6015. The court ruled that it possessed the retained inherent power of the Puyallup Nation to hear cases involving all subject matters, except where limited by enactments of the tribal council. *Id.* at 6014-15.

This Court is required in the first instance to apply the applicable laws of the Confederated Salish and Kootenai Tribes in all civil actions, including the one at bar.[14] We must therefore at the outset turn to CS&KT tribal law to determine whether the Tribal Court is one of limited or general jurisdiction, and accordingly, whether it is vested with the power to review tribal

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[13] Id. at 6014, citing 13 Wright, Miller and Cooper, Federal Practice and Procedure §3522 (1979).

[14] See Ordinance 36B, CS&KT Law and Order Code, Ch. II, §3:

> In all civil actions, the Tribal Court shall first apply the applicable laws, Ordinances, customs and usages of the Confederated Salish and Kootenai Tribes and then shall apply applicable laws of the United States...

council actions. The law controlling this question is Ordinance 36B, the Tribal Law and Order Code, promulgated by the Tribal Council pursuant to Article VI, Section 1(l) of the Constitution of the Confederated Salish and Kootenai Tribes.

Pursuant to Ordinance 36B, the Tribal Council unequivocally "vested" the "judicial power" of the Tribes "in the Tribal Court."[15] Therein, the Tribal Council granted civil jurisdiction to the Tribal Court over "all suits," and authorized the Tribal Court to exercise such jurisdiction to the "fullest extent possible."[16] Further, Ordinance 36B authorizes the Tribal Court to exercise subject matter and personal jurisdiction to the "fullest extent possible not inconsistent with federal law." The grant expressly provides for tribal court jurisdiction over "[a]ll persons found within the Reservation."[17] "Persons" is broadly defined as an "individual, organization, corporation, governmental subdivision or agency..."[18]

Here, the grant of civil jurisdiction to the Tribal Court over "all suits" with authority to exercise personal and subject matter

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[15] Ordinance 36B, Ch. I, §1.

[16] Ch. II, §§1-2(a). Ordinance 36B further provides that the Tribal Court "shall have jurisdiction over all offenses enumerated in the Code of Tribal Offenses committed by any person within the exterior boundaries of the Flathead Reservation to the extent not inconsistent with federal law." Ch. I, §2(1)(a). Chapter one further authorizes the Tribal Court to exercise criminal jurisdiction "to the fullest extent possible." Ch. I, §2(1)(b).

[17] Ch. II, §2(a)(1).

[18] Ch. II, §2(b).

jurisdiction to the "fullest extent possible" constitutes a generalized grant of subject matter jurisdiction over all civil cases and controversies. The grant carves out no exceptions regarding cases and controversies involving the Tribal Council. Accordingly, we hold that when the Tribal Council enacted Ordinance 36B, it created the Tribal Court as a court of general jurisdiction, and that it thereby vested the Tribal Court with the power of judicial review to hear suits to determine the lawfulness of acts of the Tribal Council and tribal officials. Significantly, there is no federal or tribal law which limits the Tribal Court's authority so as to defeat tribal court jurisdiction in this case. We therefore further hold that as a court of general jurisdiction, the Tribal Court possesses the necessary subject matter jurisdiction to hear this case, and to issue the TRO in question.

Ordinance 36B makes no exception with respect to tribal court jurisdiction over suits involving the Tribal Council or tribal officials. The Council takes the position that a tribal member, in this case Judge Moran, who disapproves of the Council's actions must seek a remedy through the ballot box. In effect, the Council claims that it is somehow vested with absolute discretion in certain areas of legislative and executive functions, and that the judiciary improperly intrudes into the legislative or executive sphere if it hears a case concerning one or both of these areas. This precise argument has been considered and rejected by other tribal courts.

"While the ballot box is one way a tribal member can express

disapproval of a legislator's actions, it is not a means by which the legality of a particular action can be adjudged." *Menominee Indian Tribe ex rel. The Menominee Indian Tribal Legislature v. Menominee Indian Tribal Court*, 20 ILR 6066, 6068 (Men. Tr. Sup. Ct., 1993). Interpretation and application of the law to determine the legality of a particular act is the "heart of the judicial function." *Id.* Among the most important functions of courts are constitutional interpretation and the closely connected power of determining whether laws and acts of the legislature comport with the provisions of the constitution. Courts were created to serve these purposes. *See* 16 Am. Jur. 2d *Constitutional Law* §308 (1979); *see also, Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803). The Tribal Court of the Confederated Salish and Kootenai Tribes is no exception.

Though the CS&KT Constitution clearly vests the Tribal Council with the power to make and administer laws, Ordinance 36B, authorized by the Constitution, just as clearly vests the Tribal Court with the power to determine if a particular action comports with "the applicable laws, Ordinances, custom and usages of the Confederated Salish and Kootenai Tribes."[19] This power necessarily carries with it the authority to declare actions illegal under CS&KT tribal law. The CS&KT Constitution and By-Laws expressly and unambiguously hold the Council accountable under CS&KT tribal law. For example, Article VI of the Constitution imposes the following limitations and restrictions on the Tribal Council:

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[19] See Ordinance 36B, Ch. II, §3, footnote 14, supra.

> Section 1. The Tribal Council shall have the power, subject to any limitations imposed by the Statutes or Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached Bylaws....
> ...
>
> Section 3. The council of the Confederated Tribes may exercise such further powers as may in the future be delegated to it by the Federal Government, either through the order of the Secretary of the Interior or by Congress, of by the State Government or by members of the Confederated Tribes.
>
> Section 4. Any rights and powers heretofore vested in the Confederated Tribes but not expressly referred to in this Constitution shall not be abridged by this Article, but may be exercised by the members of the Confederated Tribes through the adoption of appropriate bylaws and constitutional amendments.

Article II of the By-Laws of the Constitution enumerates further restrictions applicable to the Council:

> Section 2. All final decisions of the Council on matters of temporary interest...or relating especially to particular individuals or officials...shall be embodied in resolutions. Such resolutions shall be recorded in a special book which shall be open to inspection by members of the Confederated Tribes.
>
> Section 6. Every ordinance or resolution shall contain a recital of the laws of the United States and the provisions of this Constitution under which authority for the said ordinance or resolution is found.

Inclusion of these limitations logically includes the concomitant power of the Tribal Court to determine whether the Council is acting within the "limitations imposed by the Statutes or the Constitution of the United States" and within the "restrictions upon [Council] powers contained in this Constitution and attached Bylaws." We hold accordingly. *See Menominee Indian Tribe ex rel.*, 20 ILR at 6068.

Moreover, as the Ninth Circuit affirmed in *Quechan Tribe of*

Indians v. Rowe, supra, tribal courts derive their fundamental authority from the inherent sovereign power of respective tribes, as a matter of general Indian law. *See* 531 F.2d at 411, n.4. *See also, Satiacum v. Sterud, et al.*, 10 ILR 6013, 6014 (Puy. Tr. Ct., 1982) (Puyallup IRA tribal court derives its authority from the inherent sovereign power of the Puyallup Tribe); *Chapoose, et al. v. Ute Indian Tribe of the Uintah-Ouray Reservation, et al.*, 13 ILR 6023, 6024 (Ute Tr. Ct., 1986) (Ute IRA tribal court, created by business council which defined powers of court, has inherent power to interpret tribal laws and adjudicate controversies arising under tribal law).

As recognized long ago by the United States government, the inherent sovereign judicial powers of tribes are "co-extensive" with their legislative or executive powers, and derive from the sovereign tribal membership:

> The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has the power to regulate the marriage relationships of its members, it necessarily has the power to adjudicate, through tribunals established by itself, controversies involving such relationships. So, too, with other fields of local government in which our analysis has shown that tribal authority endures. In all these fields the judicial powers of the tribe are co-extensive with its legislative or executive powers.

Satiacum, 10 ILR at 6014, *citing* Felix Cohen, *Handbook on Federal Indian Law* 145 (1971); *Chapoose*, 13 ILR at 6024, *citing Powers of Indian Tribes*, 55 I.D. 14; 1 Op. Sol 471 (1934), and *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied* 472 U.S. 1016 (1985).

The Tribal Court of the Confederated Salish and Kootenai Tribes, as an integral institution of the Tribes, properly exercises the Tribes' inherent sovereign judicial powers.[20] *See Satiacum v. Sterud*, 10 ILR at 6014. Except where expressly limited by the Tribal Council, the Tribal Court has the power to hear cases involving all subject matters within the retained inherent power of the Confederated Tribes, including the one at bar. *See Id.* We hold accordingly.

Our holdings are soundly supported by the decisions of courts of other tribes with constitutions virtually identical to the CS&KT Constitution. These courts have ruled in situations involving similar fact and legal issues that they possess the power of judicial review. This appears to be the majority rule among tribal courts.[21] *See e.g., Stone v. Swan*, 19 ILR 6093, 6094 (Colv. Tr.

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[20] While the Tribes, i.e., the sovereign membership, delegated power to the Tribal Council under the Constitution to establish the Tribal Court and define its powers and duties, the authority of the Tribal Court originates from the inherent sovereign judicial power of the Tribes (membership), not from the Tribal Council.

[21] In contrast, the few tribal courts which have ruled they lack the power of judicial review have done so either because controlling tribal law expressly prohibits judicial review of council actions, or the decision was summarily entered. See e.g., Kowalski, et al. v. Elofson, et al., 22 ILR 6007, 6008 (L. Elwha Ct. App., 1993) (Lower Elwha tribal court lacked power to review council actions pursuant to tribal ordinances expressly prohibiting such); Cf. Lac du Flambeau Band of Lake Superior Chippewa Indians v. One 200-250 Foot Small Mesh Gillnet, et al., 16 ILR 6095 (Lac du Flam. Tr. Ct., 1989) (tribal court established by tribal council pursuant to tribal constitution which gives authority to council to establish court and define its powers and duties does not have authority to review council codes and regulations in absence of council legislation conferring such review authority).

Ct., 1992) (Colville tribal court is court of general jurisdiction even though created by tribal business council, and possesses "inherent jurisdiction to review council and other tribal government actions to assure compliance with the provisions of the constitution, unless specifically limited"); *Conklin v. Freeman*, 20 ILR 6037 (N. Plns. Inter. Ct. App., 1993) (Fort Berthold tribal court created by business council pursuant to IRA constitution had authority to review and set aside acts of tribal chairman which were not in compliance with tribal law); *Committee for Better Tribal Government, et al., v. Southern Ute Election Board, et al.*, 17 ILR 6095 (So. Ute. Tr. Ct., 1990) (absent legislation specifically denying jurisdiction, Southern Ute tribal court is proper forum to hear alleged violations of tribe's constitution and code, as well as Indian Civil Rights Act); *Chapoose et al. v. Ute Indian Tribe of the Uintah-Ouray Reservation, et al.*, 13 ILR 6023 (Ute Tr. Ct., 1986) (Ute tribal court had jurisdiction to determine whether business committee complied with tribal constitution and Indian Civil Rights Act in enacting tribal ordinance, where business committee established tribal court and defined its powers and duties pursuant to tribal constitution).

We also find the history and development of the Navajo court system to be relevant and instructive here. The Navajo Nation court system is viewed as a model of tribal court development. In 1958 the Navajo Tribal Council established the Navajo judicial system, a move that was viewed as the first step of a system of checks and balances in the Navajo Nation government. *See Bennett*

v. Navajo Board of Election Supervisors, 18 ILR 6009, 6010 (Nav. Sup. Ct., 1990). In 1978, the Navajo Supreme Court ruled that Navajo courts have authority to review legislative actions by the Navajo Tribal Council. This ruling was handed down before the Navajo Nation adopted a written constitution providing for an express, formal separation of powers. *Id., citing Halona v. McDonald*, 1 Nav. R. 189, 204-06 (1978). The *Halona* court grounded its ruling on the fact that the council in creating the judicial branch "did not exclude review of Council actions from its broad grant of power to the Courts." *Id.* *Halona* remains good law to this day in the Navajo legal system.

In summary, we hold that the Tribal Court has the power to hear cases to review Tribal Council actions to determine if such comport with the Constitution and laws of the Tribes, and other applicable law, i.e., to determine if such actions are constitutional and otherwise lawful. The source of authority establishing the power of tribal court judicial review is the Tribal Constitution and the Law and Order Code promulgated by the Council, and long-standing principles of retained inherent sovereign judicial powers of Indian tribes, arising out of federal Indian law.

D. Sovereign Immunity and Personal Jurisdiction

The Tribal Council contends that it is shielded from suit by the doctrine of sovereign immunity. It reasons that the decision to grant executive clemency "was an official act of the Tribal Council taken within the scope of its governmental authority," and

that Council has not waived application of the protective doctrine. Asserting that sovereign immunity is a "complete bar to jurisdiction over the person," the Council argues that it cannot be sued over the grant of executive clemency, nor restrained by the TRO at issue. We agree.

As sovereign governments, Indian tribes possess common law immunity from suit. This immunity encompasses the governing bodies of tribes. *Burlington Northern R.R. Co. v. Blackfeet Tribe of Blackfeet Indians of Blackfeet Indian Reservation*, 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied* 505 U.S. 1212 (1992); *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1398 (9th Cir. 1993). Absent an unequivocal, express waiver of immunity by the tribe, or an abrogation of tribal sovereign immunity by Congress, neither tribes nor their governing bodies can be sued. *Id.* *See also*, *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 812 F. Supp. 1008, 1011 (D.N.D. 1992), *rev'd on other grounds* 27 F.3d 1294 (1994), *cert. denied* 1995 U.S. LEXIS 462 (1995). This immunity stems from the unique relationship between the United States government and Indian tribes, whose sovereignty predates the United States Constitution. "Such immunity is necessary to preserve the autonomous political existence of tribes,...and to preserve tribal assets..." *Chemehuevi Indian Tribe v. California. St. Bd. of Equalization*, 757 F.2d 1047, 1050-51 (9th Cir. 1985), *rev'd in part on other grounds* 474 U.S. 9 (1985) (citations omitted).

The sovereign immunity of tribes and their governing bodies

extends to suits for declaratory and injunctive relief. Such immunity "is not defeated by an allegation that a tribe acted beyond its powers." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). "The tribe remains immune from suit regardless of any allegation that it acted beyond its authority or outside of its powers." *Chemehuevi Indian Tribe*, 757 F.2d. at 1052.

Neither the Tribes nor Congress has waived the Council's immunity from suit regarding the declaratory relief Moran seeks. Nor has the Council consented to the injunctive relief purportedly granted under the TRO at issue.[22] Accordingly, we hold that the Tribal Council enjoys common law immunity from any count(s) in this action filed May 4, 1995, over which it has not waived its immunity, including count one which, in part, seeks a declaration that the Tribal Council's decision to grant executive clemency was illegal.[23]

Appellants further contend that tribal officials are immune from suit when acting in their governmental capacity. They maintain that such immunity applies even if the acts of the tribal officials result in injury, or were erroneous.

Tribal immunity does extend to tribal officials acting in

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[22] The Council conceded in brief and at oral argument that it has waived its sovereign immunity pursuant to ordinance regarding Moran's contract and related claims. Those claims are set forth in counts 2-8 of Moran's original complaint filed May 4, 1995.

[23] The Council's immunity would extend to any injunctive relief Moran received pursuant to the TRO entered May 19, 1995. However, because we vacate the temporary restraining order, the issue going to the Council's immunity from its reach is moot.

their official or representative capacity and within the scope of their valid authority. *See Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 902 (9th Cir. 1991), *citing Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949) ("'if the actions of an officer do not conflict with the terms of his *valid* statutory authority, then they are the actions of the sovereign [which]...cannot be enjoined or directed'") (emphasis in the original). However, tribal officials are not covered in an absolute sense by the protective cloak of sovereign immunity, as appellants would urge. *See e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69 (1978). When the complaint alleges that the named officer defendants have acted beyond their authority, an exception to the doctrine of sovereign immunity is invoked. *See e.g., Imperial Granite*, 940 F.2d at 1271

In *Larson*, the Supreme Court recognized two exceptions to the doctrine of sovereign immunity where officers of a sovereign may be restrained from taking an official act. First, where the officer's powers are limited by statute, the officer's actions beyond those limitations are considered *ultra vires* and are subject to specific relief. Second, an officer may be restrained when the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. The Supreme Court emphasized that in both situations, "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Larson*, 337 U.S. at 689-90. This rule has been applied to tribal officials on

numerous occasions. *See e.g., Babbitt Ford, Inc. Navajo Indian Tribe et al.*, 519 F.Supp. 418, 425 (D.Ariz. 1981), *aff'd in part and rev'd in part on other grounds* 710 F.2d 587 (9th Cir. 1983), *cert. denied* 466 U.S. 926 (1984); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d at 901.

In the case at bar, Moran alleged in count one of his complaint that defendant Michael T. Pablo, one of the named individual tribal officer defendants, acted illegally when he executed the clemency order at issue. The complaint avers violations of the Tribal Constitution,[24] By-Laws[25] and ordinances.[26] It accordingly alleges sufficient grounds for judicial review of the executive clemency order, including continued and prospective enforcement thereof, and for determining whether tribal chairman Michael T. Pablo, as an individual, acted beyond the scope of his and the Council's lawful authority, or in violation of the Tribal Constitution when he executed the challenged order. Pablo is therefore not immune from suit, at least in his capacity as tribal chairman.[27] We hold

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[24] See complaint at page 6, citing Tribal Constitution, Article VI, §§1(j) and (l), and Article VI, §4.

[25] See complaint at 6, citing By-Laws to Tribal Constitution, Article II, §6.

[26] See complaint at 6, citing Ordinance 36B, and other tribal legislative acts.

[27] The complaint also names Joseph Dupuis as an individual defendant. However, Mr. Dupuis is not expressly named in paragraph twelve of count one, which seeks specific declaratory relief, in part, that the executive clemency order is unlawful. It is not clear from the face of the complaint how Mr. Dupuis is involved in this aspect of count one, if at all. To any extent he is involved,

accordingly.[28] *See Duncan Energy v. Three Affiliated Tribes et al.*, 812 F.Supp. 1088, 1011 (D.N.D. 1992) (suit for judicial review of tribal ordinance alleging tribal officers acted in violation of law could proceed against tribal chairman and other individually named tribal officials, but tribal business council dismissed from action on basis of sovereign immunity); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d at 901-02 (9th Cir. 1991) (tribal officials not immune from suit to contest constitutionality of tribal ordinance, although tribe and its governing body enjoyed sovereign immunity).

E. Political Question

Appellants maintain that judicial review of this case is foreclosed on the basis that the executive clemency order presents a non-justiciable political question. Tying the TRO to the case-in-chief, they further contend that the political nature of the underlying dispute precludes the lower court from exercising jurisdiction to issue the "ungrounded" *ex parte* order.

To support their claim, appellants rely on *Marbury v. Madison*, 1 Cranch 137, 164-66, 5 U.S. 137 (1803), *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939), and *Baker v. Carr*, 369 U.S. 186, 217

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he enjoys no immunity for the same reasons chairman Pablo does not. If the lower court determines on remand that Mr. Dupuis is not implicated in this aspect of the complaint, he may be dismissed from count one. However, he is specifically named in other counts related to contract and tort allegations. As noted above, the Tribes have waived sovereign immunity for such matters. Therefore, Dupuis is not shielded from suit on the basis of sovereign immunity (nor is Pablo) regarding these counts.

[28] Because we vacate the TRO, any sovereign immunity issues related thereto are moot.

(1962). Notwithstanding, the Supreme Court ruled in each of these cases that the political nature of the controversy did not prevent it from reviewing the legality of the government action at issue. As Moran correctly asserts, none of these cases can be fairly construed to compel the conclusion that the Tribal Court lacks jurisdiction in this case.

When a court concludes that an issue presented to it constitutes a political question, it is in fact announcing that some entity other than itself must ultimately decide the case. *See* 6A Moore's Federal Practice, ¶57.14 (1995). Courts will not decide questions which are primarily political in nature, rather than judicial. Such questions fall within the domain of the executive or legislative branches of government. 16 Am. Jur. 2d *Constitutional Law* §312, at 832 (1979). As the Supreme Court stated in *Baker v. Carr*:

> The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether the action of that branch exceeds whatever authority has been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed is itself a delicate exercise in constitutional interpretation, and is a responsibility of the Court as ultimate interpreter of the Constitution. 369 U.S. at 210-11.

The mere fact that a suit involves a political matter does not mean it presents a political question. "Such an objection 'is little more than a play upon words.'" *Baker v. Carr*, 369 U.S. 186, 209 (1962) (citation omitted). Similarly, because a political question is peripherally involved in a controversy does not

necessarily render the case non-justiciable. "[T]he fact that political questions are beyond the competency of the courts to determine...does not mean that the exercise of political powers may not give rise to justiciable questions under the court's power to construe, declare, and apply the law and Constitution." 16 Am. Jur. 2d *Constitutional Law* §312, at 833 (1979).

As the Supreme Court emphasized in *Baker v. Carr*:

> The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases which we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing. *Baker v. Carr*, 369 U.S. at 217 (1962).

Here, Moran has alleged that the executive clemency order exceeded the constitutional and statutory authority of the Council and certain individual tribal officials.[29] Questions requiring constitutional interpretation are non-political and are therefore justiciable. *See e.g., Dyer v. Blair*, 390 F. Supp. 1291, 1301 (N.D. Ill. 1975). The possibility that such an adjudication may conflict with the views of the legislative branch cannot justify a court shirking its responsibility to interpret and apply the law.

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[29] As long as a public governing body, such as the Tribal Council, acts within the limits of its legal powers and jurisdiction, the exercise of its judgment and discretion is not subject to review or control by the courts, absent a statute authorizing such review or control. However, where executive action is beyond the scope of executive authority, it is subject to judicial review. See 16 Am. Jur. 2d Constitutional Law §314, at 838-39 (1979).

Id.[30] Further, where the major issue is statutory construction, the court has jurisdiction to interpret relevant statutes, and the case is justiciable. *See e.g., Michigan Head Start Directors Association v. Butz*, 397 F.2d 1124, 1136 (W.D. Mich. 1975) (a case containing a controversial issue, or one on which different branches of a government may differ does not necessarily present a non-justiciable political question).

Tribal courts have applied these legal principles to hold that questions similar to those at bar were justiciable. *See e.g., Chapoose, et al. v. Ute Indian Tribe of the Uintah-Ouray Reservation, et al.*, 13 ILR 6023, 6026 (Ute Tr. Ct., 1986) (legislative act of tribal council did not present a non-justiciable political question, and tribal court had jurisdiction to decide question of whether law enacted by tribal council violated tribal constitution or otherwise ran afoul of restrictions placed on council); *Garcia v. Tohono O'Odham Council, et al.*, 16 ILR 6151, 6155 (T. O'Odm. Ct. App., 1989) (question of constitutionality of tribal election law is not a non-justiciable political question, and tribal court therefore had jurisdiction to decide case); *Menominee Indian Tribe ex rel. The Menominee Indian*

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[30] See also, Moore v. U.S. House of Representatives, 733 F.2d 946, 953 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) (suit by members of the House seeking declaration that tax law was unconstitutional did not fall within political question doctrine; affirming the district court's dismissal on prudential grounds, the D.C. Circuit stated that "[w]hile disputes under certain provisions of the Constitution may be non-justiciable political questions committed to a coordinate branch of government, the mere fact that a case involves an unlawful deprivation of a legislator's powers by members of a coordinate branch of government does not automatically deprive the federal courts of power to adjudicate the claim.").

Tribal Legislature v. Menominee Indian Tribal Court, 20 ILR 6066, 6068 (Men. Tr. Sup. Ct., 1993) (where tribal court issued a temporary restraining order/injunction enjoining tribal legislature from exercising its constitutionally granted powers of approving gaming leases, held that issuance of injunction did not present non-justiciable political question because constitutional question was involved and judicially manageable standards existed to measure legislature's action, and therefore tribal court had jurisdiction to decide case).

While the case at bar is certainly "political" in nature, it does not present a political question. We hold that this controversy is justiciable since it presents cognizable questions of whether issuance of the executive clemency order exceeded appellants' constitutional authority, and whether execution of the order otherwise violated the laws of the Confederated Salish and Kootenai Tribes.

F. Executive Clemency Order

The parties to a large extent have briefed the question of whether appellants were properly vested with the requisite power to promulgate and execute the Crossguns clemency order. Notwithstanding, this issue goes to the core of the merits of the underlying case. A court has no duty to determine more than is necessary for the decision of the matter brought before it. *See* 20 Am. Jur. 2d *Courts* §93, at 454 (1965). It is not necessary that we decide this underlying question as part of the instant appeal of the *ex parte* restraining order. Because this question and the

merits of the underlying case have yet to be tried, it is not properly before us. We therefore do not decide it, and instead remand the matter to the trial court for further proceedings and determination. We do, however, provide guidance to the trial court with respect to the relevant law to be applied to decide this case.

Appellants assert that the "relevant inquiry" for determination of this question is "whether any limitation exists to prevent the Council from granting clemency, not whether any authority exists to permit it." This is incorrect. The reverse is true.

To support their proposition, appellants rely solely on federal law and the analysis set forth in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985), and *Middlemist v. Secretary of U.S. Dept. of Interior, et al.*, 824 F. Supp. 940, 943 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, ____U.S._____, 115 S.Ct 420 (1994).[31] Reliance on these decisions is misplaced. Unlike the situation here, these cases litigated questions about the extent to which Indian tribes have retained inherent sovereign authority to adjudicate or regulate the affairs of non-Indians. Moreover, both decisions required exhaustion of tribal court remedies as a prerequisite to federal court review.

In *National Farmers*, the Supreme Court held that the question of whether a tribal court has retained the power to exercise

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[31] Members of the Tribal Council of the Confederated Salish and Kootenai Tribes were defendants in *Middlemist*.

jurisdiction over a civil action against a non-Indian was a "federal question"--which a federal court may decide. The Court ruled that a federal district court may ultimately determine whether a tribal court has exceeded the lawful limits of its jurisdiction, but only after tribal court remedies have been exhausted. *National Farmers*, 471 U.S. at 852-53. The Court pointed out that "the existence and extent of a tribal court's jurisdiction will require careful examination of tribal sovereignty, the extent to which sovereignty has been altered, divested or diminished, as well as a detailed study of statutes, Executive Branch policy, and administrative or judicial decisions." *Id.* at 855-56. The Supreme Court premised its holding on the fact that federal law had been "the governing rule of decision" in previous cases it had decided concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians.[32]

The case at bar does not involve a question of the Tribes' retained inherent sovereign power over non-Indians. Neither does it involve a federal question, nor does it in any way implicate the exhaustion of tribal remedies. Rather, this case is limited to issues concerning internal tribal matters, and tribal law, not

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[32] In *Middlemist*, the Ninth Circuit stated that it is "well settled that the question of whether an Indian tribe retains the sovereign power to compel a non-Indian property owner to submit to the civil jurisdiction of the tribe gives rise to a federal question." The issue in *Middlemist* was whether the federal court must defer its exercise of jurisdiction until non-Indian irrigators had exhausted tribal administrative and judicial remedies. *Middlemist*, 824 F. Supp. at 943.

federal law, controls the outcome. As such, it will be heard exclusively in Tribal Court.[33] Accordingly, *National Farmers* and *Middlemist* simply do not fit here, nor does their analytic framework which appellants attempt to import and impose to resolve this case.

In reverse of appellants' proposed analytical scheme, the relevant inquiry here is first whether the Tribal Council was properly vested with the requisite power to issue the executive clemency order. It is not questioned that the power of pardon or clemency is a retained inherent sovereign power of the Confederated Salish and Kootenai Tribes. That is a given. Rather, the question is whether the sovereign Tribes, i.e., the membership, have properly delegated this retained inherent sovereign power to the Council, and if so, whether such power was lawfully exercised by appellants. Under controlling tribal law set forth in Ordinance 36B, Ch. II., §3, on remand these questions must be answered in the first instance by applying CS&KT tribal law, including the tribal Constitution, By-laws, and applicable ordinances and resolutions. This issue is remanded for determination accordingly.

G. Separation of Powers

To a certain extent, the parties have also addressed the question of separation of powers in briefs. However, like the

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[33] See e.g., Cameron v. Bay Mills Indian Community, 843 F.Supp 334, 336 (W.D. Mich. 1994) (federal district courts do not have jurisdiction to review actions of tribal councils under any statute, including Indian Civil Rights Act). See also, Wacondo v. Concha, 873 P.2d 276 (N.M. App. Ct. 1994) (disputes involving only tribal members or internal tribal policy must generally be maintained in tribal forums).

question concerning the lawfulness of the executive clemency order, this matter is part of the underlying case-in-chief, which has not yet been tried. Accordingly, the question of separation of powers is not properly before us. We therefore do not decide it, nor do we express any views on the issue in this opinion. Like the executive clemency issue, on remand this question must be decided by applying CS&KT tribal law in the first instance. This issue too is remanded for determination accordingly.

H. Temporary Restraining Order

Appellants contend that the *ex parte* temporary restraining order was issued in derogation of applicable tribal and federal law.[34] The core of appellants' claim is that the trial court lacked a sufficient factual and legal basis upon which to issue the TRO, and that it side-stepped procedural requirements in doing so.[35]

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[34] Counsel for appellants suggested during oral argument that the Tribal Court Clerk improperly refused to allow counsel to examine a file marked "confidential," which was ostensibly included as part of the record in this case at the trial court level. The Court has examined this file and determined that it consists of judges' notes associated with the *Crossguns* case. "A judge's workpapers...are not court records," and therefore are not public records. See Rules 7.1 and 7.2 of the Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish and Kootenai Tribes. While counsel was not entitled to inspect the file in question, it should never have been included as part of the record in the first place.

[35] Appellants initially claimed that the trial court lacked personal and subject matter jurisdiction to enter the TRO. As set forth above, we have held as a matter of law that the Tribal Court does possess the requisite jurisdiction to hear this case and to issue the TRO. We find no error on the part of the lower court for not expressly stating in the TRO that it had such jurisdiction in this matter, to the extent appellants may so contend. A court is not required to expressly state that it has jurisdiction of a case

We first look to the law of the Tribes in deciding this matter. Rule 10.4 of The Tribal Court Rules of Practice in Civil Proceedings, in relevant part, authorizes the lower court to grant emergency orders:

> Nothing in [Rule 10] limits the equitable powers of the court to issue, upon proper petition, such emergency orders as may be necessary to preserve the status quo or to maintain law and order in the context of a civil case or controversy until the earliest time that the matter may be heard.... (Emphasis added).

The parties differ regarding the meaning of the underlined term "upon proper petition." Appellants assert that the term incorporates the requirements embodied in Rules 10.2 and 10.3, while Moran maintains that Rule 10.4 does not incorporate the requirements of Rules 10.2 and 10.3.

Rules 10.2 and 10.3 provide respectively:

> 10.2 Certification of Notice
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> Prior to the issuance of an ex parte order, the counsel or unrepresented party seeking such order must file a written certification with the court declaring that opposing counsel and any unrepresented party has been contacted, or that diligent effort has been made to contact said counsel or unrepresented party, to give reasonable notice of: (a) the time and place of the ex parte conference or meeting, and (b) the substance of the order sought. Such certification shall also include information as to whether opposing counsel or any unrepresented adverse party opposes the motion.
>
> 10.3 Form of Order
>
> All requests for extension of time or continuance or other ex parte matters shall be accompanied by an appropriate form or order, with sufficient copies for the

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before it; a determination of jurisdiction is implied by the fact that the court exercises jurisdiction over it. See 20 Am. Jur. 2d Courts §92, at 453 (1965).

Clerk of Court to mail any executed order to adverse parties.

We agree with appellants that Rule 10.4 incorporates the requirements of Rules 10.2 and 10.3. Since these rules encompass the same subject matter of *ex parte* orders, they must be read *in pari materia*, i.e., together, to ascertain their intent, meaning and reach, under well established principles of statutory construction. Reading these rules *in pari materia* compels the conclusion that the term "upon proper petition" in Rule 10.4 incorporates the certification requirements of Rule 10.2 and the form requirements of Rule 10.3. These requirements must be met before an *ex parte* TRO may be properly issued.

The overriding purpose of Rule 10.2 is to inform the court that the moving party has notified opposing counsel: (1) concerning the time, if any, of any *ex parte* conference requested or set to hear the matter; (2) regarding the substance of the order sought; and (3) to ascertain whether opposing counsel would support or oppose the motion seeking the order. While Moran was not in exact compliance with the precise requirements of Rules 10.2 and 10.3, he was in fact in substantial and sufficient compliance.

Moran sought issuance of the *ex parte* order under Rule 10.4 to restrain appellants from taking certain actions that they were allegedly scheduled to take during the afternoon of May 19--the same day he filed his motion. His motion also requested a hearing on the matter to qualify the TRO as a preliminary injunction. The record indicates that he served his motion and supporting brief on appellants at approximately noon on May 19, and that the Tribal

Court issued the TRO *ex parte* (without notice or hearing) within one hour of filing.

In this instance, Moran's application identified activities he sought to have restrained, and described the harm he felt would result if the order was not issued. He also provided a draft order subsequently issued by the Tribal Court. Appellants therefore had notice of "the substance of the order sought." Rule 10.2. Moreover, the proposed order was obviously in a form acceptable to the lower court. Moran also requested a hearing, but did not request a specific time or date. As appellants concede, no hearing was held prior to the issuance of the order, which unquestionably was issued *ex parte*. Therefore, neither party appeared before the court before the TRO was issued. While Moran did not certify whether appellants opposed his motion, the substance of the motion and his supporting brief would lead a reasonable person to conclude that appellants would in fact oppose such a motion.

Because Moran was in substantial compliance with Rules 10.2 and 10.3, he presented a "proper petition" for a TRO within the meaning of Rule 10.4, insofar as Rules 10.2 and 10.3 are concerned. If any procedural error was committed for failure to comply precisely with Rules 10.2 and 10.3, it was harmless because there was in fact substantial compliance with these rules. Under applicable tribal appellate court rules, such harmless error, if any, cannot alone serve as a ground to vacate the TRO.[36]

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[36] See Rule 7, Tribal Court Appellate Procedures, Ord. 90B: Harmless Error. No judgment or order shall be reversed

Appellants also insist that the trial court erred by issuing the challenged order without notice, i.e., *ex parte* without giving them a chance to be heard prior to entry. Appellants are correct in asserting that an *ex parte* order should not be granted if there was sufficient time to give notice to the opposing party. Here, however, the motion was filed about noon, and sought to restrain council action that was scheduled to occur within a matter of an hour or two of the time of filing. A temporary *ex parte* restraining order by definition is a temporary order entered without notice, upon a summary showing of necessity to prevent immediate and irreparable injury, pending a subsequent hearing and determination of the rights of the parties or the court's jurisdiction, upon a motion for a preliminary injunction. *See* 7 Moore's Federal Practice ¶65.05 (1995). Given the circumstances, the lower court acted well within its discretion by issuing the order without hearing.

The Council also alleges that the *ex parte* order was not endorsed with the date or hour issued. Notwithstanding, the court did record the date of May 19, 1995 on the order, and the office of appellants' counsel stamped the order as received at 12:40 P.M. Appellants do not contend and we do not find that they have been prejudiced by the omission of the time of issuance of the TRO. No reversible error has occurred here.

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upon appeal by reason of any error committed by the trial court affecting the interests of the appellant where the record shows that the same result would have been attained had the trial court not committed an error or errors.

Appellants further claim the lower court erred by failing to specify the terms of duration of the TRO, and by not setting the matter for hearing. The Tribal Court Rules of Practice do not specify a precise duration for the life of *ex parte* orders.[37] We may therefore look to the Federal Rules of Civil Procedure for guidance.

Rule 65(b) provides that an *ex parte* TRO shall expire ten days after entry, unless it is extended another ten days, or unless the restrained party agrees to a longer period. An *ex parte* order under Rule 65(b) is therefore subject to definite time limitations. It is intended to preserve the status quo only until such time as the motion for a preliminary injunction can be noticed, heard and decided. *See* 7 Moore's Federal Practice ¶65.05, at 128 (1995).

Where no time limit is fixed in the *ex parte* TRO, and therefore the order is indefinite, as here, it has been held that the order expires by the terms of Rule 65(b), and when ten days has elapsed, any appeal will be dismissed as moot. *See* 9 Moore's Federal Practice ¶110.20[5], at 259 (1992). *See also, Benitz v. Anciani*, 127 F.2d 121, 125 (1st Cir. 1942), *cert. denied* 317 U.S. 699 (1943) (temporary restraining order expired after ten days under Rule 65, became moot and appeal as to it dismissed where the application was never set down for hearing and adverse party did not receive notice within meaning of Rule 65, even though copies of petition were mailed to restrained party); *Southard & Co. v.*

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[37] Rule 10.4 merely provides that the *ex parte* order may remain effective "until the earliest time that the matter may be heard."

Salinger, 117 F.2d 194, 195-96 (7th Cir. 1941) (restraining order did not provide any time for its expiration, and therefore expired ten days after entry; court was without authority to give it vitality for any longer period of time).

Applying the ten day limitation of Fed.R.Civ.P. 65(b) to the instant case, the challenged TRO would have been effective for a ten day period only, absent reversible error.[38] However, as set forth below, the TRO was in fact so tainted.

Appellants also complain that the lower court did not have a factual basis to justify issuance of the TRO. They point out that all the lower court had in front of it was the complaint and Moran's motion and brief for the TRO, which contain allegations only. Appellants rely on Rule 65(b) of the Federal Rules of Civil Procedure which requires that an order issued *ex parte* must be based upon verified facts.[39] Appellants claim that the *ex parte*

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[38] The Civil Appellate Panel of the CS&KT Court of Appeals ruled in an order dated June 9, 1995, as modified June 14, 1995, that the TRO had expired by the terms of Fed.R.Civ.P. 65(b) ten days after it was issued, and that the Council's appeal of the matter was therefore moot. The Panel further ruled that the TRO remained effective for a ten day period commencing May 19, 1995, the day it was issued. Today this Court, sitting en banc, vacates the TRO as void *ab initio*, and likewise vacates the Civil Appellate Panel's orders of June 9 and 14, 1995 related thereto.

[39] Rule 65(b) provides in relevant part:

> (b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or party's attorney only if (1) it clearly appears from the specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to

order was not based on "specific facts" set forth in an "affidavit or verified complaint," and that it is therefore deficient as a matter of law.

In comparison, Rule 10.4 of the Tribal Court Rules of Practice provides as to emergency or temporary *ex parte* orders that:

> Nothing in [Rule 10] limits the equitable powers of the court to issue, upon proper petition, such emergency orders as may be necessary to preserve the status quo or to maintain law and order in the context of a civil case or controversy until the earliest time that the matter may be heard. No emergency or temporary ex parte order shall relieve the party seeking such order of the burden of proof of allegations made in the application or pleading except in those matters where the burden of proof is expressly transferred by Tribal law or by the general rules of law governing the exercise of a court's equitable or extra ordinary powers. (Emphasis added).

At first glance, this Tribal Rule may appear to *sub silentio* authorize the Tribal Court to issue an *ex parte* temporary restraining order based upon "allegations made in the application or pleading," pending proof at a subsequent hearing "on the matter," i.e., at a hearing to qualify the *ex parte* TRO as a preliminary injunction. Notwithstanding, we interpret Rule 10.4 to

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> the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days...In case a temporary restraining order shall be granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time....

require the moving party to provide verification of such allegations at the time application for the *ex parte* order is made, i.e., before a TRO is issued without a hearing. This interpretation is harmonious with the requirements of Fed.R.Civ.P. 65(b).[40]

Application of Tribal Rule 10.4 and Fed.R.Civ.P. 65(b) to the *ex parte* order in question necessitates the conclusion that, as a matter of law, the *ex parte* order was entered upon an insufficient, i.e., unverified, factual basis. This amounts to reversible error. We so hold, recognizing that injunctive relief is a drastic remedy which subjects those restrained to the contempt powers of the court. The law and basic fairness dictate that the contempt power of a court cannot be invoked on the basis of unverified allegations, charges or speculation. Our ruling is made in this light.

Appellants further claim that the *ex parte* order fell short of the standards set forth in Fed.R.Civ.P. 65(b) in that it does not define the injury or state why it is irreparable, absent the order. We agree. While the brief supporting the motion identified the

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[40] Rule 65(b) provides two methods by which the facts relied upon in the complaint or application for the *ex parte* order can be verified: (1) by an affidavit on the complaint proper, and (2) by separate affidavit. See 7 Moore's Federal Practice ¶65.06, n. 4 (1995), citing Brown v. Bernstein, 49 F. Supp. 497, 499 (D.C.M.D. Penn. 1943). Careful practice mandates that the complaint be <u>both</u> verified and supplemented by separate affidavit(s), so that if there are any facts in the verified complaint in addition to those set forth in the affidavit, they will cumulatively support the application for the restraining order. See Moore, supra, ¶65.06, n. 4.

alleged injury and explained why it would be irreparable absent the TRO, the order itself was silent except to state that "irreparable harm may result."[41] The face of the order therefore leaves one guessing as to what harm it seeks to prevent. Because an *ex parte* order may be issued without giving the opposing party notice or an opportunity to be heard, it must be drafted to identify or define the injury and indicate how it is irreparable so that the opposing party will know what harm it seeks to prevent. It was error not to do so here.

Appellants next claim that the TRO is too broad and sweeping to be enforceable. The relevant portion of the challenged *ex parte* order provides:

> Plaintiff having filed a motion, and it appearing that irreparable harm may result unless this Court grants temporary relief until a hearing can be held, and good cause appearing therefore,
>
> The Court enters the following order:
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> 1. Defendants are restrained and enjoined, until hearing can be held, from any acts, outside regular Court process, which interfere with this Court's ability to decide this case according to this Court's rules and usual processes...

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[41] This, however, is sufficient to meet the requirement of Fed.R.Civ.P. 65(d), infra, to give a specific reason for issuance of a temporary restraining order, because it is not necessary to give elaborate detail therefor. See 7 Moore's Federal Practice, ¶65.11 (1995). See also, In re Rumsey Mfg. Corp., 9 FRD 93 (W.D.N.Y. 1949), rev'd in part on other grounds, 178 F.2d 353 (2d Cir. 1949) (recital that "irreparable injury may result" sufficiently sets forth the reasons for the issuance of a TRO). Here, the challenged TRO expressly states that "irreparable harm may result" if the order is not granted. This is sufficient under Rule 65(d) as to providing a reason for issuance, although under Rule 65(b) the TRO must define the injury and state why it is irreparable.

Appellants allege that the TRO constitutes "a broad injunction of all governmental powers of the Tribal Council" and is so "vague and ambiguous" as to be "unintelligible." While we do not think that the TRO constitutes "a broad injunction of all governmental powers," we do agree that it is too vague and sweeping to be enforceable.

Although the Tribal Court Rules of Procedure do speak to notice and proof matters going to the application of an *ex parte* restraining order, they do not address elements of form or scope of the actual orders themselves. We therefore turn to the Federal Rules of Civil Procedure for further guidance in this critical area. Rule 65(d) provides in relevant part:

> (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...

This rule requires a court to draft its orders so that those who must comply with them will understand specifically what the court intends to prohibit. The Supreme Court cogently and convincingly explained the purpose of the Rule:

> ...The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood...Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed. "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one..." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (citations omitted).

In *Schmidt*, the challenged order provided that:

> Alberta Lessard and the other members of her class are entitled to declaratory and injunctive relief against further enforcement of the present Wisconsin scheme against them...[Miss Lessard] is also entitled to an injunction against any further extensions of the invalid order which continues to make her subject to the jurisdiction of the hospital authorities. *Id.* at 474.

The Supreme Court ruled that the order fell "far short" of meeting the standards set forth in the second and third clauses of Rule 65(d). It found that the order was not "specific" in outlining the "terms," nor did it describe in sufficient detail the "act or acts sought to be restrained." Accordingly, the Court vacated the order, reasoning further that:

> The requirement of specificity in injunction orders performs a second important function. Unless the trial court carefully frames its orders of injunctive relief, it is impossible to know precisely what it is reviewing. We can hardly begin to assess the correctness of the judgment entered by the District Court here without knowing the precise bounds. In the absence of specific injunctive relief, informed and intelligent review is greatly complicated, if not made impossible. *Id.* at 477.

So too here. The lower court's order, as drafted by counsel and entered by the court, lacked sufficient specificity in outlining the "terms" of the specific relief granted. Nor did the order set forth "in reasonable detail...the acts sought to be restrained." Rather, it vaguely and broadly purported to enjoin "any acts, outside regular Court process, which interfere with this Court's ability to decide this case according to this Court's rules and processes..." As in *Schmidt*, we are left guessing as to what specific conduct is or is not included within the reach of this

facially inexplicit order.[42]

In light of the above, we find that the challenged order falls short of the long-standing standards set forth in the second and third parts of Rule 65(d). There is no compelling reason to preclude the Tribal Court from following them, particularly considering that an injunction, in the words of the Supreme Court, is a "drastic" remedy and "potent weapon" which can be "deadly." We simply cannot let the *ex parte* temporary restraining order stand since those tribal officials potentially subject to it would be under an unfair threat of judicial contempt and punishment. Basic fairness and justice therefore require us to vacate the TRO, and we hereby do so, voiding it *ab initio*.

IV. CONCLUSION

We hold that: (1) this Court has jurisdiction to hear the instant appeal regarding the *ex parte* temporary restraining order; (2) the Tribal Court is a court of general jurisdiction with the power of judicial review to hear cases to determine the lawfulness of the acts of the Tribal Council and tribal officials; (3) as a court of general jurisdiction, the Tribal Court possesses the

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[42] See also Thomas v. County of Los Angeles, 978 F.2d 504, 509 (9th Cir. 1992) (preliminary injunction too sweeping and therefore unenforceable where it directed compliance with all department policies and guidelines, but failed to define what the policies were, or how they could be identified, therefore held order fails to specify the act or acts sought to be restrained as required by Fed.R.Civ.P. 65(d)); First Technology Safety Systems, Inc. v. Depinet, 11 F.3d 641, 649 (6th Cir. 1993) (ex parte order was too broad under relevant seizure statute, and was therefore vacated).

necessary subject matter jurisdiction to hear this case and to issue the temporary restraining order in question; (4) pursuant to the Tribal Constitution and Ordinance 36B, the Tribal Court is vested with the Tribes' inherent sovereign judicial power, and thereby has the requisite authority to hear cases involving all subject matters, except where expressly limited by the Tribal Council; (5) the Tribal Council enjoys common law immunity from all counts of this suit over which it has not waived its sovereign immunity; (6) Tribal Chairman Michael T. Pablo and Joseph Dupuis are not shielded in their official capacities from this suit by the doctrine of sovereign immunity; (7) this case does not present a non-justiciable political question; and (8) the *ex parte* temporary restraining order in question was not based on verified facts and was too broad and vague to be enforceable, is void *ab initio*, and is hereby vacated, as are the Civil Appellate Panel's orders dated June 9 and 14, 1995.

We remand for further proceedings and determination the question of whether promulgation and execution of the clemency order was lawful, and the question of whether there exists a separation of powers in the government of the Confederated Salish and Kootenai Tribes. On remand, these issues are to be

determined in the first instance by applying applicable CS&KT tribal law.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

IT IS SO ORDERED THIS 23rd day of October, 1995.

CONFEDERATED SALISH & KOOTENAI TRIBES COURT SEAL OF APPEALS FLATHEAD RESERVATION

Robert M. Peregoy
Chief Justice

Margery Brown
Associate Justice

Margaret Hall
Associate Justice

Robert Gauthier
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 EN BANC OPINION REGARDING TEMPORARY RESTRAINING ORDER 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 26th day of October, 1995.

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