Wes Williams Jr. (Nevada Bar #6864)
LAW OFFICES OF WES WILLIAMS JR.
A PROFESSIONAL CORPORATION
3119 LAKE PASTURE RD.
P.O. BOX 100
SCHURZ, NEVADA 89427
TELEPHONE (775)773-2838
FACSIMILE (775)773-2830
Attorney for Defendants Pyramid Lake Paiute Tribe and Its Officials

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DUANE WASSON, *et al*, Plaintiffs, v. PYRAMID LAKE PAIUTE TRIBE, *et al.*, Defendants.	Case No.: 3:10-cv-00123-RCJ(RAM) **TRIBAL DEFENDANTS' MOTION TO DISMISS**

Defendant the PYRAMID LAKE PAIUTE TRIBE, and the following defendants in their official and individual capacities MERVIN WRIGHT, JR, NORMAN HARRY, LORI BLACK, CLAYTON SERVILLICAN, SHERRY ELY, IRWIN MIX, JUDITH DAVIS, ELWOOD LOWERY, JOHN GARCIA, LELA LEYVA, GENEVIEVE JOHN, WAYNE BURKE, and JOHN JACKSON (collectively referred to herein as "Tribal Defendants"), through their attorney Wes Williams Jr. of the Law Offices of Wes Williams Jr., a professional corporation, hereby request that the court enter its order dismissing this action. The Tribal Defendants have not been properly served a copy of the summons and complaint. Alternatively, no waiver of the Tribal Defendants sovereign immunity exists to allow for this action against the Tribal Defendants. Since the Tribe is an indispensible party and cannot be joined, this entire case must be dismissed.

This motion is supported by the attached memorandum of points and authorities, and the papers and pleadings on file herein.

RESPECTFULLY SUBMITTED this 4TH day of October 2010.

Law Offices of Wes Williams Jr.

By: /s/ Wes Williams Jr.
WES WILLIAMS JR.
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427

MEMORANDUM OF POINTS AND AUTHORITIES

I. BASIS FOR MOTION

This motion is based upon Rules 4, 12(b)(1) and 12(b)(7) of the Federal Rules of Civil Procedure ("FRCP") due to the Plaintiffs' failure to properly serve the summons and complaint, this Court's lack of jurisdiction over the Tribal Defendants, and the Tribe being an indispensable party that cannot be joined.

As to the Court's lack of jurisdiction over the Tribal Defendants, a motion to dismiss pursuant to Rule 12(b) FRCP "should not be granted unless it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 . . . (1957)." *Mack v. South Bay Beer Dist's, Inc.,* 798 F.2d 1279, 1282 (9th Cir. 1986), overruled on other grounds by *Astoria Fed. Savings and Loan Assoc. v. Soliminio,* 501 U.S. 104 (1991). Dismissal is clearly appropriate where this standard is met. In evaluating a motion to dismiss, all allegations of material fact in the complaint are to be taken as true and construed in a light most favorable to the plaintiff. *Imagineering, Inc. v. Kiewit Pac. Co.,* 976 F.2d 1303, 1306 (9th Cir. 1992). However conclusory allegations are insufficient to defeat a motion to dismiss unless more is provided. *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir. 1988).

Here, among other things, the motion to dismiss is based on the Tribe's sovereign status that renders the Tribe immune from suit. Such immunity from suit raises the question of the Court's jurisdiction that is appropriately considered under Rule 12(b)(1) FRCP addressing the subject matter jurisdiction of the Court. *See Hagen v. Sisseton-Wahpeton Comm. Coll.,* 205 F.3d 1040, 1043 (8th Cir. 2000). Once subject matter jurisdiction is raised and questioned under Rule 12(b)(1) FRCP, the plaintiff bears the burden of establishing jurisdiction. *Tosco Corp. v.*

Communities for a Better Environment, 236 F.3d 495, 499 (9th Cir. 2001); *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 84 (2nd Cir. 2001). Therefore the plaintiff must show why the Tribe's sovereignty does not require the dismissal of this case.

II. PLAINTIFFS FAILED TO PROPERLY SERVE THE DEFENDANTS

The Plaintiffs failed to properly serve the Tribal Defendants. Service of a summons and complaint must be completed by a person not a party to the case, which has not occurred. Fed. R. Civ. P. 4(c)(2). Plaintiffs did have a copy of the summons and complaint delivered to the Tribe's attorney's old office. However no proper written request to waive service pursuant to Rule 4(d) was included. Finally Plaintiffs have not filed certificates of service in this case, which provides further evidence of their failure to properly serve any of the defendants. Rule 4(m) requires a plaintiff to serve a defendant within 120 days after the complaint is filed. The complaint in this case was filed on March 3, 2010, which is over 210 days ago. Based on the Plaintiffs failure to serve the summons and complaint, the Tribal Defendants request that this case be dismissed.

III. ALTERNATIVELY, THIS CASE MUST BE DISMISSED BECAUSE THE TRIBE'S SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED TO ALLOW FOR THIS TYPE OF CASE TO PROCEED IN ANY COURT

A. The Tribe's Sovereign Immunity Has Not Been Waived

The Tribal Defendants must be dismissed from this suit based on the Pyramid Lake Paiute Tribe's (the "Tribe") sovereign immunity that has not been waived by the Tribe or Congress. The Tribe's sovereign immunity extends to its governmental officials and employees acting in their official capacities. Plaintiffs' Complaint asserts and admits that the Tribal Defendants are the Tribe, Tribal officials and/or Tribal employees (the Tribe is named as a defendant only in the caption of the Complaint). All of the Tribal Defendants are protected by the Tribe's sovereign immunity that has not been waived.

The United States Supreme Court has recognized numerous times that Indian tribes are immune from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The Supreme Court has stated, "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear

waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *see Pit River Home and Ag. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994). The Tribe has not waived its sovereign immunity to allow for this type of action. Similarly Congress has not abrogated the Tribe's immunity. Sovereign immunity extends to actions taken by a Tribe off the Tribe's lands. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1210 (11th Cir. 2009). Tribal immunity extends to claims for declaratory and injunctive relief, not merely damages, and it is not defeated by a claim that the tribe acted beyond its power. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991).

B. The Tribe's Sovereign Immunity Extends to Its Officials and Employees

The Tribe's sovereign immunity also precludes any action against any Tribal official when the official is acting within the scope of his authority. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002); *Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968). Tribal sovereign immunity protects tribal officials because they need to be free from intimidation, harassment and the threat of lawsuits when conducting tribal business. Tribal officials would be protected by the Tribe's sovereign immunity even if the Tribe was not a party to the action. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997).

In *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002), a plaintiff brought an action against a tribe, the tribe's governor (similar to a tribal chairperson), and a tribal ranger. The plaintiffs' complaint alleged that the plaintiffs were walking their dogs on the tribe's reservation when they were approached by the tribal ranger. *Id.* at 491. The ranger drew his gun, ordered the plaintiffs to turn with their hands on their head, and then the ranger searched the plaintiffs and their car. *Id.* The ranger eventually released the plaintiffs after citing them for criminal trespass. *Id.* These charges were later dropped. *Id.* The plaintiffs filed an action in federal district court against the tribe, its governor, the tribal ranger, the United States, the Bureau of Indian Affairs and other federal officials. *Id.*

The Ninth Circuit affirmed the district court's order dismissing the action against the Tribe, the tribe's governor and the tribal ranger based upon the tribe's sovereign immunity. "Because the [plaintiffs] suit against the [tribe] and against [the tribe's governor] and the [tribal ranger] in their official capacities is a suit against the tribe, it is barred by tribal sovereign immunity unless that immunity has been abrogated or waived." *Id.* at 492. Since no waiver existed, the action was dismissed. *Id.* at 492-93.

Here, Plaintiffs have named the Tribe, the Tribal Chairman, former Tribal Chairman, Tribal Vice-Chairman, the Chair of the Tribe's Election Board, and the Director of the Tribe's Water Resources Department. Similar to the defendants in the *Linneen* case, these are all Tribal officials and/or employees covered by the Tribe's sovereign immunity. They all must be dismissed.

Courts have noted that plaintiffs will often name tribal officials in attempts to avoid sovereign immunity defenses. In *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150 (9th Cir. 2001), the Ninth Circuit noted that it had created a general rule for actions naming tribal officials when the requested relief will restrain the tribal government.

> [T]he general rule [is]: "a suit is versus the sovereign if judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." [*Shermoen v. United States*], 982 F.2d [1312], 1320 (citations and internal quotations omitted). Indeed, as taught by the Supreme Court, if the relief sought will operate against the sovereign, the suit is barred. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984).

Dawavendewa, 276 F.3d at 1160. A case is not against tribal officials, but is against a tribe if the effect of the judgment sought would restrain the tribe from acting or require payment from the tribe.

Here, the judgment sought will restrain the Tribe from acting, compel it to act, or possibly require the Tribe to pay money to Plaintiffs. Therefore the action really is against the Tribe, and must be dismissed.

> Undoubtedly many actions of a sovereign are performed by individuals. Yet even if Dawavendewa alleged some wrongdoing on the part of Nation officials, his real claim is against the Nation itself. At bottom, the lease at issue is

> between SRP and the Nation, and the relief Dawavendewa seeks would operate against the Nation as signatory to the lease. As such, we reject Dawavendewa's attempt to circumvent the Nation's sovereign immunity by joining tribal officials in its stead.

Id. at 1161. Similarly, the remedy sought by Plaintiffs would operate against the Tribe, which cannot be allowed.

Finally, all of the actions by the Tribal officials and employees alleged in the Complaint occurred while they were acting in their official capacities. Plaintiffs do not state how any actions created any individual liability. Again, since the relief sought is to restrain the Tribe from acting, compel it to act, or possibly require the Tribe to pay money, the Complaint is really against the Tribe. Therefore all of the Tribal Defendants must be dismissed in their individual capacities, as well as their official capacities.

IV. THE PLAINTIFFS HAVE NOT PROVIDED A BASIS FOR FEDERAL COURT JURISDICTION OVER THIS ACTION

Only Congress or the Tribe can waive the Tribe's sovereign immunity. The Plaintiffs must prove that this Court has jurisdiction over this case by proving that a waiver of the Tribe's sovereign immunity exists. This motion will attempt to determine what Federal or Tribal actions the Plaintiffs may assert waived the Tribe's immunity, and then will show why no waiver exists.

A. The Complaint Is Written on a Form Alleging Jurisdiction Pursuant to 42 U.S.C. § 1983, And the Pleadings May Refer to Other Statutes That Plaintiffs May Allege Provide a Statutory Basis for Jurisdiction

The Plaintiffs bear the burden of proving that this Court has jurisdiction over this case. Local Rule 8-1 requires plaintiffs to state the statutory basis for claimed federal jurisdiction in the complaint's first allegation. The complaint filed by Plaintiffs (Docs. 1-1, 1-2 and 1-3; and apparently filed as Docs 4, 4-1 and 4-2) is written on the court's form titled "Civil Rights Complaint pursuant to 42 U.S.C. § 1983." Under section B titled "Nature of the Case" of that form, plaintiffs refer to due process violations guaranteed under the Indian Civil Rights Act of 1968; the Constitution and Bylaws of the Pyramid Lake Paiute Tribe; the Pyramid Lake Tribal Code – Title 9 – Election Code; the Code of Federal Regulations 25 Indians. The Plaintiffs then refer, under the form's "Count I," to the Tribe's Constitution and its Election Code. Under "Count II," they refer to the Tribe's Constitution. Under "County III," Plaintiffs refer to Tribe's

Constitution and Bylaws and possibly other laws.

The Plaintiffs later filed a pleading titled "Motion for Injunction and Temporary Restraining Order." Doc. 9 and 10, which appear to be the same. This document asserts the Court has jurisdiction based on 25 C.F.R. § 477[1]; 42 U.S.C. § 1983; NRS 41.430[2]; the United States Constitution and its 14th Amendment; and 28 U.S.C. § 2201[3]. It also refers to a number of Tribal laws, including the Tribal Constitution and Election Code, and agreements entered into by the Tribe. Certain Plaintiffs filed an affidavit and/or separate motion for injunction. Doc. 12 (see page 36 of 70).[4]

Plaintiffs may have cited to other laws as a basis for jurisdiction. However due to the number of pleadings and the huge number of attachments, it is very difficult to determine exactly what legal basis the Plaintiffs may have cited to and upon which they may rely. Based on the foregoing, if some other statutory basis exists to provide this court with jurisdiction over this case, the Tribal Defendants request leave to supplement their motion.

In conclusion, it appears the Plaintiffs rely upon the Federal Constitution and its 14th Amendment, 42 U.S.C. § 1983, the Federal Indian Civil Rights Act, the Tribe's Constitution and Bylaws, and the Tribe's Election Code. Each of these laws will be addressed below.

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[1] This regulation (25 C.F.R. § 477) does not exist. 25 U.S.C. § 477 does exist and addresses tribal corporations. However it does not provide any waiver of any tribe's sovereign immunity.

[2] NRS 41.430 is a state statute related to jurisdiction on Tribal lands. However the state cannot waive a tribe's sovereign immunity. Only Congress or a tribe itself can waive a tribe's sovereign immunity.

[3] 28 U.S.C. § 2201 addresses remedies a federal court may grant. It does not waive any tribe's sovereign immunity.

[4] Plaintiffs also filed a document titled "Criminal Complaint" (Doc. 14) that moves to amend the complaint to become a criminal complaint. There are innumerable problems with the Plaintiffs attempting to prosecute a criminal complaint, but only the most obvious related to Federal Indian law will be addressed here. Plaintiffs refer to certain sections of 25 C.F.R. Part 11 that establish Federal Courts of Indian Offenses (often referred to as "C.F.R. Courts). A Federal District Court is not a "C.F.R. Court" as established in the C.F.R. Also, C.F.R. Courts were created to provide a court for actions occurring within the lands of certain specified Indian tribes. 25. C.F.R. §

B. The Federal Civil Rights Statutes and the Other Federal Laws Referred to by Plaintiffs Do Not Apply to Indian Tribes and/or Do Not Waive the Tribe's Sovereign Immunity

Plaintiffs refer to the United States Constitution and various federal laws in their Complaint. However the United States Constitution and its amendments place no limits on tribal self-government. *See Talton v. Mays*, 163 U.S. 376 (1896)(the Bill of Rights that restricts the federal government does not apply to tribes); *see also* United States Constitution Amend. XIV (stating no "State" shall deny due process or equal protection – a tribe is not a state). Just as significantly, the Constitution and its amendments do not waive the sovereign immunity of any tribe. No express and unequivocal waiver of the Tribe's sovereign immunity exists in the United States Constitution or its amendments.

The claims in Plaintiffs' complaint appear to be based on, at least in part, 42 U.S.C. § 1983 which also does not apply to Indian tribes. This statute is meant to enforce violations of the federal Constitution and other federal laws. However Tribes and their officials are not state actors under 42 U.S.C. § 1983. *R.J. Williams Co. v. Ft. Belknap Housing Auth.*, 719 F.2d 979, 982 (9th Cir. 1983); *Kennerly v. U.S.*, 721 F.2d 252, 1259 (9th Cir. 1983).

Furthermore, 42 U.S.C. § 1983 cannot be used to enforce violations of Tribal law. The Ninth Circuit explains, in part:

> First, no action under 42 U.S.C. Sec. 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. Indian tribes are separate and distinct sovereignties, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978); *see United States v. Wheeler*, 435 U.S. 313, 331, 98 S.Ct. 1079, 1090, 55 L.Ed.2d 303 (1978), and are not constrained by the provisions of the fourteenth amendment. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir.1967); *see Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896); *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 919 (10th Cir.1957), cert. denied, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958). As the purpose of 42 U.S.C. Sec. 1983 is to enforce the provisions of the fourteenth amendment, *Monroe v. Pape*, 365 U.S. 167, 171, 81 S.Ct. 473, 475, 5 L.Ed.2d 492 (1961); *Thompson v. New York*, 487 F.Supp. 212, 220 (N.D.N.Y.1979), it follows that actions taken under color of tribal law are beyond the reach of Sec. 1983, and may only be examined in federal court under the provisions of the Indian Civil Rights Act.

11.100. The Pyramid Lake Paiute Tribe and its Reservation are not included on this list.

R.J. Williams at 982. Asserting a claim based on 42 U.S.C. § 1983 does not provide this Court with jurisdiction over the Tribal Defendants and the statute does not waive the Tribe's sovereign immunity.

The Plaintiffs also refer to the Indian Civil Rights Act ("ICRA"). *See* 25 U.S.C. §§ 1301-03. While the ICRA provides many civil rights enforceable against Indian tribes, it confers jurisdiction on Federal Courts only for habeas corpus actions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-70 (1978). All other rights must be enforced in tribal forums. *Id.* at 65. The Supreme Court based its conclusion that the ICRA cannot be enforced in federal courts in part on the ICRA containing no waiver of tribes' sovereign immunity to allow actions in federal court, except for habeas corpus actions.

> Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

Id. at 72. The ICRA does not waive the Tribe's sovereign immunity.

C. <u>Plaintiffs Cannot Avoid Sovereign Immunity By Asserting A Claim Of A Violation Of Tribal Law</u>

The Plaintiffs' complaint refers to the Tribe's Constitution and Bylaws, the Tribe's Election Code, and possibly other Tribal laws. However any waiver of the Tribe's immunity must be express and unequivocal, and may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58-59; *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993). No section of the Tribe's Constitution waives the Tribe's sovereign immunity. The Tribe's Constitution does not mention sovereign immunity. It does not state that the Tribe can be sued for any reason. *See* Constitution and Bylaws of the Pyramid Lake Paiute Tribe (Doc. 1-1 at pp. 14-38). Therefore the terms of the Tribe's Constitution cannot be construed to be a waiver of the Tribe's sovereign immunity. Also the Tribe's Election Code does not waive the Tribe's sovereign immunity to

provide any jurisdiction to a federal court. See Election Code (Doc. 1-1 at pp. 39-47).

The Plaintiffs may assert that a violation of a Tribal law creates a Federal question, which would give this Court jurisdiction under 28 U.S.C. §§ 1331 and 1362. However Federal question jurisdiction is not invoked by asserting claims that arise under Tribal law.

> For jurisdiction to lie under 28 U.S.C. §§ 1331 and 1362, the action must arise under the Constitution, laws or treaties of the United States. An ordinance enacted by a federally recognized Indian tribe is not itself a federal law; the mere fact that a claim is based upon a tribal ordinance consequently does not give rise to federal question jurisdiction. *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981). Nor does it suffice that one of the parties to a dispute is an Indian tribe. *Gila River Indian Community v. Henningson, Durham, & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980), cert. denied, 451 U.S. 911, 68 L. Ed. 2d 301, 101 S. Ct. 1983 (1981).

Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 (9th Cir. 1990). Tribal laws do not arise under the Constitution, laws or treaties of the United States.

D. Federal Courts May Not Interfere With Internal Tribal Matters And Must Respect Tribes' Right To Self-Government

The Tribe possesses jurisdiction over claims based on Tribal law, and that involve internal Tribal matters. The United States Supreme Court has recognized that Indian tribes are distinct political communities that retain their inherent rights of self-government. *See Worcester v. Georgia,* 31 U.S. 515, 557-60 (1832). The Supreme Court has repeatedly affirmed that Indian tribes retain their ability to exercise their inherent sovereign authority over their members and territory. *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505 (1991). Furthermore, the United States Congress has made a repeated and determined effort to strengthen tribal self-government. The Supreme Court has observed that Congress is "firmly committed to the goal of promoting Tribal self-government, a goal embodied in numerous federal statutes." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 335 (1983); *see Wheeler v. United States Dept. of Interior,* 811 F.2d 549, 551 (10th Cir. 1987)(stating that the federal government, through Congress and the federal courts have encouraged tribal self-government).

Federal courts have repeatedly abstained from interfering in intratribal matters based upon the federal policy of allowing tribes to govern themselves. "The federal courts have . . . encouraged self-government. Specifically, they have stated that when a dispute is an intratribal

matter, the Federal Government should not interfere." *Wheeler*, 811 F.2d at 551 (*citing R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983); *Potts v. Bruce*, 533 F.2d 527, 529-30 (10th Cir. 1976); and *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364, 367 (10th Cir. 1966)); *see Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987).

This court must respect the Tribe's right to self-government and should not interfere in the Tribe's internal processes. The Tribe and its processes and procedures possess exclusive jurisdiction over the Tribe's members and its territories for matters involving the Tribe's right to self-government. Any action by a federal district court that interferes with the Tribe's right to govern its own internal processes would constitute an improper infringement into the Tribe's exclusive jurisdiction.

> A tribe's interest in self-government could be implicated in one of two ways. First, if a state or federal court resolves a dispute which was within the province of the tribal courts or of other nonjudicial law-applying tribal institutions, that court would impinge upon the tribe's right to adjudicate controversies arising within it. *Fisher v. District Court*, 424 U.S. 382, 387-88, 47 L. Ed. 2d 106, 96 S. Ct. 943 (1976) (per curiam); *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978). Second, if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body, tribal self-government is drawn directly into the controversy. *Littell* v. Nakai, 344 F.2d 486, 490 (9th Cir. 1965).

R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 983 (9th Cir. 1983).

The Plaintiffs' allegations relate primarily to the Tribe's internal processes. This court does not have jurisdiction over such matters. Such an action would necessarily require this Court to interpret the Tribal constitution and other Tribal laws, and Tribal law is not within the jurisdiction of the district court. Plaintiffs may seek review in tribal court or pursue alternative, political remedies. *R.J. Williams Co.*, 719 F.2d at 983. This Court cannot review any matter arising under Tribal law that is within the Tribe's exclusive jurisdiction.

V. FAILURE TO JOIN THE TRIBE WHICH IS AN INDISPENSABLE PARTY REQUIRES THAT THIS ENTIRE CASE BE DISMISSED

This action must be dismissed in its entirety pursuant to Rule 12(b)(7) FRCP for failure to join a party under Rule 19. The Pyramid Lake Paiute Tribe is a necessary party to this action involving internal Tribal matters. The parties to this action cannot proceed without the Tribe else

complete resolution of the issues presented will not be achieved. However the Tribe cannot be joined due to its sovereign immunity.

Rule 19 of the Federal Rules of Civil Procedure requires an action to be dismissed if a necessary party cannot be joined to the action to provide a just adjudication. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022-25 (9th Cir. 2002)(providing discussion of tests for determining if party is "necessary" and "indispensable"). Rule 19 requires a court to determine if the absent party is a "necessary" party, and if so, whether the case can proceed without the absent party being joined. In deciding whether the absent party is necessary to the action, a federal court will follow the tests laid out in the rule. It will first determine if one of the conditions provided in subsection (a) are met. First whether complete relief can be accorded without the absent party's participation. Fed. R. Civ. P. 19(a)(1). Or, second, whether the party's absence from the case impairs or impedes his ability to protect his interest in the action, or whether the party's absence causes the persons already parties to the action subject to substantial risk of incurring inconsistent obligations due to the absent person's interests. Fed. R. Civ. P. 19(a)(2). Only one of these tests must be met, but both are met in this case.

The Tribe possesses jurisdiction to exercise and enforce its sovereign powers that the Plaintiffs are attempting to limit. Also the Tribe's ability to protect its interests in how it conducts its affairs will not be protected if it is not a party to the action. The Tribe has a protected interest in establishing and exercising its governmental powers. It cannot protect those interests if it is not a party to this action. Finally, separate proceedings, in this Court and possibly in Tribal forums, addressing the same or similar issues would guarantee that the Plaintiffs and the Tribal Defendants would incur inconsistent obligations. Therefore the Tribe is a "necessary" party to this case.

If a party is deemed "necessary" to an action under Federal Rule 19(a) but cannot be made a party, the court must determine under Rule 19(b) whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being deemed "indispensable." *See* Fed. R. Civ. P. 19(b); *American Greyhound Racing, Inc.*, 305 F.3d at 1024-25. However, when the reason for nonjoinder is because the party is immune from suit, immunity itself is viewed as the compelling factor, and there is no room for balancing the Rule 19(b) factors.

> When as here, a necessary party under Rule 19(a) is immune from suit, "there is very little room for balancing of other factors" set out in Rule 19(b), because immunity "may be viewed as one of those interests 'compelling by themselves.'"

Enterprise Management Consultants, Inc. v. United States, 883 F.2d 890, 894 (10th Cir. 1989)(citing *Wichita and Affil. Tribe v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986)); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *Fluent v. Salmanca Indian Lease Auth.*, 928 F.2d 542, 548 (2nd Cir. 1991). Immunity of a necessary party is given such overwhelming emphasis because "society has consciously opted to shield Indian Tribes from suit without congressional or tribal consent." *Fluent*, 928 F.2d at 548.

The Tribe is an indispensable party based on the compelling factor of its immunity alone, which requires that this action be dismissed. Despite acknowledging that immunity often is viewed as foreclosing the entire balancing process, the Ninth Circuit often continues to follow the four factor process. *American Greyhound Racing, Inc.*, 305 F.3d at 1025. The first Rule 19(b) factor is to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties. "Not surprisingly, the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a); a protectable interest that will be impaired or impeded by the party's absence." *Id.* at 1024-25. Plaintiff seeks for the court to review numerous Tribal actions related to the Tribe's internal matters, as well as the exercise of its governmental functions. A decision by the Court nullifying the Tribe's ability to engage in these activities will necessarily have an enormous prejudicial effect on the sovereign powers and jurisdiction of the Tribe.

The second factor under Rule 19(b) is the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided. Plaintiff's complaint attacks the legal framework under which the Tribe operates. Plaintiff is not requesting relief that can be shaped in any manner other than to nullify the Tribe's ability to create and enforce its laws and to operate as a sovereign entity. The prejudice to the Tribe cannot be avoided.

The third factor under Rule 19(b) is whether a judgment rendered in the person's absence

will be adequate. A judgment in favor of the Plaintiffs will necessarily impair the Tribe's protectable interests. *See American Greyhound Racing, Inc,* 305 F.3d at 1025. Plaintiffs request injunctive relief preventing the Tribe from exercising its governmental powers. The Tribe has jurisdiction to make these types of determinations. Therefore the Tribe's protectable interests will definitely be impaired by the requested relief, which precludes the Court from entering an order that adequately addresses the Plaintiff's claims.

The fourth factor is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. The Tribe's interest in protecting its sovereign immunity outweighs Plaintiff's need to litigate its claims. "The fourth factor would ordinarily favor the plaintiffs; there is no adequate remedy available to them if this case is dismissed for lack of joinder of indispensable parties. But this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *American Greyhound Racing, Inc.*, 305 F.3d at 1025. Many courts have found that a tribe's interest in protecting its sovereign immunity mandates that there is no room to weigh these factors. *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989).

Based on the foregoing, the Tribe is an indispensable party pursuant to Rule 19(b) FRCP. This entire case must be dismissed.

VI. CONCLUSION

The Tribal Defendants request that the Court enter its order dismissing Plaintiffs' complaint. The Tribal Defendants further request that the Court enter its order requiring Plaintiffs

to pay the Tribal Defendants' attorney's fees and costs incurred in having to defend this action.

RESPECTFULLY SUBMITTED this 4TH day of October 2010.

Law Offices of Wes Williams Jr.

By: /s/ Wes Williams Jr.
WES WILLIAMS JR.
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that I am an employee of the Law Offices of Wes Williams Jr., 3119 Lake Pasture Road, P.O. Box 100, Schurz, Nevada 89427, over the age of eighteen and not a party to the within action, and that on this date I placed in the United States mail, postage prepaid, a true and correct copy of the document titled "TRIBAL DEFENDANTS' MOTION TO DISMISS" addressed to the following:

Duane Wasson
P.O. Box 234
Nixon, NV 89424

Mitchell Tobey Sr.
P.O. Box 30
Wadsworth, NV 89442

Michelle J. Ruize
P.O. Box 448
Wadsworth, NV 89442

Elmira Copeland
P.O. Box 233
Fernley, NV 89408

DATED: October 4, 2010

By: /s/ Wes Williams Jr.
WES WILLIAMS JR.