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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13
14 DAVID LANTRY,

15 Plaintiff,

16
17 vs.

18 WALKER RIVER PAIUTE TRIBE
19 TRIBAL POLICE, et al,

20 Defendants.
21

Case No.: 3:06-cv-0600-RCJ-VPC

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS (CR 43)**

22 COMES NOW Plaintiff, DAVID LANTRY, by and through his attorneys of record,
23 and submits this Opposition to the Defendants' Walker River Paiute Tribe Tribal Police
24 Motion to Dismiss, Court Record ("CR") 43 ("Motion").

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I. LEGAL STANDARD**

27 For the purpose of ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the
28 Federal Rules of Civil Procedure, the complaint is construed in the light most favorable to

1 plaintiff, and its allegations are taken as true. See, e.g., Argabright v. United States, 35 F.3d
2 472,474 (9th Cir. 1994). The Court must give the plaintiff the benefit of every inference that
3 reasonably may be drawn from well-pleaded facts. Tyler v. Cisneros, 136 F.3d 603, 607 (9th
4 Cir. 1998). “It is axiomatic that ‘the motion to dismiss for failure to state a claim is viewed
5 with disfavor and is rarely granted.’” Hall v. City of Santa Barbara, 833 F.2d 1270, 1274
6 (9th Cir. 1986) (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure, Civil §
7 1357, at 598 (1969)).

8 Rule 8 requires a “short and plain statement” of the claim that is sufficient to
9 demonstrate that the pleader is entitled to relief and to give the defendant notice of the claim
10 against him. Although the Supreme Court recently revisited the federal pleading standard
11 articulated in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), it made clear that it was not
12 redefining the pleading standard to “require heightened fact pleading of specifics.” See Bell
13 Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007). In Twombly, the Court distinguished
14 Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) by stating that “we do not require
15 heightened fact pleading of specifics, but only enough facts to state a claim for relief that is
16 plausible on its face.” Id. “[T]he proper test in evaluating a motion under Rule 12(e) is
17 whether the complaint provides the defendant with a sufficient basis to frame his responsive
18 pleadings.” Federal Sav. and Loan Ins. Corp. v. Musacchio, 695 F.Supp. 1053, 1060 (N.D.
19 Cal. 1988) (citing Famolare Inc. v. Edison Bros. Stores, Inc., 525 F. Supp. 940, 949 (E.D.
20 Cal. 1981)).

21 The court’s inquiry is directed to whether the allegations set forth in the complaint, if
22 true, are sufficient to state a claim within the meaning of Rule 8(a) of the Federal Rules of
23 Civil Procedure. Rule 8(a) provides that the complaint need only set out a generalized
24 statement of facts from which defendants will be able to frame a responsive pleading.

25 As a general matter, motion for summary judgment should only be granted when the
26 evidence is so one- sided that one party must prevail as a matter of law. See Anderson v.
27 Liberty Lobby, Inc., 477 US 242, 251-252 (1986). A fact is “material” when, under the
28 governing substantive law, it could affect the outcome of the case. Anderson at 248. A

1 dispute about a fact is “genuine” when a reasonable jury could return a verdict for the
2 nonmoving party based on the evidence. Anderson at 248.

3 A motion to amend the complaint is governed by Federal Rule of Civil Procedure
4 15(a). In part, this rule provides that “a party may amend the party’s pleadings . . . by leave
5 of court . . . and leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a).
6 Although leave to amend a complaint is not to be granted automatically, the policy
7 permitting leave to amend is applied with “extraordinary liberality.” Morongo Band of
8 Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

9 10 **II. FACTUAL BACKGROUND**

11 Plaintiff has alleged the following facts in his Complaint.

12 “On or about April 9, 2004, Mr. LANTRY was driving an unregistered agricultural
13 vehicle on Tribal property.” See Complaint, ¶9. “He was cited into Mineral County Justice
14 Court by the TRIBAL POLICE for driving an unregistered vehicle even though the tribal
15 code specifically exempts agricultural vehicles from registration.” Id., ¶10. “On or about
16 May 4, 2004, at 9:45 a.m. Mr. LANTRY, appeared for Court as required by his citation and
17 was told that the Judge was unavailable.” Id., ¶11. “Mr. LANTRY was told by the court
18 personnel to check back in a week or so for a new Court date.” Id., ¶12. “Mr. LANTRY
19 contacted the Mineral County Justice Court for resolution of the citation on two other
20 occasions without success as the Judge was not available.” Id., ¶13. “At all times, Mr.
21 LANTRY behaved in an orderly and lawful manner.” Id., ¶14. “On or about April 28, 2005,
22 three TRIBAL POLICE OFFICERS forcibly removed Mr. LANTRY, from his residence
23 located on private allotted property - - not subject to Walker River Paiute Tribe authority - -
24 and took him into custody.” Id., ¶15. “Mr. LANTRY was thereupon transported to the
25 Mineral County Jail in Hawthorne, Nevada and booked on a Mineral County warrant,
26 apparently base upon the earlier citation.” Id., ¶16. “In order to be released from custody,
27 on or about April 28, 2005, Mr. LANTRY posted a cash bail.” Id., ¶17. “On information
28 and belief, Mr. LANTRY believes the criminal charges against him were subsequently

1 dismissed, although he was not provided with notification of said dismissal.” *Id.*, ¶18.

2 Plaintiff brought this action against the Defendant, the alleged “Walker River Paiute
3 Tribe Tribal Police Department,” (“Tribal Police” or “Defendants,” alternatively)¹ and its
4 members, in their individual and official capacities, for civil rights and state causes of
5 action. *Id.*, ¶4. The first two causes of action are for excessive force and the policy and
6 custom relating to it, and are made pursuant to 42 U.S.C. § 1983 and the Fourth and
7 Fourteenth Amendments. The Third and Fourth causes of action for supervisory liability
8 and negligent supervision are made pursuant to 42 U.S.C. §§ 1983, 1985(3), and 1986. The
9 Fifth and Seventh causes of action are common law causes of action. The Sixth cause of
10 action for oppression is brought pursuant to state law. The Eighth cause of action seek
11 punitive damages.

12 **III. SUMMARY OF THE ARGUMENT**

13 Defendants’ Motion to Dismiss must be denied on several grounds. First the
14 documents they submitted with their Motion demonstrate facts in dispute sufficient to
15 prevent any possibility of summary judgment. Second, these same documents show that no
16 sovereign immunity is implicated, or even could be implicated, in this case. Third, the
17 Motion is premature, both because: (I) the Tribal Law and Order Code has not been
18 produced; and (ii) the documents Defendants have provided support amendment to include
19 additional causes of action. Fourth, the Defendants have failed to meet their burden under
20 Rules 12 or 56 of the Federal Rules of Civil Procedure. Fifth, Plaintiffs has demonstrated
21 sufficient foundation for all of the claims in his Complaint.

22 **IV. RESPONSE TO DEFENDANTS’ “ADMITTED FACTS”**

23 Defendants set forth a series of facts which they characterize as “admitted and
24 controlling.” Motion at 5. Contrary to Defendants’ contention, the “facts” are squarely in
25 dispute, as described below:

26
27
28 ¹As discussed, *infra*, the precise character and capacity of the individuals as well as
the “Tribal Police,” is as yet unclear.

DISPUTED FACT (Item No. 1)

1
2 1. “The sole remaining defendant is the Walker River Paiute Tribal Police
3 Department which the plaintiff concedes is a police department of the Walker
4 River Paiute Tribe. Comp., pp. 1;14, 3;11-12.”

5 Motion at 5.

6 Plaintiff disputes this statements and similar ones made in the Motion. See, e.g.,
7 Motion at 3:19-24. It is true that Plaintiff reached a settlement with Mineral County and
8 released them from this case. See CR 32, 40. However, the Tribal Police are identified in
9 the Complaint as such only because this is manner in which the actors involved herein
10 presented themselves to Plaintiff.

11 Plaintiff has never “conceded” that the so-called “Tribal Police” is a police
12 department of the Walker River Paiute Tribe (“Tribe”). This nomenclature is nothing more
13 than a convenient form of reference and has absolutely no bearing on the legal and factual
14 question of the true character and capacity of the individuals and entities that harmed
15 Plaintiff, and certainly is not proof that the Tribal Police is an agency or department of the
16 Tribe.

DISPUTED FACT (Item No. 2)

17 2. “The affidavits of the current and former Chairmen of the Walker River Paiute
18 Tribe show that the Walker River Paiute Tribe’s Police Department is an
19 agency of the Tribe, charged with the public safety and protection function of
20 the Tribal government, enforcing the Tribe’s law and Order Code as an arm of
21 the Tribe.”

22 Motion at 5.

23 The statements, along with similar statements made throughout the Motion, are
24 completely incorrect and are squarely disputed by Plaintiff. See, e.g., Motion at 3:15-19,
25 7:6-7.

26 **First**, the referenced affidavits nowhere allege that the Tribal Police are an agency of
27 the Tribe. Instead, in unclear language, they assert that “Tribal officers” are employees of
28 the Tribe, but this reference to “Tribal officer” could be to members of the Tribal Council.²

²These paragraphs addressing employment issues refer to “Tribal officers,” while other paragraphs discuss the “Chief of Police,” “Tribal Police Chief,” or the “Tribe’s police
Opposition to Motion to Dismiss

1 See Affidavit of Lorren Sammaripa (“Sammaripa Affidavit”), CR 43-1, ¶¶ 10-12, 14; see
2 also Affidavit of Edmund Reymus (“Reymus Affidavit”), CR 43-4, ¶¶14-16, 18. The
3 Affidavits nowhere use the term “agency.”

4 Moreover, the paragraphs reference “the Tribe’s personnel policies and procedures,”
5 and “the Tribe’s employment processes and procedures.” Sammaripa Affidavit, ¶¶11, 13;
6 Reymus Affidavit, ¶¶17, 19. Reliance on vague reference to these policies and procedures
7 by which Defendants appear to be alleging that the Tribe’s personnel who harmed Plaintiff
8 were hired is inappropriate and fails to meet the requirements of Rule 56 absent the actual
9 production of the policies and procedures, or at least a specific description of them.

10 **Second**, the assertion that the individuals who harmed the Plaintiff are “ charged with
11 the public safety and protection function of the Tribal government” is also unsupported by
12 the evidence supplied by Defendants. There is no “public safety and protection function of
13 the Tribal Government” identified in the Affidavits. Instead, the Affidavits merely note that
14 the “Tribal Court . . . is charged with administering justice according to the Tribe’s Law and
15 Order Code and the Tribe’s Constitution.” Sammaripa Affidavit, ¶4; Reymus Affidavit, ¶4
16 (emphasis added). They also note that the “Chief of Police . . . reports to the Tribal Council
17 through the Tribal Chairman.” Sammaripa Affidavit, ¶6; Reymus Affidavit, ¶7. This is the
18 extent of any “police power” identified in the documents submitted by Defendants.

19 Notably, nothing in the documents provided by the Defendants shows that this
20 “public safety and protection” function vested in the Tribal Court was ever delegated to any
21 person or entity whatsoever, let alone the Defendants. Based on the documents provided by
22

23 officers.” Sammaripa Affidavit, ¶¶6, 8, 13. The only “Tribal officers” referenced in the
24 evidence attached to Defendants’ Motion are officers of the Tribal Council identified in the
25 Tribal Constitution and By-Laws attached as Exhibit A to the Sammaripa Affidavit. See Id.,
26 Constitution, Art. V, Sec. 1; Art. VI, Sec. 1(R); see also By-Laws, Art. I (“Duties of
27 Officers”), Art. II (“Qualifications of Office”), Art. III (“Oath of Office”), Art. IV(1)
28 (salaries of Tribal Officials). Thus, it is not at all clear whether the references in paragraphs
11-12 and 14 of the Sammaripa Affidavit, and in paragraphs 14-16 and 18 of the Reymus
Affidavit refer to officers of the Tribal Council, or some sort of alleged Tribal law
enforcement officer.

1 Defendants, they may have been operating under no delegated sovereign police power at all.

2 More important is the fact that the Tribe’s Constitution does not appear to authorize
3 the implementation of “the public safety and protection function of the Tribal government”
4 in any manner that relates to the actions complained of by Plaintiff. The Tribe’s
5 Constitution authorizes the Tribal Council to “safeguard and promote the peace, safety,
6 morals, and general welfare of the Tribe”, but only by “regulating the conduct of trade and
7 the use and disposition of property upon the Reservation” Sammaripa Affidavit,
8 Exhibit A, Constitution, Art. VI, Sec. 1(J) (emphasis added). None of the activities
9 identified in Plaintiff’s complaint fall under the category of trade or disposition of property,
10 the Plaintiff is not a member of the Tribe, and he was taken into custody on nontribal land.
11 Defendants have failed to identify any law that is applicable to nonmembers.

12 Similarly, Article VI, Sec. 1(Q) of the Tribal Constitution gives the Tribal Council
13 certain police powers that extend only to members of the Tribe:

14 “To regulate the domestic relations of members of the Tribe . . . to promulgate
15 and enforce ordinances governing the conduct of members of [the Tribe] . . .
16 and providing for the maintenance of law and order and the administration of
17 justice by establishing a reservation court and defining its powers and duties.”

18 Sammaripa Affidavit, Exhibit A, Constitution (emphasis added).

19 The Tribal Court may well possess such a power to regulate domestic relations of
20 Tribe members or to pass laws, but these powers are clearly limited to members of the Tribe,
21 which Plaintiff is not.

22 Likewise, while it appears that the Tribal Council is vested with a police power, this
23 power extends only to establishing the reservation court and defining its powers and duties.
24 None of the exhibits provided by Defendants demonstrate any delegation of this power to
25 any other entity, such as an entity which the Defendants characterize as the Tribal Police. It
26 also appears that any such power is also nevertheless limited to “regulating the conduct of
27 trade and the use and disposition of property upon the Reservation. . . .” and thus does not
28 apply in this case. Sammaripa Affidavit, Exhibit A, Constitution, Art. VI, Sec. 1(J).

Third, the Defendant have not identified the specific individuals who carried out the
unlawful arrest and imprisonment of Plaintiff, nor have the established the precise character

1 and capacity of these individuals. Dismissal as a matter of law or by way of summary
2 judgment is therefore inappropriate because the Defendants have failed to establish whether
3 the actors involved were exercising any “sovereign” tribal authority, or which law they were
4 allegedly enforcing or purporting to enforce.

5 **DISPUTED FACTS (Item Nos. 4, 6, & 7)**

- 6 4. “These affidavits further reveal that the Tribe has not waived sovereignty with
7 respect to the Tribe’s Police Department and the Department’s Operations.”
8 6. “The plaintiff’s complaint is devoid of any claim that the Tribe has explicitly
9 and unequivocally waived sovereignty from suit against the Tribe or its Police
10 Department.”
11 7. “The plaintiff’s complaint is devoid of any claim that the Congress has acted
12 to expressly and unequivocally waived [sic] the Tribe’s sovereignty from
13 suit.”

14 Motion at 5.

15 As noted above, there is no evidence before the Court that the persons / entity which
16 harmed Plaintiff possessed or were exercising any actual duly delegated sovereign police
17 powers as set forth in the Tribe’s Constitution and By-Laws, particularly as against Plaintiff,
18 who is not a member of the Tribe, and lives on and allotment of property that is not Tribal
19 land.

20 Moreover, “[e]ach member of the Tribal Council and each officer or subordinate
21 officer elected or appointed” under the Tribe’s By-Laws, must “take an oath of office prior
22 to assuming the duties” of the office, and “pledge himself to support and defend the
23 Constitution of the United States” Sammaripa Affidavit, Exhibit B, By-Laws, Art. III.
24 It would be hard to conceive of a more direct “waiver” of any sovereignty, particularly in
25 reference to the acts complained of by Plaintiff, which concern flagrant violation of the very
26 Constitution the Tribal tortfeasors swore to support and defend. The language makes clear
27 that this oath would certainly apply to any Tribal law enforcement, in whatever form, as they
28 would have to be appointed officers required to take and uphold the oath.

DISPUTED FACT (Item No. 5)

5. “The Tribe has enacted its own Law and Order Code, wherein the Tribe has
codified tort law on the Reservation.”

1 Motion at 5.

2 This statements, along with similar statements made throughout the Motion, are
3 misleading and disputed by Plaintiff. See, e.g., Motion at 11:8-12:4

4 The Defendant rely on excerpts from the Tribe's Law and Order Code as a basis to
5 assert a lack of jurisdiction, particularly for the proposition that Nevada tort law cannot
6 apply here. See Motion at 11-12. An examination of the portions of the Law and Order
7 Code which Defendants have provided includes Sections 1-30-030 and 1-30-040. These
8 sections demonstrate as yet undisclosed critical portions of the Law and Order Code, and
9 point to other evidence of Defendants' liability:

10 1-30-030. Federal Law - In any matters not covered by Sections 1-30-010
11 and 1-30-020, the Tribal Court shall apply any laws of the United States which
12 could be applied by any courts of general jurisdiction of any state, and any
regulation of any administrative agency of the United States which may be of
general or specific applicability.

13 1-30-040. Inapplicability of Nevada Law and 25 Code of Federal Regulations
14 Part 11 - Upon the passage of this Code, neither Nevada law nor 25 Code of
Federal Regulations (C.F.R.), Part 11, shall be applied by the Tribal Court
15 unless specifically incorporated into this Code by ordinance.

16 Sammaripa Affidavit, Exhibit B (emphasis added).

17 The Defendants failed to include Sections 1-30-010 and 1-30-020 as referenced in
18 Section 1-30-030 with their motion. However, they were provided in a related proceeding.
19 See Declaration of Lisa A. Rasmussen, **Exhibit A.**³ The relevant sections read as follows:

20 1-30-010. Tribal Law and Order Code - The Tribal Court shall apply the
provisions of this Code and any additional ordinance hereafter adopted by the
21 Tribe.

22 1-30-020. Tribal Custom and Usage
(a) In matters not covered by ordinance the Tribal Court shall apply traditional
23 customs and usages of the Tribe

24 * * *

25 **Exhibit A** (emphasis added).

26 As the combined effect of these ordinances makes clear, there is no way to determine

27 ³Unless otherwise noted, all references herein to exhibits refer to the Exhibits
28 attached to the Declaration of Lisa Rasmussen in Support of Plaintiff's Opposition to
Defendants' Motion to Dismiss ("Declaration of Lisa Rasmussen"), filed concurrently
herewith.

1 precisely which provisions of Nevada law have been “specifically incorporated” into the
2 Code pursuant to Section 1-30-040, or under what circumstances the laws of the United
3 State are to be applied under Section 1-30-030—without a complete review of the entire
4 Law and Order Code. Until Defendants’ provide the full Law and Order Code, which is
5 NOT available on any commercial database or on the internet, Plaintiff will suffer at the
6 hands of “secret law” and be deprived of basic due process. Moreover, this Court will be
7 unable to determine whether Nevada law has been “specifically incorporated” into the Code
8 by any ordinance as relates to this case, or whether United States law likewise applies. The
9 mere fact that the sections of the Law and Order Code dealing with tort law appear to cover
10 certain torts is not dispositive of the question of whether other portions of the Code may
11 indeed incorporate Nevada law for certain purposes relating to Plaintiff’s causes of action.
12 Similarly, these excluded sections will define where federal law is to be applied, possibly
13 supporting a Bivens claim. See Section V, infra.

14 In addition, it is a fact that the original traffic citation which relates to Plaintiff’s
15 being taken into custody and the claims in his Complaint was based not on Tribal law, but
16 on an alleged violation of NRS 482.545. See **Exhibit B**, Motion and Order to Dismiss from
17 Mineral County District Attorney, filed in this case on September 3, 2009, CR 32-1, pages
18 15 -16. At the very least, as far as waiver of sovereignty is concerned, it appears the Tribal
19 Police waived that sovereignty by attempting to enforce Nevada law in regards to the instant
20 case.

21 At the very least, ruling on the Motion should be deferred until such time as
22 Defendants provide a copy of the complete Law and Order Code and Plaintiff is permitted to
23 review it and address it in the context of the instant motion. The Defendants may have
24 indeed further waived their sovereignty here and may be simply hiding behind the fact that
25 their “law” is not publicly available. The unequivocal statement in Item 5 above is
26 completely inaccurate and misleading, and not established by the evidence provided by
27 Defendants.

28 Thus, the Defendants have failed to demonstrate that any “sovereignty” is at play here

1 to at all, and the notion of “waiver” of this unproven sovereignty in the context of the facts
2 and circumstances of this case is wholly inappropriate. Moreover, their claim they have not
3 waived sovereignty in relation to Plaintiff’s claims is not established by the evidence.

4 **V. THE DEFENDANTS’ MOTION SHOULD BE DENIED IN LIGHT OF THE**
5 **BECAUSE THE DEFENDANTS CANNOT IDENTIFY THE BASIS FOR THE**
6 **ARREST**

7 Defendants have failed to identify on what legal basis Plaintiff was taken into
8 custody on April 28, 2005, although it appears to be related to the citation improperly issued
9 to him for driving an unregistered vehicle by the Tribal Police enforcing state law. See
10 Complaint, ¶¶9-16. They have also failed to identify the Tribal Police who took Plaintiff
11 into custody.

12 What is known is that the Defendants were acting under color of state law. See
13 **Exhibit B** (showing original citation against Plaintiff was made by Tribal Police under color
14 of State law); see also Complaint, ¶¶9-16. Tribal Police cited Plaintiff under NRS 482.545
15 for operating an unregistered agricultural vehicle, an act not illegal under Tribal law. Id.
16 The charges were dismissed. Id. This alone should be sufficient foundation for Plaintiff’s
17 constitutional claims. See, e.g., Bressi v. Ford, 575 F.3d 891, 898 (9th Cir. Ariz. 2009)
18 (tribal officers enforcing state as well as tribal law held to constitutional standards, and
19 subject to 42 U.S.C. §1983 claims.)

20 It is equally possible that the Tribal Police were enforcing federal law at the time, or
21 acting in conjunction with federal or state law enforcement in carrying out the acts alleged.
22 Until the authority (or purported authority) that the Defendants were operating under when
23 they unlawfully arrested Plaintiff, dismissal is premature, since it is not know whether
24 federal or state law was the pretext for taking Plaintiff into custody. Dismissal or summary
25 judgment based on jurisdiction or alleged immunity is therefore wholly inappropriate.

26 The enforcement of federal law or collaboration with federal law enforcement would
27 establish liability for the acts complained of by Plaintiff under Bivens v. Six Unknown
28 Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); see also Kennerly
v. United States, 721 F.2d 1252, 1258-1260 (9th Cir. Mont. 1983) (noting that acts in

1 concert with federal agents could establish Bivens liability.); see also Boney v. Valline, 597
2 F. Supp. 2d 1167, 1176 (D. Nev. 2009) (Discussing possible waiver of sovereignty, noting
3 that “[i]f Defendant had arrived at the scene to enforce federal law, then there might be an
4 argument that his conduct was in the exclusive prerogative of the federal government.”)
5 Summary judgment is premature based on the fact that Plaintiff has as yet been deprived of
6 the ability to determine the basic facts of the Defendants’ actual character and capacity,
7 which is now even more squarely in question based on the very evidence produced by the
8 Defendants.

9 The impropriety of summary judgment is further evidenced by the Defendants’ failure
10 to provide a full copy of its Law and Order Code, without which there is no way to
11 determine whether the Defendants have waived sovereignty and determined to adopt Nevada
12 law. See Section IV, supra, response to Defendants’ list of “Admitted Facts”, Item No. 5.
13 The Law and Order Code is not available to review on any commercial database or the
14 internet.

15 In addition, in Sections IV and V, supra, based on the documents provided with the
16 Motion, it is quite possible that the Defendants who harmed Plaintiff may have not been
17 exercising any sovereign police power whatsoever. If the Defendants’ apparent exercise of
18 law enforcement and / or sovereign authority turns out to be a complete mirage as the
19 Defendants’ evidence indicates, Plaintiff should be permitted to amend his Complaint
20 accordingly to alleged appropriate claims based on this new evidence. This possibility of the
21 absolute lack of any authority was not known until Defendants filed the instant motion and
22 supplied the exhibits filed therewith, thereby bring into question the character and capacity
23 of the so-called “Tribal Police” who violated Plaintiff’s rights. The issue of their character
24 and capacity is a mixed question of law and fact and requires analysis by the trier of fact.

25 These defenses and alternative theories of liability all create triable issues of fact
26 which will likely preclude Defendants’ Motion. Without the opportunity to cross examine
27 on this information, Plaintiffs’ ability to put on their case and oppose Defendants’ Motion is
28 severely compromised. A trial is necessary.

1 Plaintiff respectfully requests that this Court deny the Defendants' Motion.

2 **VI. THIS COURT HAS JURISDICTION OVER THE DEFENDANTS.**

3 Plaintiff's Complaint makes claims against the Tribal Police—whose character and
4 capacity is still unsettled—as well as the individuals comprising it, who are responsible for
5 the harm to Plaintiff as alleged therein.

6 As a threshold matter, Defendants' jurisdictional arguments as against Plaintiff are
7 inapposite. Plaintiff is not a member of the Tribe. He is not even permitted to sue the
8 Defendants in tribal court. Defendants' own exhibits clearly indicates that the rules and the
9 Constitution of the Tribe only applies to "members" of the Tribe, that any "public safety and
10 protection" function or "maintenance of law and order" function such that could even
11 arguably invoke any claim of sovereignty here can only be exercised in relation to "trade and
12 disposition of property upon the Reservation," and solely to "regulate the domestic relations
13 of members of the Tribe." Sammaripa Affidavit, Exhibit A, Constitution, Art. VI, Sec. 1(J),
14 Sec. 1(Q). Based on the facts alleged by Plaintiff, and based on the documents provided by
15 Defendants with their Motion, the Defendants do not appear to be entitled to any invocation
16 of Tribal sovereignty or police power, and in fact the Tribe did not and could not exercise
17 such powers over Plaintiff—a nontribal member on nontribal land and in a situation not
18 involving the conduct of trade and the use and disposition of property upon the Reservation.

19 The Plaintiff thus has no possible remedy in the Tribal Court. The only jurisdiction
20 in which he can bring the instant action is the District Court for District of Nevada, and the
21 Defendants have not even demonstrated that there is any "sovereignty" to exercise (let alone
22 waive), under the facts and circumstances of this case.

23 **VII. THE DEFENDANTS ARE NOT ENTITLED TO IMMUNITY.**

24 As set forth in Sections IV, V, and VI, supra, there is no evidence that any Tribal
25 sovereignty or police power was exercised or even exists in regard to the acts complained of
26 by Plaintiff based on the documents Defendants have placed into evidence. Absent
27 sovereignty, Defendants have no immunity, and their Motion fails. This is true even if the
28 "Tribal officers" mentioned in the Affidavits are indeed some sort of police officer (as yet

1 unestablished in the record) as opposed to officers of the Tribal Council, or if they are mere
2 employees of the Tribe (also as yet unestablished in the record). See Section IV & n.2,
3 supra. Likewise, based on the acts alleged in the Complaint and the evidence provided by
4 Defendants, even if they were somehow deemed Tribal officials or employees, the
5 Defendants were clearly acting beyond any authority, and therefore are not entitled to any
6 immunity.

7 **First**, Defendants have failed to identify any of the parties who harmed Plaintiff as
8 members of the Tribe, and have not asserted any claim of immunity on that basis.
9 Nevertheless, had they done so, their claim would fail. Sovereign immunity does not extend
10 to individual tribal members. See Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165,
11 171-73 (1977). For Tribal sovereign immunity to extend to a member, that member must be
12 considered a “Tribal Official.” According to the Ninth Circuit, Tribal Officials are “those
13 who perform some type of high-level or governing role within the tribe.” See, e.g., Hopi
14 Tribe v. Navajo Tribe, 46 F.3d 908, 918 (9th Cir. 1995) (used to refer to deputy attorney
15 general of Navajo Nation); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 276
16 (8th Cir. 1993) (tribal members who negotiated with governor). Baugus v. Brunson, 890
17 F.Supp. 908, 911 (E.D. Cal 1995). There is no evidence that any Defendants responsible for
18 the harm to Plaintiff, such as the individuals who took him into custody, were “officials” for
19 the purposes of sovereign immunity. There is no indication that they performed a high-level
20 or governing role for the Tribe. And as noted in Sections IV and V, supra, the Defendants
21 have presented evidence that they were not exercising any Tribal sovereign police power.

22 **Second**, as discussed in Section V, supra, the Defendants were enforcing (or
23 purporting to enforce) State law in regard to the acts alleged by Plaintiff. See Exhibit B
24 (showing original citation against Plaintiff was made by Tribal Police under color of State
25 law); see also Complaint, ¶¶9-16. The Tribal Police cited Plaintiff under NRS 482.545 for
26 operating an unregistered agricultural vehicle, an act not illegal on Tribal roads. Id. Claims
27 One through Six of Plaintiff’s Complaint are clearly appropriate. See Bressi, supra. There
28 is no questions that the Defendants were acting under color of State law.

1 Similarly, it is possible that Defendants may have been acting under color of Federal
2 authority, enforcing Federal law, or acting in concert with State or Federal law enforcement.
3 Under these conditions, they have no immunity. See, e.g., Brunette v. Humane Soc’y, 294
4 F.3d 1205, 1211 (9th Cir. 2002) (describing liability based on joint action of a party and a
5 state actor); see also Kennerly v. United States, 721 F.2d 1252, 1258-1260 (9th Cir.
6 Mont. 1983) (noting that acts in concert with federal agents could establish Bivens
7 liability.); see also Stypmann v. City and County of San Francisco, 557 F.2d 1338, 1341-42
8 (9th Cir. 1977) (finding joint activity between police and private towing company where, in
9 accordance with statutory scheme, police officer “makes the initial determination that a car
10 will be towed and summons the towing company [and] . . . designates the garage to which
11 the vehicle will be towed.”); see also Boney v. Valline, 597 F. Supp. 2d 1167, 1176 (D. Nev.
12 2009) (Discussing waiver of sovereignty, noting that “[i]f Defendant had arrived at the scene
13 to enforce federal law, then there might be an argument that his conduct was in the exclusive
14 prerogative of the federal government.”);

15 **Third**, Tribal sovereign immunity does not extend to tribal officials or employees of
16 the Tribe if they were acting beyond the scope of their authority. See Santa Clara Pueblo v.
17 Martinez, 436 U.S. 49, 58 (1978). When tribal officials act beyond their authority, they lose
18 their entitlement to the immunity of the sovereign. Id. at 59. Likewise, when tribal
19 employees act beyond the scope of their authority, they are not entitled to sovereign
20 immunity. See Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 726-27 (9th Cir. 2008);
21 see also Allen v. Mayhew, 2009 U.S. Dist. LEXIS 13060, *15-16 (E.D. Cal. Feb. 19, 2009).
22 As discussed in section IV and V, supra, the documents provided by the Defendants, and the
23 acts of Defendants toward Plaintiff—show that Defendants were not acting within the scope
24 of any authority. This is true based not only on the fact that the acts carried out by
25 Defendants were against Plaintiff—a nontribal member on nontribal land—but also on the
26 fact that there was no Tribal police power to be exercised in the first place based on the
27 Tribal Constitution and By-Laws. Whether the “Tribal Police” and / or the individuals who
28 harmed Plaintiff were tribal officials or mere employees, one thing is certain—enforcing

1 Nevada law (as opposed to Tribal law) is not within the scope of their “official acts” or
2 “employment,” and Defendants’ motion must therefore fail in this regard. See Mayhew at
3 *23-*27.

4 **Fourth**, the immunities claimed by Defendants protect them only in regard to their
5 official capacities; tribal sovereign immunity does not apply to individual capacity claims.
6 See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); see also Cook, Allen, supra.
7 Defendants have ignored the fact that the Defendants are sued in their individual capacities
8 as well as their official capacities, and their Motion fails to address the individual capacity
9 claims in the Complaint. See Complaint, ¶4.

10 **VIII. 42 U.S.C. §§ 1983, 1985(3), AND 1986 ARE APPLICABLE, AND A BIVENS**
11 **CLAIM MAY ALSO EXIST.**

12 This Court has jurisdiction under § 1983 over the Defendants. 42 U.S.C § 1983
13 provides in part:

14 Every person who, under color of any statute, ordinance, regulation, custom or
15 usage of any State or Territory subjects or causes to be subjected, any person
16 of the United States or other person within the jurisdiction thereof to the
deprivation of any rights, privileges, or immunities secured by the Constitution
and laws shall be liable to the party injured in an action at law, suit at equity or
other proper proceeding for redress.

17 This also has jurisdiction over the Defendants under 42 U.S.C. § 1985(3), which provides:

18 If two or more persons in any State or Territory conspire, or go in disguise on
19 the highway or on the premises of another, for the purpose of depriving, either
20 directly or indirectly, any person or class of persons of the equal protection of
21 the laws, or of equal privileges and immunities under the laws, or for the
22 purpose of preventing or hindering the constituted authorities of any State or
23 Territory from giving or securing to all persons within such State or Territory
24 the equal protection of the laws; . . . in any case of conspiracy set forth in this
section, if one or more persons engaged therein do, or cause to be done, any
act in furtherance of the object of such conspiracy, whereby another is injured
in his person or property, or deprived of having and exercising any right or
privilege of a citizen of the United States, the party so injured or deprived may
have an action for the recovery of damages, occasioned by such injury or
deprivation, against any one or more of the conspirators.

25 Section 1983 liability extends to a private party where the private party engaged in
26 state action under color of law and thereby deprived a plaintiff of some right, privilege, or
27 immunity protected by the Constitution or the laws of the United States. Haygood v.
28 Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc). The conduct at issue must be

1 fairly attributable to the state for liability under § 1983. See Lugar v. Edmonson Oil Co., 457
2 U.S. 922, 937 (1982). Also, the Supreme Court has laid out some criteria to help determine
3 when actions are fairly attributable to the State, which are 1) source of the party's funding,
4 2) the impact of governmental regulations on the conduct of the private party 3) whether the
5 entity was performing a function that is traditionally the exclusive prerogative of the
6 government; and 4) whether a symbiotic relationship exists between actor and the
7 government. Rendell-Baker v. Kohn, 457 U.S. 830, 840-841 (1982).

8 Here, these factors demonstrate state action. The Tribal Police received funding and
9 certification from the State. See **Exhibit C**, Declaration of David Lantry, Case No.
10 3:08-cv-00638-BES-VPC, CR 25-2, ¶¶6, 7. It also receives federal funding. See
11 Sammaripa Affidavit, ¶¶8, 9; see also **Exhibit D**, Model Agreement with the Walker River
12 Paiute Tribe; see also **Exhibit E**, Annual Funding Agreement with the Walker River Paiute
13 Tribe. Tribal Police were enforcing State law, Plaintiff was prosecuted on the citation in a
14 municipal court, and was taken into custody related to this alleged violation by Tribal Police,
15 and the County District Attorney initially prosecuted and then dismissed the matter. See
16 **Exhibit B**; see also Complaint at 9-16. The traffic citation which relates to Plaintiff's being
17 taken into custody by Tribal Police and the claims in his Complaint was based not on Tribal
18 law, but on an alleged violation of state law under NRS 482.545. See **Exhibit B**. These
19 same purported Tribal Police Defendants cited Plaintiff into Mineral County Justice Court,
20 and Plaintiff was removed from his residence by Tribal Police—which is not on Tribal land
21 and not subject to Tribal authority—and transported to Mineral County Jail where he was
22 booked on a Mineral County warrant, based on this same action under color of law. See
23 Complaint, ¶¶10-16. The charges were dismissed. See **Exhibit B**. The Tribal Police and
24 the individual actors purporting to act on its behalf were sued in their individual and official
25 capacities. Id., ¶4. There is sufficient nexus here to establish actions under color of federal
26 and state authority to support Plaintiff's Section 1983 claims.

27 For example, under both Agreements provide federal funding, facilities, equipment
28 and property to the Tribe for law enforcement functions. See **Exhibit D**, §§(b)(3), (b)(8)(A)

1 & (D)-(G), (b)(10). The Model Agreement fully incorporates the Funding Agreement (see
2 Exhibit A, §§(c)& (f)), which in turn contains even more explicit evidence of funding,
3 federal control over the Tribal law enforcement function, and a symbiotic relationship
4 between the Tribe and the federal government.

5 The Funding Agreement provides for significant funds to the Tribe. See Exhibit E,
6 §B(2) (\$170,000 annually in law enforcement and contract support functions). The Funding
7 Agreement contains ten pages of terms and conditions imposed on the Tribe for the funding,
8 all of which relate to law enforcement function. Id., §C (“Statement of Work”). As to the
9 legal issue presented in Defendants’ motion, the Funding Agreement demonstrates just how
10 uncertain the question of governing law and sovereignty really is. It imposes significant
11 terms and conditions on the Tribe’s law enforcement function, including compliance with
12 State law (the Tribe is referred to as the “Contractor”):

13 (a) Services shall be provided in accordance with defined authority,
14 procedures and guidelines contained in the Walker River Tribal Law and
15 Order Code, the Walker River Paiute Tribal Constitution, 25 CFR, court
decisions and other applicable rules, regulations, ordinances and statutes.
§C(2)(2)(a)

16 (b) The Contractor shall obtain all necessary licenses, permits, and approval
17 required by local, State and Federal statutes to perform under this contract.
§C(2)(2)(b)

18 (c) The Contractor shall be responsible for the investigation of all offenses
19 enumerated in the Tribal Law and Order Code, United States Codes or 25
CFR as applicable. §C(2)(2)(c).

20 (d) In addition to Paragraph (c), above, of this contract, the Contractor shall
21 assist the Bureau of Indian Affairs, other Federal and State law enforcement
officials in the investigation of State or Federal offenses that occur on the
Reservation. §C(2)(2)(d).

22 (2) Enforcement of all tribal criminal and traffic laws, United States Codes or
23 25 CFR as applicable, including all tribal ordinances. §C(2)(2)(e)(2).

24 (3) Enforcement of applicable game and fish laws, and ordinances.
25 §C(2)(2)(e)(3).

26 (4) The protection of all private, public and government property on the
Reservation. §C(2)(2)(e)(4).

27 (8) Service of all warrants and other court processes without undue delay, as
28 directed by Indian, State and Federal Courts. §C(2)(2)(e)(8).

(9) Writing case reports; preparing cases for and testifying in court.

1 §C(2)(2)(e)(9).

2 The Funding Agreement even goes so far as to imposed Bureau of Indian Affairs
3 “jail procedures”, and specifically imposes the “performance standards” and qualifications
4 that must be met by any “employee . . . authorized to carry firearms or make arrests”:

5 (f) Walker River law enforcement officers will house Walker River Tribal
6 Prisoners at an approved Bureau facility and will follow the approved Bureau
7 jail procedures and rules as provide for. Detention costs are absorbed by the
Bureau. §C(2)(2)(f).

8 (g) The contractor shall assure that each law enforcement officer be
9 specifically identified as such and shall be individually authorized to make
arrests and carry firearms. Only employees assigned duties as law enforcement
10 officer and **qualified** under "Special Performance Standards" of this contract
may be authorized to carry firearms or make arrests. §C(2)(2)(g).

11 The Funding Agreement imposes a level of control down to the precise equipment
12 Tribal police must carry, including the caliber of weapon and barrel length, and any
13 deviation requires specific waiver frm the Assistant Secretary for Indian Affairs.
14 §C(2)(2)(e)(I), § §C(2)(2)(k)(4). The Funding Agreement even imposes and defines the
15 required firearms training courses. §C(2)(2)(k)(4). The Funding Agreement requires all
16 “police records” be open to inspection to the Federal government. §C(2)(2)(k)(8).
17 Finally, the Bureau of Indian Affairs is entitle to constantly monitor law enforcement under
18 the Funding Agreement (§C(4)), and it is the Bureau, and not the Tribe, that “investigates all
19 “major crimes / incidents on the Reservation.” Id.

20 The Defendants’ assertion of sovereign immunity in regards to Plaintiff’s claims are
21 meritless and not in conformity with their own Agreements.

22 Moreover, the constitutional torts are further established based on the oath that any
23 purported Tribal law enforcement officer must take to “support and defend the Constitution
24 of the United States.” Sammaripa Affidavit, Exhibit B, By-Laws, Art. III. Also, as noted in
25 Section III, supra, the Law and Order Code may indeed reveal further support for Plaintiff’s
26 Section 1983 claims and possible remedy under Bivens, based on as yet undisclosed
27 incorporation of Nevada law into the Law and Order Code, and the Defendants’ failure to
28 identify whether federal or state law was the purported basis to take Plaintiff into custody on

1 April 28, 2005, and the degree to which that action involved cooperation with state or
2 federal law enforcement.

3 The Defendants' implication that Plaintiff's claims related to the United States
4 Constitution are inapplicable here is simply incorrect. See Motion at 9-10. The documents
5 produced by Defendants demonstrate that the Tribal Police were acting under color of
6 nontribal law or authority, making Defendants' argument in this regard irrelevant and
7 inapposite.

8 Furthermore, this argument has no bearing on Plaintiff's individual capacity claims
9 whatsoever.

10 In similar fashion, Section 1985 and 1986 liability extends to the Tribal Police and
11 individual defendants. See, e.g., Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir.
12 1997) ("Tribal Defendants [are] entitled to sovereign immunity as far as the official capacity
13 claims."); Allen v. Mayhew, 2009 U.S. Dist. LEXIS 13060, (E.D. Cal. Feb. 19, 2009).

14 Section 1985(3) claims require that Plaintiff, "point to independent substantive rights
15 enforceable in the federal courts" to serve as a predicate violation. Wheeler v. Swimmer,
16 835 F.2d 259, 261 (10th Cir. 1987). While it is true that alleged due process and equal
17 protection violations cannot serve as predicate violations for a Section 1985(3) or Section
18 1986 claim because those provisions of the United States Constitution do not constrain
19 tribes and their officials (see Santa Clara Pueblo, 436 U.S. at 56-57 & n.7), this restriction
20 does not apply here, because all Tribal officials, including those who violated Plaintiff's
21 rights, take an oath to "support and defend the Constitution of the United States . . ."
22 Sammaripa Affidavit, Exhibit B, By-Laws, Art. III.

23 **IX. THE DEFENDANT'S ASSERTION THAT THE TRIBE HAS CLEARLY**
24 **REJECTED NEVADA TORT LAW IS PREMATURE AND CONTRADICTED**
25 **BY THEIR OWN DOCUMENTS.**

26 The Defendants assert that the Tribe has rejected the Nevada tort law on which
27 Plaintiff's Claims Five through Seven are based, and therefore these claims should be
28 dismissed. See Motion at 10:22-12:4. This conclusion does not match the evidence.

As noted in Section IV and V, supra, the Defendant rely on incomplete excerpts from

1 the Tribe's Law and Order Code the proposition that Nevada State law cannot apply here.
2 Any determination as to which aspects of Nevada law the Tribe has rejected or supplanted
3 with Tribal law cannot be made until the entire Code is produced and reviewed. This is
4 particularly evident in Code Section 1-30-040:

5 1-30-040. Inapplicability of Nevada Law and 25 Code of Federal Regulations
6 Part 11 - Upon the passage of this Code, neither Nevada law nor 25 Code of
7 Federal Regulations (C.F.R.), Part 11, shall be applied by the Tribal Court
8 unless specifically incorporated into this Code by ordinance.

9 Sammaripa Affidavit, Exhibit B. Whether such "incorporation" took place cannot be
10 determined without a review of the entire Code. This has not been done, and it is
11 inappropriate to dismiss at this stage on the basis of alleged lack of incorporation of Nevada
12 law.

13 **X. THIS COURT HAS JURISDICTION OVER PENDANT CLAIMS**

14 Plaintiffs have brought claims under state law for oppression, false arrest and
15 imprisonment, and intentional infliction of emotional distress. See Complaint, Fifth through
16 Seventh Claims for relief. Supplemental jurisdiction exists over these state law claims
17 pursuant to 28 U.S.C. §1367.

18 In 1990, Congress passed 28 U.S.C. §1367, which combined the judge-made doctrines
19 of ancillary and pendent jurisdiction into a new category, "supplemental jurisdiction."
20 Supplemental jurisdiction allows federal district courts with original jurisdiction to also have
21 jurisdiction over all other claims that form part of the "same case or controversy under
22 Article III of the United States Constitution." Situations arise where there is a claim that is
23 related to the main claim, but over which there is no subject matter jurisdiction. See Alumax
24 Mill Prods., Inc. v. Cong. Fin. Corp., 912 F.2d 996, 1002-07 (8th Cir. 1990); Carey v. E.I.
25 duPont de Nemours & Co., 209 F. Supp. 2d 641,649 (M.D. La. 2002). In order to enable the
26 federal courts to hear those related claims, the courts created the doctrine of supplemental
27 jurisdiction to allow litigants to resolve all aspects of a controversy in a single proceeding.
28 See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

28 U.S.C. §1367 codified the Supreme Court's holding in United Mine Workers v.
Gibbs by giving the federal court the discretion to hear a state law claim if the state claim

1 arises out of the same case or controversy as a claim that has original subject matter
2 jurisdiction. In Gibbs, the Court held that federal courts have jurisdiction over state law
3 claims that “derive from a common nucleus of operative fact” such that “the relationship
4 between.. . [the federal] claim and the state claim permits the conclusion that the entire
5 action before the court. It is a way to provide litigants an “opportunity ... to pursue complete
6 relief in federal-court lawsuit.” Arbaugh v. Y & H Corp., 546 U.S. 500, 506-507 (2006).

7 In the present case, the facts giving rise to the civil rights violation claims are the
8 exact same set of facts that form the basis for the tort claims. Unlawfully citing Plaintiff, a
9 nonmember of the Tribe, for state law violations, and falsely arresting him on nontribal land
10 and imprisoning under the same pretenses give rise to claims under 42 U.S.C. §§1983 and
11 1985, and also the Fifth, Sixth and Seventh Claims for Relief in Plaintiff’s Complaint.

12 **XI. PUNITIVE DAMAGES ARE PROPER.**

13 Defendants’ arguments against punitive damages are unavailing. There is no
14 evidence that the acts alleged in the Complaint by the Defendants involved the execution of
15 any sovereign power such as would abrogate punitive damages. Moreover, the Defendants
16 are fully liable for punitive damages in their individual capacities.

17 **CONCLUSION**

18 Plaintiffs have properly alleged facts under 42 U.S.C. §§1983, 1985, and
19 supplemental causes of action.

20 All of Plaintiff’s claims are properly before the Court and summary judgment or
21 dismissal would be improper and at least premature at this time. The evidence does not
22 support Defendants arguments.

23 In addition, Plaintiff requests leave of Court to amend the Complaint.

24 Dated this 8th day of November, 2010.

25
26 */s/ Lisa A. Rasmussen, Esq.*

27 LISA A. RASMUSSEN, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am not a party to the above-entitled action, that I am a person competent to serve papers, and that on the 8th day of November, 2010, I served, via CM/ECF, as authorized under the local rules, a copy of the foregoing:

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS (CR 43)

upon the following persons:

Charles R. Zeh, Esq.
Zeh & Winograd
575 Forest Street
Reno, NV 89509

/s/ Lisa A. Rasmussen

LISA A. RASMUSSEN, ESQ.