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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

David Lantry,

Plaintiff,

v.

Walker River Paiute Tribe Tribal Police, et
al.,

Defendants.

3:06-CV-00600-RCJ-VPC

**DEFENDANT'S WALKER RIVER
PAIUTE TRIBE TRIBAL POLICE
MOTION TO DISMISS**

COMES NOW, the defendant Walker River Paiute Tribe Tribal Police ("WRPT"), by and through their counsel of record, Charles R. Zeh, Esq., Zeh & Winograd, and moves pursuant to Rule 12(b), FRCP, for an Order dismissing the above-captioned matter with prejudice. The motion is based upon the accompanying points and authorities and upon all other documents and records on file herein. The Walker River Tribal Police Department seeks all other relief deemed appropriate in the premises with this motion.

Dated this 1st day of October, 2010.

Zeh & Winograd

By: 

Charles R. Zeh, Esq. (Original signature
Located in the law office of Zeh & Winograd)

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**WALKER RIVER TRIBAL POLICE
DEPARTMENT'S (THE DEFENDANT)
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

The plaintiff, David Lantry, has brought suit against the Walker River Paiute Tribal Police Department, Comp., p. 3; 11-12, the only named Tribal defendant in this case. In fact, the Walker River Paiute Tribal Police Department is the only remaining defendant in this case, as the portion of the suit against Mineral County has been dismissed. *See*, Order dated February 16, 2010.

The grounds for the complaint against the Walker River Paiute Tribal Police Department are that the Walker River Paiute Tribal Police Department unlawfully and under color of authority violated Mr. Lantry's rights by imprisoning, falsely arresting him and causing emotional harm. The plaintiff also claims he was wrongfully prosecuted, but since the Walker River Paiute Tribe did not prosecute the plaintiff, this must be a left over cause of action relating to Mineral County. Comp., p.2; 7-17.

1 In any event, for the unlawful conduct alleged herein, the plaintiff claims that the Walker
 2 River Paiute Tribal Police Department violated the plaintiff's 4th and 14th Amendment rights to the
 3 United States Constitution, violated 42 U.S.C. § 1983 and committed tortious acts in violation of
 4 the common law of the State of Nevada. Comp., p. 2; 18-23.

5 As the Tribal Police Department is an agency of the Walker River Paiute Tribe, this case
 6 must be dismissed for the want of jurisdiction, on sovereign immunity grounds.

7 **II. MOTION TO DISMISS STANDARD UNDER RULES 12(b)(1) and (6), FRCP**

8 In *Boney v. Valline*, United States District Court, for the District of Nevada, 3:05-CV-
 9 0683-RCJ-VPC, United States District Court Judge Robert C. Jones, in an order dated January 18,
 10 2007, enunciated the general standard for deciding motions to dismiss under Rule 12(b)(6) as
 11 follows:

12 Dismissal for failure to state a claim under Rule 12(b)(6) is proper only if it is
 13 beyond doubt that the plaintiff can prove no set of facts in support of the claim that
 14 would entitle the plaintiff to relief. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d
 15 1144, 1149 (9th Cir., 2000). The review is limited to the complaint and all the
 16 allegations of material fact are taken as true and viewed in the light most favorable
 17 to the plaintiff. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir., 1996).
 18 Although courts assume the factual allegations to be true, courts should not
 19 'assume the truth of legal conclusions merely because they are cast in the form of
 20 factual allegations.' *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir., 1981).
 21 On a motion to dismiss, the court 'presumes that general allegations embrace those
 22 specific facts that are necessary to support the claim.' *Lujan v. Nat'l Wildlife*
 23 *Fed'n.*, 497 U.S. 871, 889 (1990). However, conclusory allegations and
 24 unwarranted inferences are insufficient to defeat a motion to dismiss under Rule 12
 25 (b)(6). *In re Stac Elecs.*, 89 F.3d at 1403. See, Order, p. 3.

26 The Tribal defendant, however, further refines this standard because its motion to dismiss
 27 is based upon the immunity of the Walker River Paiute Tribe from suit which correspondingly
 28 questions this Court's subject matter jurisdiction under Rule 12(b)(1). See, *Garcia v. Akwesasne*
Housing Authority, 268 F.3d. 76, 84 (2nd Cir., 2001); *Haven v. Sisseton-Wahpeton Community*
College, 205 F.3d 1040, 1043 (8th Cir., 2000). Furthermore, although the Tribal defendant
 questions the jurisdiction of the Court, once subject matter jurisdiction has been raised, "...the
 burden of establishing subject matter jurisdiction rests on [the plaintiff.] the party asserting
 jurisdiction. See, *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S.Ct. 673, 856 L.Ed. 951 (1942)."

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1 *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271, 277 (D.
2 Conn. 2002).

3 Even though the case is before the Court upon a motion to dismiss, where subject matter
4 jurisdiction is an issue, the Court may consider matters outside the pleadings. *Bassett v.*
5 *Mashantucket Pequot Museum*, *supra* at 276, 277, citing also, *Land v. Dollar*, 330 U.S. 731, 735
6 n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947). *See also*, *Dry v. U.S.*, 235 F.3d 1249, 1252, 1253 (10th
7 Cir., 2000). It is also true the Court may consider documents and records which are necessarily
8 subsumed by the complaint or the complaint is necessarily based upon them, without converting
9 the motion to dismiss into a motion for summary judgment under Rule 56, FRCP. The same is
10 true of public records, of which the Court may take judicial notice. *See*, *Mack v. South Bay Beer*
11 *Distributions, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *Ania v. Allstate Insurance Co.*, 161
12 F.Supp.2d 424 (E.D. Pa. 2001).

13 Accompanying the Walker River Paiute Tribal Police Department's motion is an affidavit
14 from the Chairman of the Walker River Paiute Tribe, Lorren Sammaripa, wherein Chairman
15 Sammaripa states that the Tribe's Police Department is an agency or department of the Walker
16 River Paiute Tribe and no other entity. *See also*, the affidavit of the previous Tribal Chairman,
17 Edmund Reymus, Exhibit "C," to the same effect and submitted in another case before this Court.
18 Further, the Tribe's Police Department is employed to provide law and order and is an arm of the
19 Tribe providing for and fulfilling the public safety function of the Tribe's government. Moreover,
20 the plaintiff concedes in his complaint that the Tribal Police Department is an arm of the Tribe by
21 labeling it a department of the Tribe, when he chose to sue the "Walker River Paiute Tribe Tribal
22 Police," according to the caption of the complaint, *see*, Comp., p. 1;14. Then, in the body of the
23 complaint, the plaintiff states the defendant is the "Walker River Paiute Tribe Tribal Police
24 Department (hereinafter "Tribal Police")...." *See*, Comp., p. 3; 11-12.

25 The inclusion of the two affidavits in the deliberations of the Court should not prevent the
26 Court from deciding Tribal defendant's motion under Rule 12(b)(1), FRCP. If, however, the
27 Court believes these affidavits with attached exhibits prevent the instant motion from being
28 considered under Rule 12, FRCP, the motion may be considered under Rule 56, FRCP. There,

1 the standard is also well known. A motion for summary judgment may be granted if there is no
 2 genuine dispute over any of the material facts and the moving party is otherwise entitled to relief
 3 as a matter of law. *See, Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505
 4 (1986).

5 The standard turns upon a genuine dispute. A court need not trouble itself with disputes
 6 which are not genuine or involve issues which are immaterial. *See, Andersen v. Liberty Lobby,*
 7 *Inc., supra* at 248; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106
 8 S.Ct. 1348 (1986). The Court also need not trouble itself with "...conclusory allegations,
 9 unwarranted inferences, or legal conclusions' in a complaint." *Dry v. U.S., supra* at 1254.

10 When the moving party has carried its burden under Rule 56 (c), FRCP, the opponent
 11 must "...do more than simply show that there is some metaphysical doubt as to the material facts
 12 ...[parallel citation omitted]." *Matsushita Elec. v. Zenith, supra* at 586-587. Materiality is in turn
 13 determined by the substantive law of the case. *Andersen v. Liberty Lobby, supra* at 247, 248.

14 Finally, when deciding whether the dispute over the material facts is genuine, while it is
 15 not the function of the Court to weigh the evidence and determine who is telling the truth, it is
 16 also true that:

17 ...there is no issue for trial unless there is sufficient evidence favoring the
 18 nonmoving party for a jury to return a verdict for that party....[internal citations
 19 omitted]. If the evidence is merely colorable, ... [internal citation omitted] or is
 20 not significantly probative, summary judgment may be granted. *Id.* at 247- 250.

21 *See also, DuBois v. Association of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1180 (9th
 22 Cir., 2006); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir., 2002) (no "genuine
 23 issue" where the only evidence presented is 'uncorroborated and self-serving' testimony).

24 Consequently, even if the Court were confronted with two conflicting stories, summary judgment
 25 may still lie. "When opposing parties tell two different stories, one of which is blatantly
 26 contradicted by the record, so that no reasonable jury could believe it, a court should not adopt
 27 that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v.*
 28 *Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007).

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1 These are the standards, therefore, by which the plaintiff's complaint should be measured.
 2 Under either Rule 12(b)(1), FRCP, or Rule 56, FRCP, dismissal of the complaint is warranted.

3 **III. STATEMENT OF ADMITTED FACTS**

4 This motion is brought with reference to the following admitted and controlling facts.

5 1. The sole remaining defendant is the Walker River Paiute Tribal Police Department
 6 which the plaintiff concedes is a police department of the Walker River Paiute Tribe. Comp., pp.
 7 1;14, 3; 11-12.

8 2. The affidavits of the current and former Chairmen of the Walker River Paiute
 9 Tribe show that the Walker River Paiute Tribe's Police Department is an agency of the Tribe,
 10 charged with the public safety and protection function of the Tribal government, enforcing the
 11 Tribe's Law and Order Code as an arm of the Tribe.

12 3. These affidavits also show that the Walker River Paiute Tribe is a duly constituted
 13 Tribe, recognized as a sovereign tribal nation by the United States government.

14 4. The affidavits further reveal that the Tribe has not waived sovereignty with respect
 15 to the Tribe's Police Department and the Department's operations.

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

18 6. The plaintiff's complaint is devoid of any claim that the Tribe has explicitly and
 19 unequivocally waived sovereignty from suit against the Tribe or its Police Department.

20 7. The plaintiff's complaint is devoid of any claim that Congress has acted to
 21 expressly and unequivocally waived the Tribe's sovereignty from suit.

22 **IV. THE UMBRELLA OF THE WALKER RIVER PAIUTE TRIBE'S SOVEREIGN** 23 **IMMUNITY FROM SUIT EXTENDS AS A MATTER OF LAW TO THE TRIBE'S** 24 **AGENCIES WHICH INCLUDES THE TRIBE'S POLICE DEPARTMENT** 25 **THEREBY OUSTING THE COURT OF JURISDICTION AS NEITHER THE** 26 **TRIBE NOR CONGRESS HAS WAIVED THE TRIBE'S SOVEREIGN** 27 **IMMUNITY FROM SUIT AND THE COURT THEREFORE LACKS** 28 **JURISDICTION TO HEAR THIS COMPLAINT AGAINST THE TRIBAL** 29 **POLICE DEPARTMENT**

30 **A. Immunity From Suit Is A Fundamental Attribute Of Indian Tribal** 31 **Sovereignty**

32 ///

1 It is axiomatic that "... as distinct, independent political communities, retaining their
 2 original natural rights in matters of local self-government," *Santa Clara Pueblo v. Martinez*, 436
 3 U.S. 49, 55, 98 S.Ct. 167 (1978), "Indian tribes have long been recognized as possessing the
 4 common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.*, at 58. Tribal
 5 sovereignty is not a discretionary doctrine, turning upon the vagaries of the commercial
 6 bargaining process or the equities of a given set of circumstances. *Pan American Co. v. Sycuan*
 7 *Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir., 1989). It is, however, a matter of federal
 8 law. *See, Kiowa Tribe of Oklahoma, v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756,
 9 118 S.Ct. 1700 (1998).

10 A tribe's sovereignty is co-extensive with the United States. Tribes are immune from suit,
 11 just as the United States is immune from suit. *See, Chemehuevi Indian Tribe v. California State*
 12 *Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir., 1985), quoting *Kennerly v. United States*,
 13 721 F.2d 1252, 1258 (9th Cir., 1983) ("The common law immunity of [Indian tribes] is co-
 14 extensive with that of the United States...."). The Inter-Tribal Court of Appeals in Nevada is in
 15 accord. *See, Boice v. Washoe Tribe of Nevada and California*, Inter-Tribal Court of Appeals of
 16 Nevada, Washoe County, Case No. C-WT-97-34, 5/16/2001, pp.10, 11.

17 Tribal sovereign immunity protects tribes even when they are engaged in commercial
 18 activity taking place off the reservation on non-trust status land. *See, Kiowa, supra* at 760.
 19 Sovereignty is, therefore, not a geographic concept. It follows the Tribe, even off the reservation.
 20 Furthermore, Tribes are immune from suit when acting in excess of their authority. *See,*
 21 *Chemehuevi, supra* at 1052 ("The tribe remains immune from suit regardless of any allegation
 22 that it acted beyond its authority or outside of its powers."). Punitive damages are also
 23 unavailable against the sovereign at common law. *See, City of Newport v. Fort Concerts*, 453
 24 U.S. 247 (1981).

25 Moreover, the umbrella of tribal sovereignty extends to agencies of the Tribe, "...which
 26 further governmental objectives, such as providing housing, health and welfare services...."
 27 *Garcia, supra* at 15, 16. *See also, Bassett v. Mashantucket Pequot Museum and Research Center,*
 28 *Inc.*, 221 F.Supp.2d 271, 277 (D.C., Conn., 2002) (sovereignty extends to agencies or entities of

the Tribe); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2nd Cir., 2002); *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir., 1983). The police power is one of those inherent attributes of sovereignty retained by the Tribes. *See, United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079 (1978); *Dry v. U.S.*, 235 F.3d 1249, 1254 (10th Cir., 2000).

This is specifically true for the Walker River Paiute Tribe's Police Department which exists as an arm of the Tribe. *See*, affidavits of Chairmen Sammaripa and Reymus. Perforce, then, if Tribal housing authorities uniformly fall within the umbrella of the Tribe's sovereign immunity from suit, a Tribal ranger acting within his official capacity is protected by the Tribe's sovereign immunity, *see, Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir., 2002), a Tribe's casino manager and a bartender may be protected by the Tribe's sovereignty, *see, Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 721, 727 (9th Cir., 2008) and the Tribe's casino is similarly protected, *Id.*, at 726, the Walker River Paiute Tribe's Police Department must enjoy the same immunity from suit as does the Tribe. The Tribe's Police Department is immune from suit and that is the end of the story, absent, as explained below, an explicit, unequivocal waiver of sovereignty by Congress or the Tribe, itself.

B. To Be Effective, Any Waiver of Tribal Sovereignty Must Be Explicitly Unequivocal. Any Claim, Therefore, A Tribe Has Waived Sovereign Immunity Must, Therefore, Meet This High Standard Before A Party Is Allowed To Hail The Tribe Into Court To Be Sued

"[T]ribal sovereignty, ...[however] is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.' *United States v. United States Fidelity & Guaranty Co.*, 309 U.S.,[506] at 512, 60 S.Ct. at 656." *Santa Clara Pueblo, supra* at 59. It is also true, that Tribes, themselves, may waive their sovereignty from suit. *See, Garcia, supra* at 15, 16, citing *Santa Clara Pueblo, supra* at 56. *See also, Kiowa, supra*, at 754. These are the only two ways the Tribe may be haled into this Court to defend itself against suit. *Ibid.*

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In both instances, however, the waiver must be explicit. *See, Allen v. Gold Country Casino*, 464 F. 3d 1044, 1047 (9th Cir., 2006) (... "approach these explicit waivers of immunity from suit..."). "Like the United States, an Indian tribe can consent to suit, but such consent must be unequivocally indicated." *Chemehuevi*, *supra* at 1052, 1053. "Congress, no less than a tribe itself, cannot imply a waiver of sovereign immunity but must unequivocally express it." *Ibid*. *See also, Santa Clara Pueblo*, *supra* at 58 (the Tribe must "unequivocally express" its waiver).

Thus, as stated in *Department of the Army v. Blue Fox*, 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1998), in a case discussing the United States' immunity, applicable here, since the Tribe's sovereignty is co-extensive with the immunity of the United States, the Court stated:

We have frequently held, however, that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign....Such a waiver must also be 'unequivocally expressed' in the statutory text....Respondent's claim must meet this high standard. (Internal citations omitted).

See also, Garcia, *supra* at 15, 16, applying this principle within the context of a purported waiver of tribal sovereignty.

C. Plaintiff's Complaint Does Not Survive The Facial Plausibility Test of *Ashcroft* and, Therefore, Must Be Dismissed For the Want of Jurisdiction Due to Tribal Sovereignty.

1. Since Neither the Tribe Nor Congress Waived the Tribe's Sovereignty, There Is A Lack of Jurisdiction Patent on the Face of the Complaint Requiring Dismissal.

For the plaintiff's complaint to survive this motion to dismiss, it must contain sufficient factual content, "...accepted as true, to 'state a claim to relief that is plausible on its face.' [Internal cite omitted.] A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009). Conversely, if the complaint is facially implausible, then, it is subject to dismissal.

Facial implausibility is the case, here, because the Police Department is immune from suit, and thus, the only question conceivably left for answer is whether either Congress or the Tribe explicitly, and unequivocally waived sovereignty to permit this case to go forward against the Tribe's Police Department. Absent a showing of an explicit, unequivocal Congressional or Tribal

1 waiver of sovereign immunity from suit, the plaintiff's complaint against the Police Department
 2 must, therefore, be dismissed. *Kiowa, supra* at 754; *Santa Clara Pueblo, supra* at 55;
 3 *Chemehuevi, supra* at 1051.

4 *Linneen* is dispositive of the former. *Id.*, at 492. There, the alleged misconduct of
 5 Andrews during his official duties as a tribal ranger on the Reservation was the subject of the
 6 litigation. The Ninth Circuit dismissed the case against Andrews in his official capacity because
 7 Congress had not abrogated tribal sovereignty for the exercise of the Tribe's police power. There
 8 is not the slightest suggestion in the plaintiff's complaint in this case, either, that Congress has
 9 abrogated the Tribe's sovereignty for the Police Department carrying out the police power of the
 10 Tribe. In light of the holding in *Linneen*, the prospect that Congress has waived sovereignty as
 11 applied to this Tribe's Police Department as an arm of the Tribe is inconceivable and, therefore,
 12 the complaint fails the facial plausibility test applied to a Congressional waiver of sovereign
 13 immunity. For this prong of the two-prong waiver of sovereignty, the complaint must be
 14 dismissed.

15 The same holds for a waiver of sovereignty for the Tribe. As with a Congressional
 16 waiver, the Tribe's waiver of sovereignty must be explicit and unequivocal. *See, Allen, supra* at
 17 1047. There are no allegations in the complaint that the Tribe has waived sovereignty. The
 18 plaintiff merely alleges that the Tribe's Police Department violated plaintiff's 4th and 14th
 19 Amendment rights for which causes of action arise under 42 U.S.C. § 1983 and that the Tribal
 20 Police Department also committed tortious conduct under State law. Comp., p.2; 17-27. None
 21 constitute a basis for suit against a Tribal agency protected by sovereign immunity from suit.

22 Tribes and their agencies are not state actors under 42 U.S.C. § 1983. *See, R.J. Williams*
 23 *Co., supra* at 982; *Kennerly v. U.S.*, 721 F.2d 1252, 1259 (9th Cir., 1983). *R.J. Williams* explains,
 24 in part, as follows:

25 First, no action under 42 U.S.C. § 1983 can be maintained in federal court for
 26 persons alleging deprivation of constitutional rights under color of tribal law.
 27 Indian tribes are separate and distinct sovereignties... [internal citations omitted]
 28 ...and are not constrained by provisions of the fourteenth amendment. As the
 purpose of 42 U.S.C. § 1983 is to enforce the provisions of the fourteenth
 amendment, ... [internal citations omitted] ... it follows that actions taken under

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1 color of tribal law are beyond the reach of § 1983, and may only be examined in
 2 federal court under the provisions of the Indian Civil Rights Act." *R.J. Williams*,
supra at 982.

3 According to *Santa Clara Pueblo*, however, not only is the 14th Amendment inapplicable
 4 to the Tribes and their Tribal officials, the Federal Constitution, generally is inapplicable to the
 5 Tribes, inasmuch as they pre-date the United States Constitution. "As separate sovereigns pre-
 6 existing the Constitution, tribes have historically been regarded as unconstrained by those
 7 constitutional provision framed specifically as limitations on federal or state authority." *Santa*
 8 *Clara Pueblo*, *supra* at 56.

9 Thus, while the complaint is devoid of allegations the Tribe waived sovereignty, the
 10 complaint would have to be devoid of such an allegation according to the manner in which the
 11 complaint is pled because the 4th and 14th Amendments of the United States Constitution and 42
 12 U.S.C. § 1983 are unavailing to the plaintiff as a basis for suing the Tribe and its agency, the
 13 Tribe's Police Department. Causes of action one through four, based upon various combinations
 14 of the 4th and 14th Amendments to the United States Constitution and 42 U.S.C. § 1983, must be
 15 dismissed.

16 This is, then, truly the end of the story for the plaintiff's complaint. Existing under the
 17 Tribe's umbrella of sovereignty, the Police Department is immune from suit and is completely
 18 insulated from being forced to appear and defend itself because there is neither a Congressional
 19 nor a Tribal waiver of sovereign immunity present by which to hale the Police Department into
 20 Court. Facial implausibility is, thus, complete for the plaintiff's complaint and no further
 21 elaboration is required for the complaint to be dismissed pursuant to Rule 12 (b)(1), FRCP.

22 **2. In Addition, The Tribe Has Not Consented to be Sued Under Nevada's**
 23 **Common Law of Torts and the Tribe Has Rejected Its Application on**
 24 **the Reservation**

25 Cause of actions five through seven are Nevada common law tort claims. There is no
 26 claim in any of these causes of action that the Tribe has consented to allow itself or its agencies to
 27 be sued on causes of action grounded upon State of Nevada common law tort causes of action.
 28 The complaint simply presumes the Tribe is subject to Nevada common law of torts. Since
 however, waivers of sovereignty and thus, the subjugation of the Tribe to suit over the State's

1 common law of torts cannot be implied, *see, Allen, supra* at 1047, the Tribe's sovereignty extends
2 to activity that takes place off the Reservation, *Kiowa, supra* at 760, and only Congress and the
3 Tribe but not the State of Nevada, may cause the Tribe's sovereignty to be waived, *see Kiowa,*
4 *supra* at 754, the complaint is devoid of any reason why the Tribe's Police Department may be
5 sued in Federal Court for causes of action based upon State common law tort claims. Causes of
6 action five through seven, therefore, must be dismissed with prejudice, whether the alleged
7 conduct occurred on or off the Reservation.

8 The plaintiff's reliance upon causes of action based upon State common law tort claims is
9 further unavailing because the Walker River Tribe has also disclaimed application of State law on
10 the Reservation. Section 1-30-040 of the Tribe's Law and Order Code states: "Inapplicability of
11 Nevada Law and 25 Code of Federal Regulations Part 11 - Upon the passage of this Code, neither
12 Nevada law nor 25 Code of Federal Regulations (C.F.R.) Part 11 shall be applied by the Tribal
13 Court unless specifically incorporated into this Code by ordinance." *See, Exhibit B, attached*
14 *hereto.*

15 In addition, by ordinance, the Tribe has codified what must be perceived as state common
16 law causes of action in Tort. Title 3 of the Law and Order Code, entitled "Civil Causes of Action
17 TORTS" is the Tribe's comprehensive provision for tort causes of action codified by the Tribal
18 Council in this Chapter of the Law and Order Code. *See, Exhibit B, attached hereto.* From even
19 a cursory review of this Chapter, it can be seen that it was intended by the Tribal Council to be a
20 comprehensive restatement of the Tribe's position on civil tort litigation. This Chapter contains a
21 section governing the intentional infliction of emotional distress, *see, Section 3-20-050,*
22 *negligence, see, Section 3-70, et. seq., and conversion, Section 3-30-020. Exhibit B.*

23 This Chapter of the Law and Order Code is clearly so comprehensive, the Tribal Council
24 intended to occupy the field in the area of civil tort litigation. Therefore, not only has the Tribe
25 generally disclaimed the law of the State of Nevada, it has ousted the law of the State of Nevada
26 when it comes to civil tort litigation. By the enactment of this Code, the Tribal Council has said
27 that it will go this far and this far, only, when it comes to civil tort litigation for matters arising on
28 the Reservation. There is no room left for Nevada common law torts to apply on Tribal lands,

1 including the negligent infliction of emotional distress, though specifically not mentioned in the
 2 Tribe's Law and Order Code. To the extent the gravamen of causes of action five through seven
 3 arise due to conduct on the Reservation, the plaintiff's causes of action five through seven, must
 4 therefore, be dismissed.

5 **3. The State Law Claims Fail Also for the Want of Ancillary Jurisdiction.**

6 The State common law claims fail for yet another reason in this Court. In the absence of
 7 any viable federal claims, this Court lacks jurisdiction over the purported state law claims because
 8 pendant or ancillary jurisdiction, the Court's source of jurisdiction over such state law claims, is
 9 lacking. Pendant or ancillary jurisdiction over state law claims presumes or requires the presence
 10 of an independent basis of federal subject matter jurisdiction, such as the presence of a substantial
 11 federal question or diversity of citizenship, to which the state laws might be appended. Absent an
 12 independent, substantial federal question or federal predicate for jurisdiction, the ancillary
 13 jurisdiction vanishes and should not be exercised. 13 Wright and Miller, *Fed. Practice and*
 14 *Procedure*, "Jurisdiction and Related Matters," 3d, (2008) § 3523, pp. 154, 162. Thus, the Ninth
 15 Circuit has stated: "Because the district court lacks subject matter jurisdiction over Gherini's
 16 federal claim, it has no discretion to exercise supplemental jurisdiction over Gherini's remaining
 17 state-law claims." *Gherini v. Lagomarsino*, 258 Fed.Appx. 81, 84 (9th Cir., 2007).

18 In this case, there is no viable cause of action based upon state law because each of the
 19 Federal causes of action are insubstantial. Therefore, the state law causes of action must be
 20 dismissed since there is no federal predicate to which the jurisdiction of the Court to hear these
 21 purported state law claims might append and, thus, be heard. The state law tort claims, causes of
 22 actions five through seven, must, therefore, be dismissed against the Tribe's Police Department
 23 because there is no jurisdiction under 28 U.S.C. § 1367 to hear them.

24 **4. Punitive Damages Do Not Lie Against the Sovereign**

25 Finally, the eighth cause of action seeks punitive damages against the Tribal Police
 26 Department. Since punitive damages are not available against the sovereign, this claim also
 27 requires dismissal. *City of Newport, supra* at 259, 260, 271.
 28

CONCLUSION

There is no plausible basis for permitting this lawsuit, grounded upon the 4th and 14th Amendments to the United States Constitution and 42 U.S.C. § 1983, to proceed any further against the Tribe's Police Department. Tribes, themselves, and their agencies are not state actors subject to liability for violations of the Federal Constitution for purposes of 42 U.S.C. § 1983 since the U.S. Constitution is inapplicable to the Tribe. There is no showing either Congress or the Tribe has waived the Tribe's sovereignty, the only two basis upon which sovereignty can be waived. There are, indeed, no allegations remotely suggested in the complaint of a waiver of sovereignty. As an agency of the Tribe, the Police Department is immune from suit and as a result, there is no Federal predicate upon which the State common law claims might append.

The complaint is completely lacking of facial plausibility that either Congress or the Tribe has explicitly and unequivocally waived the Tribe's sovereign immunity from suit. As a result, the complaint is clear on its face, the Court lacks jurisdiction to hear this case against the Tribal Police Department, an arm of the Tribe.

This case must, therefore, be dismissed in its entirety with prejudice, due to the want of jurisdiction.

Dated this 1st day of October, 2010.

Zeh & Winograd

By: 

Charles R. Zeh, Esq. (Original signature
Located in the law office of Zeh & Winograd)

*Attorneys for defendant Walker River Paiute Tribe
Tribal Police*

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing document was made through the Court's electronic filing and notification or, as appropriate, by sending a copy thereof by first-class mail from Reno, Nevada, addressed to the following addressee(s) on October 1st, 2010.

LISA A. RASMUSSEN, ESQ.
LAW OFFICE OF LISA RASMUSSEN, ESQ.
616 South 8th Street
Las Vegas, NV 89101

Dated this 1st day of October, 2010.


Employee of Zeh & Winograd

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