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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF NEVADA

11 David Lantry,  
12 Plaintiff,  
13 v.  
14 Walker River Paiute Tribe Tribal Police, *et.*  
15 *al.*,  
16 Defendants.

3:06-CV-00600-RCJ-VPC

**TRIBAL DEFENDANT'S REPLY TO**  
**THE OPPOSITION TO THE TRIBAL**  
**DEFENDANT'S MOTION TO DISMISS**  
**FOR THE WANT OF JURISDICTION**

17 **I. Introduction**

18 Plaintiff opposes the motion to dismiss filed by the Tribal Defendant, the Walker River  
19 Paiute Tribe Police Department, as if multiple defendants remain in this case. Throughout the  
20 plaintiff's opposition, the plaintiff refers to "defendants" plural. The result is a conflation of  
21 defenses that might be applicable if there were individual defendants that have been named and  
22 served with a summons and complaint who are left in this case. Since the dismissal of the  
23 Mineral County defendants, however, *see* Order dated February 16, 2010, Court Doc. 40, the  
24 only defendant actually remaining in this case is the Walker River Paiute Tribe Tribal Police  
25 Department.  
26

27 The plaintiff's repeated references to defendants plural, and the cobbling together of  
28 issues which might obtain for individual capacity litigation against public officials, amount to an  
obfuscation of the issues in an attempt to obscure the fact that the instant motion to dismiss is on

1 behalf of the only defendant remaining in this case, namely, the Walker River Paiute Tribe Tribal  
 2 Police Department. Complaint ¶ 4, p.3; 11. The rest of the plaintiff's discussion in his  
 3 opposition about unnamed individual defendants is of no moment to the instant motion.

4 Refocusing the critical issue, here, as to the Walker River Paiute Tribe Tribal Police  
 5 Department, the plaintiff has failed to show that either the Tribe or Congress has waived the  
 6 Tribe's sovereign immunity from suit. Since a waiver of sovereign immunity is the only avenue  
 7 for haling the Tribe or its arm, its Police Department, into this Court, *see, Kiowa Tribe of*  
 8 *Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d  
 9 961 (1998), and because the plaintiff has failed to show even the slightest inference that there  
 10 has been an explicit and unequivocal waiver of sovereignty, the defendant's motion to dismiss  
 11 must be granted for the want of jurisdiction by reason of the umbrella of the Tribe's sovereign  
 12 immunity which extends to its Police Department.

## 13 **II. Standard For Disposing of the Motion To Dismiss**

14 Plaintiff recites a host of cases in an effort to restate the standard for deciding motions to  
 15 dismiss, which may also be treated as a motion for summary judgment under Rule 56, FRCP, if  
 16 the Court were to find itself far enough outside the pleadings to treat the motion under this Rule.  
 17 The Tribal defendant, however, must point out that when deciding a motion to dismiss, while it  
 18 is true that all of the factual allegations of the complaint must be taken as true, and the plaintiff is  
 19 entitled to have drawn all reasonable inferences in his favor which might be gleaned from the  
 20 factual allegations of the complaint, the Court is not required, of its own initiative, to supply the  
 21 facts from which the inferences may be drawn in the first place. *See, Wilson v. Schnettler*, 365  
 22 U.S. 381, 383, 81 S.Ct. 632 (1961); *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of*  
 23 *Indians*, 541 U.S. 95, 124 S.Ct. 1537 (2004) (Scalia dissenting) (the court is not obliged to  
 24 speculate on its own about the factual possibilities the parties have not contemplated).

25 In addition, legal conclusions not supported by factual recitations, need not be accepted  
 26 as true. *See, Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct 1937, 1949-50 (2009). The complaint,  
 27 furthermore, must contain sufficient facts to state a claim that is plausible on its face. It must  
 28 have, facial plausibility. *Id.*, at 1949. Thus, if, upon all the facts and inferences which might

1 permissibly be drawn, it appears implausible that jurisdiction exists over the Tribe's Police  
 2 Department by virtue of the Tribe's sovereignty from suit, the complaint against the Tribe's  
 3 Police Department must be dismissed for failing the plausibility requirement of Rule 12, FRCP.  
 4 *Ibid.*

5 Also, the plaintiff appears to skip over the fact that the motion to dismiss focuses on the  
 6 absence of jurisdiction to hear this case, in the first place. Thus, the plaintiff fails to come to  
 7 grips with the fact that though sovereignty and jurisdiction are separate and distinct concepts,  
 8 *see, Garcia v. Akwesansne Housing Authority*, 105 F.Supp.2d 12, 15, (N.D.N.Y., 2000), affirmed  
 9 in rel. part, vacated in part by *Garcia v. Akwesansne Housing Authority*, 268 F.3d 76 (2<sup>nd</sup> Cir.,  
 10 2001), the question of tribal sovereignty is jurisdictional in nature. *See, Chemehuevi Indian*  
 11 *Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9<sup>th</sup> Cir., 1985). Whether  
 12 the Court has jurisdiction must be resolved before the merits of a claim are reached. *Ibid.* The  
 13 instant motion to dismiss places this Court's jurisdiction squarely at issue. Therefore, the  
 14 question of jurisdiction must be resolved before the merits of the dispute are reached, if ever.

15 Also, while it is the defendant, the Walker River Tribal Police Department, who brings  
 16 the instant motion to dismiss, the burden of proof that the Court has jurisdiction over the Tribe's  
 17 Police Department, lies with the plaintiff to show that the Tribe's Police Department may be  
 18 haled into this Court and sued by the plaintiff for any of the grounds alleged. Plaintiff must,  
 19 therefore, come forward with sufficient facts to show it is plausible that the Court has  
 20 jurisdiction over the Tribe's Police Department. *See, Stock West, Inc. v. Confederate Tribes*, 873  
 21 F.2d 1221, 1225 (9<sup>th</sup> Cir., 1989); *Tosco Corp. v. Communities for a Better Environment*, 236  
 22 F.3d 495, 499 (9<sup>th</sup> Cir., 2001).

23 The plaintiff is obliged to show that either Congress unequivocally waived, *see, Santa*  
 24 *Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670 (1978), the Tribe's sovereign immunity  
 25 from suit or that the Tribe, itself, explicitly and unequivocally, *see, Allen v. Gold Country*  
 26 *Casino*, 464 F.3d 1044, 1047 (9<sup>th</sup> Cir., 2006), waived its sovereign immunity from suit, thereby  
 27 consenting to be haled into this court to be sued for damages, including exemplary or punitive  
 28 damages, *see, Complaint*, p. 12. These are the only two avenues open to the plaintiff for haling

1 the Tribal Police Department into court. *See, Kiowa Tribe of Oklahoma v. Manufacturing*  
 2 *Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700 I 1998) ("...an Indian tribe is subject to  
 3 suit **only** where Congress has authorized the suit or the tribe has waived its immunity.")  
 4 (Emphasis added.).

5 Finally, should the Court elect to treat the Walker River Paiute Tribe's Police  
 6 Department's motion to dismiss under Rule 12, FRCP, as a motion for summary judgment under  
 7 Rule 56, FRCP, if there is a dispute over the facts of the case, it is not a dispute over just any fact  
 8 in the case which might operate to defeat a Rule 56 motion. A motion for summary judgment  
 9 may be defeated on the facts, only, where the dispute over the facts is genuine and the genuine  
 10 dispute is with respect to the material facts of the case. *See, Matsushita Elec. Indus. Co. v.*  
 11 *Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348 (1987) (the party opposing the motion  
 12 must do "... more than simply show some metaphysical doubt as to the material facts...." [T]he  
 13 non-moving party must come forward with 'specific facts showing that there is a *genuine issue*  
 14 *for trial....*"]. Furthermore, where the dispute over the material facts is generated by one version  
 15 of the facts "...which is blatantly contradicted by the record, so that no reasonable jury could  
 16 believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for  
 17 summary judgment. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769 (2007).

18 It is also true, a genuine dispute is not created by conclusory or speculative statements or  
 19 allegations. *See, In re Caneva* 547 F.3d 1082, (9<sup>th</sup> Cir., 2008). Similarly, the plaintiff may not  
 20 be permitted to create the illusion of a dispute over a material fact, by his own, contradictory  
 21 statements. The position in the plaintiff's complaint and in the opposition to the defendant's  
 22 motion that are diametrically opposite to each other should not be permitted to defeat a Rule 56  
 23 motion on the grounds that there is a genuine dispute over material facts of the case. *See,*  
 24 *Cleveland Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 119 S.Ct. 1597 (1999); *United States v. TRW*  
 25 *Rifle*, 447 F.3d 686,(9<sup>th</sup> Cir., 2006).

26 In particular, here, the plaintiff identifies and sues the Walker River Tribal Police  
 27 Department, as such, in his complaint. Comp., ¶ 4, p. 3;11. The plaintiff attaches in opposition  
 28 to the motion to dismiss in this case, an affidavit he submitted in another case, *Lantry, etc., et.al.*

1 *v. McMinn, etc., et. al.*, Case No. 3:08-cv-0063-BES-VPC, U.S.D.C, NV, (Lantry/McMinn) a  
 2 case this Court dismissed for the want of jurisdiction due to tribal sovereignty, wherein Mr.  
 3 Lantry was also a plaintiff. In his affidavit from Lantry/McMinn tendered to the Court in this  
 4 case, the plaintiff expressly twice refers to the fact that there exists **the** Tribal Police Department.

5 Most significantly, he then further explained in the Lantry/McMinn case that he has sued  
 6 the "Walker River Paiute Tribe Police Dept" (sic) in this case. Lantry states: "I [Mr. Lantry]  
 7 filed a lawsuit in 2006 against Walker River Tribe Police Dept when they wrongfully arrested  
 8 me." This paragraph could only be a reference to this case. He concedes, clearly, one of the  
 9 defendants in this case is, therefore, the Walker River Paiute Tribal Police Department. All of  
 10 the plaintiff's protestations in the opposition to the motion to dismiss to the contrary that there is  
 11 a doubt about the existence of a Walker River Paiute Tribal Police Department or that the  
 12 plaintiff has not sued the Walker River Paiute Police Department should be disregarded as false,  
 13 misleading and implausible of belief. The plaintiff admitted in Lantry/McMinn that it was the  
 14 Walker River Paiute Tribal Police Department that he had sued in this case. Lantry affidavit, ¶¶  
 15 3, 6 and 7, Exhibit C, herein.

16 Also, an affidavit offered by the party opposing a Rule 56 motion must demonstrate that  
 17 the facts it contains are made upon personal knowledge. *Shakur v. Schiro* 514 F.3d 878 (2008);  
 18 *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, (9<sup>th</sup> Cir., 1995) (affidavit upon information and belief  
 19 insufficient). Therefore, the plaintiff's claims in his affidavit that the Tribe's Police Department  
 20 receives State funds and the officers are State certified, which are made upon information and  
 21 belief, have no place in these proceedings and should be stricken. *See*, Lantry affidavit, ¶¶ 6 and  
 22 7. Exhibit C to the Opposition.

23 Applying these standards for deciding a motion under Rules 12 and 56, FRCP, the  
 24 motion of the Walker River Paiute Tribe's Police Department to dismiss the case for the want of  
 25 jurisdiction based upon the Tribe's sovereign immunity must be granted.

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**III. The Walker River Paiute Tribe's Police Department Is The Sole Remaining, Named Defendant In This Case, Has Been Sued As Such From Any Plain Reading of the Complaint, And As the Tribe's Police Department, The Complaint Must Be Dismissed With Prejudice Due To Lack of Jurisdiction By Virtue Of The Tribe's Sovereign Immunity From Suit**

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

The fundamental notion of Tribal sovereign immunity from suit is already addressed in the underlying motion, and does not bear repeating. The plaintiff takes umbrage, however, with the application of sovereign immunity to the Walker River Paiute Tribe Tribal Police Department. Plaintiff believes the Tribal Police Department is not protected by tribal sovereign immunity.

Addressing this misguided attack by the plaintiff, the defendant would add that Tribal sovereignty extends to protect casinos owned and operated by a Tribe since the funds generated are intended to promote the health and welfare of a Tribe, thus, qualifying the casino as an arm of the Tribe. *See, Allen, supra* at 1046. Immunity also extends to the employees of the casino, *see, Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9<sup>th</sup> Cir., 2008) and tribal police officers, *see, Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9<sup>th</sup> Cir., 2002) (Tribal ranger protected because tribal sovereign immunity "...extends to tribal officials when acting in their official capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1013, n. 8 (9<sup>th</sup> Cir., 1981)). *See also, Boney v. Valline*, 597 F.Supp.2d 1167, (D.Nev.,2009).

It cannot be gainsaid, then, that a tribal police department fits within the definition of an agency acting as an arm of the Tribe and, thus, itself, is entitled to the protections of sovereign immunity that inure to the benefit of the Tribe. Discharging police powers which are inherently a part of tribal sovereignty and, therefore, require no affirmative elaboration, *see, United States v. Wheeler*, 435 U.S. 313, 322, 323, 98 S.Ct. 1079 (1978); *see also, Dry v. U.S.*, 23 F.3d 1249, 1254 (10<sup>th</sup> Cir., 2000), the Walker River Paiute Tribe's Police Department can only be seen as an arm of the Tribe entitled to the protections of the Tribe's sovereign immunity from suit. Since the Tribe is immune from suit, so is the Tribe's Police Department immune from suit.

**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 Hale The Tribe Into Court To Be Sued**

Recognition that the Tribe or Congress may waive the Tribe's sovereign immunity from suit is also adequately addressed in the underlying motion and does not require repeating. Since the plaintiff contends that there has been a waiver of sovereignty in this case, it is necessary to remind that to be effective, a waiver of Tribal sovereignty must be explicit. *See, Allen, supra* at 1047 (... "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.

For the plaintiff to succeed here with his claim the Tribe has waived sovereignty, the plaintiff has the burden of meeting this "high standard." For this suit to continue against the Walker River Paiute Tribe Tribal Police Department, the plaintiff must show that there has been an explicit and unequivocal waiver of the Tribe's sovereign immunity in whatever it is the plaintiff relies upon to show such a wavier and that the waiver is also clear on its face. The plaintiff is unable to meet this high standard.

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1           **C.       The Record Remains Clear, the Sole Remaining Named Defendant Is The**  
 2           **Walker River Paiute Tribal Police Department And That It Is This Entity**  
 3           **That Has Been Sued And As An Arm of the Tribe, Is Immune From Suit**

3           **a.       The Plaintiff Sued the Tribal Police Department As An Arm of the**  
 4           **Tribe**

5           In plaintiff's opposition to the motion to dismiss, the plaintiff appears to claim, now, he  
 6           did not sue the Tribe's Police Department and that there is some question, Opposition, p. 5; 6-8,  
 7           that the Tribal Council has authority to create the police department in the first place,  
 8           Opposition, p. 6; 11-12, p. 7; 20-21, or that there even is a police department, Opposition, p. 13;  
 9           1-3. Therefore, according to the plaintiff, tribal sovereignty is not nor could it be implicated in  
 10          this dispute. Opposition, p. 4; 15-16.

11          To be perfectly clear, there is only one, identifiable or named defendant left in this case,  
 12          with the voluntary dismissal of the Mineral County defendants. Though the plaintiff is now  
 13          trying to back pedal from his own complaint, the language of the complaint cannot be escaped.  
 14          There it states that the "...Defendant WALKER RIVER PAIUTE TRIBE TRIBAL POLICE  
 15          DEPARTMENT (hereinafter "TRIBAL POLICE") is sued herein as individuals and as a group  
 16          and in their official capacity as TRIBAL POLICE OFFICERS of the Walker River Paiute Indian  
 17          Reservation at the time....." Complaint, ¶ 4; 11-14. In addition, the plaintiff admits that [i]n  
 18          doing the acts alleged herein, they acted as the TRIBAL POLICE, located in the County of  
 19          Mineral, State of Nevada, **under color of tribal law.**" (Emphasis added.) *Id.*, ¶ 4; 17-19.

20          The paragraph makes so clear that the plaintiff sued the Tribe's Police Department as an  
 21          entity of the Tribe, further elaboration is unnecessary. Moreover, the Complaint is explicit that  
 22          in doing the acts alleged, the plaintiff admits the acts complained of were committed under color  
 23          of tribal law. Thus, the plaintiff admits in paragraph Four of his complaint, first, that he sued the  
 24          Tribe's Police Department, the department that was sued as an entity of the Tribe, and further,  
 25          that in committing the acts alleged, the officers belonging to the Tribe's Police Department and  
 26          hence, the Tribe's Police Department, acted under color of tribal law. Each of these admissions  
 27          is fatal to the balance of plaintiff's opposition to the motion to dismiss.

28          If further discussion is warranted, however, the complaint defines the term Tribal Police



1 as the short hand expression for the Walker River Paiute Tribe Tribal Police Department. Thus,  
 2 the last portion of paragraph Four of the complaint actually states that the Walker River Paiute  
 3 Tribe Tribal Police Department acted under color of tribal law when doing the acts alleged in the  
 4 complaint.

5 Furthermore, as indicated, the plaintiff revealed in his own words the true identity of the  
 6 last named defendant left standing in this case. In his affidavit from the Lantry/McMinn case  
 7 which is now offered, here, also, as Exhibit C, in support of the plaintiff's opposition to the  
 8 motion to dismiss, the plaintiff specifically told this Court that in this case, he had sued the  
 9 Walker River Paiute Tribe's Police Department. Opposition, Exhibit C, ¶ 3. The plaintiff knows  
 10 quite well that he named the Tribe's Police Department in this case and that the Tribe's Police  
 11 Department is an arm of the Tribe because that is what he alleged in his complaint, here, and that  
 12 is what he represented in his affidavit from the Lantry/McMinn lawsuit.

13 It is beyond cavil that the sole named defendant left in this case is the Tribe's Police  
 14 Department. Thus, since it is the Tribe's Police Department which has been sued, there is no  
 15 question that suit against a tribal entity implicates the question of sovereign immunity. *Allen*  
 16 makes that clear. *Allen, supra* at 1046-47. Plaintiff appears to claim the Police Department is  
 17 not entitled to the protection of sovereign immunity but that is a different question from whether  
 18 sovereign immunity is implicated in the first place. Clearly, suing, as the plaintiff has, here, the  
 19 Tribe's Police Department places sovereign immunity at issue. *See, Allen, supra* at 1046.

20 **b. It Is Also Beyond Cavil That The Tribe's Police Department Is An**  
 21 **Arm of the Tribe Doing the Tribe's Work**

22 Despite the fact that the plaintiff pled that the Tribe's Police Department acted at all times  
 23 under the color of Tribal law, plaintiff claims variously, that there is no showing in the affidavits  
 24 in support of the motion to dismiss that the Tribe's Police Department was vested with the police  
 25 power of the Tribe to enforce its criminal laws, opposition, p 6; 13-14, that the Tribal Council  
 26 has no authority to create a police department to provide for public safety on the Reservation,  
 27 opposition, p. 7; 21-22, and that the affidavits in support of the motion to dismiss refer to Tribal  
 28 officers, not necessarily Tribal Police officers and therefore, could even be a reference to

1 members of the Tribal Council, as officers of the Tribe. Opposition, p. 5; 26. As a result of  
 2 these alleged deficiencies in the motion to dismiss, plaintiff asserts there is a question of fact  
 3 over whether the Tribe's Police Department was an arm of the Tribe, charged with the police  
 4 function of the Tribe.

5 Plaintiff's assertion is unavailing. While it is true that the affidavits of former Tribal  
 6 Council Chairman Reymus and the current Tribal Council Chairman Sammaripa actually do not  
 7 use the term "Tribal Police Officer," and refer only to Tribal officers, taking the affidavits as a  
 8 whole, it is patently clear, the discussion of Tribal officers could only be understood as a  
 9 reference to the Tribe's police officers. For example, both affidavits show that the Tribe's Chief  
 10 of Police reports to the Tribal Council through the Tribal Chairman. *See*, ¶ 6, Sammaripa  
 11 affidavit, *see* ¶ 7, Reymus affidavit. Where, therefore, the affidavit discuss the Tribal Council,  
 12 "Tribal Council" is the term used. The use, therefore, of the term "Tribal officer" must mean  
 13 something else and since the affidavit, taken as a whole, clearly concerns the Police Department,  
 14 a reference to the Tribal officers could only be read to mean a "Police Officer."

15 In addition, the affidavit makes specific reference to the police department and the fact  
 16 that it exists under the Tribe's local control, Sammaripa Affidavit, ¶ 17, and that the Tribe's  
 17 Police Department retains jurisdiction over the criminal enforcement of the Tribe's law and order  
 18 code, that it may avail itself upon request, of the assistance of other police forces, but that  
 19 otherwise, it reserves this function and duty for its own police department. *See*, Sammaripa  
 20 Affidavit, ¶ 7. *See also*, Reymus affidavit, ¶¶ 6, 7, 9, 10. Quite clearly, the Tribe has delegated  
 21 this law enforcement function to the Police Department. Quite clearly, the police power aspect  
 22 of Tribal government has been vested in significant part with the Police Department. As a matter  
 23 of fact, then, the Police Department is doing the Tribe's work, maintaining law and order on the  
 24 Reservation and it, therefore, qualifies as an arm of the Tribe. *Allen, supra* at 1046-1047.

25 That being said, it is also true, the Tribal Council has the authority to delegate to the  
 26 Tribe's Police Department the duty to discharge the Tribe's police power on the Reservation.  
 27 The plaintiff cites multiple provisions of the Tribe's Constitution for the proposition that there is  
 28 no Tribal Constitutional authority for this delegation. Opposition, p. 7; 12-27.

1 Plaintiff's first problem is that he does not go far enough in his analysis of the Tribe's  
 2 Constitution. Had the plaintiff kept on reading, he would have discovered, the Tribe is  
 3 empowered by the Constitution "...to safeguard and promote the peace, safety, morals and  
 4 general welfare of the Tribe by regulating the conduct of trade and the use and disposition of  
 5 property on the Reservation," *see*, Constitution, Article VI, Section J, p. 6, Exhibit A to  
 6 defendant's motion, to "...protect and preserve the property, wildlife, and natural resources of the  
 7 Tribe," *Id.*, Section P, p. 7, to "...regulate the domestic relations of members of the Tribe," *Id.*,  
 8 Section Q, and to "...delegate to ...tribal officials,...any of the foregoing powers." *See, Id.*,  
 9 Section R, p. 7. In addition, the Preamble of the Constitution states that the Constitution itself is  
 10 intended to provide for the "general welfare of ourselves and property." *Id.*, Preamble, p. 2.

11 The clause allowing the Tribe to promote the peace, safety, morals and general welfare of  
 12 the Tribe by regulating the conduct of trade and the use and disposition of property is not unlike  
 13 the "Interstate Commerce Clause" of the United States Constitution. This clause has been  
 14 interpreted to allow for a broad array of control over individual conduct by the Federal  
 15 Government. *Cf., Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct 377 (1964). The Tribal  
 16 Council, furthermore, has the express right to delegate such duties to subordinate tribal officials.  
 17 Additionally, whether or not mentioned in the Constitution, the Tribe has the authority to  
 18 exercise police power as an inherent aspect of tribal sovereignty. *See, Wheeler, supra* at 322,  
 19 323. *Dry, supra* at 1254. Within this constellation of authority, clearly, the Tribal Council has  
 20 both the right and duty to provide for a police department for the Tribe, to preserve and protect  
 21 public safety.

22 An additional problem, however, for the plaintiff under this theory is that the plaintiff is  
 23 asking the Court to interpret in the first instance, the Tribe's Constitution. The interpretation of  
 24 the Tribe's Constitution is left for the Tribe to undertake. The Tribal Council has spoken, by  
 25 asserting it has the authority to appoint a police department in exercise of the police power of  
 26 Tribal Government over the Tribe's Reservation. This is a decision that is not left for challenge  
 27 in the first instance with this Court. *Cf., National Farmers Union Insurance Companies v. Crow*  
 28 *Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447 (1985).

1           Lastly, even if the Tribe acted in excess of its authority to appoint a Tribal Police  
 2 Department, it is of no moment to the issue of Tribal sovereignty. A tribe is immune from suit  
 3 and is not shorn, therefore, of its sovereignty even when acting beyond its authority to act. *See,*  
 4 *Chemehuevi, supra* at 1052. Thus, a tribal police department has been appointed. The plaintiff  
 5 clearly acknowledges that he sued the Tribal Police Department. Whether or not the Tribal  
 6 Council acted in excess of its authority when creating a Tribal Police Department, it is a Tribal  
 7 Police Department, nonetheless. Sovereignty applies, unless, as indicated, the Tribe or the  
 8 Federal Government has explicitly and unequivocally waived the Tribe's sovereignty, allowing it  
 9 to be haled into this Court. *See, Kiowa, supra* at 754, *Allen, supra* at 1047. The plaintiff has  
 10 made no showing this has occurred.

11                           **c.       The Plaintiff Has Not Shown A Clear and Unequivocal Waiver of**  
 12                           **Sovereign Immunity From Suit and, Thus, The Tribe's Police**  
                           **Department Is Immune From Suit**

13           Plaintiff also argues that the Tribe has waived its sovereign immunity. The plaintiff  
 14 brazenly asserts that it would "...be hard to conceive of a more direct "waiver" of any  
 15 sovereignty..." as exists in this case. Opposition, p. 8; 20-23. The plaintiff is mistaken.

16           Plaintiff's alleged source of the alleged waiver is two-fold. One is derived from the oath  
 17 of office set forth in the Tribe's By-Laws to the Constitution. Opposition, p. 8; 20-24, *see also,*  
 18 By-Laws, Article III, p. 14, Exhibit A, to the Motion to Dismiss. The other is derived from the  
 19 Tribe's Law and Order Code, Section 1-30-030, which allows the Tribal Court to apply any laws  
 20 of the United States to the extent that they may be needed to resolve a dispute. Plaintiff  
 21 apparently also relies upon Section 1-30-040 which states that neither Nevada law nor Part 25 of  
 22 the Code of Federal Regulations shall apply unless specifically incorporated into the Tribe's Law  
 23 and Order Code by Ordinance. The plaintiff then argues that the motion to dismiss cannot be  
 24 granted unless and until the rest of the Tribe's Law and Order Code has been produced to see  
 25 under what circumstances the laws of the United States and Nevada might apply. Opposition, p.  
 26 10; 2-3. Finally, the plaintiff argues that there has been a waiver of the Tribe's sovereign  
 27 immunity by the Tribal Police when they purportedly cited the plaintiff for a traffic violation  
 28 under State law.

1 None of this amounts to a waiver of sovereign immunity by the Tribe for the Police  
 2 Department, assuming all of the factual allegations are true. First, it is already well established  
 3 that a tribe's wholesale incorporation of all or a portion of Federal or state law to fill in the gaps  
 4 in a tribe's law and order code does not amount to a waiver of sovereign immunity. *See, R.J.*  
 5 *Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979, 982, (9<sup>th</sup> Cir., 1983). The  
 6 plaintiff is too late in the day to make this assertion. The incorporation language of Sections  
 7 1-30-030 and 1-30-040 do not amount to a waiver of sovereignty.

8 Second, the oath of office set out in the By-Laws does not in any way rise to the level of  
 9 an explicit and unequivocal waiver of the Tribe's sovereign immunity from suit. The mere fact  
 10 that allegiance to the United States is requested of Tribal Police Officers, hardly equates with a  
 11 waiver of sovereign immunity by the Tribe for itself or for its Police Department. This is clear  
 12 from *Allen, supra*, where the Ninth Circuit held that the "...Casino did not waive immunity when  
 13 it provided in Allen's employment application that he could be terminated 'for any reason  
 14 consistent with applicable state or federal law,' or when it stated in the Employee Orientation  
 15 Booklet that it would 'practice equal opportunity employment and promotion regardless of race,  
 16 religion, color, creed, national origin... and other categories protected by applicable federal  
 17 laws.'" *Allen, supra* at 1047.

18 The Court found theses statements do not waive sovereignty because they "...are not a  
 19 "clear" waiver of immunity." *Ibid*. Rather, they might "... imply a willingness to submit to  
 20 federal lawsuits but waivers of tribal sovereign immunity may not be implied." *Ibid*. The Court  
 21 then affirmed that the waiver must be "... unequivocally expressed," quoting *Santa Clara Pueblo*,  
 22 *supra* at 59. *Ibid*.

23 The Court explained, however, this language failed to provide a clear, unequivocal and  
 24 explicit waiver of sovereign immunity because, while referencing federal law, the language did  
 25 not mention "...court enforcement, suing or being sued, or any other phrase clearly contemplating  
 26 suits against the Casino." *Ibid*. Comparing and contrasting this standard with the oath of office  
 27 to be administered to the Tribe's police officers, the oath patently fails to waive the Tribe's  
 28 sovereignty. There is no reference to suing or being sued. There is no reference to the

1 enforcement of any judgment against the Tribe or Police Department.

2 Stated another way, an unequivocal waiver of sovereign immunity from suit  
3 contemplates two complementary principals to waivers, namely, that the waiver must be  
4 unequivocal and it must also encompass both "where" the sovereign may be sued and "whether"  
5 it may be sued in the first place. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S.Ct.  
6 3142 (1985). The oath<sup>1</sup> of office, therefore, also fails as a waiver in this respect because it  
7 addresses none of the elements which are required for the Court to find a clear, and unequivocal  
8 waiver of sovereign immunity.

9 Last, plaintiff's reliance upon the conduct of the Police Officers to waive sovereign  
10 immunity is an attempt to have sovereignty waived by implication. Setting aside the question of  
11 whether a tribal police officer even has the ability or authority to waive the Tribe's sovereignty,  
12 police conduct cannot be the basis of a waiver because waivers may not be implied. A waiver is  
13 valid only if unequivocally expressed. *Santa Clara Pueblo, supra* at 58. The fact that the Tribal  
14 police officers may have conducted themselves in a certain way may impact their personal  
15 liability. The conduct itself is incapable of amounting to a waiver because there is nothing  
16 unequivocal about it which makes clear on its face that the Tribe has consented to be haled into  
17 this Court and that the Tribe has unequivocally consented to have a judgment enforced against it  
18 as a result of these proceedings. For example, the officers might simply make a mistake and a  
19 mistake about the issuance of a traffic citation hardly comports with a waiver of Tribal  
20 sovereignty. It is an ambiguous act and an ambiguous act is the antithesis of a standard for  
21 finding a waiver that turns upon an explicit, unequivocal expression that sovereignty has been  
22 waived. *Allen supra* at 1047.

23 The plaintiff's opposition is not a model of clarity. The defendant Tribal Police  
24 Department is, thus, left to state that there does not appear to be any other conduct, documents or  
25 records asserted from which to find a waiver of sovereign immunity for the Tribe, itself, or its  
26 Police Department. To be sure, the plaintiff tries to parse the Tribe's 638 Contract with the

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27  
28 <sup>1</sup>The language of the oath of office also runs headlong in *Blue Fox*, cited, *supra*, where the United States Supreme Court required that a waiver of sovereign immunity be unequivocally expressed in the text of the purported waiver. *Id.*, at 261. The oath fails this test, also.



1 Federal Government to fund the Tribe's Police Department. The defendant understands this  
 2 discussion primarily as an attempt to justify a *Bivens* claim, *see, Bivens v. Six Unknown Named*  
 3 *Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against as of yet unidentified  
 4 and unnamed individual defendants. Opposition, pp. 16-20. The defendant, Tribal Police  
 5 Department, would only state, here, that if the intent of these pages is to assert a *Bivens* claim,  
 6 against the Tribe's Police Department, the plaintiff must still clear the hurdle of sovereign  
 7 immunity, which, as explained above, he is incapable of accomplishing. Also, there is no case  
 8 law supporting a *Bivens* claim against the Tribe, itself, or an arm of the Tribe. *See, R.J.*  
 9 *Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9<sup>th</sup> Cir., 1983).

10 Third, the 638 Contract, does not create a waiver. It states: "Nothing in the contract shall  
 11 be construed as: (a) Affecting, modifying, diminishing, or otherwise impairing the sovereign  
 12 immunity from suit enjoyed by an Indian tribe...." Contract, Exhibit E., to the Opposition, p. 31.  
 13 It is expressly, therefore, is not intended to waive the Tribe's sovereignty.

14 No waiver of tribal sovereignty is shown by the plaintiff with which to hale the Tribe's  
 15 Police Department into this Court. Thus, the Court lacks jurisdiction to hear this dispute against  
 16 the Tribe's Police Department by reason of the umbrella of protection supplied by the Tribe's  
 17 sovereign immunity from suit.

18 **IV. The Balance Of the Plaintiff's Opposition Proceeds from the View That There Are**  
 19 **Multiple Defendants Remaining In This Case And As a Result, It Is Impertinent to**  
 20 **the Motion to Dismiss**

21 Plaintiff's misdirection in his opposition to the motion to dismiss begins in earnest with  
 22 Section V, where the opposition is couched in terms of the defendants. Opposition, p. 11; 4.  
 23 The plaintiff claims that the Defendants,' possessive plural, motion should be denied for various  
 24 reasons and proceeds from that premise. As indicated throughout, there is only one named,  
 25 identifiable defendant left in this lawsuit, namely, the Walker River Paiute Tribe Tribal Police  
 26 Department. It is on behalf of this party, only, that the motion to dismiss was brought. The  
 27 reference, therefore, to defendants in the plural, miscasts the motion and conflates parties that are  
 28 not joined in the motion to dismiss.

There are no named individual capacity defendants named in this case at present. This



1 case, moreover, has been pending since November 8, 2006. Discovery closed as of November  
2 23, 2009. The plaintiff has not added any other defendants in this case, which has been brought  
3 to the attention of the Tribe's Police Department. The Tribe and its Police Department should  
4 not have to mount a defense at this time for parties the plaintiff has eschewed naming. The  
5 plaintiff should bear the responsibility for this shortcoming. *Cf., Argabright v. U.S.*, 35 F.3d  
6 472, 474 (9<sup>th</sup> Cir., 1994), a case cited by the plaintiff with approval in his opposition. *See,*  
7 *Opposition*, p. 2; 1.

8         The Tribal Police Department, must therefore, disclaim any responsibility to respond to  
9 claims and allegations addressed to unnamed individuals who are as of yet a part of this lawsuit.  
10 Furthermore, it would be patently unfair to require the Tribal Police Department to address  
11 unnamed individuals who are not yet, if ever, going to be a part of this lawsuit, because without  
12 knowing the persons the plaintiff wishes to sue, on some sort of individual capacity claim, it is  
13 difficult to ascertain what the gravamen of the claim would be. For example, the plaintiff at one  
14 point refers to "purported Tribal Police Defendants." *Opposition*, p. 17;19. Is the plaintiff,  
15 therefore, suggesting that these unnamed individual defendants were persons impersonating an  
16 officer? This suggestion clearly opens up the spectrum of potential named, individual  
17 defendants to a number of potential defendants that is inconceivable.

18         The point here, however is that the rest of the opposition, except where specifically  
19 addressed above, is irrelevant to a motion to dismiss brought on behalf of a specific defendant,  
20 the Tribal Police Department, on the specific grounds that the Court lacks jurisdiction to hear  
21 this case, against this defendant by virtue of the Tribe's sovereign immunity. The Tribe's  
22 sovereign immunity, and hence, the immunity of its arm, the Tribe's police department, do not  
23 rise and fall on the conduct of its officers, or anyone else that may be a wrong doer, acting on  
24 behalf of the Tribe. The Tribe's sovereign immunity does not turn upon whether its personnel  
25 acted improperly. It does not turn upon whether, even, the Tribe acted outside its authority. *See,*  
26 *Chemehuevi, supra* at 1052.

27         It rises and falls upon whether either the Tribe or Congress explicitly and unequivocally  
28 waived the Tribe's sovereign immunity from suit. These are the only avenues open to the

1 plaintiff for haling either the Tribe or the Tribe's Police Department into court. *Kiowa, supra* at  
 2 754. As is demonstrated, above, the plaintiff has failed to sustain his burden of showing  
 3 jurisdiction exists by supplying sufficient information from which the Court might conclude it is  
 4 plausible that sovereignty has been waived.

5 The rest of the plaintiff's opposition becomes, therefore, irrelevant to the instant motion.  
 6 It makes no difference, therefore, if there were a *Bivens* cause of action against the Tribe, if the  
 7 Tribe has also not waived sovereignty. Sovereignty, and thus, jurisdiction, are separate and apart  
 8 from the concept of a cause of action grounded in 42 U.S.C. Section 1983, or *Bivens*. See,  
 9 *Atascadero, supra* at 241. Absent the waiver, there is no jurisdiction.

10 Addressing the remaining sections of plaintiff's opposition Section VI, seems to assert  
 11 that this suit should proceed because the plaintiff, allegedly, has no access to bring suit in Tribal  
 12 Court. Setting aside the accuracy of that statement, whether the plaintiff can sue in Tribal Court,  
 13 is irrelevant to the question of whether the Tribe has waived sovereignty and, thus, would permit  
 14 its Police Department to be haled into Federal Court.

15 Section VII claims that the defendants, plural, are not entitled to immunity because  
 16 immunity does not reach lower level tribal officials,<sup>2</sup> the Tribal Police cited NRS 484.545 when  
 17 arresting the plaintiff, the defendants may have been acting under color of Federal authority,  
 18 enforcing Federal law or acting in concert with State or Federal law enforcement and lastly,  
 19 sovereign immunity does not extend to officials acting outside their scope of authority.

20 Again, disregarding the merits or lack thereof, of these claims, first, once again, the  
 21 plaintiff, using the term defendants, plural, cobbles together the Tribe and unnamed individual  
 22 defendants. The motion, however, was brought only on behalf of the Police Department. No  
 23

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24  
 25 <sup>2</sup>The plaintiff could not be more mistaken, in the claim that sovereign immunity does not reach to  
 26 the level of individual police officers. Sovereign immunity even extends to casino employees, as *Cook v.*  
 27 *AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9<sup>th</sup> Cir., 2008) clearly holds. The plaintiff cites this case with  
 28 approval, at a later point in his opposition. Opposition, p. 15; 20-21. Also, this Court has already held  
 that a tribe's sovereignty protects individual police officers. See, *Boney v. Valline*, 597 F.Supp.2d 1167  
 (D. Nev., 2009). The defendant, however, expressly rejects arguing these points concerning individual  
 personal responsibility claims about parties unnamed in this case, in order to avoid dignifying the notion  
 that virtually the entirety of the opposition, except where sovereignty is expressly addressed, above, has  
 nothing to do with the motion to dismiss filed on behalf of the Police Department.

1 allegation of an express waiver of sovereignty by either the Tribe or Congress is contained in this  
 2 section of the opposition. The plaintiff claims wrong doing on the part of tribal police officers,  
 3 apparently, unless the conduct was committed by "purported Tribal Police Officers. Regardless,  
 4 tribal sovereignty rises and falls upon the explicit waiver of sovereignty, either by the Tribe, or  
 5 Congress. It does not matter for purposes of the Tribe's sovereignty whether the plaintiff might  
 6 have a *Bivens* cause of action against some individual.

7 Section VIII presents the argument that the motion to dismiss should not be granted  
 8 because there is a genuine dispute over whether the conduct alleged constitutes State or Federal  
 9 action creating a *Bivens* type claim. The argument is of no moment to the instant motion as the  
 10 plaintiff's pleading makes plain. In response to the defendant's position in the motion to dismiss  
 11 that the United States Constitution is inapplicable to the Tribe, the plaintiff claims the argument  
 12 is incorrect because it is an argument that "...has no bearing on Plaintiff's individual capacity  
 13 claims, whatsoever." Opposition, p. 20; 8-9. In truth, this Section of the plaintiff's opposition  
 14 has no bearing on the instant motion to dismiss because there are no individual capacity  
 15 defendants left in this case and the motion filed on behalf of the Tribe's Police Department.

16 Section IX revolves around the State of Nevada law of torts. Plaintiff claims it is  
 17 premature to discuss the tort claims because it is unclear how much of the State's tort law has  
 18 been incorporated into the Tribe's Law and Order Code by virtue of Section 1-30-040, which  
 19 allows reliance upon state law where specifically incorporated into the Code by an ordinance.  
 20 Opposition, pp. 20-21. There is no reason to delay disposition of the instant motion because as  
 21 indicated, the wholesale incorporation of state law into a Tribe's law and order code does not  
 22 constitute a waiver of sovereign immunity. *See, R.J. Williams, supra* at 982.

23 Section X asserts that the Court has jurisdiction over pendant claims. This is a truism,  
 24 provided there is jurisdiction to hear this case in the first place. Since there is no jurisdiction to  
 25 hear the case against the Tribe's Police Department, as to the Police Department, the case must  
 26 be dismissed in its entirety because the want of jurisdiction requires complete dismissal of the  
 27 case as to the party over whom jurisdiction is wanting *See, Arbaugh v. Y & H Corporation*, 546  
 28 U.S. 500, 514, 126 S.Ct. 1235 (2006), cited with approval by the plaintiff. Opposition, p. 22; 6.

1 Last, Section XI claims without citation to authority, punitive damages are available in  
2 this case. As stated, punitive damages against the sovereign, which includes the Tribe's Police  
3 Department, are unavailing. *See, City of Newport v. Fort Concepts*, 453 U.S. 247 (1981). Since  
4 the Police Department, here, is the only moving party seeking dismissal for the want of  
5 jurisdiction, there is no plausible basis for sustaining this cause of action seeking punitive  
6 damages. Complaint p. 12.

### 7 CONCLUSION

8 For the reasons explained herein and in the motion to dismiss, sovereign immunity  
9 forecloses haling the Tribe's Police Department into Court for the want of jurisdiction, as the  
10 plaintiff has shown neither a Congressional nor a Tribal waiver of sovereign immunity, the sole  
11 basis available for haling this defendant into Court. Lacking jurisdiction over this defendant, the  
12 entire complaint must be dismissed against the Tribe's Police Department, the only named and  
13 identified party left in this case.

14 Dated this 23<sup>rd</sup> day of November, 2010.

Zeh & Winograd

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16 By: /s/Charles R. Zeh, Esq.  
Charles R. Zeh, Esq.  
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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 November 23, 2010.

LISA A. RASMUSSEN, ESQ.  
**LAW OFFICE OF LISA RASMUSSEN, ESQ.**  
616 South 8<sup>th</sup> Street  
Las Vegas, NV 89101

Dated this 23<sup>rd</sup> day of November, 2010.

/s/Karen Kennedy  
Employee of Zeh & Winograd

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