

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED

APR 13 2011

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
by Deputy Clerk

JEFF FIFE; TED TIGER; JESS HARJOCHEE;)
CECIL HARRY; RODNEY LUELLEN;)
JEANETTA CARR; JOSEPH DOMEBO;)
CECILIA WITTMAN; JENNIE GOODELL;)
and DANIEL WIND,)

Petitioners,)

vs.)

PATRICK E. MOORE; RODERICH WIEMER;)
and MARCY MOORE,)

Respondents.)

CIV 11 - 133 - RAW

Case No.: _____

**PETITIONERS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING
ORDER AND FOR PRELIMINARY INJUNCTION AND
OPENING BRIEF IN SUPPORT**

COMES NOW Petitioners Jeff Fife, Ted Tiger, Jess Harjochee, Cecil Harry, Rodney Luellen, Jeanetta Carr, Joseph Domebo, Cecilia Wittman, Jennie Goodell, and Daniel Wind, and, pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully submits this emergency motion and move for this Court to enter a Temporary Restraining Order against Respondents or, alternatively, after notice to Respondents and a hearing, enter a Preliminary Injunction against Respondents.

The injunctive relief sought by Petitioners (*see* Request for Relief *infra*) is to enjoin the continued prosecution of Petitioners in the District Court of the Muscogee (Creek) Nation (the "District Court") and to enjoin criminal trials set to begin in Okmulgee, Oklahoma on **April 25, 2011**, starting at **9:00 a.m.** Thus, Petitioners request an immediate hearing on their request for injunctive relief before this Court. All statements of fact and supporting exhibits contained in the *Petition for Writ of Habeas Corpus Under the Indian Civil Rights Act*, 25 U.S.C. § 1303 are expressly

PETITIONERS' EMERGENCY MOTION FOR - 1
TEMPORARY RESTRAINING ORDER AND
FOR PRELIMINARY INJUNCTION AND
OPENING BRIEF IN SUPPORT

Pitchlynn & Williams, PLLC
124 East Main Street
Norman, Oklahoma 73069
(405) 360-9600

incorporated for purposes of this emergency motion. In support of their motion, Petitioners advise the Court as follows.

FACTUAL BACKGROUND

1. On or about October 29, 2010, Respondent Wiemer executed and filed a *Criminal Complaint and Information* against Petitioners (CRF 2010-41 through CRF 2010-51 inclusive, except CRF 2010-45).

2. On or about November 1, 2010, Petitioners appeared in the District Court for an initial appearance and arraignment and, subsequently, they posted a bail bond. Petitioners had various bond amounts between them, but all Petitioners had to post a bond with a bondsman or else remain in jail. Currently, all Petitioners remain free on bond, subject to the restrictions and limitations imposed by the terms of their bond, which also require Petitioners to appear at times and places as ordered by the Respondent Patrick Moore.

3. On November 16, 2010, Petitioners filed a number of motions challenging the jurisdiction of the District Court over their cases and moved for the recusal of Respondent Wiemer and the disqualification and removal of Respondent Patrick Moore as judge based on the inherent unfairness of those individuals being involved in the prosecution of Petitioners in the District Court.

4. On November 24, 2010, Petitioners filed *Defendant's Objection to Criminal Case Proceeding in the "District Court" with Patrick Moore Presiding as Judge in Light of the Establishment of a New Criminal Court and Judge Selection Process Under NCA 10-189* challenging the continuation of the criminal cases against Petitioners until the newly created criminal court could be established and a presiding judge be seated, all in accordance with NCA 10-189.

5. On or about December 28, 2010, Petitioners filed *Defendant's Objection and Motion to Dismiss for Lack of Jurisdiction; Alternatively, Motion to Dismiss Certain Charges as Being in Violation of Indian Civil Rights Act* and seeking dismissal of all charges on the basis that the alleged criminal

activities complained of occurred outside the Nation's Indian country and, thus, the Nation did not have jurisdiction to file charges against Petitioners. The filing also sought an alternative relief on the basis that the charges were being filed ex post facto and were thus prohibited under the Indian Civil Rights Act.

6. On or about January 28, 2011, Petitioners filed *Defendant's Motion to Dismiss Based on NCA 10-189 and NCA 10-190* and affirmatively sought dismissal based on a prior objection filed by Petitioners based on the repeal of Title 26 and the establishment of a new criminal court and judge selection process and procedure, all under NCA 10-189 and NCA 10-190.

7. Hearings were held in the District Court as to all of Petitioners' motions, and oral argument was presented by legal counsel for Petitioners, and Respondent Wiemer on behalf of the Nation.

8. On March 4, 2011, Respondent Patrick Moore issued a *Consolidated Order on Defendants' Motion to Disqualify Special Prosecutor, Motion to Disqualify Patrick E. Moore as Judge, Objection to Criminal Case Proceeding in the District Court, Objection and Motion to Dismiss for Lack of Jurisdiction, Alternatively, Motion to Dismiss Pursuant to Indian Civil Rights Act and Motion to Dismiss Based on NCA's 10-189, 10-190*, in which Moore denied all of Petitioners' motions. By virtue of denying the Petitioners' motion to dismiss, Respondent Patrick Moore has indicated his intentions to now have the cases adjudicated on the merits.

9. On March 21, 2011, Petitioners timely filed in the Supreme Court of the Muscogee (Creek) Nation (the "Supreme Court"): (a) a *Petition for Writ of Habeas Corpus*, (b) a *Joint Notice of Appeal*, and (c) a *Motion to Stay the Case Pending Appeal*. The legal authority for Petitioner's appellate filings are based the Nation's Supreme Court Rules of Appellate Procedure, Title 27, App. 2 of the Nation's Code (the "Appellate Rules"). Petitioners' filings are seeking appellate review of the District Court order and are challenging the legality of Petitioners' detention based on the same issues raised in Petitioners' motions to dismiss. The

right of appeal by a criminal defendant from a denial of a motion to dismiss the charges is authorized by Rule 2(B) of the Appellate Rules. The right of a habeas corpus review is authorized by Rule 27 of the Appellate Rules. The Appellate Rules also authorizes Petitioners to seek a stay of the District Court order pending final adjudication of the appeal under Rule 16(B).

10. On March 22, 2011, Supreme Court Justice Houston Shirley issued an order summarily rejecting the *Petition for Writ of Habeas Corpus* without a hearing and in contravention to the Supreme Court's own rules for consideration of such actions.

11. On March 23, 2011, Respondent Patrick Moore set Petitioners' cases for trial starting April 25, 2011, at 9:00 a.m., even though Moore was aware of the pending appeal and the request for a stay of the trials.

12. As of the date of filing of this motion, the Supreme Court has not issued any order or ruling in regards to Petitioners' motion to stay or any other recognition of Petitioners' Rule 2 appeal.

13. Petitioners are filing their petition in this Court on April 13, 2011, and will expeditiously have Respondents served with proper process.

ARGUMENT AND AUTHORITIES

Petitioners are individuals who were charged on or about October 29, 2010, with various theft-related crimes in the District Court. All Petitioners, with the exception of Petitioner Joseph Domebo¹, are members of the Muscogee (Creek) Nation (the "Nation"). Petitioners are not government officials for the Nation, nor are they directly involved in any of the Nation's internal political unrest within the Tribal government. Petitioners are not seeking federal court review over any internal Tribal dispute. In summary, Petitioners are being criminally held and prosecuted by individuals who are not lawful officials of the Nation and in a court not recognized by the Nation; further, Petitioners are facing charges based on activities that

¹ Petitioner Joseph Domebo is a member of the Kiowa Tribe of Oklahoma.

occurred outside the jurisdiction of the Nation. Petitioners have exhausted their legal challenges in the Tribal forums. Petitioners do not ask this Court for an interpretation of substantive Tribal law in support of their claims; rather, the Nation, by and through its constitutional processes, has already spoken to these issues and has affirmed Petitioners' contentions. Yet, these prosecutions continue against Petitioners without regard to their civil rights and without regard to the limits of Tribal criminal jurisdiction under federal law.

Petitioners are entitled to an emergency hearing and for injunctive relief to be granted since the underlying root of Petitioners' claims in support of the Writ is based on ongoing violations of Petitioners' fundamental due process rights and because the prosecution of crimes allegedly occurring outside of the Nation's Indian country and jurisdiction is patently violative of federal law. These are matters of federal law which can and should be addressed by this Court without this Court getting involved in any internal Tribal affairs or interpreting substantive Tribal law. Until a determination can be made as to the merits of Petitioners' claims, this Court should enjoin the continued prosecutions of Petitioners and enjoin the criminal trials set to begin in Okmulgee, Oklahoma on **April 25, 2011**, starting at **9:00 a.m.**

The preliminary injunction standard used in the Tenth Circuit, and commonly used in other federal circuits as well, requires Petitioners to show that (1) they have a substantial likelihood of prevailing on the merits; (2) they will suffer irreparable harm unless the preliminary injunction is issued; (3) the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) the preliminary injunction if issued will not adversely affect the public interest. *Prairie Band of Potawatomi Indians vs. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). If Petitioners can establish the last three factors, the first factor becomes less strict. Instead of showing a substantial likelihood of success, Petitioners need only establish that there are "questions going to the merits . . . so serious, substantial, difficult and doubtful as to make

the issue ripe for litigation and deserving of more deliberate investigation.” *Id.* at 1246-47 (*quoting Federal Lands Legal Consortium vs. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999)).

I. IRREPARABLE HARM FACTOR

The Petitioners are facing immediate and irreparable harm by having their due process rights infringed upon by the unlawful prosecutions in a purported tribal court not recognized by the tribal government itself. It is quite clear that Petitioners are facing criminal trials against them, and that, if they are adjudicated guilty, Petitioners could face severe incarceration and monetary fines against them.

On or about October 29, 2010, Respondent Wiemer, without any lawful prosecutorial authority for the Nation, filed criminal complaints against Petitioners. Petitioners had to go through arraignment, had to post a bail bond and hire an attorney to defend themselves in the criminal cases. A trial has been scheduled by Respondent Patrick Moore for all Petitioners, starting April 25, 2011, at 9:00 a.m.

As described in the underlying Petition filed in this case, there have been numerous failures by the Respondents in following and abiding by laws of the Nation and federal law regarding the limits of tribal criminal jurisdiction. Since the alleged crimes did not occur within the boundaries of the Nation’s Indian country, there should not have been any investigation, charges, or prosecution engaged by the Nation on these alleged crimes at all. Federal law is clear on the limits of tribal jurisdiction; yet, Respondents took it upon themselves to ignore the limits of tribal jurisdiction when they decided to pursue criminal charges against Petitioners. Moreover, when the Nation failed to recognize Respondents as having any authority to act on behalf of the Nation, the Respondents failed to respect and adhere to the rule of the law within the Nation’s government by continuing to act as though they are lawful officials for the Nation.

Respondents are facing immediate and irreparable harm by having their challenges to these prosecutions ignored by Respondents and the Supreme Court for the Muscogee (Creek) Nation. The Supreme Court has failed to abide by its own rules that would allow for Petitioners to challenge the authority of the District Court. However, rather than allow Petitioners' appeal to be properly docketed, and rather than issuing a stay of the underlying District Court cases while the appeal is pending, the Supreme Court does nothing regarding Petitioners' appeal as a matter of right. It is clear from the Supreme Court's denial of Petitioners' habeas petition (*see Exhibit "12" of Petitioners' Petition for Writ of Habeas Corpus Under the Indian Civil Rights Act, 25 U.S.C. § 1303*) that the Supreme Court would prefer to have Petitioners go through a trial first before filing a habeas petition, even though the Supreme Court's own rules do not require it. (*see Rule 27 of the Appellate Rules, Exhibit "11"*).

Unless Petitioners' criminal trials starting April 25, 2011, are enjoined before consideration of the merits of the petition, Petitioners will have to go through the hardships, expense, anxiety, and interruption of their daily lives and freedoms by having to prepare for a trial in a court that is non-existent under the Nation's laws, and by individuals who have no lawful authority to act on behalf of the Nation. Further, Respondents have made it abundantly clear that Petitioners' concerns of unfairness and partiality against them will be ignored, so Petitioners do not anticipate the trial against them to be conducted in a fair and just manner. These concerns are justified, based on Respondents' actions so far. An injunction against the April 25, 2011, and continued prosecution of Petitioners is warranted.

II. BALANCE OF HARMS FACTOR

Second, the balance of harms weighs in favor of the Petitioners. As already stated, Petitioners are facing criminal prosecution that could result in incarceration, heavy fines and costs, a criminal record, and public scrutiny and embarrassment. If Petitioners are adjudged

guilty, there is no guarantee that Petitioners will be able to remain free on bond pending any appeal. Respondents and the Supreme Court have already ignored clear and direct rules of law regarding the limits of tribal criminal jurisdiction and the rule of law regarding individual due process rights and civil liberties. Unless this Court enjoins the prosecution and upcoming trial, there is a strong likelihood that Respondents will continue to ignore the rule of law, all to the detriment of Petitioners' livelihood and their federal constitutional rights.

Respondents will suffer no harm if an injunction is granted. Respondents are not authorized to speak on behalf of the Nation in any official capacity anyway, so they cannot claim any harm in not being to prosecute Respondents. The balance of harms is in favor of Petitioners.

III. PUBLIC INTEREST FACTOR

The public interest would be best served if the status quo were preserved while the Court considers the merits of the habeas petition. Further, the citizens of the Muscogee (Creek) Nation deserve to have lawful officials of the Nation act on their behalf. As fully outlined in the Petition, Respondents are not recognized officials authorized to act on behalf of the Nation. By continuing to assert authority where is there none, they act *ultra vires*, which could result in Respondents facing personal liability and causing their purported official acts on behalf of the Nation to come into question. The public is not served when people are prosecuted and condemned in a court that has no authority bestowed upon it by the people of the government. The public is not served when people are prosecuted and condemned by individuals who do not have authority to carry out official acts on behalf of the people of the government. The public interest factor weighs in favor of Petitioners.

This Court should enjoin Respondents from continuing with the prosecution of Petitioners and any trial, including the April 25, 2011, trial, in order for the Court to fully evaluate the merits of Petitioners' claims.

IV. SUCCESS ON THE MERITS

A party that successfully establishes the first three factors is not required to demonstrate a substantial likelihood of success on the merits. *Pierce*, 253 F.3d at 1253. In that case, a party only has to prove there are “questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.” *Federal Lands Legal Consortium vs. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). Notwithstanding this rule, Petitioners maintain they have demonstrated a substantial likelihood of success on the merits.

Based on the arguments asserted herein, and by incorporating those arguments and background information (including exhibits) asserted in the Petition, the Petitioners believe they can demonstrate a likelihood of success on the merits, or at the very least, have put forth questions “so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.” *Federal Lands Legal Consortium vs. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). Until a determination can be made as to the merits of Petitioners’ claims, this Court should enjoin the continued prosecutions of Petitioners, and enjoin the criminal trials set to begin in Okmulgee, Oklahoma on **April 25, 2011**, starting at **9:00 a.m.** and any other trial or hearing based on the merits of Petitioners’ charges.

REQUEST FOR RELIEF

WHEREFORE based on the matters presented herein, Petitioners Jeff Fife, Ted Tiger, Jess Harjochee, Cecil Harry, Rodney Luellen, Jeanetta Carr, Joseph Domebo, Cecilia Wittman, Jennie Goodell, and Daniel Wind respectfully pray this Court enter an order in favor of the Petitioners as follows:

PETITIONERS’ EMERGENCY MOTION FOR- 9
TEMPORARY RESTRAINING ORDER AND
FOR PRELIMINARY INJUNCTION AND
OPENING BRIEF IN SUPPORT

Pitchlynn & Williams, PLLC
124 East Main Street
Norman, Oklahoma 73069
(405) 360-9600

- (a) Issue immediate injunctive relief (either a Temporary Restraining Order without a hearing, or, alternatively, after notice to Respondents and a hearing, a Preliminary Injunction) restraining and prohibiting Respondents Roderich Wiemer and Marcy Moore, all their purported officers, employees, agents and those acting in concert or participation with them, in any capacity, from acting in any prosecutorial capacity against Petitioners, including, without limitation, filing any pleadings, motions, or requests with any court regarding alleged criminal charges against Petitioners or taking any action in furtherance of imposing any criminal liability against Petitioners, pending a final determination by this Court as to the merits of Petitioners' claims, or until further Order of this Court;
- (b) Issue immediate injunctive relief (either a Temporary Restraining Order without a hearing, or, alternatively, after notice to Respondents and a hearing, a Preliminary Injunction) restraining and prohibiting Respondent Patrick E. Moore, all his purported officers, employees, agents and those acting in concert or participation with him, in any capacity, from acting in any judicial capacity against Petitioners, including, without limitation, considering and ruling upon any pleadings, motions, or requests regarding alleged criminal charges against Petitioners or taking any judicial action in furtherance of imposing any criminal liability against Petitioners, pending a final determination by this Court as to the merits of Petitioners' claims, or until further Order of this Court;
- (c) Issue immediate injunctive relief (either a Temporary Restraining Order without a hearing, or, alternatively, after notice to Respondents and a hearing, a Preliminary Injunction) restraining and prohibiting the commencement of Petitioners' criminal trials on April 25, 2011, and/or any other hearing or trial before or after that date for the purpose of determining the merits of any criminal liability

against Petitioners, pending a final determination by this Court as to the merits of Petitioners' claims, or until further Order of this Court;

- (d) An award of attorneys' fees and costs in favor of Petitioners, and;
- (e) All other relief consistent with Petitioners' requests for relief, legal or equitable, available under law.

Respectfully submitted this 13th day of April 2011.

PITCHLYNN & WILLIAMS, PLLC



O Joseph Williams, OBA # 19256
Stephanie Moser Goins, OBA # 22242
P.O. Box 427
124 East Main Street
Norman, Oklahoma 73070
Telephone: (405) 360-9600
Facsimile: (405) 447-4219
Email: jwilliams@pitchlynnlaw.com
smgoins@pitchlynnlaw.com

ATTORNEYS FOR PETITIONERS