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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOHN P. ANDERSON, in his official capacity as the Sheriff of Madera County, and individually,

Plaintiff(s),

v.

JACK DURAN, JR., et al.,

Defendants.

Case No. 3:13-CV-04825-RS

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: July 11, 2014
Time: 10:00 a.m.
Ctrm: 3
Judge: Hon. Richard Seeborg

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I. INTRODUCTION

Plaintiff's entire Complaint was based on a purported tribal court lawsuit, the Lewis Faction Lawsuit, and purported order against the Madera County Sheriff ("August 6 TRO"). However, Plaintiff himself alleged that the Lewis Faction Tribunal was not a legitimate tribal court, and therefore cannot base subject matter jurisdiction on *National Farmers Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985), which established that federal courts possess jurisdiction to adjudicate the outer bounds of an actual tribal court's subject matter jurisdiction in certain cases. Moreover, both the Lewis Faction Lawsuit and August 6 TRO – the entire basis of this action – were vacated and dismissed on November 20, 2013, and thus Plaintiff has acquired all of the relief sought in the Complaint. Therefore, there exists no live case or controversy, and the instant action is moot.

Plaintiff seeks an expansive order in the absence of facts, intended to apply to every possible permutation of facts that may (or may not) arise in the future. Plaintiff argues that the Supreme Court in *Nevada v. Hicks*, 533 U.S. 353, 372 (2001), has established that a tribal court can never exercise jurisdiction over a state official under any set of facts. However, *Hicks* simply does not stand for such a wholesale prohibition on tribal court jurisdiction. In fact, the *Hicks* Court itself not only recognized that the holding was limited to the facts before it, but it recognized that a tribal court may be able to assert jurisdiction over a state official in some circumstances. In the absence of a live case or controversy, Plaintiff, according to his counsel, seeks a wide-reaching order concerning "whether or not any Tribal Court, however constituted, by whatever Judge appointed, by whatever faction in place, in vogue at the moment, under whatever BIA order in effect, or not, doesn't have any jurisdiction to restrain the activities of the Sheriff." Transcript of Proceedings, at 21:10-16 (Feb. 20, 2014). It is not for the federal courts, however, to "make law, nor to waste their limited resources, simply to satisfy a litigant's curiosity or a naked desire for vindication." Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3533.

Even if all of the facts alleged by Plaintiff were true and undisputed, the Court would still lack jurisdiction over this case because any order regarding the Lewis Faction Tribunal or Lewis Faction Lawsuit would require this Court first to determine whether the Lewis Faction was the Tribal

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government during the times relevant to the Complaint. Because federal courts lack jurisdiction to adjudicate such intra-Tribal disputes, this Court cannot grant Plaintiff's motion for summary judgment.

Further, in the absence of a case or controversy, Plaintiff attempts to create the appearance of a case or controversy by pointing to the fact that an intra-Tribal dispute exists. *See, e.g.*, Declaration of Sheriff Anderson, at ¶ 13 ("[T]he dismissal without prejudice, does not overcome or alter the earlier existing tribal leadership and the tensions arising therefrom."). At the same time, however, the County of Madera has taken steps to delay a decision that would address the public exigency caused by the intra-Tribal dispute in the very forum with jurisdiction over the matter, the Interior Board of Indian Appeals ("IBIA"), communicating to the IBIA that the circumstances surrounding the intra-Tribal dispute do not require an immediate decision by the Department of the Interior.[1] *See See* Letter, dated March 6, 2014, from Madera County Supervisor Tom Wheeler to the Interior Board of Indian Appeals, Declaration of James Qaqundah in support of Defendants' Opposition to the MSJ ("Qaqundah Declaration"), Exhibit A. In any case, the existence of an intra-Tribal dispute itself does not create a federal cause of action and, even if a federal cause of action existed, Plaintiff did not request any such relief in his Complaint relating to such dispute. Thus, Plaintiff would either need to file a new complaint or amend his current complaint if he wanted an order regarding the intra-Tribal dispute. Moreover, Plaintiff has not identified a federal cause of action, in either his Complaint or MSJ, that would authorize the Court to enjoin Defendants from announcing their political positions in public forums, such as newspapers, or from petitioning the Sheriff for redress of their grievances.[2]

Defendants appreciate that the Madera County Sheriff is in a difficult position due to the intra-Tribal dispute, as are the Tribe's legitimate Tribal government officials – who are currently

[1] The Department of the Interior, through the BIA, has the authority and responsibility to recognize a tribal government for government-to-government purposes. *See Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983). During an intra-tribal dispute, the BIA must either defer to a lawful resolution of the dispute under tribal law, if one exists, or recognize a governing body on an interim basis, as the Pacific Regional Director did in this case.

[2] There may be a cause of action under state law for the Sheriff's office being "inundated with letters, emails and telephone calls" from the Lewis Faction, Ayala Faction, Reid Faction or any other group of individuals, such as a claim for nuisance. Anderson Decl., at ¶ 22. However, such a claim would not constitute a federal cause of action. Further, Plaintiff did not include such cause of action in his Complaint.

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locked out of the Tribe's buildings – and the majority of Tribal members –who have had their Tribal services terminated and/or have otherwise been retaliated against. Defendants also appreciate that Plaintiff is obligated to enforce California state criminal law under Public Law 280. MSJ (Dkt. No. 160), at 18. However, this case is not about the Sheriff's general police power and responsibilities under Public Law 280 or otherwise. If Plaintiff seeks an order delineating his general law enforcement responsibilities and liabilities for his actions or inactions, he must file a complaint seeking such relief. The fact that no federal cause of action exists to provide the Sheriff a wholesale release from any liability for his hypothetical "efforts to keep the peace," MSJ (Dkt. No. 160), at 18, does not permit Plaintiff to obtain an advisory opinion in this action where no live case or controversy exists.

Accordingly, the Motion for Summary Judgment should be denied and, because this Court lacks subject matter jurisdiction, the Court should dismiss the action in its entirety.

II. FACTS

1. Plaintiff mischaracterizes and omits facts material to the order he seeks.

Plaintiff's Motion for Summary Judgment (Dkt. No. 160) ("MSJ") mischaracterizes certain disputed allegations as undisputed facts. In addition, as discussed more fully in subsection *III.B* below, Plaintiff's MSJ omits several material facts that would be necessary for the Court to weigh prior to issuing the order sought by Plaintiff, including facts that would be necessary to consider whether a tribal court could validly assert jurisdiction over the Sheriff if in fact such a tribal court action existed. These mischaracterizations and omissions constitute triable issues of material facts because Plaintiff cannot be entitled to judgment as a matter of law without such facts being established.

Plaintiff claims that it "is undisputed that Defendants failed to mediate their claims regarding law enforcement with the County prior to filing the Lewis Faction Lawsuit *as required by the 2007 MOU and Settlement Agreement* [and] Judge Fogel's Order." MSJ (Dkt. No. 160), at 4 (emphasis added). Defendants dispute Plaintiff's allegation that the 2007 MOU, Settlement Agreement, and Judge Fogel's Order required the Lewis Faction to participate in the mediation procedures of those

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agreements simply because their complaints implicated "law enforcement." As discussed more fully in *Section III.C.2 below*, the Lewis Faction Lawsuit did not allege that Plaintiff had breached the 2007 MOU or Settlement Agreement, and it did not attempt to enforce any provision of the agreements against the Sheriff. Thus, the Lewis Faction Lawsuit did not implicate or otherwise give rise to an action under the 2007 MOU, Settlement Agreement, or Judge Fogel's Order.

Plaintiff further attempts to characterize Defendants as admitting that a controversy exists in this case. MSJ (Dkt. No. 160), at 5 ("Defendants admit that a controversy exists . . . as to [whether] the Lewis Faction Tribunal has jurisdiction over Plaintiff . . . ."). In fact, Defendants argue that no case or controversy exists in this case, and therefore the case must be dismissed for lack of subject-matter jurisdiction. *See* Memorandum of Points and Authorities in Support of Defendants' Motion for Judgment on the Pleadings (Dkt. No. 191) ("MJOP"), at 18-23; *see also* discussion *Section III.C.3) infra.*

2. Evidentiary Objections

Plaintiff includes many facts that are irrelevant to the instant action. While the fact that an intra-Tribal dispute exists provides a backdrop for the material facts in this case – the Lewis Faction Lawsuit and its subsequent dismissal – the intra-Tribal dispute is not the basis of Plaintiff's claims in his Complaint. Thus, the details of the intra-Tribal dispute are irrelevant. The majority of the Declaration of Madera County Sheriff John P. Anderson in Support of Plaintiff's Motion for Summary Judgment (Dkt No. 162) ("Anderson Declaration") concerns the intra-Tribal dispute, and not the facts of this action itself. Specifically, the Anderson Declaration is geared toward Plaintiff's opinion that "there is a need for a federal court order to determine occupancy and control of the Casino and Headquarters." Anderson Declaration (Dkt. No. 162), at p. 16. It is well-established that this Court cannot issue an order determining which Tribal faction is entitled to occupancy and control of the Casino or Headquarters. Thus, the majority of the Anderson Declaration is irrelevant. Specifically, paragraphs 17 through 30 and paragraphs 34 through 53, which deal with the intra-Tribal dispute, are irrelevant. Furthermore, several statements in the Anderson Declaration are speculation or otherwise not based on personal knowledge (paragraphs 6, 8, 9, 12, 14, 15, 16, and

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50); are based on hearsay (paragraphs 24, 34, 35, and 39); or are legal argument or conclusions (paragraphs 12, 14, 15, 49, and 51). Accordingly, the majority of the Anderson Declaration is inadmissible. For this reason, pursuant to local rule 7-3(a), Defendants respectfully request that the Court strike the Anderson Declaration (Dkt No. 162) in its entirety or, in the alternative, that the Court find inadmissible those paragraphs described above.

III. ARGUMENT

A. Legal Standard

Summary judgment is only appropriate where there are no triable issues of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. Pro. 56; *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the burden of establishing that there are no triable issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the burden then shifts to the non-moving party to show that there is a genuinely disputed fact. Fed. R. Civ. Pro. 56(c); *Celotex*, 477 U.S. at 324. Further, the court must draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If there are no triable issues of material fact, the moving party must still establish that it is entitled to judgment as a matter of law. *Addisu*, 198 F.3d at 1134. In this case, there are triable issues of material fact and, even if there were no issues of fact, Plaintiff would not be entitled to judgment as a matter of law.

B. Even if this Court had jurisdiction, summary judgment is inappropriate because there is no blanket prohibition of tribal court jurisdiction over state officials.

Assuming *arguendo* that the Lewis Faction Tribunal was legally a Tribal court, that *National Farmers* therefore provided jurisdiction over this case, and that the instant action were not moot, summary judgment would not be appropriate because judgment in this case would require a factual inquiry.

As Plaintiff himself acknowledges, a federal court action challenging a tribal court's jurisdiction over a non-Indian requires an analysis under *Montana v. United States*, 450 U.S. 544 (1981). Under *Montana*, an Indian tribe can assert jurisdiction over non-Indians where necessary to

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protect tribal self-government or to control internal relations. *Montana*, 450 U.S. at 564. Specifically, the *Montana* Court established two exceptions for when an Indian tribe can exercise its inherent jurisdiction over a non-Indian in Indian country, commonly referred to as the *Montana* exceptions: (1) to regulate activities of non-members who enter consensual relationship with the tribe or its members, as by commercial dealings or intergovernmental agreements; and (2) to regulate conduct of non-Indians that threatens or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66.

Here, there are several disputed facts that would affect the *Montana* analysis. These facts include the extent to which the intergovernmental agreement may constitute a consensual relationship between the County and the Tribe sufficient to satisfy the first *Montana* exception. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 372 (2001) ("Whether contractual relations between State and tribe can expressly or impliedly confer . . . adjudicative jurisdiction as well are questions that may arise in another case, but are not at issue here."). In addition, several disputed facts concern the extent to which the Sheriff's alleged conduct threatened or directly affected the political integrity and welfare of the tribe, particularly given that the competing factions disagree over whether the Lewis Faction was in fact the Tribe's governing body.[3]

Plaintiff attempts to forego a *Montana* analysis altogether. Instead, Plaintiff suggests that such factual inquiry is not necessary because, according to Plaintiff, "the United States Supreme Court unanimously held that tribal courts have no jurisdiction over state law enforcement officials" in *Nevada v. Hicks*. MSJ (Dkt. No. 160), at 13. This is a gross mischaracterization of *Hicks*. In fact, the Supreme Court's ruling was *not* a wholesale prohibition on tribal courts' jurisdiction over state officials applicable to every possible factual scenario. Rather, it was a ruling specific to the facts and nature of the case before the Court.

[3] Because the Court lacks jurisdiction to determine whether the Lewis Faction was the Tribe's legitimate Tribal government during the times relevant to the Complaint, it would not be able to determine the extent of the threat to the Tribe's political integrity, economic security, and health and welfare.

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The Supreme Court itself recognized that the analysis of an Indian tribe's jurisdiction "requires an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Hicks*, 533 U.S. at 362. Ultimately, under the facts presented in *Hicks*, the Court concluded "that tribal *authority to regulate* in executing *process related to the violation, off reservation, of state laws is not essential to tribal self-government* or internal relations—"the right to make laws and be ruled by them,'" and that the "*State's interest in execution of process is considerable*, and . . . it *no more impairs the tribe's self government than federal enforcement of federal law* impairs state government." *Hicks*, 533 U.S. at 364 (emphases added).

Thus, the *Hicks* Court expressly limited the applicability of *Hicks* to the facts before it and cautioned against applying the holding to a different set of facts as "a great overreaching." *Hicks*, 533 U.S. at 372. The Court repeatedly rejected the proposition that the decision should be applied to issues raised by any circumstances other than that presented in that case. The issues left unanswered by *Hicks* include, but are not limited to: (1) the question of tribal court jurisdiction over nonmember defendants in general, *Hicks*, 533 U.S. at 386 (Souter, J., concurring) (quoting majority opinion); (2) whether state officials engaged on tribal land in a venture or frolic of their own are subject to tribal control, *Hicks*, 533 U.S. at 386 (Souter, J., concurring) (quoting majority opinion); (3) whether contractual relations between State and tribe can expressly or impliedly confer tribal regulatory jurisdiction over nonmembers, *Hicks*, 533 U.S. at 372; (4) whether such contractual relations can be effective to confer adjudicative jurisdiction, *Hicks*, 533 U.S. at 372; (5) whether an Indian tribe's adjudicative jurisdiction correlates to its legislative jurisdiction, *Hicks*, 533 U.S. at 358; (6) and whether a state officer would be entitled to immunities when acting without a warrant on an Indian reservation, *Hicks*, 533 U.S. at 374. Thus, *Hicks* cannot be read as a blanket prohibition on tribal court jurisdiction over state officers.

Leading scholars in the field of Indian law agree that *Hicks* was intended as a narrow decision. "Tribal courts' jurisdiction to adjudicate matters arising in Indian country is broad, encompassing all civil and criminal matters absent limitations imposed by lawful federal authority." F. Cohen, *Handbook of Federal Indian Law* 219 (2012). "*In that sense, tribal courts are more like*

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state courts of general jurisdiction than like federal courts."[4] *Id.* Thus, "in light of previous Supreme Court acknowledgment of tribal authority to adjudicate federal causes of action, even where no federal statute 'proclaim[s]' it, *Hicks* should not be viewed as supporting a denial of that authority except in cases raising section 1983 claims against state officials under factual circumstances closely resembling those of *Hicks*." Cohen, *supra*, at 240; *see also* William C. Canby, Jr., *American Indian Law in a Nutshell* 326 (5th ed. 2009) (stating that *Hicks* "should not be read too categorically."). Accordingly, a *Montana* analysis is necessary under the specific facts of each case.

At best, several facts and issues distinguish this case from *Hicks*, and this case would present one or more issues left open by *Hicks*. For example, a fact determinative in *Hicks* was the Court's finding that the Indian tribe's self-government and internal relations were not sufficiently or at all implicated. The Lewis Faction's allegations in the Lewis Faction Lawsuit – allegations concerning the Sheriff's unlawful interference in the Tribe's internal governance dispute – involved allegations of a considerable intrusion into matters of the Tribe's self-government and internal relations. Thus, if the Lewis Faction was in fact the Tribe's legitimate government, it is difficult to imagine a case where the self-government of the Tribe could be more implicated.

In this case, it is Plaintiff that argues that the action arises under the 2007 MOU and Settlement Agreement, intergovernmental agreements between the Tribe and the County. While Defendants dispute that point, the *Hicks* decision itself states that the existence of such an intergovernmental agreement may "expressly or impliedly confer . . . adjudicative jurisdiction" to a tribal court. *Hicks*, 533 U.S. at 372. Thus, Plaintiff's own allegations support the conclusion that the Sheriff may be subject to tribal court under certain factual circumstances.[5]

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[4] While Justice Scalia commented that tribal courts do not have unlimited jurisdiction and therefore it may be a slight misnomer to call them courts of general jurisdiction, it is notable that "state courts, the quintessential courts of general jurisdiction, may be denied jurisdiction over certain matters under federal law without losing their status as courts of general jurisdiction." Cohen, *supra*, at 219.

[5] Plaintiff cites to a Ninth Circuit case *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998), for the proposition that an intergovernmental agreement acts to divest a tribal court of jurisdiction over a state officer. However, in the agreement considered by the Ninth Circuit in *Allen*, the Nez Perce Indian Tribe had conferred criminal jurisdiction to the State over Indians living on the reservation. *Id.* at 511, 513. Thus, *Allen* is distinguishable from this case, where the 2007 MOU did not provide any authority to the County or the Sheriff. *Allen* is further distinguishable because, in that case, the tribal court action concerned the state officer's enforcement of state criminal law as contemplated in the intergovernmental

Further, in *Hicks*, "it was essential to the Court's holding that state officers were investigating an off-reservation crime, which fell within the state's jurisdiction." Canby, *supra*, at 99. In fact, the Court specifically found the State's interest in execution of process concerning off-reservation crimes to be "considerable." *Hicks*, 533 U.S. at 364. In this case, there was no off-reservation crime, there was no warrant, and whether there was a "considerable" off-reservation state interest is at best a question of fact.

In *Hicks*, the tribal court action concerned the state official's enforcement of ***state*** criminal law, actions taken in the performance of the state official's official duties. Here, it appears that the Lewis Faction Lawsuit did not concern Plaintiff enforcing ***state*** criminal law. The Lewis Faction Lawsuit concerned one Tribal faction suing a state officer for allegedly misapplying Tribal law to assist another Tribal faction to unlawfully seize control of the Tribe's gaming operation and Tribal offices. Such actions arguably are *ultra vires*, not taken in performance of the Sheriff's official duties, over which a tribal court may have adjudicatory jurisdiction under *Hicks*. *See Hicks*, 533 U.S. at 386 (Ginsburg, J., concurring) (quoting majority opinion); *Hicks*, 533 U.S. at 372.

In addition, *Hicks* involved an action by an individual Tribal member against a state official for the past damage of the tribal member's property under both tort and civil rights theories. The Supreme Court's holding concerned the tribal court's jurisdiction to adjudicate such tort or Section 1983 claims, specifically. Here, the Lewis Faction Lawsuit involved neither tort nor Section 1983 claims against the Sheriff. Further, the Lewis Faction Lawsuit did not seek relief related to the Sheriff's past actions, but rather prospective injunctive relief. It is well-established that "[f]ederal courts have authority to determine . . . whether a tribal court ***has exceeded*** the limits of its jurisdiction." *County of Lewis v. Allen*, 163 509, 513 (9th Cir. 1998) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and citing *National Farmers*, 471 U.S. 845 (1985)). Federal courts do not have jurisdiction to determine whether a tribal court, assuming that the Lewis Faction Tribunal

agreement. Here, in contrast, the Lewis Faction Lawsuit was unrelated to the 2007 MOU or any provisions therein. Finally, after *Allen* was decided, the Supreme Court expressly stated that contractual relations between a state and an Indian tribe may "expressly or impliedly confer . . . adjudicative jurisdiction" to a tribal court. *Hicks*, 533 U.S. at 372.

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is a tribal court, might possibly exceed the limits of an Indian tribe's jurisdiction in the future. Thus, even under *Hicks*, the order sought by Plaintiff would require a *Montana* analysis of a live case or controversy.

Worse for Plaintiff, however, is that there are no facts here to which the Court can apply *Montana* or compare *Hicks* because, as Plaintiff has all but admitted, there is no factually specific case or controversy. Rather, in a complete vacuum, Plaintiff seeks a blanket announcement – regardless of any facts or balancing of State, federal, and tribal interests – that the Sheriff cannot be sued in <u>any</u> capacity for <u>any</u> hypothetical reason in a tribal court.[6] *See* MSJ (Dkt. No. 160), at 12; Transcript of Proceedings, at 21:10-16 (Feb. 20, 2014). Neither *Hicks* nor any other case supports such a wholesale prohibition on tribal courts from exercising jurisdiction over non-Indians, including state officials, on their Tribal lands without a factual inquiry and full consideration of "*Montana*'s principles." *Hicks*, 533 U.S. at 388. In addition, the order sought by Plaintiff is solely about the meaning or effect of the law, "abstracted from any concrete actual or threatened harm," and it therefore falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). Accordingly, Plaintiff's Motion for Summary Judgment must be denied, and this action must be dismissed.

C. This Court lacks subject matter jurisdiction.

Even if *Hicks* supported Plaintiff's argument, however, this Court lacks subject matter jurisdiction to issue such an order. Plaintiff alleges that he "established that jurisdiction was proper

[6] To the extent Plaintiff is seeking an order enjoining Defendants from exercising regulatory jurisdiction over the Sheriff, *see* MSJ (Dkt. No. 160), at 12:13-14, such an order is inappropriate. First, *Hicks* itself states that it is limited to an Indian tribe's adjudicatory jurisdiction, not legislative or regulatory jurisdiction, and that legislative and regulatory jurisdiction may extend beyond an Indian tribe's adjudicatory jurisdiction. *See Hicks*, 533 U.S. at 358. Thus, neither *Hicks* nor any other case supports such an injunction, particularly an advisory order in the absence of a case or controversy, related to the legislative jurisdiction of an Indian tribe. In addition, such an order again would require the Court first adjudicate the intra-Tribal dispute, over which this court lacks jurisdiction, because there is no federal cause of action to support a claim against individual citizens purporting to regulate a state officer. Further, there is no "active dispute" over this issue, as Plaintiff claims, because, while Defendants may assert their political or legal position in a public forum, no party is attempting to subject Plaintiff to Tribal law in a tribunal or otherwise. Further, as this Court has observed, this action does <u>not</u> concern the hypothetical questions concerning "on a much grander scale - - the rights and obligations vis-à-vis a duly constituted Sheriff and a duly constituted Tribal Government." Transcript of Proceedings, at 22:9-12 (Feb. 20, 2014).

before this Court." MSJ (Dkt. No. 160), at 2. In fact, the subject-matter jurisdiction is not established, and is disputed by Defendants. Plaintiff's allegation of jurisdiction rests upon two potential sources: (1) the federal common law jurisdiction established by the Supreme Court in *National Farmers* and its progeny, by which a federal court can review the outer bounds of a tribal court's jurisdiction over non-Indians; and (2) the continuing jurisdiction for the Northern District Court under the 2007 MOU and Settlement Agreement.

However, as Defendants have discussed more fully in the MJOP, neither of those potential sources of jurisdiction applies to this case. Moreover, invoking jurisdiction under either of these theories would require this Court to first adjudicate an intra-Tribal dispute, for which this Court lacks jurisdiction. *See* MJOP (Dkt. No. 191), at 11-13; *Ransom v. Babbitt*, 69 F.Supp.2d 141, 150 (D.D.C. 1999); *Alturas Indian Rancheria v. Salazar*, 2011 WL 587588, at *2 n.1 (E.D. Cal. Feb. 9, 2011).

1. *National Farmers* does not provide jurisdiction over the instant action.

As discussed more fully in the MJOP, this Court cannot invoke jurisdiction under *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) and its progeny because it cannot determine that the Lewis Faction Tribunal was a Tribal court or other Tribal entity during the times relevant to the Complaint. *See* MJOP (Dkt. No. 191), 11-13. As discussed previously, the BIA has never recognized the Lewis Faction as the Tribe's governing body. Moreover, Plaintiff's Complaint does not allege that the Lewis Faction Tribunal was a legitimate Tribal entity, but in fact alleges the opposite. Thus, it is far from undisputed that the Lewis Faction Tribunal was a tribal court. In addition, even if it was undisputed that the Lewis Faction Tribunal was a tribal court, Plaintiff would have had to exhaust his tribal court remedies. Defendants dispute Plaintiff's claim that he exhausted any such remedies. Therefore, summary judgment is inappropriate.

This Court lacks jurisdiction to determine whether the Lewis Faction Tribunal is a legitimate Tribal entity because such a determination would require the Court to adjudicate an internal Tribal leadership dispute. *See* MJOP (Dkt. No. 191), at 11-13; *Ransom v. Babbitt*, 69 F.Supp.2d 141, 150 (D.D.C. 1999); *Alturas Indian Rancheria v. Salazar*, 2011 WL 587588, at *2 n.1 (E.D. Cal. Feb. 9, 2011). In the absence of a determination of whether the Lewis Faction Lawsuit was a legitimate

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Tribal entity, Plaintiff seeks an order such as this: "*If there was a tribal court*, then that tribal court's jurisdiction over Plaintiff would be precluded *under any factual circumstance*." Specifically, Plaintiff's counsel has stated that the order Plaintiff seeks "is whether or not any Tribal Court, however constituted, by whatever Judge appointed, by whatever faction in place, in vogue at the moment, under whatever BIA order in effect, or not, doesn't have any jurisdiction to restrain the activities of the Sheriff. And that is the issue we bring to the Court." Transcript of Proceedings, at 21:10-16 (Feb. 20, 2014). Plaintiff's suggestion that tribal courts' jurisdiction over a state officer is precluded in every factual scenario is incorrect and discussed more fully in *Section III.B* above. Even before reaching the merits of such a statement, however, this Court cannot rule on the validity of a tribal court action where no such tribal court action exists. To do so would be purely advisory and offend the Constitution. *Hall v. Beals*, 396 U.S. 45, 48 (1969); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 213 (2000) (Scalia, J., dissenting) ("Because the requirement of a continuing case or controversy derives from the Constitution . . . it may not be ignored when inconvenient.").

Summary judgment is not appropriate unless the material facts are not in dispute. Here, it is not undisputed that a tribal court action exists. In fact, it is undisputed that no such tribal court action exists (even assuming *arguendo* that that the Lewis Faction Tribunal was a legitimate tribal court). For these reasons, Plaintiff cannot establish as a matter of law that *National Farmers* provides jurisdiction in this case.

2. This action does not arise under the 2007 MOU or Settlement Agreement.

As discussed more fully in the MJOP, this action does not arise under the 2007 MOU or Settlement Agreement. *See* MJOP (Dkt. No. 191), 14-17. Even if it did, this Court would only have continuing jurisdiction to apply, interpret, and enforce the terms of the 2007 MOU and Settlement Agreement.[7] *See Stipulation Re Settlement and Request for Continuing Jurisdiction, for Enforcement of Settlement Agreement; Order*, at 1:17-20.

[7] The 2007 MOU and Settlement Agreement were the result of a lawsuit filed by the Tribe against the County of Madera. *See Picayune Rancheria of Chukchansi Indians v. County of Madera*, Case No. 06-CV-07613-JF PVT (N.D. Cal. filed

As described in the MJOP, the 2007 MOU did not provide the Sheriff with any authority or responsibility to provide law enforcement to the Tribe's Rancheria.[8] MJOP (Dkt. No. 191), at 15. The only terms within the 2007 MOU and Settlement Agreement that are related to Law Enforcement are: (1) the County's obligation to have one full-time deputy to be available in the vicinity of the Tribe's gaming facility (2) the County's obligation to provide an average response time of less than twenty minutes; and (3) the Tribe's obligation to reimburse the County for all actual costs of this additional deputy. 2007 MOU, §§ 2.2, 2.3. Only the third provision creates an obligation of the Tribe.

Plaintiff has not alleged that the Tribe has failed to reimburse the County for actual costs of the additional deputy, and the Complaint does not seek to apply, interpret, or enforce that or any other provision of the MOU. In addition, the Lewis Faction Lawsuit did not relate to or seek to enforce the two provisions creating an obligation for the County. Even if the 2007 MOU was relevant to Plaintiff's Complaint, the Court cannot attribute the actions of the Lewis Faction to the Tribe without first adjudicating the intra-Tribal leadership dispute. *See* MJOP (Dkt. No. 191), at 11-13; *Ransom v. Babbitt*, 69 F.Supp.2d 141, 150 (D.D.C. 1999); *Alturas Indian Rancheria v. Salazar*, 2011 WL 587588, at *2 n.1 (E.D. Cal. Feb. 9, 2011). Accordingly, the instant case does not arise under the 2007 MOU or the Settlement Agreement.

3. This action is moot.

Finally, this Court lacks subject matter jurisdiction because the instant action is moot. Plaintiff argues that the instant action, which arose solely out of a purported tribal court action that has since been dismissed, is not moot despite the lack of a case or controversy because Defendants have reserved the right to sue the Sheriff for violations of federal law in a federal forum and because Defendants have asserted their political positions in public forums.

Dec. 13, 2006). The action, filed by the Tribe, sought injunctive relief prohibiting the County from unlawfully attempting to assert and exercise governmental jurisdiction over the Tribe's Rancheria, including the assessment of *ad valorem* taxes and land use regulations. *See id.*, Complaint. The litigation did not implicate law enforcement or the law enforcement provisions of the agreements.

[8] The recitals of the 2007 MOU, which observe that Plaintiff has certain authorities under Public Law 280, do not provide any authority to Madera County or the Sheriff.

Defendants have more fully addressed the merits of this action's mootness in the MJOP, and will not repeat the arguments in full. *See* MJOP (Dkt. No. 191), 18-23. In sum, there is no live case or controversy in this case, and therefore the action is moot and must be dismissed. The entire action here is premised on the existence of an action ("Lewis Faction Lawsuit") and a purported "temporary restraining order" ("August 6 TRO") against the Sheriff in the Lewis Faction Tribunal. Both the Lewis Faction Lawsuit and the August 6 TRO were vacated and dismissed on November 20, 2013. Thus, Plaintiff has obtained all of the relief sought in the Complaint. Accordingly, the action is moot and must be dismissed.

Nonetheless, in the only order sought by the Plaintiff in his MSJ relating to the Complaint, Plaintiff seeks a permanent injunction enjoining Defendants from taking any action to re-file or prosecute the Lewis Faction Lawsuit in a tribal court. However, while district courts have the inherent power to enter pre-filing orders against vexatious litigants under the All Writs Act, 28 U.S.C. § 1651(a), "Courts should not enter pre-filing orders with undue haste because such sanctions can tread on a litigant's due process right of access to the courts." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (citations omitted). For this reason, "such pre-filing orders are an extreme remedy that should rarely be used."[9] *Id.* (citations omitted). In order to justify such an order, the litigant's "claims must not only be numerous, but also be patently without merit." *Id.* at 1059. The Lewis Faction Lawsuit was the only action filed against the Sheriff by the Lewis Faction, in tribal court or otherwise. Accordingly, the "extreme remedy" of a pre-filing order is inappropriate here.

In his MSJ, Plaintiff argues that the instant action is not moot because the Lewis Faction Lawsuit was dismissed without prejudice, thereby reserving Defendants' right to sue Plaintiff. Further, Plaintiff complains that Defendants' action to dismiss the Lewis Faction Lawsuit was a "strategic choice." However, the relevant fact is not the reason Plaintiff acquired the relief he sought

[9] Before issuing such an injunction on invoking the judicial process, a court must first (1) ensure the parties are given adequate notice and an opportunity to oppose the order; (2) compile an complete record of the repeated litigation for review; (3) make substantive findings as to the frivolous or harassing nature of the litigant's actions; and (4) narrowly tailor the order. *Molski*, 500 F.3d at 1057.

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in the Complaint. Rather, the relevant facts are that Plaintiff has obtained the relief he sought and that this Court can no longer render effective relief. Further, Defendants have repeatedly advised Plaintiff and this Court that the reason, or strategy, for dismissing the action without prejudice, was to preserve Defendants' ability to file potential actions by the Tribe against Sheriff Anderson in *federal court* without having to spend resources on arguments over claim preclusion.[10] *See* MJOP (Dkt. No. 191), at 21. It is undisputed that Defendants have the right to sue a Sheriff in federal court for violations of federal law. *See, e.g.*, Transcript of Proceedings, at 8:12-14. Further, this Court has acknowledged that a party's reservation of its right to sue does not amount to a live case or controversy. Transcript of Proceedings, at 12:2-13:3 (Nov. 22, 2013).

Plaintiff also argues that the instant action – which is premised on the since-dismissed Lewis Faction Lawsuit – is not moot because of the "'wild fire' that is occurring on the Rancheria regarding the intra-tribal dispute." MSJ (Dkt. No. 160), at 7. Plaintiff suggests that, "[a]s with any raging wild fire, the exact ground over which it expands until extinguished changes somewhat in its form and intensity, but its existence remains." *Id.* Defendants do not dispute that the intra-Tribal leadership dispute remains live. But *this action is not about the intra-Tribal leadership dispute*. To maintain Plaintiff's metaphor, the actual subject matter of this dispute –the Lewis Faction Lawsuit– existed on distinct and unchanging ground, and that dispute has extinguished since the filing of the Complaint. Further, to the extent that the intra-Tribal leadership dispute is implicated in this action and would require resolution, this Court lacks jurisdiction.

An "actual controversy must be extant at all stages of review, *not merely at the time the complaint is filed*." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (internal citations omitted) (emphasis added). Plaintiff argues that the question is not whether the precise relief sought in the complaint is available, but rather "whether there can be any effective relief." MSJ (Dkt. No. 160), at 8 (citing

[10] Plaintiff relies solely on statements made by attorney David Osterfeld at the November 22, 2013 hearing, in which he did not explicitly state that the Lewis Faction Lawsuit would not be re-filed. However, since that time, the Lewis-Reid Faction has repeatedly advised the Court that, if any action will be filed against Sheriff Anderson, it will be a federal cause of action filed in federal court. *See* Transcript of Proceedings, at 32:8-33:3 (Feb. 20, 2014); MJOP (Dkt. No. 191), at 21. Plaintiff has ignored the several statements by Defendants made since. Accordingly, Plaintiff's continued reliance on Mr. Osterfeld's preliminary statements is misplaced.

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West v. Secretary of Dept. of Transp., 206 F.3d 920 (9th Cir. 2000)). However, any such effective relief must be related to the actual case or controversy; it cannot be based on a hypothetical set of facts. *Alvarez*, 558 U.S. at 93 (concluding that a dispute solely about the meaning or effect of the law, "abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'").

Here, Plaintiff has not identified any effective relief that can be granted related to the Lewis Faction Lawsuit. For example, this Court cannot order Defendants to dismiss or otherwise dispose of the Lewis Faction Lawsuit because that has already happened, and this fact is undisputed. Furthermore, even if the Lewis Faction Lawsuit had not been dismissed, this Court could not have jurisdiction under *National Farmers* unless it first determined that the Lewis Faction was the Tribe's legitimate Tribal government during the times relevant to the Complaint. Otherwise, the Court would be issuing an order concerning a hypothetical tribal court. Therefore, Plaintiff's request for an advisory opinion regarding a hypothetical tribal court action must be denied.

Plaintiff complains that, "In every public forum, Defendants challenge" the positions and actions taken by the Sheriff, creating "an intense environment of hostility and potential violence." MSJ (Dkt. No. 160), at 9. This action only concerns one forum, however, the since-dismissed Lewis Faction Lawsuit in the Lewis Faction's putative "court." If Plaintiff seeks an order restricting Defendants' political and other speech in public forums, he would need to file a complaint to that effect or amend his current complaint, though such a complaint would have several constitutional problems. Otherwise, they are irrelevant to the instant action.

Finally, in addition to the fact that this Court cannot issue an order concerning the intra-Tribal dispute, Plaintiff's complaint that the unresolved intra-Tribal dispute creates an urgent need for an order giving Plaintiff direction over the occupancy and control of Tribal assets is problematic because the County has, at the same time, attempted to delay such an order from the Department of the Interior, the forum with jurisdiction to recognize a Tribal government for federal purposes. The Interior Board of Indian Appeals ("IBIA") was considering whether the situation on and around the Rancheria was sufficiently hostile to constitute public exigency and justify placing the Regional

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Director's February 11, 2014 Decision into immediate effect. Such an IBIA order would have begun the process of resolving the tensions caused by the uncertainty of having no faction recognized by the federal government. Instead of communicating the difficulty caused by the uncertainty of the Tribe's governance to the IBIA, however, the County of Madera actively sought to delay an effective decision by the Department of the Interior, telling the IBIA that it was "not aware of any violence that has occurred at the Rancheria between or among any of the competing factions" and further "not aware of any irregularities concerning the operation of Tribal programs." *See* Letter, dated March 6, 2014, from Madera County Supervisor Tom Wheeler to the Interior Board of Indian Appeals, Qaqundah Declaration, Exhibit A. Accordingly, Plaintiff's attempt to justify an order unrelated to the Complaint by pointing to the tensions caused by the intra-Tribal dispute rings hollow. Moreover, the continuing intra-Tribal dispute also does not change the fact that Plaintiff has already acquired all the relief sought in the Complaint, and therefore that the instant action is moot. Accordingly, Plaintiff's Motion for Summary Judgment must be denied, and this action must be dismissed.

IV. CONCLUSION

There are several material facts that are either disputed or ignored by Plaintiff altogether. In either case, they are triable issues of fact that make summary judgment inappropriate. Even if all of the material facts were undisputed, however, Plaintiff would not be entitled to judgment as a matter of law. For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for Summary Judgment in its entirety, dismiss the instant action for lack of subject-matter jurisdiction, and vacate the preliminary injunction.

Respectfully submitted,

Dated this 19th day of May, 2014

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/s/ James Qaqundah
JAMES QAQUNDAH, Attorneys for Defendants:
The Picayune Rancheria of the Chukchansi Indians;
Chukchansi Economic Development Authority;
Chukchansi Indian Housing Authority

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Dated this 19th day of May, 2014 ROSETTE, LLP

/s/
ALEX LOZADA, Attorneys for Defendants: Reggie Lewis; Chance Alberta; Carl Bushman; Irene Waltz; Lynn Chenot; David Castillo; Melvin Espe; The Picayune Rancheria of the Chukchansi Indians; Chukchansi Economic Development Authority; Chukchansi Indian Housing Authority

Dated this 19th day of May, 2014 KLINEDINST PC

/s/ Gregory T. Fayard
GREGORY T. FAYARD, Attorneys for Defendants: Jack Duran, Jr. and Donna Howard, in their official capacities only

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Suzanne Balluff
Suzanne Balluff

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