JOHN D. KIRBY, ESQ. (SBN 066432)
LAW OFFICES OF JOHN D. KIRBY, A.P.C.
9747 Business Park Avenue
San Diego, California 92131
(858) 621-6244
(858) 621-6302 fax

MARGARET KEMP-WILLIAMS, County Counsel (SBN 123347)
COUNTY OF INYO
224 North Edwards Street, P.O. Box M
Independence, California 93526
(760) 878-0229
(760) 878-2241 fax

Fees Exempt, Gov't. Code §§ 6103 and 6103.5

Attorneys for Defendants COUNTY OF INYO; INYO COUNTY SHERIFF WILLIAM LUTZE; AND INYO COUNTY DISTRICT ATTORNEY THOMAS HARDY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BISHOP PAIUTE TRIBE, Plaintiff, vs. INYO COUNTY, a governmental entity, WILLIAM LUTZE, Inyo County Sheriff; and THOMAS HARDY, Inyo County District Attorney, Defendants.	Case No. 1:15-CV-00367 GEB-JLT REPLY OF DISTRICT ATTORNEY THOMAS HARDY TO OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE CLAIM UPON WHICH RELIEF CAN BE GRANTED JOINDER IN REPLIES BEING FILED BY COUNTY OF INYO AND SHERIFF WILLIAM LUTZE Date: June 2, 2015 Time: 9:30 A.M. Dept: To Be Assigned District Judge: Hon. Garland E. Burrell Magistrate: Hon. Jennifer L. Thurston Complaint Filed: 3/6/15 Trial Date: Not Set

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I

INTRODUCTION

In paragraph 1 of its pending Complaint for Declaratory and Injunctive Relief ("Complaint"), plaintiff Bishop Paiute Tribe ("Tribe") states:

> "1. *This action is for declaratory and injunctive relief* by the Bishop Paiute Tribe ("Tribe"), a federally recognized Indian Tribe, *against Inyo County, the Inyo County's (sic) Sheriff and District Attorney, for the arrest and prosecution of a Bishop tribal law enforcement officer for performing his duties on the Tribe's Reservation.*" (Italics supplied)

In response, defendants County of Inyo ("County"), Sheriff William Lutze ("Sheriff" or "Sheriff Lutze"), and District Attorney Thomas Hardy ("District Attorney" or "Mr. Hardy") each filed, on grounds that are individual to it/him, respectively, a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted.

After receiving and reviewing those motions, and after consultation with defense counsel regarding this case (Opposition, page 2, line 23; and Opposition, page 9, lines 25-27), and contrary to its clear above-quoted allegation and statement of what "This action is for… ," the Tribe now asserts in its Opposition that it is:

> "… apparent that Defendants are confused regarding the relief sought by the Tribe. The Tribe is not seeking to enjoin or interfere with the pending state criminal case against Tribal Officer Daniel Johnston." Opposition, page 9, lines 25-27.

Instead, the Tribe now asserts, initially, that what it is asking for is a "clarification and settling, as a matter of federal law, [of] its [claimed] inherent authority over non-Indian offenders who violate tribal and state law on tribal lands," and that once declared, it is also seeking "prospective injunctive relief preventing the defendants from further arrests and prosecutions of its law enforcement officers when exercising tribal authority." (Opposition, page 2, lines 1-3; first two underscores supplied; third underscore in original text).

The Tribe's Opposition thereafter expands on this statement of sought-after relief, and is so doing expands the same to include a claimed right to "stop, restrain, [and] detain" non-

Indians on tribal lands, and thereupon, with regard to such non-Indians who are "stopped, restrained and detained" – to further "investigate violations or possible violations of tribal, state or federal law by non-Indians on tribal lands." Opposition, page 10, lines 8-10.

The Tribe goes on to state in its Opposition, at page 10, lines 10-12, that, with respect to these claimed tribal rights over non-Indians, once the Court "clarifies and settles" the same, "… the Tribe seeks a *prospective* injunction against future criminal charges and prosecution against its officers" when and while its officers are exercising the authority over non-Indians that the Tribe is asking this District Court to "clarify and settle." (Italics in original text.)

In response to these Opposition positions of the Tribe, defendants reply as follows:

1. No federal constitutional or statutory provision, and no Ninth Circuit or Supreme Court of the United States decision (nor any District Court decision, as far as is known to defendants) has ever declared the existence of the Tribe's claimed authority and rights over non-Indians (to detain, forcibly restrain, and investigate for state and federal law violations, etc.) for which the Tribe is now seeking "clarification and settling;"

2. Any establishment of a federal law providing such jurisdiction of Indian tribes over non-Indians is within the purview of Congress – and not the Courts;

3. The Court herein should, respectfully, decline the invitation of the Tribe for a "clarification and settling" of its claimed authority over non-Indians, as is the Court's right to do under the Declaratory Relief Act (28 U.S.C. § 2201), and dismiss this case; and

4. On the grounds set forth in the defendants' individual and pending motions to dismiss, including a lack of the Constitution's Article III case or controversy requirement, the Court should sustain said motions to dismiss, and dismiss the Tribe's Complaint without leave to amend.

II

THE CLAIMED EXISTING FEDERAL LAW THAT THE TRIBE ASSERTS IN ITS OPPOSITION, AND FOR WHICH THE TRIBE IS THEREIN ASKING THE COURT FOR A "CLARIFICATION AND SETTLING" (WHICH IS THE CLAIMED "INHERENT AUTHORITY" ALLOWING TRIBES TO EXERT COMMON LAW JURISDICTION OVER NON-INDIANS TO STOP THEM,

RESTRAIN THEM, DETAIN THEM, AND INVESTIGATE VIOLATIONS, OR POSSIBLE VIOLATIONS, OF TRIBAL, STATE AND FEDERAL LAW BY THEM) IS NOT SUPPORTED IN THE PLEADINGS, AND DOES NOT EXIST

As above stated, this action has changed course, and the Tribe is no longer seeking declaratory and injunctive relief "… against Inyo County, the Inyo County's Sheriff (sic) and District Attorney, *for the arrest and prosecution of a Bishop tribal law enforcement officer for performing his duties on the Tribe's Reservation*." Complaint, paragraph 1 (italics supplied).

As now presented in its Opposition, the Tribe is seeking only a "clarification and settling" of what it claims is an "inherent authority" of Indian tribes to "stop, restrain, [and] detain" non-Indians on tribal lands, and thereupon, with regard to such non-Indians who are "stopped, restrained and detained" by the tribes – to further "investigate violations, or possible violations, of tribal, state or federal law by non-Indians on tribal lands." Opposition, page 10, lines 8-10.

The Tribe gives no legal precedent for this claimed real-life inherent authority over non-Indians in its Opposition. It its Complaint, however, the Tribe alleges that it has such authority by virtue of two Ninth Circuit cases, along with the legal reasoning in a Washington State Supreme Court case. These cases are:

1. *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (see Complaint, paragraphs 35 and 38);

2. *United States v. Becerra-Garcia,* 397 F.3d 1167 (9th Cir. 2005) (see Complaint, paragraph 39); and

3. *State of Washington v. Schmuck*, 850 P.2d 1332 (1993) (see Complaint, paragraph 40).

A reading of these cases reveals, however, that they do not prescribe any of the Opposition-claimed tribal inherent authority or jurisdiction over non-Indians with regard to violations of either tribal law, or state or federal criminal law. What they do stand for and confirm is that: (1) Tribes have the inherent right to exclude trespassers from their lands; (2) tribes also have the right to establish tribal criminal laws which are applicable to tribal

members; and (3) when, during the course of a tribal law enforcement officer's investigation into either situations (1) or (2) above,[1] it is discovered that the person being investigated has violated a state or federal criminal law, the tribal authority (tribal law enforcement officer) may detain that person, whether the person is a tribal member Indian, non-tribal member Indian, or non-Indian, and turn him or her over to a properly credentialed state of federal law enforcement officer for whatever action that officer deems is appropriate.

This was demonstrated and approved in the case of *Ortiz-Barraza*, supra, a case involving whether evidence (marijuana) should be excluded in a criminal trial in federal court where the defendant was charged with smuggling the marijuana into the country from Mexico.

In this case, a Papango Tribal Law Enforcement Officer, who was not cross-certificated as an Arizona peace officer (*Ortiz-Barraza*, supra, page 1179), and was not a BIA federal law enforcement officer (*Ortiz-Barraza*, supra, page 1179), stopped the defendant, Mr. Ortiz-Barraza, for suspected trespass in violation of the Tribe's Article 5, Section 3 (trespass), as well as a Tribal Code provision that made any non-tribal member who committed a state or federal crime on the reservation subject to forcible ejection from the reservation (*Ortiz-Barraza*, supra, pgs 1179-1180). Upon stopping Mr. Ortiz Barraza, the tribal officer discovered the marijuana, and turned him over to the U.S. Drug Enforcement Administration. The Court held that the marijuana discovered by the tribal officer, while investigating the suspected trespass and smuggling by Mr. Ortiz-Barraza (the smuggling making Ortiz-Barraza

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[1] Where, as here, in California, the tribal law enforcement officer is not otherwise cross-deputized or appointed by the local Sheriff or other appropriate law enforcement official per California Penal Code § 830.6(b), and is not a federal law enforcement officer as described in Penal Code§ 830.8(a), with respect to California state law; and where, also as here, the tribal law enforcement officer is not otherwise commissioned by the United States Bureau of Indian Affairs (BIA) to have federal law enforcement powers pursuant to the BIA's Special Law Enforcement Commission (SLEC) program, per 25 C.F.R. § 12.21, et seq.

> Note: California Penal Code §§ 830.6(b) and 830.8(a), and 25 C.F.R. § 12.21, provide in pertinent part as is set forth on Exhibit A attached to this Reply.

subject to forcible ejection from the reservation by the Tribal Code), was admissible because the stop, detention and search by the tribal officer was performed in the course of *investigating tribal law violations re trespass and conduct exposing the perpetrator to forcible ejection under tribal law.* The tribal officer was thus investigating a trespass and tribal law violation – not an Arizona state law or federal law violation per se. *Ortiz-Barraza*, supra, page 1180.

The case of *Becerra-Garcia*, supra, is similar – another suppression of evidence case. In *Becerra-Garcia*, tribal rangers stopped a van, on the Tohono O'odham Reservation, that was found to contain twenty illegal aliens being smuggled into the USA. In finding the evidence admissible and the stop proper, the Court stated, at page 1172 of the opinion:

> "The rangers stopped Becerra-Garcia to enforce the criminal trespass laws of the tribal nation."

Thus, once again, the tribal law enforcement officer was investigating a potential tribal law violation – not an Arizona state or federal criminal law violation.

And finally, in *Schmuck*, supra, the Washington Supreme Court discussed this area of the law in the context of a person who was stopped on the reservation, by Tribal Law Enforcement Officer Bailey, for suspected violation of the Suquamish Tribe's traffic laws prohibiting tribal members from speeding and running a stop sign. Upon stopping the vehicle, the driver – Schmuck – was identified as a non-Indian. However, Tribal Officer Bailey also smelled intoxicants coming from Mr. Schmuck, Mr. Schmuck admitted to drinking, and Mr. Schmuck failed a "few field sobriety tests" which he voluntarily took. *Schmuck*, supra, page 377. The driver, Mr. Schmuck, was thereupon detained until he could be turned over to the Washington State Patrol for appropriate state criminal charges of DUI under state law.

The Court held that the stop for suspected violation of tribal law was proper as follows:

> "We hold Suquamish Tribal officer Bailey had the requisite authority to stop Schmuck to investigate a possible violation of the Suquamish traffic code and to determine if Schmuck was an Indian, subject to the Code's jurisdiction." *Schmuck*, supra, page 383.

Thus, once again, the tribal officer is making his stop to investigate a possible tribal law violation by an Indian, and not state or federal criminal law violation by a non-Indian.

Accordingly, none of the cases cited by the Tribe herein support a claim of "inherent authority" to stop, restrain, detain, and investigate non-Indians for suspected violations of state or federal criminal law – the very thing that the Tribe herein is asking this Court to "clarify and settle" by way of the requested declaration that such is indeed the law. And, also accordingly, the Tribe's Complaint should therefore be dismissed as failing to state a claim upon which relief can be granted.

III

ANY ESTABLISHMENT OF A FEDERAL LAW PROVIDING AUTHORITY AND JURISDICTION BY INDIAN TRIBES OVER NON-INDIANS IS WITHIN THE PURVIEW OF CONGRESS – AND NOT THE COURTS

It is clear that Congress has plenary power and authority over Indian tribes, and has the power to establish laws providing for Tribal authority with respect to non-Indians. This was at issue in the case of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), where the Supreme Court, in ruling that tribes did not have authority to try non-Indians in Indian courts, held, at page 212:

> "Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. *But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.*" (Italics supplied)

Accordingly, just as in *Suquamish*, supra, where the Supreme Court left it to Congress to weigh the considerations "in deciding whether Indian tribes should finally be authorized to try non-Indians," the answer to the question here, of whether Indian tribes should have the authority and right to stop, detain, restrain, and investigate non-Indians for suspected violations of state and federal criminal law, should be likewise left to Congress.

IV

THE COURT SHOULD, RESPECTFULLY, DECLINE THE INVITATION OF THE TRIBE FOR A "CLARIFICATION AND SETTLING" OF THE CLAIMED AUTHORITY TO RESTRAIN AND INVESTIGATE NON-INDIANS, ETC., AS IT IS THE COURT'S RIGHT TO DO UNDER THE DECLARATORY RELIEF ACT (28 U.S.C. § 2201), AND DISMISS THIS CASE

The Tribe is here inviting and requesting that this Court issue, and declare, a "clarification and settling" of uncharted federal Indian law, with regard to a claimed inherent right, of all Indian tribes in the United States, to stop, restrain, detain, and investigate non-Indians for suspected violations of state and criminal law – even though the Tribe has no authority to prosecute non-Indians for those violations. See *Suquamish,* supra.

The Tribe invites this "clarification and settling" of this claimed law, even though, as is shown above in the analysis of the *Ortiz-Barraza, Becerra-Garcia, and Schmuck* cases, there is no Court of Appeals or Supreme Court case holding any aspect of this claimed right.[2]

The Court is not required to accept this invitation, and has the well established discretion to decline to issue such a dramatic declaration under 28 U.S.C. § 2201. *A. L. Mechling Barge v. United States*, 368 U.S. 324,333 (1961); *Chese-brough Pond's, Inc v. Faberge, Inc.*, 666 F.2nd 393, 396 (9th Cir. 1982). Under the circumstances of this case, the Court should exercise its sound discretion, decline the Tribe's invitation to issue a first-impression and dramatic declaration of Indian rights, and leave the matter to Congress – where it, respectfully, properly resides – just as was the case in *Suquamish,* supra.

[2] That is outside of the right of a tribal law enforcement officer to ultimately detain a non-Indian, who was the subject of a proper stop for a suspected violation by an Indian of tribal law, where the officer could not, of course, determine if the person being stopped was an Indian who would be subject to the tribal law, or a non-Indian who would not be subject to the tribal law; and where, after the proper stop, the non-Indian was found to be in violation of a state or federal law (such as DUI, or smuggling).

And – on a final note here – if the Tribe really wants the right to detain, restrain and investigate non-Indians for suspected violation of state and federal criminal law, etc., they can go through the already established procedures to be cross-deputized, and/or otherwise lawfully recognized and empowered by state and/or federal law enforcement, under California Penal Code §§ 830.6 and 830.8, and the BIA procedures for obtaining SLEC (Special Law Enforcement Commission) status from the federal government per 25 C.F.R. § 12.21, et seq.

V

THE COMPLAINT DOES NOT CONTAIN, AND THE TRIBE'S OPPOSITION TO THE DISTRICT ATTORNEY'S MOTION TO DISMISS FAILS TO POINT OUT, ANY ALLEGATION OF FACT IN THE COMPLAINT OF THE REQUISITE CONDUCT OR THREAT OF AN "ONGOING AND CONTINUOUS" CLAIMED VIOLATION OF FEDERAL LAW BY MR. HARDY; ACCORDINGLY, THE EX PARTE YOUNG DOCTRINE IS NOT APPLICABLE, AND THE 11TH AMENDMENT BARS THIS ACTION AGAINST MR. HARDY, IN THAT HE IS A STATE ACTOR WHEN EXERCISING HIS PROSECUTORIAL FUNCTIONS AS THE DISTRICT ATTORNEY

The Tribe's Opposition asserts on page 11, at lines 17-26, that the 11th Amendment to the United States Constitution does not bar this action for prospective relief against Mr. Hardy because the Ex Parte Young doctrine is applicable.

The Tribe is mistaken, because the Ex Parte Young doctrine applies only to "ongoing and continuous" violations of federal law (*Papasan v. Allain,* 478 U.S. 265, 277-278 (1986), or where there is a threat of future enforcement that may be remedied by prospective relief. *Summit Md. Assocs., P.C. v. Pryor,* 180 F.3d 1326, 1338 ((11th Cir. 1999).

However, nowhere in the Complaint is such an allegation of ongoing and continuous violations, or threat of same, made. See Complaint, paragraphs 1, 2 and 30. Accordingly, Ex Parte Young is not applicable here, and does not enable this suit to proceed and skirt the 11th Amendment protections of Mr. Hardy.

VI

JOINDER

Mr. Hardy hereby joins in each of the Replies being concurrently filed herein by the County of Inyo and Inyo County Sheriff William Lutze; and Mr. Hardy respectfully asks the Court to especially consider the lack of case and controversy argument contained in Sheriff Lutze's Reply as also being applicable to him.

VII

CONCLUSION

By way of all of the foregoing, the motion herein made by defendant Mr. Hardy for dismissal of the Amended Complaint against him should be granted without leave to amend.

Dated: May 26, 2015

Respectfully submitted,
LAW OFFICES OF JOHN D. KIRBY,
A Professional Corporation

By _____
JOHN D. KIRBY

Attorneys for Defendant DISTRICT ATTORNEY THOMAS HARDY

EXHIBIT A

EXHIBIT A TO REPLY

California Penal Code§ 830.6. Deputized or appointed personnel; peace officer status; powers and duties

* * *

(b) Whenever any person designated by a Native American tribe recognized by the United States Secretary of the Interior is deputized or appointed by the county sheriff as a reserve or auxiliary sheriff or a reserve deputy sheriff, and is assigned to the prevention and detection of crime and the general enforcement of the laws of this state by the county sheriff, the person is a peace officer, if the person qualifies as set forth in paragraph (1) of subdivision (a) of Section 832.6. The authority of a peace officer pursuant to this subdivision includes the full powers and duties of a peace officer as provided by Section 830.1.

California Penal Code § 830.8. Federal employees; Washoe tribal law enforcement officers

(a) Federal criminal investigators and law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer in any of the following circumstances:

(1) Any circumstances specified in Section 836 of this code or Section 5150 of the Welfare and Institutions Code for violations of state or local laws.

(2) When these investigators and law enforcement officers are engaged in the enforcement of federal criminal laws and exercise the arrest powers only incidental to the performance of these duties.

(3) When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.

(4) When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed.

In all of these instances, the provisions of Section 847 shall apply. These investigators and law enforcement officers, prior to the exercise of these arrest powers, shall have been certified by their agency heads as having satisfied the training requirements of Section 832, or the equivalent thereof.

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This subdivision does not apply to federal officers of the Bureau of Land Management or the United States Forest Service. These officers have no authority to enforce California statutes without the written consent of the sheriff or the chief of police in whose jurisdiction they are assigned.

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25 C.F.R. §12.21 What authority is given to Indian country law enforcement officers to perform their duties?

BIA law enforcement officers are commissioned under the authority established in 25 U.S.C. 2803. BIA may issue law enforcement commissions to . . . tribal full-time certified law enforcement officers to obtain active assistance in enforcing applicable Federal criminal statutes, including Federal hunting and fishing regulations, in Indian country.

(a) BIA will issue commissions to . . . tribal full-time certified law enforcement officers only after the head of the local government or Federal agency completes an agreement with the Commissioner of Indian Affairs asking that BIA issue delegated commissions. The agreement must include language that allows the BIA to evaluate the effectiveness of these special law enforcement commissions and to investigate any allegations of misuse of authority.

* * *

Exhibit A
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