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In Pro Per

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES ACRES,

Plaintiff,

v.

BLUE LAKE RANCHERIA TRIBAL COURT, *et al.*,

Defendants.

Case No.: 3:16-CV-00598-H-BLM

PLAINTIFF'S MEMO AND POINTS OF AUTHORITIES OPPOSING DEFENDANTS' MTD AT DOCKET 9

Date: May 9, 2016
Time: 10:30am
Courtroom: 15A
Judge: Hon. Marilyn L. Huff

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INTRODUCTION

The present action arises from an assertion of adjudicatorial jurisdiction by the Blue Lake Rancheria over Plaintiff. Plaintiff requests prospective injunctive and declaratory relief and Defendants have responded with a motion to dismiss under FRCP 12(b)(1), 12(b)(2), and 12(b)(3).

Defendants' 12(b)(1) and 12(b)(2) arguments assert that tribal sovereign immunity, and a requirement that tribal remedies be exhausted, bar the action. Their 12(b)(3) argument would place proper venue in the Northern District under 28 USC 1391(b)(1) as the venue where all Defendants reside. Defendants also argue that tribal jurisdiction is probable.

Plaintiff opposes, showing that: 1) The assertion of tribal jurisdiction violates Supreme Court precedent, 2) At least three of the four exceptions to the requirement for tribal exhaustion apply, 3) Tribal sovereign immunity does not bar prospective relief, 4) Relief is proper both because the tribe lacks jurisdiction, and because any exercise of tribal jurisdiction over Plaintiff would violate his rights to due process, and 5) Venue is proper under 28 USC 1391(b)(2).

STATEMENT OF FACTS

With two exceptions, Plaintiff sees nothing in *Docket 9* that contradicts the allegations of fact made in the *Complaint at Docket 1*.

The first exception is *Docket 9-2 at ¶ 7* asserting that the underlying tribal complaint was filed on January 12th, 2016. The *Complaint at ¶ 40* alleges that, according to the Tribal Court docket, the tribal complaint was filed on January 13th, 2016, the day after the tribal summons was issued. The second exception is *Docket 9-2 at ¶ 9* claiming that the five-day summons issued by the tribal court was a benign mistake and corrected by an order of the Tribal Court on February 16th. Plaintiff rebuts this at length below.

Docket 9 introduces two new pieces of relevant evidence.

Docket 9-3 at ¶ 2 alleges that Plaintiff visited the Casino on multiple occasions during 2010 and 2011. This is unremarkable, and Plaintiff concedes the general point without commenting on the specific dates.

Docket 9-4 at ¶ 5 is a vague allegation about a lunch-time conversation six years ago. It is self-interested parol evidence, and Plaintiff brings attention to it as such.

Concurrent with filing this opposition memo, Plaintiff requested judicial notice of documents filed in the Tribal Court in order to bring the District Court up to date on filings since March 9th 2016. They are referenced below as the *Feb 16 Order, Feb 23 Docket, Feb 24 Order, March 17 Notice, March 17 Request, March 18 CMC Statement, March 25 Order,* and *March 28 Summons Notice.*

Plaintiff believes these are the relevant facts for the present motion, and respectfully asks each be given its due consideration according to its merits.

JURISDICITON AND EXHAUSTION

The limits of tribal jurisdiction is a federal question. *Plains Commerce Bank v Long Family* 554 U.S. 316, 324 (2008).

When a tribal court seeks to assert jurisdiction over a non-Member of the tribe, there is a prudential tradition of comity allowing tribal courts to first define the limits of their authority before any federal review. *Strate v A-1 Contractors* 520 U.S. 438, 451 (1997).

This prudential tradition requires that non-Members challenging tribal jurisdiction must generally first exhaust all tribal remedies before seeking relief from an Article III court. *Nevada v Hicks* 533 U.S. 353, 369 (2001).

There are four recognized exceptions to this prudential tribal exhaustion doctrine (*Id.*):

i) Lack of a plausible claim for tribal jurisdiction over the non-Member;

ii) Bad-faith on the part of the tribal court itself;

iii) Inadequate tribal opportunity to challenge tribal jurisdiction, and;

iv) An express jurisdictional barrier prohibiting assertion of tribal jurisdiction.

While this is not the traditional order in which the four exceptions are enumerated, it is the order in which the present argument flows most naturally and is presented below.

No Plausible Jurisdiction

Montana Discussion

Within the Ninth Circuit *Montana v United States* 450 U.S. 544 (1981), and its progeny, provide a framework for evaluating whether or not a tribal court may exercise jurisdiction over an individual who is not a member of that tribe. *Philip Morris v King Mountain* 569 F.3d 932, 938 (9th Cir. 2009).

The general rule in *Montana* provides that tribes lack jurisdiction over non-Members because "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes." *Montana* at 564. Tribes retain only those powers needed to quietly enjoy their rights to "make their own laws and be governed by them." *Plains* at 335 quoting *Hicks* at 361. Thus, tribes retain absolute authority to exclude non-Members from trust land. *Plains* at 328. Beyond this right to exclude, the general rule in *Montana* expressly

prohibits tribal jurisdiction[1] over non-Members unless one of two exceptions apply. *Plains* at 329.

Montana's second exception allows that a tribe may assert jurisdiction over a non-Member if their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* at 566. *Montana's* second exception may only be invoked to avoid "catastrophic consequences," *Plains* at 341, and clearly does not apply to our current controversy over a $250,000 enterprise software contract.

Defendants do not allege that they wished to exclude Plaintiff from their reservation. Thus the tribe cannot assert jurisdiction from its inherent right to exclude.

Defendants can only assert tribal jurisdiction under *Montana's* first exception, which provides that whether on trust-land or on fee-land, beyond the limited exceptions above, tribes may only obtain adjudicatorial authority over non-Member conduct if:

i) There is a consensual agreement with the non-Member specifically granting jurisdiction,[2] *Montana* at 565, and;

ii) Even then only when the tribe's exercise of that authority is required to "protect tribal self- government [and] to control internal relations."[3] *Plains* at 332, quoting *Montana* at 564, brackets in original.

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[1] To date the Supreme Court has only stated that "a tribe's adjudicatorial jurisdiction does not exceed it's legislative jurisdiction." *Hicks* at 357-358. Plaintiff dares not where Justices have yet to tread, and *arguendo* treats the two jurisdictions as identical, but notes it seems doubtful a band of fifty-odd members would ever require adjudicatorial authority over non-Members to "protect self-government or control internal relations."

[2] The "specific-consent" element can be thought of as necessary to establish personal jurisdiction . . .

[3] . . . and the "vital-interest" element as necessary to establish subject matter jurisdiction. But this is only Plaintiff's own personal "folk-law" understanding.

With respect to the first element, the Supreme Court has often alliterated on the need for specific consent. Consent in one area does not give consent in another area so ***"it is not 'in for a penny in for a Pound.'"*** *Atkinson v Shirley* 532 U.S. 645, 656 (2001).

Montana at 565-566 used four specific cases to illustrate its first exception, and the importance of these four cases in applying *Montana's* exceptions was re-iterated by *Strate* at 457 and again in *Plains* at 332.

Three of the four cases describing *Montana's* first exception dealt with a tribe's power to tax on-reservation business activities and cannot be stretched to include our present "tort suit jurisdiction over an enterprise software sale" controversy.

Williams v Lee 358 U.S. 217 (1959), the remaining member of *Montana's* first exception quartet, involved a tort suit arising over unpaid bills from retail transactions at an on-reservation general store. But in *Williams* the Plaintiff was a non-Member attempting to compel an unwilling Indian Defendant, who was resident on the reservation, into Arizona state court. This is significant because a non-Member's party status is the "First, and most important [fact]" in considering tribal jurisdiction over that non-Member. *Smith v Salish Kootenai College* 434 F.3d 1127, 1131 and *en banc* (9th Cir. 2006). This is because "The [Supreme] Court has repeatedly demonstrated its concern that tribal courts not require defendants who are not tribal members to defend themselves against ordinary claims in an unfamiliar court." *Id.,* at 1131 referring to *Strate*, the brackets are mine, original quotation marks omitted.

In the present controversy, the tribe's attempt to force Plaintiff into tribal court as a defendant on the basis of a luncheon sales meeting regarding enterprise software, *Docket 9-4 at ¶ 5*, does not fit within the established limits of *Montana's* first exception.

Defendants must therefore ask for *Montana's* first exception to be stretched to include the current controversy solely from the extrapolation of *Montana's* guiding principals that a tribe may regulate activities of a non-Member with that non-Member's ***specific consent*** and ***when such regulation is necessary*** for the tribe to "protect tribal self-government [and] to control internal relations." *Plains* at 332 citing *Montana* at 564.

Since *Montana's* exceptions should be narrowly construed lest they "swallow the rule," (*Plains* at 330 quoting *Atkinson* at 655) or "'severely shrink' it" (*Plains* at 330 quoting *State* at 520) the first exception should only be extended in those instances when the non-Member's consent is exceptionally clear, and the threat to tribal self-rule is especially strong.

Ours is not such an instance because, as shown below, there is no threat to tribal self-rule, non-Member consent is lacking, and the alleged tort never happened anyway.

Alleged Tort Implausible

The tribe alleges Plaintiff fraudulently induced it over lunch in July of 2010 by "[assuring it] that the royalty payment scheme would repay the advance deposit." *Docket 9-4 at* ¶ 5.

This vague and one-sided remembrance by an adversarial party of a verbal conversation nearly six years ago is the only evidence of the alleged tort.[4]

This remembrance is flatly contradicted by the language of the agreement between the Tribe and Plaintiff's employer, which forms *Docket 9-4's* own Exhibit A, and baldly

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[4] Plaintiff points out that there were 2,100 days from July 7th 2010 when the contract was signed and April 6th 2016 when *Docket 9* was filed. If the fraud really happened (which Plaintiff maintains it did not), why is *this* the evidence Defendants bring forward?

states that "the deposit shall be refunded if, and only if, [Plaintiff's Employer] doesn't make an iSlot System available to [the Casino] for installation by October 1st, 2010 which [conforms to certain regulatory and technical requirements]." *Id.,* Exhibit A p 04.

Plaintiff's *Complaint,* p 9 at ¶ 24, asserted that the October 1st 2010 requirements were met in a timely fashion and that the "Casino has never claimed otherwise." Nothing in Defendants' filings challenges the *Complaint's* assertion at ¶ 24 and no such challenge can truthfully be made.

Any extension of *Montana's* first exception is a creation of new law. It is often said that "bad facts make bad law." Here Defendants have no facts and should create no law.

No Consenting Relationship

There was no personal business relationship whatsoever between the Casino and Plaintiff.

Plaintiff at all times acted as an employee of Acres Bonusing, Inc. (ABI), and the agreement between ABI and the Casino expressly disavowed any kind of personal liability accruing to Plaintiff. *Docket 9-4,* Exhibit A, p 08.

This lack of any personal contractual relationship whatsoever seems fatal to the Tribe's theory that Plaintiff consented to tribal authority over his personal conduct.

The Tribe might argue then that it somehow gained jurisdiction over Plaintiff through his employer. But there is no plausible claim for explicit corporate consent either. The iSlot Agreement makes a specific grant of regulatory authority to the tribe providing that "All equipment and software leased under [the] agreement shall pass all applicable GLI standards, and conform to all tribal, local, state, and federal laws and regulations." *Id.,* Exhibit A, p 04.

This envisions tribal jurisdiction existing within a multi-jurisdictional patchwork, establishing ***no tribal jurisdiction over conduct***, but being ***strictly limited to the gaming equipment*** supplied under the agreement. Since, where consent to tribal jurisdiction is concerned, ***it is not "in for a penny, in for a Pound,"*** *second time, now from Plains* at 338, it is unreasonable to believe that the parties meant to grant Tribal tort jurisdiction over ABI's conduct and simply neglected to mention it.

Finally, it cannot be that ABI should have reasonably expected tribal jurisdiction to flow implicitly from ABI's distribution of enterprise software, which was created by an off-reservation third-party and intended for general use by gaming enterprises throughout the country. *Contra Docket 9-3*, p 2 at ¶ 2, that ABI personnel occasionally visited the Casino does not change this. Especially since the Casino is not a place reserved for tribal members to privately enjoy living by their own laws on their own land, but is rather a place to which the Tribe unceasingly desires and encourages the attendance of the general public.

No Vital Tribal Interest

Any assertion of tribal adjudicatorial jurisdiction over non-Members must be linked to that vital interest of the tribe to "protect tribal self-government [and] to control internal relations." *Plains* at 332 citing *Montana* at 564. Defendants have not linked this vital interest with the alleged tort, likely because the attempt to do so could only prove that none exists.

Summary

Under existing federal law there is clearly no plausible claim to tribal jurisdiction under the Tribe's inherent right to prevent trespass, nor is there a plausible claim from either of *Montana's* two exceptions.

Defendants argue that *Montana's* first exception should be stretched to encompass the alleged tort. The District Court should decline the invitation because: 1) Defendants themselves contradicted their already weak evidence and thereby revealed that the alleged tort never happened, 2) Plaintiff never gave the required consent to tribal authority, and 3) No vital tribal interest is at stake.

Bad Faith in Tribal Court

The Tribal Court has revealed its bad-faith towards Plaintiff through its issuance of a five-day summons, its joinder of *Docket 9*, and its use of the Tribal Court's calendar.

Malicious Five-day Summons

Defendants have all certified that the five-day Summons issued Plaintiff was "caused by an unintentional error of the [Tribal] Court that was corrected . . . in its February 16, 2016 Order." *Docket 9-1*, p 9 lines 19-22.

The five-day summons cannot be seen as a matter of benign negligence, nor was it corrected by the *Feb 16 Order*.

The *Complaint,* p 12 at ¶ 31, describes how Plaintiff raised the issue of the five-day summons as early as an email on January 25th.

If the five-day summons was issued from benign negligence, then surely the Tribal Court would have swiftly and clearly corrected that mistake. After all, Plaintiff's tremendous distress at the abusively short deadline was obvious, and relieving him of it would've been trivial.

The Tribe's contention that the error was corrected by the *Feb 16 Order* is not accurate because the *Feb 16 Order* commanded Plaintiff to make a responsive pleading by March

18th, 2016, and to somehow make it pursuant to a tribal court rule regarding dismissals from plaintiff stipulation or lack of prosecution. *Complaint,* p 13 at ¶ 33 – 34.

Plaintiff did not know how to comply with this Order, which for added measure, also sternly admonished Plaintiff to cease "flouting" the Tribal Court's rules. *Id.*

On March 17th, Plaintiff requested a clarification from the Tribal Court on how he might comply with its Order. *Plaintiff's March 17 Request*, p 2 at ¶s 3 – 5. *[Please see Plaintiff's concurrently filed Request for Judicial Notice providing a record of Tribal Court filings up to April 24th 2016.]*

Judge Marston responded with his *March 25 Order* explaining that the *Feb 16 Order's* reference to Tribal Court Rule 30 (Plaintiff Dismissals) actually should've noted Rule 15 (Time to Answer) and Rule 18 (Motion Practice). *March 25 Order,* p 3 and lines 14 - 15.

Rule 15, governing Answers, provides that "All allegations which are not denied . . . within the time provided . . . shall be deemed admitted and true by the [tribal] court." *Docket 9-2,* Exhibit A p 6.

Plaintiff received the *March 25 Order* via email from the Tribal Court Clerk on March 28th. Thus, the *Feb 16 Order* was not understandable until March 28th, ***forty days after it was issued***.

Significantly, while the *March 25 Order* did reschedule the Tribal CMC mandated by the *Feb 26 Order* from April 6th to May 9th (*March 25 Order,* p 3 from line 9), it did nothing to alter the March 18th deadline for Plaintiff to submit an answer or responsive pleading (*March 25 Order*, at nowhere to be found).

And so, not only did the *Feb 16 Order* fail to correct the issue of the five-day summons, the *March 25 Order,* which might've done so were it timely, was not delivered to Plaintiff until ***ten days after he lost the right to respond*** to the tribal complaint.

Finally, if, as she claims in her declaration, she believed the matter of the five-day summons was corrected by the *Feb 16 Order*, why did the Tribal Court Clerk on March 28th issue a new summons for the Casino to serve on Plaintiff? *March 28 Summons Notice.*

To Plaintiff's knowledge, no attempt has yet been made to serve this March 28th summons.

And so, based upon the Tribal Court's communications with him, Plaintiff cannot determine if it is the Tribal Court's position that he was served a complaint and lost his right to answer on March 18th or on some other date in the past, or that he was served a complaint and retains the right to answer until some date in the future, or perhaps that he has never actually been effectually served at all.[5]

This isn't benign negligence. This is bad-faith.

Joinder of Judge, Court, and Clerk

At *Docket 10* Judge Marston, on behalf of the Court and himself, joined all of the Casino's filings supporting its Motion to Dismiss in their entirety.[6] Under FRCP 11(b)

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[5] Plaintiff has scoured the literature and the procedural history most resembling his own is that of Josef K. in *The Trial* by Kafka, Franz (1925).

[6] Anita Huff also used *Docket 10* to join *Docket 9* in full.

this means that Judge Marston made reasonable inquiries into the totality of *Docket 9*, and certifies that he found reasonable everything therein.

The Tribe's Memo at *Docket 9-1* concludes from *Docket 9-4* that "[T]he tortious conduct of James Acres (fraudulently inducing [the Casino] to enter into the agreement with ABI) ***occurred***, at least in part, on tribal property." *Docket 9-1*, p 14 lines 19 – 21 drawing their conclusion from the immediately preceding paragraphs, emphasis mine.

No modifiers such as "alleged" or "may have" are employed to soften the force of this conclusion.

Judge Marston in his joinder is essentially considering an ex-Parte communication with Thomas Frank (a fellow Tribal employee, and *Docket 9-4's* declarant), and on that basis is finding that the tort alleged in the tribal complaint did in fact ***occur***.[7]

Judge Marston then continues to rely upon his collegial ex-Parte communication with Thomas Frank to conclude that "Tribal Court jurisdiction . . . is probable." *Docket 9-1*, p 15, lines 1 – 2.

Judge Marston could easily have filed a joinder in part disavowing *Docket 9-1's* prejudicial conclusions. Or he could have submitted his own memo describing how Plaintiff would be afforded an opportunity to contest jurisdiction and requesting the grace of comity from the District Court in the meantime. Those are just some of the options available to a judge acting in good faith, carefully preserving his impartiality.

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[7] Significantly, this conclusion survived at least three levels of review. Dan Stouder, Judge Marston, and Anita Huff, all sophisticated legal actors, certified to this conclusion. Plaintiff, being unsophisticated, knows not if Amy O'Neill's certification of service encompasses the memo itself.

Instead Judge Marston joined *Docket 9* in full, and revealed himself as a tribal partisan who, eager with zeal to win the chance to render his judgment, neglected to conceal that he already knew what it would be.[8]

Use of Calendar as Weapon

Every single deadline imposed by the Tribal Court can be seen as an attack on Plaintiff.

First, the issuance of a five-day summons is conducive to obtaining a default or panicked settlement out of an unrepresented litigant.[9] *Complaint at Docket 1,* p 10 at ¶ 26 and 28.

Second, Judge Marston's *Feb 24 Order,* p 1 from line 24, commanded attendance at a tribal CMC on April 4th. That same *Feb 24 Order,* on p 2 from line 3, commanded Plaintiff to co-operate with the Casino to submit a joint CMC statement on March 18th. March 18th was also the date by which Judge Marston's *Feb 16 Order*, p 6 at line 18, commanded a responsive pleading.[10] Scheduling both deadlines for the same day seems calculated to overwhelm Pro Se Plaintiff, to make him feel resistance was doomed, and to foster his capitulation.

After action was begun in District Court, the first CMC conference was rescheduled by the tribal *March 25 Order,* p 3 from line 9, to May 9th at 9:30am, forcing Plaintiff to choose between Tribal Court, and that same morning's MTD Hearing in District Court.[11]

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[8] Then again, perhaps Plaintiff is possessed with a Pro-Se-ically literal understanding of the "reasonable inquiry" strictures imposed by *FRCP 11(b)*.

[9] Finding an attorney admitted to Blue Lake's limited bar seems doubtful within five-days, and admission is not automatic. *Complaint,* Exhibit 23 p 1 (attempted admission to tribal bar by third-party in an unrelated 2011 action), and *Complaint,* Exhibit 21 p 1 (cryptic refusal/tribal default in the same).

[10] Thirty days from February 16th was March 18th, as February had twenty-eight days.

[11] Plaintiff will attend District Court.

It is of course true that litigation is fundamentally inconvenient, and the time-pressures are intense. But if we imagine that the Casino was allowed the opportunity to set the Tribal Court calendar themselves, then we'd probably imagine something like the calendar we've seen. And this is likely because that's what's actually happened.

Summary

The underlying tribal action began with a five-day summons that has only possibly been corrected. Both the Judge and the Clerk of the Tribal Court have certified their belief that the tort Plaintiff is accused of ***occurred.*** And every calendared event in the Tribal Court seems calculated to particularly inconvenience Plaintiff or break his spirit.

Seeking Tribal Exhaustion Futile

Tribal exhaustion is not required where it "would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *Hicks* at 369.

As we'll see below, Judge Marston's *March 25 Order* makes clear that Plaintiff has no opportunity to challenge the Tribal Court's jurisdiction.

Plaintiff's *March 17 Request,* p 3 at ¶ 6, asked if the Tribal Court would "consider a SPECIAL APPEARANCE contesting jurisdiction to be an "answer" as demanded [by the court in its *Feb 16 Order*[12]]."

Judge Marston responded that a "motion to dismiss is not an answer or responsive pleading as that phrase is used in the Court's February 16, 2016, Order." *March 25 Order*, p 3 lines 16-17.

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[12] *Feb 16 Order,* p 6 from line 18.

The *Feb 16 Order* required an answer be made by March 18th. *Feb 16 Order,* p 6 at line 18.[13] That answer couldn't be a motion to dismiss, needed to respond to the tribal complaint, and so it needed to be in the form of a general appearance. *March 25 Order*, p 3 line 16. Further, the *March 25 Order* demanded Plaintiff attend a tribal CMC on May 9th. *Id.*, p 3 from line 9 (an absurd demand if the Tribal Court hasn't found jurisdiction).

At *Docket 9-1* Defendants certify that "Acres and ABI have a full and fair opportunity to challenge the Tribal Court's jurisdiction before the Tribal Court" (*Docket 9-1*, p 11 at lines 3-4), before asking that "the [District] Court dismiss this case to allow the Tribal Court to determine its own jurisdiction" (*Id.*, p 15 at lines 15-17). [14]

Defendants' statement is false and their request is misleading.

The Tribal Court twice refused Plaintiff's perfectly comprehensible – if *pro se* – attempts to contest tribal jurisdiction. *Complaint at Docket 1,* p 23 at ¶ 67. Subsequent filings in Tribal Court make clear that Plaintiff has ***no opportunity to challenge tribal jurisdiction within tribal court.*** *March 25 Order*, p 3 line 16 (disallowing special appearance).

Defendants are not asking the District Court to allow them time to determine the jurisdictional question. They seek freedom to continue prosecuting the underlying tribal action. *March 25 Order,* p 3 lines 9 to 13 (demanding joint CMC to plan trial in Tribal Court). *See also March 18 Joint CMC Statement and footnote 14 above.*

This is ample evidence that it is futile for Plaintiff to seek relief from the Tribal Court.

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[13] Thirty days from February 16th was March 18th, as February had twenty-eight days.

[14] Amy O'Neill for the Casino emailed Plaintiff on April 18th, ***after filing Docket 9-1***, seeking a new joint-CMC statement under the *March 25 Order.* Plaintiff rebuffed her with cordial vigor.

Express Jurisdictional Prohibition

On the face of it, the Indian Civil Rights Act of 1968 seems to provide an express jurisdictional prohibition against the underlying tribal action, because it forbids an Indian Tribe exercising self-government from ". . . depriv[ing] any person of liberty or property without due process of law." *25 USC 1302(a)(8).*

Plaintiff freely admits that this is his "weak argument" since *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978) has generally been held to establish that the ICRA provides no private cause of action save for violations of habeas corpus.

Plaintiff raises the argument anyway as he's not a lawyer and hasn't been able to figure out if perhaps the improper assertion of tribal jurisdiction gives him a private cause of action as arising under *Montana* and *28 USC 1331*, allowing that improper assertion to then be defeated by invoking *25 USC 1302(a)(8).*

Alternatively, *Santa Clara* based it's ruling partly on the fact that tribes are "separate sovereigns pre-existing the Constitution." *Id.,* at 56. But the Blue Lake Rancheria was created in the 1980's, and post ICRA, by an act of the Department of the Interior. Plaintiff hasn't been able to determine how this might alter the *Santa Clara* immunities enjoyed by tribes of more ancient lineage.

Plaintiff also notes that he only raises his jurisdictional prohibition argument if his first "no plausible claim" argument fails. This is because Plaintiff's primary argument is that the Tribe is utterly devoid of any jurisdiction over him, and so he only quibbles about defects in the exercise of that non-existent jurisdiction if jurisdiction is found "plausible."

With that lengthy preamble, the tribal court is structurally incapable of providing Plaintiff with due process, and so the ICRA prohibits any action against him by it.

Tribe and Casino Dominate Court

Wilson v Marchington, 127 F.3d 805 (9th Cir. 1997) discusses in depth matters of comity and due process in tribal courts. *Marchington* at 811, in a section discussing due process at length, teaches that evidence a "judiciary was dominated by the political branches of government or by an opposing litigant . . . support[s] a conclusion that the legal system was one whose judgments are not entitled to recognition."

Plaintiff has shown that the Business Council is the governing body of the tribe (*Docket 1*, p 16 at ¶ 42), and that the Business Council dominates both the Casino (*Id.*, ¶ 43) and the Tribal Court (*Id.*, ¶ 44 - 47).

Defendants agree. First in their twice-repeated statement that "[the Casino] is the Tribe" (*Docket 9-1*, p 6 at line 5, then again at line 6) and then by citing a passage in the Tribe's constitution empowering the Business Council to provide the Tribal Court with its procedures and judges (*Id.*, lines 8 - 9).

The Tribal Court is dominated both by the political arm of the Tribe and by the Casino (since the "Casino is the Tribe") making it twice-over the kind of tribunal in which *Marchington* was concerned about a lack of due process.

Tribe Hired Judge Marston

Caperton v Massey 566 U.S. 868 (2009) established a "probability of bias" standard whereby allowing a judge to hear a case in which one of the litigants had a disproportionate influence in placing that same judge onto the court trying the case in-and-of itself violates due process, and no actual proof of bias needs be found.

In *Caperton,* the undue influence in placing the judge on the court came by way of disproportionate campaign contributions. With Judge Marston, undue influence comes from the fact that the Tribe simply hired him. *Complaint,* p 16 at ¶ 45, and uncontested.

Judge Marston, like any other judge hired by the Tribe (which is the Casino), cannot provide Plaintiff with due process under *Caperton.*

Summary

Under *Caperton* and *Marchington* the Tribal Court is structurally incapable of providing Plaintiff due process. If nothing else, this bars enforcement actions, as discussed below.

NO BAR AGAINST PROSPECTIVE RELIEF

"[T]ribal immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." *Burlington Northern v Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir. 1991).

Plaintiff alleges that Defendants are violating federal law as established in the *Montana* line of rulings. Sovereign immunity does not bar prospective relief in the form of declaratory and injunctive relief in such cases.[15] Nor does it bar actions against individuals for improperly performing their duties. *Maxwell v San Diego County* 708 F.3d 1075, 1087-1090 (9th Cir. 2013).

From ignorance, Plaintiff hasn't named individual Casino defendants. As the action progresses, leave to add discovered names will be requested per FRCP 15(a)(2).

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[15] Otherwise, *Montana* would be a barren precedent, none would know its progeny from *Strait* through *Hicks* to *Plains,* and the Federal Reporters would never need untangle the baroque and sordid lines of tribal jurisdiction over non-Members.

In the meantime, it seems well for the Tribal Defendants as a class that the Casino numbers among them, since they are relying upon the Casino to put forth the motion they've joined.

DECLARATORY RELIEF PROPER TODAY

The Declaratory Judgment Act provides that the District Court "may [in the case of an actual controversy] declare the rights and relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 USC 2201(a)*

Declaratory relief is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Fed. S&L v American Cas. Co*, 873 F.2d 229, 231 (9th Cir. 1989) citing *Bilbrey by Bilbrey v Brown*, (9th Cir. 1984) down to *Declaratory Judgments*, a textbook from 1941.

Declaratory judgment is not limited to resolving controversies already at law, but rather "[is] designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure – or never." *Societe de Conditionnement v Hunter Eng.,* 655 F.2d 938, 943 (9th Cir. 1981).

Finding Lack no Due Process

Such anticipatory relief is what Plaintiff seeks in the *Complaint,* p 25 at ¶ 76, when he asks for declaratory judgment that the Tribal Court is so constituted that it cannot provide due process to litigants such as Plaintiff – namely those who are defending themselves against Blue Lake Tribal Entities in Blue Lake Tribal Court.

Plaintiff desires this relief because it would effectually immunize him from any attempts by Defendants to enforce a tribal judgment in state or federal court.

In California state court, immunity is granted because the California Tribal Court Civil Money Judgment Act provides that a tribal court judgment shall not be enforced if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the due process of law." *Calif. Code of Civil Procedure 1737(b)(3).*[16] And in federal court immunity is conferred by the teachings of *Marchington* and *Caperton. [See above, "Express Jurisdictional Prohibition."]*

A judgment enforcement attempt by Defendant-the-Casino is a foreseeable outcome from the underlying tribal action. The Casino is certainly trying to get Plaintiff's money and is demanding the money in tribal court. Plaintiff just as surely does not want to give it to them since he's resisting the attempt with furious prolixity. Since Plaintiff keeps no money within the Blue Lake Rancheria, the Casino will need some other court to enforce the tribal judgment.

The Tribal Defendants have all certified their belief that the underlying fraudulent inducement tort "***occurred***" (*Docket 9-1,* p 14 line 21, joinder at *Docket 10*), and that tribal jurisdiction is "probable" (*Docket 9-1,* p 15 line 2, joinder at *Docket 10*). Plaintiff's certifications are entirely opposed (*Complaint* p 9 at ¶ 24 refutes the tort, and *See also everything else Plaintiff has filed* refuting tribal jurisdiction). Absent federal intervention, there is no doubt about where the parties are headed.[17]

The ultimate question in this controversy is "can Blue Lake Casino seize Plaintiff's money on the basis of proceedings in Blue Lake Tribal Court?" Declaratory judgment that the Tribal Court can't provide due process resolves that uncertainty, as neither

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[16] The language of the California Act mirrors *Marchington* in significant ways.

[17] As noted above, a mandatory Tribal Court CMC was scheduled for the hour before the District Court's MTD Hearing. Since Plaintiff is attending District Court, the parties might already "be there."

federal nor state courts will recognize judgments that were produced in the absence of due process.

Finding Individuals Exceeded Authority

Tribal Court rules require Defendants be given thirty days to answer complaints. *Complaint* p 10 at ¶ 27. Through issuing a five-day summons (*Id.*, Exhibit 5 p 1, for the Clerk), serving it (*Id.*, p 10 at ¶ 25, for the Casino), and issuing Orders based on it (*Id.*, Exhibits 16 and 17, *See also March 25 Order*, for the Judge), all Defendants exceeded the bounds of their tribal authority.

A declaratory judgment noting this "out-of-bounds behavior" might prevent Defendants from even seeking enforcement in a California court, as *California Code of Civil Procedure 1734(c)(3)* requires any application for recognition of a tribal money judgment must be accompanied by a statement, under penalty of perjury and by a knowledgeable party, that "the case that resulted in the entry of the judgment was conducted in compliance with the tribal court's rules of procedure."

Plaintiff also cherishes the hope that this category of declaratory relief might help him to recover his costs, which have been considerable,[18] from the individual Defendants under a *Maxwell v County of San Diego* theory.

Declaratory Relief Proper Today

Defendants' Motion to Dismiss should be denied if only because declaratory relief may be properly granted here and now on the due process issues as against the foreseeable coercive enforcement action.

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[18] E.g. *The Rutter Group Practice Guide to Federal Civil Procedure Before Trial* cost $796.98.

VENUE IN SOUTHERN DISTRICT PROPER

The present action before this District Court contemplates two other actions. The first is the underlying tribal action in Blue Lake Tribal Court, and the second is the anticipated "coercive action" that will occur when Defendant-the-Casino seeks to enforce a Tribal Court judgment.

A judicial district in which a "substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated" is a proper district. *28 USC 1391(b)(2)*

Defendants make light of Plaintiff's assertion that he was served "at his home." *Docket 9-1,* p 17 from lines 13 to 19.

By "his home," Plaintiff meant to encompass the place where Defendants perfected their improper claim to tribal jurisdiction, the place where the resulting pain from that wrong was – and is being – felt, and the place of that property Defendants hope to gain.

For the Underlying Tribal Action

Service of process is "the means by which a court asserts its jurisdiction over [a] person." *SEC v Ross,* 504 F.3d 1130, 1138 (9th Cir. 2007).

In this current federal action, Plaintiff alleges Defendants violated federal law under *Montana* by asserting tribal jurisdiction over him. The personal service of the five-day summons was the mechanism by which Defendants did this, and they did it at Plaintiff's home, early one Sunday morning, in the Southern District. [19]

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[19] As noted above, it is not clear if this service is effectual within the Tribal Court. No matter. That service is the basis of all the parties' filings and actions in the Tribal Court.

The five-day summons ***service is the single event*** transforming Defendants' private contemplation into public conduct. Service is not only a substantial event giving rise to Plaintiff's claims, ***service is the indispensible event***.

The shock and stress of receiving a five-day summons threatening a ruinous default judgment from an obviously biased court caused Plaintiff to suffer such intense, persistent, and worsening chest-pain that he sought emergency medical treatment from, and spent the night of Monday January 18th 2016 in, an emergency room in the Southern District.[20] This experience, as well as ongoing concern at the "Damoclean" threat posed him by the Tribe, are substantial factors giving rise to Plaintiff's seeking federal relief.

The property at issue within an action is also a basis in *28 USC 1391(b)(2)*. The casino is suing Plaintiff for money, and by Plaintiff's understanding, substantially all of his assets are located at his home in the Southern District.[21]

By both the events and property tests, the underlying tribal action allows venue to be properly placed in the Southern District by *28 USC 1391(b)(2)*.

For the Coercive Enforcement Action

Defendant-the-Casino (which is the Tribe), upon gaining its judgment from the Tribal Court (a subdivision thereto), must seek to have it enforced in some other court, and then use that enforcement to instantiate other legal processes to locate and seize Plaintiff's assets. This process – from request for enforcement all the way down to asset seizure –

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[20] Whence his "cordial vigor." Footnote 14, *supra*.

[21] Beyond his home and personal property Plaintiff considers his assets are his various financial accounts and instruments, which by Plaintiff's inexpert understanding, are "located" at his home.

forms the basis of the "Damoclean" coercive action Plaintiff seeks prospective relief from.

Since substantially all of Plaintiff's assets are in the Southern District, some substantial portion of the legal processes forming the coercive action to divest him of those assets must take place in the Southern District.

By both the events and property tests, the prospective coercive enforcement action allows venue to be properly lain in the Southern District by *28 USC 1391(b)(2).*

Defendants Cannot Challenge Venue Under 28 USC 1406(a)

"Venue may properly lie in *any* judicial district in which significant events or omissions material to the plaintiff's claim have occurred." *Gulf Ins. Co. v Glasbrenner*, 417 F.3d 353, 354 (2d Cir. 2005). Plaintiff concedes that this is not an opinion from our own Ninth Circuit, but it is of recent vintage and deals with the current language of the venue statute. *Id.,* at 355-356.

As shown above, substantial events – ***the indispensible event*** – giving rise to the present federal action occurred in the Southern District. And substantially ***all of the property*** at issue in the present federal action are located in the Southern District.

Since "venue may properly lie in *any* judicial district" (*Id.,* at 353) it is not required that Plaintiff show that the Southern District is necessarily the "best" district for it to be a "proper" district.

28 USC 1406(a) is a method for curing complaints filed in the "wrong" district. By *Glasbrenner*, the Southern District is a "proper" district. It is therefore not a "wrong district," *28 USC 1406(a)* does not apply, and Defendants' 12(b)(3) motion has no basis.

CONCLUSION

Tribal sovereign immunity does not bar suit seeking prospective relief from violations of *Montana.* Tribal exhaustion is not required as at least three of the four exceptions to that doctrine apply. In satisfying the "no plausible claim" exception Plaintiff has shown that, under *Montana,* he is not subject to tribal jurisdiction and is entitled to his request for injunctive relief. In satisfying the "bad faith" and "futility" exceptions, and in arguing the "jurisdictional prohibition" exception, Plaintiff has shown he is entitled to his requests for declaratory relief.

With the possible exception of Thomas Frank's dubious assertion about a conversation over lunch in 2010, *Docket 9-4,* p 2 at ¶ 5, there are no relevant facts open to dispute.

Therefore this case is ripe for summary judgment under FRCP 56 with respect to the individual defendants, and matters should proceed against the Casino so that individuals may be identified upon whom relief might be lain.

Plaintiff is entitled to declaratory relief even if injunctive relief is granted or if the Tribal Court dismisses the action. Defendants have shown a willingness to use their court as a weapon. Plaintiff deserves permanent relief from the Tribe's Damoclean sword, and neutral courts exist in which the Casino can press any claims it believes to have merit.

Plaintiff therefore respectfully requests the District Court to: 1) Deny Defendants' motion to dismiss at *Docket 9* in its entirety; 2) Issue an order staying the underlying tribal action till the conclusion of this federal action; 3) Take any other actions it deems necessary or proper to provide for Plaintiff's relief.

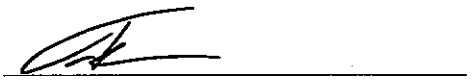
Respectfully Submitted April 25th 2016

James Acres

CERTIFICATE OF SERVICE

I hereby certify that on April 25th, 2016, a copy of this **PLAINTIFF'S MEMO AND POINTS OF AUTHORITIES OPPOSING DEFENDANTS' MTD AT DOCKET 9** was personally delivered by me to a clerk of the District Court, and served by First Class U.S. Mail on each Defendant as follows:

Blue Lake Rancheria Tribal Court Rapport & Marston Attn.: Lester J. Marston 405 West Perkins Street Ukiah, California 95482	**Blue Lake Casino and Hotel** Boutin Jones Attn.: Daniel S. Stouder 555 Capitol Mall, Suite 1500 Sacramento, CA 95814-4603
Lester J. Marston (Tribal Court Judge) Rapport & Marston Attn.: Lester J. Marston 405 West Perkins Street Ukiah, California 95482	**Anita Huff (Tribal Court Clerk)** Anita Huff 428 Chartin Road Blue Lake, CA 95525



James Acres

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In Pro Per

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO

JAMES ACRES, a natural person, Plaintiff, vs. **BLUE LAKE RANCHERIA TRIBAL COURT**, the court of a Federally Recognized Tribe; **LESTER J. MARSTON**; in his official capacity as CHIEF JUDGE OF THE BLUE LAKE RANCHERIA TRIBAL COURT; **ANITA HUFF**, in her official capacity as CLERK OF THE BLUE LAKE RANCHERIA TRIBAL COURT; and **BLUE LAKE CASINO AND HOTEL**, a tribally owned entity of the Federally Recognized tribe the BLUE LAKE RANCHERIA, Defendants.	Case No.: 3:16-cv-00598-H-BLM **PROOF OF SERVICE ON LESTER MARSTON**

1. I, James Acres, declare under penalty of perjury as follows:

2. Unsure of where to have Defendant Lester J. Marston served, I made attempts to have him served both at the Blue Lake Tribal Court at 428 Chartin Road in Blue Lake, California 95525 and at his law office at 405 West Perkins Street in Ukiah, California 95482.

3. Being inexperienced in such things, I was still researching whether either service was sufficient until April 6th, 2016 when Defendant Lester J. Marston made an appearance at *Docket 10*.

4. From *Docket 10* I learned that at least one of my attempts must've sufficed. But I still don't know whether it was the one, the other, or both.

5. So attached are both proofs, from the two different process servers. I apologize for submitting both, but I really don't know which one was proper.

6. Respectfully submitted April 25th, 2016

James Acres

CERTIFICATE OF SERVICE

I hereby certify that on April 25th, 2016, a copy of this **LESTER J MARSTON – PROOF OF SERVICE** was personally delivered by me to a clerk of the District Court, and served by First Class U.S. Mail on each Defendant as follows:

Blue Lake Rancheria Tribal Court Rapport & Marston Attn.: Lester J. Marston 405 West Perkins Street Ukiah, California 95482	**Blue Lake Casino and Hotel** Boutin Jones Attn.: Daniel S. Stouder 555 Capitol Mall, Suite 1500 Sacramento, CA 95814-4603
Lester J. Marston (Tribal Court Judge) Rapport & Marston Attn.: Lester J. Marston 405 West Perkins Street Ukiah, California 95482	**Anita Huff (Tribal Court Clerk)** Anita Huff 428 Chartin Road Blue Lake, CA 95525

James Acres

AO 441 Summons in a Civil Action (Page 2)

Civil Action No. 16cv0598-H-BLM Date Issued: 3/9/16

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))

This summons for *(name of individual and title, if any)* Lester J. Marsten, Chief Judge of the Blue Lake Rancheria Tribal Court

was received by me on *(date)* 3/15/16.

I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____; or

I left the summons at the individual's residence or place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of the individual)* Anita Huff, who is

~~designated by law to accept service of process on behalf of~~ Clerk of the *(name of organization)* Blue Lake Rancheria Tribal Court, 328 Chartin Rd. Blue Lake, CA 95525 on *(date)* 3/16/16; or

I returned the summons unexecuted because _____; or

Other *(specify)*: Anita Huff stated that L. Marsten was not at Tribal Court on the date of service.

My fees are $ 0 for travel and $ 42.50 for services, for a total of $ 42.50.

I declare under penalty of perjury that this information is true.

Date: 3/18/16

Cynthia Mitchell
Server's Signature

Humboldt #13-01

Cynthia Mitchell, Process Server
Printed name and title

1834 Central Ave, McKinleyville, CA 95519
Server's address

NOTICE OF RIGHT TO CONSENT TO TRIAL BY A UNITED STATES MAGISTRATE JUDGE

IN ACCORDANCE WITH THE PROVISION OF 28 USC 636(C) YOU ARE HEREBY NOTIFIED THAT A U.S. MAGISTRATE JUDGE OF THIS DISTRICT MAY, UPON CONSENT OF ALL PARTIES, CONDUCT ANY OR ALL PROCEDDINGS, INCLUDING A JURY OR NON-JURY TRIAL, AND ORDER THE ENTRY OF A FINAL JUDGMENT.

YOU SHOULD BE AWARE THAT YOUR DECISION TO CONSENT OR NOT CONSENT IS ENTIRELY VOLUNTARY AND SHOUL BE COMMUNICATED SOLELY TO THE CLERK OF COURT. ONLY IF ALL PARTIES CONSENT WILL THE JUDGE OR MAGISTRATE JUDGE WHOM THE CASE HAS BEEN ASSIGNED BE INFORMED OF YOUR DECISION.

JUDGMENTS OF THE U.S. MAGISTRATE JUDGES ARE APPEALABLE TO THE U.S. COURT OF APPEALS IN ACCORDANCE WITH THIS STATUTE AND THE FEDERAL RULES OF APPELLATE PROCEDURE.

Civil Action No. 16cv0598-H-BLM Date Issued: 3/9/16

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(1))

This summons for *(name of individual and title, if any)* Lester J. Marsten

was received by me on *(date)* 03/17/2016.

I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____; or

I left the summons at the individual's residence or place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of the individual)* Brissa DeLaherran, Office Manager, who is

designated by law to accept service of process on behalf of *(name of organization)* Lester J Marsten,

Chief Judge of the Blue Lake Rancheria Tribal Court on *(date)* 03/17/2016; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are $ _____ for travel and $ 130 for services, for a total of $ 130.

I declare under penalty of perjury that this information is true.

Date: 03/24/2016

Cindy Hooper

Server's Signature

Cindy Hooper, Process Server, PS-67

Printed name and title

NorCal Legal - 2559 Lakeshore Blvd., Suite 5, Lakeport, CA 95453

Server's address

NOTICE OF RIGHT TO CONSENT TO TRIAL BY A UNITED STATES MAGISTRATE JUDGE

IN ACCORDANCE WITH THE PROVISION OF 28 USC 636(C) YOU ARE HEREBY NOTIFIED THAT A U.S. MAGISTRATE JUDGE OF THIS DISTRICT MAY, UPON CONSENT OF ALL PARTIES, CONDUCT ANY OR ALL PROCEDDINGS, INCLUDING A JURY OR NON-JURY TRIAL, AND ORDER THE ENTRY OF A FINAL JUDGMENT.

YOU SHOULD BE AWARE THAT YOUR DECISION TO CONSENT OR NOT CONSENT IS ENTIRELY VOLUNTARY AND SHOUL BE COMMUNICATED SOLELY TO THE CLERK OF COURT. ONLY IF ALL PARTIES CONSENT WILL THE JUDGE OR MAGISTRATE JUDGE WHOM THE CASE HAS BEEN ASSIGNED BE INFORMED OF YOUR DECISION.

JUDGMENTS OF THE U.S. MAGISTRATE JUDGES ARE APPEALABLE TO THE U.S. COURT OF APPEALS IN ACCORDANCE WITH THIS STATUTE AND THE FEDERAL RULES OF APPELLATE PROCEDURE.