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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHEMEHUEVI INDIAN TRIBE, on its own behalf and on behalf of its members *parens patriae*, CHELSEA LYNN BUNIM, TOMMIE ROBERT OCHOA, JASMINE SANSOUCIE, and NAOMI LOPEZ,

Plaintiffs,

v.

JOHN McMAHON, in his official capacity as Sheriff of San Bernardino County, RONALD SINDELAR, in his official capacity as Deputy Sheriff for San Bernardino County, MICHAEL RAMOS, in his official capacity as the District Attorney of San Bernardino County, JEAN RENE BASLE, in his official capacity as County Counsel for San Bernardino County, and MILES KOWALSKI, in his official capacity as Deputy County Counsel for San Bernardino County,

Defendants.

Case No. 5:15-cv-01538-DMG(FFMx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

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INTRODUCTION

In what appears to be a campaign of racial profiling and targeted vehicle stops of Indian people, Deputy Sheriffs of San Bernardino County ("County") are issuing citations to, and impounding the vehicles of, members of the Chemehuevi Indian Tribe ("Tribe") while they are driving vehicles on the Chemehuevi Indian Reservation ("Reservation"). Those citations are being prosecuted by the San Bernardino County District Attorney and County Counsel in the San Bernardino County Superior Court. The issuance of the citations, the impoundment of the vehicles, and the prosecution of the Indians in State Court violate federal statutory law, federal common law, and the Constitution of the United States. Unless this Court acts to enjoin the defendants from citing and arresting tribal members, impounding their vehicles, and prosecuting them, members of the Tribe will be deprived of the equal protection and due process guaranteed to them under the Constitution and laws of the United States, and the Tribe will be deprived of the right to govern itself on its Reservation.

In this brief, the Tribe and the individual Indian plaintiffs ("Indians") will demonstrate that: (1) the Tribe and the Indians will suffer irreparable harm in the absence of an injunction; (2) they are likely to succeed on the merits of their claims; (3) the balance of the equities tips in favor of the Tribe and the Indians; and (4) an injunction is in the public interest.

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STATEMENT OF FACTS

The relevant facts of this case are set forth in the declarations of Chelsea Lynn Bunim ("Bunim Declaration"), Jasmine Sansoucie ("Sansoucie Declaration"), Tommie Robert Ochoa ("Ochoa Declaration"), Naomi Lopez ("Lopez Declaration"), Lee Ann Potts ("Potts Declaration"), June Leivas ("Leivas Declaration"), and Lester J. Marston ("Marston Declaration") filed in support of the plaintiffs' motion for temporary restraining order and order to show cause re: preliminary injunction. Plaintiffs will not repeat those facts here, but, rather, will incorporate them by this reference as if set forth here in full.

LEGAL STANDARD

The "[s]tandard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction." *United States Cellular Inv. Co. of Los Angeles, Inc. v. Airtouch Cellular*, 2000 U.S. Dist. LEXIS 4731, *15 (C.D. Cal. 2000). The plaintiff "[1] must establish that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

Additionally, the Ninth "[C]ircuit has adopted and applied a version of [a] sliding scale approach" in which "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser

showing of likelihood of success on the merits." *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-1132 (9th Cir. 2011) (internal citations omitted).

In the remaining portions of this brief, the plaintiffs will demonstrate that they clearly satisfy these requirements.

I.

THE TRIBE AND THE INDIANS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS.

A. The Defendants' Enforcement of State Civil/Regulatory Traffic Laws Against Indians on Their Reservation Is Unlawful Under *California v. Cabazon Band* of Indians and 28 U.S.C. § 1360.

Indian tribes retain attributes of sovereignty over both their members and their territory. Tribal sovereignty depends on and is subordinate only to the federal government, "not the states." *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987), *citing United States v. Mazurie*, 419 U.S. 544, 557 (1975) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). Under federal law, there is a presumption **against** state jurisdiction in Indian country. *Cabazon*, 480 U.S. at 216 n. 18; *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980). Congress, through the enactment of federal legislation, can expressly provide that state laws are applicable to Indian persons residing on their reservations. But for two specific federal statutes, however, no statutory authority exists that grants the State of California or any of its political subdivisions jurisdiction over Indian persons within the exterior boundaries of their reservations. *Worcester v. Georgia*, 31

U.S. 515 (1832); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

Congress granted the State of California limited criminal jurisdiction over criminal offenses committed in Indian country in 18 U.S.C. § 1162. Congress granted the State of California limited civil jurisdiction over Indian country in 28 U.S.C. § 1360. The grant of civil jurisdiction, however, is limited to *private* litigation involving individual Indian residents of reservations in state court proceedings. *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976).

When a state seeks to enforce its laws against an Indian person within an Indian reservation under the authority of either 18 U.S.C. § 1162 or 28 U.S.C. § 1360 (collectively, "Public Law 280"), a court must determine whether the law is a criminal statute of statewide application, and thus fully applicable to Indians on a reservation, or civil in nature, and thus applicable only as between private state court litigants. *Cabazon*, at 208. In making this determination, courts apply a criminal/prohibitory and civil/regulatory distinction test. *Cabazon*, at 209. This test is sometimes referred to as "the public policy test." "The 'public policy test' holds that Public Law 280 gives states power over Indian lands only if the state law in question prohibits, rather than regulates, conduct." *United States v. E.C. Invs.*, 77 F.3d 327, 330 (9th Cir. 1996).

The State of California does not prohibit the conduct at issue in this case: driving. Instead, the State allows individuals to operate motor vehicles provided that they comply with various regulatory requirements, including qualifying for and receiving a driver's license, registering vehicles, and insuring vehicles. The vehicle code

registration requirements set forth in California Vehicle Code § 4000(a)(1), the financial responsibility requirements set forth in California Vehicle Code § 16028(a), and the licensure requirements set forth in California Vehicle Code § 14601.1(a), the provisions of the California Vehicle Code at issue in this case, are not prohibitory. They are, rather, civil/regulatory requirements and, as such, do not apply to Indian persons within Indian country.

The State Attorney General, in analyzing this issue, concluded that California Vehicle Code Sections analogous to those at issue in this case are civil/regulatory and, thus, inapplicable in Indian country. In an opinion issued on February 8, 2006, 89 Ops. Cal. Atty. Gen. 6 ("Opinion"), former Attorney General Bill Lockyer opined that registration and licensure requirements are not subject to enforcement against "tribal Indians" on roads within their reservations. *Id*. at 4.

> [T]he primary issue to be resolved is whether section 4000 . . . constitute[s] a criminal statute that may be applied to tribal Indians on Indian reservations pursuant to the grant of authority contained in Public Law 280. To answer that question, we apply the test set forth in *California v. Cabazon Band of Mission Indians*, *supra*, 480 U.S. 202:
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> > " . . . [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, **but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation**." (*Id*. at p. 209.)

Id. (emphasis added).

The Attorney General found that "sections 4000 and 12500 [making it unlawful to drive without a license] are civil regulatory laws, not criminal laws, for purposes of Public Law 280." *Id.*, at 5. "What is significant is that under California's motor vehicle

laws, including these two statutes, the driving of a motor vehicle on the roads of the state is generally permitted, subject to various conditions including the two at issue here: (1) the vehicle must be registered and (2) the operator must have a valid driver's license." *Id.*, at 9.

The Attorney General concluded that "California motor vehicle registration and driver's license requirements are not subject to enforcement against Indian tribal members on roads within their Indian reservation." *Id.*, at 1.

Thus, civil/regulatory laws, like California Vehicle Code Sections 4000(a)(1), 16028(a), and 14601.1(a), do not apply to Indians when they are within "Indian country." The fact that the land may be patented does not alter the land's status as "Indian country." Public Law 280 and 18 U.S.C. § 1151(a) define "Indian country" as:

> [A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, **notwithstanding the issuance of any patent,** and, including rights-of-way running through the reservation[.]

18 U.S.C. § 1151(a) (emphasis added.).

The "rights-of-way running through a reservation" language of 18 U.S.C. § 1151(a) includes state and county highways. In *Gourneau v. Smith*, 207 N.W.2d 256 (N.D. 1973), a case involving a personal injury action that occurred on a state highway on an Indian reservation, both parties to the action were enrolled members of that reservation. In reaching the conclusion that the highway was "Indian country" within the meaning of Section 1151, the court stated:

> There can be no doubt that State highways within the boundaries of a reservation are a part of the reservation. "Indian country" is defined by Federal law as being all land within the limits of an Indian reservation

> under jurisdiction of the United States Government, "including rights-of-way running through the reservation…." 18 U.S.C.A. Sec. 1151.

Id. at 258. See *In re Konaha*, 131 F.2d 737 (7th Cir. 1942).

Gourneau and *Konaha* reveal that the fact that a state or county road runs through an Indian reservation does not confer state or county jurisdiction over misdemeanors or infractions of a civil-regulatory nature when they are committed by Indians on state or county maintained roads within their reservations.

In the present case, the citations were issued within the boundary of the Reservation, Leivas Declaration, Exhibit A, pp. 2-3, and, therefore, under federal law, the land is "Indian country" within the meaning of 18 U.S.C. § 1151(a). As "Indian country," the land is exempt from application of the civil/regulatory laws of the State, including California Vehicle Code §§ 4000(a)(1), 16028(a), and 14601.1(a). Therefore, the Sheriff's deputies were, and are, without jurisdiction to issue the citations and California state courts are without jurisdiction to entertain the prosecution of the Indians for such violations. Nevertheless, that is exactly what the Sheriff's deputies have done and are continuing to do at an alarming and increasing rate.

B. The Indians Can Demonstrate a Likelihood of Success on Their § 1983 Causes of Action.

The Tribe and the Indians are likely to succeed on the merits of their § 1983 causes of action because they can demonstrate that they have been deprived of their federally protected right to be free from state regulation and control. The plaintiffs can

further demonstrate that they have been deprived of their right to be free from racially motivated harassment and the unlawful impoundment of their vehicles.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

"The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), *quoting Ex parte Virginia*, 100 U.S. 339, 346 (1880). Thus, "§ 1983 basically seeks 'to deter *state* actors from using the badge of their authority to deprive individuals of their federally guaranteed rights' and to provide related relief…It imposes liability only where a person acts 'under color' of a state 'statute, ordinance, regulation, custom, or usage.'" *Richardson v. McKnight*, 521 U.S. 399, 403 (1997), *quoting Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (emphasis in original).

Here, the defendants, by citing tribal members on the Reservation and prosecuting those cases, are acting under color of state law, specifically, civil/regulatory portions of the California Vehicle Code that do not apply to California Indians on their reservations. In doing so, the defendants are depriving the plaintiffs of their federally protected rights

to be free of state regulation and control, a right created by the United States Constitution and affirmed through hundreds of years of Supreme Court jurisprudence. *See Worcester v. Georgia*, 31 U.S. 515 (1832). The Indian Commerce Clause expressly removes relations with Indian tribes and their members from the jurisdiction of the states and specifically grants authority over such matters to the United States Congress:

> The Congress [not the states] shall have power ... to regulate commerce ..., with the Indian tribes….

U.S. Const. art. I., § 8, cl. 3.

By attempting to assert state civil/regulatory jurisdiction over tribal members on the Tribe's reservation, the defendants have violated the fundamental rule that "Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress." *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1178 (9th Cir. 1975). This "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). Thus, under color of state motor vehicle laws, the defendants have deprived the Tribe and its members of a federally protected right and the defendants are liable under § 1983 for such violations.

Moreover, Deputy Sindelar's racially-motivated discriminatory practices, entering the Chemehuevi reservation with the intent to seek out and detain Indians without probable cause and to unlawfully impound their vehicles, constitute violations of the tribal members' rights under the Fifth and Fourteenth Amendments of the United

States Constitution. By citing tribal members for violations of laws that do not apply on the Reservation, as pretext for impounding their vehicles, and by continuing to prosecute those tribal members in a court that lacks jurisdiction over the tribal members' activities, the defendants are depriving the Tribe's members of their constitutional rights under color of state law and are, therefore, liable under § 1983.

C. The Tribe Can Bring This Action on Its Own Behalf and as *Parens Patriae* on Behalf of Its Members.

The Tribe may bring suit as *parens patriae* under 42 U.S.C. § 1983 to enforce the federally protected rights of its members to be free from state regulation and control and the racially-motivated discriminatory practices in which the San Bernardino County Sherriff's Department is currently engaged under color of state law. That conduct, in turn, harms the Tribe and its interests as a whole.

The doctrine of *parens patriae* permits a state to bring suit to protect a set of interests that the state has in the well-being of its populace. *See Alfred L. Snapp & Son. Inc. v. Puerto Rico*, 458 U.S. 592 (1982). To have standing *parens patriae*, a state must assert an injury to what has been characterized as a "quasi-sovereign interest." *Snapp*, 458 U.S. at 600-602. Quasi-sovereign interests can be classified in two general categories: (1) interests that the state has in the general health and well-being — both physical and economic — of its populace, *id*.; and (2) interests that ensure that the state and its citizens "are not excluded from the benefits that are to flow from participation in the federal system." *Id*. at 607-608. In a *parens patriae* action, the state is required to

"articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party." *Id*. at 607.

Indian tribes, like states, are entitled to file suit on behalf of its members *parens patriae*. *See Quapaw Tribe of Okla. v. Blue Tee Corp*., 653 F.Supp.2d 1166, 1183-1184 (N.D. Okla. 2009) ["[T]he Court finds that the Tribe has standing to assert claims ... on behalf of Tribal members ... the Court determined that the alleged harm to the environment affects the health and well-being of a substantial number of Tribal members ... the Tribe has a quasi-sovereign interest in protecting natural resources on Tribal land."]; *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728 (8th Cir. 2001); *In re Blue Lake Forest Products, Inc*., 30 F.3d 1138 (9th Cir. 1994). The Alaska Supreme Court specifically held that a tribe can bring § 1983 actions *parens patriae* on behalf of its members. *Dep't of Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 413 (2006).

Here, the injury the Tribe seeks to remedy under § 1983, on behalf of its members *parens patriae*, is an injury to the well-being of its larger population suffered as a result of the systematic deprivation of tribal members' federally protected rights, namely those protected under U.S. Const. amend. XIV, § 1 and U.S. Const. art. I., § 8, cl. 3. The Tribe has a quasi-sovereign interest in ensuring that its members are not under the continuous threat of State arrest and prosecution in contravention of well-established federal law depriving the State of jurisdiction over matters that are civil/regulatory in nature. Protection of that interest enables reservation Indians to thrive physically and

economically both within and outside of the boundaries of their lands without fear of intimidation, mistreatment, and discrimination perpetrated by state actors. *See generally United States v. Kagama*, 118 U.S. 375, 384 (1886) [recognizing that Indians and Indian tribes "owe no allegiance to the States, and receive from [the States] no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."].

The Tribe, furthermore, has a broad interest in protecting its members from civil rights violations and may file suit *parens patriae*, even though private individuals would have had a cause of action under state statutes. *Pennsylvania v. Porter*, 659 F.2d 306 (3d. Cir. 1981). With respect to civil rights violations, "[b]ecause the state's interest will usually not be completely addressed by individual lawsuits brought by aggrieved individuals, courts have allowed the state to sue *parens patriae*." *Curyung*, at 400, *citing Pennsylvania*, 659 F.2d at 315-316. If the defendants are permitted to continue invidious discrimination, each individual tribal member will be forced to bear the costs associated with that prosecution in a court that does not have jurisdiction over them and, in doing so, risk inconsistent binding judgments from state and federal courts. *See Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709 (1989).

The Tribe is not a nominal party because all of its members, the entire Chemehuevi tribal population, are under the threat of unlawful state prosecution and violations of their civil rights under the color of state motor vehicle laws. In particular, San Bernardino County Sherriff Deputy Sindelar has aggressively targeted tribal

members for alleged violations of state motor vehicle registration requirements. *See* Sansoucie, Bunim, and Ochoa Declarations. The Tribe has an interest in ensuring that other similarly situated tribal members are not subject to the same mistreatment and discrimination.

Accordingly, the Tribe has standing to sue on behalf of its members *parens patriae*.

D. The Anti-Injunction Act Does Not Bar the Relief Requested by the Tribe and the Indians.

The Anti-Injunction Act, 28 U.S.C. § 2283 ("AIA"), provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The AIA, however does not bar federal courts from enjoining state court criminal prosecutions when the federal cause of action is based on 42 U.S.C. § 1983. Individual Indian plaintiffs Tommie Robert Ochoa and Chelsea Lynn Bunim, who are requesting that the Court enjoin ongoing prosecutions in state court, are likely to succeed on the merits of their claims because their claims fall with these exceptions.

The Supreme Court has held that, when an action is brought pursuant to 42 U.S.C. § 1983, the AIA does not bar a federal court from enjoining a state court because § 1983 actions fall within the "expressly authorized by Act of Congress" exception to the AIA:

> [W]e conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law.

Mitchum v. Foster, 407 U.S. at 242-243 (1972). *See also Bowen v. Doyle*, 880 F. Supp. 99, 130-131 (W.D.N.Y. 1995) [district court could enjoin a state court proceeding involving jurisdiction over Indians for activity within Indian country because the federal action was brought pursuant to § 1983].

This Court, thus, is not prevented by the AIA from enjoining state court criminal prosecutions because the individual Indians seeking the injunction have brought their federal court claims pursuant to § 1983.

The AIA also does not bar this Court from enjoining state court proceedings when an injunction is necessary to preserve the integrity of Indian sovereignty, particularly when the issue is whether or not the state court has jurisdiction. Courts have determined that such an injunction falls within the second AIA exception, "where necessary in aid of its jurisdiction." See 28 U.S.C. § 1360(b); 28 U.S.C. § 1362; *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1304 (9th Cir. 1988); *Tohono O' Odham Nation v. Schwartz*, 837 F. Supp. 1024, 1027-1029 (D. Ariz. 1993); *Bowen*, 880 F. Supp. at 130-131; *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

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II.

THE TRIBE, ITS MEMBERS, AND THE INDIVIDUAL INDIAN PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION.

The Tribe, its members, and the individual Indian plaintiffs have suffered and will suffer irreparable harm in a number of ways if the County Officials are not enjoined.

First, the Sheriff's Office has engaged in a pattern and practice of racially-profiling tribal members, with the specific intent of citing tribal members for violations of civil/regulatory provisions of the Vehicle Code. The tribal members, thus, travel on their Reservation under the threat of racial-profiling and unlawful citation for violations of state law. Tribal members further face the threat of impoundment of their vehicles.

These actions are serious constitutional violations, which give rise to a cause of action under the 42 U.S.C. § 1983. Such constitutional violations constitute, as a matter of law, irreparable harm. "In *Elrod v. Burns*, [427 U.S. 347 (1976),] the Supreme Court held that when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Mich. Rehab. Clinic Inc., P.C. v. City of Detroit*, 310 F. Supp. 2d 867, 871 (E.D. Mich. 2004). The *Elrod* Court held that the loss of constitution freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373. *See Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir. 1984)["An alleged constitutional infringement will often alone constitute irreparable harm."]; *Haynes v. Office of the AG*, 298 F. Supp. 2d 1154,

1159 (D. Kan. 2003) ["[I]rreparable harm is generally viewed as established when a plaintiff's claim is based upon a violation of the plaintiff's constitutional rights."]; *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1259 (D.N.M. 2003) ["When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (internal citations omitted)]; *Coeur D'Alene Tribe v. Hammond*, 244 F. Supp. 2d 1250, 1264 (D. Idaho 2003)["When a plaintiff's constitutional rights are violated, there is a *presumption* of irreparable harm."].

Second, the Tribe, its members, and the individual Indian plaintiffs can demonstrate irreparable harm because, in the absence of the injunctive relief requested, the continued citation and prosecution of tribal members for violations of state law that do not apply to Indians impermissibly encroaches upon, and interferes with, the right and ability of the Tribe to govern itself.

Indian tribes are irreparably harmed by unlawful deprivations of their jurisdictional authority. *E.g.*, *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1205-1206, 1210-1211 (W.D. Okla. 2005). State encroachments on tribal sovereignty constitute an irreparable injury because the harm to tribal self-government is "not easily subject to valuation," and because "monetary relief might not be available because of the state's sovereign immunity." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001); *see also EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) ["Assuming that the Tribe is correct in its analysis with respect to jurisdiction, **the prejudice of subjecting the Tribe to a subpoena for which**

the agency does not have jurisdiction results in irreparable injury vis-a-vis the Tribe's sovereignty." (emphasis added)]; *Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d 1182, 1187 (W.D. Okla. 2010) [remedies at law are inadequate to remedy unlawful assertions of state jurisdiction in Indian Country].

The Tenth Circuit has "repeatedly stated" that enforcing state jurisdiction on Indian land is an "invasion of tribal sovereignty" constituting irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255-56 (10th Cir. 2006). The threat of repeated state prosecutions creates the "prospect of significant interference with [tribal] self-government." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1250, *citing Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d at 716. Neither the Tribe nor its members should be "forced to expend time and effort on litigation in a court that does not have jurisdiction over them, and risk inconsistent binding judgments from state and federal courts." *Seneca-Cayuga* at 716.

Each time the State of California illegally extends its civil/regulatory jurisdiction inside the Tribe's reservation boundaries, the Tribe's members suffer unconstitutional deprivations of their liberty and/or property, *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990), and the Tribe itself suffers an illegal encroachment on its territorial jurisdiction. *Prairie Band of Potawatomi Indians*, at 1250 [Indian tribes have the inherent right to control access to and presence of persons on their reservations].

In a recent case that is on all fours with the present dispute, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 2015 U.S. App. LEXIS 10132 (10th Cir.

2015), the Tenth Circuit found that the State of Utah had repeatedly, and in violation of the Tenth Circuit's holdings, cited Ute members while they were driving on their reservation for violations of state law that did not apply on the Ute reservation.[1] The Ute Tribe sued the State of Utah, as well as other state governmental entities, seeking an order enjoining the prosecution of a Ute tribal member and seeking a declaration that Utah lacked jurisdiction to cite Ute members for violations of state law that occurred on their reservation.

The Tenth Circuit unequivocally held that Utah's unlawful exercise of state jurisdiction on the Ute reservation constituted irreparable harm:

> Indeed, the harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time. Not only is the prosecution of Ms. Jenkins itself an infringement on tribal sovereignty, but the tortured litigation history that supplies its backdrop strongly suggests it is part of a renewed campaign to undo the tribal boundaries settled by *Ute III* and *V*.… Never mind *Ute III* and *V*. And never mind the United States Constitution and the authority *that* document provides the federal government to regulate Indian affairs. On the record before us, there's just no room to debate whether the defendants' conduct "create[s] the prospect of significant interference with [tribal] self-government" that this court has found sufficient to constitute "irreparable injury." *Prairie Band*, 253 F.3d at 1250-51…By any fair estimate, that appears to be the whole point and purpose of their actions.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah, 2015 U.S. App. LEXIS 10132, *9-10 (10th Cir. 2015).

[1] The State of Utah is not a Public Law 280 state. *See* 28 U.S.C. §1360(a). However, that is not relevant to the application of the Tenth Circuit's analysis to the issues in the current dispute, because the Tribe is challenging the citation and prosecution of Tribal members for alleged state civil/regulatory laws that do not apply to Indians on their reservations in the State of California.

Here, as in *Ute Indian Tribe*, there can be no question that the defendants' continued campaign to unlawfully cite and prosecute Chemehuevi tribal members for violations of state law that do not apply on the Reservation significantly interferes with tribal self-government. The Tribe, on behalf of its members, has spent and continues to spend substantial amounts of its limited tribal revenue to defend its tribal members. This bleeding of the Tribe's limited resources has a significantly negative impact on the Tribe's ability to govern itself and provide essential governmental services to its tribal members. Rather than using tribal funds to administer governmental programs to provide, for example, support to tribal elders or scholarships to young tribal members, the Tribe must expend its tribal revenue to defend against prosecutions that the District Attorney and County Counsel know are meritless.

The fact that the defendants continue to cite tribal members and to prosecute those cases after two cases have already been dismissed on jurisdictional grounds is further evidence that irreparable harm has occurred. Rather than appealing those dismissals, the defendants have chosen to issue more unlawful citations, presumably in the hope that getting more cases in the pipeline increases the chances that a state court will issue a favorable decision. This is the same strategy that the State of Utah used in the *Ute Indian Tribe* case. Unless and until a federal court enjoins the defendants from illegally citing and prosecuting tribal members for violations of state civil/regulatory laws, there is nothing stopping the defendants from continuing to racially-profile and harass the Tribe's members and from illegally depriving them of their personal property.

Thus, the Tribe's remedies at law are inadequate to address these unlawful assertions of state jurisdiction in Indian country.

Third, individual tribal members face continued harassment and the threat of unlawful citation and prosecution on a daily basis. "The threat of . . . prosecution . . . constitutes irreparable harm." *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1309 (S.D. Fla. 2008). *See also Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012) [Finding a likelihood of irreparable harm because plaintiffs were "under the threat of state prosecution."]; *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999) ["In our view, such an express threat [of prosecution] instills a fear of . . . prosecution that cannot be said to be 'imaginary or wholly speculative.'"].

The Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37, 46 (1971), does not conflict with this analysis. In that case, the Supreme Court held:

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Here, the plaintiffs are not faced with defending a single prosecution. The illegal citation and prosecution of tribal members is ongoing and there is no evidence to suggest that the unlawful citations and prosecutions will cease in the absence of the requested relief.

The Ninth Circuit has, moreover, held that "[e]ven in the context of state criminal prosecutions, where federalism concerns raise additional barriers to the federal courts' exercise of equitable jurisdiction, federal courts refuse to abstain in cases involving a bad faith prosecution that has little expectation of a valid conviction or is initiated to retaliate for or discourage the exercise of constitutional rights." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir.1995). "In this context, bad faith 'generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction.'" *Lewellen v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988), *quoting Kugler v. Helfant*, 421 U.S. 117, 126 n. 6 (1975).

Here, the prosecutions of tribal members for the alleged violation of state laws that do not apply on the Tribe's reservation constitute bad faith prosecutions. The charges are brought without a reasonable expectation of obtaining valid convictions, because the county law enforcement officials lack jurisdiction to issue the citations.

Finally, with respect to the individual Indian plaintiffs currently facing prosecution, the threat of irreparable harm is imminent because the Indians face prosecution in a tribunal that lacks jurisdiction over them. The harm caused to individual tribal members currently being prosecuted for citations over which the State of California lacks jurisdiction cannot be said to be imaginary or wholly speculative. These are tangible harms that are not subject to valuation. Monetary damages cannot compensate for the harm caused by dragging tribal members through the courts of a separate sovereign on charges that the Indians have violated state laws that do not apply

to them. The individual Indian plaintiffs currently facing prosecution, thus, will suffer irreparable harm in the absence of the injunctive relief requested.

III.

BOTH THE PUBLIC INTEREST AND THE EQUITIES WEIGH IN FAVOR OF GRANTING THE INJUNCTIVE RELIEF REQUESTED.

The public interest and the balance of the equities require that the defendants' citation and prosecution of tribal members be enjoined. The threatened injury to the Tribe and its tribal members outweighs any conceivable harm to the defendants. "The federal nature of the law and of the issues to be decided," combined with the State's lack of civil/regulatory jurisdiction over tribal members inside the Tribe's reservation, "reduce the State's interest in this litigation to the vanishing point." *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 716; *see also Prairie Band of Potawatomi Indians*, at 1251-1252 [the state "has not been prevented from enforcing its registration and titling laws wholesale — only with respect to the tribe and its members."].

A temporary restraining order and preliminary injunction will not adversely affect the public interest. Exactly the opposite is true. There is a strong public interest in requiring the defendants to recognize and comply with federal laws that protect the integrity of the Tribe's sovereign territory and its right to self-government. *Winnebago Tribe of Nebraska v. Stovall*, 205 F. Supp. 2d 1217, 1223 (2002) ["[T]he public has a significant interest in assuring the viability of tribal self-government, self-sufficiency, and self-determination."].

In *Ute Indian Tribe*, the Tenth Circuit pointedly articulated why the public interest and the equities favored enjoining the unlawful prosecution of tribal members for violation of state law where the state officials lacked jurisdiction to do so:

> That brings us to the last two elements of the preliminary injunction test: a comparison of the potential harms that would result with and without the injunction and a consideration of public policy interests. *Prairie Band*, 253 F.3d at 1250. Here again there's no question who has the better of it. On the Tribe's side of the ledger lies what this court has described as the "paramount federal policy" of ensuring that Indians do not suffer interference with their efforts to "develop…strong self-government." *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989); *see also Prairie Band*, 253 F.3d at 1253. Against this, the State and Wasatch County argue an injunction would impede their ability to ensure safety on public rights-of-way. But this concern "is not as portentous as [they] would have it." *Prairie Band*, 253 F.3d at 1253. It isn't because nothing in the requested temporary injunction would prevent the State and County from patrolling roads like the ones on which Ms. Jenkins was stopped, from stopping motorists suspected of traffic offenses to verify their tribal membership status, from ticketing and prosecuting non-Indians for offenses committed on those roads, from referring suspected offenses by Indians to tribal law enforcement, or from adjudicating disputes over the Indian status of accused traffic offenders when meaningful reasons exist to question that status. **Instead, the temporary injunction would simply prohibit the State and County from prosecuting Ms. Jenkins and perhaps other tribal members for offenses in Indian country — something they have no legal entitlement to do in the first place. In this light, the defendants' claims to injury should an injunction issue shrink to all but "the vanishing point."** *Seneca-Cayuga*, 874 F.2d at 716.

Id., 2015 U.S. App. LEXIS at *13-14.

Thus, a temporary restraining order and preliminary injunction are in the public interest and the balance of equities tip in favor of the plaintiffs.

CONCLUSION

For all of the foregoing reasons, the plaintiffs' respectfully request that the Court issue a temporary restraining order and an order to show cause why a preliminary injunction should not be issued.

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Respectfully Submitted,

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