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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-FFM

[Action filed: July 30, 2015
Case Assigned to: Hon. Dolly M. Gee
Courtroom 7]

PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: February 5, 2016
Time: 11:00 a.m.
Courtroom: 7

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND 2

I. THE STATE AND THE RESIDENTS ARE NOT NECESSARY PARTIES UNDER RULE 19 4

A. The County Has Failed To Demonstrate That The State And The Residents Of Section 36 Have A Legally Protected Interest As Required By Fed. R. Civ. P. 19 And, Even If They Had, The County Adequately Represents Those Interests. 5

B. Concern Among Residents Of Section 36 And The State Regarding An Exercise Of Tribal Jurisdiction Over Section 36 Is Not A Protectable Interest And Is Legally Unfounded. 7

II. THE COUNTY LACKS JURISDICTION TO ENFORCE ITS CIVIL/REGULATORY VEHICLE CODE AGAINST MEMBERS OF THE TRIBE WITHIN THE TRIBE'S INDIAN COUNTRY 10

A. Section 36 Is Indian Country. 10

B. The Determination Of The Boundaries Of The Reservation Is Not Dependent On The Ownership Of The Land. 12

C. The County's Presumptions About The Effect Of A Conclusion That Section 36 Is Within The Boundaries Of The Reservation Are Unsupported, Unfounded, And Untrue 13

III. THE SECRETARY HAD THE AUTHORITY TO ESTABLISH THE BOUNDARIES OF THE TRIBE'S RESERVATION. 15

IV. DEFENDANTS MISCHARACTERIZE THE LAW AND THE FACTS AT ISSUE REGARDING IRREPARABLE HARM. 18

V. DEFENDANTS' ANALYSIS OF THE BALANCE OF EQUITIES AND PUBLIC INTEREST RELIES ON UNPROVEN, IMAGINED HARMS. 21

VI. A PRELIMINARY INJUNCTION ENJOINING THE DEFENDANTS FROM ENFORCEMENT OF CIVIL/REGULATORY PROVISIONS OF THE CALIFORNIA VEHICLE CODE WITHIN INDIAN COUNTRY IS NECESSARY. 22

VII. THE PROPOSED INJUNCTION COMPLIES WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THE COUNTY HAS NOT OFFERED ANY REASONS WHY THIS COURT SHOULD REQUIRE A BOND.....23

CONCLUSION.....24

TABLE OF AUTHORITES

Cases

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) 14

Beardslee v. United States, 541 F.2d 705 (8th Cir. 1976) 13

Big Horn Elec. Coop., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000) 9

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 9, 15

Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201 (C.D. Cal. 1998) 19

California v. Cabazon, 480 U.S. 202 (1987) 3

Coeur D'Alene Tribe v. Hammond, 244 F. Supp. 2d 1250 (D. Idaho 2003) 18

County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) 6

DeCoteau v. District County Court, 420 U.S. 425 (1975) 12

Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990) 5

Mattz v. Arnett, 412 U.S. 481 (1973) 12

McClendon v. City of Albuquerque, 272 F. Supp. 2d 1250 (D.N.M. 2003) 18

McLaughlin v. International Ass'n of Machinists, 847 F.2d 620 (9th Cir. 1988) 5

Merrion v. *Jicarilla Apache Tribe,* 455 U.S. 130 (1982) 14

Montana v. United States, 450 U.S. 544 (1981) 8, 9, 13, 14

Northern Alaska Environmental Center v. Hodel, 803 F.2d 466 (9th Cir. 1986) 5, 6

Prairie Band of Potawatomi Indians v. Pierce, 64 F. Supp. 2d 1113 (D. Kan. 1999) ... 18, 23

Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983) 5

TABLE OF AUTHORITES

Cases

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) 14

Beardslee v. United States, 541 F.2d 705 (8th Cir. 1976) 13

Big Horn Elec. Coop., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000) 9

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 9, 15

Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201 (C.D. Cal. 1998) 19

California v. Cabazon, 480 U.S. 202 (1987) 3

Coeur D'Alene Tribe v. Hammond, 244 F. Supp. 2d 1250 (D. Idaho 2003) 18

County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) 6

DeCoteau v. District County Court, 420 U.S. 425 (1975) 12

Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990) 5

Mattz v. Arnett, 412 U.S. 481 (1973) 12

McClendon v. City of Albuquerque, 272 F. Supp. 2d 1250 (D.N.M. 2003) 18

McLaughlin v. International Ass'n of Machinists, 847 F.2d 620 (9th Cir. 1988) 5

Merrion v. *Jicarilla Apache Tribe,* 455 U.S. 130 (1982) 14

Montana v. United States, 450 U.S. 544 (1981) 8, 9, 13, 14

Northern Alaska Environmental Center v. Hodel, 803 F.2d 466 (9th Cir. 1986) 5, 6

Prairie Band of Potawatomi Indians v. Pierce, 64 F. Supp. 2d 1113 (D. Kan. 1999) ... 19, 23

Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983) 5

Queets Band of Indians v. Washington, 765 F.2d 1399 (9th Cir. 1985).....19

Seneca-Cayuga Tribe of Okla. v. Oklahoma, 874 F.2d 709 (10th Cir. 1989).....19

*Seymour v. Superintendent,*368 U.S. 351 (1962).....13

Solem v. Bartlett, 465 U.S. 463 n. 2 (1984).....3

Strate v. A-1 Contractors, 520 U.S. 438 (1997).....8, 9

United States v. Cooper, 312 U.S. 600 (1941).....17

United States v. McBratney, 104 U.S. 621 (1881).....3

United States v. Michigan, 508 F. Supp. 480 (W.D. Mich. 1980).....24

United States v. Nice, 241 U.S. 591 (1916).....13

Ute Indian Tribe of the Uintrah & Ouray Reservation v. Utah, 2015 U.S. App. LEXIS 10132 (10th Cir. 2015).....5, 12

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997).....19

Worcester v. Georgia, 31 U.S. 515 (1832).....10

Yount v. Salazar, 933 F.Supp. 2d 1215 (D. Ariz. 2013).....16

Statutes

18 U.S.C. § 1151.....11, 18

18 U.S.C. § 1162.....18

28 U.S.C. § 1360.....3, 18

P.L. 280.....18

Rules

Federal Rule of Civil Procedure 19.....4, 5, 6, 7

Federal Rule of Civil Procedure 24.....6

Other Authorities

Congressional Act of March 3, 1891, c. 543, 26 Stat. 1035 12

Mission Indian Relief Act 16, 17

Secretarial Order of February 2, 1907 11

INTRODUCTION

In its Supplemental Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opposition") and the declarations filed in support thereof, the defendants ("County") continue to omit relevant key facts and conflate a lack of trust ownership for the Chemehuevi Tribe ("Tribe") of Section 36, with Section 36 not being part of the Chemehuevi Indian Reservation ("Reservation").

The County concedes that the Vehicle Code provisions ("VC") at issue in this case are civil regulatory (Opposition, p. 18, lls. 2-12) and that the Sheriff has no authority to enforce the VC provisions against members of the Tribe within the Reservation or the Tribe's "Indian country," which is defined as "all lands within the boundaries of an Indian reservation." 18 U.S.C. § 1151.

Instead, the County asserts, that Section 36 is not within the boundaries of the Reservation, is not "Indian country" and therefore, the Sheriff and his deputies can enforce all of the provisions of the VC against the members of the Tribe while driving within Section 36.

The sole basis for the County's position is that Section 36 was patented to the State of California ("State") in 1866, prior to the creation of the Reservation in 1907. In making this argument, the County ignores the fact that Congress set aside and reserved Section 36 to the Tribe in 1853, enacted legislation that expressly authorized the Secretary of the Interior ("Secretary") to officially withdraw the lands for the Tribe, and that the Secretary, pursuant to such authorization, specifically withdrew and included Section 36 within the Reservation in 1907.

As a result, regardless of who holds title to Section 36, Section 36 lies within the boundaries of the Reservation, is Indian country, and the County has no authority to enforce the provisions of the VC against tribal members while driving within Section 36.

FACTUAL BACKGROUND

The facts of this case are accurately set forth in Plaintiffs' Complaint and the Declarations filed in Support of Plaintiffs' Application for Temporary Restraining Order and Motion for Order to Show Cause Re: Preliminary Injunction ("Declarations").

In its Opposition, the County misstates, overlooks, and fails to mention a number of the essential facts of this case. In order to correct these omissions and misstatements, the Tribe and individual Indian plaintiffs ("Indians") will not restate all of the facts of this case, but rather, will only set forth those facts omitted or misstated by the County in its Opposition.

Throughout its Opposition, the County characterizes the Tribe's and Indians' claims as "occurring on tribal land". Opposition, p. 1, lls. 4 - 5. The Tribe and the Indians have never asserted that Section 36 is "tribal land," which is owned by the United States in trust for the Tribe or land owned by the Tribe in fee. Rather, the Tribe and Indians, for purposes of determining whether California civil/regulatory laws can be enforced against the Indians, have asserted that Section 36 lies within the boundaries of the Reservation and is therefore "Indian country" as defined in 18 U.S.C. § 1151.

Throughout its Opposition, the County uses the term "Reservation land" to describe where the violations at issue in this case have occurred. *Id*, p. 1, lls. 12. This misstates or mischaracterizes the location of where the Tribe's and the Indians' claims arose. The issue in this case is *not* whether the land is Reservation land, implying that ownership of the land is vested in the Tribe, but rather whether the land is "Indian country" and lies within the boundaries of the Reservation as established by Congress through enactment of federal statutes and action of the President through issuance of a Secretarial order.

The County also baldly asserts in its Opposition, without citation to any legal authority, that "Section 36, historically . . . has never been considered Reservation land." *Id*. p. 1, lls 17-18. This statement selectively ignores the fact that on March 13,

1853, Congress reserved and set aside for the Tribe, all lands on the public domain within California under the use and occupancy of the Tribe and its members, including Section 36. It also ignores the fact that the Tribe and its members were using the lands comprising Section 36 in 1853, as evidenced by the State's own surveyor's notes reporting seeing Indians while surveying the Section and C.E. Kelsey's report to Congress that the Chemehuevi had been occupying the lands comprising the Reservation, including Section 36, from time immemorial. Finally, the County's statement ignores the fact that the Secretary expressly included Section 36 in his Secretarial Order issued in 1907 establishing the boundaries of the Reservation.

Furthermore, throughout its Opposition, again without citing to any legal authority, the County infers that if Section 36 is Indian country, that the non-Indians living in Section 36 will somehow no longer be protected by State law: "this is in stark contrast to the several hundred non-Indians residents living in Section 36 who understand and expect to be protected under California law." *Id*. p. 1, lls. 24-26.

First, the record is devoid of any evidence to support this bald assertion. Second, and more importantly, as set forth below, the statement is clearly contrary to the law. State laws apply to non-members of the Tribe within the Tribe's Indian country, absent an act of Congress that expressly grants the federal government or the Tribe jurisdiction. *United States v. McBratney,* 104 U.S. 621 (1881); *Draper v. United States*, 16 U.S. 240 (1896); *Solem v. Bartlett*, 465 U.S. 463, 465. n. 2 (1984). Finally, even as to members of the Tribe, the State has criminal jurisdiction to enforce its criminal/prohibitory laws against tribal members within the Tribe's Indian country. 28 U.S.C. § 1360; *California v. Cabazon*, 480 U.S. 202 (1987).

In addition, the County asserts that prior "to the present dispute, the Tribe had not attempted to exercise jurisdiction over Section 36…." *Id*., p. 2, lls. 10-13. This statement implies that the Tribe has never considered Section 36 to be within the boundaries of the Reservation. Once again, the record is devoid of any evidence to

support this inference. This is not true. Since the Tribe's government was recognized in 1970, it has always been the position of the Tribe that the original boundaries of the Reservation, as established by the Secretary's 1907 Order, still exist and that all lands within the 1907 boundaries, including Section 36, are Indian country. Declaration of Lester J. Marston In Reply To Defendant's Supplemental Opposition To Plaintiff's Motion For Preliminary Injunction.

Finally, the County states that if the Indians are not subject to the VC provisions at issue in this case, that non-tribal members will be put at "a significant risk" of being harmed. Opposition, p. 16, lls. 24-26. Again, there is nothing in the record to support this assertion. Whether a person has a driver's license or their car is registered or whether they have insurance has absolutely nothing to do with whether they will operate a vehicle in a safe manner. And while lack of insurance may go to the issue of whether a person may be able to recover money damages if harmed as a result of a car accident with a tribal member, the lack of proof of insurance or lack of insurance, in and of itself, does not make tribal member driving a car within the boundaries of the Reservation any more or any less a safe or dangerous driver.

Having now corrected the omissions and misstatements of fact contained in the County's Opposition, the Tribe and the Indians will now address the County's legal arguments set forth in their Opposition brief.

I.

THE STATE AND THE RESIDENTS ARE NOT NECESSARY PARTIES UNDER RULE 19.

The County incorrectly alleges that the State and those persons who reside within Section 36 are necessary parties under Rule 19 (a)(1)(B)(i) because they have an interest in the subject matter of the proceeding and because disposing of this proceeding without joining them as parties would impair or impede their ability to protect that interest. Opposition, p. 4-5. As for the State's interest in this suit, the County speculates that the State could be divested of its jurisdiction and ability to tax the private, non-Indian

residents. *Id*. As for the residents' interest in this proceeding, the County surmises that the private, non-Indian residents could "presumably" be subjected to the Tribe's regulation and taxation. *Id*. But these concerns are not as portentous as the County would have it. *Ute Indian Tribe of the Uintrah & Ouray Reservation v. Utah*, 2015 U.S. App. LEXIS 10132 (10th Cir. 2015).

A. The County Has Failed To Demonstrate That The State And The Residents Of Section 36 Have A Legally Protected Interest As Required By Fed. R. Civ. P. 19 And, Even If They Had, The County Adequately Represents Those Interests.

Federal Rule of Civil Procedure 19(a)(1)(B)(i) provides that a person or entity who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may … as a practical matter impair or impede his ability to protect that interest" shall be joined in the action if feasible.

"To determine if a party is necessary to the suit, the court must determine whether the absent party has a *legally protected interest* in the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-559 (9th Cir. 1990)(emphasis in original); *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986). This interest must be more than a financial stake, *Northern Alaska Environmental Center*, 803 F.2d at 468, and more than speculation about a future event. *McLaughlin v. International Ass'n of Machinists*, 847 F.2d 620, 621 (9th Cir. 1988) ["Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19."]; *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

If a legally protected interest exists, the court must further determine whether that interest will be *impaired or impeded* by the suit. *Makah Indian Tribe*, 910 F.2d at 558. Impairment, however, may be minimized if the absent party is adequately represented in the suit. *Id.* In assessing an absent party's necessity under Fed. R. Civ. P. 19(a), the question of whether that party is adequately represented parallels the question whether a

party's interests are so inadequately represented by existing parties as to permit intervention of right under Fed. R. Civ. P. 24 (a). *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992).

Courts consider three factors in determining whether existing parties adequately represent the interests of the absent parties: (1) whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; (2) whether the party is capable of, and willing to make such arguments; and (3) whether the absent party would offer any necessary element to the proceedings that the present parties would neglect. *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992).

The County makes various conjectures regarding the jurisdictional interests of the State and the residents of Section 36, but does no more than that. The County does not demonstrate that jurisdiction is a legally protected interest—they do not even attempt to do so. This is because the question of which governmental entity is permitted to exercise jurisdiction over a parcel of land is not the type of interest contemplated under Fed. R. Civ. P. 19(a)(1)(B)(i).[1]

The County argues that a ruling in this case could "possibly [have] financial implications for this group" of residents, observing that the residents have made "investments in establishing their homes within Section 36." Opposition, p. 5. Speculation about financial implications and investments does not, however, constitute a legally protected interest. *Northern Alaska Environmental Center*, 803 F.2d at 468. The absent residents, therefore, do not possess the requisite legally protected interest in the subject matter of this proceeding. Accordingly, they are not, as the County contends, necessary parties to this suit and temporary injunctive relief is a proper remedy.

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[1] Likewise, any legal obligations that stem from that question are not properly considered in a Rule 19(a)(1)(B)(i) analysis.

Even if the County succeeded in demonstrating a legally protected interest, it was nevertheless responsible for establishing that such interest would be impeded or impaired by issuance of a preliminary injunction. For purposes of temporary injunctive relief, the defendants, who are officials of San Bernardino County—a political subdivision of the State—have already adequately represented any impediment and/or impairment of a State or resident interest in this suit. In fact, the County, in its Opposition, dedicates six pages to defense of purported State and resident interests, alleging that "the actual facts and history of Section 36 reveal that it is not within the boundaries of the Reservation" and that the State thus retains title to the land. Opposition, pp. 6-11. The County, the State, and the residents are, moreover, likely to continue to make identical arguments. Furthermore, neither the State nor the residents would offer any necessary element to the proceedings that the County would not otherwise neglect. Significantly, neither the State nor the residents, despite their purported concerns, have moved to intervene in this case.

As mere conjecture, the County's concerns regarding jurisdiction and finances—offered on behalf of unnamed and unnumbered persons and the State—are insufficient as legally protected interests required by Fed. R. Civ. P. 19(a)(1)(B)(i). As such, the Court should now grant temporary injunctive relief preventing the County from continued citation and prosecution of tribal members alleged to have violated State civil/regulatory traffic laws within the boundaries of the Reservation, which includes but is not limited to Section 36.

B. Concern Among Residents Of Section 36 And The State Regarding An Exercise Of Tribal Jurisdiction Over Section 36 Is Not A Protectable Interest And Is Legally Unfounded.

The County imagines that "if this Court were to rule that Section 36 is within the boundaries of the Reservation, presumably the Tribe could seek to tax and otherwise regulate" the non-Indian residents of Section 36. Opposition, p. 5. Not only is this unsubstantiated allegation insufficient as a legally protectable interest, it is unsupported

by the overwhelming weight of relevant case law regarding tribal exercises of regulatory jurisdiction over non-Indians residing on fee land within the boundaries of a reservation.

Montana v. United States, 450 U.S. 544, 565 (1981) ("*Montana*") is "the pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). In *Montana*, the Supreme Court stated that the "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 the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. The narrow question the Court considered in light of this test concerned the tribe's exercise of regulatory jurisdiction over non-Indians on non-Indian land within the boundaries of the reservation. *Id*. at 557 ["[T]he question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe."].

The Court noted two exceptions to this limitation on tribal powers: "A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. Second, the Court stated that, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566. These exceptions have come to be known as the two *Montana* exceptions.

In addition to *Montana*, the Tribe's potential to tax or otherwise regulate residents of Section 36 is similarly restricted by numerous other Supreme and Circuit Court decisions limiting tribal power over non-members on non-Indian fee land within the boundaries of a reservation. *See, e.g., Brendale v. Confederated Tribes & Bands of*

Yakima Indian Nation, 492 U.S. 408, 428 (1989) ["Therefore under the general principle enunciated in *Montana*, the Yakima Nation has no authority to impose its zoning ordinance on the fee lands owned by" non-Indians within the boundary of the reservation; *Big Horn Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000)[tribe cannot impose ad valorem tax on non-Indian rights-of-way]; *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Here, the County has not attempted to demonstrate that either of the two *Montana* exceptions would permit the Tribe to regulate or exercise jurisdiction over the non-member residents of Section 36. Simply because Section 36 is within the boundaries of the Reservation and is, therefore, Indian country, does not grant to the Tribe the wholesale authority to regulate non-members within Section 36 as the County posit. The County's speculation regarding potential tribal jurisdiction is, therefore, unsupported by both the County's arguments and the relevant authorities.

The County further argues that if this Court were to determine that Section 36 is Indian country, such a determination "will divest the State of its jurisdiction, as well as its ability to tax Landowners, as explained below." Opposition, p. 5. The County, however, fails to explain why the State would be unable to tax or exercise jurisdiction over non-Indians on what the County alleges is non-Indian owned fee land. This is because states have always maintained the authority to tax and regulate non-Indians and non-Indian owned fee land within the boundaries of an Indian reservation. *See Brendale*. Thus, a determination that Section 36 is within the Tribe's Indian country cannot, as a matter of law, divest the State of its jurisdiction and ability to tax the non-Indian residents of Section 36. As such, the State has no interest to protect, that would be impaired or impeded by this Court's determination that Section 36 is Indian country.

For these reasons, the County has failed to demonstrate that the State and the residents of Section 36 are necessary parties to these proceedings and the Court can, therefore, grant the requested preliminary injunction in their absence.

II.
THE COUNTY LACKS JURISDICTION TO ENFORCE ITS CIVIL/REGULATORY VEHICLE CODE AGAINST MEMBERS OF THE TRIBE WITHIN THE TRIBE'S INDIAN COUNTRY.

In its Opposition, the County makes two fundamental errors in addressing the issue of whether the County has jurisdiction to enforce civil/regulatory laws against Indians for actions taking place within Section 36. The first is that the County confuses the determination of the boundaries of the Reservation with the ownership of land within those boundaries. The second is that the County asserts, inaccurately, that a determination that Section 36 is within the boundaries of the Reservation will have a number of dire effects on the property interests of the non-Indian owners of land within Section 36.

A. Section 36 Is Indian Country.

In its Opposition, the County argues that, because the United States does not own title to the land within Section 36 in trust for the Tribe, Section 36 is not within the boundaries of the Reservation and, therefore, Section 36 is not "Indian country". "Section 36 was expressly excluded from the land that was issued to the United State to be held in trust for the Tribe. . . . Section 36 is neither allotted land, nor land held in trust by the Federal government for the benefit of the Tribe. By the time the Trust Patent was issued to the Tribe, Section 36 was already privately owned in fee by County residents." Opposition, p. 10. The County confuses title to or ownership of land with jurisdiction over the land. Title or ownership to real property does not determine what government has jurisdiction over the land. Territorial boundaries determine the territorial extent of a government's authority to enforce its laws. This is true for tribal as well as state governments. "The Cherokee nation, then, is a district community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . ." *Worcester v. Georgia,* 31 U.S. 515, 561 (1832).

Under the applicable federal law, "the term 'Indian country', means (a) all 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. Thus, the fundamental question in the present case is not who owns the land. The question is, did the Secretary include Section 36 within the boundaries of the Reservation?

On February 2, 1907, the Secretary issued an order that established the boundaries of the Reservation by prohibiting any person or entity from acquiring title to any land within the boundaries of the Reservation through entry, settlement, or patenting under the United States public land laws.

In his Order the Secretary stated: "In review of the recommendation of the Indian office, I have to direct that the lands referred to be withdrawn from all forms of settlement or entity until further notice, also that the local land officers of the District in which the said lands are located, be advised of such withdrawal." Secretarial Order of February 2, 1907 ("Order")[2].

The "recommendation of the Indian office," referred to in the Order was a letter dated January 31, 1907, from the acting Commissioner of Indian Affairs to the Secretary requesting that he withdraw certain lands from settlement and entry for the use and occupancy of 12 separate bands of Mission Indians, including the Chemehuevi Indian Tribe. In his letter the Commissioner wrote: "I have the honor to transmit herewith certain descriptions of lands which he recommends be withdrawn from all forms of settlement and entry pending action by Congress whereby they may be added to several reservations. The proposed additions are as follows: Chemehuevi Valley. Fractional townships 4 N., R. 25 E., T, 4 N., R 26 E., T. 5 N., 25 E., 6 N., 25 E.; the E/2 of 5 N., R. 24 E, and Secs. 25, 26, 35 and **36**, T. 6 N., R. 24 E, S.B.M." (Emphasis added.)

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[2] A true and correct copy of the Order is attached as Exhibit A to the June Leivas Declaration filed in Support of the plaintiffs motion for injunction.

The Order withdrew the lands identified in the Commissioner's January 31, 1907 letter from future settlement and entry, and thereby established the territorial boundaries of the Chemehuevi Indian Reservation.

A township is made up of thirty-six one mile by one mile sections of land. The Secretarial Order withdrew all of Township 4 North, Range 25 East and Township 5 North, Range 24 East, which included all 36 sections within those townships. The Section 36 at issue in this case is located in **Township 5 North, Range 24 East**. Section 36 was included within the boundaries of the Reservation. It is, therefore, "Indian country." As was demonstrated in detail in Argument IA of plaintiffs' brief in support of their motion for preliminary injunction, the County does not have jurisdiction to enforce California's civil/regulatory laws against members of the Tribe with the Indian country that comprises the Reservation.

B. The Determination Of The Boundaries Of The Reservation Is Not Dependent On The Ownership Of The Land.

Federal courts, including the Supreme Court, have repeatedly found that the private ownership of land by non-Indians does not change the boundaries of an Indian reservation. *DeCouteau v. District County Court,* 420 U.S. 425, 444 (1975) (Emphasis added).[3]; *Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent,*368 U.S. 351

[3] Given the County's lack of accuracy in its discussion of the issue of jurisdiction over Indians versus non-Indians within the boundaries of a reservation, Plaintiffs presume that the County will mischaracterize the holding in *DeCouteau*. The Supreme Court in that case found that the state court had jurisdiction over Indians in that case, because the reservation at issue in that case, the Lake Traverse Indian Reservation, had been disestablished. *DeCouteau v. District County Court*, 420 U.S. at 444-445. See, *Beardslee v. United States*, 541 F.2d 705, 707, 708 (8th Cir. 1976), ["The Indian conduct in *DeCoteau* did occur on non-Indian, unallotted land within the 1867 reservation boundaries. . . . However, the Supreme Court also concluded that as to this particular land, reservation status had been terminated by the Congressional Act of March 3, 1891, c. 543, 26 Stat. 1035. . . . Appellant cites no statute similarly disestablishing the reservation status of Todd County in the Rosebud Reservation."]. See, also, *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1490-1491 (D. Utah 1996). As was the case in *Beardslee*, the County identifies no statute disestablishing the Chemehuevi Indian Reservation because none exists.

(1962); *United States v. Nice*, 241 U.S. 591 (1916). See, *Beardslee v. United States*, 541 F.2d 705, 707 (8th Cir. 1976), ["Ownership of the land alone by a non-Indian is not sufficient to change reservation status."]

The significance of this distinction is that land within the boundaries of a reservation remains "Indian country" for jurisdictional purposes as it relates to Indians on the reservation, regardless of the ownership status of the land. As was discussed in detail above, under both federal statutory law and the interpretation of the Attorney General of California, the civil regulatory laws of the State of California do not apply to Indians within the boundaries of their Indian Reservation, because it is Indian country.

C. The County's Presumptions About The Effect Of A Conclusion That Section 36 Is Within The Boundaries Of The Reservation Are Unsupported, Unfounded, And Untrue.

The County, without a single citation to legal authority, asserts that a determination that Section 36 is within the boundaries of the Reservation will have the following horrific consequences for the non-Indian landowners: (1) the Landowners will become subject to the zoning laws of the Tribe; (2) the Landowners will have to pay property taxes to the Tribe; (3) the Landowners will no longer have to pay taxes to the County or the State; (4) the Landowners will no longer be subject to County zoning laws; and (5) the Landowners will no longer be protected by the ability of the County to cite Tribal members for traffic violations. Opposition, p. 5.

The word "presumably" is the critical word here. Perhaps preoccupied with preparations for responding to the Armageddon that a determination that Section 36 is within the boundaries the Reservation will unleash, the County did not bother to investigate whether any of the catastrophic consequences will actually occur. The County's assertions are, in fact, unfounded. The fact that Section 36 is within the boundaries of the Tribe's Reservation has none of the effects that the County presumes.

In *Montana*, the Supreme Court articulated the fundamental principles applicable to the regulation of non-Indian activities on tribal land and non-tribal fee land located

within the boundaries of a reservation In that case, the Court "readily agreed" that the 1868 Fort Laramie Treaty authorized the Crow Tribe to prohibit nonmembers from hunting or fishing on tribal land, *Id.*, 450 U.S. at 557. The Court held, however, that such "power cannot apply to lands held in fee by non-Indians." *Id.* at 559. The Court also set forth the exceptions to the basic principle that tribal powers do not extend to non-members, as discussed in Argument IB.

Thus, under the Supreme Court's analysis in *Montana*, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" unless those activities fall within the two exceptions articulated in that decision. Neither of the *Montana* exceptions is present in this case. The County does not allege that the non-Indian owners of land within Section 36 have entered into "commercial dealing, contracts, leases, or other arrangements" with the Tribe that could be interpreted to constitute a submission to the jurisdiction of the Tribe's regulatory authority relating to any of the claims raised in the Complaint or any of the legal issues arising from the current dispute. Nor has the County alleged any such landowner's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

The conclusion that tribal jurisdiction does not extend to the regulation of non-members on non-tribal land has, much to the dismay of Indian tribes throughout the country, been repeatedly upheld in a variety of contexts, including all of the presumed assertions of jurisdiction over the non-tribal landowners fabricated by the County. See, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) ["The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is . . . presumptively invalid. Because respondents have failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner or is necessary to vindicate the Navajo Nation's political integrity, the presumption ripens into a holding."]; *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982),

[an Indian tribe's inherent power to tax only extended to "transactions occurring on *trust lands* and significantly involving a tribe or its members"]; *Brendale* [Tribe did not have jurisdiction to impose zoning regulations on fee lands owned by non-members, except under highly unusual and highly specific circumstance in which the area of the reservation is almost entirely trust land and it was closed to non-members.]

With regard to the assertion that a conclusion that the landowners "would be left unprotected and without recourse" if tribal members are not subject to the State's civil regulatory jurisdiction, that is simply absurd. See, p. 5, lls. 15-25 above. As for the allegation that property values "would likely be impacted," the County admits that that alleged impact is pure speculation. More important, the County has no authority to protect the property values of private landowners from diminution, let alone from the effects on those values of a court's rulings on the law.

It bears repeating that there is not a single allegation or cause of action in the Complaint that relates in any way to the non-member owners of land within Section 36. Even if the County was not entirely wrong on the law, a determination that the County lacks jurisdiction to enforce State civil/regulatory laws relating to alleged traffic offenses against tribal members within Section 36 would have no binding effect on the non-member landowners with regard to an assertion of jurisdiction over them or their property by the Tribe relating to taxation, zoning or other regulatory matters at some time in the future.

III.
THE SECRETARY HAD THE AUTHORITY TO ESTABLISH THE BOUNDARIES OF THE TRIBE'S RESERVATION.

To the extent that the County's Opposition was intended to challenge the Secretary's authority to establish the boundaries of the Reservation, the County's argument is meritless. The Secretary had both implied and specific authority to reserve the lands that constitute the Tribe's Reservation.

The implied authority of the Secretary to create the Reservation is based in the *Midwest Oil* doctrine, established when the Supreme Court affirmed the Executive Branch's authority to reserve lands for various purposes, including Indian settlement, based on finding that Congress's "acquiescence" in a multitude of executive land withdrawals over a long period of time had "readily operated as an implied grant of power." *Yount v. Salazar*, 933 F.Supp. 2d 1215, 1221 (D. Ariz. 2013) (*citing and quoting United States v. Midwest Oil Company*, 236 U.S. 459, 471 (1915)).

The specific authority of the Secretary to create the Reservation is found in the "Act for Relief of the Mission Indians in the State of California." 26 Stat. 712, which was enacted on January 12, 1891 ("MIRA"), and the Amendments to the MIRA. Under the MIRA, the Secretary was expressly authorized "to select Reservations for each band or village of the Mission Indians residing within" the State of California, "which Reservation shall include, as far as practicable, the lands and village which have been in the actual occupation and possession of said Indians …, which selection shall be valid when approved by the President and Secretary of the Interior."[4]

The language of the MIRA makes it clear that the Secretary and President are authorized by Congress to create "reservations" for the Mission Indians, excepting "any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain. . . ." MIRA, Sec 3.

The claims to ownership of parcels within Section 36 are dependent on the conveyance of Section 36 by the United States to the State of California. The exception set forth in Section 3 of MIRA does not apply to the conveyance of Section 36 by the

[4] The patent issued for the Reservation to the Tribe specifically cites as authority for the issuance of the patent the Mission Indian Relief Act, the Amendments to the MIRA, and the Secretary's Order of February 2, 1907, "withdrawing from settlement and entry" the land that comprised the original Chemehuevi Indian Reservation as the authorization for the creation of the Reservation and the issuance of the Patent.

United States to the State, for two reasons. As a result, the exception set forth in Section 3 of MIRA, does not apply to any fee interest the non-members have in parcels located in Section 36.

First, California is not a "person" within the meaning of Section 3 of the MIRA. When Congress uses the term "person" in a federal statute and does not define the term, it is presumed that the term excludes a sovereign governmental entity, unless the plain wording of the statute or legislative history evidences a clear Congressional intent to include a sovereign government within the purview of the statute. *United States v. Cooper*, 312 U.S. 600 (1941). Even giving Section 3 the broadest interpretation possible, there is nothing in either the plain wording of the MIRA or its legislative history evidencing an intent on the part of Congress to have the term "person" include the State of California.

Second, the exception in Section 3 of the MIRA only applies to vested rights obtained "under any of the United States laws providing for the disposition of the **public domain** . . . ." (Emphasis added). The conveyance by the United States of Section 36 to the California was made to the State pursuant to Section 6 of the Act of March 3, 1853, 10 Stat. 244, 245-246. That statute had the effect of preventing Section 36 from becoming land on the public domain, because it excluded from its application land occupied by Indians. Section 6 contained a proviso stating that the Act "shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preemption right to the same." Therefore, the exemption in Section 3 of the MIRA relating to the "disposition of the public domain" has no application to Section 36, and the Secretary and/or President were expressly authorized to include all other lands within any reservation created under the MIRA, including Section 36 of the Chemehuevi Reservation contained in the Secretarial Order of February 2, 1907.

Because the Secretary included Section 36 in the Order creating the Reservation and because the Secretary had the authority to do so, pursuant to the MIRA, Section 36 is "Indian country" within the meaning of 18 U.S.C. § 1151 and P.L. 280, 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

IV.
DEFENDANTS MISCHARACTERIZE THE LAW AND THE FACTS AT ISSUE REGARDING IRREPARABLE HARM.

In their Opposition, the County asserts that the Tribe and Indians have not set forth facts showing that the County's conduct has caused and continues to cause irreparable injury to the Tribe and the Indians. This is simply untrue.

The County's arguments are not responsive to the Tribe's and Indians' allegations. Instead, the County persists in asserting, incorrectly, that the Tribe and Indians' rights have not been violated because Section 36 is not part of the Reservation. In making this argument, the County is conflating two separate factors in the preliminary injunction analysis, i.e. a showing of irreparable harm and a showing of success on the merits.

By placing the crux of their arguments on the issue of Section 36, the County fails to assert a legally coherent argument showing that the Tribe and Indians will not suffer irreparable harm in the absence of injunctive relief. As stated in plaintiffs' brief in support of their motion for preliminary injunction, for purposes of seeking injunctive relief, an allegation of a deprivation of a constitutional right leads to a presumption of irreparable harm. *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1259 (D.N.M. 2003); *Coeur D'Alene Tribe v. Hammond*, 244 F. Supp. 2d 1250, 1264 (D. Idaho 2003). At this point in the litigation process, the Tribe and the Indians do not need to meet the burden of proof of demonstrating that they have suffered harm due to the County's actions, only that such harm is likely unless this Court issues a preliminary injunction that curbs the County's pattern of conduct pending an evidentiary hearing.

Furthermore, as the Tribe and the Indians have already discussed, an Indian tribe suffers irreparable harm where a state statute or rule "create[s] the 'prospect of significant interference with [tribal] self-government.'" *Prairie Band* at 1250 (quoting *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989)).[5] "[W]hen harm cannot be compensated for in money damages, irreparable harm is established." *Id*. at 1251. Because harm to tribal self-government is "not easily subject to valuation" in terms of monetary compensation, such harm is irreparable. See *id*. Note also that a tribe may be barred by sovereign immunity from recovering money damages from a state. *Id*.

The Indians and the other members of the Tribe suffer doubly. Not only do they continually risk unconstitutional deprivations of their liberty and/or property due to the conduct of the County, they also risk expending effort and money in litigation to defend themselves from these deprivations perpetrated by the County.

The County's other arguments, similarly, have no basis in law or fact. That the Tribe and Indians have only recently filed suit to contest the County's jurisdiction does not prevent a showing that the Tribe and the Indians will be irreparably harmed in the absence of a preliminary injunction. First, the Tribe and the Indians were not, until recently, in a financial position to bring a costly lawsuit against the County. Second, while the County's course of conduct violating the Indians' constitutional rights began approximately thirty (30) years ago, the frequency and egregiousness of the County's

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[5] The State's continued enforcement of civil/regulatory laws within Section 36 violates the Tribe's right to enact its own laws and be ruled by them. If the Tribe enacts and implements its own motor vehicle ordinance, the County, pursuant to the doctrine of comity, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), is required to recognize tribal licenses and registrations—even when driving off of the reservation. *See Queets Band of Indians v. Washington*, 765 F.2d 1399, 1403-1408 (9th Cir. 1985)["Indian tribes possess the sovereign authority to license and register tribal vehicles" and "the tribes' exercise of sovereignty in licensing and registering their respective tribal vehicles carrie[d] with it sufficient 'preemptive' force to require that the State of Washington afford reciprocal recognition."]; *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1201, 1205 (C.D. Cal. 1998).

actions have escalated only recently. The County cites to no legal authority standing for the proposition that a delay in seeking a preliminary injunction will lead to a finding that the seeker does not suffer irreparable harm.

The County also asserts, but does not show, that a preliminary injunction would not prevent irreparable harm to the Indians because the California Highway Patrol ("CHP") will continue to cite Indians and non-Indians for traffic violations on Section 36. Here, the Tribe and the Indians have brought suit specifically to address unconstitutional law enforcement citations and prosecution by the County. A preliminary injunction would prevent the harm caused specifically by the County. If the Tribe and Indians wish to seek redress for CHP citations and prosecution, they may file a separate action to do so. Furthermore, the County is again conflating two separate issues in this case, i.e. the possibility of irreparable harm and whether a party is indispensable. Whether CHP is an indispensable party has nothing to do with whether a preliminary injunction would prevent harm caused specifically by the County.

Also, to the extent that the County maintains that the Tribe and Indians have not demonstrated irreparable harm because they have not conclusively demonstrated, through documentary evidence and witness testimony, that the County engaged in racial profiling, it is not necessary at this state of the litigation, through extensive evidence, that the County had a policy and practice of racial profiling. This Court may, at this point, issue a preliminary injunction based on a showing of irreparable harm based on the County's constitutional violations. Evidence of the County's policy and practice of racial profiling will be forthcoming through the discovery process once it has occurred.

Finally, the County's statement that a preliminary injunction is unnecessary because they do not intend to issue or prosecute citations for future traffic violations in Section 30, so there is no irreparable harm, is a meaningless, unenforceable promise. The Tribe and Indians seek a remedy with force of law, a court order, to prevent the

recurrence of actions of the part of the County that has harmed the Indians through a violation of their constitutional rights and the Tribe's right of self-governance.

V.

DEFENDANTS' ANALYSIS OF THE BALANCE OF EQUITIES AND PUBLIC INTEREST RELIES ON UNPROVEN, IMAGINED HARMS.

The County's conclusion that the balance of equities and public interest mandates that this Court deny the preliminary injunction is flawed because not only is it centered on the unproven assertion that Section 36 is not part of Indian country, it relies on the same parade of horribles that characterize the majority of the County's arguments against granting the preliminary injunction. The only harm that the County asserts, in their Opposition, will result from granting the preliminary injunction, is to non-parties and is unfounded.

In their Opposition, the County asserts that they are mandated to protect the hundreds of residents in that area and to enforce State law, and that, presumably, granting the preliminary injunction will impede their execution of that duty. This is untrue. The County may still act to protect those who work and reside in Section 36 and may continue to enforce State law against those individuals over whom they have jurisdiction. The requested preliminary injunction would only prevent the County from, "directly or indirectly taking action to cite, arrest, impound the vehicles of, and/or prosecute tribal members" as they traverse Section 36.

In addition, the County makes an unsupported assertion that a number of landowners and real estate agents have expressed concern that the preliminary injunction will, "not only substantially affect their property interests, but could pose a significant risk to public safety if tribal members are able to violate laws without consequence." Opposition, p. 16, lls. 24. This is an expression of concern, not an inevitable result of the preliminary injunction. Not only is this statement unsupported, it is incorrect. The members of the Tribe will not be given carte blanche to violate laws, it is simply that the County may not enforce civil/regulatory traffic laws against them. If a

tribal member violates State traffic laws on Section 36, and this results in harm to a resident or landowner there, the harmed individuals may seek a civil legal remedy for the damage caused by the tribal member who is driving without a State license and insurance. In addition, the members of the Tribe must still obey tribal laws, state criminal laws, and federal laws while in Section 36.

The notion that granting the preliminary injunction will create a state of lawlessness and chaos is simply unfounded. The County has made no showing, other than stating a "concern" of local landowners, that the preliminary injunction will have consequences that are detrimental to the public interest.

VI.

A PRELIMINARY INJUNCTION ENJOINING THE DEFENDANTS FROM ENFORCEMENT OF CIVIL/REGULATORY PROVISIONS OF THE CALIFORNIA VEHICLE CODE WITHIN INDIAN COUNTRY IS NECESSARY.

Irrespective of Section 36, the County has explicitly, in their Opposition, and implicitly, by failing to argue otherwise, conceded that the State's civil/regulatory laws are not applicable to Indians within Indian country: "Defendants do not intend to enforce civil/regulatory traffic citations against Indians for violations that occur within Section 30." Opposition, p. 18, lls. 7-8. Nevertheless, a clear order from this Court—stating that civil/regulatory provisions of the Vehicle Code do not apply to Indians within Indian country—is required to ensure that, should the County's intentions change, the Tribe, Indians, and other tribal members are not cited, their vehicles are not impounded, and they are not required to defend against prosecution in a forum that lacks jurisdiction. For all of the reasons stated in the Tribe's and Indians' Application For Temporary Restraining Order And Motion For Order To Show Cause Re: Preliminary Injunction, the County's enforcement of State civil/regulatory traffic laws against the members of the Tribe within Indian country is unlawful and must be enjoined.

VII.

THE PROPOSED INJUNCTION COMPLIES WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THE COUNTY HAS NOT OFFERED ANY REASONS WHY THIS COURT SHOULD REQUIRE A BOND.

The County claims, Opposition pp. 18-19, that the proposed order filed by the Tribe and Indians does not comply with the Federal Rules of Civil procedure because it is "vague and ambiguous." The County further claims that, "Plaintiffs' wrongly and without any supporting evidence conclude that Section 36 is within the boundaries of the Reservation." *Id*. These arguments are frivolous. The proposed order, as well as the papers filed in support thereof, clearly request that the County be enjoining from citing and prosecuting tribal members for alleged violations of civil/regulatory provisions of the Vehicle Code that occur within the boundaries of the Tribe's Reservation, as those boundaries are established in the order of the Secretary dated February 2, 1907. *See* **Exhibit A** to the Declaration of June Leivas in Support of Application for Temporary Restraining Order and Motion for Order to Show Cause Re: Preliminary Injunction. That Secretarial order includes Section 36 within the boundaries of the Tribe's Reservation. Thus, the proposed order is neither vague nor ambiguous and complies with the Federal Rules of Civil Procedure.

The Court directed the parties to address the amount of an appropriate bond if injunctive relief is granted. In response to this Court's request, the County simply states, "As such, Defendants respectfully request that Plaintiffs post a bond as deemed reasonable by the Court." Opposition, p. 21. The County offers no explanation as to why a bond should be required and does not offer a proposed amount. Thus, the County has failed to show any likelihood of monetary damages to the County should the Court issue the preliminary injunction and, therefore, the Court should require no bond. *See Prairie Band of Potawatomi Indians v. Pierce*, 64 F. Supp. 2d 1113, 1115 (D. Kan. 1999)["There has been no showing of a likelihood of monetary damages to the defendants in this case if the court issues this restraining order. Therefore, the court

finds that an injunction bond will not be necessary in this case."]; *United States v. Michigan*, 508 F. Supp. 480, 492 (W.D. Mich. 1980)["In addition, no bond will be required since only negligible harm will result if this injunction is wrongful, and the strong public interest is an overriding concern."].

CONCLUSION

For all of the foregoing reasons, the plaintiffs' respectfully request that this Court issue the preliminary injunction as requested.[6]

DATED: January 22, 2015

Respectfully Submitted,

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
LESTER J. MARSTON
Attorney for Plaintiffs

[6] The Court directed the parties to discuss the *Younger* abstention doctrine. The defendants, however, have conceded that *Younger* abstention is not warranted because the cases have been or are going to be dismissed. Nevertheless, even if those cases were not dismissed, *Younger* abstention would not be warranted because the central issue—whether the defendants have jurisdiction to issue and prosecute citations pursuant to the Vehicle Code within the boundaries of the Tribe's Indian country—is a federal question that must be adjudicated in federal court. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994); *Gartrell Const., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991); *Seneca-Cayuga Tribe v. Oklahoma, ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989); *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428 (9th Cir. 1994).

CERTIFICATE OF SERVICE

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of Rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the foregoing with the Clerk of the United States District Court for the Central District of California by using the CM/ECF system on January 22, 2016.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on January 22, 2016, at Ukiah, California.

/s/ Brissa De La Herran
Brissa De La Herran