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party in interest seeking guardianship
of the minors

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

EFRIM RENTERIA, TALISHA RENTERIA v. REGINA CUELLAR, individually as party in interest seeking guardianship of the minors, et al., DEFENDANTS.	Case No.: 2:16-cv-1685- MCE-AC **SPECIAL APPEARANCE** MEMORANDUM OF LAW IN SUPPORT OF NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF LAW IN SUPPORT FOR RECOSIDERATION OF THE COURT'S SEPTEMBER 2, 2016 RULING ON THE MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION LOCAL RULE 230; FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(b)(6) DATE: NOVEMBER 3, 2016 TIME: 2:00 p.m. COURTROOM: 7, 14TH FLOOR JUDGE: HONORABLE MORRISON C. ENGLAND, JR.

SPECIAL APPEARANCE BY DEFENDANT REGINA CUELLAR, INDIVIDUALLY

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INDIAN CHILD WELFARE ACTS POWERS TO THE TRIBE OVERRIDES THIS COURT'S ATTEMPT AT FINDING SUBJECT MATTER JURISDICTION

This case is about the Indian Child Welfare Act (ICWA), which grants Indian Tribes either primary jurisdiction over minor tribal members -Title 25 U.S.C. section 1911(a) - or presumptive primary jurisdiction over minor tribal members not domiciled or residing within the reservation - Title 25 U.S.C. section 1911(b). The Shingle Springs Band of Miwok Indians along with its governmental entities[1] are indispensable, necessary and required parties to this litigation by the plain language of The Indian Child Welfare Act. Accordingly, under Federal Rules of Civil Procedure, Rule 19, this case must be dismissed as against individual defendant Regina Cuellar.

By its plain terms and meaning, ICWA, requires, without exception or qualification, that The Shingle Springs Band of Miwok Indians—which this Court dismissed under sovereign immunity, but with the Court writing that sovereign immunity "was not entirely convincing" (See Exhibit A, page 7, line 11)—is an indispensable necessary required party to this litigation:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. (See-Title 25 U.S.C. section 1991 (a))

[1] The Tribes Tribal Council, the Tribes Tribal Court, the Tribes Tribal Judge Chief Judge Williams, and Tribal member Regina Cuellar, all dismissed by this Court pursuant to fundamental Federal Indian sovereign immunity.

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe. (See-Title 25 U.S.C. section 1991 (b))

ICWA prohibits either a substitution of any party (whether that party is labeled "well-positioned to defend" the Tribe and its governmental entities (Exhibit A, page 13, line 26-28) in any court, or the forced abandonment of the Tribe's Congressional given power to assert its jurisdiction and enforce the orders of its Tribal Court in any State Court. Specifically, ICWA grants to Tribes exclusive power to transfer from State to Tribal Court any custody case involving minors who are members of the Tribe, regardless of their domicile or residency. This Court has neither the Congressional authority nor case authority to deprive the Tribe the rights granted to it by Congress pursuant to ICWA, and to enforce those rights in any State Court.

Thus, with the Tribe possessing those Congressional rights, under Federal Rules of Civil Procedure, Rule 19, due to the legal inability of the Court to join the Tribe and the Tribal defendants[2], this case must be dismissed since not only would the Tribe and Tribal defendants be prejudiced by this Court's unsupported taking of the Tribe and Tribal defendants' rights granted to them by Congress under ICWA, but also prejudiced the Tribe and Tribal defendants' from utilizing the full panoply of rights granted to them

[2] Tribal Council, Tribal Court, Tribal Judge, Chief Judge Williams and Tribal Council member Regina Cuellar.

by Congress through ICWA by the use of any State Court to enforce Congressional rights of ICWA of Tribal Court Orders.

This Court does not have the authority under Rule 19 to prejudice and take the Tribe and Tribal defendants' ICWA rights. Since the Tribe and Tribal defendants are legally prohibited from being joined by sovereign immunity, this case cannot proceed against the individual defendant, Regina Cuellar, who has violated no federal law and can never violate the Fourteenth Amendment's due process clause.

Further, this Court is attempting to do what no Court in the history of American jurisprudence has held, that an alleged cause of action against an **individual** defendant, not acting under color of any government authority, is viable under the United States Constitution's Fourteenth Amendment's due process clause, and satisfies the mandatory Article III required subject matter jurisdiction. That interpretation of the Fourteenth Amendment is unsupported by any case law spanning the history of that constitutional clause.

The due process clause of the Fourteenth Amendment, section 1 to the United States Constitution applies only, as that Amendment clearly and plainly reads, to States:

> "... No **state** shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any **state** deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Without legal authority from any source, the United States Constitution or case law or an act of Congress, this Court applied the Fourteenth Amendment, Section 1,

due process clause to an individual acting, not under color of any government, but solely as an individual, and held;

> "As to their due process claim, the Court finds that Plaintiffs are entitled to preliminary injunctive relief and GRANTS Plaintiffs' Motion with respect to Defendant Cuellar in her individual capacity" (footnote 3 of the Court in the order states: "Given the non-viability of Plaintiffs' challenge to the Tribal Court's jurisdiction, the Court refers only to their due process claim in discussing its jurisdiction")" (See Exhibit A, September 2, 2016, Court Order, Page 7, lines 18-20, and footnote 3)

In so doing, this Court created, without legal authority, mandatory Article III subject matter jurisdiction over Regina Cuellar, under the theory that "the Court possesses jurisdiction over her" (See Exhibit A, page 12, lines 9-10), without any finding of mandatory federal subject matter jurisdiction as required under Article III.

The Court, abandoning the long standing Article III requirement of federal subject matter jurisdiction, and following Plaintiffs ill-fated theory of an alleged violation of the Fourteenth Amendment's due process clause by an individual, Regina Cuellar, concluded that under Federal Rule of Civil Procedure, Rule 19's equity and good conscience rule, this alleged due process violation could proceed against individual defendant Regina Cuellar, without any citation or Constitutional authority to satisfy the required Article III federal subject matter jurisdiction. (Exhibit A, page 12, lines 24-25) Except for stating that it has subject matter jurisdiction over Regina Cuellar in her individual capacity, pursuant to the Fourteenth Amendment to the United States Constitution, the Court cited no support from case law, from Congress, or from the clear

language of Constitution itself, to support this conclusion. In fact, there is no support for it.

This is clear manifest error, clear abuse of discretion and causing clear manifest injustice to the individual defendant Regina Cuellar must be both reconsidered by this Court and reversed.

Compounding the clear manifest error in the Court's September 2 order, from page 12 to the conclusion of the order on page 21, the Court lays out facts alleging how the dismissed defendants - the Tribe, the Tribal Council, the Tribal Court, the Tribal Judge, Regina Cuellar as a Tribal Council member - allegedly violated Plaintiffs Fourteenth Amendment due process rights. However - not only skipping and missing the required Article III mandate of limited subject matter jurisdiction, but also never listing one fact or one instance or one allegation that Regina Cuellar as an individual violated Plaintiffs Fourteenth Amendment due process rights, and ignoring Congress and ICWA- the Court nevertheless holds it has subject matter jurisdiction over this individual, Regina Cuellar.

The focus on the motion to dismiss should have been whether the Court has subject matter jurisdiction over Regina Cuellar as an individual, and to do so the Court had to find that she violated the United States Constitution's Fourteenth Amendment's due process rights, which can never legally occur, or violated a Federal Statute which harmed the Plaintiffs, which is not true in this case. With that focus in mind, it is clear this Court made a clear manifest legal error in its September 2 order that requires reconsideration and reversal.

Rather than following the foundational principles of American constitutional law, the Court held that an individual, sued in her individual capacity without even the slightest hint of what she had done wrong, or that she was acting under the faintest color of state law, could have violated the Fourteenth Amendment due process clause. This conclusion is simply unprecedented, and requires reversal.

Without the mandatory Article III subject matter jurisdiction, the court never gets to the "equity and good conscience" analysis of Federal Rules of Civil Procedure, Rule 19. This is because, the individual defendant left, Regina Cuellar, can never violate the due process clause of the Fourteenth Amendment, thus, Regina Cuellar is dismissed totally on her own lack of subject matter jurisdiction.

PLAINTIFFS HAVE ONLY TWO THEORIES – TRIBAL COURT LACKS JURISDICTION – VIOLATION OF THEIR FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

The Court on page 1, lines 24-28 and page 2, line 1, set forth the only two theories Plaintiffs put before this Court for the required Article III subject matter jurisdiction: 1- Tribal Court jurisdiction over the custody proceedings; 2- the un-enforceability of the June 3rd Tribal Court order (appointing as guardian of the three tribal minors, Regina Cuellar, sued individually) because the underlying proceedings violated the Plaintiffs' due process rights 14th Amendment of the United States Constitution. The Court uses no other theories of alleged Article III subject matter jurisdiction.

On page 7, footnote 3, in Exhibit A, the Court dismisses as non-viable Plaintiffs attempt to use lack of Tribal Court jurisdiction for Article III subject matter jurisdiction by stating:

> "Given the non-viability of Plaintiffs challenge to the Tribal Court's jurisdiction, the Court refers only to their due process claim in discussing its jurisdiction".

Hence, Plaintiffs' attempt to satisfy the requirements of mandatory Article III subject matter jurisdiction now rested on the ill-fated theory of a violation of the Fourteenth Amendment's due process clause. As noted above, without legal or Constitutional or Congressional support, this Court made a clear manifest error and abused its discretion by accepting this theory and holding there was subject matter jurisdiction over the individual, Regina Cuellar, under the Fourteenth Amendment's due process clause. Strikingly, the Court never cites any authority -case, Constitution, Congressional action – that supports such a theory of mandatory subject matter jurisdiction over individual defendant Regina Cuellar.

FEDERAL COURTS ARE COURTS OF LIMITED JURISDICTION

The Ninth Circuit Court of Appeal, as late as August 18, 2016, in *Polo v. Innoventions International, LLC*, -- F.3d – 2016 WL 4394586, reiterated: "It is axiomatic that federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). We are limited, by Congress and by the Constitution, in the subject matter of cases we may adjudicate. *Id.*"

Here, as the Ninth Circuit recognizes, neither Congress nor the Fourteenth Amendment to the United States Constitution provides Article III subject matter

jurisdiction to this Court over Regina Cuellar as an individual. The Court's September 2, 2016, Order, (Exhibit A) is clear manifest error that must be reconsidered and reversed.

ICWA GRANTS TRIBES AND TRBIAL DEFENDANTS THE UNLIMITED USE OF ANY STATE COURT TO SATISFIY CONGRESSIONAL GIVEN JURISDICTION OVER TRIBAL MINORS

ICWA overrides this Court's attempt to deprive the Tribe and Tribal defendants with the powers granted by Congress by using Rule 19 to continue the case when no mandatory subject matter jurisdiction under Article III exists regarding individual defendant Regina Cuellar.

An individual in Regina Cuellar's position in this case, can never violate another individual's Fourteenth Amendment's due process rights.

AN ALLEGATION OF AN ALLEGED VIOLATION OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE DOES NOT SUPPLY THIS COURT WITH ARTICLE III SUBJECT MATTER JURISDITION

The Plaintiffs never explain, and the Court never expands, whether Plaintiffs theory of mandatory Article III subject matter jurisdiction is from an alleged violation of procedural due process or alleged substantive due process, or maybe both. Legally, however, it does not matter since, neither procedural nor substantive or the combination thereof provides this court with the mandatory subject matter jurisdiction under Article III.

PROCEDURAL DUE PROCESS
DOES NOT GRANT SUBJECT MATTER JURISDICTION

The United States Supreme Court has made it clear to lower courts that that an alleged violation of procedural due process imposes constraints on government decisions not individuals: "Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause" *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978)

The Ninth Circuit follows the Supreme Court and has also been clear on the requirements for subject matter jurisdiction for an alleged violation of procedural due process: A procedural due process claim under the Fourteenth Amendment has three elements: "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Portman v. County of Santa Clara,* 995 F.2d 898, 904 (9th Cir.1993).

In addition, the Ninth Circuit continuing to follow the lead of the Supreme Court: "The Due Process Clause of the Fourteenth Amendment imposes procedural constraints on *governmental decisions* that deprive individuals of liberty or property interests.*Mathews,*424 U.S. at 332, 96 S.Ct. 893 (1976)." *Nozzi v. Housing Authority of City of Los Angeles,* 806 F.3d 1178, 1190 (9th Cir. 2015) (emphasis added).

There is no governmental defendant, nor government action, in this case when this Court only has in front of it individual defendant Regina Cuellar. Thus, there is no procedural due process alleged violation of the Fourteenth Amendment granting this court Article III subject matter jurisdiction under that theory (which was never pled by Plaintiffs).

SUBSTANTIVE DUE PROCESS
DOES NOT GRANT SUBJECT MATTER JURISDICTION

When the Supreme Court instructs about an alleged violation of substantive due process of the Fourteenth Amendment, the Supreme Court is talking ***only about*** State governments or State government officials, ***not about solely*** individuals: "Our prior cases have held the provision that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law," U.S. Const., Amdt. 14, § 1, to "guarante[e] more than fair process," *Washington v. Glucksberg,* 521 U.S. 702, 719, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772 (1997), and to cover a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them," *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct., at 665 (1986); see also *Zinermon v. Burch,*494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (noting that substantive due process violations are actionable under § 1983). Cf. *Collins v. Harker Heights,* 503 U.S. 115, 126, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992) (noting that the Due Process Clause was intended to prevent government officials " ' "from abusing [their] power, or employing it as an instrument of oppression"' ") (quoting *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), in turn quoting *Davidson v. Cannon,* 474

U.S. 344, 348, 106 S.Ct. 668, 670–671, 88 L.Ed.2d 677 (1986))." (footnote 4 omitted) *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)

The Supreme Court in *County of Sacramento* makes it clear to lower courts: "We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government, "*Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, *e.g., Fuentes v. Shevin,*407 U.S. 67, 82, 92 S.Ct. 1983, 1995, 32 L.Ed.2d 556 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, *e.g., Daniels v. Williams,* 474 U.S., at 331, 106 S.Ct., at 664 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, *e.g., Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and its executive capacities, see, *e.g., Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue. *County of Sacramento v. Lewis*, at pages 845-846.

In addition, the Supreme Court has been clear to the lower courts: "Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working

environment is a substantive component of the Due Process Clause. "[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S., at 196, 109 S.Ct., at 1003 (quoting *Davidson v. Cannon,* 474 U.S. 344, 348, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986)). As we recognized in *DeShaney*:

"The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text." 489 U.S., at 195, 109 S.Ct., at 1003." (footnote 10 omitted) *Collins v. City of Harker Heights, Tex.,* 503 U.S. 115, 126-127, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)

The Ninth Circuit follows the Supreme Court in that a substantive due process claim requires that "the plaintiff [ ] show as a threshold matter that a *state actor* deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel,* 540 F.3d 1082, 1087 (9th Cir.2008) (emphasis added).

WITH THE TRIBE AND TRIBAL DEFENDANTS DISMISSED AND NO FOURTEENTH AMENDMENT SUBJECT MATTER JURISDICTION FEDERAL RULE OF CIVIL PROCEDURE 19 REQUIRES DISMISSAL WITH PREJUDICE

Federal Rule of Civil Procedure, Rule 19's "equity and good conscience" analysis *does not* provide "independent Article III subject matter jurisdiction" to this Court over individual defendant Regina Cuellar, because, this Court can never find under any set of circumstances or facts find that she ***could ever or has ever*** violated the Fourteenth Amendments due process clause, either procedurally or substantively.

The basic concept of Rule 19, is that all and every interested party must be allowed the opportunity to defend its respective interests[3]. This inability under Rule 19 - the legal failure to join the dismissed Tribal defendants due to sovereign immunity - is not a jurisdictional defect but an equitable defect based on Congressional action[4].

THERE IS NO GOVERNMENT ACTION, THERE IS NO SUBJECT MATTER JURISDICTION

Procedural due process requires government action, specifically State government action, and clearly the individual defendant Regina Cuellar is not a State or a State governmental entity or employee acting under color of State law. That theory will not work in light of centuries of case law and the clear plain wording of the Constitution's Fourteenth Amendment.

Substantive due process requires a governmental actor or a person acting under color of State law, and clearly individual defendant Regina Cuellar is not a

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[3] The Comparative Rights of Individual Sovereigns, Matthew L.M. Fletcher, Gonzaga Law Review, volume 40, March, 2005.

[4] See Charles Allen Wright, Law of Federal Courts, section 70, at 500 (5th Ed. 1994)

governmental actor or a person acting under color of State law, she is clearly and plainly an individual.

The Court has no jurisdiction over the Shingle Springs Band of Miwok Indian Tribe, the Tribal Council, the Tribal Court, the Tribal Court Judge (Chief Judge Williams) or Regina Cuellar as a Tribal Council member. They are dismissed.

Whether the Court agrees or disagrees, the law and Congressional actions have been settled for centuries, an individual can never violate the due process clause of the Fourteenth Amendment. Thus, no matter how distasteful it is to the Court, the individual Regina Cuellar must be dismissed for lack of mandatory Article III subject matter jurisdiction.

There is no action Regina Cuellar ***can do or did do or took*** that violates in any way the Plaintiffs' Fourteenth Amendment due process rights, either procedural or substantive. What Plaintiffs complain about in their First Amended complaint and what this Court listed in its order of September 2, 2016, on pages 16-17 lines 23-28 and 1-14, are the five (5) areas where Plaintiffs allege a procedural violation of due process under the Fourteenth Amendment[5]:

(1) The Tribal Court did not fully consider Plaintiffs' position in the guardianship proceedings and had no incentive to do so, because Judge Williams serves at the pleasure of the Tribal Council on which Defendant Cuellar serves as a member:

a- The Court errored in stating Defendant Cuellar serves as a member of the Tribal Council because it is Defendant Regina Cuellar sued as a Tribal Council member that is the one serving as a Tribal Council member.

[5] Neither Plaintiffs nor the Court use the term alleged "procedural" due process violation, however, the Court uses the phrase "Plaintiffs allege that they did not receive a fair opportunity to be heard because" which can only be a potential procedural due process violation.

b- The Court dismissed the Tribal Court, the Tribal Judge, Chief Judge Williams, and Defendant Regina Cuellar as a Tribal Council member based on century old core aspects of Federal Indian Law sovereign immunity.

c- There is no and can never be an allegation under this theory of individual defendant Regina Cuellar violating the Fourteenth Amendment, either the procedural or substantive due process clause

(2) During the underlying proceedings, the Tribal Council passed an ordinance specifically intended to benefit Regina Cuellar's guardianship petition:

a- The Court dismissed the Tribal Council based on century old core aspects of Federal Indian Law sovereign immunity.

b- There is no and can never be an allegation under this theory of individual defendant Regina Cuellar violating the Fourteenth Amendment, either the procedural or substantive due process clause.

(3) Judge Williams was biased in favor of the Tribe, as evidenced by" (a) her statement that "Native Americans have felt that way about state court proceedings for years and now you know how they felt" in response to Plaintiffs claims of bias, and (b) her statement that she would not consider a report by a therapist involved in the molestation accusations and that she only wanted to hear from Tribal services.

a- The court dismissed both the Tribal Court and the Tribal Judge, Chief Judge Williams based on century old core aspects of Federal Indian Law sovereign immunity.

b- There is no and can never be an allegation under this theory of individual defendant Regina Cuellar violating the Fourteenth Amendment, either the procedural or substantive due process clause.

(4) The law firm that represented Regina Cuellar in the guardianship proceedings (Fredericks Peebles & Morgan) was also retained by the Tribe, the Tribe Council and the Tribal Court to assist and advise in legal matters affecting them, thereby creating a conflict of interest.

a- The court dismissed both the Tribe, Tribal Council and the Tribal Court based on century old core aspects of Federal Indian Law sovereign immunity.

b- Whatever potential cause of action under whatever theory the Plaintiffs may have against the law firm Fredericks Peebles & Morgan, the law firm is not a party to this litigation and thus the Court has no personal jurisdiction over the law firm

c- There is no and can never be an allegation under this theory of individual defendant Regina Cuellar violating the Fourteenth Amendment, either the procedural or substantive due process clause.

(5) Judge Williams refused to consider and rule upon several of Plaintiffs legal arguments, including that Regina Cuellar does not quality as a foster parent under California law due to evidence of domestic abuse in her home and alcohol-related criminal convictions.

a- The court dismissed both the Tribal Court Judge Williams based on century old core aspects of Federal Indian Law sovereign immunity.

b- There is no and can never be an allegation under this theory of individual defendant Regina Cuellar violating the Fourteenth Amendment, either the procedural or substantive due process clause.

The Court never set forth how the individual defendant Regina Cuellar ***ever did or could ever*** violate the Fourteenth Amendment under the five (5) listed theories the Court set forth on pages 16-17 and laid out above. It is inconceivable, factually impossible and legally impossible for her to have violated the Plaintiffs due process

rights, either procedurally or substantively, under the Fourteenth Amendment ***under any theory*** either the Court used or the Plaintiffs alleged.

All of the five (5) listed allegations by the Court of due process violations under the Fourteenth Amendment, are directed solely at all of the party defendants the century old core law of Federal Indian Law, sovereign immunity, required the Court to dismiss. The Court may disagree, in fact the Court may be angry with the core Federal Indian law, however, that does not transform any allegation of the Plaintiffs First Amended Complaint into mandatory Article III subject matter jurisdiction over individual defendant Regina Cuellar.

What the Court is attempting to do, without finding Article III subject matter jurisdiction over individual Regina Cuellar, is attempting a method of abrogating sovereign immunity[6]. Yet, tribal sovereign immunity is a constitutional principle supported by centuries of Supreme Court decisions, which can only be diminished by Congress. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030-31, 188 L.Ed. 2d 1071 (2014) stated:

> "Indian tribes are " 'domestic dependent nations' " that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (*Potawatomi*) (quoting *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). As dependents, the tribes are subject to plenary control by Congress. See *United States v. Lara,* 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) ("[T]he Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive' " to "legislate in respect to Indian tribes"). And yet they remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Thus, unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55

[6] See The Comparative Rights of Individual Sovereigns, Matthew L.M. Fletcher, Gonzaga Law Review, volume 40, March, 2005.

> L.Ed.2d 303 (1978). Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo,* 436 U.S., at 58, 98 S.Ct. 1670. That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is "inherent in the nature of sovereignty not to be amenable" to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands. See *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (*USF & G*) ("It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit"). Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization (or a waiver). *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). In doing so, we have held that tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals."

Rule 19 is not an alternative to mandatory Article III subject matter jurisdiction, and no case cited by the Court so holds. The dismissed defendants are required parties under Rule 19 and under both the Court's and Plaintiffs' five (5) theories of alleged violations of due process under the Fourteenth Amendment. However, no individual can violate the Fourteenth Amendment's due process clause, either procedurally or substantively. Thus, there is no Article III subject matter jurisdiction holding individual Regina Cuellar to Plaintiffs lawsuit. Regina Cuellar, sued as an individual must, under the law, be dismissed.

AS AN INDIVIDUAL REGINA CUELLAR HAS NO LEGAL ABILITY TO REPRESENT THE TRIBAL DEFENDANTS

The reason the Court made a clear manifest error is ICWA. This Court failed to abide by Congress' legislation.

On page 13, lines 25-28, the Court makes the unsupported statement that

> "third, if any of the Tribal Defendants' interests are implicated by this action, Defendant Cuellar is well-positioned to defend them given her status as a tribal member, a member of the Tribal Council and the appointed guardian of the Minors".

The Court cites no law to allow the transformation of an individual defendant to switch legal identities, back and forth, between the identity of a dismissed defendant based on sovereign immunity – Regina Cuellar a Tribal Council member – to somehow legally represent a sovereign – the dismissed Indian Tribe – to somehow legally represent a sovereign's governmental entities – Tribal Council, Tribal Court, Tribal Judge Chief Judge Williams and Regina Cuellar as a member of the Tribal council – all dismissed by the Court for lack of jurisdiction based on the century old core aspects of Federal Indian law sovereign immunity – and then switch back to being the party the Court wrongly held in the case, individual defendant Regina Cuellar. Parties do not just whimsically change from dismissed parties – based on sovereign immunity – to then wrongfully sued parties – individual Regina Cuellar – to legally be "well-positioned" to legally represent dismissed parties – Tribal defendants.

The Court – without the support of the United States Constitution, case law or Congressional action – attempts to pass over sovereign immunity and Rule 19 and bring back into the lawsuit the dismissed defendants by transforming an individual defendant Regina Cuellar into the dismissed defendants' advocate. Regina Cuellar as

an individual *cannot represent* the Tribal defendants since Regina Cuellar has no legal access to the Tribal defendants as clients. All of the Tribal defendants are protected by the attorney-client relationship since they are represented by counsel. Further, all of the Tribal defendants are protected by other privileges - attorney-client work product, attorney work-product – which legally protects the Tribal defendants from being represented by a non-lawyer and prevents the non-lawyer, individual defendant Regina Cuellar, from representing any of the Tribal defendants.

In fact, all of the dismissed Tribal Defendants are represented by legal counsel, which prevents Regina Cuellar as an individual to be, in the Court's words, "well-positioned" to defend them since the attorney-client privilege protects the dismissed Tribal defendants and prevents an individual from representing the dismissed Tribal defendants' legal interests. The Court cites to no authority to pierce the attorney-client privilege or the attorney-work product privilege of the dismissed Tribal defendants and their legal counsel so as to have individual defendant Regina Cuellar "well-positioned" to represent the dismissed Tribal defendants.

NATIONAL FARMERS UNION INS. COS. V. CROW TRIBE OF INDIANS AND WILSON v. MARCHINGTON

NATIONAL FARMERS UNION INS. COS. v. CROW TRIBE OF INDIANS

National did not have as an issue, thus the Supreme Court never reached the issue of whether the district court had mandatory Article III subject matter jurisdiction over an individual defendant for allegedly violating due process rights under the

Fourteenth Amendment. That is the issue here, however, on the motion for re-consideration.

Further, *National* was a civil tort case. There, the issue facing the Supreme Court was "whether an Indian tribe retains the power to compel a non-Indian ***property owner*** to submit to the civil jurisdiction of a tribal court". (Emphasis added) *National Farmers Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Here, on the other hand, this case is about three tribal minors, and the Congressional mandate that the minors' Tribe—acting through the Tribal Court—have jurisdiction over the appointment of the minors' guardian. This is not about injuries suffered in a tort case, nor is it is not about the State owning real property within the boundaries of an Indian Reservation.

National's analysis neither erases centuries of case holdings that the Fourteenth Amendment's due process applies to States nor erases the clear, plain wording of the Fourteenth Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Neither of Plaintiffs' two theories provide this Court with the mandatory subject matter jurisdiction under Article III: Theory 1- Lack of Jurisdiction of the Tribal Court, which this Court dismissed saying the Tribal Court did have Jurisdiction over the Indian Child Welfare Act case, thus this lack of jurisdiction theory does not provide subject

matter jurisdiction; and Theory 2- violation of Plaintiffs' due process rights under the Fourteenth Amendment. The Fourteenth Amendment has never and does not today, apply to individuals, thus this theory does not provide the mandatory subject matter jurisdiction under Article III.

National dealt with a tribal member filing a lawsuit for alleged tort injuries occurring at a School located on State owned land within the boundaries of the Crow Tribe reservation. A default judgment was entered against the School District, which was a political subdivision of the State. Ensuing litigation began, with the Insurance Company of the School District, National and the School District – a political subdivision of the state- filing in federal court and the case ended up at the Supreme Court. The Supreme Court opinion is silent on specifically what were the alleged constitutional violations of petitioners (defendants). *National Farmers Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 848, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Even this court in its September 2, 2016 order, does not state what the alleged constitutional violations were in *National.*

This Court in its September 2, 2016, page 10, 14-19, cites dicta in *National* by the Supreme Court, which is non-binding on any court or party by stating:

> "The Court implied, however, that if the plaintiffs in the federal action had exhausted their tribal court remedies, the district court could have granted injunctive relief and declaratory relief preventing enforcement of the judgment for lack of jurisdiction. See Id. ("Until petitioners have exhausted the remedies available to them in the Tribal court system…it would be premature for a federal court to consider any relief.").

And what the Supreme Court actually wrote was "...it would be premature for a federal court to consider any relief" (*National Farmers Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 848, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985)). The Supreme Court used the word "consider" and did not write the district court could have granted injunctive relief and declaratory relief.

Then, without citation, Constitutional authority or Congressional action, this Court writes in its September 2, 2016 order, page 10, 19-23:

> "It follows that if a federal court could issue declaratory and injunctive relief against a Tribe, a Tribal Council and a Tribal Court preventing enforcement of a judgment obtained in excess of jurisdiction, it could issue the same relief against the same defendants with respect to a judgment that violated non-tribal members' due process rights". (See Exhibit A, page 10, lines 19-23).

The Court used dismissed Tribal defendants – based on core principals of Federal Indian Law sovereign immunity – as hypothetical examples of potential future action, not before this court, and transferred and transposed this hypothetical example of dismissed Tribal defendants into mandatory Article III subject matter jurisdiction over an individual defendant, Regina Cuellar. First, as the Supreme Court has historically held: "Early in its history, this Court held that it had no power to issue advisory opinions, Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792), as interpreted in Muskrat v. United States, 219 U.S. 346, 351—353, 31 S.Ct. 250, 251—252, 55 L.Ed. 246 (1911),...." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). Second, this Court has no Article III mandatory subject matter jurisdiction over individual Regina Cuellar.

National provides no framework for this Court to find the mandatory required Article III subject matter jurisdiction over individual defendant Regina Cuellar using Plaintiffs only remaining theory, a violation of the Fourteenth Amendment's due process clause.

WILSON v. MARCHINGTON

ICWA. That is the clearest response to *Wilson*. ICWA always grants the Tribe with exclusive jurisdiction or presumptive primary jurisdiction over minor Tribal members.

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), clearly, expressly and specifically reads:

> "A federal court must also reject a tribal judgment if the defendant was not afforded due process of law. 'It has long been the law of the United State that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process.' *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406, 11410 (9th Cir.), *cert denied*, 516 U.S. 989, 116 S. Ct. 519, 133 L.Ed.2d 427 (1995) The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes.

The Ninth Circuit writes "tribal judgments", "foreign nations" and "Native American tribes", these are all independent sovereigns or independent sovereign employees, and not, as the case here, an individual sued in her individual capacity. If the Plaintiffs were denied due process of law in Tribal Court—an allegation that is not being conceded—that was not by any action or inaction done or taken by individual

defendant Regina Cuellar. Individual defendant Regina Cuellar was only a party in the Tribal Court hearings, and nothing more.

The focus must remain on the Court's adoption of Plaintiffs' theory of mandatory subject matter jurisdiction under Article III over individual defendant Regina Cuellar, that is an alleged violation of Plaintiffs' Fourteenth Amendment's due process rights. An individual cannot violate another individual's Fourteenth Amendment's due process rights. Such a violation can only be by a government, the State, or State actors acting under color of state law, government employees. Individual defendant Regina Cuellar has never been and is not now either of those.

In *Wilson*, the Ninth Circuit held:

> Applying the comity analysis to this case, we find that the tribal judgment is not entitled to recognition or enforcement because the tribal court lacked subject matter jurisdiction, one of the mandatory reasons for refusing to recognize a tribal court judgment. Our jurisdictional determination is commanded by *Strate v. A–1 Contractors*, —— U.S. ——, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), decided April 28, 1997.
>
> The Supreme Court's holding in *Strate* is succinctly stated in its opening paragraphs: "[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." *Id.* at ——, 117 S.Ct. at 1408. (Id. at 813)

Here, this Court already found the Tribal Court did indeed have subject matter jurisdiction over the three tribal minors under the plain language of the ICWA. (See Exhibit A, page 7, line 28, footnote 3) In *Wilson*, in contrast, the Tribal Court did not have subject matter jurisdiction since the defendant was non-Indian, the auto accident

occurred on a state highway, and there was no federal statute that provided the Tribal Court with jurisdiction over the claims.

In *Wilson*, it was the plaintiff Jane Wilson, a tribal member, who was seeking, by voluntarily filing the lawsuit in federal court, to register the judgment in the federal system. Here, on the contrary, individual defendant Regina Cuellar did not file the lawsuit, did not attempt to register the Tribal Court judgment in any Court system. and has never agreed or voluntarily submitted to the jurisdiction of this or any federal court.

Take for example, if this Court, did ***not*** have jurisdiction over General Motors or IBM in a lawsuit filed in this Court, then this Court could not create or invent or manufacture jurisdiction over General Motors or IBM and then issue orders or grant declaratory or injunctive relief against either General Motors or IBM. This Court would first have to have jurisdiction over General Motors or IBM before taking any action. That fundamental legal principle is the same with individual defendant Regina Cuellar. This Court must first have mandatory subject matter under Article III over individual defendant Regina Cuellar before this Court can either take any action regarding individual defendant Regina Cuellar or issue any orders or grant any declaratory or any injunctive relief against individual defendant Regina Cuellar.

This Court does not have mandatory subject matter jurisdiction under Article III over individual defendant Regina Cuellar, especially under Plaintiffs' and this Court's adopted theory of an alleged violation of due process under the Fourteenth Amendment. Without subject matter jurisdiction over individual defendant Regina Cuellar, this Court can issue no orders regarding her. Just like the Court could not issue

any orders regarding General Motors or IBM unless the Court had subject matter over them.

INDIAN CHILD WELFARE ACT ALWAYS GRANTS THE TRIBE JURISDICTION OF THE THREE TRIBAL MINORS BOTH ON AND OFF THE RESERVATION

Congress enacted the Indian Child Welfare Act. That Act, under Title 25 U.S.C. sections 1911(a) and (b) grants the Tribe either- (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe or – (b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

This Court misinterprets the Indian Child Welfare Act when is states in its September 2, 2016 order: "The adequacy of the remedy factor favors Plaintiffs. Under this factor of the Rule 19 test, a remedy can be adequate even if not complete. Makah Indian Tribe, 910 F.2d 560." First, what the Ninth Circuit said in Makah just above this sentence was: "First, *prejudice* to any party resulting from a judgment militates toward dismissal of the suit. As in Rule 19(a)(2), the presence of a representative may lessen prejudice. ***Amicus status is not sufficient*** to satisfy this test, however, nor is ability to intervene if it requires waiver of immunity." *Makah Indian Tribe v. Verity*, 910 F.2d 555,

560 (9th Cir. 1990)(emphasis added). Second, the prejudice to the Tribe and Tribal defendants is plain from the clear language of ICWA that the Tribe has been granted rights by Congress over the three Tribal minors. This prejudice can't be cured or lessened in an ICWA case. Third, there is no representative of the Tribe or Tribal defendants left in the case. All that is left is an individual defendant, Regina Cuellar, who legally can't represent their interests as stated above. Certainly, ***since amicus status is not sufficient***, which is what the Ninth Circuit held, ***neither is an individual***, Regina Cuellar sufficient. The Tribe and Tribal defendants are represented by distinct and separate legal counsel and Regina Cuellar as an individual can't represent the Tribe and/or Tribal defendants for many reasons, one being the attorney-client privilege and relationship.

Finally, the Ninth Circuit in Makah restates the rule: "Sovereign immunity may leave a party with no forum for its claims. *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1326 (9th Cir.1975), *cert. denied,* 425 U.S. 903, 96 S.Ct. 1492, 47 L.Ed.2d 752 (1976)." *Makah Indian Tribe*, 910 F.2d 555, at page 560.

CONGRESS HAS GIVEN PLAINTFFS THEIR FORUM TO LITIGATE THIS ICWA CASE, TRIBAL COURT

Plaintiffs have an alternative forum to litigate this ICWA case—Tribal Court—and that is where Congress determined it must and should be litigated. The fact that Plaintiffs will not have this federal forum for their claim following dismissal is of no moment, since Congress has spoken. However, the "lack of an alternative forum does not automatically prevent dismissal of a suit." *Makah Indian Tribe v. Verity*, 910 F.2d at 560. The Ninth Circuit has explained "[c]ourts have recognized that a plaintiff's interest

in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d at 1500 (quotations omitted); *Enterprize Management Consultants, Inc. v. U.S. ex rel. Hodel,* 883 F.2d 890, 894 (10th Cir. 1989) ("dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.") (quotations omitted)). This standard is consistently followed by the Ninth Circuit. *American Greyhound Racing v. Hull,* 305 F.3d at 1025 ("[W]e have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.").

CONCLUSION

For all the reasons stated herein, individual defendant Regina Cuellar respectfully requests this Court to both reconsider its September 2, 2016 order and to dismiss individual defendant Regina Cuellar from this lawsuit.

DATED: September 16, 2016

Respectfully submitted

/s/ JAMES R. GREINER

LAW OFFICES OF JAMES R. GREINER
JAMES R. GREINER
ATTORNEY FOR INDIVIDUAL DEFENDANT
REGINA CUELLAR

MOTION FOR

RECONSIDERATION OF THE

SEPTEMBER 2, 2016 COURT ORDER

EXHIBIT A

COURT ORDER OF

SEPTEMBER 2, 2016

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EFRIM RENTERIA, TALISHA RENTERIA,

Plaintiffs,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al.,

Defendants.

No. 2:16-cv-1685-MCE-AC

MEMORANDUM AND ORDER

Plaintiffs Efrim and Talisha Renteria ("Plaintiffs") bring this action against the Shingle Springs Band of Miwok Indians ("Tribe"), its Tribal Council, its Tribal Court, Christine Williams in her official capacity as the Tribal Court judge, Regina Cuellar in both her official capacity as a member of the Tribal Council (collectively, the "Tribal Defendants") and her individual capacity as the appointed guardian of Plaintiffs' three minor nieces ("Minors"), all of whom are under seven years old. They seek to prevent the enforcement of Tribal Court's June 3, 2017 Order ("June 3 Order") appointing Defendant Regina Cuellar as the legal guardian of the Minors. Their Complaint attacks the Tribal Court's jurisdiction over the custody proceedings, and further alleges that the June 3 Order is unenforceable in courts subject to the 14th Amendment of the United States Constitution because the underlying proceedings violated Plaintiffs' due process

rights.

Plaintiffs' Motion for Preliminary Injunction (ECF No. 8) is presently before the Court. That Motion is GRANTED with respect to Defendant Regina Cuellar in her individual capacity. All defendants with the exception of Regina Cuellar in her individual capacity are DISMISSED for lack of jurisdiction.

BACKGROUND[1]

Plaintiffs are the maternal great aunt and uncle of the Minors.[2] The Minors' parents were killed in a car accident on December 17, 2015. Their late father was a member of the Tribe, but the Minors resided and were domiciled with their parents in Visalia, California. They have never resided or been domiciled on tribal lands.

Plaintiffs cared for the Minors in the weeks following the accident. On January 5, 2016, members of the children's paternal family appeared at Plaintiffs' house in Visalia, presented a copy of an emergency order issued by the Tribal Court of the Shingle Springs Band of Miwok Indians ("Tribal Court") to Plaintiffs', and forcibly removed the two youngest Minors (the eldest Minor remained hospitalized from injuries sustained in the car accident that killed her parents). On January 22, 2016, the Tribal Court held a review hearing regarding guardianship, appointed Plaintiffs as temporary guardians for the Minors, and established a schedule of visitations for the paternal family.

Beginning in February 2016, the two older children repeatedly reported that their paternal step-grandfather ("Joseph") sexually abused them during their visits. Plaintiffs reported the abuse to the Visalia Police Department and the Tulare County Health &

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[1] The following recitation of facts is taken, sometimes verbatim, from the Complaint and the papers filed on the docket in connection with Plaintiffs' Motion for Preliminary Injunction.

[2] In an effort to be cognizant of the best interests of the Minors, details that could lead to their identification and allegations are not included in this Order.

[1] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

[2] In an effort to be cognizant of the best interests of the Minors, details that could lead to their identification and allegations are not included in this Order.

[3] Given the non-viability of Plaintiffs' challenge to the Tribal Court's jurisdiction, the Court refers

Human Services Agency. In the days that followed Plaintiffs' initial police report, the children were interviewed outside of Plaintiffs' presence on three separate occasions by social workers with no connection to the family. The two older children continued to report instances of sexual abuse by Joseph to these social workers. After Plaintiffs made these reports, the Tribal Court modified the visitation order such that Joseph was not to have access to the Minors.

On June 3, 2016, the Tribal Court appointed Defendant Regina Cuellar as the Minors' permanent guardian over Plaintiffs' competing petition and objections. Defendant Cuellar's appointment became effective June 12, 2016. At the same time, the Tribal Court issued a visitation order that failed to restrict Joseph's access to the Minors. The Minors then went for visitation with Defendant Regina Cuellar on June 4 and 5.

The failure to restrict Joseph's access to the Minors during this visit resulted in yet another instance of alleged sexual abuse. Plaintiffs declined to give custody of the Minors to the paternal family on June 12, and caused a "Good Cause" Report to be filed with the Tulare County District Attorney. Plaintiffs then filed this action on July 21, 2016. They seek a declaration that the Tribal Court lacked jurisdiction to appoint a guardian for the Minors in the first instance, a declaration that the proceedings that led to the appointment of Regina Cuellar violated Plaintiffs' due process rights, and an injunction preventing the enforcement of the June 3 Order outside of tribal lands. .

The Court issued a Temporary Restraining Order ("TRO") enjoining enforcement of the Tribal Court's June 3 Order pending a hearing on Plaintiffs' Motion for Preliminary Injunction. ECF No. 19. After the Court issued the TRO, the Tribal Court ordered Plaintiffs to appear at another hearing to discuss visitation for an important tribal cultural event known as the "Big Time." As a result of that order, Plaintiffs requested a supplemental TRO enjoining the enforcement of any additional Tribal Court orders in the custody proceeding pending the resolution of Plaintiffs' Motion. The Court denied Plaintiffs' application for a supplemental TRO for failure to comply with Local Rule 231.

ECF No. 49.

Defendants oppose Plaintiffs' Motion. They contend that the Court lacks jurisdiction over the Tribal Defendants, and that Plaintiffs' action cannot proceed solely against Defendant Cuellar in her individual capacity under Rule 19(b).

STANDARDS

A. Jurisdiction

Federal courts are courts of limited jurisdiction, and are presumptively without jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. Id. Because subject matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at any point during the litigation. Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also Int'l Union of Operating Eng'rs v. Cnty. of Plumas, 559 F.3d 1041, 1043-44 (9th Cir. 2009). Lack of subject matter jurisdiction may also be raised by the district court sua sponte. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999). Indeed, "courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party." Id.; see Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss the action if subject matter jurisdiction is lacking).

There are two types of motions to dismiss for lack of subject matter jurisdiction: a facial attack, and a factual attack. Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the allegations of jurisdiction contained in the nonmoving party's complaint, or may challenge the existence of subject matter jurisdiction in fact, despite the formal sufficiency of the pleadings. Id.

When a party makes a facial attack on a complaint, the attack is unaccompanied

by supporting evidence, and it challenges jurisdiction based solely on the pleadings. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to dismiss constitutes a facial attack, the Court must consider the factual allegations of the complaint to be true, and determine whether they establish subject matter jurisdiction. Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003). In the case of a facial attack, dismissal is warranted only if the nonmoving party fails to allege an element necessary for subject matter jurisdiction. Id. However, in the case of a facial attack, district courts "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." Safe Air for Everyone, 373 F.3d at 1039.

In the case of a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations." Thornill, 594 F.2d at 733 (internal citation omitted). The party opposing the motion has the burden of proving that subject matter jurisdiction does exist, and must present any necessary evidence to satisfy this burden. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff's allegations of jurisdictional facts are challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the mere assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind., Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat'l Bank of Chi. v. Touche Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may review any evidence necessary, including affidavits and testimony, in order to determine whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its burden and the court determines that it lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3).

A court dismissing a complaint for lack of jurisdiction must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the

amendment . . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005)); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility . . . .")).

B. Preliminary Injunction

"A preliminary injunction is an extraordinary and drastic remedy." Munaf v. Geren, 553 U.S. 674, 690 (2008). "[T]he purpose of a preliminary injunction is to preserve the status quo between the parties pending a resolution of a case on the merits." McCormack v. Hiedeman, 694 F.3d 1004, 1019 (9th Cir. 2012). A plaintiff seeking a preliminary injunction must establish that he is (1) "likely to succeed on the merits;" (2) "likely to suffer irreparable harm in the absence of preliminary relief;" (3) "the balance of equities tips in his favor;" and (4) "an injunction is in the public interest." Winter v. Natural Res. Defense Council, 555 U.S. 7, 20 (2008) "If a plaintiff fails to meet its burden on any of the four requirements for injunctive relief, its request must be denied." Sierra Forest Legacy v. Rey, 691 F. Supp. 2d 1204, 1207 (E.D. Cal. 2010) (citing Winter, 555 U.S. at 22). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Winter, 555 U.S. at 24 (quoting Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)). A district court should enter a preliminary injunction only "upon a clear showing that the plaintiff is entitled to such relief." Winter, 555 U.S. at 22 (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).

Alternatively, under the so-called sliding scale approach, as long as the plaintiff demonstrates the requisite likelihood of irreparable harm and shows that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in the plaintiffs' favor. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (concluding that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after Winter).

ANALYSIS

Defendants' sovereign immunity argument, while not entirely convincing, raises serious questions about the Court's jurisdiction over the Tribal Defendants. The Court, however, can provide Plaintiffs with the relief they seek by dismissing the Tribal Defendants and allowing this action to go forward against Regina Cuellar in her individual capacity. As explained more fully below, the Court dismisses the Tribal Defendants, finds that Federal Rule of Civil Procedure 19[1] does not mandate joinder, and proceeds to the merits of Plaintiffs' Motion solely with respect to Defendant Cuellar. As to their due process claim, the Court finds that Plaintiffs are entitled to preliminary injunctive relief and GRANTS Plaintiffs' Motion with respect to Defendant Cuellar in her individual capacity.[3]

A. The Court Declines To Exercise Jurisdiction Over The Tribal Defendants

Defendants challenge the Court's jurisdiction to hear Plaintiffs' due process claim on two grounds. First, Defendants argue that the Tribal Defendants are immune from suits for declaratory and injunctive relief under the doctrine of sovereign immunity. Second, Defendants contend that to the extent that Plaintiffs' due process claim is

[1] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

[3] Given the non-viability of Plaintiffs' challenge to the Tribal Court's jurisdiction, the Court refers only to their due process claim in discussing its jurisdiction.

predicated on the Indian Civil Rights Act ("ICRA"), they can assert their due process rights against the Tribal Defendants only by way of a habeas petition.

Tribal sovereign immunity presents a jurisdictional question. See Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 722 (9th Cir. 2008). Generally, a plaintiff cannot bring a lawsuit in federal court against a tribe absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. Arizona Public Service Co. v. Aspaas, 77 F.3d 1128, 1133. Tribal sovereign immunity extends to agencies of the tribe, Hagen v. Sisseston-Wahpeton Community College, 205 F.3d 1040, 1043 (8th Cir. 2000), and to tribal officials acting in their official capacity within the scope of their authority.[4] Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir. 2002). Based on these principles and the Supreme Court's reasoning in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), Defendants assert that Plaintiffs can only bring their due process challenge to the Tribal Court proceedings by way of a habeas petition pursuant to the Indian Civil Rights Act ("ICRA"). See id. at 56-61 (observing that the Fourteenth Amendment of the Constitution has not historically applied to Indian tribes and that habeas corpus is the only vehicle by which to challenge a claim covered by the ICRA).

Defendants' argument is not entirely persuasive. Plaintiffs' due process claim does not seek an order enjoining the Tribe or its officials from governing its members, nor do they seek an order preventing the enforcement of the Tribal Court's June 3 Order on tribal lands. Rather, Plaintiffs ask the Court to hold that the June 3 Order is not entitled to recognition by the state and federal governments. ECF No. 51 at 7:4-8; ECF No. 7 at 14, ¶ D.

In light of Plaintiffs' requested relief, Santa Clara Pueblo is distinguishable. That

[4] Although the Ex Parte Young doctrine carves out an exception to tribal sovereign immunity when a plaintiff brings a suit for prospective relief against tribal officers allegedly acting in violation of federal law, Plaintiffs have failed to allege that Judge Wiliams or Regina Cuellar are engaged in an ongoing violation of federal law. See Burlington Northern & Santa Fe Railway Co. v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007). Plaintiffs' due process claim does not allege a violation of federal law because "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

case dealt with a dispute between tribal members wherein female tribal members challenged sexist tribal policies that excluded them from tribal membership. Santa Clara Pueblo, 436 U.S. at 52-53 (1978). The plaintiffs sought to enjoin the enforcement of a tribal ordinance. Id. In pertinent part, the Supreme Court noted that "even in matters involving commercial disputes and domestic relations, we have recognized that subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves may "undermine the authority of the tribal court . . . [and hence] . . . [in]fringe on the right of the [I]ndians to govern themselves." Id. at 59 (internal quotation marks and citations omitted).

Here, in contrast, Plaintiffs do not seek to force the Tribe, tribal officials, or the Tribal Court to do anything or refrain from doing anything. Instead, they seek a declaration that the June 3 Order is unenforceable by non-tribal governmental entities. Furthermore, there is no danger that hearing a dispute about the enforceability of a tribal court order would undermine the authority of the tribal court to address internal disputes about matters of tribal governance. See id. Rather, the focus of Plaintiffs' lawsuit is whether the June 3 Order is enforceable against them by state, federal, or local governments off of the reservation. The relief Plaintiffs seek does not compel the Tribe to act in a particular way, nor does it prevent the June 3 Order from remaining in effect on the reservation. Instead, granting a preliminary injunction will only prevent the June 3 Order from being enforced in state or federal courts. Accordingly, the reasoning in Santa Clara Pueblo does not support Defendants' sovereign immunity argument particularly well.

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) seems to provide a better framework for the Court's understanding of its jurisdiction here. In that case, a Crow Indian minor was struck by a motor cycle in the parking lot of the Lodge Grass Elementary school located on land owned by the state of Montana. Id. at 847. The minor, through his guardian, filed suit in tribal court and obtained a default judgment for $153,000. The school district and its insurer then filed suit in federal district

court, alleging that the enforcement of the tribal court judgment would impair their constitutional and statutory rights. Id. at 848. The complaint named as defendants the Crow Tribe of Indians, the tribal council, the tribal court, judges of the tribal court, and the chairman of the tribal council. It described the entry of the default judgment, alleged that a writ of execution might issue on the following day, and asserted that a seizure of school property would cause irreparable injury to the School District and would violate the petitioners' constitutional and statutory rights. The District Court entered an order restraining all the defendants "from attempting to assert jurisdiction over plaintiffs or issuing writs of execution out of Cause No. Civ. 82–287 of the Crow Tribal Court until this court orders otherwise." Id. Eventually, the district court entered a permanent injunction, the basis of which was its finding that the tribal court lacked jurisdiction over the tort that was the basis of the tribal court suit and default judgment. Id. at 848-49.

The Supreme Court ultimately decided the case in favor of the Crow Tribe on exhaustion grounds. Id. at 857. The Court implied, however, that if the plaintiffs in the federal action had exhausted their tribal court remedies, the district court could have granted injunctive and declaratory relief preventing enforcement of the judgment for lack of jurisdiction. See id. ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief."). It follows that if a federal court could issue declaratory and injunctive relief against a Tribe, a Tribal Council, and a Tribal Court preventing enforcement of a judgment obtained in excess of jurisdiction, it could issue the same relief against the same defendants with respect to a judgment that violated non-tribal members' due process rights. This must be the case because foreign judgments are not entitled to be enforced with full faith and credit if they are obtained either in excess of jurisdiction or due to a failure to comport with due process. See Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) ("A federal court must also reject a tribal judgment if the defendant was not afforded due process of law.").

Indeed, Wilson v. Marchington provides additional support for Plaintiffs' position

that the court has jurisdiction to enter declaratory and injunctive relief against the enforcement or recognition of the June 3 Order outside Defendants' reservation. In Wilson, the Ninth Circuit examined the question of "whether, and under what circumstances, a tribal court tort judgment is enforceable in the United States courts." Id. at 807. The plaintiff in Wilson was a member of the Blackfeet Tribe. She sued the defendant in tribal court after a car accident, and obtained a judgment in her favor. Claiming her judgment was entitled to full faith and credit, she filed suit in the U.S. District Court for District of Montana to register her judgment in the federal court system. The Ninth Circuit affirmed the District Court's holding that the judgment was not entitled to recognition. It noted that federal courts may not enforce tribal judgments under the comity doctrine if they were obtained in excess of the tribal court's jurisdiction or after a denial of due process. Id. at 811 ("A federal court must also reject a tribal judgment if the defendant was not afforded due process of law . . . . We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes."). It further observed that the due process requirement was equally applicable where a plaintiff seeks to enforce a judgment entitled to full faith and credit, as is required by the Indian Child Welfare Act ("ICWA"). See id.; see also Kremer v. Chemical Const. Corp., 456 U.S. 461, 482 (1982) ("The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.")

Plaintiffs' argument based on Wilson and National Farmers, however, is an inferential one. The Court is not convinced that those inferences, logical though they may be, satisfy Plaintiffs' burden of establishing jurisdiction in the face of the clear statement of controlling authority that Indian tribes and their agents are immune from civil suit in federal court. Arizona Public Service Co. v. Aspaas, 77 F.3d 1128, 1133. Given the limited nature of federal court jurisdiction, the Court's reluctance to potentially

expand that jurisdiction by accepting Plaintiffs' arguments, and the fact that effective relief can be fashioned without the Tribal Defendants' participation, the Court declines to exercise jurisdiction over them. The Tribal Defendants are therefore DISMISSED from this action for lack of jurisdiction. Accordingly, the Court DENIES Plaintiffs' Motion as moot with respect to the Tribal Defendants.

B. Plaintiffs' Due Process Claim Can Proceed Against Regina Cuellar In Her Individual Capacity

There is no genuine dispute that the doctrine of tribal sovereign immunity does not apply to Defendant Cuellar in her individual capacity, and that the Court possesses jurisdiction over her. ECF No. 30 at 22:26-28. Nevertheless, Defendants argue that Cuellar should also be dismissed because the Tribal Defendants are indispensable parties under Rule 19. Id. at 22-23; ECF No. 32 at 27:15-32:10. The Court finds Defendants' argument unpersuasive.

More specifically, the Court agrees that the Tribal Defendants are required parties under Rule 19(a)(1)(A).[5] Plaintiffs have not provided the Court with any authority that would limit the Tribal Defendants' ability to themselves seek enforcement of the June 3 Order in state or federal court. Assuming that they can do so, an injunction issued against Cuellar alone would be insufficient to afford complete relief because the Tribal Defendants could "possibly initiate further action to enforce" June 3 Order even if that order were held unenforceable in this action. E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, 780 (9th Cir. 2005). Furthermore, the Court agrees that joinder of the Tribal Defendants would be infeasible given its reluctant decision that they are immune from suit here.

The Court disagrees, however, with Defendants' assertion that this action cannot proceed against Defendant Cuellar as an individual in equity and good conscience. See

[5] The Court rejects any suggestion that the Tribal Defendants are also required parties under Rule 19(a)(1)(B)(i). The Tribal Defendants cannot have any interest in the enforceability of an order against non-tribal members in state or federal court if that order violates the non-members' due process rights. Furthermore, if such an interest is legitimate, Defendant Cuellar is more than capable of sufficiently defending it in her individual capacity.

Fed. R. Civ. P. 19(b). In determining whether an action can proceed against a party despite the infeasibility of joining required parties, courts apply a four-factor test:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.; Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990).

The first factor favors Plaintiffs. Defendants appear to contend that the Tribe's interest in regulating the custody of its minor members would be prejudiced without its participation in this action. But Plaintiffs' requested relief on their due process claim would do nothing to imperil the ability of the Tribal Court to continue issuing custody orders in cases where, as here, it properly asserts jurisdiction. Nor would Plaintiffs' requested relief compel the Tribal Defendants to do anything in regards to their ability to regulate its members on tribal lands. See Santa Clara Pueblo, 436 U.S. at 59. Second, to the extent Defendants contend they have an interest in the enforcement of a custody order against non-tribal members residing off tribal lands, the Court disagrees. No tribe has a legitimate interest in enforcing an order in state or federal courts if it was obtained in tribal court without regard for the due process rights of such persons. If such an interest exists, the time for the Tribal Defendants to protect it was during the custody proceedings themselves. Third, if any of the Tribal Defendants' interests are implicated by this action, Defendant Cuellar is well-positioned to defend them given her status as a tribal member, a member of the Tribal Council, and the appointed guardian of the Minors. Finally, Defendant Cuellar does not contend her own interests would be

prejudiced if the Tribal Defendants are not joined in this action. The prejudice factor therefore favors Plaintiffs.[6]

The adequacy of the remedy factor also favors Plaintiffs. Under this factor of the Rule 19(b) test, a remedy can be adequate even if it is not complete. Makah Indian Tribe, 910 F.2d at 560. Here, Plaintiffs' remedy against Cuellar would be adequate in that it would prevent her from attempting to seek recognition of the June 3 Order in state or federal court. While that remedy would presumably not prevent the Tribal Defendants from attempting to enforce the June 3 Order, it would complicate their ability to do so in at least two ways. First, a judgment from this Court holding that the June 3 Order is unenforceable for failure to comport with Plaintiffs' due process rights would likely have at least some persuasive effect on another judge assigned to determine the enforceability of that Order. Second, if the Tribal Defendants sought to have the June 3 Order recognized in the Superior Court for Tulare or El Dorado County, Plaintiffs would likely be able to remove that proceeding to this Court under 28 U.S.C. § 1331 and relate it to this case pursuant to Local Rule 123 for adjudication by the undersigned. See Local Rules of E.D. Cal., Rule 123; see generally Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). The same relation procedure would hold true if the Tribal Defendants sought recognition of the June 3 Order in this Court in the first instance. Accordingly, the Court finds that while a judgment against Defendant Cuellar alone would not immediately provide a complete remedy, the remedy would be more than adequate for Plaintiffs' purposes.

Finally, Plaintiffs would lack an adequate remedy if this suit were dismissed against Defendant Cuellar for nonjoinder. Fed. R. Civ. P. 19(b)(4). If Plaintiffs are unable to litigate their meritorious due process claim here, they face two options. The first would be to sacrifice their right not to have an infirm foreign judgment enforced

[6] The Court's finding that the prejudice factor favors Plaintiffs makes it unnecessary to consider the second factor of the Rule 19(b) test.

against them by the state or federal governments by voluntarily returning the Minors to an allegedly harmful environment. Their second option, as defense counsel intimated at the hearing on this Motion, would be to wait for the Tulare County Sheriff's Department to collect the children (and possibly arrest Plaintiffs for kidnapping) pursuant to the June 3 Order. See Cal. Penal Code § 278. Both "remedies" are plainly inadequate.

Because all three relevant factors of the Rule 19(b) test favor Plaintiffs, the Court concludes that this action may proceed solely against Defendant Cuellar in her individual capacity. Accordingly, the Court proceeds to the merits of Plaintiffs' Motion for Preliminary Injunction.

C. Plaintiffs Are Entitled To A Preliminary Injunction On Their Due Process Claim

Although Defendants have failed to argue the merits of Plaintiffs' entitlement to a preliminary injunction, the Court must independently determine whether it should exercise its discretion to provide Plaintiffs with preliminary relief. See Fed. R. Civ. P. 65(d)(1). Concluding that the Plaintiffs are entitled to preliminary relief, the Court ENJOINS Defendant Cuellar from seeking recognition or enforcement of the June 3 Order in state or federal court.

1. Plaintiffs are likely to succeed on the merits of their due process claim.

The Indian Child Welfare Act ("ICWA") requires the United States and every state to "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to . . . the judicial proceedings of any other entity."[7] 25 U.S.C. § 1911(d). Enforcing a foreign judgment entitled to full faith and credit requires that the proceedings that led to the judgment comported with due process. Kremer v. Chemical Const. Corp., 456 U.S. 461, 482 (1982). Furthermore, the California Family

[7] Although there is a dispute as to whether the Tribal Court's June 3 Order is a child custody determination entitled to full faith and credit under ICWA, the comity doctrine that would otherwise apply also requires due process.

Code requires a child custody determination made by a tribe to comply with due process in order to be enforced in state court. Cal. Fam. Code § 3404(b)-(c); id. at §§ 3443, 3446; In re Marriage of Nurie, 176 Cal. App. 4th 478, 493 (Cal. Ct. App. 2009) ("The requirements of due process of law are met in a child custody proceeding when, in a court having subject matter jurisdiction over the dispute, the out-of-state parent is given notice and an opportunity to be heard."); see also ECF No. 30-3 at 59 (citing California Family Code). At the federal constitutional level, the Supreme Court has endorsed the existence of a significant liberty interest in extended family members' relationships with children. See Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 504 (1977) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition"); Troxel v. Granville, 530 U.S. 57, 65–66 (2000) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

The core of the constitutional right to due process is a meaningful opportunity to be heard before a person is deprived of a significant liberty interest. LaChance v. Erickson, 522 U.S. 262, 266 (1998); see also Wilson v. Marchington, 127 F.3d 805, 811 (1997) (due process requires an "opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings...and that there is no showing of prejudice in the tribal court or in the system of governing laws."). In this case, Plaintiffs allege that they did not receive a fair opportunity to be heard because:

(1) The Tribal Court did not fully consider Plaintiffs' position in the guardianship proceedings, and had no incentive to do so, because Judge Williams serves at the pleasure of the Tribal Council, on which Defendant Cuellar serves as a member;

(2) During the underlying proceedings, the Tribal Council passed an ordinance specifically intended to benefit Regina Cuellar's guardianship petition;

(3) Judge Williams was biased in favor of the Tribe, as evidenced by: (a) her statement that "Native Americans have felt that way about state court proceedings for years and now you know how they felt" in response to Plaintiffs claims of bias; and (b) her statement that she would not consider a report by a therapist involved in the molestation accusations and that she only wanted to hear from Tribal services;

(4) The law firm that represented Regina Cuellar in the guardianship proceedings (Fredericks Peebles & Morgan) was also retained by the Tribe, the Tribal Council, and the Tribal Court to assist and advise in legal matters affecting them, thereby creating a conflict of interest; and

(5) Judge Williams refused to consider and rule upon several of Plaintiffs' legal arguments, including that Regina Cuellar does not qualify as a foster parent under California law due to evidence of domestic abuse in her home and alcohol-related criminal convictions.

These allegations if true, would likely lead to a ruling that Plaintiffs were denied a meaningful opportunity to be heard in Tribal Court. Indeed, the multiple conflicts of interest inherent in the custody proceeding, combined with Plaintiffs' as-yet unrefuted allegations of Defendant Williams' expressions of bias, lead the Court to question whether Plaintiffs can ever receive a meaningful opportunity to be heard in the Tribal Court.[8] The Court further doubts whether the Tribal Court is capable of considering the best interests of the Minors given the aforementioned issues in the underlying

[8] The Court further observes that Defendants could have potentially refuted some of the questions surrounding the hearing that led to the June 3 Order by providing audiotapes of the hearing to either this Court or Plaintiffs. They refused to do either, and Defendant Williams' refusal to release them to Plaintiffs appears to have violated the Tribal Court's own Rules of Court. See Shingle Springs Band of Miwok Indians Tribal Court Rules of Court, Rule 1.5.B (available at shinglespringsrancheria.com/ssr/wp-content/uploads/documents/tribal-court/Tribal%20Court%20Rules.pdf); ECF No. 47-1 at 4, ¶ 6. The adverse inference the Court may draw as a result of Defendants' refusal to provide these tapes further supports the Court's finding that Plaintiffs are likely to succeed on the merits of their due process claim. See London v. Standard Oil Co. of California, 417 F.2d 820, 824 (9th Cir. 1969) ("The rule upon which he relies is that an unfavorable inference may result from the unexplained failure of a party to produce documentary or other real evidence." (citing Evis Manufacturing Company v. F.T.C., 287 F.2d 831, 847 (9th Cir. 1961); 2 Wigmore, Evidence, 285, 291 (3d Ed. 1940))).

proceedings. Accordingly, Plaintiffs have established a likelihood of success on the merits of their due process claim.

On the other hand, Plaintiffs' jurisdictional claim is unlikely to succeed. The ICWA's jurisdictional scheme is relatively simple. A tribal court has exclusive jurisdiction over child custody proceedings concerning Indian children who are domiciled on the reservation. 25 USC § 1911(a). "Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction by the tribal court." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

Plaintiffs argue that ICWA does not provide the Tribal Court here with jurisdiction for two reasons. First, Plaintiffs argue that the Minors are not Indians. They suggest that because the Minors have only 1.2 percent Maidu blood, they cannot meet the ICWA's definition of an Indian. This argument is meritless. The ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4). A tribe's determination that a child is a member of, or is eligible for membership in, a tribe is conclusive evidence that a child is an Indian child within the meaning of the ICWA. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). Neither enrollment nor blood quantum is required as long as the child is recognized as a member of the tribe or as eligible for membership. In re Riffle (Riffle II), 922 P.2d 510, 512-13 (Mont. 1996).

There is no dispute that the Minors are members of the Tribe. The Tribe's determination that they are members is conclusive. The fact that they are do not have a large amount of Indian genetic heritage is irrelevant. Under the ICWA, tribal

membership is a political affiliation rather than a matter of blood quantum. Plaintiffs' blood quantum argument therefore fails.

Second, Plaintiffs argue that the proceedings in the Tribal Court are not "child custody proceedings" within the meaning of the ICWA. See 25 U.S.C. § 1911. They may be correct, but their argument misses the point. First, the ICWA is a federal statute that applies to state courts when an Indian child is subjected to child custody proceedings in state court. It does not govern Indian tribes' ability to exercise jurisdiction over its minor members. Second, and regardless of whether the state has concurrent jurisdiction over these guardianship proceedings, the Tribe's Family Code provides the Tribal Court with jurisdiction over the Minors. See ECF No. 30-3 at 90 (the Tribal Court has "authority to appoint a guardian for a tribal member minor . . . whenever it is in the best interests of the minor."). The Superior Court for Tulare County accordingly declined to exercise its concurrent jurisdiction over the Minors' custody, citing the Tribal Court's pre-existing exercise of jurisdiction.[9] It is thus clear that the Tribal Court had jurisdiction to issue the June 3 Order appointing Regina Cuellar as the Minors' guardian.

2. Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

Plaintiffs easily establish the requisite level of harm to obtain a preliminary injunction. If Plaintiffs' allegations are true, three young children have been sexually abused by a tribal family member in the recent past. The instances of sexual abuse are not isolated incidents. The Minors' reports of sexually abusive conduct span the course of nearly half a year.

Defendants have submitted a report, purportedly emanating from the El Dorado County Health and Human Services agency, which they claim contradicts Plaintiffs' allegations and affidavits of abuse. ECF No. 30-3 at 68-83. Plaintiffs' have objected to the admissibility of that report. ECF No. 51-1. The Court has serious doubts about the admissibility of the report, but declines to address Plaintiffs' objections at this time.

[9] In light of this Order, the Superior Court for Tulare County may wish to reconsider whether there is good cause for it to assert jurisdiction over the Minors' guardianship proceedings.

Instead, the Court finds that the report is not entitled to any weight whatsoever in determining whether Plaintiffs will suffer irreparable harm if an injunction does not issue. The authors of the report based their finding that the Minors' accusations of abuse are unfounded solely upon uncritical interviews with the accused abuser and his family. The authors never interviewed the Minors in connection with their investigation. The inadequacies of the authors' investigation are astounding, and the Court declines to afford any consideration to their conclusions.[10]

Permitting enforcement of the Tribal Court's custody order would re-expose the Minors to their alleged abuser. The sexual exploitation of children is not only morally repugnant, but results in long-lasting and serious harm for the rest of their lives. See U.S. v. Baker, 672 F. Supp. 2d 771, 773 (E.D. Tex. December 7, 2009). Furthermore, Plaintiffs have cared for the Minors and served as their guardians for an extended period of time, and they have a close familial relationship. ECF No. 7 at ¶ 12; ECF No. 11 at ¶ 3. The fact that the Minors will be re-exposed to their alleged abuser is emotionally devastating for Plaintiffs as well as the Minors. See ECF No. 11 at ¶ 22. Accordingly, Plaintiffs have met their burden of demonstrating that both they and the Minors will suffer irreparable harm in the absence of preliminary relief. Winter, 555 U.S. at 20 (2008).

3. The balance of harms and the public interest favor the issuance of a preliminary injunction.

The balance of hardships tips sharply in Plaintiffs' favor. Plaintiffs' Motion seeks to maintain the status quo. The Minors have apparently never lived on tribal lands, and they have a close relationship with Plaintiffs. They will suffer little, if any, harm from the maintenance of the status quo. Conversely, the Minors may be subjected to further abuse if the Tribal Court's order is not enjoined from enforcement. Furthermore, Plaintiffs' right to due process will be jeopardized if an injunction does not issue, while

[10] Plaintiffs' submitted their own expert report in conjunction with their Reply brief. ECF No. 51-2. Defendants' objection to that report is well-taken, and accordingly SUSTAINED. ECF No. 55 at 2-3. Plaintiffs have made numerous allegations and submitted numerous declarations in conjunction with their moving papers. Those allegations and affidavits are sufficient to establish a likelihood of irreparable harm without the Court's consideration of Plaintiffs' expert's declaration.

Defendant Cuellar cannot claim hardship because the Court enjoins her from attempting to enforce an apparently unenforceable order in state or federal court. Finally, while the public interest may favor the placement of tribal member minors with tribal member guardians, it favors the prevention of child sexual abuse even more strongly. Plaintiffs' Motion is therefore GRANTED with respect to Defendant Cuellar in her individual capacity.

CONCLUSION

Defendants Shingle Springs Band of Miwok Indians, the Shingle Springs Band of Miwok Indians Tribal Council, the Shingle Springs Band of Miwok Indians Tribal Court, Christine Williams, and Regina Cuellar in her official capacity as a member of the Tribal Council are DISMISSED for lack of jurisdiction. Plaintiffs' action may proceed against Defendant Regina Cuellar in her individual capacity, and their Motion for Preliminary Injunction (ECF No. 8) is GRANTED as to Defendant Regina Cuellar in her individual capacity. Defendant Cuellar is hereby ENJOINED from attempting to seek recognition or enforcement of the Tribal Court's June 3 Order appointing her as permanent guardian of the Minors outside of the Tribal Court pending a final disposition of this action on the merits.

IT IS SO ORDERED.

Dated: September 1, 2016

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE