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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES ACRES,
Plaintiff,

v.

BLUE LAKE RANCHERIA, and its TRIBAL COURT, through its Chief Judge LESTER MARSTON, in his individual and official capacities.

Defendant.

Case No. 3:16-cv 05391-LB

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

[Fed. R. Civ. Proc. 12(b)(1)-12(b)(2), 12(b)(6)]

Date: December 1, 2016
Time: 9:30 a.m.
Courtroom: C, 15th Floor
Magistrate Judge: Laurel Beeler

TO: MAGISTRATE JUDGE LAUREL BEELER and to PLAINTIFF JAMES ACRES, IN PRO PER:

PLEASE TAKE NOTICE that, on December 1, 2016 at 9:30 a.m. or as soon thereafter as the matter may be heard in the courtroom of the Honorable Laurel Beeler, Magistrate Judge of the United States District Court for the Northern District of California, Courtroom 3, 15th Floor, located at 450 Golden Gate Avenue, San Francisco, CA 94201. Defendant Blue Lake Rancheria ("Tribe"), a federally recognized Indian tribe, shall make a special appearance for the purpose of moving the Court for an order dismissing Plaintiff's complaint in its entirety for lack of subject matter jurisdiction, Fed. R. Civ. Proc. 12(b)(1), for lack of personal jurisdiction, Fed. R. Civ. Proc. 12(b)(2), and for failure to state a claim upon which relief can be granted, Fed. R. Civ. Proc. 12(b)(6).

The motion is made on the grounds that James Acres ("Acres") has again prematurely asked a federal district court to intervene in an underlying Tribal Court lawsuit, Tribal Court Case No. C-15-1215LJM, in which the Tribe, d.b.a. the Blue Lake Casino & Hotel ("BLC&H"), has sued Acres and his company, Acres Bonusing, Inc. ("ABI"). Just as this Court found a few short months ago in *Acres v. Blue Lake Rancheria Tribal Court*, *et al.*, Case No. 3:16-cv-02622-WHO, Acres has failed to exhaust his Tribal Court remedies and still no exception to the exhaustion rule applies. Furthermore, Acres' request that this Court review a Tribal Court decision with respect to the removal of the Tribal Court Chief Judge does not present a federal question and this Court, therefore, lacks jurisdiction over the request.

This motion is based on all pleadings and papers already on file herein, the memorandum of points and authorities filed in support of this motion, the declaration of Amy L. O'Neill filed in support of this motion, the Request for Judicial Notice, and such other pleadings, papers, argument, or evidence that may be introduced prior to or at the hearing on this motion.

//

Dated: October 19, 2016

BOUTIN JONES, INC.

By: */s/ Daniel S. Stouder*
Daniel S. Stouder
Amy L. O'Neill
Attorneys for Blue Lake Rancheria

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

There have been no material changes in circumstances since the last time James Acres sued the Blue Lake Rancheria ("Tribe"), the Blue Lake Rancheria Tribal Court, and its Chief Judge. *See James Acres v. Blue Lake Rancheria Tribal Court et al.*, United States District Court, Northern District of California Case No. 16-cv-02622-WHO (dismissed August 10, 2016). Like the prior suit, the instant action prematurely asks a federal district court to intervene in an underlying Tribal Court lawsuit, Tribal Court Case No. C-15-1215LJM, in which the Tribe, d.b.a. the Blue Lake Casino & Hotel ("BLC&H"), has sued Acres and his company, Acres Bonusing, Inc. ("ABI").[1]

In dismissing Acres' previous federal court lawsuit, this Court found that Acres was required to exhaust his Tribal Court remedies with respect to whether the Tribal Court may properly exercise jurisdiction over Acres and/or ABI. (*See* Request for Judicial Notice ("RJN"), Request No. 3 (Order Granting Motion to Dismiss, issued by this Court on August 10, 2016, in *Acres v. Blue Lake Rancheria Tribal Court, et al.*

[1] Unlike the complaint in the first action which names the Tribe and Judge Marston as defendants and was served on both parties, the caption in the Complaint in this action purports to name the Blue Lake Rancheria and its Tribal Court "through its Chief Judge Lester Marston." The complaint also names Judge Marston in his individual and official capacities. Under "Parties" in paragraph 13, the Complaint only alleges facts pertaining to defendant Marston. There are no allegations pertaining to the Tribe or the Tribal Court as parties. So far, the complaint has only been served on Judge Marston. [Docket cite] As a result it is unclear whether Acres has named the Tribe or the Tribal Court as parties and this may be intended to avoid the bar of tribal sovereign immunity. That bar cannot be so easily avoided. See, e.g., *Carsten v. Inter-Tribal Council of Nev*., 599 Fed. Appx. 659, 660 (9th Cir. Nev. 2015) ["Although tribal sovereign immunity extends to tribes' employees sued in their official capacities, it does not prevent suits against those same employees when sued in their individual capacities. See *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. Cal. 2013)] at 1088. An employee may be sued in his or her individual capacity even when the suit arises out of actions taken in the employee's official capacity **if the remedy sought is against the individual**. See *id.* at 1088-89." (Emphasis added.)] Here, the remedies sought by Acres seek to challenge the Tribal Court's jurisdiction over the Tribe's action against Acres. Judge Marston's interests, as the Tribal Court judge, are clearly different than the Tribe's interests as the plaintiff in the Tribal Court action against Acres. For that reason, Judge Marston cannot represent the Tribe's legal interests in this action. Accordingly, the complaint should be construed as naming the Tribe as a defendant and against naming Judge Marston in his individual capacity. So construed, the Tribe has standing to file this motion to dismiss, even though it has not yet been served with summons and complaint. A defendant may waive service of summons and complaint without waiving any obection to jurisdiction. Fed. R. Civ. P. 4.d(5).

Case No. 16-cv-02622-WHO).) In so finding, this Court determined that none of the factors which, in limited circumstances, may excuse a Tribal Court defendant from exhaustion of Tribal Court remedies exist here: (1) the assertion of tribal court jurisdiction is not motivated by a desire to harass and is not conducted in bad faith; (2) exhaustion is not futile because of the lack of an adequate opportunity to challenge the Tribal Court's jurisdiction; and (3) Tribal Court jurisdiction is colorable. *Id.* Accordingly, this Court ordered Acres to exhaust his Tribal Court remedies and dismissed the federal case. *Id.*

Rather than follow this Court's directive and respond to the Tribal Court's procedural orders with respect to determining the Tribal Court jurisdiction issue, Acres has instead brought another premature federal court action—an action that seeks federal court review of matters that are within the exclusive jurisdiction of the Tribal Court and that asks for review of issues already determined by this Court in Acres' previous suit.

In this brief, the Tribe, again, demonstrates that this case must be dismissed because: (1) the Tribe enjoys sovereign immunity from unconsented suit absent congressional abrogation or waiver of that immunity; (2) no such abrogation or waiver has occurred with regard to this case; (3) the Tribal Court is a governmental subdivision of the Tribe and is similarly cloaked in the same immunity enjoyed by the Tribe; (4) the Tribe's sovereign immunity extends to Judge Marston who, at all times relevant to this action, acted in his official capacity and within the scope of his authority and cannot be sued in his individual capacity; and (5) Acres has still failed to exhaust his Tribal Court remedies.

In addition to the above, the Tribe also demonstrates that the issue of whether a tribal court judge is biased and/or has a conflict of interest such that recusal from presiding over a tribal court action is warranted does not pose a federal question under 28 U.S.C. §1331 and does not constitute grounds to excuse exhaustion of tribal court remedies with respect to Tribal Court jurisdiction.

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STATEMENT OF FACTS

The relevant facts of this case are set forth in the declaration of Amy L. O'Neill filed in support of the Tribe's motion to dismiss. For the Court's convenience, the Tribe will not repeat the facts here, but rather, incorporates them by this reference as if fully set forth here.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY BARS THIS ACTION IN ITS ENTIRETY.

As a federally recognized Indian tribe, the Tribe is entitled to sovereign immunity from unconsented suit absent congressional authorization or waiver. The Tribe's sovereign immunity from suit extends to the Tribal Court and Judge Marston. None of the defendants has waived sovereign immunity from suit and Congress has not abrogated the Tribe's immunity. Consequently, the Court lacks jurisdiction and the case must be dismissed.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The sovereign immunity of an Indian tribe is coextensive with that of the United States itself, *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1050 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985), and thus extends to governmental and commercial activities whether they occur on or off of a reservation. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred.... Nor have we yet drawn a distinction between governmental and commercial activities of a tribe.... Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Id. at 754-55.

The doctrine of tribal sovereign immunity includes an action against a tribal court and its tribal court judge when serving in his official capacity. *See United States v.*

Yakima Tribal Court of the Yakima Indian Nation and David Ward, Tribal Judge, 806 F.2d 853, 861, *citing Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th Cir. 1985) [recognizing that, while tribal sovereign immunity would bar an action against a tribal court and its tribal court judge acting in his official capacity, it does not bar such an action by the United States].

Inclusion of an Indian tribe on the Federal Register list of federally recognized tribes is generally sufficient to establish a tribe's entitlement to sovereign immunity. *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F.Supp.2d 952, 955 (N.D. Cal. 2011); *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 957 (E.D. Cal. 2009); *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997).

Moreover, it must be recognized that "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Chemehuevi*, 757 F.2d at 1047, fn. 6 (internal citations omitted); *Rehner v. Rice*, 678 F.2d 1340, 1351, *rev'd on other grounds*, 463 U.S. 713 (1983) [tribal sovereign immunity applies "irrespective of the merits" of the claim asserted against the tribe]. Rather, it presents a pure jurisdictional question. *Chemehuevi* at 1051.

Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. *See Linneen v. Gila River Indian Cmty.,* 276 F.3d 489, 492 (9th Cir. 2002); *Snow v. Quinalt Indian Nation*, 709 F.2d 1391,1321 (9th Cir. 1983); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Hardin*, 779 F.2d at 479-480; *Davis v. Littel*, 398 F.2d 83, 84 (9th Cir. 1968). Thus, "a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials[.]" *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). "'[T]he interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself.'" *Id.*, *citing Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462 (10th Cir. 1989).

Accordingly, "a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d at 1296.

"Tribal officials" are not limited to political officials, but include all employees of a tribe if acting within the scope of their employment. *See Cook v. AVI Casino. Enters., Inc.*, 548 F.3d 718, 727 (9th Cir.2008). Although the doctrine of sovereign immunity as applied to officials is not absolute and is subject to certain exceptions, including the *Ex Parte Young* doctrine, an *Ex Parte Young* action requires an allegation of an ongoing violation of federal law. *BNSF Ry. Co. v. Ray*, 297 Fed. Appx. 675, 676 (9th Cir. 2008) (unpublished).

While tribal sovereign immunity may be waived by an Indian tribe or abrogated by Congress, any such abrogation must be unequivocally expressed and is to be narrowly construed. *Santa Clara Pueblo*, 436 U.S. at 58 [a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."]. *Accord*, *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ["To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."]; *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) ["[T]ribal sovereign immunity remains intact unless surrendered in express and unequivocal terms."].

The requirement that the waiver be "unequivocally expressed" is not a "requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). "In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.*

Moreover, the Ninth Circuit has held that "[t]here is a strong presumption against waiver of tribal sovereign immunity[.]" *Demontiney v. U.S. ex rel. Dept. of Interior,*

Bureau of Indian Affairs, 255 F.3d 801, 811 (9th Cir. 2001). It is "the plaintiff"—not the defendant—who "bears the burden of showing a waiver of tribal sovereign immunity." *Hall v. Mooretown Rancheria*, 2013 U.S. Dist. Lexis 81446, *citing Ingrassia*, 676 F.Supp.2d at 956-57.

Like tribal waivers of sovereign immunity, congressional abrogation cannot be implied. *See Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) [holding that an abrogation of tribal sovereign immunity by Congress cannot be determined by implication and must be expressly stated]; *C&L Enterprises., Inc.*, 532 U.S. at 418 ["To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."].

Here, the Tribe is included on the list of federally recognized tribes promulgated by the Bureau of Indian Affairs, Department of the Interior, 81 Fed. Reg. 5020 (Jan. 29, 2016). *See* RJN Nos. 1-2. As such, it enjoys tribal sovereign immunity from unconsented suit and cannot be sued without its consent.

Similarly, the Tribal Court, as a governmental subdivision of the Tribe established pursuant to the Tribe's Constitution, Art. V, Sec. 6 (n), is cloaked in tribal sovereign immunity. Declaration of Amy L. O'Neill in Support of Motion to Dismiss, O'Neill Decl."), ¶15, Ex. 10. Finally, Judge Marston, as a tribal officer acting in his official capacity, is cloaked in the Tribe's sovereign immunity and cannot be sued absent consent or waiver.

Acres has provided no allegations nor can he provide evidence that a waiver of tribal sovereign immunity exists. Nor has Acres shown that Congress has waived tribal sovereign immunity for the purpose of this action. This is so because there has been no waiver or congressional abrogation of the Tribe's immunity from suit. Thus, the Tribe, the Tribal Court, and Judge Marston enjoy sovereign immunity from this suit.

Importantly, Judge Marston is cloaked in the Tribe's immunity as an officer of the Tribe and he cannot be sued in either his official or personal capacity for actions taken within the scope of his duties as Chief Judge of the Tribal Court. Acres, in an

apparent attempt to circumvent the bar of tribal sovereign immunity, has named in the Complaint's caption the Tribal Court as a defendant "through its Chief Judge Lester Marston, in his individual and official capacities." Complaint, p. 1. However artful the attempt, Acres nevertheless fails to allege any basis that would permit the Court to bypass tribal immunity with respect to Judge Marston, whether or not the suit is brought against Marston in his official or individual capacity.

First, as discussed above, suits against Judge Marston in his official capacity are barred by tribal sovereign immunity. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d at 1296. Second, with respect to a suit against Judge Marston in his personal capacity, such a suit cannot proceed simply because Judge Marston is named in his personal capacity. In *Murgia v. Reed*, 338 Fed. Appx. 614, 616 (9th Cir. 2009), the Ninth Circuit held that "the fact that a tribal officer is sued in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity." Immunity from suit can remain if an officer is acting within the scope of his authority "regardless of whether the words 'individual capacity' appear on the complaint." *Id*. Thus, Acres cannot simply state, without more, that his suit is brought against Judge Marston in his personal capacity to avoid sovereign immunity.

For an individual capacity suit against a tribal official to move forward in spite of a claim of sovereign immunity, the remedy sought in a complaint must operate against the individual, not the tribe. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013). Tribal immunity may not bar a damages claim if "the relief is sought not from the [government] treasury but from the officer personally.'" *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015), *citing Alden v. Maine*, 527 U.S. 706, 757 (1999). Importantly, "[i]n any suit against tribal officers, [courts] must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" *Maxwell v. County of San Diego*, 708

1 F.3d 1075, 1088 (9th Cir. 2013), *citing* Shermoen v. United States, 982 F.2d 1312, 1320
2 (9th Cir. 1992).

3 While Acres has named Judge Marston in his individual capacity, it is clear that
4 Acres' claims are based on Judge Marston's performance of his official duties as Chief
5 Judge of the Tribal Court and the remedies are directed at the Tribal Court and the
6 Tribe—not against Judge Marston as an individual. Acres has requested an order from
7 the Court declaring that he is not required to exhaust his Tribal Court remedies, a
8 "permanent injunction **against the tribe and its court** (applied against Marston **and his**
9 **successors**)…," and a "permanent injunction **against the tribe** from renewing litigation
10 in tribal court in any action based upon the same events as" the underlying Tribal Court
11 action. Complaint, pp. 10-11 (emphasis added). All of the relief requested is directed at
12 the Tribe and the Tribal Court, not against Judge Marston individually. Thus, an
13 individual capacity suit cannot go forward against Judge Marston since sovereign
14 immunity bars the claims.[2]

15 Finally, a personal capacity action cannot avoid immunity here because Tribal
16 Court Judges, like Judge Marston, are not simply tribal officials against whom
17 individual relief may be sought. Rather, they are judicial officers and, as such, are
18 immune from suits for actions taken within the scope of their judicial duties. *See Fox v.*
19 *Lower Sioux Tribal Court*, 2014 U.S. Dist. LEXIS 148842, *7-8, *citing Edlund v.*
20 *Montgomery*, 355 F. Supp. 2d 987, 990 (D. Minn. 2005)["Judge Small is absolutely
21 immune from suit under § 1983 for such actions. Judges are not liable for judicial acts,
22 even if those acts exceed their jurisdiction, 'and are alleged to have been done
23 maliciously or corruptly.'… Tribal judges, like Judge Small, are entitled to the same
24 absolute judicial immunity that shields state and federal court judges from suit."]; *Penn*
25 *v. United States*, 335 F.3d 786, 789 (8th Cir. 2003)[concluding that a tribal court judge

26 [2] Additionally, *Maxwell* and *Pistor* are both §1983 tort causes of action against tribal officers in
27 which the plaintiffs sought money damages from the individual officers. Here, Acres has not asserted
any federal statute under which he is requesting relief against Judge Marston except for 28 U.S.C.
28 §1331, which, as discussed below, does not provide a basis for this Court's jurisdiction.

has absolute judicial immunity as a result of federal policy encouraging tribal self-government and self-determination]; *Stump v. Sparkman*, 435 U.S. 349 (1978); *Mireles v. Waco*, 502 U.S. 9, 12 (1991).

For these reasons, the Court lacks jurisdiction over all of the defendants and must, again, dismiss the Complaint in its entirety.

II. THIS CASE MUST BE DISMISSED BECAUSE ACRES HAS FAILED TO EXHAUST HIS TRIBAL COURT REMEDIES, DESPITE BEING ORDERED BY THIS COURT TO DO SO.

A. Federal Law Requires that Acres Exhaust His Tribal Court Remedies with Respect to Tribal Court Jurisdiction Prior to Resort to this Court.

Under applicable federal law, Acres is required to exhaust his Tribal Court remedies before this Court can address whether the Tribal Court may properly exercise jurisdiction over Acres. *National Farmers Union Insurance Co. v. Crow Tribe of Indian,* 471 U.S. 845, 856 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991). Acres' Complaint flies in the face of this principle.

"As a matter of comity…federal courts generally decline to entertain challenges to a tribal court's jurisdiction until the tribal court has had a full opportunity to rule on its own jurisdiction." *Elliott v. White Mountain Apache Tribal Ct.,* 566 F.3d 842, 844 (9th Cir. 2009). *See Iowa Mut. Ins. Co.,* 480 U.S. at 16-17. "The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction: 'Exhaustion *is required* before such a claim may be entertained by a federal court.'" *Burlington Northern R. Co.*, 940 F.2d at 1245, *citing National Farmers Union*, 471 U.S. at 857 (emphasis in original). The Supreme Court has said that "federal policy…*directs* a federal court to stay its hand," and "proper respect… *requires*" tribal remedy exhaustion. *Iowa Mutual Ins. Co*., 480 U.S. at 16 (emphasis added).

Therefore, non-Indian petitioners "*must* exhaust available tribal remedies." The *LaPlante* Court emphasized that "*National Farmers Union*

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> *requires* that the issue of jurisdiction be resolved by the Tribal courts in the first instance."…[A]s the Supreme Court recognized, "Congress is committed to a policy of supporting tribal self-government and self-determination." *Id.* at 856. "That policy," the Supreme Court said, "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."

Burlington N. R. Co., 940 F.2d at 1245 (emphasis added).

As a result, "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Id.* "If deference is called for, the district court may not relieve the parties from exhausting tribal remedies." *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991). Thus, "[t]he tribal exhaustion rule formulated by the Supreme Court in *LaPlante*…and *National Farmers*…bars federal courts from exercising jurisdiction over matters pending in tribal courts." *Bowen v. Doyle*, 230 F.3d 525, 529 (2nd Cir. 2000). "Even when the jurisdiction of the tribal court is challenged, 'the Tribal Court itself' must be permitted to determine the issue 'in the first instance.'" *Id*. at 529-530, *citing National Famers*, 471 U.S. at 856.

It is also the "practical imperative of judicial efficiency" that "compels exhaustion of tribal remedies." *Burlington N. R. Co.*, 940 F.2d at 1245. "[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers Union*, 471 U.S. at 856. "Exhaustion thus encourages more efficient procedures." *Burlington N. R. Co.*, 940 F.2d at 1246. Finally, the Supreme Court has recognized that "exhaustion of tribal court remedies… will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *National Farmers Union*, 471 U.S. at 857.

B. This Court has Already Determined That Exhaustion is Not Excused and this Case Still Does Not Fit Within An Exception To The Exhaustion Rule

The Supreme Court has established four limited exceptions to the exhaustion rule: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) where a tribal court action is "patently violative of express jurisdictional prohibitions"; (3) where "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." *Elliott*, 566 F.3d at 847, *quoting Nevada v. Hicks,* 533 U.S. 353, 369; *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013).

In its order of August 10, 2016, this Court determined that none of these exceptions to the exhaustion rule are present in this case. RNJ No. 3; O'Neill Decl. ¶ 4, Ex. 1. Since the date of that order, there have been no changed circumstances in the Tribal Court action that are relevant to whether Acres must exhaust his Tribal Court remedies prior to resort to this Court. The Tribal Court has not yet determined whether it has jurisdiction. O'Neill Decl. ¶¶ 10, 12, & 14, Ex. 9. Rather, the Tribal Court has requested that the parties conduct discovery with respect to Acres' contacts with the Tribe and asked for more detailed information related to where the Tribe's causes of action arise and whether Acres and the Tribe established a consensual relationship that may or may not establish that Tribal Court jurisdiction is proper. *Id.* ¶ 12, Ex. 9.

In response to the Tribal Court's order, Acres, instead of exhausting his Tribal Court remedies, filed the instant case. He argues that Judge "Marston's discovery order was made in bad-faith, with the goal of delaying a tribal court finding of jurisdiction for as long as possible, so as to stave off federal review." Complaint, p. 9. This argument has no merit. Judge Marston's orders are consistent with the express federal objective to encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction and to provide other courts with the benefit of their expertise in such

matters in the event of further judicial review. *National Farmers Union*, 471 U.S. at 857. Requesting that the parties file cross motions for summary judgment, with the benefit of discovery, on the issue of Tribal Court jurisdiction does not constitute evidence that Acres does not have an adequate opportunity to challenge jurisdiction in the Tribal Court. Rather, it demonstrates the opposite. Neither is the briefing schedule set by the Tribal Court evidence of bad faith. If anything, the schedule demonstrates the Tribal Court's clear objective to make a well-reasoned and factually detailed determination regarding whether the Tribal Court may properly exercise jurisdiction over Acres and/or ABI.

Accordingly, this case must again be dismissed because Acres has failed to exhaust his Tribal Court remedies with respect to whether the Tribal Court has jurisdiction over Acres and/or ABI.

III. THIS COURT DOES NOT HAVE FEDERAL QUESTION JURISDICTION TO REVIEW WHETHER A TRIBAL COURT JUDGE IS BIASED AND/OR HAS A CONFLICT OF INTEREST.

28 U.S.C. §1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." While it is true that "[n]on-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction," *Elliott v. White Mountain Apache Tribal Court,* 566 F.3d 842, 846 (9th Cir. 2009), Acres is not, in fact, challenging tribal court jurisdiction. Instead, he asks this Court to review a Tribal Court determination that is unrelated to whether the Tribal Court may properly exercise jurisdiction over Acres and/or his company. Acres does not present a federal question, since tribal law (including custom and tradition), not federal law, determines whether a tribal court judge is biased and/or has a conflict of interest such that presiding over a tribal court case would be improper.

In *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139 (10th Okla. 2004), plaintiffs in a federal district court action challenged whether a tribal court judge was, under tribal law, authorized to preside over a tribal court case. The federal district court

stated that, "[t]o acquire jurisdiction under § 1331 or § 1362, Plaintiffs must establish that they have a claim arising under federal law." *Id.* at 1142. The plaintiffs contended "that under the Supreme Court's decision in *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985), 'a federal court is empowered to determine under 28 U.S.C. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.'" *Id.*

The court acknowledged that, while the plaintiffs were "correct that under *National Farmers* the outer boundaries of tribal jurisdiction -- particularly over non-members -- may be a matter of federal law," the plaintiffs had not "contest[ed] the limits of tribal jurisdiction; they challenge[d] the right of [the tribal court judges] to exercise judicial authority." *Id.* at 1142-1143. "Tribal law, not federal law, dictates which personnel may exercise tribal judicial authority. Plaintiffs cite no federal law allegedly violated by the manner in which [the tribal court judges] acquired their judgeships." *Id.* at 1143. Thus, to establish jurisdiction under §1331, a plaintiff must point to a federal law that makes the issue of whether a tribal judge may preside over a case a federal question. "A dispute over the meaning of tribal law does not 'arise under the Constitution, laws, or treaties of the United States,' as required by 28 U.S.C. §§ 1331 and 1362. This is the essential point of opinions holding that a federal court has no jurisdiction over an intratribal dispute." *Id. citing Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968) and *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364, 366 (10th Cir. 1966). *See also Williams v. Pyramid Lake Paiute Tribe etc.*, 625 F. Supp. 1457, 1458 (D. Nev. 1986)["Further, there is no federal legislation which grants the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."].

Here, Acres has not brought the instant case for the purpose of challenging tribal court jurisdiction.[3] Rather, he has brought the action to challenge the Tribal Court's

[3] The Court ordered Acres to exhaust his Tribal Court remedies prior to bringing a federal court action and Acres has, admittedly, failed to do so. *See* RJN 3; O'Neill Decl. ¶ 12, Ex. 9.

determination as to whether grounds exist for the disqualification of Judge Marston, or, alternatively, to ask this Court to make its own determination as to whether Judge Marston may hear the underlying Tribal Court action. This is a matter exclusively governed by the application of tribal law and no federal law provides this Court with authority to determine whether a tribal judge may hear a tribal court case. Accordingly, Acres' Complaint does not pose a federal question sufficient to establish jurisdiction under 28 U.S.C. §1331.

Acres is similarly unable to tie his claims in this case to a federal court's §1331 jurisdiction to review tribal court jurisdiction determinations. A tribal court either has jurisdiction under *Water Wheel Camp v. LaRance*, 642 F.3d 802, 809 (9th Cir. 2011) or *Montana v. United States*, 450 U.S. 544, 565 (1981) or it doesn't. The cause of action either arises on the reservation or it doesn't. A non-Indian has either entered into a consensual relationship with a tribe through commercial dealing, contracts, leases, or other arrangements or he hasn't. Whether a tribal court judge is biased or could have a conflict of interest to preside over a tribal court case is not relevant to whether the tribal court has jurisdiction. There is either tribal court jurisdiction or there isn't—and the federal district courts have jurisdiction to review a tribal court's determination on the issue.

Furthermore, any alleged bias in a tribal court is subject to federal review in the event that recognition of a tribal court judgment is sought in federal or state court. In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), a tribal member sought federal court recognition and registration of a judgment entered in a tribal court in a personal injury action against a non-member.[4] The Ninth Circuit concluded that, while tribal court judgments do not have to be recognized pursuant to the Full Faith and Credit Clause, Article IV, § 1 of the Constitution, a tribal court judgment should be recognized pursuant to the doctrine of comity. *Id*.

[4] Although the case concerned a federal court extending comity to a tribal court, the reasoning applies as well to a state court proceedings.

> In synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments. However, federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law. In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds including the following circumstances: (1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.

Id. at 810.

"Due process [in the tribal court] means 'there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws.'" *FMC Corp. v. Shoshone-Bannock Tribes*, 2015 U.S. Dist. LEXIS 152814, *3, 2015 WL 6958066 (D. Idaho Nov. 9, 2015), *citing Wilson v. Marchington*, 127 F.3d at 811.

Thus, if and when the underlying Tribal Court action reaches a final judgment and recognition is sought in federal or state court, the federal or state court may refuse to recognize or enforce the judgment if it is determined that any of the *Marchington* factors require or allow the court to refuse recognition. Accordingly, Acres has the opportunity to make these claims prior to the enforcement of any judgment issued by the Tribal Court.

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Thus, Acres' Complaint does not pose a federal question and this Court, therefore, must dismiss for lack of subject matter jurisdiction.[5]

IV. ALLEGATIONS OF BIAS AND/OR CONFLICTS OF INTEREST DO NOT EXCUSE TRIBAL COURT EXHAUSTION.

Numerous federal courts have expressly rejected alleged tribal court bias as an excuse to the tribal court exhaustion requirement.

> The third exception involves a situation "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." National Farmers, 471 U.S. at 856 n.21. A plaintiff may not speculate regarding such futility; an adjudication of the issue must be sought in the tribal court. Bank of Okla., 972 F.2d at 1170. Calumet asserts that the common representation by counsel in this matter of the Tribe and the Tribal Court Judge creates a conflict and raises the appearance of impropriety. **The bias of a tribal court is foremost a question for that court, however.** *Id.* at 1171. Moreover, the rulings of the Tribal District Court are subject to review by an appellate tribal court, where any judicial errors may be corrected. The court concludes that Calumet has an adequate opportunity within the Tribal Court system to challenge jurisdiction.

Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe, 987 F. Supp. 1321, 1328, 1997 U.S. Dist. LEXIS 17377, *17 (D. Kan. 1997)(emphasis added).

> Ms. Wilson does not object to the magistrate judge finding she failed to exhaust her tribal remedies. Rather, Ms. Wilson objects on the basis that she does not believe the tribal courts can be impartial because of their connection to OLC.…Ms. Wilson asserted this same argument in her response to defendants' motion to dismiss.…This contention does not fall within any of the exceptions to the exhaustion requirement noted

[5] While it is unnecessary to establish for the purposes of this motion, the Tribe disputes Acres' allegations that Judge Marston possesses a conflict of interest to hear the underlying Tribal Court action and disputes that there is any evidence that Judge Marston is biased against Acres and/or ABI. In any event, these issues are ones for the Tribal Court to decide. If the Tribal Court finds that it has jurisdiction and if Tribe prevails in the underlying Tribal Court action and if the Tribe seeks to enforce a Tribal Court judgment against Acres, then Acres will have the opportunity to present the argument that he was not provided due process based on alleged bias and/or conflict of interest. Furthermore, since Acres did not raise any of the allegations of conflict set forth in his Complaint in the Tribal Court, *See* O'Neill Decl. ¶ 7, Ex. 6, he has the opportunity raise them in the Tribal Court as well.

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> above….The court finds Ms. Wilson is required to exhaust her tribal remedies. Because Ms. Wilson has not exhausted those remedies, this court lacks jurisdiction over her action.

Wilson v. Bull, 2014 U.S. Dist. LEXIS 6201, *2-3, 2014 WL 412328 (D.S.D. Jan. 16, 2014)

> "[A]llegations of local bias and tribal court incompetence . . . are not exceptions to the exhaustion requirement." *Burrell v Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006). If a litigant could avoid exhaustion simply by arguing bias, he would sneak under the higher standard required by *National Farmers* that he show harassment or bad faith, rendering that standard a nullity.

FMC Corp. v. Shoshone-Bannock Tribes, 2015 U.S. Dist. LEXIS 152814, *5, 2015 WL 6958066 (D. Idaho Nov. 9, 2015).

Here, Acres argues that the Chief Judge's decision finding that he is not disqualified to preside over the underlying Tribal Court action "is an act of outrageous bad-faith allowing [Acres] to petition for immediate federal relief." Complaint, p. 10. However, as demonstrated by the above cases, an allegation that a tribal court judge is biased and/or has a conflict of interest, even if established, is not an exception to the rule that tribal court remedies must be exhausted prior to resort to federal court. Thus, Acres cannot use this argument to escape the requirement that he exhaust his Tribal Court remedies.

Furthermore, in examining whether alleged bias and/or conflicts of interest may excuse tribal court exhaustion, the first limited exception to the exhaustion requirement applies only in cases where the **assertion of tribal court jurisdiction** is "motivated by a desire to harass or is conducted in bad faith." *Elliott v. White Mountain Apache Tribal Ct.,* 566 F.3d 842, 844 (9th Cir. 2009). The inquiry relevant to this exception is whether a tribal court **plaintiff's** claim that tribal court **jurisdiction** exists is motivated by a desire to harass or is conducted in bad faith. It is not relevant whether it is alleged that the tribal court itself is acting in bad faith. The Tribal Court's actions are also not relevant unless the actions relate to determining whether or not the Tribal Court has

jurisdiction. Thus, because Acres has not alleged that the Tribe, the plaintiff in the Tribal Court action, has asserted that tribal court jurisdiction exists in order to harass Acres or has otherwise done so in bad faith, this exception to the exhaustion rule cannot be met.

Accordingly, none of the recent developments in the underlying Tribal Court action constitute grounds to excuse Acres from exhausting his Tribal Court remedies with respect to tribal jurisdiction and this case must, again, be dismissed.

CONCLUSION

For all of the same reasons this Court dismissed Acres' previous suit against the Tribe, its Tribal Court, and Judge Marston, the instant case must too be dismissed. Furthermore, this Court does not have federal question jurisdiction under 28 U.S.C. §1331 to review whether Chief Judge Marston is biased and/or has a conflict of interest in the underlying Tribal Court action. Neither does the Court have jurisdiction to issue an independent declaration that Chief Judge Marston may not preside over the Tribal Court action. The right to issue such a determination is exclusively reserved to the Tribal Court. Finally, the Court may not excuse Acres from exhausting his Tribal Court remedies—something this Court has already ordered but he has failed to do—based on an allegation of bias and/or conflict.

For these reasons, as well as the other reasons stated herein, the Tribe respectfully requests that the Court dismiss the Complaint in its entirety.

Dated: October 19, 2016 BOUTIN JONES, INC.

By: */s/ Daniel S. Stouder*
Daniel S. Stouder
Amy L. O'Neill
Attorneys for Blue Lake Rancheria

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2016, a copy of this **NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION** was served on all interested parties through the Court's electronic filing system.

/s/ Amy L. O'Neill
Amy L. O'Neill