

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD NAPOLES, LAURINE
NAPOLES, RICK NAPOLES, JAMES
NAPOLES, MARK NAPOLES, DEBRA
WILLIAMS, and WADE WILLIAMS,

Petitioners,

v.

DESTIN ROGERS, BRIAN PONCHO,
EARLEEN WILLIAMS, BISHOP
PAIUTE TRIBAL COURT, BILL
KOCKENMEISTER, and WILLIAM
“BILL” VEGA,

Respondents.

No. 1:16-cv-01933-DAD-JLT

ORDER DENYING PLAINTIFFS’ EX PARTE
APPLICATION FOR EMERGENCY
INJUNCTIVE RELIEF AND TEMPORARY
RESTRANING ORDER

(Doc. No. 6)

Petitioners Ronald Napoles, Laurine Napoles, Rick Napoles, James Napoles, Mark Napoles, Debra Williams, and Wade Williams proceed under a petition for writ of habeas corpus pursuant to 25 U.S.C. § 1303. Before the court is petitioners’ ex parte application for a temporary restraining order and order to show cause why a preliminary injunction should not issue. For the reasons set forth below, the ex parte application will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of the petition and in the instant application, petitioners are descendants of Ida Warlie and heirs to her family assignment of land located within the present

1 boundaries of the Bishop Paiute Tribe's federal reservation. (*See* Doc. No. 1 ¶ 10.) In 1962,
2 tribal members enacted the Ordinance Governing Assignments of Bishop, Big Pine and Lone
3 Pine Reservations ("1962 Ordinance"), which validated then-existing assignments like that of Ms.
4 Warlie. (*Id.* ¶¶ 17–18.) Since the adoption of the 1962 Ordinance and after Ms. Warlie's death,
5 petitioners applied for, and in several instances were granted, applications for assignments to
6 portions of this land. (*See id.* ¶¶ 24–35.) Beginning in 2006, however, the Bishop Paiute Tribal
7 Council decided to cancel certain assignments and to seize certain lands subject to petitioners'
8 assignments for the proposed expansion of a casino on the reservation. (*Id.* ¶¶ 36–37.) In this
9 action, petitioners dispute whether the Tribal Council had the proper authority to do so.

10 In 2013, the Tribal Council took steps toward expansion of the casino, but petitioners,
11 believing they were the rightful occupants of the disputed land, continued to use and occupy
12 certain lots of land. (*See id.* ¶¶ 38–45.) The Tribal Council issued trespass citations, and in
13 proceedings before the Bishop Paiute Tribal Court, respondent Judge Bill Kockenmeister
14 concluded that the court did not have jurisdiction to adjudicate land disputes and affirmed the
15 citations for trespass. (*Id.* ¶¶ 47–49, Ex. I.) On appeal, the court of appeals reversed and
16 remanded the matter for further determination regarding petitioners' legal rights to occupy the
17 land. (*Id.* ¶ 51.) Before such a determination could be made by the Tribal Court, the Tribal
18 Council voluntarily dismissed its trespass claims, and petitioners resumed their use of the land.
19 (*See id.* ¶¶ 52–58.)

20 In late 2016, the Tribal Council continued its casino expansion efforts and, on November
21 19, Tribal Council member Deston Rogers entered petitioners' land with Bishop Paiute Tribal
22 Police and the members of the Inyo County Sheriff's Office to issue trespass and nuisance
23 citations to petitioners. (*See id.* ¶¶ 59–65.) Tribal Police returned each of the next two days and
24 issued additional citations. (*Id.* ¶ 66.) In addition, on November 21, 2016, the Tribal Council
25 served a notice on petitioners to remove their personal property and fencing from the lots, as well
26 as a notice of an unspecified proceeding before the Tribal Court the following day. (*Id.* ¶¶ 69–
27 70.) On November 22, 2016, respondent Kockenmeister informed petitioners that he was
28 granting the Tribal Council's ex parte request for a temporary protection order barring them from

1 entering or occupying the disputed lots. (*Id.* ¶¶ 76–77, Ex. Q.)

2 On December 13, 2016, petitioners filed a petition for a writ of mandamus regarding the
3 temporary protection order before the court of appeals but discovered that the contract between
4 the Tribal Court and the Intertribal Court of Southern California (“ITCSC”), which served as the
5 appellate court, had been cancelled. (*See id.* ¶¶ 87–88.) Because petitioners sought to resolve
6 their property rights with respect to the issued temporary protection order as well as each of the
7 individual trespass and nuisance actions, respondent Kockenmeister agreed to continue a
8 previously scheduled December 20, 2016 hearing until the appellate court could be convened.
9 (*Id.* ¶ 92.) Respondent Kockenmeister further extended the provisions of the temporary
10 protection order until March 21, 2017, around the time construction on the casino expansion is
11 expected to begin. (*Id.* ¶¶ 93–94.)

12 On December 27, 2016, petitioners commenced this action by filing a petition for writ of
13 habeas corpus. (Doc. No. 1.) Therein, petitioners allege four claims under the Indian Civil
14 Rights Act of 1968, 25 U.S.C. §§ 1301–1303: (1) unlawful restraint on personal liberty in
15 violation of due process, (2) unlawful restraint on personal liberty in violation of equal protection,
16 (3) unlawful taking of property, and (3) deprivation of rights to assembly and speech. On
17 December 29, 2016, petitioners filed the instant ex parte application for emergency injunctive
18 relief. (Doc. No. 6.) Specifically, petitioners ask that this court enjoin respondents from: (1)
19 enforcing the temporary protection order and (2) commencing any construction of the proposed
20 casino expansion.

21 **LEGAL STANDARD**

22 The standard for issuing a temporary restraining order is “substantially identical” to the
23 standard for issuing a preliminary injunction. *See Stuhlbarg Intern. Sales Co. v. John D. Brush &*
24 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). “The proper legal standard for preliminary injunctive
25 relief requires a party to demonstrate ‘that he is likely to succeed on the merits, that he is likely to
26 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
27 favor, and that an injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109,
28 1127 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008));

1 *see also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) (“After *Winter*,
2 plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a
3 preliminary injunction.”); *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052
4 (9th Cir. 2009). The Ninth Circuit has also held that “[a] preliminary injunction is appropriate
5 when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the
6 balance of hardships tips sharply in the plaintiff’s favor.” *Alliance for Wild Rockies v. Cottrell*,
7 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 97 (9th
8 Cir. 2008) (en banc)).¹ The party seeking the injunction bears the burden of proving these
9 elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). Finally, an
10 injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the
11 plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

12 A temporary restraining order may be issued without notice to the adverse party or its
13 attorney only if

14 (A) specific facts in an affidavit or a verified complaint clearly
15 show that immediate and irreparable injury, loss, or damage will
16 result to the movant before the adverse party can be heard in
17 opposition; and (B) the movant’s attorney certifies in writing any
efforts made to give notice and the reasons why it should not be
required.

18 Fed. R. Civ. P. 65(b)(1); *see also* Local Rule 231(a) (“Except in the most *extraordinary of*
19 *circumstances*, no temporary restraining order shall be granted in the absence of actual notice to
20 the affected party and/or counsel, by telephone or other means, or a sufficient showing of efforts
21 made to provide notice.” (emphasis added)). As the Supreme Court has noted, an ex parte
22 temporary restraining order is justified in very limited circumstances:

23 The stringent restrictions imposed . . . by Rule 65 on the availability
24 of ex parte temporary restraining orders reflect the fact that our
entire jurisprudence runs counter to the notion of court action taken

25 ¹ The Ninth Circuit has found that this “serious question” version of the circuit’s sliding scale
26 approach survives “when applied as part of the four-element *Winter* test.” *Alliance for Wild*
Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011). “That is, ‘serious questions going to the
27 merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a
preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable
28 injury and that the injunction is in the public interest.” *Id.* at 1135.

1 before reasonable notice and an opportunity to be heard has been
2 granted both sides of a dispute. Ex parte temporary restraining
3 orders are no doubt necessary in certain circumstances, but under
4 federal law they should be restricted to serving their underlying
5 purpose of preserving the status quo and preventing irreparable
6 harm just so long as is necessary to hold a hearing, and no longer.

5 *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438–39 (1974) (internal citation omitted).

6 DISCUSSION

7 Here, petitioners have failed to meet their burden under Federal Rule of Civil Procedure
8 65(b)(1) and therefore have not established that they are entitled to the extraordinary relief
9 requested. First, petitioners have not shown that the potential harm they face is so immediate to
10 justify issuing a temporary restraining order without notice and an opportunity to be heard. As
11 petitioners allege, they removed their livestock, fencing, and other property, and have stayed off
12 of the disputed property since the Tribal Court issued its temporary protection order on November
13 22, 2016. (See Doc. No. 1 ¶ 86.) Apart from this restriction, petitioners have neither alleged nor
14 stated in a sworn affidavit any facts to suggest that they face a risk of immediate and irreparable
15 injury in the time that it would take for the opposition parties to be given notice and an
16 opportunity to be heard. Moreover, petitioners have made no showing that potential construction
17 of the proposed casino expansion, its commencement still months away, justifies action by this
18 court without a hearing. Thus, this court is unable to find the extraordinary circumstances
19 necessary to justify the issuance of an ex parte temporary restraining order.

20 Second, petitioners' counsel concedes he has not undertaken any efforts to give the
21 respondent parties notice of petitioners' request for a temporary restraining order. (Doc. No. 6-3
22 at 4.) In his declaration, petitioners' counsel explains he "do[es] not believe that the Tribal
23 Council, the Court or Tribal Judge Kockenmeister, as shown by their actions to date will agree to
24 a temporary restraining order prior to the March 21, 2017 hearing date when construction is
25 underway." (*Id.* at 3.) Counsel's explanation for his failure to notify the respondents is
26 insufficient: the unlikelihood of respondents to agree to a stipulated temporary restraining order is
27 no justification for a refusal or provide notice of petitioner's application completely.

28 ////

CONCLUSION

2 For the reasons set forth above, petitioners' ex parte application for a temporary
3 restraining order (Doc. No. 6) is denied.²

4 || IT IS SO ORDERED.

Dated: January 3, 2017

Dale A. Troyd
UNITED STATES DISTRICT JUDGE

² Of course, plaintiffs are free to pursue preliminary injunctive relief by way of properly noticed motion.