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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

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

Petitioners

vs.

DESTON ROGERS, JEFF ROMERO, BRIAN PONCHO, EARLEEN WILLIAMS, WILLIAM "BILL" VEGA, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE BISHOP PAIUTE TRIBAL COUNCIL; BISHOP PAIUTE TRIBAL COUNCIL; TRIBAL COURT JUDGE BILL KOCKENMEISTER IN HIS INDIVIDUAL OFFICIAL CAPACITY

Respondents.

CASE NO. 1:16-cv-01933-DAD-JLT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) AND (6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Date: June 20, 2017
Time: 9:30 a.m.
Judge: Dale Drozd
Courtroom: 5

Action Filed: December 29, 2016

Trial Date: TBD

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I. INTRODUCTION

Petitioners' First Amended Petition ("FAP") represents the most recent in a long line of proceedings where Petitioners continue their attempts to further their unfounded theory of ownership, inheritance, and right of possession of land within the jurisdiction of the Bishop Paiute Tribe. Petitioners, some of whom are descendants of Ida Warlie ("Warlie Faction"), have been repeatedly rebuked by the governing bodies with jurisdiction over land assignments: the Bishop Tribal Council ("Tribal Council") and the Owens Valley Board of Trustees ("OVBT"). Petitioners continue to ignore the actions taken by these governing bodies, leaving the Tribe with no alternative but to issue trespass citations against the Warlie Faction over the course of the past few years.

Petitioners cite the 1962 Land Assignment Ordinance ("1962 Ordinance") as "the principal (sic) document upon which land assignments are governed within the Owens Valley," (FAP, p. 2). Yet Petitioners fail to provide documentation to support their theory they possess a right to use and occupy the land in question pursuant to the 1962 Ordinance.

With respect to the trespass proceedings Petitioners complain of, the Trespass Ordinance clearly provides Respondent Tribal Council with the authority to direct its officers to issue trespass citation and Respondent Bishop Paiute Tribal Court Judge Bill Kockenmeister the jurisdiction to preside over trespass proceedings. Petitioners completely mischaracterize the nature and status of the trespass proceedings, cobbling and shoehorning those misrepresentations into a demand for habeas corpus relief based upon unsupported violations of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 *et seq*. Under the facts that existed at the time the FAP was filed, Petitioners were not detained, did not face criminal prosecution, and tribal remedies had not been exhausted. Petitioners have failed to state a claim upon which habeas corpus relief can be by this Court pursuant to 24 U.S.C. Section 1303. As such, this case should be dismissed pursuant to Federal Rule of Civil Procedure Section 12(b)(6).

Furthermore, the FAP must be dismissed pursuant to Federal Rule of Civil Procedure Section 12(b)(1), as this Court lacks jurisdiction over Respondent Bishop Paiute Tribal Council, and its Tribal Council members, who have been sued in their individual and official capacity

(hereafter "Tribal Council"). All Respondents are protected by sovereign immunity, and are therefore immune from suit.

Significantly, since the filing of the FAP, Petitioners have actively participated in the tribal court proceedings: Petitioners have appealed to the Bishop Paiute Court of Appeals the dismissal of the 2014 trespass citations; Petitioners have withdrawn the Writ of Mandamus filed with the Bishop Paiute Court of Appeals; and last, but certainly not least, Petitioners' 2016 trespass citations have been dismissed by Judge Kockenmeister, resulting in the vacating of the Temporary Protection Orders ("TPOs") Petitioners allege violated their rights. Petitioners fail to present a prayer for relief upon which this Court can grant. Therefore, the FAP should be dismissed, and given the fatal infirmities of their legal theories and the sovereign immunity of the Respondents, no opportunity for amendments to their petition should be granted.

II. STATEMENT OF SIGNIFICANT FACTS

A. The Governing Body of the Bishop Paiute Tribe is the Tribal Council

The Bishop Paiute Tribe is a federally recognized Tribe. Fed. Reg. Vol. 82 No. 10, p. 4915 1/172017 (*Declaration of Anna Kimber; Request for Judicial Notice* ["*RJN*"], Ex. 1.) "The Bishop Indian Reservation is one of three reservations set aside for the Owens Valley Paiute-Shoshone Indians . . . acquired by Executive Order 1496 . . . Title to the three tracts is held by the United States in trust for the Indians of Owens Valley." *Rogers v. Acting Deputy Assistant Secretary, Indian Affairs*, 15 I.B.I.A. 13, 14 (10/16/1986).

The governing body of the Bishop Paiute Tribe is the Tribal Council, having been delegated by the Bishop Tribe General Council the authority to act for the Tribe on general business matters. B.I.A. Regional Solicitor's Opinion, p. 3, January 27, 1981. (*RJN*, Ex. 2.) ("The customary manner by which day-to-day business activities of the Bishop Tribe has been conducted has been through tribal resolution passed by the Bishop Tribal Council.")

In addition to the general powers to act on behalf of the Bishop Paiute Tribe, the Tribal Council has specified powers pursuant to the 1962 Land Assignment Ordinance.

B. The 1962 Land Assignment Ordinance and the Owens Valley Board of Trustees

In 1939 and 1941, the Commission of Indian Affairs entered into trust agreements with

the representatives of the Bishop, Big Pine, and Lone Pine Tribes, establishing the Owens Valley Board of Trustees ("OVBT"), "whose primary responsibility was to control the use of the homes and other improvements constructed with these funds. Ownership of the improvements and lots was not transferred to individual tribal members; instead, use is permitted through land assignment." *Rogers*, *supra*, 15 I.B.I.A. at 14 (emphasis added).

In 1962, the OVBT approved the "Ordinance Governing Assignments on Bishop, Big Pine and Lone Pine Reservations" ("*1962 Ordinance*"). A land assignment granted under this Ordinance "is for use and occupancy rights only." *1962 Ordinance*, Article 2, Section D(1) (FAP App., Ex. B.) Original land assignments in existence prior to the passage of the 1962 Ordinance were acknowledged as "valid," and "subject to the rules and regulations as set forth" in the Ordinance. *Id.*, Article I, Section A(1). The size of the original land assignments were based upon the size of the family of the original assignment holders. However, because of the demand for assignments and the limited land available, any future assignment was limited to two lots. *Id.*, Article II, Section D(10)(a)(2). Notably, an assignment "is not subject to inheritance. The assignee may designate a person to receive the assignment in the event of his death. However, it is the responsibility of the designated individual to file an application for the assignment and if he is eligible, the Board of Trustees shall give him preference in granting the assignment." *Id.*, Article II, Section D(9) (emphasis added).

The Bishop Tribal Council occupies five of the seven positions of the OVBT, and serves as the "Local Indian Committee . . . elected by the community to direct and control activities on the reservation and to represent the interest of the reservation on the Owens Valley Board of Trustees." *Id.*, p. 1.

C. The Warlie Faction

Most, but not all, of Petitioners are descendants of Ida Warlie. Petitioner Wade Williams, is the adopted son of Petitioner of Debra Williams, and is not a descendant of Ida Warlie. (See *Declaration of Valerie Spoonhunter*, ¶ 12 ["*Spoonhunter Dec.*"].) Ida Warlie's Grant of Land

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Assignment was executed by the Owens Valley Trustees in 1941,[1] (FAP App. Ex. A) and validated by the OVBT in 1962. *1962 Ordinance*, Article I, Section A(1). (FAP App., Ex. B.)

Ms. Warlie passed away in 1973. She did not designate a person to receive an assignment of her remaining parcels. Pursuant to the 1962 Ordinance, her assignment became available for reassignment to any qualified applicant, with preference given to any, "qualified members represented in the original assignment or those named as beneficiaries by the assignee." *1962 Ordinance,* Article 2, Section D (10)(D). However, by the express terms of the 1962 Ordinance, any future assignments were limited to two lots. *Id*., Section D(10)(A)(2).

D. Land Assignment History of Block 3, Lots 4, 5, 6 and 7

Prior to her death, on or about October 20, 1969, Ida Warlie transferred Block 3, Lots 4 and 5 to her daughter, Josephine Paradise. (*Spoonhunter Dec*., ¶ 8.) On or about April 14, 1975, Josephine Paradise transferred her assignment of Lots 4 and 5 to her daughter, Karen Gail Vassar Manuelito.[2] Notably, on July 24, 2007, Ms. Manuelito's land assignment for Lots 4 and 5 was cancelled by the OVBT. *Id*., ¶ 8, Ex. 6.

After Ida Warlie's death, Warlie Descendants submitted competing applications for assignments of land that were part of her original land assignment. In 1977, Carole Warlie, daughter of Richard Warlie (Ida's son) submitted an application for Block 3, Lots 6 and 7, on behalf of Richard's grandchildren, Christopher Williams and Marnie Jo Andreas. That same year, Geraldine Pasqua, daughter of Ida Warlie, submitted an application for all of Ida Warlie's remaining assignment: Block 3, Lots 6, 7, 8, 9, 10, and 11; Block 9, Lot 4. (*Spoonhunter Dec*., ¶ 3.)

The OVBT tentatively approved Ms. Pasqua's assignment application on November 15, 1977 by passing Resolution 127, subject to approval by the Area Director of the Bureau of Indian Affairs. (FAP, App., Ex. F.) On November 30, 1977, the application of Geraldine Pasqua was returned by the Bureau of Indian Affairs "unapproved," because the application "contains

[1] Ida Warlie's original assignment consisted of Block 3, Lots 4, 5, 6, 7, 8, 9, 10, and 11, and Block 9, Lots 2, 3, and 4.

[2] Karen Manuelito has two children, John Manuelito III and Karen Manuelito, and none are a party to this action. (*Spoonhunter Dec*., ¶ 11.)

more than two Lots which is in conflict with the Assignment Ordinance." (*Spoonhunter Dec*., ¶ 4, Ex. 1.) No appeal of the BIA disapproval was taken by Ms. Pasqua, and the OVBT did not issue a Grant of Standard Assignment of Tribal Land. (FAP App. Ex. D.)[3]

In 1982, the Tribal Council passed Resolution T82-6, holding Block 3, Lots 6 and 7, for Christopher Williams and Marnie Jo Andreas, the grandchildren of Richard Warlie,[4] until they were old enough to apply for the assignment themselves. (*Spoonhunter Dec*., ¶ 5, Ex. 2.) Resolution T82-6 remained in effect until rescinded by Tribal Council on February 6, 2014. (*Id*., ¶ 6, Ex. 3.) On March 27, 2014, the Tribal Council designated Block 3, Lots 6 and 7 for economic development. (*Id*., ¶ 7. Ex. 4.)

Over the years, Tribal Council has met with the Warlie Faction in an effort to address their issues and concerns related to Lots 6 and 7. Each Tribal Council since the 1980's has chosen to uphold past Tribal Council decisions regarding the Warlie Assignment. (*Spoonhunter Dec*., ¶ 8, Ex. 5.) In an effort to quell the continued disputes by the Warlie Faction with respect to their claim of right to ownership of Lots 6 and 7 based upon their unsupported interpretation of Resolution 127, on November 20, 2015, the Owens Valley Board of Trustees rescinded Resolution 127. (*Id*., ¶ 10, Ex. 7.)

E. The Trespass Citations Related to Block 3, Lots 6 and 7[5]

After the Tribal Council's 2014 decision to proceed with the development of Lots 6 and 7, Petitioners commenced a series of protests on the property, leading to the issuance of trespass citations pursuant to the Trespass and Nuisance Ordinances. (Petitioners FAP, App. Ex. S.) In 2014, Petitioners' legal theory on their right to use and occupancy of Lots 6 and 7 was based entirely upon the premise they had the permission of Geraldine Pasqua, whom they claimed "has

[3] See also Resolution 127, at FAP, App. Ex. E: "upon approval of said application by the Area Director, the chairman and secretary are hereby authorized to execute . . . a 'Grant of Standard Assignment' to the said applicant on the land requested." No Grant was ever executed by the OVBT.

[4] Warlie Descendants Christopher Williams and Marnie Jo Andreas are not a party to this action.

[5] It's important to note that at all times, the matter before the Tribal Court involved trespasses that occurred only on Block 3, Lots 6 and 7. At no time, until the filing of this Petition, has there ever been a challenge by Petitioners (or anyone else) with respect to the decisions reached by the OVBT in 2007 to cancel the land assignment of Karen Manuelito for Block 3, Lots 4 and 5. *(Spoonhunter Dec*., ¶ 9, Ex. 6.)

been assigned" Lots 6 and 7, "and thus the Defendants had the right to be on the land in question." (FAP App, Ex. I, p. 7; also FAP App. Ex. C [pp. 2-3 of the decision].)

Geraldine Pasqua is now deceased. (FAP, p. 8, ¶ 19.) Petitioners' new legal theory supporting their right of ownership is "they are the rightful occupants of Lots 4 and 5, and 6 and 7 . . . as direct descendants to Ida Warlie with interest in a family assignment existing since the inception of the creation of the Bishop Paiute Reservation, passing properly through the generations based on the terms of the 1962 Ordinance, the decisions of the Owens Valley Board of Trustees, and tribal law and custom." (FAP, p. 13, ¶ 47.) In other words, according to Petitioners, there is no need for them to obtain a Grant of Standard Land Assignment from the OVBT in order to occupy land within the jurisdictional boundaries of the Bishop Paiute Tribe, and the Warlie Faction (but not all of the Warlie Descendants) have a right in perpetuity to all of the original assignment of Ida Warlie, to the exclusion of all others.

III. ARGUMENT

A. Pursuant to Rule 12(b)(6), Petitioners' Failed to State a Claim upon Which Relief can be Granted by this Court

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." *Fed.R. Civ.P.12(b)(6).* Claims shall be dismissed if they are "based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

A claim for relief that is not plausible on its face must be dismissed. See *Aschcroft v. Iqbal*, 566 U.S. 662, 678 (2009). A claim has "facial plausibility" only if a party seeking relief "pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnotes omitted); *Skokomish Indian Tribe v. Forsman, et al.*, 2017 WL 1093294,

at 2 (W.D. Wash. Mar. 23, 2017).

1. Petitioners Failed to State a Claim of Violation of the Indian Civil Rights Act

Applying existing case law interpreting the rights and remedies available under the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* ("ICRA"), Petitioners have failed to establish a cognizable legal theory that supports the habeas corpus relief they seek.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the seminal case interpreting the ICRA, the Supreme Court noted the primary purpose of Congress in enacting the ICRA was to "promote the well-established federal policy of furthering Indian self-government." *Santa Clara Pueblo*, 436 U.S. at 62 (1978) (internal quotation omitted). In order to promote this primary purpose and protect tribal sovereignty from undue influence, the Supreme Court held the substantive rights contained within Section 1302 of the statute did not imply a federal remedy; instead, Section 1303 set out the exclusive remedy for violations of the ICRA—a writ of habeas corpus "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." *Id.,* at 58 (1978) (emphasis added).

"All federal courts addressing the issue [of ICRA violations] mandate that two prerequisites be satisfied before they will hear a habeas petition filed under the ICRA: (1) The petitioner must be in custody, and (2) the petitioner must first exhaust tribal remedies." *Jeffredo v. Macarro,* 599 F.3d 913, 918 (9th Cir. 2010), citing Cohen, *Handbook of Federal Indian Law* § 9.09 & § 9.09 n. 280.

As discussed below, Petitioners fail to meet both prerequisites, and therefore the FAP must be dismissed.

(a) Petitioners Failed to Exhaust Tribal Remedies

Petitioners alleged they have exhausted all tribal legal remedies related to the trespass citations, and they "have no remaining remedy within the Bishop Paiute legal system." (FAP, p. 4.) Exceptions to the tribal exhaustion are to be applied narrowly and only to the most extreme of cases. See *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1203 (9th Cir. 2013). Petitioners still have legal remedies available to them in the Bishop Tribal Courts.

First, Petitioners cannot complain they have exhausted all tribal court remedies because of Judge Kockenmeister's continuance of the December 20, 2016 hearing on the pending trespass citations and related TPOs because it was Petitioners who requested the continuance. (*RJN*, Ex. 3.) Eleven days after Judge Kockenmeister granted their motion and continued the hearing, Petitioners rushed to the federal courts and filed their Petition, asserting they had no legal remedies available. (*RJN*, Ex. 4.) If Petitioners miscalculated the Court's intent to keep the terms and conditions of the TPOs in place during the continuance they requested, their legally required response would be to file a motion for reconsideration with Judge Kockenmeister, and not rush to the federal courts in Fresno. Tribal remedies have not been exhausted based upon the decision of Judge Kockenmeister to grant Petitioners' request for a continuance.

Furthermore, Petitioners misrepresent the status of the reconstitution of the Bishop Paiute Appellate Court, alleging "no plan is in place for the appointment of said judges." (FAP, p. 3.) Petitioners knowingly failed to apprise this Court of the fact the Tribe has been in the process of reconstituting the Bishop Appellate Court since September, 2016. The Bishop Appellate Court has since been reconstituted. On March 31, 2017, Petitioners filed their Notice of Appeal with the Bishop Appellate Court of the Tribal Court's dismissal of the 2016 trespass citations. (RJN, Ex. 5.)

Additionally, on March 23, 2017, Judge Kockenmeister, sua sponte, dismissed Petitioners' 2016 trespass cases (and the related TPOs) in their entirety. (*RJN*, Ex. 6.) On April 10, 2017, Petitioners withdrew the Writ of Mandamus they had previously filed with the Bishop Paiute Tribal Court of Appeals, concerning the 2016 trespass cases. (*RJN*, Ex. 7.)

Petitioners failed to exhaust their tribal remedies before rushing to the federal court. Even if tribal remedies had been exhausted, Petitioners fail to state a claim upon which relief can be granted, since they have not satisfied the second prerequisite for habeas relief. Petitioners have not been "detained" by the Tribal Council or the Tribal Court.

(b) Petitioners Have Not Been "Detained"

Detention within the meaning of the ICRA normally involves criminal proceedings.

Alire v. Jackson, 65 F. Supp. 2d 1124, 1127 (D. Or. 1999). Petitioners allege they have been prosecuted "criminally." However, the Trespass Ordinance and the proceedings before the Tribal Court are civil in nature, not criminal. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987). ("But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law.")

Additionally, "Detention" is "commonly defined to require physical confinement." *Tavares v. Whitehouse*, 2017 WL 971799, at 6 (9th Cir. March 14, 2017) (emphasis added). In *Tavares*, the Ninth Circuit recently held the federal courts lacked jurisdiction to review a tribal member's habeas corpus petition brought pursuant to the ICRA, even though the member had been excluded for ten years from the United Auburn Indian Community's tribal offices, casino, school, health and wellness facilities and park. The court made it clear that even a ten-year "temporary" restriction against an individual from significant portions of the Indian reservation does not constitute being "detained" within the meaning of the ICRA, holding that "petitioners' remedy is with the Tribe, not in the federal courts." *Id*., at 11 (9th Cir. March 14, 2017).

If the Ninth Circuit in *Tavares* considered a tribal member to not be "detained" within the meaning of the ICRA when excluded for ten years from multiple locations within the Reservation boundaries, it is incomprehensible as to how Petitioners can support the claim they have been "detained" here, particularly in light of the fact Petitioners failed to exhaust tribal remedies.

Because Petitioners have failed to meet the jurisdictional prerequisites for habeas corpus relief available pursuant to the ICRA, they are obligated to "turn to remedies and measures available within the relevant tribal system of government." Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 697 (2002).[6] In this case, the relevant tribal systems of government available to Petitioners to address any disputes they have with respect to the lawfully-issued trespass citations and ensuing orders are the Tribal Council and Tribal Courts of the Bishop Paiute Tribe.

[6] Andrea Seielstad is Petitioners' legal counsel.

B. Pursuant to Rule 12(b)(1), the Court Lacks Subject Matter Jurisdiction Because Respondents are Immune from Suit

In addition to the jurisdictional limitations pursuant to the ICRA, the court lacks subject matter jurisdiction, as Respondents are protected by the sovereign immunity of the Bishop Paiute Tribe, and as a result, this case should be dismissed.

A motion to dismiss based upon the assertion of tribal sovereign immunity is to be presented pursuant to Federal Rule of Civil Procedure Rule 12(b)(1). See *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1177 (10th Cir. 2010); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). Tribal sovereign immunity is a quasi-jurisdictional issue that, if invoked at the Rule 12(b)(1) stage, must be addressed and decided. See *Pistor v. Garcia*, 791 F.3d 1104, 1115 (9th Cir. 2015).

Pursuant to Rule 12(b)(1), a Petition must be dismissed if the action: "(1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III Section 2 of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute." *Skokomish Indian Tribe v. Forsman*, 2017 WL 1093294, at 2 (W.D. Wash. Mar. 23, 2017). When considering a motion to dismiss under Rule 12(b)(1), a court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *Id*. A federal court is presumed to lack subject matter jurisdiction, and the burden of proving jurisdiction exists lies with Petitioner. *Id*.

"A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). With a facial attack, the complaint is challenged as failing to establish federal jurisdiction, even assuming all the allegations are true and construing the complaint in the light most favorable to plaintiff. See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

By contrast, with a factual attack, the challenger provides evidence that an alleged fact is

false, or a necessary jurisdictional fact is absent, resulting in a lack of subject matter jurisdiction. *Id.* In these circumstances, the allegations are not presumed to be true and "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

In the case of either a facial or factual attack, the courts may review evidence beyond the complaint without converting a motion to dismiss into a motion for summary judgment. See *Renteria v. Shingle Springs Band of Miwok Indians*, 2016 WL 4597612, at 3 (E.D. Cal. Sept. 2, 2016), reconsideration denied sub nom., *Renteria v. Cuellar,* 2016 WL 7159233 (E.D. Cal. Dec. 8, 2016).

1. Sovereign Immunity of the Tribe and its Officials Bars this Court from Asserting Jurisdiction

The Bishop Paiute Tribe is a federally recognized Tribe. (*RJN*, Ex. 1.) "Inclusion of a tribe on the Federal Register list of recognized tribes is generally sufficient to establish entitlement to sovereign immunity." *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F. Supp. 2d 952, 955 (N.D. Cal. 2011), citing *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 957 (E.D. Cal. 2009). Indian tribes enjoy sovereign immunity absent an express waiver or federal statute to the contrary. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978); see also *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014); *United States v. Oregon*, 657 F.2d 1009, 1012–13 (9th Cir. 1981).

The Bishop Paiute Tribe, a distinct, independent political community, has retained all of its attributes of sovereignty, which includes the power to establish their own substantive laws to address internal matters. See *Santa Clara Pueblo*, *supra*, 436 U.S. at 56. A core aspect of sovereignty is the common law immunity from suit traditionally enjoyed by sovereign powers, subject to congressional action. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030 (2014), citing *Santa Clara Pueblo*, 436 U.S. at 58. The sovereign immunity of the Tribe flows to its tribal officials acting in their official capacity. *Davis v. Littell*, 398 F. 2d 83, 84-85 (9th Cir. 1968).

The relief Petitioners seek constitutes relief against the Bishop Paiute Tribe, and not the individually named Respondents. Tribal Council and Judge Kockenmeister at all times were acting within their official capacity as representatives of the Bishop Paiute Tribe. As such, the sovereign immunity of the Bishop Paiute Tribe "'extends to tribal officials when acting in their official capacity and within the scope of their authority.'" *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008), citing *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002). Petitioners cannot circumvent the immunity of the Bishop Tribe simply by suing tribal officers in their official capacity instead of the sovereign entity. *Id.* "In these cases the sovereign entity is the 'real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'" *Id.* (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).)

Nor can Petitioners sue tribal officers in their individual or personal capacity unless they can show the individuals are personally liable. Personal capacity suits are brought against the individuals only when one seeks to impose personal liability upon government officials for wrongful actions taken under color of law. *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) ("By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself: they 'generally represent [merely] another way of pleading an action against an entity of which an officer is an agent.'" (internal citations omitted).)

The Petitioners fail to allege any facts that support their claim the individually named Respondents were acting outside their scope and authority. Tribal Council at all times has been authorized to take all actions against Petitioners with respect to their repeated violation of the Trespass Ordinance. Judge Kockenmeister was also acting at all times in his official capacity, presiding over proceedings that resulted from the lawfully issued trespass citations.

The relief Petitioners seek is against the Tribe as an entity, and not the individually named Respondents. The judgment sought by Petitioners would impact the Tribal treasury or domain and restrain the Tribe from acting, and is therefore ultimately a judgment against the Bishop Paiute Tribe. See *Pistor, supra,* 791 F.3d at 1114; see also *Maxwell v. County of San*

Diego, 708 F.3d, 1075, 1089 (9th Cir. 2013).

C. Petitioners must seek Relief from the Governing Bodies of the Tribe, and not the Federal Courts

Any remedies available to address Petitioners' true underlying claims – their purported right to use and occupy the disputed Lots without obtaining a Grant of Standard Land Assignment– rest entirely with the Tribal Council and the OVBT, who, pursuant to their inherent and tribal statutory authority, determined Petitioners have no exclusive right to use and occupy the disputed Lots. At all times, Tribal Council has acted within its jurisdictional authority, and the federal courts have no jurisdiction over land assignment issues.

> The first element of sovereignty . . . is the power of the tribe to determine and define its own form of government. Such power includes the right to define the powers and duties of its officials, . . . the rules they are to observe in their capacity as officials, and the forms and procedures which are to attest to the authoritative character of acts done in the name of the tribe.

Opinion of the Solicitor, 1/27/1981, p. 2 (emphasis added). (*RJN*, Ex. 3.) In 1981, the Regional Solicitor concluded the BIA Area Director was justified "in recognizing Bishop tribal council resolutions as evidencing the will of the Bishop Indian Community. *Id*., p. 4.

Petitioners have failed to state a claim which the federal courts have jurisdiction to address, since "at the root" of this matter is Petitioners' effort to create federal jurisdiction over a purely intra-tribal matter that has been appropriately addressed by the governing tribal bodies with jurisdiction to address land assignments: The Tribal Council and the Owens Valley Board of Trustees.[7]

> When land is communally held by the tribe, individual members may simply share in the enjoyment of the entire property without having any claim at all to an identifiable piece of land. In practice, however, tribal members usually require some method of knowing that it is permissible for them to erect a residence on a given spot, to graze stock in a particular area, or to engage in other activities requiring a relatively fixed location. This need is customarily met by the tribe's conferring a license upon the individual to use particular land. That license may

[7] The Trespass Ordinance specifically states at Section 103: "It is hereby expressly reaffirmed that the Bishop Paiute Tribal Court has no jurisdiction over any disputes concerning Land Assignments. However, in the event a finding of trespass involves a determination as to whether an individual has a right to occupy the land in question, the only evidence that will be accepted by the Tribal Court will be a Grant of Standard Assignment of Tribal Land executed by the Owens Valley Board of Trustees in accordance with the 1962 Land Assignment Ordinance, and in effect." (FAP App. Ex. S.)

go by many names, but it is commonly referred to as an "assignment."

W. Canby, *American Indian Law in a Nutshell*, 6th edition, p. 447. Ownership of tribal property is vested in the tribe rather than individual tribal members, and any interests individuals may receive are only authorized "as a matter of tribal law." Cohen, *Handbook of Federal Indian Law*, 2012 Ed. § 1601[3] p. 1069. With respect to any individual land use rights authorized pursuant to tribal law, "the Department of the Interior's responsibility is to the tribal landowner rather than the individual tribal member." *Id.*, citing *Candelaria v. Sacramento Area Dir.*, 27 I.B.I.A. 137, 144-145 (1995).

The evidence presented by Petitioners clearly identifies Tribal Council and OVBT as the forums to address land assignments, not the federal courts. The land assignment for Block 3, Lots 4 and 5 was terminated by the OVBT in 2007. (*Spoonhunter Dec.,* ¶ 9, Ex. 6.) The land assignment of Geraldine Pasqua which included Block 3, Lots 6 and 7 was returned to the OVBT by the Bureau of Indian Affairs "unapproved." (*Id.*, ¶ 4, Ex. 1.) The OVBT never issued a Grant of Standard Land Assignment to Geraldine Pasqua related to her assignment application, and the OVBT formally rescinded Resolution 127 in 2015. (*Id.*, ¶ 10, Ex. 7.) Petitioners' dissatisfaction with the outcome of the decisions of the Tribal Council and the OVBT with respect to land assignments does not equate to the availability of federal remedies from the federal courts. See *Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005) ("The issue is not whether the plaintiffs' claims would be successful in these tribal forums, but only whether tribal forums exist that could potentially resolve the plaintiffs' claims."). "'Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.'" *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010), citing *Santa Clara Pueblo,* 436 U.S. at 72, n. 32. Petitioners' forum to resolve disputes with respect to land assignments lie with the governing bodies of the Bishop Paiute Tribe, and not the federal courts. Therefore, their petition should be dismissed.

D. Leave to Amend Should be Denied

Any attempt by Petitioners to request leave to amend should be denied, since their pleadings cannot be cured by allegations of other facts. *Cook, Perkiss & Liehe v. N. Cal.*

Collection Serv., 911 F.2d 242, 247 (9th Cir. 1990). The only remedy available pursuant to the Indian Civil Rights Act – a writ for habeas relief – is unavailable to Petitioners, since and they failed to exhaust tribal remedies, and have not been "detained."

Further, the sovereign immunity of the Bishop Paiute Tribal Council and Tribal Court, including its Council members and Judge Kockenmeister sued in their individual and official capacities precludes federal court jurisdiction over any relief Petitioners seek, since any remedy will impermissibly infringe upon the sovereignty of the Bishop Paiute Tribe. See *Shermoen v. United States,* 982 F.2d 1312, 1320 (9th Cir. 1992).

IV. CONCLUSION

For all the reasons stated above, the Petitioners' First Amended Petition should be dismissed, and no leave to amend should be granted.

Dated: May 5, 2017

LAW OFFICE ANNA S. KIMBER

By: /s/
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