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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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The First Amended Petition ("FAP") for Habeas Corpus names "TRIBAL COURT JUDGE BILL KOCKENMEISTER IN HIS INDIVIDUAL OFFICIAL CAPACITY" ("Kockenmeister") as a Respondent. Kockenmeister moves this court for an order dismissing the FAP as follows:

1. The FAP must be dismissed under 12(b)(1) as this Court lacks jurisdiction over Kockenmeister, sued in his official capacity, based upon sovereign immunity.

2. The FAP must be dismissed under 12(b)(1) as Kockenmeister, a judicial officer, is not liable from suit based upon the doctrine of judicial immunity.

3. The FAP must be dismissed under 12(b)(6) as Petitioners have failed to state a claim upon which habeas corpus relief can be by this Court pursuant to 24 U.S.C. Section 1301, et seq., the Indian Civil Rights Act ("ICRA").

I. Legal Standard

A. Rule 12(b)(1):

Plaintiffs bear the burden of demonstrating that federal subject matter jurisdiction exists. (See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).)

A "[r]ule 12(b)(1) jurisdictional attack[ ] can be either facial or factual." (*White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).) This Rule 12(b)(1) motion is a facial attack because the existence of subject matter jurisdiction depends on allegations in the petition, rather than evidence extrinsic to the complaint. (*Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).)

B. Rule 12(b)(6):

A Rule 12(b)(6) dismissal motion tests the legal sufficiency off the claims alleged in the complaint. (*Novarro v. Black*, 250 F.3d 729, 732 (9th Cir. 2001).) Dismissal of a claim under Rule 12(b)(6) is appropriate where the complaint either 1) lacks a cognizable legal theory, or 2) lacks factual allegations sufficient to support a cognizable legal theory. (*Balistreri v. Pacific Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).) "[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).)

II. Allegations in the FAP Relative to Kockenmeister

The FAP alleges that Kockenmeister took certain actions while sitting on the bench as a Tribal Judge. Petitioners allege "Respondent, Tribal Judge, Bill Kockenmeister, is the sole judge of the Bishop Paiute Tribal Court, the Tribe's court of general jurisdiction, who issued the Temporary Restraining Order ("TRO" also referred to as a "TPO") which is the primary issue in this case. (FAP, 5:3-5.)[1] Petitioners allege that they "have been ordered to vacate the assignments and face criminal sanction, for trespass, which has been ordered by the [Tribal] Court. The punishment Respondents imposed constitutes detention, as contemplated by ICRA." (FAP, 2:13-15.) Petitioners allege they appealed to the Intra-Tribal Court of Southern California ("ITCSC") and that appeal was ignored by Kockenmeister who thereafter issued a Temporary Protection Order ("TPO") sua sponte, ex parte and without trial. (FAP, 2-3:16-9.)

III. Argument

1. The FAP must be dismissed under 12(b)(1) as this Court lacks jurisdiction over Kockenmeister, sued in his official capacity, based upon sovereign immunity.

To begin with, Petitioners unnecessarily conflate the concepts of individual capacity versus

[1] The remainder of the FAP further alleges that all actions by Kockenmeister were undertaken within the scope and authority as a Tribal Court Judge. See FAP, ¶¶ 52 ("Kockenmeister conducted an evidentiary hearing…"), 53-57 (inability to act as impartial judge, stated the tribal court lacked jurisdiction, and conducted no reasonable fact finding), 61-64 (rejected decisions and authority in role as impartial judicial officer, made statements during a Pretrial Hearing, and dismissed citations with prejudice), 93-95 ("Kockenmeister convened a proceeding in the tribal court," Kockenmeister issued an ex parte restraining order, and "during that proceeding" indicated he would not follow the appellate decision), 102-103 (Kockenmeister issued Notices of Hearing, and issued an oral directive to remove personal property), 107-108 (Petitioners moved Kockenmeister to disqualify himself, and Petitioners moved the tribal court to recuse Kockenmeister), 111 ("Kockenmeister issued an order…"), 113-115 (Kockenmeister did not recuse himself, Kockenmeister sua sponte extended an order, and set a hearing), 117 (Kockenmeister failed to serve as an independent/impartial judge), 136-139 (Kockenmeister issued a TPO, Kockenmeister extended the order, the extension was not requested, and Kockenmeister acted in contravention of law), 143 ("Kockenmeister has convicted them…"), 150-160 (Kockenmeister conducted a hearing, without notice, Petitioners lacked legal counsel, Kockenmeister was acting as a judicial officer, during various hearing Kockenmeister made statements and issued orders, etc.), 162-163 (issuance of the TPO was harmful, and Kockenmeister refused to obey the appellate court's order), 167 (Kockenmeister "through his actions and decisions," has not been an "impartial judicial officer,"), 173 (Kockenmeister issued the TPO without notice or hearing), and 190 ("In the first trespass action in the tribal court … Kockenmeister directed [Petitioners] to remove the signs from the land in addition to trespassing them [sic]).

official capacity in the caption by asserting that Kockenmeister is sued "IN HIS INDIVIDUAL OFFICIAL CAPACITY."[2] (FAP, 1:21.)

Although unnecessary confusion frequently arises when a complaint fails to clearly allege whether a defendant is sued in his individual or official or both capacities, determining the appropriate characterization from the allegations in the complaint is neither impossible nor difficult. Simply stated, if a plaintiff seeks damages from an official, the suit is generally against the official in his individual capacity; and if the plaintiff seeks an injunction, the suit is generally against the official in his official capacity. (See *Price v. Akaka*, 928 F.2d 824, 828 (1990); *Biggs v. Meadows,* 66 F.3d 56, 61 (4th Cir. 1995).) Because of this distinction, a majority of the circuits "look to the substance of the plaintiff's claim, the relief sought, and the course of proceedings to determine the nature of a [] suit when a plaintiff fails to allege capacity." (*Biggs*, 66 F.3d at 59 (citing cases from the Second, Fifth, Seventh, Ninth, Tenth, and Eleventh circuits).)

Here, Petitioners seek, *inter alia*, an order declaring the TPO invalid, an order vacating the trespass/nuisance sanctions and an injunction against further legal process, not money damages. (FAP, 40-41:10-7.) In sum, Petitioners seek injunctive/equitable relief. Therefore, Kockenmeister is sued in his official capacity. The Supreme Court has explained that an official capacity claim is treated as a claim against the entity:

> Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

(*Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985) (quoting *Monell v. New York City Dep't of Social Servs*., 436 U.S. 658, 690, n. 55 (internal citations omitted); see also *Cmty House, Inc. v.*

[2] Kockenmeister's counsel emailed counsel for Petitioners in an attempt to meet and confer and avoid wasting judicial resources. Vinding asked for clarification as to whether Petitioners were asserting Kockenmeister acted in his official or individual capacity. Petitioners' attorneys refused to meaningfully respond.

City of Boise, 623 F.3d 945, 966-967 (9th Cir. 2010).)

As noted above, Petitioners fail to allege any facts that support the claim that Kockenmeister was acting outside the scope and authority as a tribal judge. So, it is without reasonable dispute that Petitioners named Judge Kockenmeister in his official capacity, those claims must be treated as official capacity claims.

In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) the Supreme Court held that a suit against a state official in the "official capacity" makes the suit one against the person's office and therefore against the state itself, and must be dismissed. The reasoning was that if a party sues a state officials in their "official capacity," the whole case will be seen as one directly against the state and will be dismissed pursuant to the 11th Amendment.

Similarly, when a party sues a tribal official in his official capacity, it is therefore an action against the Tribe itself. For the same reasons that the action would be barred against a state, it is barred against a federally recognized tribe because 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).) Indeed, a sovereign tribe can assert immunity at any time during judicial proceedings.[3] Appellate courts have occasionally considered the issue *sua sponte*. Yet even when a party does not invoke sovereign immunity until appeal, it does not waive immunity unless it voluntarily invokes jurisdiction or makes a "clear declaration" that it intends to submit itself to jurisdiction. (*Cook v. AVI Casino Enters*., 548 F.3d 718, 724 (9th Cir. 2008).) Accordingly, the federal courts may exercise jurisdiction over the Tribe only if the Tribe has unequivocally waived its immunity from suit or Congress has done so through legislation. (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).) And 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).)

So, if the injunctive and other equitable relief is barred against the Bishop Paiute Tribe, it is also barred against Kockenmeister whom is alleged to have been acting within his official capacity as a judge on the Bishop Paiute Tribal Court. That is the case here. As a result, the sovereign

[3] There is no dispute that the Bishop Paiute Tribe is a federally recognized Tribe. (FAP, 4:19-20.)

immunity of the Bishop Paiute Tribe "'extends to tribal officials when acting in their official capacity and within the scope of their authority,'" including Kockenmeister. (*Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).) Thus Kockenmeister should be dismissed based upon sovereign immunity grounds.[4]

2. The FAP must be dismissed under 12(b)(1) as Kockenmeister, a judicial officer, is not liable from suit based upon the doctrine of judicial immunity.

There is long established case law regarding judicial immunity – absolute judicial immunity – declared by the United States Supreme Court since at least 1868, including in egregious cases concerning ex parte orders, issued without notice, that violate a persons rights. In *Stump v. Sparkman*, 435 U.S. 349 (1978) ("*Stump*") it was held that a judge was immune from suit for having signed an ex parte order which authorized and resulted in sterilization of a minor. In reaching its conclusion, the Supreme Court cited *Randall v. Brigham,* 74 U.S. (7 Wall) 523 (1868) in which the court stated that judges are not responsible "to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." (*Id.* at p. 537.)

The *Stump* decision also cites to *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1871) wherein the court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." (*Id*. at p. 351.) The court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself." (*Id*. at p. 347.) *Bradley* went on to hold that acting to disbar an attorney as a sanction for contempt of court, by invoking a power

[4] As noted below, to the extent Petitioners oppose this motion and claim Kockenmeister was acting in his individual capacity, 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).) As with the official capacity allegation, Petitioners cannot show liability based upon individual capacity because Petitioners have sued a tribal court judge who, by the nature of his judgeship, is immune from liability.

"possessed by all courts which have authority to admit attorneys to practice," does not become less judicial by virtue of an allegation of malice or corruption of motive:

> The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

(*Id.*, at 354.)

As noted above, the allegations of the FAP exclusively relate to actions taken within the jurisdiction conferred to Judge Kockenmeister as the tribal court judge. In other words, there is no basis for concluding that the he was acting in the clear and complete absence of all jurisdiction. As such, Kockenmeister is immune from suit. (*Forrester v. White*, 484 U.S. 219, 219 (1988) (judges have absolute immunity in order to protect judicial independence).)

Like other forms of official immunity, judicial immunity is immunity from suit, not just from ultimate assessment of damages. (*Mireles v. Waco*, 502 U.S. 9, 11 (1991) ("*Mireles*") citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); see *Pierson v. Ray*, 386 U.S. 547 (1967).)

Tribal court judges are entitled to the same absolute judicial immunity that shields state and federal court judges. (*Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003) ["a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges.]; see *Sandman v. Dakota*, 816 F. Supp. 448, 452 (W.D. Mich. 1992); *Brunette v. Dann,* 417 F. Supp. 1382 (D. Idaho 1976) citing *Cadena v. Perasso*, 498 F.2d 383 (9th Cir. 1974).)

Judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Bradley v. Fisher*, 80 U.S. 335, 349 (1871).) Importantly, disagreement about a judge's actions does not warrant depriving him of his immunity, and the fact that "tragic consequences" can ensue from the judge's action also does not deprive him of his immunity. (*Stump v. Sparkman*, 435 U.S. 349, 350 (1978) (judge was

absolutely immune from suit by woman forcibly sterilized at age 15).) Indeed, the fact that the issue before a judge is a controversial one is "all the more reason that he should be able to act without fear of suit." (*Id.*)

It bears short discussion that judicial immunity can be overcome in only two limited sets of circumstances. (*Mireles*, 502 U.S. at 11.) Judicial immunity is lost where a judge knows that (s)he lacks jurisdiction, or where the judge acts in the face of "clearly valid statute or case law expressly depriving" the judge of jurisdiction. (*Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980), *overruled on other grounds by Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986).)

a. No immunity from liability for nonjudicial actions—*i.e.*, actions not taken in a judicial capacity.

To determine whether an act taken by a judge is "judicial" for purposes of conferring judicial immunity, the court will look at factors which relate to the nature of the act itself (whether it is a function normally performed by a judge) and the expectation of the parties (whether they dealt with the judge in his judicial capacity). (*Stump*, 435 U.S. at 350.) The court must look beyond whether the action he took was in error, was done maliciously, or was in excess of his authority. (*Gross v. Rell,* 585 F.3d 72, 83 (2d Cir. 2009).) Courts have found conduct to be non-judicial in nature and declined to find judicial immunity in only rare circumstances. (*Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996) (no judicial immunity where a judge stalked and sexually assaulted a litigant); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (justice of the peace accused of forcibly removing a man from his courtroom and physically assaulting him not absolutely immune).)

The allegations are not that Kockenmeister lacked jurisdiction to do what he did. Instead, the FAP alleges Kockenmeister failed to follow procedure when he issued the TPO ex parte, sua sponte and without hearing as well as chastising Kockenmeister for asserting that he lacked jurisdiction and thus could not follow the appellate court's direction. (FAP, 2-3:16-9 and 36:3-7.)

b. No immunity for actions, though judicial in nature, taken in the complete absence of all jurisdiction.

As noted above in *Bradley*, *supra*, the second circumstance in which a judge is not immune

from actions, though judicial in nature, where they are taken in the "complete absence of all jurisdiction." (*Id*., at 354; see *Mireles*, 502 U.S. at 12.) In *Bradley*, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction, and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction, and would be immune. (*Id.* at 80 U.S. 352.)

Since Bradley, courts have declined to abrogate judicial immunity even where the judge has failed to follow the law, so long as it was not a law expressly depriving jurisdiction. (See *O'Neil v. City of Lake Oswego,* 642 F.2d 367, 369–70 (9th Cir. 1981) (pro tem municipal judge's convicting defendant of contempt was in excess of jurisdiction, but not in clear absence of all jurisdiction, so judge was immune from liability); *Pace v. Williams*, CIV. A. 15-0157-WS-B, 2015 WL 3751405, at *3 (S.D. Ala. June 16, 2015) (finding that "contraven[ing] state or even constitutional law does not override [judge's] protections under the doctrine of absolute judicial immunity").)

3. The FAP must be dismissed under 12(b)(6) as Petitioners have failed to state a claim upon which habeas corpus relief can be by this Court pursuant to 24 U.S.C. Section 1301, et seq., the Indian Civil Rights Act ("ICRA").

In *Santa Clara Pueblo v. Martinez*, 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).)

Petitioners cannot show either prong is met.

a. Petitioners are not in custody.

Detention within the meaning of the ICRA normally involves criminal proceedings. (*Alire v. Jackson*, 65 F. Supp.2d 1124, 1127 (D. Or. 1999).)

Petitioners vaguely allege they have been prosecuted "criminally."[5] However, 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).) 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).)

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[5] Excepting the single reference to "convicting Petitioners of crimes," in the introduction on page 2, line 4 of the FAP, all other references are to *potential* criminal liability faced by Petitioners. (FAP, 2:14, 3:6-7, 5:19, 21:9, 23:22, 25:8, 31:14 and 17, 32:6 and 21, 35:15 and 19, 37:6 and 8, and 40:12.)

Notably, on page 31, Petitioners admit that the ordinances under which they were convicted (and which were subsequently dismissed) are vaguely characterized as criminal in nature, because "These ordinances authorize citations to be filed by persons authorized by Bishop Paiute Tribal Council, as de facto prosecutors, and carry sanctions in the form of fines and other restrictions on the movement and liberty of those charged." (FAP 31:20-22.) Yet Exhibit S (referenced at 31:18-19) – the Trespass Ordinance – only allows a "Civil Penalty" and "Money Damages." (Docket No. 2-1, at ¶¶ 7 and 8.) [Note: The Nuisance Ordinance, also referenced at 31:18-19, cannot be located in the Docket.]

Thus, 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 and failed to plead with particularity the date, time, location and nature of any physical detention.

Because Petitioners have failed to meet either 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." ([Petitioners' counsel] 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).)

In this case, the relevant tribal court systems 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. Not the District Court.

b. 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 failed to exhaust legal remedies –abandoned those remedies– in the Bishop Tribal Courts. Kockenmeister hereby respectfully requests that the Court, in the interests of judicial economy, allow incorporation by reference of the other Respondents concurrently filed Requests for Judicial Notice Exhibits Nos. 5-7.[6] These three exhibits show that Petitioners filed an

[6] This request is also made on the basis that if the Court finds the Tribe is not liable/immune from suit, logically, the Court would also find the same for the tribal actor, Judge Kockenmeister. (*Davis v. Littell*, 398 F. 2d 83, 84-85 (9th Cir. 1968).

appeal in the ITCSC on March 31, 2017 (RJN 5), Kockenmeister dismissed the 2016 trespass cases and TPOs against Petitioners with prejudice on March 23, 2017 (RJN 6) and Petitioners thereafter dismissed their appeal on April 10, 2017. (RJN 7.)

Like Ms. Seielstad, Petitioners other counsel, Mr. Duran, has also advocated a legal position diametrically opposed to the one proffered to this court. In a Rule 12 Motion filed last year in the Northern District, he argued:

> Here, Plaintiffs' reliance on Title 29 of the United States Code, section 1303 to establish jurisdiction is misplaced. . . . A *controversy* does not presently exist because Petitioners [sic] have not exhausted their tribal remedies.

(*John, et al., v. Brown, et al*., N.D. Ca., Case No. 16-CV-02368, Docket No. 12 (7/17/16), 14:9-18; emphasis in original.)

The inescapable conclusion is that Petitioners failed to exhaust their administrative remedies, cannot satisfy the second prong for habeas relief and cannot state a claim.

IV. Leave to Amend Should be Denied

Despite Petitioners' inartful pleading, the claims against Judge Kockenmeister are little more than a chilling attack on routine judicial conduct. Thus, any request for leave to amend should be denied since the infirmities related to the immunities cannot be cured. (*Cook, Perkiss & Liehe v. N. Cal. Collection Serv*., 911 F.2d 242, 247 (9th Cir. 1990).) Any relief Petitioners seek will impermissibly infringe upon the sovereign immunity enjoyed by Bishop Paiute Tribal Judge Kockenmeister (*Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992)[7]) or will be in contravention of the doctrine of judicial immunity.

V. Conclusion

In the words of Mr. Duran, "Plaintiffs' refusal to participate in the tribal process results in an unexcused failure to exhaust available tribal remedies." (*John, et al., v. Brown, et al*., N.D. Ca., Case No. 16-CV-02368, Docket No. 12 (7/17/16), 13:19-20.) This motion should be granted and

[7] The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Larson v. Domestic & Foreign Corp*., 337 U.S. 682, 704 (1949).

Petitioners' First Amended Petition should be dismissed with prejudice.

Dated: May 5, 2017

BRADY & VINDING

By: /s/
MICHAEL E. VINDING
Attorneys for Respondent Tribal Court Judge Bill Kockenmeister