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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

RONALD NAPOLES, LAURINE NAPOLES, RICK NAPOLES, MARK NAPOLES, JAMES NAPOLES, DEBRA WILLIAMS WADE WILLIAMS, Petitioners, v. 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; BISHOP PAIUTE TRIBAL COURT AND TRIBAL COURT JUDGE BILL KOCKENMEISTER, IN HIS INDIVIDUAL OFFICIAL CAPACITY, Respondents.	Case No. 2:13-cv-02101-TLN-CKD Date: June 20, 2017 Time: 9:30 a.m. Judge: Dale Drozd Courtroom: 5 Action Filed: December 29, 2016 Trial Date: TBD PETITIONERS' OPPOSITION TO RESPONDENT BISHOP TRIBAL COUNCIL AND COUNCIL MEMBERS' MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) & 12(b)(1)

PETITIONERS' OPPOSITION TO RESPONDENT BISHOP TRIBAL COUNCIL AND COUNCIL MEMBERS' MOTION TO DISMISS

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I. INTRODUCTION

The Motions to Dismiss should be rejected because this under 28 U.S.C. Section 1331 and 1343(4) to determine its authority under Section 1303 of the Indian Civil Rights Act based upon the facts and law set forth below. *See also Howlett v. Salish & Kootenai Tribes of Flathead Reservation, Montana*, 529 F.2d 233, 236 (9th Circuit 1976)(" ' section 1343(4) provides a logical and specific basis of jurisdiction and to hold otherwise would render the provisions of [ICRA]unenforceable and an exercise in Congressional futility," quoting *Crowe v. Eastern Bank of Cherokee Indians, Inc.*, 506 F.2d 1231, 1234 (4th Cir. 1974).

A clear physical detention sufficient to invoke the jurisdiction of this court is established by factual circumstances clearly articulated in Petitioners' complaint and include their physical ejectment and restraint from their family land as well as repetitive and persistent actions by Respondents such as convictions for trespass, issuance of unlawful orders of protection ejecting and banning from the land, and threat of arrest and sanctions issued to jurisdictions outside of Bishop Paiute Tribe. FAC at paragraphs 75-89, 92-112, 127-140 and accompanying attachments. Additionally, through legal convictions and orders of the tribal court rendered both before and after the filing of the FAC, Petitioners have been subjected to the kind of control that has rendered federal habeas appropriate, *i.e.,* when released on personal recognizance pending trial, sentenced to probation, placed under supervisory parole, or otherwise "obligated to appear for trial at the court's discretion." *See Dry Creek v. CFR Court of Indian Offense for Choctaw Nation*, 168 F.3d 1207 (10th Cir. 1999). Petitioners exhausted all remedies available to them in the tribal context, the appellate court having been dissolved indefinitely and there being no further recourse in tribal court. These are the essential issues at this stage of inquiry.

II. PROCEDURAL HISTORY

This matter came before the court on December 29, 2016 and a First Amended Petition filed on January 28, 2017 (hereinafter "FAC") as a Petition for Writ of Habeas Corpus filed under the jurisdictional authority of the Indian Civil Rights Act, 25 U.S.C. Section 1302 et. seq. and 28 U.S.C. Section 1331 and 1343.

Based upon circumstances that changed since the filing of the FAC, most notably, the empanelment of new appellate judges that occurred in or around March 9, 2017, Petitioners, despite their reservations about the possible futility of such a course of action, have moved to stay the proceedings to permit final resolution under the tribal court system and the most expeditious handling of the matter. Motion to Stay, May 5, 2017.

This memorandum focuses on the argument and authority presented in the Motion to Dismiss filed by Respondents Bishop Paiute Tribal Council and its Members. A separate response will be submitted on the issues of judicial immunity presented in Respondent Kockenmeister's Motion.

It is important to note that, notwithstanding the developments that occurred since then, at the time of filing of both the initial Complaint and FAC, all the requisite bases for jurisdiction and exhaustion existed and had been satisfied. This memorandum focuses on those circumstances, not the ones transpiring since, although subsequent action by Respondents and their designees including an additional tribal court order issues on May 23, 2017 continues to violate Petitioners' rights under ICRA as well. Although the restraint and interference with Petitioners' rights has extended beyond the filing of the FAC through the present, release from

detention during the pendency of a filed habeas action does not eliminate federal jurisdiction. *Caravas v. Lavalee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

III. FACTUAL BACKGROUND

The facts relevant to this court's jurisdiction and sufficiency of the complaint are fully set forth in the Petition and accompanying documents and exhibits and will be referenced and incorporated as relevant to the specific legal arguments below. They detail the multiple and egregious ways in which Petitioners have been detained in satisfaction of ICRA habeas jurisdiction.

One factual predicate underlying the action is that the restraint stems from an effort by Respondents to permanently eject Petitioners from land within the boundaries of the Bishop Paiute reservation that is part of a valid family assignment originally granted to Petitioners' grandmother and mother, Ida Warlie, and has been continually occupied by Ida Warlie and her descendants until Respondents' actions to force their ejectment. Respondent BTC and individual tribal council members focus on this issue to the exclusion of the relevant ones. However, this goes to the underlying merits of the case and is not something to be resolved at the motion to dismiss stage, and the court need not concern itself at this stage with those details.

That being said, since Respondents' Motion emphasizes the matter, it should be emphasized that Petitioners' claim to the land and the converse proposition, that Respondents BTC lack authority to trespass or eject them from the land, have been established. The Intertribal Court of Appeals of Southern California, then acting as the Bishop Paiute Court of Appeals, ruled in Petitioners' favor, reversing trespass convictions against them that had been ordered by the tribal court in June 2014 and remanding the matter for further factual

assignments and arguments on the issue of the land and the authority of Bishop Paiute Tribal Council or its agents to exercise dominion over it. FAC at paragraphs 50-51, 59 and accompanying attachments, citing Ex. C, Opinion, *Bishop Paiute Tribal Council v. Bouch* et al., June 1, 2016, B-AP-1412-6-12. Rather than do that, Respondents dismissed that case with prejudice, which should have resolved the dispute about the matter and precluded further efforts by Respondents to interfere with Petitioners' rights. *Id.* at 66-67, citing Ex. J, Order of Dismissal, *Bishop Paiute Tribal Council v. Bouch et al.*, October 28, 2016.

Thereafter, however, Respondents have repeatedly and persistently taken measures, using physical methods and also the coercive authority of orders of the tribal court, to force Petitioners from the land, physically restraining them with threats from armed law enforcement, imposing orders and actions that threaten the filing of further sanctions and even federal criminal action, convicting and awarding substantial fines and court costs, and holding them at the mercy of the tribal court as one after another action is filed and dismissed, refiled and dismissed, and new orders attempt to exert control over their movements and actions.

The Motion to Stay, filed on May 5, 2017, details the various proceedings and actions that have taken place since the filing of the FAC. Since then there have been additional filings and proceedings before the Bishop Paiute tribal court[1] and court of appeals[2] with the second

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[1] On May 23 Respondent Kockenmeister issued an order denying motions to recuse and stay proceedings and found Petitioners Ron, Rick and Lee Napoles and additional family members guilty once again of trespass on the very land that was at issue in the first case, ordering fines of $5,000 for each citation with a caveat that $4750 of fine would be suspended so long as Petitioners stayed off the land. Amended Order, *BTC v. Napoles*, Case nos. BT-CC-TP-2017-0012 through 0021, Exhibit 2. Although taking partial argument and testimony on

part of a tribal court hearing started on May 16 now scheduled for July 18. Through repetitive action on the land and the filing, dismissing, refiling, dismissing, and refiling the identical trespass actions in a way that evades and contradicts the tribal appellate court's prior ruling in Petitioners' favor and principles of res judicata and collateral estoppel, Respondents have detained Petitioners as required for federal review under ICRA.

IV. LEGAL STANDARD

Respondents invoke 12(b)(1) and 12(b)(6) as the bases for their motions. Both sets of Respondents, however, agree that they mount a facial attack on the pleadings, rather than rely on evidence extrinsic to the complaints. Kockenmeister Motion at 1, citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Bishop Paiute Tribal Council Motion at 6 ("A claim for relief that is not plausible on its face must be dismissed.")

May 16, duplicative and barred by the appellate court's first ruling, the hearing was also continued until July 18 to permit those sanctioned with the opportunity to present their side of the case once again, once again violating Petitioners' right to due process and equal protection under ICRA.

[2] Because Respondent Kockenmeister dismissed the cases underlying Petitioner's First Petition for Writ of Mandamus, thereby Petition for Writ of Mandamus and Prohibition filed by Petitioners in the appellate court in response to new citations filed against them and other family members on April 1 and 2. That Petition was summarily dismissed without prejudice based upon an alleged discrepancy between case numbers described in the Petition and those on record with the court, although Petitioner included on the cover sheet and in the body of the document the exact names and numbers of the cases with respect to which the Petition was aimed. Those numbers matched also those that appeared on the tribal court order of May 23. Decision & Order Denying Waiver of Filing Fee; Order Denying State without Prejudice; Order Denying Writ without Prejudice; *Napoles v. Kockenmeister*, BP-CA-WRIT-2017-0001, Exhibit 1. Thus, the first decision of the newly established appellate court does not restore a sense of confidence in the independence and efficacy of the newly established panel.

With respect to Rule 12(b)(6), the standards requiring a Complaint to have a cognizable legal theory and factual allegations enough to raise the right to relief above the speculative level are also not in dispute. *Balistreri v. Pacific Police Dept*., 901 F.2d 696, 699 (9th Cir. 1988); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnotes omitted). Bishop Paiute Tribal Council Motion, *id.* These are the correct legal standards to be applied, and Petitioners' FAC meets the requisite standard for exhaustion and jurisdiction.

Respondent Bishop Paiute Tribal Council's attached materials and declarations, to the extent they appear to offer factual material, does not change the facial nature of Respondents' motions. Indeed, Respondents offer no additional facts relevant to whether Petitioner was detained and/or had exhausted all available remedies, the only two issues relevant to their motions. Respondents' "Statement of Significant Facts" addresses issues of governance and the history and underlying status of the land that go to the merits of the case, i.e., about the status and ownership of the land, whether a trespass occurred, and whether there was a taking and violation of due process and equal protection. Motion at 2-6. With one exception, these are also the identical facts that were considered by the tribal appellate court in the first trespass action that led to a reversal and dismissal with prejudice.[3]

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[3] The only new fact is the revelation that Respondents, unbeknownst to Petitioners, and during the pendency of the original appeal, appear to have taken steps to rescind Geraldine Pasqua's assignment. This is the first time Respondents have informed Petitioners of this action. Even so, a rescission of one family member's assignment would not deprive others of the right to the family land or cause it to escheat to the tribal council or other entity. It would remain unassigned family land until such time as it is assigned to another family member, and the OVBT would eventually be required to do so under the 1962 Ordinance.

There is nothing contained therein contradicting any facts relevant to the detention or exhaustion. The proposed attachments, Declarations and BIA memorandum similarly present information extraneous to the issue of jurisdiction. Ms. Spoonhunter's declaration references selected matters exclusively related to the history and ownership of the land by Petitioners' family and documents their longstanding occupation and interest in the land. Counsel Kimber's is exclusively about the materials she seeks to attach and offers nothing by way of new factual content. The appropriate stage for these materials to be considered would be in discovery, summary judgment and/or trial once the case advances to those stages on the merits of Petitioners' ICRA claims. At this stage, since Respondents mount a facial attack to jurisdiction under both Rule 12(b)(1) and (b)(6), the "factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Denney v. Drug Enforcement Administration,* 508 F.Supp.2d 815 (E.D. California 2007), citing Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 12.07 (2d ed.1987). All the requisite elements are set forth in detail in the FAC.

V. PETITIONERS HAVE BEEN DETAINED UNDER SECTION 1303

A central purpose of ICRA was to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (quoting S.Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967)). Pursuant to this objective, Congress granted individual tribal members such as Petitioners the rights to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses.

25 U.S. C. Section 1302(6). It also guarantees them "due process," both procedural and substantive, and equal protection under law, grants a right to freedom of speech and assembly, and prohibits the taking of land for public use without just compensation. 25 U.S.C. 1302(1), 1302(5) and 1302(8). In enacting these provisions, embracing the same protections evidenced in the First, Fifth and Fourteenth Amendments to the Congress evinced an intent to extend to members of tribes rights against abuses by tribal officers and governments. It is these rights that Petitioners seek to enforce in this habeas action. FAC, 146-192 and accompanying attachments.

A. **The relevant issue is whether there has been a detention under ICRA, not whether sovereign immunity generally exists protecting the Bishop Paiute Tribe**.

Respondents go to great lengths in support of their Motion to Dismiss to extoll the virtues of sovereignty immunity as a general principle of law that exists to protect tribes from civil suits. At the expense of the relevant issues, they devote space in their memorandum to establishing that the Bishop Paiute Tribe is a federally recognized tribe, a point that has never been disputed by Petitioners.[4]

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[4] They spend pages discussing the general principle of sovereign immunity articulated in other contexts, none of which is dispute either. And they cite to a law review article by undersigned counsel on the subject of tribal sovereign immunity. Respondent's Brief at 9, quoting 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 Law Review 661 (2002). Although it was an interesting choice to highlight this treatise, it does not address, nor contradict, anything about this case or Petitioners' claims. Although the precedent of the lower courts has evolved over time, it remains true in 2017 as it was in 2002, that "[a]fter Martinez, individuals seeking enforcement of substantive

No one contests that tribes, likes states, the federal government and even foreign nations, may as a general matter enjoy a measure of sovereign immunity as an inherent attribute of sovereignty. However, all authority related to the doctrine of sovereign immunity, even that cited by Respondents, also recognizes that sovereign immunity is subject to waiver or Congressional abrogation. Respondent's Brief at 11 (citing *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)).

It is the scope of this congressional waiver set forth in Section 1303 of ICRA that is the issue of this case; and the applicable authority in the matter, therefore, are the cases in this and other jurisdictions that interpret that provision. As aptly stated by this court in its most recent pronouncement of the subject:

> In response to perceived abuses in the administration of criminal justice to tribe members, in 1968, Congress chose to exercise its plenary authority and to abrogate Indian tribal immunity in part through the Indian Civil Rights Act ("ICRA"), 29 U.S.C. §§ 1301–1304. *See Santa Clara Pueblo,* 436 U.S. at 71 ("Congress['s] ... legislative investigation revealed that ... serious abuses of tribal power had occurred in the administration of criminal justice.").

Tavares v. Whitehouse, United States District Court, E.D. California. March 21, 2014, Not Reported in F.Supp.3d, 2014 WL 1155798, affirmed in part and dismissing appeal, *Tavares v. Whitehouse*, 851 F.3d 86317 (9th Circuit 2017).

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rights guaranteed to them by Congress in ICRA in circumstances other than detention must turn to remedies and measures available within the relevant tribal system of government." *Id.* at 697 (emphasis added).

Section 1303 of the ICRA provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. The Supreme Court in *Santa Clara v. Martinez* held that the ICRA's substantive rights did not imply a federal remedy; rather, a writ of habeas corpus under § 1303 was the exclusive remedy for violations of the ICRA. Id. at 69–72. Petitioners have taken great pains to utilize the remedies and measures available within the tribal system of government; and, indeed, have prevailed in a decision by the court of appeals and subsequent order of dismissal with prejudice that should have ended the matter once and for all. Opinions. FAC at paragraphs 50-51, citing Ex. T, Opinion, *Bishop Paiute Tribal Council v. Bouch et al*., B-AP-1412-6-12, November 2, 2015, vacated upon rehearing; and Ex. C, Opinion, *Bishop Paiute Tribal Council v. Bouch et al*., June 1, 2016, B-AP-1412-6-12. Respondents' refusal to honor that authority and their taking of actions subsequent to it that violated Petitioners' rights, including the efforts at physical restraint and removal and the issuance of a Temporary Protection Order, ex parte and sua sponte, by Respondent Kockenmeister, are what necessitated the filing of the FAC.

The key issue in federal habeas cases, therefore, becomes whether a detention sufficient to warrant habeas protection has taken place. If so, then the BTC and those of its officers who have acted in their official capacity, but against federal law, to infringe upon Petitioners' rights would lose their protection from suit under the mantle of sovereign immunity. As with *Santa Clara* and all other cases invoking jurisdiction under Section 1303, it is not the Tribe itself that is the Defendant, but rather the officials and/or tribal entities responsible for the breach and the concomitant detainment of Petitioners. Individually and collectively the named individual

Respondents and the Bishop Tribal Council, an executive committee of the Tribe, but not the Tribe itself, have properly been named as parties to this action, as is proper in an ICRA habeas action.

B. Jurisdiction under Habeas Corpus Does Not Require Actual Incarceration.

"It is well established that actual *physical* custody is not a jurisdictional prerequisite for federal habeas review." *Poodry v. Tonawanda*, 85 F.3d 874, 893 (2nd Circuit 2013) (citing Jones v. Cunningham, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963). *See also Jeffries* at 919. Rather, "[t]he custody requirement is simply designed to limit the availability of habeas review 'to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty

As a result, in and outside of tribal contexts, federal habeas jurisdiction has been established in diverse circumstances. *See, e.g., Poodry*, *supra*, (permanent banishment from tribal lands). *See also*, *Hensley v. Municipal Court,* 411 U.S. 345, 351, 93 S.Ct. 1571, 1574–75, 36 L.Ed.2d 294 (1973) (terms of personal recognizance requiring petitioner to appear at times and places as ordered by any court or magistrate and other restraints "'not shared by the public generally' " (quoting *Jones,* 371 U.S. at 240, 83 S.Ct. at 376)); *United States ex rel. B. v. Shelly,* 430 F.2d 215, 217–18 n. 3 (2d Cir.1970) (probation); *Sammons v. Rodgers,* 785 F.2d 1343, 1345 (5th Cir.1986) (per curiam) (suspended sentence carrying a threat of future imprisonment); *Justices of Boston Mun.* are neither severe nor immediate." *Id.* at 894 (citing *Hensley*, 411 U.S. at 351, 93 S.Ct. at 1575). *Court v. Lydon,* 466 U.S. 294, 301, 104 S.Ct. 1805, 1809–10, 80 L.Ed.2d 311 (1984) (obligation to appear in court and requirement that petitioner not depart the state without the court's leave demonstrated the existence of restraints on the petitioner's

personal liberty "not shared by the general public"). *See also Dow v. Court of the First Circuit Through Huddy*, 995 F.2d 922, 923 (9th Cir.1993) (per curiam), cert. denied, 510 U.S. 1110 (1994) (holding that a requirement to attend fourteen hours of alcohol rehabilitation constituted "custody" because requiring petitioner's physical presence at a particular place "significantly restrain[ed][his] liberty to do those things which free persons in the United States are entitled to do.").

The Tenth Circuit also has held that release on personal recognizance pending trial constitutes detention under ICRA Section 1303. *Dry Creek v. CFR Court of Indian Offense for Choctaw Nation*, 168 F.3d 1207 (10th Cir. 1999). Explained that court: "Although Appellants are ostensibly free to come and go as they please, they remain obligated to appear for trial at the court's discretion. This is sufficient to meet the "in custody" requirement of the habeas statute." *Id.* at 1208.

C. The requisite conditions for habeas are that, at the time of filing, there be a severe or actual or potential restraint on liberty.

Federal law is clear that to invoke habeas relief under the ICRA, one must establish "a severe actual or potential restraint on liberty." (*Poodry, supra*, 85 F.3d at 880.) Though "actual physical custody is not a jurisdictional prerequisite for habeas review," the "[t]erm 'detention' [used in the ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts." (*Jeffredo, supra*, 599 F.3d at 918.) In *Hensley v. Municipal Court*, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973), the Supreme Court explained:

> The custody requirement of the habeas statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use had been limited to cases of special urgency,

> leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

In *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), the Supreme Court also stated: "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints that are not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."

D. Detention is warranted under federal court interpretation of ICRA's Section 1303

Applying these standards to federal court jurisdiction under ICRA, the Second Circuit has said that "under Jones and its progeny, a severe actual or potential restraint on liberty" is necessary for jurisdiction under § 1303. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir.1996); *see also Shenandoah v. Halbritter*, 275 F.Supp.2d 279, 285 (N.D.N.Y.2003) (quoting *Poodry* for the same proposition). The 9th Circuit has embraced this standard as well, citing Poodry for the proposition that "§ 1303 does require 'a severe actual or potential restraint on liberty.'" *Jeffries* at 919, quoting *Poodry*, 85 F.3d at 880. *See also Tavares v. Whitehouse*, 9th Circuit, *supra*.

There are two bases for detention in this case: (1) through the control exerted by the tribal court, and (2) through the circumstances giving rise to physical and geographical ejectment and restraint of Petitioners' with respect to the land.

1. Judicial Control and Restraint

Independent as to whether there has been a banishment or actual term of imprisonment, actions taken under the cloak of authority of the tribal court have the effect of exerting the kind of control over Petitioners that have formed an independent basis for federal habeas jurisdiction in other contexts whether or not there has been a banishment or actual term of imprisonment. *See, e.g., Dry Creek, Hensley, Sammons, Justices of the Boston Municipal Court*. For example the most recent order of May 23 attempts to exert control over Petitioners pending the next July 18 court hearing that it scheduled through the issuance of $5000 fines, $4750 of which may be suspended so long as Petitioners do not enter upon the land. *Supra* n. 1. Additionally, Respondents purport to have convicted Petitioners of trespass, citing and assessing fines that would be assessed and informing them that if they return they will be subject to further sanctions, fines and penalties, including incarceration. FAC at paragraph 43, citing Ex. I, Findings of Fact, Conclusions of Law and Judgment, June 19, 2014 (reversed on appeal); and *supra* n. 2.

Finally, and the precipitating factor in the filing of the habeas action in this case, was the fact that Respondent Kockenmeister issued a temporary protection order, sua sponte and ex parte and without any petition or affidavit ever having been filed with the court, that directly threatened Petitioners with federal criminal prosecution should they enter upon the land or possess a firearm and indicated on its face that outside jurisdictions were required to give it full faith and credit as well. FAC, paragraphs 94-103, citing Exhibit Q.

Petitioner contends that this TRO was entered wholly outside the jurisdiction and lawful authority of the court or laws of the Bishop Paiute Tribe. Moreover, this order had the very real threat of landing Petitioners in jail had they entered upon and utilized their land or

stopped by law enforcement while hunting or otherwise in possession of a firearm, or encountered a law enforcement officer confused about the nature of the order (it suggested it was issued under the Violence Against Women Act, for example). FAC, paragraphs 94-103 and accompanying attachments. In so including such directives, it placed Petitioners in actual threat of arrest, incarceration, and severe restraint of liberty, over and above the efforts to physically eject and remove Petitioners from their land.[5] When the court places conditions on a person in an effort to secure their participation in future proceedings or manage their behavior and actions under some purported supervisory authority, the federal courts have found habeas jurisdiction to be appropriate. *Dry Creek* is the best example of that with respect to Section 1303.

2. Physical Banishment, Ejectment, Physical and Geographical Restraint

Although there are not a high number of identically analogous factual circumstances in the case law, it has been determined that "[p]ermanent banishment is a sufficiently severe restraint on liberty to constitute 'detention' and invoke federal habeas jurisdiction under § 1303 of ICRA." *Tavares v. Whitehouse*, No. 13-2101, 2014 WL 1155798, at *7 (E.D. Cal. Mar. 21, 2014), affirmed in relative part by *Tavares v. Whitehouse*, 9th Circuit. A tribal member who is "convicted of treason, sentenced to permanent banishment, and permanently [deprived of] any

[5] In the Tribal Court's most recent order of May 22, 2017, Respondent Kockenmeister once again convicted Petitioners of trespass and assessed fines in the amount of $5,000 each, $4750 of which may be suspended so long as none enters upon the land in question. *See supra* n. 2, citing Amended Order, *BTC v. Napoles*, BT-CC-TP-2017-0012 through 0021, May 22, 2017. The tribal court has also charged each Petitioner exorbitant fees, requiring each to pay $150 for filings in the appellate court and $25 for every filing. Due to Respondents' repetitive dismissal and refiling of the identical actions, this has exacted an exorbitant and unfair burden on Petitioners and contributes to the egregious nature of the matter.

and all rights afforded to tribal members" is "detained" for purposes of ICRA habeas relief. *Poodry Tonawanda Band of Seneca Indians,* 85 F.3d at 876, 878 (2nd Cir. 1996); *Jeffredo v MaCarro* 599 F.3d at 919 (9th Cir. 2009). Further, *Jeffredo* adopted the *Poodry* analysis to find that habeas relief may be warranted for a "severe actual or *potential* restraint on liberty." *Id.* at 919 (emphasis added).

A restraint tantamount to custody exists in the instant case because the Respondents decided to forcibly remove the Petitioners and their belongings, including their cattle, from their lands forever, and there is no legal authority that allows the Respondents to do so. They did this in a number of ways. First, as indicated in the Petition, Respondents directed armed law enforcement from two jurisdictions to order them to physically leave the land. Napoles Declaration; FAC at paragraphs 75-89, 92-112, 127-40. Facts alleged and referenced in the signed affidavit indicate that the officer encircled Petitioners each time they entered the land and at least some officers had their hands on their guns in a manner that intimidated Petitioners and made them fear for their safety and imminent arrest. *Id.* Respondents banned petitioners from their land as a penalty for fictitious trespass convictions in order to abscond with their land assignment to expand the Tribe's casino and aggrandize power in the Bishop Paiute Tribal Council that does not exist. As a result, the Petitioners are no longer able to utilize, live or access their land assignments.

Because of these actions by Respondents, that have persisted over more than three years' time in contravention of tribal and federal law and previous determinations of the appellate and tribal court, Petitioners are ejected and effectively permanently banished from their lands, permanently deprived of their rights as tribal members to the useful enjoyment of

their land assignment, an assignment to which they have enjoyed for over seventy years and which the Tribe has no legal entitlement to take from Petitioners.[6]

Respondents summarily decided to evict petitioners and have never taken the issue to the General Council, the official governing body of the Bishop Paiute Tribe. In fact, the General Council rejected the casino expansion. (FAC, Dkt 1-Main Appendix at Ex. H) The fact that no one has been made to leave the Reservation in its entirety is not dispositive as to the issue of detention. What is critical under the precedent of federal habeas law is that the effect of Respondents' action was to physically remove, eject, and restrain Petitioners and put them in threat through physical confrontation and sequestering from their land, by purported court order creating risk of being arrested and cited, even under federal law, should they resume use and occupancy of their land. The *Poodry* court reasoned:

> 'Restraint' does not require 'on-going supervision' or 'prior approval.' As long as the banishment orders stand, the petitioners may be removed from the Tonawanda Reservation at any time. That they have not been removed thus far does not render them 'free' or 'unrestrained.' While 'supervision' (or harassment) by tribal officials or others acting on their behalf may be sporadic, that only makes it all the more pernicious. Unlike an individual on parole, on probation, or serving a suspended sentence-all "restraints" found to satisfy the requirement of custody-the petitioners have no ability to predict if, when, or how their sentences will be executed. The petitioners may currently be able to "come and go" as they please, [. . .] but the banishment orders make clear that at some point they may be compelled to "go," and

[6] Respondents Bishop Tribal Council and Tribal Officials, have not produced any document demonstrating they have authority, title or legally cognizable interest above or in priority to Petitioners'. Further, the Tribe does not have a Constitution or any ordinance or legal authority demonstrating their authority to take any assignment from an individual tribal member. The lands are not in trust on behalf of the Tribe; as with allotments, the assignments at issue are held in trust on behalf of individual tribal members.

> no longer welcome to "come.' That is a severe restraint to which the members of the Tonawanda Band are not generally subject. Indeed, we think the existence of the orders of permanent banishment alone-even absent attempts to enforce them-would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus.

Poodry, 85 F.3d 895.

Poodry is good authority in this matter because the facts are analogous to Petitioners' case. Petitioners have been harassed, intimated, ordered to leave, fenced out, fined and told if they return to their lands they will face additional sanctions and prosecution. It is in this context that the Petitioners were punished with the penalty of banishment from their own lands. In both cases the group in power intimidated the petitioners, threw them off the lands and denied them access to tribal benefits. *Poodry*, 85 F.3d 897. The *Poodry* court found that a person is detained if the restraint is not shared by the general tribal public. In this case, other tribal members are not subject to the same sanctions as Petitioners, the loss of their lands, physical confrontation by armed law enforcement and threats of arrest and federal criminal sanctions should they enter upon or possess firearms, physical fencing off of their family land. Thus, under the other line of *Poodry* analysis the Petitioners are restrained because their restraints are not shared by other Bishop Tribal members.

After *Jeffredo*, two cases of relevance to Petitioners also apply, *Tavares v. Whitehouse*, *supra*, and *Quair v. Sisco* (2007 WL 1490571 (E.D. Cal. May 21, 2007)) ("*Quair II*"). In *Quair II* the respondents argued that the penalty of banishment and the penalty of disenrollment were not synonymous too. The court found that it did not matter; habeas corpus could attach in either case so long as the effect of the disenrollment or banishment otherwise met the requirements of

habeas, i.e., detention and exhaustion. *Quair*, 2007 WL 1490571 at *7. The court could look at the "disenrollment" even if the tribal council did not use the words banish or did not technically apply the banishment penalty. *Id.* This holding is directly on point for the instant case. The *Quair* court said that if there were proof that non-members could be prohibited from living on the reservation then perhaps the verdict would have been different. *Id.* at fn. 11.

Significantly, *Quair* also emphasized the need for geographic movement. "Accordingly, the court may review the disenrollment of petitioners under §1303 only if it similarly affects their geographic movement." The instant case does precisely that. Respondent's actions individually and collectively physically restrict Petitioners' geographical movement within and upon the limits of their own family land, completely and permanently ejecting them from it. Respondents have physically driven Petitioners from their land with assistance from armed law enforcement from two different jurisdictions each time they have entered during the pendency of the action, and they have ordered them off and restricted other of their rights upon threatened penalty of tribal, state, and federal criminal sanctions. It is entirely about geographical movement and restraint.

Another thing that *Quair II, Jefferies, Poodry and Tavares* do is distinguish between habeas actions based on disenrollment from all others. Explained the court in Quair II:

> But courts long have recognized that the right to define its membership is central to a tribe's 'existence as an independent political community.'. . . Therefore, 'the [federal] judiciary should not rush to create causes of action that would intrude on these delicate matters.' . . . . Because the Tribe's disenrollment of Quair and Berna directly addresses tribal membership, the court must exercise great caution in deciding whether § 1303 applies to these decisions by the Tribe.

Quair II, *supra* at 2, quoting *Santa Clara Pueblo* at 72, n. 32. It ultimately determined in *Quair*, only with respect to the Tribe's decision to disenroll Petitioners, not with respect to banishment, which it did not. The instant case has nothing to do with disenrollment, membership or eligibility for tribal services. It is distinctively and exclusively about geographical restraint. Consequently, the special hesitation that federal courts must afford in habeas actions premised on membership does not apply to the circumstances of this case.

E. The 9th Circuit's decision in *Tavares v. Whitehouse*, issued during the pendency of this action, also sustains a finding of detention.

Tavares v. Whitehouse is another recent case that is on point for Petitioners. Although Respondents' argument for dismissal predominantly relies upon this case and it does articulate a restrictive interpretation of Section 1303's custodial requirement, it does not preclude habeas jurisdiction under the circumstances of this case. The petitioners in *Tavares* were only facing partial disenfranchisement from certain tribal events, properties, offices, schools, health and wellness facilities, a park and casino, but not private land within the reservation, their own homes or land owned by other tribal members. *Id.* At 868. Furthermore, the Petitioners in Tavares were temporarily excluded from these tribally-sponsored services, events and tribal lands, for between two and ten years. *Id.* It was a punishment for established violations of tribal laws that specifically gave the Tribal Council the power to discipline tribal members for disseminating false or defamatory information outside the tribe against tribal programs and/or tribal officials. *Id.* The punishment, moreover, was established in the Enrollment Ordinance, which provided punishment "up to and including disenrollment" for violations of the above-described tribal laws.

The circumstances of this case are markedly different. Whereas *Tavares* involved a temporary exclusion from tribal services and land, the instant case involves a permanent ejectment. The exclusion, moreover, is from Petitioners' own family land assignment, not tribal lands held in trust by the United States for the benefit of the Tribe as the case was in Tavares. There is no connection with membership or enrollment in this case as well. These distinctions are important ones because they diverge from the reasons that led the court in Tavares to conclude there was no detention.

For example, a primary reason behind the court's decision in *Tavares* is the link between the temporary exclusion and membership rights of tribal members. "Unlike the Second Circuit, we distinguished between disenrollment and banishment, and recognized that there is no federal habeas jurisdiction over tribal membership disputes. *Id.* at 875, citing *Poodry* at 920." Furthermore, emphasized the court: "Because exclusion orders are often intimately tied to community relations and membership decisions, we cannot import an exclusion-as-custody analysis from the ordinary habeas context. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32, 98 S.Ct. 1670 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. 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." (citations omitted))." Id. There is no issue of membership or enrollment in the instant case.

Another primary reason, cited by the court was the principle that "tribes have the authority to exclude non-members from tribal land." Id. At 876, citing *Merrion v. Jicarilla*

Apache Tribe, 455 U.S. 130, 142, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (recognizing tribes' authority to exclude non-members); and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). Explained the Court:

> If tribal exclusion orders were sufficient to invoke habeas jurisdiction for tribal members, there would be a significant risk of undercutting the tribes' power because 'any person,' members and nonmembers alike, would be able to challenge exclusion orders through § 1303. Thus, tribal sovereignty vis-à -vis exclusion of non-members would collide with habeas jurisdiction." *Id.*

As with membership and enrollment, exclusion of members or non-members is not at issue in this case, such that the concerns of *Tavares* are not present here.

As discussed in more detail below, the governing structures and authority of the Respondents in each case are also different, with the *Tavares* case involving a model of governance where the Tribal Council was the primary governing body of the Tribe, and the instant case involving a model where the primary governing body consists of a General Council and the inter-band Owens Valley Board of Trustees, not the Tribal Council. Thus, the concerns about interfering with tribal governance and sovereignty do not exist in this case like they did in *Tavares* and other ICRA. Careful case-by-case analysis of the unique circumstances, historical legacy and features of sovereignty present within each tribal context provide a basis for distinguishing the circumstances of this case from those in Tavares.

Reading *Quair II* together with *Tavares* it is clear that it does not matter whether the tribal government at issue uses the word "banish." The effect of the action against the tribal individual is what needs to be analyzed. If the effect of the action taken restricts geographic movement and /or causes a permanent and total destruction of their social, cultural, and political existence then habeas relief may be granted.

The eviction of Petitioners has the effect of limiting the Petitioners because for those that live on "the reservation" now can be made to leave without any due process at the will of the Tribe.[7] Those who live off the reservation, who own assignments on the Reservation are now considered invitees who can be deemed trespassers at any time. They can be prohibited from the useful enjoyment of their assignments if Respondent Tribal Officials decide as such.

F. The circumstances of this case are criminal in nature.

Although habeas petitions often are brought in the context of criminal proceedings, this is not an essential requirement. It is the situation of being detained or restrained, not the characterization of the action that matters. *See, e.g., Poodry* at 887. ("The relevance of this debate is not immediately obvious, insofar as §1303 does not explicitly limit its scope to the criminal context: it speaks of "detention" by order of an Indian tribe as the sole jurisdictional prerequisite for federal habeas review.") That being said, as the 2nd Circuit determined with respect to banishment and other convictions resulting in jail time, the nature and severity of Respondents' actions are criminal in nature and, hence, particularly appropriate for review through the remedy of habeas.

The BTC has criminalized trespass and nuisance through the implementation of two ordinances. Ex. S, Bishop Paiute Trespass Ordinance, No. 2000-02; Bishop Paiute Nuisance

[7] Petitioners use the term "Reservation" and "Tribe" loosely here because the Tribe's lands are made up of individual assignments made pursuant to federal Congressional action and trust agreements with the original heads of household like Ms. Warlie and the latter authority delegated in the Owens Valley Land Ordinance (hereinafter "Land Ordinance") Dkt 1, Appendix, Ex. B. In sum, the Tribe does not "own" any reservation lands because the lands are held in trust for tribal members pursuant to the Land Ordinance. Further, the Tribe does not have a Constitution or powers over the assigned lands.

Ordinance, No. 2000-03. 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 and convicted by the court. Through orders of the court prohibiting Petitioners from entering upon their land or possess firearms upon threat of federal or state actions, engaging armed state and federal law enforcement in driving them physically from the land, and issuing trespass and nuisance citations, Respondents criminalize, punish and sanction Petitioners for their entry and action upon the land. FAC, paragraphs 75-89, 92-112, 127-40 and accompanying attachments; Napoles Declaration. BTC has erected a fence around the property and directed its law enforcement officers and that of the Inyo County Sheriff's Department to continue to monitor and take against Petitioners and their family and friends each and every time they are observed upon their land. *Id.* The most recent order of May 23 is further illustration of that, convicting Petitioners once again of trespass, ordering substantial fines and physical restrictions upon Petitioners' movement. The nature of the proceedings and resulting court orders have real and punitive legal consequences, thereby rendering the actions criminal in nature.

G. ICRA's twin goals of protecting the rights of tribal members and the sovereignty of the Tribe would best be served by permitting federal review.

When it came to interpreting the Indian Civil Rights Act, the Court acknowledged and was required to balance two aims set forth by Congress: specifically, "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." *Santa Clara* 436 at 67-68, citing Summary Report 11. In other words, explained the court: "Two distinct and competing

purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.' *Id.* At 62 quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974) and citing *Fisher v. District* Court, 424 U.S., at 391. Respecting the goals of furthering Indian self-government, the Court was concerned that it not interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity, acknowledging that tribal forums might be in a better position to evaluate matters of custom and tradition than federal courts. *Id.*

Lower courts have also wrestled with the contours of this doctrine when applying it to circumstances different from those in *Santa Clara*. Many, like that in *Poodry* and *Tavares*, have noted the unique importance of deferring to tribes in matters of membership. In all of those decisions, moreover, the governance authority and structure of the Tribe over the particular issues giving rise to the habeas complaint was not in dispute.

As emphasized in the habeas petition and confirmed in Respondents' Motions to Dismiss, this case presents a novel and significantly different context in which to apply the requirements of federal habeas review in the context of ICRA. This case is not about membership or exclusion from tribal services or lands as a result of a membership dispute. Unlike any other case, this case involves land that is unique and held by the United States for the benefit of families, not tribal trust land. The creation and sovereignty of the tribe, therefore, depends on the status of each family's lands and the ability of them to continue use and occupancy for their survival in the way intended by Congress without interference and alternative development or business goals of other entities who may find the land attractive.

Additionally, those seeking to eject Petitioners from their land and livelihood are not the ones authorized with sovereign authority to do so. Thus, federal jurisdiction is necessary to preserve and protect tribal sovereignty and self-determination within the Bishop Paiute Tribe, and proceeding in this habeas action will best further those goals.

1. Land within the Bishop Paiute Reservation is a compilation of individual and family assignments, not tribal trust land like the majority of reservations.

As indicated in the FAC and accompanying affidavit and documents, the history of the Bishop Paiute Tribe and its reservation is unique above all over tribes. FAC, paragraphs 10-27 and accompanying exhibits. This is a consequence of the history of land ownership in the Owens Valley, and the City of Los Angeles' purchasing of thousands of acres of land at the beginning of the 20th century, creating an untenable situation for Paiute individuals and families who found themselves squatting upon such land and/or separate and dislocated from others. The solution agreed upon by the federal government was to purchase and exchange land previously obtained by the federal government with the Department of Water and Power for the purposes of consolidating and creating the present boundaries of the reservation. The pre-requisite for this exchange was that the majority of the Paiutes had to agree and agreement be obtained from families like that of Ida Warlie, the mother and grandmother of Petitioners, to give up homesites and improvements in other locations in exchange for land assignments within the reservation that was to be created.

In April 1937, Congress passed an Act that authorized the exchange of land and water rights between the federal government and the City of Los Angeles. Act of April 20, 1937, 50 Stat. 70 ("To authorize the Secretary of the Interior to exchange certain lands and water rights in

Inyo and Mono Counties, California, with the city of Los Angeles, and for other purposes"). In a case regarding water rights under the same agreement the 9th Circuit summarized the early history:

> For centuries, Plaintiff's members lived in the area now called the Owens Valley in Inyo County, California. After non-Indian settlers began to move into that area in the late Nineteenth Century, Congress moved to protect Plaintiff by acquiring land in the area and setting it aside for Plaintiff's benefit. By 1924, the United States had acquired and set aside five tracts of land totaling approximately 1,030 acres (the "Bishop Tribal Land"). Pursuant to the usual custom, the United States held the title to the Bishop Tribal Land in trust for Plaintiff.
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> In the Act of April 20, 1937, 50 Stat. 70, Congress authorized the Secretary of the Interior to exchange federal land and water rights in the Owens Valley for other land and water rights owned by the City. The Act placed several conditions on any such exchange. Among them, a majority of Plaintiff's adult members had to consent to an exchange; an exchange had to include the water rights appurtenant to the exchanged lands; and the value of the rights conveyed in an exchange had to equal the value of the rights received.

Paiute-Shoshone Indians of Bishop Community of Bishop Colony, California v. City of Los Angeles, 637 F.3d 993, 996 (9th Circuit 2011). In the resulting Land Exchange Agreement, the United States swapped 3,126 acres of federally reserved Indian lands for 1,511 acres of city-owned land located in the Owens Valley.[8] *Id.* The land exchange consolidated scattered parcels

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[8] Interestingly, the Bishop Paiute Tribal Land acquired in 1924 and swapped in the Land Exchange Agreement was determined by the 9th Circuit to belong to the United States, not the Bishop Paiute Tribe. *Id.* at 998 ("But Plaintiff's theory skips a crucial fourth step. As Plaintiff's complaint acknowledges, the United States, not Plaintiff, conveyed the Bishop Tribal Land to the City. Even if a finder of fact were to decide that the United States violated the Act and that those violations render the land exchange null and void, the title to the Bishop Tribal Land would revert to the United States, not to Plaintiff. To achieve the relief that it seeks, Plaintiff would require an additional order, apart from an order ejecting the City, requiring the United States either to cede title to Plaintiff or to hold the land in trust for Plaintiff's benefit. Without such an order, we see nothing stated in Plaintiff's complaint that would require the United States to give the Bishop Tribal Land back to Plaintiff.")

that the Owens Valley Indians held into three new reservations in Bishop, Big Pine, and Lone Pine.

Also and as detailed in the FAC, following discussions with agents of the federal government, heads of households like Ida Warlie gave up interests in land, homes and improvements in Sunland, Inyo County, California in exchange for family assignments of land located within the present boundaries of the Bishop Paiute Reservation. FAC. *See also* Ida Warlie Community Land and Building Assignment, July 22, 1941 (FAC, Exhibit A). Family land was assigned according to household size, and the purpose was to provide a means of livelihood and eligibility for housing funds for the benefit of individual members of the Bishop Paiute Tribe. 1937 Act. *See also* FAC, Ex. B, 1962 Ordinance Governing Assignments on Bishop, Big Pine and Lone Pine Reservations ("In the past, the size of assignments on the Bishop, Big Pine and Lone Pine Reservations generally were determined by the size of the assignee's family. The assignments were granted for the purpose of providing a home and acreage to aid in supporting a family.").

Through these land exchanges and grants of family and individual assignments, the Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony was founded and located within the present boundaries of the Bishop Paiute Reservation. The name itself is indicative of the underlying organization – a community within a colony. Before Congress even would approve the land exchange that gave rise to the present reservation in Bishop, families were contacted by U.S. officials and gave their consent to enter into an exchange and move onto the newly acquired federal land. Some, like Ms. Warlie, then received family land assignments that were based in size on the number of persons living within the household.

Those land assignments were and are held in trust by the United States for the livelihood, welfare and benefit of the individual members and families of the Bishop Paiute community, never for the development or business purposes interests of the Bishop Paiute Tribal Council or other entity claiming governmental authority. Different land was set aside and/or could be acquired for the purposes of tribal development, and it is upon those lands that development and tribal projects should occur.

2. Tribal council not the sovereign governing entity with authority to approve the building of a casino expansion or the taking or transfer of original family land assignments.

The other significant difference in this case from a sovereignty perspective is that decisions over land assignments and their transfer from one family member or tribal member to another are exclusively within the authority of the Owens Valley Board of Trustees, not the Bishop Paiute Tribal Council or any entity of the Bishop Paiute Tribe. The OVBT was created and recognized by the Trust Agreement for Relief and Rehabilitation Grant to Unorganized Bands, approved April 17, 1939, by the Acting Commissioner of Indian Affairs. "It was to this recognized governing body and their successors in office that the Commissioner granted and conveyed the said funds in trust, subject to specified conditions stated in the Trust Agreement. Therefore, the recognized governing body of the Owens Valley Indian Bands is the Owens Valley Board of Trustees." *Id.* This body is comprised and responsible for land assignments and housing grants for members of the Bishop, Big Pine and Lone Pine bands of the Paiute Colony of Owens Valley. Indeed, the Tribal Council did not even exist at the time these original individual and family assignments were granted and consolidated into the land base that lies within the boundaries of Bishop Paiute reservation.

Consistent with the governing authority delegated to the OVBT under the Act of 1937 and resulting Trust Agreement of 1939, a land assignment ordinance was enacted in 1962 by the members of the Bishop, Big Pine, and Lone Pine Reservations "in order to promote the general welfare, safeguard our interests, conserve and develop our lands and resources." FAC, Ex. B, Preamble, Ordinance Governing Assignments on Bishop, Big Pine and Lone Pine Reservations (1962). That ordinance validated all original and existing assignments like that of Ida Warlie's. Ordinance, Article I, Section A(1). It also provided procedures for other tribal members to apply for assignments of "unassigned tribal land," to exchange or relinquish land for reassignment to another tribal member as well as for land to be passed down through the generations through designation by assignees of those they would like to receive the assignment upon death and preference rights for those who are named as beneficiaries or represented in the original assignment. 1962 Ordinance II(D)(5)(6), (9) & (10)(d). Neither the ordinance nor any other federal or tribal legal authority has any provision for family land assignments to escheat to the Bishop Paiute Tribal Council or any other entity of the Tribe. Even where land is properly rescinded by the OVBT or a tribal member holding one dies or relinquishes his interest to another, it remains family land unless and until such time as another family member applies and is assigned a specific assignment within that land. *Id.* These are not issues that need to be resolved at this stage in the proceeding. Aside from establishing the unique context of this case and how it deviates from the most cases involving Indian lands and a Tribe's power to exclude or disenroll people from certain boundaries, the matter of property rights within the Bishop Paiute reservation should be resolved during the merits phase of this case. Petitioners puts this history here because it addresses the sovereignty concerns of ICRA and Santa Clara. Here,

unlike other cases that have come before this court, sovereignty is best enhanced by federal review of the underlying actions by Respondents because they are taking land that is critical to the livelihood and self-determination of members of the Bishop Paiute Tribe and not theirs to take. This is exactly what Congress intended to be reviewed by federal courts.

3. To allow any tribal officer or other entity or member to take land designated exclusively for the survival of individual families and members would eviscerate the legitimate sovereignty authority of the Bishop Paiute Tribe.

Unlike the cases of *Santa Clara, Poodry, Jeffries* and *Tavares*, where the sovereign authority of the tribal actors was not at issue and the principal governing body was a five-member Tribal Council, this is a case in which those acting on behalf of the tribe to restrain Petitioners and eject them permanently from their land lack the power to proceed against Petitioners in the way they have. Since 1962, assignments and intergenerational transfer of land assignments are to be approved by the OVBT within the strictures imposed by Congress, the Trust Agreement and the 1962 Ordinance. As established in the FAC and like many other California Tribes, the primary sovereign authority of the Bishop Paiute Community was and continues to be exercised by consensus through its General Council of all adult members. As established in the FAC, the Bishop Tribal Council is organized as a business committee and "operates under a granted of limited authority" that is secondary and more limited than the General Council. Quair v. Cisco, 369 F.Supp. 948, 954 (E.D.Ca. 2004). Even Respondent acknowledges that the BTC at most is responsible for "day-to-day" business activities and fail to establish anything that would contradict the authority of the General Council and OVBT with respect to a matter of this nature. Motion at 2.

As alleged in the FAC and supporting attachments, the FAC body has voted and rejected the idea of the casino and hotel expansion that precipitated Respondents' efforts to take Petitioners' family land. Petitioners' clear, uninterrupted and lawful interest in the land in question has also been established and is not contradicted by anything set forth in Respondents' motions.[9]

Given these circumstances, federal intervention is both appropriate and necessary to further the Bishop Paiute Tribe's power of self-governance. If Respondents are allowed to continue to exercise authority they do not have under federal or tribal law and in a way that harms and takes land from individual tribal members, the very foundation of the sovereignty of the Bishop Paiute tribe is undermined, its land base, the authority of its primary governing bodies in matters relevant to this dispute, and the livelihood and security of these Petitioners and all others in the community. This would eviscerate the original intentions of the Act of 1937 and Trust Agreement granting the land exchange with Ms. Warlie and other original families and undermine the entire sovereignty of the Tribe. It also contradicts the twin purposes of ICRA and *Santa Clara*. Without federal intervention, the individuals' fundamental rights are likely to continue to be violated without redress while the sovereign interest is diminished by an errant group of tribal officials who have usurped lawful authority delegated to other governing

[9] Even the *Rogers* case that counsel loves to cite supports Petitioners' position regarding the existence of assignments like those at issue in this case, the role of the OVBT, and the rules and procedural rights afforded to those with interests in assigned land that must be followed by the OVBT as well. *Rogers v. Acting Deputy Assistant Secretary*, Indian Affairs, 15 I.B.I.A. 13 (10/16/1986).

bodies and seek to diminish the land set aside for the livelihood, use, occupancy and survival of tribal members like Petitioners.

Petitioners' FAC contains all the necessary allegations and support for this proposition. Federal law and the written laws of the OVBT and Bishop Tribe, easily ascertainable by this court, support these conclusions as well. The case, moreover, may be resolved exclusively on these sources. To the extent tribal custom and tradition should even become at issue, Respondents would have to submit alternative evidence, not presented thus far in the lower court proceedings below, and that would not warrant dismissal. Further factual development of these issues would need to occur at trial or summary judgment, after full exchange of discovery regarding the merits, not at this preliminary state. Petitioner meet their burden of pleading on the matter.

VI. THE FIRST AMENDED PETITION IS RIPE FOR REVIEW BECAUSE THERE WERE NO REMEDIES AVAILABLE TO THE PETITIONERS TO CHALLENGE THEIR DETENTION.

Respondents argue that the Petition is unripe for review, allegedly because Petitioners failed to exhaust administrative remedies. As alleged and fully documented in the FAC and accompanying documents, those assertions are misplaced. At the time of filing the instant petition, there were no remedies available to Petitioners to challenge Respondents detention. This Court was the only forum available. (Dkt 1-Main (Petition), Intro pp. 2-4). This situation changed markedly after the Petition was filed and Petitioners empaneled a new court of appeals in an effort to get the matter back into the tribal realm and avoid review by this court.

At the time of the filing of the Petition there were no tribal remedies available because the Tribal appellate court had been disbanded by the Tribe. *Id.* Contrary to Kimber's assertion in the Motion to Dismiss, Petitioners did not become aware that the appellate court had been disbanded until they filed their Petition for Writ of Mandamus and were informed by the tribal court clerk that this had happened.[10] It was at this point that filing the instant action in federal court became imperative.

It was only ***after*** the FAC's filing that reconstituting the Court by Respondent's was a possibility. Neither Petitioners nor their counsel were informed or participated in the processes leading up to the reconstitution of the appellate court and would have no basis to gauge what activities occurred on what dates beyond what was told to them by opposing counsel and the court clerk. It was not until the March 8 scheduling conference between the parties that counsel for Respondents announced a new panel had been selected and been sworn in; not until March 9 that the judges were apparently sworn in. That court's first official action did not occur until May 16, 2017 that said court took its first action in the matter. Decision and Order Denying Waiver of Filing Fees; Order Denying Stay without Prejudice; Order Denying Writ Without Prejudice. See supra n. 2. Hence, the reconstituted Court ***may*** provide an avenue for legal recourse with the Tribe, an avenue that did not exist previously or at the time of filing the Petitions, that is if the Court remains reconstituted and is not disbanded

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again by Respondents and is able to act independently and in accordance with tribal and federal law.[11]

According to established law, Tribes are permitted to determine their jurisdiction prior to federal court intervention. Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15–16 (1987); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244–47 (9th Cir. 1991).

Additionally, courts have interpreted *National Farmers* as determining that tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. *Crow Tribal Council*, 940 F.2d at 1245 n.3. "Therefore, under *National Farmers*, the federal courts should not even make a ruling on tribal court jurisdiction . . . until tribal remedies are exhausted." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989).

However, there are four recognized exceptions to the requirement for exhaustion of tribal court remedies where: (1) an assertion of tribal jurisdiction is motivated by a desire to

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[11] Although Petitioners remain hopeful the appellate court will turn out to be independent and faithful interpreters of law, as their predecessors were, they are admittedly concerned by the court's initial ruling. That ruling summarily dismissed their Petition based on a technicality about case numbers that is most puzzling, as the case numbers provided by Petitioners in their caption and briefings matched those provided by the court for their various and they refused to stay or otherwise intervene in the lower court's actions such that another contradictory, legally and factually groundless and improper decision was issued by Respondent Kockenmeister once again. Petitioners nonetheless, should the court stay the action, take all measures necessarily to complete the tribal remedies that may yet be available. One problem is that despite their prevailing court order, Petitioners have been subjected to one action after another, in an endless loop that has become very harassing and diminishes their finances and capacity to sustain legal representation as well.

harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule. *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999) (citations omitted).

Administrative or judicial review is futile where the final decision-maker has already made its decision or where there is objective and undisputed evidence of administrative bias, which would render pursuit of an administrative remedy futile. *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988). "The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Jeffredo,* 599 F.3d at 918, *citing Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). There is authority for relaxing the exhaustion requirement where the party can show that exhaustion would be futile or that tribal courts offer no adequate remedy. *Id. citing Selam*, 134 F.3d at 954.

Here, because the appellate court had been previously disbanded by the Respondent Bishop Tribe and tribal officials, the third exception, futility, applies because at the time of filing the petition the Appellate Court did not legally exist for Petitioners to exhaust their tribal remedies.[12] Indeed, an appellate panel was not sworn in until March 9, more than 2

[12] Among the many unfounded allegations in Respondent BTC's Motion is the assertion that "Petitioners knowingly failed to apprise this Court of the fact the Tribe has been in the process of reconstituting the Bishop Paiute Appellate Court since September, 2016." Motion at 8. This is patently false. As stated in the FAC and sworn affidavit attached, Respondents did not even become aware that

months after the filing of this FAC and 7 months after Respondents terminated the contract with the previous appellate judges. Given the timing and manner of disbanding and the fact that Respondents had exclusive control over the selection, contracts, pay and empanelment of the new judges, Petitioners have concerns that further participation in the tribal court will continue to be futile.

Further, Petitioners believe the assertion of tribal jurisdiction, specifically as to Respondent Kockenmeister, satisfies the first exception (harassment) and seems likely to be motivated by the Tribe's and Judge Kockenmeister's interest in forcing them to relinquish their legal claim to the land and/or in retaliation for their actions in defense of their interests. This is demonstrated in the Tribe's request and Judge Kockenmeisters, imposition of various Court orders implemented, unilaterally, without due process to petitioners and Kockenmeisters failure to abide by the Appellate Court's finding on behalf of Petitioners, which he unilaterally and

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the court had been disbanded and the ITCSC's contract terminated until December 12, 2016, when they were in a position to have to file a Petition for Writ of Mandamus in that court and learned from the clerk of ITCSC of this fact. Ronald Napoles, Declaration, December 29, 2016. At that time, no information was available about any process underway for the selection of a replacement panel of judges. In fact, the clerk of court, Ms. Joyce Alvey indicated she would forward the Petition to Respondent Kockenmeister to see how he wished to handle it. *Id.* Respondent Kockenmeister's order of December 19, 2016 confirms this status to the extent it orders a stay of the proceedings "pending the empanelment of the Appellate Court." FAC at Paragraph 12, citing Order of Continuance and Stay Pending Appeal.

The reality is, whatever process went on leading up to the selection of the new judges, Petitioners were not involved or informed of any movement in the empaneling of a new appellate court until the parties' Rule 26(f) scheduling conference held on March 8, 2017. The first written communication to Petitioners or their counsel about the matter was sent by counsel Kimbers on March 10. It indicates that the judges were sworn in on March 9 and describes the process by which they were selected. Before making baseless accusations of impropriety, Respondent Kimber herself would do well to produce the document establishing her own effort, as council for BTC then and now, to communicate information to Petitioners and their counsel about a matter as serious as the disbanding of the appellate court and the steps that were underway to renew it. That lapse is on Respondents, not Petitioners.

overtly refused to abide by. (Dkt 1, pp. 14:50-16:55). Other indicia of futility include the great lengths Respondent Kockenmeister has gone to avoid application of tribal law, his mandate to provide an independent judicial function, and his persistence in making court decisions despite the fact he previously dismissed the matter with prejudice and then once again. Once dismissed, future action was precluded, but Respondent Kockenmeister's dismissals had the effect, if not the intent, of circumventing appellate or federal review at various points, dismissing cases for which Petitions or Appeals were pending and then entering orders immediately thereafter sanctioning and banning Petitioners from their land. FAC, paragraphs 53-67, 94-103, 112-116, 148-74, and *supra* n. 2. Even in the face of a clear appellate decision reversing his decision and remanding the matter for further proceedings, Respondent Kockenmeister has indicated a strong intent to disregard what he perceived to be the most outrageous appellate decision he had ever seen. *Id.* His solution was dismiss the case and then issue orders and entertain further proceedings on the same matter.

It is only now at the 11th hour, two months after the filing of this habeas action and after the Tribe's appellate Court has heretofore been reconstituted that any possible Tribal remedy ***may*** be available. While Petitioners strongly believe that they will not receive justice from Respondent Tribe, Tribal Officials and Respondent Kockenmeister, they are hopeful that the current makeup of the Appellate Court, like the prior disbanded appellate Court, the Intra-Tribal Court of Southern California (ITCSC), may dispense justice and provide due process fairly.

For these reasons they moved to stay the matter. Motion to Stay, Dkt 18. Respondents' bad acts, including the disbanding of the appellate court, warrant a stay of the Federal habeas case, as opposed to dismissal, in order for Petitioners to ***attempt*** to exhaust remedies. The word

attempt is used here because exhaustion will not occur if the appellate court does not remain reconstituted, is unable to execute its duty as independent arbiters of justice effectively, and/or is disbanded once again by Respondents if things do not turn out in their favor.

VI. CONCLUSION

The circumstances set forth in Petitioners' Complaint are exactly the kind unlawful conduct by tribal officials that Congress intended to be reviewed in the federal courts. The relentless efforts by Respondents' to deprive Petitioners of their right and family land in derogation of all authority constitute action that is squarely within Congress' requirement of detention for the purposes of habeas review. There is geographical and physical restraint and judicial control of the kind that has warranted habeas review in other circumstances before the federal courts. Without judicial review, not only will the individual rights of Petitioners guaranteed by ICRA be denied, but the sovereignty of the Bishop Paiute Tribe will be eroded as well. Unless Respondents are stopped from their ability to do so, the Bishop Paiute Tribe will lose its ability to sustain its small land base for the benefit, protection, survival and livelihood of its members, impair the collective health and security of its members, and undermine its legitimate system of governance as established by the Tribe itself and approved by the federal government. Respondents' Motions to Dismiss should be denied.

Dated: June 5, 2017

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