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Attorneys for Respondent Tribal Court
Judge Bill Kockenmeister

**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

**REPLY TO OPPOSITION TO 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

Petitioners' Opposition to Respondent Kockenmeister's Motion To Dismiss Under Rule 12 ("Opposition") clarified for the first time that Petitioners only seek prospective injunctive/ declaratory relief against Kockenmeister in his official capacity for violation of 24 U.S.C. Section 1301, et seq., the Indian Civil Rights Act ("ICRA"). (Opposition, 4:10-12.)¹

¹ This concession by Petitioners is important because the relief sought in the Prayer of the First Amended Petition ("FAP") is much broader in scope. (FAP, 40-41:10-4.) Thus, in the event Kockenmeister's Rule 12 Motion is denied, the scope of litigation against him will be narrowed.

At the outset, Kockenmeister concedes that if the Court has jurisdiction under ICRA and because the relief sought is “merely” prospective injunctive/declaratory relief against Kockenmeister in his official capacity, then the doctrine of judicial immunity may not apply.

However, Kockenmeister maintains Petitioners have failed to state a claim upon which habeas corpus relief can be obtained. Moreover, Kockenmeister maintains that Petitioners did not respond to the exhaustion and jurisdiction arguments under ICRA and therefore Petitioners conceded those issues.² (*Ritchie v. United States*, 451 F.3d 1019, 1026, n.12 (9th Cir. 2006) [when not raised, the argument is waived]; *U.S. v. Kitsap Physicians Service*, 314 F.3d 995, 999 (9th Cir. 2002) [failure to address evidence in its opposition waived any arguments related to it].)

Petitioners Have Failed To State A Claim Upon Which Habeas Corpus Relief Can Be Granted Under ICRA.

The two prerequisites for maintaining an action under ICRA are: (1) the petitioner must be detained, and (2) the petitioner must first exhaust tribal remedies. Petitioners’ Opposition fails to show either prong is met.

a. The Opposition fails to establish that Petitioners have been detained.

The Opposition fails to allege, much less demonstrate, that Petitioners were physically detained by Kockenmeister. (See *Tavares v. Whitehouse*, 2017 WL 971799, at 6 (9th Cir. March 14, 2017) [federal court lacked jurisdiction to review a tribal member’s habeas corpus petition brought pursuant to the ICRA for “temporary” ten-year restriction from significant portions of the reservation].) Similarly, Petitioners cannot satisfy the first prong for habeas relief based upon the restriction from limited portions of Tribal lands and therefore cannot state a claim against Kockenmeister.

b. Petitioners failed to exhaust tribal remedies.

Petitioners also did not address the failure to exhaust tribal remedies argument in the

² To be accurate, Petitioners’ Opposition claim to “reference and incorporate all facts and arguments,” raised in the 39-page Opposition to the Bishop Paiute Council’s Rule 12 Motion relative to exhaustion and jurisdiction. (Opposition, 1:2-14.) However, that incorporation by reference is subject to an Objection to Petitioners’ Request to Exceed 25 Pages. (Docket No. 31.) In addition, if the Bishop Paiute Council’s Rule 12 Motion is granted on either of those two grounds, then Kockenmeister’s Rule 12 Motion should be granted on those same grounds. Thus, in the interest of brevity, those arguments are not repeated in this Reply Brief.

Kockenmeister Opposition. The reason is simple: Kockenmeister, not Petitioners, disclosed to this Court that Petitioners dismissed their appeal before the Bishop Paiute Appellate Court on or about June 5, 2017, rendering this entire action moot based upon the failure to exhaust tribal remedies. (See Docket Nos. 28 and 28-1.) Additionally, Petitioners conceded Kockenmeister dismissed the underlying tribal case against Petitioners in its entirety, including the related Temporary Protective Orders, on March 21, 2017. (See Docket Nos. 18, 18-1, at 8.) Kockenmeister's dismissal of the underlying tribal case, including the vacating of the Temporary Protective Orders, and Petitioners' dismissal of their appeal is the proper subject of Request for Judicial Notice pursuant to FRE 201(b)(2). "The court need not accept as true, allegations that contradict facts which may be judicially noticed." (*United States v. S. California Edison Co.*, 300 F. Supp. 2d 964, 970 (E.D. Cal. 2004).) "For example, matters of public record may be considered, including pleadings, orders, and other papers filed with the court or records of administrative bodies." (*Id.*) Kockenmeister hereby requests judicial notice of Docket No. 28-1 pursuant to FRE 201.

Thus, the argument of failure to exhaust tribal remedies could not be addressed and instead had to be conceded. The resulting inescapable conclusion is that because Petitioners failed to exhaust their administrative remedies, they cannot satisfy the second prong for habeas relief and thus cannot state a claim.

CONCLUSION

This motion should be granted and Respondent Kockenmeister should be dismissed from this action with prejudice. Further, if this motion is granted, Kockenmeister continues to ponder the viability of a Rule 11 motion prior to the Court's entry of judgment.

Dated: June 13, 2017

BRADY & VINDING

By: /s/Michael E. Vinding
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 Judge Bill Kockenmeister