JOHN D. KIRBY, ESQ. (SBN 066432)
LAW OFFICES OF JOHN D. KIRBY, A.P.C.
9747 Business Park Avenue
San Diego, California 92131
(858) 621-6244
(858) 621-6302 fax

MARSHALL S. RUDOLPH, County Counsel (SBN 150073)
COUNTY OF INYO
224 North Edwards Street, P.O. Box M
Independence, California 93526
(760) 878-0229

Fees Exempt, Gov't. Code §§ 6103 and 6103.5

Attorneys for Defendants INYO COUNTY, CALIFORNIA; WILLIAM LUTZE, Inyo County Sheriff; and THOMAS HARDY, Inyo County District Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA (FRESNO DIVISION)

BISHOP PAIUTE TRIBE, Plaintiff, vs. INYO COUNTY, a governmental entity, WILLIAM LUTZE, Inyo County Sheriff; and THOMAS HARDY, Inyo County District Attorney, Defendants.	Case No. 1:15-CV-00367 DAD-JLT POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANT WILLIAM LUTZE, INYO COUNTY SHERIFF, TO DISMISS ALL CLAIMS OF AMENDED COMPLAINT AGAINST HIM Date: October 17, 2017 Time: 9:30 a.m. Courtroom: 5, United States Courthouse, 2500 Tulare Street, 7th Floor, Fresno, CA 93721 District Judge: Hon. David A. Drozd Magistrate: Hon. Jennifer L. Thurston Complaint Filed: 3/6/15 Trial Date: Not Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I

INTRODUCTION

This motion is made by defendant WILLIAM LUTZE, the elected Sheriff of Inyo County, California, a political subdivision of the State of California. The motion seeks to dismiss all claims against Sheriff Lutze that are made against him in the Amended Complaint filed by plaintiff Bishop Paiute Tribe ("tribe") on March 30, 2015 (the "Amended Complaint," or sometimes "AC"). All of those claims are claimed by the tribe to arise out of the Sheriff's allegedly wrongful sending of a letter to the Bishop Paiute Tribal Police Department, said letter dated January 6, 2015, and entitled "Cease and Desist Order."

In essence, plaintiff tribe claims that this letter by Sheriff Lutze somehow wrongfully proscribes, and threatens criminal arrest, for the exercise by the tribe of "tribal-inherent" police actions, against non-Indians, within Indian County (here, the tribe's reservation), by persons hired by the tribe to enforce its own laws. The persons hired by the tribe are not California peace officers, and are not federal officers commissioned under the Bureau of Indian Affairs' Special Law Enforcement Commission (or "SLEC") program. The training, recurrent training, background checks (if any), and other qualifications of these persons are completely left up to the tribe – which may, of course, change, or eliminate, any requirements at any time.

The ground for the motion herein made by Sheriff Lutze is that, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Amended Complaint fails to state a claim against him upon which relief can be granted.

II

SUMMARY OF MOTION

This motion to dismiss is made on each of the following independent grounds:

1. The issuance of said letter by Sheriff Lutze was not unlawful or wrongful. The letter properly orders tribal officers, who are not California peace officers (nor federal SLEC officers), to do two things. Those two things are (1) stop the unlawful exercise of California

peace officer authority; and (2) stop the unlawful possessing (carrying) of firearms outside of tribal property, and upon non-tribal County property, such as the carrying of firearms into state courthouses when making court appearances;

2. The Sheriff's letter does not order cessation of lawful tribal authority; only unlawful California peace officer authority;

3. The claimed existing federal law that the tribe asserts in its Amended Complaint, and Prayer for Relief, and for which the tribe is herein asking the court for a "clarification and settling," is a claim that a tribe has "tribal-inherent" authority permitting tribes to exert jurisdiction over non-Indians to, apparently without any limits stop them (under unspecified conditions), restrain them (in unspecified ways and in unspecified places), detain them (for unspecified time periods), and investigate them (in unspecified manners) for possible or suspected violations of tribal, state and federal law. Such claimed tribal-inherent authority is not supported by the cases cited in the pleadings, and does not exist;

4. The establishment of any additional federal law providing for authority and jurisdiction by Indian tribes over non-Indians is within the proper purview of congress – and not the Court; and

5. The court should, respectfully, decline the invitation of the tribe to issue a "clarification and settling" of its claimed tribal-inherent authority over non-Indians, as is the court's right to do under the Declaratory Relief Act (28 USC § 2201), and dismiss this case.

This is so because any pronouncement by the Court of such a tribal-inherent right will lead to untold issues, including without limit the lack of accountability of tribes to non-Indians who suffer wrongs as a result of future conduct by tribal officers wielding this new power. This is because a tribe, of course, has sovereign immunity from civil suit for the wrongs of its officials and officers. The result is that non-Indians who suffer future wrongs (from excessive force, loss of liberty, other types of injuries, and even death), will, because of a tribe's immunity to civil suit, be without recourse for any wrongs any tribal officers have committed against them.

The necessity of such recourse has been amply demonstrated by the value of 42 USC § 1983 actions against state law officers and their employers for violation of constitutional and other civil rights, and by the value of a *Bivens* action against federal officers and their employers for violation of those same rights.

Should the tribe be successful in obtaining a Court-ordered expansion of the currently recognized existing tribal rights to address trespassers, enforce their own laws against tribal members, etc., as the same are recited in the cases of *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (see AC, paragraphs 35 and 38); *United States v. Becerra-Garcia,* 397 F.3d 1167 (9th Cir. 2005) (see AC, paragraph 39); and *State of Washington v. Schmuck*, 850 P.2d 1332 (1993),[1] persons who are victims of this new-found power of tribes and tribal officers will have no recourse against offending tribal-officers, or their tribal-employers, for wrongs committed by them, due to tribal sovereign immunity. On the other hand, those same persons, if victims of the same wrongs committed by state or federal officers, would have recourse against the offending officers, and their city, county, state or federal employers, under either a 42 USC § 1983 action, or a *Bivens* action.

III

PLAINTIFF DOES NOT CLAIM ITS TRIBAL OFFICERS ARE CALIFORNIA PEACE OFFICERS; AND TRIBAL OFFICERS INDEED ARE NOT SUCH OFFICERS

California Penal Code § 830.1 sets forth who are California peace officers, as well as the extent of their authority. Section 830.1 provides in part:

> **§ 830.1. Persons who are peace officers; extent of authority**
>
> (a) Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a county, any chief of police of a city or chief, director, or chief executive officer of a consolidated municipal public safety agency that performs police functions, any police officer, employed in that capacity and appointed by the chief of police or chief, director, or chief executive of a public safety agency, of a city, any chief of police, or police officer of a district, including police

[1] Sheriff Lutze certainly does not dispute the law and holdings of these cases.

> officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department .... is a peace officer....

The statute goes on to identify other California peace officers (such as the Attorney General), but the statute does not identify and include officers of Indian Tribes, or of their tribal police departments, as California peace officers. Simply stated, tribal police officers are not California peace officers. And, also, simply stated, tribal police officers do not, therefore, have the authority of California peace officer. Thus, they may not lawfully exercise California peace officer authority anywhere in the state.

This is critical, of course, because Sheriff Lutze's letter to the tribal police department properly advised the tribal police department of these same facts. The letter also provided an effective 10-day grace period for the tribal police department to get the word out, and stop the unlawful exercise of California peace officer authority by its officers.

IV

CONTENT AND DIRECTION OF LETTER BY SHERIFF LUTZE WAS PROPER

The letter from Sheriff Lutze that plaintiff tribe alleges is wrongful, and somehow wrongfully intimidated it, and infringed upon its rights, is dated January 6, 2015, and is attached to the Amended Complaint as Exhibit 3. The letter starts out by advising the tribal police department that its officers are "continuously committing serious violations of California criminal statutes and that these actions have seriously endangered the public welfare both within and outside of tribal territory." 1/6/15 Letter, page 1. The letter goes on, at pages one and two, to advise among other things that:

a. The Sheriff's office "... has repeatedly given notice to Tribal Police that its officers have been illegally exercising state police powers under color of authority of Bishop Paiute tribal law...." (underscore supplied)

b. It cannot be overly emphasized to "... Tribal Police that its employees are NOT California peace officers and also are NOT federal officers."

c. "Alarmingly, Tribal Police officers have been employing unlawful force on subjects during the unlawful exercise of [California peace officer] authority ...."

d. "… documented instances of illegal exercises of law enforcement authority include, but are not limited to:

- Unlawful operation of emergency vehicles off tribal property
- Violations of the California Vehicle Code …
- False arrests
- Battery (both felony and misdemeanor)
- Illegal home entries
- Illegal searches of persons and property
- Possession of firearms in public (… outside tribal property)"

The letter, which is the basis of all of the claims by plaintiff in this lawsuit, went on to state the following, and said letter is, in turn, the basis of this motion to dismiss such claims:

> "**Therefore**, this Office orders that Tribal Police immediately (A) cease and desist the unlawful exercise of California peace officer authority both within and outside tribal property and (B) cease and desist possessing firearms outside tribal property (e.g. court appearances) …." (Underscore supplied)

It is the order to stop the "unlawful exercise of California peace officer authority" and stop the unlawful "possessing firearms outside tribal property (e.g. court appearances)" in violation of California law, that plaintiff here complains of as being wrongful, intimidating, and inhibiting of tribal rights. However, these admonishments do no such thing – they instead properly admonish, and warn against the continuation unlawful exercise of California peace officer authority, and the unlawful possession of firearms outside of tribal property.

Nowhere does Sheriff Lutze order the cessation of lawful tribal officer authority. The Sheriff's letter instead properly orders cessation of unlawful California peace officer authority. Such is clearly a proper exercise of the Sheriff's law enforcement and peace-keeping duties.

V

CLAIMED EXISTING FEDERAL LAW THAT TRIBE ASSERTS IN AMENDED COMPLAINT, AND FOR WHICH TRIBE IS REQUESTING A "CLARIFICATION AND SETTLING," IS NOT SUPPORTED IN AUTHORITY CITED, AND DOES NOT EXIST

As has been stated in filings made earlier in this litigation by the tribe, the tribe is seeking a "clarification and settling" of what it claims is a "tribal-inherent" authority to stop

(under unspecified conditions), restrain (in unspecified ways and in unspecified places), detain (for unspecified time periods), and investigate (in unspecified manners) non-Indians on tribal land for what the tribe or its officials determine (in some unspecified process or way) may possibly be a violations of (apparently, any and all) "tribal, state and federals laws." See Amended Complaint, pg 2, para 1, lines 2 -4; and Prayer of Amended Complaint, pg 15, para 45, lines 22.

The tribe is apparently asserting that it already has these broad rights, and that it wants this Court to bless this assertion.

However, the tribe gives no legal precedent for this claimed real-life, existing, tribal-inherent jurisdiction and authority over non-Indians. The tribe's assertion that this tribal-inherent authority already belongs to it appears to arise from existing authority granted in the cases of, primarily, the following cases: *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (see Complaint, paragraphs 35 and 38); *United States v. Becerra-Garcia,* 397 F.3d 1167 (9th Cir. 2005) (see Complaint, paragraph 39); and *State of Washington v. Schmuck*, 850 P.2d 1332 (1993) (see Complaint, paragraph 40).

A reading of these cases reveals, however, that they do not prescribe any of the claimed tribal-inherent authority or jurisdiction over non-Indians with regard to violations of either tribal law, or state or federal law.

What they do stand for, along with the tribe's cited case of *Duro v. Reina*, 495 U.S. 676, 697 (1990) (see Amended Complaint, para 37), and what they confirm, is the following: (1) tribes have the inherent right to exclude trespassers from their lands; (2) tribes also have the right to establish tribal laws which are applicable to tribal members; and (3) when, during the course of a tribal law enforcement officer's investigation into either situations (1) or (2) above,[2] it is discovered that the person being investigated has violated a state or federal

[2] And where, as in California, the tribal law enforcement officer is not otherwise cross-deputized or appointed by the local Sheriff or other appropriate law enforcement official per California Penal Code § 830.6(b), and is not a federal law enforcement officer as described in

criminal law, the tribal authority (tribal law enforcement officer) may detain that person, whether the person is an Indian or a non-Indian, and turn him or her over to a properly credentialed state of federal law enforcement officer for whatever action that officer deems is appropriate.

This was demonstrated and approved in the case of *Ortiz-Barraza*, supra, a case involving whether evidence (marijuana) should be excluded in a criminal trial in federal court where the defendant was charged with smuggling the marijuana into the country from Mexico.

In this case, a Papango Tribal Law Enforcement Officer, who was not cross-certificated as an Arizona peace officer (*Ortiz-Barraza*, supra, page 1179), and was not a BIA federal law enforcement officer with a SLEC commission (*Ortiz-Barraza*, supra, page 1179), stopped the defendant, Mr. Ortiz-Barraza, for suspected trespass in violation of the Tribe's Article 5, Section 3 (trespass) ordinance, as well as a Tribal Code provision that made any non-tribal member who committed a state or federal crime on the reservation subject to forcible ejection from the reservation (*Ortiz-Barraza*, supra, pgs 1179-1180).

Upon stopping Mr. Ortiz Barraza, the tribal officer discovered the marijuana, and turned him over to the U.S. Drug Enforcement Administration. The Court held that the marijuana discovered by the tribal officer, while investigating the suspected trespass by Mr. Ortiz-Barraza (the smuggling making Ortiz-Barraza subject to forcible ejection from the reservation by the Tribal Code as a trespasser), was admissible evidence, because the stop, detention and search by the tribal officer was performed in the course of *investigating tribal law violations re trespass and conduct exposing the perpetrator to forcible ejection under tribal law (smuggling).* The tribal officer was thus investigating a trespass and tribal law

---

Penal Code§ 830.8(a), with respect to California state law; and where, also as here, the tribal law enforcement officer is not otherwise commissioned by the United States Bureau of Indian Affairs (BIA) to have federal law enforcement powers pursuant to the BIA's Special Law Enforcement Commission (SLEC) program, per 25 C.F.R. § 12.21, et seq.

violation – not an Arizona state law or federal law violation per se. *Ortiz-Barraza*, supra, page 1180.

The case of *Becerra-Garcia*, supra, is similar – another suppression of evidence case. In *Becerra-Garcia*, tribal rangers stopped a van, on the Tohono O'odham Reservation, that was found to contain twenty illegal aliens being smuggled into the USA. In finding the evidence admissible. and the stop proper, the Court of Appeal stated, at page 1172 of the opinion:

> "The rangers stopped Becerra-Garcia to enforce the criminal trespass laws of the tribal nation." (underscore supplied)

Thus, once again, the tribal law enforcement officer was investigating a potential tribal law violation – not an Arizona state or federal criminal law violation.

And finally, in *Schmuck*, supra, the Washington Supreme Court discussed this area of the law in the context of a person who was stopped on the reservation, by Tribal Law Enforcement Officer Bailey, for a suspected violation of the Suquamish Tribe's traffic laws prohibiting tribal members from speeding and running a stop sign. Upon stopping the vehicle, the driver – Schmuck – was identified as a non-Indian. However, Tribal Officer Bailey also smelled intoxicants coming from Mr. Schmuck, Mr. Schmuck admitted to drinking, and Mr. Schmuck failed a "few field sobriety tests" which he voluntarily took. *Schmuck*, supra, page 377. The driver, Mr. Schmuck, was thereupon detained until he could be turned over to the Washington State Patrol for appropriate state criminal charges of DUI under state law.

The Court held that the stop for suspected violation of tribal law was proper as follows:

> "We hold Suquamish Tribal officer Bailey had the requisite authority to stop Schmuck to investigate a possible violation of the Suquamish traffic code and to determine if Schmuck was an Indian, subject to the Code's jurisdiction." *Schmuck*, supra, page 383.

Thus, once again, the tribal officer was making his stop to investigate a possible tribal law violation by an Indian, and not state or federal criminal law violation by a non-Indian.

Accordingly, none of the cases cited by the plaintiff tribe herein support a claim of "tribal-inherent" authority to simply (for reasons of suspicion to the tribe or its officers) stop,

restrain, detain, and investigate non-Indians for suspected violations of tribal, state or federal criminal law. Yet – that is what the tribe here is asking this Court to declare, and "clarify and settle," and thereby bless, by way of the requested declaration that such is indeed the law.

Such is not the law; no citation to existing authority by the tribe so holds; and the Court should not so declare. Accordingly, the tribe's Amended Complaint should be dismissed as failing to state a claim upon which the relief being requested can be granted.

VI

ESTABLISHMENT OF FEDERAL LAW PROVIDING JURISDICTION BY INDIAN TRIBES OVER NON-INDIANS IS WITHIN THE PURVIEW OF CONGRESS, AND NOT THE COURTS

Congress is the governmental branch that has plenary power and authority over Indian tribes, and Congress is the governmental branch that has the power to establish laws providing for tribal authority over to non-Indians. This was at issue in the case of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), where the Supreme Court, in ruling that tribes did not have authority to try non-Indians in Indian courts, held, at page 212:

> "Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. **But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians**. They have little relevance to the principles which lead us to conclude **that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians**." (emphasis supplied)

Accordingly, just as in *Suquamish*, supra, where the Supreme Court left it to Congress to weigh the considerations in deciding whether Indian tribes should have authority to try non-Indians, and where the Supreme Court held that "Indian tribes do not have inherent jurisdiction to try and to non-Indians," here, too, the answer to the question of whether Indian tribes should have the authority and right to stop, detain, restrain, and investigate non-Indians for suspected violations of tribal, state and federal law, should likewise, and respectfully must, be left to Congress.

VII

COURT SHOULD DECLINE TRIBE'S INVITATION TO RENDER "CLARIFICATION AND SETTLING" OF TRIBE'S DESIRED POWER TO RESTRAIN & INVESTIGATE NON-INDIANS, AS IS THE COURT'S RIGHT UNDER DECLARATORY RELIEF ACT

The tribe is here inviting and requesting that this Court issue, and declare, a "clarification and settling" of uncharted federal Indian law, with regard to a claimed inherent right, of all Indian tribes in the United States, to stop non-Indians (under unspecified conditions), restrain non-Indians (in unspecified ways and in unspecified places), detain non-Indians (for unspecified time periods), and investigate non-Indians (in unspecified manners) for possible or suspected violations of tribal, state and federal law.

The tribe's invitation is by way of its action under the Declaratory Relief Act (28 USC 2201); and whether or not the Court hears this action is left to the Court's discretion. This is because the Declaratory Relief Act states that Courts *may* declare rights. "This is an authorization, not a command to do so. [Brillhart v. Excess Ins. Co. of America (1942) 316 US 491, 494…]" California Practice Guide, Civil Procedure Before Trial, The Rutter Group, Section 10:45.

The tribe's invitation should be declined, for such a claimed tribal-inherent right, and tribal authority over non-Indian citizens and non-Indian residents, is not supported by the cases cited in the tribe's Amended Complaint, and does not exist. This has been outlined and shown above in the discussion of the authorities the tribe cited in its Amended Complaint as, allegedly (but not actually), enabling such a wide-ranging order and declaration. More specifically, and in fact, the tribe invites this "clarification and settling, of this claimed new law, even though, as was shown above in the analysis of the *Ortiz-Barraza, Becerra-Garcia, Schmuck,* and *Duro* cases, no Court of Appeals or Supreme Court case, and no other authority, has ever held any aspect of this broad, far-reaching, and dramatic newly-claimed right.[3]

[3] The ruling being sought is well outside of the existing right of a tribal law enforcement officer to ultimately detain a non-Indian, who was the subject of a proper stop for a suspected violation by an Indian of a tribal law, when the officer could not, of course, determine if the

As already stated, the Court is not required to accept this invitation, and has the well established discretion to decline to issue such a dramatic declaration under 28 U.S.C. § 2201. See also *A. L. Mechling Barge v. United States*, 368 U.S. 324, 333 (1961); *Chese-brough Pond's, Inc v. Faberge, Inc.*, 666 F.2nd 393, 396 (9th Cir. 1982).

Instead, under the circumstances of this case, the Court should exercise its sound discretion, and decline the tribe's request to issue a first-impression, and dramatic, declaration of Indian authority over non-Indians. The Court should instead and leave the matter to Congress, where it, respectfully, properly resides, just as was the case in *Suquamish,* supra.

To do otherwise, and issue a ruling creating the requested tribal-inherent rights over non-Indians, will, as outlined above, lead to untold issues, including without limit the lack of accountability of tribes to non-Indians who suffer wrongs as a result of future conduct by tribal officers wielding this new power.

This is because a tribe has sovereign immunity from civil suit for the wrongs of its officials and officers. The result here would be that non-Indian members of society, who suffer future wrongs (from excessive force, loss of liberty, other types of injuries, and even death), as a result of a tribal officer action, will – because of a tribe's immunity to civil suit, be without recourse for any wrongs any tribal officers (or their employing tribes) have committed against them.

The necessity for such recourse has been amply demonstrated by the value of 42 USC § 1983 actions against state law officers and their employers for violations of constitutional and other civil rights, and by the value of a *Bivens* action against federal officers and their employers for violation of those same rights.

Should the tribe be successful in obtaining a Court-ordered expansion of the currently recognized existing tribal rights to address trespassers, enforce their own laws against tribal

---

person being stopped was an Indian who would be subject to the tribal law, or a non-Indian who would not be subject to the tribal law; and when, after the proper stop, the non-Indian was found to be in violation of some state or federal law (such as DUI, or smuggling).

members, etc., as the same were explained in the cases of *Ortiz-Barraza v. United States*, et al., discussed above, then persons who are victims of this new-found power of tribes and tribal officers will have no recourse against offending tribal-officers, or their tribal-employers, for wrongs committed by them, due to tribal sovereign immunity. On the other hand, those same persons, if victims of the same wrongs committed by state or federal officers, would have recourse against the offending officers, and their city, county, state or federal employers, under either a 42 USC § 1983 action, or a *Bivens* action.

And finally, as a closing note here, if the tribe really wants the right to stop, detain, restrain and investigate non-Indians for suspected violations of state and federal criminal law, they can go through the already established procedures to be cross-deputized, and otherwise lawfully recognized and empowered by state and/or federal law enforcement authorities, under California Penal Code §§ 830.6 and 830.8, and pursuant to the Bureau of Indian Affairs procedures for obtaining Special Law Enforcement Commission (SLEC) status from the federal government, as the same is authorized, and an extensive program already set up and ongoing, pursuant to 25 C.F.R. § 12.21, et seq.

VIII

CONCLUSION

By way of all of the foregoing, the motion herein made by defendant William Lutze, Sheriff of Inyo County, for dismissal of all claims in the Amended Complaint against him, should be granted without leave to amend.

Dated: August 14, 2017

Respectfully submitted,

LAW OFFICES OF JOHN D. KIRBY,
A Professional Corporation

By _____
JOHN D. KIRBY
Attorneys for Defendant WILLIAM LUTZE, Inyo County Sheriff