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BISHOP PAIUTE TRIBE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| BISHOP PAIUTE TRIBE,<br><br>Plaintiff,<br>vs.<br><br>INYO COUNTY; WILLIAM LUTZE, Inyo County Sheriff; THOMAS HARDY, Inyo County District Attorney.<br><br>Defendants. | Case No. 1:15-CV-00367-DAD-JLT<br><br>PLAINTIFF'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS<br><br>Date: October 17, 2017<br>Time: 9:30 A.M.<br>Courtroom: 5, United States Courthouse, 2500 Tulare Street, 7th Floor Fresno, CA 93721<br><br>District Judge: Hon. David A. Drozd<br>Magistrate: Hon. Jennifer L. Thurston<br>Complaint Filed: 03/16/2015<br>**Trial Date: Not Set** |

## INTRODUCTION

Defendants, pursuant to FRCP 12(b)(6), filed independent Motions to Dismiss on the grounds that Plaintiff ("Tribe") has failed to state claims upon which relief can be granted.

The Tribe seeks declaratory relief asking for clarification and settling, as a matter of federal law, its inherent authority over non-Indian offenders who violate tribal and state law on tribal lands, as well as, prospective injunctive relief preventing the Defendants from further arrests and prosecutions of its Law Enforcement Officers when exercising tribal authority in compliance with the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 et. seq. As demonstrated below, each Defendant has acted directly or indirectly in creating the current controversy at the heart of the Tribe's complaint, and is therefore subject to the Tribe's request for equitable relief.

## LEGAL ARGUMENT

Under Rule 12(b)(6), "dismissal for failure to state a claim is proper 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir.1993). Rule 12(b)(6) should be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 1355–56 (1990). Moreover, a court "must accept all material allegations in the complaint as true, and construe them in the light most favorable [to the plaintiff]." *NL Industries v. Kaplan*, 792 F.2d 896 (9th Cir.1986). The Tribe has met this standard and the Defendants' Motions to Dismiss should be denied

A. Inyo County is Subject to Declaratory and Injunctive Relief Because the Inyo County Sheriff was Acting as a County Official and Policymaker When Investigating and Arresting the Tribe's Law Enforcement Officer in Violation of Established Federal Law.

In consultation with Defendants' legal counsel, it was agreed that the Tribe's relief against the County is limited to the actions of the Inyo County Sheriff, and not the District Attorney — under federal and state case-law holding that a District Attorney carrying out his or her prosecutorial functions is acting as a state—not county, official. *Bishop Paiute Tribe v. County of Inyo et.al*, 275 F.3d 893, 908-909 (9th Cir. 2002), (*vacated and remanded on other grounds* 538 U.S. 702 (2003) citing *Pitts v. County of Kern,* 17 Cal.4th 340 (1998).

The County moves to dismiss the Tribe's Amended Complaint on the grounds that the County does not, and cannot, control the actions of the County Sheriff. Because the Sheriff acts within his discretion and capacity as independent elected official, no relief for his alleged "wrongful" acts can be obtained from the County. Contrary to the County's assertion, federal law has established that pursuant to California law, a sheriff is a "county official" and that a County is liable if the Sheriff's actions complained of were taken in his/her capacity as a final County policymaker.

In *Bishop Paiute Tribe v. County of Inyo et.al*, supra., the County, much like here, sought to distance itself from the actions of its then Sheriff in an effort to avoid responsibility for his wrongdoings alleged in the Tribe's 42 U.S.C. §1983 action. In that case, the Tribe sought monetary damages, declaratory and injunctive relief from the County, the County Sheriff and District Attorney for the improper issuance and execution of a search warrant that resulted in the seizure of tribal documents from the Tribe's gaming facility located on tribal lands. The court held that the County *was responsible and liable* for the actions of its Sheriff because he was a County official and was a final County policy maker at the time the search warrant was obtained and executed against the Tribe.

In reaching its holding the court made a two-part inquiry on when a local government is liable for an official's conduct: (1) did the official have final policymaking authority concerning the action alleged to have caused the particular violation of the federal constitutional, statute or law; and (2) was the official policymaker acting for the local government for the purposes of the particular act. Both inquiries require the court to look to the California Constitution, applicable statutes, and state case law. *Bishop Paiute Tribe v. Inyo County*, 275 F.3d at 906 citing *McMillian v. Monroe County*, (Alabama), 520 U.S. 781 (1997).

Responding to the first inquiry and after its review of California law, the court conclusively found, that "[T]here is no doubt that the" Sheriff has "final decision making authority to obtain and execute search warrants for the County of Inyo." *Bishop Paiute Tribe v. Inyo County* 275 F.3d at 910.

Turning to the second inquiry, the court followed the analytical framework set out in *McMillian,* where the Supreme Court, after careful review of the Alabama Constitution and state law, found the Monroe County Sheriff and Monroe County District Attorney were state officials and policymakers. The court in *Bishop Paiute Tribe* found that unlike the Alabama Constitution in *McMillian,* the California Constitution did not designate sheriffs as a member of the executive branch, but instead they were defined under Article XI, "Local Government", Section 4 which provides that the "County Charter shall provide for … an elected sheriff…" Also, distinguished from *McMillian*, Article IV, Section 8 of the Constitution does not provide for the impeachment of a sheriff. Instead, sheriffs are removed from office following the accusations of the County Grand Jury. California Government Code ("Gov. Code") §3069. Id. at 907.

The court also found relevant that under California statutory law, specifically Gov. Code §24000(a) and (b) it defines Sheriffs as a "County Officers" and that the [County] Board of

Supervisors set their salaries. Gov. Code §25300. Sheriffs must be registered to vote in their respective counties. Gov. Code §24001. The county has authority to supervise the sheriff's conduct and use of public funds. Gov. Code §25303. Finally, the Court looked at Gov. Code §26603 which requires sheriffs in California to attend upon and obey state courts within their county. Id. at 907.

While the Court acknowledged California Constitutional and statutory provisions providing for supervisory authority by the Attorney General over sheriffs, it found:

> However, "supervision by the Attorney General does not alter the status of the sheriff [and district attorney] as elected county officials." *Brewster v. County of Shasta*, 112 F. Supp. 2d 1185, 1190 (E.D. Cal. 2000); See also *People v. Brophy*, 120 P. 2d 946,953 (Cal.Dist.Ct.App.1942) (Noting that constitutional oversight does not "contemplate absolute control and direction of such officials …Especially is this true as to sheriffs and district attorneys…") Id. at 907-908.

The County further argues that it is specifically prohibited under Gov. Code § 25303 from obstructing the "investigative functions of the sheriff …" However, when confronted with a similar argument, the federal court in *Brewster v. County of Shasta,* 112 F. Supp. 2d 1185, 1190 (E.D. Cal. 2000), looked to the California Supreme Court holding in *Dibb v. San Diego County*, 8 Cal. 4th 1200 (Cal. 1994). Drawing from *Dibb* the court found:

> ... [the Supreme Court] rejected the argument that §25303 limited the county's authority to monitor county officials solely to their fiscal conduct. (citation omitted) Rather the court observed that, under that statute, a county board of supervisors has the power to 'supervise the county officials in order to assure that they faithfully perform their duties.' The court further explained that 'the operations of a sheriff's department …and conduct of employees of th[at] department are legitimate concerns of the board of supervisors.' The court did not perceive that such general supervisorial powers were in conflict with the obligation of the board not to obstruct the sheriff's offices investigative function. *Brewster*, 112 F. Supp. 2d 1189-1190.

Both *Brewster* and *Dibb* are cited as support by the 9th Circuit in the *Bishop Paiute Tribe v. Inyo County* case. *Id.* at 907 and 910.

As in *Bishop Paiute Tribe,* the County is responsible for the actions of the Sheriff—a county policymaker—when he violated established federal law by obtaining and executing an arrest warrant against the Tribe's law enforcement officer. The County is also responsible for the Sheriff's actions as a final policymaker when he issued his January 6, 2014 "Cease and Desist" Order threatening the Tribe, and its Law Enforcement Officers, with future criminal arrests, prosecutions and injunctive action, based on the Tribe's Police Officers carrying out their legal and lawful duties. This Order demonstrates a patent misunderstanding of federal law and inherent tribal authority. The Order does not cite any legal authority, yet seemingly empowers the Sheriff to determine what is and is not the lawful exercise of tribal police authority over non-Indians. As a matter of County policy, Inyo County is coextensively liable for its policy, as expounded in the Sheriff's "Cease and Desist" Order as the Sheriff.

The Tribe's legal action against the County, seeks only to clarify the law, and settle the ongoing controversy between a County official, the Sheriff—whose policies and actions have and will continue result in further injury to the Tribe and threaten the peace and security on its Reservation for tribal and non-tribal members alike.

B. The Inyo County Sheriff's January 6, 2015 "Cease and Desist" Order Threatening Future Arrests and Prosecutions of Tribal Officers Violates Established Federal Law and the Tribe's Inherent Authority over Actions Involving Non-Indians.

Defendant Lutze, moves for dismissal on the grounds that his "Cease and Desist" Order to the Tribe merely placed the Tribe on notice of the illegal actions of its Police Officers, who are not California peace officers, and that the Order was neither unlawful nor wrongful. Defendant Lutze had no legal authority to issue his Order and made inaccurate statements regarding the authority of Tribal Police Officers and federal law. The Order was transmitted with

the sole intent to intimidate and harass the Tribe, and dissuade its Officers from carrying out their duties. Given the events that took place the day before the issuance of the Order, it is clear that it was a calculated overreach by a County official. If the Order was, as Defendant Lutze claims, simply placing the Tribe on notice, should it not have been issued before the arrest and criminal charges against Office Johnson had taken place?

Defendant Lutze's January 6, 2015 "Cease and Desist" Order must be read in context. On January 5, 2015, an arrest warrant had been issued and Defendant Lutze arrested Tribal Officer Daniel Johnson. Also, on January 5, 2015, Defendant District Attorney, filed a four count criminal complaint against Office Johnson in state Superior Court. Reeling from such overtly threatening conduct, the Tribe then received an Order from Defendant Lutze informing it that more arrests and prosecutions were forthcoming, unless the Tribe's officers stopped "illegally exercising state police power under the color of authority of Bishop Paiute tribal law, notwithstanding applicable federal law." (Amended Complaint, Exhibit 3).

The actions taken by Defendant Lutze and the District Attorney against Tribal Officer Johnson, coupled with the Sheriff's "Cease and Desist" Order, left the Tribe with a "Hobson's Choice." Should the Tribe order its Officers not to interact or engage with non-Indian on the Reservation who are or have committed state criminal offenses, which threaten community safety, or should it's Officers continue to carry out tribal inherent authority and federal law and run the risk of being arrested by the Sheriff and prosecuted for false imprisonment, impersonating a state officer, and using lawful restraint when necessary?

The actions taken by the Defendants, and particularly the "Cease and Desist" Order, compelled the Tribe to file this declaratory action. The actions of the Defendants and the Order demonstrates that there is a basic and fundamental misunderstanding of tribal inherent authority

to take actions against any person, Indian or non-Indian, who commits or is committing a crime on the Tribe's Reservation. Unless and until this misunderstanding is resolved by the Court, Defendants will, as threatened in the Order, continue to interfere and prevent the Tribe from providing peace and security to its community.

Defendant Lutze's January 6, 2015 Order typifies what is at issue in the Tribe's federal action. Defendant Lutze equates Tribal Officers' on reservation duties of stopping, restraining and detaining a non-Indian for an apparent violation of state law as: (1) impersonating a state officer; and (2) making an arrest that constitutes false imprisonment. Because Defendant Lutze believes Tribal Officers have no authority over non-Indians, any force used during the restraining or detaining of the non-Indian, regardless if necessary or justified, is a criminal assault and battery.

Statements from the Order demonstrate this misunderstanding:

1. "The following documented instances of illegal exercise of law enforcement authority by Tribal Police include…*illegal detentions, false arrest, battery, illegal searches of persons and property*..."

2. (In recounting the event on December 24, 2014 the Order states) "…Tribal Officer Daniel Johnson *arrested* a female for alleged trespass on tribal lands and violation of state restraining order. … During Officer's Johnson's attempted *arrest* of the female, he committed felony *battery*…"

3. "Therefore, this office orders the Tribal Police immediately (A) cease and desist the unlawful *exercise of California peace officer author*ity both within and outside the tribal property. …"

4. "If Tribal Police does not comply …Tribal Police employees will be subjected to arrest and criminal prosecution for applicable charges as well as Penal Code § 538d *(Fraudulent impersonation of a Peace Officer)*."

The Order further states that the Sheriff's Office will seek injunctive relief and an order for court costs and attorney fees, should the Tribe fail to comply with the Order. Such assertions

and allegation cannot be squared with the Tribe's authority and federal law which allows tribal law enforcement officers to legally act under tribal inherent authority as set forth in the Tribe's Amended Compliant.

Incongruently, Defendant Lutze maintains that he is not and was not ordering cessation of "lawful tribal authority." However, the Tribe and federal law determines "lawful tribal authority" over non-Indians, not the Inyo County Sheriff, as a policymaker for the County, or the Inyo County District Attorney. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851–52(1985) (This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. In all of these cases, the governing rule of decision has been provided by federal law); *Santa Ynez Band of Mission Indians v. Torres,* 262 F.Supp.2d 1038, 1041 (C.D.Cal.2002)(…the tribe's inherent powers must necessarily arise under federal law, since federal law defines the outer boundaries of an Indian tribe's power over non-Indians.)

Allowing Defendants to determine what is and is not proper tribal authority over non-Indians, by resorting to state criminal actions against the Tribe's Police Officers, directly infringes on the Tribe's authority as a sovereign government. The practical effect and results is that Defendants would be allowed to usurp tribal and federal authority with state authority by unilaterally determining what is permissible and impermissible tribal police conduct in cases involving non-Indians committing state crimes and violations of tribal law on tribal lands. Defendant Lutze's Motion to Dismiss should be denied.

C. Federal Law Supports the Tribe's Claim of Inherent Authority to Stop, Restrain, Detain and Turn Non-Indians Committing Crimes On Tribal Lands Over to Proper Authorities.

Defendant Lutze further argues that the Tribe's Amended Complaint should be dismissed because the Tribe has cited no authority prescribing "any of the claimed tribal inherent authority or jurisdiction over non-Indians with regard to violations of either tribal law, state or federal law." Defendant Lutze then proceeds to cite and discuss the many cases that specifically proscribe the Tribe's inherent authority that its Tribal Police Officer took in this case.

Defendant Lutze offers a summation of four cases cited by the Tribe in its Amended Complaint, *Duro v. Reina*, 495 U.S. 676, 697 (1990); *Ortiz-Barraza v. United States*, 512 F. 2d 1176 (9th Cir.1975); *United States v. Becerra-Garcia,* 397 F. 3d. 1167, (9th Cir. 2005), and *State of Washington v. Schmuck*, 850 P. 2d 1332 (1993) and states that these cases confirm that tribes: (1) have inherent authority to exclude trespassers from their lands; (2) the right to establish laws that are applicable to tribal members; and (3) when during the investigation of either 1 or 2 a tribal police officer discovers the person has violated a state or federal law criminal law the tribal officer may detain that person (Indian or non-Indian) and turn the person over to a properly credentialed state or federal law enforcement officer. The Defendant then concludes that none of the cases support a claim of inherent authority to "simply (for reasons of suspicion to the tribe or its officer) stop, restrain, detain and investigate non-Indians for suspected violations of tribal, state or federal criminal law." To the contrary, the collective holdings of the cases cited by Defendant Lutze, hold that a tribal officer may stop a non-Indian who has is or has violated tribal law and if during the course of the stop it is apparent and/or obvious a state or federal law has or is being violated may restrain and detain the non-Indian until the proper authorities can take custody. The legal guidance provided by the cases and as presented by the Defendant is the very law that Defendant ignored and violated when he arrested Tribal Officer Johnson. The facts of this case as set forth in the Amended Complaint shows that the Tribe has enacted three civil

laws that were violated by the non-Indian in this case: Trespass, Nuisance and Tribal Public Safety Ordinance (Protection Orders.) Officer Johnson was responding to a call from a tribal member complaining that his non-Indian ex-wife was at his home and making demands to see their minor son. When Officer Johnson arrived he found the ex-wife in her vehicle parked in front of her ex-husband's home. Officer Johnson knew the non-Indian was under a Tribal Protective Order prohibiting her from having contact with her ex-husband. She was violating that Order and also committing trespass since she was at the home of her ex-husband and on his tribal land assignment. She was also causing a disturbance which prompted the call to tribal law enforcement from the non-Indian's ex-husband, thus constituting a nuisance under tribal law. Office Johnson also had knowledge that the non-Indian was under a state Domestic Violence Protection Order prohibiting her from having contact with her ex-husband and under the same restriction as a term and condition of the non-Indian's probation.

Officer Johnson had knowledge of these state criminal violations because the non-Indian was well known to him and the Tribal Police Department. During a 9-month-period in 2014, Tribal Police responded to 11 calls involving the non-Indian. Seven of these calls involved joint responses with the Sheriff's department and 2 of the incidents resulted in her arrest by the Sheriff for violation of a state Protective Order. Officer Johnson was the tribal officer involved in 8 of the 11 calls involving the suspect and cited her 4 times for violation of an active Tribal Protective Orders. (Amended Compliant, ¶ 22, pp 8-9.)

The Tribe fails to see the distinction that Defendant Lutze attempts to draw between the current case and those he cites to support his argument. In *Ortiz-Barraza, Becerra-Garcia,* and *Schmuck,* all involved tribal officers stopping a non-Indian on tribal land for a violation of tribal law, during the course of the stop by the tribal officer it was discovered an apparent violation of

state or federal criminal law. Upon the discovery of the state or federal violation the suspect was detained until the proper law enforcement agency could take custody. These facts are what gave rise to the Tribe's case and are almost identical to the facts in the cases cited Defendant Lutze, who has offered no meaningful distinctions. As such the cases control and the Defendant Lutze's Motion to Dismiss should be denied.

D. Congress does not Delegate Inherent Authority to a Tribe. Such Authority Exists Unless Limited or Abrogated by Congress.

Defendant Lutze is under the misunderstanding that tribes cannot act or exert jurisdiction unless Congress has enacted a statute authorizing such jurisdiction. Defendant's understanding is the inverse of tribal inherent authority and Congress' authority over tribes. Judge William C. Canby, Jr. provides a clear and decisive approach to when courts are asked to determine questions of tribal inherent authority: "*The proper inquiry being "whether any limitations exist to prevent the tribe from acting within the sphere of its sovereignty, not whether any authority exists to permit the tribe to act."* American Indian Law, In A Nutshell, p. 75, William C. Canby, Jr., Senior Judge, United States Court of Appeals for the Ninth Circuit, 4th Ed. West Publishing 2004.

"Inherent" authority by definition is the authority a government has and retains as a sovereign and is not authority delegated to it by the dominate government. Federal courts are often asked to determine whether a tribe's assertion of sovereign authority has been limited or extinguished by Congress. The role of federal courts in defining the contours of tribal inherent authority dates back to the bedrock cases of federal Indian law known as the "Marshall Trilogies," appropriately named after their author Chief Justice Marshall. The guiding principles of the "Marshall" cases are that although tribes are "domestic dependent nations" subject to the

plenary powers of Congress, they nonetheless retain attributes of common law sovereign status unless and until Congress limits one of these attributes. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1832)(tribes do not have the inherent authority to grant lands to anyone other the federal government); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25(1831)(tribes are not "foreign nations" and have no authority to deal with foreign powers); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)(tribes as sovereigns remain free from state control and laws.) The principle that tribes retain inherent sovereignty authority, unless extinguished by Congress, was re-enumerated as recently as 2014 by the Supreme Court in *Michigan v. Bay Mills Indian Community et.al.*, 134 S. Ct. 2024, 2030 (2014). There, when addressing the attributes of tribal sovereign immunity from unconsented suits the high Court held that:

> Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S., at 58, 98 S. Ct. 1670. That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L.Ed.2d 881 (1986).
> *Michigan v. Bay Mills Indian Community et.al.,* 134 S. Ct. 2024, 2030 (2014).

Applying these principles to the present case, the Tribe's inherent authority exercised by its Police Officers is derivative of and inextricably intertwined in its sovereign authority to exclude non-Indian from its lands. The inherent authority of exclusion is well established under Supreme Court case law and has not been altered, divested, or diminished by Congress. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nations,* 492 U.S. 408, 422, (1989)(Indian tribes have inherent sovereignty authority independent of treaty right to exclude nonmembers of the tribe from its lands, citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 102 S. Ct. 894, 903, 71 L.Ed.2d 21 (1982)) More specifically, the Supreme Court has expressly addressed

the inherent authority exercised by the Tribe's Police Officer in the present case and found that it was within the sphere of retained tribal sovereignty. In *Duro v. Reina,* 495 U.S. 676, 697 (1990) the Court stated:

> For felonies such as the murder alleged in this case at the outset, federal jurisdiction is in place under the Major Crime Act, 18 U.S.C. § 1153. The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. See, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nations,* 492 U.S. at 422, 109 S.Ct. at 3003; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 234, 333, 103 S. Ct. 2378, 2385- 86, 76 L. Ed.2d 611 (1983); *Worcester v. Georgia,* 6 Pet. 515, 561, 8 L. Ed. 483 (1832); *Cohen* 252. Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.

The Supreme Court also affirmed the authority of tribes to stop and detain non-Indians for violating state law on non-tribal right-ways within a tribe's reservation in *Strate v. A-1 Contractors* (520 U.S. 488, fn. 11, 1997) finding "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law."

In sum, there is no federal statute that grants the Tribe the authority to stop, restrain, detain, and turn a non-Indian who has violated a state or federal law over to the proper authorities; namely because such authority is inherent and needs no congressional delegation. It is the Defendants' burden to cite and present a federal statute prohibiting the Tribe from exercising such inherent authority or a federal case finding the Tribe's authority has been limited of abrogated.

E. The Purpose of Declaratory Relief is to Declare the Rights Of Parties and to Provide the Tribe with Certainty and Security Moving Forward in Protecting its Community.

"Under the Declaratory Judgment Act, a federal court may 'declare the rights and other legal relations' of parties to a 'case of actual controversy'." 28 U.S.C. § 2201. The purpose of the Declaratory Judgment Act is 'to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure-or never'." *Spokane Indian Tribe v U.S*, 972 F.2d 1090, 1091-1092 (9th Cir. 1992) citing *Hal Roach Studios, Inc. v. Richard Feiner and Co*., 896 F.2d 1542, 1555 (9th Cir.1990) (quoting *Societe de Conditionnement v. Hunter Engineering Co*., 655 F.2d 938, 943 (9th Cir.1981). Further, "Declaratory relief is appropriate 'When there is an actual controversy and a declaratory judgment would settle the legal relations in dispute and afford relief from uncertainty or insecurity, in the usual circumstance the declaratory judgment is not subject to dismissal.'" *Electronics for Imaging, Inc. v. Coyle,* 394 F.3d 1341, 1345 (Fed. Cir. 2005). Declaratory relief is designed to afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

The Ninth Circuit Court of Appeals remanded the current case back to the district court finding that there is a "case and controversy" between the parties, due in large part because of the actual arrest and prosecution of the Tribe's Police Officer and the threat of future arrests made by the Defendant Lutze in his January "Cease and Desist" Order. Failing to define the respective authority of the parties in this case, the Tribe will be placed in an untenable position of having its Officers exercising its inherent authority to protect the community from criminal activities of non-Indians and risk its Police Officers being arrested and criminally prosecuted or alternatively direct its Officers to take no action and allow non-Indians to act without impunity for state and federal crimes they commit in the tribal community.

Should the Court decline to exercise its discretion and grant the Tribe the relief its seeks, the disputed issues between the parties will remain and leave the Tribe with uncertainty, insecurity, and the same controversy giving rise to its case against the Defendants.

Further, Defendant Lutze contends that 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" because it could lead to "untold issues" such as non-Indians who suffer wrongs as a result of future conduct by officers wielding this power. The Defendant goes on to claim that a non-Indian would be barred from seeking any redress for injuries caused by tribal police officers, because they are shielded from liability under tribal sovereign immunity.

First, the Tribe is not requesting that the Court make a declaration of "first-impression" on inherent tribal authority. The federal common law that forms the basis for the Tribe's request for a declaration has been in place for forty (40) years (*Ortiz-Barraza v. United States* decided in 1975; *Duro v. Reina,* decided in 1990; *United States v. Becerra-Garcia* decided in 2005.) Secondly, the Tribe's request for a declaration is not some "dramatic" pronouncement on the inherent authority of the Tribe. The BIA, Office of Justice Services as recent at December 2, 2016 issued a Memorandum on the legal authority of BIA and tribal law enforcement officers to arrest and detain offenders in Indian Country. This guidance confirms and clarifies that BIA and tribal law enforcement may stop and detain *anyone* in Indian Country, regardless of tribal status for violations of federal, state, or tribal law and turn them over to the appropriate prosecuting authority. The guidelines state that "Federal and State courts have repeatedly found that the tribal power of exclusion provides the authority to temporarily detain a non-Indian offender." (Exhibit 1.) The BIA also lends guidance on the length of the detention stating it must be in compliance with the statutory restrictions under the ICRA for unreasonable searches and seizures

that occur within the territory under the office's authority. Given that the BIA has issued a 2016 guidance that, is based on existing federal and state court decisions, reiterates the law as understood and presented by the Tribe in this case, the declaratory relief sought by the Tribe is neither a case of "first impression" nor a "dramatic" declaration of tribal authority.

Finally, in response to Defendant Lutze's claim that defining tribal inherent authority over non-Indians will leave them without a remedy for the wrongs they suffer from future conduct by officers wielding this power, the claim is irrelevant and inaccurate. Determining whether to exercise the Court's discretion in entertaining a request for declaratory relief turns on whether such relief will bring certainty to the parties and prevent ongoing legal disputes, not whether some hypothetical 3rd party may sue a tribal law enforcement officer.

It should also be noted that the Supreme Court recently issued an opinion that a tribal official, officer or employee may not invoke tribal immunity if they are sued in their individual capacity. *Lewis v. Clarke*, 581 U.S. __, 137 S. Ct. 1285 (2017.) The Supreme Court's ruling conforms to the Ninth Circuit Court rulings in *Maxwell v. County of San Diego County,* 708 F. 3d 1075 (2013) (involving tribal paramedics) and *Pistor v. Garcia*, 791 F. 3d 1104 (2015) (involving tribal police chief, tribal gaming inspector, and casino GM.) Defendant Lutze's argument is alarmist rhetoric and is no basis for dismissing the Tribe's Amended Complaint.

F. The Tribe's Amended Complaint Does Not Challenge the District Attorney's Prosecutorial Discretion.

The Defendant District Attorney Thomas Hardy prosecuted Tribal Police Officer Johnson for violating four Penal Code sections which include: False Imprisonment, Impersonating a Public Officer, Battery, and Unlawful Assault with a Stun Gun. It has been and is the position of the Tribe that Defendant Hardy's charges against the Tribe's Officer are in contradiction and

conflicts with federal law that authorizes tribal police officers to stop, restrain, detain a non-Indian until such time proper authorities can take custody of the non-Indian or the officer may transport him/her to such authorities. Its Amended Complaint seeks only prospective relief that the current and future District Attorney understand and acknowledge the Tribe's inherent authority over non-Indians who are committing or have committed crimes on the Reservation before exercising their prosecutorial discretion.

Had Defendant Hardy, as well as the other Defendants, approached the current case with the understanding that Officer Johnson had the authority as a Tribal Police Officer to stop, restrain and detain the non-Indian in this case but believed that Officer Johnson violated the ICWA by using excessive force during her seizure, the Tribe might well have determined that it was unnecessary to pursue the current action. The Tribe has never argued or advanced a position that its Police Officers, as a matter of inherent authority, are immunity from all and any criminal prosecution if they exceed or abuse that authority.

However, Defendant Hardy's actions demonstrate that he views tribal officers as "impersonating" state peace officers if they attempt to stop, restrain and detain a non-Indian who has violated state law. Any restrain or detention of a non-Indian by a tribal officer constitutes "false imprisonment" because tribal officers have no authority to take such actions under California law or under any enacted tribal criminal law. This latter position was advanced by the Defendant in his Opposition Brief to Officer Johnson's "Motion to Set Aside Information Under Penal Code Section 995." (Exhibit 2, pp.9-13). And finally, if a tribal officer engages in physical contact with the non-Indian for refusing to comply with the officer's order during the restraining and/or detaining of the non-Indian it will constitute "battery", because there is no authority requiring the non-Indian to obey the order, since the tribal police officer is not a state

peace officer nor does the Tribe have a tribal law providing for the restraint or detention. (Exhibit 2, p. 16)

Defendant Hardy is misguided. The Tribe's inherent authority does not need to be reduced to writing and codified in criminal code in order to be effective. Inherent authority exists unless or until Congress limits or abrogates the authority. It should also be stressed that even if the Tribe were to adopt a criminal code it would not be applicable to non-Indians since the Tribe cannot try and punish non-Indians for violations of tribal criminal law. *Oliphant v. Suquamish,* 435 U.S. 191 (1978).

Without a declaration from the Court that clarifies and affirms federal law defining the contours of tribal inherent authority over non-Indians committing or who have committed a crime on tribal lands, Defendant Lutze will, as threatened, continue to arrest and Defendant Hardy or a future District Attorney will prosecute Tribal Police Officers in violation of the Tribe's inherent authority. Defendant Hardy's Motion to Dismiss should be denied to prevent the continuation of this violation and federal law.

G. Under the doctrine of *Ex Parte Young,* the Eleventh Amendment does not bar the Tribe's Declaratory and Prospective Injunctive Relief against the Inyo County District Attorney.

In support of Defendant Hardy's argument for dismissal on Eleventh Amendment grounds, he cites *County of Los Angeles v. Superior Court*, 181 Cal.App.4th 218 (2nd App. Dist. 2009) in which plaintiffs sought damages for actions of the district attorney for violation of their civil rights under California Civil Code section 52.1 and 42 U.S.C. § 1983. The case is consistent with the well-established rule that the Eleventh Amendment will bar a suit against a state official sued in his or her official capacity because such a suit is not against the official but

rather against the official's office and thus no different than a suit against the state itself. *County of Los Angeles v. Superior Court,* 181 Cal.App.4th at 233; *Pitts v. County of Kern*, 17 Cal.4th 340 (1998); *Leon v. County of San Diego et. al*, 115 F. Supp.2d 1197, 1200 (S.D. CA. 2000) citing *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989). However, Defendant Hardy's reliance on *County of Los Angeles* is inapposite to the equally well-established rule that the Eleventh Amendment is *not* a bar to a suit against a state official, including a district attorney, in which the plaintiff seeks declaratory and prospective injunction relief. *Ex Parte Young*, 209 U.S. 123 (1908).

The *Ex Parte Young* doctrine provides an exception to a state's and state official's Eleventh Amendment immunity defense if the suit is seeking a declaration that a state official is acting in violation of federal law and must be enjoined from doing so in order to prevent future injury to the plaintiff and others who are subject the state official's conduct. "The rule of *Ex Parte Young* 'gives new life to the Supremacy Clause' by providing a pathway to relief from continuing violations of federal law by a state or its officers." *Los Angeles County Bar Ass'n. v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992), citing *Green v. Mansour,* 474 U.S. 64 (1985).

*Ex Parte Young* is directly applicable to and controls the current case. As the Tribe has explained above, it seeks a declaration that federal law allows its Law Enforcement Officers to stop, restrain, conduct an investigation and detain a non-Indian who has violated tribal, state, and/or federal law and deliver the non-Indian to local law enforcement authorities. By prosecuting the Tribe's Police Officer and the threat of future prosecutions against Tribal Police Officers for their actions under inherent authority, Defendant Hardy is violating the Tribe's inherent authority and federal law over non-Indians.

The Tribe's declaratory action seeks to protect its Tribal Officers from future arrest and prosecution by clarifying and affirming the Tribe's authority over non-Indians. The Tribe seeks only prospective relief in this case and as such the Eleventh Amendment presents no barrier to the Tribe's request for declaratory and prospective injunctive relief against the District Attorney.

## CONCLUSION

Defendants have failed to establish that the Tribe's case must be dismissed for failure to state a claim. The Tribe's Amended Complaint has set forth sufficient factual and legal grounds establishing that Defendants, by and through their actions, violated and threaten to continue to violate the Tribe's inherent authority and federal law over non-Indians violating tribal law and committing state and federal crimes on tribal lands.

The Tribe has demonstrated that the Inyo County Sheriff is a County official with final policymaking authority, thereby making the County responsible for the Sheriff's actions in arresting the Tribe's Police Officer and for issuing his January 6, 2015 "Cease and Desist" Order. The Sheriff's Order mischaracterizes the actions taken by the Tribe's Police Officers as being violations of state law and accused them of impersonating state peace officers. This mischaracterization and misunderstanding of federal law, has caused the Tribe to seek declaratory and prospective relief from the Court.

Finally, the Tribe does not seek to interfere or limit the District Attorney's prosecutorial discretionary through its request for prospective relief. The Eleventh Amendment does not bar the Tribe's action against the District Attorney. The Tribe is seeking a declaration and prospective injunctive relief so that any future potential prosecutions of Tribal Officers by the Inyo County District Attorney will be properly evaluate and with an understanding of tribal

inherent authority before he or she seeks to criminal charge a tribal police officer who took actions against a non-Indian on the Reservation that was committing or had committed a violation of tribal, state or federal law. Defendants' Motions to Dismiss should be denied.

DATE: October 3, 2017

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