

IN THE UNITED STATES COURT
OF APPEALS TENTH CIRCUIT

Case No. 17-4124

Edson Gardner, and
Lynda Kozlowicz, and
Athenya Swain, and
Konna Oviatt.

Plaintiff/Appellant

v.

Hon. William Reynolds, in his official
capacity as Judge of the Ute Tribal Court, and Shawn
Chapoose, Edred Secakuku, Tony Small, Luke Duncan, Sal
Wopsock, Ronald Wopsock, in their official capacity as
Ute Tribal Council, and Cleve Hatch, Ute Tribe Family
Services, in his official capacity.

Defendant/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH

APPELLANT'S OPENING BRIEF

Appellants:

Edson Gardner, and
Lynda Kozlowicz, and
Athenya Swain, and
Konna Oviatt.
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FEDERAL QUESTION PRESENTED

Pass;

Indian Plaintiff's filed Writ of Habeas Corpus for relief from Ute Tribal Court and bad faith conviction and the removal from Ute Tribal Court and Ute Tribal Office pursuant to 25 U.S.C. 1303, Petition, states Indian Plaintiff's was charged and arrested within the boundaries of the Uintah and Ouray Indian Reservation and Indian Plaintiff's claims the conviction and sentence violated the rights to due process, counsel, by the Indian Civil Rights Act (ICRA). The Indian Plaintiff's seeks the issuance of the writ of habeas corpus finding the charges and the conviction to be in violation of the ICRA and commanding the immediate release from custody. The Indian Plaintiffs names, as the Ute Tribal Defendant's, filed the response raising the defense of failure to state the claim. Indian Plaintiff's was charged, and no authority other than to abide by the facially invalid Ute Tribal Court Order, the Indian Plaintiff's filed for habeas corpus proceeding under the ICRA, 25 U.S.C. 1303; the ICRA extends

certain constitutional rights to Indian Plaintiff's within 25 U.S.C. 1302, and the jurisdiction over the habeas corpus proceeding under ICRA is vested in the federal Courts of the United States.

The 28 U.S.C. 1331 of judicial code provides the federal Court shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States, it is well settled that this statutory grant of jurisdiction will support claims founded upon federal common law as well as those of the statutory origin, federal common law as articulated in rules that are fashioned by federal court decision are laws as that term is used in 1331, the federal Court has frequently been required to decide questions concerning the extent to which Indian Plaintiff's have retained the rights to regulate the affairs of Indian Plaintiff's. In the case, the governing rule of decision has been provided by federal law 1331.

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STATEMENT OF JURISDICTION

On July 18, 2017 the District Court issued Minute Order by Hon. Robert J. Shelby, full docket text for document 56, and Judgment dated July 19, 2017, dismiss the Indian Plaintiff's amended complaint for lack of justifiable case or controversy. Indian Plaintiffs filed timely Notice Of Appeal on August 1, 2017. This Court has appellate jurisdiction over the district court's ruling pursuant to 28 U.S.C. 1291.

Indian Plaintiffs invoked the 10th Circuit Court's jurisdiction under statutes. Indian Plaintiffs invoked the 10th Circuit Court's jurisdiction under 28 U.S.C. 1331, in that Indian Plaintiffs being removed from Ute Tribal Court on claims arise under the Fourth Amendment Constitution.

The Indian Plaintiffs has alleged the violation of the Fourth Amendment based on Ute Tribal Defendants seized Indian property (Ute Tribal Records) on Indian land. The Indian Plaintiffs contends that the search was unlawful because it was executed beyond Ute Tribal Defendants jurisdiction.

The Indian Plaintiff's have suffer by being removed from Ute Tribal Court and Ute Tribal Office and

Indian Plaintiff's being charged and arrested and prosecuted of the law Indian Plaintiffs right seeking to challenge Ute Tribal Defendants. The Indian Plaintiff's make it known to the Ute Tribal Defendants authorities the Indian Plaintiff's intends to and have concrete plan that have not violated any law and believed the Ute Tribal Defendants to be unconstitutional.

The United States Congress has primary and plenary authority over Indian affairs and may impose such restraints by federal statute. Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470-471 (1979), in the exercise of this authority, Congress enacted the Indian Civil Rights Act (ICRA), 25 U.S.C. 1301, et seq., the ICRA extends certain federal rights to Indian Plaintiffs, including the privilege of the writ of habeas corpus to challenge Ute Tribal Official Defendants Orders, and taking the facts in the light most favorable to the Tribe, that the search violated the Fourth Amendment the Ute Tribal Defendants conduct was unlawful, and the laws of the United States. Indian Plaintiff's invoked jurisdiction under Indian Civil Rights Act, the Constitutional Rights, 25 U.S.C 1301-1303 and the Fourth Amendment to

the United States Constitution as Indian Plaintiffs which asserts Ute Tribal Official Defendants actions violates the Constitution and laws of United States. Indian Plaintiffs being removed from Ute Tribal Court have invoked the 10th Circuit Courts jurisdiction under 28 U.S.C. 2201 and 2201 as Indian Plaintiffs sought declaratory and injunctive relief regarding Ute Tribal Officials Defendants authority over Indian Plaintiff's on reservation.

STATEMENT OF THE ISSUE

Whether Indian Plaintiff's case being removed from Ute Tribal Court have presents the controversy under Article III of the United States Constitution in lights of Ute Tribal Official Defendants arrest and ongoing of being removed from Ute Tribal Court on prosecution of Indian Plaintiff's and being removed from Ute Tribal Court on threat of future arrests and prosecutions of Indian Plaintiff's if they continue to carry out the inherent Indian authority over Indians committing violation of tribal and federal law on Indian lands.

STATEMENT OF THE CASE

Indian Plaintiffs filed Petition for Writ of Habeas corpus and appeal from Ute Tribal Court for

Declaratory and Injunctive Relief with the United States District Court for the District of Utah, on 4/14/2017. Indian Plaintiff's subsequently filed their Amended Writ of Habeas Corpus ICRA 25 U.S.C. 1303 on 9.28/2016, continuing to seek declaratory and prospective injunctive relief on being removed from Ute Tribal Court. The district court dismissed the Indian Plaintiff's Complaint for lack of justifiable case or controversy over which the federal court has no jurisdiction on July 18, 2017. Indian Plaintiff's filed timely Notice of Appeal on August 1, 2017.

STATEMENT OF THE FACTS

Indian Plaintiff's being removed from Ute Tribal Court on tribal and federal laws established Ute Tribe in 1934 and also operates the Ute Tribal Court. The Ute Indian Tribe has established laws that provides for the peace and security of Indians, residents and guests Indian Civil Rights Act (ICRA).

Petition for Writ of Habeas Corpus and Appeal from Ute Tribal Court for declaratory and injunctive relief, Racketeer Influenced and the corrupt organization, Prohibited Activities, 18 U.S.C. 1663, are required to have knowledge of and District Courts, Jurisdiction;

Civil rights and elective franchise, 28 U.S.C. 1343(3),
basic federal Indian law.

The Ute Tribal Defendants are required to interact with local BIA law enforcement when incidents arise on the reservation involving acts by Indian Plaintiffs that did nothing wrong, who are ordered to be arrested and taken into custody. Policy and Procedures, addresses detention of individuals for investigation and releasing, Ute Tribal Defendants has the responsibility for the purpose of conducting an investigation for violations of Tribal Law and Ordinances, to detain the suspect violator. Provides that Indian Plaintiff's was investigated two times and may need to detain an individual in order to prevent suspect from public safety. In case of detention.

Indian Plaintiff's pleadings repeatedly of civil rights violations by the Ute Tribal Defendants, even when Plaintiff acted at all times in Indians inherent authority, not Utah State law. When restrained Indian Plaintiff's as alleged violators are detained on Indian land and denied process in Ute Tribal Courts. Indian Plaintiff's Amended Writ sets forth the tribal and federal legal authority establishing Indian inherent

authority over Indians who commit crimes on Indian land. While the Supreme Court has limited Indian inherent authority holds, Ute Tribe cannot try and punish Indians for violation of criminal laws. U.S. v. Lara, 124 S. Ct. 46 (2003), the Supreme Court views Indian Civil Rights Act, Definitions, 25 U.S.C. 1301(2) as the delegation of federal power, it violates the citizenship or equal protection rights of nonmembers Indians by treating them differently from non-Indians. Duro v. Reina, 496 U.S. 676, at 692-94 (1990).

In pre-enforcement challenges, courts have found that the ripeness requirement of case or controversy does not require the plaintiff to suffer arrest and prosecution of the law he or she seeks to challenge. Steffel v. Thompson, 415 U.S. 452 (1974). Ripeness can be established where the plaintiffs makes it known to authorities that he or she intends to and has the concrete plan to violate the law that's believed to be unconstitutional. Oklevueha Native Am. Church of Haw. v. Holder, 676 F. 3d 829, 835 (9th Cir. 2012).

The sovereign immunity of Ute Tribe does not bar the Indian Plaintiffs petition. ICRA dictates that the writ of habeas corpus shall be available to any person.

In the court of the United States, to test the legality the detention by order of an Indian tribe. 25 U.S.C. 1303. where, as here, Plaintiffs seek to test the legality of orders of government banishment. The federal district court has subject matter jurisdiction to entertain applications for writ of habeas corpus. In, Poodry v. Tonawanda Band of Seneca Indians, 85 F. 3d 874, at 887 (2nd Cir. 1996), the habeas petitions create no immunity issue at all.

Because the petition for the writ of habeas corpus is not properly the suit against the sovereign Ute Tribe. The proper Defendants in this case are those who have been named above; purported Ute Tribal Officials who have an interest in opposing the petitions.

The Supreme Court has recently held that sovereign immunity does not apply to individual capacity suits. Lewis v. Clarke, ___ U.S. ___ 137 S. Ct. 1285, 1291-92 (2017). In Lewis, plaintiff were suing the individual member of the Native American tribe who worked for the Mohegan Tribal Gaming Authority, and who caused the car accident while driving in scope of his employment. The issue turned upon the identity of the real party in interest. Notwithstanding the Tribe's agreement to

indemnify its employees. In Lewis, the Court used the general principles of sovereign immunity, taken from lawsuits against state and federal employees or entities. Thus, the suit against the individual officers in this case would not be barred by tribal immunity.

Defendant Ute Tribal Officials are unlawfully restraining Indian Plaintiffs by permanently convicting Indian Plaintiffs of crimes, without due process or equal protection of the laws. Indian Plaintiffs are being punished and deprived of their liberty interests for the fantastic litany of crimes. The punishment Indian Plaintiffs are imposing -- permanent banishment -- is detention as contemplated by ICRA. Further, Indian Plaintiffs lack any meaningful administrative remedy to exhaust, and have exhausted even those purported remedies as Ute Tribal Officials Defendants has set up for this purpose. Defendants Ute Tribal Defendants brief should therefore be denied.

Indian Plaintiffs have stated the valid claim for habeas relief under ICRA because they are presently detained. Defendant Ute Tribal Officials argue that Indian Plaintiffs have failed to state the claim for relief under Fed. R. Civ. P. 12(b)(6). ICRA, however,

clearly outlines how Indian Plaintiffs may state the claim for relief; 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 the detention by order of an Indian tribe. 25 U.S.C. 1303.

Permanent banishment is sufficiently severe restraint on liberty to constitute detention and invoke federal habeas jurisdiction under 1303 of ICRA. That evictions have not occurred yet is not dispositive. The Poodry, 85 F. 3d 895 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 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.

The custody requirement jurisdictional prerequisites, Indian Plaintiffs be in custody pursuant to the tribal court, 25 U.S.C. 1303, and must have been in custody under the conviction or sentence under attack at the time the petition is filed. Maleng v. Cook, 490 U.S. 488, 490-91 (1989). Indian Plaintiffs need not show actual, physical custody to obtain relief. Indian Plaintiffs is in custody for purpose of statute if Indian Plaintiffs is subject to severe restraints on Indian Plaintiffs individual liberty,,,, The restraint is severe when it is not shared by the public generally. Dry v. CFR Court of Indian Offenses for Choctaw Nation, 186 F. 3d 1207, 1208 (10th Cir. 1999). In Dry, the court concluded that criminal defendants who had been released on their own recognizance pending trial were in custody for purpose of federal habeas statute;

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, See Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-01, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984) (concluding petitioners released on his own recognizance, after his conviction was vacated on application for a new trial, was in custody for purposes of habeas corpus statute); Kolski v. Watkins, 544 F. 2d 762, 763-63 and n.

2 (5th Cir. 1977) (holding petitioner released on his own recognizance after arrest was in custody); United States ex rel. Scranton v. New York, 532 F. 2d 292, 293-94 (2nd Cir. 1976) (concluding petitioner released on her own recognizance after indictment was in custody because she could be ordered to appear before the court at any time).

In, Hamdi v. Rumsfeld, 542 U.S. 507 (2004), holding that even an enemy combatent must be afforded judicial process to contest the validity of the restraint because it would turn our system of checks and balances on its head to suggest that the citizens could not make their way to court with the challenge to the factual basis for any detention by the government, simply because the Executive opposes making available such challenges.

The Exceptions may be warranted to protect integrity of the writ or the rights of the person detained. Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004). very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriage of justice within its reach are surfaced and corrected. Harris v. Nelson, 394 U.S. 286, 291 (1969). Here the unique nature of habeas under 1303 U.S.C. and 2241 applies to Ute Tribal Official

Defendants.

The Supreme Court has acknowledged established exceptions to the immediate-custodian rule and exceptions to the territorial jurisdiction rule.

Ramsfeld v. Padilla, 542 U.S. 426, 451, 454; Strait v. Laird, 406 U.S. 341, 345 (1973) (non-physical custody); Ex Parte Endo, 323 U.S. 283 (1944) (removal of the prisoner from the territory).

The U.S. Ninth Circuit Court of Appeals in, Bishop Paiute Tribe v. Inyo County, Case No. 15-16604' dated July 19, 2017, the federal question, 28 U.S.C. 1331 jurisdiction of ripeness and seeks the declaration that they have the right to investigate violations of tribal, state, and federal law, detain, and transport or deliver the non-Indian violator encountered on the reservation to the proper authorities. Before reaching this issue, the district court dismissed the case on jurisdictional grounds, concluding that the case presents no actual case or controversy. On appeal, the district court had subject matter jurisdiction over case, because questions of federal common law can serve as the basis of federal subject matter jurisdiction pursuant to 28 U.S.C. 1331, and because this case presents the definite and concrete

dispute that is ripe and not moot.

SUMMARY OF THE ARGUMENT

Indian Plaintiffs case presents justifiable case or controversy that is ripe as to injury and issues is not moot as to injury, or issues is not non-justifiable political question solely left for U.S. Congress. The present case presents the justifiable case or controversy under Article III of the Constitution.

The federal Court possesses jurisdiction over the Indian Plaintiff's claim, the federal exhaustion is required unless and Ute Tribal Court jurisdiction is automatically foreclosed. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855 (1985). The Ute Tribal Defendant's and Ute Tribal Court are not protected by Ute tribal sovereign immunity under the doctrine of in Crowe & Dunlevy v. Stidum, 640 F. 3d 1140 (2011), that tribal sovereign immunity is subject to Ex Parte Young, 208 U.S. 123 (1908),

The Ute tribal exhaustion are in bad faith and requirement not needed and subject to several exceptions;

- (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;
- (2) where the tribal

court action is patently violative of express jurisdictional prohibitions; (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; (4) when it is plain, no federal grant provides for tribal governance of nonmembers conduct on land covered by the main rule established in Montana v. United States, 450 U.S. 544 (1981); or, (5) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay.

Burrell v. Armijo, 456 F. 3d 1159, 1165 (10th Cir. 2006).

STANDARD OF REVIEW

The district court's dismissal of Indian Plaintiffs case for lack of jurisdiction based on finding that there is no Article III case and controversy is the question of law subject to de novo review. Knieval v. ESPN, 393 F. 3d 1068, 1072 (9th Cir. 2005) (review of motion to dismiss is reviewed de novo); also, In re Canion (Randall & Blake, Inc. v. Evans, 196 F. 3d 579, 584 (5th Cir. 1999) (subject matter jurisdiction is reviewed de novo).

The legal doctrine of ripeness, mootness and the Tribe's cognizable interest in the outcome of the case are all essential parts of the case or controversy requirement, and are also subject to de novo review.

Oklevueha Native Am. Church of Haw. v. Holder, 676 F. 3d

829, 834 (9th Cir. 2012) (motion to dismiss is reviewed de novo for case or controversy ripeness, both constitutional and reviewed de novo for case or controversy ripeness, both constitutional and prudential components, in pre-enforcement challenge case); Colwell v. Dep't of Health and Human Servs., 558 F. 3d 1112, 1121 (9th Cir. 2009) (for standing and ripeness are reviewed de novo); Manufactured Home Cmty. Inc. v City of San Jose, 240 F. 3d 1022, 1025 (9th Cir. 2005) (ripeness is reviewed de novo); Vertura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura, 371 F. 3d 1046, 1050 (9th Cir. 2004) (ripeness is reviewed de novo); Southern Organ Barter Fair v. Jackson County, Oregon, 372 F. 3d 1128 (9th Cir. 2004) (mootness is reviewed de novo).

De novo review requires the appellate court to accept the Indian Plaintiffs factual allegations as true and viewed in light most favorable to the Indian Plaintiffs. Oklevueha, 676 F. 3d at 834; Knieval, 393 F. 3d at 1072. Under this standards it is clear that the district court erred in dismissing Indian Plaintiffs complaint. Given the importance of the legal issues presented in this case, the district court's dismissal

should be overturned and the case remanded for the determination on the merits.

ARGUMENT

INDIAN PLAINTIFFS CASE PRESENTS JUSTIFIABLE CASE OR CONTROVERSY THAT IS RIPE, DOES NOT PRESENT NON-JUSTIFIABLE POLITICAL QUESTION, AND IS NOT MOOT.

Article III of the United States Constitution limits federal court jurisdiction to cases or controversies. U.S. Const. Art. III, 2, cl. 1. Subsumed within the requirement of the case and controversy are the doctrines of ripeness.

Standing, non-justifiable political questions, and mootness. Flast v. Cohen, 392 U.S. 83, 95, 99-101 (1968), thus, the federal court is admonished from hearing the case that is not yet ripe, is moot, that presents the non-justifiable political question, in which the parties lack the cognizable interest in the outcome of the case, or is not presented in an adversarial context.

Indian Plaintiffs case meets each of the components of the case and controversy requirement. Indian Plaintiffs pleadings demonstrate that Indian Plaintiffs is currently being held from Ute Tribal Court

and due process and prosecuted for actions within Ute Tribal Court as it took while performing duties as tribal law enforcement in Ute Tribal Court. This fact is undisputed by Ute tribal official defendants and speaks to both the ripeness and lack of mootness of the issues. The Ute Tribal Official Defendants presented in its case for declaratory and injunctive relief. The ongoing prosecution and threat of future prosecution by Ute Tribal Official Defendants directly and continuously interferes with Indian Plaintiffs inherent Indian authority, as defined by this Court and the Supreme Court, to protect its community from the unlawful acts of Indian coming on to Indian Reservation and committing violation of tribal and federal law. Clearly Indian Plaintiffs has presented cognizable interest in the outcome of the case.

A. INDIAN PLAINTIFFS CASE PRESENTS RIPE CASE OR CONTROVERSY FOR ARTICLE III JUSTIFY ABILITY MEETING BOTH THE CONSTITUTIONAL AND PRUDENTIAL COMPONENTS FOR RIPENESS.

Ripeness is one component of the case or controversy requirement for justify ability under Article III, ensuring federal courts do not adjudicate issues that are premature or disagreements that

abstract. Oklevueha Native Am. Church of Haw. v. Holder, 676 F. 3d 829, 835 (9th Cir. 2012) citing Abbot Labs v. Gardner, 387 U.S. 136, 148 (1967); Thomas v. Anchorage Equal Rights Comm'n, 220 F. 3d 1134, 1138 (9th Cir. 2000) (en banc). Ripeness contains both constitutional component and the prudential component. These components are applicable even if the Indian Plaintiffs is seeking injunctive relief. Oklevueha, 676 F. 3d 829 (analysis of constitutional and prudential ripeness in relation to request for both declaratory and injunctive relief).

The ripeness analysis is the same for declaratory relief. Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (same requirements for declaratory relief), also Orix Credit Alliance v. Wolfe, 212 F. 3d 895, 896 (5th Cir. 2000) (case or controversy requirement of Article III is identical to controversy requirement of Declaratory Judgment Act).

The burden to establish ripeness and standing rests on the party asserting the claim, here the Tribe, Colwell v. Dep't of Health and Human Servs., 558 F. 3d 1112, 1121 (9th Cir. 2009).

B. INDIAN PLAINTIFF'S CASE MEETS THE

CONSTITUTIONAL COMPONENT OF RIPENESS.

The Indian Plaintiff's case demonstrates constitutional ripeness as the Ute Tribal Defendants have invaded Indian Plaintiff's legally protected interests of inherent authority and Indian Plaintiff's has suffered concrete injury of arrest and prosecution of Indian Plaintiff's and continues to suffer threats of future injury of arrest and prosecution of Indian Plaintiff's.

The constitutional component of ripeness has the strong relationship to the requirements of standing.

The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong,,,, the overlap between these concepts has led some legal commentators to suggest that the doctrines are often indistinguishable.

Thomas v. Anchorage Equal Rights Comm'n, 220 F. 3d 1134, 1138 (9th Cir. 2000) (en banc); Colwell v. Dep't of Health and Human Servs., 558 F. 3d 1112, 1123 (9th Cir. 2009) (Article III requirements of the case or controversy include standing and ripeness); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). The Court has distinguished the two by recognizing that ripeness is peculiarly the question of timing and looks to when litigation may occur as opposed to standing which inquires who is proper party. Thomas, 220 F. 3d at 1138 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

For an injury in fact Lujan requires an invasion of the legally protected interest which is the concrete and particularized,,,, and actual or imminent, not conjectural or hypothetical,,,, Colwell, 558 F. 3d at 1121-1122, citing to Lujan, 504 U.S. at 560-561. For the future injury the two doctrines (ripeness and standing) are so closely intertwined this Court stated in Thomas, where Indian Plaintiff's filed for declaratory and injunctive relief that:

In assuring that this jurisdictional prerequisite is satisfied, we consider whether the Tribes face the realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, or whether the alleged injury is too imaginary or speculative to support jurisdiction. We need not delve into the nuances of the distinction between the injury in fact prong of standing and the constitutional component of ripeness; in this case, the analysis is the same.

Thomas, 220 F. 3d at 1138-1139.

In sum, the invasion of the protected interest must be concrete and particularized, and can be an actual injury or and imminent future injury or threat of the future injury, but in any case the injury or threat of future injury the injury cannot be conjectural, hypothetical, imaginary, or speculative. When the threat

of future injury is involved the ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention and courts must consider the likelihood of any contingencies actually occurring. Orix Credit Alliance, Inc. v. Wolfe, 212 F. 3d 895, 897 (5th Cir. 2000).

Similar to the Indian Plaintiff's in Prairie Band of Potawatomi Indians v. Pierce, 253 F. 3d 1234 (10th Cir. 2001) the Indian plaintiffs has suffered sufficient actual injury to establish the case or controversy. In Prairie Band of Potawatomi the Indian's. The 10th Circuit Court determined the Indian established case or controversy and standing by finding that the state's refusal to recognize tribally issued registrations and Indians and issuance of state citations to Indians (citation which were dismissed and resolved by payment of fine) was sufficient injury as it caused an obvious harm to the Indian's; interference with infringement on Indian self-government.

The authority over Indian's who commit crimes on Indian Reservation, resulting in the arrest and criminal prosecution of the Indian Plaintiff's.

As in Prairie Band of Potawatomi Indians, the Ute Tribal Defendant's are directly interfering with and infringing on the Indian Plaintiff's inherent authority to maintain peace and security on the Indian Reservation.

C. The fundamental disagreement between the parties presents concrete legal issues that are neither hypothetical nor abstract.

An additional requirement to actual or imminent injury for the constitutional case or controversy and justify ability of Indian Plaintiff's, must present concrete legal issues, presented in actual cases, not abstractions, Colwell v. Dep't of Human and Human Servs., 558 F. 3d 1112, 1123 (9th Cir. 2009). Thomas v. Anchorage Equal Rights Comm'n, 220 F. 3d 1134, 1139 (9th Cir. 2000) (en banc) (The Tribe must ensure that the issue presented are definite and concrete, not hypothetical or abstract.) The issue presented by the Indian Plaintiff's case is definite and concrete; are the Ute Tribal Tribal Defendant's subject to arrest and state prosecution by Indian Plaintiff's for carrying out Indians inherent authority, defined under federal law, over Indians who are committing violations of tribal and federal law on Indian land.

D. INDIAN PLAINTIFF'S CASE MEETS THE TEST FOR PRUDENTIAL RIPENESS.

The second component of ripeness is prudential ripeness and requires the court evaluate both the fitness of the issues for judicial decision; and, the hardship to the parties of withholding court consideration. Abbot Labs. v. Gardner, 387 U.S. 136, 149 (1967); Colwell v. Dep't of Health and Human Servs., 558 F. 3d 1112, 1124 (9th Cir. 2009); Thomas v. Anchorage Equal Rights Comm's, 220 F. 3d 1134, 1141 (9th Cr. 2000) (en banc). Case are unfit for judicial resolution if they are devoid of any specific factual context and do not present the concrete factual situation. Thomas, 2220 F. 3d at 1141. The Indian Plaintiff's litigation demands the judicial decision not only to prevent future arrest and prosecution of Indian Plaintiff's, but also to ensure the Indian Plaintiff's ability to keep peace and security on Indian Reservation by taking lawful actions against Indians committing crimes on Indian lands.

E. INDIAN PLAINTIFF'S CASE IS NOT NON-JUSTIFIABLE CASE OR CONTROVERSY COMMITTED TO UNITED STATES CONGRESS.

The Ute Tribal Defendant's assert any established federal statute providing authority and jurisdiction by

Ute Tribal Defendant's over Indian Plaintiff's is within the purview of Congress and not the Courts.

Although the Ute Tribal Defendant's attempt to cast the Indian Plaintiff's case as one that presents the political question and thus non-justifiable under case or controversy, they fail to cite any relevant authority for their argument. The one case relied upon by Ute tribal defendants, is in opposite to their argument. Which is jurisdiction to try and punish Indians who commit crimes on Indian lands. The court did not decline the case stating it was the question better left for Congress, but instead held Ute Tribal Defendant's lacked such jurisdiction over Indian Plaintiff's and left it for Congress to determine otherwise through legislation if they chose to do so.

Contrary to the Ute Tribal Defendants claim, the Indian Plaintiff's presented the district court with numerous federal cases in which the courts are called upon to make judicial determinations on Indian Plaintiff's jurisdiction over Indians, including Supreme Court cases. Duro v. Reina, 495 U.S. 676 (1990); Montana v. United States, 450 U.S. 544, 565-66 (1981); United States v. Becerra-Garcia, 397 F. 3d 1167 (9th Cir. 2005);

Ortis-Barrazza v. United States, 512 F. 2d 1176 (1975);
Walker v. Rushing, 898 F. 2d 672 (8th Cir. 1990); Cabazon
Band of Mission Indians v. Smith, 34 F. Supp. 2d 1195
(Cal. C.D. 1998), present case does not present the
political question that is non-justifiable in the
district court.

**F. INDIAN PLAINTIFF'S CASE IS NOT MOOT BECAUSE
IT PRESENTS CONTROVERSY BETWEEN ADVERSE
PARTIES, EFFECTIVE RELIEF IS AVAILABLE TO
THE INDIAN PLAINTIFF'S, AND PUBLIC INTEREST
WILL NOT BE SERVED IF MOOTNESS IS FOUND.**

The case or controversy must be presented at all
stages of review not only when the complaint is filed.
Steffel v. Thompson, 416 U.S. 452, 459 n. 10 (1974);
also Alvarez v. Smith, 558 U.S. 87, 92 (2009). If
factors such as adverse interest or injury are no longer
met the case may be moot. The basic question in
determining mootness is whether there is the present
controversy as to which effective relief can be granted.
Feldman v. Bomar, 518 F. 3d 637, 642 (9th Cir. 2008).
Additionally, there must be the showing that public
interest will not be served if there is finding of
mootness in the case. Olaques v. Russoniello, 770 F. 2d
791, 794 (9th Cir. 1985).

The Indian Plaintiff's case demonstrates there is

the continuing adverse interest in the present controversy, the form of effective relief is available to the Indian Plaintiff's, and the strong public interest in resolving the issues.

G. INDIAN PLAINTIFF'S CASE IS NOT MOOT DUE TO THE PRESENT CONTROVERSY BETWEEN THE ADVERSE INTERESTS OF THE PARTIES.

The Indian Plaintiff's case presents the controversy that is not moot, as there are sufficient adverse interests due to the underlying dispute regarding federal law.

Contrary to the district court and Ute Tribal Defendant's view, the Indian Plaintiff's case is not the matter of the whether its, Ute Tribal Court was acting as removing and barring from Ute Tribal Court. The issue is one of Indian inherent authority defined under federal law. Therefore, the Indian Plaintiff's stating its Ute Tribal Court, unwilling to enforce tribal and federal law, does not reconcile the differences between the Indian Plaintiff's and the Ute Tribal Defendant's. The Indian Plaintiff's has not changed the prescribed duties of its Ute Tribal Court departmental policies, or Indian Plaintiff's regarding the exercise of Indian inherent authority over Indians. Likewise, the Ute

Tribal Defendant's have not revoked the prosecution of the Ute Tribal Court Order to continues.

H. INDIAN PLAINTIFF'S CASE IS NOT MOOT AS THE INDIAN'S CAN DEMONSTRATE THE FORM OF EFFECTIVE RELIEF AVAILABLE

If the court cannot provide the Indian Plaintiff's effective remedy, the case may be dismissed as moot, however, the threshold for granting effective relief is low. The Indian Plaintiff's seeks both declaratory relief and injunctive relief, both of which can be granted by the district court.

For the granting of injunctive relief, past exposure to illegal conduct alone does not present the case or controversy. Olaques v. Russoniello, 770 F. 2d 791, 794 (9th Cir. 1985). For injunctive relief, courts must question if the relief sought was available at the time the legal action was filed and if not,,,, the question is whether there can be effective relief,,,, West v. Secretary of Dept. of Transp., 206 F. 3d 920, 925 (9th Cir. 2000); also Enyart v. Nat'l Conference of Bar Exam'rs, Inc., 630 F. 3d 1153, 1159 (9th Cir. 2011).

If the case is moot with regard to injunctive relief, the court may still have jurisdiction to grant declaratory relief. Feldman v. Bomar, 518 F. 3d 637, 642

(9th Cir. 2008). For declaratory relief the case is not moot if the continued injury or threat of injury on the part of the Ute Tribal Defendant's can still have substantial adverse effect on the interests of petitioning parties. Olaques, 770 F. 2d at 794-795, the case or controversy for declaratory relief exists only when challenged government activity is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence,, Feldman, 518 F. 3d at 642.

Once declared, Indian Plaintiff's request for the prospective injunction against future criminal charges and prosecution by Ute Tribal Defendants when and while exercising Indian Plaintiff's lawful authority that can be issued by district court to further resolve future misunderstandings between the parties as to Indian Plaintiff's respective rights. The Indian Plaintiff's request for the prospective injunction is proper and the common form of relief under 28 U.S.C. 2202, which allows; Further necessary or proper relief based on the declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

I. THE COURT SHOULD NOT HOLD INDIAN PLAINTIFF'S CASE MOOT AS PUBLIC INTEREST MILITATES AGAINST MOOTNESS.

Finally, the case should not be found moot if there exists public interest in having legality of the practices settled,,,, this militates against the mootness conclusion. Olaques v. Russoniello, 770 F. 2d 791, 795 (9th Cir. 1985).

In the present case, the interests raised transcend just those of the parties. Indian Plaintiff's, as well as Indians, have an interest in knowing the extent and scope of Indian Plaintiff's authority on the Indian Reservation. This public interest goes directly to the safety of the tribal community and the surrounding community at large. Safe communities are in the best interest of the Indian Plaintiff's and the Ute Tribal Defendants at large. Safe communities are in the best interest of the Indian Plaintiff's and the Ute Tribal Defendants and clearly necessitate the decision from the district court on the merits of the Indian Plaintiff's case.

This Court also found that federal common law can provide subject matter jurisdiction under 28 U.S.C. 1331. Gila River Indian Community v. Hennington, Durham


& Richardson, 626 F. 2d 708 (9th Cir. 1980).

CONCLUSION

For the reasons stated above, the Indian Plaintiff's respectfully requests this Courts reverse the district court's the Minute Order dated July 18, 2017, and Judgment, dated July 19, 2017, dismissing the Indian Plaintiff's case for lack of the justifiable case or controversy and remand the case for determination on the merits.

Respectfully submitted this day 28 of August, 2017.


Edson Gardner


Athenya Swain



Lynda Kozlowicz


Konna Oviatt

CERTIFICATE OF SERVICE

Having filed copy dated August 28, 2017, on the following; **APPELLANT OPENING BRIEF**, as set forth was by U.S. mailed to the following address;

J. Preston Stieff
J. PRESTON STIEFF LAW OFFICE
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Edson Gardner