Case No. 17-4124

IN THE UNITED STATES COURT

OF APPEALS TENTH CIRCUIT

Edson Gardner, et al.,

Plaintiff/Appellant

v.

Hon. William Reynolds,
in his official capacity
as Judge of the Ute Tribal
Court, et al.,

Defendant/Appellees

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

REPLY BRIEF OF INDIAN PLAINTIFF/APPELLANTS

Plaintiff/Appellants Respectfully submitted:

Edson Gardner, and
Lynda Kozlowicz, and
Athenya Swain, and
Konna Oviatt.
Post Office Box 472
Fort Duchesne, Utah 84026
Telephone; (435) 722-8224

October 2, 2017

Oral Argument not requested

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U.S. District Court Order Of New Mexico;

INTRODUCTION AND SUMMARY OF ARGUMENT

The Venue is proper in this Tenth Circuit as all, or substantial part of the events, or omission giving rise to the action complained of herein, occurred within this Tenth Circuit's ruling authority. The Indian Plaintiff's liberties are restrained by Ute Tribal Court Judge, the Ute Tribal Defendants, and Ute Social Services Department, (Ute Tribal Defendants) are all residents within Tenth Circuit authority. 28 U.S.C. 1291. The court has jurisdiction over the parties and subject matter jurisdiction of this action pursuant to ICRA, 25 U.S.C. 1303.

The Indian Appellant's, Opening Brief demonstrates that District Court erred in dismissing its case based on lack of subject matter jurisdiction because of no case or controversy. The Ute Tribal Defendant's concede that they detained, arrested and will continue to prosecute the Indian Plaintiffs. In addition, Ute Tribal Defendants threaten future charges on any challenges and prosecution of the Indian Plaintiffs. The controversy between the parties is whether the Indian Plaintiff's was acting

pursuant to Ute Tribal Court inherent authority and enforcing ICRA law at the time the Indian Plaintiff's retrained, detained and delivered the Indian Plaintiff's being barred from the Ute Tribal Court, and Ute Tribal Office. It is the incident giving rise to Indian Plaintiff's charge and prosecution arose on-Reservation and that the Indian Plaintiff's charge was in violation against the Indian Civil Rights Act (ICRA).

The facts presented in the Indian Plaintiff's case satisfy the subsumed doctrines within the case or controversy requirement of Article III of the United States Constitution. The Art. III, 2, cl. I. U.S. Const. The Ute Tribal Defendant's intentionally and willfully interfered with the Indian Plaintiff's inherent authority to protect public safety. The Indian Plaintiff's acted at all relevant times under well-delineated rules established under federal law ICRA. These federal rules ICRA apply specifically when tribal law enforcement engages Indians entering Indian lands, and when the Indians have or are committing violations of tribal and federal law.

Since the Ute Tribal Defendant's interference

with Indian Plaintiff's inherent authority, the Indian Plaintiff's ability to provide safety is shrouded under the looming, and specific threat, the Ute Tribal Defendant's actions can, and will be arrested and prosecuted by the Ute Tribal Defendants. The Ute Tribal Defendant's action has case doubt in both the Indian communities regarding the authority of the Ute Tribal Defendant's taking actions against any person violating or any challenges by Plaintiffs, while on Indian lands. This significant intrusion into the Indian Plaintiff's inherent right and authority to exercise civil rights, maintain peace and security on personal property, and most of all the protection of Indian children, or face arrest and continued prosecution by the Ute Tribal Defendants and the Tribal Departments that has caused the Indian Plaintiff's an actual and immediate injury. The facts of the Ute Tribal Defendant's case were presented to the lower court demonstrated that it meets the requirement of standing and the controversial issue that is ripe for review and clearly not moot.

The Ute Tribal Defendant's Brief fails to address why or how there is no case or controversy

presented in the Indian Plaintiff's case. The Ute Tribal Defendant's simply reiterated the District Court ruling, yet offer no argument or legal authority to counter why the Indian Plaintiff's has no standing. Neither do the Ute Tribal Defendant's provide facts to support the finding that the Indian Plaintiff's case is no longer ripe or is moot, or somehow presents the non-justifiable political question solely left for Congress.

Rather, Ute Tribal Defendant's brief argues that the Indian Plaintiff's case presents no federal question jurisdiction under 28 U.S.C. 1331 and the 25 U.S.C. 1303. This argument was raised in the District Court as basis for dismissing the Indian Plaintiff's case. The Ute Tribal Defendant's argument, that the Indian Plaintiff's failed to plead federal question jurisdiction diverts from the relevant issues, whether the Indian Plaintiff's case presents the case or controversy on the issue before the Court.

The inherent authority recognized by the United States Supreme Court and controlling in the Indian Plaintiff's case is found in Duro v. Reina, 495 U.S. 676 (1990), that Congress responded to Duro by

amending the Indian Civil Rights Act, 25 U.S.C. 1301(2) and recognized and affirmed the inherent power of Indian tribes exercise criminal jurisdiction over non-members Indians. United states v. Lara, 541 U.S. 139, 198 (2004).

The centerpiece of the Indian Plaintiff's case is the inherent authority described in Duro and other federal Court precedents that are presented in the Indian Plaintiff's Writ. The Indian Plaintiff's properly plead federal question jurisdiction under 28 U.S.C. 1331 and 25 U.S.C. 1303. The Indian Plaintiff's has further demonstrated that there is factual case or controversy between the parties. The Ute Tribal Defendant's have presented no controlling authority or compelling argument to the contrary.

The Indian Plaintiff's moves to transfer this habeas corpus review action to the Tenth Circuit Court of Appeals pursuant to rule Change of venue, 28 U.S.C. 1404, the action pending the conclusion of the federal Court action. The Indian Plaintiff's support the transfer in the event the federal Court grants the transfer.

I. Discussion Of Letters From The Ute Tribal Office And The Letter From Ute Tribal Court Erroneous Conclusions

The Ute Tribal Defendant's letter to the Indian Plaintiff's, Re; Kozlowicz & Gardner Advocates, Inc., dated July 10, 2012 (**Exhibit "A"**), and letter to the Indian Plaintiff's, Re; Suspension, dated July 18, 2012 (**Exhibit "B"**), and the letter from Ute Tribal Court to the Indian Plaintiff's, Subject; Suspension of Tribal Advocates; Lynda Kozlowicz and Edson Gardner, dated December 08, 2015 (**Exhibit "C"**). The Ute Tribal Defendant's violation of the Indian Civil Rights Act, 25 U.S.C. 1301 through 1303, abuse of the Ute Tribal Defendant's discretion. The right to counsel, and right to jury trial. In, Toya v. Toledo, Civil No. 17-0258 (D. New Mexico September 19, 2017) (**Exhibit "D"**); United States v. Grover, 119 F. 3d 850, 851 (10th Cir. 1997); United States v. Deninno, 103 F. 3d 82, 84 (10th Cir. 1996). under this standard, do not defer to the district court's legal conclusion. Koon v. United States, 518 U.S. 81, 100 (1996) (A district court by definition abused its discretion when it makes an error of law. The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.).

challenges the Ute Tribal Defendant's in Ute Tribal Office and the Ute Tribal Court's legal conclusions.

ARGUMENT

A. The District Court Has Federal Question Jurisdiction Under 28 U.S.C. 1331 and 25 U.S.C. 1303.

The District Court has federal question jurisdiction under 28 U.S.C. 1331 and 25 U.S.C. 1303. The Ute Tribal Defendant's Brief advances argument, that the Indian Plaintiff's case should be summarily dismissed for lack of subject matter jurisdiction because the Indian Plaintiff's has failed to present the federal question under either 28 U.S.C. 1331 or 25 U.S.C. 1303. On the contrary, the Indian Plaintiff's writ sets forth that the inherent sovereign authority exercised by the Ute Tribal Defendant's over the Indian Plaintiff's in this case has been defined, recognized and supported by federal case (common) law. In clear and unmistakable language the Supreme Court has held that, the 28 U.S.C. 1331 of the Judicial Code provides that the federal district 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 a statutory origin. Federal common law as articulated in rules that are fashioned by court decisions are laws as that term is used in 1331. 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 Indians … In all of these cases, the governing rule of decisions has been provided by federal law. National Farmers Union Insurance Company et al., v. Crow Tribe, 471 U.S. 845, 850-852 (1985). This Court has found that federal common law can provide subject matter jurisdiction under 28 U.S.C. 1331. Gila River Indian Community v. Henningson, Durham & Richardson, 626 F. 2d 708 (9th cir. 1980).

The 25 U.S.C. 1302(8) provides that no Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws. Although the Indian Civil Rights Act of 1968 makes the handful of analogous safeguards found in the Bill of rights and Fourteenth Amendment enforceable in Ute Tribal Courts that the

guarantees are not identical and there is the definite trend by Ute Tribal Courts towards the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and need not follow the U.S. Supreme Court precedents jot-for-jot.

The Court determines that the situation presented here is most like the claim involving an alleged violation of an individual's right to equal protection due to improper selective prosecution. In those cases, the Ninth Circuit teaches;

> A government entity has discretion in prosecuting its criminal laws, but enforcement is subject to constitutional constraints. To prevail on its claims under the equal protection clause of the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the police must demonstrate that enforcement had a discriminatory effect, and the police were motivated by a discriminatory purpose that establish a discriminatory effect. The claimant must show that similarly situated individuals were not prosecuted. To show discriminatory purpose, a plaintiff must establish that the decision-maker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.

Rosenbaum v. City and County of San Francisco, 454 F. 3d 1142, 1152-1153 (9th Cir. 2007). For the Indian Plaintiff's to prove the claim for denial of

procedural due process, the Indian Plaintiff's must show that they did not receive adequate notice or an opportunity to be heard with respect to the Ute tribal law where they were banished. Mathews v. Eldride, 424 U.S. 319, 332 (1976)(interpreting the United States Constitution). Due process, unlike some legal rules, is not the technical conception with the fixed content unrelated to time, place and circumstances. Cafeteria & Rest. Workers Union v. McElrot, 367 U.S. 886, 895 (1961). Instead, due process is flexible, and calls for such procedural protections as the particular situation demands. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

For the reason stated above, the Indian Plaintiff's determined, they have demonstrated the violation of their right to due process under ICRA. The Indian Plaintiff's next argue that the Ute Tribal Defendant's violated the Indian Plaintiff's confrontation rights found in 25 U.S.C. 1302(6). 25 U.S.C. 1302(6); provides that no Indian tribe in exercising powers of self-government shall deny to any person in the criminal proceeding the right to the speedy and public trial, to be informed of the

nature and cause of the accusation, to be confronted with the witnesses against Indian Plaintiff's, to have compulsory process for obtaining witnesses in the Indian Plaintiff's favor, and at the Indian Plaintiff's own expense to have the assistance of counsel for the Indian Plaintiff's defense. Due process requires that the party affected by government action be given the opportunity to be heard at the meaningful time and in the meaningful manner. S. Cal. Edison Co. v. Lynch, 307 F. 3d 794, 807-08 (9th Cir. 2002)(quoting Mathews v. Eldridge, 424 U.S. 319 at 333 (1976)).

B. The Court Has Subject Matter Jurisdiction Over Petition For The Writ Of Habeas Corpus Under The Indian Civil Rights Act.

Federal Courts exercise subject matter jurisdiction over petitions for writ of habeas corpus where, as here, the Indian Plaintiff's seek to test the legality of permanent banishment from Ute Tribe under the ICRA in, Poodry, 85 F. at 874. The Ute Tribal Defendant's efforts to recast and rewrite the Petition as the case against the Indian Plaintiff's concerning being barred from Ute Tribal Court, and Ute Tribal Office matters ignores the facts. The

Indian Plaintiff's are entitled to an evidentiary hearing because they have alleged facts which, if proven, would entitled them to relief from the unlawful restraint on personal liberty imposed by the Ute Tribal Defendant's banishment resolution. Norris v. Risley, 878 F. 2d 1178, 1180 (9th Cir. 1989) (stating rule).

C. Poodry v. Tonawanda Band Of Seneca Indians Establishes That Permanent Banishment Is The Sufficient Restrained On Personal Liberty So As To Be In Custody Or Detention For Purposes Of Habeas Corpus Relief.

This Court should be guided in its exercise of subject matter jurisdiction by Poodry v. Tonawanda Band of Seneca Indians, 85 F. 3d 874, 899 (2d Cir. 1996). The Poodry is the leading authority on ICRA protections for Indians unlawfully banished in violation of the protections afforded by the Bill of Rights to U.S. Constitution as applied to Indians through the ICRA. The Poodry has been followed by courts in this Circuit and cited with approval by the Ninth Circuit. In, Quair v. Sisco, 359 F. Supp. 2d 948 (2004) (There is no question that the most authoritative discussion of this issue is that in Poodry and the Court finds the rationale of Poodry

persuasive); In, Moore v. Nelson, 270 F. 3d 787 (9th Cir. 2001)(relying on Poodry to conclude that imposition of the fine is not detention sufficient for habeas jurisdiction under the ICRA); In the non-ICRA case, stating that the holding in Poodry is not remarkable because the severe restraint imposed by the threat of banishment was enough to put the petitioner in custody to warrant habeas relief). As explained, the facts of this case closely parallel those of Poodry, ~~and~~ the Court should be persuaded by the Second Circuit's exercise of jurisdiction to hear Petitioners similar ICRA claims.

The Court reasoned that banished has clearly and historically been punitive in nature making it sufficiently akin to the criminal sanction for habeas relief to be warranted. Poodry, 85 F. 3d at 889. (There is no question that the most authoritative discussion of this issue is that in Poodry and the Court finds the rationale of Poodry persuasive; More v. Nelson, 270 F. 3d 789 (9th Cir. 2001)(relying on Poodry to conclude that imposition of a fine is not detention sufficient for habeas jurisdiction under the ICRA); Resendiz v. Kovensky, 416 F. 3d 952 (9th

Cir. 2005)(in a non-ICRA case, stating that the holding in Poodry is not remarkable because the severe restraint imposed by the threat of banishment was enough to put the petitioner in custody to warrant habeas relief). As explained, the facts of this case closely parallel those of Poodry, and the Court should be persuaded by the Second Circuit's exercise of jurisdiction to hear the Indian Plaintiff's similar ICRA claims). The fact that there was no criminal proceeding per se was irrelevant. The allegations of charge and actions on Ute Tribal Government were such that the Court reasoned these to represent criminal conduct, for which banishment was the sanction punitive in nature. Second, the Court engaged in the lengthy analysis to conclude that physical custody is not the jurisdictional prerequisite for federal habeas review. (citing Jones v. Cunningham, 371 U.S. 236, 243 (1963)). The Court stated that the focus on custody or detention was misplaced; instead, the Court focused upon the severity of an actual or potential restraint on liberty. Applying these standards to the permanent banishment orders in the case, the Second Circuit

determined that petitioners have surely identified severe restraints on their liberty because;

> 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. We deal here not with a modest fine or a short suspension of a privilege-found not to satisfy the custody requirement for habeas relief-but with the coerced and peremptory deprivation of the petitioners membership in the tribe and their social and cultural affiliation.

Thus, the Court held that where, as here, petitioners seek to test the legality of orders of permanent banishment, the federal District Court has subject matter jurisdiction to entertain applications for writs of habeas corpus.

D. The Habeas Corpus Petition Is Not The Suite Against The Ute Tribe And Does Not Infringe On The Ute Tribe's Sovereign Immunity.

The Ute Tribe is not implicated in this habeas action. The petition for the writ of habeas corpus is never viewed as the suit against the sovereign, simply because the restraint for which review is sought, if indeed illegal, would be outside the power of the Ute Tribal Defendants acting in the sovereign's name. Poodry, 85 F. 3d at 899 (citing Larson, 337 U.S. at 690, Ex parte Young, 209 U.S.

123, 167-68 (1908)). As the Second Circuit correctly noted in Poodry, because the petition for the writ of habeas corpus is not properly the suit against the sovereign, the Ute Tribe is simply not the proper Defendant. Therefore, there is no credible argument that this is the case against the sovereign Ute Tribe - it is not. The Ute Tribe is not named as the Defendant and the Ute Tribe, qua Tribe, did not directly cause the unlawful restraint on Indian Plaintiff's liberty. The petition correctly names the individual purposed members of the Ute Tribal Defendant's.

Without question, the Ute Tribal Defendant's does not own sovereign immunity. The Ute Tribal Defendant's admits. It is axiomatic that Ute tribal sovereign immunity does not extend to individual Ute Tribal Defendant's of the Ute Tribe simply because of their status as the Ute Tribal Defendant's in, United States v. James, 980 F. 2d 1314, 1319 (9th cir. 1992) (citing Puyallup Tribe, Inc. v. Washington State Dep't of Game, 433 U.S. 165, 171-72 (1977))(Tribal immunity does not extend to the individual members of the tribe.); Kizis v. Morse Diesel Intern., Inc., 794

A. 2d 498, 501 n. 7 (Conn. 2002)(Several cases have established that tribal sovereign immunity does not extend to individual members of a tribe and that the tribe itself must assert immunity.).

Simply acting as the group does not grant some immunity that would otherwise not exist if each of the individuals of that group acted alone. The Ute Tribal Defendant's argument would greatly expand the contours of sovereign immunity jurisdiction.

More importantly, contrary to The Ute Tribal Defendant's suggestions, the individual Ute tribal Defendant's are not acting as Ute tribal officials or as the Ute tribe so as to be protected by the Ute tribe's sovereign immunity of the Ute tribal Defendants. This argument was rejected in, Imperial Granite Co v. Pala Band of Mission Indians which established that the act of voting is not an official action of the tribe. 940 F. 2d 1269 (9th Cir. 1991).

The Plaintiff in Imperial Granite sued tribal officials after the tribe refused to grant as individual Tribal Council members are properly named as Defendants. In, Tenneco Oil Co., v. the Sac and Fox Tribe of Indians of Oklahoma, 725 F. 2d 572 (10th

Cir. 1984). This habeas corpus proceeding does not implicate or infringe on the Ute Tribe's sovereign immunity.

E. The Ute Tribal Defendant's Do Not Have Sovereign Immunity For Unlawful Acts.

As the threshold matter, the Petition correctly names the individuals purported the Ute Tribal as Defendant's. The Indian Plaintiff's allege the Ute Tribal Defendant's acting in their Official Capacities, have acted outside the scope of their authority as purported of the Ute Tribal Defendant's, and accordingly, the Ute Tribal Defendant's actions in violation of the ICRA cannot be shielded by the Ute tribe's sovereign immunity to the extent the Ute Tribal Defendants suggest they cannot be sued. The contention is incorrect. The Ute tribal sovereign immunity does protect the Ute Tribal Official Defendant's from suit, but only when they are acting within the scope of their lawful authority in, Harden v. White Mountain Apache Tribe, 779 F. 2d 476, 479 (9th Cir. 1985). When the Ute tribal official Defendant's act outside the scope of authority. The conduct against which the specific relief is sought

is beyond the Ute Tribal Official Defendant's powers and is, therefore, not the conduct of the sovereign. Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma, 725 F. 2d 572, 574 (10th Cir. 1984)(quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949)). Not only does the Ute tribal sovereign immunity not shield the actions of the Ute Tribal Defendant's that violate Federal law, by acting outside the scope of their authority. The Ute Tribal Defendant's made the conduct without any connection to the Ute Tribe. The Ute Tribal Defendant's may not take shelter in the Ute Tribe's immunity. Vann v. Kempthorne, 534 F. 2d 741 (D.C. Cir. 2008)(holding that tribal sovereign immunity does not bar the suit against tribal officers for alleged constitutional and other violations).

F. The Indian Plaintiff's Do Not Have An Alternative Forum In Which To Seek Relief And Have Exhausted, Or Are Excused From Exhausting Available Ute Tribal Administrative remedies.

The Ute Tribal Defendant's 12(b)(6) claims can best be described as the failure to exhaust the Ute tribal administrative remedies argument. The Ute Tribal Defendant's, as explained, the Indian

Plaintiff's has no Ute Tribal Court and, the Indian Plaintiff's factual allegations, which must be accepted as true for purpose to dismiss, show there were no Ute tribal administrative remedies provided or otherwise made available. This Federal habeas action remains the only forum that can provide the Indian Plaintiff's with the remedy.

H. There Is No Ute Tribal Judicial Forum

It is an undisputed fact the Ute Tribe does not have the Ute Tribal Court, or any judicial process for reviewing the actions of the Ute Tribal Defendant's. Necklace v. Tribal Court of Three Affiliated Tribes, 554 F. 2d 845, 846 (8th Cir. 1977) (concluding that the absence of any meaningful forum to dispute the banishment militates strongly in favor of the flexible application of the tribal exhaustion rule)(quoting O'Neal v. Cheyenne River Sioux Tribe, 482 F. 2d 1140, 1146(8th Cir. 1973)). The fact alone can be dispositive and should end the Court's inquiry.

I. No Ute Administrative Remedies Exist To Seek Review Of The Decision Of The Ute Tribal Defendants And Indian Plaintiff's Were Barred From Attempting To Defend

The Actions Before The Banishment Resolution Issued.

The Indian Plaintiff's alleged that no Ute Tribal administrative remedies were available to the Indian Plaintiff's before, during, or after the banishment, assuming arguendo there were some Ute tribal administrative remedies available to the Indian Plaintiff's, as explained, the Indian Plaintiff's should not be required to exhaust such remedies. Federal Courts have routinely held that the normal exhaustion of Ute tribal remedies requirement is excused as futile in the absence of Ute Tribal Court. Johnson v. Gila River Indian Community, 174 F. 3d 1032, 1036 (9th Cir. 1999).

Because Indian Plaintiff's do not have an alternative forum in which to seek relief, the Court should be extra cautious when considering dismissals therefore, the federal Court should conclude that the absence of any Ute Tribal Court forum excuses the exhaustion requirement or that the effect to exhaust those remedies would have been futile. Indian plaintiff's position is that the Ute tribal Defendant's provide no procedure to appeal those

decisions and to raise the contentions being raised in the petition as grounds for relief, for alleged violations of ICRA 25 U.S.C. 1302. The fact the Indian Plaintiff's can not reapply for writ in the Ute Tribal Court or the Ute Tribal Office does not address the issues of writ.

In, Quair v. Sisco , 359 F. Supp. 2d 948 (2004), at 971-72, similarly, here, the hollow offer of meeting with the Ute Tribal Defendants now is too little, too late, and would not address the underlying habeas claims. As such, the Indian Plaintiff's have alleged facts sufficient to establish the exhaustion of remedies component of habeas relief with respect to the decision to banish them from the Ute Tribal Court or the Ute Tribal Office.

K. No Meaningful Review Is The Available To Indian Plaintiff's In Ute Tribal Court Or The Ute Tribal Office

The District Court ruled on summary judgment the federal Court had jurisdiction under the ICRA to review the Ute Tribe's decision to banish Quair (adopting Poodry analysis). Following Poodry, the 2004 Quair decision held that banishment is the

detention in the sense of the severe restriction on the Indian Plaintiff's liberty not shared contention, also made by the Ute Tribal Defendant's here. The mere fact the Indian Plaintiff's could petition the Ute Tribal Defendant's for reinstatement (and had not done so) suggested that all available Ute tribal remedies had not been exhausted. The Ute Tribal Court did not view this as meaningful review, especially in light of the fact that there were no appellate procedures and the Ute Tribal Court to protect the Indian Plaintiffs. The Indian Plaintiff's here, like in Quair, have no Ute tribal institution to turn to for meaningful review of the banishment resolution.

J. The Ute Tribal Defendants Answering Brief Evidence Even Further That The Issues Presented By The Present Case Are Ripe, And Are Not Moot.

The Ute Tribal Appelles argues there is no case or controversy before the federal court as the Defendant Ute Tribal Defendants changes to tribal and federal law in Ute Tribal Court Actions. The Ute Tribal Defendants respond that it would direct Ute Tribal Court to address issues presented in Ute Tribal Court Order, namely, the Ute Tribal Defendants

will not exercise Ute tribal court authority, will action on Indian reservation the Ute Tribal Defendants to review the Indian Plaintiffs response as act of contrition.

The review de novo the district court's conclusion that it lacked jurisdiction. Kaw Nation ex rel. McCauley v. Lujan, 378 F. 3d 1139, 1142 (10th Cir. 2004). the controversial issues presented here are concrete, not hypothetical or abstract, and certainly not moot. The Ute Tribal Defendants Answering Brief make no showing the Indian Plaintiff's and Ute Tribal Defendants have resolved what legal authority the Ute Tribal Defendant's was acting under during the incident giving rise to Indian Plaintiff's charges, and arrest, and prosecution, or that the prosecution will be necessary.

CONCLUSION

For the foregoing reasons, and assuming indian Plaintiff's alleged facts as true and drawing reasonable inferences therefrom. The Indian Plaintiff's respectfully request that the 10th Circuit Court to issue an order denying Ute Tribal

Defendant's brief to dismiss pursuant to Habeas Rule 5.

Respectfully submitted this day 4, Oct. 2017.

Edson Gardner

Lynda Kozlowicz

Athenya Swain

Konna Oviatt

UTE INDIAN TRIBE

Business License

FY2014

Phone: (435) 725-4950
Uintah & Ouray Reservation

NOT TRANSFERABLE

No. 3190

$ 100.00

We hereby certify that Kozlowicz, Gardner Advocates Inc. (Tribally Owned)

having paid to the Ute Indian Tribe Treasurer the sum of One Hundred no/100 dollars and

having complied with the Ordinance in force relating to Business License is hereby authorized to transact

business as Legal Services - Civil & Criminal Legal Activity

on the Uintah and Ouray Reservation for a term of one year commencing 10-01-2013 and

ending 09-30-2014

Approved 03-18-2014

Director

Manuel Myore - Director of Energy & Minerals

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December 08, 2015

INTER-OFFICE MEMORANDUM

TO: Shaun Chapoose, Ute Indian Tribal Business Committee-Chairman

FROM: Roberta Cesspooch, Court Administrator

SUBJECT: Suspension of Tribal Advocates: Lynda Kozlowicz and Edson Gardner

Attached you will find a copy of letters addressed from Ms. Lynda Kozlowicz and Mr. Edson Gardner, assuming records were lost no case number listed, regarding their right to practice within the Ute Indian Tribal Court. Ms. Kozlowicz and Mr. Gardner, were both suspended by the Executive Director (Michelle Sabori) and were no longer allowed to practice within the Ute Indian Tribal Court as Tribal Advocates.

Ms. Kozlowicz and Mr. Gardner, had filed several Civil Complaints with the Ute Indian Tribal Court, against the Tribal Business Committee Members as to their suspension and right to practice before this Court. The Tribal Court civil cases files, CV13-185 and CV-14-089 where transferred to the Ute Tribal Business Committee for resolution pursuant to Ordinance 13-022, as the Tribal Court had no jurisdiction to hear administrative complaints. On June 23, 2014 an Order was issued in case no. CV14-089, which dismissed the matter with prejudice by the three Judge Panel, scheduled before the Tribal Business Committee. (attached)

We are becoming very concerned of these issues, this is where the Court needs your clarification. We are asking if possible a response from the Business Committee how to proceed with continued pleadings filed by Ms. Kozlowicz and Mr. Gardner.

Please advise the Court of your attention and decision of these issues that are pressing. We would appreciate a response.

xc: Tribal Business Committee Members (5)
Clifford Serawop, Executive Dir.
Quanah Poweaukee, Assistant Executive Dir.
William Reynolds, Acting Chief Judge
Rjc/file

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July 10, 2012

SENT VIA HAND DELIVERY

Michelle Sabori
Executive Director
Ute Indian Tribe

RE: KOZLOWICZ & GARDNER ADVOCATES, INC.

Dear Ms. Sabori:

As Executive Director, you are tasked with the supervision of lay advocates (also referred to as lay counselors or lay officers). *See* Ute Ordinance No. 04-003 amending U.L.O.C. § 1-3-4(Z). It has come to the attention of the Ute Tribal Business Committee ("Business Committee") that Kozlowicz & Gardner Advocates, Inc., have been filing suit against parties of whom the Ute Tribal Court has no personal or subject matter jurisdiction (i.e., state and/or county officials). *See* e.g., *Reed v. Dalton*, Case No. CV12-1111 (Ute Indian Tribal Court 2012), *Swain v. Poulsen*, Case No. CV12-207 (Ute Indian Tribal Court 2012), *In the Matter of Severance: Farnsworth Road Cemetery and Tribal Right-a-way* [sic], Case No. 09-039 (Ute Indian Tribal Court 2009).

Tribal court subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law. *See* COHEN'S HANDBOOK, § 7.02[1][a], p. 599. However, tribal court jurisdiction over nonmembers is of a different matter. A tribe's exercise of adjudicative jurisdiction over non-Indians or nonmembers does raise questions of federal law, however, reviewable in federal court. *Id.* A tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction as to nonmembers. *See Strate v. A-1 Contractors*, 20 U.S. 438, 442 (1997). The Supreme Court has also stated that a tribe lacked adjudicative jurisdiction over state officers conducting an on-reservation investigation for an alleged off-reservation crime. *See Nevada v. Hicks*, 533 U.S. 353, 358 (2001)(notwithstanding absence of any mention of tribes in 42 U.S.C. § 1983, tribal courts have no jurisdiction to hear certain claims under that statute). As a general matter, the tribal courts do not possess authority over non-Indians who come within their borders. *See Montana v. United States*, 450 U.S. 544, 565 (1981)(the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe). Nothing in the language of the Indian Civil Rights Act § 1302, its legislative history or its subsequent construction has been read to mandate that Indian tribes exercise civil authority over non-Indians coextensive with tribal civil authority over tribal members *Manchester v. San Juan County*, 405 F.Supp.2d 1302, 1315 (D. Utah 2005).

Despite previous rulings by the Tribal Court indicating this point, Kozlowicz & Gardner Advocates, Inc. have insisted on filing additional suits against county and/or state officials in Tribal Court. As lay advocates practicing in the Tribal Court, Ms. Kozlowicz and Mr. Gardner are to abide by the American Bar Association Code of Ethics. *See* Ute Ordinance No. 96-005, sec. (Z)(a); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

Plaintiffs, Judge Clair M. Poulson and (former) Duchesne County Sheriff's Deputy Derek Dalton recently filed a complaint in federal court against the Ute Indian Tribe, the Ute Tribal Business Committee, Business Committee members in their individual official capacities, the Tribal Court, the Tribal Court Chief Judge in his individual official capacity, Dean Reed, Lynda Kozlowicz, Elson Gardner, Kozlowicz & Gardner Advocates, Inc., Alfonso Swain, and Johnny Slim, Sr. in Case No. 2:12-cv-00497 (hereinafter referred to as the "*Poulson* case"). This federal complaint brings to the forefront the jurisdictional issues created when lay advocates file suit against county officials in tribal court. Furthermore, the federal complaint implies that the Tribe is somehow supportive of the actions of Kozlowicz & Gardner Advocates, Inc.

The Business Committee is concerned with the practices of Kozlowicz & Gardner Advocates, Inc. In presenting themselves as "tribal advocates," Ms. Kozlowicz and Mr. Gardner have created the misperception that they are advocates and representatives *on behalf of and for the Tribe*. (emphasis added). Most concerning, though, is the repeated filing of cases against state and county officials. Given previous admonishments to Ms. Kozlowicz and Mr. Gardner by the Court concerning the lack of jurisdiction over county and state officials, the Business Committee respectfully request that you, as Executive Director and supervisor of lay advocates practicing in the Tribal Court, review Kozlowicz & Gardner Advocates, Inc. and consider a suspension of their practices. Enclosed is a proposed letter to Kozlowicz & Gardner Advocates, Inc.

The Business Committee finds cases involving questions of jurisdiction to be an important matter of self-government and inherent sovereignty. The exercise of jurisdiction by our Tribal Court is one of the most visible aspects of self-determination. It is important to the Business Committee and the Tribe that we protect the Tribal Court from challenges to its jurisdiction. Thank you for your consideration.

Sincerely,

Irene C. Cuch, Chairwoman
Ute Tribal Business Committee

UTE INDIAN TRIBE
P. O. Box 190
Fort Duchesne, Utah 84026
Phone (435) 722-5141 • Fax (435) 722-5072

July 18, 2012

SENT VIA CERTIFIED U.S. MAIL

Kozlowicz & Gardner Advocates, Inc.
ATTN: Lynda Kozlowicz and Edson Gardner
P.O. Box 472
Fort Duchesne, Utah 84026

RE: SUSPENSION

Dear Ms. Kozlowicz and Mr. Gardner:

As Executive Director, I am tasked with the supervision of lay advocates (also referred to as lay counselors or lay officers). *See* Ute Ordinance No. 04-003 *amending* U.L.O.C. § 1-3-4(2). It has come to my attention that you, as Kozlowicz & Gardner Advocates, Inc., have been filing suit against parties of whom the Ute Tribal Court has no personal or subject matter jurisdiction. *See e.g., Swain v. Poulsen*, Case No. CV12-207 (Ute Indian Tribal Court 2012), *In the Matter of Severance: Farmcreek Road Cemetery and Tribal Right-a-way* [sic], Case No. 09-039 (Ute Indian Tribal Court 2009).

Tribal court subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law. *See* COHEN'S HANDBOOK, § 7.02[1][a], p. 599. However, tribal court jurisdiction over nonmembers is of a different matter. A tribe's exercise of adjudicative jurisdiction over non-Indians or nonmembers does raise questions of federal law, however, reviewable in federal court. *Id.* A tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction as to nonmembers. *See Strate v. A-1 Contractors*, 20 U.S. 438, 442 (1997). The Supreme Court has also stated that a tribe lacked adjudicative jurisdiction over state officers conducting an on-reservation investigation for an alleged off-reservation crime. *See Nevada v. Hicks*, 533 U.S. 353, 358 (2001)(notwithstanding absence of any mention of tribes in 42 U.S.C. § 1983, tribal courts have no jurisdiction to hear certain claims under that statute). As a general matter, the tribal courts do not possess authority over non-Indians who come within their borders. *See Montana v. United States*, 450 U.S. 544, 565 (1981)(the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe). Nothing in the language of the Indian Civil Rights Act § 1302, its legislative history or its subsequent construction has been read to mandate that Indian tribes exercise civil authority over non-Indians coextensive with tribal civil authority over tribal members *MacArthur v. San Juan County*, 405 F.Supp.2d 1302, 1315 (D. Utah 2005).

Thus, you cannot establish a basis for jurisdiction to sue county and/or state officials in the Ute Tribal Court. Despite previous rulings by the Tribal Court indicating this point, as Kozlowicz & Gardner Advocates, Inc., you have insisted on filing additional suits against county and/or state officials in Tribal Court.

As lay advocates practicing in the Tribal Court, you are to abide by the American Bar Association Code of Ethics. *See* Ute Ordinance No. 96-005, sec. (2)(a). The Code of Ethics is referred to as "Rules of Professional Conduct." You are in violation of Rule 3.1 Meritorious Claims And Contentions. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

This letter hereby serves as notice to you, Lynda Kozlowicz and Edson Gardner, that you are suspended from any practice in the Ute Tribal Courts as lay advocates for a period of ninety (90) days from July 18, 2012. You may be reinstated to practice as lay advocates on October 17, 2012.

Thank you for your cooperation.

Sincerely,

Michelle M. Saboni
Executive Director
Ute Indian Tribe

xc: Ute Tribal Business Committee
Ute Tribal Court Judges
Ute Tribal Court Staff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MILTON TOYA,

Petitioner,

vs. No. CV 17-00258 JCH/KBM

AL CASMENTO, DIRECTOR,
Sandoval County Detention Center,
PUEBLO OF JEMEZ,

Respondents.

ORDER

This matter is before the Court on Petitioner Milton Toya's Petition For Writ of Habeas Corpus for Relief From a Tribal Court Conviction Pursuant to 25 U.S.C. § 1303 (Doc. 1). The Petition names Al Casamento, Director of Sandoval County Detention Center, and Pueblo of Jemez as Respondents. However, "[a]n application for a writ of habeas corpus is never viewed as a suit against the sovereign," and "§ 1303 does not signal congressional abrogation of tribal sovereign immunity, even in habeas cases." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899 (2nd Cir. 1996). Therefore, the Pueblo of Jemez is not a proper respondent and will be dismissed as a party to this action.[1] *See id.* ("Because a petition for writ of habeas corpus is not properly a suit against the sovereign, the Tonawanda Band is simply not a proper respondent."). The Court has reviewed the Petition and determined that it is not subject to summary dismissal and, therefore, will order Respondent Casamento to file an answer. *See* Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

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[1] Tribal sovereign immunity does not bar "actions against tribal officers for writs of habeas corpus," *Poodry*, 85 F.3d at 899, but the Petition does not identify the tribal officer or officers responsible for Petitioner's allegedly unlawful incarceration.

IT IS THEREFORE ORDERED that Respondent Pueblo of Jemez is DISMISSED as a party to this action;

IT IS FURTHER ORDERED that Respondent Casamento answer said petition within thirty (30) days from the date of entry of this Order. Respondent Casamento's answer shall advise, but is not limited to, whether the Petition has exhausted his tribal court remedies as to the issues raised in the federal petition. In each case, Respondent Casamento shall attach to his answer copies of any pleading pertinent to the issue of exhaustion which was filed by Petition in the sentencing court, the district court, and appellate courts, together with copies of all memoranda filed by both parties in support of or in response to those pleadings. Respondent Casamento shall also attach to the answer copies of all tribal court findings and conclusions, docketing statements, and opinions issued in Petitioner's tribal court post-conviction or appellate proceedings. In the event Respondent Casamento denies exhaustion, Respondent Casamento shall identify the tribal court procedures currently available to Petitioner given the nature of Petitioner's claims and their procedural history.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MILTON TOYA,

Petitioner,

v. CIV 17-0258 JCH/KBM

ALAN TOLEDO, Pueblo of Jemez Tribal Court Judge,
JOSEPH A. TOYA, Pueblo of Jemez Governor,
WILLIAM WAQUIE, Pueblo of Jemez 1st Lt. Governor, and
JONATHAN ROMERO, Pueblo of Jemez 2nd Lt. Governor,

Respondents.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on Petitioner Milton Toya's First Amended Petition for Writ of Habeas Corpus for Relief from a Tribal Court Conviction Pursuant to 25 U.S.C. § 1303 (*Doc. 10*), filed June 9, 2017. Petitioner asserts that he was denied the right to counsel and the right to request a trial by jury during the course of his tribal-court prosecution. *Id.* at 2. Respondents, on the other hand, contend that Petitioner has failed to exhaust his tribal remedies, leaving this Court without jurisdiction to resolve the Petition. *Doc. 13.*

The Honorable Judith C. Herrera referred this matter to me on August 18, 2017, to "conduct hearings, if warranted, including evidentiary hearings, and to perform any legal analysis required to recommend to the Court an ultimate disposition of the case." *Doc. 17.* Having reviewed the submissions of the parties and the relevant law, the Court finds that Petitioner has exhausted his tribal remedies or that resort to them would be futile. The Court furthermore concludes that there is merit to Petitioner's contentions, and therefore recommends that the Petition be granted.

I. BACKGROUND

Petitioner is an enrolled member of the Pueblo of Jemez, a federally-recognized Indian Tribe. *Doc. 10* at 1. On January 25, 2017, Officer Jordan Shendo of the Jemez Pueblo Police Department allegedly discovered Petitioner passed out in the driver's seat of a pick-up truck within the exterior boundaries of the Jemez Indian Reservation. *Doc. 13-1* at 2. The truck was running. *Id.* Based on these events Petitioner was charged with four crimes: aggravated driving under the influence, liquor violation, driving on a revoked or suspended license, and open container. *Doc. 13-1* at 1.

Petitioner was arraigned on January 27, 2017, before the Governor and Lieutenant Governors of the Pueblo. *See Doc. 13-1* at 3; *Doc. 14* (Notice of Lodging – Exhibit 3). At the conclusion of his arraignment, Petitioner pled guilty to all of the charges and signed a document so stating. *Doc. 13-1* at 4. This document acknowledged that Petitioner was advised of the rights "as afforded to all defendants appearing before [Tribal] Court." *Id.* These rights are stated under Rule 3 of the "Pueblo of Jemez Rules of Criminal Procedure." As written, there is no mention of the right to a jury trial or an attorney in Rule 3. However, Petitioner was informed that he had a right to counsel at the arraignment. *Doc. 14* (Exhibit 3).[1]

Petitioner appeared for sentencing before the Honorable Alan Toledo, Tribal Court Judge, on February 8, 2017. *Doc. 13-1* at 6. Second Lieutenant Governor Jonathan Romero was present at the hearing. *Id.* Judge Toledo explained to Petitioner the fines and jail sentences he had the authority to impose, and asked if there were any

[1] It should be noted that Jemez Rule of Criminal Procedure 3.8 purports to confer upon defendants "[a]ll other rights and protections which have been conferred upon the defendant by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et. seq." However, the rights conferred by ICRA were not read to Petitioner at his arraignment.

recommendations made as to sentencing at the arraignment. *Doc. 14* (Exhibit 5). Petitioner then asked to change his plea to not guilty and proceed to a jury trial. *Id.* Petitioner also asked for an attorney. *Id.* Judge Toledo advised Petitioner that he should have asked for an attorney and a trial before he pled guilty, and he denied Petitioner's request to change his plea. *Id.*

Judge Toledo told Petitioner that if he was unhappy with the decision, he could appeal to the Governor's office. *Id.* Judge Toledo explained that "because [Petitioner had] already entered a guilty plea, all [he] can do is ask for reconsideration" or appeal the denial of his oral request to change his plea. *Id.* Judge Toledo explained that when there is an appeal, he "sends it to the governor's office, and if they want to hear it, or they can deny it; if it's denied then my decision stands." *Id.* Judge Toledo went on, "but if they want to consider his appeal, then he can send it to the council." *Id.* The Second Lieutenant Governor then explained this process to Petitioner in Towa.[2] *Id.*

Judge Toledo sentenced Petitioner to 180 days incarceration for the DUI and 90 days incarceration for the liquor violation, for a total of 270 days confinement. *Id.* Judge Toledo added, "But you can appeal my decision." *Id.*

Petitioner inquired about treatment in lieu of jail time. *Id.* Judge Toledo told him that it would be up to Behavioral Health and the probation office, which would give Petitioner an assessment. *Id.* Judge Toledo admitted that he did not know how this process worked. *Id.* Judge Toledo then remanded Petitioner back to custody to serve his sentence. *Id.* Judge Toledo also imposed fines in the amount of $500 for the DUI, and $100 each for the liquor violation, revoked license and open container charges, for

[2] Towa is the traditional, unwritten, language of the Pueblo. *See* Jemez Towa Language Program, *A Community Effort*, <http://www.jemezpueblo.org/Jemez_Language_Program.aspx>.

a total of $800. *Id.* Judge Toledo reminded Petitioner that some of his jail time could be suspended for treatment, but indicated that Petitioner would remain incarcerated during the pendency of any appeal. *Id.* Petitioner stated, "my decision is treatment." *Id.*

On May 2, 2017, Petitioner filed a *pro se* Motion to Reconsider Sentence wherein he apologized and asked to be placed on probation. *Doc. 13-1* at 7. Judge Toledo held a hearing on Petitioner's motion on May 18, 2017. *Doc. 13-1* at 8; *Doc. 14* (Exhibit 8). At the hearing Judge Toledo suspended the remainder of Petitioner's sentence and placed him on supervised probation. *Id.*; *see Doc. 13-1* at 9 (Release Conditions).

Meanwhile, Petitioner filed this Petition under 25 U.S.C. § 1303 of the Indian Civil Rights Act ("ICRA") on February 23, 2017. *Doc. 1*. His Amended Petition was filed on June 9, 2017, *Doc. 10*, and this Court ordered Respondents to answer on June 22, 2017. *See Doc. 11*. The Court's Order stated that "Respondents' answer shall advise, but is not limited to, whether the Petition[er] has exhausted his tribal court remedies as to the issues raised in the federal petition." *Id.* at 2. Respondents explain that their Answer is "limited to the Court's request" insofar as it only addresses exhaustion. *Doc. 13* at 5, n.1. However, the Court finds that it can resolve the Petition on the merits, and so addresses them. To the extent that Respondents may seek to supplement their argument as to the merits of Petitioner's claims they may do so by objecting to these findings, as set forth below.

II. ANALYSIS

Pursuant to 25 U.S.C. § 1303, "[t]he privilege of the writ of habeas corpus shall be available to any person, in a Court of the United States, to test the legality of his

detention by order of an Indian tribe." *Id.*; *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). "Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions." *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016). Petitioner contends that his rights to counsel and a jury trial under ICRA were violated in this case. *See Doc. 10* at 2. The Court agrees.

A) Exhaustion

Before turning to the merits of Petitioner's claims, the Court must first address exhaustion, as "[w]hen presented with a petition for habeas relief pursuant to § 1303, the federal court must, in the first instance, determine whether the petitioner has exhausted his tribal remedies." *Steward v. Mescalero Apache Tribal Court*, CIV 15-1178 JB/SCY, 2016 WL 546840 at *2 (D.N.M. 2016) (citing *Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1209 (10th Cir. 1999)). "Under the tribal exhaustion rule, until petitioners have exhausted the remedies available to them in the tribal court system, it is premature for a federal court to consider any relief." *Valenzuela v. Silversmith*, 699 F.3d 1199, 1207 (10th Cir. 2012) (alterations and quoted authority omitted). "In order to satisfy the exhaustion requirement, a criminal defendant must pursue a direct appeal or show that such an appeal would have been futile." *Alvarez v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016). "[T]he aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984).

However, "exhaustion of tribal court claims is not an inflexible requirement." *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Rather,

> [a] balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights.

Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation, 554 F.2d 845, 846 (8th Cir. 1977) (quoted authority omitted); *accord Selam*, 134 F.3d at 953. Accordingly, the tribal exhaustion doctrine is subject to a narrow set of exceptions, one of which is showing that requiring resort to tribal remedies would be futile. *Steward*, 2016 WL 546840 at *2 (citing *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 n.21 (1985)); *see also Valenzuela*, 699 F.3d at 1207. Courts have held that where there are informal remedies available to a petitioner, but none that are formal, the petitioner is not required to exhaust his tribal remedies. *See Necklace*, 554 F.2d at 846 (holding that in the absence of formal habeas procedures, the petitioner was not required to exhaust informal tribal remedies); *see also Wounded Knee v. Andera*, 416 F. Supp. 1236, 1239 (D.S.D. 1976) ("[i]f a tribal remedy in theory is non-existent in fact or at best inadequate, it might not need to be exhausted.") (citing *Schantz v. White Lightning*, 502 F.2d 67, 70 n.6 (8th Cir. 1974)).

Petitioner argues that he has exhausted his tribal remedies because "neither the Jemez Tribal court nor the Jemez Tribal Code actually provide for an appellate process or remedy or an appellate court. Thus, a trial before the Jemez Tribal Court is the final remedy." *See Doc. 10* at 2. Respondents counter that there were several tribal remedies available to Petitioner that he failed to invoke; specifically, Respondents point to the appeal and motion for reconsideration processes explained to Petitioner by Judge Toledo at sentencing. *See Doc. 13* at 5-8. Respondents further proffer the affidavit of Judge Toledo, wherein he avers that "[i]f a post-trial motion or a habeas corpus petition

is filed with the Jemez Tribal court seeking relief based on alleged violations of the ICRA, I would hear and decide any such motion as the presiding judge." *Doc. 13-1* at 15.

The problem for Respondents is that the remedies they speak of "are available in theory, but not in fact." *See Wounded Knee*, 416 F. Supp. at 1239. Respondents point to "custom and tradition" and contend that Petitioner's avenue for direct appeal was clear, as "it is the Governor and Tribal Council that make the final decisions." *Doc. 13* at 7. Respondents then point to Title I, Section 1-2-2, ¶ 2 of the Tribal Code and quote it for the proposition that "the Tribal Council, 'has jurisdiction to hear controversies between members, if a Tribal Council Court hearing is requested in accordance with traditional and customary practice or procedure.'" *Id.* (quoting *Doc. 13-1* at 13). However, Respondents misquote this portion of the Code, which in fact states that the Tribal Council Court "*may* have jurisdiction to hear controversies between members." *Doc. 13-1* at 13 (emphasis added).

Moreover, Respondents ignore Title I, Section 1-2-1 of the Code which explains that the Tribal Court is "responsible to hear all cases, civil and criminal, that occur or arise within the jurisdiction of the Pueblo of Jemez," and which took Petitioner's Plea and sentenced him. *See id.*; *see also Doc. 13-1* at 14 (Affidavit of Judge Toledo). Most importantly, Respondents ignore the provision of the Code that states: "[t]he decisions of the Tribal Court *are final and shall not be appealed to the Tribal Council Court*." *Doc. 13-1* at 13. (emphasis added). In other words, the appellate process described by Respondents appears to be illusory at best, as it is unsupported by the Code itself.

It is made even more clear that Petitioner has no recourse in appealing to the Tribal Council or in requesting post-judgment relief from his criminal proceedings when examining Title II of the Code, the Pueblo of Jemez Rules of Criminal Procedure. The Rules provide, in pertinent part:

> RULE 22 NEW TRIAL (RESERVED)
>
> RULE 24 RIGHT OF APPEAL; HOW TAKEN (RESERVED)
>
> RULE 25 STAY OF JUDGMENT AND RELIEF PENDING REVIEW (RESERVED)

As other Judges in this District have observed, "[t]he Jemez Tribal Code contains no additional provisions, of any kind, for post-conviction relief." *Fragua v. Elwell*, 16cv1404 RB/WPL, *Doc. 12* (D.N.M. May 8, 2017) (Lynch, M.J.); *Fragua v. Casamento*, 16cv1405 RB/LF, *Doc. 18* (D.N.M. May 12, 2017) (Fashing, M.J.). The Court has independently examined Titles I (General Provisions), II (Rules of Criminal Procedure), III (Criminal Code) and XV (Rules of Civil Procedure) of the Tribal Code, and nowhere is there described the appellate process or habeas proceedings of which Respondents contend Petitioner should have availed himself. Thus, Respondents' reliance on *Valenzuela* is unavailing. *Compare* 699 F.3d at 1207 (cited by Respondents for the proposition that "ignorance of the law is not a valid excuse for failing to satisfy procedural requirements."). Therefore, as have other judges in this district, I recommend that the presiding judge determine that "[b]ecause the Jemez Tribal Code does not provide any avenue for seeking post-conviction relief, any attempt at pursuing post-conviction relief would have been futile." *See Casamento*, 16cv1405 RB/LF, *Doc. 18* at 4 (citing *Johnson v. Gila River Indian Community*, 174 F.3d 1032, 1036 (9th Cir. 1999); *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 623 (8th Cir. 1997)).

B) Right to Counsel

Under the ICRA, "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302(a)(6). "The right to counsel under ICRA is not coextensive with the Sixth Amendment right." *Bryant*, 136 S. Ct. at 1962. Namely, "[i]f the sentence imposed is no greater than one year . . . the tribal court must allow a defendant only the opportunity to obtain counsel 'at his own expense.'" *Id.* (quoting Section 1302(a)(6)). As noted above, Petitioner was informed of this right at his arraignment. *See Doc. 14* (Exhibit 3). However, Petitioner contends that "neither the Jemez Tribal Court nor the Jemez Tribal Code actually allow or provide for State licensed attorneys to represent defendants before it. . . ." *Doc. 10* at 2.

It appears that Petitioner is correct. Title I, Section 1-4-2 of the Jemez Tribal Code states that "Professional Attorneys shall not represent parties before the Tribal Court unless otherwise *permitted* by the Tribal Council." Thus, while Petitioner was informed of his "right" to counsel, that right was merely illusory.

As the Supreme Court recently discussed in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017), both the right to select one's own attorney and the denial of an attorney to an indigent defendant are errors that are structural in nature, meaning that "the effects of the error are simply too hard to measure" or "the error always results in fundamental unfairness." *Id.* (citing *United States v. Gonzalez–Lopez*, 548 U.S. 140, 149 (2006); *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963)). The Court finds that a similar rationale applies in this case, where Petitioner was denied the opportunity to

obtain counsel at his own expense as required by ICRA. Therefore, I recommend that Petitioner's convictions be reversed on this ground.

C) Right to a Jury Trial

Under the ICRA, "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury." 25 U.S.C. § 1302(a)(10). Petitioner asserts that "[n]either the Jemez Tribal Court nor the Jemez Tribal Code actually allow or provide for a right to a trial by jury. The right is in the books but it is reserved. It is not a present, existing right." *Doc. 10* at 4. Moreover, Petitioner avers that he "was never advised of his right to trial by jury or his right to request one by the governors at his arraignment." *Id.* at 5. Pointing to *Alvarez*, Petitioner correctly asserts that under this set of facts his Petition must be granted. *Id.*

In *Alvarez*, the Ninth Circuit stated that a tribal defendant's "right to 'fair treatment' includes the right to know that he would forfeit his right to a jury unless he affirmatively requested one," *Alvarez*, 835 F.3d at 1029, and that a Tribe "must inform defendants of the nature of their rights, including what must be done to invoke them." *Id.* Concluding that the Tribe had failed to do so by providing the defendant a "Defendant's Rights" form which said only "you have the right to a jury trial" but "didn't explain what Alvarez needed to do in order to invoke that right," *id.* at 1026, the court held "that the Tribe denied Alvarez his right under ICRA to be tried by a jury." *Id.* at 1030. And, "[b]ecause denial of the right to a jury trial is a structural error," the court reversed his conviction. *Id.*

Here, the Tribe failed to inform Petitioner of his right to a trial by jury at his request at his arraignment. And, when he requested one, the same was denied by Judge Toledo, who explained that Petitioner's only recourse was an uncertain and unestablished appellate process. Petitioner, as an unrepresented defendant, cannot be "expected to understand more about his rights than [the Tribal Court tells him]." *Id.* at 1029. Thus, because Petitioner was not informed of his right to trial by a jury, he could not be expected to request one. Moreover, even if Petitioner had requested a trial by jury, the Jemez Tribal Code has no mechanism for providing a jury trial. *See* Rule 16 of Pueblo of Jemez Rules of Criminal Procedure ("TRIAL BY JURY (RESERVED)"). Thus, I recommend that the Court conclude that the Pueblo of Jemez denied Petitioner his right under ICRA to request a trial by jury and to reverse his conviction on this alternative ground. *See Alvarez*, 835 F.3d at 1030 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993)); *see also Weaver*, 137 S. Ct. at 1907 (discussing structural error).

III. CONCLUSION

The Court finds that Petitioner either exhausted his available Tribal remedies or that resort to them would be futile. The Court furthermore finds that Petitioner was denied his rights to obtain counsel at his expense and to a jury trial as required by ICRA.

Wherefore,

IT IS HEREBY RECOMMENDED that the Court grant Petitioner's First Amended Petition for Writ of Habeas Corpus for Relief from a Tribal Court Conviction Pursuant to 25 U.S.C. § 1303, and reverse Petitioner's conviction.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.

Karen B. Molzen

UNITED STATES CHIEF MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

Having filed copy dated October 4, 2017, on the following; **REPLY BRIEF OF INDIAN APPELLANT'S,** as set forth as filed by U.S. mailed to the following.

J. Preston Stieff
J. PRESTON STIEFF LAW OFFICE
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111

Edson Gardner