No. 17-16620

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD NAPOLES, LAURINE NAPOLES, RICK NAPOLES, MARK NAPOLES, JAMES NAPOLES, DEBRA WILLIAMS, WADE WILLIAMS

Petitioners-Appellants,

v.

DESTIN ROGERS, BRIAN PONCHO, EARLEEN WILLIAMS, BISHOP PAIUTE TRIBAL COURT, BILL KOCKENMEISTER, WILLIAM "BILL" VEGA, JEFF ROMERO

Respondents-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 1:16-cv-01933-DAD-JLT
Hon. Dale A. Drozd

APPELLEES' ANSWERING BRIEF

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I. INTRODUCTION

This case presents an internal dispute between members of the Bishop Paiute Tribe and the Tribal government regarding real property rights on the Reservation. Appellants seek a federal court declaration that they alone possess rights of beneficial ownership, use and occupancy of two small parcels of land on the Reservation held in trust by the United States government, to the exclusion of all others. The District Court correctly dismissed for lack of jurisdiction.

Appellants acknowledge the disputed parcels are held in trust by the United States. Yet the United States is not a party, and cannot be made a party, due to its sovereign immunity, which Congress has not waived. Similarly, Appellants acknowledge that the Owens Valley Board of Trustees ("OVBT") shares regulatory jurisdiction with the member tribes' Tribal Councils over land assignment issues. Yet the OVBT is not a party to these proceedings, and cannot be made a party due to its sovereign immunity, which neither Congress nor the OVBT member tribes have waived.[1]

Lacking necessary and indispensable parties to their land dispute, Appellants instead have contorted their real property claims in a vain attempt to frame a

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[1] The "seven member Paiute-Shoshone Owens Valley Board of Trustees (OVBT) consist[s] of the five member Bishop Paiute Tribal Council and one elected Trustee representing the Big Pine Paiute Tribe and one elected Trustee representing the Lone Paiute Tribe." http://www.ovcdc.com/blog/about/ovbt/.

habeas corpus claim. Appellants claim they are in "detention" as a result of Tribal Council and Tribal Court actions enforcing a Tribal Trespass Ordinance. The Tribal Council issued trespass citations, which the Tribal Court enforced through temporary injunctive relief. The Tribal Court dismissed the trespass proceedings on March 21, 2017, and Appellants abandoned all Tribal Court remedies concerning those proceedings, facts that Appellants omitted from their Opening Brief.

Appellants' *habeas* arguments are fatally flawed. Their claim arises solely under section 1303 of the Indian Civil Rights Act ("ICRA"). *See* 25 U.S.C. §§ 1301-03. The Supreme Court has held that section 1303's extension of *habeas corpus* to Indian tribes is the ***only*** provision of ICRA that abrogates tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978) ("we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck ***in providing only for habeas corpus relief***") (emphasis added).

ICRA's preceding section, 1302, extends certain additional constitutional protections to Indians, including due process, equal protection, rights of free speech and assembly and protection against uncompensated takings. 25 U.S.C. § 1302. Importantly, Congress did ***not*** abrogate tribal sovereign immunity as to claims seeking to assert those rights under section 1302. *See Santa Clara Pueblo*,

436 U.S. at 61 ("***Congress' failure to provide remedies other than habeas corpus was a deliberate one***") (emphasis added).

Appellants' First Amended Petition, the operative pleading here, alleged District Court jurisdiction solely under section 1303, not section 1302. *See* FAP 4, ¶ 4 ER 19. On appeal, however, Appellants argue that alleged violations of the substantive rights in 25 U.S.C. § 1302 may be imported into a petition for *habeas relief* under section 1303. Appellants are wrong.

Appellants' Opening Brief blatantly attempts to expand the congressional abrogation of tribal sovereign immunity, and the concordant federal court jurisdiction, for *habeas* claims under section 1303 to address a real property dispute in which they assert due process and takings claims. This distortion of ICRA requires Appellants to assert that the Tribe's trespass enforcement constitutes "detention" sufficient to trigger *habeas corpus* jurisdiction. 25 U.S.C. § 1303. In dismissing Appellants' *habeas* petition, the District Court properly found no detention, and recognized this to be an intratribal real estate matter, which it lacked jurisdiction to address. This Court should affirm.

II. JURISDICTIONAL STATEMENT

District Court jurisdiction was limited to *habeas corpus* jurisdiction provided in ICRA Section 1303. 25 U.S.C. § 1303. Federal courts have not been

conferred jurisdiction to address alleged violations of the remaining provisions of ICRA, *Santa Clara Pueblo*, 436 U.S. at 61, 66, *Scudero v. Moran*, 230 F. Supp. 3d 980, 983-84 (D. Alaska 2017), and have no jurisdiction to address intratribal land assignment disputes.

Appellants' First Amended Petition ("FAP") failed to assert jurisdiction under 28 U.S.C. §§ 1331 and 1343. ER 19. Even if Appellants' FAP had asserted jurisdiction pursuant to these federal statutes, jurisdiction hereunder was impliedly overruled as to ICRA suits other than *habeas* claims by the Supreme Court in *Santa Clara Pueblo*. *See Ordinance 59 Ass'n v. Babbit*, 970 F. Supp. 914, 926 (D. Wyo. 1997), *aff'd sub nom. Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y*, 163 F.3d 1150 (10th Cir. 1998).

III. COUNTERSTATEMENT TO APPELANTS' STATUTORY ADDENDUM

Appellants' Statutory Authorities Addendum erroneously includes reference to 25 U.S.C. §1302. Section 1302 was absent from the FAP's assertion of jurisdiction.[2] *See* FAP 5, ¶ 4 ER 19.

[2]Curiously, Appellants' Statutory Authorities Addendum did not include 28 U.S.C. §§ 1331 and 1343, which they identify in their Jurisdictional Statement as ostensibly providing the District Court with jurisdiction.

IV. APPELLEES' STATUTORY ADDENDUM

Appellees separately file their Statutory Authorities Addendum, which includes *inter alia* a true and correct copy of the Ordinance Governing Land Assignments on Bishop, Big Pie and Lone Pine Reservations ("1962 Land Assignment Ordinance"). *See* Statutory Authorities Addendum (S.A.). Appellants provided an incomplete copy in the District Court, *see* ER 86-91, omitting significant provisions of the Land Assignment Ordinance.[3]

V. ISSUES PRESENTED

1. May Appellants invoke *habeas corpus* jurisdiction pursuant to 25 U.S.C § 1303 to address alleged violations of 25 U.S.C. § 1302 involving a purely intratribal land use matter?

2. If Appellants may invoke *habeas* jurisdiction pursuant to 25 U.S.C. § 1303, to address a purely intratribal land dispute, were they "detained" within the meaning of 25 U.S.C. § 1303 so as to permit federal court jurisdiction?

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[3]*See* http://www.bishoppaiutetribe.com/assets/ordinances/Land%20Ordinance.pdf.

3. Did Appellants exhaust their tribal remedies before filing this action in federal court?

4. Are Appellants' land use claims barred by the Quiet Title Act?

5. Are Appellants' land use claims barred by their failure to join required, necessary and indispensible parties, namely, the United States as owner of the disputed lots, and the OVBT as the lots' co-regulator?

VI. SUMMARY OF ARGUMENT

The District Court correctly held that this matter is purely intra-tribal, over which it lacked jurisdiction. Appellants failed to meet their burden of proving that they have been "detained" as necessary to confer jurisdiction over a petition for *habeas corpus* relief pursuant to the Section 1303 of the Indian Civil Rights Act.

Appellants have not been detained, nor have their liberties been severely, actually, nor potentially restrained by the actions of the Bishop Paiute Tribal Council or the Bishop Tribal Court. They have been treated in the same manner as all other individuals – tribal members and non-members alike - with respect to enforcing the Trespass Ordinance. Pursuant to Federal Rule of Civil Procedure 12(b) (6), the District Court properly dismissed Appellants' First Amended Petition for failing to state a claim upon which relief can be granted.

Other grounds support affirmance. Notably, Appellants failed to exhaust tribal remedies by abandoning their right to challenge the Tribal Court decisions related to the November, 2016 trespass citations.

Finally, as evident by the First Amended Petition and their Opening Brief, Appellants attempt to shoehorn alleged violations of Section 1302 of the Indian Civil Rights Act into *habeas* relief pursuant to ICRA Section 1303. Section 1302 did not abrogate tribal sovereign immunity, and as such, the sovereign immunity of the Bishop Paiute Tribe and its officials required the District Court to dismiss the FAP pursuant to Federal Rule of Civil Procedure 12(b) (1), as the court lacked jurisdiction.

VII. STATEMENT OF FACTS

A. The Bishop Paiute Reservation

"The Bishop Indian Reservation is one of three reservations set aside for the Owens Valley Paiute-Shoshone Indians ... acquired by Executive Order 1496 ... Title to the three tracts is held by the United States in trust for the Indians of Owens Valley." *Rogers v. Acting Deputy Assistant Secretary, Indian Affairs*, 15 I.B.I.A. 13, 14 (10/16/1986).

The Bishop Paiute Tribe is the beneficial owner of lands held in trust by the federal government. Title to all of the land within the Bishop Paiute Reservation is held in trust by the United States. *Paiute-Shoshone Indians of Bishop Cmty. Of*

Bishop Colony, Cal. V. City of Los Angeles, 637 F.3d 993, 996 (9th Cir. 2011). Despite holding title to the two disputed lots at issue here, the United States is not a party to these proceedings.

B. The Appellees

Appellee Destin Rogers is the former Chairman of the Bishop Paiute Tribe, having resigned from office effective May 22, 2017. Appellees Brian Poncho, Earlene Williams, William Vega and Jeff Romero are the elected members of the Bishop Paiute Tribal Council. William Vega currently serves as the Tribe's Chairman. Appellee Bishop Paiute Tribal Court was established in 2008. Prior to its establishment, the Tribal Council served in a dual capacity as the Tribal Council and the Tribal Court. ER 145.[4] Appellee Bill Kockenmeister is the appointed judge for the Bishop Paiute Tribal Court, having served in that position since the establishment of the Tribal Court in 2008.

C. The Bishop Paiute Tribe is Governed by the Tribal Council

The Bishop Paiute Tribe is a federally recognized Tribe. 83 Fed. Reg. 4,236 (1/30/2018). The governing body of the Bishop Paiute Tribe is the Tribal Council, having been delegated by the Bishop Tribe General Council the authority to act for the Tribe on all matters. All Tribal ordinances are adopted and approved by the Bishop Paiute Tribal Council. *See January 27, 1981 B.I.A. Regional Solicitor's*

[4] *See* Note 1 in the Trespass Ordinance: "Until a Tribal court is established, the Tribal council shall act as the Tribal Court." Therefore, prior to the establishment of the Tribal Court in 2008, the Tribal Council heard all trespass matters.

Opinion, Supplemental Excerpts of Record 7("SER 7"), ("The customary manner by which day-to-day business activities of the Bishop Tribe has (sic) been conducted has been through tribal resolution passed by the Bishop Tribal Council."); *see also* Resolution T2014-03, SER 30 ("The Bishop Tribal Council is the governing body of the Bishop Paiute Tribe."); *Bishop Paiute Trespass Ordinance ("Trespass Ordinance),* Section 101,ER 144("The Tribal Council, pursuant to its inherent authority, exercises its authority in providing for a comprehensive regulation of trespass issues."). The Bishop Paiute Tribal Council governs all land within the boundaries of the Bishop Paiute Reservation. Resolutions passed by the Tribal Council constitute evidence of the will of the Bishop Indian community. SER 7.

In 1981, the BIA Regional Solicitor acknowledged:

> Section 4b of the April 5, 1962 Owens Valley Assignment Ordinance refers to the Bishop Representatives to the ordinance committee as those "Trustees elected by the community to direct and control activities on the reservation and to represent the interest of the reservation as the Owens Valley Board of Trustees." (emphasis added) Bishop trustees (Tribal Council) were to exercise powers in addition to their duties as trustees. This interpretation is in keeping with the nearly twenty years of recognized governmental authority exercised by the Bishop Tribal Council.

January 27, 1981 B.I.A. Regional Solicitor's Opinion. SER 7. Thus, the Tribal Council is an extension of the Owens Valley Board of Trustees, and is authorized to exercise all necessary powers associated with the governance of the Bishop Paiute Tribe

The current Tribal Council consists of five elected officials: Chairman William "Bill" Vega, Vice Chair Allen Summers, Sr.[5], Secretary/Treasurer Earlene Williams, and council members Jeff Romero and Brian Poncho.

D. The 1962 Land Assignment Ordinance and the Owens Valley Board of Trustees

In 1939 and 1941, the Commission of Indian Affairs entered into trust agreements with the representatives of the Bishop, Big Pine, and Lone Pine Tribes, establishing the Owens Valley Board of Trustees ("OVBT"), "whose primary responsibility was to control the use of the homes and other improvements constructed with these funds. Ownership of the improvements and lots was not transferred to individual tribal members; instead, use is permitted through land assignment." *Rogers, supra*, 15 I.B.I.A. at 14 (emphasis added).

In 1962, the OVBT approved the "Ordinance Governing Assignments on Bishop, Big Pine and Lone Pine Reservations" ("*1962 Ordinance*") (*See Appellees' Statutory Addendum* ("SA")).[6]

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[5] Vice Chairman Summers, Sr. is not a party in this matter.

[6] Appellants' copy of the 1962 Ordinance included as an Exhibit to their First Amended Petition (ER 86-91) was incomplete. A correct copy of the 1962 Ordinance is presented to the Court as a separate Appellee's Statutory Addendum.

The Bishop Tribal Council as the "Local Indian Committee ... elected by the community to direct and control activities on the reservation and to represent the interest of the reservation on the Owens Valley Board of Trustees." *1962 Ordinance*, Definitions, 4A p. 1. SA p. 1.

A land assignment granted under the 1962 Ordinance "is for use and occupancy rights only." *Id*, Article 2, Section D(1). SA p.3. Original land assignments in existence prior to the passage of the 1962 Ordinance were acknowledged as "valid," and "subject to the rules and regulations as set forth" in the Ordinance. *Id.*, Article I, Section A(1). SA p. 2. The size of the original land assignments was based upon the size of the family of the original assignment holders. However, because of the high demand for assignments for all tribal members and the limited availability of land, any future assignment of land on the Bishop Reservation was limited to two lots per assignment. *Id.*, Article II, Section D(10)(A)(2). SA p.5.

Notably, an assignment "is not subject to inheritance. The assignee may designate a person to receive the assignment in the event of his death. However, it is the responsibility of the designated individual to file an application for the assignment and if he is eligible, the Board of Trustees shall give him preference in granting the assignment." *Id.*, Article II, Section D(9). SA p. 5. Thus, an application for an assignment is required, even for a designated individual, and the

designated individual is given "preference," but not a right, to an assignment, by the OVBT.

Once an individual receives an assignment of available tribal land, "rights to the original assignment in which the assignee was represented terminate." *Id*., Art. II, Section D (10)(C). SA p. 6.

E. The Appellants

Appellants are members of the Bishop Paiute Tribe, and most, but not all, are descendants of Ida Warlie.[7] Ida Warlie's grant of Land Assignment was executed by the Owens Valley Board of Trustees in 1941, ER 109, and validated by the OVBT in 1962. *See 1962 Ordinance*, Article I, Section A(1). SA p. 2. Ms. Warlie's original land assignment consisted of Block 3, Lots 4, 5, 6, 7, 8, 9, 10 and 11, and Block 9, Lots 2, 3, and 4. The original land assignment identified Ida Warlie as the "Head of Household" with six (6) children listed as members of the Household: Ernest, Roger, Josephine, Richard, Lorraine and Geraldine.[8]

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[7] Appellant Wade Williams, is the adopted son of Petitioner of Debra Williams, and is not a descendant of Ida Warlie. *See Declaration of Valerie Spoonhunter ("Spoonhunter Dec*."), ¶ 12, SER 24.

[8] "Lorraine" is Laurine Napoles, Petitioner Appellant in this matter. "Geraldine" is Geraldine Pasqua. Laurine Napoles is Ida Warlie's only surviving child.

Block 3, Lots 4 and 5 were transferred by Ida Warlie to her daughter, Josephine W. Paradise, on October 20, 1969. Block 9, Lots 2 and 3 were transferred by Ida Warlie to her daughter, Appellant Laurine Napoles, on June 17, 1965. Appellant Laurine Napoles continues to reside on Block 9, Lots 2 and 3. Once Appellant Laurine Napoles received her assignment, any right she may have had to the original assignment of Ida Warlie was terminated in accordance with the 1962 Ordinance. *Id*., Art. II, Section D (10)(C). SA p. 6.

Ms. Warlie passed away in 1973. She did not designate a person to receive an assignment of her remaining parcels. Pursuant to the 1962 Ordinance, her assignment became available for reassignment to any qualified applicant, with preference given to any, "qualified members represented in the original assignment or those named as beneficiaries by the assignee." *Id*., Article 2, Section D (10)(D). SA p. 6. However, by the express terms of the 1962 Ordinance, any future assignments were limited to a maximum of two lots. *Id*., Article 2, Section D(10)(A)(2). SA p. 5.

Aside from Appellant Laurine Napoles, none of the other Appellants are represented in Ida Warlie's original land assignment, and Appellant Wade Williams is not a descendant of Ida Warlie. *Spoonhunter Dec*., ¶ 12, SER 24.

F. Land Assignment History of Block 3, Lots 6 and 7[9]

After her death, Ida Warlie's descendants submitted competing land assignment applications. In 1977, Carole Warlie, daughter of Richard Warlie (Ida's son) submitted an application for Block 3, Lots 6 and 7 (the "Lots"), on behalf of Richard's grandchildren, Christopher Williams and Marnie Jo Andreas. That same year, Geraldine Pasqua, daughter of Ida Warlie, submitted an application for all of Ida Warlie's remaining assignment: Block 3, Lots 6, 7, 8, 9, 10, and 11; Block 9, Lot 4. *Spoonhunter Dec*., ¶ 3, SER 23.

Although Geraldine Pasqua's application violated the two-lot limit requirement of the 1962 Ordinance, on November 15, 1977, the OVBT passed Resolution 127 concerning Ms. Pasqua's assignment application. However, the passage of a Resolution does not constitute approval, since a Grant of Standard Land Assignment is not issued by the OVBT unless and until the application is approved by the Area Director of the Bureau of Indian Affairs. ER 111-112.

On November 30, 1977, the BIA Area Director returned Geraldine Pasqua's application as "unapproved," because the application "contains more than two Lots which is in conflict with the Assignment Ordinance." *Spoonhunter Dec*., ¶ 4, SER

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[9] Although Appellants First Amended Petition challenged previous Tribal Council decisions with respect to Block 3, Lots 4 and 5, on appeal they have abandoned those challenges.

23; SER 25. Ms. Pasqua did not appeal the BIA decision, and a Grant of Standard Assignment was never issued by the OVBT.[10]

In 1982, the Tribal Council passed Resolution T82-6, holding Block 3, Lots 6 and 7, for Christopher Williams and Marnie Jo Andreas, the grandchildren of Richard Warlie,[11] until they were old enough to apply for the assignment themselves. *Spoonhunter Dec*., ¶ 5, SER 23; SER 28. Resolution T82-6 remained in effect until rescinded by Tribal Council on February 6, 2014. *Spoonhunter Dec*., ¶ 6, SER 23; SER 29. On March 27, 2014, the Tribal Council designated the Lots for economic development. *Spoonhunter Dec*., ¶ 7, SER 23; SER 32.

Over the years, every elected Tribal Council, including some of the current Appellees, have met with Appellants and other descendants of Ida Warlie to address land assignment issues, including those related to the Lots. Each elected Tribal Council since the 1980's has chosen to uphold past Tribal Council decisions regarding the Warlie Assignment. *Spoonhunter Dec*., ¶ 8, SER 23; SER 24. Appellants asserted a right of ownership by and through Geraldine Pasqua, even

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[10] Resolution 127 states: "upon approval of said application by the Area Director, the chairman and secretary are hereby authorized to execute … a 'Grant of Standard Assignment' to the said applicant on the land requested." ER 111.

[11] Warlie Descendants Christopher Williams and Marnie Jo Andreas are not a party to this action.

though her assignment application was never approved, and a grant of land assignment was never executed, by the OVBT.

In an effort to quell the continued disputes raised by Appellants with respect to their claim of a right of ownership of Block 3, Lots 6 and 7 based upon their unsupported interpretation of Resolution 127, on November 20, 2015, the OVBT passed Resolution No. 2015-30, rescinding Resolution 127. *Spoonhunter Dec*., ¶ 10,SER 23; SER 35-37. By taking this action, the OVBT affirmatively confirmed that Geraldine Pasqua was never granted any right of ownership, use and occupancy of Block 3, Lots 6 and 7.

G. <u>The Bishop Paiute Tribe Trespass Ordinance</u>

In 2000, the Tribal Council, "pursuant to its inherent sovereignty," determined "there is a need for Tribal governmental regulations in the areas dealing with trespass to both Tribal property and individual assignments" *Bishop Paiute Trespass Ordinance,* Section 101. ER 144.[12]

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[12] *See* fn.3 above. Until the establishment of the Tribal Court in 2008, the Bishop Paiute Tribal Council served as the Tribal Court. Given limited resources, this arrangement was a common practice with tribal governments, and courts have recognized nonjudicial tribal institutions as competent law-applying bodies. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978).

Trespass is defined as "every wrongful entry on real property in the occupation or possession of another" *Id*., Section 103. ER 144. "Each day any violation of any provision of this Ordinance shall constitute a separate offense" *Id*., Section 104(9). ER 146. The Bishop Paiute Tribal Officer is the authorized official, designated and empowered by the Bishop Tribal Council to enforce the trespass ordinance *Id*., Section 104. ER 145.

The Trespass Ordinance specifically states:

> It is hereby expressly reaffirmed that the Bishop Paiute Tribal Court has no jurisdiction over any disputes concerning Land Assignments. However, in the event a finding of trespass involves a determination as to whether an individual has a right to occupy the land in question, the only evidence that will be accepted by the Tribal Court will be a Grant of Standard Assignment of Tribal Land executed by the Owens Valley Board of Trustees in accordance with the 1962 Land Assignment Ordinance, and in effect.

Id., Section 103. ER 144.

H. Trespass Citations Related to Block 3, Lots 6 and 7

After the Tribal Council's 2014 decision to proceed with the development of Block 3, Lots 6 and 7, Appellants commenced a series of protests on the property, leading to the issuance of trespass citations pursuant to the Trespass Ordinance. In 2014, Appellants' legal theory of their right to use and occupancy of Block 3, Lots 6 and 7 was based entirely upon the premise they had the permission of Geraldine

Pasqua, whom they asserted owned the Lots due to OVBT passing Resolution 127 in 1977,[13] "and thus the Defendants had the right to be on the land in question." ER 94, 121.

Geraldine Pasqua is now deceased. Appellants' new legal theory supporting their right of ownership is "they are the rightful occupants of Lots 4 and 5, and 6 and 7 … as direct descendants to Ida Warlie with interest in a family assignment existing since the inception of the creation of the Bishop Paiute Reservation, passing properly through the generations based on the terms of the 1962 Ordinance, the decisions of the Owens Valley Board of Trustees, and tribal law and custom." *First Amended Petition ("FAP")*, ¶ 47, ER 27. In other words, Appellants do not need to obtain a Grant of Standard Land Assignment from the OVBT in order to occupy the Lots, and Appellants (but not all of the Warlie descendants) have inherited a right in perpetuity to all of Ida Warlie's original assignment, to the exclusion of all others.

Under Appellants' legal theory, family members of an original assignee would forever be permitted to use and occupy any land associated with an original

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[13] As noted above, Resolution 127, by its own terms, required BIA approval before a Grant of Standard Assignment would be issued by the OVBT. The BIA returned Geraldine Pasqua's application "unapproved," SER 25, and the OVBT rescinded Resolution 127 on November 20, 2015. SER 36-37.

assignment, and would never have to apply for an assignment. This theory is legally unsupported, and in fact is contrary to the express terms of the 1962 Land Assignment Ordinance, which states assignments are "not subject to inheritance."[14]

I. Tribal Court Proceedings Involving Trespass Citations

On November 19, and 20, 2016, the Bishop Tribal Police cited Appellants for trespass on Block 3, Lots 6 and 7. ER 127-136. Appellants refused to vacate the Lots, and threatened to move property onto the Lots with the intention of establishing permanent occupancy on the Lots.

The Trespass Ordinance provides an authorized official to take any necessary emergency action if the official "determines that a trespass has occurred and may present an imminent and substantial threat to the health, safety, peace or environment of the community." *Trespass Ordinance*, Section 104(4). ER 146.

Because Appellants' actions constituted a substantial threat to the community, on November 22, 2016, pursuant to the authority granted by Section 104(3)(A) of the Trespass Ordinance, ER 145, the Tribal Court issued Temporary Protection Orders ("TPOs") against all Appellants.

Because of the urgent nature and the timing of the trespass proceedings,[15] Tribal Court staff used a form order normally used for protection orders issued in

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[14] On appeal, Appellants' abandoned their claim of rights to use and occupy Block 3, Lots 4 and 5. However, under Appellants' theory of inheritance of rights to possess all of Ida Warlie's original land assignment, Appellees, future Tribal Councils, and the members of the Tribe face uncertainty and potential challenges with respect to any future land use decisions involving any of the Warlie original assignment.

domestic violence matters.[16] The TPOs clearly indicated the only restriction on Appellants was to "not enter and occupy Bishop Paiute Tribal Lands – Block 3, Lots 6 & 7." ER 139. The TPOs were temporary in nature, and the Court calendared further proceedings for December 20, 2016. ER142-143.

On December 13, 2016, Appellants filed a Petition for Writ of Mandamus with the Bishop Paiute Tribal Court of Appeals. On December 15, 2016, Appellants asked Judge Kockenmeister to stay the Tribal Court Proceedings pending a decision from the Tribal Court of Appeals, SER 9,[17] which Judge Kockenmeister granted on December 18, 2016, scheduling a status hearing for March 21, 2017, and leaving the Temporary Protection Orders in effect. SER Ex.13.

Rather than object to, or request reconsideration or modification of, Judge Kockenmeister's order granting Appellants' requested stay, eleven days later, Appellants rushed to the federal courts, filing a Petition for Habeas Corpus and a request for a Temporary Restraining Order, [18] alleging they had been "detained" by the actions of the Tribal Council and Tribal Court Judge Kockenmeister, and had exhausted all tribal remedies.

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[15] The hearing was scheduled the Tuesday before Thanksgiving, 2016, and the TPOs were issued Wednesday, November 22, 2016, the day before Thanksgiving, 2016.

[16] The fact that Tribal Court staff used a form order is confirmed in the District Court's order. *July 7, 2017 Order Granting Motion to Dismiss* ("*Order*"), ER 4, n.2.

[17] Appellants' Motion for a Continuance/Stay did not ask Judge Kockenmeister to vacate the Temporary Protection Orders.

[18] Judge Drozd denied the TRO on January 3, 2017. Docket # 8.

While the federal case was pending, on March 21, 2017, Judge Kockenmeister *sua sponte* dismissed the trespass proceedings as to all Appellants. SER 15. On April 19, 2017, Appellants filed a hand written withdrawal of their Petition for Writ of Mandamus filed with the Bishop Tribal Court of Appeals. SER 21.

Thus, Judge Kockenmeister's dismissal of the trespass proceedings, including the TPOs, and Appellants decision to withdraw their Petition for Writ of Mandamus, rendered the entire underlying tribal court proceedings moot.

VIII. ARGUMENT

A. Standard of Review

Typically, dismissals for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) are reviewed *de novo*. *See Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). However, Appellants' significant focus on the facts of this case rather than pure questions of law suggests the more deferential clearly erroneous standard. *See In re Cherrett*, 873 F.3d 1060, 1066 (9th Cir. 2017) ("Mixed questions are typically reviewed de novo, but, depending on the nature of the inquiry involved, *may be reviewed under a more deferential clearly erroneous standard*.") (emphasis added).

The Court's review should also be guided by the well-settled Indian canon of construction. Judicial review of federal statutes and their application to Indian tribes are to be construed liberally in favor of a tribes' inherent authority to self-

govern. *Tavares v. Whitehouse*, 851 F.3d 863, 869 (9th Cir. 2017), *cert. denied*, No. 17-429, 2018 WL 1460776 (U.S. Mar. 26, 2018), *citing Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes ... must be 'construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'").

Finally, this Court is not limited in affirming the District Court ruling strictly on the basis of the order being appealed. If there are any other grounds supported by the record before the District Court that could sustain Appellees' motion to dismiss, this Court can rely upon those other grounds to affirm dismissal. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 974 (9th Cir. 2017) ("if the district court's order can be sustained on any ground supported by the record that was before the district court at the time of the ruling, we are obliged to affirm the district court.") (internal citations omitted).

B. Because Appellants Failed to State a Claim for Violation of the Indian Civil Rights Act, Dismissal Pursuant to FRCP Rules 12(b) (6) Should be Affirmed

Federal courts are courts of limited jurisdiction, possessing only those powers authorized by the Constitution and statute. When a matter is presented to the federal

courts, "it is to be presumed that a cause lies outside this limited jurisdiction, … and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Principles of federalism must temper the federal court's assertion of its authority pursuant to writ proceedings beyond its historic purpose. *See Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 512–13 (1982). Furthermore, principles of federalism and respect for tribal sovereignty call for judicial restraint. *See Santa Clara Pueblo*, 436 U.S. 49; *Tavares*, 851 F.3d 863.

The statute at issue here is the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq*. Congress' primary purpose in enacting the Indian Civil Rights Act was to "promote the well-established federal policy of furthering Indian self-government." *Tavares*, 851 F.3d at 870, *citing Santa Clara Pueblo*, 436 U.S. at 62:

> Although the Court recognized that Congress also intended to "strengthen[ ] the position of individual tribal members vis-à -vis the tribe," it concluded that finding an implied cause of action would strengthen this goal only at the expense of tribal sovereignty. *Id.* In sum, federal remedies beyond habeas were "not plainly required to give effect to Congress' objective[s]."

Id. (internal citations omitted).

In order to promote this purpose and protect tribal sovereignty from undue influence, the Supreme Court in *Santa Clara Pueblo* held the substantive rights contained within Section 1302 of the statute did not create a federal remedy and

did not abrogate tribal sovereign immunity; instead, Section 1303 set out the exclusive federal court remedy for violations of the ICRA — a writ of *habeas corpus* "available to any person, in a court of the United States, to test the legality of his ***detention by order of an Indian tribe***." *Santa Clara Pueblo*, 436 U.S. at 58 (emphasis added).

Appellants were obligated to provide the basis for the District Court's jurisdiction and their entitlement to relief. On motions to dismiss pursuant to Rule 12(b) (6), the court is not bound to accept as true a legal conclusion couched as a factual allegation. "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), *citing* 5 C. *Wright & A. Miller, Federal Practice and Procedure* § 1216, pp. 235–236 (3d ed. 2004). "Formulaic recitation of the elements of a cause of action will not do." *Id*.

As addressed below, the District Court properly dismissed Appellants' petition for *habeas* relief, which lacked a cognizable legal theory upon which relief could be granted, and also failed to allege sufficient facts under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

1. Appellants have not been "Detained" Within the Meaning of Sec. 1303 of the Indian Civil Rights Act

"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 his detention by order of an Indian tribe." 25 U.S.C.A. § 1303. Appellants' Opening Brief and Excerpts of Record do not support the conclusion they were "detained" by Appellees. The District Court's dismissal should be affirmed.

"Detention" as applied in federal *habeas* proceedings pursuant to 25 U.S.C. §1303 has a meaning unique to other types of federal habeas proceedings - not only with respect to the difference in the use of the word "detention" versus "in custody," but also with respect to the interpretation of the statute in its application to federally recognized tribes. As noted above, federal courts are obligated to tread lightly with respect to the application of federal laws where a tribe's right to self-governance is implicated.

Appellants expend a great deal of their Opening Brief collaterally attacking this Court's decision in *Tavares v. Whitehouse*, 851 F.3d 863 (9th Cir. 2017). On March 26, 2018, the Supreme Court denied the Petition for Writ of Certiorari in *Tavares (cert. denied,* No. 17-429, 2018 WL 1460776 (U.S. Mar. 26, 2018)).[19]

[19] A few weeks before appearing here, on October 23, 2017, Appellants' counsel Andrea Seielstad filed an amicus curiae brief with the Supreme Court in support of

Thus *Tavares*, and a multitude of other cases within this circuit, are controlling, and support the District Court's ruling that Appellants were not "detained" within the meaning of §1303 of the ICRA.

In *Taveras*, this Court thoughtfully analyzed ICRA's "limited" legislative history. Congress's focus when debating ICRA was primarily concerned with the potential abuse of power "in the administration of criminal justice." *Id*., at 873. *Taveras* noted that Congress adopted the phrase "detention" in Section 1303 instead of "custody" as it is typically used in other habeas statutes, finding that "detention" was a subset of "custody," and was commonly defined to require physical confinement. *Taveras* found that "custody" had a broader meaning, "physical control of the person," and concluded that, based upon ICRA's "limited legislative history", the courts "should credit Congress's use of 'detention' to narrow the scope of federal habeas jurisdiction over ICRA claims." *Id*.

In conclusion, *Tavares* held federal courts lack jurisdiction pursuant to § 1303 to review temporary exclusion orders, even though the member had been excluded for ten years from the United Auburn Indian Community's tribal office, casino, school, health and wellness facilities and park. *Id.* at 878.

Petitioner *Tavares*. Thus Appellants, by and through their legal counsel, took full advantage of their opportunity before the Supreme Court to challenge the holding in *Tavares*. They should not be permitted to collaterally attack *Tavares* here.

a. **Appellants have not been "Permanently Banished"**

In an attempt to distinguish the fact of this case from *Tavares*, on appeal Appellants characterize the trespass citations issued by Bishop tribal officials as constituting a "permanent banishment," and therefore the Second Circuit's approach in *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), should control. [20]

The District Court correctly distinguished *Poodry*:

> In *Poodry*, the Second Circuit found permanent banishment and disenrollment sufficient to constitute detention because it analogized such actions to the stripping of citizenship in denaturalization and denationalization proceedings . . . That is quite dissimilar from what is alleged by petitioners here, which more closely resembles a takings claim than a denaturalization or denationalization. ***Petitioners cite to no authority, and the court has identified none, suggesting that § 1303 gives federal courts sitting in habeas the jurisdiction to resolve intra-tribal land ownership disputes.***

Order. ER 10-11 (emphasis added).

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[20] The orders of "banishment" in *Poodry* stated in part: "You are to leave now and never return.... [Y]our name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY." *Poodry*, 85 F.3d at 876.

The District Court did not rely exclusively upon *Tavares* in support of dismissal, and cited to a number of cases *within this Circuit* in support of the conclusion Appellants had not been "detained":

> [P]laintiffs are not currently detained, have never been in physical custody, and cannot face such confinement as a result of the issuance of these citations. Even if petitioners' complaints of foul play may have merit, their allegations are nonetheless simply insufficient to support a finding that a "detention" has occurred within the meaning of §1303. *See Tavares*, 851 F.3d at 875-76 (suggesting that, absent physical custody, only permanent banishment could satisfy detention requirement); *Jeffredo*, 599 F.3d at 918-19 (denial of access to various facilities on reservation is not detention); *Moore*, 270 F.3d at 791 (fines do not constitute detention); *Quitiquit*, 2011 WL 2607172, at *5 (tribal eviction proceedings do not constitute a detention); *see also Lac Vieux Desert Band of Lake Superior Chippewa Indians Tribal Council v. Lac Vieux Desert Band of Lake Superior Indians Tribal Court*, No. 2-10-cv-223 2010 WL 3909957 at *2 (W.D. Mich. Sept. 14, 2010) (finding no jurisdiction under the ICRA where the petitioners had been temporarily detained and then released from custody). Even to the extent petitioners fear the issuance of additional trespass citations or exclusion from the disputed land, these concerns are insufficient to confer habeas jurisdiction upon this court. *Cf. Maleng v. Cook*, 490 U.S. 488, 491-93 (1989) (concluding that a petitioner is not "in custody" for purposes of a federal habeas statute, 28 U.S.C. § 2241, after expiration of his sentence "merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes); *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998) (addressing a habeas petition filed pursuant to 28 U.S.C. §2241 and observing that "[w]e do not think that the mere potential for future incarceration, without any present restraint on liberty, can satisfy the 'in custody' requirement.")

Order. ER 10.

In addition to their reliance on *Poodry*, Appellants cite to a number of ***criminal*** cases, and cases ***outside this Circuit*** in support of their argument that

restrictions on their geographical movement have created a detention sufficient to invoke federal jurisdiction pursuant to §1303 involve ***banishment*** from the ***entire reservation***. Opening Brief at 40.[21]

Appellants have not been "banished" by the issuance of civil trespass citations by Tribal officials, or any decision of the Tribal Court regarding the same. Without dispute, Appellants are free to come and go as they please anywhere in the world, except for two small lots on the Bishop Paiute Reservation. All they are prohibited from doing is trespassing on property that is off limits to all. *See Jeffredo v. Macarro*, 599 F. 3d 913, 918-21 (9th Cir. 2010) (Permanent exclusion from certain tribal facilities was insufficient to confer federal court jurisdiction).

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[21] *See Quair v. Sisco*, 359 F. Supp. 2d 948, 969 (E.D. Cal. 2004) ("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***") (emphasis added); *see also Quair v. Sisco*, No. 1:02-CV-5891DFL, 2007 WL 1490571, at *3 (E.D. Cal. May 21, 2007) ("While banishment requires a person -- whether a member of the Tribe or not -- ***to leave the reservation***") (emphasis added); *Sweet v. Sisco*, 634 F.Supp.2d 1196 (W.D. Wash. 208) ("Sweet 1")*; but see Sweet v. Hinzman*, No. C08-844JLR, 2009 WL 1175647, at *1 (W.D. Wash. Apr. 30, 2009) ("Sweet 2") (the court found it had jurisdiction because petitioners were either socially or permanently banished because they were "not able to attend tribal functions, including any tribal council or tribal general membership meeting, ***or come onto tribal property***") (emphasis added).

The District Court correctly concluded that Appellants are not "detained" within the meaning of 25 U.S.C. § 1303, and properly dismissed the case for that reason.

b. Appellants have not Suffered Severe, Actual, or Potential Restraint of Their Liberty

Nor to the ***criminal*** cases primarily ***outside this Circuit*** support Appellants' claim they have suffered a severe, actual, as well as potential, restraint on their liberty. As stated above, the enforcement of a Trespass Ordinance applies equally to all Bishop Paiute Tribal members, as well as non-tribal members, and does not constitute a severe actual restraint on their liberty.

Nor did Appellants suffer a severe actual restraint of their liberty due to the issuance of the Temporary Protection Orders by the Tribal Court on November 22, 2016. In their First Amended Petition, ER 17, and Opening Brief at page 32, Appellants recognized the criminal language within the form Temporary Protection Order used by the Tribal Court was inapplicable and unenforceable. Because Appellants refused to vacate the disputed Lots, and threatened to move property onto the Lots with the intention of establishing permanent occupancy on the Lots, the Tribal Court was forced to respond quickly, and thus a form Temporary Protection Order normally used for domestic violence matters was used. There was never any intent to arrest Appellants, but the Tribal Court was authorized to impose civil penalties to enforce its orders.

Again, Appellants' reliance upon *Poodry* is misplaced. In *Poodry*, Petitioners were convicted of "treason" and sentenced to "permanent banishment" from the Tonawanda Seneca Indian Reservation. The Second Circuit in *Poodry*, facing "a question of federal Indian law not yet addressed by any federal court" framed the question as: "whether the habeas corpus provision of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1303, allows a federal court to review punitive measures imposed by a tribe upon its members, when those measures involve 'banishment' rather than imprisonment." *Poodry*, 85 F.3d at 879.

In *Tavares*, this Court analyzed *Poodry*, and dismissed its precedential value, limiting its reach to "permanent banishment orders, not temporary exclusions orders like those in this case." *Tavares*, 851 F.3d at 875. *Tavares* cited *Shenandoah v. United States*, 159 F. 3d 708 (2nd Cir. 1998), where the Second Circuit walked back *Poodry's* precedential value, noting "*Poodry* had only recognized federal habeas jurisdiction for cases involving ***permanent banishment***." *Tavares*, 851 F.3d at 874, *citing Shenandoah*, 159 F.3d at 714 (emphasis added).

Again, the District Court properly distinguished *Poodry*:

> While the Ninth Circuit had earlier suggested agreement with the decision in *Poodry* to the extent it found that § 1303 requires 'a severe actual or potential restraint on liberty,' *Jeffredo*, 599 F.3d at 919 (quoting *Poodry*, 85 F.3d at 880), the decision in *Tavares* now makes it abundantly clear that any extension of 'detention' under § 1303 beyond actual physical custody must be narrowly construed by courts

> of this circuit. Indeed, the banishment at issue in *Tavares* was found insufficient to constitute detention – despite the fact that it barred the petitioners from entering *any* tribal land, including their own homes – because it was only temporary, lasting for ten years from some of the petitioners and two years for others. *Tavares*, 841 F.3d at 867-68.

Order (ER 9).[22]

It strains credulity to analogize the outlier cases Appellants rely on as having precedential value under the circumstances of this case. Appellants are subject to the Trespass Ordinance in the same manner as all tribal members and non-members. The only distinction between Appellants and other tribal members is their claim of ownership of the Lots they trespassed upon.

If a member claims a right to use and occupy land within the Bishop Reservation, the Trespass Ordinance provides the member the opportunity to present as an affirmative defense to a trespass allegation the right to produce a grant of standard land assignment. *Trespass Ordinance*, Section 103. ER 144. Appellants cannot produce a grant, because the Owens Valley Board of Trustees has never executed a grant for Block 3, Lots 6 and 7 to any descendant of Ida Warlie. *See Spoonhunter Dec.*, SER 22-24; SER 25-37. The Lots have been unassigned since Ida Warlie's death in 1973.

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[22] *See also Jeffredo*, 599 F.3d at 919 ("We therefore hold that the limitation of Appellants' access to certain tribal facilities does not amount to a 'detention.'")

The closest evidence Appellants provide to support their claim of ownership and right to use and occupy Block 3, Lots 6 and 7 is Resolution 127, ER 111-112, passed by the OVBT in 1977, approving the assignment application of Geraldine Pasqua. But Geraldine Pasqua, who is now deceased, is not an Appellant. And Resolution 127 specifically required approval by the Area Director of the Bureau of Indian Affairs before a grant would be executed by the OVBT.[23] The assignment application of Geraldine Pasqua was returned by the BIA "unapproved" "because it contains more than two Lots which is in conflict with the 'Assignment Ordinance.'" SER 26. Furthermore, on November 20, 2015, the OVBT rescinded Resolution 127 because the assignment application "was never completed in accordance with the custom, practice and tradition of the Bishop Paiute Tribe, the Owens Valley Board of Trustees, and the Bureau of Indian Affairs, since the Application violated Article II Section D.10(a)(2) of the 1962 Land Assignment Ordinance, which limited applicants to two 92) lots per assignment." SER 36-37.

Appellants' assertion of a right of ownership of the Lots is also contrary to the terms of the 1962 Ordinance. Land assignments cannot be inherited. Anyone who

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[23] *See Resolution 127*, ER 111("BE IT FURTHER RESOLVED that upon approval of said application by the Area Director, the Chairman and secretary are hereby authorized to execute in behalf of the Owens Valley Board of Trustees a 'Grant of Standard Assignment' to the said applicant on the land requested."). The signature line for the BIA Area Director at the bottom of Geraldine Pasqua's application is unsigned. *See* ER 112.

wishes to obtain an assignment must apply. *1962 Ordinance*, Art. 2 (D)(9). SA 5. None of the Appellants have received a grant of standard land assignment from the Owens Valley Board of Trustees for Block 3, Lots 6 and 7. The trespass citations were validly issued. Appellants have not suffered severe, actual restraint that would support federal court jurisdiction pursuant to § 1303 of the Indian Civil Rights Act.

Nor do Appellants face any "potential restraint," as the Trespass Ordinance clearly limits the authority of the Bishop Paiute Tribal Council and Tribal Court to enforce only civil penalties, such as injunctions or fines, in the same manner as those penalties are enforced against all tribal members and non-tribal members. *See Tavares, supra* 851 F.3d at 870 ("federal habeas jurisdiction does not operate to remedy economic restraints.").

2. Appellants' "Judicial Superintendence and Control" Argument is Meritless

Appellants' "judicial superintendence and control" argument at pages 27-33 of their Opening Brief is not supported by the cases they cite. All matters before the Bishop Paiute Tribal Courts were civil, not criminal proceedings. Furthermore, the Trespass Ordinance is a restraint upon the general public and all tribal members, not just Appellants.

a. Appellants were not subject to criminal proceedings

As they did below, Appellants cite to multiple cases that involve ***criminal proceedings*** in support of their argument they have been detained in the Tribal Court trespass proceedings. The Trespass Ordinance and the proceedings before the Tribal Court were civil in nature, not criminal. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987) ("an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law.").

The trespass citations are clearly identified as "civil infractions," not criminal actions. *Trespass Ordinance,* Section 104(1). ER 145. The Trespass Ordinance authorized the Tribal Court to impose a "temporary restraining order, and injunctive relief, including an order to abate trespass" as well as any other "civil penalty" or "money damages." *Id.*, Section 104(3). ER 145. The Trespass Ordinance authorizes a tribal official to take any necessary emergency action if the official "determines that a trespass has occurred and may present an imminent and substantial threat to the health, safety, peace or environment of the community." *Id*., Section 104(4). ER 146. The "civil penalty" is limited to a fine "not exceeding Five Thousand Dollars ($5,000.00) for each violation. ***A civil infraction is not a crime and shall not subject a person to criminal punishment***." *Id*. ER 146 (emphasis added).

Contrary to Appellants assertion, *Means v. Navajo Nation* does not control. The issue in *Means* was "whether an Indian tribe can exercise ***criminal*** jurisdiction

over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe." *Means v. Navajo Nation*, 432 F.3d 924, 927 (9th Cir. 2005) (emphasis added).[24] Furthermore, in *Means*, petitioner had exhausted all tribal court remedies. *Id*. at 928. As addressed below, Appellants failed to exhaust their tribal court remedies before turning to the federal court with their demand for federal court intervention into what is clearly a purely intra-tribal matter.

Appellants also misrepresent *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). *Dry Creek* ***did not*** involve *habea*s proceedings under §1303. In *Dry Creek*, appellants were ***non-Indians*** who owned patented tracts of land in fee, ***not*** "private assignees" as described by Appellants (Opening Brief, p.37).

Under the so-called "*Dry Creek* exception," courts will recognize a federal right of action for civil claims under the ICRA (but not habeas relief) under limited circumstances: "To apply, the plaintiff must demonstrate that the dispute involves ***a non-Indian party***, that ***a tribal forum is not available***, and that ***the dispute involves an issue falling outside internal tribal affairs***." *Santa Ynez Band of Mission Indians v. Torres*, 262 F. Supp. 2d 1038, 1046 (C.D. Cal. 2002) (internal citations

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[24] The Ninth Circuit affirmed the district court's denial of *Means*' petition for a writ of habeas corpus.

omitted) (emphasis added).[25] Here, Appellants are members of the Bishop Paiute Tribe, have tribal forums available (which they failed to exhaust), and the dispute over the on-Reservation Lots clearly concerns the internal tribal affairs of the Bishop Paiute Tribe.

Nor does *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965) support Appellants. *Colliflower* – a pre-ICRA case – extended general *habeas* jurisdiction because the tribe's courts functioned "'in part as a federal agency and in part as a tribal agency.'" *Tavares*, 851 F.3d at 873, *citing Colliflower*, 342 F.2d at 379. "*Colliflower* did not have occasion to consider the scope of 'detention' because the court used the term to refer to a situation within the traditional confines of habeas corpus jurisdiction: Colliflower's ***incarceration*** pursuant to a criminal ***conviction***." *Id*. (emphasis added).

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[25] This Court has repeatedly declined to adopt the "*Dry Creek* exception", determining the "Tenth Circuit's application of *Santa Clara* is of questionable authority in this circuit." *Santa Ynez Band*, 262 F. Supp. 2d at 1046 (C.D. Cal. 2002), *citing Demontiney v. United States*, 255 F.3d 801, 815 n. 6 (9th Cir. 2001); *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035 n. 2 (9th Cir. 1999).

b. The Trespass Ordinance is Enforced Against the General Public

"Judicial superintendence and control" does not provide a separate basis for *habeas* review, as the enforcement of the Trespass Ordinance by the Tribal Council is uniformly enforced, and acts as a restraint, as to all members of the Bishop Paiute Tribe, as well as to non-members, not just Appellants.

The cases cited in Appellants' Opening Brief at pages 28-30 make it clear the "restraint" giving rise to *habeas* relief must be a severe restraint on one's individual liberty "not shared by the public generally." *Dry v. CFR Court of Indian Offenses for Choctaw Nation*, 168 F.3d 1207, 1208 (10th Cir. 1999); *see also Jones v. Cunningham*, 371 U.S. 236, 242 (1963) ("the custody and control of the Parole Board involves significant restraints on petitioner's liberty because of his conviction and sentence, which ***are in addition to those imposed by the State upon the public generally***") (emphasis added).

Nor does *Hensley v. Municipal Court* support Appellants' argument that they have been judicial restrained. In *Hensley*, the Supreme Court noted Petitioner:

> is subject to restraints 'not shared by the public generally . . . that is, the obligation to appear at all times and places as ordered by any court or magistrate of competent jurisdiction . . . He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions

> imposed on the unattached reserve officer whom we held to 'in custody' in *Strait v. Laird, supra*.

Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., California, 411 U.S. 345, 351 (1973) (internal citations omitted).

Unlike those criminal defendants, Appellants here are free to come and go as they please. All they are prohibited from doing is trespassing on to property that is off limits to all, tribal members and non-members alike. *See Jeffredo*, 599 F. 3d at 918-21 (permanent exclusion from certain tribal facilities was not "detention" and did not confer federal court jurisdiction).

The Trespass Ordinance's purpose is: "to promote the general health, safety and welfare of all residents of the Bishop Paiute Reservation and in furtherance of the sovereign right of self-governance of the Tribe, the Tribal Council declares its commitment to the establishment and maintenance of rules and regulations covering the subject matter of this ordinance." *Trespass Ordinance*, Section 102 (ER 144). All members of the public, both tribal members and non-tribal member, are subject to the Trespass Ordinance and its potential sanctions, including fines, as well as action in the Tribal Court for temporary restraining orders. *Id*. Section 104(3) (ER 145).

Appellants cannot complain that they have suffered a restraint on their individual liberty not shared by the public generally.

C. Other Grounds for Dismissal

As outlined below, there are other grounds presented below that support affirmation of the District Court's Motion to Dismiss.

1. Appellants Failed to Exhaust Tribal Remedies

The District Court dismissed Appellants' *habeas* petition because the matter involved a purely intra-tribal dispute, and Appellants had not satisfied one of the two prongs necessary in order for federal courts to have jurisdiction to grant *habeas* relief: Appellants had not been "detained". The District Court elected to not respond to Appellees' arguments that Appellants' failed exhaust all tribal remedies. *See* ER 11. As outlined below, Appellants' failure to exhaust tribal remedies is an alternative grounds for affirmance.

Exhaustion of all tribal remedies is a second prong that must be satisfied in order to determine whether habeas relief is available to a party pursuant to § 1303 of the Indian Civil Rights Act. Principles of exhaustion are premised upon the recognition by Congress and the courts that tribal forums should have the opportunity to review the claim and provide any available relief. *See Williams v. Taylor*, 529 U.S. 420, 436–37 (2000). Exceptions to tribal exhaustion are narrowly applied in only the most extreme cases. *See Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1203 (9th Cir. 2013).

As noted above in the "Statement of Facts", Appellants failed to exhaust tribal remedies available to them in Tribal Court prior to filing their petition for *habeas* relief in federal court on December 29, 2016.

The initial Tribal Court hearing to address the November, 2016 trespass citations (and related Temporary Protection Orders) was scheduled for December 20, 2016. On December 15, 2016, Appellants asked the Tribal Court to continue and stay proceedings pending a decision from the Tribal Court of Appeals on the Writ of Mandamus they had filed on December 13, 2016. *See* SER 9.[26]

On December 18, 1996, the Tribal Court granted Appellants' motion, and continued the matter until March 21, 2017, keeping the conditions of the Temporary Protection Orders in place. *See* SER 13. Appellants failed to object or request reconsideration of the Tribal Court's order to keep the Temporary Protective Orders in place until the next scheduled hearing.

Eleven days later, Appellants filed their first Petition in federal court, along with a motion for a Temporary Restraining Order, alleging they had been "detained," and had "exhausted all tribal remedies."

The ongoing proceedings in Tribal Court belie Appellants' claim that they exhausted their tribal remedies. While this matter was pending in District Court,

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[26] It is worth noting that Appellants, in their request for a continuance/stay, did not move for the Tribal Court to vacate the Temporary Protection Orders.

Appellants actively participated in Tribal Court proceedings, as well as the Bishop Paiute Tribal Court of Appeals.

On March 21, 2017 Appellants appeared in Tribal Court. During that hearing, Judge Kockenmeister *sua sponte* dismissed Appellants' trespass cases and the related protection orders. *See* SER 14.

In addition, on April 16, 2017, Appellants withdrew their Petition for Writ of Mandamus in the Bishop Tribal Court of Appeals. *See* SER 20.

Although Appellants have no matters pending before the courts of the Bishop Paiute Tribe concerning the November, 2016 trespass citations, their decision to abandon the remedies available to them before the Tribal Courts does not constitute "exhaustion" of tribal remedies. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17 (1987) ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."); *see also Williams v. Taylor*, 529 U.S. 420, 436–37 (2000) ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.").

Because Appellants failed to exhaust their tribal remedies, the District Court had alternative grounds for dismissal of the Petition pursuant to FRCP Rule 12(b)(1), and the dismissal should be affirmed.

2. Because of the Sovereign Immunity of the Tribe and its Officials, Dismissal Pursuant to Federal Rule Civil Procedure 12(b)(1) was Warranted

The District Court declined to rule on Appellees' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). *Order*, ER 11, n.10. In addition to affirming the District Court's dismissal pursuant to FRCP Rule 12(b)(6), this Court can also affirm the District Court's dismissal pursuant to FRCP Rule 12(b)(1), since the relief Appellants seek is unavailable because of the sovereign immunity of the Bishop Paiute Tribe and its officials.

Pursuant to FRCP Rule 12(b)(1), a petition must be dismissed if the action: "(1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III Section 2 of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or, (3) is not one described by any jurisdictional statute." *Skokomish Indian Tribe v. Forsman*, 2017 WL 1093294, at 2 (W.D. Wash. Mar. 23, 2017). When considering a motion to dismiss pursuant to Rule 12(b)(1), the courts are not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *Id*. A federal court is presumed to lack subject matter jurisdiction, and the burden of proving jurisdiction exists, lies with Petitioner. *Id*.

Appellants allege their rights pursuant to Section 1302 of the Indian Civil Rights Act ("ICRA") were violated, [27] but then assert a right to habeas relief pursuant to Section1303 of the Indian Civil Rights Act.

Appellants mischaracterize the holding of *Santa Clara* Pueblo by arguing that, if a federal court determines it has jurisdiction to grant habeas relief pursuant to §1303, it opens the door for the federal courts to address the alleged violations of the substantive rights outlined in §1302. *Opening Brief*, pp. 18-19 ("If there is a detention, then there is jurisdiction; and the court must decide the land ownership question to determine the merits of assignees' claims under the takings clause and make findings regarding all other alleged violations of §1302 as well.") Yet the Supreme Court in *Santa Clara Pueblo*, or any court for that matter, never interpreted §1303 as a constituting a jurisdictional threshold, which, if met, gives federal courts jurisdiction to address alleged violations of §1302.

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[27] *See First Amended Petition*: "First Cause of Action; Unlawful Restraint on Personal Liberty in Violation of ICRA Due Process" (ER 46); "Second Cause of Action: Denial of rights to confront witnesses and obtain compulsory process for obtaining witnesses in their favor"(ER 37); "Third Cause of Action: Unlawful Restraint on Personal Liberty in Violation of Federal ICRA Equal Protection"(ER 37); "Fourth Cause of Action: Unlawful taking of land in violation of ICRA" (ER 52); "Fifth Cause of Action: Deprivation of Rights to assembly and speech" (ER 53).

Tribal sovereign immunity was not waived by Congress to allow for federal jurisdiction to enforce provisions of Section 1302 of the ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Sovereign immunity serves as a separate jurisdictional bar, and would support dismissal pursuant to FRCP Rule 12(b)(1).

The Bishop Paiute Tribe, a distinct, independent political community, has retained all of its attributes of sovereignty, which includes the power to establish its own substantive laws to address internal matters. *Santa Clara Pueblo*, 436 U.S. at 56. A core aspect of sovereignty is the common law immunity from suit traditionally enjoyed by sovereign powers, subject to congressional action. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030 (2014), citing *Santa Clara Pueblo*, 436 U.S. at 58. The sovereign immunity of the Tribe flows to its tribal officials acting in their official capacity. *Davis v. Littell*, 398 F. 2d 83, 84-85 (9th Cir. 1968); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008), citing *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002).

Petitioners cannot circumvent the immunity of the Bishop Tribe by suing tribal officers in their official capacity instead of the sovereign entity. *Cook, supra*. "In these cases the sovereign entity is the 'real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'" *Id.* (quoting *Regents of the Univ. of Cal. v.*

Doe, 519 U.S. 425, 429 (1997).) The relief Appellants seek is affects the entire Bishop Paiute Tribe, and not the individually named Appellees.

3. Appellants Failed to Join Necessary and Indispensable Parties

Appellants concede that the real property at issue here is "owned and held in trust by the United States …." *See Opening Brief*, p. 5. They allege that the Owens Valley Board of Trustees regulates use of the subject lots. Indeed, the First Amended Petition alleges that "[d]ecisions over [assignments of the property at issue] are ***exclusively*** within the authority of the Owens Valley Board of Trustees." *FAP* p. 9, ¶ 25, ER 23 (emphasis added). The FAP further alleges that "the OVBT recognized and validated [the] assignment" of the lots at issue. *Id*. p. 10, ¶ 28, ER 24. The relief they seek includes "an Order enjoying [sic] Respondents' from issuing legal process or further interfering with ***Petitioner's Use and Occupancy rights***" in the disputed lots. *FAP* Prayer for Relief p. 40 ¶ G, ER 54 (emphasis added). The Opening Brief describes "***the core issue***" in this case as the "***use and occupancy rights to the land*** in question." *Opening Brief* at 11 (emphasis added).

Yet Appellants failed to name either the United States or the OVBT as a party hereto. *See generally First Amended Petition*, ER 15-55. Under Appellants own allegations, both the United States and OVBT are necessary (now "required") and indispensable parties, which Appellants have failed to join. See Fed. R. Civ. P. 19;

Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles, 637 F.3d 993, 997 (9th Cir. 2011) (affirming "district court's decision to dismiss this action for failure to join the United States").

In *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, this Court had "no doubt that the United States is a required party." *Id.* at 997. There, like here, "Plaintiff's theory of this case involves three steps that it claims lead to its requested relief, which is to eject the City from the Bishop Tribal Land and to restore Plaintiff to possession of it." *Id.* Because the United States had previously held title to the contested land and, under plaintiffs' theory, illegally transferred title to the City of Los Angeles, the "district court could not award the relief that Plaintiff seeks in the absence of the United States." *Id.*

Here the case for indispensability under Rule 19 is even stronger, as the United States retains title to the contested property and, according to Appellants, the OVBT retains "exclusive" regulatory authority over the assignments of the lots they seek to control. *See also Steel Valley Authority v. Union Switch and Signal Div.*, 809 F.2d 1006 (3rd Cir. 1987) (property owner necessary because any injunction requiring owner to maintain property's status quo would undoubtedly affect owner's rights); *Dudley v. Meyers*, 422 F.2d 1389 (3rd Cir. 1970) (party defendants should include all persons whom the plaintiffs can ascertain to be interested as landowners); *McShan v. Sherrill*, 283 F.2d 462 (9th Cir. 1960) (in

quiet title action, landowners whose holdings lay between plaintiff's and defendant's, and which was adjudicated to have been acquired by plaintiffs, were indispensable parties); *Alliance for the Wild Rockies v. Marten*, 200 F.Supp.3d 1110 (D. Mont. 2016); *Wright v. Incline Village General Imp. Dist.*, 597 F.Supp.2d 1191 (D. Nev. 2009); *Taylor v. Bureau of Indian Affairs*, 325 F.Supp.2d 1117 (S.D. Cal. 2004) (Tribe was necessary party to cattle owners' suit regarding BIA's proposed impoundment of cattle for grazing on Indian land); *U.S. v. Norman Lumber Co.*, 127 F.Supp. 518 (M.D.N.C. 1955), *aff'd* 223 F.2d 868.

For these reasons, this Court should affirm on independent grounds of Federal Rules of Civil Procedure 12(b)(7) and 19.

4. The Quiet Title Act Also Supports Affirmance

Appellants' First Amended Petition seeks "an Order enjoying [sic] Respondents' from issuing legal process or further interfering with ***Petitioner's Use and Occupancy rights***" in the disputed lots. *FAP* Prayer for Relief p. 40 ¶ G, ER 54 (emphasis added). The Opening Brief describes "***the core issue***" in this case as the "***use and occupancy rights to the land*** in question." *Opening Brief* at 11 (emphasis added). Appellants concede that that the disputed land is "owned and held in trust by the United States …." *Opening Brief* at 5-6.

Thus Appellants lawsuit seeks to "adjudicate a disputed title to real property in which the United States claims an interest …." 28 U.S.C. § 2409a(a) (Quiet Title Act). The Quiet Title Act applies to a broad range of lawsuits addressing interests in real property, not just ultimate ownership. It applies when a "plaintiff claims" a "right, title, or interest … in the real property …." 28 U.S.C. § 2409a(d). Indeed, "[m]ost actions under the Quiet Title Act concern the ***incidents*** of land ownership and not ownership *per se*." *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1, 2 (D.D.C. 1995), *aff'd sub nom. Hat Ranch, Inc. v. U.S.*, 102 F.3d 1272 (D.C. Cir. 1996) (*citing Block v. North Dakota*, 461 U.S. 273 (1983) (right to issue oil and gas leases); *Town of Beverly Shores v. Lujan*, 736 F.Supp. 934 (N.D. Ind. 1989) (right to destroy easements)) (emphasis added).

For example, the Quiet Title Act applies to cases involving grazing rights on federal lands, easements, and other "interest[s]" in federal lands. 28 U.S.C. § 2409a(d). *See, e.g., Gardner v. Stager*, 103 F.3d 886 (9th Cir. 1996) (grazing rights); *Michel v. United States*, 65 F.3d 130 (9th Cir. 1995) (cattle access routes across national wildlife refuge); *North Dakota ex rel. Stenehjem v. United States*, 257 F.Supp.3d 1039 (D.N.D. 2017) (rights-of-way); *Proschold v. U.S.*, N.D.Cal.2002, 244 F.Supp.2d 1027, affirmed 90 Fed. Appx. 516 (9th Cir. 2004) (easement); *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1 (D.D.C. 1995), *aff'd sub*

nom. Hat Ranch, Inc. v. United States, 102 F.3d 1272 (D.C. Cir. 1996) (grazing fees).

Here, Appellants sought to adjudicate claimed interests, including beneficial ownership, use and occupancy rights, in federally-owned lands. Yet they sought to avoid the Quiet Title Act and its limitations by contorting their claims into a *habeas* petition aimed at individual tribal officials. This they cannot do.

"Litigants cannot circumvent the provisions of the [Quiet Title] Act by drawing fine distinctions between the incidents of land ownership and ownership itself." *Hat Ranch, Inc.*, 932 F. Supp. at 2 (*citing Humboldt Cty. v. U.S.*, 684 F.2d 1276, 1280 n. 3 (9th Cir. 1982) (court looked to essence of action to see if it is one to quiet title: "the County's claims of rights of way in the roads are essentially claims to quiet title in those roads"); *McClellan v. Kimball*, 623 F.2d 83 (9th Cir.1980) (same)).

Indeed, the Supreme Court has expressly rejected the tactic of suing government officials instead of the government as a means of circumventing the limitations of federal law. "Enterprising claimants … pressed the so-called 'officer's suit' as another possible means of obtaining relief in a title dispute with the Federal Government." *Block*, 461 U.S. at 281. Such suits typically "would proceed against the federal officials charged with supervision of the disputed area, rather than against the United States. The suit would be in ejectment or, as here, for

an injunction or a writ of mandamus forbidding the defendant officials from interfering with the claimant's property rights." Id. (emphasis added). This aptly describes Appellants' approach in this case.

After reviewing the Quiet Title Act's legislative history, the Court rejected "North Dakota's contention that it can avoid the QTA's statute of limitations and other restrictions by the device of an officer's suit. If North Dakota's position were correct, all of the carefully-crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted." *Id.* at 284-85. "'It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.'" *Id.* at 285 (*quoting Brown v. GSA*, 425 U.S. 820, 833 (1976)).

Thus the Supreme Court held "that Congress intended the QTA to provide ***the exclusive means*** by which adverse claimants could challenge the United States' title to real property." *Id.* at 286 (emphasis added). *See Leisnoi, Inc. v. U.S.*, 170 F.3d 1188, 1191 (9th Cir. 1999) (*quoting Alaska v. Babbitt*, 38 F.3d 1068, 1073 (9th Cir. 1994).

Appellants failed to sue for possession and use of federal lands under the Quiet Title Act because it precludes such actions. Specifically, it bars suits against the United States concerning "trust or restricted Indian lands," and title to their claimed native assignments is still held by the government in trust. 28 U.S.C.

2409a(a); *see Alaska v. Babbitt*, 38 F.3d at 1073; *Wildman v. U.S.*, 827 F.2d 1306 (9th Cir. 1987) (the Quiet Title Act does not apply to trust or restricted Indian lands).

Federal sovereign immunity insulates the United States from suit "in the absence of an express waiver of this immunity from Congress." *Block*, 461 U.S. at 280. Such waivers, to be effective, must be "unequivocally expressed," and the government's consent to be sued must be construed "strictly in favor of the sovereign." *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (citations omitted). "[W]hen the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the government's immunity." *U.S. v. Mottaz*, 476 U.S. 834, 843 (1986).

Thus the Quiet Title Act is the "exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block*, 461 U.S. at 286. *Block* explicitly rejected the theory that plaintiffs could avoid the Quiet Title Act's limitations by bringing an action under a different federal statute – there, the Administrative Procedures Act, here the Indian Civil Rights Act. *Id.* at 286 n. 22. Consequently, when the United States has an interest in the disputed property, the waiver of sovereign immunity must be found, if at all, within the Quiet Title Act. Absent a waiver, the United States is a necessary and indispensible party that

cannot be joined. Thus the Quiet Title Act, and Fed. R. Civ. P. 19, provide another reason for affirming the District Court's dismissal of this action.

D. Because Federal Courts Lack Jurisdiction to Address Intra-Tribal Disputes, Appellants must seek Relief from the Governing Bodies of the Tribe

The District Court properly noted that "at the core of this case is an intra-tribal dispute" between Appellants and Tribal Council. *Order*, ER 2. Federal courts cannot expand the scope of habeas relief to circumvent their lack of jurisdiction over such intra-tribal disputes. *See Tavares*, 851 F. 3d at 875. Federal courts have no jurisdiction to address Appellants land claims. Those claims need to be addressed by the governing tribal bodies with jurisdiction to address land assignments: The Tribal Council and the Owens Valley Board of Trustees.

> When land is communally held by the tribe, individual members may simply share in the enjoyment of the entire property without having any claim at all to an identifiable piece of land. In practice, however, tribal members usually require some method of knowing that it is permissible for them to erect a residence on a given spot, to graze stock in a particular area, or to engage in other activities requiring a relatively fixed location. This need is customarily met by the tribe's conferring a license upon the individual to use particular land. That license may go by many names, but it is commonly referred to as an "assignment."

W. Canby, *American Indian Law in a Nutshell*, 6th edition, p. 447. Ownership of tribal property is vested in the tribe rather than individual tribal members, and any interests individuals may receive are only authorized "as a matter of tribal law." Cohen, *Handbook of Federal Indian Law*, 2012 Ed. § 1601[3] p. 1069. With

respect to any individual land use rights authorized pursuant to tribal law, "the Department of the Interior's responsibility is to the tribal landowner rather than the individual tribal member." *Id.*, *citing Candelaria v. Sacramento Area Dir.*, 27 I.B.I.A. 137, 144-145 (1995).

For over 40 years, every elected Bishop Tribal Council, as well as the Owens Valley Board of Trustees ("OVBT"), has rejected Appellants' asserted claim of ownership, and right of use and occupancy of, Block 3, Lots 6 and 7. Appellants' dissatisfaction with decisions made by the governing bodies with jurisdiction to hear their claims does not create a federal remedy with the federal courts. *See Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005) ("The issue is not whether the plaintiffs' claims would be successful in these tribal forums, but only whether tribal forums exist that could potentially resolve the plaintiffs' claims."). "'Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.'" *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010), citing *Santa Clara Pueblo*, 436 U.S. at 72, n. 32.

Appellants' forum to resolve disputes with respect to land assignments lie with the governing bodies of the Bishop Paiute Tribe, and not the federal courts. Appellees possess the sovereign immunity of the Bishop Paiute Tribe, and therefore, the District Court properly dismissed Appellants' petition.

IX. CONCLUSION

No amount of hyperbole espoused can coalesce Appellants' forty-year history with every elected Bishop Paiute Tribal Council into a "detention" such that Appellants may petition for writ of habeas corpus under Section 1303 of the Indian Civil Rights Act. *See John v. Garcia*, No. C 16-02368 WHA, 2018 WL 1569760, at *6 (N.D. Cal. Mar. 31, 2018).

Because Petitioners have failed to meet the jurisdictional prerequisites for *habeas corpus* relief available pursuant to the ICRA, they are obligated to "turn to remedies and measures available within the relevant tribal system of government." Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 697 (2002).

For the foregoing reasons, Appellees respectfully request that this Court affirm the District Court's dismissal.

Date: April 16, 2018

Law Office of Anna Kimber

/s/ Anna Kimber
Anna Kimber
Attorneys for Appellees

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases.

Date: April 16, 2018

Law Office of Anna Kimber

/s/ Anna Kimber

Anna Kimber

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,784 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

Date: April 16, 2018

Law Office of Anna Kimber

/s/ Anna Kimber

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Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: April 16, 2018

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