

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-16604

BISHOP PAIUTE TRIBE,
Plaintiff-Appellant

v.

INYO COUNTY; WILLIAM LUTZE, Inyo County Sheriff; and
THOMAS HARDY, Inyo County District Attorney.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLANT

Dorothy Alther,
CALIFORNIA INDIAN LEGAL SERVICES
609 S. Escondido Blvd.
Escondido, CA 92025
(760) 746-8941
Attorney for Appellant
BISHOP PAIUTE TRIBE

Jasmine Andreas,
CALIFORNIA INDIAN LEGAL SERVICES
873 N. Main St. Ste. 120
Bishop, CA 93514
(760) 873-3581
Attorney for Appellant
BISHOP PAIUTE TRIBE

CORPORATE DISCLOSURE STATEMENT

Required by Rule 26.1 of Federal Rules of Appellate Procedure

The undersigned, counsel of record for Tribe Bishop Paiute Tribe, a Federally Recognized Tribe, hereby certifies that the Tribe does not have any parent company, subsidiary, or affiliate thereof that has issued any shares of capital stock to the public.

Dated: January 21, 2016

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STATEMENT OF JURISDICTION

Plaintiff (herein “Tribe”) invoked the district court’s jurisdiction under three statutes. First, the Tribe invoked the district court’s jurisdiction under 28 U.S.C. §1331, in that the Tribe’s claims arise under the Constitution and the laws of the United States. Excerpt of Record (“ER”) 12, Vol. III, Tab 10, p. 3. Second, the Tribe invoked jurisdiction under 28 U.S.C. §1362 as Tribe is a federally recognized Tribe which asserts that defendants’ actions violate the Constitution and laws of the United States. *Id.* Third, the Tribe invoked the district court’s jurisdiction under 28 U.S.C. §2201 and §2202 as the Tribe sought declaratory and injunctive relief regarding the Tribe’s police authority over non-Indians on its Reservation. *Id.*

On July 13, 2015 the district court issued a sua sponte order dismissing the Tribe’s amended complaint for lack of a justiciable case or controversy. ER 35, Vol. I, Tab 1. Tribe filed a timely notice of appeal on August 12, 2015. ER 37, Vol. II, Tab 2. This Court has appellate jurisdiction over the district court’s ruling pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

Whether the Tribe’s case presents a case or controversy under Article III of the United State Constitution in light of defendants’ arrest and ongoing prosecution

of the Tribe's law enforcement officer and threat of future arrests and prosecutions of the Tribe's police officers if they continue to carry out their inherent tribal authority over non-Indians committing violations of tribal and state law on tribal lands.

STATEMENT OF THE CASE

The Tribe filed a complaint with the United States District Court for the Eastern District of California on March 6, 2015. The Tribe subsequently filed their First Amended Complaint on March 30, 2015 continuing to seek declaratory and prospective injunctive relief. ER12, Vol. III, Tab 10. The district court dismissed the Tribe's First Amended Complaint for lack of a justiciable case or controversy over which the federal court has no jurisdiction on July 13, 2015. ER 35, Vol. I, Tab 1. The Tribe filed a timely Notice of Appeal on August 12, 2015. ER 37, Vol. II, Tab 2.

STATEMENT OF THE FACTS

The Tribe's Reservation consists of 875 acres and supports a population of 1,796. The Tribe established a Tribal Police Department in 2009 and also operates the Bishop Paiute Tribal Court. The Tribe has established laws that provide for the peace and security of its members, residents and guests. ER 12, Vol. III, Tab 10, pp.4-8, 26-42.

Tribal officer qualifications require at least two years of law enforcement experience and a certification of completion from a Police Officer Standards & Training (POST) state or federal training institution or agency. In addition Officers are required to have knowledge of 18 U.S.C § 1662 and 28 U.S.C. § 1360 (common known as “Public Law 280”) and basic federal Indian law. All applicants are subject to a pre-employment screening that includes verification of past employment, education, certifications from other agencies, criminal background check, credit checks, review of prior agency screenings and adjudication and a U.S. Department of Justice background check. A member of the Inyo County Sheriff’s Department and Bishop Police Department often sit in on the interviewing panel for the hiring of new tribal police officers, and did so when the tribal officer now being prosecuted was interviewed for his current position. ER 12, Vol. III, Tab 10, pp.43-45.

Tribal police are required to interact with local law enforcement when incidents arise on the Reservation involving criminal acts by persons who need to be arrested and taken into custody, including non-Indians. The “Bishop Tribal Police Department, Policy and Procedures,” Department General Order, 3.1 Detentions, addresses detention of individuals for investigation and releasing to outside law enforcement. Per the Order 3.1, a tribal officer has the responsibility when arriving on scene, before outside law enforcement arrives or for the purpose

of conducting an investigation for violations of Tribal Law and Ordinances, to detain the suspected violator. In addition, 3.1 provides that a tribal officer may need to detain an individual in order to: secure the scene; prevent the suspect from leaving the scene; and/or for officer or public safety. In cases of detention, the tribal police officer is to notify the Tribal Chief of Police and the Sheriff's Department. Non-Indians suspected of violating state law should be, as soon as possible, turned over to outside law enforcement. ER 12, Vol. III, Tab 10, pp.46-48

Department General Order, 3.1 further addresses securing a detained person. A tribal officer may handcuff the detained person, check for spacing with a minimum of two fingers to avoid injury and secure the detained person in the custody area of the officer's police vehicle. This policy ensures officer safety, the safety of the detained person, and the public. The officer is also instructed to conduct a search of the detained person for weapons. Reasonable force may be used to detain the person if necessary to: conduct an investigation, while enforcing tribal law, to overcome resistance or the threat of resistance or prevent an unlawful attack. Finally, any person detained and that has been determined to have violated California criminal law, shall be turned over to outside law enforcement as required by policy and existing case law. *Id.*

On December 24, 2014, the Tribe's tribal law enforcement officer responded to a call from a tribal member on the Reservation and encountered a non-Indian

known to the officer as being in violation of both a tribal and state domestic violence restraining order. ER 12, Vol. III, Tab 10, p. 8. The tribal officer proceeded to restrain the non-Indian, who was uncooperative and combative, and detain her for delivery to the sheriff department. *Id.* at pp. 9-10. Upon arrival, the sheriff's deputy first controlled the small crowd of onlookers, called for backup, assisted the tribal officer in cuffing the non-Indian and placing her in the tribal officer's police vehicle. *Id.* at p. 10. The non-Indian was not arrested by the sheriff and was released. *Id.* at pp. 10-11.

Days following the encounter, the defendants arrested and charged the tribal officer with false imprisonment for his detaining the non-Indian, battery and unlawful use of a Taser used by the tribal officer in subduing and restraining the non-Indian, and impersonating a state official for detaining the non-Indian for violation of a state domestic violence protection order. ER 12, Vol. III, Tab 10, pp. 11, 18, 20-21. All criminal charges are currently pending, except for impersonating a state official which was dismissed at the Preliminary Hearing upon a finding by the state court that Tribe's officer was acting as a tribal law enforcement officer at all times during the December 2014 incident.

The day of the arrest of the Tribe's officer, the defendant sheriff issued a "Cease and Desist" Order (hereinafter "Sheriff's Order") containing several conclusory statements on the limits of tribal authority and allegations of tribal

officer misconduct. ER 12, Vol. III, Tab 10, p. 11, 23-25. Specifically, the sheriff ordered the Tribe to: (1) cease the enforcement of state criminal law; and (2) to direct its officers not to carry their firearms off Reservation. ER 12, Vol. III, Tab 10, p. 24. Unless the Tribe and its officers complied immediately, the sheriff was prepared to continue to arrest tribal police officers and threatened the Tribe's officers with civil penalties and injunctive action. *Id.*

The Tribe responded to the Sheriff's Order disagreeing with the sheriff's legal interpretations of tribal authority and disputing any wrongful action taken by its officers. ER 12, Vol. III, Tab 10, p. 11; ER 29, Vol. II, Tab 4, pp.5-7. In direct response to the Sheriff's Order, the Tribe found no difficulty agreeing to the first demand since its officers have and do not enforce state law on the Reservation. ER 29, Vol. II, Tab 4, p. 3. With regard to the second demand, the Tribe clarified that its officers' carrying of firearms off Reservation was necessary when patrolling certain areas of the Reservation that were not contiguous and when traveling to and from work since its officers resided off Reservation. ER 29, Vol. II, Tab 4, p.6. Beyond these circumstances, the Tribe's officers, while off Reservation, were subject to any state laws applicable to them as residences of the county.

It was clear from the Sheriff's Order and the District Attorney's prosecution that they misunderstood and failed to recognize tribal inherent authority over non-Indians committing crimes on tribal lands. ER 29, Vol. II, Tab 3, p. 4. The

defendants' collective view is that the Tribe's officers have no authority over a non-Indian and any actions (restraining or detaining) taken by a tribal officer against a non-Indian will be considered as actions taken by a private citizen and subject to criminal prosecution. ER 12, Vol. III, Tab 10, pp. 23-25, p. 23 for "private citizen"; ER 12, Vol. III, Tab 10, p. 18; ER 12, Vol. III, Tab 10, pp. 20-21.

As a result, the Tribe initiated a federal action seeking declaratory and (prospective) injunctive relief to clarify that federal law recognizes and authorizes tribal law enforcement officers to stop and restrain a non-Indian on tribal land to investigate violations of tribal, state, and federal law, and to detain the non-Indian for the proper law enforcement authorities to take custody or to exclude the person from the Reservation. ER 12, Vol. III, Tab 10, pp. 2-3, 12, 15-16. Indeed, without such clarification and understanding, tribal officers will remain subject to future arrest and state criminal prosecution by defendants.

Without hearing, the district court entered an order dismissing the Tribe's case based exclusively on Tribe's January response to the Sheriff's Order that its officers would not enforce state law. ER 35, Vol. I, Tab 1, pp. 1-8. The district court's presumed reasoning is that the Tribe's officer was acting pursuant to state law when he restrained and detained the non-Indian during the on Reservation incident. *Id.* Thus, because the Tribe has agreed to not enforce state criminal law

in response to the Sheriff's Order, there is no longer a justiciable dispute between the parties and the case requires dismissal for lack of jurisdiction. *Id.*

The Tribe's pleadings repeatedly set forth that its officer acted at all times within his tribal inherent authority, not state law, when he restrained the non-Indian violator and detained her on tribal land for the sheriff. ER 12, Vol. III, Tab 10, pp. 2-3, 12; ER 21, Vol. II, Tab 8, pp. 2, 8, 10, 12, 16; ER 33, Vol. II, Tab 3, p. 4. The Tribe's Amended Complaint sets forth the federal and state legal authority establishing tribal inherent authority over non-Indians who commit crimes on tribal lands. ER 12, Vol. III, Tab 10, pp. 12-15. Noting that while the Supreme Court has limited tribal inherent authority by holding tribes cannot "try and punish" non-Indians for violation of tribal criminal laws, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court has acknowledged that:

Tribal law enforcement authorities have the power to *restrain* those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to *detain* the offender and transport him to the proper authorities. *Duro v. Reina*, 495 U.S. 676, 697 (1990) (Emphasis added).

ER Vol. III, Tab 10, p. 13. Also citing, *United States v. Becerra-Garcia*, 397 F. 3d 1167, (9th Cir. 2005); *Ortiz-Barraza v. United States*, 512 F. 2d 1176 (1975); *Walker v. Rushing*, 898 F.2d 672 (8th Cir. 1990); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp.2d 1195 (Cal. C.D. 1998); *State of Washington v.*

Schmuck, 850 P. 2d 1332 (1993); *State v. Ryder*, 649 P. 2d 756 (1982). ER Vol. III, Tab 10, pp. 12-15.

The Tribe's "Prayer for Relief" asked the district court for:

A declaration that the Tribe's police officers have the authority on its Reservation to stop, restrain, investigate violations of tribal, state, and federal law, detain, and transport or deliver a non-Indian violator to the proper authorities. By carrying out these federally authorized actions, the Tribe's duly authorized law enforcement officers are not impersonating a state officer nor is their restraint, investigation and detention of a non-Indian, in compliance with provisions of the Indian Civil Rights Act, an "arrest" for purposes of a state criminal charge of false imprisonment.

ER 12, Vol. III, Tab 10, pp. 15-16.

The Tribe's "Consolidated Opposition to Defendants' Motion to Dismiss", again reiterated the issue and dispute between the parties. On pages 7-8 the Tribe presented that:

The actions taken by the Defendants, and particularly the "Cease and Desist" order, compel the Tribe to file this declaratory action. The authority of tribal law enforcement officers over non-Indians who commit crimes on the Reservation, must clearly be defined in order to avoid further interference from the Defendants and threatening public safety on the reservation.

The Sheriff's January 6, 2015 "order" typifies what is at issue in the Tribe's federal action. Sheriff Lutze equates tribal officers' on reservation duties of stopping, restraining and detaining a non-Indian, while conducting an investigation for a violation of state law, as (1) making an unlawfully arrest that constitutes false imprisonment, and (2) the tribal officer enforcing state law which he or she are not authorized to do, and are therefore guilty of impersonating a state officer. Further, if force used during the restraining or detaining of the non-Indian, the tribal officers will not be treated as a law enforcement officer carrying out duties within their scope of employment, but rather as a private individual subject to criminal battery.

ER 21, Vol. II, Tab 8, pp. 7-8.

Finally, and possibly the most direct statement of the conflict and issue in the current case was presented in the Tribe's "Consolidated Opposition To Defendants' Declaration of John Kirby in Support of all of Defendants' Pending Replies to Tribe's Consolidated Opposition to Motions to Dismiss Amended Complaint":

After transmitting its January 15, 2015 letter, the Tribe had hoped that discussions with Defendant Lutze and Defendant Thomas Hardy would resolve the agencies' respective law enforcement duties and applicable law, unfortunately such discussions did not. Table

The Tribe's law enforcement officer continues to be criminally prosecuted for actions he took during the performance of his lawful duties under tribal authority and federal law. There also remains a fundamental difference between the Tribe's and the Defendants' interpretation of federal law with regard to what actions the Tribe can take against a non-Indian on the reservation who has or is in violation of tribal, state and/or federal law, that affects public safety. Without Declaratory Relief, the Tribe has no assurance that Defendants will refrain from future arrests and prosecutions of tribal officers for carrying out their lawful duties. Clearly, the Tribe's case is not moot and presents a case and controversy.

ER 33, Vol. II, Tab 3, pp. 3-4.

Until and unless tribal inherent tribal authority over a non-Indian on tribal lands who is or has committed a crime is clarified and understood by the defendants, they will continue to directly infringement on tribal sovereignty and non-Indians will be free to act without impunity on Tribe's Reservation.

SUMMARY OF THE ARGUMENT

Based on the above, the Tribe has ample facts on the record to demonstrate that the case is ripe as to the constitutional component of ripeness. The Tribe and its officers have suffered not only the injury of arrest and prosecution, but also the continued threat of arrest and infringement on the Tribe's sovereignty and inherent authority. The Tribe's case is ripe as to the issues as there continues to be disagreement on the defendants' ability to use state law to infringe on the inherent authority of the Tribe, in fact the defendants contend there is no such thing and tribal police have the rights of a public citizen. The Tribe's case is also ripe as the above demonstrates a concrete factual scenario for fitness of a judicial decision, and can demonstrate multiple hardships that satisfy the prudential ripeness component.

The Tribe's case does not constitute a non-justiciable political question that would be an exception to the court's jurisdiction, and no case law supports that conclusion.

Importantly, due to the nature of the continued disagreement on applicable law, the Tribe's case is not moot. Defendants interpretation of the narrow issue of the Tribe and its officers not possessing state law enforcement authority misses the larger picture that in holding the Tribe's officers to the same standard as the general public while carrying out their duties infringes on the Tribe's inherent authority over non-Indians on the Reservation restrain and detain those individuals

to turn them over to the proper authorities. The Tribe has demonstrated it can be afforded effective relief if this case were remanded to the district court to be heard on its merits, and public interest involved in safety is against a finding of mootness in this case.

The Tribe's case presents a justiciable case or controversy that is ripe as to injury and issues, is not moot as to injury or issues, and is not a non-justiciable political question solely left for Congress. The present case presents a justiciable case or controversy under Article III of the Constitution.

STANDARD OF REVIEW

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

The legal doctrines of ripeness, mootness and the Tribe's cognizable interest in the outcome of the case are all essential parts of the "case or controversy" requirement, and are also subject to *de novo* review. *Oklevueha Native Am. Church of Haw. V. Holder*, 676 F.3d 829, 834(9th Cir. 2012)(motion to dismiss is reviewed *de novo* for case or controversy ripeness, both constitutional and

prudential components, in preenforcement challenge case); *Colwell v. Dep't of Health and Human Servs.*, 558 F.3d 1112, 1121(9th Cir. 2009) (for standing and ripeness are reviewed *de novo*); *Manufactured Home Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1025(9th Cir.2005) (ripeness is reviewed *de novo*); *Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1050(9th Cir. 2004) (ripeness is reviewed *de novo*); *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, (9th Cir. 2004)(mootness is reviewed *de novo*).

De novo review requires the appellate court to accept the Tribe's factual allegations as true and viewed in a light most favorable to the Tribe. *Oklevueha*, 676 F.3d at 834; *Knieval*, 393 F.3d at 1072. Under this standard it is clear that the district court erred in dismissing Tribe's complaint. Given the importance of the legal issues presented in this case, the district court's dismissal should be overturned and the case remanded for a determination on the merits.

ARGUMENT

THE TRIBE TRIBE'S CASE PRESENTS A JUSTICIABLE CASE OR CONTROVERSY THAT IS RIPE, DOES NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION, AND IS NOT MOOT.

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

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

The Tribe’s case meets each of the components of the “case and controversy” requirement. The Tribe’s pleadings demonstrate that its tribal officer is currently being criminally prosecuted for actions he took while performing his duties as a tribal law enforcement officer. This fact is undisputed by the defendants and speaks to both the ripeness and lack of mootness of the issue the Tribe presented in its case for declaratory and injunctive relief. The ongoing prosecution and threat of future prosecution of tribal officers directly and continuously interferes with the Tribe’s inherent tribal authority, as defined by this Court and the Supreme Court, to protect its community from the unlawful acts of a non-Indian coming on to its Reservation and committing violations of tribal and/or state law. Clearly the Tribe has presented a “cognizable interest in the outcome of the case.”

A. THE TRIBE’S CASE PRESENTS A RIPE CASE OR CONTROVERSY FOR ARTICLE III JUSTICIABILITY BY MEETING BOTH THE CONSTITUTIONAL AND PRUDENTIAL COMPONENTS FOR RIPENESS.

Ripeness is one component of the case or controversy requirement for justiciability under Article III, ensuring federal courts do not adjudicate issues that are premature or disagreements that are abstract. *Oklevueha Native Am. Church of Haw. V. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) citing *Abbot Labs. V. Gardner*, 387 U.S. 136, 148 (1967); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). Ripeness contains both a constitutional component and a prudential component. *Id.* These components are applicable even if a tribe is seeking injunctive relief. *Oklevueha*, 676 F.3d 829 (analysis of constitutional and prudential ripeness in relation to request for both declaratory and injunctive relief). The ripeness analysis is the same for declaratory relief. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (same requirements for declaratory relief), *see also Orix Credit Alliance v. Wolfe*, 212 F.3d. 895, 896(5th Cir. 2000) (case or controversy requirement of Article III is identical to controversy requirement of Declaratory Judgment Act).

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

1. THE TRIBE'S CASE MEETS THE CONSTITUTIONAL COMPONENT OF RIPENESS.

- i. The Tribe's case demonstrates constitutional ripeness as the defendants have invaded the Tribe's legally protected**

interest of inherent authority and the Tribe has suffered a concrete injury of arrest and prosecution of its officer and continues to suffer threats of future injury of arrest and prosecution of its officers.

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

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

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

For an “injury in fact” *Lujan* requires “an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical,’”...” *Colwell*, 558 F.3d at 1121-1122, citing to *Lujan*, 504 U.S. at 560-561. For a future injury the two doctrines (ripeness and

standing) are so closely intertwined this Court stated in *Thomas*, where Tribes filed for declaratory and injunctive relief that:

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

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

In sum, the invasion of a protected interest must be concrete and particularized, and can be an actual injury or an imminent future injury or threat of a future injury, but in any case the injury or threat of future injury the injury cannot be conjectural, hypothetical, imaginary, or speculative. When a threat of future injury is involved a “ripeness inquiry ‘focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention’” and courts must consider the likelihood of any contingencies actually occurring. *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d. 895, 897 (5th Cir. 2000).

Here, the legally protected interest claimed by the Tribe is its inherent authority, under established federal common law, over non-Indians on tribal lands to stop, restrain, detain and investigate violations of tribal, state, and federal laws and deliver or transport non-Indians to the proper authorities. ER Vol. III, Tab 10, pp. 2, 3, 12.

The Tribe's injury and threatened future injury are a direct result of its police officers carrying out this protected interest. The exercise of its tribal inherent authority has resulted in the actual injury of arrest and prosecution of one of Tribe's police officers, and the very real and imminent threat of future injuries of arrests and prosecutions of its officers should the Tribe continue to exercise its inherent authority. ER12, Vol. III, Tab 10, p. 18; ER 12, Vol. III, Tab 10, pp. 20-21; ER 12, Vol. III, Tab 10, pp. 23-25. This future threat is not conjectural, hypothetical, imaginary or speculative, but clearly stated in the Sheriff's January Order. ER 12, Vol. III, Tab 10, pp. 23-25.

Similar to the tribe in *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (10th Cir. 2001) the Tribe has suffered sufficient actual injury to establish a case or controversy. In *Prairie Band of Potawatomi* the tribe disputed enforcement of the state motor vehicle laws against the tribe and its members. *Id.* The 10th Circuit Court determined the tribe established a case or controversy and standing by finding that the state's refusal to recognize tribally issued registrations and titles and issuance of 3 state citations to tribal members (two which were dismissed and the last one resolved by payment of fine) was sufficient injury as it caused "an obvious harm to the tribe: interference with or infringement on tribal self-government." *Id.* at 1242. Like the state defendant in *Prairie Band of Potawatomi Indians*, the defendants here refuse to recognize the Tribe's inherent

authority over non-Indians who commit crimes on the Reservation, resulting in the arrest and criminal prosecution of the Tribe's officer. ER12, Vol. III, Tab 10, p. 11; ER 12, Vol. III, Tab 10, p. 18; ER 12, Vol. III, Tab 10, pp. 20-21. As in *Prairie Band of Potawatomi Indians*, the defendants are directly interfering with and infringing on the Tribe's inherent authority to maintain peace and security on the Reservation. ER 12, Vol. III, Tab 10, p. 2.

Even more compelling than the facts in *Prairie Band of Potawatomi Indians*, here the Tribe's officer did not just receive a citation that was dismissed or was payable by a small fine, he was charged by the defendant District Attorney on January 5, 2015 with three felonies and a misdemeanor. ER 12, Vol. III, Tab 10, pp. 20-21. The Tribe has suffered a sufficient, concrete and actual injury, and continues to be threatened with similar future injuries, and therefore has met the ripeness requirement of Article III case or controversy.

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

An additional requirement to actual or imminent injury for a constitutional case or controversy and justiciability is a tribe must present "concrete legal issues, presented in actual cases, not abstractions." *Colwell v. Dep't of Health and Human Servs.*, 558 F.3d 1112, 1123 (9th Cir. 2009). *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (The Tribe must ensure

“that the issues presented are ‘definite and concrete, not hypothetical or abstract.’”)

The issue presented by the Tribe’s case is definite and concrete: are the Tribe’s police officers subject to arrest and state prosecution by defendants for carrying out tribal inherent authority, defined under federal law, over non-Indians who are committing violations of tribal and state law on tribal lands?

As shown by the pleadings in this case, the Tribe has argued repeatedly that federal law establishes tribal “inherent authority over non-Indians on tribal lands to stop, restrain, detain, investigate violations of tribal, state, and federal laws, and deliver or transport the non-Indian to the proper authorities.” ER 12, Vol. III, Tab 10, pp. 2, 3, 12; ER 21, Vol. II, Tab 8, pp. 2, 8, 10, 12, 16; ER 33, Vol. II, Tab 3, p. 4. Through its pleadings, the Tribe has demonstrated that in carrying out its inherent authority it has established a well-trained police department, enacted tribal laws and ordinances for the protection of its community, and implemented policies and procedures to oversee the legal treatment and detention of non-Indians. ER 12, Vol. III, Tab 10, pp. 5-8; ER 12, Vol. III, Tab 10, pp. 26-48. The defendants arresting and prosecuting a tribal officer and threatening future arrests and prosecutions, undermines the Tribe’s ability to exercise its authority and ensure a safe and secure community.

In responding the defendants have attempted to narrow the legal issue of this case and contend the only issue is or was tribal officers unauthorized exercise of

California peace officer authority. ER 15, Vol. III, Tab 9, pp. 3-8; ER 29, Vol. II, Tab 4, pp. 3-4. Defendants have consistently maintained that the Tribe's officers are not California peace officers or Federal officers and therefore have no legal authority over non-Indians. ER 12, Vol. III, Tab 10, p. 23; ER 15, Vol. III, Tab 9, pp. 3, 5, 6; ER 25, Vol. II, Tab 7, pp. 4-5; ER 26, Vol. II, Tab 6, pp. 5-6; ER 27, Vol. II, Tab 5, pp. 5-6. The defendant's Sheriff's Cease and Desist Order states that "Tribal Police officers have only the same rights as private citizens" and have characterized tribal officer detainment of a non-Indian as "illegal exercises of law enforcement authority" which include illegal detentions, false arrests, and battery. ER 12, Vol. III, Tab 10, pp. 23-24; ER 12, Vol. III, Tab 10, pp. 20-21.

This erroneous view of federal law and lack of recognition of tribal inherent authority resulted in the arrest and criminal prosecution of a tribal officer. ER 12, Vol. III, Tab 10, pp. 20-21. Without clarification of the critical issues in this case, defendants have made clear that they will continue to treat tribal law enforcement officers as mere private citizens and proceed with arresting and prosecuting the Tribe's officers for "their continued unlawful exercise of California peace officer authority." ER 15, Vol. III, Tab 9, pp. 5-7.

The Tribe repeatedly presented the district court with the controversy between the parties--- a "patent misunderstanding of federal law and inherent tribal

authority” and that the Tribe seeks clarification of federal law in order to resolve the ongoing controversy. ER 21, Vol. II, Tab 8, p. 6. Further that:

[a]llowing the Defendants to determine what is and is not proper tribal authority over non-Indians, by resorting to state criminal actions against the Tribe’s Police officers, directly infringes on the Tribe’s authority as a sovereign government. The practical effect of such a result is that defendants would be allowed to usurp tribal and federal authority with state authority in determining what is permissible and impermissible tribal police conduct in cases involving non-Indians...

Id. at p. 9.

The Tribe and federal law determines what lawful tribal authority is, not the local Sheriff, County policymaker, or the District Attorney. *Id.* at 8. If that were the case, tribal inherent authority would be meaningless but for what the local Sheriff and District Attorney agree is the Tribe’s authority.

In sum, the Tribe presented the district court with a “definite and concrete” disagreement between the parties. The district court erred in failing to consider the Tribe’s pleadings as true and in a light most favorable to the Tribe. The Tribe is entitled to a decision on the merits of its case and resolution of the controversy presented to the court.

2. THE TRIBE’S CASE MEETS THE TEST FOR PRUDENTIAL RIPENESS.

The second component of ripeness is prudential ripeness and requires the court “to evaluate both the fitness of the issues for judicial decision and the

hardship to the parties of withholding court consideration.” *Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *Colwell v. Dep’t of Health and Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009); *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (en banc). Cases are unfit for judicial resolution if they are “devoid of any specific factual context” and do not present a “concrete factual situation.” *Thomas*, 220 F.3d at 1141. The Tribe’s litigation demands a judicial decision not only to prevent future arrests and prosecution of its tribal officers, but also to ensure the Tribe’s ability to keep peace and security on its Reservation by taking lawful actions against non-Indians committing crimes on its lands.

The Tribe has presented the district court with the detailed factual account of the events that led to its officer’s arrest and prosecution, the events immediately following those actions and the parties differing interpretation of the relevant law on the issue being litigated. ER 12, Vol. III, Tab 10, pp. 8-11 (description of December 24, 2014 incident involving the Tribe’s officer and detainment of a non-Indian leading to his prosecution).

In addition, the Tribe’s case is fit for judicial review, given the hardship it will experience if the court withholds consideration. This Court has held that the hardship a Tribe must demonstrate is a “legal hardship or something imposing

significant practical harm to the Tribe that if review is postponed will be immediate, direct, and significant.” *Colwell*, 558 F.3d at 1128.

First, the Tribe has clearly stated in its Amended Complaint the continued threat of arrest and prosecution of the its police officers interferes with its “ability, and obligation, to maintain peace and security on its Reservation,” and due to the media coverage of its officer’s arrest and prosecution, there is confusion within the tribal community on what authority the Tribe has in general, not just over non-Indians. ER 12, Vol. III, Tab 10, pp. 2-3. This confusion exposes the tribal police to unnecessary safety risks as well as the public. *Id.* at 3. The current situation has left the Tribe with a “Hobson’s Choice”: Should the Tribe order its Officers not to interact or engage with non-Indian on the Reservation who are or have committed state criminal offenses, which threaten community safety, or should it’s Officers continue to carry out tribal inherent authority and federal law and run the risk of being arrested and prosecuted by the defendants for false arrest, impersonating a state officer, and using lawful restraint when necessary? ER 21, Vol. II, Tab 8, p. 7.

Secondly, any law enforcement officer, state, tribal or federal, with an arrest record, regardless of the outcome of the prosecution, risks adverse effects to his or her career in law enforcement, in particular with felony charges and with their ability to carry firearms. Unless the current issue is resolved, retaining and

recruiting police officers will become increasingly difficult for the Tribe, since no officer wants to risk their future career in law enforcement.

Thirdly, with the pending prosecution and unresolved issues in the current case, the Tribe's police officer is ineligible for commissioning by the Office of Justice Services (OJS) as a federal Special Law Enforcement Commissions (SLEC.) The Tribe has been in the process of pursuing a Deputation Agreement with the OJS for the commissioning of its officers. If tribal officers continue to be arrested and prosecuted, the Tribe will be unable to secure a Deputation Agreement and provide federal authority to its tribal officers.

Lastly, the Tribe currently bears the burden of costs in relationship to this litigation and the current criminal defense of the Tribe's officer. Unless and until the issues raised in this litigation are resolved the Tribe may soon be unable to sustain a Tribal Police Department given the high legal costs necessary to defend its officers and its own sovereign authority.

The issues in the present case are fit for judicial decision by the district court, which has experience with interpreting federal law and to resolve the dispute between the parties. If the Tribe's claim is postponed for review it will create immediate, direct, and significant hardships for the Tribe, its officers, and its community. The present case is prudentially ripe for purposes of a case or controversy.

In sum, the Tribe's case presents a justiciable case or controversy that is ripe under Article III justiciability. The aforementioned sections demonstrate the Tribe's case satisfies both constitutional and prudential components for ripeness for a case or controversy. For the constitutional component the Tribe has demonstrated a concrete injury of arrest and prosecution of its officer, imminent future injury by threat of arrest and prosecution to its tribal police department, both of which separately satisfy the ripeness test for Article III justiciability. Most significantly, the legal issues of the Tribe's case are concrete and demonstrate the necessary adversarialness of the parties in the fundamental disagreement of what tribal inherent authority is over non-Indians. For all these reasons, this Court should find the Tribe's case ripe for adjudication under Article III.

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B. THE TRIBES CASE IS NOT A NONJUSTICIABLE CASE OR CONTROVERSY COMMITTED TO CONGRESS.

Defendants assert "Any Establishment of a Federal Law Providing Authority and Jurisdiction by Indian Tribes Over Non-Indians is Within the Purview of Congress and Not the Courts." (capitalization omitted) ER 25, Vol. II, Tab 7, p. 8; ER 26, Vol. II, Tab 6, p. 9; ER 27, Vol. II, Tab 5, p. 9.

Although the defendants attempt to cast the Tribe's case as one that presents a "political question" and thus non-justiciable under case or controversy, they fail

to cite any relevant authority for their argument. The one case relied upon by defendants, is inapposite to their argument. Defendants cite *Oliphant v. Suquamish*, 435 U.S. 191 (1978) which is the landmark case on tribal criminal jurisdiction to “try and punish” non-Indians who commit crimes on tribal lands. The Supreme Court did not decline the case stating it was a question better left for Congress, but instead held tribes lacked such jurisdiction over non-Indians and left it for Congress to determine otherwise through legislation if they chose to do so. *Id.* The Court in *Oliphant* did not declare the case was a non-justiciable political question or declare the Court had no jurisdiction as the question was one only for Congress. *Id.*

Contrary to the defendants’ claim, the Tribe has presented the district court with numerous federal cases in which the courts are called upon to make judicial determinations on tribal jurisdiction over non-Indians, including Supreme Court cases. *Duro v. Reina*, 495 U.S. 676 (1990), *Montana v. United States*, 450 U.S. 544, 565-66 (1981), *United States v. Becerra-Garcia*, 397 F. 3d. 1167, (9th Cir. 2005); *Ortiz-Barraza v. United States*, 512 F. 2d 1176 (1975), *Walker v. Rushing*, 898 F.2d 672 (8th Cir. 1990), *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp.2d 1195 (Cal. C.D. 1998), *State of Washington v. Schmuck*, 850 P. 2d 1332 (1993), *State v. Ryder*, 649 P. 2d 756 (1982). ER Vol. III, Tab 10, p. 12-15. The

present case does not present a political question that is non-justiciable in the district court.

C. THE TRIBE’S CASE IS NOT MOOT BECAUSE IT PRESENTS A CONTROVERSY BETWEEN ADVERSE PARTIES, EFFECTIVE RELIEF IS AVAILABLE TO THE TRIBE, AND PUBLIC INTEREST WILL NOT BE SERVED IF MOOTNESS IS FOUND.

A case or controversy must be present at all stages of review not only when the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1974); see also *Alvarez v. Smith*, 558 U.S. 87, 92 (2009). If factors such as adverse interest or injury are no longer met a case may be “moot.” “The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.” *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). Additionally, there must be a showing that public interest will not be served if there is a finding of mootness in the case. *Olagues v. Russoniello*, 770 F.2d 791, 794 (9th Cir.1985). The Tribe’s case demonstrates there is a continuing adverse interest in a present controversy, a form of effective relief is available to the Tribe, and a strong public interest in resolving the issues.

1. THE TRIBE’S CASE IS NOT MOOT DUE TO A PRESENT CONTROVERSY BETWEEN THE ADVERSE INTERESTS OF THE PARTIES.

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

The issue of mootness was first raised by the defendants just prior to oral argument and following the briefing schedule set by the district court. By declaration, legal counsel for defendants argued that he had just recently been provided a copy of the Tribe's written response to the defendant sheriff's "Cease and Desist Order."

Based on the Tribe's statement that it would comply with the demand not to enforce state law, defendants argued the case should be dismissed as there was no longer a case or controversy, the case was no longer ripe and was also moot. ER 29, Vol. II, Tab 4, pp. 3-4.

The Tribe raised no objection to including the Tribe's response to the Sheriff's Order, as the Tribe's response was referred to in the First Amended Complaint. ER12, Vol. III, Tab 10, p. 11, ER 33, Vol. II, Tab 3, pp. 2-4.

However, the Tribe opposed the defendants' mootness argument and demonstrated that the defendants had excerpted only select statements from the Tribe's response to support their argument. ER 33, Vol. II, Tab 3, p. 2. The Tribe's response, read as a whole, clearly showed that there was a concrete and continuing controversy between the parties. *Id.* pp. 2-3.

The Tribe pointed to specific sections of its response to the Sheriff's Order which demonstrates the disputed issues before the district court:

As you know, it is essential that all police officers, both county and tribal, understand the scope of their legal authority and how they are expected to conduct themselves both on and off the reservation. It is important that our

tribal police officers be allowed to perform their legal duties without fear or expectation of criminal prosecution.

Id. p. 3; ER 29.Vol. II, Tab 4, p. 7. Other statements contained in the Tribe's response to the Order clearly indicate a dispute and the desire to resolve the parties' issues through meeting and dialogue. ER 29,Vol. II, Tab 4, pp. 6-7. For example, the Tribe made clear "...we disagree with your presentation of the facts, and your interpretation of the applicable law" and that "time is of the essence and that these matters should be addressed as soon as practical." *Id.* The Tribe's response to the Order was "[a]s a show of good faith and to keep the peace" and attempt to respond to the defendant sheriff without closing the door to further discussions on how to resolve their differences. *Id.* at 6. The Tribe at no time admitted in its response to the Sheriff's Order any wrongdoing on behalf of the Tribe or its officers, nor did the Tribe concede that its officers have or do enforce California state criminal law. *Id.* at 6-7.

The Tribe's present case is not moot as it presents a clear divergence in the understanding of law between the Tribe and the defendants and therefore continues to present a controversy between adverse parties. The Tribe has never contended or argued that its police officers are authorized to enforce state criminal law. Its officers are well trained and well versed on federal Indian law and Public Law 280, and understand the extent of their authority.

Contrary to the district court and defendants' view, the Tribe's case is not a matter of the whether its officer was acting as California Peace Officers, the issue is one of tribal inherent authority defined under federal law. Therefore, the Tribe stating its police officers will not enforce state law does not reconcile the differences between the Tribe and the defendants. The Tribe has not changed the prescribed duties of its tribal officer or tribal police departmental policies regarding the exercise of their inherent authority over non-Indians. ER 12, Vol. III, Tab 10, pp. 44-48. Likewise, the defendants have not revoked the Cease and Desist Order and prosecution of the Tribe's police officer continues.

2. THE TRIBE'S CASE IS NOT MOOT AS THE TRIBE CAN DEMONSTRATE A FORM OF EFFECTIVE RELIEF IS AVAILABLE.

If the court cannot provide a Tribe an effective remedy, the case may be dismissed as moot. However, the threshold for granting effective relief is low. The Tribe seeks both declaratory relief and injunctive relief, both of which can be granted by the district court.

For the granting of injunctive relief, past exposure to illegal conduct alone does not present a case or controversy. *Olagues v. Russoniello*, 770 F.2d 791, 794 (9th Cir. 1985). For injunctive relief, courts must question if the relief sought was available at the time the legal action was filed and if not "...The question is whether there can be any effective relief". *West v. Secretary of Dept. of Transp.*,

206 F.3d 920, 925 (9th Cir. 2000); see also *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

If a case is moot with regard to injunctive relief, a court may still have jurisdiction to grant declaratory relief. *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). For declaratory relief a case is not moot if the continued injury or threat of injury on the part of the government can still have “substantial adverse effect” on the interests of petitioning parties. *Id.*; *Olagues*, 770 F.2d at 794-795. A case or controversy for declaratory relief exists only when “challenged government activity is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence...” *Feldman*, 518 F.3d at 642.

The district court can provide the Tribe the relief it seeks to resolve the dispute between the parties. A declaration affirming that the Tribe has inherent authority, recognized and affirmed under federal law, to stop, restrain, detain, investigate violations or possible violations of tribal, state or federal law by non-Indians on tribal lands and to deliver the non-Indian to the proper law enforcement authorities, will clarify that tribal officers are not acting as state peace officers or as general members of the public when they take such actions against non-Indians on the Reservation.

Once declared, the Tribe’s request for a prospective injunction against future criminal charges and prosecution against its officers when and while exercising

their lawful authority can be issued by the district court to further resolve any future misunderstandings between the parties as to their respective rights. The Tribe's request for a prospective injunction is proper and a common form of relief under 28 U.S.C. § 2202, which allows: 'Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.'

The Tribe's case should not be held moot as to declaratory relief as the continued threat of arrest and prosecution is a sufficient threat of injury to the Tribe and its officers which will have a "substantial adverse effect" on the interests of the Tribe, just as such a threat has a "significant practical harm" in the prudential component of ripeness. This case presents a continued threat of injury not only for effects on the tribal officers' carrying out their duties but also for the health, safety, and welfare of the Bishop Paiute Reservation community. Until judicial intervention through a declaratory judgment determines the rights of the parties involved, the defendants' threats of arrest and prosecution serve as a brooding presence to the Tribe and each and every one of its individual tribal officers.

With regard to injunctive relief, the Tribe seeks only a prospective injunction to ensure that once the district court determines the Tribe's inherent

authority over non-Indians, the defendants will adhere to the court's determination and not seek to circumvent the court's ruling by arresting and seeking to prosecute the Tribe's officers.

3. THE COURT SHOULD NOT HOLD THE TRIBES CASE MOOT AS PUBLIC INTEREST MILITATES AGAINST MOOTNESS.

Finally, a case should not be found moot if there exists "a public interest in having the legality of the practices settled...[this] militates against a mootness conclusion." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985). In the present case, the interests raised transcend just those of the parties. Tribal members, as well as non-tribal members, have an interest in knowing the extent and scope of tribal police authority on the Reservation. This public interest goes directly to the safety of the tribal community and the surrounding community at large. Safe communities are in the best interest of the Tribe and the defendants and clearly necessitate a decision from the district court on the merits of the Tribe's case.

CONCLUSION

For the reasons stated above, the Tribe respectfully requests this Court reverse the district court's July 13th, 2015 order dismissing the Tribe's case for lack of a justiciable case or controversy and remand the case for determination on the merits.

Date: January 21, 2016

CALIFORNIA INDIAN LEGAL SERVICES

s/Dorothy Alther
Dorothy Alther

s/Jasmine Andreas
Jasmine Andreas

Attorneys for Tribe-Appellant

STATEMENT OF RELATED CASES

Tribe is not aware of any related cases pending in this Court.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing brief is proportionally spaced, has a typeface of 14 points and contains 9,268 words (which does not exceed the applicable 14,000 word limit).

Date: January 21, 2016

CALIFORNIA INDIAN LEGAL SERVICES

s/Dorothy Alther
Dorothy Alther

s/Jasmine Andreas
Jasmine Andreas

Attorneys for Tribe-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 21, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: January 21, 2016

CALIFORNIA INDIAN LEGAL SERVICES

s/Dorothy Alther
Dorothy Alther

s/Jasmine Andreas
Jasmine Andreas

Attorneys for Tribe-Appellant