IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RUSSELL MEANS,

Petitioner,

v.

NAVAJO NATION, et al.,

Respondents.

CIV 99-1057 PCT EHC (SLV)

SECOND REPORT AND RECOMMENDATION

TO THE HONORABLE EARL H. CARROLL:

Russell Means is a resident of Porcupine on the Pine Ridge Sioux Indian Reservation. Means is a citizen of the United States and an enrolled member of the Oglala-Sioux Tribe of Indians. Means has filed a Verified Petition for Writ of Habeas Corpus and/or for a Writ of Prohibition ("Petition"), asking the Court to prohibit the Navajo Nation from exercising criminal jurisdiction over him.

1. Procedural history

On or about December 28 or 29, 1997, Means was arrested by the Navajo Nation police and charged with three counts of violating the Navajo Nation Code.[1] Means was released on his own

[1] Exhibits A and C to Means' Verified Petition for Writ of Habeas Corpus and/or for a Writ of Prohibition list the charges against Means as one count of threatening and two counts of battery. See Petition at Exs. A & C. The actual Petition itself lists the charges against Means as two counts of threatening and one count of battery. See id. at paras. 3 & 4. The charge(s) of threatening assert a violation of Navajo Nation Code Title

recognizance prior to trial, and several conditions were placed on his release: (1) he must appear at all proceedings in the Navajo Nation courts regarding the charges against him and he faces re-arrest if he fails to appear; (2) Means must stay 100 yards away from the residence of Leon Grant; and (3) Means is prohibited from specific types of contact with Leon Grant. See Petitioner's Memorandum on Issue of "Custody" for Habeas Jurisdiction and Exhaustion (Docket No. 32), Attach.

Means filed, in the Navajo Nation trial court, a motion to dismiss the charges against him for lack of jurisdiction and asserted that tribal court jurisdiction over him violated his rights to equal protection of the law. See Petition at paras. 5 & 6. The Chinle District Court of the Navajo Nation held an evidentiary hearing on Means' motion to dismiss on April 14, 1998. See Petitioner's Submission of Transcript of Evidentiary Hearing Held Before Navajo Trial Court, Navajo Nation v. Russell Means, Apr. 14, 1998 (Docket No. 20). The tribal court denied the motion to dismiss, apparently in two separate orders issued July and September 1998. See Petition, Exs. A & B.

On August 19, 1998, Means filed a Petition for Writ of Prohibition with the Supreme Court of the Navajo Nation. See id., Ex. J. The Navajo Nation Supreme Court declined to issue the writ in an opinion filed on May 11, 1999. See id., Ex. C. The court held that the Navajo Nation had criminal jurisdiction

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17 § 310, and the allegation(s) of battery assert a violation Navajo Nation Code Title 17 § 316. The crimes charged by the Navajo Nation against Means are punishable by: (1) threatening - a term of not more than 90 days and/or a fine not to exceed $250; (2) battery - a term of not more than 180 days and/or a fine not to exceed $500. See Navajo Nation Code tit. 17 §§ 310 & 316.

over Means pursuant to the Treaty of 1868, that Means had consented to this jurisdiction, and that he had not been denied equal protection of the law. See id. The court remanded the matter to the Chinle District Court for trial. Id.

Prior to the scheduled trial in the Navajo Nation courts on the charges against him, Means filed a Verified Petition for Writ of Habeas Corpus and/or for a Writ of Prohibition in this Court. See Means v. Navajo Nation, et al., No. 99-CV-1057 PCT EHC (SLV) (D. Ariz. June 14, 1999), Docket No. 1. Means also filed a Motion for Preliminary Injunction, seeking to stay the tribal prosecution pending a hearing in his federal habeas action. See id., Docket No. 3.

In October 2000, this Court issued its first Report and Recommendation in this case, concluding that this Court did not have jurisdiction over Mean's petition for habeas relief under either 28 U.S.C. § 2241 or 25 U.S.C. § 1303 because Means was not "in custody" as required for the Court to grant him a writ of habeas corpus. Means filed an objection to the Report and Recommendation. See id., Docket No. 36.

On January 16, 2001, Judge Carroll issued an order concluding that Means was "in custody" as required to grant a petition for habeas, and declined to adopt this Court's Report and Recommendation. That order also granted Mean's Motion for a Preliminary Injunction, prohibiting the Navajo Nation from further prosecuting Means pending a decision on his petition for federal habeas relief. In that order Judge Carroll also referred the case back to this Court to prepare a Report and

Recommendation on Means' Petition for Writ of Habeas Corpus and/or Writ of Prohibition.

**2. Jurisdiction**

This court has subject matter jurisdiction over Means' petition for federal habeas relief, pursuant to 28 U.S.C. § 2241 and 25 U.S.C. § 1303. Section 2241 confers on the United States District Courts the power to grant a writ of habeas corpus to individuals "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1994). Means alleges that the Navajo Nation's attempted exercise of criminal jurisdiction over him violates the Constitution of the United States. See Petition at paras. 29 & 30.

The Indian Civil Rights Act ("ICRA"), codified at 25 U.S.C. §§ 1301-1303, provides: "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. § 1303 (1983). Although Means was not incarcerated by the Navajo Nation when he filed his petition for habeas relief, the conditions placed on his liberty by the Navajo Nation pending his trial are a sufficiently significant restraint on his liberty that he is "in custody" and "detained" for purposes of invoking federal habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241 and 25 U.S.C. § 1303. See Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-01, 104 S. Ct. 1805, 1809 (1984); Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., 411 U.S. 345, 351-52, 93 S. Ct. 1571, 1575 (1973).

Additionally, Means may seek habeas relief from this Court whether or not he has exhausted his Navajo Nation tribal court remedies. See Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 949 (9th Cir. 1998).

**3. Analysis of the merits of Mean's Petition for Writ of Habeas Corpus**

Means has filed a Verified Petition for Writ of Habeas Corpus and/or for a Writ of Prohibition, asking the Court to find that the Navajo Nation does not have criminal jurisdiction to try him on three misdemeanor violations of the Navajo Nation Code. Means' petition asserts that his rights to equal protection and due process will be violated if the Navajo Nation is allowed to prosecute him. See Petition at paras. 29 & 30. Means argues that the Navajo Nation cannot exercise criminal misdemeanor jurisdiction over him pursuant to ICRA, specifically sections 1301 and 1302, because the legislation giving the tribe that authority, i.e., the 1990 amendments to ICRA, is unconstitutional.

The Indian Commerce Clause grants Congress plenary power to control the realm of Indian affairs. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086 (1978); see also United States v. Wadena, 152 F.3d 831, 843 (8th Cir. 1998).

> Indian tribes are, of course, no longer possessed of the full attributes of sovereignty. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily

> divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

Wheeler, 435 U.S. at 323, 98 S. Ct. at 1086 (internal citations and quotations omitted). See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S. Ct. 1670, 1676 (1978) (". . . Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 881 (2d Cir. 1996)("even aspects of 'sovereignty' thought to derive from the status of Indian nations as distinct, self-governing entities are subject to congressional limitation.").

Additionally, because the United States Congress has authority over federal common law, Congress may refine or alter the scope of tribal power as described by the United States Supreme Court, if the Court itself described the scope of the tribal power as a matter of federal common law. See City of Milwaukee v. States of Illinois & Mich., 451 U.S. 304, 313-14, 101 S. Ct. 1784, 1790-91 (1981); United States v. Weaselhead, 156 F.3d 818, 825 (8th Cir. 1998) (Arnold, J., dissenting), on reh'g, 165 F.3d 1209 (en banc), cert. denied, 528 U.S. 829, 120 S. Ct. 82 (1999). The United States Congress has specifically granted the Navajo Nation, as a federally recognized Indian tribe, criminal misdemeanor jurisdiction over non-Navajo

individuals who are Indians enrolled in another federally recognized Indian tribe.[2]

Prior to 1990, although it was clear that Indian tribes had general criminal jurisdiction over members of their own tribe, see Wheeler, 435 U.S. at 322, 98 S. Ct. at 1085, and that they did not have general criminal jurisdiction over non-Indians, see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212, 98 S. Ct. 1011, 1022-23 (1978), it was not clear if Indian tribes had general criminal jurisdiction over non-tribal-member Indians. In 1990, in Duro v. Reina, the United States Supreme Court held that as a matter of federal common law, Indian tribes did not have criminal jurisdiction over non-tribal-member Indians who allegedly committed crimes within the physical boundaries of the tribe's reservation. See 495 U.S. 676, 684-85 & 697-98, 110 S. Ct. 2053, 2059 & 2066 (1990).[3]

The Supreme Court's holding in Duro v. Reina was specifically legislatively overruled by Congress when it amended the Indian Civil Rights Act (ICRA) in 1990, in a provision commonly referred to as the "Duro fix." See Publ. L. No. 101-

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[2] The ICRA does forbid tribal courts from imposing a penalty of more than one year in jail and a $5000 fine for "conviction for any one offense." 25 U.S.C. § 1302(7) (Supp. 2000).

[3] In reaching its holding in Duro, the Court relied on the distinction between members of the tribe and all others. The Court held that a tribe's criminal jurisdiction over its tribal members was justified "by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." 495 U.S. at 694, 110 S. Ct. at 2064. Justice Brennan's dissent in Duro, however, states that the limits of tribal jurisdiction are not a matter of consent, but that the scope of tribal jurisdiction is determined by Congress pursuant to its determination of what power is necessary to allow the tribes to handle their internal affairs. Id., 495 U.S. at 706-08, 110 S. Ct. at 2070-71

511, Title VIII, §§ 8077(b) & 8077(c), 104 Stat. 1892-93 (1990) (codified at 25 U.S.C. §§ 1301-1303 (Supp. 2000)).[4] The 1990 amendments to ICRA, the "Duro fix," "'recognize and affirm the inherent power of tribes to exercise criminal misdemeanor jurisdiction over all Indians on their respective reservations.'" Mousseaux v. United States Comm'r of Indian Affairs, 806 F. Supp. 1433, 1441 (D.S.D. 1992)(emphasis added), quoting H.R. Conf. Rep. No. 101-938, at 233 (1990). The 1990 ICRA amendments have been interpreted as a delegation of power, from the United States Congress to the tribes, of the authority to try non-member Indians charged with committing misdemeanor offenses within the physical boundaries of the relevant Indian reservation. See Means, 154 F.3d at 946-47. Congress' power to delegate this authority was acknowledged by the Supreme Court in its Duro opinion. See 495 U.S. at 697-98, 110 S. Ct. at 2066.

Means' primary contention is that the Supreme Court opinion in Duro v. Reina is an accurate, valid, and controlling expression of federal law, and that the legislation reversing the holding of Duro is unconstitutional because it deprives him of equal protection of the law by subjecting Indians to tribal court jurisdiction while not subjecting non-Indians to tribal court jurisdiction. See Petition at paras. 29 & 30; Petitioner's Submission of Transcript of Evidentiary Hearing

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[4] In Duro, the Supreme Court reasoned that non-member Indians were more akin to non-Indians in relation to a "foreign" tribe, i.e., both non-member Indians and non-Indians are "external" to the tribe trying to exert criminal jurisdiction over them. Therefore, the Court concluded, the tribe's "retained inherent authority" to exercise power over its internal affairs did not include the ability to exert criminal jurisdiction over any non-tribal-member, whether Indian or not. See 495 U.S. at 685-89, 110 S. Ct. at 2060-61. See also Means, 154 F.3d at 944-945.

Held Before Navajo Trial Court, Navajo Nation v. Russell Means, Apr. 14, 1998, at 37-39 (Docket No. 20). During the Navajo Nation trial court hearing on Means' Motion to Dismiss, Means' counsel stated:

> if Congress wants to give jurisdiction to [the Navajo Nation tribal court] and to Indian courts across the country to [try] non-members, then [Congress] must do it in a manner that doesn't distinguish between races. . . . if you're gonna give criminal jurisdiction to the Court, you can't do it in a manner that distinguishes between Indians and non-Indians.[5]

Petitioner's Submission of Transcript of Evidentiary Hearing Held Before Navajo Trial Court, Navajo Nation v. Russell Means, Apr. 14, 1998, at 33 (Docket No. 20). Means' argument is, essentially, that Congress may not pass legislation which treats Indian citizens differently from non-Indian citizens because such legislation discriminates against a race of citizens, Indians, in violation of the Equal Protection Clause.

Although it is true that Congress may not enact legislation which does not comport with the United States

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[5] Means asserted before the Navajo Nation trial court that Navajo Indians and Sioux Indians are as unalike as United States citizens and citizens of France. See Petitioner's Submission of Transcript of Evidentiary Hearing Held Before Navajo Trial Court, Navajo Nation v. Russell Means, Apr. 14, 1998, at 3 & 27 (Docket No. 20). Therefore, he argued, he should be treated similarly to a non-Indian United States citizen, i.e., a citizen of a foreign state, for purposes of establishing the criminal jurisdiction of a Navajo tribal court. See id. Although Means' contention that the Navajo and Sioux people are distinguishable might be valid, as a practical and legal matter Means should not be able to exercise the rights and privileges of being "Indian" at some times and then argue that he is entitled to be treated as a non-Indian United States citizen when that suits him. For example, Means should not be allowed to avail himself of the privileges afforded him, as an Indian, by the Oglala-Sioux tribe and by the United States, and then claim he is the legal equivalent of a non-Indian United States citizen for purposes of evading the criminal jurisdiction of the Navajo Nation tribal courts.

Constitution, i.e., the Equal Protection Clause, Means' argument is patently frivolous. The United States Supreme Court and the United States Circuit Courts of Appeal have expressly rejected the argument that Congress may not enact legislation which distinguishes Indians from non-Indians. "Federal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a racial group consisting of Indians." United States v. Antelope, 430 U.S. 641, 646, 97 S. Ct. 1395, 1399 (1977) (stating this in the context of the Major Crimes Act's distinction between Indians and non-Indians) (internal citations and quotations omitted). See also United States v. Juvenile Male, 864 F.2d 641, 645-46 (9th Cir. 1988); United States v. Eagleboy, 200 F.3d 1137, 1139-40 (8th Cir. 1999). In Kicking Woman v. Hodel, the Ninth Circuit Court of Appeals stated:

> [Plaintiffs'] equal protection claim may be dealt with summarily. . . . [Plaintiffs' equal protection argument] fails, for the Supreme Court has effectively disposed of all arguments that statutes which treat Indians differently from others offend the constitution by the fact of differential treatment alone: "The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with the Indians."

878 F.2d 1203, 1205 n.6 (1989), quoting Antelope, 430 U.S. at 645, 97 S. Ct. at 1398.

Some jurists have argued that retrospective application

of the "Duro fix" is unconstitutional. See Means, 154 F.3d at 951 (Reinhardt, J., concurring) (concluding that the statute is unconstitutional as applied to offenses committed prior to its enactment because its application to individuals whose offenses occurred prior to that time violates the Ex Post Facto Clause).[6] However, this argument does not apply to Means' Petition for Writ of Habeas Corpus as Means' petition was filed in 1999, long after the "Duro fix" was enacted. Although Means asserts that the "Duro fix" was "short-sighted and ineffective," Petitioner's Memorandum in Support of Motion for Preliminary Injunction at 48, there is no federal court opinion, published or unpublished, which states that the 1990 amendments to the ICRA are unconstitutional, either facially or as applied to individuals whose alleged crimes were committed subsequent to its enactment. Petitioner's counsel, Mr. Trebon, offers this Court no citation of legal authority which substantiates his position that the amendments as applied to Petitioner are unconstitutional.[7]

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[6] The debate within the United States Circuit Courts of Appeal regarding the application of the 1990 amendments to ICRA revolve around the issue of whether the tribes have always had inherent sovereignty to try non-member Indians, which was affirmed by the 1990 amendments, or whether the tribes' authority to try non-member Indians was affirmatively granted by the 1990 amendments. The debate is generally raised in the context of the United States Constitution's Double Jeopardy and Ex Post Facto Clauses. See Means, 154 F.3d at 946 & 950; Weaselhead, 156 F.3d at 824-25.

[7] United States v. Enas, 204 F.3d 915 (9th Cir. 2000), an opinion concerning whether a non-member Indian may be tried on criminal charges by a tribal court pursuant to the 1990 ICRA amendments, without this prosecution violating the United States Constitution, has been withdrawn by the Ninth Circuit Court of Appeals pending a rehearing of that case en banc, and the case is not to be cited as precedent in the federal courts. See United States v. Enas, 219 F.3d 1138 (9th Cir. 2000). The Enas case was proffered by the Navajo Nation Department of Justice on March 1, 2000, to the Court via a Notice of Supplemental Authority. See Docket No. 22. Means offers Enas as authority in his Memorandum in Support of Motion for Preliminary Injunction, at page 56.

Congress has plenary power over the Indian tribes of the United States and may proscribe and delineate the powers of the tribal courts. Mr. Trebon, Petitioner's counsel, is simply wrong in asserting that "when the debate comes down to Duro v. Reina versus Congress, it's clearly a United States Supreme Court decision that must rule, not the act of Congress." Petitioner's Submission of Transcript of Evidentiary Hearing Held Before Navajo Trial Court, Navajo Nation v. Russell Means, Apr. 14, 1998, at 38 (Docket No. 20). Additionally, although the Navajo Nation's criminal misdemeanor jurisdiction over Means is not based upon his consent or contacts with the tribe, given Means' awareness of federal Indian law and the laws of the Navajo Nation, see id. at 8-30, one can presume that Means was aware that he was subjecting himself to the jurisdiction of the Navajo Nation courts when he chose to reside within the Navajo Nation Indian reservation boundaries and to interact with members of the Navajo Nation.

**3. Conclusion**

Means' alleged crimes are misdemeanors. Means is a member of the Oglala-Sioux Tribe of Indians, who is subject to the jurisdiction of the Navajo Nation courts for alleged criminal misdemeanor violations committed within the boundaries of the Navajo Nation Indian reservation, pursuant to 25 U.S.C. § 1301. The Navajo Nation is a federally recognized Indian tribe that may exercise criminal jurisdiction over non-Navajo Indians who allegedly commit misdemeanor crimes within the physical boundaries of the Navajo Nation, pursuant to federal statutes. The United States Supreme Court has held that Indian

citizens may be distinguished from non-Indian citizens in federal statutes without offending the Equal Protection Clause of the United States Constitution. Therefore, it is clear that under current federal law, the Navajo Nation may exercise criminal misdemeanor jurisdiction over Means without violating the laws or the Constitution of the United States.

**IT IS THEREFORE RECOMMENDED** that the Means' Verified Petition for Writ of Habeas Corpus and/or for a Writ of Prohibition be **denied with prejudice.**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

DATED this 17 day of May, 2001.

Stephen L. Verkamp
United States Magistrate Judge

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CIV 99-1057-PCT-EHC (SLV)

O R D E R

The Ninth Circuit filed an En Banc opinion in U.S. v. Enas, D.C. 99-10049, June 29, 2001, holding that an Indian tribe has inherent power to exercise criminal jurisdiction over a member of another tribe.

The Court finds that further briefing, considering Enas and its relationship, if any, to the Navajo Treaty of 1868, would be helpful to the Court.

Accordingly,

**IT IS ORDERED** that the parties file supplemental memoranda by September 10, 2001, addressing Enas and the Navajo Treaty of 1868.

**DATED** this 20 day of August, 2001.

Earl H. Carroll

EARL H. CARROLL
United States District Judge



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O R D E R

On June 14, 1999, Petitioner filed a Petition for Writ of Habeas Corpus and/or a Writ of Prohibition, with Exhibits (Dkts. 1 & 2). Respondents filed a Response (Dkt. 18) and a Supplementary Answer. (Dkt. 21).

On September 28, 2000, Magistrate Judge Stephen L. Verkamp filed a Report and Recommendation, (Dkt. 34) and on October 12, 2000, Petitioner filed Objections. (Dkt. 36). As an alternative to the Objections, Petitioner requested leave to amend his petition to assert federal jurisdiction pursuant to 28 U.S.C. § 1331.

On January 17, 2001, the Court entered an Order finding that Petitioner was "in custody" pursuant to § 2241 and the Court

ordered that a further Report and Recommendation be prepared. (Dkt. 37). Accordingly, the Court will deny the Motion to Amend.

On May 23, 2001, Magistrate Judge Verkamp filed a Second Report and Recommendation. (Dkt. 38). On June 18, 2001, Petitioner filed "Objections to Second Report and Recommendation." (Dkt. 42).

## STANDARD OF REVIEW

A district court judge reviews de novo the Report and Recommendation of a Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C) and Rule 1.15(b) Rules of Practice of the United States District Court for the District of Arizona.

## DISCUSSION

The Court, has reviewed the record de novo including the Objections filed by Petitioner to the Second Report and Recommendation filed on May 23, 2001.

On June 29, 2001, the Ninth Circuit issued an En Banc Opinion in U.S. v. Enas, 255 F.3d 663 (9th Cir. 2001) holding that "Congress had the power to determine that tribal jurisdiction over nonmember Indians was inherent" and a tribe could proceed with such a prosecution "under the 1990 amendments to the ICRA."

I have reviewed memoranda filed by Petitioner and Respondents concerning the Supreme Court's decision in Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053 (1990) and the relevance, if any, of the Navajo Treaty of 1868.

This Court is constrained to follow Ninth Circuit precedent in deciding this case.

Accordingly,

**IT IS ORDERED** adopting the Second Report and Recommendation of the Magistrate Judge filed May 23, 2001. (Dkt. 38), as supplemented by this Order.

**IT IS FURTHER ORDERED** denying the Petition for Writ of Habeas Corpus and/or for a Writ of Prohibition. (Dkt. 1).

**IT IS FURTHER ORDERED** denying Petitioner's Motion to Amend Petition as moot. (Dkt. 36).

**DATED** this 18 day of September, 2001.

Earl H. Carroll

EARL H. CARROLL
United States District Judge