No.

IN THE

# Supreme Court of the United States

MICHAEL SALINAS, et al.,
Petitioners

v.

BOBBI LAMERE, et al,
Respondents

On Petition For Writ Of Certiorari
to the California Court of Appeal, Fourth District

BRIAN C. UNITT, ESQ.
HOLSTEIN, TAYLOR, UNITT & LAW
A Professional Corporation
4300 Latham Street
Riverside, CA 92501
(951) 682-7030
Attorney for Petitioners

JONATHAN VELIE, ESQ.
VELIE & VELIE
Norman, OK 73069
Of Counsel

## QUESTIONS PRESENTED

Petitioners, formerly members of the Temecula Band of Luiseno Mission Indians of the Pechanga Reservation (Pechanga Band), sued Respondents in California State Court seeking an injunction to prevent them from unlawfully disenrolling Petitioners from the Tribe, and thereby acting beyond the scope of their authority under the constitution and laws of the Pechanga Band. The Superior Court held that jurisdiction was proper pursuant to 28 U.S.C. §1360 (commonly known as Public Law 280 ["PL 280"]), a congressional grant of civil adjudicatory jurisdiction to the Courts of California to hear and determine civil suits between Indians arising in Indian Country. The California Court of Appeal, Fourth District, Division Two, reversed the Superior Court's ruling, holding that PL 280 did not grant jurisdiction in civil suits that implicated a tribe's sovereignty. The California Supreme Court declined to review the case.

The following questions are presented:

First, whether PL 280, confers subject matter jurisdiction on California Courts in a civil suit by individual Native Americans that seeks injunctive relief under California law against other individual Native Americans to prevent them from violating the constitution and laws of their Tribe. PL 280 grants California "... jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in ... Indian Country ... to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian Country as they have elsewhere within the State..." (28 USC §1360(a)) Tribal ordinances or customs are to be given full

force and effect in the determination of such civil causes of action, if not inconsistent with any applicable civil law of the State. (Id. Subd. (c))

This issue raises an important question of federal law that has not been, but should be, settled by this Court. It implicates several questions of the interpretation of PL 280 civil-adjudicatory jurisdiction. These include: 1. Whether, contrary to the approach taken by the Court below, in exercising jurisdiction under 28 USC §1360(a) state courts are required by subd. (c) of that section to interpret and apply Tribal membership laws to determine the nature and scope of the individual Defendants' authority, and thus their entitlement to protection by the Tribe's sovereign immunity; 2. Whether the Court below misconstrued PL 280 to conclude that Tribal membership disputes are impliedly excepted from its jurisdiction; and, 3. Whether the court below misinterpreted Congressional intent, and therefore incorrectly restricted the scope of Congress' delegation of PL 280 civil jurisdiction.

The second question for review calls upon this Court to resolve a conflict between the published decision of the California Court of Appeal in this case, and Federal Court decisions whose holdings are reflected in its prior decision in *Turner* v. *Martire* 82 Cal.App.4th 1042, 99 Cal.Rptr.2d 587 (Cal. App., 2000). The *Turner* decision applied Federal precedents to conclude that the question of whether Tribal officials were entitled to shelter under the Tribe's sovereign immunity was a factual question requiring a showing that they not only acted within the scope of their authority but also performed discretionary or policymaking functions within or on behalf of the Tribe, so that exposing them to liability would undermine the immunity of the tribe itself. (82 Cal.App.4th at pp. 1050-1055) By contrast in the

Court below, the *Turner* test was discarded because the case involved a question of Tribal membership. "In our view, this is not a 'private legal dispute between reservation Indians,' but rather goes to the heart of tribal sovereignty." (31 Cal.Rptr.3d at p. 883) Thus, this Court, in granting Certiorari, is called upon to establish the proper standard by which individual tribal agents or employees may assert sovereign immunity. Since this Court has never directly extended such immunity to individual Indians, if it chooses to do so now, Petitioners submit that it should only be allowed where the individual proves he or she both possessed discretionary, policymaking authority on behalf of the Tribe or Band, and was acting within the scope of his or her lawful authority.

## LIST OF PARTIES

MICHAEL SALINAS, JUANITA SANCHEZ, ANDREW CANDELARIA, BOBBI CANDELARIA, JOHN A. GOMEZ, JR, WILLIAM SALINAS, SR., JOHN A. GOMEZ, SR., MARIE BARTOLOMEI, LOUIS ALFRED HERRERA, JR., NELLIE LARA and THERESA SPEARS,

Petitioners

vs.

BOBBI LAMERE, RUTH MASIEL, MARGARET DUNCAN, SANDRA GARBANI, FRANCES MIRANDA, IREHNE SCEARCE and LORI VASQUEZ,

Respondents.

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The order of the Superior Court of the State of California for the County of Riverside in Salinas, et al. v. Lamere, et al., Case No. RIC406255, overruling the Respondents' Demurrer and denying their Motion to Strike is unreported. (See Appendix A)

The Opinion of the California Court of Appeal, Fourth District, Division Two, in *Lamere* v. *The Superior Court,* Case No. E036474, is reported at 131 Cal.App.4th 1059, 31 Cal.Rptr.3d 880, (Cal.App. 4 Dist. 2005). (See Appendix B)

The order of the California Supreme Court, No. S137418, denying review of the ruling of the Court of Appeal is not reported. (See Appendix C)

## BASIS FOR JURISDICTION

The Opinion of the California Court of Appeal was filed August 8, 2005. The California Supreme Court issued its order denying review on November 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1257, and Rule 10(c) of the Rules of the United States Supreme Court. (See e.g.: *Kossick* v. *United Fruit Co.* 365 U.S. 731, 733, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961) [Certiorari granted because the case "... presented novel questions as to the interplay of state and maritime law."]) Here the case presents novel questions as to the interplay between State, Federal, and Tribal law.

Petitioners were granted an extension of time to file their Petition for writ of Certiorari by the Supreme Court of the United States. (See Appendix D)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, "Congress shall have power... ¶ Clause 3: To regulate Commerce ... with the Indian Tribes; ... Clause 18: To

make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

28 U.S.C. §1360:

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian Country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian Country as they have elsewhere within the State:

| State of | Indian Country affected |
|---|---|
| Alaska | All Indian Country within the State. |
| California | All Indian Country within the State. |
| Minnesota | All Indian Country within the State, except the Red Lake Reservation. |
| Nebraska | All Indian Country within the State |
| Oregon | All Indian Country within the State, except the Warm Springs Reservation. |
| Wisconsin | All Indian Country within the State. |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any

regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

The pertinent provisions of the Constitution and Laws of the Pechanga Band are:

Constitution and Bylaws of the Pechanga Band "membership is an enrolled member documented in the band's official enrollment book of 1979. Qualifications for membership of the Temecula Band of Luiseno Mission Indians are: A. Applicant must show proof of lineal descent from original Pechanga Temecula people. B. Adopted people, family or band and non-Indians can not be enrolled. Exception: people who were accepted in the Indian Way prior to 1928 will be excepted. C. If you have ever been enrolled or recognized in any other reservation you can not enroll in Pechanga." (Pet.[1] Exh. B pp. 0061-0062)

Pechanga Enrollment Disenrollment Procedure "8. Revoking Privileges And Member's Rights. When the individual has been disenrolled by the Enrollment Committee he/she and all of his/her off-

[1] Parenthetical references are to the record before the California Court of Appeal on Petition for Writ of Mandate filed by the Respondents herein. Pet. refers to the papers and exhibits filed by the Respondents herein, who were Defendants at the Trial Court level, and Petitioners in the mandate proceeding. Real Parties refers to Petitioners herein, who were Plaintiffs at the Trial Court level, and Real Parties-in-Interest in the mandate proceeding.

spring claiming lineal descent through this disenrolled member lose all privileges and rights accorded a member. The adult members of this line will be notified individually by letter. Their names shall be removed from the mailing and enrollment lists. The names that are removed shall be sent a letter informing them of this action since they no longer can claim lineal descent. The Band's secretary should be sent an update of the mailing list reflecting the deletions. The minors of disenrolled members will lose Tribal membership. 9. The Appeal Process. In the disenrollment process if the Enrollment Committee fails to follow each step outlined by the disenrollment procedure or is negligent in any way then the involved individual can appeal to the Tribal Council for a fair hearing. In this event the individual must sign a waiver to disclose their confidential enrollment papers that the Council may need to access. The information presented to the Tribal Council at the hearing is limited to only the documents that the Band approved on the enrollment application. The information provided to the Tribal Council should be the exact information that was used by the Enrollment Committee for their decision. The Enrollment Committee members may be present at this meeting in case the Council need to question them. A legal representative may not be present at this hearing. If the Tribal Council notes an infraction to the disenrollment procedure or any unfair and/or impartial handling of a case, then they will instruct the Enrollment Committee to reevaluate the case applying their specific suggestion for a fair decision. The Tribal Council will provide their suggestions in writing to the Enrollment Committee. The Enrollment Committee will respond in writing within thirty days to the Council, commenting on how they carried out the suggestions of the Council with-

in thirty days. This appeal is to check the attitude of the Enrollment Committee and to correct any infractions to the disenrollment procedure. The appeal is not for the Tribal Council to grant membership." (Id., pp. 0191- 0192)

## INTRODUCTION AND STATEMENT OF THE CASE

Native Americans have entered a new period of their tumultuous history – one marked not so much by oppression or exploitation by outsiders, as by the spectre of greed and internal corruption. The circumstances culminating in the filing of this Petition are becoming all too common in modern Tribal life, especially in tribes experiencing the sudden wealth created by gambling and related businesses. In this and similar cases around the nation, a temporary majority seeks to make its power-base permanent by expelling from the Band or Tribe all members who pose a political threat, and in so doing, increasing its share of the Tribal wealth. The absence of an independent Tribal judiciary leaves review of such decisions in the hands of those who stand to profit from the outcome. Indian gaming revenues have almost doubled those of Las Vegas, yet only one in ten Native Americans benefits from that wealth, a number that diminishes further with each new purge of Tribal membership rolls.

The economic motivation behind disenrollments is a national phenomenon. Many of the Tribes who have recently disenrolled significant numbers of their members: "... perhaps ironically, are quite wealthy through casino revenues (like the Saginaw Chippewa) or, as in the case of the Oklahoma Seminole, were recently awarded millions of dollars in a land claim settlement." (Ferguson: *'Indian Blood'*

*Or Lifeblood? An Analysis Of The Racialization Of Native North American Peoples,* p. 54[2]) Even in Tribes that do not benefit from Indian gaming dominant factions have succumbed to economic pressures to arbitrarily reduce the numbers on their rolls. (*Ibid.,* pp. 53-55) Though these disenrollments often take place in total disregard of Tribal Constitutions and laws, the absence of independent Tribal judicial forums strips the targets of disenrollment of any vestige of judicial review consistent with basic notions of due process that would be available to any other citizen of the United States. In this regard, Tribal governments have used this Court's decision in *Santa Clara Pueblo* v. *Martinez* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) , as a sword with which to fend off any challenge to their untrammelled power. The irony of this has not gone unnoticed. (See Ferguson, Op. Cit. At p. 53, and works cited therein)

The Pechanga Band is a Federally-recognized Indian Tribe consisting of over 990 adults and organized pursuant to a "Constitution and Bylaws" adopted in 1980. (Pet. Exh. B: pp. 30:20-22[3]; 34:24-25) The history of the Band dates back to the mid-19th century when the Mexican government granted a tract of land to its founder, Chief Pablo Apis. (Id. at p. 34:11-19) Plaintiffs are descendants of Chief Apis's granddaughter, Manuela Miranda. For over a century, Petitioners (Plaintiffs in the Trial Court) and their ancestors were members of the Band, residing and

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[3] All references are to the exhibits submitted by the parties to the Writ proceeding in the Court below.

working in the Pechanga community, and holding numerous voluntary and elected positions in the Band's government. (Id. at pp. 32:28-33:1-28) Pursuant to a gaming compact concluded in 1999, the Band has operated a successful casino operation, the profits of which produce a monthly income of approximately $15,000 per member. This predictably has caused friction among the members of the Band. (Id. at pp. 30:15-19; 33:6-7; 34:21; 34:26-27)

Certain Band members calling themselves the "Concerned Pechanga Tribal Members" went so far as to begin scrutinizing the Band's enrollment records with the intent of reducing the membership to enhance their own per capita shares of the casino profits. (Id. at p. 34:26-27; p. 37:7-10)

In 2002, the Concerned Pechanga Tribal Members instigated disenrollment proceedings against Plaintiffs and their extended family. In the process, however, the enrollment status of all but three members of the Enrollment Committee was called into question, and the challenged members were disqualified from acting on enrollment matters. This left the Committee without a quorum to act on any enrollment matter. All further actions of this rump Committee, including the disenrollment of Plaintiffs' family were thus invalid under the Pechanga Constitution. Nonetheless, Defendants, acting in disregard of the Tribal Constitution and laws, have orchestrated a conspiracy to disenroll almost one-fifth of the Band's population. Although Plaintiffs had a technical right to "appeal" Defendants' conduct to the Band's Tribal Council, such an "appeal" did not stay the effect of disenrollment, nor provide Plaintiffs with any substantive review of the Enrollment Committee's decision. The Band has no duly constituted Tribal Court, and thus no forum for meaningful judicial review. Thus, Plaintiffs had no alternative but to seek redress in the California Superior Court,

pursuant to Public Law 280, 28 U.S.C. §1360, subds. (a) and (c).

Plaintiffs filed their Complaint against Petitioners (not the Tribe itself) on January 15, 2004. At the hearing on Plaintiffs' request for a TRO, held January 21, 2004, Defendants advised the Trial Court they had removed the action to the United States District Court based on Federal Question Jurisdiction. When Plaintiffs renewed their application for TRO before District Judge Timlin, Defendants then argued that the Federal Court lacked jurisdiction. Judge Timlin remanded to the Superior Court based on a finding that the Federal Courts had no jurisdiction of disputes between Indians. (Pet. Exh. D: pp. 714-720) Judge Charles Field of the California Superior Court then issued a Temporary Restraining Order, on February 4, 2004, restraining Defendants from taking any actions purporting to disenroll the Plaintiffs until February 17, 2004. On March 3, 2004, Judge Field declined to extend the TRO any further. (Pet. Exh. I: pp. 1091-1092)

On February 17, 2004, Judge Field denied the Motion for Preliminary Injunction (Real Parties Exh. 2: p. 52:26-28), but observed: "There is an enormous amount at stake for each of the individuals who are – even of the potentially disenrolled here. Their jobs, health insurance, educational programs, their homes, their entire life would be destroyed substantially by what you described as arbitrary and capricious acts of members of the Enrollment Committee. And that's not something that any court, me or anybody, would like or would be tempted to take lightly. That's an extremely serious group of events that would occur. There does appear to be a basis under Public Law 280 for a court to intervene if it chooses." (Real Parties Exh. 2: pp. 48:28-49:10) He also declined to dismiss

the Complaint for lack of subject matter jurisdiction. (Real Parties Exh. 2: p. 51:17-28)

A hearing on Defendants' Demurrer and Motion to Quash was then held on April 19, 2004, after Defendants had issued notices of disenrollment to more than 130 adults and numerous children (the "potentially disenrolled" to whom Judge Field had referred). Defendants argued that the Trial Court lacked jurisdiction of this matter because enrollment matters were involved. (Real Parties Exh. 1: p.4:14-17) Counsel for Plaintiffs advised the Court that as the result of the purported disenrollments, which had resulted in a cessation of Tribal benefits, they would amend their Complaint to seek compensatory damages alleging violations of Pechanga law and tortious interference with economic advantage, civil conspiracy and breach of fiduciary duty. (Real Parties Exh.1: p. 13:5-16; p. 12:22, pp. 12:28-13:4) The sovereignty of the Tribe is not implicated or impaired by such an award. If anything, its sovereignty is protected, as damages awards against individual Indians who exceed their authority under Tribal law will tend to discourage such conduct and thus promote the fair and judicious conduct of Tribal affairs.

Judge Field distilled the arguments offered by both sides as raising the issue of whether and to what extent individual Indians enjoyed the due process protections enjoyed by citizens of the United States. (Real Parties Exh. 1: p. 23:23-24) Thus: "There is rights to their property, the rights to their jobs, the rights to every single portion of their lives has been lived for very long extended periods of time, and you take them away, snap, by this determination, and you give them no remedy, except an appeal to the Tribal Council of a right which in any other setting that I can imagine would constitute a due process right and be reviewable all the way to the United States

Supreme Court." Id. (Real Parties Exh. 1: p. 24:9-16)

On July 23, 2004, Judge Field issued his decision. Finding that the issues raised are neither trivial nor simple, he held that this Court has jurisdiction of this dispute between Indians in Indian Country, based on Public Law 280, in that the Pechanga Band has no Tribal Courts, and the Plaintiffs therefore have no adequate (Tribal) forum. (Pet. Exh. Q: pp. 1245- 1249, see Appendix A attached hereto) Accordingly, he denied Defendants' Motion to Quash and overruled Defendants' Demurrer. (Id.)

Defendants then sought a Writ of Mandate from the Court of Appeals to overturn this ruling. After issuing an order to show cause why the Writ should not issue, considering extensive briefing, and hearing oral argument, the Court reversed Judge Field's rulings. (See Appendix B) Plaintiffs' Petition for Review in the California Supreme Court was denied. (See Appendix C)

## SUMMARY OF ARGUMENT

Certiorari should be granted to resolve correctly the question that confronted the California Trial and Appellate Courts in this matter – whether the concept of Tribal sovereign immunity can be stretched to protect acts of individual Indians that exceed their lawfully defined scope of authority. The conclusion reached by the Court of Appeal, that acts of Tribal functionaries will be shielded regardless of their legality so long as they relate to Tribal membership, must not be allowed to stand. PL 280 authorizes specified State Courts to determine civil causes of action between individual Indians, arising in Indian Country, and to apply Tribal law in so doing. (28 U.S.C. §1360, subds. (a) & (c)) In enacting PL 280 Congress granted the power to adjudicate civil dis-

putes, including those affecting rights and status, but withheld from states the power to extend their regulatory jurisdiction into Indian Country. (See *Bryan* v. *Itasca County,* 426 U.S. 373, 384, 96 S.Ct. 2102, 2109, 48 L.Ed.2d 710 (1976)) Plaintiffs invoked California law to enjoin anticipated ultra vires acts of Tribal officials, and called upon the Court to apply Tribal law to determine the scope of the Defendants' authority, and thus to determine that the authority had been exceeded.

The Respondents persuaded the Court below to expand the reach of this Court's decision in *Santa Clara Pueblo* v. *Martinez, supra*, to preclude the application of PL 280. *Santa Clara* held that Tribes were free to enact laws pertaining to membership, and would be trusted to adopt laws that were consistent with the mandate of the Indian Civil Rights Act. (25 U.S.C. §§1301 et seq.). [ICRA] What was at issue in *Santa Clara* was the validity of the tribal membership statute, and this Court held that Congress did not confer jurisdiction on the Federal Courts to determine whether tribal laws conformed to the ICRA.

Here what was called for was not an adjudication of the validity of the Tribal Constitution and laws pertaining to membership, they were presumed to be valid and essential to the Court's determination of the merits of the case. Rather, what was at issue was whether individual Indians who substituted their own notion of the standard for Tribal membership for that expressed in the Constitution and laws of the Pechanga Band could be enjoined from doing so in the only forum available to those aggrieved by that conduct.

Should this Court decline to grant Certiorari, it will leave thousands of Native Americans without a forum to adjudicate the most fundamental issue they can confront, the loss of their Tribal identity, citizen-

ship, and related rights. In so doing, it will open the door to similar lawless acts throughout the Tribal lands, inviting transitory power blocs to exploit their temporary hold on the tools of government to implement their own self-serving notions of the necessary qualifications for Tribal membership. This is the very lawlessness Congress intended to prevent when it enacted PL 280.

## PLAINTIFFS PROPERLY INVOKED CIVIL ADJUDICATORY JURISDICTION UNDER PUBLIC LAW 280

Public Law 280 confers jurisdiction on California Courts over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian Country ...to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian Country as they have elsewhere within the State ..." (28 U.S.C. §1360(a)) Plaintiffs invoked the State laws pertaining to injunctive relief, laws that are generally applicable to private persons and private property.

Under California law, an injunction is a proper remedy to prevent an ultra vires act. (*Major* v. *Miraverde Homeowners Assn.* 7 Cal.App.4th 618, 9 Cal.Rptr.2d 237 (Cal. App., 1992) [Actions taken in excess of an association's power are unenforceable and courts have granted injunctive relief against associations which have exceeded the scope of their authority.], Cf. *Spitser* v. *Kentwood Home Guardians* 24 Cal.App.3d 215, 218, 100 Cal.Rptr. 798 (Cal. App., 1972) ; *Ticor Title Ins. Co.* v. *Rancho Santa Fe Assn.* 177 Cal.App.3d 726, 223 Cal.Rptr. 175 (Cal. App.,

1986) ) In the context of a City Council proposing to violate the terms of a deed creating a public trust, it was said that an injunction will lie to prevent an ultra vires, and hence non-legislative, act. (*Save the Welwood Murray Memorial Library Com.* v. *City Council* 215 Cal.App.3d 1003, 1017, 263 Cal.Rptr. 878 (Cal. App., 1989) ) The Court cited *Pughe* v. *Lyle* 10 F.Supp. 245, 248 (D.C.Cal. 1935): "Where public officers act in breach of trust or without authority, or threaten to do so, and such acts will result in irreparable injury, or will make necessary a multiplicity of suits at law to obtain adequate redress, they may be enjoined. [Citations]" (*Welwood Murray, supra,* at p. 1017)

Though the pleading before the Trial Court properly stated a cause of action, since the threatened harm actually materialized, Plaintiffs will be entitled to amend their Complaint to seek damages in lieu of the injunctive relief originally sought. Such damages will be predicated on well-established State law tort doctrines such as intentional interference with economic advantage.

Of course to determine whether the Defendants' acts were ultra vires requires reference to Tribal law. In this regard the Court below was mistaken when it said: "Insofar as plaintiffs sue for violations of "Pechanga Band Law," it is for the Band to determine what that law is and whether or not it has been violated." (31 Cal.Rptr.3d at p. 886) Under Public Law 280, "Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community ... shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section." (28 USC §1360(c))

"The primary concern of Congress in enacting Pub.L. 280 that emerges from its sparse legislative

history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." (*Bryan, supra,* at p. 379) "Subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording ..." (Id. P. 383) "This construction finds support in the consistent and uncontradicted references in the legislative history to permitting 'State courts to adjudicate civil controversies' arising on Indian reservations, ..." (Id. P. 384, citing H.R.Rep.No.848, pp. 5, 6, U.S.Code Cong. & Admin.News 1953, p. 2411) "Additionally, this interpretation is buttressed by sec. 4(c), [28 U.S.C. §1360(c)] which provides that 'any tribal ordinance or custom . . . adopted by an Indian tribe . . . in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section'" (Id. P. 385) Finally, *Bryan* notes that certain Tribal reservations were completely exempted from the provisions of Pub.L. 280 precisely because, unlike the Pechanga Band, each of those Tribes had a "tribal law-and-order organization that functions in a reasonably satisfactory manner." (Id. Citing H.R.Rep.No.848, p. 7, U.S.Code Cong. & Admin.News 1953, p. 2413.)

The question of whether a particular case falls within the civil jurisdiction conferred by Public Law 280 was carefully analyzed by the Ninth Circuit after the instant case had been argued and submitted. (See *Doe* v. *Mann* 415 F.3d 1038 (9th Cir., 2005))

*Doe* was a child dependency case brought in

California State Court under an exception to the Indian Child Welfare Act that conferred such jurisdiction if allowed by Federal Law. Both the District Court and the Ninth Circuit identified Public Law 280 as the authorizing Federal Law. The analysis of when a State may intervene to remove a child from his or her home, and place him or her with a different family, one not even belonging to the same Tribe has significant implications for the jurisdictional question here, as it relates to the concern expressed by the Court below regarding interference with a Tribe's internal matters.

The Ninth Circuit cited *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) as establishing "... three categories into which a state law may fall: criminal, regulatory, and civil law relevant to private litigation." (*Doe* at p. 1053, quoting *Cabazon* 480 U.S. 202 at 208) *Cabazon* was concerned with deciding whether the California Penal Code provision prohibiting certain forms of gambling, when applied to Indian gaming, was criminal (and thus within PL 280 jurisdiction under 11 USC §1162(a)), or civil/regulatory, and thus exempted from Public Law 280 civil jurisdiction under 28 USC §1360(b). Similarly *Bryan* v. *Itasca County,* 426 U.S. 373, 384, 96 S.Ct. 2102, 2109, 48 L.Ed.2d 710 (1976) was concerned with distinguishing the situations in which the State Courts could decide private civil disputes, but not impose the civil regulatory laws of the States on Tribal governments.

"... the genesis of the Court's analysis in *Bryan* and *Cabazon* was very different from a child dependency proceeding. In both those cases, the broad language about "private legal disputes" and "private civil litigation" was made in the context of an attempt to categorize a state's authority to regulate taxation

and gambling. The taxation and gambling statutes both regulate the conduct of the public at large. They do not address the rights or status of private individuals. And, in the case of taxation, the Court was particularly sensitive to precedent barring states from taxing reservation Indians without express congressional approval. In contrast, California's child dependency proceedings focus, not on public activities, but on the status of individual Indian parents and children." (*Doe* at p. 1059, fn. omitted.)

"In *Bryan*, the Supreme Court recognized commentary stating that laws having to do with status were the types of laws that Congress envisioned would fall within a state's civil Public Law 280 jurisdiction: A fair reading of these two clauses suggests that Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather that Congress intended 'civil laws' to mean those laws which have to do with private rights and *status*. Therefore, 'civil laws ... of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, *insanity*, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws. [426 U.S. at 384 n. 10, 96 S.Ct. 2102]. While we do not view the Supreme Court's footnote as dispositive, we observe that the Court recognized "status" laws generally, and "insanity" laws particularly, as different from regulatory laws." (*Doe* at p. 1060)

As further support for the authority of State Courts to decide cases involving status, *Doe* cites William Canby's *American Indian Law in a Nutshell*:

> "The civil grant is one of power over 'civil causes of action.' This language would appear to mean that the state simply

> acquired adjudicatory jurisdiction -- the power to decide cases -- not the entire power to legislate and regulate in Indian Country.... The Supreme Court [in *Bryan*] concluded that the primary purpose of the civil provisions of Public Law 280 was to provide a state forum for the resolution of disputes. Viewed in that light, the provision that the civil laws of the State should have effect in Indian Country simply 'authorizes application by the State Courts of their rules of decision to decide such disputes.' The effect of the Court's decision is to confine the civil grant of Public Law 280 to adjudicatory jurisdiction only. [William C. Canby, Jr., *American Indian Law in a Nutshell* 241-42 (4th Ed.2004).] That California's dependency law determines children's status is compelling evidence that it is adjudicatory, not regulatory." (*Doe* at pp. 1060-1061)

In *Atkinson* v. *Haldane*, 569 P.2d 151 (Ak 1977), the Alaska Supreme Court cited the following from the legislative history: "Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian Country within their borders. Permitting the State Courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable." (*Id.* P. 165, fn.54, Citing H.R.Rep. No. 848, 83d Cong., 1st Sess., 1953 U.S. Code Cong. and Adm. News 2409, 2412.)

The action filed by Petitioners clearly invoked the civil adjudicatory jurisdiction of the State Courts. It

did not seek to impose State regulation on Tribal membership. It simply sought to enjoin unlawful acts by individual Tribal functionaries. It alleged that the Defendants not only acted in excess of their authority, but their authority did not even extend to policy-making in the first place, thus excluding them from the shelter of the Tribe's sovereign immunity. Thus though the case clearly falls within the subject matter jurisdiction conferred by PL 280, the Court below disregarded the canons of construction to deny that jurisdiction to the Petitioners. Certiorari is therefore necessary to instruct the Court below, and all other courts confronted with the task of construing PL 280 as to the proper meaning of the words chosen by Congress

"(I)n determining the scope of the statute, we look first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" (*Russello* v. *United States,* 464 U.S. 16, 20, 104 S.Ct. 296 78 L.Ed.2d 17 (1983) [citing *United States* v. *Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981) quoting from *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)) Giving the words used by Congress "their ordinary . . . common meaning" (*Perrin* v. *United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d (1979)), "[n]othing on the face of the statute suggests a congressional intent to limit its coverage. . ." (*Dickerson* v. *New Banner Institute, Inc.,* 460 U.S. 103, 111, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983)). As articulated in *Doe, supra,* what was conferred by Congress was jurisdiction over civil actions between Indians. The limitation imposed by the Court below, that such actions may not implicate membership issues is not within the plain lan-

guage of the statute, nor is such an exception fairly inferable. Congress specified the exceptions in §1360(b), and membership does not appear among them.

Neither does the special canon of construction for laws pertaining to Indians permit such a construction. "The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." (*South Carolina* v. *Catawba Indian Tribe, Inc.,* 476 U.S. 498, 506, 106 S.Ct. 2039, 90 L.Ed2d 490 (1986); *DeCoteau* v. *District County Court,* 420 U.S. 425, 447, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) ["A canon of construction is not a license to disregard clear expressions of tribal and congressional intent"]). Courts should apply the canons of construction only if the plain language of the statute or the statute's legislative history is ambiguous. (*United States* v. *Thompson,* 941 F.2d 1074, 1077-1078 (10th Cir. 1991), Cert. denied *Pueblo of Santo Domingo* v. *Thompson,* 503 U.S. 984, (Apr 20, 1992) (NO. 91-1179) and *U.S.* v. *Thompson,* 503 U.S. 984, (Apr 20, 1992) (NO. 91-1346) [canon of construction in favor of Indians is applied when intent of Congress remains unclear after consideration of statutory language and legislative history.]) Additionally, this Court has stated that the canons of construction are inapplicable if both parties to the litigation are Indian. (*Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 655, fn.7, 96 S.Ct 1793, 48 L.Ed.2d 274 (1976) [canon has no application where "the contesting parties are an Indian Tribe and a class of individuals consisting primarily of Tribal members"]) Here, Plaintiffs and Defendants are Indians, so that applying the canon to reach a result that favors the interest of one faction does not promote the welfare of

Indians in general.

In this case, what was presented to the Trial Court was a dispute between individual Indians, arising in Indian Country in California. The dispute was over rights and status – whether Defendants had the legal authority to disenroll Plaintiffs; whether Plaintiffs were lawfully stripped of the property rights associated with their membership in the Band. The relief sought would not constitute an exercise of State regulatory power, but would merely constitute an adjudication as to the rights and status of the parties. The Band continues to possess the sovereign right to conduct its affairs according to its own laws. (See *Williams* v. *Lee* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) ) But no case has held that Congress granted to the Tribes the right to sink into anarchy, allowing individual appointees in its government to arrogate to themselves the power to decide the fate of individual members of the Tribe without regard for law or process, but merely to serve their personal ends.

## THE PUBLISHED DECISION OF THE COURT BELOW IS IN CONFLICT WITH FEDERAL COURT DECISIONS AND ITS PRIOR DECISION IN *TURNER V. MARTIRE,* CALLING FOR THIS COURT TO RESOLVE THE CONFLICT TO SECURE UNIFORMITY OF DECISION AMONG ALL COURTS EXERCISING JURISDICTION UNDER PL 280

At the outset it must be noted that this Court has repeatedly stated that Tribal immunity generally "does not immunize the individual members of the Tribe." (*Puyallup Tribe* v. *Washington Game Dept*. 433 U.S. 165, 172 97 S.Ct. 2616, 2621, 53 L. Ed. 2d 667

(1977), fn. omitted; accord, *Santa Clara Pueblo* v. *Martinez, supra,* 436 U.S. 49, 59; see also *Oklahoma Tax Comm'n* v. *Potawatomi Tribe* 498 U.S. 505, 514 111 S.Ct. 905, 912, 112 L.Ed.2d 1112 (1991) ) Lower federal Court decisions, however, have extended immunity to "tribal officials" when such officials act "in their official capacity and within their scope of authority." (*United States* v. *State of Or.* 657 F.2d 1009, 1012, fn. 8 (9th Cir. 1981); accord, *Hardin* v. *White Mountain Apache Tribe* 779 F.2d 476, 479 (9th Cir. 1985).)

The Court below concluded that this action involves a dispute between Plaintiffs and the Band. (31 Cal.Rptr.3d at p. 884) In doing so, it abandoned the reasoning of its prior decision in *Turner* v. *Martire, supra,* 82 Cal.App.4th 1042, 99 Cal.Rptr.2d 587, and the Federal case law on which that decision was based. In *Turner,* the Court adopted an analysis that is well-grounded in the precedents developed in the Federal Courts. This Court should grant Certiorari to reject the lower Court's retrenchment of that position, and to guide PL 280 Courts in the proper analysis of individual sovereign immunity claims.

*Baugus* v. *Brunson* (E.D.Cal. 1995) 890 F.Supp. 908 held a Tribal security officer, who was not a member of the tribe, was not a "tribal official" entitled to immunity in a civil rights action, stating the term "Tribal official" was "virtually always used to denote those who perform some type of highly held position or governing role within the tribe." (Id. at pp. 911-912) The principle that to justify sovereign immunity the Tribal agent or employee had to establish not only that he or she was acting in the scope of his or her authority, but that he or she held a policymaking position is well established by this Court and the lower Federal Courts.

In *Westfall* v. *Erwin* 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed. 619 (1988), this Court held that "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature." ( (*Id.,* at pp. 297-298)

Underscoring the need to be circumspect in granting immunity, the *Westfall* opinion observed that "... absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct." (Id. 484 U.S. at p. 295) "[T]he central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct." (Id. 484 U.S. 292, 296-297) Significant to the case presented by this Petition, the *Westfall* Court held, summary judgment was improper because the Plaintiff had asserted the Defendants' duties only required them "'to follow established procedures and guidelines'" and that they were" 'not involved in any policy-making work ....'" The Defendants, who had the burden of proving they were immune, had not presented "any evidence relating to their official duties or to the level of discretion they exercise." (Id. 484 U.S. at p. 299)

Here Respondents should similarly have been put to the burden of establishing that they made policy rather than implementing it, but the Court of Appeal declined to do so. "... we cannot agree that the "Enrollment Committee" is intended to operate in a mechanical matter, exercising no discretion. Although the Band Constitution and other enact-

ments may set out the basic qualifications for Tribal membership, it is apparent to us that the Committee is necessarily entrusted with substantial discretion in evaluating evidence submitted for its consideration." (Id. p. 884) Apparent from what is a question never answered, as the Court cites nothing in the record to support this conclusion. In fact the Enrollment Committee of which the Defendants were alleged to be members is not even mentioned in the Constitution and Bylaws of the Band. Nonetheless, the Court was lured by the comfortable nostrum that since the Committee deals with membership, it acts as an arm of the Band, and thus, apparently, is incapable of straying from the Band's laws.

*Westfall* was decided under the Federal Tort Claims Act which has since been amended to completely immunize federal employees for their torts, yet it remains the framework for determining when non-governmental persons or entities are entitled to the same immunity. (*Pani* v. *Empire Blue Cross Blue Shield* 152 F.3d 67, 72 (2d Cir. 1998); *Midland Psychiatric Associates, Inc.* v. *U.S.* 145 F.3d 1000, 1005 (8th Cir. 1998) ["[I]t is well established that Westfall still articulates the more restrictive federal common-law rule limiting official immunity to discretionary conduct."]; *Beebe* v. *Washington Metro. Area Transit* 129 F.3d 1283, 1289, 327 App.D.C. 171 (D.C. Cir. 1997) ["... Westfall remains the common law rule ...."].)

Tribal immunity emanates from the common law, and this Court has described Tribal immunity as "the common-law immunity from suit traditionally enjoyed by sovereign powers." (*Santa Clara Pueblo* v. *Martinez, supra,* 436 U.S. 49, 58) The decisions recognizing immunity of Tribal officials typically involve individuals who clearly occupied a discretionary or policymaking position. (*Davis* v. *Littell* 398

F.2d 83, 85 (9th Cir. 1968)[tribal general counsel could not be sued for making a defamatory statement to the tribal council about his assistant.]) Conversely, where an individual does not occupy such a position, immunity has been denied. For example, in *Otterson* v. *House* 544 N.W.2d 64 (Minn.Ct.App. 1996), the Court held a security guard for a Tribally chartered corporation was not immune from liability for an off-reservation traffic accident that occurred while he was delivering mail to the post office. It was undisputed that the guard was acting within the scope of his employment, but the Court also found his employment was "merely ministerial" and his duties did not call for him to rely on a delegation of Tribal authority--his tortious act did not relate to policymaking. (*Id.*, at p. 66; See also: *Hegner* v. *Dietze* 524 N.W.2d 731, 735 (Minn.Ct.App. 1994) [Factual issue existed whether position held by human resources manager for Indian casino was sufficient to provide him with immunity].)

It is axiomatic that as a common law doctrine, Tribal immunity and any extension of it to Tribal officials must be grounded in some body of judicial decisions. As previously noted, this Court has never extended Tribal sovereign immunity to Tribal officials. The lower Courts have done so, but only on the limited basis described above. Prior to the publication of the Opinion in this case, the question of whether Petitioners were acting in their official capacities, and exercising such discretionary authority as would qualify them for immunity would both have been questions of fact, the burden of proof on which would have rested on the Defendants. (*Turner* v. *Martire,* supra, 82 Cal.App.4th 1042, 99 Cal.Rptr.2d 587) The *Turner* decision rejected the Defendants' claim: "... that all they must show to establish immunity is that they acted within the scope of their authority." (Id. p.

1054) Concluding rather that: "... to qualify as "tribal officials" for immunity purposes, Defendants also must show they performed discretionary or policymaking functions within or on behalf of the Tribe, so that exposing them to liability would undermine the immunity of the Tribe itself." (*Id.*) This principle was well grounded in the precedents previously discussed.

As in *Turner*, there is no evidence in the record here establishing as a matter of law that the members of the Enrollment Committee possessed discretionary authority, as opposed to being charged with the ministerial application of clearly delineated standards. The Court below was content to assume the Defendants possessed discretionary policymaking authority, though no Tribal law conferred such authority. When it decided *Turner* the Court was not willing to make that assumption. Granting Certiorari in this case will give this Court the opportunity to condemn such assumptions, and guide the lower Courts in the proper mode of proof.

Even if the burden of proof had been satisfied on the existence of discretionary authority, Respondents could not prove they acted within the scope of their authority under Pechanga law. "Where an officer of a sovereign acts beyond his or her delegated authority, or her actions 'are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden.'" (*Turner, supra*, p. 1055) However, as to this issue, the Court below said: "... even if the allegations of the complaint are sufficient to show that the defendants were acting ultra vires in the sense that they failed to follow established procedures, the dispute remains essentially between Plaintiffs and the Band." (Id.) Yet the footnote to this statement sug-

gests the opposite conclusion. "... a governmental agency that acts outside of the scope of its statutory authority acts ultra vires and the act is void. (See *Turlock Irrigation Dist.* v. *Hetrick* 71 Cal.App.4th 948, 84 Cal.Rptr.2d 175 (Cal. App. 1999) [irrigation district's attempt to provide natural gas service is ultra vires].)" (Id. p. 884 fn.4) Here, the Court acknowledges the ultra vires acts of government officials are void. The logical result of this should be that the acts of those officials are clearly beyond the scope of their authority. Yet the Court shrinks from this, concluding: "It seems more appropriate here to term the Defendants' actions as being well within their essential authority, although arguably procedurally improper." (Id.)

In their merits brief, the Petitioners would show that the actions of the three Enrollment Committee Members purporting to reinstate their fellow conspirators took place without the quorum required by the Tribe's Constitution. They were beyond the scope of the authority vested in those three individuals. The other members of the Enrollment Committee thus illegally returned to their seats were consequently acting beyond the scope of their authority, since they were not duly reinstated by legal means under Pechanga law. As such, the acts of all the Defendants were beyond the sanction of Pechanga law.

It is settled that "Tribal officials are not necessarily immune from suit. (*Santa Clara Pueblo* v. *Martinez, supra,* 436 U.S. 49, 59, 98 S.Ct. 1670, 1677.) When tribal officials act beyond their authority they lose their right to the sovereign's immunity. [*Ibid.; Imperial Granite Co.* v. *Pala Band of Mission Indians* 940 F.2d 1269, 1271. (9th Cir. 1991) ]" (*Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians* 74 Cal.App.4th 1407, 1421, 88 Cal.Rptr.2d 828 (Cal. App., 1999); *Ex parte Young* 209 U.S. 123 28

S.Ct. 441, 52 L.Ed.2d 714 (1908) [state attorney general not immune from suit over threatened enforcement of unconstitutional law.]; *Burlington Northern* v. *Blackfeet Tribe* 924 F.2d 899, 901 (9th Cir. 1991) overruled in part on another point as noted in *Big Horn County Elec. Coop., Inc.* v. *Adams* 219 F.3d 944 (9th Cir. 2000) [citing *Larson, supra,* 337 U.S. 682, in holding that principle that sovereign immunity does not extend to officials acting pursuant to allegedly unconstitutional statute should apply to Tribal officials]; *Boisclair* v. *Superior Court* 51 Cal.3d 1140, 1157, 276 Cal.Rptr. 62, 801 P.2d 305 (Cal., 1990) [citing *Larson* v. *Domestic & Foreign Corp.* 337 U.S. 682, 688 69 S.Ct. 1457, 1460-1461, 93 L.Ed. 1628 (1949) , in stating that agent of a sovereign may be liable for acts in excess of authority; noting that "[t]his general principle of sovereign immunity has been applied to Indian sovereign immunity"].

The Court below was unwilling to consider that there might be facts to establish both prongs of the *Turner* test, facts that could only be established through discovery. Further, by refusing to consider, interpret and apply Tribal law as required by 28 USC §1360(c) the Court foreclosed any possibility of providing Plaintiffs with the judicial forum intended by Congress.

## CONCLUSION

The availability of an independent judicial forum in which individual Native Americans may protect their most basic rights is undeniably fundamental to their ability to secure the benefits of liberty promised to all American Citizens. In recognition of the special circumstances presented by the peculiar relationship between the United States and the various Tribes and Bands of Native Americans historically recognized as domestic dependent nations, Congress,

through PL 280, has mandated that the Courts of six states including California shall serve as that independent forum for resolving civil causes of action that may arise between individual Native Americans. Yet, as has been shown by this Petition, Certiorari is required to correct an unduly restrictive interpretation of PL 280 adopted by the Court below. That interpretation, holding that causes of action related in any way to Tribal membership, may not be considered by State Courts, threatens to eliminate the safeguard created by Congress in the exercise of its plenary authority over relations with the Native American nations.

Disenrollments motivated by personal gain on the part of a transitory power bloc acting in defiance of duly enacted Tribal laws are a reality that will continue to spread if its victims are deprived of any meaningful remedy. Employing PL 280 jurisdiction in the way Petitioners have done in this case not only provides them with the opportunity to protect their sense of identity as members of a particular Native American nation, but protects the legal integrity of that nation by seeing that its laws are respected and applied fairly and independently to resolve legitimate and important disputes. This was the clear intent of Congress when it granted jurisdiction over civil actions in §1360(a), and empowered State Courts to apply and interpret Tribal law under §1360(c) in deciding those cases. The Court below carved out an exception to PL 280 jurisdiction that Congress neither expressed nor intended. Only this Court can correct that error, and in so doing, both provide the Petitioners with the chance to hold the Respondents accountable for their unlawful acts, but uphold the rule of law throughout the Native American lands.

For these reasons Petitioners request this Court to issue a Writ of Certiorari to the Court below, and

thereby to resolve the important questions presented on their merits.

Respectfully submitted,

Brian C. Unitt
Attorney for Petitioners
4300 Latham Street
Riverside, CA 92501
(951) 682-7030

DATED: March 13, 2006

Appendix A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

Plaintiff(s): Michael Salinas, et al.
Defendant(s): Bobbi Lamere, et al.
Date/Dept: 7-23-04 D-5
Case Number: RIC 406255
Proceeding: Notice of Ruling

The present posture of this case is that there are two pending matters, one being a Motion to Quash filed by defendants, the second being a Demurrer filed by defendants. Both matters rest entirely on defendant's argument that this court lacks jurisdiction of this cause, based on principals of sovereign immunity as it relates to defendant Band and the actions herein under review.

The plaintiffs herein consist of persons who have heretofore been members of the Temecula Band of Luiseno Mission Indians of the Pechanga Indian Reservation, and will be referred to herein as "plaintiffs." Defendants are individual members of the same Band and are alleged members of the Enrollment Committee of said Band, and are sued herein in their capacities as individuals and as members of the "Enrollment Committee," and will be referred to herein as the "Pechanga Band,"

The history of the Pechanga Band is both a reflection of the rather consistent cruelty and broken promises inflicted in general on the various bands and tribes of Indians by non-Indian settlers,

as well as the story of this particular hard working and unique Band. Resident in the western side of the Temecula valley for a very long time prior to the coming of the white and Hispanic settlers, the Pechanga Band was included in the groups pressed into service in the late 1700's by the establishment of the Mission of San Luis Rey. That service has been described as essentially comparable to slavery by most authors, and in any event worked great hardships on the Band members, and caused forced migration of the Band. By the mid-1800's, when the Missions released the various tribes and bands,

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D. Cope (jn), Clerk



the Pechanga Band returned to their ancestral area. By Treaty of 1863, their historic lands were accorded to them. In 1875, however, ranchers in the area filed a petition in the Federal Court in San Francisco, seeking ownership rights to the Band's lands, and got a decree to evict the Band. This court order was forcibly carried out by the Sheriff of San Diego, who moved the tribe and placed them in the hills south of Temecula in 1881. A Federal Executive Order of 1882 set aside this land as the Band's new reservation, and by 1883 it was up and running.

A good account of this history may be found in that portion of Exhibit 1 to the complaint herein consisting of relevant sections of a report "On the Conditions and Needs of the Mission Indians of California" prepared on site in 1883 by Helen Hunt Jackson, noted poet, historian, and author (of, among other things, the book Ramona, which is the

basis of the Ramona pageant held yearly). That report was prepared for President Chester A. Arthur's administration, and was included by Ms Jackson in her book *A Century of Dishonor, A Sketch of the United States Government's Dealings With Some of the Indian Tribes*, published in 1885 and frequently republished, and available today. Among Ms. Jackson's observations were, prior to the settlement in Pechanga Canyon, "For forty years these Indians have been recognized as the most thrifty and industrious Indians in all California." Further, she commented that after their removal in 1881, "A portion of these Temecula Indians, wishing to remain as near their old homes and the graves of their dead as possible, went over to the Pechanga Canyon ... it was a barren, dry spot, but the Indians sunk a well, built new houses, and went to work again." On revisiting the valley in May 1883, she wrote: "Our first thought on entering it was, would all persons who still hold to the belief that Indians will not work could see this valley. It would hardly be an extreme statement to say that the valley was one continuous field of grain." And, further, "The whole expression of the place had changed, so great a stimulus had there been to the Indians in even the slight additional sense of security given by the Executive Order setting off their valley as a reservation".

Various changes in the applicable legal and economic framework gave the tribe a renewed opportunity for improved economic health in the 1990's. Since the opening of

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their first major venture, in 1995, a series of businesses have been started and expanded by the Band, and it is now an extremely successful entity. The business activities here included various gaming and recreational enterprises. Considering the history of Indians in general and this Band in particular, it is a heartwarming story of new opportunity and new success. However, with this progress has come internal conflict. In particular, a dispute has arisen with respect to membership in the Band and concurrent participation in the new prosperity that comes with Band membership. This suit arises from actions of the Band through its "Enrollment Committee," and particularly the "disenrollment" proceedings against plaintiffs. Plaintiffs action seeks to maintain tribal membership for plaintiffs, and to stop or reverse disenrollment actions. Defendants' demurrer essentially states that this court lacks jurisdiction over the defendant Band and the individual members of the Enrollment Committee. An enormous amount is at stake for the plaintiffs, who stand to lose their income from the tribe, which is substantial, as well as their health, education, and other benefits.

This court has attempted to become familiar with the applicable statutes and cases, which is a truly substantial body of information. Further, and often due to "membership" disputes, this is becoming an increasingly litigated and contentious area of law. As many tribes and bands have become more successful economically, there are many more litigated disputes of all kinds. For example, while this case has been under submission, a ruling has been issued by the National Labor Relations Board,

in a case involving the San Manuel Indian Bingo and Casino, the Hotel and Restaurant Employees Union, and the Communication Workers of America, another union. The case is cited as 341 NLRB No 138, reverses precedent to the contrary, and asserts that the NLRB has jurisdiction over a dispute as to an unfair labor practice allegedly committed by the Tribe. The facts are not terribly close to those of the within case, but this case is illustrative of the increasing assertion of administrative and judicial scrutiny over matters previously considered to be within the sole jurisdiction of the "sovereign authority" of a tribe or band. (Additionally, that case is at the very beginning of a series of likely judicial reviews, and is a long way from

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any final holding.) The court only comments on this as an example of the increasing number of, and areas of, disputes which pertain to claims of "tribal sovereignty."

Several observations may be in order here. First, notions of "Tribal Sovereignty" was originally enunciated in three cases dating from 1829 to 1832, and known as the "Marshall Trilogy." These cases included: *Johnson* v. *Mclntosh* (1829) 21 U.S. 543; *Cherokee Nation* v. *Georgia* (1831) 30 U.S. 1; and *Worcester* v. *Georgia* (1832) 31 U.S. 515. Reviewing the key holdings of those cases provides some background for some of the divergent holdings of the many cases and laws that have "followed" these cases. As the United States Supreme Court noted,

the "federal tribal relationship today embodies a convoluted history of case law and interaction among the three arms of American government." (*United States* v. *Kagama* (1886) 118 US 375, 378-385.)

Among the doctrines enunciated in the "Trilogy" is that tribal sovereignty is subject to diminution by the United States, but not by individual states.

But the legal status of Indians continue to evolve. Congress only extended United States Citizenship status to all Indians born in the United States in 1924, and a growing recognition of the many gaps in the legislative framework applicable to Indian rights led to, among others, the enactment, in 1968, of the Indian Civil Rights Act, as well as, in 1953, of Public Law 280. Public Law 280 is the principle authority upon which plaintiffs rely. Public Law 280, in relevant part codified as 28 U.S.C. Section 1360, and states that California courts (as well as the courts of several other states) "have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in Indian country." In response, defendants rely principally on *Bryan* v. *Itasca County* (1976) 426 U.S. 373, arguing that said case holds, at page 392, that "there is notably absent any conferral of state jurisdiction over the tribes themselves under Public Law 280." It appears to this court that the *Bryan* case dealt with a taxation issue, governed specifically in Section 1360(b), and this comment is at best dicta insofar as it relates to the issue here and it does not appear persuasive to this court.

Plaintiffs also rely in part on *Bryan, supra,* at page 383, for the proposition that Public Law 280 was enacted "to redress the lack of adequate

private legal disputes between reservation Indians." That appears to be a valid point. The issues raised in this complaint are neither trivial nor simple, and do involve consideration of due process issues by a decision-maker competent to deal with such matters. The defendant Band, which has a total membership (including plaintiffs) of about 1,100, and which has no tribal courts, appears to be almost totally inadequate to the task. To refer issues of this nature to a tribal council, all of whom have a personal stake in the outcome, few if any of whom have legal training, and where the council is under no compunction to follow established due process rights, appears to fall into the category referred to above of a "lack of an adequate forum."

This court has attempted to fully review the arguments and issues presented by each side. A discussion as to all would be extensive and would not be determinative of the issues before this court. At the time of the hearing held April 19th, this court requested further briefs in the basic question, as to whether the sovereign nation arguments "trumped" the due process clause of the state and federal constitutions. Upon further review, and with the good assistance of the further briefs, it does appear to this court that the issue more properly is solely to determine whether Public Law 280 applies. As above stated, this court holds that it does.

For the reasons set forth above, and having

given consideration to the other arguments submitted, as court holds that Public Law 280 does apply in this instance, this court does have jurisdiction of this matter. Defendants' demurrer is therefore overruled, and defendants' motion to quash is denied.

Both sides having indicated to the court an intent to seek a writ if this ruling is adverse to their position, this court will also stay this order for a period of 30 days from the date of issuance of this order to permit adequate time for such further procedures if necessary.

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Appendix B

CERTIFIED FOR PUBLICATION

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH DISTRICT

DIVISION TWO



BOBBI LAMERE et al.,
Petitioners,

E036474

v.

(Super.Ct.No. RIC406255)

THE SUPERIOR COURT OF THE COUNTY OF RIVERSIDE,

OPINION

Respondent;

MICHAEL SALINAS et al.,
Real Parties in Interest.

ORIGINAL PROCEEDING; petition for writ of mandate. Charles D. Field, Judge. Petition granted in part and denied in part.

Holland & Knight and Alex R. Baghdassarian, James Kawahara; Law Office of John Schumacher and John Schumacher for Petitioners.

No appearance for Respondent.

Holstein, Taylor, Unitt & Law and Brian C. Unitt; Velie & Velie and Jonathan T. Velie for Real Parties in Interest.

Petitioners, defendants in the trial court, are members of the Enrollment Committee of the Temecula Band of Luiseno Mission Indians of the Pechanga Indian Reservation, commonly known as the Pechanga Band (Band). Real parties, plaintiffs below, were enrolled members of the Band at the time of the commencement of this action.

According to the complaint, defendants have initiated "disenrollment procedures" against plaintiffs on the general ground that the ancestor from whom plaintiffs claimed descent was not one of the "original Pechanga people" and her descendants therefore did not qualify as Band members. Plaintiffs' objections to the procedures are generally as follows:[1] 1) the disenrollment proceedings had been improperly instituted by fewer than 51 percent of the Committee members; 2) the Tribal Chairman had removed several members, leaving an insufficient number to take valid action; 3) members of the Committee were improperly reinstated to create a false quorum; 4) the Committee is imposing proof requirements on plaintiffs that are more strict than set out in Pechanga law; and 5) the Committee acts inconsistently and arbitrarily in deciding whether a person is entitled to membership.

Plaintiffs asserted causes of action for "Violation of Pechanga Band Law," and "Violation of U.S. Law," citing the Indian Civil Rights Act of 1968, title 25 United States Code section 1302.



After certain proceedings, which need not be recounted in detail (including a brief sojourn in federal court, which determined that it did not have jurisdiction and remanded to California), defendants, appearing specially, demurred and moved to quash service of summons on them. The bases for the motions, although related, were technically

separate: for the demurrer, that the trial court lacked subject matter jurisdiction of the dispute; and for the motion to quash, that the individual defendants had been acting in the capacity of tribal officials and were therefore immune from suit.

The trial court eventually disagreed and this petition followed.

DISCUSSION

The issues raised by the petition are significant, but we have elected not to attempt a detailed treatise on Indian law. Although we acknowledge the excellence of the briefs submitted by plaintiffs (as well as those on behalf of defendants), we believe the resolution of the case is relatively clear. In addition, our resolution of the case means that plaintiffs' grievances must be resolved in the political arena, not the judicial forum.

Plaintiffs base their position that California state courts have jurisdiction over this dispute on "Public Law 280." (28 U.S.C. § 1360.) In pertinent part, it provides that, "Each of the States listed ... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country ... to the same extent that such State has jurisdiction over other civil causes of action...."

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*[footnote continued from previous page]*

[1] We have omitted mention of alleged improprieties which do not directly affect plaintiffs.



They argue that as the Band does not have a "tribal court," the state courts therefore operate as de facto "tribal courts" to decide disputes between tribal members. As we will explain, California courts act as "tribal courts," if at all, in only a limited sense, and that sense does not extend

as far as plaintiffs argue. Plaintiffs have cited no case, and our research has disclosed none, which purports to apply Public Law 280 to a dispute such as the one here. With some reluctance we conclude that Congress did not intend the statute to authorize state courts to intervene in a case such as this.[2]

Although it is not directly on point, the seminal case of *Santa Clara Pueblo* v. *Martinez* (1978) 436 U.S. 49 (*Martinez*) is not only authoritative but instructive. *Martinez* was a proposed class action brought by a female tribal member and her daughter, suing to obtain membership in the tribe for children who were excluded under a recent tribal ordinance affecting the children of tribal women who married outside the tribe. The children of men who married outside the tribe were *not* excluded, and the plaintiffs charged that the ordinance constituted a violation of the equal protection clause of the Indian Civil Rights Act of 1968. (25 U.S.C. §§ 1301 et seq.)

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[2] We say "with some reluctance" because, as defendants admit, our ruling means that plaintiffs have *no* formal judicial remedy for the alleged injustice. However, it has been recognized that this lack is sometimes an inevitable consequence to the individual tribal member of the tribe's sovereign immunity. (*Taylor* v. *Bureau of Indian Affairs* (S.D. Cal. 2004) 325 F.Supp.2d 1117, 1122.) As we will discuss further, tribes have been given broad power to order their own affairs without regard for Eurocentric mores. To the extent that Congress has not chosen to provide an effective *external* means of enforcement for the rights of tribal members, the omission is for Congress to reconsider if and when it chooses.



It had previously been held, and is not now disputed, that Indian tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." (*Martinez, supra,* 436 U.S. at p. 56; and see cases cited at fn. 7.) The Indian Civil Rights

Act represented an affirmative act of Congress to impose statutory obligations on the tribes. However, without reaching the merits of plaintiffs' claim, the Supreme Court relied on the absence of an express remedy or language conferring jurisdiction on the federal courts, and noted that, "Creation of a federal cause of action for the enforcement of the rights ... plainly would be at odds with the congressional goal of protecting tribal self-government." [3] (Martinez, supra, 436 U.S. at p. 64.) The court also commented that "resolution of statutory issues under § 1302 ... will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts ... the tribes remain quasi sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments." Accordingly, it held that federal courts had no jurisdiction over actions to enforce the Indian Civil Rights Act (*Martinez, supra,* 436 U.S. at pp. 71.)

*Martinez* stands as the primary case recognizing the importance of tribal rights and sovereignty, and the limited extent to which the federal government has chosen to intrude on these concepts. Significantly for our case, the Supreme Court also commented that "A

[3] As the court observed, the Act *does* allow "[t]he privilege of the writ of habeas corpus" 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.)



tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." (*Martinez, supra,* 436 U.S. at p. 72, fn. 32.) Although

*Martinez* arose under the Indian Civil Rights Act rather than Public Law 280, its construction of Congressional intent and the general disavowal of any Congressional purpose to allow general judicial intervention in tribal matters stands as a valuable cautionary statement.

We agree with those courts that have found that, in light of *Martinez*, Public Law 280 cannot be viewed as a general grant of jurisdiction to state courts to determine Intratribal disputes. (See also *Ackerman* v. *Edwards* (2004) 121 Cal.App.4th 946, 953-954.) Rather, "[t]he primary concern of Congress in enacting Pub L 280 ... was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." (*Bryan* v. *Itasca County* (1976) 426 U.S, 373, 379 (*Bryan*).) Accordingly, Public Law 280 allowed state courts to enforce their own criminal laws with respect to offenses committed either by or against Indians on Indian land.

With respect to the grant of civil jurisdiction, the Supreme Court has acknowledged that the legislative history reflects a "virtual absence of expression of congressional policy or intent...." (*Bryan, supra*, 426 U.S. at p. 381.) However, this provision "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens ..." (Id. at p. 383.) Its effect is therefore "to grant jurisdiction over private civil litigation involving reservation Indians in state court." (*Id.*



at p. 385.) In our view, this is not a "private legal dispute between reservation Indians," but rather goes to the heart of tribal sovereignty.

It is very clear that Public Law 280 does not provide

jurisdiction over disputes involving a *tribe*. As the court noted in *Bryan,* "there is notably absent any conferral of jurisdiction over the tribes themselves ..." (*Bryan, supra,* 426 U.S. at p. 389; see also *Ackerman* v. *Edwards*, *supra.* 111 Cal.App.4th at 954.) Plaintiffs tacitly acknowledge this fact, as they have not attempted to sue the Band, but have only sued the individual members of the Enrollment Committee. They insist that the individual member defendants are subject to jurisdiction and the dispute is justiciable. We disagree.

It is quite true that individual tribal members have no sovereign immunity from suit *unless* they are acting in official capacities on behalf of a tribe. (See *Turner* v. *Martire* (2000) 82 Cal.App.4th 1042, 1046.) Plaintiffs argue that the defendants do not qualify for two reasons: first, they exercised only ministerial authority in reviewing enrollment matters, and second, that in taking the actions of which complaint is made, they acted ultra vires and thus lost any immunity. (*Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1421.) Neither argument is persuasive.

First, we cannot agree that the "Enrollment Committee" is intended to operate in a mechanical matter, exercising no discretion. Although the Band Constitution and other enactments may set out the basic qualifications for tribal membership, it is apparent to us that the Committee is necessarily entrusted with substantial discretion in evaluating evidence submitted for its consideration. Perhaps more importantly, in exercising its



authority to determine who qualifies as a member of the Band, the Committee also necessarily acts as an essential arm of the Band itself. As the Supreme Court observed in *Martinez,* "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its

existence as an independent political community." (*Martinez, supra,* 436 U.S. at p. 72, fn. 32.) Insofar as the Committee decides issues of Band membership, we can hardly conceive of a more essential tribal function.

Secondly, even if the allegations of the complaint are sufficient to show that the defendants were acting ultra vires in the sense that they failed to follow established procedures, the dispute remains essentially between plaintiffs and the Band.[4] Whether or not there is personal jurisdiction over the defendants therefore is largely moot. Nor are we persuaded by real parties' assertion that there is no effective redress for misconduct by members of the Enrollment Committee. According to the Band's "Enrollment Disenrollment Procedure" enacted by the General Council in 1988, the Enrollment Committee's decision is subject to an appeal to the Council. The Council has the authority to "correct any infractions to the disenrollment procedure." It may also

[4] The term ultra vires, meaning "beyond the power," is used in varying senses. A corporation may act within its lawful power, but in violation of the governing law; such an act will not be held ultra vires and although it is wrongful, it can be ratified or validated by conformance to the statutes. (See Sammis v. Stafford (1996) 48 Cal.App.4th 1935,1942.) On the other hand, a governmental agency that acts outside of the scope of its statutory authority acts ultra vires and the act is void. (See Turlock Irrigation Dist. v. Hetrick (1999) 71 Cal.App.4th 948 [irrigation district's attempt to provide natural gas service is ultra vires].) It seems more appropriate here to term the defendants' actions as being well within their essential authority, although arguably procedurally improper.



"instruct" the Committee to re-evaluate a disputed matter applying "any specific suggestion for a fair decision." If the defendants breached their duties to the Band, the Band may "correct" and "instruct" them.[5] We cannot, and do not,

assume that the Committee would defy such instructions. We note that a tribe may choose to exercise its "law-applying" power *either* through a tribal court or a "nonjudicial tribal institution" (*Martinez, supra,* 436 U.S at p. 66); and where a tribe, as here, has provided for an internal appeal of crucial decisions, there is no need for state courts to act as a "tribal court." The fact that the Band may not have a judicial forum appropriate for the resolution of disputes between members concerning such matters as private contracts does not mean that it has not the power to make final determinations of internal tribal matters such as tribal membership.

Finally, to further confirm our decision, we consider the lessons to be learned from the case of *Gallegos* v. *French* (1991) 2 Okla. Trib. 209 (*Gallegos*), a decision by the Court of Indian Appeals[6] for the Delaware Tribe of Western Oklahoma. The issue was claimed irregularities in a tribal election, with the defendants being members of the "Election Board" who were allegedly not proceeding in accordance with tribal constitutional and other legal provisions. Pertinently, the court held that it had jurisdiction over what it conceded was an "intratribal dispute" because, under the federal regulations establishing the "Court of Indian Offenses," that court was intended to act

[5] In fact, in March of 2003, the Tribal Council did intervene in previous disenrollment proceedings concerning at least some of Plaintiffs, and issued instructions to the Committee "in order that fairness and impartiality may be upheld."



both as a federal agency and a tribal court. In the latter role, "the court is exercising the sovereignty of the tribe for which it sits." (Id. at p. 232.) As the purpose behind the

creation of the Courts of Indian Offenses was similar to that prompting the enactment of Public Law 280 (see *Bryan*; *Gallegos, supra,* 2 Okla. Trib. at pp. 230-231), it might be argued that under the latter statute, state courts might also be considered "tribal courts" capable of exercising tribal power.

However, as defendants have pointed out, subsequent to the *Gallegos* decision, the governing regulations were amended. Title 25 of the Code of Federal Regulations part 11.104(b) now provides that "no Court of Indian Offenses may adjudicate an election dispute ... or adjudicate any internal tribal government dispute." Thus, it is clear that the underlying premise of *Gallegos* was in error. The Courts of Indian Offenses do *not* function as true "tribal courts" and may not interfere in essential intratribal matters.[7]

The fact that Public Law 280 was not similarly amended is not significant because two different bodies were involved. The Bureau of Indian Affairs amended the federal regulations controlling the Courts of Indian Offenses, but the failure of Congress to act with respect to Public Law 280 does not reflect a meaningful contrasting choice. The Bureau may have acted to clarify its regulations in response to a specific perceived error

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*[footnote continued from previous page]*

[6] That court sat as a reviewing court for the "Court of Indian Offenses," see below.

[7] The Gallegos court itself recognized that if the plaintiff had pursued his available tribal administrative remedy, which tribal law declared would result in a "final" decision, the court "may not have been able to rehear the merits...." (Gallegos, supra, 2 Okla. Trib. at p. 227.)



(e.g., the *Gallegos* holding); Congress, on the other hand, was not faced with any similar interpretation of Public

Law 280. Thus, real parties can take no comfort from the failure to amend the latter statute.

The jurisdiction to state courts granted by Public Law 280 can hardly be construed to go farther than that conferred upon the Courts of Indian Offenses. Although it is true that the term "internal tribal government dispute" does not expressly include membership issues, it is apparent that such issues are basic to tribal self-governance. The point may be most clearly made by the example of litigation concerning the outcome of an election. If the critical point were the membership rights of certain voters (or rejected voters), obviously, surely the courts could not intervene to make membership decisions. Here, plaintiffs are effectively asking this court to interfere with the Band's determination of "Who is a Pechanga?" and that decision would unavoidably have substantial and continuing effects on the Band's self-governance. Congress cannot have had such an intent in enacting Public Law 280.

In short, we are persuaded that Congress did not intend that the courts of this state should have the power to intervene – or interfere – in purely tribal matters. Insofar as plaintiffs sue for violations of "Pechanga Band Law," it is for the Band to determine what that law is and whether or not it has been violated. The cause of action under the Indian Civil Rights Act is also unsustainable in California courts. As *Martinez* explains, Congress chose not to create a *federal* remedy for tribal violations of the act in order to



protect tribal autonomy; a fortiori Congress cannot have intended that the various courts of Public Law 280 states would have jurisdiction over such claims.[8]

In essence, the federal government has largely elected to entrust Native Americans' civil rights to an "honor

system" under which tribes are exhorted to respect and apply United States Constitutional principles but cannot be compelled to do so.[9] Whether the potential for corruption in the system created by the influx of gambling wealth to some tribes would justify a change is not for us to decide.[10] If plaintiffs are unable to persuade the tribal council of the merits of their claims, so be it. The courts of this state have no power to intervene.

DISPOSITION

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[8] As was noted above, Congress did provide a federal remedy in habeas corpus. This has been applied by at least one federal court in a somewhat similar case in which the plaintiffs had been "banished" from their tribe. (Poodry v. Tonawanda Band of Seneca Indians (2d Cir. 1996) 85 F.3d 874.)

[9] At oral argument, counsel for the Tribe stressed that the procedures in place concerning membership issues satisfy the requirements of due process that a party be given notice of the claims against him and an opportunity to respond. We note that the concept also includes the requirement of an impartial decision-maker. (Catchpole v. Brannon (1995) 36 Cal.App.4th 237,245.) We also note that we understand real parties as raising issues relating to the uneven application of tribal rules.

[10] We do not mean to imply that we accept plaintiffs' claims concerning defendants' motives. Where large sums of money are involved, however, it has long been recognized that the potential for corruption always exists.

It is worth noting at this point that the dangers of arbitrary and self-interested action on behalf of powerful tribal members or a tribal majority were raised by Justice White-with examples from the Congressional hearings on the Indian Civil Rights Act - in his dissent in Martinez. (Martinez, supra, 436 U.S at pp. 81-84 (dis. opn. of White, J).)



Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order overruling defendants' demurrer, and to enter a new order sustaining the demurrer without leave to amend on the basis that the court lacks subject matter jurisdiction over

the dispute. With respect to defendants' motion to quash, the petition is denied without prejudice as moot. Any discussion of the issue on our part would constitute an advisory opinion, and we decline to do so. (See *Salazar* v. *Eastin* (1995) 9 Cal.4th 836, 860.)

The parties shall bear their own costs.

CERTIFIED FOR PUBLICATION

/s/Richli
Acting P. J.

We concur:

/s/ McKinster
J.

/s/Gaut
J.

Appendix C

Court of Appeal, Fourth Appellate District,
Division Two – No. E036474
S137418

IN THE SUPREME COURT OF CALIFORNIA

En Banc

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BOBBI LAMERE et al., Petitioners,

v.

RIVERSIDE COUNTY SUPERIOR COURT, Respondent;

MICHAEL SALINAS, Real Party in Interest.

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Petition for review DENIED.

SUPREME COURT
FILED
NOV 18 2005
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE
Chief Justice

Appendix D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 31, 2006

Mr. Jonathan Velie
Velie & Velie
210 E. Main Street
Suite 222
Norman, OK 73069

Re: Michael Salinas, et al.
v. Bobbi Lamere, et al.
Application No. 05A690

Dear Mr. Velie:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on January 31, 2006 extended the time to and including March 16, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
by
Sandy Spagnolo
Case Analyst