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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BISHOP PAIUTE TRIBE,  
  
                                Plaintiff,  
  
          v.  
  
INYO COUNTY; WILLIAM LUTZE,  
Inyo County Sheriff; THOMAS  
HARDY, Inyo County District  
Attorney,  
  
                                Defendants.

No. 1:15-CV-00367-GEB-JLT

**ORDER DISMISSING AMENDED  
COMPLAINT FOR LACK OF A  
JUSTICIABLE CASE OR CONTROVERSY**

Each Defendant moves separately for dismissal of Plaintiff Bishop Paiute Tribe's ("the Tribe's") First Amended Complaint ("FAC"), in which the Tribe seeks declaratory and injunctive relief. (See ECF Nos. 13-16.) The Tribe opposes each motion.

Before considering whether any dismissal motion has merit, the Court decides sua sponte whether the Tribe's claim for relief is ripe for judicial review since a federal court has an independent duty to consider its jurisdiction. Review of the FAC reveals it does not contain factual allegations demonstrating a justiciable case or controversy over which the federal court has jurisdiction.

1 The jurisdiction of federal courts is defined  
2 and limited by Article III of the  
3 Constitution. In terms relevant to the  
4 question for decision in this case, the  
5 judicial power of federal courts is  
6 constitutionally restricted to "cases" and  
7 "controversies." As is so often the situation  
8 in constitutional adjudication, those two  
9 words have an iceberg quality, containing  
10 beneath their surface simplicity submerged  
11 complexities which go to the very heart of  
12 our constitutional form of government.  
13 Embodied in the words "cases" and  
14 "controversies" are two complementary but  
15 somewhat different limitations. In part those  
16 words limit the business of federal courts to  
17 questions presented in an adversary context  
18 and in a form historically viewed as capable  
19 of resolution through the judicial process.  
20 And in part those words define the role  
21 assigned to the judiciary in a tripartite  
22 allocation of power to assure that the  
23 federal courts will not intrude into areas  
24 committed to the other branches of  
25 government. Justiciability is the term of art  
26 employed to give expression to this dual  
27 limitation placed upon federal courts by the  
28 case-and-controversy doctrine.

16 Flast v. Cohen, 392 U.S. 83, 94-95 (1968). "Ripeness is one  
17 component of the Article III case or controversy requirement. The  
18 'basic rationale' of the ripeness requirement is 'to prevent the  
19 courts, through avoidance of premature adjudication, from  
20 entangling themselves in abstract disagreements.'" Oklevueha  
21 Native Am. Church of Haw. v. Holder, 676 F.3d 829, 835 (9th Cir.  
22 2012) (citing Abbot Labs. v. Gardner, 387 U.S. 136, 148 (1967)).

23 The difference between an abstract question  
24 and a "controversy" . . . is necessarily one  
25 of degree, and it would be difficult if it  
26 would be possible, to fashion a precise test  
27 for determining in every case whether there  
28 is such a controversy. Basically, the  
question in each case is whether the facts  
alleged, under the circumstances, show that  
there is a substantial controversy, between  
the parties having adverse legal interests,  
of sufficient immediacy and reality to

1                    warrant issuance of a declaratory judgment.  
2 Md. Case. Co. v Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)  
3 (emphasis added). "The burden of establishing ripeness . . .  
4 rests on the party asserting the claim." Colwell v. HHS, 558 F.3d  
5 1112, 1121 (9th Cir. 2009).

6                    The alleged case or controversy in the Tribe's FAC  
7 concerns the following allegations:

8                    [Defendants] threat[en] [to] arrest and  
9 prosecut[e] a [T]ribal law enforcement  
10 officer . . . for performing his duties on  
11 the Tribe's Reservation. The Tribe seeks an  
12 order declaring that Defendants are  
13 interfering with the Tribe's inherent  
14 sovereign authority to take action, defined  
15 by federal law, against non-Indians  
perpetrators on tribal lands. Federal law  
establishes that tribes have inherent  
authority over non-Indians on tribal lands to  
stop[;] restrain[;] detain[;] investigate  
violations of tribal, state and federal  
laws[;] and deliver or transport the non-  
Indian to the proper authorities.

16 (FAC ¶ 1.) The Tribe also alleges in the FAC that on January 6,  
17 2015, Defendant Inyo County Sheriff Lutze ("Sheriff Lutze")  
18 issued a "Cease and Desist Order" regarding the Tribe's police  
19 officers, (FAC ¶ 31), in which he states the officers "are  
20 continuously committing serious violations of California criminal  
21 statutes," and "have been employing unlawful force on subjects  
22 during the unlawful exercise of authority;" and that the tribal  
23 police shall "immediately . . . cease and desist the unlawful  
24 exercise of California peace officer authority." (FAC Ex. 3, ECF  
25 No. 12-1.) Sheriff Lutze further states in the Cease and Desist  
26 Order:

27                    If Tribal Police do not comply with this  
28 cease and desist order within [10 days], be  
advised that Tribal Police employees will be

1 subject to arrest and criminal prosecution  
2 for applicable charges as well as Penal Code  
3 § 538d (Fraudulent Impersonation of a Peace  
4 Officer). In addition, this Office will seek  
5 injunctive relief and an order for court  
6 costs and attorney's fees. Tribal Police  
criminal and civil liability, both  
individually and collectively, could be  
considerable, not to mention the liability  
exposure to victims of Tribal Police  
misconduct.

7 (Id.) The Tribe responded to the Cease and Desist Order in a  
8 letter dated January 15, 2015, stating in pertinent part:

9 While we disagree with your presentation of  
10 the facts, and your interpretations of  
11 applicable law, we understand that your  
12 concerns are motivated by a legitimate desire  
13 to protect the public . . . As a show of good  
14 faith and to keep the peace, we have directed  
15 our tribal officers to ensure that the  
16 matters outlined in your January 6, 2015  
17 letter are addressed. Specifically, our  
18 tribal law enforcement officers will not  
19 exercise California peace officer authority  
20 on or off the [R]eservation with the  
21 exception of: (a) daily patrols that require  
22 them to cross State Hwy 168 and when  
23 traversing U.S. Highway 395, and (b)  
24 traveling to and from their homes off the  
25 reservation. The officers have been directed  
26 that they are not authorized by the Tribe to  
27 expose their firearms off reservation except  
28 in compliance with applicable state law.

(Decl. John Kirby ISO Defs.' Replies ("Kirby Decl"), Ex. A, ECF  
No. 29 (emphasis added).)<sup>1</sup>

The Tribe's response letter is attached to the  
Declaration of John Kirby, in which Kirby argues in a conclusory

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<sup>1</sup> The Tribe's response letter to Sheriff Lutze, which is attached to the Declaration of John Kirby, is treated as being part of the FAC since the letter is incorporated by reference in paragraph 32 of the FAC. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (stating "[c]ertain written instruments . . . may be considered part of the pleading . . . [e]ven if [it] is not attached to [the] complaint," if it is "incorporated by reference into [the] complaint [and] . . . forms the basis of the plaintiff's claim.").

1 manner:

2 This [response letter] raises the issue of  
3 mootness of this litigation, and subject  
4 matter jurisdiction, as well as accompanying  
5 justiciability, and further speaks to and  
6 underscores the issue of ripeness, as well as  
7 the issue of existence of an actual case or  
8 controversy with a real life fact-basis that  
9 is subject to adjudication by this Court.  
It also speaks to the position of all  
defendants, as set forth in their  
Replies, that declaratory relief is . . .  
inappropriate with respect to the abstract  
principle of law that the Tribe seeks to have  
adjudicated.

10 (Kirby Decl. ¶ 11.)

11 The Tribe does not oppose consideration of its response  
12 letter, but objects to the cited portion of the Kirby  
13 declaration, arguing Kirby's arguments are "new and additional  
14 grounds for dismissal" that should not be considered. (Pl.'s  
15 Consolidated Opp'n Defs.' Decl. of John Kirby, ("Opp'n") 2:22,  
16 ECF No. 33.) The merits of this objection need not be decided  
17 because the Court is considering its jurisdiction sua sponte.  
18 However, the Tribe's argument concerning whether the FAC evinces  
19 a justiciable case or controversy, which is included in the  
20 Tribe's opposition to the Kirby Declaration, is considered. The  
21 Tribe contends its FAC evinces a justiciable case or controversy  
22 since it:

23 seeks to accomplish . . . clarification of  
24 applicable law, the scope of [tribal]  
25 officers' law enforcement duties and their  
26 ability to perform those duties without fear  
27 or expectation of criminal prosecution. . . .  
28 There also remains a fundamental difference  
between the Tribe's and the Defendants'  
interpretation of federal law . . . . Without  
Declaratory Relief, the Tribe has no  
assurance that Defendants will refrain from  
future arrest and prosecutions of tribal

1 officers for carrying out their lawful  
2 duties.

3 (Opp'n 3:25-4:10.) The Tribe prays for the following prospective  
4 relief in its FAC:

5 A declaration that Defendants' . . .  
6 threat of criminal prosecution of the Tribe's  
7 police officers, violates federal common law  
8 and directly interfer[e]s with the Tribe's  
9 inherent authority to maintain a police  
10 department and protect public safety on its  
11 Reservation.

12 A declaration that the Tribe's police  
13 officers have the authority on its  
14 Reservation to stop[;] restrain[;]  
15 investigate violations of tribal, state, and  
16 federal law[;] detain[;] and transport or  
17 deliver a non-Indian violator to the proper  
18 authorities [and that by] carrying out these  
19 federally authorized actions, the Tribe's  
20 duly authorized law enforcement officers are  
21 not impersonating a state officer nor is  
22 their restraint, investigation and detention  
23 of a non-Indian, in compliance with  
24 provisions of the Indian Civil Rights Act, an  
25 "arrest" for purposes of state criminal  
26 charges or false imprisonment.

27 The Defendants be enjoined from  
28 arresting and criminally charging the Tribe's  
duly authorized police officers, acting in  
compliance with the Indian Civil Rights Act,  
for carrying out their duties as clearly  
delineated under tribal and federal law, or  
otherwise interfering and threatening tribal  
officers while executing their duty.

(FAC ¶¶ 44-46 (paragraph numbering omitted).)

The Tribe appears to root its allegations of an actual  
controversy in concerns about the warning contained in the Cease  
and Desist Order, which states the Tribe's police officers could  
be subject to criminal prosecution and/or a civil action if they  
exercise what Sheriff Lutze characterizes as "unlawful force  
during the unlawful exercise of authority[;]" however, in its

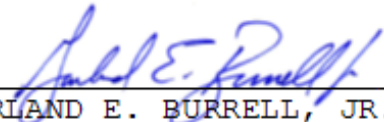
1 response letter, the Tribe states its "law enforcement officers  
2 will not exercise California peace officer authority on or off  
3 the [R]eservation." Further, the Tribe "directed [its officers]  
4 to ensure that the matters outlined [in the Cease and Desist  
5 Order] are addressed." (Kirby Decl. Ex. A.) The Tribe's FAC does  
6 not allege "a definite and concrete dispute" regarding what  
7 anticipated conduct is involved with the declaratory and  
8 injunctive relief it seeks. Oklevueha Native Am. Church of Haw.  
9 Inc. v. Holder, 676 F.3d 829, 836 (9th Cir. 2012). "Such unknown  
10 . . . claims do not present an immediate or real threat to [the  
11 Tribe and its officers] such that declaratory [and/or injunctive]  
12 relief is proper, Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d  
13 891, 896 (5th Cir. 2000), since "the mere existence of . . . a  
14 generalized threat of prosecution [does not] satisf[y] the 'case  
15 or controversy' requirement." Thomas v. Anchorage Equal Rights  
16 Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). Further,  
17 "[f]or purposes of a preenforcement challenge . . . , the  
18 constitutional ripeness inquiry focuses on [inter alia] . . .  
19 whether the [Tribe has] articulated a concrete plan  
20 [demonstrating that one of its police officers intends] to  
21 violate the law in question," and here the Tribe has not  
22 articulated a plan to violate any law. Alaska Right of Life  
23 Political Action Comm. v. Feldman, 504 F.3d 840, 849 (9th Cir.  
24 2007). The Tribe therefore has not shown the "immediacy and  
25 reality" of a "substantial controversy between the parties" that  
26 is required to establish a justiciable case or controversy. Md.  
27 Case. Co., 312 U.S. at 273.

28 Since the Tribe has not demonstrated a justiciable case

1 or controversy in its FAC, this action is DISMISSED for lack of  
2 jurisdiction and shall be closed.

3 Dated: July 10, 2015

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GARIAND E. BURRELL, JR.  
Senior United States District Judge