No. 17-855

In The Supreme Court of the United States

VANCE NORTON, GARY JENSEN, KEITH CAMPBELL, ANTHONEY BYRON, BEVAN WATKINS, and TROY SLAUGH,

Petitioners,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian Tribe; the BUSINESS COMMITTEE FOR THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, in its official capacity; the UTE TRIBAL COURT OF THE UINTAH AND OURAY RESERVATION; and the HONORABLE THELMA STIFFARM, in her official capacity as Chief Judge of the Ute Tribal Court,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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The issue that Petitioners seek to present to this Court in their petition for writ of certiorari is simply, unquestionably, not presented by the facts which must be accepted for current purposes. Incidentally, the issue they are seeking to present also will not be presented after tribal court remedies are exhausted, but of course discussion of what the facts will be once we have a factual record is exactly why establishment of a factual record is required before there is a federal question presented to this Court.

The key holding in the Tenth Circuit's opinion, which is consistent with this Court's decisions and the decisions of every appellate court which has weighed in on the issue, is that where a case filed in a Tribe's Court presents a plausible claim of tribal court jurisdiction, that Tribe's Court must be provided the opportunity to establish the facts relevant to the jurisdictional question and then apply the law. Until that happens, the allegations of the Tribal Court complaint must be accepted as true. That is the same rule that would apply in a federal court or in a state court. As will be discussed below, it is the only rule that is consistent with basic logic.

The Tribe's Complaint plainly sets forth facts which, if true, not only establish Ute Court jurisdiction but establish that the Ute Court Defendants knowingly and openly trespassed onto the Tribe's Reservation and then continued with that trespass beyond anything which would be permitted even if every one of their false or dubious allegations of fact were true. They even went so far as to exclude the Tribe's law

enforcement officers from the Tribe's own land well after Petitioner Norton had shot at a tribal member on non-public land on the Tribe's Reservation and that tribal member was dying from a gunshot wound.

Petitioners are seeking to skip ahead to issues that might or might not be presented after the Ute Court creates the factual record upon which review can be based. The issue Petitioners are prematurely seeking to present would only be presented if the Ute Court were to accept all of Petitioners' unsupported, and in part frivolous, factual allegations. There is no way for this Court to review the issue Petitioners are seeking to present, because there is not a factual record sufficient for that review. And until there is a factual record and the Tribe's Court is then able to apply the law to that factual record and determine whether or not it has jurisdiction, there is no Article III case or controversy.

DISCUSSION OF FACTS AND PROCEDURAL HISTORY

The Ute Tribe is a federally recognized Indian Tribe composed of three bands of the greater Ute Tribe – the Uintah, White River, and Uncompahgre Bands – who today live on the Uintah and Ouray Reservation in northeastern Utah.

The Tribe is the beneficial owner of the land at issue in this matter. That land is 25 miles inside the boundaries of the Uncompahgre Reservation, a

Reservation which was created by President Arthur as a replacement for a prior Reservation further east that the Tribe had been forced off of. Executive Order of Jan. 5, 1882, reprinted at I Charles J. Kappler, *Indian Affairs: Laws and Treaties* 901 (1904). The federal courts have repeatedly held that the Uncompahgre Reservation is Indian Country. *E.g.*, *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (then-Judge Gorsuch, writing for the panel, provided a detailed history of the relevant litigation). Because the land is Indian Country, the Tribe has the well-established right to exclude non-Indians from the land. *E.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982); *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997). The right is similar, but greater than, the right which all landowners have to exclude others from their non-public lands.

That right predates the United States and has been part of this nation's fabric since the United States was created. It was a right that was well-understood by the framers of the United States Constitution, and was incorporated into the Constitution in the "Indian Commerce Clause," U.S. Const. Art. I, § 8, Cl. 3, and into federal statutes beginning with the Indian Non-Intercourse Act, Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138. In the era of treaty-making between tribes and the United States, the parties sometimes bargained for narrow relinquishments of the tribal right to exclude, e.g., for railroads, for the federal military, or for other purposes. Petitioners here do not claim, and could not claim, that the Ute Tribe

relinquished its right to exclude the lands upon which Petitioners were intentionally and knowingly trespassing.

The specific land at issue is non-public land within the Tribe's Reservation. Petitioners attempt to imply that the land in the present matter is a public roadway or other public land. The undisputable facts show that those are simply not the facts of this case. The facts show the trespass is to non-roadway, non-public land.

Petitioners are some of the eleven non-Indians[1] who, while *NOT* acting as county or municipal officers, knowingly trespassed on the Tribe's non-public land to hunt an Indian who had *NOT* committed any crime, or who trespassed to assist with a cover-up of the events which then occurred. Tribal Court Complaint, App. 33 (hereinafter Complaint). None of those non-Indians

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[1] The Tribal Court complaint is brought against eleven non-Indians. All eleven then brought an unsupported contempt action against the Tribe in the federal court (which they lost), then filed a different suit in the federal district court, claiming they did not need to exhaust tribal court remedies or create a factual record for review. Five of those eleven correctly chose not to bother to petition for a writ of certiorari after they lost in the Tenth Circuit, and the Tenth Circuit decision related to them is now final. Petitioners are the Ute Court Defendants who are aligned with Uintah County and who are represented by Jesse Trentadue. That County and Mr. Trentadue were correctly rebuked in *Ute Indian Tribe v. Utah*, 790 F.3d 1000 for refusing to accept and abide by the federal court decisions settling the Ute Reservation boundaries, and their present petition is merely a continuation of their seemingly never-ending refusal to accept or respect the Tribe's Reservation and the Tribe's sovereignty. The eleven non-Indian Defendants will be referred to as the Tribal Court Defendants.

had sought or obtained the Tribe's permission, nor had they obtained the United States' permission to enter the Tribe's non-public lands. They caused damage during their trespass, including but not limited to lead petitioner Norton being the proximate cause of the death of a tribal member, allegedly and quite possibly by murder.

The Tribal Court Defendants are sued solely in their individual capacity. The Tribe understands that the factual record which will be created in the Tribal Court will need to show that the officers were acting in their individual capacity, and the Tribe expects to have little difficulty creating that record, given the officers' criminal and unlawful behavior. Neither Utah nor the United States accords governmental protections or immunities to criminals.

The tribal member whom Norton caused the death of was Todd Murray. On April 1, 2007, Mr. Murray was a 21-year-old tribal member and father. Mr. Murray had been the *passenger* in a car being driven by another Indian, Uriah Kurip. Utah Highway Patrol officer Swenson (who is a Ute Court Defendant but not a Petitioner) clocked Kurip for speeding. Swenson began his pursuit of Kurip on the Ute Reservation.[2] Swenson informed State dispatch that there were two

[2] Petitioners claim that Swenson started his pursuit off the Reservation. While that allegation is not material to the current petition for a writ of certiorari, the allegation is also false. Swenson alleged he started his pursuit off-Reservation, but the video of his pursuit shows that it started approximately two miles inside the Reservation. *Jones v. Norton*, 10th Cir. App., disk. 4.

Indians in the vehicle. Ultimately, Kurip's car came to a stop 25 miles inside the border of the Tribe's Reservation. That part of the Tribe's Reservation is not a patchwork of Indian and non-Indian Country. All of it is Indian Country, regardless of Uintah County and its officers' ongoing refusal to accept the federal court holdings on that issue. *Ute Indian Tribe*, 790 F.3d 1000.

The two Indians got out of the car, and after initial hesitation, both ran away. In *Jones v. Norton*, Swenson subsequently testified in a deposition that before Mr. Murray ran, Swenson scanned Murray, who was dressed in light clothing, and Swenson did not believe Murray was armed. D. Utah No. 2:01-cv-730-TC. The driver, Kurip, ran north while the passenger, Mr. Murray, ran south. Swenson quickly caught and arrested the driver. *After* Swenson caught Kurip, Vance Norton arrived on the scene. Norton was in his personal vehicle and not in uniform. Swenson told Norton that he had the driver in custody, and that the passenger had headed south on foot. Norton drove south, then got out of his vehicle with his gun drawn, and went hunting for Mr. Murray.

Norton found Mr. Murray, and Norton admits he shot two times at Mr. Murray. What happened next is unclear because the FBI officers assigned to investigate the death spoliated most of the evidence. There were two guns which had obvious importance: the gun that Norton used to shoot at Mr. Murray and the gun that Norton claimed Murray used to shoot himself. The FBI did not preserve either gun, did not test either guns for blood or tissue, did not prevent Norton from roaming around the crime scene without supervision,

did not search Norton's vehicle even though Norton visited his vehicle after he had shot at Mr. Murray, did not obtain an autopsy of Mr. Murray, did not obtain an admissible blood sample from Mr. Murray, etc. Norton was even allowed to keep his gun, the one that he admitted he had used to shoot at Mr. Murray, for over half an hour. Reviewing this record of spoliation, the Federal Circuit Court of Appeals held in the Murray Family's related suit against the United States:

> But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact shot by Norton.

Jones v. United States, 846 F.3d 1343, 1359 (Fed. Cir. 2017). On remand from *Jones*, the Court of Claims currently has before it a motion seeking default judgment or other spoliation sanctions against the United States. *Jones v. United States*, Fed. Cl. No. 1:13-cv-00227, Dkt. 78. In its motion for default judgment in the Court of Federal Claims, the Murray family discusses in detail how the meager existing physical evidence, while not dispositive, points at Norton as the person who killed Mr. Murray. The spoliated evidence would have definitively shown whether Norton was the killer. For example, even Norton's own expert in *Jones v. Norton* concluded that the gun used to kill Mr. Murray and the killer's hand would have been covered in blood and human tissue immediately upon pulling the trigger.[3] The United States obtained close-up

[3] As noted, the United States spoliated evidence by not sequestering Norton or taking his gun from him for over half an hour after Norton shot at Murray. Norton had ample time and opportunity to clean his gun.

pictures of the gun Norton claims Mr. Murray shot himself with. Those pictures appear to affirmatively show that there is no blood or human tissue on the gun, but the very basic test for blood or tissue on the gun was never conducted and the United States subsequently intentionally destroyed the gun without ever having it tested. If that test had been conducted and if, as expected, the test had confirmed what the pictures appear to show, that now lost evidence would have definitively proven that Norton was lying when he claimed Mr. Murray shot himself. Similarly, Mr. Murray was shot on the left back side of his head, but close-up pictures of Mr. Murray's left hand similarly do not show any blood on his hand. But the United States never conducted simple forensic testing to definitively confirm that Mr. Murray did not have blood or human tissue on his left hand.

In their petition to this Court, petitioners discuss in detail the related Federal District Court suit, but they seek to hide the importance of spoliation to the district court decision.[4] Like the Federal Circuit Court of Appeals, the District Court noted the wholesale

[4] The Tribe was not a party to *Jones v. Norton*, and the Tribe has brought suit against Norton based upon its own rights as landowner and as sovereign to protect its land and jurisdiction from unlawful trespass. It is not bound by the decision in *Jones v. Norton*, and in particular it is not bound by the federal court's application or misapplication of the federal spoliation standard and the conclusion that Norton and his associates were not liable for the wholesale spoliation of evidence. *See Jones v. United States*, 846 F.3d 1343 (holding that the Utah Federal Court decision on spoliation was not binding in the related suit which had different parties).

destruction of evidence at the Norton crime scene, but it concluded that the United States, not the local police, had the duty to preserve the evidence. It therefore refused to impose spoliation sanctions against Norton or other local police. After making that spoliation decision, the Utah District Court concluded that there was not enough remaining physical evidence to permit a reasonable federal jury to reject the testimony of the sole surviving eyewitness, Norton. The Tribe was not a party to that District Court suit, nor was there a claim of trespass in that suit; and Norton was only found not guilty in that suit because he was not the liable spoliator. He was not found innocent and there was no finding regarding trespass in that suit, because there was no claim of trespass.

In its opinion, the Tenth Circuit thoroughly explained that one of the reasons the Ute Court Defendants are required to exhaust Ute Court remedies before they run to federal court is so that there will be a full and accurate factual record upon which the federal court can review this matter. Petitioners' attempt to obtain this Court's review based upon their disagreement with the facts in this case therefore illustrates exactly why exhaustion is required. It defeats their own argument. The remainder of Respondents' discussion of facts will correct Petitioners' open and intentional misstatements of fact.

Tribal Court Defendants admitted that they did not have an arrest warrant and did not have the Ute Tribe's permission to enter onto the Tribe's non-public trust land. Their only possible argument would

therefore have to be that they somehow had some right to enter the Tribe's non-public land without permission of the landowner and that they had the further right to exclude the landowner's own law enforcement officers from the Tribe's own lands.

Petitioners do not have a factual basis for their petition for a writ of certiorari, and base their petition on factual allegations which are not of record, and many of which are simply false.

Petitioners were not government officers when trespassing in pursuit of Mr. Murray.

Petitioners assert they were acting in their capacity as county or municipal law enforcement officers. Under the current procedural posture, that is incorrect, and it will be a strongly disputed factual issue once there is a full record for review. Simply and dispositively, the Ute Court complaint alleges claims against Petitioners in their individual capacity and there is currently no factual record in the Tribal Court for rejecting those factual allegations. Petitioners admit that they were not cross-deputized by either the United States or the Tribe. The Tribal Court complaint alleges facts which, if ultimately proven, will support the Tribe's allegation that Petitioners were acting far outside the scope of any employment. Complaint, *passim*, *e.g.*, ¶¶13-23. Petitioners will presumably attempt to refute the Tribe's factual presentation on this point, but the Tribe expects that the facts will ultimately support all of the allegations in the Tribal Court complaint. But the important point is that under the

current posture, the "facts" are that Petitioners were merely non-governmental trespassers who lacked probable cause to believe that they were pursuing a criminal, and who lacked permission or jurisdiction to hunt Mr. Murray on the Tribe's non-public lands. Complaint ¶¶58-61.

Additionally, even under Petitioners' disputed version of facts, exhaustion of Tribal Court remedies would still be required because Petitioners' disputes do not provide any legal basis for their exclusion of the Tribe's law enforcement officers from the Tribe's own lands after the shooting. Excluding the landowner is itself trespass.

Kurip is an Indian.

Petitioners assert Kurip is a non-Indian. That is false. Complaint ¶28.[5] It is also contrary to the officers' understanding at the time that Kurip was being pursued. Tribal Court Defendant Swenson (who chose not to petition this Court for review) acknowledged that he believed he was pursuing a car "with two tribal males and Nevada plates." Complaint ¶29.[6]

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[5] As with most of Petitioners' allegations, its claim that Kurip is not an Indian is not only contrary to the facts as alleged in the Tribal Court complaint, but is contrary to the facts known to Petitioners. In *Jones v. Norton*, Kurip submitted an affidavit showing that he is enrolled as FB# 507 of the federally recognized Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada.

[6] *See also Jones v. Norton*, App. VIII, 2380:4-7; App. XV, 4868:24-4869:1.

Mr. Murray had not committed any offense.

Appellees assert that Kurip committed several off-reservation felonies. That is contrary to paragraphs 30-32 of the Tribal Court complaint. But more important for current purposes, it is immaterial to whether the officers were committing trespass when they hunted down Mr. Murray after having already arrested Mr. Kurip. Neither the Tribe (the victim of the trespass) nor Mr. Murray had committed any crime, nor were either even suspected of having committed any crime. Complaint ¶25; *Jones v. Norton*, D. Utah Dkt. 73 at 8 (holding that "Officers had no probable cause to believe that Mr. Murray was involved in criminal activity" and that the officers' hunt of Mr. Murray was not "hot pursuit.").

Petitioners' belatedly claimed motives are not the facts applicable to this petition, and are also dubious and disputed.

Petitioners assert that officers sought Mr. Murray for officer safety and because they did not know if Mr. Murray had been injured. Materially, that is contrary to the allegations of the complaint. It is also contrary to every single police report from the time and is contrary to the bulk of the officers' subsequent deposition testimony in *Jones v. Norton*.[7]

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[7] Despicably, Appellees slander the deceased with false allegations, stated as "fact" that Mr. Murray, allegedly not knowing that there were other officers in the area, may have been "circling back" to harm Officer Swenson. That is contrary to the allegations

Mr. Murray was not under the influence of alcohol or drugs.

Petitioners assert that Mr. Murray was intoxicated and had recently used methamphetamines. While that is their allegation, and they are welcome to try to prove it, the Tribe expects that they will not be able to provide any competent evidence for their assertion. They base that allegation on blood results that would not be admissible in any competent court because there is no chain of custody; and there are other substantial indicia consistent with Petitioners tampering with the blood.[8] Complaint ¶¶68-69.

The fatal shooting of Mr. Murray was not "witnessed by several officers."

The contemporaneous police reports show only one officer, Vance Norton, witnessed Mr. Murray being

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of the complaint and is also contrary to the deposition testimony. That testimony consistently shows that Mr. Murray was south of the stop location and heading south, i.e., farther away. Appellees conjecture that Mr. Murray was unware of other officers is easily disproven because the area is so quiet that one can hear someone approaching from far away, from sight lines, and because Mr. Murray was keenly aware that numerous police vehicles had previously been chasing Mr. Kurip. In the Tenth Circuit, petitioners also repeatedly made the knowingly false factual allegation that Mr. Murray (who had only one minor misdemeanor charge in his life, which was closed before April 1, 2007) had been a gang member and had a felony warrant out for his arrest.

[8] In addition to the lack of chain of custody, Appellees, for reasons they have never explained, drew multiple vials of blood for which they are unable to account. Complaint ¶¶68-69.

shot. Years later, one of Norton's alleged co-conspirators and friends claimed that he saw, from a great distance, Mr. Murray waving his arms in the air and then falling. His account is dubious to begin with because if it were true, the officer would have included it in his initial police report. Once a factual record is created it will show that from the location where that officer was at the time, he could not possibly have seen the location where Mr. Murray was shot. Further, while he and his attorney think his new "memory" supports Norton's suicide story, it actually does not. Norton claims Mr. Murray put the gun to his head, that Norton yelled, and that Mr. Murray then shot himself and fell. The second officer claimed to see Mr. Murray waving his hands in the air before he fell.

REASONS FOR DENYING THE PETITION

This Court has provided clear notice to its bar that it will rarely grant certiorari to review an alleged misapplication of a properly stated rule of law to the facts, and will rarely review factual disputes. Sup. Ct. R. 10. Petitioners' allegations (which are factually and procedurally incorrect to begin with) set forth issues which fall within both of these categories, and certiorari should be denied. And, as a threshold issue, the federal courts do not yet have a case or controversy, and therefore do not have jurisdiction.

I. This Court lacks jurisdiction because there is not now, and never has been, an Article III case or controversy.

Like every federal court, the first legal question in this Court is whether the federal courts have jurisdiction over the claim. The Tribal Court Defendants invoked federal jurisdiction under 28 U.S.C. § 1331 (federal question). The Tribal Appellants moved to dismiss the suit, contending the district court lacks subject matter jurisdiction because, *inter alia*, there is no Article III case or controversy.

The Tenth Circuit held that it had jurisdiction based upon application by analogy of *Ex Parte Young*, 209 U.S. 123 (1908), to the Tribe's judge. That decision is wrong, and this Court therefore does not have jurisdiction. Assuming, *arguendo*, that *Ex Parte Young* applies to tribes, the present matter does not come within the limited scope of *Ex Parte Young*. Federal court review of a tribal court action is strictly limited to reviewing whether the tribal court exceeded a federally imposed limitation on tribal court jurisdiction. *E.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). *Ex Parte Young* then would provide a federal court with jurisdiction to enjoin a tribal judge who took action exceeding a federally imposed limitation. But here, there is no allegation, and there could not be any allegation, that the Tribe's judge took any action exceeding a federally imposed limitation on his jurisdiction. The only action the Tribe's Court has taken is to allow a complaint to be filed in

the Tribe's Court. Tribal courts, like every other court, have jurisdiction to determine their own jurisdiction. *E.g.*, *United States v. Ruiz*, 536 U.S. 622 (2002) (holding "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction"); 20 Am. Jur. 2d *Courts* § 60 (citing cases from numerous jurisdictions for the proposition that a court has the inherent jurisdiction to determine its own jurisdiction). That is, a Tribal Court judge does not exceed his or her jurisdiction when the judge determines whether or not he or she has jurisdiction. A tribal appellate court does not exceed its jurisdiction when it reviews a tribal trial court's jurisdictional decision. Petitioners have not alleged, and could not have alleged, a basis for enjoining the tribal court judge for merely allowing a complaint to be filed in the Tribe's Court, and there is, therefore, not yet a federal question presented. This Court should deny certiorari because there is no federal court jurisdiction.

II. The Court should not grant certiorari to review the factual disputes in this matter, particularly where there is not yet a full factual record upon which that review can be based.

As set forth in detail above, Petitioners are arguing that if their version of facts were correct, the Tribal Court would not have jurisdiction. But as also discussed above, their version of facts is not based upon a factual record, and in fact many of their allegations are demonstrably false. Other of their allegations are

based, often very loosely, on facts found in a case in which the Tribe, the victim of the trespass in the current case, was not a party, and which therefore are not binding on the Tribe. The Tribe gets its own day in court to create its factual record on its claims against the Tribal Court Defendants.

In almost every case, a party would win if the Court were required to decide the case on that party's disputed allegations of fact. But that is not how courts work, and more particularly it is not how this Court works. This Court resolves significant legal issues presented by developed factual records. This case does not provide any legal issue based upon a developed factual record.

III. The Tenth Circuit decision correctly states and applies the rule of law from *Hicks* and *Long*, and Petitioners are actually arguing, as they did below, that the Tenth Circuit should have applied their misquotation of *Hicks*.

Petitioners attempt to fit within Supreme Court Rule 10 by arguing that the Tenth Circuit's decision is in conflict with *Nevada v. Hicks*, 533 U.S. 353 (2001). The Tenth Circuit carefully analyzed and applied *Hicks* and this Court's subsequent clarification of *Hicks*, and the Tenth Circuit correctly analyzed and applied the uniform precedent of this Court and the circuit courts to the facts of this case. As discussed above, Petitioners' argument is based upon other fact-scenarios, not the

facts of this case. In addition, Petitioners' argument is based upon their own misquoting of *Nevada v. Hicks*, 533 U.S. 353 (2001). Petitioners made this exact same argument below, and the Tenth Circuit carefully examined that argument, noted that Appellees' expansive interpretation of *Hicks* was contrary to this Court's own subsequent clarification that tribal courts have *plenary* jurisdiction over suits against non-Indians for actions on reservations, that *Hicks* is a narrow exception to that rule, and that until the facts are fully developed, the courts cannot determine if the case will come within the narrow exception in *Hicks*. Therefore, exhaustion is required.

In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), this Court discussed that the correct rule of federal law is that unless tribal court jurisdiction over a case is not "automatically foreclosed," 471 U.S. at 855, Tribal Court Defendants must create the necessary record related to jurisdictional facts in the Tribal Court and then permit the Tribal Court, through its highest court, to issue its legal decision. Once that is done, limited federal court review is possible, akin to appellate review.

Based upon *National Farmers Union* and *Iowa Mutual*, every federal court which has reached the issue has determined that: "[T]he *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the 'orderly administration of justice in the federal court.'" *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990).

Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996) (citing *FMC*); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (citing *FMC*).

In their response brief to the Tenth Circuit, Petitioners argued that the "facts" for the current pre-exhaustion federal court review are those alleged in their own federal court complaint, i.e., that they escape the exhaustion requirement merely by pleading facts that, if true, would bring the case within an exception to exhaustion. Petitioners could not cite a single case for their legal assertion, and the Tenth Circuit correctly concluded that their assertion was directly contrary to *National Farmers Union, FMC, Mustang Production Company*, and *Duncan Energy Company*. Those cases hold that federal court review is based upon the factual record which is created in the Tribal Court.

Petitioners' argument is also contrary to the core purpose of the firmly established exhaustion rule. That core purpose is to provide for an orderly determination of whether or not the Tribal Court actually has jurisdiction over the case that has been filed in the Tribal Court. Instead of seeking to answer that question, Petitioners, through a federal court complaint alleging vastly different facts, asked the District Court and now asks this Court to determine whether the Tribal Court would have jurisdiction over a set of facts which is simply not before the Tribal Court. The answer to their hypothetical question would not even be of use in the Tribal Court proceedings, since it is not based upon the facts which will be shown in that Court.

Tribal Court Defendants' assertion that the present matter is identical to *Hicks* is based upon their open misquotation of *Hicks*. The fact that they need to misquote *Hicks* in order to make their argument illustrates that they do not come within *Hicks'* very different, limited holding. *Hicks* states:

> Because the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties. Nor can the Tribes identify any authority to adjudicate respondent's § 1983 claim. And since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court. State officials operating on a reservation *to investigate off-reservation violations of state law* are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court.

Nevada v. Hicks, 533 U.S. 353, 374 (2001) (emphasis added). The officers in *Hicks* had in fact obtained multiple tribal warrants, authorizing them to search the property that they then entered. *Id.* at 356. Some courts initially interpreted *Hicks* expansively (though not as expansively as the Tribal Court Defendants here) and this Court, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), rejected those expansive interpretations. It clarified that on

land that the Tribe has both beneficial ownership and governmental authority, tribes have plenary authority. Under that plenary authority on tribally owned land, a tribe has the "'traditional and undisputed power to exclude persons' from tribal land," *Plains Commerce*, 554 U.S. at 335 (quoting *Duro v. Reina*, 495 U.S. 676, 696 (1987)). There is no federal appellate court case after *Plains Commerce* which permits state officers to enter tribal trust land, other than for investigation of an off-Reservation offense.[9]

Petitioners cannot meet the emphasized qualification expressly contained in the holding in *Hicks*: they were not investigating an off-Reservation crime and they were on land owned by the Tribe, without lawful basis for being on that land. To get around that fatal flaw in their argument, they simply delete that qualification. They misquote *Hicks* as follows:

> [T]here is no need to exhaust the jurisdiction dispute in tribal court [because] . . . state officials operating on a reservation . . . are properly held accountable for misconduct and civil rights violations in either State or Federal Court but not in Tribal Court.

Petition at 5.

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[9] Appellees cannot properly contend that Mr. Murray running away from Appellees was a criminal offense. Appellees were not cross-deputized as federal or tribal officers, and as the District Court held in *Jones v. Norton*, the officers had no legal authority to detain Mr. Murray. Additionally, even if there were any offense, it would be an on-Reservation offense, and therefore would not come within *Hicks*' limited exception.

Under the current posture, Petitioners are individual, non-governmental actors, and they therefore do not come within the narrow exception in *Hicks*. Even if they were considered governmental actors, they still would not come within that limited exception because they were not investigating an off-Reservation offense.

Therefore, Petitioners' attempt to fit within Supreme Court Rule 10, based upon an alleged conflict between the Tenth Circuit ruling and *Hicks*, is without merit. The Tenth Circuit provided a detailed and correct application of *Hicks*. On the current record, the Tenth Circuit correctly held Petitioners must exhaust tribal court remedies. The Tribal Court will then create the necessary factual record and issue its decision. Tribal Court Defendants cannot even know whether they will disagree with the Tribal Court decision, and if they do disagree, they can then have the federal courts perform their limited appellate-like review of the Tribal Court's jurisdictional decision.

IV. Petitioners' assertion that the current issue in this case is of broad importance is without merit.

Section III of the petition uses false allegations of fact to attempt to create a parade of horribles. Once there is a factual record, it will be clear that Petitioners' parade of horribles will never occur.

Petitioners assert that if they are subject to tribal trespass claims "whenever they stop a suspect anywhere near Indian Country," then state and county

police officers will "ignore criminal activity near Indian Country." That claim is without merit for multiple reasons.

First, at least as applies to the officer in this matter, that is not true. Once the factual record is developed, that record is expected to show the exact opposite – that the local Utah state and county officers focus their patrols more heavily near the Tribe's borders, looking for tribal members to stop on various pretextual grounds.

Second, as discussed above, we are not talking about an officer making a traffic stop *near the Reservation border*. We are instead talking about an officer chasing an Indian on non-public tribal land 25 miles inside the reservation boundaries.

Third, Petitioner is purposefully conflating the separate legal issue of tribal court authority to prosecute non-Indians for crimes with the wholly separate issue of the power of federal law enforcement officers to stop non-Indian criminals on the Reservation. Petitioners claim that because the Tribe cannot prosecute Indians, the Tribe's police cannot stop or arrest non-Indians. First, tribal police authority to stop non-Indians is firmly established in federal case law, and Petitioners cite no case for their contrary argument. But the Court need not even consider that issue under the current facts because on the Ute Reservation, it is the United States, through the Bureau of Indian Affairs,

which provides law enforcement.[10] Federal authority to stop non-Indians is beyond question. 25 U.S.C. § 2803 (BIA police have authority to arrest "for offenses committed in Indian Country").

Finally, as discussed above, the facts of this case are that Petitioners were hunting an Indian on non-public tribal land far inside the Reservation, even though the Indian they were hunting had not committed any crime. Under these facts, the facts of this case, the officers clearly were not exercising police powers and had no basis to exercise police powers. A decision which chills their lawless actions is good, not bad, and is wholly consistent with federal law.

CONCLUSION

Granting a writ of certiorari would not develop the law and would not resolve any divergence of opinions in the lower courts. It would merely reaffirm that the Court of Appeals correctly applied the existing legal rules to the unique and limited facts of this case. For

[10] The Tribe employs Fish and Game officers who have limited tribal police powers.

all of the reasons stated in this response, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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