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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JOSEPH LISKA,

12 Petitioner,

13 vs.
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15 MARK MACARRO; MARK CALAC; MAR
16 LUKER; JOHN MAGEE; ANDREW
17 MASIHEL; DONNA BARON; BUTCH
18 MURPHY; and DOES 1 to 50,

19 Respondents.
20

CASE NO. 08-CV-1872-IEG (POR)

ORDER:

**(1) DENYING PETITIONER'S
MOTION FOR DEFAULT
JUDGMENT (Doc. No 19); and**

**(2) GRANTING IN PART AND
DENYING IN PART
RESPONDENT'S MOTION TO
DISMISS THE PETITION
(Doc. No. 26)**

21 Presently before the Court are Petitioner Joseph Liska's motion for default judgment (Doc. No.
22 19,) and Respondent Donna Baron's¹ motion to dismiss Petitioner's petition for writ of habeas corpus
23 pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). (Doc. No. 26.) For the
24 reasons stated herein, the Court denies Petitioner's motion, denies Respondent's Rule 12(b)(1) motion,
and grants Respondent's Rule 12(b)(2) and 12(b)(6) motions.

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28 ¹ Although the complaint names Defendant as "Donna Baron," Ms. Baron's moving papers indicate the proper spelling of her last name is "Barron." For the sake of consistency with the petition, this Order addresses Defendant as "Ms. Baron."

BACKGROUND

I. The Parties

Petitioner Joseph Liska (“Petitioner”), proceeding *pro se*, alleges he is a descendant of the Pechanga Band of Mission Luiseño Mission Indians (“Pechanga Band” or “Tribe”).

Respondents Mark Macarro, Mark Calac, Mar Luker, John Magee, Andrew Masiel, Donna Baron, and Butch Murphy are allegedly “enrolled members of the Pechanga Band.” Respondent Baron (“Respondent”) is the only Respondent whom Petitioner has served with the complaint.

II. Factual and Procedural Background

On February 26, 2005 Petitioner attempted to enter to the Pechanga Indian Reservation (“The Reservation”) without prior permission from the Tribe. (Attachment 1 to Petition, “Exclusion Letter.”) Mr. Liska allegedly made false statements to the ranger on duty at the reservation entrance, claiming he was lost and sought to promptly turn around his vehicle and leave. After passing the ranger post, Petitioner continued into the reservation and did not turn his vehicle around until a ranger stopped him. The Tribal Council of the Pechanga Band (“Tribal Council”) found that these actions constituted trespass and public nuisance and excluded Petitioner from the reservation pursuant to the Tribe’s “Non-Member Reservation Access and Rental Ordinance.” The Tribal Council informed Petitioner of his exclusion in a letter dated May 19, 2005. (Id.) Petitioner additionally alleges he attempted to enter the reservation on August 1, 2006 to pray at his father’s gravesite, but tribal rangers refused to let him enter the reservation. (Petition at 7.) The rangers contacted the Riverside County Sheriff’s Department, who dispatched a deputy to the scene. The deputy threatened to arrest Petitioner if he did not leave the reservation. (Id.)

On October 14, 2008 Petitioner filed a “Complaint [for] Writ of Habeas Corpus.” (Doc. No. 1.) The Complaint alleges Respondents illegally banished Petitioner from the Pechanga Band, in violation of the United States Constitution and the American Indian Civil Rights Act of 1968 (“ICRA”), 25 U.S.C. §§ 1301, 1302, and 1303. Petitioner also filed an affidavit in support of his complaint attaching: (1) the exclusion letter; and (2) a letter from the Pechanga Indian Reservation verifying Petitioner’s application for enrollment to the Pechanga Band, dated March 15, 2001. (Doc. No. 2.) The latter document explains that his membership application had not been processed due to

1 a “moratorium” enacted by the Pechanga Band. Petitioner prays that the Court issue an order vacating
 2 his alleged “conviction for unspecified criminal charges”² and his banishment from the Tribe.
 3 Additionally, Petitioner requests the Court order respondents to provide him with “back pay he should
 4 have been receiving” during the membership moratorium period. This “back pay” allegedly consists
 5 of “per capita payments” and revenue from “trust land,” both of which are “paid to all other members
 6 of the Pechanga Band.” (Petition at 5.)

7 On June 15, 2009 Petitioner filed a motion for default judgment against all respondents. (Doc.
 8 No. 19.) Respondent Baron filed an opposition. The Court finds Petitioner’s motion suitable for
 9 disposition without oral argument pursuant to Local Civil Rule 7.1(d)(1).

10 On June 25, 2009, Respondent Baron (“Respondent”) filed the instant motion to dismiss the
 11 petition. Petitioner has filed an opposition and Respondent has filed a reply. The Court heard oral
 12 argument on Respondent’s motion on Monday, July 27, 2009.

13 DISCUSSION

14 I. Petitioner’s Motion for Default Judgment

15 On October 14, 2008 Petitioner filed his petition for writ of habeas corpus. On March 18,
 16 2009, Petitioner moved for default judgment against Donna Baron (Doc. No. 5,) along with a proof
 17 of service indicating Ms. Baron had been served with the petition on February 12, 2009. Petitioner
 18 has not submitted proof that he has served any other respondent with the petition, aside from Ms.
 19 Baron. On April 2, 2009, the Court issued an order construing Petitioner’s request as a motion for
 20 entry of default pursuant to Fed. R. Civ. P. 55(a), and granted the motion. The Clerk of Court entered
 21 default against Ms. Baron that same day. On May 12, 2009, Ms. Baron filed a motion to set aside the
 22 entry of default. (Doc. No. 13.) The Court granted the motion on June 22, 2009. (Doc. No 25.)

23 On June 15, 2009, before the Court granted Ms. Baron’s motion to set aside default, Petitioner
 24 filed the instant motion default judgment against all respondents, including Ms. Baron. His motion
 25 contends all respondents were properly served with the complaint on February 13, 2009.
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 28 ² It is unclear what “criminal charges” Petitioner references with this request. Ostensibly,
 Petitioner is referring to the Tribal Council’s finding of trespass and public nuisance, which gave rise
 to his alleged “banishment.”

1 A. Legal Standard

2 Federal Rule of Civil Procedure 55 describes a two-step process by which a default judgment
3 may be entered where the defendant is not an infant, incompetent person, or the United States
4 government. See Fed. R. Civ. P. 55(a), (b) (2009); Bach v. Mason, 190 F.R.D. 567, 574 (D. Idaho
5 1999); see also Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986). First, under Rule 55(a), a
6 plaintiff may request the clerk to enter a default against a party upon a showing that the party “has
7 failed to plead or otherwise defend as provided by these rules. . . .” Fed. R. Civ. P. 55(a). After entry
8 of default, and upon application by the plaintiff, a default judgment may then be entered by the clerk
9 or by the Court pursuant to Rule 55(b). See Fed. R. Civ. P. 55(b).

10 B. Analysis

11 As an initial matter, the Court has already set aside the Clerk’s entry of default against Ms.
12 Baron. Petitioner’s motion for default judgment against Ms. Baron is therefore denied as moot.

13 As to the rest of the respondents, Petitioner has improperly moved for default judgment
14 without first requesting a Clerk’s entry of default against them pursuant to Fed. R. Civ. P. 55(a).
15 However, even if the Court construed Petitioner’s motion as a request for entry of default, his request
16 is still denied because there is no proof that any of the remaining respondents have been properly
17 served with the petition. Fed. R. Civ. P. 55(a) provides the clerk must enter a party’s default “when
18 a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise
19 defend, *and that failure is shown by affidavit or otherwise*[.]” Fed. R. Civ. P. 55(a)(2009) (emphasis
20 added). Therefore, in order to secure entry of default a plaintiff must make a showing that the
21 defendant(s) have been served with summons and complaint and have failed to respond within the
22 time permitted by the Federal Rules of Civil Procedure. Accord Geter v. Horning Bros. Mgmt., 502
23 F. Supp. 2d 69, 70 (D. Colo. 2007) (“In the absence of proof that the individual defendants were
24 properly served with process, no basis exists for entering defaults and granting plaintiff’s motion for
25 a default judgment.”) Here, Petitioner has not properly secured a Clerk’s entry of default before
26 moving for default judgment, and has also failed to offer proof that an entry of default is even
27 warranted. The Court therefore denies his motion for default judgment against respondents Macarro,
28 Calac, Luker, Magee, Masiel, and Murphy.

1 II. Respondent Baron's Motion to Dismiss the Petition

2 Respondent's motion to dismiss is based on three theories: lack of subject matter jurisdiction
3 under Fed. R. Civ. P. 12(b)(1); lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2); and
4 failure to state a claim under Fed. R. Civ. P. 12(b)(6).

5 A. Subject Matter Jurisdiction

6 Petitioner alleges Respondent was "at all times [a] member[] of the General Council of the
7 tribe or [was an] individual who [was] given official authority to cause the banishment of Petitioner,"
8 and that she caused him to be banished "while acting in her official capacity." (Petition, ¶¶7-8.)
9 Respondent argues that because Petitioner sued her in her official capacity, she is protected by the
10 doctrine of sovereign immunity and the Court lacks subject matter jurisdiction over this action.³

11 1. Legal Standard

12 "[T]he issue of tribal sovereign immunity is jurisdictional in nature," Pan American Co. v.
13 Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989), and a court must address
14 jurisdictional questions before proceeding to the merits of a case. Wilbur v. Locke, 423 F.3d 1101,
15 1106 (9th Cir. 2005). "A motion to dismiss for lack of subject matter jurisdiction may either attack
16 the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of
17 subject matter jurisdiction in fact." Thornhill Publishing Co. v. General Tel & Elect., 594 F.2d 730,
18 733 (9th Cir. 1979); see also Fed. R. Civ. P. 12(b)(1) (2009). "Unlike a Rule 12(b)(6) motion, a Rule
19 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their
20 formal sufficiency, and in so doing rely on affidavits or *any other evidence* properly before the court."
21 St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989) (emphasis added). Thus, the existence
22 of disputed material facts will not preclude the trial court from evaluating for itself the merits of
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25 ³ Respondent also appears to argue the Court lacks **personal** jurisdiction based on sovereign
26 immunity, but provides no support for this argument beyond briefly invoking Fed. R. Civ. P. 12(b)(2)
27 (2009). Sovereign immunity is an issue underlying subject matter jurisdiction, not personal
28 jurisdiction. See, e.g. Cook v. AVI Casino Enters., 548 F.3d 718, 726 (9th Cir. 2008) (upholding
dismissal for lack of subject matter jurisdiction because of tribal sovereign immunity); and Cook v.
Avi Casino Enter., 2006 U.S. Dist. LEXIS 78265, at *3 n. 2 (D. Ariz. Oct. 25, 2006) ("tribal sovereign
immunity is an issue of subject matter jurisdiction . . ."). Compare McCarthy v. United States, 850
F.2d 558, 560 (9th Cir. 1988) ("The question whether the United States has waived its sovereign
immunity against suits for damages is, in the first instance, a question of subject matter jurisdiction.")

jurisdictional claims. Id. Because the plaintiff bears the burden of establishing subject matter jurisdiction, no presumption of truthfulness attaches to the allegations of the plaintiff's complaint and the Court must presume it lacks jurisdiction until the plaintiff establishes jurisdiction. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

2. Analysis

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Thus, a tribe may not be sued absent an express waiver or Congressional abrogation of sovereign immunity. A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 789 (9th Cir. 1986). With the passage of the ICRA, Congress created a limited mechanism for federal judicial review of tribal actions through the habeas corpus provisions of 25 U.S.C. § 1303.⁴ Santa Clara Pueblo, 436 U.S. at 70. Under § 1303, suits against a tribe are barred by the tribe's sovereign immunity, Id. at 59, but "Congress clearly has power to authorize civil actions against *tribal officers*, and has done so with respect to habeas corpus relief in § 1303." Id. at 60 (emphasis added).

Respondent's argument that the Tribe's sovereign immunity shields her from Petitioner's habeas corpus claim against her in her official capacity is therefore meritless. Although the cases Respondent cites hold that tribal officials acting within the scope of their authority are immune from suit, none of those cases involve a § 1303 habeas corpus claim. See Burlington Northern & Santa Fe Ry. v. Vaughn, 509 F.3d 1085, 1093 (9th Cir. 2007) (holding tribal official was immune from suit for declaratory and injunctive relief); Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 978 (9th Cir. 2006) (holding sovereign immunity extended to board members of tribal housing authority in a class action seeking declaratory relief, injunctive relief, and damages); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-480 (9th Cir. 1985) (holding tribal officials acting in their representative capacities were immune from a suit for declaratory and injunctive relief). The Court denies Respondent's motion to dismiss the petition under Rule 12(b)(1) for lack of subject matter jurisdiction.

⁴ "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303 (2009).

1 B. Personal Jurisdiction

2 Respondent's papers incorrectly conflate the legal standards for dismissal under Federal Rules
3 of Civil Procedure 12(b)(1) and 12(b)(2). She apparently contends her arguments for lack of subject
4 matter jurisdiction also establish lack of personal jurisdiction, even though the two inquiries are
5 distinct. Nevertheless, Respondent's contention that she cannot give Petitioner the relief he seeks
6 because she is no longer a Tribal Council member implicates personal jurisdiction, as discussed below.

7 1. Legal Standard

8 Under Fed. R. Civ. P. 12(b)(2), a court may decide the issue of personal jurisdiction on the
9 basis of affidavits and documentary evidence submitted by the parties,⁵ or hold an evidentiary hearing⁶
10 regarding the matter. See 4 Charles A. Wright & Arthur Miller, Federal Practice and Procedure, §
11 1351 (3d ed.2004); Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir.1977).
12 The court retains broad discretion in determining which procedure to utilize. See, e.g., Travelers Cas.
13 & Sur. Co. of America v. Telstar Constr. Co., 252 F. Supp. 2d 917 (D. Ariz. 2003). Under either
14 procedure, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. Rio
15 Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002).

16 If the motion is based on affidavits and documentary evidence, the plaintiff need only make
17 a prima facie showing of facts establishing personal jurisdiction, "i.e. facts that, if true would support
18 the court's exercise of jurisdiction over the defendant." Amini Innovation Corp. v. JS Imports, Inc.,
19 497 F. Supp. 2d 1093, 1100 (C.D. Cal. 2007). Uncontroverted allegations in the complaint are
20 accepted as true and conflicts between parties over statements contained in affidavits must be resolved
21 in the plaintiff's favor. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004).
22 Nevertheless, a prima facie showing must be based on affirmative proof beyond the pleadings, such
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26 ⁵ If the Court considers evidence presented in documentary evidence, it may order discovery
27 on the jurisdictional issues. Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir.2001).

28 ⁶ At such a preliminary hearing, the plaintiff must establish the jurisdictional facts by a
preponderance of the evidence. Data Disc., Inc. v. Systems Technology Association, Inc., 557 F.2d
1280, 1285 (9th Cir. 1977).

as affidavits, testimony or other competent evidence of specific facts.⁷ See 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1067.6 (3rd ed. 2002).

2. Analysis

The proper respondent in a federal habeas corpus petition is the petitioner's immediate custodian. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992). However, "[a]s the 'custody' requirement has expanded to encompass more than actual physical custody, so too has the concept of a custodian as a respondent in a habeas case." Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 899 (2d Cir.), cert. denied, 519 U.S. 1041 (1996). Therefore, even if a habeas corpus petitioner under § 1303 is not in actual physical custody he may still "name as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit—namely, his unconditional freedom." Poodry, 85 F.3d at 899 (citation omitted); see also Quair v. Sisco, 359 F. Supp. 2d 948, 974 (E.D. Cal. 2004) (relying on Poodry, 85 F.2d at 899-900 and Armentero v. I.N.S., 340 F.3d 1058, 1064 (9th Cir. 2003)) (finding the petitioner had correctly named tribal council members as respondents in § 1303 matter because they were empowered to end the petitioner's restraint by overturning or ceasing to enforce the relevant banishment order).

Respondent submits, and Petitioner does not dispute, that "only the Tribal Council has [the] authority [to offer Petitioner his requested relief]." (Memo. ISO Motion at 2.) Accordingly, if Respondent is a member of the Tribal Council, she would be a proper respondent in this action under Poodry and Quair. However, Respondent's declaration states she is no longer a member of the Tribal Council or otherwise empowered to take any action with respect to Petitioner's expulsion. (Barron Decl. ISO Motion, ¶¶ 2-3.) At oral argument, Respondent again maintained she was no longer a member of the Tribal Council, and Petitioner did not refute this assertion. Petitioner also did not claim Ms. Baron is otherwise capable of providing him with the relief he seeks. Ms. Baron, therefore, is not the proper respondent in this action.

⁷ Even if Plaintiff makes a prima facie showing, he still must prove the jurisdictional facts by a preponderance of the evidence at a preliminary hearing or at trial. Data Disc, Inc., 557 F.2d at 1285 n. 2 (citation omitted).

1 Federal courts lack personal jurisdiction when a habeas corpus petition fails to name a proper
 2 respondent, see Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28
 3 U.S.C. foll. § 2254),⁸ and Ms. Baron is the only respondent who has been served with the petition.
 4 Petitioner has therefore failed to properly establish personal jurisdiction. Although the Court may
 5 substitute the successor of a party sued in her official capacity under Fed. R. Civ. P. 25(d) (2009),⁹
 6 such a substitution would be futile in this case because Petitioner cannot state a claim, as is further
 7 explained below.

8 C. Failure to State a Claim

9 1. Legal Standard

10 A complaint must contain “a short and plain statement of the claim showing that the pleader
 11 is entitled to relief.” Fed. R. Civ. P. 8(a) (2009). A motion to dismiss pursuant to Rule 12(b)(6) of
 12 the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint.
 13 Fed. R. Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept
 14 all factual allegations pled in the complaint as true, and must construe them and draw all reasonable
 15 inferences from them in favor of the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336,
 16 337-38 (9th Cir.1996). To a void a Rule 12(b)(6) dismissal, a complaint need not contain detailed
 17 factual allegations, rather, it must plead “enough facts to state a claim to relief that is plausible on its
 18 face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). However, “a plaintiff’s obligation to
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 21 ⁸ Although there is no case holding that failure to name the proper respondent in a § 1303
 22 habeas corpus petition defeats personal jurisdiction, the Court finds this rule is nonetheless applicable
 23 because courts deciding § 1303 claims frequently draw on principles of analogous habeas statutes.
 24 The Second Circuit has notably held that “the legislative history [of the ICRA] suggests that § 1303
 25 was to be read coextensively with analogous statutory provisions [regarding the scope of federal
 26 habeas review],” and that “[c]ourts . . . appear to look to the development of law under 28 U.S.C. §
 27 2254 for guidance as to whether habeas relief is available in such matters under § 1303.” Poodry, 85
 28 F.2d at 891-92. See also Weatherwax on behalf of Carlson v. Fairbanks, 619 F. Supp. 294, 296 (D.
 Mont. 1985) (“This court has consistently found the law which has developed with respect to actions
 for habeas corpus relief under 28 U.S.C. § 2254 to be applicable by analogy to actions founded upon
 25 U.S.C. § 1303.”)

⁹ “An action does not abate when a public officer who is a party in an official capacity dies,
 resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is
 automatically substituted as a party. Later proceedings should be in the substituted party's name, but
 any misnomer not affecting the parties' substantial rights must be disregarded. The court may order
 substitution at any time, but the absence of such an order does not affect the substitution.”

1 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and
 2 a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555 (citation omitted).
 3 In spite of the deference the court is bound to pay to the plaintiff’s allegations, it is not proper for the
 4 court to assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that the
 5 defendants have violated the . . . laws in ways that have not been alleged.” *Associated Gen.*
 6 *Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). The Court
 7 recognizes the mandate to construe a *pro se* plaintiff’s pleadings liberally in determining whether a
 8 claim has been stated. *Ortez v. Washington County*, 88 F.3d 804, 807 (9th Cir. 1996).

9 In ruling on a motion to dismiss for failure to state a claim, “a court may generally consider
 10 only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly
 11 subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). If a complaint
 12 fails to state a claim, the court should grant leave to amend unless it determines that the pleading could
 13 not possibly be cured by the allegation of other facts. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
 14 1995). Leave to amend, however, may be denied where a complaint previously has been amended,
 15 or where amendment would be futile. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.
 16 1990).

17 2. Analysis

18 a. 25 U.S.C. § 1301 and 1302 Claims

19 Respondent first challenges Petitioner’s claims under 25 U.S.C. §§ 1301 and 1302. Section
 20 1301 merely provides the definitions of various terms of the ICRA, and does not contain provisions
 21 capable of being violated. The Court therefore strikes Petitioner’s § 1301 cause of action under Fed.
 22 R. Civ. P. 12(f)(1)¹⁰ as redundant of his other claims.

23 Section 1302 lists a number of substantive constitutional rights afforded to individuals.
 24 However, Title I of the ICRA does not establish or imply a federal civil cause of action to remedy
 25 violations of § 1302. See *Santa Clara Pueblo*, 436 U.S. at 72; *Poodry*, 85 F.3d at 884 (“*Santa Clara*
 26 *Pueblo* thus precluded federal interpretation of the substantive provisions of the ICRA, except in cases
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28 ¹⁰ “The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed R. Civ. P. 12(f) (2009).

1 in which the relief sought could properly be cast as a writ of habeas corpus.”) Rather, the ICRA
 2 “identifies explicitly only one federal court procedure for enforcement of the substantive guarantees
 3 of § 1302: § 1303 makes available to any person ‘the privilege of the writ of habeas corpus . . . , in a
 4 court of the United States, to test the legality of his detention by order of an Indian tribe.’” Id. at 882
 5 (quoting 25 U.S.C. § 1303).

6 Here, Respondent argues Petitioner cannot state a § 1302 claim because the ICRA does not
 7 provide an individual civil cause of action under that section. This argument fails because Petitioner’s
 8 allegations under § 1302 are not independent civil causes of action; they ultimately derive from his
 9 alleged “illegal banish[ment],” which, as explained below, is also the basis for his claim for habeas
 10 corpus relief under § 1303. Petitioner’s ability to assert his § 1302 claims therefore turns on his
 11 eligibility for relief under § 1303. The Court addresses this issue further below.

12 b. 25 U.S.C. § 1303 Claim

13 25 U.S.C. § 1303 (2009) provides, “[t]he privilege of the writ of habeas corpus shall be
 14 available to any person, in a court of the United States, to test the legality of his detention by order
 15 of an Indian tribe.” Petitioner alleges he was denied various procedural and substantive rights under
 16 the ICRA as a result of the proceedings that resulted in the Tribe’s decision to “illegally banish” him
 17 from the reservation. He now challenges the legality of this alleged “detention” under § 1303 and
 18 alleges the Tribe’s actions denied him: (1) his right to free speech, peaceful assembly, and to petition
 19 for a redress of grievances under § 1302(1); (2) his right to a trial, to confront adverse witnesses, to
 20 be informed of the nature and cause of accusations against him, to produce favorable witnesses, and
 21 to an attorney under § 1302(6); (3) his right to be free from cruel and unusual punishment under §
 22 1302(7); (4) his rights to equal protection and due process under § 1302(8); and (5) his right to a jury
 23 trial under § 1302(10). (Petition at 3-4.)

24 In order to state a claim for habeas corpus relief under § 1303, Petitioner must successfully
 25 allege, *inter alia*, that he is being “detained” within the meaning of the statute. See Poodry, 85 F.3d
 26 at 889. In Poodry, court determined the petitioners’ banishment constituted “detention” for purposes
 27 of § 1303 because the tribe’s revocation of the petitioners’ tribal membership and subsequent
 28 banishment constituted a significant restraint on their liberty to which other members of the tribe were

1 not subject. Id. at 895-97; Quair, 359 F. Supp. 2d at 969. Cf Alire v. Jackson, 65 F. Supp. 2d 1124,
 2 1129 (D. Or. 1999) (finding a tribe's exclusion of a nonmember "[fell] far short of the severe restraint
 3 on liberty suffered by the plaintiffs in Poodry" because the plaintiff "[had] not been stripped of her
 4 Indian name, her lands, her tribal citizenship, or her tribal membership, nor [had] she been banished
 5 from her own Tribe's reservation or territory.") Petitioner has cited no authority for the proposition that
 6 a non-member of a tribe who is excluded from a reservation is "detained" as contemplated by § 1303.
 7 In fact, Ninth Circuit authority conclusively establishes that "[i]n the absence of treaty provisions or
 8 congressional pronouncements to the contrary, the tribe has the inherent power to exclude
 9 non-members from the reservation." Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410 (9th Cir.
 10 1976).

11 Respondent argues the "detention" requirement has not been satisfied here, because unlike in
 12 Poodry, "Petitioner was not stripped of his tribal citizenship because he never was a Pechanga Tribal
 13 citizen." (Reply at 7.) The Court agrees. Properly focusing on the petition itself and the attached
 14 documents for the purposes of Rule 12(b)(6), the petition alleges Petitioner is a "descendent" of the
 15 Pechanga Band (Petition at 1), as opposed to a member. Petitioner also attaches a letter from the Tribe
 16 indicating that at some point prior to March 15, 2001 he had applied for membership in the Tribe but
 17 that his application "ha[d] not been processed due to a moratorium enacted by the Pechanga Band."
 18 (Attachment 2 to Petition.) Plaintiff's affidavit in support of his petition describes the letter as one
 19 of "acknowledgment that Petitioner is a descendant of the Pechanga Band of Mission Indians;" not
 20 that he is a member of the Tribe. (Liska Affidavit of Supporting Documentation ISO Petition.)
 21 Moreover, elsewhere in the petition, Petitioner prays for "per capita payments that he should have
 22 been receiving for the last ten years he's been sitting in the tribe's moratorium," (Petition at 8,) further
 23 indicating that while Petitioner may self-identify as a tribal member,¹¹ he is not an official member
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25
 26 ¹¹ At points in his petition Petitioner claims he was "stripped of his citizenship in the tribe"
 27 (Petition at 2,) and that he has "lost individual recognition as a member of a federally recognized
 28 indian tribe." (Id. at 3.) His conclusory labeling of himself as a tribal member is insufficient to
 establish a basis for habeas corpus relief under § 1303. See Twombly, 550 U.S. 544 at 555 ("a
 plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels
 and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citation
 omitted).

1 of the Pechanga Band and continues to be subject to the Tribe's moratorium on membership.
 2 Petitioner's assertion at oral argument that he is not a tribal member corroborates the Court's reading
 3 of the petition.

4 Therefore, Petitioner has not alleged he is an official member of the Pechanga Band. Although
 5 the Court sympathizes with Petitioner's situation, he has not sufficiently alleged his exclusion from
 6 the Tribe constitutes a restraint on liberty that rises to the level of a "detention" for purposes of §
 7 1303. Further, because Plaintiff *cannot* claim he is a member of the Tribe, it would be futile to amend
 8 his petition to sufficiently allege the "detention" requirement. As such, even if Petitioner had
 9 established personal jurisdiction in this case by naming and serving the proper respondent, which he
 10 has not, he still could not state a claim under § 1303. The Court therefore dismisses the petition with
 11 prejudice.

12 c. 18 U.S.C. § 1167 Claim

13 As Respondent points out, Petitioner invokes but does not discuss 18 U.S.C § 1167 in his
 14 petition. The statute provides:

15 (a) Whoever abstracts, purloins, willfully misapplies, or takes and
 16 carries away with intent to steal, any money, funds, or other property
 17 of a value of \$ 1,000 or less belonging to an establishment operated by
 18 or for or licensed by an Indian tribe pursuant to an ordinance or
 resolution approved by the National Indian Gaming Commission shall
 be fined under this title or be imprisoned for not more than one year, or
 both.

19 (b) Whoever abstracts, purloins, willfully misapplies, or takes and
 20 carries away with intent to steal, any money, funds, or other property
 21 of a value in excess of \$ 1,000 belonging to a gaming establishment
 22 operated by or for or licensed by an Indian tribe pursuant to an
 ordinance or resolution approved by the National Indian Gaming
 Commission shall be fined under this title, or imprisoned not more than
 ten years, or both.

23 28 U.S.C. § 1167 (2009). Respondent is correct that this is a criminal statute that does not
 24 provide a private right of action. Even if the Court did have personal jurisdiction in this case, which
 25 it does not, Petitioner could not state a claim for relief under this statute.

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CONCLUSION

As discussed herein, the Court denies Petitioner's motion for default judgment and denies Respondent's motion to dismiss the complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). However, the Court grants Respondent's motion to dismiss the petition for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), and alternatively for failure to state a claim under Rule 12(b)(6). The Court also strikes Petitioner's claim for relief under 25 U.S.C. §§ 1301, pursuant to Fed. R. Civ. P. 12(f)(1). The Court dismisses the petition with prejudice.

IT IS SO ORDERED.

DATED: August 5, 2009


IRMA E. GONZALEZ, Chief Judge
United States District Court