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DONNA BARRON

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSEPH LISKA,

Petitioner,

vs.

MARK MACARRO; MARK CALAC; MARK LUKER; JOHN MAGEE; ANDREW MASIEL; DONNA BARRON, BUTCH MURPHY; and DOES 1 to 50,

Respondents.

Case No. 08-CV-1872-IEG (POR)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6)

Date: July 27, 2009
Time: 10:30 a.m.
Courtroom: Courtroom 1
Judge: Hon. Irma E. Gonzalez

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I. INTRODUCTION

Specially-Appearing Respondent Donna Barron hereby moves to dismiss the above-captioned matter with prejudice on the grounds that as a government official of a federally-recognized Indian tribe she is immune from this lawsuit, and that Petitioner fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(6).

This dispute is between the Petitioner and the Pechanga Band of Luiseño Mission Indians ("Tribe"), a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,554 (Apr. 4, 2008). Respondent Barron was at all times relevant hereto a duly elected member of the Tribal Council, which is the government entity that carries out the directives of the General Membership, the Tribe's governing body. *See* Declaration of Donna Barron filed herewith (hereinafter "Barron Dec.") at ¶ 2.

As a Tribal government official, Respondent Barron is immune from this lawsuit. "Suits against Indian tribes are … barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978)); s*ee also Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986). Tribal sovereign immunity extends to individual tribal officials acting in their official capacity. *See Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) ("Indian tribes, and tribal officials acting within the scope of their authority, are immune from lawsuits or court process in the absence of congressional abrogation or tribal waiver.") (*citing Kiowa Tribe*, 523 U.S. at 754; *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir.1986)). *See also Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006) (sovereign immunity extends to tribal officials acting in their official capacity and within the scope of their authority); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (same).

Petitioner seeks a writ directed to Respondent Barron under federal law, challenging an order of the Tribal Council excluding him from the Pechanga Indian Reservation. *See* Complaint at ¶¶ 5, 8. But Petitioner fails to establish this Court's jurisdiction over Respondent or this action because the Tribe and Respondent, a Tribal government official, are immune from this lawsuit. In addition, Respondent is no longer a Tribal Council member and therefore lacks the capacity to offer Mr. Liska the relief he seeks. *See* Barron Dec. at ¶ 3. It is only the Tribal Council that has that authority, and the Tribal Council cannot be joined as a party due to the Tribe's sovereign immunity.

Tribal sovereign immunity bars this petition because Petitioner does not allege, let alone prove, that there was an express and unequivocal waiver of that immunity. And, in fact, Petitioner cannot supply the requisite proof because the Tribe has not waived Respondent's sovereign immunity in connection with this lawsuit. *See* Declaration of Mark Macarro (hereinafter "Macarro Dec.") filed herewith, at ¶ 6. Thus the Court lacks personal jurisdiction over Respondent Barron and subject matter jurisdiction over the Complaint.

Petitioner also claims that he was denied his rights under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, but that Act is of no avail to him. Federal judicial review of alleged violations of ICRA is allowed only by a petition for writ of habeas corpus under 25 U.S.C. § 1303, s*ee Santa Clara Pueblo*, 436 U.S. at 65-66, and only in connection with "unlawful detentions arising out of tribal criminal decisions[,]" *Alire v. Jackson*, 65 F.Supp.2d 1124, 1127 (D. Or. 1999); *see also Santa Clara Pueblo*, 436 U.S. at 67. Because Petitioner's exclusion from the Tribe's Reservation was an exercise of the Tribe's civil – and not criminal – jurisdiction, he does not have a cognizable claim under ICRA.[1] Respondent therefore requests that the Complaint be dismissed because Petitioner fails to state a claim upon which relief can be granted, in addition to failing to prove a waiver or Congressional abrogation of Respondent's

[1] Petitioner's Complaint also cites, but does not discuss, 18 U.S.C. § 1167. *See* Complaint at p. 9. 18 U.S.C. § 1167 is a criminal statute punishing theft from gaming establishments on Indian lands. It does not provide a private right of action and is irrelevant to this lawsuit.

immunity.

II. ARGUMENT

A. This Case Should Be Dismissed Under Fed. R. Civ. P. 12(b)(1) And 12(b)(2) Because Defendant Is Immune From This Action And This Court Lacks Subject Matter And Personal Jurisdiction

1. Legal Standards

In a motion to dismiss under Rules 12(b)(1) and 12(b)(2) the plaintiff bears the burden of proving that the court has jurisdiction to decide the case. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Rio Properties*, Inc. *v. Rio Int'l Interlink*, 284 F.3d 1007, 1009 (9th Cir. 2002). In resolving motions under Rules 12(b)(1) and 12(b)(2) a court is not restricted to allegations in the complaint but may consider materials outside the pleadings, such as affidavits. *See Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1289 (9th Cir. 1997); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

2. Absent An Express Tribal Waiver Of Immunity This Court Lacks Jurisdiction Over The Tribe And Its Officers

Absent an express waiver or Congressional abrogation of sovereign immunity, courts may not exercise jurisdiction over federally recognized Indian tribes. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978)). *See also Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986).

A waiver of tribal sovereign immunity may not be implied but instead must be unequivocally expressed. *See Santa Clara Pueblo*, 436 U.S. at 58; *A.K. Mgmt. Co.*, 789 F.2d at 789. "[N]othing short of an express and unequivocal waiver can defeat the sovereign immunity

of an Indian nation." *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d. 1374, 1378 (8th Cir. 1985). Thus, the Court lacks jurisdiction over the Tribe, its agencies, and its officials unless the Tribe grants an express and unequivocal waiver. *Id.* Petitioner 's Complaint fails to point to any express or unequivocal waiver of immunity. Indeed, the Tribe has not granted any such waiver. *See* Macarro Dec. at ¶ 6.

Sovereign immunity is a jurisdictional bar to *any* claims against the tribe, "irrespective of the merits of the claim." *Chemehuevi Indian Tribe v. California Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985); *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *California ex rel. Dep't of Fish and Game v Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). *See also Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989); *Wendt v. Smith*, 273 F.Supp.2d 1078, 1082 (C.D. Cal. 2003).

Moreover, because sovereign immunity is jurisdictional in nature, its recognition by the Court is not discretionary. *Puyallup Tribe*, 433 U.S. at 172-73; *Quechan Tribe*, 595 F.2d at 1154-55. "[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of a given situation." *Chemehuevi*, 757 F.2d at 1052 n.6 (*citing Quechan Tribe*, 595 F.2d at 1155). "'Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize.'" *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (*quoting Quechan Tribe*, 595 F.2d at 1155). Sovereign immunity may not be defeated even where its assertion may "unfairly deprive contracting parties of the benefit of their bargains." *American Indian Agric. Credit Consortium*, 780 F.2d at 1379. Accordingly, even if the Complaint's substantive allegations could be proven (which Respondent vigorously disputes), Respondent's sovereign immunity would still foreclose this action.

The Supreme Court has expressly rejected the application of equitable considerations in the context of tribal sovereign immunity: "The perceived inequity of permitting the Tribe to recover … for civil wrongs in instances where a [person] … allegedly may not recover against

the tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances." *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 893 (1986). *See also McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989). Thus "the requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (*citing Chemehuevi*, 757 F.2d at 1052 n.6). When, as here, a tribe does not expressly waive its immunity, courts lack jurisdiction over the tribe and its officers regardless of the specific facts involved in the lawsuit.

Supreme Court precedent also makes it clear that tribal immunity from suit extends to tribal government officials such as Ms. Barron. *See Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093, 1090 (9th Cir. 2007) (holding suit against Tribal Chairman barred by sovereign immunity and noting that "Indian tribes, and tribal officials acting within the scope of their authority, are immune from lawsuits or court process in the absence of congressional abrogation or tribal waiver.") (*citing Kiowa Tribe*, 523 U.S. at 754; *Yakima Tribal Court*, 806 F.2d at 861). *See also Marceau*, 455 F.3d at 974 (sovereign immunity extends to tribal officials acting in their official capacity and within the scope of their authority); *Hardin*, 779 F.2d at 479 (same).

Respondent Barron was sued in her official capacity as an officer of the Pechanga Band of Luiseño Mission Indians, a federally-recognized Indian tribe. *See* Complaint at ¶ 7 ("Petitioner alleges that Respondents were at all times members of the General Council of the tribe or were individuals who were given official authority …."); Complaint at ¶10 ("Petitioner alleges that Respondents, while acting an a [sic] official capacity of the [Tribe] have also caused …."); Complaint at ¶ 11 ("Petitioner alleges that Respondents, while in a [sic] official capacity of the [Tribe] have also caused petitioner [alleged harms] …."); Complaint at ¶ 12 ("Petitioner alleges that respondents, while acting in an official capacity of the Pechanga Band of Mission Indians, caused [alleged harms] …."). *See also* Barron Dec. at ¶ 2. As a Tribal government official Respondent Barron is immune from this lawsuit absent an explicit waiver of her

immunity by the Tribe or an abrogation of that immunity by Congress. Accordingly, Ms. Barron enjoys tribal sovereign immunity from suit and cannot be sued unless the Tribe expressly waives that immunity.

3. The Tribe Did Not Waive Respondent's Sovereign Immunity With Respect To This Lawsuit

Here, Petitioner never even alleges that the Tribe waived its or Respondent's immunity from this lawsuit. And, indeed, the Tribe has not expressly waived its or Respondent's sovereign immunity from suit here. *See* Macarro Dec. at ¶ 6. Because sovereign immunity is jurisdictional in nature and its recognition by the Court is not discretionary, this Court lacks jurisdiction over this action and the Respondent.

B. Petitioner's Complaint Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6) For Failure To State A Claim Under Which Relief Can Be Granted

Plaintiff cites the Indian Civil Rights Act, 25 U.S.C. §§ 1301, 1302, and 1303, as a basis for his right to sue Defendant Barron and other Tribal officials. *See* Complaint at ¶ 5.[2] He claims that he was denied rights in violation of ICRA.[3] However, federal judicial review of

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[2] As noted at n.1, *supra*, the Complaint also cites, but does not discuss, 18 U.S.C. § 1167. *See* Complaint at p. 9. 18 U.S.C. § 1167, however, is a criminal statute punishing theft from gaming establishments on Indian lands that does not provide a private right of action and is irrelevant to this lawsuit.

[3] Specifically, he claims that he was denied his rights under 25 U.S.C. § 1302(8) because he was denied his right to trial, was not informed of the nature or cause of accusations against him, was not able to confront any witnesses against him, was not entitled to produce witnesses in his favor, was not afforded the assistance of counsel in his defense, was denied equal protection of the laws, and was deprived of his property without due process of law, Complaint at ¶¶ 8(a), (c), (d); that he was denied his rights under 25 U.S.C. § 1302(7) because cruel and unusual punishment was inflicted on him, Complaint at ¶ 8(b); that he was denied his rights under 25 U.S.C. § 1302(10) because he was denied his right to jury trial, Complaint at ¶ 8(e); and that he was denied his rights under 25 U.S.C. § 1302(1) because his right to assemble peaceably and petition for redress of grievance, and his right to freedom of speech, were interfered with.

Respondent Barron notes that a person's rights "to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense[]" exists under § 1302(6), not § 1302(8), and that these rights apply only to "a[] person in a criminal proceeding." Mr. Liska is not now and was never involved in a criminal proceeding before the Tribe, *see* Macarro Dec. at ¶ 15, and thus § 1302(6). Similarly, the right to a jury trial under § 1302(10) applies only "to a[] person accused of an offense by punishable by imprisonment." Mr. Liska has not been accused by the Tribe of

alleged violations of ICRA is allowed only by a petition for a writ of habeas corpus under 25 U.S.C. § 1303, *see Santa Clara Pueblo*, 436 U.S. at 65-66, and therefore Petitioner has no private federal causes of action under sections 1301 and 1302. Plaintiff likewise lacks a cause of action under section 1303 because "the writ of habeas corpus available under section 1303 is limited to unlawful detentions arising out of tribal criminal decisions[,]" *Alire v. Jackson*, 65 F.Supp.2d 1124, 1127 (D. Or. 1999); *see also Santa Clara*, 436 U.S. at 67, whereas Petitioner's exclusion from the Tribe's Reservation was an exercise of the Tribe's civil – and not criminal – jurisdiction. *See* Macarro Dec. at ¶¶ 9, 12. Indeed, the Tribal Council, which is the Tribal government entity that issued the Notice of Exclusion, does not have any criminal jurisdiction and thus cannot issue the sort of criminal decision that would give rise to an action under section 1303. *See* Macarro Dec. at ¶ 11. Accordingly, Petitioner lacks a cause of action under ICRA.

In *Santa Clara Pue*blo, the United States Supreme Court held that remedies against Indian tribes and tribal officials could not be implied under ICRA, and it "made it clear that, in order not to intrude unduly on tribal self-government, the enforcement of most of the guarantees of [ICRA] would be left to the tribal courts alone." *Moore v. Nelson*, 270 F.3d 789, 792 (9th Cir. 2001) (*citing Santa Clara Pueblo*, 436 U.S. 65-66). The Court did leave in place the habeas corpus remedy provided in section 1303 (because Congress expressly provided for it), but it established that the jurisdiction provided to federal courts to issue habeas relief under section 1303 was the only exception to the rule that Congress, in enacting IGRA, did not abrogate Indian tribes' or tribal officials' immunity from suit. *See Santa Clara Pueblo*, 436 U.S. at 72; *Moore*, 270 F.3d at 792 ("'[S]ince the respondent in a habeas corpus action is the individual custodian of the prisoner, the provisions of § 1303 can hardly be read as a general waiver of the tribe's immunity.'") (*quoting Santa Clara Pueblo*, 436 U.S. at 59). *See also Shenandoah v. Dep't of Interior*, 159 F.3d 708, 713 (2d Cir. 1998) (ICRA does not establish or imply a federal civil cause of action to remedy violations of § 1302); *Poodry v. Tonawanda Band of Seneca Indians*,

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an offense punishable by imprisonment, *see* Macarro Dec. at ¶ 16, and thus § 1302(10) has no application.

85 F.3d 874, 884 (2d Cir.), *cert. denied*, 519 U.S. 1041 (1996) ("*Santa Clara Pueblo* thus precluded federal interpretation of the substantive provisions of the ICRA, except in cases in which the relief sought could properly be cast as a writ of habeas corpus."). In all cases other than petitions for habeas relief, Indian tribes' and tribal officials' immunity from suit remained intact, so that federal courts lack jurisdiction to entertain them. Accordingly, Petitioner lacks any cognizable claims under sections 1301 and 1302.

Section 1303, which establishes federal courts' jurisdiction to entertain petitions for writs of habeas corpus, limits that jurisdiction to cases seeking to "test the legality of [a petitioner's] detention by order of an Indian tribe." 25 U.S.C. § 1303. Federal jurisdiction exists only in connection with Tribal action arising from tribal criminal proceedings. *See Alire v. Jackson*, 65 F.Supp.2d at 1127 ("[T]he writ of habeas corpus available under section 1303 is limited to unlawful detentions arising out of **tribal criminal decisions**.") (emphasis added). *See also Santa Clara Pueblo*, at 67 (noting that the "general thrust" of the habeas review provision in § 1303 was "to provide some form of judicial review of **criminal proceedings** in tribal courts") (emphasis added).

Petitioner's exclusion from the Pechanga Reservation is not a criminal detention. The Tribal Council, which is the government entity that excluded Petitioner from the Pechanga Reservation, does not have any criminal jurisdiction and thus could not have initiated any criminal proceedings or taken any actions that are criminal in nature. *See* Macarro Dec. at ¶ 11. The Tribe has never enacted any criminal laws, nor does it exercise criminal authority. *See* Macarro Dec. at ¶ 14. Petitioner has not been subject to any Tribal criminal proceeding, *see* Macarro Dec. at ¶ 15, and his exclusion is not a criminal punishment. *See* Macarro Dec. at ¶¶ 9, 12. Accordingly, this Court lacks habeas jurisdiction under section 1303.

Although Plaintiff claims that he was "charges [sic] with unwritten and unspecific criminal charges … [,] and … banished from the geographical boundaries of the Pechanga Reservation …. [,]" Complaint ¶ 5, he alleges elsewhere that he was ""[b]anished from the Pechanga tribe without a hearing or ever being accused of a crime[,]" *id*. at ¶ 6, and that

"Respondents … caused Petitioner to be Banished without unspecified Criminal charges …." *Id.* at ¶ 8. In fact, Mr. Liska has never been charged with any crime by, or been the subject of any criminal proceeding before, the Tribe. *See* Macarro Dec. at ¶ 15. As noted, the Pechanga Tribe has enacted no criminal laws, Macarro Dec. at ¶ 14, nor does it exercise criminal jurisdiction. If a person engages in criminal behavior on the Reservation, Riverside County (which exercises criminal jurisdiction over both members and non-members on the Reservation under 25 U.S.C. § 1360) handles the arrest and subsequent prosecution and punishment. *See* Macarro Dec. at ¶ 14.

The civil nature of Petitioner's exclusion is also evidenced by the Notice of Exclusion issued to Petitioner, which states that Mr. Liska was excluded for "actions [that] constitute trespass and public nuisance within the meaning of those terms as assigned by tribal custom and tradition." Notice of Exclusion from Pechanga Indian Reservation (hereinafter "Notice of Exclusion"), at 2, attached as Exhibit 3 to Macarro Dec. Under tribal custom and tradition, trespass and public nuisance are civil offenses. Macarro Dec. at ¶ 10.

The Notice of Exclusion also provides that violations of the exclusion order "shall be punished by a fine of up to five thousand dollars ($5,000) …. [,]" Notice of Exclusion at 2, further demonstrating that the punishment imposed in the Notice of Exclusion – and indeed the entire Tribal legal regime governing access to and banishment from the Reservation – is civil in nature. Any fine would be imposed pursuant to Article 4(h) of the Tribe's Non-Member Reservation Access and Rental Ordinance (hereinafter "Access Ordinance") and Article 3(b) of the Tribe's Exclusion and Eviction Regulations (hereinafter "Exclusion Regulations"), both of which provide for a fine of up to five thousand dollars for a violation of an exclusion order.[4] And "fine" is defined under Tribal law to mean a "civil penalty imposed by order of the Tribal Council." Exclusion Regulations, Art. 2(d). The Exclusion Regulations do not provide for incarceration.

[4] Copies of the Tribe's Access Ordinance and Exclusion Regulations are attached as Exhibits 1 and 2, respectively, to the Declaration of Mark Macarro filed herewith.

That Mr. Liska's was an exercise of the Tribe's civil authority is further evidenced by the Notice of Ruling issued by the Tribal Council on August 2, 2005. *See* Notice of Ruling, attached as Exhibit 4 to Macarro Dec. The Notice of Ruling, which was issued pursuant to – and following Mr. Liska's appeal of his exclusion under – the procedures set forth in the Exclusion Regulations, states that it was based on the Tribal Council's determination that "there is a very real and substantial threat of public interest if the appellant [Mr. Liska] were to be permitted to enter the Pechanga Indian Reservation." *Id*. at 1. The Notice also states that "the appellant has engaged in disruptive behavior and has made threats to engage in violence in the past." *Id*. And the Notice acknowledges that it is the duty of the Tribal Council "to protect the safety of [the Tribe's] members[,]" and that the Tribal Council was denying Mr. Liska's appeal in fulfillment of this duty.

Contrary to Petitioner's claim that "federal courts have … ruled banishment criminal …. [,]" Complaint at p. 8, federal courts have recognized that exclusion is an exercise of a tribe's civil jurisdiction if – like in the present case – exclusion is not imposed as criminal punishment. In *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985), the court held that exclusion from tribal lands was an exercise of a tribe's civil jurisdiction where, as here, the exclusion was ordered pursuant to an ordinance adopted to protect the health and safety of tribal members. *See also Alire*, 65 F.Supp.2d 1124, 1128 (*citing Hardin*, 779 F.2d at 478).[5] Important to the *Hardin* court's analysis was its finding that the intent of the tribal exclusion ordinance at issue "[wa]s merely to remove a person who 'threatens or has some direct effect on the … health

[5] The Supreme Court has also recognized the civil nature of exclusion. In *Duro v. Reina*, 495 U.S. 676 (1990), the Court held that although Indian tribes lacked criminal jurisdiction over nonmembers, they possess "their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Id*. at 696. While the *Duro* Court did not expressly state that "exclusion" is a civil proceeding, it did imply that "exclusion" proceedings are not a function of criminal jurisdiction. *See Duro*, 495 U.S. at 696-97. *See also Alire*, 65 F.Supp.2d at 1128; *id*. at 1128 n.7 (noting that although Congress, in response to *Duro*, amended ICRA to affirm the power of Indian tribes "to exercise [inherent] criminal jurisdiction over all Indians," 25 U.S.C. § 1301(2), "the portion of *Duro* that is relevant to the present issue [of whether exclusion proceedings are separate from criminal jurisdictional issues] remains valid.").

or welfare of the tribe,' a permissible civil regulation of the Tribe's internal order." *Hardin*, 779 F.2d at 479 (*quoting Montana v. United States*, 450 U.S. 544, 566 (1981)).

Like the exclusion ordinance in *Hardin*, the Pechanga Access Ordinance was adopted with the intent to "protect[] the health, welfare and safety of [Tribal] members and the residents of [the Pechanga] Reservation"). Access Ordinance, Art. 1(a), attached as Exhibit 1 to Macarro Dec. The Exclusion and Eviction Regulations that implement the Tribal ordinance are likewise civil in nature and aimed at protecting health and welfare. *See* Exclusion Regulations, Article 1(b), attached as Exhibit 2 to Macarro Dec ("The purposes of these regulations are to protect law and order on the Pechanga Reservation, and to safeguard the public health, safety and welfare of all Pechanga tribal members and their families ….").

Where, as here, exclusion of a person from an Indian reservation is an exercise of the tribe's civil jurisdiction, federal courts lack jurisdiction to entertain a habeas action under § 1303 because Tribes are immune from actions against exercises of their civil jurisdiction, *see Hardin*, 779 F.2d at 479, and ICRA does not abrogate tribal sovereign immunity for that sort of an action. *See Alire v. Jackson*, 65 F.Supp.2d at 1128 (dismissing habeas petition of petitioner who was banished for an underlying civil offense and holding that § 1303 did not provide a waiver of tribal or tribal official sovereign immunity where banishment is an exercise of tribal civil jurisdiction). *Compare Poodry*, 85 F.3d at 889 (allowing habeas review under § 1303 where the petitioners were convicted of treason and sentenced to, among other penalties, banishment from the reservation); *id*. at 879 (noting that the "orders of permanent banishment constitute[d] punitive sanctions imposed for allegedly criminal behavior"). *See also Alire*, 65 F.Supp.2d at 1127 (noting that the banishment in *Poodry* was imposed as criminal punishment).[6] Mr. Liska,

[6] Also figuring prominently in the *Poodry* court's holding was that there was no tribal review available in the circumstances of the case, and that "[i]f the reasoning of *Santa Clara Pueblo* foreclose[d] federal habeas jurisdiction, the petitioners [would] have [had] no remedy whatsoever." *Poodry*, 85 F.3d at 885. In the present case, however, there are other available remedies. The Tribe's Exclusion Regulations and the Notice of Exclusion issued to Plaintiff expressly provide for an appeal of his exclusion to the Tribal Council, and Petitioner did appeal his exclusion. *See* Exclusion Regulations, Art. 2(a), Ex. 2 to Macarro Dec.; Notice of Exclusion, at 2, Ex. 3 to Macarro Dec.; Notice of Ruling, at 1, Ex. 4 to Macarro Dec.

like the plaintiff in *Alire*, fails to demonstrate that his exclusion satisfies the prerequisites for habeas review. *See Alire*, 65 F.Supp.2d at 1128.

Because Petitioner has failed to meet his burden of proving a clear, unequivocal waiver of sovereign immunity, and because he has failed to state any cognizable claim under federal law, Respondent respectfully requests that the Court grant the Motion to Dismiss on the grounds that it lacks personal and subject matter jurisdiction and Plaintiff has failed to state a claim.

III. CONCLUSION

For all of the above reasons, Specially-Appearing Respondent respectfully requests that the Court dismiss this lawsuit with prejudice.

Dated: June 25, 2009

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