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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LUWANA QUITIQUIT, ROBERT QUITIQUIT, KAREN RAMOS, INEZ SANDS, REUBEN WANT, Petitioners, vs. ROBINSON RANCHERIA CITIZENS BUSINESS COUNCIL; TRACEY AVILA, Tribal Chairperson, in her official and individual capacity; CURTIS ANDERSON, JR., Vice Chairperson, in his official and individual capacity; STONEY TIMMONS, Tribal Member-at-Large, in his official and individual capacity; NICHOLAS MEDINA, Tribal Member-at-Large; MICHELLE MONLO, Tribal Secretary-Treasurer, in her official and individual capacity; KIM FERNANDEZ, Tribal Member-at-Large, in her official and individual capacity, Respondents.	Case No. C 11-00983 PJH RESPONDENTS' NOTICE OF MOTION AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: June 22, 2011 TIME: 9:00 a.m. CTRM.: 4 JUDGE: Honorable Phyllis J. Hamilton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

TO THE PETITIONERS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on June 22, 2011, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Phyllis J. Hamilton, Judge of the United States District Court for the Northern District of California, Courtroom 3, located at 1301 Clay Street, Oakland, California 94612-5212, Respondents, and each of them, will make a special appearance for the sole purpose of moving the Court, pursuant to Fed. R. Civ. P. Rule 12 (b)(1) and Rule 56, for an order dismissing the Petition for Writ of Habeas Corpus ("Petition") filed by the Petitioners in this case.

Specifically, Respondents move the Court for an order declaring:

1. That all of the claims set forth in the Petition arise from a breach of contract action and do not arise under the Constitution, laws and treaties of the United States and therefore, this Court lacks subject matter jurisdiction to hear this case;

2. That the Respondents, as the elected officials of the Robinson Rancheria, a federally recognized Indian Tribe, enjoys sovereign immunity from suit, have never given their consent to be sued and therefore, the Petition is barred by the Respondents' sovereign immunity; and

3. That, even if the doctrine of sovereign immunity does not bar the claims set forth in the Petition, the judgment entered by the Tribal Court ordering the eviction of the Petitioners from Tribal housing and excluding them from the Robinson Rancheria Indian Reservation, unless they have the permission of the Tribe's Citizens Business Council to be on the Reservation, does not constitute a detention within the meaning of the Indian Civil Rights Act, 25 U.S.C. § 1302, and therefore, a writ of habeas corpus does not lie in this case.

For all of these reasons, the Court lacks jurisdiction over this case.

This motion is made upon the grounds that there are no material issues of fact in dispute in this case and that the Respondents, and each of them, are entitled to a dismissal as a matter of law.

The present proceedings amount to nothing more than an attempt to halt the eviction of delinquent tenants, who have failed to pay rent for years, through habeas corpus proceedings. If

this matter did not involve an Indian tribe, Indian housing, and a tribal court, the petitioners, Luwana Quitiquit, Robert Quitiquit, Karen Ramos, Inez Sands, and Reuben Want ("Petitioners") would have been removed from the dwellings they occupy by the county sheriff months ago. Because they occupy tribal housing on reservation lands, Petitioners claim that their eviction amounts to a detention from which this Court must free them. That is absurd.

ARGUMENT

Petitioners remain in the tribal housing pending the conclusion of these proceedings. They are not under arrest and live precisely as they did before the Tribal Court proceedings. When they finally comply with the Tribal Court's order to vacate the housing, they will enjoy the same liberty they enjoyed before these proceedings. The only differences are that they will not be able to occupy housing owned by the Robinson Rancheria of Pomo Indians of California ("Tribe") and they will have to seek the Tribe's permission before entering the Robinson Indian Rancheria ("Reservation").

Federal Courts do not have subject matter jurisdiction over eviction actions against occupants of tribal land based upon a breach of contract. Petitioners are not under any form of detention. Habeas corpus does not lie and the action against the Tribe's officials is barred by sovereign immunity. For these reasons, this case must be dismissed for lack of subject matter jurisdiction.

I.

THE PETITION IS SUBJECT TO DISMISSAL PURSUANT TO FRCP 12(b)(1) OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT PURSUANT TO FRCP 56.

Rule 12 (b)(1) of the Federal Rules of Civil Procedure ("FRCP") permits a court to dismiss an action where the court lacks subject matter jurisdiction. Federal courts have found a Rule 12(b)(1) motion an appropriate vehicle for challenging a petition for writ of habeas corpus filed pursuant to Section 1303. See e.g., *Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 284-285 (N.D. N.Y. 2003). A court addressing a motion filed pursuant to Rule 12(b)(1) can consider evidence outside the pleadings that bears on the issue of jurisdiction. "On a motion to dismiss for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, proof of

jurisdictional facts may be supplied by affidavit, declaration, or any other evidence properly before the court, in addition to the pleadings challenged by the motion." *Greene v. United States*, 630 F.3d 1245, 1248 (9th Cir. 2010); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007).

A Rule 56 motion is also an appropriate response to a petition for habeas corpus. See e.g., *Boggs v. Santos*, 334 F. Supp. 2d 1244, 1246 (N.D. Or. 2004), citing *Blackledge v. Allison*, 431 U.S. 63, 80-81 (1977). Pursuant to Rule 56: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

As will be demonstrated below, the Court lacks jurisdiction over eviction actions against individuals occupying tribal land based upon a breach of contract action. In addition, Petitioners are not subject to any form of detention by Respondents, Robinson Rancheria Citizens Business Council, Avila, Anderson, Timmons, Medina, Monlo, and Fernandez ("Tribal Officials") and the Tribal Officials are immune from suit.

The Petition, therefore, must be dismissed or summary judgment granted for lack of subject matter jurisdiction.

II.

STATEMENT OF FACTS

The relevant facts of this case are set forth in the Declaration of Lester J. Marston in Support of Respondents' Motion to Dismiss Petition for Writ of Habeas Corpus ("Marston Declaration") and the Tribal Court's Finding of Fact, Conclusions of Law, and Judgment entered against each of the Petitioners (hereinafter referred to collectively as the "Judgments"), the Tribal Court's Opinion, Decision and Order (hereinafter referred the "Opinion"), and the Tribal Court's Order Adopting Proposed Findings of Fact, Conclusions of Law, and Judgment ("Order"),[1] which are attached to the Petition as Exhibits 1-6. The Marston Declaration, the

[1] The Tribal Officials also move the Court pursuant to Rule 201 of the Federal Rules of Evidence to take judicial notice of the Judgments, which are attached to the Petition as Exhibits 1-6. *In re Perry*, 2008 Bankr. LEXIS 174, *4 (2008 B.C.E.D.Pa).

Judgments, the Opinion, and the Order are incorporated herein as if set forth in full.

For the convenience of the Court, the Tribal Officials will provide a brief summary of the facts relevant to the issue of this Court's subject matter jurisdiction. The Tribal Officials will not allege facts that are not related to the issue of subject matter jurisdiction, including alleged due process violations arising from the disenrollment of the Petitioners; alleged due process violations arising from the administrative hearings held by the Robinson Rancheria's Housing Department; or the alleged due process violations in the Tribal Court proceedings. The Tribal Officials do not admit the truth of any of those allegations. Though Petitioners would wish to broaden the Court's inquiry to include those issues, they are not related to the issues before the Court because they are unrelated to the issue of whether the Tribal Court's Judgments subjects the Petitioners to detention.

Petitioners, Luwana Quitiquit, Robert Quitiquit, Karen Ramos, Inez Sands, and Reuben Want, are tenants of housing owned by the Tribe, pursuant to mutual help and occupancy agreements ("Leases") between the Tribe and the Petitioners. Judgments, Ex. 1, p. 2, ¶¶ 5-6, Ex. 2, p. 2, ¶¶ 5-7, Ex. 3 p. 2, ¶¶ 5-6, Ex. 4, p. 2, ¶¶ 5-6, Ex. 5, p. 2, ¶¶ 5-6. For years, Petitioners failed to pay even the nominal administration fee charged for the use of the housing. Judgments, Ex. 1, p. 2, ¶¶ 7-8, Ex. 2, p. 2, ¶¶ 9-10, Ex. 3 p. 2, ¶¶ 7-8, Ex. 4, p. 2, ¶¶ 7-8, Ex. 5, p. 2, ¶¶ 7-8. Each Petitioner was given notice of the delinquency in the payment of the fee and an invitation to resolve the problem through a repayment agreement. Judgments, Ex. 1, p. 2, ¶ 9, Ex. 2, p. 2, ¶ 11, Ex. 3 p. 2, ¶ 9, Ex. 4, p. 2, ¶ 9, Ex. 5, p. 2, ¶ 9. The Petitioners either chose not to enter into a repayment agreement, failed to fulfill their obligations under those agreements or otherwise bring their accounts current after entering into a repayment agreement. Judgments, Ex. 1, pp. 2-3, ¶¶ 11-12, Ex. 2, p. 2, ¶ 12, Ex. 3 p. 2, ¶ 10, Ex. 4, p. 2, ¶ 10, Ex. 5, p. 2, ¶ 10. Each Petitioner was given notice that his/her Lease would be terminated for failure to pay the administration fee and notice that administrative hearings before the Tribe's Housing Commission would be held to give each an opportunity to explain why his/her Lease should not be terminated. Judgments, Ex. 1, pp. 2-3, ¶¶ 10-13, Ex. 2-3, p. 2, ¶¶ 13-14, Ex. 3 p. 2-3, ¶¶ 11-12, Ex. 4, p. 2-3, ¶¶ 11-12, Ex. 5, p. 2-3, ¶¶ 11-12. All of the Petitioners refused to appear at

the hearings. Judgments, Ex. 1, p. 3, ¶ 13, Ex. 2, p. 3, ¶ 14, Ex. 3 p. 3, ¶ 12, Ex. 4, p. 3, ¶ 12, Ex. 5, p. 3, ¶ 12. Each Petitioner was then given a three day notice to quit the tribal housing. Judgments, Ex. 1, p. 3, ¶ 14, Ex. 2, p. 3, ¶ 15, Ex. 3 p. 3, ¶ 13, Ex. 4, p. 3, ¶ 13, Ex. 5, p. 3, ¶ 13. All of the Petitioners refused to vacate the tribal housing. Judgments, Ex. 1, p. 3, ¶ 17, Ex. 2, p. 3, ¶ 18, Ex. 3 p. 3, ¶ 16, Ex. 4, p. 3, ¶ 16, Ex. 5, p. 3, ¶ 16. The Tribe filed an unlawful detainer complaint against each of the Petitioners in the Robinson Rancheria Tribal Court ("Tribal Court"). Petition, p. 10, ¶ 18.

After hearing and ruling on multiple pretrial challenges and motions filed by Petitioners' legal counsel, the Tribal Court held a separate trial for each Petitioner. Petition, pp. 10-11, ¶¶ 18-20. Petitioners' legal counsel presented evidence and argument to the Tribal Court. The Trial Court considered all of the Petitioners' arguments and issued the lengthy, comprehensive Opinion (Exhibit 6) and the lengthy, comprehensive Judgments (Exhibits 1-5). The Tribal Court ordered the Petitioners to vacate the dwellings they occupy and pay the amount of rent in arrears. Judgments, Ex. 1, p. 5-6, Ex. 2, p. 5-6, Ex. 3, p. 5-6, Ex. 4, p. 5-6, Ex. 5, p. 5-6.

III.

THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PETITIONERS' CLAIMS DO NOT ARISE UNDER THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES.

Federal courts are courts of limited jurisdiction. Federal jurisdiction may arise from claims raising a federal question or from diversity of the parties as plead in the complaint.

> Federal jurisdiction must stem from an element pleaded in plaintiff's complaint. *Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908)*; *American Invs-co Countryside v. Riverdale Bank, 596 F.2d 211 (1979)*. Therefore the court must look at the well-pleaded complaint to determine whether it supports federal subject matter jurisdiction. *Countryside, 596 F.2d at 216* ("Federal question must appear in plaintiff's well-pleaded complaint in order to make the case arise under federal law.").

Round Valley Indian Housing Authority v. Hunter, 907 F. Supp. 1343, 1346. (N.D. Cal. 1995) ("*Round Valley*").

In the present case, Petitioners have neither plead diversity jurisdiction nor alleged any facts that would support such a claim. Federal court jurisdiction, to the extent that it exists, therefore, must be based on federal question jurisdiction.

Petitioners have not plead jurisdiction pursuant to 28 U.S.C. § 1331 ("Section 1331"), or generally alleged that their claims arise under the Constitution, laws, or treaties of the United States. Petitioners have cited as the basis for the Court's jurisdiction 25 U.S.C. § 1303 ("Section 1303 "), a provision of the Indian Civil Rights Act, 25 U.S.C. § 1301, et seq. ("ICRA"), which provides for habeas corpus relief where the petitioner is subject to detention by order of any Indian tribe. Petition, p. 6, ¶ 9.[2] Section 1303 states: "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."

The factual allegations set forth in the Petition reveal that the Petitioners' claims are based on eviction actions brought in the Tribal Court under tribal law. In *Round Valley*, *supra*, this Court found that federal courts do not have jurisdiction over an action brought by a housing authority to evict individual tribal member tenants:

> . . . actions involving an Indian tribe as a party claiming a possessory right in land arising under federal law should be adjudicated by the federal courts. *Oneida, 414 U.S. at 676*. In contrast, actions which involve individual members of tribes where the underlying action does not involve an Indian tribe's possessory rights should be adjudicated by the state courts.

Round Valley, 907 F. Supp. at 1349.

The United States District Court for the Southern District of California reached the same conclusion:

> The Ninth Circuit, in an opinion which was subsequently withdrawn, and thus is no longer precedential, explained that actions like the one presently before the Court do not "require an interpretation of [a] federal right" and, thus, do not arise under federal law. *Owens Valley Indian Housing Authority v. Turner, 185 F.3d 1029 (9th Cir. 1999)*, withdrawn and reh'g granted, *192 F.3d 1330 (9th Cir. 1999),* appeal dismissed as moot, *201 F.3d 444 (9th Cir. 1999)*. The *Turner* court cited with approval both *Hunter, 907 F. Supp. at 1348*, and *Reese, 978 F. Supp. at 1266*. See *185 F.3d at 1033*. The court agreed that, while federal common law jurisdiction exists when resolution of a case requires an interpretation of an Indian tribe's federal right of possession, an unlawful detainer suit brought by an Indian Housing Authority merely asserts the rights of a landlord as against its tenant, and does not implicate the Indian tribe's federally protected right to possess and exclude others from its lands. *Id. at 1032-33*.

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[2] Petitioners state that venue is proper because "this action arose in Lake County" without citing to any statutory basis for asserting that this Court is the appropriate venue for their claims. The Tribal Officials assume that the Petitioners base that assertion on 28 U.S.C. 1391(b)(2).

> Although the Ninth Circuit's opinion in *Owens Valley* was withdrawn, the Court finds the reasoning expressed therein wholly persuasive and concludes that federal common law jurisdiction does not exist for the present action.

All Mission Indian Housing Authority v. Magante, 526 F. Supp. 2d 1112, 1116-1117 (S.D. Cal. 2007) (emphasis added).

This Court does not have jurisdiction over the Petitioners' claims to a possessory right in the homes they occupied. The unlawful detainer actions brought against the Petitioners has been adjudicated in the appropriate forum, the Tribal Court. Attempting to repackage those breach of contract/unlawful detainer actions as civil rights claims arising from detention does not transform those claims into matters that are subject to federal court jurisdiction.

The Petition, therefore, must be dismissed.

IV.

PETITIONERS' CLAIMS ARE BARRED BY THE ROBINSON RANCHERIA'S SOVEREIGN IMMUNITY FROM SUIT.

Even if the Court concludes that it has jurisdiction pursuant Section 1331, Petitioners' claims are barred by tribal sovereign immunity.

As a federally recognized Indian tribe, the Tribe enjoys the protection of tribal sovereign immunity. "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).

The sovereign immunity of an Indian tribe is coextensive with that of the United States itself. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1050 (9th Cir. 1985), rev'd on other grounds, 474 U.S. 9 (1985); *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983).

Although tribal sovereign immunity can be abrogated by Congress or waived by a tribe, any such waiver must be unequivocally expressed and is to be narrowly construed. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001).

Judicial recognition of a tribe's immunity from suit is not discretionary with a court or

administrative forum. Rather, absent an effective waiver or abrogation, the assertion of sovereign immunity by a federally recognized Indian tribe deprives the court of jurisdiction to adjudicate the claim:

> Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court. . . . Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.

People of the State of California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979). See, also, *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 512-513 (1940).

Tribal sovereign immunity is jurisdictional in nature and applies "irrespective of the merits" of the claim asserted against the Tribe. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), rev'd on other grounds, 463 U.S. 713 (1983).

The doctrine of Tribal sovereign immunity that bars lawsuits brought against an Indian tribe without its consent, equally applies to lawsuits brought against tribal officials acting in their representative capacity and within the scope of their authority: "Tribal immunity extends to Tribal officials acting within their representative capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981); see also, *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983). Federal courts have specifically found that tribal council members acting within the scope of their authority are protected by tribal sovereign immunity. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991); *Saucerman v. Norton*, 51 Fed. Appx. 241, 243 (9th Cir. 2002). As the Petition acknowledges, the Tribal Officials are members of the Tribe's Citizens Business Council ("Council"), the governing body of the Tribe. Petition, p. 5-6, ¶ 8.

The Petition reveals that this action is based on the Opinion and the Judgments issued by the Tribal Court against the Petitioners, which, Petitioners allege, amount to a detention. Petition, p. 2-3, ¶¶ 1, 3-7. Petitioners allege that the detention that provides the jurisdictional basis for this action is the order to vacate the tribal housing and the restriction on the

Petitioners' access to the Reservation included in the Judgments. Petition, p. 6, ¶ 9. Petitioner's assert that the Tribal Officials' "actions have cause the detention, or immediate threat of detention, of Petitioners and restraint on their liberty." Petition, p. 6, ¶ 8. Petitioners include no specific allegation that reveals that any actions on the part of the Tribal Officials have caused the alleged detention. The Tribal Officials were not parties to the Tribal Court proceedings. The Tribal Court actions were brought by the Tribe. The operative orders in this case, the Opinion and the Judgments were issued by the Tribal Court. Petition, p. 11, ¶ 21. Federal courts addressing the issue have concluded that, in order for tribal officials to be the proper defendants, they must have the authority to reverse the order of detention. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899 (2d Cir. 1996) ("*Poodry*"), citing *Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 408-09* (7th Cir. 1985). Here, the Tribal Court issued the Order and Judgments. The Council and the individual members of the Council do not have the authority to overturn the Order and Judgments. Marston Declaration, p. 2, ¶ 8.

Nevertheless, to the extent that the Court concludes that Petitioners' claims relate to action taken by the Tribal Officials, the Tribal Officials were, at all times relevant to the events alleged in the Petition, acting in their official capacities. Since any action taken by the Tribal Officials that relate to the claims set forth in the Petition were within the course and scope of the Tribal Officials' duties as tribal officials, the Tribal Officials enjoy the protection of tribal sovereign immunity in the absence of a waiver by the Tribe or Congressional abrogation of that immunity. *People of the State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979); *State of California v. Harvier*, 700 F.2d 1217 (9th Cir. 1983); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985).

The Petition does not contain any allegation that the Tribe has waived its sovereign immunity with regard to Petitioners' claims. The Tribe has, in fact, never consented to a waiver of its sovereign immunity with regard to itself or any of the Tribal Officials for any of the claims set forth in the Petition. Marston Declaration, p. 2, ¶ 5-6. Thus, Petitioners' claims are barred by tribal sovereign immunity unless the Petitioners can show that the Tribe's sovereign

immunity has been abrogated by Congress.

While Petitioners have not affirmatively plead that Congress has abrogated the Tribal Officials' immunity with regard to their claims, Petitioners appear to believe that Section 1303 provides such an abrogation where the petitioner is subject to "his detention by order of an Indian tribe." Petition, pp. 6-7, ¶ 10.

The issue of whether Petitioner's claims are barred by tribal sovereign immunity, therefore, turns entirely on whether the Tribal Court's Judgments ordering the Petitioners to vacate the tribal housing they occupy and requiring that they seek permission before they enter the Reservation constitutes a "detention" for the purposes of Section 1303.

V.

PETITIONERS ARE NOT SUBJECT TO DETENTION.

Before addressing the Petitioners' assertion that they are subject to detention as a result of the Judgments, it is necessary to begin by clarifying what is *not* at issue in the present proceedings. First, the issues before the Court are not related to tribal membership. Petitioners have attempted to conflate the issue of tribal membership with their eviction from the tribal housing, Petition, p. 9-10, ¶¶ 15-16, although they do not to affirmatively allege that the Tribal Court addressed the issue of membership. Petitioners, in fact, admit that the issue of membership was appealed to the BIA, not the Tribal Court. Petition, p. 9, ¶ 15. A review of the Opinion and Judgments, however, reveals that Tribal membership was not at issue in the unlawful detainer actions before the Tribal Court or a basis for the Opinion or Judgments.

Moreover, even if the issue of tribal membership had been addressed by the Tribal Court, the Supreme Court has ruled that federal courts have no jurisdiction over tribal membership disputes:

> A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff v. Burney, 168 U.S. 218 (1897)*; *Cherokee Intermarriage Cases, 203 U.S. 76 (1906)*. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

Santa Clara Pueblo, 436 U.S. at 72 n.32.

Second, present proceedings cannot address any due process claims arising from the Tribal Court proceedings that resulted in the Opinion and Judgments or the administrative proceedings that led to the Tribal Court proceedings. While Petitioners include references to alleged due process violations on the part of the Tribal Officials and Tribal Court, Petition, pp. 9-11, ¶¶ 15-21, any such due process claim would arise under 28 U.S.C. §1302(8). The fundamental holding in *Santa Clara Pueblo* was the rejection of the claim that the ICRA granted federal courts jurisdiction to address civil claims based on 28 U.S.C. §1302:

> Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of *§ 1302*, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that *§ 1302* does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

Id., 436 U.S. at 72. See also, *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 394-95 (E.D. Wis. 1995).

Thus, despite Petitioners attempt to bring the issues of tribal membership and alleged due process violations into these proceedings through the back door, the only issue to be addressed in determining where the Court has jurisdiction over this action is whether the Petitioners are subject to detention as that term is used in Section 1303.

In *Santa Clara Pueblo*, the Supreme Court expressly held that the only private right of action to be found in the ICRA is that for habeas corpus relief. ". . . Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in *§ 1303*." *Santa Clara Pueblo*, 436 U.S. at 70.

The federal courts generally require that the petitioner meet three criteria in order to find that a detention has occurred under Section 1303: (1) the proceedings at issue must be criminal proceedings; *Santa Clara Pueblo,* 436 U.S. at 67; (2) the petitioner must be subject to detention, *Moore v. Nelson*, 270 F.3d 789, 790-791 (9th Cir. 2001) ("*Moore*"); and (3) the petitioner must have exhausted his/her tribal remedies. *Jeffredo v. Macarro*, 599 F.3d 913, 918

(9th Cir 2010).

First, the Court in *Santa Clara Pueblo* made it clear that the proceedings from which a petition for writ of habeas corpus will lie are criminal proceedings:

> In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. . . .
> Similarly, and of more direct import to the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context.

Id., 436 U.S. at 67.

Most[3] of the federal court cases interpreting Section 1303 that have been brought since *Santa Clara Pueblo*, have specifically required that the proceedings be criminal proceedings. See, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996) ("*Poodry*"); *Quair v. Sisco*, 2007 U.S. Dist. LEXIS 36858 (E.D. Cal 2007) ("*Quair II*") ["Petitioners seeking relief under *§ 1303* must establish that . . . the proceeding at issue is criminal and not civil in nature . . . ."]; *Quair v. Sisco*, 359 F. Supp. 2d 948, 963 (E.D. Cal. 2004) ("*Quair I"*) [same]; *Alire v. Jackson*, 65 F. Supp. 2d 1124, 1127 (D. Ore. 1999) ("*Alire*") ["[W]rit of habeas corpus available under *section 1303* is limited to unlawful detentions arising out of tribal criminal decisions."].

There is no question that the Petition in this case does not arise from criminal proceedings. As the Opinion and Judgments make clear, Petitioners' claims arise from unlawful detainer actions filed in tribal court. Unlawful detainer actions are not criminal proceedings.

As a result of the *Santa Clara Pueblo* decision, litigants seeking to bring claims under the ICRA have sought to expand the scope of the term "detention" as used in Section 1303. Federal Courts have generally been reluctant to do so. *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010); *Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 285 (N.D.N.Y. 2003)

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[3] The Ninth Circuit in *Jeffredo* initially ruled that Section 1303 required criminal proceedings. *Jeffredo v. Macarro*, 590 F.3d 751, 759 (9th Cir. 2009). The Ninth Circuit later issued an amended opinion that did not address the issue. *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010).

("*Shenandoah*"); *Moore; Alire*. Those courts that have allowed incrementally more expansive interpretations have done so only after concluding that the proceedings were criminal and that the petitioner faced severe restraints on liberty. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996) ("*Poodry* "); *Quair v. Sisco*, 2007 U.S. Dist. LEXIS 36858 (E.D. Cal 2007).

In *Jeffredo*, the Court of Appeals for the Ninth Circuit provided the basic standard that applies to the present proceedings:

> *Section 1303* of the ICRA provides: "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*. The term "detention" in the statute must be interpreted similarly to the "in custody" requirement in other habeas contexts. *See Moore v. Nelson, 270 F.3d 789, 791 (9th Cir. 2001)* ("There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act *§ 1303* is any more lenient than the requirement of 'custody' set forth in the other habeas statutes." (citation omitted)). Further, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo, 436 U.S. at 72 n.32*. Therefore, an ICRA habeas petition is only proper when the petitioner is in custody. *Id. at 791* (explaining the custody requirement).

Jeffredo, 599 F.3d at 918.

In *Jeffredo*, the petitioners sought habeas corpus relief based on the denial of access to tribal programs and services, such as the tribal health clinic and school, potential exclusion from the tribe's reservation, and the loss of membership. The petitioner argued that each of these restrains on the petitioner's liberty constituted a detention under Section 1303. The *Jeffredo* court rejected all three arguments. Citing, *Poodry,* the Court stated, "We agree with our colleagues on the Second Circuit and hold that *§ 1303* does require 'a severe actual or potential restraint on liberty.'" *Id.*, 599 F.3d at 919.

Applying this standard, the Court found that "the denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty." *Ibid.* The Court found the potential for exclusion also insufficient:

> [U]ntil confinement is imminent (like the confinement in *Hensley* [v. Mun. Court, 411 U.S. 345, 351 (1973)]) there can be no justification for use of the habeas corpus remedy. *Id*. We see no reason not to analogize to the court's

> construction of the criminal habeas corpus provisions in *Edmunds* [*v. Won Bae Chang*, 509 F.2d 39, 40-41 (9th Cir. 1975)]. Therefore, we hold that the potential threat of future eviction is not sufficient to satisfy the detention requirement of *§ 1303*.

Id., at 920.

Finally, the *Jeffredo* Court rejected the claim that loss of membership constitutes detention for the purposes of Section 1303, "We do not wish to minimize the impact of the Tribe's membership decision on Appellants. Indeed, we recognize that Appellants have suffered a significant loss. Nevertheless, such loss is simply not equivalent to detention." *Id.*, at 921.

The only basis that any of these Courts have found for concluding that a petitioner was subject to detention sufficient to meet the requirements of Section 1303 was permanent banishment from a tribe for criminal conduct (i.e., treason).

The only Court of Appeals decision addressing the applicability of Section 1303 to enforcement of a housing ordinance is the decision of the United States Court of Appeals for the Second Circuit, *Shenandoah v. Halbritter*, 366 F.3d 89 (2nd Cir. 2004). That case involved a tribal leadership dispute and accusations of attempted harassment and intimidation through the enactment and enforcement of a housing ordinance. Despite the fact that the lead plaintiff was incarcerated twice in tribal jail for her actions resulting from the dispute, and despite the fact that the homes of the plaintiffs were destroyed by tribal government officials without eviction proceedings, the court found that it lacked jurisdiction under the ICRA:

> In the instant case, Respondents' enforcement of their housing ordinance did not constitute a sufficiently severe restraint on liberty to invoke this Court's habeas corpus jurisdiction.
>
> The gravamen of Petitioners' Complaint focuses on the destruction of their homes, which can be described more aptly as an economic restraint, rather than a restraint on liberty. As a general rule, federal habeas jurisdiction does not operate to remedy economic restraints. The imprisonment of Ms. Patterson for her alleged physical assault on Nation officers is too tenuously connected to the housing ordinance to provide habeas jurisdiction for an attempt to prevent the enforcement of that ordinance.
>
> Because the only mechanism for federal enforcement of rights under ICRA is a federal habeas petition, and no detention has been established, the District Court properly dismissed Petitioners' claim for lack of subject matter jurisdiction. . . .

Shenandoah, 366 F.3d at 92.

The Second Circuit has also issued the most expansive reading of the jurisdictional

reach of Section 1303, *Poodry*, *supra*. *Poodry* involved an intertribal dispute which lead the Tribal Council of the Tonawanda Band to summarily find the petitioners guilty of treason, strip them of their tribal membership and ownership of any tribal lands, and permanently banish them from the Band's reservation. First, as cited above, the *Poodry* court determined that the proceedings leading up to the punishment for treason were criminal in nature. The Court then stated the standard that it would apply to the issue of jurisdiction under Section 1303:

> As with other statutory provisions governing habeas relief, one seeking to invoke jurisdiction of a federal court under *§ 1303* must demonstrate, under *Jones v. Cunningham, 371 U.S. 236, 243, 9 L. Ed. 2d 285, 83 S. Ct. 373 (1963)*, and its progeny, a severe actual or potential restraint on liberty." The Court then found that the punishment was so severe as to amount to detention for the purposes of Section 1303.

Poodry, 85 F.3d at 880.

The *Poodry* case has been frequently cited as the standard for determining whether detention under Section 1303 has occurred. Courts have rarely concluded that the actions of a tribal official have met this standard. See *Jeffredo*, *Shenandoah*, *Alire*, *Moore*, [tribal action not sufficiently severe to qualify under Section 1303]; *Quair I* and *II*, [tribal action qualified as detention].

What is immediately obvious from even a brief review of the relevant cases is that, in order to qualify as detention, the actions by the tribal officials must amount to a severe restriction on a person's liberty. As the *Poodry* court stated:

> We deal here not with a modest fine or a short suspension of a privilege--found not to satisfy the custody requirement for habeas relief--but with the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation. To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason.

Poodry, 85 F.3d at 895.

When this standard is applied to the present case, there is no doubt that eviction from tribal housing does not impose a severe restraint on liberty. Unlawful detainer actions are contract actions arising from a tenant's failure to meet his/her obligations under the contract.

As a result of that failure to meet their obligations under the contract, the tenants are required to leave the premises they occupy and find other housing. As the *Shenandoah* court concluded, "enforcement of their housing ordinance did not constitute a sufficiently severe restraint on liberty to invoke this Court's habeas corpus jurisdiction." *Shenandoah*, 366 F.3d at 92.[4] As the *Shenandoah* court further concluded, even the destruction of the homes is an economic restraint, rather than a restraint on liberty. *Id.*

The Petition does not include any allegation that Petitioners are subject to any form of physical detention, such as incarceration. Petitioners assert that the Court's Judgments "when executed, will effectuate the immediate expulsion of Petitioners from their homes on the reservation and from tribal lands under threat of arrest and criminal trespass, effectively banishing them." Petition, p. 2, ¶ 1.

Petitioners are clearly trying to transform their eviction into a banishment similar to that in *Poodry* and *Quair I and II*. "These evictions operate as a significant restraint on Petitioner's liberty, barring them from their homes and tribal lands. In effect, the evictions banished the already disenrolled Petitioners from tribal lands." Petition, p. 11, ¶ 21. Their effort fails. The Judgments do not have the effect of permanent banishment. They merely require that the Petitioners seek permission before entering tribal land.

There is, thus, simply no basis for concluding that the Petitioners are subject to any restraint on their liberty, and there is no basis for concluding that they are subject to detention.

Finally, Petitioners have also failed to exhaust their Tribal Court remedies.[5] To the extent that they wish to challenge the Tribal Court's Order that they enter tribal land only with the permission of the Tribal Council, the Petitioners could have filed a motion for rehearing on

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[4] The Second Circuit was careful to distinguish *Poodry* from other cases: "We determine the majority in *Poodry*, in interpreting the court's jurisdiction to encompass banishment, was concerned about the unique severity of that punishment." *Shenandoah*, 366 F.3d at 92.

[5] The Petitioners also failed to exhaust their tribal administrative remedies by failing to appear at the hearings afforded each of them by the Tribe's Housing Commission. The "exhaustion of an administrative remedy has been held jurisdictional in California." *Lopez v. Civil Service Com.* (1999) 232 Cal. App. 3d 307, 311.

that issue. They did not do so.

The Petitioners' claims do not meet any of the criteria for jurisdiction under Section 1303. The Tribal Court proceedings were not criminal proceedings. The Opinion and Judgments do not impose conditions that qualify as detention under the case law interpreting Section 1303. Finally, the Petitioners have failed to exhaust their tribal remedies.

CONCLUSION

The Tribal Court action was simply an unlawful detainer action brought by the Tribe because the Petitioners had failed to pay their rent. The foregoing leaves no doubt that the Petitioners' claims do not constitute a detention and, therefore, fail to meet the standards for Section 1303. Without a detention, there is no waiver of the Tribal Officials' sovereign immunity from suit. As a result, the Court lacks subject matter jurisdiction over Petitioners' claims. The Petition, therefore, must be dismissed.

Respectfully submitted,

DATED: April 11, 2011

RAPPORT AND MARSTON

/s/ Lester J. Marston

By: _____

Lester J. Marston
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of April, 2011, my office electronically filed the foregoing document, using the ECF System for the United States District Court, Northern District of California, which will send notification of such filing to the attorney for petitioners:

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/s/ Lester J. Marston

Lester J. Marston