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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

KAY LEWIS,	)	NO. 3:12-CV-08073-SRB-DKD
	)	
Petitioner,	)	
	)	MOTION TO DISMISS AMENDED
vs.	)	PETITION FOR WRIT OF HABEAS
	)	CORPUS
GREGG HENRY, CLINTON KESSAY,	)	(Oral Argument Requested)
JR., KINO KANE, THERESA	)	
LARZELERE, ARNOLD BEACH,	)	
ALVIN DECLAY, SR., KINO TORINO,	)	
CLINE GRIGGS, SR., JUSTIN	)	
WILLIAMS,	)	
	)	
Respondents.	)	

1 Respondents, elected officials of the White Mountain Apache Tribe, hereby  
2 move this Court to dismiss the Amended Petition for a Writ of Habeas Corpus with  
3 prejudice pursuant to Fed. R. Civ. Proc. 12(b)(1) and (6), for the reason that this Court  
4 is without jurisdiction over the subject matter of the Petition and because the Petition  
5 fails to state a claim for which relief can be granted. This Motion to Dismiss is  
6 supported by the following Memorandum of Points and Authorities.  
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8 **MEMORANDUM OF POINTS AND AUTHORITIES**  
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10 **I. PROCEDURAL HISTORY**

11 Petitioner served his original Petition for Writ of Habeas Corpus on the White  
12 Mountain Apache Tribe (“Tribe”) on or about May 4, 2012. The original Petition  
13 named the Tribe as the respondent. Following receipt of the Tribe’s Motion to Dismiss,  
14 Petitioner filed his amended Petition replacing the Tribe as the named respondent with  
15 the names of nine of the eleven members of the Tribe’s Tribal Council, presumably in  
16 their official capacity—as no allegation is made of any action done in a personal  
17 capacity by the named Respondents. The Tribe filed its opposition to Petitioner’s  
18 Response to the Motion to Dismiss (Docket # 9), in part because the Amended Petition  
19 fails to cure the material jurisdictional defects in the original Petition. Accordingly, on  
20 behalf of the named Respondents, legal counsel for the Tribe submit this Motion to  
21 Dismiss the Amended Petition.  
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## II. BACKGROUND AND STATEMENT OF FACTS

Petitioner, Kay Lewis, is an enrolled member of the Tribe who unsuccessfully sought to become certified as a candidate for elected office in the Tribe's April 2012, general election. The Amended Petition stems from his dispute over Tribal procedures and authority to certify candidates seeking elected tribal office. The Amended Petition is fraught with misstatements, omissions and conclusions of law. The dispositive issue for the Tribal Election Commission's administrative determination which Petitioner disputes was that he had not complied with application procedures enacted into tribal law to confirm his constitutional qualification to become a candidate. However, Petitioner fails to inform this Court of this critical factual finding by the Tribal Election Commission. Instead, Petitioner unconditionally states that he "operated cattle" within the district, and accordingly satisfied a tribal constitutional requirement for elective office within the Tribal Council. *Amended Petition, paragraph 8*. Thus, although Petitioner alleges a, "criminal detention," *Amended Petition, paragraph 17*, the gravamen of his Amended Petition is that he disagrees both with the administrative fact-finding of the Tribal Election Commission which found him ineligible to be a candidate for the office he sought, and with the Tribal Council's exclusive constitutional authority to certify candidates seeking office.

The Tribe's election procedures and the qualifications for persons seeking office are governed by the Tribe's Constitution and the Tribe's Election Code. A copy of the Tribe's Constitution, approved by the Secretary of the Interior on November 12, 1993,

is attached as RESPONDENTS' EXHIBIT 1 to this Memorandum.<sup>1</sup> A copy of the Tribe's Election Code is attached as RESPONDENTS' EXHIBIT 2. The Constitution authorizes the Tribal Council to promulgate an election ordinance governing the conduct of elections and to appoint subordinate committees and commissions such as the Tribal Election Commission. *WMAT Constitution, Article VI, Section 8 and Article IV, Section 1 (s)*. Nevertheless, the Tribe's Constitution reserves the authority to certify candidates for office exclusively to the Tribal Council. *WMAT Constitution, Article VI, Section 6*.

The Tribal Council enacted the Tribe's Election Code into law pursuant to its Constitutional authority and established and appointed an Election Commission, as required by the Election Code.<sup>2</sup> On behalf of the Tribal Council, the Election Commission conducts administrative functions and engages in fact-finding necessary to carry out the Tribal election process. *Election Code, Section 2.1B*. Among other things, these duties include the duty by the Election Commission to verify that applicants are qualified to be certified as candidates. This verification is done through the use of an application process to confirm compliance with the Tribe's Constitution. *Election*

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<sup>1</sup> Petitioner, in his Amended Petition, paragraph 5, again erroneously states the adoption date of the Tribe's Constitution as June 18, 1934. The first Constitution adopted by the Tribe was on August 26, 1938. The date provided by Petitioner, June 18, 1934, is the date when the Indian Reorganization Act of 1934 (48 Stat. 984) was enacted by Congress.

<sup>2</sup> The Election Commission is established pursuant to Section 2.1A of the Election Code. The Commission is composed of nine members none of whom may be an immediate family member of any elected official or any candidate. Commission members are appointed to serve a term ending not more than six months after the close of the election.

1 *Code, Section, 4.6.* However, after the Election Commission reports its fact-finding  
 2 regarding each candidate application, it is the Tribe's governing body only, the Tribal  
 3 Council, which has the constitutional authority and duty to certify those persons who  
 4 have demonstrated their eligibility to be a candidate for office. This structure of  
 5 authority is consistent with other provisions of the Tribe's Constitution which vests  
 6 much of the Tribe's governmental authority exclusively in a single governing council.<sup>3</sup>  
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8 After the Tribal Council certifies the candidates, those decisions become final.  
 9 The Election Code authorizes Tribal Court review only for alleged impropriety or fraud  
 10 during election balloting, *WMAT Election Code, Chapter 8*, but it does not provide for  
 11 court review of the Tribal Council's candidate certification decision. Most importantly,  
 12 the Tribe's laws confirm that except as expressly and unequivocally authorized by the  
 13 Tribal Council, the Tribe and the Tribal Council are absolutely immune from suit.<sup>4</sup>  
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 17 <sup>3</sup> Although the Tribe's Constitution delegates some authority to certain Tribal officials,  
 18 unlike the U.S. Constitution, it does not allocate separation of power among the three  
 19 branches of government. Instead, the Tribal Constitution vests broad plenary powers in  
 20 the Tribal Council to exercise the inherent powers of the Tribe, the powers of the Tribe  
 21 under existing law, and powers enumerated in the Tribal Constitution. *WMAT*  
 22 *Constitution, Article IV, Section 1.*

23 <sup>4</sup> The White Mountain Apache Tribe Judicial Code, Section 1.7, states as follows:  
 24 The White Mountain Apache Tribe, as a sovereign government, is absolutely  
 25 immune from suit, and its Tribal Council, officers, agents, and employees shall be  
 26 immune from any civil or criminal liability arising or alleged to arise from their  
 27 performance or non-performance of their official duties. Nothing in this code  
 28 shall be deemed to constitute a waiver of the sovereign immunity of the White  
 Mountain Apache Tribe except as expressly provided herein or by action of the  
 Tribal Council.

The Judicial Code was enacted pursuant to the Tribal Council's delegated authority  
 under Article IV, Section 1(q) of the Tribe's Constitution to, "enact ordinances  
 establishing and governing tribal courts."

1 In order to qualify as a candidate for Tribal Council office, *inter alia*, a person  
 2 must reside, operate cattle, or have farm land assigned in the voting district from which  
 3 the person intends to seek office. *WMAT Constitution, Article XII, Section 1.*<sup>5</sup>  
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 5 Petitioner in this matter sought to become a candidate in the Tribe's District I on the  
 6 basis that he "operates cattle" in the District. The Election Commission  
 7 administratively found that Petitioner failed to comply with the Election Code  
 8 requirement that an applicant provide corroborating documentation to verify he or she  
 9 meets the qualification criteria. *Election Code, Appendix A-2, Candidate Application*  
 10 *Form*. In contrast to the successful applicants for candidacy, Petitioner failed to comply  
 11 with the written procedures enacted into tribal law in the Election Code, which by their  
 12 very terms, are the exclusive procedures by which a person can be certified as a  
 13 candidate. *WMAT Election Code, Section 4.4.*

16 The Election Commission's administrative findings were subsequently accepted  
 17 by the Tribal Council which certified the candidates for office---a certification which  
 18 did not include the Petitioner. RESPONDENTS' EXHIBIT 3, TRIBAL COUNCIL

20 <sup>5</sup> The full requirements of Article XII, Section 1, are as follows:

21 Any member of the Tribe who has reached the age of twenty-five years, and who  
 22 can speak Apache, and who is a resident of the district which he or she is to  
 23 represent, or who operates cattle within the said district or who has farm land  
 24 assigned to him or her in said district, shall be qualified to be a candidate for  
 25 election to the Council. No person who has been convicted of a felony shall be  
 26 eligible to hold office in the Council. No person who within the past year  
 27 preceding the election has been convicted of a crime involving moral integrity,  
 28 shall be eligible to hold office in the Council. The following crimes and no  
 others, shall be considered crimes involving moral integrity: adultery, bribery,  
 embezzlement, extortion, fraud, forgery, misbranding, perjury, theft or public  
 intoxication.

*WMAT Constitution, Article XII, Section 1.*

1 RESOLUTION 12-2011-241. Thus, Petitioner makes yet another material misstatement  
2 of fact when he declares to this Court that he was, “a candidate for the office of Tribal  
3 Council Member.” *Amended Petition, paragraph 2*. Petitioner was never recognized as  
4 a candidate in the 2012 Tribal election, and his name never appeared on the ballot.  
5 Furthermore, his ineligibility to be a candidate for office was not the work of a  
6 “corruption,” as Petitioner recklessly claims. *Amended Petition, paragraph 14*.<sup>6</sup>  
7 Instead, as shown above, Petitioner’s disqualification was solely the result of uniform  
8 application of binding standards to all applicants by the Election Commission and the  
9 Tribal Council.  
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12       There is no authority under tribal law for court review of candidate certification,  
13 but Petitioner sought and obtained a hearing in the Tribe’s Tribal Court, held on January  
14 13, 2012, challenging the Election Commission’s findings and the Tribal Council’s  
15 subsequent certification of candidates. The Election Commission members attended the  
16 hearing pursuant to court subpoena. At the conclusion of the hearing, the Tribal Court  
17 issued an order directing the Election Commission to add Petitioner’s name to the  
18 ballot.  
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21       The Election Commission objected to the basis for the court ruling, but, under  
22 protest, did submit Petitioner’s name to the Tribal Council for certification. The  
23 Election Commission does not possess the constitutional authority to certify candidates  
24 itself, so it could only recommend to the Tribal Council that it add Petitioner’s name to  
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27 <sup>6</sup> This claim of corruption, as the other claims, is an utterly unsupported statement of  
28 "fact" by Petitioner which the Tribe and Respondents deny.

1 the ballot. The Tribal Council declined to accept the Election Commission's  
2 recommendation, as was its right, based on the Tribal Council's exclusive and reserved  
3 constitutional authority to certify candidates and the Tribal Court's limited jurisdiction  
4 over election matters. The Election Commission then timely filed its notice of appeal of  
5 the Tribal Court ruling with the Tribal Court of Appeals.<sup>7</sup> That appeal is still pending.  
6 This fact directly contradicts Petitioner's claim to this Court that all tribal remedies have  
7 been exhausted in this matter, *Amended Petition, Section II heading*, and that the  
8 "highest court in the Tribal Government has ruled in favor of petitioner," *Amended*  
9 *Petition, paragraph 15*. The Court of Appeals is not "inactive" as Petitioner asserts. *Id.*  
10 The Tribal Council is in the process of appointing a qualified appellate panel to hear the  
11 appeal. There is no provision under Tribal law or other basis to assert to this Court that  
12 such a circumstance converts the Tribe's trial court to the, "highest court in the Tribal  
13 Government." *Id.*

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19 <sup>7</sup> Among other things, the Election Commission appeal contends the Tribal Court had no  
20 basis by which it could assert jurisdiction, and that its assertion of jurisdiction, for which  
21 it has never identified any basis in law, was in violation of established Tribal law. The  
22 appeal also challenges the Tribal Court's erroneous, arbitrary, capricious, and  
23 extrajudicial disregard for the Election Commission's fact-finding which had concluded  
24 that Petitioner did not provide the corroborative documentation required to verify his  
25 eligibility as a candidate.

26 Even after filing the filing of the appeal, which deprived the Tribal Court of  
27 jurisdiction, the Tribal Court judge continued to convene hearings and to issue rulings,  
28 contempt orders and warrants for arrest against various officials and attorneys because  
the Tribal Council proceeded with the Tribal election date, as mandated in the Tribal  
Constitution. In addition to the appeal, the Tribal Court judge's extrajudicial conduct  
relating to the Tribal election is under review while he is on a leave of absence from his  
appointed position.

Notwithstanding the ruling in the Tribe's trial court, the Tribal Council proceeded with the election, limited to those persons who had been duly certified as candidates.<sup>8</sup> The Tribe's primary election was held on February 1, 2012, and the general election was held on April 4. The Tribal Council formally accepted and ratified the election outcome, and the winning candidates were sworn into office on May 2, 2012, and have now assumed their new duties as duly elected officials of the Tribe.

At no point in these proceedings or in any events thereafter have the Respondents any other representative of the Tribe taken any action or suggested any threat of action which could be construed as a form of "detention"<sup>9</sup> against Petitioner or other form of restraint on his liberty. Significantly, Petitioner alleges no conduct by Respondents other than to assert they, "ignored the Tribal Court and conducted an election without including Petitioner's name." *Amended Petition, paragraph 14*. Petitioner also fails to explain or allege how the nine named members of the eleven-member Tribal Council could have authority or power to take any action, apart from a meeting presided by the Council Chairman, or in his absence, the Vice-Chairman, neither of whom, for reasons unknown, are named as Respondents.<sup>10</sup> Furthermore, Petitioner fails to explain how

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<sup>8</sup> For his Amended Petition, however, Petitioner asserts that the decision to proceed with the election without the Petitioner's name on the ballot was the work of the nine Respondents, of whom only seven were members of the eleven-member Tribal Council.

<sup>9</sup> In this Memorandum, the terms "detention" and "custody" are synonymous and used interchangeably.

<sup>10</sup> *See, Respondents' Exhibit 1*, Tribal Constitution, Article XI, Sections 1 and 2, regarding the Chairman's exclusive duty, or in his absence, the Vice-Chairman's duty to preside over meetings. Also note this Article gives the Chairman and Vice-Chairman voting power; thus they hold the same authority and role as other Council members. In the absence of a presiding officer, there can be no meeting, and apart from a duly called

1 two of the Respondents, Theresa Larzelere and Kino Kane, could have, “conducted an  
2 election,” as the Amended Petition alleges, *id.*, when they were not members of the  
3 Council at the time of the election, but instead were candidates seeking Council office.  
4 Thus, Petitioner’s claim rests upon the belief, for which no factual allegations are  
5 provided, that during the events which form the basis of his claim, seven of the named  
6 Respondents, who comprised only seven members of the eleven-member Tribal  
7 Council, bear the responsibility for what he alleges to constitute, “a criminal  
8 ‘detention’” against him. *Amended Petition, paragraph 17.*

11 Thus, apart from its failure to identify conduct which could be construed as a  
12 “detention,” the Amended Petition also fails to properly link the named Respondents to  
13 any action which resulted in the circumstance Petitioner complains of, his inability to be  
14 a certified candidate. At its essence, Petitioner’s claim is an objection raised against a  
15 process, and not against the conduct of any one individual or group of individuals—and  
16 clearly not about any act which could be construed as “custody” for a habeas corpus  
17 action. Although Petitioner is dissatisfied with the outcome of the process, the sole  
18 consequence of the election process for which Petitioner seeks a writ of habeas corpus,  
19 was that Petitioner was found ineligible to run for office in the 2012 tribal election.  
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27 meeting, the remaining members of the Tribal Council can take no action. *WMAT*  
28 *Constitution, Article XIII.*

### III. ARGUMENT

#### A. SUMMARY OF ARGUMENT.

There is no colorable claim to jurisdiction in this Court over the Amended Petition. Under the Indian Civil Rights Act, 25 U.S.C. §1303, a habeas corpus action must be grounded upon a claim of the petitioner's detention and upon confirmation that the petitioner has first exhausted tribal remedies. In this matter, there are no alleged circumstances which could be remotely construed as a "detention" under the Act or under any published federal court opinion interpreting its application. Furthermore, tribal procedures have not been exhausted to review petitioner's underlying claims. For these reasons, and as directed in Ninth Circuit precedence, this Court lacks subject matter jurisdiction, and Petitioner's claim must be dismissed pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(1). Petitioner also fails to state a claim for which relief may be granted, and the claim must be dismissed pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6).

#### B. PETITIONER'S ALLEGATIONS FAIL TO ESTABLISH GROUNDS FOR A HABEAS CORPUS ACTION, THEREBY DEPRIVING THIS COURT OF JURISDICTION.

Petitioner has the burden to establish that this Court has subject matter jurisdiction over this action. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998). To establish habeas corpus jurisdiction under the Indian Civil Rights Act, 25 U.S.C. §1303, the Petitioner must demonstrate that, (1) he is in custody and, (2) he has first exhausted his tribal remedies. *Jeffredo v. Macarro*, 599 F.3d 913,

1 918 (9thCir.2010). Unless both threshold standards are met, there can be no jurisdiction  
2 in this Court. *Id.* Those necessary preconditions are absent here.

3       Petitioner relies upon *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d  
4 874 (2ndCir.1996), a case concerning habeas corpus jurisdiction under the Indian Civil  
5 Rights Act, but based on fundamentally different facts than those presented here. In  
6 *Poodry*, the Tribal Council of the Tonawanda Band of Seneca Indians had issued  
7 permanent banishment orders against several members of the tribe who were found to  
8 have engaged in treason against the tribe. 85 F.3d at 878. As a further consequence of  
9 the charge, the banished individuals became subject to harassment and assault by other  
10 members of the tribal community while facing the threat of their forced removal from  
11 the reservation. *Id.*

12       The *Poodry* court concluded that these circumstances constituted a severe  
13 restraint on the petitioners' individual liberty, sufficient to merit habeas corpus  
14 jurisdiction under the Indian Civil Rights Act. 85 F.3d at 878-80, 895. The court noted  
15 that the act of treason is a serious criminal offense and the sentence of banishment is  
16 historically recognized as a harsh penalty which is reserved for only the most serious  
17 crimes, such as murder, rape, and treason. 85 F.3d at 895. This resulted in what the  
18 court characterized as a proceeding arising in a criminal context and resulting in a  
19 serious deprivation of the petitioners' liberty interests. 85 F.3d at 879. Those factors  
20 were sufficient to justify federal court jurisdiction for a habeas corpus proceeding under  
21 the Indian Civil Rights Act.

1       The contrast between the facts in *Poodry* and the conclusory allegations here  
2 could not be more stark. In the issue before this Court, the unfavorable outcome for  
3 Petitioner in the Election Commission's administrative review precluded his candidacy  
4 for office in the 2012 election, and nothing more. Although undoubtedly a  
5 disappointment for Petitioner, his ineligibility to be a candidate in the 2012 election  
6 carried no other negative impact or repercussions, and bears no relation to the criminal  
7 charge and resulting restraints on individual liberty at issue in *Poodry*. Accordingly,  
8 there is no habeas corpus jurisdiction in this Court over this matter on the basis of  
9 *Poodry*, as Petitioner claims.

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12       Even the Second Circuit, which issued the *Poodry* opinion, would acknowledge  
13 the non-application of the *Poodry* holding to the matter presented here, as confirmed in  
14 a case coming after *Poodry*, entitled *Shenandoah v. U.S. Department of Interior*, 159  
15 F.3d 708 (2ndCir.1996). In that case, the Second Circuit Court of Appeals easily  
16 distinguished the severe restraints upon liberty described in *Poodry* from the tribal  
17 action at issue in *Shenandoah*, in which the petitioners alleged wrongful termination of  
18 employment by the tribe and the resulting loss of access to tribal facilities and removal  
19 from tribal membership rolls. 159 F.3d at 714. Those events, although serious, did not  
20 constitute, in the Second Circuit's view, the, "severe actual or potential restraint on  
21 liberty" it saw in *Poodry*. 159 F.3d at 714 quoting *Poodry*, 85 F.3d at 880.  
22 Accordingly, the *Shenandoah* court, in reliance on *Poodry*, found no basis to support a  
23 claim of habeas corpus jurisdiction.

1 Similarly, the Ninth Circuit, in several recent opinions involving the Indian Civil  
2 Rights Act, has confirmed that in the absence of a severe impact on individual liberty,  
3 no federal habeas corpus jurisdiction is established. In *Liska v. Macarro*, 2010 WL  
4 3718300 (S.D.Cal.2010), the federal court for the Southern District of California found  
5 no severe restraint on liberty to warrant habeas corpus jurisdiction because of the  
6 Pechanga Indian Tribe's exclusion of a non-member non-resident who sought entry  
7 onto the reservation to pray at his father's gravesite and who alleged he was prevented  
8 from obtaining membership in the tribe. 2010 WL 37718300 at \*6. The *Liska* court  
9 held that these allegations, even if true, could not constitute a "detention" for purposes  
10 of a habeas corpus petition under the Indian Civil Rights Act. *Id.* Similarly, in *Jeffredo*  
11 *v. Macarro*, 599 F.3d 913, 918 (9thCir.2010), the Ninth Circuit Court of Appeals  
12 confirmed that even the disenrollment of a tribal member by the tribe and the loss of  
13 privileges which it entails would not constitute a "detention" for purposes of the Indian  
14 Civil Rights Act as such circumstances do not result in a "severe actual or potential  
15 restraint on liberty" as necessary to justify jurisdiction. 599 F.3d at 919, quoting  
16 *Poodry*, 85 F.3d at 880.

21 Similarly, in *Quitiquit v. Robinson Rancheria Citizens Business Council*, 2011  
22 WL 2607172 (N.D.Cal.2011), the federal court for the Northern District of California  
23 found no habeas corpus jurisdiction under circumstances in which the petitioners had  
24 been disenrolled from the tribe and then, in a separate proceeding, ordered out of the  
25 reservation or face arrest for trespass following an unlawful detainer action for non-  
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1 payment of rent. As with the *Jeffredo* court, the court in *Quitiquit* saw no restraint on  
2 individual liberty as a result of the tribe's civil proceedings against the petitioner. The  
3 court also relied upon the Ninth Circuit standard for determination of 25 USC §1303  
4 jurisdiction---that there must be a demonstration that, (1) the petitioner is in custody,  
5 and (2) the petitioner has first exhausted tribal remedies. *Id.*, and compare to *Jeffredo*,  
6 599 F.3d at 918. The *Quitiquit* court found that neither requirement had been met.  
7 2011 WL 2607172 at \*5. Petitioner's claims in the case before this Court likewise fail  
8 to meet either requirement.  
9

11 The only recent cases reported in the Ninth Circuit in which habeas corpus  
12 jurisdiction has been granted under 25 USC §1303 have involved the permanent  
13 banishment of tribal members, as in *Poodry*, such as to constitute "constructive  
14 detention" or custody. See, *Quair v. Sisco*, 359 F.Supp.2d 948 (E.D.Ore.2004) and  
15 *Sweet v. Hinson*, 634 F.Supp.2d 1196 (W.D.Wash.2008). Those circumstances are  
16 simply not present here. There were no sanctions or other negative consequences for  
17 Petitioner, other than the disqualification of his application for candidacy. Petitioner  
18 alleged no conduct which even remotely suggests an imposition of custody or other  
19 restraint or restriction on individual liberty that would warrant a writ of habeas corpus.  
20

23 Finally, if there were an actual allegation of conduct by Respondents which  
24 could constitute a "detention" for purposes of a habeas corpus proceeding, it is clear that  
25 Petitioner would have failed to include all necessary parties. If it truly was the Tribal  
26 Council, of which the named Respondents are current members, which had imposed a  
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1 “detention” on Petitioner, for compliance with Fed. R. Civ. Proc. 19, it would be  
2 necessary that all Tribal Council members be named, and not merely seven of the  
3 eleven members who served at the time of the events Petitioner challenges. In  
4 particular, it would be necessary that the Tribal Council Chairman and Vice-Chairman  
5 be named, as the remaining Council members have no authority to take action outside of  
6 a meeting called by and presided over by the Chairman, or the Vice-Chairman in the  
7 Chairman’s absence.<sup>11</sup>

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10 Accordingly, as seen in the original petition, Petitioner has again failed to name  
11 the proper parties to seek a habeas corpus action. Petitioner must identify and name the  
12 proper tribal official who is alleged to have exercised authority to wrongfully hold  
13 Petitioner in custody. *Poodry*, 85 F.2d at 899, and *Acosta-Vigil v. Delorme-Gaines*, 672  
14 F.Supp.2d 1194 (D.N.M.2009). This is a far higher standard than the simple  
15 designation of some individuals solely because they hold Tribal Council seats. Even so,  
16 the deeper issue is not one of procedure, but of substance. The fundamental flaw in the  
17 Amended Petition, as in the original Petition, is Petitioner’s inability to allege any  
18 justiciable action by any identified person---simply because no impermissible acts have  
19 occurred for purposes of a habeas corpus inquiry. Petitioner’s random selection of the  
20 named parties underscores the fact that no conduct of any kind has occurred which

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25 <sup>11</sup> See, n. 9, *supra*, regarding the Chairman’s duty to preside over Council meetings. In  
26 part because of the absence of allegations of individual conduct by any of the named  
27 Respondents, the concern about necessary parties is raised on the assumption *arguendo*  
28 that Respondents were named in the Amended Petition due to the actions of the Tribal  
Council, although there are no allegations which link the actions of the eleven-member  
Tribal Council to the named Respondents.

1 constitutes an actionable detention for purposes of 25 U.S.C. §1303. Thus, the  
2 requirement to name the proper party serves to filter out specious claims, such as here,  
3 in which the alleged facts cannot meet the minimum jurisdictional requirements for  
4 granting a petition of habeas corpus.  
5

6 **D. CONCLUSION.**

7 Petitioner has alleged no factual basis to invoke subject matter jurisdiction in this  
8 Court pursuant to 25 U.S.C. §1303. There is no evidence of any kind of a restraint,  
9 direct or otherwise, on Petitioner's individual liberty and the applicable tribal remedies  
10 and procedures have not been exhausted.  
11

12 A writ of habeas corpus is an extraordinary measure reserved for only the most  
13 serious restraints on individual liberty which would be deemed to constitute "custody"  
14 or "detention." *Liska v. Macarro*, 2010 WL 3718300 (S.D.Cal.2010), quoting *Hensley*  
15 *v. Municipal Court*, 411 U.S. 345, 351 (1973). Its purpose is to safeguard the interests  
16 of individual liberty from wrongful government-imposed restraint. *Shenandoah*, 85  
17 F.3d at 893-94, quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). This is a far  
18 different objective than that of Petitioner who is seeking federal court intervention in a  
19 misguided attempt to substitute this Court's fact-finding and judgment over internal  
20 tribal candidate qualification procedures and standards.  
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24 The Amended Petition is replete with conclusions of law and fact as well as legal  
25 contentions which are not warranted by existing law. Petitioner fails to present any  
26 argument for extending, modifying, or reversing existing law or for establishing new  
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1 law that would make a habeas corpus proceeding applicable to the case at Bar. For  
2 these reasons, the Respondents request that the Petition for Writ of Habeas Corpus be  
3 denied and the matter dismissed with prejudice.

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5 **III. REQUEST FOR RELIEF**

6 **WHEREFORE**, the Respondents request that this Court grant the Motion to  
7 Dismiss with prejudice the Amended Petition pursuant to Fed. R. Civ. Proc. 12(b)(1)  
8 and (6) and grant such other and further relief at law or in equity as this Court deems  
9 just or appropriate in the premises.  
10

11 Respectfully submitted this 19th day of June, 2012.

12 /s/ Richard J. Palmer, Jr.  
13 Richard J. Palmer, Jr., Tribal Attorney  
14 White Mountain Apache Tribe

15 /s/ George Hesse  
16 George Hesse  
17 George Hesse, PLLC  
18 Attorneys for Respondents

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that on this 19th day of June, 2012, I electronically transmitted  
21 the foregoing document to the Clerk's Office using the ECF System, which will send  
22 notification of this filing to the attorneys of record.  
23

24 /s/ George Hesse  
25 George Hesse  
26 George Hesse, PLLC  
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