UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BERGAL MITCHELL III,

Plaintiff,

v.

SENECA NATION OF INDIANS, et al.,

Defendants

Civil Action No. 12-CV-0119
Hon. Richard J. Arcara

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(B)(1)

INTRODUCTION

Plaintiff Bergal Mitchell III commenced this action against Defendant the Seneca Nation of Indians ("Seneca Nation" or "Nation") on February 9, 2012. On March 16, 2012, the Nation moved to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Mr. Mitchell did not respond to that motion, but instead sought to moot it by amending his complaint on March 30, 2012, pursuant to Fed. R. Civ. P. 15(a)(1)(B). Mr. Mitchell's amended complaint names as additional defendants the Nation's President, Robert Odawi Porter, and the sixteen Councillors (collectively, "Council Defendants") duly elected to the Council of the Seneca Nation of Indians ("Council"). The amendment, however, fails to cure the fundamental jurisdictional defects in the original complaint. The Nation and the Council Defendants accordingly move to dismiss the amended complaint for lack of subject matter jurisdiction, with prejudice and without leave to further amend.

Mr. Mitchell is a citizen of the Seneca Nation and asserts a claim under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 ("ICRA"), alleging that the Council's February 12,

2011 resolution "Approving Civil and Administrative Action Concerning Bergal L. Mitchell III" ("Resolution") violates his *habeas corpus* rights. Doc. 10 ¶¶ 24-25 & Ex. A. This Court lacks subject matter jurisdiction over Mr. Mitchell's claim, which seeks to interfere with the Nation's internal affairs and governance, for three reasons. First, the Seneca Nation's sovereign immunity is an absolute bar to his claim as against the Nation. Second, the Council's Resolution does not subject Mr. Mitchell to custody, to detention, or to any other severe restraint on his liberty, and thus is not subject to *habeas corpus* review by this Court under ICRA. Third, even if Mr. Mitchell were subject to detention, which he is not, he may not seek *habeas corpus* review here because he has not exhausted his remedies in the Courts of the Seneca Nation. The Nation and the Council Defendants therefore request that the Court dismiss this action with prejudice and without leave to further amend.[1]

FACTUAL BACKGROUND

Mr. Mitchell's amended complaint alleges that "[i]n February of 2011, Mitchell was indicted by a federal grand jury for his alleged involvement in the sale of a parcel of land to the Seneca Niagara Falls Gaming Corporation, which is a business entity controlled by the Nation." Doc. 10 ¶ 29. The thirteen-count indictment includes charges of "theft by an officer of an Indian gaming establishment, wire fraud, money laundering, conspiracy, and making a false statement to a federal agent." *Id.* Ex. A; *see also United States v. Bergal L. Mitchell, III*, No. 11-CR-00057-RJA-JJM (W.D.N.Y. Feb. 9, 2011) (Indictment). On February 12, 2011, the Council passed the Resolution to protect the best interests of the

[1] As discussed *infra* at 18-19, although Mr. Mitchell also purports to name DOES 1-20 as additional defendants, the amended complaint fails to state a claim against these defendants upon which relief can be granted. Any such claim, moreover, would be barred for the same reasons that his claim against the Council Defendants is barred.

Nation in light of Mr. Mitchell's "alleged improper diversion of a portion of the proceeds from the 2006 sale of certain lands" and his "alleged unlawful conduct." Doc. 10 Ex. A.

The Council's Resolution places into escrow Mr. Mitchell's annuity payments, pending the resolution of all civil and criminal matters stemming from his alleged role in the land transaction and the determination of any restitution, fees, or other financial obligations owed to the Nation or the Seneca Gaming Corporation. *Id.* The Resolution also revokes all licenses issued by the Nation to Mr. Mitchell and his businesses, and prohibits Mr. Mitchell from personally entering Seneca Nation buildings and businesses, with the exception of the Nation's Courts and health clinics. *Id.* The Resolution further expresses the Council's view that the Seneca Gaming Corporation should bring a civil action against Mr. Mitchell to recover the stipend payments it made to him "or otherwise request that the U.S. Attorney's office recover the stipends, plus all legal fees and expenses incurred by the Company in connection with the review and investigation of the alleged unlawful activity." *Id.*[2]

The Council's Resolution, however, does not adjudge Mr. Mitchell guilty of any crime, does not impose any term of custody or confinement on Mr. Mitchell, does not strip Mr. Mitchell of his citizenship in the Seneca Nation, does not banish Mr. Mitchell from the Nation's Territories or restrain his movement or residence thereon, and does not restrict in any way the access of Mr. Mitchell's family members or agents to buildings and businesses owned by the Seneca Nation. Moreover, at no point in the past sixteen months has Mr. Mitchell sought to challenge the Council's Resolution in the Courts of the Seneca Nation. *See* Doc. 10 ¶¶ 50-53. Nevertheless, Mr. Mitchell now asks this Court to intrude into the

[2] To the Nation's knowledge, there is one criminal matter, *United States v. Bergal L. Mitchell III*, No. 11-CR-00057-RJA-JJM (W.D.N.Y. Feb. 9, 2011) (Indictment), and one civil matter, *Seneca Niagara Falls Gaming Corp. v. Bergal L. Mitchell, et al.*, Index No. 140634 (Niagara Cty. Sup. Ct. Apr. 30, 2010) (Complaint), currently pending against Mr. Mitchell.

internal affairs of the Seneca Nation and to nullify, void, and invalidate that resolution pursuant to the *habeas corpus* provision contained in ICRA.

ICRA STRICTLY LIMITS THE JURISDICTION OF THE FEDERAL COURTS TO REVIEW THE ACTIONS OF INDIAN NATION GOVERNMENTS

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court discussed the policies underlying the Indian Civil Rights Act and the narrow circumstances in which the federal courts possess jurisdiction to review alleged violations of ICRA by Indian nation governments. "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal policy of furthering Indian self-government." *Id.* at 62 (quotation marks omitted). Accordingly, "rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments," Congress "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Id.* The substantive rights guaranteed by ICRA are set forth in 25 U.S.C. § 1302.

In enacting ICRA, Congress further accorded respect to Indian nations' powers of self-government by largely leaving the enforcement of the statute's substantive rights to Indian nation courts. Hence, as the Supreme Court unequivocally held in *Santa Clara Pueblo*, federal courts may intervene in Indian nation affairs to enforce these rights in only one circumstance—where a tribal member is subject to detention and entitled to the issuance of a writ of *habeas corpus* under 25 U.S.C. § 1303. 436 U.S. at 58, 70; *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 882 (2d Cir. 1996) ("Title I of the ICRA identifies explicitly only one federal court procedure for enforcement of the substantive

guarantees of § 1302: § 1303 . . . .").[3] Thus, "[t]he Supreme Court distinguished the creation of the substantive rights under the ICRA from the provision of a federal forum for the vindication of those rights . . . ." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984).

In concluding that "a judicially sanctioned intrusion into tribal sovereignty is [not] required to fulfill the purposes of the ICRA," *Santa Clara Pueblo*, 436 U.S. at 61, the Supreme Court emphasized the proper role of an Indian nation's own court system in adjudicating internal disputes:

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.
> . . .
> By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.

Id. at 65, 71 (footnotes omitted). Indian nation courts thus possess exclusive jurisdiction over all claims under ICRA, with the exception of those properly implicating the writ of *habeas corpus*.

ARGUMENT

This Court lacks subject matter jurisdiction over Mr. Mitchell's ICRA claim for three independent reasons, each of which requires dismissal of his action against the Nation, and the latter two of which also require the dismissal of his action against the Council

[3] Section 1303 provides that "[t]he 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.

Defendants. First, the Nation's sovereign immunity is an absolute bar to Mr. Mitchell's claim as against the Nation. Second, Mr. Mitchell is not subject to custody, to detention, or to any other severe restraint on his liberty, and thus his claim against both the Nation and the Council Defendants is not subject to *habeas corpus* review under 25 U.S.C. § 1303. Third, Mr. Mitchell's failure to exhaust his remedies in the Courts of the Seneca Nation likewise bars this Court's exercise of subject matter jurisdiction with respect to all Defendants. In addition, Mr. Mitchell cannot salvage his claim by purporting to name DOES 1-20 as additional defendants, where he fails to make any factual allegations against them. The amended complaint should accordingly be dismissed in its entirety pursuant to Rule 12(b)(1), with prejudice and without leave to further amend.

I. Mr. Mitchell's Claim Against the Seneca Nation Is Barred by Sovereign Immunity

The Seneca of Indians is a sovereign Indian nation that enjoys immunity from suit. *See, e.g.*, *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 545-46 (2d Cir. 1991); *Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 169 (N.D.N.Y. 2006); *Warren v. United States*, No. 06-CV-226S, Doc. 87 at 25-32 (W.D.N.Y. Mar. 13, 2012) (Skretny, J.) (Decision and Order); *Zeth v. Johnson*, 309 A.D.2d 1247, 1247-48 (N.Y. App. Div. 4th Dep't 2003). In *Santa Clara Pueblo*, the Supreme Court held that an Indian nation's sovereign immunity operates as an absolute bar to any suit against it under ICRA:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit.
>
> It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, *see, e.g.*, 28

> U.S.C. § 2243, the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

436 U.S. at 58-59 (citations and quotation marks omitted). Similarly, the Second Circuit held in *Poodry* that ICRA's *habeas corpus* provision "does not signal congressional abrogation of tribal sovereign immunity even in habeas cases," noting also that "[b]ecause a petition for a writ of habeas corpus is not properly a suit against the sovereign, the Tonawanda Band is simply not a proper respondent." 85 F.3d at 899.

The Nation explained all of this in its prior motion to dismiss. *See* Doc. 6-1 at 6-7. Mr. Mitchell nevertheless persists in naming the Seneca Nation as a defendant in his amended complaint. The only federal court remedy available under ICRA, however, is a writ of *habeas corpus*. To invoke that remedy, a petitioner must sue the individual Indian nation official who has him in custody, not the Indian nation itself, which retains its sovereign immunity. Mr. Mitchell has again improperly sued the Seneca Nation, and his claim against the Nation must be dismissed for lack of subject matter jurisdiction.

II. The Court Lacks Subject Matter Jurisdiction over Mr. Mitchell's Claims Against the Nation and the Council Defendants Because He Is Not Subject to Detention

This Court possesses subject matter jurisdiction over Mr. Mitchell's petition for *habeas corpus* only if he meets his burden to demonstrate that he is in "detention by order of an Indian tribe." 25 U.S.C. § 1303. To meet this burden he must show that he is in physical custody, or is subject to an equivalent, severe restraint on his liberty by order of the Seneca Nation and the Council Defendants. *See, e.g.*, *Poodry*, 85 F.3d at 880, 891 (holding that "[a]s with other statutory provisions governing habeas relief, one seeking to invoke jurisdiction of a federal court under § 1303 must demonstrate . . . a severe actual or potential restraint on

liberty," and finding that "Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context"). The Council's Resolution does not constitute such an order, and Mr. Mitchell therefore does not satisfy this threshold jurisdictional burden.

The Second Circuit has addressed in three cases the severity of an alleged restraint on liberty necessary to constitute "detention" for purposes of ICRA: *Poodry*, 85 F.3d 874, *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713-14 (2d Cir. 1998) ("*Shenandoah I*"), and *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004) ("*Shenandoah II*"). The cases establish a strict standard for *habeas* review. In *Poodry*, an order of the Tonawanda Band of Seneca Indians summarily convicted the petitioners of "treason," permanently disenrolled them from the Band, and "banished [them] from the [Band's] territories." 85 F.3d at 876, 878. The order further provided:

> You are to leave now and never return. . . . [Y]our name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.

Id. at 876. The Second Circuit held that the order of *permanent banishment* imposed severe restraints on the petitioners' liberty and therefore constituted "detention" for purposes of *habeas corpus* review. *Id.* at 895-97.

Two years later, in *Shenandoah I*, the Second Circuit held that the petitioners "failed to allege a sufficiently severe restraint on their liberty" for purposes of *habeas corpus* jurisdiction under ICRA. 159 F.3d at 710. The petitioners alleged:

> [O]ne or more of the six plaintiffs were suspended or terminated from employment positions, lost their "voice[s]" within the [Oneida] Nation's governing bodies, lost health insurance, were denied admittance into the Nation's health center, lost quarterly distributions paid to all Nation members, were banned from various businesses and recreational facilities such as the

> casino, Turning Stone park, the gym, and the Bingo hall, were stricken from Nation membership rolls, were prohibited from speaking with a few other Nation members, and were not sent Nation mailings. The complaint also alleges that one member of Halbritter's governing Men's Council threw a large rock at one of the plaintiffs and grabbed that plaintiff through a car window.

Id. at 714. The Court distinguished the loss of annuities, employment, health benefits, and access to Oneida Nation buildings and businesses from the "considerably more severe" punishment alleged in *Poodry*—"plaintiffs in the instant case have not alleged that they were banished from the Nation, deprived of tribal membership, convicted of any crime, or that defendants attempted in anyway to remove them from Oneida territory." *Id.*

Finally, in *Shenandoah II*, the Second Circuit held that the Oneida Nation's enforcement of an allegedly unlawful housing ordinance regulating the inspection, rehabilitation, and demolition of homes did not constitute "the legal equivalent of a banishment" or a sufficiently severe restraint on liberty to support subject matter jurisdiction under ICRA. 366 F.3d at 91-92. The Court explained that "[t]he 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." *Id.* at 92.

Mr. Mitchell attempts to satisfy the strict standard for *habeas corpus* review by mischaracterizing the Council's Resolution as an order of "criminal punishment" and of "banishment." *E.g.*, Doc. 10 ¶ 24; *see also, e.g.*, *id.* ¶¶ 32-33 (alleging that the Tribal Council "summarily convicted" Mr. Mitchell and "imposed a series of harsh penalties against Mitchell that severely restrict Mitchell's liberties"). These conclusory allegations, however, are contradicted by the plain, unambiguous language of the Resolution, and are insufficient to establish jurisdiction. On a motion to dismiss for lack of subject matter jurisdiction, "[i]t

is well established that we need not credit a complaint's conclusory statements without reference to its factual context. . . . Furthermore, where a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true." *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 146-47 (2d Cir. 2011) (citation and quotation marks omitted).

Here, the Resolution, which is attached to Mr. Mitchell's complaint, clearly does not banish Mr. Mitchell from the Nation's Territories, does not adjudge him guilty of any crime, does not impose any term of custody or confinement on him, and does not strip him of his citizenship in the Seneca Nation. Doc. 10 Ex. A. The Resolution thus shares no similarity with the order of permanent banishment in *Poodry*, and Mr. Mitchell cannot overcome this fact with conclusory allegations contradicted by the language of the Resolution itself.

While the Resolution does restrict Mr. Mitchell's personal access to buildings and businesses owned by the Nation, the Second Circuit squarely held in *Shenandoah I* that such restrictions do not constitute a severe restraint on liberty for purposes of jurisdiction under ICRA. 159 F.3d at 714 (holding that even the complete denial of access to the Oneida Nation health center and to "various businesses and recreational facilities such as the casino, Turning Stone park, the gym, and the Bingo hall," did not constitute "detention," even where the petitioners "were stricken from Nation membership rolls").[4] The Ninth Circuit reached a similar conclusion in *Jeffredo v. Macarro*, 599 F.3d 913, 919 (9th Cir. 2010), where the petitioners, who in contrast to Mr. Mitchell were also disenrolled from the Tribe, were denied access to tribal buildings and services, including health and education services:

[4] The Resolution specifically preserves Mr. Mitchell's access to health services at the Nation's health clinics.

> [T]he denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty. Appellants have not been banished from the Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. . . . No personal restraint (other than access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation.
>
> Appellants contend that the denial of access to these facilities is similar to the restraint found in *Poodry*. This is not *Poodry*. In *Poodry*, the petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members.

For the same reasons, the restriction on Mr. Mitchell's personal access to certain Nation buildings and businesses does not constitute a restraint on his liberty sufficient to support a *habeas corpus* action.

Nor is the Resolution's revocation of Mr. Mitchell's business licenses a severe restraint on his liberty. Assuming *arguendo* that Mr. Mitchell possesses a cognizable legal interest in the business licenses the Nation had granted to him, the Nation's subsequent revocation of those licenses constitutes an economic restraint, which is not subject to *habeas corpus* review. *See Shenandoah II*, 366 F.3d at 92. It is well-established that the revocation of business licenses does not constitute detention or custody for purposes of *habeas corpus* jurisdiction. *See, e.g.*, *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279 (10th Cir. 2006) (holding that the revocation of a permit to do business at the Tesuque Pueblo Flea Market does not subject the vendor to detention or to any other severe restraint on his liberty for purposes of ICRA); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) ("Petitioner's argument that his removal from the bench of the Nassau Family Court, the revocation of his professional license to practice law, and his disqualification from being licensed as a real estate broker or insurance agent so greatly limited his economic mobility as to constitute 'custody' is rejected and the dismissal of the petition is affirmed."); *Lefkowitz v. Fair*, 816

F.2d 17, 20 (1st Cir. 1987) (holding that the revocation of petitioner's license to practice medicine does not constitute custody for *habeas corpus* purposes).

Likewise, the temporary escrowing of the annuity payments that Mr. Mitchell receives as a citizen of the Seneca Nation, "until such time as all civil and criminal matters, pending or filed in the future . . . are finally resolved, and all obligations of Mitchell established thereunder satisfied," does not subject him to detention under ICRA. *See Shenandoah I*, 159 F.3d at 714 (holding that the loss of "quarterly distributions paid to all Nation members" is not a sufficiently severe restraint on liberty for purposes of ICRA). The schedule and amount of such annuity payments are set on an *ad hoc* basis by the Council in its sole discretion, and their temporary placement in escrow constitutes at best an economic restraint. *Cf. Sec. & Exch. Comm'n v. Prater*, No. 303-CV-1524-MRK, 2003 WL 22937722, at *1 (D. Conn. Oct. 17, 2003) (holding that the petitioner "cannot be considered to be 'in custody'" based upon orders "freezing certain assets").

In sum, the Resolution by its plain language does not subject Mr. Mitchell to custody or detention. Mr. Mitchell remains free to reside on and to move throughout the Nation's Territories. The facts of this case parallel those in *Shenandoah I* and *Shenandoah II*, rather than those in *Poodry*. Under clear Circuit precedent, this Court lacks subject matter jurisdiction to review the Council's Resolution with respect to both the Nation and the Council Defendants. Mr. Mitchell's complaint should accordingly be dismissed in its entirety with prejudice and without leave to amend.

III. The Court Lacks Subject Matter Jurisdiction over Mr. Mitchell's ICRA Claim Because He Has Failed to Exhaust His Remedies in the Nation's Courts

The federal courts lack subject matter jurisdiction over a petition for *habeas corpus* under ICRA where the petitioner fails to first exhaust his remedies in tribal court. *See*

Jeffredo, 599 F.3d at 918; *see also Cohen's Handbook of Federal Indian Law* 770 § 9.09 (2005 ed.) ("All federal courts addressing the issue mandate that . . . [t]he petitioner must first exhaust tribal remedies."). In *Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 51, 58 (W.D.N.Y. 1972), Judge Curtin held that "certainly no jurisdiction exists [under ICRA] unless a claim is supported by well-pleaded facts including facts which show that resort to tribal remedies has failed." *Compare Poodry*, 85 F.3d at 876 (reviewing petition where it was "undisputed that no avenue for tribal review of the actions of the members of the Council of Chiefs is available in this case"). This mandatory exhaustion requirement is analogous to that found in 28 U.S.C. § 2254(b)(1), which requires a person in state custody to exhaust all state court remedies before petitioning for federal *habeas corpus* relief. *See, e.g.*, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). Mr. Mitchell has failed to exhaust the remedies available to him in the Courts of the Seneca Nation, and his claim for *habeas corpus* relief here is accordingly barred.[5]

Mr. Mitchell recognizes this threshold jurisdictional requirement, but alleges that exhaustion would be futile. Doc. 10 ¶¶ 50-56. He contends that the Resolution itself bars him from prosecuting any claim in the Nation's Courts to challenge it. *Id.* ¶¶ 51-53. Specifically, Mr. Mitchell's amended complaint alleges that the Resolution precludes him "from commencing and/or participating in a proceeding to challenge the Resolution in Nation's judicial system or administrative system." *Id.* ¶ 53. This contention, however, is belied by the language of the Resolution. The Resolution does not restrict in any way Mr. Mitchell's legal counsel's ability to appear before the Peacemakers Court to prosecute a claim on his behalf, and Mr. Mitchell does not allege otherwise. Rather, the Resolution only

[5] It is unnecessary for the Court to reach this issue unless it first concludes that Mr. Mitchell is subject to custody or detention.

restricts Mr. Mitchell's *personal physical access* to Nation buildings, one of the exceptions being "to appear before the Nation's courts to defend any actions pursued against him as a result of his conduct." *Id.* Ex. A. Upon commencing an action in Peacemakers Court, Mr. Mitchell's counsel could also seek a ruling regarding his client's ability to personally attend proceedings in the action, or otherwise seek from the Court appropriate procedures to enable him to provide testimony if needed.

The Resolution thus does not preclude Mr. Mitchell from pursuing his ICRA claim in the Nation's Courts. *See Jimi Dev. Corp. v. Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493, 497 (D. Colo. 1996) ("Although Jim Pierce was banned from the reservation, nothing prevented counsel or another representative from approaching the Tribal Council or the BIA [Court] on the plaintiffs' behalf. . . . Under the circumstances here, I conclude that plaintiffs have simply alleged futility. I hold that . . . plaintiffs have failed to meet their burden of establishing subject matter jurisdiction . . . ."). Unless and until Mr. Mitchell, through counsel or another representative, actually seeks and is denied access to the Nation's Courts, and thus can demonstrate that "resort to tribal remedies has failed," *Seneca Constitutional Rights Org.*, 348 F. Supp. at 58, his mere allegation of futility is insufficient to establish jurisdiction in this Court. *See Pueblo of San Juan*, 728 F.2d at 1312 ("[T]o adhere to the principles of *Santa Clara*, the aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility.").

Moreover, to the extent Mr. Mitchell disputes that the terms of the Resolution preserve his legal counsel's access to the Nation's Courts on his behalf, the proper interpretation of the Resolution is a question of Seneca Nation law that must be resolved by the Nation's own

court system. As the Second Circuit explained in *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997):

> The Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law, and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions. Federal courts, as a general matter, lack competence to decide matters of tribal law and for us to do so offends notions of comity underscored in [*Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)].

(citations omitted); *see also, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("[U]nconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.") (citations omitted).

Mr. Mitchell nevertheless alleges that a letter from the Nation's General Counsel, Christopher Karrns, "acknowledge[s]" that "he is barred from prosecuting claims in Peacemaker's Court." Doc. 10 ¶ 51. Again, Mr. Mitchell's conclusory allegation finds no support in the document cited. Mr. Karns' February 18, 2011 letter merely acknowledges receipt of Mr. Mitchell's February 16, 2011 letter objecting to the Council's Resolution. *Id.* Ex. E. Nowhere in this letter does Mr. Karns suggest that Mr. Mitchell is barred from prosecuting claims in Peacemakers Court. *Id.* Nor does Mr. Mitchell's own letter reflect any understanding as to his available remedies in the Nation's Courts. His only reference to a judicial challenge to the Resolution appears at the end of the letter, where he states that "[i]f the action taken by the Council is not reversed, or the President does not invalidate this action, I will be left with no other option than to seek legal redress in court." *Id.* Ex. D. In short, neither Mr. Karns nor Mr. Mitchell suggested an understanding in February 2011 that

the Resolution bars Mr. Mitchell from challenging its validity in the Nation's Courts.[6]

In the alternative, Mr. Mitchell alleges that exhaustion would be futile because the Nation's Council also sits as the Nation's Supreme Court, and because it "is extremely unlikely" that the Council would "invalidate its own resolution." *Id.* ¶ 55. This allegation is a thinly-veiled facial attack on the Constitution of the Seneca Nation of Indians, which has ably served the Nation since 1848. Judge Curtin rejected a similar attack in *Seneca Constitutional Rights Org.*, where the plaintiffs sought to challenge a Council resolution condemning their use interests in Seneca land. 348 F. Supp. at 55. The Council had acted pursuant to its legislative authority and to an ordinance providing for judicial review of the condemnation in the Nation's Courts. *Id.* Plaintiffs argued that they were denied the right to "a fair and impartial trial" under ICRA because the Peacemakers Court's decision might ultimately be subject to review by the Council sitting as the Supreme Court. *Id.* at 58. Judge Curtin dismissed the action, concluding that "due process [does not] forbid[] a tribe from employing such a procedure." *Id.* The Supreme Court reached the same conclusion in *Santa Clara Pueblo*, holding that judicial review of Ms. Martinez's ICRA claim was exclusive in

[6] Mr. Mitchell's February 16, 2011 letter, moreover, reflects that the gravamen of his complaint is that the Council approved the Resolution without the authority to do so under Seneca Nation law. The letter requests "the statutory authority upon which the Council's decision to ban me from Nation buildings and businesses is predicated," asks for "the authority that grants the Council the right to promulgate licensing regulations, including revocation of such licenses," inquires "[u]nder what legal authority may the Council enact and enforce its current resolution against me absent a law allowing them to take such action against all Senecas similarly accused of criminal misconduct," challenges the "express or inherent right of the Nation to license businesses or revoke those licenses once duly issued," and alleges that "[i]n approving this resolution, the individual Council members have acted outside of the authority granted to them as elected officials of the Seneca Nation" under the Nation's Constitution and laws. Doc. 10 Ex. D. For the reasons explained above, only the Courts of the Seneca Nation may adjudicate Mr. Mitchell's claim that the Council acted in violation of Seneca Nation law. *See supra* at 14-15. Mr. Mitchell may not circumvent this requirement by purporting to state a claim under ICRA.

the tribal council sitting as the tribal court, 436 U.S. at 66 n.22 ("By the terms of its Constitution, . . . judicial authority in the Santa Clara Pueblo is vested in its tribal council."), notwithstanding that the ordinance challenged by Ms. Martinez was "enacted by the Santa Clara Pueblo Council pursuant to its legislative authority." *Id.* at 52 n.2. Mr. Mitchell's challenge to the Seneca Nation's constitutional structure likewise fails here.

Mr. Mitchell's allegation of futility also fails because it rests upon multiple levels of speculation. He concedes that the Nation's Council, sitting as the Nation's Supreme Court, would only review his claim if he prevailed before the Peacemakers Court and/or the Seneca Nation Court of Appeals. Doc. 10 ¶ 55. If he prevailed before those lower courts, however, the Nation might choose not pursue an appeal for any number of reasons. Even if the dispute did eventually reach the Supreme Court (which would require the Court to first grant a writ of permission), the individuals comprising the Council at that time might be substantially different from the individuals comprising the Council in February 2011 (for example, as many as eight new Councillors may be elected in November 2012), thereby eliminating the bias suggested by Mr. Mitchell. Section IV of the Constitution of the Seneca Nation of Indians, regarding the judicial power, also expressly preserves "the right of any Council to repeal or modify existing laws and regulations passed and approved by a previous Council."[7]

The members of the Council, moreover, are bound by the Seneca Nation of Indians Ethics Law, Sections 2.2 and 2.3 of which specifically address conflicts of interest and the appearance of impropriety, and provide that public officials "shall not . . . have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or

[7] The Nation requests that the Court take judicial notice of the Seneca Nation of Indians Constitution and the Nation's Ethics Law, *infra*, the relevant provisions of which are attached to this memorandum of law.

professional activity or incur any obligation of any nature, which is in conflict with proper discharge of his/her duties in the interest of the Nation," and "shall avoid any action which may result in or create the appearance of . . . losing complete independence or impartiality." It is therefore unclear whether Mr. Mitchell's challenge to the Resolution would ever reach the Supreme Court in the first instance, and if it did, how the Court would address, whether *sua sponte* or by Mr. Mitchell's motion, any conflict of interest or appearance of impropriety alleged to exist at that time. Mr. Mitchell's self-serving speculation does not exempt him from ICRA's mandatory exhaustion requirement. *See generally Bowen v. Doyle*, 880 F. Supp. 99, 126-27 (W.D.N.Y. 1995) (Arcara, J.) ("[T]he federal courts have refused to adjudicate the competency or impartiality of the tribal court as a forum. Instead, the federal courts have consistently required that such allegations be addressed, in the first instance, in the tribal court itself."). This Court accordingly lacks subject matter jurisdiction over Mr. Mitchell's claim with respect to both the Nation and Council Defendants.

IV. Mr. Mitchell Fails to State a Claim Against the So-Called DOE Defendants

In his amended complaint, Mr. Mitchell purports to name DOES 1-20 as additional defendants, alleging as follows:

> Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1-20, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities of the Doe Defendants when ascertained. Plaintiff is informed and believes and thereon alleges that each of such fictitiously named Doe Defendants is responsible in some manner for the occurrences, injuries and offenses herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by Defendants' acts.

Doc. 10 ¶ 22. This bare statement is devoid of any factual allegations that would support the inference that any of the DOE defendants have Mr. Mitchell in detention or custody, and the amended complaint makes no other mention of the DOE defendants.

By failing to make any factual allegations against DOES 1-20, the amended complaint fails to state a claim against them upon which relief can be granted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") (quotation marks and citation omitted). To the extent the amended complaint could be construed to state a claim against DOES 1-20, any such claim should be dismissed for lack of subject matter jurisdiction because, as discussed above, Mr. Mitchell is not subject to detention and has failed to exhaust his remedies in the Nation's Courts.

CONCLUSION

Mr. Mitchell's ICRA claim against the Seneca Nation is barred by sovereign immunity. Although he has amended his complaint to name the Nation's President and the Nation's sixteen duly-elected Councillors as additional defendants, that amendment does not cure the fundamental jurisdictional defects in his claim. The Council's Resolution does not impose any term of custody or confinement on Mr. Mitchell, strip him of his Nation citizenship, or banish him from the Nation's Territories. Mr. Mitchell is accordingly not subject to detention, and this Court lacks subject matter jurisdiction to review his claim under ICRA. Mr. Mitchell has also failed to exhaust his remedies in the Courts of the Seneca Nation to challenge the Resolution, again precluding jurisdiction here. The Seneca Nation and the Council Defendants therefore respectfully request that the Court dismiss the amended complaint in its entirety, with prejudice and without leave to further amend.

Dated: June 1, 2012

s/ Riyaz A. Kanji

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ATTACHMENT

CONSTITUTION
OF THE
SENECA NATION OF INDIANS OF 1848, AS AMENDED

[effective November 9, 1993]

Made and adopted in convention assembled, duly called and organized in accordance with the provisions of the Constitution of the said Nation, convened at the Council House at Cold Spring on the Allegany Reservation; and also at the Council House on the Cattaraugus Reservation, on the 15th day of November, 1898.

We the people of the Seneca Nation of Indians, residing on the Cattaraugus, Allegany and Oil Spring Reservations, in the State of New York, grateful to Almighty God for our national preservation, growth and prosperity, for the freedom and manifold blessings heretofore by us enjoyed honoring the traditions of our Nation, trusting in the present, with confidence in the future advancement and better condition of our race and desiring greater enlightenment in order to perpetuate our national relations to provide for ourselves greater safeguards to pursuit of life, liberty and happiness, and to bring ourselves, as a Nation, to as high a plane intellectually, socially, and morally as possible, do make, adopt and establish the following resolution:

SECTION I.

Our government shall have a legislative, executive and judiciary department.

The legislative power shall be vested in a Council of sixteen members, who shall be known and called the Councillors of the Seneca Nation of Indians, eight Councillors elected to the Council shall be from the Cattaraugus Reservation, and eight Councillors elected to the Council shall be from the Allegany Reservation. Councillors shall be elected for four-year terms, except for the November, 1978 election. The staggered terms will be determined by the four Councillors having obtained the highest number of votes from the Allegany and Cattaraugus Reservations. The four Councillors, per reservation, with the least number of majority votes shall serve a two year term. No person shall be eligible for the office of Councillor unless he is an enrolled member of the Nation, has attained age twenty-one (21), and has resided on the Reservation he represents for at least one (1) year prior to the date on which he takes office.

The first election under this Constitution will be held on the first Tuesday of November, 1899, and thereafter on the first Tuesday of November every second year. The vote of the Nation shall be by single ballot containing the names of all party candidates and independent candidates, and shall be cast by the individual voter, out of presence of others, and be cast by him, without inspection by the Board of Inspectors. That on Election Day the polls shall be open at 9:00 a.m. and close at 7:00 p.m.

The president shall from time to time give to the Council information of the state of the Nation and recommend to their consideration such measures as he shall judge necessary and expedient, not inconsistent with the true spirit and intent of the laws of the Seneca Nation.

It shall be his duty to see that the laws applicable to the Nation are faithfully executed.

He shall have power to fill all vacancies by appointment that shall occur either by death, resignation or impeachment of any of the officers of the Nation.

Such appointees shall hold office until their successors are elected and duly qualified.

The president shall have the power of veto. Every resolution or other measure, passed by the Council carrying with it any appropriation out of the funds of the Nation, before it becomes operative shall be presented to the president for his approval or objections; if he approves, he shall sign it; but if not, he shall return it to the Council with his objections in writing.

The objections shall be entered at large on the minutes of the Clerk; after which the same may become operative and binding on the Nation only by a second passage of the same by not less than twelve votes of the Council.

In all such cases, the name of each member voting shall be entered in the journal of the proceedings of the Council.

SECTION IV.

The judicial power shall be vested in a Court of Appeals, a Peacemakers Court and a Surrogates Court. There shall be one Court of Appeals. There shall be two Peacemakers Courts and two Surrogates Courts, one each to be established upon the Cattaraugus Reservation and one each to be established upon the Allegany Reservation.

The Court of Appeals shall be comprised of six judges, any three of whom shall hear each appeal. The judges of the Court of Appeals shall be trained in the law. The Peacemakers Court shall be comprised of three judges each, any two of whom shall have the power to hold Court and discharge all the duties of the Peacemakers Court. The Surrogates Court shall be comprised of one judge each.

The judges of the Court of Appeals shall be elected from the residents of the Allegany, Cattaraugus and Oil Springs Reservations, with three of the judges elected from the residents of the Cattaraugus Reservation and three of the judges elected from the residents of the Allegany and Oil Springs Reservations. The judges of each of the Peacemakers and Surrogates Courts on the Cattaraugus Reservation shall be elected from the residents of the Cattaraugus Reservation and the judges of each of the Peacemakers and Surrogates Courts on the Allegany Reservation shall be elected from the residents of the Allegany and Oil Springs Reservations. The election of judges shall be on the first Tuesday of November. Beginning in 1993, judges shall not be elected in the same year that other Nation officials are elected. Judges elected in November, 1992 shall serve in office until their successors are duly elected in November, 1993, provided that judges of the Court of Appeals shall first be elected in November, 1993.

The term of office of the judges of the Court of Appeals shall be four years. At the first election of judges of the Court of Appeals, three positions on the Court of Appeals initially shall be for a term of two years and three positions initially shall be for a term of four years. The term of each position shall be determined by lot prior to the election, provided that at least one judge from each Reservation shall serve a two year term. All subsequently elected judges of the Court of Appeals shall be elected for a term of four years.

The term of office of the Peacemakers and Surrogates shall be four years, provided that, at the next judicial election following the approval of this amendment, except if judicial elections are moved to an off-year, one Peacemaker from each Peacemakers Court shall be elected for a term of two years, with the remaining two Peacemakers from each court and all subsequently elected Peacemakers elected for a term of four years.

The judicial power shall extend to all cases arising under this Constitution, the customs or laws of the Nation, and to any case in which the Nation, a member of the Nation or any person or corporate entity residing on, organized on, or doing business on any of the Reservations shall be a party.

The forms of process and proceedings in all Courts shall be such as is prescribed by law.

All determinations and decisions of the Peacemakers and Surrogates Courts shall be subject to appeal to the Court of Appeals. All cases of appeal shall be decided by the Court of Appeals upon the evidence taken in the Peacemakers and Surrogates Courts. In every case on appeal, it shall be the duty of the judge

or judges before whom the case was heard to certify the evidence and record in the case to the Court of Appeals. The Court of Appeals shall then decide the case upon the certified evidence and record. Upon the hearing of the appeal, a party shall have the right to be heard and to appear in person or by counsel and argue the merits of the case at his own expense.

All determinations of the Court of Appeals shall be subject to appeal to the Council upon the granting of a writ of permission by a vote of not less than seven Councillors. Such appeal, if granted, shall be heard by at least a quorum of the Council. In the event that no appeal is made to the Council, the decision of the Court of Appeals is final, and no other court or subsequently elected Council shall have the right to re-open, re-hear, reverse or affirm the decision of the Court of Appeals. All cases of appeal shall be decided by the Council upon the evidence taken in the Peacemakers or Surrogates Courts. In every case on appeal, it shall be the duty of the judges before whom the case was heard to certify the record in the case to the Council. The Council shall then decide the case upon the certified evidence and record. Upon the hearing of an appeal, a party in interest shall have the right to be heard and to appear in person or by counsel and argue the merits of the case at his own expense.

On such matters of appeal from the Court of Appeals, the decision of the Council shall be final, and no subsequent elected Council shall have the right to re-open, re-hear, reverse or affirm the decision of a previous Council.

In every action in any Court, such action shall be brought in the name of the real party in interest.

Nothing herein shall be construed as affecting the right of any Council to repeal or modify existing laws and regulations passed and approved by a previous Council.

SECTION V.

The power of making treaties shall be vested in the Council, subject to the approval of at least three-fourths of the legal voters and the consent of three-fourths of the mothers of the Nation.

SECTION VI.

There shall be a clerk and a treasurer of the Nation. The rights, duties and liabilities of such shall be as defined by law.

It shall be the duty of the Council to submit the same to the electors of the Nation for their approval or objection, to be determined by a majority vote of the qualified electors at a meeting called for that purpose on the Cattaraugus and Allegany Reservation, respectively.

In case the proposed amendments of the committee are rejected, no action shall be taken by the Council or the electors relative to amending this constitution within one year from the date of said meeting and rejection.

CERTIFICATION

I hereby certify that, based upon my review of the known records of the Seneca Nation of Indians, the foregoing Constitution of the Seneca Nation of Indians of 1848, as amended, is true and correct.

Dated: November 9, 1993

Robert B. Porter
Attorney General of the
Seneca Nation of Indians

SENECA NATION OF INDIANS

ETHICS LAW

As amended : September 27, 2007
March 31, 2009
April 17, 2010
August 30, 2010

ETHICS LAW

ARTICLE I. GENERALLY

Section 1.1. Purpose.

Public officials are expected to conduct the official business of the Nation with pride and dignity. They must exercise wisdom and sound judgment at all times in order to avoid abuse of office, power and people.

This law is intended to eliminate the possibility that Nation public officials may engage in dishonest, immoral and disrespectful conduct in the course of their public duties. Defining appropriate standards and setting forth an effective enforcement mechanism is critical to maintaining the highest standards of ethical and moral conduct. This will ensure that public officials do not reflect adversely on the Nation and its members or otherwise undermine public confidence in the Nation government.

Accordingly, this law is enacted to set forth (i) the standards of ethical conduct required of all individuals in the public sector of the Seneca Nation of Indians, and (ii) a mechanism to enforce such standards of conduct.

Section 1.2. Definitions.

For purposes of this law, the term

(a) "Ambassadorial function" shall mean the participation of a Nation public official at an occasion sponsored by a Nation gaming enterprise in which the visible presence and support of a Nation public official is necessary to promote the success of the enterprise and the identity of the enterprise as being Nation-owned;

(b) "Business" includes any profit or non-profit enterprise, organization, trade, occupation or profession, including any business, trust, holding company, corporation, partnership, joint venture, sole proprietorship, consultant or other self-employed enterprise;

(c) "Clerk" shall mean the Clerk of the Nation established under Section VI of the Constitution;

(d) "Board" shall mean the Ethics Board, as defined in Article III of this law

(e) "Confidential information" shall mean information which by law or custom is not available to the general public;

(f) "Constitution" shall mean the Constitution of the Nation of 1848, as amended;

(g) "Council" shall mean the Legislative branch of the Nation established under Section I of the Constitution;

(h) "Executives" shall mean the President, Treasurer, and Clerk collectively;

(i) "Family" shall mean only (i) husband/wife (including common law relationships), (ii) child/grandchild, (iii) mother/father, (iv) brother/sister, (v) aunt/uncle, (vi) first cousin, (vii) niece/nephew, (viii) grandparent, (ix) mother-/father-in-law, or (x) brother-/sister-in-law;

(j) "Gaming enterprise" shall mean the Class III gaming facilities operated by the Seneca Gaming Corporation and its subsidiaries and the Class II gaming operations of Seneca Gaming and Entertainment;

(k) "Gift" includes any gratuity, special discount, favor, hospitality, payment, loan, subscription, economic opportunity, advance, deposit of money, services, or other benefit received without equivalent consideration and not extended or provided to members of the public at large;

(l) "Interest" shall mean a pecuniary or material benefit accruing to an individual, or where the context requires, the Nation;

(m) "Member" shall mean an individual who is an enrolled member of the Seneca Nation;

(n) "Nation" shall mean the Seneca Nation of Indians, a sovereign nation;

(o) "Person" shall mean either a member or any other individual, also, "People";

(p) "President" shall mean the President of the Seneca Nation established under Section III of the Constitution;

(q) "Public Official" shall mean any person (i) elected to Nation office or (ii) appointed to a Nation office, committee, board, commission or task force, including public benefit corporations by the Council, the President, the Treasurer or the Clerk or; (iii) Employees of the Nation and employees of public benefit corporations established by Nation law.

Section 1.3. Separability.

If any provision of this law or its application to any person or circumstances is held invalid, the remainder of the provisions of this law or the application of the provision to other persons or circumstances shall not be affected.

Section 1.4. Codification.

The provisions of this law may be codified so as to facilitate accessibility.

Section 1.5. Effective Date.

The effective date of this law shall be October 11, 1997.

ARTICLE II. CODE OF ETHICS

Section 2.1. Accountability.

Each committee of the Nation government and each public benefit corporation created by Nation law is responsible for preparing written minutes for each meeting of the committee or corporation. The minutes shall summarize the activity at the meeting and list the names of the persons participating. All minutes shall be filed in the Clerks' office and made available to Nation members.

Section 2.2. Conflicts of Interests.

(a) A public official shall not:

(i) have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in conflict with proper discharge of his/her duties in the interest of the Nation; or

(ii) participate in his/her official capacity in any matter in which his/her family or business associates have an interest.

(b) A public official and his/her family may receive benefits from the Nation on the same basis as other Nation members, provided, that the public official does not interfere with or use their authority to influence the delivery of such benefits or give preferential treatment.

(c) Except as set forth in this law, public officials are free to engage in lawful economic transactions and employment to the same extent as Members generally.

(d) No public official shall, except in the discharge of their official duties, represent any party before any court, governmental forum or proceeding in a matter in which the Nation is a party or has an interest.

Section 2.3 Appearance of Impropriety

(a) A public official shall avoid any action which may result in or create the appearance of:

(i) using Nation office to satisfy a personal interest;

(ii) giving preferential treatment to any person or group;

(iii) impeding governmental efficiency or administration;

(iv) losing complete independence or impartiality;

(v) binding the Nation to a course of conduct in the absence of official authority;

(vi) adversely affecting confidence in the integrity of the Nation;

(b) A public official may not receive any salary or anything of monetary value from any private source:

(i) in payment for their services to the Nation; or

(ii) that is reasonably intended to influence the performance of his/her official duties.

Section 2.4 Use of Confidential Information

A public official shall not use or disclose confidential information gained in the course of, or by reason of, his/her official position or use such information to further a personal or economic interest.

Section 2.5. Unauthorized Compensation or Benefits.

A public official shall not accept or receive any benefit, income, favor or other form of compensation for performing the official duties of his/her office if such duties were not actually performed, or for which the official is not otherwise properly entitled to receive.

Section 2.6. Unauthorized Use of Nation Property, Funds or Staff

(a) A public official shall not use any Nation property or funds for other than authorized and approved official purposes. Such persons shall protect and conserve all property and funds which are so entrusted, assigned or issued to them.

(b) A public official shall not:

(i) employ with Nation funds any unauthorized individuals who do not perform duties commensurate with such compensation; or

(ii) utilize employees or independent contractors for other than the official purposes for which they are employed or otherwise retained.