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

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

1. Introduction

Defendants the Seneca Nation of Indians ("Seneca Nation" or "Nation"), its President, Robert Odawi Porter, and the sixteen Councillors (collectively, "Council Defendants") duly elected to the Council of the Seneca Nation of Indians ("Council") argued in their motion to dismiss that the Court lacks subject matter jurisdiction over Mr. Mitchell's petition for *habeas corpus* under the Indian Civil Rights Act ("ICRA") because (1) he is not subject to custody or detention, and (2) he has not exhausted his remedies in the Nation's own court system.[1] In response, Mr. Mitchell asserts that the Council's February 12, 2011 Resolution "effectively banishes" him from the Seneca Nation, Doc. 18 at 2, and that exhaustion would be futile, *see id.* at 10. The undisputed jurisdictional facts, however, tell a very different story.

[1] These are questions of subject matter jurisdiction, *see, e.g.*, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 884 (2d Cir. 1996); *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010), and Defendants accordingly moved to dismiss under Fed. R. Civ. P. 12(b)(1). To be sure, it is Mr. Mitchell's burden to establish subject matter jurisdiction under ICRA, *see Shenandoah v. Halbritter*, 366 F.3d 89, 91 (2d Cir. 2004), notwithstanding his erroneous citation to the standards that control a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), *see* Doc. 18 at 2–3.

Banishment is not a term to be trivialized or invoked lightly. In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895–96 (2d Cir. 1996), the Second Circuit found that banishment is a form of punishment more severe than imprisonment, comparable to the "extraordinarily severe" and "primitive" punishments of denaturalization and denationalization, and that "Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provision by permanently banishing, rather than imprisoning, members 'convicted' of the offense of treason." There is no colorable basis to equate the Council's Resolution—which prohibits Mr. Mitchell from entering most Nation buildings, places into escrow his annuity payments, and revokes his business licenses—with the order of permanent banishment at issue in *Poodry*. Mr. Mitchell's remedies do not lie in the federal courts, but in the courts of the Seneca Nation. This action should accordingly be dismissed.[2]

2. Mr. Mitchell Is Not Subject to Custody or Detention

The parties agree that Mr. Mitchell, a citizen of the Seneca Nation, must meet the standard set by the Second Circuit in *Poodry* to establish that he is subject to custody or detention for purposes of this Court's *habeas corpus* jurisdiction. In *Poodry*, the petitioners were (1) convicted of treason (a crime punished on par with murder and rape), (2) expressly banished from Tonawanda Territory, (3) stripped of their citizenship in the Tonawanda Band, (4) stripped of all rights afforded to tribal citizens, (5) removed from the tribal membership rolls, (6) stripped of their Indian names, (7) deprived of tribal lands, (8) accosted at their homes by 15 to 25 people serving the banishment orders, (9) subjected to multiple attempts to remove them from Tonawanda Territory and to the ongoing threat of removal, (10)

[2] Mr. Mitchell does not dispute that the Seneca Nation's sovereign immunity is an absolute bar to his claim as against the Nation. *See* Doc. 18 at 3; Doc. 15-1 at 6–7.

physically assaulted and harassed, (11) denied health services and medications, and (12) denied electrical service. 85 F.3d at 878. *Not one of these circumstances, however, is present in the instant case.* The Council's Resolution simply does not subject Mr. Mitchell to any restraint on his liberty that approaches the extreme circumstances in *Poodry*.[3]

Mr. Mitchell nevertheless argues that the Resolution subjects him to custody or detention in three ways: (1) it prohibits his entry to Nation buildings and businesses, with the exception of the Nation's health clinics and courts; (2) it places his annuity payments in escrow pending the resolution of all civil and criminal proceedings related to his alleged misconduct; and (3) it revokes his business license and provides for the revocation of the license of any Seneca business that does business with him. *See* Doc. 18 at 6–7. Each of Mr. Mitchell's arguments is foreclosed by controlling precedent.

With respect to the prohibition on entry into Nation buildings, the Second Circuit held in *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 714 (2d Cir. 1998) ("*Shenandoah I*"), that such a ban (even where it denies access to health services, which is not the case here) is insufficient to support *habeas* jurisdiction. The Ninth Circuit reached the same conclusion in *Jeffredo v. Macarro*, 599 F.3d 913, 919 (9th Cir. 2010). Mr. Mitchell cites no legal authority to the contrary.

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[3] Mr. Mitchell erroneously states that the Council's Resolution deprived him of his Nation citizenship, convicted him of fraud, and banished him from the Nation. *See* Doc. 18 at 5, 7. These conclusory assertions find no support in the plain language of the Resolution, do not constitute jurisdictional facts, and should be disregarded. "It 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 Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 146–47 (2d Cir. 2011) (citation and quotation marks omitted).

With respect to the escrowing of annuity payments, the Second Circuit also held in *Shenandoah I* that the loss of quarterly distribution payments does not constitute custody or detention. 159 F.3d at 714; *see also generally Moore v. Nelson*, 270 F.3d 789, 790–91 (9th Cir. 2001) (holding that monetary penalties do not support *habeas* jurisdiction under ICRA). Mr. Mitchell, moreover, has not "lost" his annuity payments. Rather, they have been placed temporarily in escrow and "shall be used to satisfy any restitution, legal fees, court costs or obligations Mitchell might be determined to have to the Nation or the [Seneca Gaming Corporation]." Doc. 10 Ex. A.

With respect to the revocation of his business license, Mr. Mitchell argues that the Resolution has forced him to close his business and to seek employment outside of Seneca Territory. In *Shenandoah I*, however, the Second Circuit held that the loss of employment does not constitute custody or detention. 159 F.3d at 714. Further, it is well-established that economic restraints, including the revocation of a business license, do not support *habeas* jurisdiction. *See* Doc. 15-1 at 11–12. Again, Mr. Mitchell cites no legal authority to the contrary.

Mr. Mitchell also argues that "the Resolution effectively prohibits [him] from purchasing food, gasoline, and other necessities on the reservation." Doc. 18 at 6. But the Resolution does not restrict in any way his family members or agents from purchasing these goods on his behalf. This Court has held, moreover, that a State regulatory scheme that may require Seneca citizens to travel up to 30 miles to purchase consumer goods (namely cigarettes) does not unduly burden their rights under federal law. *See Seneca Nation of Indians v. Paterson*, No. 10-CV-687A, 2010 WL 4027796, *16 (W.D.N.Y. Oct. 14, 2010), *aff'd sub nom. Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011).

Mr. Mitchell's assertion that these aspects of the Resolution are tantamount to banishment also fails because *his Complaint reflects that he does not even live on Seneca Territory in the first instance*. Mr. Mitchell alleges that he resides in Gowanda, New York. Doc. 10 ¶¶ 2, 26. The documents attached to the complaint show his address as 42 North Chapel Street, Gowanda, NY 14070. *See* Doc. 10 Exs. C, E. That address is *not* located on Seneca Territory, but is located southeast of the Nation's Cattaraugus Territory. *See* Map of 42 N. Chapel St., Gowanda, NY 14070, MapQuest, http://classic.mapquest.com (search for address, follow "Get Map" hyperlink, and use zoom feature to view location in reference to Cattaraugus Territory) (last visited July 18, 2012). This map showing Mr. Mitchell's address in relation to the Cattaraugus Territory is attached for the Court's convenience.

Ultimately, Mr. Mitchell must concede that "when viewed individually" the three aspects of the Resolution "seem mild in comparison to those in *Poodry*," that "simply revoking a business license does not give rise to a habeas corpus claim," and that "restraints on economic liberties, as a general rule, do not give rise to *habeas* jurisdiction." Doc. 18 at 8–9. He nevertheless argues that these aspects, viewed in their totality, "achieved the same result" as the orders of permanent banishment in *Poodry*. *Id.* at 8.[4] The totality of these same factors, however, was deemed insufficient to support *habeas* jurisdiction in *Shenandoah I*, notwithstanding that the petitioners in that case, in contrast to Mr. Mitchell, were also (1) stricken from the tribal membership rolls, (2) denied health insurances and health services, (3) physically assaulted, (4) denied their voices in the Oneida Nation's

[4] Contrary to Mr. Mitchell's assertion, the petitioners in *Poodry* did not retain the right to reside on Tonawanda Territory. *See* Doc. 18 at 8. Multiple attempts were made to forcibly remove them, and the Second Circuit noted that they were subject to the threat of removal so long as the banishment orders remained in effect. *Poodry*, 85 F.3d at 895.

governing body, (5) not sent tribal mailings, and (6) prohibited from speaking to certain tribal members. 159 F.3d at 714.

The district court in *Shenandoah I*, moreover, expressly rejected the same theory of "effective banishment" urged by Mr. Mitchell:

> In an attempt to fall within the scope of *Poodry*, plaintiffs allege that defendants imposed sanctions that "resulted in" their banishment. However, I cannot strain plaintiffs' allegations to constitute custody or detention permitting habeas review under the ICRA. . . . Until such time as plaintiffs suffer actual banishment rather than the essential banishment they allege, their remedies lie within the political process of the sovereign Oneida Nation and not the confines of federal district court.

Shenandoah v. U.S. Dep't of the Interior, No. 96-CV-258(RSP/GJD), 1997 WL 214947, *8–9. (N.D.N.Y. Apr. 14, 1997) (citations omitted), *aff'd*, 159 F.3d 708 (2d Cir. 1998). Here, where the measures taken by the Council are less severe than those in *Shenandoah I*, Mr. Mitchell falls far short of establishing that he is subject to custody or detention.

3. Mr. Mitchell Must Exhaust His Remedies in the Courts of the Seneca Nation

The Court also lacks subject matter jurisdiction over Mr. Mitchell's petition for *habeas corpus* because he has failed to exhaust his remedies in the Nation's court system.[5] ICRA's threshold exhaustion requirement has been recognized by this Court, *see Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 51, 58 (W.D.N.Y. 1972), by the Ninth Circuit, *see, e.g.*, *Jeffredo*, 599 F.3d at 918, by the Tenth Circuit, *see, e.g.*, *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984), by innumerable other federal courts, and by the seminal Indian law treatise, *Cohen's Handbook of Federal Indian Law* § 9.09, at 770 (2005 ed.). As the District of Connecticut explained:

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[5] It is unnecessary for the Court to reach this issue unless it concludes that Mr. Mitchell is subject to custody or detention, which he is not. *See Shenandoah v. U.S. Dep't of the Interior*, No. 96-CV-258(RSP/GJD), 1997 WL 214947, *8 n.5 (N.D.N.Y. Apr. 14, 1997), *aff'd*, 159 F.3d 708 (2d Cir. 1998).

> In *Poodry*, the Court of Appeals held that Congress's grant of habeas jurisdiction to federal courts in Section 1303 is analogous to the grant of habeas jurisdiction in other contexts. [85 F.3d] at 890. Exhaustion of available remedies is a fundamental tenet of federal court review in the context of habeas corpus proceedings. . . . Significantly, the exhaustion of administrative remedies has been mandated by Congress with respect to petitions for writs of habeas corpus challenging state court convictions, which raise similar interests to those present in the instant proceedings. *See* 28 U.S.C. § 2254(b)(1). In other words, before a federal court will review the decision by another state or entity, the party seeking review must obtain a final decision from that state or agency.

Colebut v. Mashantucket Pequot Tribal Nation Tribal Elders Council, No. 3:05CV247 (DJS), 2006 WL 1646155, *1 (D. Conn. June 9, 2006). Mr. Mitchell cites no case law to the contrary.

Poodry does not support Mr. Mitchell's argument that exhaustion would be futile in this case. In *Poodry*, it was "undisputed that no avenue for tribal review of the actions of the members of the Council of Chiefs [was] available." 85 F.3d at 876; *see also id.* at 885 ("the respondents concede that there is no tribal review available"). Mr. Mitchell, however, may challenge the Council's Resolution in the courts of the Seneca Nation. *See* Doc. 15-1 at 13–16. Indeed, he does not dispute that his counsel may commence and prosecute a claim in Peacemakers Court on his behalf, may seek a ruling regarding his ability to personally attend proceedings in the action, and may otherwise seek from the Court appropriate procedures to enable his participation as necessary and appropriate. *See id.* at 13–14. The Supreme Court found in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978), that tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," and that finding applies with particular force here where the Council acted to safeguard the best interests of the Nation and its citizens.

Mr. Mitchell's allegation that exhaustion would be futile because the Nation's Council sits as the Nation's Supreme Court also fails. Mr. Mitchell does not dispute that Judge Curtin rejected the same argument in *Seneca Constitutional Rights Org.*, and that the Supreme Court recognized in *Santa Clara Pueblo* that a tribal council may legitimately serve in both a legislative and judicial capacity. *See* Doc. 15-1 at 16–17. Nor does he dispute that his case may never reach the Supreme Court, and that if it does, the individuals comprising the Council might be very different from the individuals that passed the Resolution, and that any conflict of interest alleged to exist at that time could be addressed under the Nation's Ethics Law. *See id.* at 17–18.

The three cases cited by Mr. Mitchell do not support his bare allegation of futility.[6] In *St. Marks v. Chippewa-Cree Tribe of Rocky Boy Reservation*, 545 F.2d 1188 (9th Cir. 1976), the plaintiff *did in fact* exhaust his tribal court remedies while his action was pending in federal district court. *Id.* at 1189 ("Because he secured a final tribal adjudication before the district court acted on the motion to dismiss, we believe he had satisfied the jurisdictional precondition to suits under the Indian Civil Rights Act (25 U.S.C. s 1302), even though he did so after, instead of before, he invoked the aid of the federal court."). *St. Marks* thus provides no support for Mr. Mitchell, who has filed no action in the Nation's Courts.

In *U.S. ex rel. Cobell v. Cobell*, 503 F.2d 790, 792 (9th Cir. 1974), a father who had been awarded custody of his minor children by the Montana Supreme Court challenged a

[6] These cases predate the Supreme Court's 1978 decision in *Santa Clara Pueblo*, 436 U.S. 49 (1978), limiting federal court jurisdiction under ICRA to petitions for *habeas corpus*. Both *St. Marks v. Chippewa-Cree Tribe of Rocky Boy Reservation*, 545 F.2d 1188 (9th Cir. 1976), a tribal member challenge to the residency requirement for election to the tribal judiciary and tribal council, and *Rosebud Sioux Tribe of S.D. v. Driving Hawk*, 534 F.2d 98 (8th Cir. 1976), a tribal election dispute, do not involve any colorable claim of custody or detention and would be jurisdictionally barred today under *Santa Clara Pueblo*.

conflicting restraining order subsequently entered *ex parte* by a judge of the Blackfeet Tribal Court. The Ninth Circuit found it particularly significant that the tribal judge "testified that he had issued the restraining order to test tribal jurisdiction, and that only a federal court order would cause him to rescind the action," and agreed with the district court that the father "lacked [a] meaningful remedy in the tribal courts" under these circumstances. *Id.* at 793–94. And in *Rosebud Sioux Tribe of S.D. v. Driving Hawk*, 534 F.2d 98, 101 (8th Cir. 1976), the Eighth Circuit determined that "exceptional circumstances," including all parties' initial request that the federal court exercise jurisdiction over the dispute, excused exhaustion. No such circumstances, however, excuse Mr. Mitchell's failure to challenge the Resolution in the Nation's Courts before seeking relief from this Court.

4. The Court May Take Judicial Notice of the Laws of the Seneca Nation

Mr. Mitchell urges the Court not to consider the Seneca Nation of Indians Constitution and the Seneca Nation Ethics Law, the accuracy of which he does not dispute, for only one reason—they expose the baselessness of his allegation of futility. It is well-established that the federal courts may consider materials outside the pleadings on a motion to dismiss for lack of subject matter jurisdiction. *See, e.g.*, *Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010); *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008). The case law cited by Mr. Mitchell arises solely under Fed. R. Civ. P. 12(b)(6), not Fed. R. Civ. P. 12(b)(1), and is therefore inapposite here. *See* Doc. 18 at 12–13. Instead, it is appropriate to "take[] judicial notice of the Seneca Constitution and the provisions thereof" in an action arising under ICRA. *Seneca Constitutional Rights Org.*, 348 F. Supp. at 54. Judicial notice of the Nation's Ethics Law is also appropriate. *See, e.g.*, *N. Cnty. Cmty.*

Alliance, Inc. v. Salazar, 573 F.3d 738, 746 n. 1 (9th Cir. 2009) (taking judicial notice of the Nooksack Tribe's Gaming Ordinance).

5. Conclusion

Congress strictly limited the federal courts' jurisdiction under ICRA to extreme circumstances properly implicating the writ of *habeas corpus*. Whatever Mr. Mitchell may think of the Council's action, that action does not banish him from the Seneca Nation and does not subject him to custody or detention. The appropriate forum for Mr. Mitchell's challenge to the Council's Resolution is the courts of the Seneca Nation. Accordingly, Defendants respectfully request that the Court dismiss Mr. Mitchell's claim for lack of subject matter jurisdiction.

Dated: July 19, 2012

s/ Cory J. Albright

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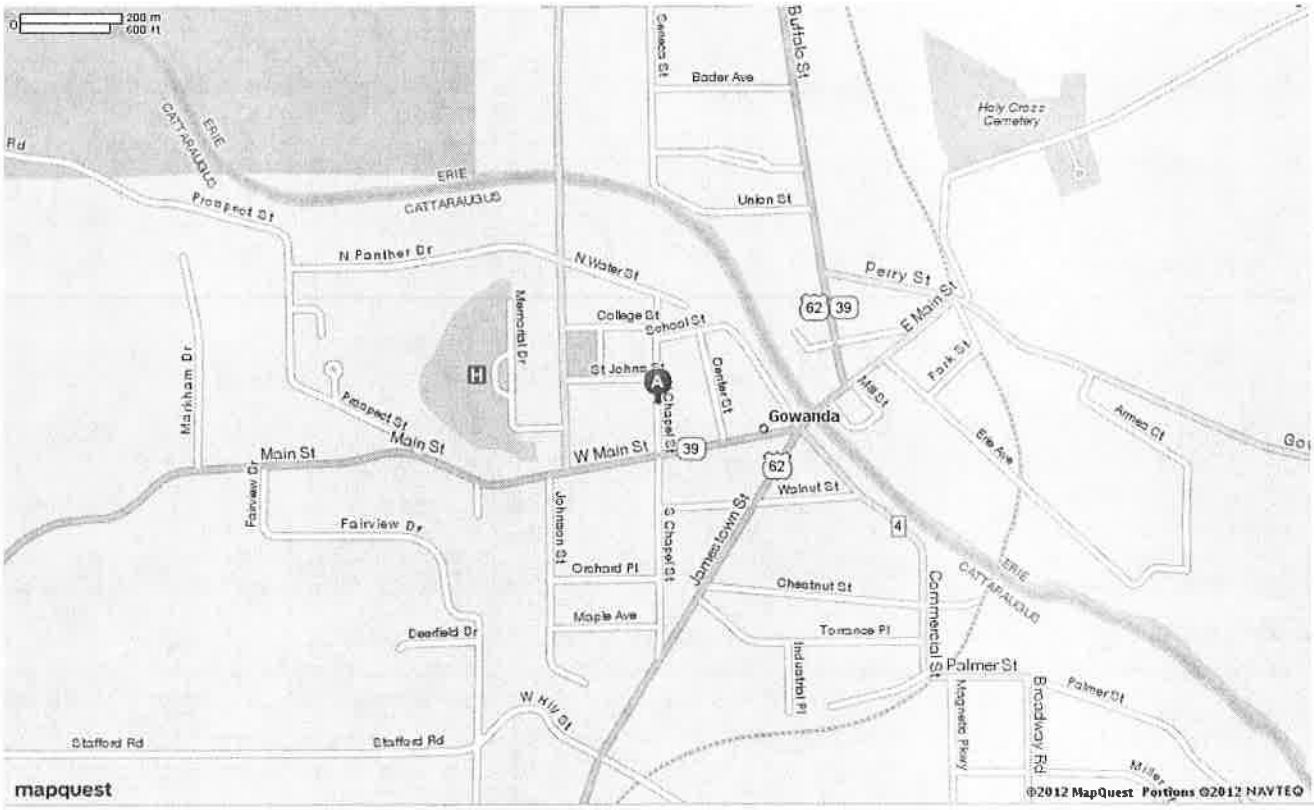

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