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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RONALD D. ALLEN, JR., et al.,

Plaintiffs,

vs.

ROBERT H. SMITH, et al.,

Defendants.

Case No. 12-CV-1668-WQH-KSC

REPLY BRIEF SUPPORTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FOR FAILURE TO JOIN AN INDISPENSABLE PARTY, AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

[Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(b)(7)]

Date: November 5, 2012
Ctrm: 4
Judge: William Q. Hayes

Complaint Filed: July 3, 2012

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I. INTRODUCTION

Try as they might to circumvent the "double jurisdictional whammy" barring their claims (*Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005)), Plaintiffs do not, and cannot, dispute that this lawsuit attacks the internal self-governance of an Indian tribe. Nonetheless, in the face of thirty-five years of precedent eschewing federal involvement in internal tribal matters (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 72 n.32 (1978) ("*Santa Clara Pueblo*"), Plaintiffs proceed undeterred, arguing, on the basis of inapposite, distorted, or superseded case law, that they are entitled to judicial relief in connection with the Pala Band's decision to exclude them as members. Specifically, because Plaintiffs disagree with the Tribe's decision to disenroll them, they challenge the validity of the Tribe's constitution, the Tribe's ordinances authorizing disenrollment, the actions of the government officials pursuant to the ordinances, and even the legitimacy of the tribal officials making the decisions. In the end, while Plaintiffs try to distinguish the membership determinations of *the Tribe* with the determinations of *the Tribe's officials* (through whom the Tribe necessarily acts), Plaintiffs seek relief in an internal tribal dispute predicated on alleged violations of tribal law. This, no federal court can grant.

Sovereign immunity presents an equally formidable jurisdictional barrier to claims attacking an Indian tribe's self-governance. Plaintiffs ask this Court to be the first to hold that tribal officials lack immunity to claims that they have violated tribal law—even where Plaintiffs elsewhere admit their injuries resulted from governmental action of the Tribe. Ninth Circuit precedent squarely forecloses such an intrusion on tribal sovereignty. A fundamental corollary to tribal immunity is that a suit like Plaintiffs', to control the Tribe's membership decisions and the disbursement of funds from the Tribe's sovereign treasury, cannot proceed in the Tribe's absence.

Given these jurisdictional barriers to claims attacking tribal self-governance in intramural matters, federal and state courts have declined to extend statutory and common laws to claims like Plaintiffs'. Indeed, that the substantive law precludes Plaintiffs from stating a claim based on tribal membership determinations is not surprising given the Supreme Court's admonition that "the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

At bottom, and despite a 30-page brief citing a litany of irrelevant case law, Plaintiffs impermissibly seek to draw a federal court into an internal dispute of a sovereign tribal government. Binding precedent forbids it, requiring dismissal with prejudice instead.

II. ARGUMENT

A. This Court Lacks Jurisdiction To Grant Relief For Alleged Violations Of Tribal Law In An Internal Tribal Dispute.

This case is an intratribal membership dispute, plain and simple. And under bedrock law, federal courts lack power to grant relief in such cases, which necessarily rest on alleged violations of tribal law. (Opening Brief, at 6:5-9:15.) *See, e.g.*, *Lewis*, 424 F.3d at 960; *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 276-77 (9th Cir. 1981).

1. *Santa Clara Pueblo* And Its Progeny Control, Even To Claims Alleging Violation of Tribal Law.

In a futile attempt to avoid the force of *Santa Clara Pueblo* and its progeny, Plaintiffs try to argue "this case is not about a tribe's right to define its membership." (Opp. at 13:7-8; *see generally id.* at 12:3-14:3.) To wit, Plaintiffs argue their claims are not about *the Tribe's* membership determinations, but rather, those of *Defendants* (*id*. at 12:4-11), who Plaintiffs personally sue but who Plaintiffs concede governed the Tribe. (Complaint at 15:4-13.) The apparent theory is that, because Defendants allegedly misconstrued Tribal laws when "unilaterally declaring" that Plaintiffs were not entitled to membership (Opp. at 13:7-14:3), this Court can decide for itself whether Defendants were correct in their interpretation, and it can do so without violating the bar on federal intrusion into internal tribal disputes. Plaintiffs appear to be suggesting *Santa Clara Pueblo* applies only to facial challenges to tribal laws, not to challenges to the manner in which tribal officials interpret and apply those laws. 436 U.S. at 72 n.32. Of course, the Supreme Court made no such distinction, instead expressing concern about federal disruption of a tribal government's sovereign independence: "[in] a dispute arising on the reservation among reservation Indians . . . . resolution in a foreign forum of intratribal disputes . . . cannot help but unsettle a tribal government's ability to maintain authority." *Id.*, at 59-60 (internal quotations and citations omitted). No court following the Supreme Court's precedent has drawn

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the distinction Plaintiffs advance, and indeed, the law is otherwise. *See Boe*, 642 F.2d at 276-78 (alleged violations of tribal laws did not support federal court jurisdiction over claims against tribal council members); *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1184-85 (E.D. Cal. 2009) (rejecting claim challenging tribal officials' authority to disenroll plaintiffs under tribal law).

Nor, as Plaintiffs suggest (Opp. at 13:19-24), is *Santa Clara Pueblo* limited to claims against tribes, as opposed to tribal officials, as the Supreme Court held that concerns about "intrusion on tribal sovereignty" prohibited federal courts from entertaining implied "actions for declaratory or injunctive relief against either the tribe *or its officers*." 436 U.S. at 72 (emphasis added); *Boe*, 642 F.2d at 276-78. Indeed, because a tribe necessarily acts through the persons comprising its government—here, Defendants—Plaintiffs' view of the law would mean that, contrary to *Santa Clara Pueblo*, every membership decision would be subject to federal scrutiny.

Also contrary to Plaintiffs' suggestion (Opp. at 13:26-14:1), the existence of a tribal court has no bearing on whether a federal court may intercede in an intratribal dispute, as the Supreme Court in *Santa Clara Pueblo* expressly approved tribal resolution of disputes through "[n]onjudicial tribal institutions," such as a tribal council. 436 U.S. at 66.

The cases Plaintiffs cite authorizing habeas corpus in certain narrow circumstances (Opp. at 14:4-24) are inapposite. None permit tort claims against Indian tribal officials for their role in membership decisions. *Settler v. Yakima Tribal Court*, 419 F.2d 486, 487 (9th Cir. 1969) (reversing dismissal of petition for writ of habeas corpus in criminal matter);[1] *compare Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 889 (2d Cir. 1996) (holding criminal banishment in conjunction with disenrollment constituted "detention" supporting habeas relief under the ICRA), *with Jeffredo v. Macarro*, 599 F.3d 913, 919-20 (9th Cir. 2010), *cert den.* 130 S. Ct. 3327 (declining to "expand[] the scope of the writ of habeas corpus to cover" appeals of tribal enrollment decisions in the absence of criminal banishment proceeding).

[1] Plaintiffs neglect to mention *Settler* is no longer good law for the proposition for which they cite it. *Moore v. Nelson*, 270 F.3d 789, 791-92 (9th Cir. 2001).

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Of course, Plaintiffs may not avoid *Santa Clara Pueblo* and its progeny by citing lower-court cases decided *before* that seminal 1978 case. *See* Opp. at 17-18 citing *Olney Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035, 1038 (D.S.D. 1977) and *Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation* ("*Johnson*"), 484 F.2d 200 (9th Cir. 1973); *and see Tenney v. Iowa Tribe of Kan.*, 243 F. Supp. 2d 1196, 1199 (D. Kan. 2003) (*Johnson* no longer viable for the principle that the ICRA permits federal court jurisdiction over tort claims).

2. The Pala Band Constitution's Mention Of The ICRA Is Irrelevant.

Plaintiffs try to distinguish the mountain of authority prohibiting this Court from entertaining their claims by suggesting the Pala Constitution's reference to the ICRA changes the analysis. (Opp. at 16:18-17:1, 17 n.5.) It does not. An Indian tribe's decision to model its own self governance on the laws of another sovereign hardly amounts to consent to resolve its internal disputes in another sovereign's forum. *Demontiney v. United States ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 814 (9th Cir. 2001) (rejecting argument that "the Tribe's incorporation of [the Indian Civil Rights Act] into its constitution and bylaws shows an intent to waive sovereign immunity in federal court" and holding that "[i]mplying such an intent here would improperly undermine sovereign immunity for many Indian nations"); *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1152-53 (10th Cir. 2011) (holding Indian tribe's commitment to comply with Title VII did not consent to that statute's jurisdictional and enforcement provisions to permit federal court suit against the tribe). The Tribe's Constitution is silent as to any remedies for an alleged violation of the ICRA. (Declaration of Elizabeth Lin In Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Lin Dec."), Ex. F, at p.10.) Indeed, at most, implying the Tribe's consent to the ICRA would permit a petition for habeas corpus, a remedy Plaintiffs do not, and cannot, invoke. (Opening Brief at 12:1-13:6.) *See Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460-61 (10th Cir. 1989) (tribal constitution's guarantee of ICRA rights "no more constitutes an unequivocal expression of waiver than does the language of the ICRA"). Federal jurisdiction existed for the military contract case Plaintiffs cite (Opp. at 16:27-28)—not because the contract *mentioned or included language from* federal law—but because "the construction of subcontracts, let under prime contracts connected with the national security"

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are "regulated by a uniform federal law." *New SD, Inc. v. Rockwell Int'l*, 79 F.3d 953, 955 (9th Cir. 1996) (internal citations omitted).

3. Plaintiffs' Reliance On Instances Of Tribal Law Issues Expressly Dedicated To Federal Court Review Is Misplaced.

Plaintiffs try to counter the principle that "federal courts cannot grant relief for civil *claims predicated on* the violation of tribal laws." (Opening Brief at 9:18-11:27 (emphasis added)). To that end, Plaintiffs cite cases involving tribal law; however, these are all cases in which Congress exercised its plenary power to expressly dedicate certain issues to federal court review. (Opp. at 15:5-16:15). *Randall v. Yakima Nation Tribal Court*, 841 F. 2d 897, 899-900 (9th Cir. 1988) (reviewing tribal court procedures in habeas corpus action under the ICRA); *Sweet v. Hinzman*, No. C08-844JLR, 2009 U.S. Dist. LEXIS 36716, at *1-2, *25-26 (W.D. Wash. April 30, 2009) (granting writ of habeas corpus under the ICRA, but refusing to "delve into the inner workings of the banishment process"); *Cahto Tribe of Laytonville Rancheria v. Dutschke*, No. 2:10-cv-01306-GEB-GGH, 2011 U.S. Dist. LEXIS 108393, at *2 (S.D. Cal. May 20, 2011) (claims against federal officials under the Administrative Procedure Act ("APA")); *Alto v. Salazar*, No. 11-cv-2276, slip op., at 3 (S.D. Cal. Dec. 19, 2011) (same); *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 149 n.8 (D.D.C. 1999) ("Since the Court decides this case only under the jurisdiction afforded it by the APA, it cannot issue an order compelling a certain form of government upon the Saint Regis Mohawk Tribe."). No such congressional grant of authority exists here.

Similarly, Plaintiffs' reliance on specific statutory schemes authorizing the federal government to create and administer tribal rolls to distribute certain funds is misplaced. (Opp. at 17:17-18:4) *See Sac & Fox Tribe of Indians v. Andrus*, 645 F.2d 858, 860 (10th Cir. 1981) ("[T]he Department's decision is limited to a holding that the heirs can participate in the distribution of federally-derived funds [authorized under 25 U.S.C. § 163], and does not make them members of the Tribe for any other purpose.");[2] *Allery v. Swimmer*, 779 F. Supp. 126, 127

[2] Moreover, the rolls created under 25 U.S.C. § 163 were used only for the distribution of funds created under the former 25 U.S.C. § 162, which was repealed in 1938. *Ordinance 59 Ass'n v. United States DOI Sec'y*, 163 F.3d 1150, 1159 & n.8 (10th Cir. 1998).

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(D. N.D. 1991) (interpreting special statute requiring the Secretary of Interior to establish and maintain a membership roll and use that roll to allocate certain funds).

Equally misplaced is Plaintiffs' reliance on cases predicated on the Indian Reorganization Act ("IRA"). (Opp. at 15:24-16:17.) The IRA gave the Secretary broad power to administer the affairs of certain Indian tribes voting to organize under that Act. 25 U.S.C. § 476 (a)(1), (c), (d). However, Plaintiffs do not allege the Pala Band organized under the IRA (*see* Complaint at 4:1-11); nor could they, as the Tribe rejected organization under the IRA, and so is not subject to its provisions. *See* United States Indian Service, *Ten Years of Tribal Government Under IRA*, at 14, available at http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf (reflecting Pala's vote rejecting the terms of the IRA). Moreover, none of Plaintiffs' IRA cases authorize tort actions against an Indian tribe, but rather all involve unsuccessful claims *by Indian tribes* against the federal government. *Cal. Valley Miwok Tribe v. United States,* 515 F.3d 1262 (D.C. Cir. 2008); *Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 202 (D.D.C. 2006); *Shakopee Mdewakanton Sioux Com'ty v. Babbitt*, 906 F. Supp. 513 (D. Minn. 1995).

Plaintiffs' citations to cases involving challenges to an Indian tribe's civil jurisdiction over non-Indians (Opp. at 15:16-21, 16:15-17, 23:26-28) are similarly unhelpful. *Rincon Mushroom Corp. of Am. v. Mazzetti*, No.. 09-cv-2330-WQH-POR, 2010 U.S. Dist. LEXIS 99926 (S.D. Cal. Sept. 21, 2010), *reversed by* 2012 U.S. App. LEXIS 14984 (9th Cir. Cal. July 19, 2012); *Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 572 (5th Cir. Tex. 2001); *Tenneco Oil Co. v. Sac & fox Tribe of Indians*, 725 F.2d 572, 574-75 (10th Cir. 1984). These cases rest on the principle that "*[n]on-Indians* may bring a federal common law cause of action under 28 U.S.C. § 1331 to *challenge tribal [] jurisdiction*" over them (*Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009) (emphasis added).). None support federal jurisdiction to adjudicate tort claims against tribal officials in an internal tribal membership dispute.

B. Sovereign Immunity Bars Plaintiffs' Claims Attacking Tribal Officials' Governance Of An Indian Tribe.

Sovereign immunity also bars Plaintiffs' claims, as tribal officers necessarily possess immunity to claims alleging their actions caused the tribe to take an action that injured a plaintiff.

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Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991) ("*Imperial Granite*"). Specifically, where an action of the tribe caused the injury, the officials' conduct effecting that tribal action was necessarily within the tribal officials' authority. *Id.* (finding tribal officials immune since it was "the official action of the Band, following the votes [of the officials], that caused Imperial's alleged injury"). Even putting aside jurisdictional barriers to the adjudication of an intratribal dispute, Plaintiffs' disagreement with Defendants' application of tribal law simply does not alter that Plaintiffs' alleged injury stems solely from the action of the Tribe to disenroll them.

Plaintiffs ignore *Imperial Granite*'s explanation that tribal officials' acts of governance are, by definition, within their authority. Without precedent, Plaintiffs argue tribal officials are not immune from claims that they have violated tribal law in the course of fulfilling their legislative and executive duties. (Opp. at 12:12-22.) However, viewing Plaintiffs' cited authorities generously, at most they hold that, (1) consistent with *Imperial Granite*, tribal officials lose their immunity when their actions so exceed their authority that they cease to be actions governing the tribe[3] (*Burrell v. Armijo*, 456 F.3d 1159, 1162-63, 1174 (10th Cir. 2006) (holding tribal officials who misappropriated plaintiffs' hay were "acting as individual[s]" and not immune to claims for actions taken outside of their governmental positions); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359-60 (2d Cir. 2000) (directing district court to consider whether Tribal museum employees who committed acts of copyright infringement "acted beyond the scope of the authority that the Tribe could lawfully bestow");[4] and (2) that tribal officials are subject to injunctive relief prohibiting ongoing conduct that violates federal—not tribal—law. *Burlington N. R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 901-902, 906 (9th Cir. 1991).[5]

[3] Contrary to Plaintiffs' suggestion (Opp. at 2:2-3), Defendants do not contend they are immune by virtue of merely being *members* of the Tribe. *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 171 (1977).

[4] *See Bassett v. Mashantucket Pequot Museum & Research Ctr.*, 221 F. Supp. 2d 271, 280-81 (D. Conn. 2002) (finding on remand that alleged violations of federal and state law did not show tribal officials acted "without any colorable claim of [tribal] authority" such that they did not act on behalf of the tribe).

[5] Plaintiffs' reference to a qualified immunity case holding that a retaliatory motive counsels in favor of finding a violation of a clearly established First Amendment right (Opp. at 19:5-11), is

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As in *Imperial Granite*, Plaintiffs' alleged injuries do not result from actions of Defendants so far beyond their governmental authority that they cease to be actions of the Tribe. Indeed, Plaintiffs' Complaint establishes Defendants necessarily acted within their authority "as members of Pala's Executive Committee, . . . in positions of power and control over members of the Tribe" and as "members of Pala's Enrollment Committee." (Complaint at 15:4-13; *see also id.* at 30:14-31:2 (alleging defendants, as members of the Tribe's "Executive Committee" operating as its "Enrollment Committee," took action that "terminated [Plaintiffs'] Tribal citizenship" and "their rights to all Tribal distributions and benefits").) Plaintiffs do not—and cannot—dispute that the act of disenrollment is necessarily an act of the Tribe. (Complaint at 9:18-10:2) *See Santa Clara Pueblo*, 436 U.S. at 72 n.32 (recognizing "[a] *tribe's* right to define its own membership for tribal purposes" (emphasis added)); *United States v. Bruce*, 394 F. 3d 1215, 1225 (9th Cir. 2005) (tribe's "authority to determine questions of its own membership" is one of its "most basic powers").

That Plaintiffs purport to sue individual tribal officials for damages changes nothing. To the contrary, claims for damages against high-ranking tribal officials exercising their governmental duties "attack[] the very core of tribal sovereignty" and are barred by sovereign immunity. *Maxwell v. County of San Diego*, ___ F.3d ___, No. 10-56671, 2012 U.S. App. LEXIS 19225, at *30 (9th Cir. Sept. 13, 2012); *see Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478-80 (9th Cir. 1985) (holding sovereign immunity barred suit for damages against tribal officials alleged to have wrongfully expelled plaintiff from tribal land pursuant to tribal law).

Nor does the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which permits only "suit for prospective relief against tribal officers allegedly acting in *violation of federal law*," authorize this Court to adjudicate an intratribal dispute by enjoining the Tribe's officials based on alleged violations of *tribal law*. *Burlington N.R. Co.*, 924 F.2d at 901-902, 906 (challenging tribe's authority to impose tax on non-Indian entities in violation of federal statutes); *see, e.g., Big Horn County Electrical Cooperative, Inc. v. Adams*, 219 F.3d 944, 947-48, 954 (9th Cir. 2000)

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of no help. *Lacey v. Maricopa County*, No. 09-15703, 2012 U.S. App. LEXIS 18320, *25 (9th Cir. August 29, 2012). Unlike qualified immunity, tribal sovereign immunity bars all suits, without reference to the potential merits. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755, 759-60 (1998).

(sovereign immunity inapplicable to tribal officials enforcing tax on electric cooperative on non-Indian land in violation of federal law); *Salt River Project Agric. Improvement & Power Dist. v. Lee*, No. 10-17895, 2012 U.S. App. LEXIS 10862, at *15 (9th Cir. Ariz. May 29, 2012) (evaluating whether application of Navajo Preference in Employment Act violated federal law); *Vann v. Kempthorne,* 534 F.3d 741, 749 (D.C. Cir. 2008) (authorizing injunction prohibiting tribal officials from violating federal law in the form of a treaty).[6]

Indeed, the single federal issue Plaintiffs identify—whether the Tribe's Constitution was validly adopted under the IRA, 25 U.S.C. § 476 (Opp. 15:24-27)—references a provision of federal law inapplicable to the Tribe. *See supra* Section II.A.3. In any event, even if applicable, the IRA imposes no substantive restrictions on the Tribe in favor of Plaintiffs, such that this Court could redress Plaintiffs alleged injuries through prospective injunctive relief. *See* 25 U.S.C. § 476 (providing that "[a]ny Indian tribe shall have the right to organize" under IRA procedures and imposing certain duties on the Secretary to facilitate such organization). And of course, Plaintiffs' claims depend on a host of issues grounded in tribal law. (Opening Brief at 8:12-20, 10:6-11:5.)

Because sovereign immunity necessarily protects tribal officials carrying out the quintessential act of tribal self governance—applying tribal law to determine membership—this Court lacks jurisdiction to hear Plaintiffs' claims.

C. The Tribe Is A Necessary And Indispensable Party That Cannot Be Joined.

Plaintiffs do not dispute that the Tribe has an interest in not having the merits of a dispute over its membership determined in its absence. (Opening Brief at 17:18-18:19.) Nor do they try to explain how tribal officials personally sued for significant monetary damages can simultaneously protect the Tribe's interests, as if the Tribe were itself a party. (*Id*. at 18:20-19:28.) Indeed, Plaintiffs' own allegations, if true, necessarily mean Defendants could not adequately represent the Tribe's interests, as they are allegedly "rogue officials who overstepped

[6] Plaintiffs' assertion that, notwithstanding tribal immunity, this Court may enjoin tribal officials' "ultra vires" actions finds no support in the cases they cite. (Opp. at 23:8-17.) *See United States v. Wildcat,* 244 U.S. 111, 116-119 (1917) (Secretary of Interior violated federal statutes governing distribution of tribal land allotment); *In re J.M.*, 718 P.2d 150, 154 (Alaska 1986) (dismissing complaint on sovereign immunity grounds because ultra vires act of the chief could not effect waiver); *Turlock Irrigation District v. Hetrick*, 71 Cal. App. 4th 948 (1999) (holding irrigation district, not possessing immunity, violated Public Utilities Code).

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the bounds of their authority by using tribal membership as a ruse to avenge personal vendettas, . . . persistently exceeded and ignored any restraint on their powers . . . and deliberately subverted the will of the [Tribe]." (Opp. at 2:22-23, 3:4-5; Complaint at 48:6-11.)

To be sure, neither of the cases Plaintiffs cite to suggest Defendants could adequately represent the Tribe involved tribal officials sued for damages, or for allegedly violating tribal law or otherwise acting contrary to the Tribe's interests. *Salt River Project Agric. Improvement & Power Dist.*, 2012 U.S. App. LEXIS 10862, at * 2, 11, 15 (entertaining claims for injunctive relief to prevent alleged violations of federal law and noting "no suggestion that the officials' attempt to enforce the statute here is antithetical to the tribe's interests"); *Sweet*, 634 F. Supp. 2d at 1201 (petition for habeas corpus by banished individuals based on alleged violation of ICRA).[7] Plaintiffs' specifically contend the relief they seek would entitle them to per capita and other payments and various services that would deplete the Tribe's resources. (Complaint at 3:8-13.)

In an effort to avoid a finding that complete relief is unavailable without the Tribe's joinder, Plaintiffs apparently abandon any claim for past damages from the Tribe's treasury, and confirm that such damages are sought from Defendants only. (Opp. at 21:20-22.) However, the complete relief Plaintiffs seek still requires an order directing the Tribe to re-enroll Plaintiffs. (Complaint at 60:21-26.) Plaintiffs' only answer is their legally untenable assertion that the *Ex parte Young* doctrine authorizes injunctive relief against tribal officials to compel them to comply with tribal law. But *Ex parte Young* only authorizes injunctive relief for violations of federal law, not tribal law. *Burlington N. R. Co.*, 924 F.2d at 901. *See supra* Section II.B.

Plaintiffs' suggestion, without authority, that the Tribe is not indispensable where "an order enjoining or voiding" Plaintiffs' disenrollment would simply "restore . . . the status quo" is bizarre. (Opp. at 24:9-12.) The Rule 19 analysis depends on evaluating a judgment's effect on the absent party compared with the absent party's status in the absence of a judgment, without reference to whether the judgment would restore some past state of affairs. Fed. R. Civ. P. 19(b)(1) (effect of "*judgment rendered* in person's absence" (emphasis added)). And tribal

[7] Plaintiffs' attempt to distinguish *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) (Opp. at 21 n.7) fails, as intervenors have "equal standing with the original parties." *Donovan v. Oil, Chemical, and Atomic Workers Int'l Union*, 718 F.2d 1341, 1350 (5th Cir. 1983).

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sovereign immunity outweighs Plaintiffs' assertion they lack an alternative forum. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991).

D. Plaintiffs Cannot State A Claim Upon Which Relief Can Be Granted.

Plaintiffs' attempts to recast an intratribal dispute under various tort regimes fail under the considerable precedent built upon the Supreme Court's directive that courts must refrain from recognizing such claims. *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Indeed, as a threshold matter, each of Plaintiffs' state law claims fail, as they do not even attempt to explain how they can avoid California's bar on adjudicating claims alleging disenrollment in violation of an Indian tribe's laws. *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1067 (2005).

1. The ICRA Cannot Serve As The Substantive Basis Supporting Plaintiffs' 42 U.S.C. § 1985(3) Claim.

Conceding, as they must, that other sources of substantive rights do not support their Section 1983(5) claim, Plaintiffs assert the Tribe's incorporation of the ICRA into its governing documents provides the substantive rights upon which Plaintiffs may base their § 1985(3) claim. They are mistaken. As explained above, the Tribe's election to afford its members due process and equal protection as enumerated in the ICRA—a federal statute authorizing only habeas corpus relief—in no way authorizes federal tort claims against the Tribe or its officials. *See supra* Section II.A.2; *Demontiney*, 255 F.3d at 814. Entertaining federal claims that tribal disenrollment violates the ICRA under the guise of § 1985(3) is inimical to the principle articulated in *Santa Clara Pueblo* that the courts should "not rush to create causes of action" intruding in internal tribal membership disputes. 436 U.S. at 72 n.32. Moreover, Plaintiffs cite no authority for the proposition that tribal law can serve as the underlying source of substantive rights through which this Court can entertain their §1985(3) claim. *See Boe*, 642 F.2d at 276-77.

Plaintiffs' reliance on *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) is misplaced, as it was decided before, and is no longer viable after, *Santa Clara Pueblo*. *See, e.g., E.F.W. v. St. Stephen's Mission Indian High School*, 51 F. Supp. 2d 1217, 1231 (D. Wyo. 1999) ("[*Means'*] ruling regarding the ability to sue the Tribe or its governmental arms under the ICRA was impliedly overruled by" *Santa Clara Pueblo*). Later Ninth Circuit authority citing *Means* outside

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the Indian law context hardly overrules the Supreme Court's pronouncements in *Santa Clara Pueblo*. *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720 n.15 (9th Cir. 1981).

In fact, none of Plaintiffs' pre-*Santa Clara Pueblo* cases support their position that they can state a claim under § 1985(3). *See Dry Creek Lodge v. United States*, 515 F.2d 926 (10th Cir. 1975) (claims by non-Indian entity against Secretary of the Interior and tribal officials); *McCurdy v. Steel*, 353 F. Supp. 629 (D. Utah 1973). The *McCurdy* court's suggestion, in *dicta*, that allegations of a conspiracy by and among Indians to deprive another of civil rights may be cognizable under § 1985(3) could only have rested on that court's now repudiated holding that federal court jurisdiction under the ICRA expanded beyond habeas corpus relief, as only the ICRA, not the United States Constitution, protects the rights of individual Indians against actions by their tribes. 353 F. Supp. at 635, 637 n.11; *see also Santa Clara Pueblo*, 436 U.S. at 56. The holding in *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006), is also inapposite, as that court expressed no view of the procedural or substantive merits of the § 1981 or § 1985 claims, and merely remanded to permit plaintiff to amend his "difficult to decipher" pro se pleadings to attempt to "assert these two claims intelligibly." *Id.* at 1048.

Furthermore, § 1981 cannot serve as the substantive basis for Plaintiffs' § 1985(3) claim because, as elsewhere explained (*see* Opening Brief, at 25:1-26:17 and Section II.D.2 *infra*), § 1981 simply does not apply to tribal membership determinations.

This Court should follow the rule in *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) that the intra-corporate conspiracy doctrine forecloses § 1985(3) claims against tribal officials. Although the Ninth Circuit has not squarely addressed the issue, the Eighth Circuit's approach best respects the Supreme Court's directive that federal courts take care not to intercede in the inner workings of a sovereign tribal government. *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Further, Plaintiffs' reliance on *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 936-37 (D. Neb. 1986) is misplaced, as Plaintiffs' only alleged injuries result from Defendants' actions in their role as officials governing the Tribe. *See supra* Section II.B.

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2. 42 U.S.C. § 1981 Does Not Apply In The Context Of Tribal Membership Disputes.

Plaintiffs' § 1981 claim rests entirely on their erroneous theory that Defendants' acts allegedly violating tribal law somehow mean their suit is something other an improper attempt to control the Tribe's sovereign right to determine its membership. It isn't. As Plaintiffs must concede (Complaint at 15:4-13, 30:14-31:2), only the Tribe's government, not Defendants individually, has the power to make decisions regarding tribal membership. *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

Plaintiffs' citations offer no support for their § 1981 claim. *See* Opp. at 27, citing *Vann*, 534 F.3d 741, 745 (involving no claims under § 1981, which is not even mentioned in the opinion); *Burrell*, 456 F.3d at 1174 (expressing no opinion as to the merits of non-Indian plaintiffs' § 1981 claim); *Allen*, 464 F.3d 1044, 1048 (expressing no opinion as to plaintiff's "difficult to decipher" § 1981 claim). By comparison, Plaintiffs' attempts to distinguish *Nero*, 892 F.2d 1457, also fail. (Opp. at 27:26-28.) The claim that this case is not about the Tribe's inherent, sovereign right to define its membership is just wrong. *See supra* Section II.A.1. And the assertion that *Nero* did not involve tribal defendants allegedly exceeding their authority is a meaningless distinction, given *Nero*'s well-founded holding that applying § 1981 to tribal membership determinations would "eviscerate the tribe's sovereign power to define itself," and interfere "'with a tribe's ability to maintain itself as a culturally and politically distinct entity.'" *Id*. at 1463 (citing *Santa Clara Pueblo*, 436 U.S. at 72). Plaintiffs' use of cases finding *non-tribal* lineage-based discrimination actionable under § 1981 misses the point (Opp. at 28:5-12), as federal law bars its application to tribal membership disputes, regardless of alleged discrimination. *Nero*, 892 F.3d at 1463 (citing *Santa Clara Pueblo*, 436 U.S. at 72).

3. Plaintiffs. Lacking Any Vested Property Right In Tribal Membership Or Its Benefits, Cannot State A Conversion Claim.

Unable to dispute that tribal membership is not an actionable property right, Plaintiffs assert that that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq*., guarantees them money and benefits attendant to membership in the Tribe. This is categorically

wrong. Putting aside that IGRA relates only to the Tribe's gaming activities (*see* 25 U.S.C. § 2702)—and not any other sources of revenue the Tribe distributes to its members—IGRA does not vest individuals with ownership or a right to possession of property. To be sure, IGRA does not require, as Plaintiffs' claim, that the Tribe adopt a plan governing the distribution of gaming revenue. *See* 25 U.S.C. § 2710(b)(3) (requiring a tribe to adopt a plan governing the allocation of gaming revenue *only* where the tribe decides to pay gaming revenue directly to its members). While IGRA mandates that gaming revenue may only be expended for particular purposes furthering the interests of a tribe and its citizens (25 U.S.C. § 2710(b)(2)(B)), nothing in IGRA prevents the Tribe from altering the distribution of revenue among these uses at any time.

Indeed, the distribution of gaming revenue to tribal members is an internal tribal matter and governed by tribal law. *See Lewis*, 424 F.3d at 963 ("'[D]isputes arising from the allocation of net gaming revenue and the distribution of per capita payments' are to be resolved through 'a tribal court system, forum or administrative process.'" (quoting 25 C.F.R. § 290.23)); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996). Because Plaintiffs have failed to establish a vested property right in the benefits associated with Tribal membership, their conversion claim fails.

4. Although Defamation Law Does Not Control An Indian Tribe's Membership Decisions, Plaintiffs Fail To State A Claim In Any Event.

Plaintiffs make no effort to refute Defendants' argument that state defamation law cannot attach liability to the acts of a sovereign Indian tribe in matters regarding tribal membership or to conduct predicated on violations of tribal law in an internal tribal matter. *See, e.g., Timbisha Shoshone*, 687 F. Supp. 2d at 1181, 1184-85; *Lamere*, 131 Cal. App. 4th at 1067.

Aside from these insurmountable jurisdictional barriers, Plaintiffs have not stated, and cannot state, a claim for defamation as they cannot show that statements regarding their ancestor's Indian blood degree are of or concerning them. *See Blatty v. New York Times*, 42 Cal. 3d 1033, 1044, 1046 (1986) (holding a group allegedly defamed which numbers over twenty-five members cannot meet "of or concerning" requirement). Of no help to Plaintiffs is *Church of Scientology v. Flynn*, 744 F.2d 694 (1984). The *Flynn* court found the group defamation rule inapplicable where the plaintiff sect alleged defendants' comments about the church as a whole could reasonably be

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understood to refer to specifically plaintiff. *Id*. at 697. In contrast here, Plaintiffs allege only that statements were made about their ancestor, and that such statements were directed at over 150 people, without differentiation. (Complaint at 35:7-10, 35:15-17, 59:1-2.) Make no mistake, the allegedly defamatory statements concerned a deceased person, Margarita Britten, alone, and not the Plaintiffs. (Opening Brief at 29:15-20.) In the end, neither statements about Ms. Brittain, nor about 150 of her descendants, support a defamation claim as a matter of California law.

5. Plaintiffs' Tortious Interference And Conspiracy Claims Fail For Lack Of Any Predicate Wrongful Act Under Federal Or State Law.

Plaintiffs' claims for tortious interference with prospective economic advantage and conspiracy fail for lack of a predicate wrongful act. *See Della Penna v. Toyota Motor Sales, U.S.A. Inc.*, 11 Cal.4th 376, 393 (1995); *Youst v. Longo*, 43 Cal. 3d 64, 79 (1987). Defendants' acts disenrolling Plaintiffs from the Tribe in alleged violation of tribal law do not constitute a wrong actionable under either California or federal law. *Lamere*, 131 Cal. App. 4th at 1067; *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Vague assertions that Defendants "illegally t[ook] away Plaintiffs' rights and property" (Opp. at 30:13-14) are insufficient, as Plaintiffs lack any vested right in membership or its benefits. *See supra* Section II.D.3. Nor can Plaintiffs' failed defamation claim support either claim. *See supra* Section II.D.4. And their mention of "deceit or misrepresentation" (Opp. at 30:7) is strange without allegations suggesting Defendants' somehow defrauded Plaintiffs. Cal. Civ. Code § 1709; *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 216 Cal. App. 3d 388, 402 (1989).

III. CONCLUSION

Bedrock precedent precludes this Court from interceding in an intratribal dispute based on alleged violations of tribal law. Accordingly, Defendants respectfully request dismissal of the action with prejudice.

Respectfully submitted,

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