APPELLATE CASE NO. A-15-008

IN THE TRIBAL COURT OF THE CONFEDERATED TRIBES OF THE

GRAND RONDE COMMUNITY OF OREGON

COURT OF APPEALS

ALEXANDER, VAL, ET AL.,

Petitioners-Appellants,

vs.

THE CONFEDERATED TRIBES OF GRAND RONDE AND THE

GRAND RONDE ENROLLMENT COMMITTEE,

Respondents-Appellees.

APPEAL FROM TRIBAL COURT

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

This Court should reverse the Tribal Court and remand its decision because the government's mass disenrollment violates Grand Ronde Tribal Code § 4.10(d)(4)(H) ("Enrollment Ordinance") and the Constitution of the Confederated Tribes of the Grande Ronde Community of Oregon ("Constitution"). The disenrollment was arbitrary and capricious. Additionally, the government repeatedly violated Petitioners' due process rights under the Constitution and the Indian Civil Rights Act of 1968 ("ICRA").

This case is about a government agenda to strip 66 American Indians ("Petitioners") and their deceased ancestors of their tribal citizenship, and how the law and facts have been subordinated to that political agenda. A Tribal Court judge rubber-stamped this cleansing. Absent remand this precedent will fundamentally alter the constitutional rights to tribal citizenship of all Grand Ronde members.

Among other things, the Tribal Court rejected evidence that the Tribe itself had previously promised it would end the forcible disenrollment action and fabricated a "pseudo residency [enrollment] requirement." In other words, the government has subordinated the facts and law to execute its roll-cleansing campaign. The overarching problem here is that this tribal government's despotism will have rippling effects extending far beyond the Appellants in this

case, and, in effect, vest the tribal government with unfettered and absolute power to wash its tribal rolls of whomever it chooses for no legitimate purpose

Put simply, if this Court does not uphold the rights of the indigenous people looking for justice here, the constitutional rights of all Grand Ronde members will have been profoundly changed in a way that violates human decency and the Constitution of the Confederated Tribes of the Grand Ronde Community of Oregon ("Constitution").

II. JURISDICTION

This appeal is from the Tribal Court's review of a final decision by the Grand Ronde Enrollment Committee ("Enrollment Committee") to remove Petitioners from membership in the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde Tribes"). This Court has appellate jurisdiction under the Enrollment Ordinance § (i)(6).

III. ISSUES ON APPEAL

A. Whether the Tribal Court erred when it determined that the mass disenrollment did not violate the Constitution in this case.

B. Whether the Tribal Court erred when it determined that the mass disenrollment did not violate Grand Ronde law in this case.

C. Whether the Tribal Court erred when it determined that the mass disenrollment was not arbitrary and capricious.

D. Whether the Tribal Court erred with it determined that Respondents did not violate Petitioners' due process rights in the course of the mass disenrollment.

E. Whether the Tribal Court erred when it determined that the audit did not violate the Enrollment Ordinance and the Constitution.

F. Whether the Tribal Court erred when it determined that laches was not applicable to the current proceeding.

G. Whether the Tribal Court erred when it determined that equitable estoppel was not applicable to the current proceeding.

IV. STATEMENT OF THE CASE

In 2013, Respondents conducted an illegal enrollment audit. Based on the illegal enrollment audit, Respondents initiated disenrollment proceedings against Petitioners. During those proceedings, after Tribal Council had already deliberated and remanded the matter once to the Enrollment Committee, Respondents made so-called "emergency" changes to the Enrollment Ordinance.[1] These changes made the Enrollment Committee, rather than the Grand Ronde Tribal Council ("Tribal Council"), the final decision-maker for disenrollment proceedings. The

[1] *See* Enrollment Ordinance § (i)(7), as amended July, 2014, providing, in pertinent part, that the so-called "emergency" amendments to the Enrollment Ordinance and the new process for disenrollment apply to all Enrollment Committee recommendations issued before "July 2, 2014, but not yet acted upon by Tribal Council as of such date . . . regardless of when disenrollment proceedings began."

disenrollment proceedings were then, once again, remanded from the Tribal Council to the Enrollment Committee.[2] On July 22, 2014, the Enrollment Committee issued a final decision, to remove Petitioners from membership in the Grand Ronde Tribes.[3]

On August 20, 2014, Petitioners appealed the Enrollment Committee's final decision to the Tribal Court.[4] On September 1, 2015, the Tribal Court issued an Order Denying Appeal ("Order").[5] On September 11, 2015, Petitioners filed a Notice of Appeal with the Tribal Court, providing notice of Petitioners' intent to file an appeal with this Court.[6]

V. STATEMENT OF FACTS

Any dispassionate review of the record reveals that the evidence establishing Petitioners' legitimacy as Grand Ronde members is overwhelming and undeniable. The evidence to the contrary is non-existent or based on purely arbitrary and unfounded, unqualified opinion that ignores fact and withholds deference to over seventy carefully considered governmental decisions enrolling Petitioners and their deceased family members.

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[2] Certified Record, Document 3, Exhibit 23.
[3] Certified Record, Document 3, Exhibit 23.
[4] Certified Record, Document 1.
[5] Certified Record, Document 32.
[6] Certified Record, Document 34.

In short, all Petitioners have proven—beyond any reasonable doubt—at least two independent grounds that satisfy the lineal descent requirements for enrollment: (1) through Chief Tumulth's signature on the Treaty with the Kalapuya of 1855 ("Treaty"), and (2) through his wife Susan's appearance on the 1872 Grand Ronde census. Many Petitioners have a third independent ground establishing that they may not legally be disenrolled because they descend directly from other Grand Ronde members, *i.e.*, birthright citizenship.[7]

The following factual overview and account of the administrative proceedings provides (1) an overview of the evidence in the record with respect to Chief Tumulth and the Treaty; (2) a similar overview of the evidence in the record regarding Susan Tomolcha, her appearance on the 1872 Grand Ronde census roll, and the evidence linking her to Petitioners' common ancestor, Mary Will-Wy-Ity; and (3) an account of the fundamentally flawed process Respondents have subjected Petitioners to over the past year.

[7] It is for this reason that Respondents have summarily disenrolled several of Petitioners' ancestors, without notice to the living, as detailed in the opening brief in the *Altringer et al. v. CTGR* Case No.: A-15-002.

A. Petitioners Descend Directly From Chief Tumulth Of The Cascade Indian Tribe, Who Signed The Treaty With The Kalapuya And, Therefore, All Petitioners Descend From A Grand Ronde Member For Purposes Of Lineal Descent Enrollment Requirements Under The Grand Ronde Constitution.

The Treaty that Chief Tumulth signed is a seminal legal document of the Confederated Tribes of Grand Ronde, as evidenced by: (1) the Treaty text itself; (2) the Executive Order creating the Grand Ronde Reservation; and (3) the Restoration Act restoring the Confederated Tribes of Grand Ronde as a federally recognized sovereign Native American Tribe, which itself references the Treaty and the corresponding executive order establishing the Grand Ronde Reservation. The Treaty was created by the United States Department of the Interior; the Treaty is also a legal record of Grand Ronde members, as evidenced by uncontroverted expert testimony furnished to the Enrollment Committee during the course of the initial administrative proceedings. Thus, the Treaty is a legal document of Grand Ronde members created by the Department of the Interior prior to the effective date of the Constitution.

1. Chief Tumulth Of The Watlala Band Of Chinook Indians Signed The Treaty Leading To The Creation Of The Grand Ronde Reservation And Federal Recognition Of The Confederated Tribes Of Grand Ronde.

There is no dispute that Petitioners are all direct lineal descendants of Chief Tumulth.[8] Chief Tumulth was a chief of the Cascade Indians, or the Wah-lal-la ("Watlala") Band of Chinook Indians, members of which were generally removed to the area that is now the Grand Ronde Reservation.[9] Put another way, Chief Tumulth's Tribe was absorbed by the Confederated Tribes of Grand Ronde.[10]

Critically, Chief Tumulth signed the Treaty.[11] This Treaty is literally a founding document of the Grand Ronde Tribes, serving as the basis for the Executive Order establishing the Grand Ronde Reservation upon which gave rise to the confederation of Tribes and other indigenous peoples that now comprise today's Grand Ronde Tribes.[12] It is accurate to call the Treaty *the* founding document of the Grand Ronde Tribes. President Buchanan's Executive Order establishing the permanent Grand Ronde Reservation references the Treaty, noting

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[8] Certified Record, Document 3, Exhibit 1, p. 93; *see also id.* pp. 99-100.
[9] *Id.* at p. 100 ("Joel Palmer identified the ceded lands of the Watlatla (or Cascade) in a report on the Willamette Valley Treaty . . . and with the establishment of the Grand Ronde Reservation in 1856 they were removed there"); *see also id.* p. 125
[10] For decades, and to this day, Respondents have used Chief Tumulth, his lands, and his people as leverage for claims to rights in the indigenous homelands of Chief Tumulth and his Tribe, highlighting the incongruity between the instant disenrollment actions, and the exploitation of Petitioners' family for purposes of asserting Grand Ronde Tribal rights. *Id.* at pp. 127-146.
[11] *Id.* at pp. 110-16.
[12] *Id.* at pp. 200-204.

that the Reservation was established "particularly for the Willamette tribes, parties to the treaty of January 1855" (i.e., the Treaty with the Kalapuya).[13] Unfortunately for Chief Tumulth and his family, the United States Army hanged Chief Tumulth in 1856 based on his alleged involvement in the "Battle of the Cascades," before he was relocated to the Grand Ronde Reservation.[14]

2. The Treaty Is A Record Of Grand Ronde Members Created By The United States Department Of The Interior Prior To The Effective Date Of The Grand Ronde Constitution.

The Grand Ronde Constitution provides two non-exhaustive, but definitive, examples of the ways a person may satisfy the lineal descent requirements for membership in the Grand Ronde Tribes. Put another way, if a person can show an ancestor appearing on "any" record of Grand Ronde members prepared by the Department of the Interior, and the person satisfies other enrollment requirements, Respondents may not arbitrarily deny that person Tribal membership or, as they have done here, forcibly disenroll such a person. Specifically, the Constitution states that a person meets the lineal descent requirement when they show "lineal descent from any person who was named on **any roll or records of Grand Ronde members prepared by the Department of the Interior prior to the effective**

[13] *Id.* at pp. 118-120.
[14] *Id.* at p. 98.

date of [the] Constitution."[15] The words "any" and "or" are critical and must be given effect as explained in detail below.

The Department of the Interior predates the Treaty by approximately six years, having been created in 1849 pursuant to a Congressional act.[16] Chief Tumulth's name appears on the Treaty.[17] The Treaty was countersigned by Joel Palmer, Superintendent of Indian Affairs under the Department of the Interior.[18] The Treaty is, therefore, a Department of Interior record upon which Petitioners' direct lineal descendant—Chief Tumulth—appears.

Here, the only mixed question of fact and law in dispute with respect to the Treaty is whether the Treaty is a "record ***of Grand Ronde members***" as required for enrollment purposes under the Constitution. The factual evidence establishes that the answer to this question is unequivocally: yes, the Treaty is a record of Grand Ronde members. In fact, it is the first record of Grand Ronde members when the uncontested historical picture is taken into account. As indicated *supra*, in 1857 President James Buchanan signed an Executive Order establishing the Grand Ronde Reservation.[19] This Order notes that the Grand Ronde Reservation is

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[15] Grand Ronde Constitution, Art. V, § 1 (emphasis added).
[16] *See* 9. Stat. 395 (codified at 43 U.S.C. § 1451) mandating that there "shall be at the sate of government an executive department to be known as the Department of the Interior, and a Secretary of the Interior, who shall be the head thereof."
[17] Certified Record, Document 3, Exhibit 1, pp. 110-116.
[18] *Id.*
[19] *Id.* at pp. 118-120.

expressly created for "parties to treaty of January, 1855," which, obviously included Chief Tumulth and his people.[20] Further, the "Pocket Diary of Joel Palmer for the year 1856" shows that 51 members of Tumulth's tribe, the Watlala (spelled "Wallala" in Joel Palmer's diary) had been removed to the Grand Ronde Reservation.[21] Tumulth's specific Tribe therefore, was removed to the Grand Ronde Reservation pursuant to the rights and obligations set forth in the Treaty. The 1857 Executive Order is a fulfillment of the promises made to Tumulth and the people he represented when he signed the Treaty in 1855. It also bears noting that the Restoration Act in 1983 expressly restored the obligations of the Treaty with the Kalapuya and the corresponding 1857 Executive Order establishing the Grand Ronde Reservation.[22]

The only expert evidence offered on the matter of the Treaty came in the form of Eirik Thorsgard's testimony. Thorsgard was the Grand Ronde Tribal Historic Preservation Officer. He testified that the Treaty is a legal record of Grand Ronde members that qualifies as a document that descendants may use to prove lineal descent for purposes of enrollment at Grand Ronde. Despite the Enrollment Committee's erroneous contention to the contrary in its majority opinion, Thorsgard set forth the historic authority for his conclusions in clear,

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[20] *Id.*
[21] *Id.* at pp. 122-123.
[22] *Id.* at p. 203.

logical, and comprehensive terms during his testimony.[23] Thorsgard's opinion logically limits the utility of the Treaty as a document showing lineal descent to only those direct lineal descendants of individual Indians who appeared on the Treaty, furnishing the following illustrative example:

> If I was the chief of this room and I signed the treaty on behalf of all of us and then the treaty was used to legitimize descendancy, I, and all my children, and grand children, and so on would be able to use that connection, no one else in the room would because their names are not listed on it . . . which is why it is not a census or a roll. . . ***But the Treaty in my opinion does create a legal record*** . . .[24]

Thus, according to the only expert opinion on the record, the direct descendants of Chief Tumulth—and any other signatory to the Treaty—may use the Treaty as a record of Grand Ronde members to prove lineal descent under the Constitution.

Mr. Thorsgard's testimony highlights the constitutional distinction between "record" and "roll" Respondents seek to diminish in the disenrollment of Petitioners, and the inclusive use of the word "any" that is an express constitutional limitation on Respondents' ability to discriminate as to which records it might accept and which it can reject for purposes of considering lineal descent qualifications. In other words, because the Constitution provides that lineal descent may be established by identifying a lineal ancestor on *any* roll *or* record of Grand Ronde members, Respondents may not arbitrarily decide that certain records

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[23] Certified Record, Document 3, Exhibit 23, p. 2.
[24] Certified Record, Document 3, Exhibit 19, recording of January 10, 2014 hearings commencing at 11:45 a.m., at 29:00-30:30; and 34:20-36:00.

of Grand Ronde members created by the Department of the Interior prior to the Constitution are simply unacceptable, as they have done with respect to Petitioners.

Respondents' "order" purporting to disenroll Petitioners[25] advances a nonsensical position unsupported by fact, which is completely dismissive of the Grand Ronde Tribes' own cultural expert.[26] Oddly, the Enrollment Committee—save for its one dissenting member—claims that "it does not make sense that a Treaty signer would only represent himself and his family and not all the people he was sent to represent."[27] This highlights that the Enrollment Committee has failed to grasp the legal and factual underpinnings of Thorsgard's opinion, and either ignores or cannot understand the distinction between Chief Tumulth's role as a Treaty signer representing his Tribe in terms of the obligations and promises of the Treaty, and the ability for his lineal descendants to use the Treaty as a "record of Grand Ronde members" to satisfy membership requirements under the Grand Ronde Constitution.

Furthermore, the Enrollment Committee opines that the Treaty cannot be a record of Grand Ronde members because it predates the establishment of the Grand Ronde Reservation in 1857.[28] But this arbitrary decision contradicting

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[25] As noted herein, there is no authority permitting the Enrollment Committee to overturn Tribal Council decisions enrolling Petitioners.
[26] Certified Record, Document 3, Exhibit 23.
[27] *Id.*
[28] *Id.*

decades of precedent set by previous Enrollment Committees and Tribal Councils also cuts against the Enrollment Department's own testimony, during which it claimed that the first record or roll of Grand Ronde members that may be used to satisfy lineal descent requirements was dated 1856, before the establishment of the Grand Ronde Reservation.[29]

It is a matter of fact that: (1) the Grand Ronde Tribes' federal recognition arises from the Treaty; (2) the Grand Ronde Reservation was created for those who signed the Treaty with the Kalapuya, and the people they represented, including Chief Tumulth; (3) Chief Tumulth's Tribal members were indeed relocated to the Grand Ronde Reservation; (4) the Treaty itself is a Department-of-Interior-created record of Grand Ronde members; and (5) no factual evidence or expert testimony, whatsoever, was presented to the Enrollment Committee to support any argument that the Treaty was not a record of Grand Ronde members created by the Department of the Interior prior to the effective date of the Constitution.[30]

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[29] Certified Record, Document 3, Exhibit 19 recording of December 16, 2013 hearings commencing at 08:16 a.m., at 1:31:30-1:32:07. Interestingly, in the description of the first roll or record of Grand Ronde members the Enrollment Department recognizes for lineal descent purposes, the Enrollment Department identifies that record as only "a list of the chiefs and how many people were under them." *Id.* This highlights the totally arbitrary rejection of the Treaty as a record of Grand Ronde Chiefs or head men who signed the Treaty on behalf of the people they led.

[30] Joel Palmer's removal of Watlala Tribal members to the Grand Ronde Reservation manifested the Department of the Interior's intent to honor the terms of the Treaty with the Kalapuya; namely the rights of Chief Tumulth's Wallalla

Based on Chief Tumulth's appearance in the Treaty, Petitioners satisfy the lineal descent requirement for membership at Grand Ronde. This Court's analysis may end here, and it may, under its authority for *de novo* review with respect to legal issues and mixed issues of law and fact, remand this matter with a finding in accord with history and the Grand Ronde Tribal government's initial enrollment decisions with respect to Petitioners' family in 1986 and in the years that followed preceding the 1999 amendments to the Constitution. In 1986 when Petitioners' family members were first enrolled, the Enrollment Committee unanimously concluded that the Treaty itself was a record of Grand Ronde members that satisfies the lineal descent requirements.[31]

What has transpired, starting in 2013 and leading to Petitioners' disenrollment, is nothing more than an uninformed and historically baseless change in political policy. The record establishes that all but one member of the current Enrollment Committee—and, for what it's worth, those who favored disenrollment

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members to reside at the Grand Ronde Reservation and avail themselves of the benefits secured to them through their Tribal government. After termination in 1954, on November 22, 1983, President Ronald Reagan signed into law the 1983 Grand Ronde Restoration Act, which simultaneously restored, as stated from the act, "any Federal treaty, Executive order, agreement, or statute, or under any other Federal authority, which may have been diminished or lost under the Act approved August 13, 1954." Because the 1983 restoration act restored both the 1855 Treaty with the Kalapuya and the 1857 Presidential executive order that formerly organized the original Grand Ronde reservation, the 1855 Treaty with the Kalapuya was, yet again, unambiguously established as a Department of Interior record of Grand Ronde members.

[31] Certified Record, Document 3, Exhibit 1, p. 125.

on the Tribal Council—premised their opinion that the Treaty is not a record of Grand Ronde members on an outcome-based analysis and a misplaced and ironic deference to layperson opinions in the current Enrollment Department over previous governmental officials who had enrolled Petitioners.[32] In sum, based on the Treaty alone, these disenrollment matters should never have moved past the Enrollment Department.

B. Petitioners Descend Directly From Susan Tomalch Or Tomolcha, Who Appears On The 1872 Grand Ronde Census, A Roll Of Grand Ronde Members.

Chief Tumulth's wife, Susan, appears on an 1872 Grand Ronde census roll.[33] Because official state government records prove that Susan was Mary Will-

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[32] Certified Record, Document 3, Exhibit 19, recording of December 16, 2013 hearings commencing at 8:16 a.m., at 1:30:40 – 1:32:21. The Enrollment Department contends in its testimony that the Treaty was not a "record of Grand Ronde members" because the Grand Ronde Reservation was not in existence at the time of its ratification. But in the same line of questioning, the Enrollment Department argues that a record from 1856—before President Buchanan's executive order establishing the Reservation—is, in fact, a record of Grand Ronde members that prospective members may use to establish that they meet the lineal descent requirements. *Id.* This contradiction highlights the arbitrary and uninformed nature of the Enrollment Department's efforts to disenroll people it deems were "enrolled in error."

[33] Certified Record, Document 3, Exhibit 1, pp. 67-84. This census document was transcribed into typewritten form and mistakenly dated "1860." *Id.* at pp. 50-66. Initially, the Enrollment Department argued that the census roll was from 1860, pursuant to the transcribed copy, and based on that faulty assumption, argued that Susan Tomolcha was unlikely the mother of Petitioners' ancestor, Mary, because Mary would have been a young child at the time and did not appear on the roll in 1860. Certified Record, Document 3, Exhibit 19, recording of December 16, 2013 hearings commencing at 8:16 a.m., at 1:18:30 – 1:19:10. In fact, during this

Wy-Ity's mother, as detailed below, and because it is uncontested that all Petitioners descend directly from Mary Will-Wy-Ity, it follows that all Petitioners likewise descend directly from Susan.[34]

Respondents have never contested that the 1872 census roll is a record that may be legally used to satisfy the lineal descent requirements for Grand Ronde membership. Therefore, Petitioners have a separate and independent ground beyond the Treaty for satisfying the lineal descent requirement and, in turn, establishing that Respondents may not legally forcibly disenroll Petitioners.

Rather tellingly, Susan Tomolcha is buried with two of her grandchildren who died in their youth, the children of Susan Tomolcha's daughter, Mary Will-Wy-Ity, a/k/a, *inter alia*, Mary Stooquin and "Indian Mary." A state record from the Skamania County Cemetery District establishes that Susan Tomalch, a variation of the name "Tomolcha" and "Tumulth" is indeed Mary Will-Wy-Ity's mother and is buried with Mary's children.[35]

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testimony, the Enrollment Department conceded that if the 1860 roll is proven to be from 1872, this would obviate the doubts the Enrollment Department had with respect to Susan Tomolcha on that roll due to Mary's absence. Later in the hearings before the Enrollment Committee, the Enrollment Department reversed its position and conceded that it had "no proof" that the transcribed copy of the Grand Ronde census roll upon which Susan Tomolcha appears was from 1860; instead, the Enrollment Department confirmed that "1872" is the "correct" date for the census at issue. *Id.* at recording of December 30, 2013 hearings at 07:40 AM. 15:24-16:00.

[34] Certified Record, Document 3, Exhibit 1, p. 47, Exhibits 77 and 78.

[35] Certified Record, Document 3, Exhibits 77 and 78.

During the hearings before the Enrollment Committee in December 2013 and January 2014, the Enrollment Department agreed that "Susan Tomolcha" appeared on a qualifying census roll for purposes of Petitioners' lineal descent requirements. But the point of contention, as highlighted in the Enrollment Department's "closing statement," was the Department's claim that it had no "legal" or "official" or "government" records establishing a link between Susan Tomolcha and Mary Will-Wy-Ity.[36] On January 6, 2014, however, the Enrollment Committee Chairman Robert Schmidt declared that "a burial record" that would "tie Susan and Mary" was all the Committee needed to establish the so-called "missing link" between Susan Tomolcha and Mary Will-Wy-Ity.[37] The Committee was in fact able to link those two matriarchs, with evidence.

1. Skamania County Burial Records Provide "Legal Documents" Establishing The "Missing Link" Connection Between Susan Tomalch And Mary Will-Wy-Ity.

Throughout the hearings, the Enrollment Committee reviewed evidence derived from records of the Skamania County cemeteries, as transcribed by a former and now-deceased Skamania County Clerk.[38] This evidence was compiled in volumes kept in various libraries, including the Washington State Library,

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[36] Certified Record, Document 3, Exhibit 19, recoding of January 10, 2014, Hearings commencing at 11:45, at 2:03:50 – 2:04:36

[37] *Id.*, recording of January 6, 2014, Hearings commencing at 07:36, at 1:08:42-1:14:20.

[38] Certified Record, Document 3, Exhibit 1, pp. 45-48.

among others, and such compilations specifically referenced burial records from the Cascade Pioneer Cemetery in Skamania County, Washington, where several family members of Chief Tumulth have been laid to rest.[39] But the actual records upon which the former county clerk relied to complete her compilations could not be located within the Skamania County records, and, therefore, the Enrollment Committee and the Enrollment Department indicated that it would not rely on the county clerk's compilations as a basis to stop Petitioners' forcible disenrollment. Later, however, Petitioners secured official records from the Skamania County Cemetery District regarding Mary and her mother Susan.[40]

Initially, these official Skamania County government burial records reflected that Mary Will-Wy-Ity's mother's name was "Susan Will-Wy-Ity."[41] But "Will-Wy-Ity" was a surname derived from one of *Mary's* husbands, and therefore the surname was incorrect as applied to Mary's mother, who would not have adopted such a surname under any known applicable custom or tradition. It is notable that several of Tumulth's family members are buried in this particular cemetery and are noted to have surnames tying them to Tumulth, such as "Tomalch."[42] Consequently—and due to the Enrollment Department's rejection of "Susan Will-Wy-Ity" as adequate evidence that Mary's mother was the "Susan Tomolcha"

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[39] Certified Record, Document 3, Exhibits 79 – 81.
[40] Certified Record, Document 3, Exhibits 77 and 78.
[41] Certified Record, Document 3, Exhibit 77.
[42] Certified Record, Document 3, Exhibit 81, at p. 9-11.

appearing on the 1872 Grand Ronde Census roll—Petitioners sought relief from the Skamania County Cemetery District Board to correct the county records in order to reflect that Mary Will-Wy-Ity's name was in fact, Susan Tomalch, and not Susan Will-Wy-Ity, and to assist Petitioners in proving that they were in fact lineally connected to Susan Tomolcha or Tomalch, wife of Chief Tumulth and mother to Mary Will-Wy-Ity.[43]

The second declaration of Skamania County official Danielle Iman Lankford provides the following evidence:

- Ms. Lankford is the Manager of Skamania County Cemetery District No. 1.[44]
- Appended to her declaration, Ms. Lankford includes a deed for a burial plot ("Burial Record") at the Cascade Pioneer Cemetery and she attests, under penalty of perjury, to the Burial Record's origins, authenticity, and reason for creation.[45]
- Ms. Lankford declares that the Cemetery District acknowledges that Mary Will-Wy-Ity, daughter of Chief Tumulth according to their records, "had the maiden name of Tomalch...." Accordingly, the Cemetery Board took corrective governmental action so the Burial Record for Susan reflects her

[43] Certified Record, Document 3, Exhibit 78 (Second Declaration of Danielle Iman Lankford).
[44] *Id.*
[45] *Id.*, Ex. A to Second Declaration of Danielle Iman Lankford.

actual known last names—"Tomalch"—as opposed to "Will-Wy-Ity," a name Mary acquired through marriage.[46]

- The Burial Record establishes that Susan "Tomalch" was Mary Will-Wy-Ity's mother and that Susan "Tomalch" is buried with Mary's two sons.[47]
- Ms. Lankford testifies that the corrections "were mandated by the [Skamania County] Cemetery District Board," a governmental entity created under Washington State law.[48]
- The burial record corrections also are "the official actions of the Skamania County Cemetery District No. 1, a Washington State government body."[49]

Specifically, the Skamania County Cemetery District No. 1 Burial Record states that Susan Tomalch was: "Mary Will-wi-ity's [sic] mother – Also buried in the grave are Mary's two (young) sons."[50] Ms. Lankford's second declaration is notarized by Melissa A. Anderson, a Notary Public commissioned by Washington State.[51]

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[46] *Id.* Previously, Skamania County records identified Mary's mother as "Susan Will-Wy-Ity." The Skamania County Cemetery Board found this to be an error after Petitioners brought it to their attention—as attested by Ms. Lankford—based on the evidence and the names of Susan and Mary's other "Tomalch" relatives identified in cemetery records.
[47] *Id.*, Ex. A.
[48] *Id.*
[49] *Id.*
[50] *Id.*, Ex. A.
[51] *Id.*

By virtue of Ms. Lankford's second declaration, the Burial Record from Skamania County Cemetery District No. 1 showing that Susan Tomalch a/k/a Tomolcha[52] is Mary Will-Wy-Ity's mother is a certified copy of a public record. Therefore, under the Federal Rules of Evidence, the Burial Record is self-authenticating and admissible as evidence in a federal court.[53] In other words, and as demonstrated in greater detail below, the document is a "legal document" or "official record" under even the most conservative or stringent definitions of these terms. And it is unquestionably "a burial record that ties Susan to Mary" which the Enrollment Committee Chairman advised Petitioners was all they needed to confirm that Petitioners were not enrolled in error and subject to forcible disenrollment.

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[52] The names "Tomalch" and "Tomolcha" are both related variations of the name Tumulth, as established through uncontroverted expert evidence submitted to the Enrollment Committee in the administrative proceedings and set forth *infra*.

[53] Under Fed. R. Evid., 902(4)(A), the Burial Record is admissible as evidence because it is a "copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law . . ." and the copy "is certified as correct by . . . the custodian or another person authorized to make the certification." The Burial Record is (1) an official record of Skamania County, a Washington State governmental entity, (2) filed with the Skamania County Cemetery District No. 1, and (3) certified as correct by its custodian and someone authorized to make the certification, Ms. Lankford, who is the Manager of Skamania County District No. 1.

2. As A Matter Of Law, The Burial Record Is A Document That Respondents Must Consider To Prove Lineal Descent.

The Enrollment Department and the Enrollment Committee inexplicably and improperly rejected the uncontested Cemetery Record. Under the Grand Ronde Enrollment Ordinance: "Enrollment Staff shall establish the nature and types of acceptable evidence, **which will include but not be limited to, court documents, and state or federal records.**"[54] It follows, therefore, that the Enrollment Staff have certain discretion in establishing the "nature and types of acceptable evidence" for purposes proving enrollment eligibility; but it does not have unfettered discretion and must, under Grand Ronde law, accept state records.

Cemetery districts in Washington State's counties and municipalities arise by virtue of a Washington State legislative act.[55] In fact, counties and municipalities themselves are essentially subsidiaries of the state.[56] The records of the Cemetery District are therefore "state records." Accordingly, the Burial Record itself is not only acceptable evidence showing eligibility for enrollment

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[54] Enrollment Ordinance § (d)(2)(emphasis added). Under this Section, copies of such records are acceptable if they are "certified to be true copies by the office having custody of the original record." Here, the Burial Record is held by the Skamania County Cemetery District No. 1. Ms. Lankford is the Manager of Skamania County Cemetery District No. 1, and has certified that the copy of the state record submitted with these materials is true and correct through the Second Lankford Decl.

[55] *See* Wash. Rev. Code §§ 68.52 *et seq.*

[56] Wash. Rev. Code §§ 36 *et seq.*, and §§ 37 *et seq.*

under the Grand Ronde Enrollment Ordinance, it is evidence the Enrollment Department lacks the authority to reject as it has done here.

3. The Names "Tomalch" And "Tomolcha" Are Insignificant Variations Of The Name Tumulth, And, Therefore, The Evidence In The Record Establishes That Susan Tomolcha On The 1872 Grand Ronde Census Roll Is The Same Susan Tomalch Who Appears As Mary Will-Wy-Ity's Mother And The Wife Of Chief Tumulth In State Cemetery Records.

During the initial December 2013-January 2014 hearings before the Enrollment Committee—which was the first time any substantive information on the Enrollment Department's decision to recommend disenrollment was furnished to Petitioners, albeit on an extremely limited basis—the Enrollment Department argued repeatedly that although the Petitioners had shown that Susan Tomolcha appeared on a roll of Grand Ronde members, the Petitioners had not linked their ancestor Mary Will-Wy-Ity to Susan. Initially, Petitioners had only oral history advising them that Mary's mother's name was Susan. When the Petitioners discovered cemetery records identified "Susan" as Mary's mother, the Enrollment Department still argued that this was insufficient because the name "Susan Tomolcha" on the 1872 Grand Ronde census was different from the name "Susan Will-Wy-Ity" that erroneously appeared on the Skamania County records.[57] Although no specific contention is recalled with respect to the minor distinction

[57] *See* Certified Record, Document 3, Exhibit 19, testimony of Penny DeLoe for the Enrollment Department generally.

between the names "Tomalch" and "Tomolcha," Petitioners nevertheless secured the testimony of two linguist and cultural experts on that distinction and the Tumulth name in general.

The first expert, Dr. Zenk, is a "linguistic expert in Chinuk Wawa, as taught in the Chinuk Wawa Language Program of the Confederated Tribes of Grand Ronde."[58] Dr. Zenk is also "an academically-trained specialist with a number of publications relating to lower Columbia region indigenous languages and cultures."[59] In the early 1980s during his graduate studies in anthropology at the University of Oregon, Dr. Zenk "recorded Chinuk Wawa from some of its last elder native speakers, all members of the Grand Ronde Indian community."[60] Dr. Zenk's declaration provides his "observations on the name 'Tumulth' (etc.), first attributed to a Cascades Chinookan chief hanged by the U.S. Army in 1856."[61] Zenk confirms that the name Tumulth survived Chief Tumulth's hanging "as a family surname of his wives and descendants."[62] This is a critical expert acknowledgment proving the link among Tumulth to Susan Tomolcha and Mary.

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[58] Certified Record, Document 3, Exhibit 3.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

After setting forth the academic foundation for his analysis—including reference and citation to historical and linguistic sources—Dr. Zenk states that variations of the name "Tumulth" in the historic record include, without limitation:

- Tumalth
- Tomulch
- Tomalsch
- Tomalth
- Tomalt
- Tumalt
- Tomalch
- Tumulth
- Tum-walth
- Tumath
- Tomult[63]

With respect to the name that accompanies the Susan at issue in this matter on the 1872 Grand Ronde census, Dr. Zenk offers the following expert opinion:

> The spelling "Tomulcha" [or Tomolcha], appearing on a Grand Ronde census taken ca. 1872 obeys the pattern outlined above, except for showing an extra syllable in the terminal "a." While I see no linguistic motivation (for example, any likely candidate among recorded Chinookan suffixes) to explain such a termination, historical

[63] *Id.*

> spellings of Indian names are notoriously rife with errors, and I would not consider a slight spelling variation significant in itself. It could have many explanations: the census taker may have requested careful enunciation of the name, introducing an artificial syllabification; the name may have been miscopied from a field document by someone who had no grasp of the actual pronunciation; etc.[64]

Dr. Zenk ventures from the linguistic domain into the historic to explain that "Susan 'Tomulcha' may well have borne the name of Tumulth" having been listed with "one of the Apperson brothers, sons of Chief John of Oregon City, who in turn was a son of Chief Tomaquin at the Cascades."[65] Although Dr. Zenk concedes "these further lines of evidence are outside my particular area of expertise," his opinion is substantiated in the expert testimony offered by others, including anthropological, archaeological, and cultural expert Eirik Thorsgard.[66]

Petitioners also secured the testimony of Tony Johnson, Chair of the Native Advisory Board for the University of Oregon's Northwest Indian Language Institute and a member of the Chinook Nation's Culture Committee for over two decades.[67] Mr. Johnson is "an instructor and expert in Chinuk Wawa and former Cultural Education Coordinator for the Confederated Tribes of Grand Ronde."[68] Mr. Johnson's declaration is consistent with Dr. Zenk's position, opining that there

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Certified Record, Document 3, Exhibit 4.
[68] *Id.*

is "no significant difference between 'Tomalch,' 'Tomolch,' and 'Tomolcha.'"[69] Johnson continues, noting that it is typical to encounter such variations in records of Indian names from this historic time period:

> It is wholly typical to find a variety of spellings for the Native names of individuals during the time period in question. This is a product of the attempts of primarily English speaking Americans to approximate Native names that had sounds not easily represented by the limited English alphabet. I believe these names from the historic record [Tomalch, Tomolch, Tomolcha] are very likely the same words and refer to the same name and surname in the attached records.[70]

The records Johnson relies upon include gravestones found in the Cascade Pioneer Cemetery showing "Tomalch" as the surname of Joseph Tomalch among others. In addition, Johnson references an obituary for Virginia Miller from 1927 where "reference is made to Virginia's father, 'Chief Tomolch, who with a number of other chiefs and Indians from the Cascades and the Yakimas were hanged for instituting the massacre on the whites in 1856."[71] Johnson notes that "[c]learly the 'Tomolch' in this obituary is a reference to Chief Tumulth."[72] Johnson further opines that the name "Tomolcha" appearing in the 1872 census as Susan's surname

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[69] *Id.*
[70] *Id.*
[71] *Id.*, referring to Virginia Miller obituary at Certified Record, Document 3, Exhibit 1, p. 91.
[72] Certified Record, Document 3, Exhibit 4.

"is the same surname as that appearing on the gravestones and associated with the Cascades Chief Tumulth."[73] Johnson concludes that:

> the name 'Susan Tomolcha' on [the 1872 Grand Ronde Census] document refers to the same Susan (1st wife of Chief Tomalch) especially when one considers the other individuals listed above and below her on the census document. The others named here are some of the best known Chinookan people that came to the Grand Ronde Reservation from the Columbia and Willamette Rivers.[74]

Ultimately, based on the foregoing evidence and Johnson's expertise, he concludes that Susan Tomolcha on the 1872 census is Tumulth's wife and Mary Will-Wy-Ity's mother.

It is notable that Respondents failed to provide one single piece of reliable evidence to the contrary, nor did it provide any conflicting testimony from any qualified witness. Accordingly, Dr. Zenk and Mr. Johnson's declarations stand totally unrebutted. There is no evidence in the record—much less substantial evidence—supporting a plausible position that Susan Tomolcha appearing on the 1872 census roll with a family closely related to Tumulth's Tribe could be anyone other than Chief Tumulth's wife. Similarly, there is no plausible evidence in the record supporting a position that Susan Tomalch in the Skamania County cemetery

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[73] *Id.*
[74] *Id.*

records as Mary Will-Wy-Ity's mother could be anyone other than Susan Tomolcha from the 1872 Grand Ronde census.[75]

C. The Record Reveals Significant Due Process Violations With The Disenrollment Process Respondents Prescribed For Petitioners.

At the administrative hearings, Respondents deprived Petitioners of the due process and codified right to confront witnesses by arbitrarily limiting the

[75] It is likewise notable that throughout this entire administrative process, Respondents never once explained to Petitioners or their counsel the standard of proof that Petitioners were being held to. The Enrollment Ordinance is silent on the matter. No procedures with respect to the Enrollment Committee were furnished to Petitioners on the matter. No reference to standard of proof, burden, or even the actual evidence supporting disenrollment was ever furnished to Petitioners, in their written notices for their administrative hearings or otherwise. Instead, the Enrollment Committee and the Enrollment Department kept moving the goal posts so to speak. Every time the family secured that "one thing" that the Enrollment Committee said it needed to see to end the disenrollment process in Petitioners' favor—such as an official government burial record linking Susan to Mary—Respondents would renege and say that Petitioners have still failed to carry whatever mysterious burden Respondents had arbitrarily employed, if there was any objective burden at all. This issue highlights the fundamental due process failure of the disenrollment process Petitioners faced. Given the express Constitutional protections for Tribal membership once it has been secured, any attempt for Respondents to strip that membership should be subject to a clear process, with a clear burden of proof. Because of the constitutional protections for Tribal enrollment, it should be Respondents' burden to *prove* that Petitioners failed to meet the enrollment criteria. Instead, throughout the entire administrative process, Respondents treated Petitioners as if they were illegitimate Tribal members until they could prove themselves legitimate Tribal members, and the means through which such proof could be established was shrouded in mystery and ever-changing. In short, this process Respondents have subjected Petitioners to over the past year is wholly inconsistent with any accepted standard of fair and just due process.

witnesses Petitioners were able to call.[76] Respondents totally failed to implement any process through which Petitioners might have the ability to confront witnesses who had relevant testimony regarding the disenrollment matter and the illegal audit used to justify disenrollment.

Petitioners were also effectively denied the right to access their full enrollment files.[77] When Petitioners attempted to secure access to their files, they were told a court order was needed, but there was no clear process established for how to secure such an order and the court fees required for access to files was cost prohibitive for a family saddled with significant travel costs and legal fees to prepare a defense to Respondents' opaque attack on their enrollment statuses.[78]

Petitioners also repeatedly requested access to the audit results with respect to their disenrollment actions; but Respondents denied these requests outright. The records relative to the audit were not provided until Respondents produced the initial administrative record in this action.[79]

Petitioners also repeatedly requested that the evidence against them be set forth in detailed fashion; such requests were likewise summarily denied.

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[76] *See generally* Certified Record, Document 3, Exhibit 19 at recording of December 16, 2013 hearings commencing at 8:16 a.m.
[77] *Id.*
[78] Certified Record, Document 3, Exhibit 1, pp. 154-198.
[79] *See, e.g.*, Petitioners' individual enrollment files, first produced in September, 2014.

And Petitioners also repeatedly requested what standard of proof the Enrollment Committee was holding the Petitioners to; but Petitioners never received a clear response, and, as noted, the standards shifted as the evidence mounted showing Petitioners were not subject to legal forcible disenrollment under the Constitution.

Under the Enrollment Ordinance, as it existed prior to July 2, 2014, and as applicable to the instant disenrollment action until that date, Petitioners were entitled to a vote from the Grand Ronde Tribal Council on whether or not to disenroll Petitioners.[80] No such votes ever occurred, despite over nine months, and hundreds of hours of administrative proceedings.

On or about April 30, 2014, and May 1, 2014, the Tribal Council heard from Petitioners and Petitioners' family on the matter of the disenrollment of Petitioners. At that time, the Tribal Council voted to remand the matter to the Enrollment Committee to review the evidence presented to the Tribal Council. The remand was believed, as evidenced in records of the public Tribal Council proceeding and the eventual so-called "emergency" amendments to the Enrollment Ordinance removing the Tribal Council from the disenrollment process altogether, to be a

[80] *See* Enrollment Ordinance, as amended 2/19/14.

thinly veiled attempt for the pro-disenrollment political faction on Tribal Council to ensure the success of its efforts to disenroll Petitioners.[81]

In May of 2014, the Enrollment Committee met several times to conduct the remand proceedings.[82] Respondents arbitrarily set strict rules for the remand process—rules that Respondents failed to adhere to, notably—and generally prohibited all descendants of Chief Tumulth and Susan Tomolcha from appearing at said hearings, with the exception of one half of one day of the proceedings. Counsel for Petitioners was permitted to attend the hearings, but was generally barred from speaking unless the Enrollment Committee had questions for Petitioners' counsel.[83]

On the final day of the remand proceedings, the Enrollment Committee, including a sibling of the Enrollment Department's manager and a vocal public advocate for the disenrollment of Petitioners, colluded with the Enrollment Department to raise an entirely novel theory regarding Susan Tomolcha and her origins in an ambush-style effort to scuttle Petitioners' attempts to stave off disenrollment. This theory had never before been presented during the several months of administrative proceedings and despite repeated requests for Respondents to produce evidence which it contends supports disenrollment, and

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[81] Certified Record, Document 3, Exhibits 133.
[82] Certified Record, Document 3, Exhibit 22.
[83] Certified Record, Document 3, Exhibit 16.

both Petitioners and legal counsel for Petitioners were not permitted time to review the new materials presented and respond to those materials.[84]

On or about June 9, 2014, the Enrollment Committee re-issued its second recommendation to disenroll Petitioners; Respondents, on the same date, set a hearing on July 9, 2014, before the Tribal Council for it to "act on the Enrollment Committee's recommendation that you be removed from the Tribal roll . . . ." That hearing never occurred.

On or about July 2, 2014, the Tribal Council enacted so-called "emergency" amendments to the Enrollment Ordinance, in violation of the procedures established for amendments to Tribal law given the fact that there was no *bona fide* emergency, and the amendments clearly targeted Petitioners and were aimed to avoid any up-or-down vote on the matter of the disenrollment of Petitioners by the Tribal Council; Respondents' specifically engineered the "emergency" amendments to apply retroactively to Petitioners and Petitioners' family.[85]

The Enrollment Ordinance amendments the Tribal Council enacted made the Enrollment Committee the final agency decision-maker for disenrollment actions.

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[84] *Id.*

[85] *See* Enrollment Ordinance § (i)(7), as amended July, 2014, providing, in pertinent part, that the so-called "emergency" amendments to the Enrollment Ordinance and the new process for disenrollment apply to all Enrollment Committee recommendations issued before "July 2, 2014, but not yet acted upon by Tribal Council as of such date . . . regardless of when disenrollment proceedings began."

But the Enrollment Committee never held one single hearing for Petitioners in its role as the final arbiter, and, instead, issued its final agency action disenrolling Petitioners. On or about July 22, 2014, the Enrollment Committee issued its decision which claims to have overturned the long-standing Tribal Council Resolutions enrolling Petitioners in the Grand Ronde Tribes and disenrolled Petitioners based on allegations of being "enrolled in error."

VI. STANDARDS OF REVIEW

The Tribal Court is required under the "emergency amendments" to the Enrollment Ordinance to uphold "[f]indings of fact . . . unless unsupported by substantial evidence in the record."[86] The Tribal Court reviews questions of law or mixed questions of law and fact *de novo*.[87] The Enrollment Ordinance provides that the Tribal Court's decision may be appealed to the Court of Appeals; the Court of Appeals reviews the Tribal Court's decision for error.

VII. SUMMARY OF ARGUMENT

The Tribal Court's decision and the Petitioners' disenrollment violate the Constitution. The Constitution expressly limits the ability of Respondents to disenroll members; the Constitution does not empower Respondents to revisit decisions previous Tribal elders made decades ago to disenroll a member that new

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[86] Enrollment Ordinance § (i)(5)(F).
[87] *Id.*

government officials deem to have been an "error." The Constitution provides a very narrow authority for forcible disenrollment:

> The reasons for [forcible loss of membership] shall be **limited exclusively to failure to meet the requirements set forth for membership in this Constitution** . . . .[88]

Even if this Court does find that Respondents have the near-unfettered authority to disenroll members that have been "enrolled in error," this exception does not apply to Petitioners because: (1) Respondents have disenrolled Petitioners based on a change in policy regarding the interpretation of the term "record of Grand Ronde members" and other subjective historical views (*e.g.*, consider the "quasi residential" requirement that Tribal Court manufactured), not on any actual constitutionally cognizable enrollment error, such as a fraudulent birth certificate, and, therefore (2) Petitioners qualify for membership under the Constitutional requirements.

Put another way, the Respondents have wide latitude in making determinations on *whether* to enroll a prospective Grand Ronde member. But the Respondents do not have the same constitutional latitude to audit enrollment files of existing members and effectively require each member it decides didn't quite meet the standards under its own subjective view to go through the enrollment process once again and prove his or her qualifications for membership.

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[88] Constitution, Art. V, § 5.

This approach actually flips the constitutional notion of disenrollment on its head; rather than protect the interests of a long-standing tribal members, it subjects that tribal member to a constant state of uncertainty with respect to tribal identity, which identity may be stripped away at any time at the whim of a government official's decision to reverse course on a previous determination made decades before.

In short, upholding the Tribal Court's decision here rewrites the Constitution to empower the government to disenroll any Tribal member by simply claiming that a prior government official made an "error" because the current government officials disagree with the conclusion of the prior government official. Outrageously, when the official (presently, the Enrollment Department) determines that an "error" has been made, the revamped constitutional authority to disenroll foists a nebulous, and potentially insurmountable burden (as was the case with the Petitioners here) on the enrolled Grand Ronde member to re-litigate her enrollment application and, upon not satisfying the unspecified burden imposed on her by those who seek her disenrollment, be stripped of her tribal identity.

The Disenrollment Decisions violate the Enrollment Ordinance. The Enrollment Ordnance vests the Enrollment Staff with the "power" to "maintain the roll."[89] Respondents exercised that power and enrolled Petitioners as Grand Ronde

[89] Enrollment Ordinance, § (c)(2).

members. The Enrollment Ordinance does not authorize the Enrollment Committee to revisit the decisions of previous Enrollment Committees and, effectively, overrule the resolutions of prior Tribal Councils that enrolled Petitioners. Accordingly, the Disenrollment Decisions exceed the power provided to the Enrollment Committee and violate Grand Ronde law.

Respondents denied Petitioners' substantive due process. Substantive due process is denied where a decision is arbitrary, interferes with a party's rights to ordered liberty, or where the decision shocks the conscience.[90] Here, Respondents have executed a concerted effort to disenroll Petitioners. Respondents violated Petitioners' substantive due process rights on multiple occasions; Petitioners were denied access to files, denied the right to confront key witnesses, subjected to an ambiguous and ever-shifting standard of proof, denied the right to respond to Respondents arguments. Respondents politically manipulated the disenrollment process by changing the process mid-proceeding, through changes to the Enrollment Ordinance. The totality of Respondents' behavior constitutes the denial of substantive due process by any of the three standards detailed herein. As such, the Trial Court erred when it concluded that Respondents provided substantive due process.

[90] *See infra* notes 131, 132, and 133.

Respondents denied Petitioners procedural due process. The controlling *Mathews* factors, detailed *infra*, weigh in favor of Petitioners: (1) disenrollment is a significant public interest; (2) the many procedural deficiencies and abnormalities in the disenrollment process means that the risk of erroneous deprivation is high and the value of additional safeguards is significant; and (3) the government's interest would be aided by these additional procedural safeguards, ensuring a streamlined process, rather than the prolonged, disjointed, and opaque process Petitioners have been subjected to.[91] Further, while, as the Tribal Court urges, a government may adopt a more informal process, the process must still be fair and provide meaningful review.

Here, Respondents subject Petitioners to a one-sided process: a well-coordinated effort between political officials, staff members, and the Tribal Court to disenroll Petitioners. Petitioners were repeatedly denied access to information necessary for their defense. Petitioners were denied ready and total access to their files and to the audit results, which was the genesis of the Disenrollment Decisions. Respondents refused to provide or details the information and evidence they were relying on for disenrollment. Further, Respondents refused to detail the applicable

[91] *Jackson* at 15, *citing Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Synowski v. Confederated Tribes of Grand Ronde*, Case No. A-01-10-001 (Grand Ronde Tr. Ct. 2003).

standards of proof. Petitioners were prohibited from attending proceedings at one point, and Petitoners' counsel was generally prohibited from speaking.

Contrary to the Tribal Court's assertion, the totality of the circumstances indicates that Petitioners did not receive a meaningful, or fair, review. Due process is not assessed quantitatively based on the number of hearings a person is afforded if all of those hearings are shams hearings. Accordingly, the Tribal Court erred when it determined that Respondents did not violate Petitioners procedural due process rights.

The Disenrollment Decisions were arbitrary and capricious. A decision is arbitrary and capricious if it fails to consider important aspects of an issue or offers an explanation that runs counter to the evidence.[92] As detailed below, Petitioners offered substantial evidence demonstrating that Petitioners satisfy the Constitutional membership requirements. That evidence remained unrebutted, but for a last-minute ambush by the Enrollment Department to concoct a theory regarding Susan Tomolcha's presence on a Grand Ronde roll that is absurd on its face and unsupported by any expert opinion whatsoever. Petitioners, on the other hand, submitted expert testimony indicating that the Treaty may be used as a record of Grand Ronde members based on its history and the other factors used to determine what a "record of Grand Ronde members" for purposes of enrollment

[92] *See County of Los Angeles v. Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008).

may be, and produced official state government records indicating that Petitioners descend directly from Susan Tomolcha.

The Tribal Court fabricated an additional "pseudo-residency" requirement for a record, finding that the Treaty was not a record because Chief Tumulth did not relocate to the Grand Ronde reservation. There is no authority supporting this requirement, the Tribal Court cannot create out of thin air an additional prerequisite an enrolled member must satisfy to avoid disenrollment that is not found anywhere in the Constitution.

Further, the Tribal Court fails to cite to any substantial evidence in the record showing that Petitioners' expert testimony and state records indicating that Susan Tomolcha is Petitioners' lineal ancestor was incorrect or may not be relied upon. In fact, under the existing law, the Enrollment Committee was *required* to accept the state record regarding Susan Tomolcha.[93] Accordingly, the Tribal Court erred when it determined that the Disenrollment Decisions were supported by substantial evidence and, therefore, not arbitrary and capricious.

The Disenrollment Decisions are based on an illegal audit. The Enrollment Ordinance expressly limits access to Enrollment Records to "inspection" by the "Executive Officer, the Tribal Attorneys and Enrollment Staff. . . . Except as thus

[93] Enrollment Ordinance § (d)(2).

provided, all Enrollment Records shall be confidential."[94] Notwithstanding the statutory confidentiality protections of these records, the Enrollment Staff exposed all of the records to an outside auditing agency, including, apparently, all of Petitioners' confidential Enrollment Records. Providing this information to prohibited persons is illegal and punishable by termination, removal, or recall as applicable.[95] Basing the Disenrollment Decisions on an audit that was, itself, illegal is unconstitutional, and arbitrary and capricious. The Tribal Court asserted that Respondents had the ability to conduct an audit, based on its ability to "correct errors." However, as discussed in detail below, the Constitution does not contain any provision that allows Respondents disenroll a member that has been enrolled in error. Accordingly, this authority cannot be extended to allow audits of constitutionally protected, confidential information.

The doctrine of laches requires reversal of the disenrollment of Petitioners.[96] The Enrollment Department did not diligently pursue an action against Petitioners. There was no new information discovered indicating some sort of fraud perpetrated by Petitioners to secure enrollment in the 1980s. Rather, Respondents, for whatever reason, waited almost 30 years to pursue a disenrollment action. Petitioners are now obviously prejudiced, as elders have walked on, their potential

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[94] Enrollment Ordinance, § (c)(5)(B).
[95] Enrollment Ordinance, § (c)(5)(B).
[96] *Infra* Section VIII, Subsection F.

testimony and recollection of material events and records and other facts supporting Petitioners' enrollment qualifications have been lost over the course of decades and Petitioners are therefore unable to provide potential additional evidence supporting their enrollment that could have been available in the 1980s had Respondents, at that time, indicated that lineal descent from a Treaty signatory was insufficient. Contrary to the Tribal Court's findings, courts have specifically held that a tribe's sovereign immunity does not bar the defense of laches and applied laches to tribal governments.[97] Further, as the relief sought is equitable in nature, rather than compensatory, laches is applicable.[98]

Respondents are estopped from disenrolling Petitioners. Respondents approved Petitioners' enrollment applications; Petitioners relied on this approval. There is no evidence anywhere in the record showing that Respondents were tricked or defrauded into enrolling Petitioners. Reversal of Respondents' prior approval will result in profound and undeniable injuries to Petitioners. To prevent manifest injustice, Respondents should be estopped from disenrolling Petitioners. The Tribal Court applied an elevated standard, requiring affirmative misconduct. This is an error, as most tribal courts do not require this level of behavior to assert

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[97] *Jicarilla Apache Tribe v. Andrus*, 687 F. 2d 1324, 1339 n.11 (10th Cir. 1982) (rejecting the Tribe's argument that "Tribal sovereign immunity precludes application of laches and similar defenses" and holding "the trial court did not err in holding that the Tribe's NEPA claim was subject to the doctrine of laches.").
[98] *Infra* Section VIII, Subsection F.

equitable estoppel against a tribal government. Further, Respondents' actions are not based on "misinformation," as the Tribal Court asserts. Rather, Respondents' actions are motivated by a shift in policy; an attempt to redefine the membership requirements. Respondents are implementing this shift with a series of actions that constitute affirmative misconduct. Accordingly, the Court should have applied equitable estoppel and remanded this matter for Petitioners to be reinstated.

VIII. ARGUMENT

A. The Tribal Court Erred When It Determined That The Disenrollment Decisions Did Not Violate The Constitution.

The Constitution protects the right of tribal members to tribal citizenship by expressly limiting the government's authority to forcibly disenroll its members. In other words, the authority to disenroll under the Constitution is a narrow and expressly limited one. Specifically, the Grand Ronde Constitution dictates that Respondents power to forcibly disenroll members is "**limited exclusively** to failure to meet the requirements set forth for membership in this Constitution."[99]

The Tribal Court's Order recognizes this limitation.[100] However, the Tribal Court provides that Respondents may institute "an action to correct a prior enrollment error."[101] First, the Tribal Court fails to cite to any authority that supporting its finding that Respondents are authorized to revisit a decades-old

[99] Constitution, Art. V, § 5 (emphasis added).
[100] Certified Record, Document 32, pp. 8-9.
[101] *Id.* at p. 9.

enrollment decision to "correct" a prior enrollment "error." The Tribal Court merely states, "the Tribe advocates that the Constitution provides authority for correction of a member enrolled by error . . . ."[102] The Tribal Court fails to identify the Constitutional provision that it concludes allows Respondents to correct a so-called enrollment error, because it cannot. Put more simply, the Constitution does not provide that any Grand Ronde member may be disenrolled upon a finding that that person was "enrolled in error." If that is the policy Respondents wishes to adopt, Respondents must amend the Constitution.

Further, if the Court allows Respondents to create new methods of disenrollment, without any supporting Constitutional authority, the Court is opening up the Grand Ronde Tribes' members to endless challenges to their enrollment. Respondents may, at their whim, determine and effectuate a change in enrollment standards, without any required authority. By refusing to recognize the Constitution's protections of its members' tribal citizenship, it will render the Constitution's use of the word "exclusive[]" meaningless with respect to the constitutional protections against forcible disenrollment. Without an amendment, Respondents' actions disenrolling Petitioners violate Petitioners' Constitutional rights and, therefore, the Disenrollment Decisions must be reversed and remanded.

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[102] *Id.*

Second, even if this Court were to determine that Respondents have the power to correct a prior enrollment error, that newly created exception is not applicable to the current proceedings. The Tribal Court recognizes that there is a difference "between 'an action to correct a prior enrollment error' and 'a disenrollment action.'"[103] The Tribal Court found that the "'correction' of an 'enrollment error'" is "lawful," but that a "disenrollment action" would be "unauthorized" under the Constitution.[104] The Tribal Court categorizes the Disenrollment Decisions as corrections of prior enrollment errors. This holding ignores the reality that the "correction" of the "error" here has led to forcible disenrollment.

Furthermore, as the Tribal Court recognizes, the Disenrollment Decisions are the result of a "policy choice,"[105] in this case, the real issue is a change in government policy and interpretation of what a "record" of Grand Ronde members is under the Constitution's lineal descent requirements. Accordingly, Respondents did not disenroll Petitioners based not on any error committed in their enrollment process, such as the revelation of a fraudulent birth certificate. Rather a change in policy and a shift in interpretation occurred. Effectively, the 1986 Tribal Council was satisfied that Petitioners' family had proven their lineal descendancy from a

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[103] *Id.*
[104] *Id.*
[105] *Id.*

founding member of the Tribe given his appearance on the Treaty that effectively formed the Tribe (a "record" of Grand Ronde members), but the 2013 Tribal Council changed its mind. This is unquestionably a disenrollment action, which is unauthorized by the Constitution. Whether the disenrollment action springs from a purported "error" in enrollment or some other factor is immaterial and does not magically transform an unauthorized forcible disenrollment into an authorized forcible disenrollment.

Finally, there is no error in enrollment to correct, as Petitioners meet the membership requirements set forth in the Constitution. The Constitution provides:

> Section 1. Requirements. The membership of the Confederated Tribes of the Grand Ronde Community of Oregon shall consist of all persons who are not enrolled as members of another recognized tribe, band or community and, who for five years have fully and unconditionally relinquished membership in another Indian Tribe and;
> ...
> (b) whose names validly appear on the official tribal membership roll as of September 14, 1999;[106]

The lineal descent requirement provides that a person meets such requirements if they "are descended from a member" of the Grand Ronde Tribes.[107] The Constitution thereafter provides an illustrative, non-exhaustive example of two avenues to prove lineal descent.[108]

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[106] Constitution, Art. V, § 1 (as amended).

[107] *Id.*

[108] Again, the categories illustrated in the Constitution for lineal descent are not exhaustive; in other words, if a person can prove lineal descent from a Grand

First, a person can satisfy the lineal descent requirements for membership by tracing his or her ancestry to a Grand Ronde member who appears on a "roll . . . of Grand Ronde members prepared by the Department of the Interior" prior to the effective date of the Constitution.[109] Second—and this second and distinct avenue for establishing lineal descent is critical in Petitioners' circumstances as explained below—a person can prove lineal descent by tracing his or her ancestry to a Grand Ronde member who appears on a "**record** . . . of Grand Ronde members prepared by the Department of the Interior" prior to the effective date of the Constitution.[110] The use of the word "or" in the text of the Constitution denotes that records and rolls of Grand Ronde members are two separate and distinct options[111] that a person may use to prove he or she meets the lineal descent requirements.[112]

Ronde member who appears on any roll of Grand Ronde members, even a post-restoration roll, under the plain text of the Constitution that person has met the lineal descent requirements.

[109] *Id.*

[110] *Id.* (emphasis added).

[111] Contrary to the expressly limited power to forcibly disenroll members in the Constitution, the provision on how a person might prove lineal descent from a Grand Ronde member is not qualified by the use of a restrictive word. For example, the Constitution does not state that "[f]or purposes of this section, descent from a member of the Confederated Tribes of the Grand Ronde Community of Oregon shall **exclusively include lineal descent from any person who was named on any roll or records of Grand Ronde members.**" Accordingly, even if this Court were to conclude that the Treaty is not a record of Grand Ronde members

[112] The alleged lineal descent requirement issue is the sole basis claimed by Respondents for disenrolling Petitioners, and beyond the bald and baseless

Petitioners have established, through uncontroverted evidence, that they satisfy the lineal descent requirement through two separate people appearing on two separate documents. Chief Tumulth appears on the Treaty, a record of the first Grand Ronde members created by the Department of the Interior. Even Eirik Thorsgard, Respondents' own cultural expert who has a Master's degree in "applied anthropology (archaeology)" has opined that the direct descendants of the signatories, and only the signatories who appear on the Treaty, may use the Treaty itself to satisfy the lineal descent requirements because the Treaty is a record of Grand Ronde members.[113] In other words, Petitioners put forth substantial evidence supporting their claim that Chief Tumulth's name on the Treaty may be used to satisfy the lineal descent requirements. Respondents put forth no evidence whatsoever to rebut this substantial evidence. Thus, the conclusion that the Treaty is not a record of Grand Ronde members is unsupported by any evidence, much less substantial evidence.

In addition, contrary to the expressly limited constitutional power to forcibly disenroll members, the constitutional provision on how a person might prove lineal descent from a Grand Ronde member is not qualified or limited by the use of a restrictive word. For example, the Constitution does not state that "[f]or purposes

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assertion that the Treaty is not a "record of Grand Ronde members" under the Constitution, Respondents have advanced no evidence to support their claims.

[113] *See supra* note **Error! Bookmark not defined.**.

of this section, descent from a member of the Confederated Tribes of the Grand Ronde Community of Oregon shall **exclusively** include lineal descent from **only** any person who was named on any roll or records of Grand Ronde members." Instead the provision is unqualified and permits Respondents the discretion to determine other ways under which a person might prove lineal descent:

> For purposes of this section, descent from a member of the Confederated Tribes of the Grand Ronde Community of Oregon shall[114] include lineal descent from any person who was named on any roll or records of Grand Ronde members prepared by the Department of the Interior prior to the effective date of this Constitution.[115]

Accordingly, even if this Court were to conclude that the Treaty is not a record of Grand Ronde members, the Respondents' officials who first determined that Petitioners met the lineal descent requirements were in no way prohibited by any applicable law or constitutional constraint from making the determination that showing lineal descent from the signatory of a Treaty is adequate for purposes of the constitutional enrollment requirements.

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[114] The use of the word "shall" here indicates one restriction on Respondents' authority: Respondents cannot reject lineal descent proof based on a showing that a person descended from a Grand Ronde member appearing on a roll or record of Grand Ronde members. But the use of the word "shall" does not indicate that the two methods following for a person to satisfy the lineal descent requirements are the **only** methods a person may use to satisfy the lineal descent requirement; nor is the government prohibited from deciding that another document, such as, for example a letter written by the federal government mentioning a Grand Ronde member, might be used to satisfy the lineal descent requirement.

[115] Constitution, Art. V § 1.

In addition to Chief Tumulth, Petitioners have a second lineal ancestor who unquestionably appears on a roll of Grand Ronde members. Susan Tomolcha was Chief Tumulth's wife and Mary Will-Wy-Ity's mother, both of whom are Petitioners' lineal ancestors. Susan Tomolcha appears on the 1872 Grand Ronde census roll with a family that is closely related to Chief Tumulth's Tribe. Petitioners advanced a mountain of evidence supporting their case that Susan Tomolcha is their lineal ancestor and Respondents failed to advance any credible or timely evidence to the contrary.[116]

In addition, Petitioners presently meet each element of the applicable provisions of Constitution, Art. V, Sec. 1: (1) Petitioners are not enrolled as members of another recognized tribe, and (2) Petitioners names validly appear on the official tribal membership rolls as of September 14, 1999. Therefore, because

[116] In fact, the evidence the Enrollment Department sought to ambush Petitioners with on the last day of the last hearing on remand before the Enrollment Committee is totally irrational. Essentially, Ms. DeLoe—who has no qualifications to render an expert opinion on the matter—claimed that a "Billy Baker" was in fact the "Willy" who appeared with Susan Tomolcha based on nothing more than a transcript showing Billy Baker testifying that his mother's name was Susan. No explanation was furnished for why Billy had changed his name from "Tomolcha" to "Baker." Ms. DeLoe's last-minute assertion was literally based on nothing more than the common first names of William and Susan, as if the combination of those names had never before appeared in Grand Ronde records. To add insult to injury, Ms. DeLoe attempted to explain away the lack of the word "Tomolcha" by claiming that the word was similar to the Native word for tub, which, curiously, neither Dr. Henry Zenk nor Tony Johnson mentioned in an any of their detailed declarations on linguistics. *See* Enrollment Committee's parroting of Ms. DeLoe's baseless opinions, at Certified Record, Document 3, Exhibit 23.

Petitioners do not "fail[] to meet the requirements set forth for membership in this Constitution,"—and in fact Respondents have failed to prove that Petitioners have *ever* failed to meet the requirements set forth for membership in the Constitution—Respondents' Disenrollment Decisions are a direct violation of the Constitution's express limitations and Petitioners' Constitutional right to membership and violate the limited authority conferred upon Respondents to forcibly disenroll Grand Ronde members.[117]

B. The Tribal Court Erred When It Determined That The Disenrollment Decisions Did Not Violate Grand Ronde Law.

The Disenrollment Decisions also violate the Enrollment Ordinance and Grand Ronde law. Under the Enrollment Ordinance, the Enrollment Staff has the "power" to "maintain the roll."[118] In the exercise of that power, the Enrollment Staff determined that Petitioners met the requirements for enrollment. The Enrollment Committee and Tribal Council ratified all of the Petitioners' applications for membership and, through Tribal Council resolution, Petitioners became Grand Ronde members. The Enrollment Ordinance does not authorize Enrollment Committees to revisit decisions of previous Enrollment Committees and Tribal Councils and effectively overrule Tribal Council Resolutions.

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[117] *See generally Loy v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 132; *Gomez v. Confederated Tribes of Grand Ronde*, 5 Am. Tribal Law 117.
[118] Enrollment Ordinance, § (c)(2).

Accordingly, as the Disenrollment Decisions exceeded the power provided to the Enrollment Committee, the Disenrollment Decisions violated Grand Ronde law.

During the administrative hearings, Respondents repeatedly violated the rights afforded to Petitioners in the Enrollment Ordinance. The Enrollment Ordinance provides Petitioners the right to "confront" witnesses.[119] However, when the proceedings were commenced, Respondents provided no mechanisms through which Petitioners were able to compel witnesses to confront; the only witnesses Petitioners were permitted to call and solicit testimony from were those who agreed voluntarily to testify on behalf of Petitioners and one staff member from the Enrollment Department.[120] The Tribal Court does not address this violation of the Enrollment Ordinance, merely stating in its Procedural Background "Petitioners were able to confront witnesses." The Tribal Court does not consider that Petitioners were not able to compel adverse witnesses to cross examine aside from the witness Respondents made available, and were only able to solicit testimony from volunteers.

Petitioners were effectively denied the right to access their full enrollment files.[121] Petitioners attempted to secure access to their files. However, as the Tribal Court recognizes, but does not directly address, "Petitioners were required

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[119] Enrollment Ordinance § (i)(2).
[120] *See generally* Certified Record, Document 3, Exhibit 19 at recording of December 16, 2013 hearings commencing at 8:16 a.m.
[121] *Id.*

to request and receive orders from the Tribal Court prior to reviewing information in Enrollment Department files . . ."[122] Respondents failed to establish any clear process for how to obtain such an order from the Tribal Court. Further, the court fees associated with access to files was cost prohibitive. Petitioners repeatedly requested access to the audit results, but Respondents denied these requests outright. The records relative to the audit were not provided until Respondents produced the initial administrative record for the Tribal Court action. The Tribal Court recognized that Petitioners requested "the 'evidence' Respondents were relying upon to support disenrollment. These requests were denied." Further, as recognized by the Tribal Court, "Petitioners were not provided with a formal statement of the burden of proof at these hearings."[123] While the Tribal Court recognized these inadequacies in the Procedural History, the Tribal Court does not specifically address the violations.

Respondents also denied Petitioners the right to a hearing before a final arbiter. Under the Enrollment Ordinance, as it existed prior to July 2, 2014, and as applicable to the instant disenrollment action until that date, Petitioners were entitled to a vote from the Tribal Council on whether or not to disenroll Petitioners.[124] No such votes ever occurred, despite over nine months, and

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[122] Certified Record, Document 32, p. 7.
[123] *Id.*
[124] *See* Enrollment Ordinance, as amended 2/19/14.

hundreds of hours of administrative proceedings. The "emergency" amendments to the Enrollment Ordinance made the Enrollment Committee, rather than the Tribal Council, the final decision-maker for disenrollment proceedings. However, the Enrollment Committee never held a hearing for Petitioners in its role as the final decision-maker, and, instead, issued a decision disenrolling Petitioners. The Tribal Court recognized the "emergency" amendments to the Enrollment Ordinance, but does not address the Enrollment Committee's failure to fulfill it's role as final decision-maker.

Respondents actions, denying Petitioners the right to confront witnesses, denying Petitioners access to their enrollment files, and denying Petitioners the right to a decision from a final arbiter all directly violate Grand Ronde law. The Tribal Court failed to address these violations.

C. The Tribal Court Erred When It Determined That Respondents Did Not Violate Petitioners Due Process Rights.

The Disenrollment Decisions violated Petitioners' due process rights. The Tribal Government must comply with the due process rights reserved to Grand Ronde members through the Constitution and the Indian Civil Rights Act of 1968, as incorporated by the Constitution.[125] The Constitution also obligates Respondent, separately, "to provide due process to any person threatened with a

[125] *See* Constitution, Art. IV, § 3; Art. III, § 3(k); *Synowski v. Confederated Tribes of Grand Ronde Indian Cmty.*, 31 Indian Law Rep. 6117 (Confed. Tribe Grand Ronde Ct. App. 2003).; and 25 U.S.C. § 1301 (ICRA).

lost of liberty or property."[126] This Court has recently acknowledged that the "loss of Tribal membership and related loss of Petitioner's health, social service, financial and other benefits presents strong grounds for the necessary establishment of due process property rights at issue with a disenrollment action."[127] In addition to the strong proprietary interests implicating due process considerations in any disenrollment action, Petitioners assert that a strong liberty interest is also threatened by Respondents' unconstitutional disenrollment efforts. Put simply, the two—property and liberty—go hand in hand. For example, Petitioners proprietary interests in the lands and assets held in trust for Grand Ronde by the federal government may be given effect through Petitioners' exercise of their right to vote in Tribal elections, to elect those who will manage and otherwise direct said property and assets. Having been unjustly stripped of their Tribal membership, however, Petitioners now are deprived of their liberty to vote in Tribal elections, and have a voice with respect to the promises made to their ancestor Chief Tumulth and all of his progeny, including all of Petitioners. In short, Respondents' actions have violated Petitioners' substantive and procedural due process rights as set forth below.

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[126] *Id.*; *Jackson v. CTGR*, Case No. C-13-08-004, 13 (Confed. Tribe Grand Ronde Tr. Ct. 2014).

[127] *Jackson* at 15, *citing Bordeaux v. Wilkinson*, 21 ILR 6131, 6132 (Ft. Bert. Tr. Ct., Oct. 1, 1993) and Felix S. Cohen's *Handbook of Federal Indian Law*, p. 184 (1941).

1. Respondents have violated Petitioners' substantive due process rights.

"Substantive due process protects individuals from arbitrary deprivation of their liberty by government."[128] Governments may violate substantive due process rights when an agency deprives individuals of property interests.[129] Even the U.S. Supreme Court has acknowledged the potential for substantive due process violations arising from land use decisions when a government decision is "arbitrary in the constitutional sense" and deprives a litigant of property interests.[130] Although courts generally employ the "shock-the-conscience" analysis in deciding substantive due process claims,[131] case law supports substantive due process depravation claims when government decisions interfere "with rights implicit in

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[128] *Brittain v. Hansen*,451 F.3d 982, 991 (9th Cir.2006) (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–49, 118 S.Ct. 1708 (1998)).

[129] *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) ("An arbitrary deprivation of [rights in real property] may give rise to a viable substantive due process claim in any case in which the Takings Clause does not provide a preclusive cause of action.").

[130] *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 488 (7th Cir. 2014), citing *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198–99, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003) (rejecting substantive due process claim based on delay in issuance of building permits because delay was "eminently rational" rather than arbitrary).

[131] *See March v. Cnty. Of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012)(substantive due process claims are sustained when the deprivation alleged "shock the conscience and offend the community's sense of fair play and decency.").

the concept of ordered liberty,"[132] and when the decisions are "arbitrary in the constitutional sense."[133]

In this case, all three possible standards apply to Respondents' course of conduct over the past year with respect to Petitioners' rights as Grand Ronde members. As the Tribal Court has noted in a separate proceeding, the "shock the conscience" standard is a "relatively high burden focusing primarily on both (i) intentional acts by governmental actors or a high level of reckless indifference and (ii) the government improperly using its power as an instrument of oppression."[134] In this case Respondents have taken intentional—as opposed to involuntary or accidental—actions that are reckless with respect to Petitioners' constitutional rights and "offend the community's sense of fair play and decency"; specifically, Respondents gave no deference to decades of unanimous decisions enrolling Petitioners and confirming Petitioners' status as Tribal members and then systematically and then deliberately violated Petitioners' rights throughout the disenrollment process. As the United States Court of Appeals for the Ninth Circuit has held, government action is "conscience-shocking if it [is] taken with deliberate indifference toward a plaintiff's constitutional rights."[135] That definition of

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[132] *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, (1987).
[133] *Collins v. City of Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, (1992).
[134] *Jackson* at 10.
[135] *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189 (9th Cir. 2013).

"conscience-shocking" governmental action reflects precisely the actions Respondents have taken here, including:

1. Illegally and unconstitutionally forcibly disenrolling Petitioners based on nothing more than policy changes on interpretations of ambiguous constitutional terms like "records of Grand Ronde members", and while ignoring substantial evidence establishing other grounds for meeting the enrollment criteria (i.e. Susan Tomolcha);
2. Subjecting Petitioners to disenrollment processes while denying them free and total access to their enrollment files and inexplicably withholding the audit findings upon which their disenrollment actions were premised;
3. Denying these Petitioners their Tribal identities and their statutory rights to confront key witnesses having information relevant to their disenrollment proceedings;
4. Deeming Petitioners "guilty until proven innocent," or, in this case "enrolled in error until proven otherwise by some shifting and secret, totally arbitrary, or non-existent standard of proof," and otherwise denying fair notice for Petitioners' administrative hearings, specifically, failing to notify Petitioners of the standard of proof applicable to their cases;

5. Denying Petitioners right and opportunity to respond to evidence the Enrollment Department advanced at the 11th hour, and in so doing violating Respondents' own arbitrary rules for the "remand process;"
6. Denying Petitioners hearings before the Enrollment Committee in its capacity as final agency arbiter;
7. Subjecting Petitioners to sweeping changes in the Enrollment Ordinance governing their disenrollment proceedings, and denying them the Tribal Council vote Petitioners had been promised after it became clear to the Tribal Council's advocates for disenrollment that the Petitioners would win the vote and avoid disenrollment if the Tribal Council held an up or down vote;

Even if this Court determines that Respondents' actions do not rise to the level of shocking the conscience, Respondents' actions have interfered with rights implicit in the concept of ordered liberty and were certainly arbitrary in the constitutional sense. The massive volume of evidence establishing that Petitioners are and always have been eligible for enrollment taken against the litany of calculated, rights-denying actions by Respondents establish that there can be no rational, logical, or legal connection between Respondents' arbitrary behavior and its oppressive agenda bulldozing towards the desired cleansing of the Grand Ronde Tribes' membership rolls in a manner that is totally untethered to the limitations on

government power and the suffering it causes. In short, there has been nothing more than the illusory pretense of procedural due process employed to deprive Petitioners of what, in Indian Country, has been described as the "most important civil right," the right to tribal citizenship.[136]

The Tribal Court denied Petitioners substantive due process claim, finding that Respondents behavior did not shock the conscience, as Respondents' behavior was "negligent . . . but does not rise to the level of an intentional or recklessly indifferent act . . . ."[137] To the contrary, Respondents' actions demonstrate a deliberate indifference of Petitioners' rights. At every stage of the disenrollment proceedings, Respondents acted to limit Petitioners' ability to effectively participate in the proceedings. Petitioners were denied access to their enrollment files and the audit files to be able to advance a "defense" in the disenrollment proceedings before the Enrollment Committee. Respondents refused to detail the basis for their belief that the Petitioners should be disenrolled and refused to communicate the applicable standard of proof. Respondents prevented Petitioners from confronting key witnesses. Respondents brought up new arguments on the

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[136] *Wabsis v. Little River Band of Ottawa Indians, Enrollment Com'n*, No. 04-185-EA, 2005 WL 6344603, at *1 (Little River Tribal Ct. Apr. 14, 2005); *see also Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (to deprive one of citizenship "obviously deprives him of liberty . . . . It may result also in loss of both property and life, or of all that makes life worth living.").

[137] Certified Record, Document 32, p. 18.

last day of remand and refused to allow Petitioners to respond at the hearing itself, imposing *ad hoc* rules gagging Petitioners' counsel.

These are not merely procedural violations; the disenrollment proceedings, when considered as a whole, indicate a process that was manipulated by Respondents at multiple points, to the disadvantage of Petitioners. This reckless disregard for the rights of Petitioners is enough to shock the conscience of this Court. The Trial Court erred when it determined that Respondents' actions did not deny Petitioners substantive due process.

2. Respondents have violated Petitioners' procedural due process rights.

Under the well-known applicable standards this Court uses for procedural due process analyses, the Court should apply the *Mathews* three-part test balancing "(i) the private interest affected by the government action; (ii) the risk that the interest is being deprived erroneously and the value, if any, of additional safeguards; and (iii) the government's interest, including administration burdens caused by the imposition of additional procedural requirements."[138] This Court has found the potential forcible loss of disenrollment a significant private interest,

[138] *Jackson* at 15, *citing Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Synowski v. Confederated Tribes of Grand Ronde*, Case No. A-01-10-001 (Grand Ronde Tr. Ct. 2003).

considering the property interests involved.[139] Therefore, the first step in the *Mathews* analysis counsels in favor of Petitioners.

The second step likewise weighs in favor of remand for due process violations in this instance, with the risk that the Petitioners are being erroneously deprived of their rights as Tribal members reflected in the substantial evidence they have submitted supporting their case weighed against: (1) the withholding of evidence relative to Petitioners' enrollment files and the audit results that were the genesis of the disenrollment actions; (2) the total lack of clarity as to process and standards of proof, including whether Petitioners or the Enrollment Department bore the burden of proof in the disenrollment proceedings; (3) the refusal to provide a process through which Petitioners might be able to exercise their statutory right to confront witnesses; (4) the shifting and unarticulated standard in terms of what type of documents the Petitioners could submit to satisfy whatever unknown burden Petitioners faced; (5) the refusal to permit an informed response to the 11th-hour ambush coordinated between the Enrollment Department's manager and her sister on the Enrollment Committee; and (6) the refusal to hold any hearings once the disenrollment process fundamentally changed and the Enrollment Committee was required to decide the matter as a final agency arbiter.

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[139] *Id.*

Given these significant flaws Petitioners faced in this process, the value of additional safeguards is significant; safeguards such as (1) free and immediate access to all enrollment file information, including audit information so that Petitioners could adequately prepare for their hearings;[140] (2) a clear process set forth with established and objective standards of proof so that Petitioners would understand the evidentiary hurdles they faced in defeating the attacks on their Tribal identities; (3) a clear and timely process through which the Enrollment Committee and its counsel provide targeted Grand Ronde members with the means to exercise their statutory right to confront witnesses; (4) a presentation by the Enrollment Department of its case against Petitioners, including objective criteria for documentary evidence it would consider acceptable, and the legal justification for such criteria would have ensured Petitioners knew what they needed to find in order to overcome the disenrollment recommendation; (5) additional time to provide an informed response to the extremely late opinion offered by the Enrollment Department, which itself violated the arbitrary rules the Enrollment Department had set for the remand process; and (6) additional hearings to address the Enrollment Committee in its role as final agency arbiter when the Tribal Council fundamentally changed the disenrollment process after nearly one year of administrative proceedings.

[140] No government agency in this country is permitted to deprive a litigant of the right to access evidence used against him or her as Respondents have done here.

These safeguards applied to the disenrollment process Petitioners faced would have added significant benefits to ensure the process was fair and that Petitioners' rights were protected. The errors that occurred in the absence of these safeguards are significant, and contaminated the entire proceedings from its inception in the fall of 2013 to its close in July 2014.[141] In addition, as this Court noted, there are some constitutional rights "so basic to a fair trial that their infraction can never be treated as harmless error."[142] Petitioners' rights to confront adverse witnesses, to access evidence to be used against a party or critical to the party's case, and to have an opportunity to rebut evidence lodged against them are among the most basic elements of fairness interwoven in the judicial process and quasi-judicial process, and, therefore, the violations of said rights by Respondents in this case cannot be considered harmless errors.

The final *Mathews* element, the government's interest, counsels in favor of remand here to apply the safeguards in question in order to protect Petitioners' due process rights. The Tribe itself deliberately prolonged this process, which was first scheduled to end in April, 2014 with a final Tribal Council vote, but remanded without such a vote back to the Enrollment Committee for additional hearings in May 2014 by the pro-disenrollment faction on the Tribal Council who apparently were afraid of the prospect of a final up or down vote, then submitted back to the

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[141] *See Jackson* at 16, *citing United States v. Padilla*, 415 F.3d 211 (1st Cir. 2005)
[142] *Id.* (*quoting Chapman v. California*, 386 U.S. 18, 22 (1967)).

Tribal Council in June 2014 with a second recommendation for disenrollment, and finally subjected to a fundamental change stemming from the "emergency" amendments to the Enrollment Ordinance, before the process finally ended with the Enrollment Committee's decision in its capacity as final arbiter without affording Petitioners a single hearing before it in its new capacity.[143]

It is clear that adding the procedural safeguards above would not have needlessly prolonged a matter Respondents were already keen on prolonging; in fact, the safeguards would very likely have curtailed the process. And there would be no significant cost in adding the requested safeguards, nor would there be a significant administrative burden in granting Petitioners free access to their complete enrollment files and audit information.

The Tribal Court held that "Due process requires, at its essence, notice and an opportunity to comment."[144] The Tribal Court noted "it is uncontroverted that the process used below fell short of a full judicial hearing, perceived imperfections occurred, and Petitioners' counsel had to overcome some obstacles in making its presentation."[145] However, the Tribal Court found that:

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[143] Curiously, the Enrollment Committee has no authority under the Constitution or any law Petitioners are aware of to overturn the Tribal Council Resolutions that made Petitioners Grand Ronde members in the first place. The final decision itself, therefore, was *ultra vires* and should be remanded on that ground alone.
[144] Certified Record, Document 32, p. 15.
[145] *Id.* at 14.

> When considered in light of the totality of the process and mitigated measures of additional opportunities and extensions of time and the skill and the efforts of Petitioners' counsel, these perceived shortcomings to the process below did not rise to the level of legally fatal Tribal due process.[146]

First, the Tribal Court argues that due process is construed differently in tribal courts, apparently alleging that tribal governments have more leeway to withhold due process from their members. However, "[t]he meaning of 'due process' under the Indian Civil Rights Act has been construed to be the same as the meaning of 'due process' under the Federal Constitution of the United States."[147]

Second, the Tribal Court urges a more informal process. While courts recognize the "imposing elaborate hearing requirements" is not necessary in every case, courts also recognize that:

> **[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights** . . .' 'Secrecy is not congenial to truth-seeking, and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.[148]

Due process requires "notice of the factual basis" for the government's arguments "and a **fair opportunity** to rebut the Government's factual assertions before a

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[146] *Id.* at pp. 16-17.

[147] *Hoopa Valley Hous. Auth. v. Gerstner*, 3 NICS App. 250, 258 (Hoopa Valley Tribal Ct. App. Sept. 1993) (citing *Red Fox v. Red Fox*, 564 F.2d 361, 364 (9th Cir. 1977)).

[148] *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170, 171-172 (1951) (emphasis added)).

neutral decisionmaker."[149] As recognized by Respondents, "[b]oth the Tribal Court of Appeals and the Supreme Court have held that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[150] In other words, while courts recognize that a government may impose a more informal process, that process must still be fair; it must still provide a party with a meaningful review.

Here, contrary to the Tribal Court's assertion, the totality of the process indicates that Petitioners were not allowed a meaningful review. Respondents were not concerned with fairness, but rather a determination based on a secret, one-sided presentation of the facts. Respondents denied Petitioners access to their full enrollment files and the audit results related to the disenrollment actions, and refused to detail the standard of proof that would be applied to Petitioners.[151] During the proceedings, Petitioners were prohibited from attending some of the hearings and Petitioners' counsel was generally prohibited from speaking at the final hearing.[152] By preventing Petitioners access to their enrollment information, the alleged basis for disenrollment and severely limiting the participation of Petitioners and Petitioners' counsel, Respondents prevented Petitioners from

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[149] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (emphasis added).
[150] Certified Record, Document 23, pp. 30-31 (citations omitted).
[151] *Supra* Section V, Subsection C.
[152] Certified Record, Document 3, Exhibit 16.

having a meaningful review and from a fair opportunity to rebut Respondents' assertions.

The Tribal Court specifically recognized that notice must "give[] sufficient detail to allow an opposing party to prepare his defense."[153] Further, the Tribal Court found that Petitioners "knew the reason why they were proposed for disenrollment, and the evidentiary basis."[154] This is patently false. Respondents repeatedly denied Petitioners details necessary for preparing a defense. The best demonstration of this is with Respondents' absurd and insulting theory regarding Petitioners' ancestor Susan Tomolcha. Petitioners, repeatedly, requested the information and evidence Respondents were relying on for disenrollment, and specifically requested the information Respondents relied on in refusing to accept that Susan Tomolcha was Petitioners' lineal ancestor. These requests were repeatedly denied.

On the final day of the remand proceedings, the Enrollment Department's manager, a vocal proponent of the disenrollment of Petitioners, raised a novel theory regarding Susan Tomolcha, alleging that Susan Tomolcha was, in fact, Susan Baker, a slave woman from southern Oregon. Nevermind the fact that Baker bears no resemblance to "Tomolcha." Respondents alleged that "Billy Baker" was in fact William Tomolcha, who appeared with Susan Tomolcha.

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[153] *Id.* at 15.
[154] *Id.* at 16.

Respondents' contention was based entirely on a transcript (i.e., unsupported hearsay) showing Billy Baker testified that his mother's name was Susan. That's the sum total of the purported evidence Respondents advanced to rebut Petitioners' claims regarding Susan Tomolcha. This theory had not previously been presented during any of the prior administrative proceedings, even though Respondents had full access to all documents, including the transcript of Billy Baker. Petitioners and Petitioners' counsel were not permitted time to review the new materials presented or respond to those materials in any fashion at the final hearing.[155] This resulted in a determination being made on a one-sided presentation of the facts, denying Petitioners the right to rebut the allegations at the hearing and cross-examine the Enrollment Department's manager on her ridiculous, unsupported, anti-factual theory.

If Petitioners had been previously notified of the factual basis of this argument or if Petitioners had been permitted to respond, Petitioners could have provided evidence to the Enrollment Committee that:

- William Baker was born between 1865 and 1866. The Applegate Report indicates that William Baker's mother died shortly after he was born, and that afterward William Baker was taken to Washington State by his Grandmother.

[155] Certified Record, Document 3, Exhibit 16.

- The 1872 GRIC Roll lists Susan Tomolcha, and her son Willie Tomolcha, as living with Joe Apperson. The 1872 GRIC Roll does not indicate that Susan Tomolcha is a slave woman.
- The book relied upon by Respondents, *Living in a Great Circle*, does not indicate that Susan or William Baker ever lived with Joe Apperson, nor does it provide any evidence that Susan and Willie Tomolcha are Susan and William Baker.[156]

In short, Respondents' theory rests wholly on the coincidence that Billy Baker's mother was named Susan. There is no evidence indicating that Susan Baker is Susan Tomolcha. In fact, the evidence indicates that Susan Baker was deceased shortly after Billy Baker's birth, in 1865 or 1866, and, therefore, would not have been included in the 1872 GRIC Roll. This means that the Susan Tomolcha who appears on the 1872 GRIC Roll is not Susan Baker. Respondents prevented Petitioners from both knowing the substance of the Susan Baker argument and rebutting the argument; this greatly increased the risk of erroneous deprivation, allowing Respondents to make a one-sided determination based on a skewed interpretation of the facts.

By failing to provide Petitioners with the factual basis Respondents allege supports disenrollment, by preventing Petitioners from accessing their enrollment

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[156] *See* Certified Record, Document 3, Exhibit 17.

or audit files, and by prohibiting Petitioners from attending the disenrollment proceedings and Petitioners' counsel from speaking at the disenrollment proceedings, Respondents did not afford Petitioners' meaningful due process. While Respondents may adopt a more informal process, the process must still contain the requisite procedural safeguards, it must still ensure the process is fair and provides meaningful review. In the present matter, Respondents failed. The Trial Court erred in determining that Respondents provided Petitioners with procedural due process.

D. The Tribal Court Erred When It Determined That The Disenrollment Decisions Were Not Arbitrary and Capricious.

A government actor acts arbitrarily and capriciously when it relies on factors impermissible under relevant legislative acts and the Constitution.[157] Moreover, a government actor has acted arbitrarily and capriciously if it entirely fails to consider important aspects of the issue at hand, offers an explanation for its decision that runs counter to the evidence Respondents had, "or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[158] To "provide a meaningful review" a government actor's "decision should engage in a discussion supported by reasons, substantial evidence, and applicable law;" where a decision is not supported by substantial evidence, the

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[157] *See Cnty. of Los Angeles v. Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008).
[158] *Id.*

decision is arbitrary and capricious and should be reversed and remanded.[159] Put another way, a lack of substantial evidence indicates an arbitrary and capricious decision.[160] "Substantiality of the evidence is based upon the record as a whole … In determining whether the evidence in support of the administrator's decision is substantial, we must 'take[] into account whatever in the record fairly detracts from its weight.'"[161] When reviewing a decision, a court gives "less deference" where the government actor "fails to gather or examine relevant evidence."[162]

Here, Respondents have gone beyond their authority under the Constitution and the Enrollment Ordinance in disenrolling Petitioners. Respondents have entirely failed to consider evidence, including expert witness testimony demonstrating that Petitioners meet the requirements for membership with the Grand Ronde Tribes; the expert testimony indicated that the Treaty may be used as a record of Grand Ronde members to prove lineal descent under the Constitution.[163] Respondents also failed to consider official state government records, demonstrating that Petitioners descend directly from Susan Tomalch or

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[159] *Wagner v. Tulalip Hous. Auth.*, 6 NICS App. 75, 78 (Oct. 2001) (reversing employment court decision where decision was not supported by substantial evidence and, therefore, was arbitrary and capricious).
[160] *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1282 (10th Cir. 2002).
[161] *Id.* (internal citations omitted).
[162] *Id.* (citing *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1097 (10th Cir.1999)).
[163] *Supra* Section IV; Certified Record, Document 3, Exhibit 19, 29:00-30:30; and 34:20-36:00.

Tomolcha, a person who appears on the 1872 Grand Ronde Census, satisfy the lineal descendent requirements for enrollment at Grand Ronde.[164]

In addition, throughout the entire administrative process, Respondents failed to provide any standard of proof, details of its case against Petitioners, and never articulated a burden the Tribe contends to have met in order to commence the disenrollment action. Petitioners received no information on which the disenrollment action was based, save for a vague contention that Petitioners were "enrolled in error" because of an alleged failure to meet the eligibility requirements. Further, despite repeated requests for clarification on whether the Tribe or the tribal member bore the burden of proof, no such clarification was ever provided.[165]

As previously discussed, when the proceedings were commenced, Respondents provided no mechanisms through which Petitioners were able to compel witnesses to confront; the only witnesses Petitioners were permitted to call and solicit testimony from were those who agreed voluntarily to testify on behalf of Petitioners and one staff member from the Enrollment Department.[166]

The vague, ambiguous, arbitrary, and inconsistent standards, coupled with total opacity on the standard—if any standard exists—by which Respondents

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[164] *Supra* Section IV, Subsection B.
[165] *Supra* note **Error! Bookmark not defined.**.
[166] *See generally* Certified Record, Document 3, Exhibit 19 at recording of December 16, 2013 hearings commencing at 8:16 a.m.

decided that Petitioners should be disenrolled, and the standard of proof through which Petitioners might overcome such a prosecution against their cultural identity, results in a deprivation of procedural due process safeguards incompatible with the ICRA and the Constitution, and, therefore, the ultimate decision to disenroll Petitioners was constitutionally impermissible and violative of Petitioners' rights. In other words, the decisions were illegal. And agency actions that run contrary to the law are patently arbitrary and capricious.

The Tribal Court found that the Disenrollment Decisions were supported by substantial evidence, and were not arbitrary and capricious.[167] The Tribal Court focused on two issues: (1) whether "the Willamette Valley Treaty, signed by Chief Tumulth" constituted "a record or roll of Grand Ronde members" and (2) whether "Susan Tomolocha" was "with the Apperson family."[168]

The Tribal Court determined that the Treaty was not a record, because Chief Tumulth did not later relocate to the Grand Ronde Reservation. For this determination, the Tribal Court concocts out of thin air an additional constitutional requirement for enrollment: what the Tribal Court calls a "pseudo-residency element."[169] The Tribal Court states "Chief Tumulth did not ever relocate to the future CTGR Reservation, and thus merely had eligibility for CTGR membership

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[167] Certified Record, Document 32, pp. 11-14.
[168] *Id.* at 12-13.
[169] *Id.* at 2.

that was not effectuated."[170] This pseudo-residency element that the Tribal Court applies is a complete fabrication. The Tribal Court is now asserting that to be on a roll, or for a document to be considered a record of Grand Ronde members, a member must have resided on the Grand Ronde Reservation. There is no authority that requires a member to be both listed on a roll or record of Grand Ronde members **and** to have resided on the Grand Ronde Reservation. The Tribal Court cannot now concoct new requirements for records or membership to support the disenrollment holocaust the tribal government is now executing. As discussed above, Petitioners provided substantial evidence demonstrating that the Treaty is a record of Grand Ronde members. The fact that Chief Tumulth did not later reside at the Grande Ronde reservation is wholly immaterial.

Petitioners provided substantial evidence Susan Tomolcha, Chief Tumulth's wife, was a lineal ancestor of Petitioners; Petitioners provided expert testimony and official state government records demonstrating the connection. The Tribal Court determined that Respondents' conclusion that Susan Tomolcha was not Petitioners' ancestor boiled down to two findings, (1) a name is insufficient to establish identity and (2) others used the Tomolcha or Tomalch name.[171] The Tribal Court determined, in a single paragraph, that "These findings are sufficient

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[170] *Id.* at 13.
[171] Certified Record, Document 32, p. 14.

to uphold under the substantial evidence standard."[172] As discussed above, a decision is arbitrary and capricious if the government fails to consider important aspects or where a decision runs counter to the evidence.

Here, in response to the records and expert testimony submitted by Petitioners, Respondents put forth a mishmash of last-minute, completely unsupported, arguments based on hearsay and totally contrary to the known facts. Respondents had a layperson allege, without any documentary evidence, that Petitioners' ancestor Susan Tomolcha was not Chief Tumulth's wife, but was, instead, a slave named Susan Baker.[173] Now, incredibly, Respondents allege that having the same name is insufficient to establish identity; this argument is problematic, as the Constitution provides membership may be tracked by the name of an individual, as set forth in a record or roll. For the time period, many records consist solely of names, without any other supporting documents.

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[172] *Id.*

[173] In a last-minute ambush at the last hearing before the Enrollment Committee coordinated between the head of the Enrollment Department—who has always advocated for Petitioners' disenrollment—and her sister who sat on the Enrollment Committee, these proponents of disenrollment raised an unfounded argument that Susan Tomolcha appearing on the 1872 census roll was in fact "Susan Baker," a slave woman from southern Oregon. This argument was offered months after Petitioners had asked, repeatedly, for any information Respondents and its agents might have on Susan Tomolcha, and was offered as the opinion of Penny DeLoe, a layperson who lacks anthropological or historical expertise to render an opinion that may be considered evidence under the rules of evidence governing this Court. To the extent the Enrollment Committee relied on this evidence to deny that Petitioners had established their lineal connection to Susan Tomolcha, this reliance, in and of itself, is arbitrary and capricious.

Further, Petitioners do not provide only a name, Petitioners provide a name, supported by expert testimony and official government and historic records. The Tribal Court erred when it absurdly determined that Respondents had substantial evidence without even a name to support their identity argument (i.e., Baker is not Tomolcha), and that the Disenrollment Decisions were not arbitrary and capricious. Put another way, it was not Petitioners' burden to advance substantial evidence, even though they did. It was *Respondents'* burden to advance substantial evidence disproving that Susan Tomolcha was the ancestor of Petitioners. Respondents utterly failed in this respect. They had to ignore the extensive evidence and fabricate their own far-fetched theory unsupported by evidence because the only thing that mattered to Respondents was that, at the end of the day, they cleansed their rolls of Petitioners and their deceased family members. This is the essence of arbitrary and capricious government action.

E. The Tribal Court Erred When It Determined That The Audit Did Not Violate The Enrollment Ordinance And The Constitution.

The Disenrollment Decisions are based on an illegal audit. The Disenrollment Decisions were based on the findings of the membership audit. However, the audit, initiated by the Enrollment Department staff, violated the Enrollment Ordinance and the Constitution. Therefore, the disenrollment of Petitioners is premised on an illegal and unconstitutional audit. The Enrollment Ordinance limits access to Enrollment Records to "inspection" by the "Executive

Officer, the Tribal Attorneys and Enrollment Staff. . . . Except as thus provided, all Enrollment Records shall be confidential."[174] But Enrollment Staff provided access to an outside auditing agency that—aside from a contract—apparently has absolutely nothing to do with the Grand Ronde Tribes and the tribal government. Providing this information to prohibited persons is illegal and punishable by termination, removal, or recall as applicable.[175] Basing the Disenrollment Decisions on improperly obtained information is illegal, unconstitutional, and arbitrary and capricious.

This Court should acknowledge and apply the exception to the exclusionary rule's applicability in administrative or civil contexts when the violations of a tribal member's rights are egregious or widespread.[176] Here, the Grande Ronde Tribes' enrollment audit is both widespread and egregious. Although this Court has denied discovery into the nature and extent of the enrollment audit, it is undisputed that the Grand Ronde Tribes sent its membership's enrollment files to a third party for examination, in violation of the right of privacy codified in Grand Ronde law.[177] Any information from this egregious and widespread violation of Petitioners'—and indeed all Grand Ronde members'—rights should not be

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[174] Enrollment Ordinance, § (c)(5)(B).
[175] Enrollment Ordinance, § (c)(5)(B).
[176] *See Immigration and Naturalization Serv. v. Lopez-Mendoza*, 1032, 1050-51, 104 S.Ct. 3479 (1984); *See also Oliva-Ramos v. Att'y Gen.*, 694 F.3d 259, 272 (3rd Cir. 2012).
[177] Enrollment Ordinance, § (c)(5)(B).

sanctioned by the Grand Ronde Tribes and used in punitive measures against its tribal members, like the instant action. Accordingly, because the disenrollment of Petitioners is based on an egregious and widespread violation of tribal members' fundamental right to privacy, this Court should reverse the disenrollment spawned by the violation as an incentive that will compel the Grand Ronde Tribes to honor their members' rights in the future.

The Tribal Court denied this claim in a single paragraph that contained no analysis of the Enrollment Ordinance or Constitution. Rather, the Tribal Court merely asserted that:

> The Tribe is within its authority to both conduct an audit of enrollment files under its authority to correct errors and administer the Tribal enrollment standards, and also to hire agents and representatives to act on its behalf to perform these governmental functions.[178]

In essence, the Tribal Court claims the ability to conduct an audit, and violate legal confidentiality protections, stems from the nebulous and undefined authority to "correct errors." However, as discussed in detail above, the Constitution does not provide Respondents with the ability to disenroll a member that has been enrolled in error. Accordingly, the Constitution cannot also extend any supposed authority to "correct errors" to allow the inspection of confidential records. Therefore, the

[178] Certified Record, Document 32, p. 10.

Tribal Court erred when it determined that the audit did not violate Grand Ronde law.

F. The Tribal Court Erred When It Determined That Laches Was Not Applicable To The Current Proceeding.

The doctrine of laches requires reversal of the disenrollment of Petitioners. The doctrine of laches applies against Indian tribes.[179] Courts have applied laches to Indian tribes on multiple other occasions, in a variety of contexts.[180] Laches is "[a] failure ... to claim or enforce a right at a proper time. A neglect to do something which one should do, or to seek to enforce a right at a proper time."[181] Laches requires "(a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense as a result of this delay."[182] Laches is "a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims."[183] In other words, a

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[179] *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221 (2005).
[180] *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1337-1340 (10th Cir. 1982) (holding that laches barred Jicarilla Apache Tribe's NEPA claim); *Hoopa Valley Tribal Council*, 7 NICS App. 9, 15 (Hoopa Valley Tribal Ct. App. Mar. 2005) (affirming Tribal Court's ruling that plaintiff had affirmative defense against the Tribal Council's compensation reimbursement claim under theories of estoppel, acquiescence and laches); *Apache Survival Coalition v. United States*, 21 F. 3d 895, 905-914 (9th Cir. 1994) (holding that laches barred the San Carlos Apache Tribe's NHPA claim); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221 (2005) (holding that laches, acquiescence and impossibility barred Oneida Indian Nation from asserting its immunity from state taxation).
[181] *Hoopa Valley Tribal Council*, 7 NICS App. at 14-15.
[182] *Jicarilla Apache Tribe*, 687 F.2d at 1338.
[183] *Oneida*, 544 U.S. at 217.

party is barred from taking action where a party, like the Enrollment Department, has sat on its rights.

Here, the Enrollment Department did not diligently pursue a disenrollment action against Petitioners. The Enrollment Committee was, and has always been, in possession of all information and evidence it contends requires the disenrollment of Petitioners. In fact, it has been aware of the family lineage relating to Petitioners for more than a quarter century, given that the elders were enrolled nearly 30 years ago. Respondents have failed to act, year after year. Petitioners are now gravely prejudiced by the reversal of the Grand Ronde Tribes' position. The Grand Ronde Tribes' actions have culminated in the disenrollment of Petitioners. And because Grand Ronde Tribes have now altered their enrollment procedures and criteria to Petitioners detriment, Petitioners are no longer able to simply re-enroll. Accordingly, the doctrine of laches should prevent Respondents from disenrolling Petitioners.

The Tribal Court determined that the doctrine of laches was not applicable to the current proceeding based on its reasoning that: (1) sovereign immunity did not permit the defense of laches; (2) Respondents were shielded from the defense of laches; and (3) the current proceeding does not involve equitable claims. The Tribal Court's reasoning fails for several reasons.

First, sovereign immunity does not bar the defense of laches. Courts have explicitly held that a tribe's sovereign immunity does not prevent laches from being applied to the tribe's claims.[184] The Enrollment Ordinance provides for judicial review of an Enrollment Committee decision. The Enrollment Ordinance clearly does not outline every claim, theory, defense or argument that a petitioner might be permitted to utilize under this general but express waiver of sovereign immunity. Accordingly, sovereign immunity does not preclude the application of laches and it should be considered in this case.

Second, laches may be applied against Respondents. As discussed above, laches has specifically been applied to Indian tribes. The Tribal Court determined that Respondents are shielded from laches.[185] However, the cases cited by the Tribal Court[186] to support its assertion all concern the application of laches to the federal government of the United States; the cases do not discuss the applicability of laches to tribal governments. In regards to the doctrine of laches, courts do not typically provide the same protections afforded to the federal government to tribal governments; this trend is seen even in cases where a tribal court is applying laches

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[184] *Jicarilla Apache Tribe*, 687 F. 2d at 1339 n.11 (rejecting the Tribe's argument that "Tribal sovereign immunity precludes application of laches and similar defenses" and holding "the trial court did not err in holding that the Tribe's NEPA claim was subject to the doctrine of laches.").
[185] Certified Record, Document 32, p. 10.
[186] *Id.*

against its own tribe.[187] Accordingly, Respondents are not shielded from the application of laches.

Finally, contrary to the Tribal Court's assertion, the current proceeding does involve an equitable claim. Black's Law Dictionary defines an "Equitable action" as "One seeking an equitable remedy or relief" and defines "Equitable relief" as "That species of relief sough in a court with equity powers as, for example, in the case of one seeking an injunction or specific performance instead of **money damages.**"[188] Similarly, the Supreme Court distinguishes between "'traditional' equitable remedies, such as injunction and restitution, and . . . **compensatory damages** – 'the classic form of legal relief.'"[189] Here, as recognized by the Trial Court, Respondents' action is to remove Petitioners from membership.[190] This does not involve any of the typical forms of legal relief, i.e. it does not involve monetary or compensatory damages; therefore it is not a legal claim. Rather, it is an equitable claim. Accordingly, laches may be applied.

G. The Tribal Court Erred When It Determined That Equitable Estoppel Was Not Applicable To The Current Proceeding.

The doctrine of equitable estoppel also prevents Respondents from disenrolling Petitioners. The doctrine of "[e]quitable estoppel operates to place the

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[187] *See supra* note **Error! Bookmark not defined.**.
[188] Black's Law Dictionary (6th Ed. 1990) (emphasis added).
[189] *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 263-63 (1993) (emphasis added).
[190] Certified Record, Document 32, p. 10.

person entitled to its benefit in the same position he would have been in had the representations been true."[191] "The doctrine of equitable estoppel prevents a party from claiming a right against another person who in good faith has relied on the party's prior conduct and has changed his position for the worse."[192] Equitable estoppel, as applied in tribal court, requires "(1) an admission, statement or act by the agency inconsistent with its earlier claim; (2) reliance on that admission, statement or act; (3) injury to the relying party if the agency were allowed to contradict or repudiate its earlier admission, statement or act; (4) the necessity of estoppel to prevent a manifest injustice; and (5) no impairment of governmental functions if estoppel is applied."[193]

Here, Respondents' Disenrollment Decisions are inconsistent with Respondents' earlier actions, specifically when the Enrollment Committee and Tribal Council ratified Petitioners' applications for membership and, through Tribal Council resolution, Petitioners became Grand Ronde members. [194] Petitioners have relied upon Respondents' initial approval of their applications for decades, now to their detriment. If Respondents are allowed to reverse their prior

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[191] *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 1880 (2011).
[192] *Nez v. Peabody W. Coal Co., Inc.*, 2 Am. Tribal Law 468, 474 (Navajo 1999).
[193] *In the Membership of Julie Bill Meza, et al.*, 7 NICS App. 111, 117-18 (Sauk-Suiattle Tribal Ct. App. Oct. 2006) (applying equitable estoppel in a tribal court proceeding to a tribal council's decision to disenroll a member). *See also Shopbell v. Tulalip Gaming Comm'n*, 3 NICS App. 363, 368 (Tulalip Tribal Ct. App. Nov. 1994); *Hoopa Valley Tribal Council*, 7 NICS App. at 12.
[194] *See, e.g.*, Certified Record, Document 3, Exhibit 1, p. 125.

actions, Petitioners will suffer a significant injury. Further, due to changes to Grand Ronde Law regarding enrollment, Petitioners are unable to re-enroll. In order to prevent manifest injustice, Respondents should be estopped from disenrolling Petitioners. Finally, there is no impairment of the governmental functions of the Grand Ronde Tribes if Petitioners are allowed to remain members.

The doctrine of equitable estoppel is applicable. To hold otherwise, this Court would be sanctioning violations of tribal members' constitutional and legal rights and would, indeed, permit the Tribal Government to exact punitive actions against tribal members decades after the action giving rise to the punitive action occurred. Put another way, if this Court sanctions the Tribal Government's actions in disenrolling Petitioners, it will effectively be holding that the Tribal Government has the power to change its mind at any time, without any regard to the extreme prejudice tribal members will suffer at the whims of a sudden change in policy. All tribal members' enrollment decisions, indeed all tribal memberships, will be in peril of being revisited and arbitrarily and capriciously reversed at any time, subjecting tribal members not only to the trauma of enduring months of opaque and unfair administrative proceedings, and thousands of dollars in legal expenses, but to the extreme injustice of having their lives upended and their tribal identities stripped from them.

The Tribal Court determined that Petitioners' assertion of equitable estoppel failed.[195] The Tribal Court stated, "the government's actions must constitute affirmative misconduct," and classified Respondents' actions as negligent conduct or misinformation, rather than affirmative misconduct.[196] First, the standard of conduct required to maintain equitable estoppel that the Tribal Court applied is not appropriate in this matter. Most tribal courts, in applying equitable estoppel against a tribal government, do not require "affirmative misconduct," instead applying the requirements Petitioners outlined above.[197] However, even if the Tribal Court requires "affirmative misconduct," Respondents are still estopped from disenrolling Petitioners. The disenrollment of Petitioners is not due to misinformation, as there is no new information coming to light; rather, the Disenrollment Decisions are due to a shift in policy. Respondents are attempting to redefine membership requirements. This shift is being implemented by the Enrollment Committee, Enrollment Staff, Tribal Council, and now the Tribal Court, in a series of rights-depriving and unconscionable actions that most certainly constitute affirmative misconduct. Accordingly, the Court may apply equitable estoppel to Respondents.

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[195] Certified Record, Document 32, pp. 10-11.
[196] *Id.* at 11.
[197] *See supra* note **Error! Bookmark not defined.**.

IX. CONCLUSION

Petitioners respectfully request that this Court reverse Respondents' Disenrollment Decisions and remand this matter for reconsideration and reinstatement of Petitioners as enrolled members.

X. STATEMENT OF RELATED CASES

Counsel for Petitioners identifies the following case, which may be deemed a "related case" under Fed. R. App. P. 28-2.6, as the case "raise[s] the same or closely related issues":

- *The Estate of Dan Altringer, et al. v. Conf. Tribes of Grand Ronde*, Case No. A-15-002.

DATED this 5th day of February, 2016.

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DECLARATION OF SERVICE

I, Molly A. Jones, declare as follows:

I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite L1, Seattle, WA 98115.

On February 4, 2016, I caused the foregoing document(s) to be filed with the above referenced court via Federal Express and to the following via Federal Express:

Robert Greene
Tribal Attorney's Office
Confederated Tribes of Grand Ronde
9615 Grand Ronde Road
Grand Ronde, OR 97347
Rob.greene@grandronde.org

The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and the Confederated Tribes of the Grand Ronde Community of Oregon and is true and correct.

Signed at Seattle, WA, this 4th day of February, 2016.

Molly A. Jones

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number A-15-008

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Signature of Attorney or Unrepresented Litigant: s/ R. Joseph Sexton

("s/" plus typed name is acceptable for electronically-filed documents)

Date: February 5, 2016

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.