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' REPLY BRIEF

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I. INTRODUCTION

Respondents have no authority to disenroll any Grand Ronde member based on an alleged lineal descent deficiency when that member descends 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 [the] Constitution."[1] In this case, Petitioners proved lineal descent from two members appearing on "roll[s] or records of Grand Ronde members," and otherwise meet all enrollment criteria. Thus, Petitioners' mass disenrollments should be reversed.

There are two overarching questions before this Court: (1) is the Treaty of 1855 with the Kalapuya ("Treaty") a record of Grand Ronde members; and (2) is Susan Tomolcha—who appears on an 1872 roll of Grand Ronde members—Petitioners' lineal ancestor? If both of these questions cannot be answered in the negative, Petitioners' disenrollments are unlawful. If only one of the questions is answered in the positive, the disenrollments are unlawful. In this case, the answer to question (1) has been answered in the affirmative by past Tribal Councils more than seventy times. Respondents' Brief fails to establish that both of these questions can legally and constitutionally be answered in the negative. Accordingly, Petitioners' disenrollments are unlawful and should be reversed.

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[1] Constitution of the Confederated Tribes of the Grand Ronde Community of Oregon ("Constitution"), Art V § 5 and Art. V, Sec. 1 (emphasis added).

II. ARGUMENT

A. The Disenrollment Decisions Violated the Constitution and the Enrollment Ordinance.

Respondents have limited authority to disenroll members under the Constitution, but they do not have the authority to reverse a policy on the interpretation of the Constitution, and then use that reversal as a means to purge members from the rolls under the guise of "upholding the Constitution." This is precisely the authority claimed by Respondents in the instant matter. They have revisited decisions of previous Tribal Councils dating back thirty years finding that the Treaty is a record of Grand Ronde members and disenrolled a large swath of the Tribe based upon a reversal of a policy on the interpretation of the Constitution.

Respondents' reliance on *Beebe*, an unpublished Tribal Court case, is misplaced. Respondents cite *Beebe* for the proposition that they have the "right to disenroll a member who was enrolled in error . . ." noting that, in *Beebe*, "[t]he Tribal Council's decision to remove [Beebe] from the Tribal Roll because she had been enrolled in error was neither arbitrary and capricious nor a violation of Petitioner's constitutional rights."[2] But in *Beebe*, the enrolled member had been enrolled in another tribe for at least twenty-five years.[3] There is no question that

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[2] Respondents' Brief, at 19, citing *Beebe v. Confederated Tribes of Grand Ronde*, Case No. C-12-07-002 (Grand Ronde Tribal Ct. May 2, 2013).
[3] *Beebe* at pp. 2-3.

Beebe failed to meet the requirements for enrollment at the time of enrollment based on the member's ongoing dual enrollment.[4]

By contrast, here, Respondents argue that the Treaty is not a record of Grand Ronde members. Therefore, according to Respondents the previous Enrollment Committees and Tribal Councils who found, time and again, that each of Petitioners satisfied the lineal descent requirement of the Constitution by virtue of their common ancestor and his appearance in and signature to the Treaty were wrong and violated the Constitution each time they enrolled one of Petitioners. The conclusion that the Treaty is not a record of Grand Ronde members is in no way analogous to a discovery that a tribal member was enrolled in another tribe, which is expressly proscribed under the Constitution. In fact, Respondents' conclusion regarding the Treaty, which is the foundation of its "enrollment in error" claim, is in reality a policy reversal on the question of the Treaty and the descendants of one of its signers. Enrollment Committee member Margaret Provost noted this in her dissent to the Disenrollment Decisions:

> Prior Enrollment Committees found a lineal ancestor connection to Chief Tumulth, a signer of the 1855 Treaty, as a basis for enrollment. I wish to honor their decision . . . . The first of these members was enrolled in 1986. The 1986 Enrollment Ordinance gave the Enrollment Staff discretion to determine what supporting documents were acceptable for enrollment purposes. . . . Based on the evidence in

[4] Constitution Art. V §§ 1 and 2.

> the record before us, I see no reason to second-guess the earlier Enrollment Committees' recommendation.[5]

Ms. Provost understands that her Committee's decision is not one based on the discovery of some unambiguous disqualification like dual enrollment. Instead, Ms. Provost recognizes that the purge at issue here is the result of a deliberate and calculated attempt to re-litigate an enrollment matter that had already been definitively resolved by previous Tribal authorities, through a finding that Petitioners satisfied the Constitution's lineal descent requirements. The Constitution does not vest Respondents with this sweeping authority to revisit past interpretations of the Constitution. If it did, Respondents' authority to disenroll would be effectively unqualified.

Petitioners descend directly from Chief Tumulth. Chief Tumulth signed the Treaty on behalf of his people. The Treaty is a record of Grand Ronde members created by the Department of the Interior prior to the effective date of the Constitution. Respondents allege that the Treaty is not a record of Grand Ronde members because it is not a list of <u>all</u> Grand Ronde members.[6] Respondents' argument essentially requires this Court to interlineate the word "all" into Article V, Section 1 of the Constitution before the phrase "Grand Ronde members." To require a record to contain a list of all members of Grand Ronde negates the

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[5] Excerpts of Record, at 222-223.
[6] Respondents' Brief, at 25-29 (distinguishing between an official census roll and the Treaty).

purpose of the Constitution's inclusion of both rolls and records as documents that may be used to establish lineal descent.[7] Accepting Respondents' argument is unconstitutional because it negates the records option from the Constitution.[8] If a record is the same thing as a roll, the inclusion of the word "records" in the Constitution is rendered meaningless. Such a result would expand Respondents' power to disenroll beyond the express limitations found in the Constitution.

The Constitution cannot and should not be amended by bureaucratic fiat. The Constitution cannot be reformed by this Court to vest Respondents with more authority to disenroll members than the Constitution provides by its express terms. This Court should give effect to all provisions of the Constitution, including the plain meaning of a "record[] . . . of Grand Ronde members."

B. The Disenrollment Decisions Were Not Supported by Substantial Evidence and Were, Therefore, Arbitrary and Capricious.

As detailed in Petitioners' Opening Brief, 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

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

[8] *In re HP Inkjet Printer Litig.*,716 F.3d 1173, 1184 (9th Cir. 2013) ("Under accepted canons of statutory interpretation, we must make every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

difference in view or the product of agency expertise."[9] For a decision to avoid being found arbitrary and capricious, the decision must "provide[] a meaningful review."[10] To "provide[] a meaningful review" a government actor's "decision should engage in a discussion supported by reasons, substantial evidence, and applicable law."[11] A lack of substantial evidence indicates an arbitrary and capricious decision.[12] "Substantiality of the evidence is based upon the record as a whole."[13]

Here Respondents discount any evidence provided by Petitioners, including expert testimony and state records; instead, Respondents rely on hearsay and layperson testimony regarding matters they are unqualified to testify to and based on facts unsupported in the record. Respondents attempt to justify the Disenrollment Decisions by cherry-picking excerpts from reports and books and ignoring any facts detracting from their narrative. This attempt fails. The record demonstrates that the Disenrollment Decisions were not based on substantial evidence but instead unsupported biased conjecture from a bureaucratic body

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[9] *See Cnty. of Los Angeles v. Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008).
[10] *Wagner v. Tulalip Hous. Auth.*, 6 NICS App. 75, 77-78 (Oct. 2001) (reversing employment court decision where decision was not supported by substantial evidence and, therefore, was arbitrary and capricious).
[11] *Id.*
[12] *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1282 (10th Cir. 2002).
[13] *Id.* (internal citations omitted).

predisposed to reaffirming a decision it had already rendered. The Disenrollment Decisions are, therefore, arbitrary and capricious.

1. The Treaty Is a Record of Grand Ronde Members on Which Chief Tumulth Appears.

The Treaty is a record of Grand Ronde members and, therefore, may be used to satisfy the constitutional lineal descent requirements. Respondents argue that the Treaty is not a record of Grand Ronde members because there was no Grand Ronde reservation at the time of its signature.[14] This argument ignores the primacy of the Treaty in the creation of the Reservation, a primacy noted by President Buchanan himself in so ordering the creation of a reservation for Grand Ronde. Furthermore, this argument is directly undermined by the testimony of Grand Ronde's Enrollment Department, whose manager testified before the Enrollment Committee that it has relied on records or rolls predating the 1857 reservation. Finally, Respondents' arguments further highlight the attempt to create a "pseudo residency requirement" that is a *de facto* amendment to the Constitution not permitted under the *Loy* decision and its progeny.

As noted, Respondents' position now directly contradicts the unambiguous testimony of the Enrollment Department's manager. She testified that the first roll or record of Grand Ronde members that her department uses to confirm lineal

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[14] Respondents' Brief, at 25.

descent requirements for enrollment dates to November of 1856.[15] The Tribe's *Reservation* was not created until June of 1857, when President Buchanan issued an Executive Order.[16] But the Tribe itself was not born at the instant the federal government decided to create a reservation to fulfill some of the promises made to the Tribe's founders in the Treaty. This absurd notion of the Tribe not existing before the creation of a reservation is entirely unsupported by law, history, or evidence, including, *inter alia*, expert testimony, or anthropological records. Nevertheless, in order to sustain Respondents' disenrollment agenda, it was necessary to fabricate this fiction.

President Buchanan's Executive Order was signed in order to fulfill the promises the federal government made to, *inter alia*, Chief Tumulth and his Tribe; promises that are the rightful inheritance of Chief Tumulth's lineal ancestors. As part of the Executive Order in the prelude to the action directed by President Buchanan, the Secretary of the Department of the Interior recommends the President establish the Grand Ronde Reservation "particularly for the Willamette tribes, parties to the treaty of January, 1855," *i.e.,* the Treaty with the Kalapuya.[17] President Buchanan responds in the Executive Order by affirming the

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[15] Excerpts of Record, at 163 (recording of December 16, 2013 hearings commencing at 08:16 a.m., at 1:30:40 – 1:32:27).
[16] Excerpts of Record, at 82-84.
[17] *Id.*

recommendation and calling out the parameters of the Grand Ronde Reservation.[18] In plain terms, the Treaty was an agreement between the United States and tribes, represented by their signatories; the Executive Order was the fulfillment of the Treaty's obligations. Therefore, the Treaty is among the first—if not *the* first—records of Grand Ronde members created by the Department of the Interior prior to the effective date of the Constitution.

Throughout the administrative process, Respondents advanced no evidence whatsoever to support their contention that the Treaty is not a record of Grand Ronde members because it predates the existence of a Grand Ronde Reservation. In fact, the Tribe's own cultural and anthropological expert testified in favor of Petitioners.[19] Respondents allege that the testimony of Eirik Thorsgard was inconsistent.[20] However, considering Mr. Thorsgard's testimony as a whole, the inconsistency Respondents fixate upon is a product of miscommunication. Mr. Thorsgard misunderstood Petitioners' counsel's question on whether the Treaty with the Kalapuya is a "record" to have been a question asking him whether the Treaty with the Kalapuya is a comprehensive "roll":

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[18] *Id.*

[19] *See generally* Excerpts of Record, at 163 (recordings of January 10, 2014 hearings commencing at 11:45 a.m., at 20-36). Mr. Thorsgard was the Tribe's Historic Preservation Officer. The Tribe has since terminated Mr. Thorsgard.

[20] Respondents' Brief, at 26-27.

> Petitioners' Counsel: Do you believe that the Treaty with the Kalapuya etc. is a **record** of Grand Ronde members created by the Department of the Interior?
>
> Eirik Thorsgard: No and the reason is, is 'cause **it is not comprehensive** . . . so the census and rolls come afterwards . . . .[21]

Highlighting the miscommunication, immediately preceding the above-referenced exchange, Eirik Thorsgard testified that in his "professional opinion"[22] the:

> connection between the Tumulth family and Grand Ronde isn't 'legitimized' through these rolls . . . but it is 'legitimized' through the signatory to the Treaty and the subsequent executive order that created the [Grand Ronde] reservation . . . .[23]

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[21] Excerpts of Record, at 163 (recording of January 10, 2014 hearings commencing at 11:45 a.m., at 21:39 – 22:21) (emphasis added); Mr. Thorsgard repeatedly explains during the course of his testimony that the distinction between a "roll" and a "record" is that the former is a comprehensive or attempted comprehensive list of all members or residents of the Grand Ronde Reservation, while the latter can be any Department of Interior record of Grand Ronde Indians. It is further noteworthy that the testimony of David Lewis, another Grand Ronde employee that Petitioners understand has been terminated, did not contradict, and in fact, generally supports Mr. Thorsgard's position. *Id.*, at recording of January 6, 2014 hearings commencing at 7:36, at 05:18:00 – 05:46:00. In addition, the Enrollment Department after listening to Mr. Thorsgard's testimony indicated, on the records, that it had reconsidered its positions based on Mr. Thorsgard's representation that the Treaty was in fact a record. *Id.* Of course, this reconsideration was short-lived.

[22] Excerpts of Record, at 163 (recording of January 10, 2014 hearings commencing at 11:45 a.m., at 20:55-21:33) (explicitly separating out his professional opinion from his personal opinion). Several weeks after his testimony, Mr. Thorsgard was compelled to sign a declaration clarifying that testimony offered was his personal opinion and not the official position of the Tribe. Mr. Thorsgard, again, was later fired.

[23] *Id.*

This contention is further supported by Mr. Thorsgard's later testimony in response to a similar question on whether the Treaty is a Grand Ronde **record** that may be used to satisfy the Grand Ronde lineal descent requirements. It is clear that Mr. Thorsgard was making the distinction between a "roll" (an attempt to make a comprehensive record of all members) and a "record" of Grand Ronde members rooted in the text of the Grand Ronde Constitution. Accordingly, Respondents failed to provide substantial evidence to support their argument that the Treaty is not a record of Grand Ronde members.

2. Respondents' Account of Chief Tumulth's Family Is a Red Herring and, Moreover, Is Incomplete, Inaccurate, and Unsupported By Substantial Evidence.

It is undisputed that Chief Tumulth signed the Tribe's foundational Treaty. Moreover, a significant amount of historic evidence, and the only expert testimony in the administrative record (*i.e.*, the Tribe advanced no expert testimony whereas Petitioners had the testimony of the Tribe's own employee experts—later terminated—supporting their historical contentions), support the contention that Susan Tomolcha who appears on a Grand Ronde roll in 1872 was one of Chief Tumulth's wives and the mother of Petitioners' lineal ancestor, Mary Will-Wy-Ity. In order to distract from these inconvenient facts and the evidence supporting them, Respondents seek to muddy the waters and raise wholly immaterial

historical matters regarding the history of some of Tumulth's descendants and their relation to nearby Tribes, such as the Yakama and the Warm Springs tribes.[24]

Respondents rely[25] on an incomplete account of the history of the Tumulth family, provided by Dr. Boxberger's in a report entitled "Cascade Locks and the Confederated Tribes of the Grand Ronde Community." In essence, Respondents' argument is that Tumulth and his descendants do not belong at Grand Ronde because *some* of them ended up on other tribes' reservations. Setting aside the irrationality of this argument, Respondents fail to account for Dr. Boxberger's introduction, in which he notes that the "Confederated Tribes of the Grand Ronde Community include cultural heirs of succession to the Wah-lal-la or Cascade Indians whose traditional territory included the Cascades of the Columbia River."[26]

Respondents advance a distorted interpretation of Petitioner Chuck Williams' account of his family history for Respondents' false contention that Tumulth's family "went primarily to the Yakama Reservation" and that "[s]ome also went to the Warm Springs Reservation."[27] However, on the first sentence following Mr. Williams' account, Dr. Boxberger notes that:

> some Cascades removed to the Grand Ronde Reservation and through the continuation of intermarriage descendants of Cascades Indians are found on all three reservations [Yakama, Warm Springs, and Grand Ronde] and in

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[24] Respondents' Brief, at 6-7; 27-29.
[25] *Id.* citing to Supplemental Excerpts of Record, Tab 10.
[26] Petitioners' Further Excerpts of Record, at 376.
[27] Respondents' Brief, at 6, citing to Supplemental Excerpts of Record, Tab 10.

> off-reservation communities as well . . . **Descendants of Tum-Wulth [*i.e.* Tumulth] are part of the Grand Ronde Community to this day**. The result of the Cascades conflict was that the Cascade Indians were diminished in number, the adult male population nearly gone and they could no longer exist as a viable community. The only option was for individuals to join other communities which would include Wishram, Wasco, **Grand Ronde** and non-Indian communities.[28]

Respondents also argue that Indian Mary "went to the Yakama Reservation where Indian Mary was an allottee and her children were enrolled." [29] Respondents' truncated historical account of Indian Mary ends here, implying that her and her progeny permanently relocated the Yakama Reservation. However, records demonstrate that Mary was married at one point to a Yakama man who hailed from the Wishram area and later "returned to the Great Cascades and traded horses to homesteaders to get back a piece of her original homeland," therefore she did not stay at Yakama and was never a Yakama member.[30] However, the full account of Mary's history cuts against Respondents' narrative, so they ignore it.

3. Susan Tomolcha, from the 1872 Census Roll Was the Wife of Chief Tumulth and the Mother of Indian Mary

In Petitioners' Opening Brief, Petitioners outline the substantial evidence that Petitioners offered to demonstrate that Susan Tomolcha, who appears on the 1872 Grand Ronde census roll, is Chief Tumulth's wife and the Mother of Indian Mary or Mary Will-Wy-Ity. The evidence included the submission of a state

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[28] Petitioners' Further Excerpts of Record, at 377 (emphasis added).
[29] Respondents' Brief, p. 7.
[30] Supplemental Excerpts of Record, Tab 11, at 2.

record—evidence the Enrollment Staff is required to consider—and the testimony of two linguist and cultural experts, all of which indicated that Susan Tomolcha from the 1872 Grand Ronde census roll was Petitioners' lineal ancestor.[31]

However, Respondents allege that there is not substantial evidence demonstrating Susan Tomolcha is who Petitioners claim, but that there is substantial evidence demonstrating that the Susan Tomolcha from the 1872 Grand Ronde census roll was, instead, "a Pit River slave."[32] As discussed in Petitioners' Opening Brief, this argument is based novel, last-minute theory alleging that Susan Tomolcha was Susan Baker, a slave woman from southern Oregon. Respondents alleged that "Billy Baker" was William Tomolcha, who appeared with Susan Tomolcha in the 1872 roll. Respondents' contentions were based entirely on a transcript (*i.e.*, unsupported hearsay) showing Billy Baker testified that his mother's name was Susan and were presented at a final and extraordinary "remand" hearing before the Enrollment Committee at which all but two of Petitioners were excluded from attendance, and at which Petitioners' counsel was prohibited from speaking or presenting any information unless the Enrollment Committee asked him a question.

The evidence was presented in what appeared to be a scripted question directed by one member of the Enrollment Committee to her sister, the manager of

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[31] Petitioners' Brief, at 15-28.
[32] Respondents' Brief, at 33-34.

the Enrollment Department.[33] In response to the question, the Enrollment Department manager then launched into what appeared to be a prepared diatribe in which she—for the first time and several months after the initial disenrollment hearings and the extensive testimony she provided therein—claimed that Susan Tomolcha was a slave woman unrelated to Tumulth or Mary Will-Wy-Ity. This last-minute testimony, provided by a layperson without any substantive historic support aside from the common names (Susan and William/Billy), is the sum total of the purported evidence Respondents advanced to rebut Petitioners' claims regarding Susan Tomolcha. This evidence flies in the face of the expert and unbiased testimony Petitioners secured and advanced at their hearings, including, testimony from linguistic experts and the Tribe's own erstwhile Historic Preservation Officer, Mr. Thorsgard.

This inconsistency reveals the outcome-based analysis employed by Respondents to disenroll Petitioners. On one hand, Respondents believe there is substantial evidence to demonstrate that Susan Tomolcha is actually Susan Baker, based on hearsay. On the other hand, Respondents contend that the expert testimony, historic and anthropological evidence, and the corroborating state cemetery records are insufficient to demonstrate that the surnames "Tomolcha" and "Tomalch" are both derivatives of the name Tumulth.

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[33] Excerpts of Record, at 214-220.

C. Respondents Violated Petitioners Due Process Rights.

Respondents argue that due process is construed differently under the Indian Civil Rights Act of 1968.[34] 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."[35] Due process requires "a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[36] Further, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."[37] 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."[38] Accordingly, while it is important to construe due process with respect to tribal values, it is equally important that to ensure that Petitioners were actually afforded due process (*i.e.*, process that is meaningful and fair). Respondents may not hide behind tribal values as an excuse to withhold due process from their members.

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[34] Respondents' Brief, at 40-41.
[35] *Hoopa Valley Housing Authority 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)).
[36] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).
[37] *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170, 171-172 (1951)).
[38] Excerpts of Record, at 325-327.

1. Respondents Violated Petitioners' Substantive Due Process Rights.

Petitioners have a liberty interest in their tribal memberships. Respondents contend that tribal membership is not a fundamental liberty interest.[39] However, the Supreme Court of the United States has recognized that the deprivation of one's 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."[40] Given that tribes are considered sovereigns, and the benefits of tribal membership (*e.g.,* voting rights, provision of government services, etc.) are analogous in many respects to the benefits inherent in national citizenship, the liberty interests associated with citizenship are akin to those associated with tribal membership. For example, the Tribal Court acknowledged that the loss of tribal membership results in the deprivation of a variety of benefits, including "health, social service, financial and other benefits. . . ."[41]

Further, the deprivation of Petitioners' tribal membership has also stripped Petitioners of their right to vote in the Tribe's elections. The Supreme Court has specifically held that the right to vote is a protected liberty interest,[42] stating that

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[39] Respondents' Brief, at 41.
[40] *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
[41] *Jackson v. CTGR*, Case No. C-13-08-004, 15 (Confed. Tribe Grand Ronde Tr. Ct. 2014)).
[42] *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (finding the right to vote a protected liberty interest protected by the due process clause).

the right to vote "rank[s] among our most precious freedoms."[43] Accordingly, as the Disenrollment Decisions strip Petitioners of their membership and deny Petitioners the tangible privileges listed above, Petitioners possess a liberty interest in their memberships to the Tribe.

Respondents also argue that their actions are not "conscience shocking."[44] First, Respondents ignore the additional standards outlined by Petitioners in their Opening Brief, *i.e.*, whether the government decision interferes "with rights implicit in the concept of ordered liberty,"[45] and whether the decision is "arbitrary in the constitutional sense."[46] Second, Respondents' actions shock the conscience. Respondents' actions demonstrate a deliberate indifference of Petitioners' rights in what appears to be a coordinated and determined effort to disenroll Petitioners, despite any evidence Petitioners submitted, including the very evidence the Enrollment Committee instructed Petitioners would result in an end to their disenrollments. At every stage of the disenrollment proceedings Respondents acted to limit Petitioners' ability to effectively and meaningfully participate and advocate for their interests.

As outlined, in detail, in Petitioners' Opening Brief, Respondents denied Petitioners timely access to their enrollment files and the enrollment audit

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[43] *Id.* (citing *Williams v. Rhodes*, 393 U. S. 23, 30-31 (1968)).
[44] Respondents' Brief, at 42.
[45] *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095 (1987).
[46] Collins *v. City of Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061 (1992).

findings[47]; they denied Petitioners the right to confront key witnesses; they refused to identify whether Petitioners bore a burden of proving their membership or Respondents bore the burden of showing they meet the high bar for disenrollment as implied in the Constitution; they failed to identify a clear and objective standard of proof; they moved the proverbial goal posts on the proof the Enrollment Committee had indicated, halfway through the initial hearings, would satisfy the Committee and end the disenrollment process (a cemetery record showing that Susan Tomolch was the same as Susan Tomolcha); they denied Petitioners the right to respond in person to evidence introduced at the 11th hour and to cross examine the Enrollment Department's manager on the basis for her testimony, if any, beyond pure conjecture, and unqualified opinion rooted in hearsay; they denied Petitioners hearings before a final arbiter on the final matter of their disenrollment[48]; and they subjected Petitioners to sweeping changes in the

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[47] Information in their enrollment files was readily provided to outside auditors notwithstanding the confidentiality protections against such disclosure, but Respondents forced Petitioners to undertake a lengthy and expensive judicial process to secure the same information from their files.

[48] All hearings before the Enrollment Committee were held in the committee's capacity as the bureaucracy tasked with advising the Tribal Council on rendering its final decision on disenrollment. After the final "remand" hearing before the Enrollment Committee, Respondents amended the Enrollment Ordinance and made the amendments retroactive to Petitioners' case. *See* Enrollment Ordinance § (i)(7), as amended July, 2014 (providing that the so-called "emergency" amendments 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

Enrollment Ordinance governing the Disenrollment Decisions after repeatedly promising Petitioners would be granted a final vote by their Tribal Council.

These are not harmless procedural discrepancies, though taking each one on its own a person might be led to believe this; the Disenrollment Decisions, and the flawed procedures from which those decisions sprang, when considered as a whole, indicate a process Respondents manipulated to the disadvantage of Petitioners. This reckless disregard for Petitioners' rights should shock the conscience of this Court and any reasonable person.

2. Respondents Violated Petitioners' Procedural Due Process Rights.

Due process rights require meaningful notice and meaningful hearings.[49] Petitioners do not contend that Respondents refused to provide any notice or any hearings. Rather, Petitioners' contention is that despite the notice provided, said notice was not meaningful. And despite the number of hearings provided, said hearings were not meaningful.

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began."). Thereafter, Petitioners were denied a final hearing and final vote by the Tribal Council and never had a hearing before the Enrollment Committee in its capacity as the final arbiter on the enrollment matter despite Petitioners' request for such a hearing.

[49] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976)(internal quotations omitted).

For example, Respondents note that Petitioners received notice along with the "audit finding" triggering the disenrollment process.[50] The record reveals that the "audit finding" provided Petitioners was nothing more than a cursory notification written in a form letter to each Petitioner in which Petitioners were informed that an "enrollment audit indicated that you were enrolled in error because at the time you were enrolled you did not meet the lineal descent requirement."[51] This was followed by an equally cursory notice that the "Enrollment/Vital Statistics Department has verified your ancestral line did not meet the Tribe's Constitutional requirements at the time of your enrollment."[52] No indication was provided as to how the auditors arrived at their conclusion; what direction the auditors were given, if any; how the Enrollment Department confirmed the audit's findings including, *inter alia*, which records and rolls it reviewed and what standards or definitions it used to decide whether the Treaty was a record of Grand Ronde members or whether Susan Tomolcha on the 1872 rolls was Chief Tumulth's wife and Mary Will-Wy-Ity's mother.

Furthermore, there was no notice regarding the witnesses who would be called to provide evidence against Petitioners or what the substance of their testimony might be; no notice regarding the rules of procedure to be used at the

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[50] Respondents' Brief, at 46-47.
[51] Supplemental Excerpts of Record, Tab 2, at 1.
[52] *Id.*

disenrollment hearing, including, *inter alia*, which party bore the burden of proof in the matter and what standard of proof would be applied.

Would Petitioners' attorneys need to establish by a preponderance of the evidence that they were lineal descendants of Susan Tomolcha? Did Respondents bear any burden of proof in stripping a tribal member of her tribal identity? Who would Respondents call to testify against Petitioners and what would be the substance of their testimony? On what basis would the Enrollment Committee decide whether either party had met its burden? Would Petitioners have an opportunity to examine the policies and procedures employed by the Enrollment Department and the auditors in making a determination about the Treaty?

These were questions presented to Respondents and their counsel at the outset of the Kafkaesque administrative process Petitioners endured. And these questions would never be fully answered or were answered only after the process was underway and without adequate time for Petitioners and their counsel to prepare. As the U.S. Supreme Court has long held, this sort of quantitatively significant albeit illusory process is insufficient when an administrative quasi-judicial bureaucracy is empowered with sweeping powers to impact what is perhaps the most significant aspect of modern indigenous identity in the United States, a tribal members' enrollment status with a federally recognized Indian tribe:

> [A] 'full hearing'—a fair and open hearing—requires more than [an opportunity to present one side's case]. The right to a hearing

> embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. . . . The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority.[53]

In the instant matter, the Enrollment Committee sat and patiently listened to all of Petitioners and their counsel's arguments. They even called one witness to the stand, and gave Petitioners the opportunity to cross-examine her. But not once did the Enrollment Committee indicate how it would decide the matter, what evidence it would consider sufficient to reject the Enrollment Department's recommendation for disenrollment, or what threshold would be required of the Enrollment Committee to meet whatever burden it might have to support its findings on the bare claim of a failure to meet the Tribe's lineal ancestry requirements.

In short, Petitioners received notice and an opportunity to be heard. But at every step of their lengthy administrative adventure, the notice and the hearings were inadequate and failed to ensure Petitioners received *meaningful* due process.

D. The Audit Violated the Enrollment Ordinance and the Constitution.

The Enrollment Ordinance explicitly protects the confidentiality of Enrollment Records, liming access to Enrollment Records to "inspection" by the

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[53] *Morgan v. United States*, 304 U.S. 1, 18, 58 S. Ct. 773, 776-778 (1938)

Executive Officer, the Tribal Attorneys and Enrollment Staff."[54] There is nothing in the confidentiality provision that limits the protections to benefit the government and the government alone.

Respondents allege they have the authority to conduct an enrollment audit.[55] Respondents cite to *Williams v. Leno*, which provides, in a footnote, that the confidentiality provision "most likely" accrues to the Tribe, rather than individual members.[56] This footnote is not determinative of the issue. The footnote, which is *dicta* in a trial court decision, states that that the provision *most likely* accrues to the Tribe. The uncertainty of this statement may due to the fact that it was not an issue before the court. The court dismissed the case, because: (1) it was filed after the filing deadline, and (2) there was no applicable waiver of sovereign immunity (as the Enrollment Ordinance's waiver applied only to enrollment appeals). The court did not actually reach an analysis on the accrual of the right to confidentiality. Accordingly, *Williams v. Leno* has limited applicability here.

Put simply, the confidentiality protections of the Enrollment Ordinance do not permit the audit that gave rise to the disenrollments. If the Enrollment Department is incapable of discovering "errors" in enrollment files, Respondents should seek to amend the Enrollment Ordinance to provide the Enrollment

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[54] Enrollment Ordinance, § (c)(5)(B).
[55] Respondents' Brief, at 55-56.
[56] *Id.* (citing *Williams v. Leno*, Case No. C-13-11-002, 5 n.3 (Grand Ronde Tribal Ct. May 30, 2014).

Department with the authority to transmit otherwise confidential materials to outside contractors who are not members of the Tribe and are not employed by it.

E. Laches and Equitable Estoppel Are Applicable to the Disenrollment Decisions.

Laches and equitable estoppel may be applied to Respondents. Respondents allege that sovereign immunity protects the Tribe from laches and equitable estoppel.[57] Here, the Enrollment Ordinance provides for judicial review of an Enrollment Committee decision.[58] The Enrollment Ordinance is not required to outline every claim, theory, defense or argument that a petitioner might be permitted to utilize. Further, courts have expressly rejected Respondents' argument that tribal sovereign immunity prevents laches from being applied.[59]

1. Laches Is Applicable to the Disenrollment Decisions.

The Tribe is not immune from the defense of laches. Respondents argue the Tribe is immune from the defenses of laches; however, Respondents do not cite any cases concerning tribal governments.[60] Rather, Respondents rely on cases concerning the federal government.[61] As detailed in Petitioners' Opening Brief,

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[57] Respondents' Brief, at 57.
[58] Enrollment Ordinance § (i).
[59] *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338-339 (10th Cir. 1982).
[60] *See* Respondents' Brief, at 57-58.
[61] *Id.*

courts do not typically provide tribal governments with the same protections as the federal government; instead, courts routinely apply laches to tribal governments.[62]

As explained in *Jicarilla*, "**[w]hen Government action is involved, members of the public are entitled to assume public officials will act in accordance with law** . . . Laches may be found, however, where a party, having knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right . . . A party must exercise reasonable diligence in protecting his rights."[63] This is true even in tribal courts. Tribal courts will enforce laches against a tribal government where it "neglected to enforce its asserted rights at the proper time."[64]

Respondents also attempt to argue that laches does not apply to tribal governments, where the tribal government is attempting to enforce its constitution. However, Respondents do not cite any cases supporting this exception. Further, as detailed above, Respondents actions violate the Tribe's Constitution. Accordingly, the Tribe is not immune from the defense of laches.

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[62] *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1337-1340 (10th Cir. 1982); *Hoopa Valley Tribal Council v. Sherman*, 7 NICS App. 9, 15 (Hoopa Valley Tribal Ct. App. Mar. 2005) *Apache Survival Coalition v. United States*, 21 F. 3d 895, 905-914 (9th Cir. 1994); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221 (2005).

[63] *Jicarilla Apache Tribe*, 687 at 1338 (emphasis added).

[64] *Hoopa Valley Tribal Council*, 7 NICS App. at 16

Respondents argue that laches is inapplicable, alleging that this matter "is a legal action and not an action where the Tribe sought equitable relief" because Respondents are merely seeking the "enforcement of Tribal law."[65] Here, as discussed in detail in Petitioners' Opening Brief, Respondents' action is to remove Petitioners from the Tribe.[66] As this does not concern monetary or compensatory damages, it is an action seeking equitable relief. (*i.e.*, Respondents are seeking to remove Petitioners from the Tribe's membership rolls).

Respondents also allege that laches is inapplicable because it is typically a defense to an equitable claim, pointing out that laches is not typically raised by plaintiffs.[67] Petitioners are not plaintiffs. At every step of the administrative process, Petitioners were treated like defendants. In fact, they were treated worse than criminal defendants, insofar as they were considered unqualified for enrollment until proven otherwise by some nebulous undisclosed standard. Here, the matter before the Court is Respondents' action to remove Petitioners from the Tribe. During that administrative process, Petitioners raised laches as a defense against Respondents' disenrollment actions. Laches is applicable.

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[65] Respondents' Brief, at 58-59.
[66] Petitioners' Brief, at 83 (citing Excerpts of Record, at 360).
[67] Respondents' Brief, at 58-59.

2. Equitable Estoppel Is Applicable to the Disenrollment Decisions.

The Tribal Court erred when it required Petitioners to demonstrate affirmative misconduct. Respondents argue that "affirmative misconduct" is required to apply equitable estoppel against a government, noting that the Tribal Court categorized Respondents' actions as "negligent conduct or misinformation."[68] In general, most tribal courts do not require "affirmative misconduct," even in cases applying equitable estoppel against tribal governments,[69] or specifically concerning tribal disenrollment.[70] Respondents again rely on cases involving the federal government; Respondents cite only one case from a tribal court:[71] *Kalk v. Mille Lacs Band of Ojibwe Corporate Commission.*[72] This case is distinguishable. In *Kalk*, the Band had a specific statute that required the court to apply the laws of the United States of America. Accordingly, the discussion regarding affirmative conduct was the court's attempt

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[68] Respondents' Brief, at 59-61.

[69] *See, e.g., Shopbell v. Tulalip Gaming Commission*, 3 NICS App. 363, 368 (Tulalip Tribal Ct. App. Nov. 1994); *In the Membership of Julie Bill Meza, et al.*, 7 NICS App. 111, 117-18 (Sauk-Suiattle Tribal Ct. App. Oct. 2006); *Hoopa Valley Tribal Council v. Sherman*, 7 NICS App. 9, 12 (Hoopa Valley Tribal Ct. App. Mar. 2005).

[70] *In the Membership of Julie Bill Meza, et al.*, 7 NICS App. 111, 117-18 (Sauk-Suiattle Tribal Ct. App. Oct. 2006).

[71] Respondents' Brief, at 59-60.

[72] *Kalk v. Mille Lacs Band of Ojibwe Corp. Comm'n.*, No. 03 APP 03, 2004 WL 5746060 (Mille Lacs Ct. App. Sept. 16, 2004).

to apply federal laws.[73] Here, the Tribe has no such equivalent statute. Therefore, the Court is free to interpret equitable estoppel according to tribal values. As most tribal courts do not require affirmative conduct, the Court should not require it as an element of equitable estoppel and instead ensure tribal members are afforded equitable relief to the extent their tribal government violates their rights.

However, even if the Court does require affirmative misconduct, Respondents are still estopped from disenrolling Petitioners. Contrary to the Tribal Court's assertions, Respondents' actions were not merely the proliferation of misinformation, as there is no new information coming to light. As detailed in Petitioners' Opening Brief, the Disenrollment Decisions are the result of a policy shift; a shift being implemented by a serious of unconscionable and unconstitutional actions that constitute affirmative misconduct. Thus, equitable estoppel applies to Respondents.

Further, in governmental estoppel cases, courts recognize citizens' reliance on the acts of government agents acting within the scope of their duties,[74] acknowledging that citizens have an interest in "in some minimum standard of decency, honor, and reliability in their dealings with their Government."[75] Here, Respondents, acting within their authority, enrolled Petitioners as members of the

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[73] *Id.* at *2.
[74] *Walsonavich v. United States*, 335 F.2d 96, 101 (CA3 1964) (*citing Ritter v. United States*, 28 F.2d 265 (3rd Cir. 1928)).
[75] *Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 61 (1984).

Tribe. The principles of decency, honor, and reliability estop Respondents from disenrolling Petitioners.

III. CONCLUSION

Petitioners respectfully request that this Court reverse Respondents' Disenrollment Decisions and remand this matter for reinstatement of Petitioners to the Grand Ronde Tribal Roll.

DATED this 30th day of March, 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 March 30, 2016, I caused the foregoing document(s) to be filed with the above referenced court via hand delivery and to the following via U.S. Mail, Certified Return Receipt and email:

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 30th of March, 2016.

Molly A. Jones

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Attorney for Petitioners

Date March 30, 2016

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

FURTHER EXCERPTS OF RECORD

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Cascade Locks
and the
Confederated Tribes of the Grand Ronde Community

Daniel L. Boxberger
April 2006

Introduction

The Confederated Tribes of the Grand Ronde Community include cultural heirs of succession to the Wah-lal-la or Cascade Indians whose traditional territory included the Cascades of the Columbia River. By treaty of January 22, 1855 the territory lying in the northeast portion of the ceded lands included "...to the summit of the Cascade Mountains, thence along said summit northerly, to the middle of the Columbia River, at the Cascade Falls, and thence down the middle of said river to the place of beginning." The *Treaty with the Kalapuya, etc.* (10 Stats., 1143) was signed by "Tum-walth and O-ban-a-hah, chiefs of the Wah-lal-la band of Tum-waters." This report will focus on the establishment of the Grand Ronde traditional use rights of the Cascade Locks area and the factors involved in their subsequent restriction of continued use of the area.

Several historical factors are important to consider in establishing the focus of this report.

1. The 1855 Treaty with the Kalapuya, etc. did not include reserved fishing and hunting rights on ceded lands as did other treaties completed at about the same time, (e.g., Treaty with the Tribes of Middle Oregon, 1855).
2. Although members of the Grand Ronde community continued to fish at the Cascades, the construction of Bonneville dam in the 1930s restricted continued access to traditional fishing sites and other cultural properties.
3. Grand Ronde tribal status was terminated in 1954, abrogating treaty rights and dissolving the reservation.
4. The Grand Ronde Restoration Act of 1983 restored federal recognition and treaty rights specifically excluding any fishing and hunting rights.

The above, considered with the factor of time, that is, that nearly seventy years have elapsed since the inundation of the Cascades and over fifty years since termination, limits the number of tribal members having direct experience with traditional use practices of the Cascades area. Therefore this report primarily focuses on archival data and oral histories previously gathered. Some oral histories were collected but the bulk of the information contained herein will focus on historical and ethnographic information.

Nevertheless, some Cascades removed to the Grand Ronde Reservation and through the continuation of intermarriage descendents of Cascades Indians are found on all three reservations and in off-reservation communities as well. "Upper Chinookans from down the Columbia, for example, from Hood River, were becoming assimilated to the Wasco group while they lived at Warm Springs; Indians from the Cascades and White Salmon were similarly assimilating to the category "Wishram" at Yakima and Spearfish" (French 1961:373-374).

Virginia Miller, the daughter of Tum-Wulth mentioned above, married a non-Native and homesteaded near Cascade Locks. She died in 1928 and was buried in the Cascade Locks cemetery (*The Dalles Optimist*, July 13, 1934:6). Descendents of Tum-Wulth are part of the Grand Ronde Community to this day.

The result of the Cascades conflict was that the Cascades Indians were diminished in number, the adult male population nearly gone and they could no longer exist as a viable community. The only option was for individuals to join other communities which would include Wishram, Wasco, Grand Ronde and non-Indian communities.