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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

JIM E. SCUDERO, Petitioner, v. JEFF MORAN, DANIEL MARSDEN, SR., ALBERT SMITH, BYRON HAYWARD, WILLIAM WILSON, DANIEL WILLIAMS, LOUIS WAGNER, RICHARD HUDSON, SR., CONNIE DARLING, RACHAEL ASKREN, GAVIN HUDSON, TIM WILLIAMS, Respondents.	Case No.: 5:16-cv-00005-JWS MOTION TO DISMISS

Motion to Dismiss

According to the Federal Rules of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim), Respondents move to dismiss the Petition with prejudice.

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Certification of Conferral

Between September 14 and 19, 2016, counsel for Respondents conferred with Petitioner's counsel regarding the issues raised in this Motion, but were unable to resolve any of these issues.

Introduction

At its core, Mr. Scudero's Petition asks this Court to do what no court anywhere has done or has even come close to doing: use the exceptional remedy of a habeas writ to relieve him of potentially having to pay courts costs arising from his losing effort in tribal court. Petitioner's Petition has no merit.

Under prevailing and well-settled law concerning a request for habeas relief under the Indian Civil Rights Act, a necessary factual predicate is a Tribe's unlawful detention of a tribal member, which usually stems from some form of underlying criminal activity. In some cases, a tribal member's *permanent* banishment from a Tribe's membership and reservation lands can support a request for habeas relief.

Here, Petitioner has not been charged with any crime, has not been detained in any manner, has not be banished, lives on tribal lands, freely moves about those tribal lands, and otherwise enjoys all the benefits of tribal membership. Moreover, Petitioner's alleged "detention" - which is a cost bill arising from the unsuccessful lawsuit Petitioner brought against the Metlakatla Indian Community in tribal court – *has not even been resolved.* Also, despite having the opportunity to challenge the Community's request for costs in tribal court, Petitioner has failed to do so. Instead, Petitioner chose to bypass the tribal-court process entirely by filing his Petition.

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Significantly, there is no legal authority to support Petitioner's Petition. The law is clear about the kinds of factual scenarios that support habeas petitions and equally clear about what circumstances do not. In that regard, there is no reasonable interpretation of the applicable law that would support Petitioner's strained rationale for his Petition. That is so because in his case there has been no "detention," no due process violation, and no imposition of a cost bill. Despite these undisputed facts and total absence of legal authority, Petitioner nonetheless filed this federal court action, forcing the Respondents to incur additional expenses in defending Petitioner's meritless claim. Under these circumstances, Respondents respectfully request that this Court dismiss Petitioner's Petition with prejudice.

Legal Standard

Federal courts are courts of limited jurisdiction, possessing only the power to hear matters authorized by the Constitution and statutes enacted by Congress. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). If authority does not exist, a court lacks subject-matter jurisdiction, and the power to consider the claim. *Id.* The burden of establishing subject-matter jurisdiction falls on the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

On a Motion to Dismiss for lack of subject-matter jurisdiction, the defendant may challenge the petition or complaint on its face, or with extrinsic evidence. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). If extrinsic evidence is introduced, a court need not take the allegations of the petition as true, and may look beyond the petition to determine whether jurisdiction exists. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

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Petitioner brings this action under 25 U.S.C. § 1303, which provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." A habeas corpus petition under § 1303 is the only available relief for a violation of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq*. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *Boozer v. Wilder*, 381 F.3d 931, 934 n.2 (9th Cir. 2004).

Points and Authorities

I. The Petition Fails to Allege Facts Sufficient to Grant this Court Jurisdiction under the Indian Civil Rights Act.

Petitioner seeks habeas corpus review based on a single action of the Metlakatla Indian Community Council: the "decision to force Petitioner to bear all costs of a Tribal Court case against the Community." Petition at 2. This alleged action (which is obviously a far cry from any sort of unlawful detention) is woefully insufficient to bestow habeas corpus jurisdiction upon this Court – and Petitioner's characterization of the action is entirely inaccurate.

To establish jurisdiction under 28 U.S.C § 1303, a habeas petition must show that: (1) the petitioner is in custody; and, (2) the petitioner exhausted all tribal remedies. *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010). While actual *physical* custody is not a jurisdictional prerequisite for habeas review, to establish "detention" without physical custody, a petitioner must show that alleged "conditions and restrictions . . . significantly restrain [petitioner's] liberty." *Id*. at 919 (internal quotations omitted). In other words, a petitioner must show "a severe actual or potential restraint on liberty." *Id.*

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In *Jeffredo*, the Ninth Circuit addressed a habeas petition based on petitioners' disenrollment from the Pechanga Band of Luiseno Mission Indians. 599 F.3d at 915. After disenrollment, petitioners were "denied access to the Senior Citizens' Center, [denied access] to the health clinic, and their children [could] no longer go to tribal school." *Id* at 918-19. Petitioners argued that disenrollment and the accompanying denial of access to tribal facilities was a "severe actual . . . restraint on liberty" amounting to detention. *Id.* The Ninth Circuit disagreed, holding that:

> [T]he denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty. Appellants have not been banished from the Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation.

Id.

In so holding, the Ninth Circuit commented favorably on *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708 (2d Cir. 1998). In that case, the Second Circuit determined that "restraints" such as loss of one's "voice" in the community, loss of health insurance, loss of access to tribal health and recreation facilities, loss of quarterly distributions, and loss of place on membership rolls were "insufficient to bring plaintiffs within ICRA's habeas provision." *Id.* at 714. In reaching their decisions, both the Ninth and Second Circuits distinguished the cases before them from *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 884 (2d Cir. 1996), *cert denied*, 519 U.S. 1041 (1996). In *Poodry*, petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost all rights afforded tribal members.

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Unsurprisingly, the Second Circuit characterized that punishment as "considerably more severe than the punishments alleged by plaintiffs" in *Shenandoah*. *Shenandoah* 159 F.3d at 714. *See also*, *Jeffredo*, 599 F.3d at 919 (noting that petitioners had "not been convicted, sentenced, or permanently banished," and holding that petitioners' limitation on access to certain facilities [did] not amount to "detention").

In sum, under *Poodry*, *permanent* banishment and *permanent* loss of membership rights is enough to trigger § 1303 jurisdiction. However, under *Jeffredo* and *Shenandoah*, the following restrictions were insufficient: disenrollment from the tribe and an attendant loss of access to tribal facilities; loss of "voice" in the tribal community; loss of health insurance; and, loss of quarterly distributions. *Jeffredo*, 599 F.3d at 919; *Shenandoah*, 159 F.3d at 714.

Furthermore, none of the Ninth Circuit district court cases applying *Jeffredo* have found § 1303 jurisdiction absent actual physical custody. In that regard, courts found jurisdiction lacking when a tribe failed to certify a member as a candidate for tribal office, *Lewis v. White Mountain Apache Tribe,* Case No. 12-8073, 2013 WL 510111 (D.Az. Jan. 24, 2013),[1] and when petitioner was both disenrolled and evicted from tribal housing. *Quitiquit v. Robinson Rancheria Citizens Business Council*, Case No. 11-0983, 2011 WL 2607172 (N.D.Cal. July 1, 2011). Courts have even dismissed for lack of jurisdiction when tribal members were banned from reservation lands, but the banishment was only temporary. *Tavares v. Whitehouse*, Case No. 13-CV-02101, 2014 WL 1155798 (E.D.Cal. March 21, 2014) (holding that habeas relief was improper when

[1] In an unpublished opinion, the Ninth Circuit affirmed and noticed that restrictions on candidacy "d[id] not create a deprivation of liberty similar to the types of infringement *on personal movement* previously recognized as establishing federal habeas corpus jurisdiction." *Lewis v. White Mountain Apache Tribe*, 584 Fed.Appx. 804 (9th Cir. 2014).

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petitioners were banned "from all tribal lands and facilities" for periods of four and ten years, and per capita distributions from casino were withheld for six months and four years). As the court noted in *Tavares*, decisions on this issue reflect that "short of an order of permanent banishment, federal courts have been reluctant to find tribal restraints severe enough to warrant habeas review." *Id*. at *11 (quotations omitted).

Despite the clarity of the above-cited authorities, under his First Claim for Relief Petitioner asks this Court to entertain § 1303 habeas corpus jurisdiction because Respondents elected to pursue a right granted to them by statute: the recovery of costs as a prevailing party in litigation. In that regard, Title Two, Chapter 1 of the Metlakatla Law & Order Code (Civil Jurisdiction) states that: "[t]he Magistrate may award costs to the prevailing part and to the Court, which shall be assessed against the losing party and shall include the expenses and fees of witnesses, jurors and any incidental expenses connected with any Court procedures." SECTION TWO.1.17(E).

On December 21, 2015, after a closed session during which the Community Council and its attorney discussed Petitioner's tribal court lawsuit, the Community Council instructed its attorney to seek costs under that provision should it prevail against Petitioner's Complaint in Magistrate's Court.[2] Declaration of Christopher Lundberg ("Lundberg Decl."), ¶ 2, Exhibit 1. Importantly, at that meeting, the Council did not "award" costs. Rather, it simply authorized its

[2] It appears that Petitioner's claim is based in part on the Community Council's closed session with its attorney to discuss Petitioner's tribal court lawsuit. Given that this communication was obviously a privileged communication under the attorney/client privilege, it is difficult to understand why Petitioner, an adverse party to the Community in the very same tribal court lawsuit, has asserted in this case that he had a "due process" right to attend and be heard at that meeting. In fact, Petitioner's unreasonable use of that meeting to support his claim underscores the total lack of factual support for his Petition.

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attorney to seek cost recovery in the event that Petitioner's lawsuit was unsuccessful. After this Council meeting, Mr. Scudero was informed of the Council's action, including specifically Council's instruction to seek recovery of costs through the judicial process. Lundberg Decl. at ¶ 3, Exhibit 2. Following Magistrate *Pro Tem* Steckel's dismissal of Petitioner's Complaint with prejudice, and according to the cost-recovery ordinance and the Council's previous instruction, the Community filed its Motion for Costs, a motion that is still pending and that has not yet been decided.[3] Lundberg Decl. at ¶ 4, Exhibit 3.

Permanent banishment is the only non-custodial restriction on liberty held by the Ninth Circuit to constitute such a "severe restraint on liberty" sufficient to justify § 1303 jurisdiction. Disenrollment is not enough. Eviction from tribal housing is not enough. Not even temporary banishment from the reservation for *ten years* is enough. *See, e.g., Tavares*, 2014 W.L. 1155798 at *10, 12. Petitioner's attempt to equate an unresolved request to recover costs as a prevailing party with a "detention" is so far outside the realm of any reasonable interpretation of applicable case law that the Petition borders on frivolous. Because Petitioner's allegations are not enough to invoke this Court's jurisdiction, this Court should dismiss Petitioner's First Claim for Relief with prejudice.

Petitioner's Second Claim for Relief relies on an even more strained and unsupported rationale for § 1303 jurisdiction – namely that if Petitioner does not pay the pending cost bill, he would not be allowed to vote in Community elections. Again, there is absolutely no legal support for Petitioner's speculative claim because his claim does not come close to allegations of

[3] There is nothing unusual about the Community's decision to seek recovery of its costs after prevailing in tribal court. In that regard, had the matter been litigated in federal court, the Community would have had the right to request costs under FRCP 54(d)(1), or if in Alaska state court, under Alaska Court Rule 79.

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permanent banishment. In fact, Petitioner's claim is not even close to the magnitude of the severity of other restrictions held by various courts as insufficient to confer jurisdiction, such as permanent disenrollment.

In some instances, the "collateral consequences" of a detention, such as the right to vote, *might* be enough to confer habeas corpus jurisdiction. *See Carafas v. LaVallee*, 391 U.S. 234 (1968). However, the collateral consequences doctrine does not state that the "collateral consequence" itself is enough to confer jurisdiction. Rather, the existence of a collateral consequence is simply enough to prevent a habeas case from being moot if the petitioner is released from custody while a habeas petition, brought while the petitioner was incarcerated, is pending. *Maleng v. Cook*, 490 U.S. 488, 492 (1989). Indeed, in *Maleng*, the Supreme Court held that once a petitioner is fully released from custody, the "in custody" requirement is not met, regardless of remaining consequences of the conviction: "the collateral consequences of [a] conviction [such as inability to vote] are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack." *Id.* Under *Jeffredo* and *Maleng*, the possibility that Petitioner may not be allowed to vote in a future election for failure to pay a pending cost bill is not enough to confer jurisdiction under § 1303.

Regardless, the speculative nature of Petitioner's allegations (*i.e.* the *possibility that* he might be ordered to pay costs, that he might not pay those costs and that he might be prohibited from voting) precludes § 1303 jurisdiction. In that regard, the Ninth Circuit has held that the mere threat of *incarceration* for failing to pay a fine is not enough to trigger habeas corpus jurisdiction. *Edmunds v. Won Bae Chang*, 509 F.2d 39 (9th Cir. 1975). Petitioner's speculative claim falls far short of what is required to establish this Court's jurisdiction.

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Because Petitioner's First and Second Claims for Relief fail to meet the "in custody" requirement necessary to invoke § 1303 jurisdiction, the Petition should be dismissed with prejudice.

II. Petitioner Failed to Exhaust Tribal Remedies.

As set forth above, Petitioner has not met the "in custody" requirement for jurisdiction under § 1303. While dismissal is proper on that basis alone, dismissal is also proper because Petitioner failed to exhaust tribal remedies. Exhausting all tribal remedies is a prerequisite to jurisdiction under § 1303. *Jeffredo v. Macarro*, 599 F.3d at 918. The Petition is based entirely on the potential imposition of court costs on Petitioner. Ignoring for the time being that no costs have actually been imposed on Petitioner and that his claim is not ripe for adjudication, *see* Lundberg Decl. at ¶4, Exhibit 3, Petitioner never filed an opposition to Respondent's Motion for Costs in tribal court. If Petitioner had done so, he could have made many of the arguments he is making here for the tribal court's consideration. Petitioner's failure to submit a simple opposition is a failure to exhaust tribal remedies. As a result, Petitioner should be prohibited from invoking § 1303 jurisdiction for that reason as well. *See, Jeffredo*, 599 F.3d at 918.

III. The Petition is not Ripe.

In the alternative, the Petition should be dismissed because it is not ripe. A fundamental aspect of the judiciary is that it can only adjudicate live cases and controversies; if a claim is not ripe, it cannot be adjudicated. *Texas v. United States*, 523 U.S. 296 (1998). A "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 300-01.

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In this case, the Petition rests entirely on a cost judgment that has not in fact been imposed, and may not ever be. *Pro Tem* Magistrate Steckel *has not yet ruled* on Respondent's Motion for Costs, and Petitioner does not have a money judgment against him in any amount. Lundberg Decl. at ¶ 4, Exhibit 3. Because the Petition is not ripe, this Court should dismiss Petitioner's First and Second Claims in their entirety.

Conclusion

Because Mr. Scudero's Petition lacks legal and factual support, Respondents respectfully request that this Court dismiss Petitioner's Petition in its entirety and with prejudice.

DATED this 19th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2016, I served the foregoing Motion to Dismiss**,** on the following:

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by the following indicated method(s):

☐ by **mailing** a full, true and correct copy thereof in a sealed first-class postage prepaid envelope, addressed to the foregoing attorney at the last known office address of the attorney, and deposited with the United States Post Office at Portland, Oregon on the date set forth above.

☐ by causing a full, true and correct copy thereof to be **hand delivered** to the attorney at the last known address listed above on the date set forth above.

☐ by sending a full, true and correct copy thereof via **overnight mail** in a sealed, prepaid envelope, addressed to the attorney as shown above on the date set forth above.

☐ by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office on the date set forth above.

☒ by transmitting full, true and correct copies thereof to the attorneys through the court's Cm/ECF system on the date set forth above.

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