

**Christopher Lundberg**, OSB No. 941084

Email: [clundberg@hk-law.com](mailto:clundberg@hk-law.com)

**Joshua J. Stellmon**, OSB No. 075183

Email: [jstellmon@hk-law.com](mailto:jstellmon@hk-law.com)

**HAGLUND KELLEY LLP**

200 S.W. Market Street, Suite 1777

Portland, Oregon 97201

Phone: (503) 225-0777

Facsimile: (503) 225-1257

Attorneys for Respondents

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

RESPONDENTS' REPLY IN SUPPORT OF  
ITS MOTION TO DISMISS

**I. Petitioner's Response Confirms the Frivolous Nature of His Petition.**

Rather than satisfactorily rebut any of Respondent's arguments for dismissal, Petitioner's Response actually highlights the frivolous nature of his petition. That is so because Petitioner's Response is full of irrelevant arguments and a severe misinterpretation of facts. Yet, his Response is wholly void of any substantive argument to meaningfully distinguish his case from

Page 1 – REPLY

Scudero v. Moran, et al.,

USDC Case No. 5:16-cv-00005-JWS

HAGLUND KELLEY LLP  
ATTORNEYS AT LAW  
200 SW MARKET STREET, SUITE 1777  
PORTLAND, OR 97201  
PL03

the numerous other losing federal cases brought under the Indian Civil Rights Act involving far greater restraints than a not-yet-imposed award of court costs. As explained below and in Respondents' Motion to Dismiss, Respondents respectfully request that Petitioner's Petition be dismissed in its entirety and with prejudice. Additionally, given the totally baseless nature of Petitioner's Petition, particularly in the light of the numerous factual errors and lack of legal authority for his position, should the Court grant Respondents' motion, Respondents request leave to file a post-dismissal motion for recovery of its costs and attorney's fees from Petitioner's attorney under FRCP 11.

## **II. Petitioner Continues to Mischaracterize the "Fine."**

To be clear, Petitioner is not subject to any "fine" related to his case brought in tribal court. Petitioner has offered no evidence to the contrary because that fact is true and cannot be disputed. Moreover, the potential financial liability that Petitioner labels as a "fine" is in fact a pending Motion for Costs made under SECTION TWO.1.17(E) of the Metlakatla Indian Community Law & Order Code, which unremarkably allows a prevailing party in litigation to seek recovery of costs.

With no factual support at all, Petitioner grossly mischaracterizes the nature of this circumstance by contending that Respondent "decided to force Petitioner to bear all costs of a Tribal Court case against the Community without providing Petitioner an opportunity to be heard . . ." Response at 2. In fact, the Tribal Council simply voted to seek recovery of its costs under SECTION TWO.1.17(E) in the event it prevailed in front of Magistrate *Pro Tem* Steckel, who

has not yet resolved that pending motion.<sup>1</sup> Importantly, as to the alleged due process violation, Petitioner again grossly misconstrues the situation in arguing that he has been denied his due process right to challenge the Community's cost motion when in fact Petitioner voluntarily chose not file an opposition to that Motion.<sup>2</sup>

### **III. Petitioner's Substantive Arguments Are Unreasonable and Frivolous.**

Perhaps knowing that a court-imposed order to pay costs is woefully insufficient to invoke a Writ of Habeas Corpus, Petitioner twists reality by contending that he actually faces a fine and then relies on that falsity to contend, without any factual support or legal authority, that the imposition of a "fine" amounts to a denial of the right to vote. As stated in Respondents' Motion to Dismiss, to even begin considering that contention this Court must speculate several times over, as follows: First, will Judge Steckel impose costs? Next, will Petitioner fail to pay those costs? And lastly, will his failure to pay those costs lead to the Community denying him the right to vote? This level of speculation alone precludes § 1303 jurisdiction.

Regardless, Mr. Scudero's Petition is obviously improper as a matter of law. In that regard, Petitioner acknowledged that "[t]he federal case law remains silent on whether or not the right to vote rises to the level of restraint on personal liberty." Response at 7. Notwithstanding, Petitioner rests his entire argument on a single sentence of dicta from the *Tavares* case, which noted that, among other reasons for not having reached the severe-restraint threshold given the

---

<sup>1</sup> Petitioner takes the position that Judge Steckel is ruling on "whether or not to pay himself." That's simply not true. The Community's Motion for Costs is based in part on costs billed by and actually paid to the Northwest Intertribal Court System.

<sup>2</sup> In yet another example of a severe misstatement of fact, Petitioner described his ability to challenge the Community's Motion for Costs as an appeal of the Tribal Court's dismissal order. First, as noted above, the Community's Motion for Costs is still pending and Petitioner is entitled to file his objections to that request. Second, even if the cost motion were a final order, which it is not, as Petitioner has conceded, he was afforded the right to appeal and again, has voluntarily opted not to exercise that right. Response at 8, n. 7.

temporary banishment suffered on the Petitioner in that case, the “Petitioner retained the right to vote through absentee ballot.” *Tavares v. Whitehouse*, No. 2:13-CV-02101-TLN, 2014 WL 1155798, at 10 (E.D.Cal. March 21, 2014). Focusing on that sentence, without more, is yet another example of Petitioner’s unreasonable effort in bringing this case.

In fact, in so arguing Petitioner not only ignores controlling Ninth Circuit precedent, he ignores the very case he cites. Specifically, the Court in *Tavares* observed 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 (no habeas jurisdiction even though tribal members were banned from “all tribal lands and facilities” for periods of four and ten years). *See also*, Motion to Dismiss at 5-7; *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010); *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708 (2d Cir. 1998). Here, Petitioner has not been banished in any respect, nor has he suffered any restraint whatsoever. Hence, in failing to even address the most important factual predicate to jurisdiction in non-detention cases brought under the Indian Civil Rights Act – namely, a severe restraint on Petitioner’s liberty that is at least on par with a permanent banishment – Petitioner effectively has conceded the legal failure of his Petition.

In his Response, Petitioner suggested that this matter should proceed because it is “complicated.” Response at 2. In reality, this matter is complicated only in so far as Petitioner continually relies on gross mischaracterizations of the facts and wholly unreasonable interpretations of the applicable law, all of which plainly reflect this simple reality: the Petition *never* had a legitimate basis in law or fact. The Petition should be dismissed.

///

///

## **II. Nothing in this Case Warrants Recusal of Counsel.**

Having no legal authority and no factual support, Petitioner's Response dedicates nearly half of his brief on a misguided argument for the recusal of Respondent's attorneys. Again, Petitioner's arguments hold no water.

Petitioner appears to argue that attorney Christopher Lundberg should "remove himself immediately" because Respondents should have been told to seek individual counsel, and there is a conflict because Mr. Scudero "pays" for Mr. Lundberg's services by virtue of his membership in the Metlakatla Indian Community. Response at 3-5. Once again, Petitioner grossly overstates the conflict rules, which uniformly agree that a lawyer who represents an organization, such as a tribal entity, does not by virtue of that representation alone, represent any individual constituent. *See, e.g., Alaska Rules of Professional Conduct (ARPC) Rule 1.3, Official Commentary* (stating that: "A lawyer who represents a corporation or other organization does not, by virtue of that representation alone, represent any constituent . . .").

Further, while the Community itself was not sued, Respondents are necessarily sued in their representative, official capacity. *See, e.g., Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899 (2d Cir. 1996) (proper respondent in habeas actions are the *officials* responsible for the alleged "detention;" in that case, the tribal officials who, acting in their official capacity, have the power to lift banishment orders). *See also ARPC Rule 1.13* (related to Organization as Client, which specifically authorizes representation in this situation).

Even more troubling, however, is Petitioner's arguments as to Mr. Stellmon's recusal. Response at 5, n.2. In that regard, Petitioner grossly misrepresented the material facts. Mr. Stellmon serves with Mr. Lundberg as general counsel for the Metlakatla Indian Community.

Earlier this year Mr. Stellmon represented the Community in an out-of-state matter in which the *Community's interests* were aligned with Mr. Scudero and Mr. Scudero's wife. Declaration of Joshua J. Stellmon ("Stellmon Decl."), ¶ 3. Throughout that matter, Mr. Stellmon made it clear, either to Mr. Scudero directly or to Mr. Scudero's wife, that while the Community's interests were aligned with the Scuderos, Mr. Stellmon did not represent them. *Id.* In fact, Petitioner was well aware of that fact, as reflected by his "pro se" signature on documents filed with the court, and his signing of a "Waiver of Right to Independent Counsel" document, also filed with the court. *Id.* ¶¶ 4-5, Ex. A & B. Petitioner's representation to this Court that he was personally represented by Mr. Stellmon is simply incorrect.

### **III. Conclusion.**

This is the third lawsuit brought by Mr. Scudero related to his loss in the 2015 Metlakatla Indian Community mayoral election. His first case was brought in tribal court (*Scudero et al v. Metlakatla Indian Community, et al.*, Case No. 15-330), and ultimately dismissed with prejudice. His next case was brought in this court, and was ultimately voluntarily dismissed after this Court issued a stern warning in its *sua sponte* Order to Show Cause regarding jurisdiction that, should Mr. Scudero continue, "if Defendants prevail in [that] action, Plaintiffs may be ordered to pay costs and/or attorney's fees to Defendants." *Scudero et al v. Metlakatla Indian Community et al*, No. 15-cv-00005-JWS, Docket #6, 9 (D.Ct. AK April 1, 2016) Petitioner's third case is this one currently before this Court. It should be his last. Mr. Scudero's Petition has zero basis in law or fact, and the Community respectfully requests that it be dismissed in its entirety and with prejudice.

///

Lastly, in the event this Court grants Respondents' motion, Respondents request leave to file a post-dismissal motion for recovery of its costs and attorney's fees against Petitioner's attorney under FRCP 11.

DATED this 24<sup>th</sup> day of October, 2016.

**HAGLUND KELLEY LLP**

By: /s/Christopher Lundberg  
Christopher Lundberg, OSB No. 941084  
Pro hac vice application pending  
Email: [clundberg@hk-law.com](mailto:clundberg@hk-law.com)  
Joshua J. Stellmon, OSB No. 075183  
Pro hac vice application pending  
Email: [jstellmon@hk-law.com](mailto:jstellmon@hk-law.com)  
Attorneys for Respondents

## CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> day of October, 2016, I served the foregoing  
RESPONDENTS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS, on the following:

Joseph J. Wheeler, Jr.  
Wheeler Firm  
1601 5<sup>th</sup> Avenue, Suite 1100  
Seattle, WA 98101  
info@thewheelerfirm.com  
(888) 705-6775

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.

/s/Christopher Lundberg  
Christopher Lundberg, OSB No. 941084  
Attorneys for Respondent