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Attorneys for Specially Appearing
"Respondents" STEPHANIE BROWN,
AGUSTIN GARCIA, SARAH BROWN GARCIA,
LEORA JOHN and NATHAN BROWN II,
in their official capacities as members of the Elem
Indian Colony of Pomo Indians Executive Committee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
AT SAN FRANCISCO

John Sr., Adrian; Morinda, Barbara; Brown, Batsulwin; Sloan, Bonnie; Sloan, Carrie; Brown, Cecil; Mota Jr., Cliff; Brown, David; Brown, Elvina; Sloan, Ermadina; Johnson,Geraldine; Brown III, James P.; Wright, James; Brown, Jessica; Brown, Kiuya; John, Ko-E-Ya; Morinda, Martha; Brown, Marvin; Brown, Michael; Sloan, Natasha; Appricio, Nickle; Brown, Rose; Brown, Sharon; Brown, Piyaco; Brown Jr., Ray; Geary, Robert; Morinda, Roxann; Mota, Verdeana; Mota, Wah-Lia,

Petitioners,

v.

Brown, Stephanie; Garcia, Agustin; Garcia Brown, Sarah; John, Leora; and Brown II, Nathan, in their official capacities as the purported members of the Executive Committee of the Elem Indian Colony of Pomo Indians,

Respondents.

Case No. 3:16-cv-2368-WHA

RESPONDENTS' REPLY TO OPPOSITION TO MOTION TO DISMISS

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

Date:	December 14, 2017
Time:	8 30 a.m.
Courtroom:	8, 19th Floor
Judge:	Hon. William H. Alsup

I. INTRODUCTION

Petitioners' opposition does not change the analysis presented in Respondents' initial motion to dismiss. (Dkt 35). Further, during the time between the filing of the Dkt 35 and this revised motion, Petitioners allegations of ICRA confinement have been, not surprisingly, proven unfounded. As is common in an intra-tribal dispute, Petitioners resort to casting aspersions toward their enemies—the Respondents, the lawful Executive Committee of the Elem Tribe.

Much of the opposition dissects Respondents' alleged conflicting "stories" regarding their actions toward Petitioners. Much of the opposition focuses on statements made at the hearings on the initial (August 30, 2016) and amended motion to dismiss hearings (February 2, 2017). The initial hearing resulted in the grant of Respondents' first motion to dismiss, but with leave to amend. (Dkt 23). The amended motion hearing resulted in the Court's order of three (3) depositions of Lake County Indian Tribal Health employees, which found no smoking gun with regards to denied medical care. (See Depositions attached to Revised Motion to Dismiss). Petitioners request for additional discovery was denied. (Dkt 65). Additionally, the Tribe has since rescinded its desire to "disenroll" Petitioners. In sum, Petitioners case, if they had a case to begin with, has been eviscerated.

The law is not on Petitioners' side. Petitioners' lengthy discussion of the allegedly conflicting stories and counsel's statements are irrelevant to Respondent's main arguments as to why the Petition should be dismissed: 1) Petitioners have never been "detained," so habeas jurisdiction is lacking; 2) Petitioners' justifications for not exhausting tribal remedies are fradulent; 3) sovereign immunity bars what is essentially a declaratory relief action alleging due process violations; and 4) the court lacks jurisdiction over an intra-tribal squabbles like this one. For these reasons, the motion to dismiss should be granted.

II. ARGUMENT

A. Petitioners' Lengthy Factual Discussion Detracts From Three Main Questions: Is this a Habeas Case? Is It Ripe for Review? Is it Barred By Sovereign Immunity?

The animosity in this case is obvious. It has resulted in as many as four (4) separate litigations costing the Tribe thousands of dollars in legal fees and court costs. Petitioners challenge the motives of Respondents. Petitioners attempt once again to convince the Court that Respondents are "bad" and Petitioners are the "good." Yet that simplistic dichotomy does not help the Court. The true question is: "Is this a habeas case", or one that "seeks declaratory relief that seeks to prevent Petitioners from being banished or evicted from Elem Tribal lands?"

The Court need not consider Petitioners' lengthy factual discussion as to Respondents' motives. Instead, the Court must resolve four core legal issues involving 1) "detention" for habeas purposes; 2) the exhaustion of tribal remedies; 3) sovereign immunity; and 4) the justiciability of an intra-tribal dispute.

B. The Threat of Future Eviction or Removal by the Petitioners Is not Sufficient to Prove Custody Under ICRA's Section 1303

Petitioners allege that nothing has changed and that they still face a *future possibility of being evicted* from the reservation and such *possibility* translates into federal court review under section 1303 of Title 25 of the United States Code. Dkt. 37 at p. 13. Petitioners spend most of their energy in their opposition briefing lambasting a letter provided by the Tribe that rescinds the option of disenrollment as being "self -serving", even though Respondent's have always maintained disenrollment never occurred. Petitioners' argument is completely disingenuous to the record.

As Petitioners well know, Tribal Chairman, Agustine Garcia, testified, under oath, before the court and Honorable Judge William H Alsup, Respondents and members of the Department of the Interior and Interior Solicitor's office, that the Tribe has no plans to disenroll Petitioners and that Petitioners remain safe in their homes on the reservation. (Dkt 2/2/17, Motion to Dismiss Hearing Transcript pp 93:19-97:4). Petitioners argument that they continue to be *threatened*, belies the plethora of evidence to the contrary.[1]

Further, the letter attached to the declaration of Sarah Garcia is consistent with the sworn testimony provided by Chairman, Garcia- that disenrollment is formally off the table.

Petitioners allegations that they are subject to *immediate eviction* pursuant to the Tribe's Land Ordinance 71-1, is again laughable and a distortion of reality. Further: (1) disenrollment has not occurred (see above) and (2) any action for eviction or removal from the reservation requires the invocation of the due process procedures at Section VII, "Cancellation of Assignments," in Tribal Land Ordinance 71-1. This section requires due process, notice and an opportunity to be heard for "the removal of any person from the territory of the Rancheria," which can be "ordered after written notice and an opportunity to be heard." *Id*., Sec. VII, Request for Judicial Notice. (Dkt. 35, Exch. 6, Decl. of A. Garcia, Land Ordinance Section 5.)

[1] Petitioners arguments that the submitted article "has not been authenticated" is nothing less than shocking. If Petitioners do not want their Counsel's representations to be used against them, they should not openly seek publicity or allow their counsel to go on the record of any publication. Further, the article's authenticity cannot be disputed and Respondents have sought a Request for Judicial Notice of the article pursuant to the Federal Rules of Evidence.

Petitioners allege that because they have been unilaterally disenrolled that they are not subject to the Land Ordinance's due process requirements is a legal *sleight of hand*.[2] The Land Ordinance requirements are clear—notice and an opportunity to be heard are required for any removal from the reservation. Further, Petitioners' own counsel, Little Fawn Boland, hearing testimony confirms the exact opposite. Boland has stated under oath during the February 2, 2017 hearing that: "No evictions have taken place."[3] (See Hearing Transcript at pp. 93).

Although Petitioners theorize that such action is imminent, even if the Court were to believe Petitioners claims, *prospective* eviction cannot be the basis of habeas jurisdiction under section 1303. In *Jeffredo v Maccaro*, 599 F.3rd 959 (9th Cir. 2010), petitioners made identical claims to imminent eviction as Petitioners make here. The Court in finding prospective action was not sufficient to meet the confinement requirement stated:

> "[A]ppellants contend that as non members they are 'under a continuing threat of banishment/exclusion.' No court has held that such a threat is sufficient to satisfy the detention requirement of § 1303. The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate."
>
> *Id*. at 919, citing *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973).

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[2] Petitioners put the cart before the horse here, the Disenrollment and Land Ordinance are separate Tribal Ordinances with separate due process requirements. As disenrollment has been rescinded any action pursuant to the Land Ordinance requires compliance with Section 5.

[3] THE COURT: Has anyone been evicted from their residence on account of the disenrollment?
MS. BOLAND: No, Your Honor.

> "Applying this principle, we previously held that a threat of confinement is not severe nor immediate enough to justify the writ. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 40-41 (9th Cir.1975) (denying habeas relief under 28 U.S.C. §§ 2241, 2254). In *Edmunds*, the petitioner was subject to a court-imposed fine, which could be enforced by jail time. *Id.* at 41. The court held, however, that until confinement is imminent (like the confinement in *Hensley*) there can be no justification for use of the habeas corpus remedy. *Id.* We see no reason not to analogize to the court's construction of the criminal habeas corpus provisions in *Edmunds*. Therefore, we hold that the potential threat of future eviction is not sufficient to satisfy the detention requirement of § 1303."

Jeffredo, 599 F.3rd at 919.

Petitioners' allegations are identical to those struck down in *Jeffredo* as not sufficient for detention purposes. Petitioners have not met the detention requirement of section 1303 and Respondent's Motion to Dismiss should be granted. Put simply, Petitioners fail to distinguish *Jeffredo*.

Petitioners also cite any array of cases to try to cobble together "detention" and hence jurisdiction under the Indian Civil Rights Act. These cases are easily distinguishable. *Sweet v. Hinzman*, 634 F.Supp 1196 (W.D. Wash. 2008), relied upon by Petitioners, is a "banishment action." *Id*. at 1198. That is, petitioners were actually banished. Here, Petitioners only received a "notice of disenrollment" that has not occurred under sworn testimony. This is a very important distinction that Petitioners again ignore in their blind reliance on *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996)—a banishment case. Since there is no "banishment decision" at issue here, *Sweet* does not help Petitioners. Further, the second case *Sweet v. Hinzman* case is also not helpful to Petitioners because it involved banishment and removal from membership. 2009 U.S. Dist. LEXIS 36716, *3 (W.D. Wash. 2009). Petitioners alleged various due process and equal protection violations under ICRA. *Id*. The court denied petitioners' equal protection claim, *id*. at *20, but granted their due process claim. *Id*. at * 26. Tellingly, unlike here,

there was no dispute among the parties that banishment affects the liberty interests of petitioners. *Id*. at * 21. Again, the instant case does not involve banishment, thus the second *Sweet* case does not support Petitioners' argument that the motion to dismiss should be denied.

Next, *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948 (9th Cir. 1998) is not germane and easily distinguishable. *Selam* is a criminal case involving a Tribe member who molested 10 and five-year old Indian girls on Tribal land. *Id*. at 950-51. This case sought to overturn Selam's criminal convictions based on his rights under the Indian Civil Rights Act to a "compulsory process for obtaining witnesses in his favor" in a criminal proceeding. — It has no bearing in this civil case.

Lastly, in *Taveras v. Whitehouse* (No. 2:13-cv-0201, 2015 U.S. Dist. LEXIS 37799 (E.D. Cal. March 21, 2014), petitioners unsuccessfully tried to recall a Tribal Council. *Id*. at *9. When they failed, the intact Tribal Council convicted petitioners of "defamation" and banished them "from all tribal lands and facilities," and withheld their right to certain casino profits. *Id*. at *10. The Court considered whether this punishment was "detention" under ICRA's section 1303. *Id*. at *16-17. The Court weighed the permanent banishment for treason in *Poodry* and the disenrollment in *Jeffredo* and applied the holdings in those cases to petitioners' temporary banishment and held that "their exclusion from tribal lands and suspension of gaming benefits" were not a "severe restraint on liberty to constitute 'detention' and establish jurisdiction in this case." *Id*. at *17-29. Hence, even a four-year banishment from Tribal land ***was not sufficient*** detention to create habeas jurisdiction under ICRA. Moreover, *Taveras* is miles away from the threatened but rescinded "disenrollment" at issue here. There is no detention in this case as ***there is no disenrollment, and no banishment***. *Jeffredo* and *Tavares* control and the motion to dismiss should be granted.

C. Petitioners' Excuse for Failing to Exhaust Tribal Remedies is Nonsense.

Petitioners want their cake and to eat it too. In their Opposition they now allege that Respondents rescission of the disenrollment notice is defective because it didn't comply with the Code. Yet they maintain that there are no remedies to exhaust, although the ordinance requires they *request* a hearing-which Petitioners ***admit*** they never did because they don't respect the Garcia government. A review of Petitioners' answer to the notice of disenrollment at issue here, demonstrates that Petitioners ***failed*** to request a hearing before the General Council. Dkt. 35 at pp. 15-19. Ordinance GCORD08412 at Section 5, "Answer," is clear in its requirement that the accused request a hearing and states unequivocally:

> "If a defendant fails to request a General Council hearing in the Answer, that Defendant will be deemed to have waived their right to a hearing before the General Council, which may then make a decision on the complaint without the accused's participation."
>
> Dkt. 1 (Appendix, AO1). GCORD08412 at Section 5.

During the initial hearing on Petitioners' original petition, the Court scrutinized the Petitioner's blanket answer to the Tribe's Notice of Disenrollment required by the Ordinance. Petitioners' answer merely denied any and all allegations and requested the following relief:

> "C. RELIEF
>
> WHEREFORE, I request the following relief: Vacate and Halt the Garcia Faction's proposed disenrollment and banishment."
>
> Dkt. 14-1, Declaration of L.F. Boland, Answer to Notice of Disenrollment.

Petitioners cannot now deny the ordinance as invalid on one hand, and argue on the other that they have been denied due process when they failed to comply with the Ordinance by refusing to request a hearing. Petitioners' failure to request a hearing should not be excused.

Doing so is tremendously disrespectful to tribal law.

The disenrollment ordinance is clear. Petitioners are required to request a hearing before the General Council. Petitioners' failure to invoke the due process procedures of the ordinance results in their failure to exhaust tribal remedies. Failure to exhaust tribal remedies is fatal to a habeas corpus petition. *Jeffredo*, *supra*, 599 F.3rd at 921 (citing *Iowa Mut.Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat'l FarmersUnion Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). Petitioners failed to exhaust remedies, their Petition is unripe and subject to dismissal for want of jurisdiction. [4]

1. Respondents' Requirement of a General Council hearing to Complete Disenrollment is Consistent with the Terms of the Ordinance

Petitioners discuss at length the Tribe's requirement for a General Council hearing to confirm the disenrollment of Petitioners in the absence of a properly requested hearing in Petitioners' answer to the Notice of Disenrollment. Dkt. 37 at p. 4. Respondents' insistence on a General Council hearing is consistent with Ordinance GCORD08142, as amended. As discussed previously, Ordinance Section 5 requires that the defendant request a hearing or the Council **"**may" move forward to decide the complaint in their absence. The word **"**may**"** is precatory and not a mandatory word such as "shall." Hence, the Tribe *may* continue on to disenroll Petitioners without their participation, or they *may* not. In this instance, the Tribe decided ***not*** to move forward unilaterally, but permit the General Council to make the disenrollment determination.

[4] Here, Ordinance GCORD08412 was adopted in 2012 and amended in 2015. However, Petitioners have alleged from the beginning of its passage that it is invalid. In an abundance of caution, and to further protect the due process rights of Petitioners, the General Council has interpreted the Ordinance consistent with the Regional Director's recommendation in their May 10, 2011 Decision resolving yet another IBIA appeal in the Respondent's favor. Thus, no inconsistency exists in the Tribe's determination that General Council approval is required by the Ordinance. Further, Petitioners benefit from an additional layer of due process.

Additionally, Respondents' interpretation that General Council approval is required to complete disenrollment is consistent with the Pacific Regional Director's Decision of May 10, 2011. See Request for Judicial Notice, Dkt 35-2, Exh. 3, Regional Director's decision at p.12. In the Director's decision, Respondent had not yet implemented Ordinance GCORD08412, which speaks to member disenrollment. In the absence of the Ordinance, as analyzed by the Director, disenrollment could only occur by action of the Tribe's General Council under the Tribe's constitution. Which means a General Council meeting is required to disenroll under the GCORD Ordinance. So whose interpretation of the Ordinance requirements for disenrollment should the Court believe? – a rouge bunch of disgruntled tribal members, or the Regional Directors, which Respondent's followed to the letter?

D. Respondents Stand By The Analysis of The Key Cases Discussed In Their Motion

In Respondents' motion and Petitioners' opposition, the same key cases are discussed: *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010), *Shenandoah v. U.S. Dep't of Interior,* 159 F.3d 708 (2d Cir. 1998), and *Quair v. Sisco*, 359 F.Supp. 2d. 948 (E.D.Cal. 2004). Respondents' stand-by their analysis of these cases. Respondents' assert their analysis of these cases is correct. Their motion should therefore be granted.

F. Petitioners Challenge The Validity of a Tribal Ordinance—A Purely Intra-Tribal Matter

Petitioners claim the Elem Tribe's charges against them are not an intra-tribal matter. Dkt. 37, p. 22. They claim the ordinance, GCORD08142, upon which the Tribe based its charges is invalid. Respondents assert that the amended ordinance is the result of a legitimate leadership change, properly voted upon by the Tribe's members. Hence, as is common on Indian

country, this is simply an intra-tribal squabble. One side says the ordinance is valid; the other side says it is not. One side says the election of the new Tribal Council is binding; the other does not. As set forth in Respondents' motion, federal courts typically stay out of intra-tribal disputes. Regardless of Petitioners' attempt to label this case as a "habeas" matter, it is still an intra-tribal dispute.

Additionally, one court, California's Lake County Superior Court, has previously held that the facts as presented by Petitioners amount to a non-justiciable intra tribal matter. In Lake County Superior Court case, *Brown v Garcia, et al,* case 415928, Petitioners filed claims of defamation and false light privacy against members of the Elem Executive Council (Respondents) based on the very facts giving rise to Petitioners' First Amended Petition. In response, Specially Appearing defendants (Respondents here) filed a motion to quash service based upon sovereign immunity and that the matter was a non-justiciable intra-tribal matter. RJN, Dkt. 39-2, Exh.3. In finding for defendants (Respondents here), the court held that the litigation of the dispute *would require an impermissible analysis of Tribal law and constitutes a determination of an intra-tribal dispute*. RJN, Exh. 3. The Court thereafter dismissed the case in favor of defendants. [5]

Further, as Indian Tribes can interpret their own law, this Court lacks jurisdiction to review the Tribe's interpretation that further disenrollment action, such as a General Council meeting approving the disenrollments, is required under Ordinance GCORD080412 (revised May 2015). See generally, *Talton v. Mayes*, 163 U.S. 376 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978). The motion to dismiss

[5] Petitioners have appealed the Lake County Court's decision. Briefing is complete and we are awaiting a decision.

should be granted.

G. Petitioners Do Not Adequately Rebut Respondents' Sovereign Immunity Bar

Lastly, Petitioners' discussion of the *Poodry* and *Quair* cases does not dispute Respondents' argument: this is a declaratory relief case masked as a habeas case seeking declarations that Petitioners' due process rights were violated. If so, Respondents are entitled to sovereign immunity and this case should be dismissed on that ground as well.

III. CONCLUSION

For the reasons outlined above, Respondents respectfully request that this Court grant their motion to dismiss.

Dated: September 1, 2017

DURAN LAW OFFICE

By: */s/ Jack Duran*

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Attorneys for Specially Appearing "Respondents" STEPHANIE BROWN, AGUSTIN GARCIA, SARAH BROWN GARCIA, LEORA JOHN and NATHAN BROWN II, In their official capacities as members of the Elem Indian Colony of Pomo Indians Executive Committee