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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ANGELITA M. CHEGUP, et. al, Plaintiffs v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al., Defendants.	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT** Civil Case No. 2:19-cv-00286-DAK-PMW Judge Dale A. Kimball Magistrate Judge Paul M. Warner

Defendants Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"); Tribal Business Committee for the Ute Indian Tribe of the Uintah and Ouray Reservation; Luke Duncan; Tony Small; Shaun Chapoose; Edred Secakuku; Ronald Wopsock; and Sal Wopsock (collectively "Defendants") submit this *Reply Memorandum in Support of Motion to Dismiss Complaint*.

INTRODUCTION

In this action Plaintiffs seek habeas corpus relief under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 ("ICRA"), based upon their banishment from the Tribe. In their *Motion to Dismiss Complaint* (Dkt. 45), Defendants showed they had not been properly

served, and the Complaint should therefore be dismissed for lack of personal jurisdiction and insufficient service of process. Additionally, the Court lacks subject matter jurisdiction based upon Defendants' sovereign immunity unless Plaintiffs can support a claim under § 1303 of the ICRA. Plaintiffs do not satisfy either of the threshold requirements for habeas corpus relief under § 1303, however, because they are not "detained" within the meaning of § 1303 and they have not exhausted their tribal remedies. Finally, Plaintiffs have failed to state a claim on which relief can be granted.

In their *Response in Opposition to Defendants' Motion to Dismiss* ("*Response*") (Dkt. 47) Plaintiffs contend that (1) Defendants' argument regarding insufficient service is premature; (2) they meet the "detention" requirement of § 1303; and (3) they have exhausted their tribal remedies. As shown below, each of these contentions fails and the motion should be granted.

ARGUMENT

I. There is No Basis for Plaintiffs' Contention Regarding the Alleged Prematurity of Defendants' Argument for Dismissal for Insufficient Service of Process.

Plaintiffs purported to serve Defendants by leaving copies of the summonses and complaints with Thomasina Real Bird, an attorney, or by leaving them with a receptionist at Ute Tribal headquarters and asking her to give them to Ms. Real Bird. Ms. Real Bird is not authorized to accept service on behalf of any of the Defendants. (*Real Bird Aff.*, attached as Ex. A to *Mot. to Dismiss Compl.*) (Dkt. 45.) Defendants have shown that such service is insufficient under Fed. R. Civ. P 4. (*Mot. to Dismiss Compl.* at 3-6.) Plaintiffs do not argue that service was adequate. Rather, they concede their service was

insufficient, but contend that Defendants' argument is premature because under Fed. R. Civ. P. 4(m) they have 120 days from the date of filing of the complaint to serve the summons and that time has not expired. This argument fails for several reasons.

First the time limit for service under Rule 4(m) is 90 days, not 120 days. Fed. R. Civ. P. 4(m). Since Plaintiffs admit they have not yet properly served Defendants, the complaint should be dismissed.

Plaintiffs' argument that they have more time for serving Defendants is also inconsistent with their previous actions in this case. Plaintiffs filed Proofs of Service for all Defendants pursuant to Fed. R. Civ. P. 4(l)(1), representing to the Court that service was complete. (Dkt. 30-37.) Plaintiffs have also proceeded with the case as if they believed service was complete. For example, Plaintiffs filed a *Reply in Support of Motion for Immediate Release* (Dkt. 53) on August 6, 2019 in which they argue for their immediate release from banishment. Pursuing relief from the Court is inconsistent with the claim that they have not yet completed service and have more time in which to do so.

Defendants' assertion of their insufficiency of process defense was not premature for other reasons. Fed. R. Civ. P. 12(b) provides that any of the defenses enumerated under that rule, including a motion for dismissal for insufficient service of process under Rule 12(b)(5), must be made before pleading. Further, Fed. R. Civ. P. 12(h)(1)(A) provides that a motion under Rule 12(b)(5) is waived if it is omitted from a motion in the circumstances described in Rule 12(g)(2). Rule 12(g)(2) provides that a party who makes a motion under Rule 12 must not make another motion under that rule raising a defense or objection that was available to the party but omitted from its earlier motion. Fed. R.

Civ. P. 12(g)(2) and 12(h)(1)(A). Defendants had a Rule 12(b)(5) available at the time they filed the subject motion and risked waiving it if they did not raise it in the motion. Raising the defense was therefore not premature.

Finally, Plaintiffs argue that Defendants should waive service. Their position is again inconsistent with their filing of Proofs of Services and with their taking actions in the case indicating their belief that service had been completed. Furthermore, Plaintiffs had already purported to serve all Defendants on June 3, 2019 (Dkt. 30-37), when counsel for the Defendants entered his appearance on June 7, 2019. Waiver of service after Defendants had already been served would have been confusing and procedurally improper. Plaintiffs also maintain that "given the trial court's ruling in *Oviatt* on this very issue, Defendants know better." (*Response* at 3.) Plaintiffs' only references to the trial court proceedings in *Oviatt*, however, contain no rulings on this issue. Further, Plaintiffs' reference to the *Oviatt* record is inaccurate and confusing (*Response* at 3 fn.9) and Defendants are therefore unable to respond.

II. The Complaint Should Be Dismissed Because the Court Lacks Subject Matter Jurisdiction.

Defendants have demonstrated that this case must be dismissed on grounds of sovereign immunity unless Plaintiffs can prove subject matter jurisdiction under the ICRA, 25 U.S.C. § 1303. (*Mot. to Dismiss Compl.* at 7-9.)((Dkt. 45.) Furthermore, "A federal court has no jurisdiction to hear a petitioner's petition for habeas corpus relief under § 1303 unless the petitioner is (1) in custody and (2) has exhausted all tribal remedies." *Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 2:12-CV-497 BSJ, 2013 U.S. Dist. LEXIS 49175, at *6 (D. Utah Apr. 4, 2013).

Defendants acknowledge that this is the law in the Tenth Circuit and elsewhere. (*Response* at 11.)

A. Plaintiffs Are Not in Custody.

Plaintiffs state that, "Defendants do not dispute that Petitioners are *currently* 'in custody'". (*Response* at 12.) This seriously misrepresents Defendants' argument. Defendants believe they made clear their position that Plaintiffs do not currently meet the "in custody" requirement of § 1303 because they have not been permanently banished. This was the holding of all of the cases cited by Defendants in their opening memorandum, and Plaintiffs have not presented a single case holding that a party meets the "in custody" requirement where he or she has not been banished temporarily.

Instead, Plaintiffs rely on *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996) and other cases in which plaintiffs were permanently banished. The Tenth Circuit has, however, specifically rejected the applicability of *Poodry* in cases not involving permanent banishment. In *Oviatt v. Reynolds*, No. 17-4124, 733 F. App'x 929, 932, 2018 U.S. App. LEXIS 11849 (10th Cir. May 7, 2018) (unpublished), the plaintiffs, including Lynda Kozlowicz, claimed entitlement to habeas corpus relief based upon their alleged banishment. The court held that even if it were to follow *Poodry,* the plaintiffs would not satisfy the detention requirement of § 1303 because they had alleged only temporary banishment and under Second Circuit law "a tribal member is considered 'detained' only when *permanently* banished from the tribe." *Id.,* 2018 U.S. App. LEXIS 11849, at **5 (citing *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 714 (2d Cir 1998)) (emphasis added). Plaintiffs state that "the [*Oviatt*] case had nothing to do with

banishment." (*Response* at 12.) That is wrong. The Tenth Circuit explained that "the plaintiffs argue that they were 'banished', relying on the Second Circuit's opinion in *Poodry v. Tonawanda Bank of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996)". *Oviatt* at **4. The court went on to discuss the banishment issue at length.

Plaintiffs also maintain that none of the cases cited by Defendants held that banishment needs to be permanent to meet the "in custody" requirement. (*Response* at 12.) As shown in Defendants' opening memorandum, that is not true. As but one example, *Oviatt* held that even under the law cited by the plaintiffs, a tribal member is considered "detained" only when permanently banished. *Oviatt* at **5. The court went on to state that plaintiffs had not presented evidence of a permanent prohibition from entering the Ute Tribe's land. *Id.* "As a result, even if we were to follow *Poodry*, the plaintiffs' new allegation of 'banishment' would not satisfy the detention requirement." *Id.*

Plaintiffs also maintain that the Second Circuit case of *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 714 (2d Cir 1998), did not limit *Poodry* by holding that a party does not meet the "detention" requirement unless he is permanently banished. The Tenth Circuit ruled otherwise in *Oviatt* where it cited *Shenandoah* as the basis for its finding that "even in the Second Circuit, a tribal member is considered 'detained' only when permanently banished from the tribe." *Oviatt* at **5. The *Shenandoah* court's ruling supports the Tenth Circuit's reliance. *Shenandoah* held that, "Habeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and *permanent* banishment. *Poodry*, 85 F.3d at 893-94, 897. The punishment that the petitioners faced in *Poodry*, however, was

considerably more severe than the punishments alleged by plaintiffs [who were not permanently banished]." *Shenandoah*, 159 F.3d at 714 (parenthetical comment omitted) (emphasis added).

In *Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 2:12-CV-497 BSJ, 2013 U.S. Dist. LEXIS 49175 (D. Utah Apr. 4, 2013), this Court also relied on *Shenandoah.* The court rejected the request of plaintiffs, including Ms. Kozlowicz, for habeas corpus relief under § 1303, holding that "federal court jurisdiction of a *§ 1303* habeas petition is only proper when the petitioner is somehow held 'in custody'". *Id*. at *8. In reaching this holding, the court cited *Shenandoah* as providing the appropriate standard for determining whether a plaintiff is "in custody". "Habeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and *permanent* banishment." *Id.* (quoting *Shenandoah*, 159 F.3d at 714) (emphasis added). The *Poulson* court concluded that "the custody required in habeas corpus proceedings is actual, physical custody or a substitute for such custody, such as release on bond." *Id.* at *9. Because the plaintiffs failed to meet that burden, the court denied their habeas corpus petition for lack of jurisdiction under § 1303. *Id.* at *10. Similarly, in this case temporary banishment is not actual, physical custody or a substitute for it.

In *Oviatt*, the Tenth Circuit also relied upon *Taveres v. Whitehouse,* 851 F.3d 863 (9th Cir. 2017). *Oviatt* at **5. *Taveras* held that "we do not need to decide whether to adopt *Poodry*'s conclusion that tribal banishment orders amount to 'detention' under *§ 1303,* because even under *Poodry*'s logic, the Second Circuit limited habeas jurisdiction

only to permanent banishment orders, not temporary exclusion orders like those in this case." *Taveras,* 851 F.3d at 875. Although Plaintiffs cite the *Taveres* dissent as supporting their reliance on *Poodry*, the *Taveras* majority held as follows:

> The dissent places great weight on *Poodry*, describing the case as the "leading authority" on banishment. Not only is *Poodry* inapposite for the reasons we have already outlined, but also, *Poodry* has been extensively criticized for disrupting the balance Congress struck in the *ICRA* between preserving tribal sovereignty and upholding the rights of individual tribe members.

Id. at 876 fn.14.

Plaintiffs argue that "the 'in custody' requirement includes banishment of any duration." (*Response* at 14.) In support of this claim, Plaintiffs cite the trial court opinion in *Taveres.* This is misleading to say the least. The trial court ruled that, "[T]his case is distinguishable from *Poodry* as well. Unlike *Poodry*, the Tribe's decision to ban Petitioners from all tribal lands for several years, was not permanent banishment." *Taveres v. Whitehouse,* No. 2:13-cv-02101-TLN-CKD, 2014 U.S. Dist. LEXIS 37799, at *24 (E.D. Cal. March 20, 2014). On that basis, the court found that the Petitioners had not met their burden of showing their temporary exclusion from tribal lands was "a sufficiently severe restraint on liberty to constitute 'detention' and establish jurisdiction in this case." *Id.* at *28. The *Taveres* trial court also found that (like the Plaintiffs here), "Petitioners have not pointed to a single case in which a federal court asserted jurisdiction to review a tribe's decision to temporarily exclude members from all tribal lands." *Id*. at *29. Above all, in the *Taveres* appeal the Ninth Circuit held directly the opposite of what Plaintiffs claim the *Taveres* trial court held.

In short, Plaintiffs rely exclusively on *Poodry.* Plaintiffs do not cite any cases in which temporary banishment was held to meet the "in custody" requirement of § 1303. Furthermore, courts that have considered the issue, including the Tenth Circuit and the District Court for the District of Utah, have found that, even following the reasoning in *Poodry*, temporary banishment does not meet the requirement.

B. Plaintiffs Have Not Exhausted Tribal Remedies.

Plaintiffs recognize that to establish jurisdiction under § 1303 they must exhaust their tribal remedies. They further recognize that Section 3-1-11(1) of Tribal Ordinance No. 14-004 (Ex. B to *Mot. to Dismiss Compl.*) gives them the right to appeal their banishment order to the Tribal Court and then to the Tribal Appellate Court. (*Response* at 15.) They offer three arguments for their claim that they should not be required to exhaust those remedies.

Plaintiffs first claim that Ordinance No. 13-022 prohibits filing the appeal that Ordinance No. 14-004 grants them. As the more recently enacted and the more specific ordinance, however, Ordinance No.14-004 governs this issue pursuant to tribal and non-tribal canons of statutory interpretation.

Plaintiffs next claim they asked the clerk of the Tribal Court whether there was anything they could do to get relief from the banishment orders, but the clerk of the court told them they could not file an appeal. (*Second Kozlowicz Decl.* ¶ 8) (Dkt. 50); (*Second Amboh Decl.* ¶ 6) (Dkt. 52.) Even assuming for purposes of this motion that this account is accurate, the clerk of the Tribal Court is not authorized to give legal advice. Plaintiffs

were represented by counsel the day they went to Tribal Court (*Response* at 6) but chose to ask the clerk for legal advice and relied on that advice when they decided not to appeal.

Finally, Plaintiffs argue they did not appeal because they are prohibited from entering the Reservation where the Tribal Court is located. Ms. Kozlowicz states that, "In July of 2012 the Business Committee permanently barred me from the ability to use the Tribal Court …." (*Second Kozlowicz Decl.* ¶ 2) (Dkt. 50.) That is not true. Although Ms. Kozlowicz was disbarred as a tribal advocate and was thereby prohibited from representing parties other than herself in Tribal Court, she was not barred from filing cases and documents on her own behalf. Attached hereto as Exhibit A is an example of a document filed by Ms. Kozlowicz *pro se* in 2014. Additionally, while the banishment orders limit Plaintiffs' ability to enter the Reservation, the orders do not deny Plaintiffs *access* to the Tribal Court. Plaintiffs might have filed their appeals in several ways consistent with the terms of the banishment orders. Their attorney could have filed an appeal, any other member of the Tribe could have physically filed papers on Plaintiffs' behalf, or Plaintiffs might have emailed or mailed the appeal to the Court for filing.

Plaintiffs' alleged excuses for not filing an appeal are baseless and they failed to exhaust their tribal remedies before filing this action.

CONCLUSION

Plaintiffs have failed to prove subject matter jurisdiction because they have not met the threshold requirements for jurisdiction under § 1303 of the ICRA. They have not

shown they are in custody or that they have exhausted their tribal remedies. Additionally, the case should be dismissed for insufficient service of process.

For all of these reasons, Plaintiffs request that the case be dismissed.

Respectfully submitted this 20th day of August, 2019.

J. PRESTON STIEFF LAW OFFICES, LLC

/s/ J. Preston Stieff
J. Preston Stieff
Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that on the 20th day of August, 2019, I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT** to be filed electronically with the Court which will send notification of such filing to all parties of record.

/s/ J. Preston Stieff
J. Preston Stieff