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Tabitha Minke

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NOTE

CHRISTMAN V. CONFEDERATED TRIBES OF GRAND RONDE: A CHAPTER IN THE DISENROLLMENT EPIDEMIC

Tabitha Minke*

Introduction

Eighty-six members of the Confederated Tribes of the Grand Ronde Community of Oregon (the Tribe or CTGR) were disenrolled on July 23, 2014.¹ In 2013, after performing an enrollment audit, it was determined that members claiming descent from Chief Tumulth did not meet the Tribe's constitutional membership requirements.² Several hearings were held with the Grand Ronde Enrollment Committee (Enrollment Committee) regarding the members' proposed disenrollment.³ By a vote of five to one, the Enrollment Committee terminated the tribal members' citizenship and removed living and deceased members of the Tribe from its membership rolls.⁴ Seventy-six members of the family appealed the Enrollment Committee's decision through the tribal courts and on September 1, 2015, Chief Judge David Shaw issued ten rulings that denied the members' appeal.⁵ The disenrolled family members took the case to the Tribe's appellate court, which was the last step of legal recourse for the tribe.⁶ In a landmark decision by the appellate court, the trial court was reversed and dismissed with prejudice, meaning the tribe may not try to remove the

* Third-year student, University of Oklahoma College of Law. This work received the Outstanding Note award from the *American Indian Law Review* editorial board for the 2015-2016 academic year.

1. *Dead or Alive – Grand Ronde Tribe Terminates Tribal Citizenship*, NATIVE NEWS ONLINE (July 26, 2014), <http://nativenewsonline.net/currents/dead-alive-grand-ronde-terminates-tribal-citizenship/> [hereinafter *Dead or Alive*].

2. *Christman v. Confederated Tribes of Grand Ronde*, 13 Am. Tribal Law 8, 12 (Grand Ronde Tribal Ct. 2015).

3. *Id.* at 13.

4. *Dead or Alive*, *supra* note 1.

5. Dean Rhodes, *Tribal Court Decisions Support Enrollment Committee Rulings*, SMOKE SIGNALS (Confederated Tribes of Grand Ronde) (Sept. 15, 2015), <http://www.grandronde.org/news/smoke-signals/2015/09/15/tribal-court-decisions-support-enrollment-committee-rulings/#sthash.vec3tsO0.dpbs>.

6. *Appeal Planned in Grand Ronde Tribes Disenrollment Dispute*, INDIANZ.COM (Sept. 3, 2015), <http://www.indianz.com/News/2015/018793.asp>.

descendants again.⁷ The enrollment board voted to comply with the appellate court's ruling and dismissed the Chief Tumulth disenrollment cases on October 3, 2016.⁸

While this case ended happily with the decedents retaining membership, the trial court decision and CTGR's attempt to disenroll its members illustrates the troubling trend of disenrollment within Indian Country. The "disenrollment epidemic"⁹ shows a dramatic number of tribes fighting over tribal belongings in "more than a dozen states, from California to Michigan."¹⁰ Academics have been hesitant to address this growing issue¹¹ given the insular nature of tribal governments.¹² Indeed, days after Chief Judge Shaw's opinion was delivered, CTGR's attorney filed a motion for the disenrolled family to be held in contempt of court for violating a gag order that was issued in September of 2014.¹³ In its attempt to justify the motion for contempt, CTGR argued that the descendants were trying to use the media to influence the disenrollment dispute.¹⁴

This note examines the tribal court's reasoning for upholding the disenrollment of Chief Tumulth's decedents, looking specifically at due process and sovereign immunity. Part I will provide background information about CTGR and the personal history of Chief Tumulth. This knowledge is fundamental in understanding the Petitioners' arguments and the court's reasoning for disenrollment. Part II will explore the due process and sovereign immunity issues that impact the case and the appellate court's reversal. Part III will analyze the potential driving forces behind

7. *Alexander v. Confederated Tribes of Grand Ronde*, 13 Am. Tribal Law 353, 367 (Grand Ronde App. Ct. 2016).

8. Dean Rhodes, *Enrollment Board Dismisses Chief Tumulth Disenrollment Cases*, SMOKE SIGNALS (Confederated Tribes of Grand Ronde) (Oct. 4, 2016), <http://www.grandronde.org/news/smoke-signals/2016/10/04/enrollment-board-dismisses-chief-tumulth-disenrollment-cases/#sthash.MylrX6kU.YYleiv4c.dpbs>.

9. Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 383 (2015).

10. Gosia Wozniacka, *Disenrollment from Native American Tribes Leaves Families 'Culturally Homeless'*, DESERET NEWS, (Jan. 20, 2014, 12:00 AM), <http://www.deseretnews.com/article/765645972/Disenrollment-leaves-Natives-culturally-homeless.html?pg=all>.

11. See David Wilkins, *Thoughts on How We Re-Member*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 30, 2014), <http://indiancountrytodaymedianetwork.com/2014/07/30/how-do-we-re-member>.

12. See Galanda & Dreveskracht, *supra* note 9, at 386.

13. *Grande Ronde Tribes Take Another Shot at Descendants of Chief*, INDIANZ.COM (Sept. 8, 2015), <http://indianz.com/News/2015/018832.asp>.

14. Galanda & Dreveskracht, *supra* note 9, at 397.

CTGR's attempt to disenroll its members.. Part IV will suggest alternative approaches to tribal disenrollment and the future of the CTGR.

I. History

During the eighteenth century, settlers were encroaching in large numbers upon American Indian aboriginal lands to fulfill the idea of Manifest Destiny.¹⁵ After the Revolutionary War, the recovering nation was too weak to enforce its sovereignty over American Indians, and instead, employed peace negotiations and treaty making to accomplish its goals.¹⁶ The federal government took an active interest in defining who was an "Indian" in order to legitimize the transfer of lands to colonizers and settlers by treaty.¹⁷ It was during this time that the government first began to regulate ethnicity and determine criterion for tribal enrollment.¹⁸ Reservations were created when Congress passed the Indian Removal Act in 1830; an effort to relocate all Indians west of the Mississippi River.¹⁹

Chief Tumulth (also known as Chief Tum-walth) was the leader of the Cascade Indians.²⁰ In 1855, he signed the Treaty of Kalapuya,²¹ which was later ratified and called the Willamette Valley Treaty.²² By signing this treaty, Chief Tumulth forever ceded his ancestral lands to the federal government in exchange for the promise of health care, protection, and the creation of a reservation.²³ After Chief Tumulth signed the treaty, many Cascade Indians relocated to the Grand Ronde Agency area.²⁴ Chief Tumulth, however, never relocated because the federal government wrongfully executed him in 1856.²⁵ It was not until a year after his

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 397-98.

19. *Id.* at 398.

20. *Christman v. Confederated Tribes of Grand Ronde*, 13 Am. Tribal Law 8, 11 (Grand Ronde Tribal Ct. 2015).

21. Treaty with the Kalapuya, Etc., 1855 art. 9, Jan. 22, 1855, 10 Stat. 1143, 1147, reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES 665, 668 (Charles J. Kappler ed., 1904), <http://digital.library.okstate.edu/kappler/vol2/treaties/kal0665.htm>.

22. *Christman*, 13 Am. Tribal Law at 11.

23. Janine Robben, *Myths, History and Destiny: Emerging Focus on Indian Law Is Sorting It All Out*, OR. ST. B. BULL., Jun. 2009, at 17, 21.

24. *Christman*, 13 Am. Tribal Law at 11.

25. *Id.*

execution, in 1857, that the United States established by executive order a 61,440-acre reservation for the Western Oregon Indians.²⁶

In 1936, the Tribe established a constitution which governed CTGR membership.²⁷ The constitution provided,

[M]embership in the CTGR shall consist of all persons of Indian blood whose names appear on the official census rolls of the CTGR as of April 1, 1935 and all children born to any Tribal member who is a resident of the [CTGR] community at the time of the birth of said children.²⁸

In 1954, the government terminated the federal recognition of the Tribe.²⁹ One year later, pursuant to the termination, a final membership roll of the Tribe was published.³⁰

In 1983, the Restoration Act restored federal recognition to the Tribe but required CTGR to define membership as,

- (i) any living individual listed on the Termination Roll;
 - (ii) or any living individual entitled to be on the membership roll on August 13, 1954, but not listed;
- or any living individual descended from (i) or (ii) and having at least one-fourth degree blood of members of the Tribe or who would have been eligible to be members under this provision.³¹

These conditions were to control only until the Tribe elected a governing body and created a tribal constitution.³²

In 1984, tribal voters adopted the Tribe's constitution.³³ The constitution provided that "a person could only be eligible for membership if validly listed on the Restoration Roll, or possess[ed] 1/16 Indian blood and [is a descendant] from a member of the CTGR."³⁴ Descent from a tribal member was defined to include the lineages from a person named on any roll or

26. Robben, *supra* note 23, at 21.

27. CONST. AND BYLAWS FOR THE CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OR. art. 3, § 1, <https://www.loc.gov/law/help/american-indian-consts/PDF/36026785.pdf>.

28. *Christman*, 13 Am. Tribal Law at 11.

29. Act of Aug. 13, 1954, ch. 733, 68 Stat. 724.

30. Confederated Tribes of the Grand Ronde Cmty. Notice of Proposed Membership Roll, 20 Fed. Reg. 3636 (May 24, 1955).

31. *Christman*, 13 Am. Tribal Law at 11-12.

32. *Id.*

33. *Id.* at 12.

34. *Id.*

record of CTGR members prepared by the Department of the Interior prior to the effective date of the Tribe's constitution.³⁵

Petitioner Darla Reynvaan was the first member of the Petitioners' family to become a member of CTGR through their ancestor, Chief Tumulth.³⁶ She achieved membership status in 1997, after the adoption of the Tribe's 1984 constitution.³⁷ The remaining Petitioners subsequently entered applications for enrollment based upon Darla Reynvaan's membership status.³⁸ In 1996, the Tribe's constitution did not provide enrollment based on decent from a treaty signer, but based enrollment only upon blood quantum or if their ancestor appeared on any roll or record of membership prepared by the Department of the Interior prior to 1984.³⁹ Discovered in the Tribe's enrollment audit in 2013, some descendants from Chief Tumulth did not have a valid constitutional membership because there was no lineal ancestor listed on any roll or record of CTGR membership.⁴⁰

The Petitioners were notified in writing of their potential disenrollment and informed of their right to a hearing.⁴¹ Hearings were held before the Enrollment Committee, but during these administrative hearings, the Tribe passed an amendment to the Enrollment Ordinance.⁴² The amendment mandated that the Enrollment Committee make the final administrative decision, rather than a recommendation to the Tribal Council, as a last administrative step prior to any judicial review.⁴³ There was also no written or public information available to Petitioners on the procedures used in Enrollment Committee hearings regarding: "(i) how traditional 'evidence' (as this term would be used by lawyers in a judicial setting) could be presented; (ii) how witnesses could be compelled to testify (including witnesses that are employees of the Tribe); (iii) and the nature of any discovery rights or process."⁴⁴ On September 5, 2014, the Enrollment Committee made their final decision to remove Petitioners from

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. CONST. OF THE CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. art. V, § 1, <https://weblink.grandronde.org/weblink8/0/doc/134/Page1.aspx>.

40. *Christman*, 13 Am. Tribal Law at 12.

41. *Id.*

42. *Id.* at 13.

43. *Id.*

44. *Id.* at 13-14.

membership in CTGR and the Petitioners appealed their disenrollment to the Grand Ronde Tribal Court.⁴⁵

II. Due Process & Sovereign Immunity

The tribal court analyzed two legal questions: whether the administrative decision was arbitrary and capricious and if the decision violated any provision of the tribal constitution.⁴⁶ The Petitioners argued that the disenrollment action was unconstitutional for a variety of reasons.⁴⁷

The tribal constitution itself provides only limited grounds for disenrollment. The Petitioners argued that since they had already met and been accepted into the Tribe, the language, “the reasons for [loss of membership] . . . shall be limited exclusively to failure to meet the requirements set forth for membership . . .”⁴⁸ does not affect them.⁴⁹

The Tribe, however, argued that “the Constitution provides authority for correction of a member enrolled by error” and that “a person cannot achieve a vested enrollment status if the enrollment is based in error.”⁵⁰ CTGR also claimed the Tribe had sovereign authority to forego conditional steps for the “correction or repair of a prior enrollment error.”⁵¹

The court began its analysis by stating that there is a linguistic tension between “an action to correct a prior enrollment error” and “a disenrollment action.”⁵² The court acknowledged that there may be a time when the “linguistic tether” is so far stretched it will become unconstitutional.⁵³ The court, however, then stated that the Enrollment Committee’s actions were “reasonably viewed as correcting an error of the Petitioners common ancestors being ineligible at the time of enrollment at CTGR.”⁵⁴ The court gave no further guidance on assessing when the “linguistic tether” snaps and it did not point to any evidence why this case should be “reasonably viewed as correcting an error.”⁵⁵ The court declared that the removal of the

45. *Id.* at 10.

46. *Id.* at 14.

47. *Id.* at 15-16.

48. CONST. OF THE CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. art. V, § 5, <https://weblink.grandronde.org/weblink8/0/doc/134/Page1.aspx>.

49. *Christman*, 13 Am. Tribal Law at 14.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

descendants of Chief Tumulth corrected an error made at the time of their enrollment rather than a disenrollment action.⁵⁶

“‘Disenrollment’ . . . is the divestment of tribal membership by a tribe after the ‘absolute right’ of membership is conferred upon a person.”⁵⁷ From this definition, the action by the Enrollment Committee is a disenrollment action and more than a mere reasonable correction of an error. Petitioner Darla Reynvaan was a member of the Tribe for eighteen years; she identified herself as a CTGR member and believed that she had an absolute right to membership.⁵⁸

Since the Court found that removal of the Petitioners from tribal membership was done to correct an error of their common ancestor being ineligible at the time of enrollment, the Petitioners next argued that the Enrollment Committee’s decision was arbitrary and capricious.⁵⁹ A decision is arbitrary and capricious if it is so implausible that it could not be “ascribed to a difference in view.”⁶⁰ When implementing the arbitrary and capricious standard, the court may only determine if something exists in the administrative record and if those facts are rationally related to the decision.⁶¹ Therefore, the court first looked at the basis upon which the Enrollment Committee determined that the Willamette Valley Treaty did not constitute a record or roll of CTGR.⁶²

Petitioners argued that the Chief signed the Willamette Valley Treaty in an individual capacity and that this signature constituted a record or roll of CTGR membership.⁶³ Petitioners presented testimony by the Tribe’s former cultural officer, Eirik Thorsgard, to support their argument.⁶⁴ Unfortunately, the court found Thorsgard to be an ineffective witness because he contradicted himself and provided ambiguities in his testimony.⁶⁵ The court found that sufficient information existed in the administrative record that Chief Tumulth signed the Willamette Valley Treaty as a representative of the Cascade Indians, and not in an independent capacity.⁶⁶ The court also found that Chief Tumulth merely had eligibility for CTGR membership if

56. *See id.*

57. Galanda & Dreveskracht, *supra* note 9, at 385.

58. *Christman*, 13 Am. Tribal Law at 12.

59. *Id.* at 15-16.

60. *In re Leno*, 2 Am. Tribal Law 89, 95 (Grand Ronde Tribal Ct. 2000).

61. *Christman*, 13 Am. Tribal Law at 16.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

he and/or his family had relocated to the newly created reservation, because the Willamette Valley Treaty was the document that created CTGR.⁶⁷

This is not an uncommon history in Indian Country and the Court is aware from public record and general knowledge of the existence of other federally-recognized tribes that consist of confederacies, have some members that descended from bands and band leaders that signed treaties with the U.S., and where membership in the federally-recognized tribe was only provided if the relevant descendants and leaders relocated to a new area or reservation.⁶⁸

While the court determined that the evidence presented by the Petitioners did not meet the arbitrary and capricious standard, it never mentioned the reason why Chief Tumult was unable to relocate:⁶⁹ his wrongful execution one year before the executive order that created the reservation.⁷⁰

Next the court addressed whether the members' due process rights were violated during the procedure to remove them from tribal membership.⁷¹ The court recognized that the process fell below the full due process of a judicial hearing, yet it maintained that the process did not constitute a failure to provide the minimum due process obligations by looking at article III, section 3(k) of the tribal constitution:⁷²

The Tribal Council shall not deny to any person within its jurisdiction freedom of speech, press, or religion or the right to assemble peacefully. The Tribal Council shall not deny to any person the equal protection of tribal laws or deprive any person of liberty or property without due process of law. The Tribe shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968.⁷³

The Indian Civil Rights Act of 1968 (ICRA) had the central purpose of guaranteeing the rights granted to the American people by the United States

67. *Id.*

68. *Id.* at 16-17.

69. *Id.*

70. *Id.* at 11; *Grand Ronde Tribes to Disenroll 86 Descendants of Treaty Signer*, INDIANZ.COM (Sept. 2, 2015), <http://www.indianz.com/News/2015/018779.asp>.

71. *Christman*, 13 Am. Tribal Law at 17.

72. *Id.*

73. CONST. OF THE CONFEDERATED TRIBES OF THE GRAND RONDE CMTY. OF OR. art. III, § 3(k), <https://weblink.grandronde.org/weblink8/0/doc/134/Page1.aspx>.

Constitution to American Indians in order to, “protect individual Indians from arbitrary and unjust actions of tribal governments.”⁷⁴ Under ICRA, tribal control of membership was limited by requiring the same due process protection as the United States Constitution.⁷⁵ Thus, when a member was disenrolled from their tribe, they could bring a claim under ICRA in federal court and escape tribal politics and potential tribal corruption.

In 1978, however, in the landmark decision *Santa Clara Pueblo v. Martinez*, the Supreme Court found that “[i]n addition to [ICRA’s] objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal ‘policy of furthering Indian self-government.’”⁷⁶ The Court held that ICRA did not create a cause of action for declaratory or injunctive relief in the federal courts.⁷⁷ Because the plaintiff was not seeking a remedy of habeas corpus, the Court held that the suit was barred from its jurisdiction due to tribal sovereign immunity.⁷⁸ This holding severely limited the reach of ICRA and essentially gave tribal courts total discretion and authority to determine whether a tribe’s enrollment practices comported with ICRA.⁷⁹ Due to *Santa Clara*, some tribes, such as CTGR, have incorporated a version of ICRA into their own constitutions, but the concept of due process also incorporates the norms and values of the individual tribe.⁸⁰ Thus, due process might be very different from one tribe to another and in comparison to due process under the U.S. Constitution.⁸¹

While the CTGR Constitution does mention ICRA, both the tribal court and the federal judiciary of the United States acknowledge that cultural values of a specific tribe create a concept of due process that may be dissimilar to the U.S. Constitution.⁸² The lawsuit in *Christman* involved

74. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. REP. NO. 90-841, at 5-6 (1967)).

75. Compare 25 U.S.C. § 1302(8) with U.S. CONST. amend. V and *id.* amend. XIV, § 1.

76. *Santa Clara Pueblo*, 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

77. *Id.* at 72.

78. *Id.* at 59.

79. Brendan Ludwick, *The Scope of Federal Authority Over Tribal Membership Disputes and the Problem of Disenrollment*, 51 FED. LAW. 37, 38 (2004).

80. Andrew Westney, *Lawyers Must Guard Against Tribal Disenrollment Abuses*, LAW360 (Apr. 27, 2015), <https://advance.lexis.com/api/permalink/e23473bf-bb10-43e9-83474e64edd6c802/?context=1000516>.

81. *Id.*

82. *Christman v. Confederated Tribes of Grand Ronde*, 13 Am. Tribal Law 8, 17 (Grand Ronde Tribal Ct. 2015) (quoting *Tom v. Sutton*, 533 F.2d 1101, 1105 n.5 (9th Cir. 1976));

only tribal members and the CTGR governing body, meaning that there was no federal jurisdiction and the tribe's interpretation of due process would be used.⁸³

The court opined that, “[d]ue process requires . . . notice and an opportunity to comment”⁸⁴ and that notice only requires “sufficient detail to allow an opposing party to prepare his defense.”⁸⁵ The Tribe, however, “exercised its sovereign discretion” and added its own cultural values and history to the concept of due process.⁸⁶ The Tribe established “an enrollment process where an . . . error in a person’s membership status c[ould] be appealed to an Enrollment Committee of non-lawyer Tribal elders.”⁸⁷ This process reflects the Tribe’s native culture of “talking circles”⁸⁸ with its “holistic approach” to analyzing issues and “non-linear communication style.”⁸⁹ Although the “Petitioners were not provided with a formalized process or a standard of how Tribal representatives could be interviewed in advance or called as a witness” at the Enrollment Committee meeting, the court determined that, given the totality of the circumstances, the disenrollment did not violate tribal due process.⁹⁰ The “Petitioners were provided [with] numerous opportunities to present information” and they knew the reason why their disenrollment was proposed.⁹¹ The court did admit that the process fell below the standard of a full judicial hearing, but because of tribal sovereign immunity that standard is not required.⁹²

Historically, however, disenrollment was not the main method used to resolve conflicts, but only used in egregious circumstances against members who committed violent crimes.⁹³ Because tribes are family based and members would not want to cast out their relatives from the tribe, most

see also James D. Diamond, *Who Controls Tribal Membership? The Legal Background of Disenrollment and Tribal Membership Litigation*, in BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES (2013), 2013 WL 5293043, at 7-8.

83. *Christman*, 13 Am. Tribal Law at 19 n.4.

84. *Id.* at 18 (citing *Goss v. Lopez*, 419 U.S. 565 (1975)).

85. *Id.* (quoting *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992)).

86. *Id.*

87. *Id.*

88. See *Mi'kmaw Spirituality - Talking Circles*, MI'KMAW SPIRIT, <http://www.muiniskw.org/pgCulture2c.htm> (Mar. 25, 2016) (describing how talking circles are a traditional way for Native American people to solve problems).

89. *Christman*, 13 Am. Tribal Law at 18.

90. *Id.*

91. *Id.*

92. *Id.* at 17.

93. Wozniacka, *supra* note 10.

disputes were settled with ceremonies and prayers.⁹⁴ So while CTGR due process may be more informal and different from the United States' concept,⁹⁵ the action of disenrollment does not seem to fit within its historical cultural values.

The last argument the Petitioners made was that their substantive due process rights were violated when CTGR removed them from membership.⁹⁶ They also said their liberty interests, the identity and name that comes with being a tribal member, and their property rights, such as federal membership benefits, like health care and housing, were violated.⁹⁷ It is the Petitioners' burden to show that "the Tribal action at issue was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"⁹⁸ In other words, the tribal action must "shock the conscience," which is a high burden to meet.⁹⁹ To meet the burden, there must be either intentional or reckless indifference by government actors or the government must use its power to oppress its people.¹⁰⁰ The court determined that the government actions did not rise to the level needed because disenrollment was not intentionally or recklessly done in order to harm the Petitioners' public health, safety, morals, or general welfare.¹⁰¹ The court's analysis here is sparse. It does not address the mental anguish of potentially losing one's identity and having no knowledge of the procedural process to combat the allegation that their membership was invalid.

The Association of American Indian Physicians met in 2015 to discuss the potential health consequences disenrollment poses to Indian Country.¹⁰² They passed a resolution that "urges Indian Tribes and Nations to reconsider decisions to dis-enroll and to consider re-enrollment of former tribal members in order to improve the health of Native American individuals, communities, Tribes and Nations."¹⁰³ According to the

94. *Id.*

95. *Id.*

96. *Christman*, 13 Am. Tribal Law at 18.

97. *Id.*

98. *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

99. *Id.* at 18-19.

100. *Id.* at 19.

101. *Id.*

102. Levi Rickert, *Association of American Indian Physicians: Disenrollment Has Negative Impact on Individuals*, NATIVE NEWS ONLINE (Oct. 28, 2015), <http://nativenewsonline.net/currents/association-of-american-indian-physicians-disenrollment-has-negative-impact-on-individuals/>.

103. *Id.*

Association, the loss of cultural identity leads to serious mental health problems, such as anxiety and depression.¹⁰⁴ With the loss of their cultural identity as well as the health care their membership had previously provided, disenrolled members have an increased chance of morbidity and mortality.¹⁰⁵

Happily, the CTGR appellate court reversed the tribal court's decision and the Enrollment Board dismissed their decision to disenroll Chief Tumulth's decedents.¹⁰⁶ The appellate court did not address questions of tribal sovereignty and the exclusive right to determine membership, but instead it held that the equitable principles of laches and estoppel prevented the Tribe from disenrolling Chief Tumulth's decedents.¹⁰⁷ Laches is a defense used when there has been an unreasonable delay in asserting rights.¹⁰⁸ The appellate court held that the Enrollment Committee unreasonably allowed twenty-seven years, from 1986 to 2013, to pass before taking any disenrollment action.¹⁰⁹ Estoppel is a defense used to stop someone from saying something because of a past inconsistent action.¹¹⁰ The appellate court found that enrolling the Petitioners' in error and for twenty-seven years telling them they were enrolled was affirmative misconduct.¹¹¹ After the Enrollment Board dismissed the case, the descendants were "once again eligible for services."¹¹²

Mia Prickett, a descendant of Chief Tumulth and disenrolled CTGR member, said, "[t]he prospect of losing her membership is... like coming home one day and having the keys taken from you . . . [y]ou're culturally homeless."¹¹³ While the descendants got to retain their citizenship, it was through unique circumstances. CTGR still has the power to disenroll other tribal members and should take into account the effect of disenrollment on their community. Tribes should focus on potential remedies with less severe consequences when faced with membership issues.

104. *Id.*

105. *Id.*

106. *Alexander v. Confederated Tribes of Grand Ronde*, 13 Am. Tribal Law 353, 367 (Grand Ronde App. Ct. 2016).

107. *Id.* at 355.

108. *See Laches*, BLACK'S LAW DICTIONARY (10th ed. 2014).

109. *Alexander*, 13 Am. Tribal Law at 363.

110. *See Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

111. *Alexander*, 13 Am. Tribal Law at 364.

112. Rhodes, *supra* note 8.

113. Wozniacka, *supra* note 10.

III. Why Are Tribes Disenrolling Members?

There are many theories addressing why tribes have begun to disenroll members at an alarming rate. David Wilkins, a professor of American Indian Studies at the University of Minnesota, claims that there are four major justifications for disenrollment made by tribal governments: (1) “family conflicts”; (2) “racial criteria and alleged dilution of blood quantum”; (3) “criminal activity”; and (4) “financial issues.”¹¹⁴ Many scholars believe the financial justification is the leading cause of increased disenrollment actions.¹¹⁵

Mass disenrollment actions began in the 1990s around the same time Indian casinos began to grow in popularity.¹¹⁶ Revenue from Indian casinos has, “skyrocketed from \$5.4 billion in 1995 to a record \$27.9 billion in 2012.”¹¹⁷ Nearly half the tribes that profit from casinos “distribute a regular per-capita payout to their members”, and membership reductions increase the payments.¹¹⁸ If a member has been proposed for disenrollment or provisionally disenrolled, the tribe may discontinue their per-capita payment, making it hard for the disenrolled members to gain legal representation in order to fight the disenrollment action.¹¹⁹

CTGR “runs Oregon’s most profitable Indian gambling operation.”¹²⁰ After the casino was built in 1995, the Tribe saw a boost in membership applications, raising their membership “from about 3,400 to more than 5,000.”¹²¹ Since the increase in membership, the Tribe has reduced their annual per-capita payments from approximately “\$5,000 to just over \$3,000.”¹²² Siobhan Taylor, CTGR’s spokeswoman, said the Tribe wanted and specifically contracted for the enrollment audit because they wanted to

114. David Wilkins, Professor, U. of Minn., Presentation at the Vine Deloria, Jr. Distinguished Indigenous Scholars Series at the University of Arizona: Putting the Noose on Tribal Citizenship: Modern Banishment and Disenrollment (Nov. 13, 2008), <http://www.nnidatabase.org/files/david-wilkins-putting-noose-tribal-citizenship-modern-banishment-disenrollment>.

115. See Galanda & Dreveskracht, *supra* note 9, at 385; see also David Gene Lewis, Termination of the Confederated Tribes of the Grand Ronde Community of Oregon: Politics, Community, Identity 65 n.13 (Mar. 2009) (unpublished Ph.D. dissertation, University of Oregon) (on file with Scholars’ Bank, University of Oregon).

116. Wozniacka, *supra* note 10.

117. *Id.*

118. *Id.*

119. Westney, *supra* note 80.

120. Wozniacka, *supra* note 10.

121. *Id.*

122. *Id.*

strengthen the integrity of CTGR's "family tree."¹²³ Gambling revenue might not be the only reason for CTGR's enrollment audit, as critics point out, "the [Indian Gaming Regularity Act of 1988] and other federal laws may . . . provide incentives to establish more inclusive standards;" but it is one contributing factor of tribal membership policy.¹²⁴

IV. *Alternative Approaches*

It is extremely difficult for the federal government to take away an American citizen's citizenship. Federal law allows for the expatriation of American citizens only when actions, such as joining a foreign military, are done "with the intention of relinquishing U.S. nationality."¹²⁵ According to the Immigration Nationality Act, Americans must voluntarily perform a number of actions, such as appearing in person before a US councilor and signing an oath of renunciation in order to lose citizenship.

In contrast, tribes have generally not limited their power to disenroll members.¹²⁶ This absolute power and the ability of tribes to deny federal intervention due to their immunity might lead to the loss of their own sovereignty and determination of membership. "It's very fair to say Indian Country doesn't want Congress or the Supreme Court asking and answering the question, 'Who is an Indian?'"¹²⁷ Therefore, tribes like CTGR should take action within themselves to confront the problems of tribal expansion in an ever-changing landscape by amending their constitutions to prohibit disenrollment.

There is a growing list of tribal governments that are amending their constitutions to discontinue the practice of disenrollment. The Passamaquoddy Tribe of the Pleasant Point Reservation Constitution, from as early as 1990, stated, "Notwithstanding any provisions of this constitution, the government of the Pleasant Point Reservation shall have no power of banishment over tribal members."¹²⁸ When one of the authors of the constitution was asked why they included this clause, he said:

We felt that it just, we had to do this. It wouldn't be right for us to say we have the power to decide who no longer is one of us.

123. *Id.*

124. Ludwick, *supra* note 79, at 42.

125. Wilkins, *supra* note 114.

126. *Id.*

127. Westney, *supra* note 80 (quoting Gabriel S. Galanda).

128. Wilkins, *supra* note 114.

We're not going to be in office for long. What if somebody comes in after us and decide [sic] that we're not members?¹²⁹

The Federated Indians of Graton Rancheria also changed their constitution to prohibit disenrollment in 2013.¹³⁰ Greg Sarris, Graton's chairperson, said: "We saw the money coming . . . We saw the changes coming. We saw the challenges and we said, 'Let's do something that could prohibit disenrollments in our tribe.'"¹³¹ In June of 2015, the Spokane Tribe of Indians passed a referendum that amended their constitution.¹³² The new constitutional provision states: "Except in instances where a citizen transfers enrollment to another Tribe, no Spokane Tribal law shall operate to strip citizenship from any person who has previously been recognized to possess citizenship"¹³³ In January of 2016, the Chinook Indian Nation General Council formally denounced disenrollment.¹³⁴

CTGR could be among the growing number of tribes that see the advantages of ending the disenrollment crisis. Instead of attempting to disenroll current members of their tribe, they could take tribal responsibility for their members. While the descendants of Chief Tumulth were not on the census rolls, this was due to extraordinary circumstances. They acted as though and believed that they were members of the Tribe for decades. As Mia Prickett said, "[i]n my entire life, I have always known I was an Indian. I have always known my family's history, and I am so proud of that."¹³⁵ The key to tribal sovereignty and self-determination is the right to determine membership, but once someone is enrolled, the tribe should have greater protections for them. Once someone is a member, however that criterion is determined and met, "there ought to be a higher standard for removing people from that body politic."¹³⁶ If Indian Country does not internally create a solution to the 'disenrollment epidemic,' the federal government could step in and limit their sovereignty in a number of ways.

129. *Id.*

130. Gabe Galanda, *Spokane Tribe Bans Disenrollment: "Right Where They Belong"*, NATIVE NEWS ONLINE, (June 10, 2015), <http://nativenewsonline.net/currents/%EF%BB%BFspokane-tribe-bans-disenrollment-right-where-they-belong/>.

131. *Id.*

132. *Id.*

133. *Id.*

134. Gabe Galanda, *Chinook Denounces Disenrollment*, NATIVE NEWS ONLINE (Jan. 12, 2016), <http://nativenewsonline.net/opinion/23746/>.

135. Wozniacka, *supra* note 10.

136. Westney, *supra* note 80 (quoting Pilar Thomas).

A. International Human Rights

In April of 2015, the National Native Bar Association (NNBA) passed a resolution denouncing the divestment of tribal citizenship without due process of law.¹³⁷ NNBA declared that it would be “immoral and unethical for any lawyer to advocate for . . . the divestment . . . [of] tribal citizenship, without equal protection . . . or due process of law or an effective remedy.”¹³⁸ Disenrolled tribal members from tribes throughout the United States and other groups have applauded the resolution.¹³⁹ Cathy Cory, who was disenrolled from the Picayune Rancheria of Chukchansi Indians in 2006, said: “Finally, the truth is being spoken nationally in tribal circles about this rampant violation of human rights that is happening right here in the United States.”¹⁴⁰ The resolution relies on the text of the United Nations Declaration on the Rights of Indigenous Peoples (“the Declaration”): “All are equal before the law and are entitled without any discrimination to equal protection of the law.”¹⁴¹

The focus on international human rights law is not new for scholars seeking to protect individual civil rights outside of domestic federal law.¹⁴² While tribal governments cannot be held accountable in the international arena, the United States may be held accountable by its endorsement of the Declaration.¹⁴³ The Declaration “guarantees that indigenous people . . . receive all human rights and fundamental freedoms recognized under international human rights law, the Charter of the United Nations, and the Universal Declaration of Human Rights.”¹⁴⁴ The Declaration requires that “states, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the

137. Nat'l Native Am. Bar Ass'n, Resolution # 2015-06, Supporting Equal Protection and Due Process for Any Divestment of the American Indigenous Right of Tribal Citizenship (Apr. 8, 2015), <http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-04-09-2015-06-NNABA-Resolution-Due-Process.pdf>.

138. *Id.*

139. *See* Westney, *supra* note 80.

140. Levi Rickert, *American Indian Lawyers' Group Calls Tribal Citizenship Dis-enrollment Unethical Without Due Process*, NATIVE NEWS ONLINE (Apr. 13, 2015), <http://nativenewsonline.net/currents/american-indian-lawyers-group-calls-tribal-citizenship-dis-enrollment-unethical-without-due-process/>.

141. *Id.*

142. *See* Diamond, *supra* note 82, at 8.

143. Galanda & Dreveskracht, *supra* note 9, at 462-63.

144. *Id.*

ends of this Declaration;” meaning that the United States must ensure that non-state actors do not violate individual rights.¹⁴⁵

B. Administrative Law

The Bureau of Indian Affairs (BIA) could provide an administrative review of disenrollment decisions, giving some redress to disenrollees.¹⁴⁶ According to BIA’s Indian Affairs Manual, “[a]ny person whose disenrollment has been approved by the Area Director acting under delegated authority may appeal the adverse decision as provided in 25 C.F.R. § 2.”¹⁴⁷ This is because when someone is disenrolled they lose their distributions of tribal assets, which is distributed by the Secretary.¹⁴⁸ While compliance with the Indian Affairs Manual is mandatory of Indian Affairs employees, BIA has recently refused to interfere in disenrollment decisions.¹⁴⁹ This current policy, however, could change at any time and provide a check on Indian Country authority.

Conclusion

In CTGR’s language, Chinook Wawa, there is no word or notion that means ‘disenrollment.’¹⁵⁰ As CTGR turned towards the kinship and spiritual understanding that link their community, instead of the economic, political, and legal motivations of today, so too should other tribes contemplating disenrollment measures. While the Tribe still has sovereign immunity to determine membership and their own due process requirements, the consequences of such an extreme action as disenrollment could lead to federal intervention. The legal community, Indian Country, and academics should no longer ignore the “disenrollment epidemic.” Tribal sovereignty is too important.

145. *Id.* at 472.

146. *Id.* at 457-59.

147. *Id.* at 457.

148. *Id.*

149. *Id.*

150. Gabriel S. Galanda, *Disenrollment Is a Tool of the Colonizers*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 16, 2015), <http://indiancountrytodaymedianetwork.com/2015/01/16/disenrollment-tool-colonizers>.