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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FOUR DIRECTIONS, ET AL.,
Petitioners,

v.

**COMMITTEE ON JUDICIAL CONDUCT AND
DISABILITY OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES, ET AL.,**
Respondents.

Case No. 14-cv-03022-YGR

**ORDER GRANTING RESPONDENTS’ MOTION
FOR RECONSIDERATION; VACATING
MARCH 18 ORDER; AND DENYING FIRST
AMENDED PETITION**

United States District Court
Northern District of California

Respondents Cathy A. Catterson, in her official capacity as representative of the Office of the Circuit Executive (“Catterson”) and Committee on Judicial Conduct and Disability of the Judicial Conference of the United States (“the USJCD Committee”) (collectively, “Respondents”), with leave of this Court, have moved for reconsideration of this Court’s March 18, 2015 Order Granting in Part First Amended Petition as to Preservation of Emails Only (“March 18 Order”), Dkt. No. 53, under Civil Local Rule 7-9, or in the alternative, to alter or amend judgment under Federal Rule of Civil Procedure 59(e). Each Respondent offers separate grounds for reconsideration, but joins in the other’s arguments in their respective briefs.

The Court previously ordered as follows:

given the unusual posture of this case and the Court’s broad discretion in fashioning appropriate relief, the Court **GRANTS** that portion of Petitioners’ request for preservation of the emails at issue and **ORDERS** that Respondents take all necessary steps to preserve the emails at issue, in accordance with Ninth Circuit policy, until **January 18, 2019**. However, given the breadth of the FAP as pleaded, the Court **DENIES** the balance thereof, since it fails to establish all elements of Rule 27(a)(1).

(March 18 Order at 1-2.)

Respondent Catterson now presents significant new information—unchallenged and, in fact, conceded by Petitioners—demonstrating that none of the Petitioners face any threatened

1 future injury to them based upon concerns about the destruction of emails in the investigative file.
2 On this basis, the Court finds Petitioners lack of standing and, therefore, **GRANTS** the Motions for
3 Reconsideration, **VACATES** its March 18 Order, and **DENIES** the First Amended Petition.

4 **I. BACKGROUND**

5 On July 1, 2014, Petitioners filed a Pre-Complaint Petition to Preserve Evidence pursuant
6 to Rule 27(a)(1) of the Federal Rules of Civil Procedure. (Original Petition, Dkt. No. 1.) Initially,
7 Petitioners sought production of the investigation file and all documents obtained therein and
8 identification of persons who worked on the investigation conducted by the Ninth Circuit Judicial
9 Council’s special committee concerning Judge Richard Cebull. (*Id.*) Respondents filed a motion
10 to dismiss which the Court granted with leave to amend by order issued October 28, 2014. (Dkt.
11 No. 32.) On November 14, 2014, Petitioners filed a substantially amended First Amended Petition
12 (“FAP”), adding a new Petitioner and new allegations specific to Petitioners’ interactions with
13 Judge Cebull. (Dkt. No. 34.)

14 **II. DISCUSSION**

15 Rule 27 of the Federal Rules of Civil Procedure governs the FAP. Rule 27(a) provides
16 that:

A person who wants to perpetuate testimony about any matter
cognizable in a United States court may file a verified petition in the
district court for the district where any expected adverse party
resides. The petition must ask for an order authorizing the petitioner
to depose the named persons in order to perpetuate their testimony.
The petition must be titled in the petitioner’s name and must show:

- 21 (A) that the petitioner expects to be a party to an action
22 cognizable in a United States court but cannot presently
bring it or cause it to be brought;
- 23 (B) the subject matter of the expected action and the petitioner's
interest;
- 24 (C) the facts that the petitioner wants to establish by the
proposed testimony and the reasons to perpetuate it;
- 25 (D) the names or a description of the persons whom the
petitioner expects to be adverse parties and their addresses,
26 so far as known; and
- 27 (E) the name, address, and expected substance of the testimony
of each deponent.

28 Fed. R. Civ. Pro. 27(a).

1 Respondent Catterson argues that the FAP should be dismissed for lack of Article III
2 standing. Constitutional, “case-or-controversy” standing under Article III is a jurisdictional issue,
3 and may be raised any time, or *sua sponte* by the court. *City of Los Angeles v. Cnty. of Kern*, 581
4 F.3d 841, 845 (9th Cir. 2009).

5 The “constitutional minimum” requirements for standing set forth require that claimants
6 have suffered an “injury in fact,” that is “an invasion of a legally protected interest which is (a)
7 concrete and particularized,” and “(b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’”
8 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). Claimants
9 must also show a causal connection between alleged injury and alleged conduct, *i.e.* that the injury
10 is “fairly traceable” to the challenged action. *Id.* Finally, claimants must show that it is “likely,”
11 not merely “speculative,” that their injury will be “redressed by a favorable decision.” *Id.* at 561.
12 While Congress may, by statute, create the legal rights which form the basis for standing, a party
13 bringing an action in federal court must still satisfy Article III standing requirements by
14 establishing a personal injury, not merely a generalized grievance common to all or a large class of
15 citizens. *Lujan*, 504 U.S. at 575-76; *see also Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440,
16 449 377 (1989) (party whose a request for information under the Federal Advisory Committee
17 Act, 86 Stat. 770, as amended, 5 U.S.C.App. § 1 *et seq.*, was denied had a sufficiently distinct
18 injury to establish standing, similar to denial of a party’s request under the Freedom of
19 Information Act, 5 U.S.C. § 552). A generalized claim “amounting only to the alleged violation of
20 a right to have the Government act in accordance with law” does not satisfy Article III standing
21 requirements. *Lujan*, 504 U.S. at 575-76.

22 Regardless of whether the issue here is viewed as one of standing or of adherence to the
23 Rules of Civil Procedure, the question for the Court is whether the Petitioners meet the parameters
24 for bringing a pre-complaint petition described in Rule 27. Rule 27 requires that the petition be
25 “titled in the petitioner’s name” and state that “the petitioner expects to be a party to an action
26 cognizable in a United States court but cannot presently bring it or cause it to be brought.” FRCP
27 27(a). The previously presented allegations suggested that, despite failing to set forth the actions
28 they intended to bring and why they had not done so, but Petitioners might nevertheless be able to

1 bring some cognizable action for relief based upon decisions made against them by Judge Cebull.
2 (See allegations at FAP ¶¶ 8-12.) Consequently, the Court granted only the limited relief of
3 preservation of the emails in the Respondents' files.

4 The new information presented in Catterson's motion for reconsideration demonstrates that
5 the named Petitioners here would not be able to bring a cognizable claim based upon the
6 allegations they offered in the FAP. Catterson's motion offers the following evidence:

7 (1) Petitioner Sara Plain Feather had a prior action dismissed based upon
8 the Report and Recommendation Magistrate Judge Carolyn Ostby on statute of
9 limitations grounds, which decision was adopted by Judge Cebull. See *Plain*
10 *Feather v. Preite*, No. CV 10-00070-BLG-RFC, 2010 WL 3038504, at *1 (D.
11 Mont. July 6, 2010) report and recommendation adopted sub nom. *Plain Feather*
12 *v. Preite*, No. CV 10-070-BLG-RFC, 2010 WL 3037530 (D. Mont. Aug. 4, 2010).
13 (Declaration of Christoffer Lee In Support of Respondent Catterson's Motion for
14 Leave To File Motion for Reconsideration, Dkt. No. 63 ["Lee Dec.,"] Exhs. A, B.)
15 The Ninth Circuit dismissed her appeal for lack of jurisdiction because the appeal
16 was not timely filed. See *Plain Feather v. Preite*, No. 10-35808 (9th Cir. Oct. 13,
17 2010). (Lee Dec. Exh. C.)

18 (2) Petitioner Clifford Bird In Ground's previous challenge to his entry of
19 a guilty plea to bribery before Judge Cebull, and a sentence of 37 months of
20 imprisonment, came before the Ninth Circuit Court of Appeals on three
21 occasions: the first affirming his conviction by guilty plea, *United States v.*
22 *Birdinground*, 107 F. App'x 806, 807 (9th Cir. 2004); the second, in which the
23 Ninth Circuit remanded his sentence for application of new precedential caselaw,
24 185 F. App'x 713, 714 (9th Cir. 2006); and the third in which his re-imposed 37-
25 month sentence was affirmed over challenges to the voluntariness of the plea and
26 Judge Cebull's alleged bias, 265 F. App'x 539, 540 (9th Cir. 2008). (Lee Dec.
27 Exhs. D, E, F.) A one-year statute of limitations, running from "the date on which
28 the judgment of conviction becomes final," applies to motions for relief from
imposition of a federal criminal sentence under 28 U.S.C. section 2255. See 28
U.S.C. § 2255(f)(1).

(3) The FAP alleged that the Crow Tribe might seek relief based upon a
voting rights case decided by Judge Cebull. A docket review of federal actions
meeting that description returned only the case of *Wandering Medicine v.*
McCulloch, (D. Mont., No. 12-cv-135), in which Judge Cebull denied a
preliminary injunction and the tribal entities appealed. The case was subsequently
reassigned to a different judge, and then later was settled, with the parties'
submission of a stipulated dismissal with prejudice in July of 2014. (Lee Dec.
Exh. G, H, I, J, K [D. Mont. Case No. 12-cv-135-DWM, Dkt. Nos. 111, 213, 222,
and 223].)

(4) The FAP alleged that the Crow Tribe might also seek relief based upon

1 a water rights case. A docket review of federal actions meeting this description
2 returned no water rights cases decided against the Crow Tribe by Judge Cebull.¹
(Catterson Mtn. at 6:14-16.)

3 Petitioners' response to the motion for reconsideration does not dispute this factual presentation
4 and Petitioners conceded the same at oral argument.

5 The consequence of this newly provided information is significant: none of the Petitioners
6 herein appear able to state a cognizable claim based upon the matters alleged in the FAP. The
7 uncontested facts presented are that Petitioner Plain Feather and Petitioner Bird in Ground have
8 both exhausted the avenues for relief with respect to their cases. They offer no other avenues in
9 their response to the motion. All Petitioners have failed to articulate a procedural vehicle that
10 would allow them to reopen any of the cases identified.

11 Likewise, in response to the motion for reconsideration, Petitioners have failed to identify
12 any other cases in connection with which they might seek relief. The FAP is not saved by
13 Petitioners invocation of allegations in a newly filed complaint, which alleges injuries to *other*
14 parties. (*See* Petitioners' Request for Judicial Notice of the complaint filed in Northern District of
15 California case *John Adams, Shane Castle v. Committee on Judicial Conduct et al.*, Case No.
16 3:15-cv-01046.)² Standing for purposes of the FAP requires examination of the allegations of the
17 Petitioners therein. Thus, the Court now has before it what it did not have before: an undisputed
18 record showing that, in addition to their failure to meet the requirements of Rule 27, Petitioners
19 are not in danger of suffering any injuries redressable by their Petition.

20 Further, the Court notes that Petitioners have not argued that Respondent Catterson is
21 likely to violate the national document retention policy, which she concedes requires her to
22 preserve the emails in the investigative file until January 18, 2019.

23 In light of the additional information regarding Petitioners' inability to bring a cognizable
24 claim, the Court has reconsidered its decision. As in its prior March 18 Order, the Court takes no
25

26 ¹ Respondent notes that a comprehensive settlement of water rights was reached with the
27 passage of the Crow Tribe Water Rights Settlement Act of 2010. *See* Claims Resolution Act of
2010, Pub. L. No. 111-291, § 401 *et seq.*, 124 Stat. 3097 (2010). (*See* Lee Dec. Exh. L.)

28 ² Petitioners' Request for Judicial Notice is **GRANTED**.

1 position on whether the emails in Respondents’ investigatory files might be discoverable in some
2 later proceeding, or whether 28 U.S.C. section 360(a)³ would shield all evidence gathered in
3 Respondents’ files. To the extent Respondents argue that the Court’s March 18 Order suggested
4 that this or any other petition under Rule 27 would permit discovery of confidential information,
5 Respondents are incorrect. The Court neither stated nor suggested that these Petitioners, or any
6 other, could obtain any documents, whether by means of a pre-complaint petition under Rule 27,
7 or as discovery in a civil case under Rule 26, or otherwise.⁴


8 **III. CONCLUSION**

9 The motion of Respondent Catterson for reconsideration, as joined by Respondent USJCD
10 Committee, is **GRANTED**. The Court, upon review of newly presented information, finds that none
11 of the Petitioners in the FAP reasonably “expects to be a party to an action cognizable in a United
12 States court but cannot presently bring it or cause it to be brought,” and therefore none of them has
13 or may have an injury redressable by the petition.

14 Consequently, the Court **VACATES** its March 18 Order and enters this new order **DENYING**
15 the Petition. The parties shall submit a revised proposed form of judgment, agreed as to form,
16 within five (5) business days of this Order.

17 **IT IS SO ORDERED.**

18 Dated: May 27, 2015

19 
20 **YVONNE GONZALEZ ROGERS**
21 **UNITED STATES DISTRICT COURT JUDGE**

22 _____
23 ³ 28 U.S.C. section 360 provides, in part:
24 (a) Confidentiality of proceedings.--Except as provided in section 355, all papers, documents, and
25 records of proceedings related to investigations conducted under this chapter shall be confidential
26 and shall not be disclosed by any person in any proceeding except [where the judicial council
releases a copy of the investigation report to the complainant and the judge investigated; for
purposes of an impeachment investigation; or as authorized by the subject judge and the chief
judge of the circuit or Chief Justice].

27 ⁴ In light of the Court’s decision that reconsideration and denial of the FAP is required for
28 reasons of standing, the Court does not reach the USJCD Committee’s argument that the Court is
without inherent authority or abused its discretion in exercising such authority.