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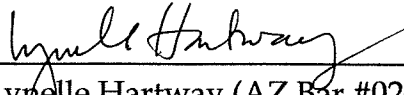
**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

RHONDA WHITEROCK FRED,)	No. Civ. S-10-0845 JAM GGH PS
)	
Plaintiff,)	
vs.)	MOTION TO DISMISS COMPLAINT
)	FOR LACK OF JURISDICTION
WASHOE TRIBE OF NEVADA &)	
CALIFORNIA,)	
)	
Defendant.)	
)	

COMES NOW the undersigned Lynelle Hartway, appearing *Pro Hac Vice* on behalf of specially appearing Defendant, the WASHOE TRIBE OF NEVADA AND CALIFORNIA and hereby moves this Court for a dismissal of the above entitled action in it is entirety as follows: (1) pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, and/or (2) pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, and/or (3) for failure to exhaust Tribal remedies, and/or (4) pursuant to

1 Fed. R. Civ. P. 12(b)(6) for failure to state claim upon which relief can be granted.¹ This
2 Motion is supported by the attached Memorandum of Points and Authorities and its
3 exhibits.

4 DATED this 22nd day of November, 2010.

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7 Lynelle Hartway (AZ Bar #020486)
8 General Counsel
9 Washoe Tribe of Nevada and California
10 Appearing *Pro Hac Vice*
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22 ¹ Pursuant to the Fed. R. Civ. P. 12(a)(4), this Motion is provided instead of an Answer, thereby
suspending the time for any Answer until after the Court rules on this Motion.

MEMORANDUM OF POINTS & AUTHORITIES

Introduction

The Defendant Washoe Tribe of Nevada and California (hereinafter “Defendant” or “Tribe”) specially appears and moves this Court to dismiss the Complaint for Declaratory and Injunctive Relief (hereinafter “the Complaint”) filed by Plaintiff Rhonda Whiterock Fred (hereinafter “Plaintiff” or “Ms. Fred”) pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, and/or pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, and/or for failure to exhaust Tribal remedies, and/or pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state claim upon which relief can be granted.

Plaintiff seeks custody of two of her minor grandchildren. She asks this Court to grant her that custody and in so doing to disregard the Washoe Tribe’s jurisdiction as it exists pursuant to the Tribe’s inherent sovereignty and as is recognized in federal and Washoe Tribal law. Further, Ms. Fred invites this Court to substitute its judgment for that of the Washoe Tribal Court on the matter of her grandchildren’s custody.

Ms. Fred’s Complaint must be dismissed. The Washoe Tribe is immune from suit absent an explicit waiver of that immunity either by the Tribe itself or by Congress. Plaintiff’s Complaint does not show any such waiver nor otherwise establish the jurisdiction of this Court for her claims against the Tribe. In the alternative, Plaintiff’s claims must be dismissed for failure to exhaust Tribal remedies and/or failure to state a claim upon which relief can be granted.

Statement of Facts

The Washoe Tribe is a federally recognized Tribe. *See e.g.* 67 Fed. Reg. 60,810-01 (Oct. 1, 2010). Plaintiff is the maternal grandmother of two minor Indian children who are wards of the Washoe Tribal Court in the care and custody of the Tribe's Department of Social Services (hereinafter "DSS").² The Washoe Tribal Court maintains ongoing jurisdiction in the matter of the children's custody and continues its wardship of the children. *See attached* as Exhibit A.

Plaintiff's minor grandchildren were removed from the care and custody of their mother and from Plaintiff's home in November and December of 2005 by DSS following allegations of child abuse and neglect. *See attached* as Exhibit B. The children's mother, M.F., is a member of the Washoe Tribe as is minor T.F. Minor E.F. is eligible for membership.³ *See attached* as Exhibit C. It appears that at the time of the emergency removals, the children resided with Plaintiff at 19750 Highway 89, #324, Markleeville, California. *See* Exhibit B. Despite statements otherwise in the Washoe Tribal Court documents, such address is not located within the exterior boundaries of Washoe Indian Country. *Id.*

Periodically since DSS removed the children from the custody and care of their mother and Ms. Fred, Plaintiff has participated in the Tribal Court proceedings in the

² As the underlying facts in Plaintiff's case involve the care and custody of minor children and such matters are confidential, the children will be referred to only by their initials. All exhibits attached to this Motion containing the minor children's names and/or dates of birth have been redacted in accordance with E.D. Cal. R. 140(a).

³ Minor E.F. is also identified by the alternate spelling of "A.F" in some documents.

case. The children were eventually placed in the care of their aunt and DSS sought to have the children's placement with their aunt become permanent. *See attached as Exhibit D.* On June 18, 2007, Plaintiff filed two Petitions for *habeas corpus* with the Tribal Court seeking custody of her grandchildren. *See attached as Exhibit E.* *Habeas corpus* was sought pursuant to the Washoe Tribe's Law & Order Code; the Tribal Court denied the Petition after a hearing. *See attached as Exhibit F.* Ms. Fred appealed that denial to the Inter-Tribal Court of Appeals of Nevada (ITCAN). *See attached as Exhibit G.* The ITCAN upheld the Tribal Court's dismissal on January 4, 2010. *See Exhibit D.* Subsequently, Ms. Fred sought reconsideration by the ITCAN. *See attached as Exhibit H.* In that request, Plaintiff raised for the first time her argument that the Tribal Court lacked the necessary jurisdiction over the matter of her grandchildren's custody. *Id.* The request for reconsideration was denied by the ITCAN. *See attached as Exhibit I.* Ms. Fred continued to be able to participate in the proceedings concerning the minor children. *See attached as Exhibit J.*

Plaintiff is now asking this Court to grant her custody of her two minor grandchildren. Her Complaint names the Washoe Tribe as the sole Defendant and invites this Court to exercise jurisdiction pursuant to 28 U.S.C. §1331 (federal question), certain provisions of §1343(a) (civil rights and elective franchise), and §1360 (state civil jurisdiction in actions to which Indians are parties - also commonly referred to as P.L. 280). Ms. Fred states that her claims "arise under" the U.S. Constitution's and the State of California's Constitution's bill of attainder provisions, 42 U.S.C. §1985, and P.L. 280. Elsewhere, Plaintiff's Complaint alleges violations of the Indian Child Welfare Act, 25

1 U.S.C. §1901 *et seq.*, due process, and provisions of the Indian Civil Rights Act (ICRA),
2 25 U.S.C. §1301 *et seq.*

3 **Summary of Arguments**

- 4 1. The Washoe Tribe is immune from Plaintiff's suit based on Tribal sovereign
5 immunity. Plaintiff points to no waiver of that immunity for her claims and has
6 otherwise failed to meet her burden of establishing this Court's jurisdiction.
- 7 2. In the alternative, the Plaintiff did not exhaust her Tribal remedies with respect to
8 her arguments questioning the Tribe's jurisdiction over the underlying child
9 custody matter and therefore her Complaint must be dismissed.
- 10 3. In the alternative, the Plaintiff has failed to state a claim upon which relief can be
11 granted.

12 **Standard of Review**

13 Federal courts are courts of limited jurisdiction, and may adjudicate only those
14 cases authorized by the Constitution and by Congress. *See Kokkonen v. Guardian Life Ins.*
15 *Co.*, 511 U.S. 375, 377 (1994). Plaintiff bears the burden of establishing the Court's
16 subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes of the Colville*
17 *Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). A motion to dismiss for failure to
18 establish the subject matter jurisdiction of the Court can be made on the face of the
19 Complaint or by presenting affidavits or other evidence before the Court. In the case of
20 the latter, the Court need not presume the truthfulness of the Plaintiff's allegations. *See*
21 *Safe Air for Everyone v Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

When considering a motion under Fed. R. Civ. Pro. R. 12(b)(6) for failure to state a claim upon which relief can be granted, “[t]he issue is . . . whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims.” *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). If the Complaint (1) fails to state a cognizable legal theory or (2) fails to allege sufficient facts under a cognizable legal theory then dismissal is proper. *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988), citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-4 (9th Cir. 1984). Dismissal is also appropriate if the defendant establishes that no cause of action exists and therefore no relief can be granted. *See Davis v. Passman*, 442 U.S. 228 (1979). The Court must accept the Complaint’s facts as true and view them in the light most favorable to the plaintiff; but need not assume the truth of legal conclusions. *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 919 (9th Cir. 1996) (citations omitted). *Pro se* pleadings are to be liberally construed. *Balistreri*, 901 F.2d at 699. Matters of public record and documents referred to and material to the complaint may also be considered. *See Nowick v. Gammell*, 351 F. Supp. 2d 1025 (D. Haw. 2004); *see also Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

Arguments

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE WASHOE TRIBE DUE TO TRIBAL SOVEREIGN IMMUNITY.

“A party invoking the federal court’s jurisdiction has the burden of proving the actual existence of subject matter jurisdiction.” *Thompson v. McCombe*, 99 F.3d 352, 353

(9th Cir. 1996), citing *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987). It is well settled that Indian tribes are immune from suit in judicial forums absent an explicit waiver of that immunity either by the Tribe itself or by Congress; and the scope of this immunity is, by now, firmly established in the case law. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The question of sovereign immunity goes to the jurisdiction of the court. *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). And, therefore, “‘only consent gives the courts the jurisdictional authority to adjudicate claims, raised by or against tribal defendants.’ ‘Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize.’” *Pit River Home & Agric. Co-op. Ass’n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (citations omitted). A Tribe may consent to the jurisdiction of the court through a waiver of immunity, but any such waiver must be clear and unequivocally expressed. *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001). For instance, tribal immunity is not defeated by allegations that the Tribe acted beyond its authority. *Imperial Granite, Co. v. Pala Band of Indians*, 940 F.2d 1269 (9th Cir. 1991), citing *Chemehuevi Indian Tribe v. California Bd. of Equal.*, 757 F.2d 1047, 1052 (9th Cir. 1985), *rev’d on other grounds*, 474 U.S. 9 (1985). A court must presume it lacks jurisdiction over a tribe until the plaintiff establishes jurisdiction by showing a clear and unequivocal waiver of sovereign immunity. *Stock West*, 873 F.2d at 1225.

The Washoe Tribe, as a sovereign entity, possesses sovereign immunity. Plaintiff’s Complaint quite simply ignores this immunity and names the Tribe as the

1 Defendant. Ms. Fred's failure to acknowledge or otherwise provide any good faith
2 argument asserting a waiver of the Tribe's immunity or otherwise establishing this
3 Court's subject matter jurisdiction are fatal flaws as she bears the burden of establishing
4 the subject matter jurisdiction of the Court. *Stock West*, 873 F.2d at 1225. Further, the
5 statutes cited to by Ms. Fred as the basis of the Court's jurisdiction do not provide the
6 necessary waiver of tribal sovereign immunity necessary to support any claims either
7 against tribes generally or the Washoe Tribe in particular. For instance, the Supreme
8 Court has found that the grant of civil jurisdiction to states in P.L. 280 is not applicable
9 against tribes. *Bryan v. Itasca County, Minn.*, 426 U.S. 373. 388-389 (1976). Neither do
10 the statutes Ms. Fred points to as those her claims "arise under". To the extent that Ms.
11 Fred's seeks this Court's jurisdiction under those statutes, her Complaint must be
12 dismissed for lack of subject matter jurisdiction.

13 Plaintiff's Complaint also: (1) argues that the Washoe Tribal Court exceeded its
14 jurisdiction by adjudicating the custody of her grandchildren, (2) attempts to invoke the
15 ICRA as a basis for her claims, and (3) attempts to invoke the U.S. Constitution, the
16 State of California's Constitution, and 42 U.S.C. §1985. Each of these will be dealt with
17 in turn.

18 ***A. The Plaintiff Fails to Establish this Court's Federal Question Jurisdiction.***

19 Ms. Fred's Complaint offers 28 U.S.C. §1331 as basis of this Court's jurisdiction,
20 which provides that, "district courts shall have original jurisdiction of all civil actions
21 arising under the Constitution, law, or treaties of the United States." §1331 is not an
22 independent basis for jurisdiction and it is necessary for Plaintiff, "to assert a claim

1 'arising under' federal law." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S.
2 845, 850 (1985). Notwithstanding the Tribe's sovereign immunity, under limited
3 circumstances federal courts have found that they, "may determine under §1331
4 whether a tribal court has exceeded the lawful limits of its jurisdiction," in a particular
5 matter. *Id.* at 853. Ms. Fred has alleged that the Washoe Tribe has "usurped" the
6 "original" jurisdiction of the State of California and that its jurisdiction over the custody
7 matter was unlawful. *See e.g.* Complaint, p. 3, line 24.

8 Ms. Fred cannot successfully establish this Court's §1331 jurisdiction under
9 *National Farmers Union*. First, Plaintiff's claims do not "arise under" any federal law.
10 The actions underlying her claims involve the actions of the Washoe Tribal Court and
11 DSS taken pursuant to Washoe Tribal law, *i.e.* the emergency removal of two minor
12 Indian children from the custody of their mother under Title 8 of the Tribe's Law &
13 Order Code. *See* Exhibit A. In questioning those actions, Ms. Fred's issues "arise
14 under" Tribal law, not federal law. Second, the narrow circumstances providing for
15 federal review of tribal court jurisdiction found in *National Farmers Union* do not exist
16 here. The Supreme Court in *National Farmers Union* considered whether an Indian tribe
17 retains the power to compel a non-Indian property owner to submit to the civil
18 jurisdiction of a tribal court. 471 U.S. at 852-3. Ms. Fred's Complaint does not involve
19 non-Indian property owners being compelled into Tribal Court. Instead, it involves a
20 custody matter involving Indian children. Finally, federal law specifically recognizes
21 tribal jurisdiction in such matters. The ICWA recognizes that, "there is no resource that
22 is more vital to the continued existence and integrity of Indian tribes than their children

1 and that the United States has a direct interest, as trustee, in protecting Indian children
2 who are members of or are eligible for membership in an Indian tribe.” 25 U.S.C.
3 §1901(3). To that end, ICWA was intended to supplement and complement the powers
4 and jurisdiction of Indian Tribes, not diminish them. *Mississippi Band of Choctaw Indians*
5 *v. Holyfield*, 490 U.S. 30 (1989); *see also Native Village of Venetie v. Alaska*, 944 F.2d 548, 562
6 (9th Cir. 1991). ICWA serves to rectify state agency and court actions that result in the
7 removal of Indian children from Indian communities. *Doe v. Mann*, 415 F.3d 1038, 1047
8 (9th Cir. 2005). “‘At the heart of ICWA’ lies a jurisdictional scheme aimed at ensuring
9 that tribes have a role in adjudicating and participating in child custody proceedings
10 involving Indian children domiciled both on and off the reservation.” *Id.* at 1049.
11 “Tribal courts have exclusive jurisdiction over child custody proceedings involving
12 Indian children domiciled on reservations.” *Mississippi Band of Choctaw*, 490 U.S. at 36.
13 Under §1911(b), there is, “concurrent but presumptively tribal jurisdiction in the case of
14 [Indian] children not domiciled on the reservation.” *Id.* at 36. Further, nothing in P.L.
15 280 strips tribes of the right, concurrent with states, to exercise the jurisdiction
16 recognized in ICWA.⁴ *See Id.* at 745-46 (recognizing *Venetie’s* holding that “[Public Law]
17 280 had not stripped [the tribe] of sovereignty over child custody issues because it had
18 granted the states only concurrent jurisdiction”). On its face, therefore, Ms. Fred’s
19 claim that the Tribe has exceeded its jurisdiction carries no weight and cannot provide
20 this Court with jurisdiction pursuant to 28 U.S.C. §1331.

21 ⁴ Instead, ICWA provides a process by which tribes affected by P.L. 280 may reassume exclusive
22 jurisdiction over certain child custody matters – a process the Washoe Tribe has followed. *See* 61 Fed.
Reg. 1,779-01 (Jan. 23, 1996).

Further, Plaintiff's grandchildren are Indian children within the definition of ICWA. 25 U.S.C. §1903(4). Her statement to the contrary is incorrect. *See* Complaint, p. 3, lines 13-14. Both minors are the children of a Washoe Tribal member. Minor T.F. is a Washoe Tribal member and minor E.F. is eligible for membership. *See* Exhibit C. ICWA's focus is on the *child's* tribal membership as the determining factor in recognizing tribal jurisdiction. Tribal, "jurisdiction hinges upon the ethnic identity and tribal membership of the child, rather than the geographical location of the child's domicile. This reflects Congress' recognition of the fact that tribal ties extend beyond the boundaries of the reservation." Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW §7.02[1][c], pp. 1602-03 (2005 ed.). "A Tribe's authority over its reservation or Indian country is incidental to its authority over its members." *Venetie*, 944 F.2d at 559, n.12 (citations omitted). A tribe's determination of membership or eligibility is conclusive evidence that a child is an Indian Child within the meaning of ICWA. 44 Fed. Reg. 67,584 (Nov. 26, 1979); *see also In Re Junious M.*, 193 Cal. Rptr. 40 (Cal. App. Dist. 1, 1983).

Taken together, Ms. Fred's argument that the Washoe Tribe has exceeded its jurisdiction flies in the face of ICWA and other federal laws recognizing Tribal authority with regards to its members.⁵ Ms. Fred would have this Court believe that her

⁵ *See e.g., United States v. Quiver*, 241 U.S. 602, 603-4 (1916) (It is the settled policy of Congress, "to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws."). Tribal ability to determine questions of internal relations derives from their status as a distinct political entity. *See, e.g., Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390 (1976) (*per curiam*) (recognizing that the jurisdiction of a tribal court derives not from the status of the plaintiff, but, "from the quasi-sovereign status of the [Tribe] under federal law.").

1 grandchildren are not Washoe, and that *her* status as a non-member of the Washoe
 2 Tribe as well as the location of the residence of the children at the time of their removal
 3 from her home are controlling. Nothing in the law supports these arguments nor do the
 4 facts. As shown, regardless of their residence at the time the Tribe first exerted its
 5 jurisdiction over their custody, the Tribe's inherent right to exert jurisdiction over the
 6 minor Indian children is recognized by federal law.⁶

7 Despite the statements made by Ms. Fred in the Complaint and in light of the
 8 facts and circumstances of this case, 28 U.S.C. §1331 does not provide this Court with
 9 the necessary subject matter jurisdiction to proceed in light of the Tribe's immunity
 10 from suit.

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 12 ***B. Plaintiff Fails to Establish this Court's Personal or Subject Matter***
 13 ***Jurisdiction to hear her Indian Civil Rights Act Claims.***

14 Ms. Fred's Complaint contends that even if the Washoe Tribal Court properly
 15 had jurisdiction in the matter of the custody of her grandchildren, the denial of her
 16 petitions to the Tribal Court for *habeas corpus* denied her due process, "a violation of
 17 I.C.R.A. (1968) – Title 25 U.S.C. §§1302(2)(6)(8) and 1303." See Complaint p. 3, lines 25-
 18 26; p. 5, lines 25-26. The ICRA is not included by the Plaintiff as a basis of the Court's
 19 jurisdiction. See *Id.* p. 2, lines 8-14. It is not clear from the Complaint whether Ms. Fred
 20 is attempting to state a claim for violation of due process under §1302 for the Tribal

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 22 ⁶ ICWA also recognizes exclusive tribal jurisdiction over Indian children who are wards of the Tribal Court, regardless of the child's domicile or residence. 25 U.S.C. §1911(a).

1 Court's denial of her Tribal *habeas corpus* petition or is seeking *habeas corpus* relief from
2 this Court under 25 U.S.C. §1303. Regardless, the ICRA does not supply a general
3 waiver of Tribal sovereign immunity necessary, and Ms. Fred's Complaint must be
4 dismissed.

5 In *Santa Clara Pueblo*, the Supreme Court recognized that Indian tribes possess
6 immunity from suit and that ICRA does not constitute a general waiver of that
7 immunity, finding:

8 Nothing on the face of Title I of the ICRA purports to subject tribes to the
9 jurisdiction of the federal courts in civil actions for injunctive or
10 declaratory relief . . . In the absence here of any unequivocal expression of
contrary legislative intent, we conclude that suits against the tribe under
the ICRA are barred by its sovereign immunity from suit.

11 436 U.S. at 58-9.

12 ICRA's requirement that no Indian tribe, "deprive any person of liberty or
13 property without due process of law," therefore, does not provide a private cause of
14 action for declaratory and injunctive relief against a Tribe in federal court. *See* 25 U.S.C.
15 §1302(8); *see also Santa Clara*, 436 U.S. at 59. Such claim is barred by tribal sovereign
16 immunity. *Pit River Home*, 30 F.3d at 1100. "A petition for writ of *habeas corpus* under
17 §1303 is the only avenue for relief for a violation of the ICRA." *Liska v. Macarro*, No. 08-
18 CV-1872-IEG (POR), 2010 WL 3718300, at *2 (S.D. Cal. Sept. 7, 2010), *citing Boozer v.*
19 *Wilder*, 381 F.3d 931, 934 (9th Cir. 2004). To the extent that Ms. Fred's Complaint to this
20 Court asks for declaratory and injunctive relief for alleged due process violations by the
21 Washoe Tribal Court under the ICRA, it must fail under *Santa Clara* as the Washoe Tribe

1 is immune.⁷

2 Disregarding for the moment that Ms. Fred fails to clearly state her intent to seek
 3 *habeas corpus* relief in this case; to the extent that she does so, her Complaint must be
 4 dismissed due to lack of both personal and subject matter jurisdiction. Federal courts
 5 have recognized only a limited waiver of sovereign immunity under ICRA for federal
 6 *habeas corpus* petitions pursuant to 25 U.S.C. §1303. *Liska*, *supra*, at *2. ICRA makes the
 7 writ of *habeas corpus* available in federal court to any person, “to test the legality of his
 8 detention by order of an Indian tribe.” *See* 25 U.S.C. §1303. In interpreting §1303, courts
 9 have held that to successfully establish federal jurisdiction (both personal and subject
 10 matter), petitioners must show: (1) the tribal action taken was criminal or punitive in
 11 nature, (2) resulted in petitioner’s detention or a severe restraint on liberty, and (3) is
 12 properly stated not against the tribe but the person or persons with custody of the
 13 petitioner. *See, e.g. Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001) (civil trespass fine is
 14 neither criminal in nature nor does it amount to detention); *Poodry v. Tonawanda Band of*
 15 *Seneca Indians*, 85 F.3d 874 (2nd Cir. 1996) (ICRA’s “in detention” requirement should be
 16 read as analogous to federal habeas statutes of 28 U.S.C. §§2241 and 2254; and tribe
 17 itself is not the proper respondent). When a *habeas corpus* petition fails to name a proper
 18 respondent, federal courts lack personal jurisdiction. *Liska*, *supra*, at *2, *citing Ortiz-*
 19 *Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996).

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 21 ⁷ As must any request that this Court review the underlying removal of her grandchildren from her
 22 home. *See e.g.* Complaint, p. 1, lines 26-27 (“Plaintiff attempts to challenge the legality of the *cause* for
 removing her grandchildren from her custody.” (emphasis added)). Plaintiff provides no indication of
 the legal authority for asking a federal court to act as an appellate court for a tribal court’s Indian child
 custody decisions.

Ms. Fred's Complaint fails to meet any of the standards for ICRA *habeas corpus* relief. Her Complaint states several allegations against the Tribal Court and the DSS but nowhere does she allege or provide any support for the idea that the custody matter involving her grandchildren is a criminal or punitive action. The Tribe's exercise of its rights to adjudicate Indian child custody proceedings is not and should not be seen as criminal or punitive. In addition, Ms. Fred has not alleged any severe restraint on *her* liberty. Of course the removal of her grandchildren from her home and care was and is difficult. It does not, however, place her in any custody, restraint, or otherwise limit her freedoms to the extent of triggering federal *habeas corpus* relief. *Moore*, 270 F.3d at 791, citing *Hensley v. Municipal Ct.*, 411 U.S. 345, 351 (1973) ("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.")⁸ Finally, Ms. Fred incorrectly named the Tribe as the Respondent. Under both *Poodry* and *Liska*, therefore, this Court has neither personal nor subject matter jurisdiction over her Complaint, and it must be dismissed.

C. The Tribe is Not Subject to Plaintiff's Federal and State Constitutional and Constitutionally-Based Claims.

As stated above, Ms. Fred's allegations and requests for relief cannot proceed without a showing that the Tribe's immunity has been waived against such suit. Plaintiff supplies no such waiver and instead alleges that her claims "arise under" the U.S. and California Constitutions' bill of attainder provisions. Further, she presents as a

⁸ It is also questionable whether federal *habeas corpus* is available in a child custody case. *Sylvander v. New England Home For Little Wanderers*, 584 F.2d 1103 (1st Cir. 1978).

1 basis for this Court's jurisdiction 28 U.S.C. §1343(a)(1) – (3), alleging that the named
2 Defendants, including the Tribal Defendants, violated 42 U.S.C. §1985.⁹ The Tribe is not
3 constrained by the United States or California's Constitution or subject to suits
4 thereunder. Similarly, the Tribe's immunity has not been waived for federal court
5 actions pursuant to Constitution-based civil rights claims.

6 **1. The Constitution's Restrictions Do Not Apply to Indian Tribes.**

7 In *Talton v. Mayes*, 163 U.S. 376 (1896), the U.S. Supreme Court addressed the
8 issue of whether the U.S. Constitution, and the restrictions on government action
9 therein, was applicable to the actions of Indian tribes. The Court held the Constitution
10 only restricts the federal and state governments, not tribal governments. *Talton*, 163
11 U.S. at 382-5. After *Talton*, the Court again addressed the issue of the Constitution's
12 application to tribal governments, and held that, "[a]s separate sovereigns pre-existing
13 the Constitution, tribes have historically been regarded as unconstrained by those
14 constitutional provisions framed specifically as limitations on federal or state
15 authority." *Santa Clara Pueblo*, 436 U.S. at 56. The Ninth Circuit subsequently held,
16 "Constitutional guarantees . . . are not applicable to the exercise of governmental
17 powers by an Indian Tribe except to the extent that they are made explicitly binding by
18 the Constitution or are imposed by Congress." *Trans-Canada Enter., Ltd. v. Muckleshoot*
19 *Indian Tribe*, 634 F.2d 474, 476-7 (9th Cir. 1980).

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22 ⁹ Ms. Fred states that her Second Claim arises under "damages and deprivation of rights involving
conspiracy . . . " Plaintiff's Complaint contains no request for damages, however.

1 Similarly, tribe's sovereign status generally prevents state laws from being
2 applied to the tribe. *See generally Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding
3 that state law "can have no force" in Indian Country). It remains the general rule that
4 states may not regulate tribes without express Congressional consent. *See Oklahoma Tax*
5 *Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Bryan v. Itasca County*, 426 U.S. 373
6 (1976). Plaintiff has provided no basis for her assertion of a claim against the Tribe
7 under the State of California's Constitution nor otherwise shown how a state's laws
8 could be applied to the Washoe Tribal Court's adjudication of the custody of a minor
9 Indian child pursuant to the Tribe's Law & Order Code, either generally or by this
10 Court.

11 The Tribe is therefore not subject to the constraints on governmental action
12 contained in either the U.S. or California Constitutions. Plaintiff has pointed to no law
13 authorizing private actions in federal courts against the Tribe to enforce federal or state
14 constitutional protections nor has she provided any other basis to support this Court's
15 jurisdiction to hear her "Bill of Attainder" claims. Plaintiff's Constitution-based claims
16 must be dismissed as they are prohibited by the Tribe's sovereign immunity and
17 therefore limit this Court's subject matter jurisdiction.

18 **2. The Tribe is Not Subject to Plaintiff's Civil Rights Claims.**

19 As demonstrated above, Indian Tribes are not subject to the restrictions of or
20 suits under the U.S. Constitution. It therefore follows that, absent specific
21 Congressional indication otherwise, Tribes are equally free from the restrictions
22 imposed by or suits authorized under statutes whose purpose it is to enforce the rights

1 guaranteed under the Constitution. 28 U.S.C. §1343(a)(1) - (3) grants federal courts
 2 original jurisdiction over civil actions brought for violations of 42 U.S.C. §1985 and for
 3 deprivation of rights “under color of State law.” Claims against tribes under 42 U.S.C.
 4 §1985, aimed at providing enforcement of Constitutional protections, are barred by
 5 tribal sovereign immunity. *See Mosseaux v. United States*, 28 F.3d 786 (8th Cir. 1994)
 6 (finding that neither the United States nor an Indian Tribe are subject to suit under
 7 §1985(3)); *see also Bruette v. Knope*, 554 F. Supp. 301 (E.D. Wis. 1983). Absent some
 8 indication that Congress did or intended to waive tribal sovereign immunity pursuant
 9 to either 28 U.S.C. §1343 or 42 U.S.C. §1985, Plaintiff has failed to establish this Court’s
 10 jurisdiction over her Complaint and her claims must be dismissed.¹⁰

11 **II. PLAINTIFF FAILED TO EXHAUST TRIBAL REMEDIES**

12 The Supreme Court has repeatedly recognized tribal courts, “as appropriate
 13 forums for the exclusive adjudication of disputes affecting important personal and
 14 property interests of both Indians and non-Indians.” *Santa Clara Pueblo*, 436 U.S. at 65.
 15 Where there is a colorable claim for tribal jurisdiction, plaintiffs must first exhaust
 16 available tribal remedies before filing any claim in federal court asserting that a tribe
 17 lacks jurisdiction. *Nat’l Farmers Union*, 471 U.S. 845; *see also Iowa Mutual Ins. Co. v.*
 18 *LaPlante*, 480 U.S. 9 (1987). The requirement of exhaustion of tribal remedies best serves
 19 the orderly administration of justice by allowing tribal courts to develop a full record
 20 concerning jurisdictional determinations, and to enable other courts to benefit from
 21

22 ¹⁰ Plaintiff’s Complaint also contains no allegation that any action taken by the Tribal Court was done pursuant to state law – a necessary part of any claim under 28 U.S.C. §1343(a)(3).

1 tribal court expertise in such matters in the event of future judicial review. *Nat'l Farmers*
2 *Union*, 471 U.S. at 856. "Principles of comity require federal courts to dismiss or to
3 abstain from deciding claims over which tribal court jurisdiction is 'colorable,' provided
4 that there is no evidence of bad faith or harassment." *Marceau*, 540 F.3d at 920, *citing*
5 *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). Exhaustion
6 of tribal remedies is a mandatory requirement. *Burlington N. R. Co. v. Crow Tribal*
7 *Council*, 940 F.2d 1239, 1245 (9th Cir.1991).

8 Ms. Fred's Complaint is centered on the denial by the Washoe Tribal Court of her
9 Petition for *habeas corpus* in which she sought custody of her grandchildren. However,
10 her attempts at *habeas corpus* relief, begun in 2007, made no mention of any challenge to
11 the Tribal Court's jurisdiction over the underlying Indian child custody matter until she
12 sought reconsideration of an appeal. *See* Exhibit G. Though it is clear from her
13 Complaint and her Tribal Court *habeas corpus* petition that Ms. Fred has attempted to
14 argue the issue of the propriety of the removal of her minor grandchildren from her
15 home, such argument goes to the merits of the Tribal Court's decision - not its subject
16 matter jurisdiction. Plaintiff's summary statement that all of Plaintiff's remedies with
17 the Tribe were exhausted is not supported by reference to the record or otherwise.
18 Raising the issue of the Tribal Court's subject matter jurisdiction for the first time on a
19 motion for reconsideration in an appellate court does not qualify as exhausting her
20 Tribal remedies on the issue of jurisdiction. Any argument concerning the Tribal
21 Court's subject matter jurisdiction should have been presented to that Court - not the
22 ITCAN, and not this Court.

1 To the extent that Ms. Fred seeks to challenge the underlying jurisdiction of the
2 Washoe Tribal Court over the matter of the custody of her grandchildren, such claims
3 must exhaust Tribal remedies prior to being brought to this Court. Since Ms. Fred has
4 failed to present her arguments to the Washoe Tribal Court properly in order for that
5 Court to have an opportunity to determine its own jurisdiction, this Court must dismiss
6 her Complaint for failure to exhaust Tribal remedies.

7 **III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE TRIBE**

8 Plaintiff provided neither facts nor any legally cognizable theory that supports
9 her various claims against the Washoe Tribe. In other words, Plaintiff presented neither
10 cause of action nor any set of facts and law upon which relief can be granted.

11 As an initial matter, Plaintiff's Complaint requests relief that she cannot receive
12 from this Court – both because of the nature of the relief requested and the party from
13 whom that relief is sought. First, Ms. Fred argues that the Washoe Tribal Court was not
14 the proper forum for child custody matters involving her grandchildren and that
15 California has jurisdiction instead. Her requested relief from this Court, however, is not
16 to simply rule on the Tribal Court's jurisdiction or lack thereof and/or order the
17 transfer of the case to California. Instead, Ms. Fred asks that this Court award her
18 custody of her minor grandchildren. *See* Complaint, p. 7, lines 20-22. In doing so, she
19 fails to establish any legal basis for this Court rendering a child custody decision that
20 would not only replace the decisions of the Washoe Tribal Court, but would ignore any
21 interests of the Tribe and the requirements of ICWA. Second, Ms. Fred's Complaint
22 names the Tribe as Defendant - not the Washoe Tribal Court or the DSS. It is the Tribal

1 Court and DSS who are the Tribal entities involved in the consideration of the custody
2 and care of her grandchildren and who have continued wardship of those children.
3 Ms. Fred does not explain in her Complaint how her requested relief can be obtained
4 when the entities with actual custody and control of her minor grandchildren are not
5 party to the action. In short, Ms. Fred's Complaint does not establish any legal basis for
6 the relief requested against the Defendant. Without a legally cognizable theory to
7 support this Court's jurisdiction or providing a basis for the relief requested, the
8 Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

9 Further, Ms. Fred fails to state a claim under the various statutes she cites as the
10 basis for her requested relief. For instance, 42 U.S.C. §1985 seeks to provide remedies
11 for deprivation of civil rights via conspiracies among two or more persons and/or
12 under color of State law. Certain requirements must be met to state a sufficient claim
13 under 42 U.S.C. §1985. Plaintiff fails to meet those requirements. As an example,
14 plaintiffs seeking relief under §1985 must provide more than general conclusory
15 allegations as to the existence of a conspiracy, unsupported by facts. *Evans v. Little Bird*,
16 656 F. Supp. 872, 876 (D. Mont. 1987) (citations omitted), *rev'd in part on other grounds sub*
17 *nom. Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). Ms. Fred's, Complaint, however,
18 offers only conclusory statements. *See* Complaint, p. 2, lines 10-12; pp. 6-7. She fails to
19 offer any support or explanation as to *how* the Tribe conspired, how any conspiracy fits
20 within the provisions of §1985, and/or how any of this fits within the grant of
21
22

jurisdiction found at 28 U.S.C. 1343(a)(1), (2), and (3).¹¹ Additionally, the Washoe Tribe, the only named Defendant, cannot conspire with itself. *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985). As a result, Plaintiffs allegations under §1985 against the Tribal Defendants cannot provide a basis for relief and should be dismissed for failure to state a claim. Likewise, Plaintiff's other attempts to state claims under the U.S. and California Constitutions and pursuant to her "due process" rights are stated generally and without any support in law. General reference to a violation of Constitutional protections absent any other reference is not sufficient to present a colorable claim. *See Gov't & Employees Org. Comm., CIO v. Windsor*, 353 U.S. 364 (1957). Ms. Fred fails to indicate which interest(s), liberty or property, she claims the Tribe has injured. She does not specify whether this deprivation is due to a lack of procedural due process or of substantive due process or both. The Complaint contains no mention of the legal standards by which a court must assess a claim of this nature, nor the elements necessary to prove such a claim. Her bill of attainder claims are similarly problematic as on its face, Ms. Fred's Complaint meets none of the requirements for a successful bill of attainder claim. 16B Am. Jur. 2d CONSTITUTIONAL LAW §716. Finally, Ms. Fred has failed to state a claim that the Washoe Tribal Court has exceeded its jurisdiction in the custody matter of her minor grandchildren. As is shown above, the Plaintiff's minor grand children are "Indian children." 25 U.S. C. §1903(4); *see also* Exhibit C. As such, the Washoe Tribe's jurisdiction over custody matter involving those


¹¹ Including but not limited to the requirement of 28 U.S.C. §1343(3) for deprivation of rights "under color of any State law . . ." All actions by the Washoe Tribal Court complained of by Ms. Fred were taken under Tribal law. *See supra* p. 8.

1 children is recognized not just in the Tribe's law, but by federal law. *Mississippi Band of*
2 *Choctaw Indians*, 490 U.S. 30. Regardless of their residence in 2005 and whether it is
3 concurrent or exclusive, the Tribe's jurisdiction nevertheless did and does exist due to
4 their status as Indian children. *Id.* Further, the Tribal Court's continued wardship over
5 the minor children is recognized as a source of exclusive Tribal jurisdiction pursuant to
6 ICWA. 25 U.S.C. §1911(a). Ms. Fred, therefore, cannot state a claim for lack of subject
7 matter jurisdiction against the Tribe and she has failed to state a claim upon which relief
8 can be granted.

9 **Conclusion**

10 At its base, Plaintiff's Complaint asks this Court to step in the place of the
11 Washoe Tribal Court and grant her custody of her two minor grandchildren. She
12 names the Washoe Tribe as the Defendant and supplies nothing that overcomes the
13 Tribe's immunity, establishes the Court's jurisdiction, or otherwise presents a colorable
14 claim for relief. As such, the Tribal Defendants hereby respectfully request that the
15 Court dismiss her Complaint in its entirety for the foregoing reasons.

16 DATED this 22nd day of November, 2010.

17
18 
19 Lynelle Hartway (AZ Bar #020486)
20 General Counsel
21 Washoe Tribe of Nevada and California
22 Appearing *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2010, I served a true and correct copy of the foregoing MOTION TO DISMISS and MEMORANDUM OF POINTS & AUTHORITIES upon the following person(s) by depositing a copy of the same in a sealed envelope in the United States mail, postage pre-paid at Gardnerville, Nevada, and addressed as follows:

Ronda Whiterock Fred
2400 Baker Drive
Carson City, NV 89701

By: _____

Employee of the Washoe Tribe of Nevada and California