

1 Case No. 11-17180
2
3

4 **UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**
5
6

7 RHONDA WHITEROCK FRED,) **No. 11-17180**
8 v.)
9 Plaintiff - Appellee)
10) D.C. No. 2-10-0845 JAM GGH
11)
12 **WASHOE TRIBE OF NEVADA &)** Appeal from U.S. District Court for
13 **CALIFORNIA,**) Eastern District of California,
14) Sacramento
15 Defendant - Appellant.)
16) **APPELLANT WASHOE TRIBE'S**
17) **BRIEF OF APPEAL**
18)
19

20 Lynelle Hartway (AZ Bar #020486)
21 General Counsel
22 Washoe Tribe of Nevada and California
23 919 Hwy 395 South
24 Gardnerville, NV 89410
25 775/265-8600, Ext. 1115
26 775/265-8651 (fax)
27 Lynelle.Hartway@washoetribe.us

1 TABLE OF CONTENTS

2	JURISDICTION	1
3	ISSUES PRESENTED	2
4	STATEMENT OF THE CASE	2
5	(1) <i>Nature of the Case</i>	2
6	(2) <i>Statement of the Case</i>	3
7	(3) <i>Summary of Proceedings and Disposition Below</i>	6
8	STANDARD OF REVIEW	9
9	SUMMARY OF ARGUMENTS	9
10	ARGUMENTS	10
11	I. <i>The District Court Erred in Denying the Tribe's Motion to Dismiss for Failure to Exhaust Tribal Remedies</i>	10
12	II. <i>The District Court Erred in Denying the Tribe's Motion to Dismiss for Lack of Subject Matter Jurisdiction</i>	17
13	A. The District Court Erred in Reaching the Issue of its Federal Question Jurisdiction Given its Dismissal of Ms. Fred's Claims	18
14	B. The District Court Erred in Determining that Ms. Fred Met her Burden of Establishing the Court's Federal Question Jurisdiction	19
15	C. The District Court Erred in its Conclusions Regarding the Nature and Extent of any Federal Question Jurisdiction	26

1 **III. The District Court Erred in Deferring Ruling on the Tribe's Motion**
2 **to Dismiss For Lack of Jurisdiction Due to Tribal Sovereign**
3 **Immunity.....28**

4 **CONCLUSION.....30**

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

TABLE OF AUTHORITIES

Cases

3	<i>Allen v. Gold Country Casino</i> , 464 F.3d 1044, 1046 (9 th Cir. 2006)	9
4	<i>Atwood v. Fort Peck Tribal Ct. Assiniboine</i> , 513 F.3d 943 (9 th Cir. 2007) 9, 12, 14	
5	<i>Boozer v. Wilder</i> , 381 F.3d 931, 934 (9 th Cir. 2004)	9, 17
6	<i>Burlington N. R. Co. v. Crow Tribal Council</i> , 940 F.2d 1239, 1245 (9 th Cir. 1991)	
7	12
8	<i>C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe</i> , 532 U.S. 411 (2001)	
9	29
10	<i>California v. Quechan Tribe of Indians</i> , 595 F.2d 1153, 1155 (9 th Cir. 1979)	28
11	<i>Chang v. United States</i> , 327 F.3d 911, 922 (9 th Cir. 2003)	9
12	<i>Cohen v. Beneficial Indus. Loan Corp.</i> 337 U.S. 541, 545-6 (1949).....	2
13	<i>DeMent v. Oglala Sioux Tribal Court</i> , 874 F.2d 510 (8 th Cir. 1989).....	24
14	<i>Doe v. Mann</i> , 415 F.3d 1038, 1047 (9 th Cir. 2005).....	13, 16, 20, 21
15	<i>Elliot v. White Mtn. Apache Tribal Ct., et al.</i> , 566 F.3d 842, 847 (9 th Cir. 2009).....	12, 13, 14
16	<i>Hall v. Washoe Tribe of Nevada and California, et al.</i> , No. 2:06-CV-1214-MCE-PAN-GGH-PS (E.D. Cal. 2006)	24
17	<i>In Re Junious M.</i> , 193 Cal. Rptr. 40 (Cal. Ct. App. Dist. 1, 1983)	22
18	<i>In re Marriage of Leonard</i> , 122 Cal. App. 3d 443 (Cal. Ct. App., Dist. 1, 1981)	
19	24
20	<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	11, 13
21	<i>John v. Baker</i> , 982 P.2d 738, 745-46 (Ala. 1999).....	21
22	<i>Kiowa Tribe of Okla. v. Mfg. Tech., Inc.</i> , 523 U.S. 751 (1998)	28
23	<i>LeBeau v. Dakota</i> , 815 F. Supp. 1074, 1076 (W.D. Mich. 1993).....	25

1	<i>Marceau v. Blackfeet Hous. Auth.</i> , 540 F.3d 916, 920 (9 th Cir. 2008)	12, 13
2	<i>Miner Elec., Inc. v. Muscogee Creek Nation</i> , 505 F.3d 1007 (10 th Cir. 2007)	29
3	<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30 (1989)	passim
4	<i>Mohawk Industries, Inc. v. Carpenter</i> , 130 S. Ct. 599, 604-5 (2009)	8
5	<i>Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians</i> , 471 U.S. 845 (1985)	passim
6	<i>Native Village of Venetie v. Alaska</i> , 944 F.2d 548, 562 (9 th Cir. 1991).....	20
7	<i>Nevada v. Hicks</i> , 533 U.S. 553 (2001)	11, 12, 14
8	<i>Pit River Home & Agric. Co-op. Ass'n v. United States</i> , 30 F.3d 1088, 1100 (9 th Cir. 1994)	28
9	<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 40, 65 (1978)	11, 28
10	<i>Stock West, Inc. v. Confederated Tribes of the Colville Reservation</i> , 873 F.2d 1221, 1225 (9 th Cir. 1989)	29
11	<i>Thompson v. McCombe</i> , 99 F.3d 352, 353 (9 th Cir. 1996).....	19
12	<i>Trentacosta v. Frontier Pac. Aircraft Indus., Inc.</i> , 813 F.2d 1553, 1559 (9 th Cir. 1987).....	19
13		
14	Statutes	
15	25 U.S.C. §1911.....	23, 27
16	25 U.S.C. §1903(12)	23
17	25 U.S.C. §1301 <i>et seq.</i>	6
18	25 U.S.C. §1901 <i>et seq.</i>	6, 16, 20
19	25 U.S.C. §1903(4)	21
18	28 U.S.C. §§1291, 1292.....	1
19	28 U.S.C. §1331.....	passim

1 28 U.S.C. §1343(a).....1, 6

2 28 U.S.C. §1360.....1, 6

3 42 U.S.C. §1985.....6

4 **Rules**

5 FED. R. APP. P. 32

6 FED. R. APP. P. 4(a)(1)(A).....2

7 **Treatises**

8 Cohen, Felix, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §7.02[1][c], pp.
9 602-03 (2005 ed.)27

10 Jones, B.J. et al., THE INDIAN CHILDREN WELFARE ACT HANDBOOK, 2nd Ed.
11 (ABA 2008)25

12 Jones, Mack T., INDIAN CHILD WELFARE: A JURISDICTIONAL APPROACH, 21
13 Ariz. L. Rev. 1123, 1139 (1979)22

14 **Regulations**

15 44 Fed. Reg. 67,584 (Nov. 26, 1979).....22

16 61 Fed. Reg. 1,779-01 (Jan. 23, 1996)21

17 67 Fed. Reg. 60,810-01 (Oct. 1, 2010).....3

1 **JURISDICTION**

2 (1) Plaintiff-Appellee Rhonda Whiterock Fred ("Ms. Fred") asserted the
3 jurisdiction of the District Court for the Eastern District of California,
4 Sacramento ("District Court") pursuant to 28 U.S.C. §1331, 28 U.S.C.
5 §1343(a), and 28 U.S.C. §1360 (commonly referred to as P.L. 280).

6 (2) On August 12, 2011, the District Court accepted the June 9, 2011,
7 Magistrate's Findings and Recommendations ("Magistrate's
8 Recommendations") regarding the Defendant-Appellant Washoe Tribe of
9 Nevada and California's ("the Tribe") Motion To Dismiss, denying the
10 Tribe's Motion on the grounds of lack of subject matter jurisdiction and
11 exhaustion of Tribal remedies; deferring any ruling on the Tribe's
12 sovereign immunity arguments; and granting the Motion to Dismiss for
13 failure to state a claim.¹

14 (3) The United States Court of Appeals for the Ninth Circuit has
15 jurisdiction to hear the Tribe's interlocutory appeal pursuant to 28 U.S.C.
16 §§1291-1292, which provide, in part, that, "[t]he courts of appeals . . . shall
17 have jurisdiction of appeals from all final decisions of the district courts of

18 ¹Ms. Fred, however, was given an additional 28 days in which to file an
19 amended complaint.

1 the United States . . ." and the collateral order doctrine. *See Cohen v.*
2 *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-6 (1949); *see also* Appellant's
3 Response to Order to Show Cause.

4 (4) Pursuant to FED. R. APP. P. 3, the Tribe's Notice of Appeal of the
5 District Court's Order was submitted to this Court on September 12, 2011,
6 and such notice was timely filed. FED. R. APP. P. 4(a)(1)(A).

7 **ISSUES PRESENTED**

8 (1) Whether the District Court erred by failing to require Ms. Fred
9 exhaust Tribal remedies prior to seeking federal court action?

10 (2) Whether the District Court erred in determining its subject matter
11 jurisdiction over Ms. Fred's claims pursuant to 28 U.S.C. §1331?

12 (3) Whether the District Court erred in failing to dismiss Ms. Fred's
13 Complaint due to the sovereign immunity of the Tribe?

14 **STATEMENT OF THE CASE**

15 (1) *Nature of the Case.*

16 The crux of the issue before this Court is whether the District Court
17 erred when it allowed Ms. Fred to circumvent the jurisdiction of the Tribe
18 in an ongoing child custody matter by asking the District Court to
19 substitute its judgment for that of the Washoe Tribal Court on a matter of

1 Indian child custody. In denying the Tribe's Motion to Dismiss, the District
2 Court allowed the continuation of Ms. Fred's efforts to obtain custody of
3 two of her minor grandchildren by disregarding both the Washoe Tribe's
4 jurisdiction as it exists pursuant to the Tribe's inherent sovereignty and as
5 is recognized in federal and Washoe Tribal law as well as the Tribe's
6 sovereign immunity.

7 The District Court's decision has placed the Tribe in an untenable
8 position. Though recognizing that Ms. Fred's Complaint has in fact failed
9 to state a claim upon which relief can be granted, it has nevertheless failed
10 to dismiss the case outright. As a result, although there is in fact no valid
11 complaint before the District Court, the Tribe remains subject to the District
12 Court's jurisdiction due to its rulings in response to the Tribe's Motion to
13 Dismiss regarding the District Court's subject matter jurisdiction, the
14 Tribe's sovereign immunity, and the necessity to exhaust Tribal remedies.

15 ***(2) Statement of Facts.***

16 The Washoe Tribe is a federally recognized Tribe. *See* 67 Fed. Reg.
17 60,810-01 (Oct. 1, 2010). Ms. Fred is the maternal grandmother of two
18 minor Indian children who are wards of the Washoe Tribal Court in the
19 care and custody of the Washoe Tribe's Department of Social Services

1 (hereinafter "DSS").² Ms. Fred's minor grandchildren were removed from
2 the care and custody of their mother and from Ms. Fred's home in
3 November and December of 2005 by DSS following allegations of child
4 abuse and neglect. DS 14; Motion to Dismiss, Exhibit B.³ The children's
5 mother, M.F., is a member of the Washoe Tribe as is minor T.F. Minor E.F.
6 is eligible for membership.⁴ DS 14; Motion to Dismiss, Exhibit C. The
7 Washoe Tribal Court maintains ongoing jurisdiction in the matter of the
8 children's custody and continues its wardship of the children. DS 14;
9 Motion to Dismiss, Exhibit A. Periodically since DSS removed the children
10 from the custody and care of their mother and Ms. Fred, Ms. Fred
11 participated in the Tribal Court proceedings in the case. *See, e.g.*, DS 14;
12 Motion to Dismiss, Exhibit B.

13 On June 18, 2007, Ms. Fred filed two Petitions for *habeas corpus* with
14 the Tribal Court seeking custody of her grandchildren. DS 14; Motion to
15

16 ² As the underlying facts of Ms. Fred's claim involve the care and custody
17 of minor children and such matters are confidential, the children will be
18 referred to only by their initials.

19 ³ "DS_" refers to the entry number on the District Court's Docket Sheet;
"ER_" refers to the tab number of the accompanying Excerpts of Record.

⁴ Minor E.F. is also identified by the alternate spelling of "A.F." in some
documents.

1 Dismiss, Exhibit E. *Habeas corpus* was sought pursuant to the Washoe
2 Tribe's Law & Order Code; the Tribal Court denied the Petition after a
3 hearing. DS 14; Motion to Dismiss, Exhibit F. Ms. Fred appealed that
4 denial to the Inter-Tribal Court of Appeals of Nevada (ITCAN). DS 14;
5 Motion to Dismiss, Exhibit G. The ITCAN upheld the Tribal Court's
6 dismissal on January 4, 2010. DS 14; Motion to Dismiss, Exhibit D.
7 Subsequently, Ms. Fred sought reconsideration by the ITCAN, in which she
8 raised for the first time her argument that the Washoe Tribe lacked
9 jurisdiction over the matter of her grandchildren's custody due to *her* status
10 as a non-Washoe Indian.⁵ DS 14; Motion to Dismiss, Exhibit H. The
11 request for reconsideration was denied by the ITCAN. DS 14; Motion to
12 Dismiss, Exhibit I.

13

14

15 ⁵ Before the ITCAN and in her initial Complaint to the District Court, Ms.
16 Fred identified herself as a California Pomo Indian. DS 1; ER 7, p. 3, lines
17 1-2. Subsequently, she asserted to the District Court that she is in fact not
18 "legally recognized" as an Indian. DS 24; ER 4. She also asserted to the
19 District Court that her minor grandchildren are not in fact Washoe. DS 1;
ER 7, p. 3, lines 13-14. Whether Ms. Fred is a tribal member is therefore at
best unclear. It is clear, however, that both of T.F. and E.F. are Washoe. DS
14; Motion to Dismiss, Exhibit C.

(3) Summary of Proceedings and Disposition Below.

2 In April of 2010, Ms. Fred filed a *pro se* Complaint naming the
3 Washoe Tribe as the sole Defendant and asking the District Court to grant
4 her custody of two of her minor grandchildren. DS 1; ER 7. She sought the
5 District Court's jurisdiction pursuant to 28 U.S.C. §1331, certain provisions
6 of 28 U.S.C. §1343(a), and 28 U.S.C. §1360. Ms. Fred stated that her claims
7 arose under the U.S. Constitution's and the State of California's
8 Constitution's bill of attainder provisions, 42 U.S.C. §1985, and P.L. 280;
9 and alleged violations of the Indian Child Welfare Act (ICWA), 25 U.S.C.
10 §1901 *et seq.*, due process, and provisions of the Indian Civil Rights Act
11 (ICRA), 25 U.S.C. §1301 *et seq.* DS 1; ER 7. In November 2010, the Tribe
12 specially appeared to seek dismissal of Ms. Fred's claims for failure to meet
13 her burden of establishing the lower Court's personal and subject matter
14 jurisdiction, failure to exhaust Tribal remedies, and failure to state a claim
15 upon which relief could be granted. DS 14; ER 6, p. 1. Ms. Fred failed to
16 file any objection to the Tribe's Motion to Dismiss and instead filed a
17 Motion for Summary Judgment. Ms. Fred's Motion was vacated without
18 prejudice for failure to comply with the rules of procedure and additional
19 time was given to respond to the Tribe's Motion. DS 19-20. Ms. Fred's

1 Rebuttal to the Motion to Dismiss was filed on March 10, 2011, and the
2 Tribe filed its Reply on March 28, 2011. DS 21-22. Pursuant to the Court's
3 April 26, 2011, Order, Supplemental Briefs were provided by both parties
4 on May 17, 2011. DS 24-25. On June 9, 2011, the District Court Magistrate
5 issued its Findings and Recommendations. DS 26; ER 3. The Tribe filed its
6 Objections on June 23, 2011. DS 27. The District Court accepted the
7 Magistrate's Recommendations in their entirety in its August 12, 2011,
8 Order. DS 28; ER 2. In doing so, it held that: (1) though Ms. Fred utterly
9 failed to meet her burden of stating a claim upon which relief could be
10 granted, the District Court had subject matter jurisdiction over some claim
11 beyond the limited question of whether the Washoe Tribal Court exceeded
12 its jurisdiction; (2) that Ms. Fred had either exhausted her Tribal Court
13 remedies or that no such exhaustion was required; and (3) declined or
14 deferred ruling on the Tribe's sovereign immunity challenge to its
15 jurisdiction.

16 Despite its dismissal for failure to state a claim, the District Court
17 gave Ms. Fred an additional 28 days leave to file an amended complaint,
18 stating, "[f]ailure to file . . . will result in this action being dismissed." DS
19 28; ER 2, p. 2. Ms. Fred did not file an amended complaint within the time

1 provided; instead she filed a Motion for Counsel, seeking court-appointed
2 counsel and an unspecified enlargement of time in order to file an
3 amended complaint. DS 29. The Tribe filed its objections to the Motion on
4 September 15, 2011. DS 33. On October 13, 2011, the District Court issued
5 an order appointing counsel for Ms. Fred and providing until December 23,
6 2011, to file an amended complaint. DS 35. No amended complaint was
7 filed, and on January 12, 2012, the District Court *sua sponte* issued an order
8 vacating all timelines and stated that despite no stay being sought by either
9 party, "the court will take no action on this case until prompted by a party
10 and the appellate proceedings have been concluded." DS 36.

11 The Tribe filed its Notice of Appeal to this Court on September 12,
12 2011. DS 30; ER 1. On September 30, 2011, this Court issued an Order to
13 Show Cause, requiring the Tribe to either voluntarily dismiss its appeal or
14 to show cause why its appeal should not be dismissed for lack of
15 jurisdiction pursuant to 28 U.S.C. §1291 and the collateral order doctrine.
16 *Mohawk Ind., Inc. v. Carpenter*, 130 S. Ct. 599, 604-5 (2009). The Tribe filed
17 its Response and the Court discharged its Order, setting a briefing
18 schedule.
19

1 **STANDARD OF REVIEW**

2 Questions of subject matter jurisdiction and sovereign immunity are
3 reviewed *de novo* by the Court of Appeals. *Boozer v. Wilder*, 381 F.3d 931,
4 934 (9th Cir. 2004), *citing Chang v. United States*, 327 F.3d 911, 922 (9th Cir.
5 2003). *See also Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir.
6 2006). Whether exhaustion of tribal court remedies is required is also
7 reviewed *de novo*. *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943 (9th
8 Cir. 2007), *citing Boozer*, 381 F.3d at 934.

9 **SUMMARY OF ARGUMENTS**

10 (1) The District Court erred in failing to dismiss Ms. Fred's claims for
11 failure to exhaust Tribal Court remedies as such exhaustion is plainly
12 required and has not been completed by Ms. Fred prior to filing her claims
13 before the District Court.

14 (2) The District Court erred when it found that it had subject matter
15 jurisdiction over Ms. Fred's claims in light of its simultaneous ruling that
16 Ms. Fred failed to state a claim upon which relief could be granted. In the
17 alternative, the District Court incorrectly determined that it has federal
18 question over Ms. Fred's claims as well as the nature and extent of any
19 such jurisdiction.

1 (3) Assuming for the purposes of argument that the District Court has
2 subject matter jurisdiction, it erred in deferring any ruling on the Tribe's
3 Motion to Dismiss due to its sovereign immunity, as such immunity goes
4 to the jurisdiction of the Court over Ms. Fred's claims and requires Ms.
5 Fred's claims against the Washoe Tribe be dismissed.

6 **ARGUMENTS**

7 ***I. The District Court Erred in Denying the Tribe's Motion to Dismiss
for Failure to Exhaust Tribal Remedies.***

8 The District Court denied the Tribe's Motion to Dismiss for failure to
9 exhaust Tribal remedies by likening the Tribal Court's consideration of its
10 jurisdiction during the adjudication of an Indian child custody
11 determination to properly exhausting "administrative remedies." DS 26;
12 ER 3, p. 9, lines 17-19. The District Court acknowledged the Washoe Tribal
13 Court's continuing and actual jurisdiction over the underlying matter
14 involving Ms. Fred's minor grandchildren, and that Ms. Fred failed to
15 bring her jurisdictional challenges to the Washoe Tribal Court. DS 26; ER 3,
16 p. 4, lines 11-12. Nevertheless, the District Court found that because Ms.
17 Fred challenged some of the custody determinations of the Tribal Court
18 and because the Tribal Court would have examined its own jurisdiction in
19

1 those challenges, returning the matter to the Tribal Court would serve no
2 other purpose than delay, "as described in *Hicks*." DS 26; ER 3, p. 10, lines
3 11-18; *citing Nevada v. Hicks*, 533 U.S. 353 (2001). The District Court erred
4 by misapplying *Hicks* and the requirements for Tribal Court exhaustion.

5 The Supreme Court has repeatedly recognized tribal courts, "as
6 appropriate forums for the exclusive adjudication of disputes affecting
7 important personal and property interests of both Indians and non-
8 Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Where there
9 is a colorable claim for tribal jurisdiction, plaintiffs must first exhaust
10 available tribal remedies before filing any claim in federal court asserting
11 that a tribe lacks jurisdiction. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of*
12 *Indians*, 471 U.S. 845 (1985); *see also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S.
13 9 (1987). The requirement of exhaustion of tribal remedies best serves the
14 orderly administration of justice by allowing tribal courts to develop a full
15 record concerning jurisdictional determinations, and to enable other courts
16 to benefit from tribal court expertise in such matters in the event of future
17 judicial review. *Nat'l Farmers Union*, 471 U.S. at 856. "Principles of comity
18 require federal courts to dismiss or to abstain from deciding claims over
19 which tribal court jurisdiction is 'colorable,' provided that there is no

1 evidence of bad faith or harassment." *Marceau v. Blackfeet Hous. Auth.*, 540
2 F.3d 916, 920 (9th Cir. 2008), *citing Atwood*, 513 F.3d at 948 (9th Cir. 2008).
3 Exhaustion of tribal remedies is a mandatory requirement. *Burlington N.*
4 *R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991). The
5 Supreme Court has provided four exceptions to this requirement:

6 "(1) when an assertion of tribal court jurisdiction is 'motivated
7 by a desire to harass or is conducted in bad faith'; (2) when the
8 tribal court action is 'patently violative of express jurisdictional
9 prohibitions'; (3) when 'exhaustion would be futile because of
the lack of an adequate opportunity to challenge the [tribal]
court's jurisdiction'; and (4) when it is 'plain' that tribal court
jurisdiction is lacking, so that the exhaustion requirement
'would serve no purpose other than delay.'"

10 *Elliot v. White Mtn. Apache Tribal Ct., et al.*, 566 F.3d 842, 847 (9th Cir. 2009),
11 *citing Hicks*, 533 U.S. at 369 (internal quotation marks omitted).

12 It is not clear whether the District Court's denial of the Tribe's Motion
13 to Dismiss for failure to exhaust Tribal Court remedies is based on a
14 conclusion that Ms. Fred is in fact not required to exhaust Tribal Court
15 remedies (*i.e.*, due to either lack of colorable Tribal Court jurisdiction or the
16 application of a recognized exception), or the conclusion that Ms. Fred has
17 in fact fully exhausted her Tribal remedies regarding her jurisdictional
18

1 challenges. What is clear, however, is that either conclusion is in fact
2 erroneous. Each will be addressed in turn.

3 First, nothing in the facts or the law supports the conclusion that Ms.
4 Fred is not required to exhaust tribal court remedies prior to the District
5 Court considering any claim she may bring. Despite the District Court's
6 conclusion otherwise, mandatory exhaustion of tribal court remedies is not
7 the equivalent of exhaustion of administrative remedies, but is instead
8 recognition of the federal policy of promoting tribal self-government and
9 the development of tribal court systems. *Elliot*, 566 F.3d at 847, *citing Iowa*
10 *Mutual*, 480 U.S. at 16-17. Where tribal court jurisdiction is 'colorable,' and
11 no exception applies, tribal court remedies must be exhausted prior to a
12 federal court entertaining any claim. *Marceau*, 540 F.3d at 920.

13 In the present matter, the District Court agreed that the Washoe
14 Tribal Court has jurisdiction over the underlying matter of the care and
15 custody of Ms. Fred's grandchildren. DS 26, ER 3, p. 4, lines 11-12. Such
16 recognition is consistent with ICWA. *Doe v. Mann*, 415 F.3d 1038, 1047 (9th
17 Cir. 2005). Given this obviously colorable claim to jurisdiction, Ms. Fred's
18 opposition to that jurisdiction invokes the mandatory requirement for
19 exhaustion of tribal remedies prior to seeking federal court review. *Elliot*,

1 566 F.3d at 847-8. Despite this, the District Court nevertheless concluded,
2 Tribal Court exhaustion, “would serve no other purpose than delay.” DS
3 26; ER 3, p. 10, lines 11-18; *citing Hicks*, 533 U.S. 353. In doing so, the
4 District Court misapplied *Hicks* to the present matter. The Supreme Court
5 has made clear that it is *only* where is it “plain” that the Tribal Court has no
6 colorable claim of jurisdiction over a matter, that the requiring of tribal
7 exhaustion would serve no other purpose than delay. *Elliot*, 566 F.3d at
8 848. Consequently, if, “jurisdiction is ‘colorable’ or ‘plausible,’” then the
9 exception does not apply and exhaustion of tribal court remedies is
10 required. *Id.*, *citing Atwood*, 513 F.3d at 948. Given the Washoe Tribe’s
11 plausible claim of jurisdiction over Ms. Fred in relation to the underlying
12 child custody action, the *Hicks* exception relied upon by the District Court
13 does not apply and Ms. Fred must be required to exhaust her Washoe
14 Tribal Court remedies before bringing any federal claim.

15 Next, to the extent that the District Court determined that Ms. Fred
16 has in fact exhausted all Washoe Tribal Court remedies, it is in error. The
17 factors relied upon by the District Court as support for its decision – that
18 Ms. Fred presented some challenges to the Tribal Court during which the
19 Court would have considered its own jurisdiction – are contrary to the

1 purposes behind the tribal exhaustion doctrine as recognized by this Court,
2 which include providing tribal courts the opportunity to develop a full
3 record concerning jurisdictional determinations, and to enable other courts
4 to benefit from tribal court expertise in such matters in the event of future
5 judicial review. *Nat'l Farmers Union*, 471 U.S. at 856. Ms. Fred's Tribal
6 Court challenges do not amount to an opportunity by the Washoe Tribal
7 Court to fully develop a record concerning its jurisdiction. Ms. Fred never
8 argued to the Washoe Tribal Court that her status as a non-Washoe or non-
9 Indian prevented the Court from exercising any jurisdiction over her. It
10 was not until Ms. Fred sought appellate reconsideration of a *habeas corpus*
11 denial (such *habeas* challenge being brought under Tribal law) –
12 approximately two years after the Tribal Court exercised wardship over the
13 minor children – that Ms. Fred first argued her jurisdictional argument. DS
14 14; Tribe's Motion to Dismiss, Exhibit G. The Washoe Court, therefore,
15 has never had the opportunity to consider the matter. The District Court
16 acknowledges Ms. Fred's failure to raise her jurisdiction challenges to the
17 Tribal Court but nevertheless determines that no further Tribal Court
18 consideration of the issue is required. DS 26; ER 3, p. 10, line 11. Such
19 decision is not in accordance with the doctrine of tribal exhaustion of

1 remedies or the authority of Tribe's pursuant to the ICWA. Congress has
2 recognized that, "there is no resource that is more vital to the continued
3 existence and integrity of Indian tribes than their children and that the
4 United States has a direct interest, as trustee, in protecting Indian children
5 who are members of or are eligible for membership in an Indian tribe." 25
6 U.S.C. §1901(3). To that end, the ICWA ensures that tribes have a role in
7 adjudicating and participating in child custody proceedings involving
8 Indian children domiciled both on and off the reservation." *Mann*, 415 F.3d
9 at 1049. Given the importance of the Tribal interests at stake – *i.e.*, the
10 Tribe's ability to protect the two minor Washoe children and its custody
11 and jurisdiction over the matter of their welfare as recognized and
12 protected by federal law – the requirement that any challenge to that ability
13 be fully and squarely presented first to the Tribal Court so that it may first
14 consider any limits on its jurisdiction is paramount. Taken together with
15 the acknowledgement that Ms. Fred failed to fully present her
16 jurisdictional claims to the Tribal Court at every level, the District Court's
17 failure to dismiss Ms. Fred' claims for failure to exhaust Tribal Court
18 remedies is not in keeping with the facts or the law.

19

1 **II. The District Court Erred in Denying the Tribe's Motion to Dismiss**
2 **for Lack of Subject Matter Jurisdiction.**

3 The District Court determined it has apparent subject matter
4 jurisdiction over any possible claims Ms. Fred may seek to make. This
5 finding is stated broadly to include those claims not yet asserted by Ms.
6 Fred, *e.g.* "alleged fundamental right of the grandparent to custody over
7 grandchildren in the circumstances of this case." DS 26; ER 3, p. 2.
8 Relying primarily on *Boozer* and *Atwood*, the District Court concluded that
9 the, "'question whether an Indian tribe retains the power to compel a non-
10 Indian . . . to submit to the civil jurisdiction of a tribal court is one that must
11 be answered by reference to federal law and is a 'federal question' under
12 §1331.'" DS 26; ER 3, p. 4, *citing Boozer*, 381 F.3d at 934. This finding is
13 extended so that, "subject matter jurisdiction exists for some type of claim."
14 DS 26; ER 3, p. 6, lines 13-14. For several reasons, the District Court's
15 findings on its own subject matter jurisdiction regarding Ms. Fred's claim
16 are in error.

1 **A. The District Court Erred in Reaching the Issue of its**
2 **Federal Question Jurisdiction Given its Dismissal of Ms.**
3 **Fred's Claims.**

4 Through its adoption of the Magistrate's Recommendations, the
5 District Court found that Ms. Fred's Complaint fails to adequately or
6 clearly state the nature of her claim or the relief sought, requiring dismissal
7 for failure to state a claim upon which relief can be granted. DS 26, ER 2, 3.
8 Despite this, the District Court determined it has theoretical and apparently
9 unrestricted jurisdiction pursuant to 28 U.S.C. §1331 to hear whatever
10 claims are presented by Ms. Fred in a future amended Complaint against
11 whatever party may be named. DS 26; ER 3, pp. 10-11.

12 The District Court erred in deciding its federal question jurisdiction
13 in light of its simultaneous dismissal of Ms. Fred's claims. Though
14 recognizing that Ms. Fred's Complaint was flawed to the point that it failed
15 to state a claim upon which relief can be granted, the District Court
16 nevertheless used that Complaint to determine its federal question
17 jurisdiction over the issues raised therein as well as any allegations brought
18 by Ms. Fred in the future. The District Court's decision has placed the
19 Tribe in an untenable position. Although there is in fact no valid complaint
 before the District Court, the Tribe remains subject to the District Court's

1 jurisdiction. Given the defects in Ms. Fred's Complaint and its dismissal
2 thereof, the District Court erred in reaching the question of its subject
3 matter jurisdiction pursuant to 28 U.S.C. §1331. Any such ruling should
4 have been deferred until such time as a valid complaint was filed.

5 **B. The District Court Erred in Determining that Ms. Fred Met
6 her Burden of Establishing the Court's Federal Question
Jurisdiction.**

7 "A party invoking the federal court's jurisdiction has the burden of
8 proving the actual existence of subject matter jurisdiction." *Thompson v.*
9 *McCombe*, 99 F.3d 352, 353 (9th Cir. 1996), citing *Trentacosta v. Frontier Pac.*
10 *Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987). Ms. Fred alleged that
11 the Washoe Tribe "usurped" the "original" jurisdiction of the State of
12 California and that its jurisdiction over her and the custody matter was
13 unlawful. DS 1; ER 7, p. 3, line 24. In other words, Ms. Fred argued to the
14 District Court that the Tribe exceeded the lawful limits of its jurisdiction.

15 Under limited circumstances federal courts have found that they,
16 "may determine under §1331 whether a tribal court has exceeded the
17 lawful limits of its jurisdiction," in a particular matter. *Nat'l Farmers Union*,
18 471 U.S. at 850. The Supreme Court determined that federal question
19 jurisdiction can allow review of tribal court proceedings where a non-

1 Indian was a defendant, “[b]ecause petitioners contend that federal law has
2 divested the Tribe of this aspect of sovereignty, it is federal law on which
3 they rely as a basis for the asserted right of freedom from Tribal Court
4 interference.” *Nat'l Farmers Union*, 471 U.S. at 853. Looking at *Boozer* and
5 *Atwood*, the District Court determined that Ms. Fred can invoke the District
6 Court’s federal question jurisdiction under 28 U.S.C. §1331 in the context of
7 her challenge to the jurisdiction of the Washoe Tribal Court over her in
8 relation to its adjudication of a child custody matter.

9 ICWA states that, “there is no resource that is more vital to the
10 continued existence and integrity of Indian tribes than their children and
11 that the United States has a direct interest, as trustee, in protecting Indian
12 children who are members of or are eligible for membership in an Indian
13 tribe.” 25 U.S.C. §1901(3). To that end, ICWA was intended to supplement
14 and complement the powers and jurisdiction of Indian Tribes, not diminish
15 them. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); see
16 also *Native Village of Venetie v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991).
17 ICWA serves to rectify state agency and court actions that result in the
18 removal of Indian children from Indian communities. *Mann*, 415 F.3d at
19 1047. “At the heart of ICWA lies a jurisdictional scheme aimed at

1 ensuring that tribes have a role in adjudicating and participating in child
2 custody proceedings involving Indian children domiciled both on and off
3 the reservation." *Id.* at 1049. "Tribal courts have exclusive jurisdiction over
4 child custody proceedings involving Indian children domiciled on
5 reservations." *Mississippi Band of Choctaw*, 490 U.S. at 36. Under §1911(b),
6 there is, "concurrent but presumptively tribal jurisdiction in the case of
7 [Indian] children not domiciled on the reservation." *Id.* at 36. Further,
8 nothing in P.L. 280 strips tribes of the right, concurrent with states, to
9 exercise the jurisdiction recognized in ICWA.⁶ *John v. Baker*, 982 P.2d 738,
10 745-46 (Ala. 1999) (recognizing that "[Public Law] 280 had not stripped [the
11 tribe] of sovereignty over child custody issues because it had granted the
12 states only concurrent jurisdiction").

13 ICWA's focus is on the *child's* tribal membership as the determining
14 factor in recognizing tribal jurisdiction. 25 U.S.C. §1903(4). ICWA
15 recognizes, "*exclusive jurisdiction in the tribal courts for proceedings*
16 *concerning an Indian child, 'who is domiciled within the reservation'* . . .

17
18
19 ⁶ Instead, ICWA provides a process by which tribes affected by P.L. 280
may reassume exclusive jurisdiction over certain child custody matters – a
process the Washoe Tribe has followed. *See* 61 Fed. Reg. 1,779-01 (Jan. 23,
1996).

1 as well as for wards of tribal courts regardless of domicile." *Mississippi*
2 *Band of Choctaw*, 490 U.S. at 36 (emphasis added). Under §1911(b), there is,
3 "*concurrent but presumptively tribal jurisdiction* in the case of [Indian]
4 children not domiciled on the reservation." *Id.* (emphasis added). Tribal
5 jurisdiction exists, therefore, in some manner as long as the children are
6 Indian children. *See*, Jones, Mack T., INDIAN CHILD WELFARE: A
7 JURISDICTIONAL APPROACH, 21 Ariz. L. Rev. 1123, 1139 (1979) ("[J]urisdiction
8 hinges upon the ethnic identity and tribal membership of the child, rather
9 than the geographical location of the child's domicile. This reflects
10 Congress' recognition of the fact that tribal ties extend beyond the
11 boundaries of the reservation."). A tribe's determination of membership or
12 eligibility is conclusive evidence that a child is an Indian Child within the
13 meaning of ICWA. 44 Fed. Reg. 67,584 (Nov. 26, 1979); *see also In Re Junious*
14 M., 193 Cal. Rptr. 40 (Cal. Ct. App. Dist. 1, 1983).

15 In 2005, the Washoe Tribe's Court and DSS took jurisdiction over the
16 child custody matter involving claims of abuse and neglect of two Washoe
17 children. DS 14; ER 6. Though their grandmother's residence (where the
18 mother and children were living) was outside Washoe Tribal trust land, the
19 Tribe's jurisdiction to determine the best interests and custody of T.F. and

1 E.F. under the circumstances is supported by and recognized by ICWA.

2 *See 25 U.S.C. §1911(b), see also Mississippi Band of Choctaw, 490 U.S. at 36.* It
3 is possible that at the time the Tribe took jurisdiction, such Tribal
4 jurisdiction was concurrent with the State of California. Such concurrent
5 jurisdiction, however, does not prevent the Tribe from taking jurisdiction
6 in the first case. *Id.* Regardless, since 2005 the children have been and
7 continue to be wards of the Tribal Court, making the Tribe's jurisdiction
8 over the matter of their custody exclusive pursuant to ICWA. 25 U.S.C.
9 §§1911(a); *see also* 25 U.S.C. §§1903(12) & 1911(d) (Tribes have the right to
10 hear and determine Indian child dependency and custody proceedings in a
11 manner established by tribal code or custom, with full faith and credit
12 given to such decisions by state and federal courts). Pursuant to Title 8 of
13 the Washoe Tribe's Law & Order Code, the Washoe Tribe can assert
14 jurisdiction over Washoe Indian children and their extended family as
15 appropriate. DS 24; Defendant's Supplemental Brief, Exhibit A.

16 Nothing in ICWA limits the tribes' jurisdiction over child custody
17 matters to those cases where the grandparents are tribal members. Instead,
18 the focus is on the child's membership status as the basis of tribal
19 jurisdiction. In *Mississippi Band of Choctaw*, the U.S. Supreme Court found

1 that the Mississippi Choctaw had jurisdiction over the matter of the
2 custody of an Indian child that had been adopted to non-Indians. 490 U.S.
3 30 (1989). Despite the involvement of non-Indian adoptive parents,
4 therefore, the Supreme Court affirmed the Mississippi Choctaw's interest
5 in and jurisdiction over the custody of the Indian children. The non-Indian
6 or non-member Indian status of a *parent*, clearly does not automatically
7 preclude the Tribe's exercise of jurisdiction over child dependency
8 matters.⁷ *See, e.g., ER 8, Hall v. Washoe Tribe of Nevada and California, et al.,*
9 No. 2:06-CV-1214-MCE-PAN-GGH-PS (E.D. Cal. 2006) (unpublished
10 opinion) (Non-Indian parent status did not preclude Washoe Tribal Court's
11 exclusive jurisdiction over placement of children).⁸ *cf. DeMent v. Oglala*
12 *Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989) (child custody determination
13 by tribal court may violate "in personam" due process rights of
14 nonmember, nonresident parent under ICRA).

15

16 ⁷ Ms. Fred, as a grandparent, should not be presumed to have the same
17 standing as or interest in the proceedings as a parent.

18 ⁸ Further, most state courts have concluded that, personal jurisdiction over
19 a parent is not constitutionally required for a child dependency matter to
proceed. *See, e.g., In re Marriage of Leonard*, 122 Cal. App. 3d 443 (Cal. Ct.
App., Dist. 1, 1981).

1 "Recent federal court decisions have appeared to proscribe
2 tribal criminal and civil regulatory authority over non-member
3 Indians. This argument . . . is inapposite in the ICWA context,
4 however, because in the Act itself Congress has expressly
5 vested Indian tribes with exclusive jurisdiction over all Indian
6 children, much the same way Congress vested tribal courts
7 with criminal jurisdiction over all Indians after the *Duro v.*
8 *Reina* decision."

9
10 Jones, B.J. et al., THE INDIAN CHILDREN WELFARE ACT HANDBOOK, 2nd
11 Ed. (ABA 2008).

12 The District Court's findings regarding its jurisdiction over Ms.
13 Fred's claims pursuant to 28 U.S.C. §1331 is not consistent with the federal
14 recognition of tribal jurisdiction contained in ICWA. It also specifically
15 ignores the limitations on federal court jurisdiction in matters involving
16 child custody determinations. *See e.g., LeBeau v. Dakota*, 815 F. Supp. 1074,
17 1076 (W.D. Mich. 1993) ("The federal courts do not have jurisdiction to
18 review child custody decisions that are within the jurisdiction of a tribal
19 court." (citations omitted)). In *Nat'l Farmers Union*, the Supreme Court
recognized federal question jurisdiction over the question of whether, in
certain circumstances, federal law had divested tribes of their jurisdiction.
471 U.S. at 853. ICWA does just the opposite – it is an affirmative
recognition of such jurisdiction. The District Court's determination that 28

1 U.S.C. §1331 provides it with jurisdiction over Ms. Fred's challenge to the
2 Washoe Tribe's jurisdiction in this matter was therefore in error.

3 **C. The District Court Erred in its Conclusions Regarding the
Nature and Extent of any Federal Question Jurisdiction.**

4 Assuming for the purposes of argument that the District did not err
5 in reaching the question of its federal question jurisdiction in light of its
6 dismissal of the underlying Complaint, the District Court nevertheless
7 erred in its conclusion that 28 U.S.C. §1331 provides the Court with
8 jurisdiction to consider anything other than the limited question of whether
9 a tribal court has exceeded the lawful limits of its jurisdiction on a
10 particular matter.⁹

11 The findings of the Magistrate and adopted by the District Court
12 provide for nearly unlimited prospective jurisdiction over Ms. Fred's
13 potential claims against the Tribe without support for such broad finding
14 in the law. The scope of the District Court's review under 28 U.S.C. §1331,
15 is not so broad. As detailed above and as was accepted by the District
16 Court, there is no question of the Tribe's underlying jurisdiction on the

17
18 ⁹ Even if the District Court did have subject matter jurisdiction pursuant to
28 U.S.C. §1331, tribal court exhaustion is still required prior to the Court
19 exercising that jurisdiction. *See §I supra.*

1 child custody matter involving T.F. and E.F. 25 U.S.C. §§1911(a) & (b).
2 What is left, therefore, is only the question of the Tribal Court's ability to
3 exert its jurisdiction over Ms. Fred in the context of T.F. and E.F.'s child
4 custody matter.¹⁰ The expansive language used by the District Court is not
5 in accordance with the nature of the District Court's federal question
6 jurisdiction in light of ICWA. *See supra*. Despite its statements otherwise,
7 nothing in *Boozer* can be read to provide for such possible additional types
8 of review and/or claims by Ms. Fred. As such, the decision of the District
9 Court regarding the broad nature of its review authority pursuant to its
10 federal question jurisdiction was in error.

11

12

13

14¹⁰ The Tribe has argued that the Tribal Court has not had the opportunity to
15 hear any part of Ms. Fred's jurisdictional challenges in the first instance
16 and therefore, Ms. Fred has failed to exhaust Tribal remedies. This
17 includes the question of whether Ms. Fred's participation in the underlying
18 child dependency matter waived any claim she has for lack of personal
19 jurisdiction. Cohen, Felix, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW,
§7.02[1][c], pp. 602-03 (2005 ed.) ("Tribal court jurisdiction over actions
arising outside Indian country extends . . . to cases involving nonmembers who
have consented to tribal jurisdiction."). As well as the question of what effect,
if any, Ms. Fred's status as non-Indian (as opposed to non-member Indian)
may have.

1 **III. The District Court Erred in Deferring Ruling on the Tribe's Motion**
2 **to Dismiss for Lack of Jurisdiction Due to Tribal Sovereign**
3 **Immunity.**

4 Assuming for the purposes of argument that the District did not err
5 by reaching the issue of its subject matter jurisdiction in light of its
6 dismissal of Ms. Fred's Complaint, it erred in deferring any ruling on the
7 sovereign immunity arguments raised by the Tribe until an amended
8 complaint is filed by Ms. Fred.

9 It is well settled that Indian tribes are immune from suit in judicial
10 forums absent an explicit waiver of that immunity either by the Tribe itself
11 or by Congress; and the scope of this immunity is, by now, firmly
12 established in the case law. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S.
13 751 (1998); *see also Martinez*, 436 U.S. at 58. The question of sovereign
14 immunity goes to the jurisdiction of the court. *California v. Quechan Tribe of*
15 *Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). And, therefore, "only consent
16 gives the courts the jurisdictional authority to adjudicate claims, raised by
17 or against tribal defendants." Sovereign immunity involves a right which
18 courts have no choice, in the absence of a waiver, but to recognize." *Pit*
19 *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

1 court through a waiver of immunity, but any such waiver must be clear
2 and unequivocally expressed. *C & L Enter., Inc. v. Citizen Band Potawatomi*
3 *Indian Tribe*, 532 U.S. 411 (2001). A court must presume it lacks jurisdiction
4 over a tribe until the plaintiff establishes jurisdiction by showing a clear
5 and unequivocal waiver of sovereign immunity. *Stock West, Inc. v.*
6 *Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.
7 1989). Even where a district court may have subject matter jurisdiction of
8 any action pursuant to 28 U.S.C. §1331, such jurisdiction does not negate
9 tribal sovereign immunity, and a waiver of sovereign immunity must still
10 be shown. *Miner Elec., Inc. v. Muscogee Creek Nation*, 505 F.3d 1007 (10th Cir.
11 2007).

12 The Washoe Tribe, as a sovereign Tribe, possesses sovereign
13 immunity. Ms. Fred simply ignores this immunity and names the Tribe as
14 the sole Defendant in her Complaint. Ms. Fred's failure to acknowledge or
15 otherwise provide any good faith argument asserting a waiver of the
16 Tribe's immunity is a fatal flaw as she bears the burden of establishing the
17 subject matter jurisdiction of the Court. *Stock West*, 873 F.2d at 1225. The
18 District Court erred in ignoring this flaw to Ms. Fred's Complaint and to its
19

1 own subject matter jurisdiction in light of Ms. Fred's naming of the Tribe as
2 the sole defendant.

3 **CONCLUSION**

4 The District Court erred in its application of the law to the facts and
5 issues raised by the Washoe Tribe in its Motion to Dismiss. Specifically, the
6 District Court erred in determining that no Tribal Court exhaustion is
7 required by Ms. Fred before bringing any jurisdictional challenge to the
8 federal Court. In addition, it erred in ruling on its jurisdiction pursuant to
9 28 U.S.C. §1331 as well as its findings regarding the nature and extent of
10 any such jurisdiction. Finally, to the extent that the District Court
11 considered its jurisdiction, it erred in deferring any ruling on the Tribe's
12 sovereign immunity as such immunity goes to the issue of such
13 jurisdiction. Therefore, the Washoe Tribe respectfully requests that this
14 Court reverse the District Court's decision on the grounds presented
15 herein.

16 **STATEMENT OF RELATED CASES**

17 There are no known related cases pending with this Court.

18

19

1 RESPECTFULLY SUBMITTED this 6th day of April, 2012.

2 /s/Lynelle Hartway

3 Lynelle Hartway

4 General Counsel

5 Washoe Tribe of Nevada & California

6
7
8
9
10
11
12
13
14
15
16
17
18
19

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on April 6, 2012, and that four (4) copies of the attached Excerpts of Record were mailed by First-Class Mail, postage prepaid or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document and one (1) copy of the Excerpts of Record by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Goodson, Harlan W.
THE LAW OFFICE OF HARLAN GOODSON
Suite 205
1126 2nd St.
Sacramento, CA 95814

By: /s/ Lynelle Hartway

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 6,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Microsoft Office Word 2003 *(state font size and name of type style)* Font Size 14, Book Antiqua, or

this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)* _____

Signature /s/ Lynelle Hartway

Attorney for Defendant/Appellant Washoe Tribe of Nevada & California

Date 4/6/2012

Case No. 11-17180

Addendum to Appellant's Opening Brief of Appeal

TABLE OF CONTENTS

1. **25 U.S.C. §1901**
2. **25 U.S.C. §1903**
3. **25 U.S.C. §1911**

C**Effective:[See Text Amendments]**

United States Code Annotated [Currentness](#)

Title 25. Indians

[¶ Chapter 21. Indian Child Welfare \(Refs & Annos\)](#)

→→ § 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

- (1)** that [clause 3, section 8, article I of the United States Constitution](#) provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes [\[FN1\]](#)" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
- (2)** that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
- (3)** that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
- (4)** that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

CREDIT(S)

([Pub.L. 95-608](#), § 2, Nov. 8, 1978, 92 Stat. 3069.)

[\[FN1\]](#) So in original. Probably should be capitalized.

Current through P.L. 112-90 approved 1-3-12

Westlaw. (C) 2012 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

END OF DOCUMENT

C**Effective:[See Text Amendments]**

United States Code Annotated [Currentness](#)

Title 25. Indians

[¶ Chapter 21. Indian Child Welfare \(Refs & Annos\)](#)

→→ § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act

which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in [section 1606 of Title 43](#);

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organ-

ized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

CREDIT(S)

(Pub.L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

Current through P.L. 112-90 approved 1-3-12

Westlaw. (C) 2012 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

END OF DOCUMENT

C**Effective:[See Text Amendments]**

United States Code Annotated [Currentness](#)

Title 25. Indians

[Chapter 21](#). Indian Child Welfare ([Refs & Annos](#))

[Subchapter I](#). Child Custody Proceedings

→→ § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termina-

tion of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

CREDIT(S)

([Pub.L. 95-608, Title I, § 101](#), Nov. 8, 1978, 92 Stat. 3071.)

Current through P.L. 112-90 approved 1-3-12

Westlaw. (C) 2012 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

END OF DOCUMENT