UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kimberly Watso, individually and on behalf of C.P., minor child,

Petitioner,

vs.

John E. Jacobson, in his official capacity as Chief Judge of Shakopee Mdewakanton Sioux Tribal Court (Children's Court), Henry M. Buffalo, Jr., in his official capacity as Judge of Shakopee Mdewakanton Sioux Tribal Court (Children's Court), Terry Mason Moore, in her official capacity as Judge of Shakopee Mdewakanton Sioux Tribal Court (Children's Court), Shakopee Mdewakanton Sioux Community Tribal Court (Children's Court), Donald Perkins,

Respondents.

Case No. 16-cv-00983 (PJS/HB)

COMMUNITY RESPONDENTS' MEMORANDUM IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF HABEAS CORPUS

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The Tribal Court of the Shakopee Mdewakanton Sioux Community ("Tribal Court") and three of its judges sued in their official capacities (collectively with the Tribal Court, the "Community Respondents") oppose the habeas petition ("Petition") of Petitioner Kimberly Watso (née Dietrich) individually, and on behalf of her minor child, C.P. In a March 3, 2016 opinion, the three Respondent judges correctly determined that the Tribal Court has jurisdiction over the child custody proceeding involving C.P. and his half-brother C.H. *See* Petition Exhibit ("Pet. Ex.") F. If granted, the Petition would threaten to routinely federalize child protection matters in every tribal court. The Petition should be denied, and no evidentiary hearing held on the matter.

BACKGROUND

The Shakopee Mdewakanton Sioux Community ("Community") is a federally recognized Indian tribe. *Smith v. Babbitt*, 875 F. Supp. 1353, 1357 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996); 81 Fed. Reg. 5019, 5023 (Jan. 29, 2016). On January 22, 2015, a Child Welfare Officer of the Community's Family and Children Services Department ("Department") filed an emergency *ex parte* petition under Chapter VIII of the Community's Domestic Relations Code ("Code"), requesting Redacted

Pet. Ex. F, p.1; *see* Community Respondents' Ex. A.[1] Redacted

[1] The Child Welfare provisions of the Code were recently relocated to Chapter VIII from Chapter IX, but remain substantively unchanged. Petitioner's Exhibit G is a correct copy of the current Code.

There is an extensive Tribal Court record. *See* Community Respondents' Ex. B; Affidavit of Ann Many Birds, Ex. D. Because the habeas petition is legally defective on

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multiple grounds, the Community Respondents will not burden the Court with the bulk of that material. The Community Respondents will provide copies of pleadings and transcripts upon request.

Redacted

[2] Redacted

[3] The Petition at Paragraph 55 characterizes the two orders entered by the Tribal Court on February 25, 2015, as "conflicting." *See* Pet. Exs. A-B. Redacted

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[4] Redacted

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Nearly eleven months into the proceeding, on December 8, 2015, Petitioner Watso filed a motion to dismiss the child protection matter under Rule 12(b)(1) of the Community's Rules of Civil Procedure on the ground that the Tribal Court lacked jurisdiction over her and her children, under Community law and under *Montana v. United States*, 450 U.S. 544, 564 (1981), and its progeny. *See* Community Respondents'

Ex. C. The Tribal Court ordered that the motion be heard by a three-judge panel so that a final decision could be rendered promptly.[5]

On March 3, 2016, the Tribal Court denied the motion to dismiss. Pet. Ex. F. The Tribal Court determined that it had jurisdiction over the proceeding involving C.H. and C.P. pursuant to Chapter IX (recodified at Chapter VIII) of the Community's Code. *Id.*, p.6. The Tribal Court further held that the Community retains the inherent authority to exercise jurisdiction over child custody proceedings involving Indian children domiciled on its Reservation, jurisdiction confirmed by Congress and the State of Minnesota, and that neither *Montana* nor Public Law 280, 28 U.S.C. § 1360, alters that authority. *Id.*, pp. 6-11.

On April 14, 2016, Kimberly Watso filed this Petition for Writ of Habeas Corpus under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, on behalf of herself and C.P. Pet. ¶¶ 1-2, 4-8, 13. In addition to her general claim that the Tribal Court lacks jurisdiction over the underlying proceeding, Petitioner raises for the first time additional claims under ICRA and the federal Constitution. Petitioner's claims are meritless and the Petition should be denied.

ARGUMENT

Standard of Review--In reviewing a habeas petition under ICRA, the Court is not required to assume the truth of the allegations therein. Instead, the Court may consider the entire record before the tribal court as well as any additional evidence introduced by

[5] Under Rule 31 of the Community's Rules of Civil Procedure, no appeal lies within the Tribal Court from a decision of a three-judge panel. Pet. Ex. F, p.5 & n.2.

the parties. *See, e.g.*, *Azure-Lone Fight v. Cain*, 317 F. Supp. 2d 1148, 1151 (D.N.D. 2004) (considering record before tribal court in determining petitioner had not exhausted tribal remedies); *Connor v. Conklin*, 2004 WL 1242513, at *1, *5 (D.N.D. June 2, 2004) (reviewing record before tribal court and affidavits submitted by respondents before dismissing petitioner's request for habeas relief under ICRA); *Lambert v. Fort Peck Assiniboine & Sioux Tribes*, 2016 WL 40345, at *2 (D. Mont. Jan. 11, 2016) (considering additional evidence submitted in response to petition before dismissing ICRA habeas petition).

The Court also has the authority to make findings related to any disputed facts regarding entitlement to habeas relief. *See, e.g.*, *Sweet v. Hinzman*, 2009 WL 1175647, at *1 (W.D. Wash. Apr. 30, 2009). However, federal courts must defer to tribal courts' findings of fact unless they are clearly erroneous. *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 2004). The evidence in the record before the Court demonstrates that Petitioner's claims are meritless. No evidentiary hearing is warranted.

I. THE COMMUNITY RESPONDENTS ARE IMMUNE FROM SUIT

The Eighth Circuit has "held that tribal sovereign immunity is a threshold jurisdictional question." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011). The Supreme Court in its seminal decision, *Santa Clara Pueblo v. Martinez*, held that ICRA did not abrogate the sovereign immunity of Indian tribes. 436 U.S. 49, 58-59 (1978). The Community and its officials possess sovereign immunity. *Smith*, 875 F. Supp. at 1361-62. The Community's sovereign immunity "may extend to tribal agencies, including the Tribal Court." *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy, ex rel.*

C.M.B., 786 F.3d 662, 670-671 (8th Cir. 2015). The Tribal Court must be dismissed from this action.

Likewise, if tribal officials such as the Respondent judges have acted within the scope of their authority, the "tribal officers are clothed with the Tribe's sovereign immunity." *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994). If habeas relief is available to Petitioner or the Court determines that Petitioner has pled a federal common law action under *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985),[6] she must nonetheless state a valid claim under *Ex parte Young*, 209 U.S. 123 (1908), in order to establish an exception to the sovereign immunity enjoyed by the Tribal Court judges as tribal officials. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993). "'If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit.'" *Id.* (quoting *Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984)).

As discussed below in Section III, the Tribal Court judges were acting well within their authority, as separately confirmed by tribal law, federal law, and Minnesota statutes.

[6] The Community Respondents do not concede that a federal common law action has been properly raised. In *Nat'l Farmers Union*, 471 U.S. at 857, the Supreme Court held that 28 U.S.C. § 1331 "encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaustion is required before such a claim may be entertained by a federal court." While Petitioner mentions *Nat'l Farmers Union* and Section 1331, Pet. ¶¶ 17, 19, she styles her pleading as a "Verified Petition for Habeas Corpus regarding C.P. under 25 U.S.C. § 1303, Indian Civil Rights Act and for Other Relief," Pet., p.1, and asserts that the "Court has jurisdiction over [the] petition for writ of habeas corpus regarding C.P. under the Indian Civil Rights Act." Pet. ¶ 13. Accordingly, Petitioner has not stated a claim under *Nat'l Farmers Union*.

Accordingly, the *Ex parte Young* doctrine is inapplicable and the Tribal Court judges are immune from suit.

II. PETITIONER FAILS TO SATISFY THE PREREQUISITES FOR REVIEW OF A FEDERAL HABEAS PETITION

Petitioner seeks relief under ICRA, which states that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. The Supreme Court has confirmed that Section 1303 of ICRA is "the exclusive means for federal-court review of tribal criminal proceedings." *Santa Clara Pueblo*, 436 U.S. at 67. Notably, ICRA "does not authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Id.* at 72. Petitioner's extensive claims for such remedies cannot be granted. *See* Pet., pp. 56-58, ¶¶ 2-10.

Section 1303 was not "intended to have broader reach than cognate statutory provisions governing collateral review of state and federal action." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879-80 (2d Cir. 1996). Accordingly, Petitioner must satisfy two prerequisites applicable to all federal habeas petitions before substantive review of the Petition by the Court can occur: (1) the Petitioner must be in the custody of an Indian tribe in a manner contemplated by Section 1303; and (2) the Petitioner must have exhausted all available tribal remedies. *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010). Petitioner fails to satisfy both requirements.

A. Petitioner Is Not in Tribal Detention

Tribal court orders concerning custody in child protection matters do not satisfy the "detention" requirement of habeas review under Section 1303, and therefore numerous courts have held that habeas relief under ICRA is not available in civil child protection matters in tribal courts. As a general rule, federal habeas petitioners must demonstrate that they are "in custody" for relief to be available. *See* 28 U.S.C. §§ 2241, 2254, 2255. The "in custody" requirement is equated with significant restraint on liberty, actual or potential. *Harvey v. State of N.D.*, 526 F.2d 840, 841 (8th Cir. 1975). And although Section 1303 does not use the term "custody" but rather speaks of a person's "detention" by an Indian tribe, "[t]here is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other federal habeas statutes." *Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001); *Poodry*, 85 F.3d at 891; *Payer v. Turtle Mountain Tribal Council*, 2003 WL 22339181, at *4 (D.N.D. Oct. 1, 2003) (construing "custody" and "detention" coextensively).

In general, federal habeas relief is not available to a parent attacking the legality of a child custody determination because the "in custody" requirement is not satisfied in that context. In *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 516 (1982), the Supreme Court held that federal habeas relief was not available to a mother challenging the state statute under which a court terminated her parental rights. Central to the court's decision was its conclusion that the mother failed to show that her children were "in custody" for the purposes of federal habeas relief. *Id.* at 510. The court noted

that the children were in the "custody" of their foster parents "in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents" and their situation "differs little from the situation of other children in the public generally." *Id.* at 510-11.

But the unavailability of habeas relief in *Lehman* went beyond the "in custody" requirement. The Supreme Court further emphasized that federal courts "consistently have shown special solicitude for state interests in the field of family and family-property arrangements" and noted that extending the writ to challenges to custody decisions would be "an unprecedented expansion of the jurisdiction of the lower federal courts." *Id.* at 512 (quotations omitted). Finally, the court stated that the interest in finality is "unusually strong" in child custody matters because extended uncertainty over a child's placement resulting from lengthy habeas review could be detrimental to the child's sound development. *Id.* at 513-14.

Lehman's analysis applies with equal force here. Like the children in *Lehman*, Redacted in the same way and to the same extent as other children in the custody of natural parents. In terms of restraints on liberty, his situation is practically no different than that of "other children in the public generally." *Lehman*, 458 U.S. at 510-11. Additionally, the Community's substantial interest in domestic relations involving Indian children deserves the same "special solicitude" as the state interests recognized in *Lehman*.

Recognizing *Lehman*'s applicability to Section 1303 habeas relief, several courts have held that habeas relief under ICRA is not available in civil child protection matters

in tribal courts. *See Azure-Lone Fight*, 317 F. Supp. 2d at 1151 (dismissing habeas petition challenging tribal court's jurisdiction because, "[i]t is clear the petitioner is not entitled to habeas corpus relief in federal court to test the validity of a custody decree of an Indian tribal court"); *Sandman v. Dakota*, 816 F. Supp. 448, 451 (W.D. Mich. 1992) ("[A] writ of habeas corpus is not available to test the validity of the child custody decree issued by the tribal court."), *aff'd*, 7 F.3d 234 (6th Cir. 1993); *Weatherwax v. Fairbanks*, 619 F. Supp. 294, 296 (D. Mont. 1985) ("A child custody ruling is not sufficient to trigger federal habeas corpus relief since the custody involved is not the kind which has traditionally prompted federal courts to assert their jurisdiction.").

The decision cited by Petitioner as the basis for seeking habeas relief—*DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 515 (8th Cir. 1989)—should not be extended to the facts here. *See* Pet. ¶¶ 14-15. In *DeMent*, the United States Court of Appeals for the Eighth Circuit stated that a non-Indian parent could potentially use the habeas corpus remedy in Section 1303 to seek a determination as to whether the Oglala Sioux Tribal Court had deprived him of due process under ICRA, 25 U.S.C. § 1302(8), by failing to give full faith and credit to a California custody decree, but the court ultimately remanded the matter because the parent had failed to exhaust tribal court remedies. *DeMent*, 874 F.2d at 515-17. Citing *Lehman*, the Eighth Circuit acknowledged that federal habeas review "has generally not been available to challenge a state decree on parental rights or child custody." *Id.* at 515. However, the court distinguished *Lehman*, noting that "[t]his case no longer represents a child custody battle" but has "become a dispute over whether

a tribal court violates a non-Indian's due process rights by refusing to give full faith and credit to a state custody decree." *Id.*

The limited exception to *Lehman* recognized under ICRA in *DeMent* should not be extended to the facts here, where there is no competing child custody order to that of the Tribal Court. The absence of any issue regarding the recognition of competing orders from different jurisdictions places this case squarely within the contours of *Lehman*. Additionally, *DeMent* concerned issues of custody related to a divorce proceeding whereas Redacted as was the case in *Lehman*. *See Lehman*, 458 U.S. at 504-05. Redacted

Consistent with this analysis, courts have generally construed *DeMent* narrowly as not providing a general exception to *Lehman*. For example, in *Sandman v. Dakota*, 816 F. Supp. at 451-52, the court explained that *DeMent* does not provide for habeas relief under ICRA when there is no issue of extending full faith and credit to a competing court decree and the underlying case involves an adjudication of dependency as opposed to divorce. The *Azure-Lone Fight* decision, rendered by a district court in the Eighth Circuit after *DeMent*, strongly suggests that *DeMent* does not stand for the broad proposition that habeas is available routinely to challenge tribal court custody determinations.

B. Petitioner Failed To Exhaust Tribal Court Remedies For Her ICRA Claims

Should this Court determine that habeas relief is available to the Petitioner, it must next consider whether Petitioner has exhausted tribal remedies. *Jeffredo*, 599 F.3d at 918. She has not.

This Court can and should dismiss the entire Petition upon confirming that the Tribal Court has jurisdiction over the proceeding involving C.P. The scope of the Tribal Court's jurisdiction was the only issue raised by Petitioner in her motion to dismiss before the Tribal Court. *See* Community Respondents' Ex. C.

Petitioner now raises additional claims, including allegations that the Tribal Court violated various provisions of ICRA. *See* Pet. ¶¶ 183, 233. But as a matter of comity, tribal remedies must be exhausted before a federal court will review a claim asserted under ICRA. *United States v. Wadena*, 152 F.3d 831, 846 (8th Cir. 1998) ("[I]n *Santa Clara*, the Court stressed that tribal courts are available to vindicate rights created by the ICRA and are the appropriate forums to do so." (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983))); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir. 1973) (extending exhaustion requirement to federal review of tribal actions under ICRA). "Even when a federal court has jurisdiction over a claim, if the claim arises in Indian country, the court is required to 'stay its hand' until the party has exhausted all available tribal remedies." *Jeffredo*, 599 F.3d at 918; *see Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1988) ("The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from

assuming jurisdiction over unexhausted claims."). Exhaustion is excused only where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *Nat'l Farmers Union*, 471 U.S. at 856, n.21.

Petitioner moved to dismiss the child custody proceeding, arguing that the Tribal Court lacked jurisdiction under *Montana*. Pet. Ex. F, p.5; Community Respondents' Ex. L, pp. 8-9. The Tribal Court had the opportunity to address the question of its jurisdiction. Thus, Petitioner exhausted tribal remedies on her claim that the Tribal Court lacked jurisdiction over the child protection proceeding.

But Petitioner now raises claims that the Tribal Court violated discrete provisions of ICRA. Specifically, Petitioner alleges that the Tribal Court (1) denied her equal protection of law under 25 U.S.C. § 1302(a)(8), Pet. ¶ 233; (2) deprived her of liberty and property without due process under 25 U.S.C. § 1302(a)(8), Pet. ¶ 233; and (3) failed to provide notice of certain rights under 25 U.S.C. § 1304(e)(3), Pet. ¶¶ 155-57, 183. Petitioner failed to raise these claims before the Tribal Court. Because the Tribal Court was not given an opportunity to address these claims in the first instance, they must be dismissed for failure to exhaust. Given that the Tribal Court may interpret the constitutional norms enshrined in ICRA differently from the analogous protections in the federal Constitution, *see Santa Clara Pueblo*, 436 U.S. at 62-63, it is the Tribal Court and not the federal courts that must first address these claims.

Petitioner makes no arguments that exhaustion is excused. The Tribal Court has not acted outside of its jurisdiction or in bad faith. To the contrary, the Tribal Court has properly exercised its inherent jurisdiction Redacted Exhaustion is not futile because the Tribal Court is an adequate forum to hear such claims. Finally, pessimism about tribal remedies does not excuse Petitioner from invoking them before turning to federal court. *See White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984) ("[T]he aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility.").

III. THE TRIBAL COURT HAS JURISDICTION OVER THE CHILD CUSTODY PROCEEDING INVOLVING C.P.

Petitioner's principal claim is that the Tribal Court lacks jurisdiction over the underlying proceeding involving C.P. In support of that claim, Petitioner argues erroneously that the Community was required to slavishly incorporate state and federal child welfare laws into its Domestic Relations Code as a prerequisite to exercising jurisdiction, thereby reducing the Community to merely an agent of other sovereigns. But as demonstrated below, the Tribal Court judges were acting well within the Community's authority, as separately confirmed by federal and Minnesota statutes,

Redacted .

Several foundational principles govern the scope of the Community's inherent tribal authority. First, those powers lawfully vested in an Indian tribe are not delegated powers granted by acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23

(1978). It follows that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 323. As a result, an examination of the scope of the Tribal Court's jurisdiction requires "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Nat'l Farmers Union*, 471 U.S. at 855-56. The Supreme Court requires a clear expression of Congressional intent to limit traditional prerogatives of tribal sovereignty. *E.g.*, *Santa Clara Pueblo*, 436 U.S. at 58-59; *Bryan v. Itasca Cnty.*, 426 U.S. 373, 381 (1976).

A. Tribal Law Grants the Tribal Court Jurisdiction Over The Child Custody Case of C.P.

Although jurisdiction to interpret tribal laws "lies with Indian tribes and not in the district courts," *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003), a brief overview of the Community's Domestic Relations Code is instructive as it is the Community's adoption of that law pursuant to its inherent authority that vests the Tribal Court with jurisdiction to hear the child custody proceeding involving C.P. The Community through its General Council adopted the Code in 1995. *See* Pet. Ex. G. Chapter VIII, Section 9.a. of the Code provides:

> The Court [of the Shakopee Mdewakanton Sioux Community, sitting as the Children's Court] shall make such orders for the commitment, custody and care of [a child in need of assistance] and take such other actions as it may deem advisable and appropriate in the interest of the child and the interests of the Community.

See Pet. Ex. G, p.74. Chapter VIII, Section 2.d. of the Code defines "Child in need of assistance" as:

> Any child who is in violation of the law, dependent, neglected, or subject to physical, emotional or sexual abuse shall be deemed for these provisions a child in need of assistance and may be the subject of a petition under this Chapter. *Such designation shall include*: a minor Tribal member; a minor eligible for enrollment; [and] *any Indian child domiciled on the Shakopee Mdewakanton Dakota Reservation or temporarily located on the Reservation*.

Id., p.72 (emphasis added).

The Tribal Court concluded that this language of the Code is clear and unambiguous in its reach. Pet. Ex. F, p.6. The General Council of the Community, when it adopted the Code, vested the Tribal Court with the responsibility and the authority to protect children in need of assistance who were domiciled on the Reservation

Redacted

B. Congress Has Confirmed The Community's Inherent Jurisdiction Over The Child Custody Proceeding Involving C.P.

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 *et seq.*, confirms the Community's inherent jurisdiction over the underlying child custody proceeding. Congress enacted ICWA in 1976 in an effort "to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

Of dispositive relevance here, ICWA confirms the Community's retained, inherent authority over child custody proceedings involving Indian children residing or domiciled on its reservation. Indian tribes maintain exclusive jurisdiction "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." 25 U.S.C. § 1911(a); *see DeMent*, 874 F.2d at 514 ("ICWA gives Indian tribes exclusive jurisdiction to determine the custody of Indian children" in "proceedings to determine foster care placement, the termination of parental rights, preadoptive placement and adoptive placement"). Congress did not delegate authority through Section 1911(a), but "confirmed" that "in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989). Indeed, ICWA's jurisdictional provisions "have a strong basis in pre-ICWA case law in the federal and state courts." *Id.*

The child custody proceeding involving C.P. falls squarely within the Community's inherent jurisdiction as confirmed by Section 1911(a) because the matter is a "child custody proceeding" involving an "Indian child" (C.P.) domiciled within the Shakopee Reservation as those terms are defined in ICWA. ICWA defines "[c]hild custody proceeding" as "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." 25 U.S.C.

§ 1903(1)(i). Redacted

Accordingly, the proceeding before the Tribal Court is a "child custody proceeding" within the meaning of ICWA.

Second, C.P. is an "Indian child," which ICWA defines as "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." 25 U.S.C. § 1903(4). Redacted

See Pet. Ex. F, p.2; Pet. ¶ 37. Under the plain language of Section 1911(a), C.P.'s membership in a tribe other than the Community is of no legal consequence to the Tribal Court's jurisdiction over him. *See* 25 U.S.C. § 1903(4); Jones, B.J., The Indian Child Welfare Handbook 30 (1995) ("The exclusive jurisdiction provision of ICWA applies to all Indian children residing within a tribal court's jurisdiction, regardless of whether a child who is the subject of a custody proceeding is a member of the tribe that is exercising jurisdiction . . . ."); *cf. United States v. Lara*, 541 U.S. 193, 210 (2004) (affirming inherent tribal criminal jurisdiction over non-member Indians). Because C.P. is a member of an Indian tribe, he fits squarely within ICWA's definition of an "Indian child."

Third, C.P. was domiciled within the Shakopee Reservation at the time the Tribal Court took jurisdiction over the child custody proceeding involving him. Redacted

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Accordingly, it must be adopted by this Court. *See Duncan Energy*, 27 F.3d at 1300; *Lyons v. Farrier*, 730 F.2d 525, 527 (8th Cir. 1984) (a finding is not clearly erroneous when no evidence has been presented as to how the finding is in error).

Congress further confirmed through Section 1911(a) that the Tribal Court's inherent jurisdiction over the underlying child custody matter continues notwithstanding Redacted . "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*." 25 U.S.C. § 1911(a) (emphasis added); *see also* Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. § 260.771, subd. 1 (same). Redacted As a result, the Tribal Court maintains jurisdiction over the ongoing proceeding Redacted

e.

Additionally, Section 1911(a) confirms the Community's inherent jurisdiction over the child custody proceeding notwithstanding Petitioner Watso's non-Indian status. The plain language of Section 1911 places no limitation on the jurisdiction of the Community based on her status. ICWA defines "parent" broadly to include "any biological parent or parents of an Indian child," without reference to the parent's race or ethnicity. 25 U.S.C. § 1903(9). Because the plain language of ICWA's jurisdictional scheme focuses on the status of the child at the heart of the custody proceeding as opposed to the identities of other potential parties, "[t]he statute does not limit tribal court jurisdiction to cases where both parents are Indian." *Thompson v. Fairfax Cnty. Dep't of Social Servs.*, 747 S.E.2d 838, 849 (Va. Ct. App. 2013); *see also Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (tribal court had colorable jurisdiction over a custody dispute involving an Indian child even though the father was a non-Indian); *Simmonds v. Parks*, 329 P.3d 995, 1019 (Alaska 2014) ("[T]ribal jurisdiction and intervention rights [under ICWA] depend solely on the membership status of the child."). Petitioner cites no authority interpreting ICWA as exempting from coverage "Indian children" with a non-Indian parent.

Finally, contrary to Petitioner's allegation, the qualifying phrase of Section 1911(a)—"except where such jurisdiction is otherwise vested in the State by existing Federal law"—does not affect the Tribal Court's jurisdiction. The phrase likely refers to the jurisdictional framework created by Public Law 280, 28 U.S.C. § 1360, wherein certain states, including Minnesota, can exercise limited civil jurisdiction over claims involving Indians in certain areas of Indian Country. As discussed below in Section

III.D., Public Law 280 is not a limitation on inherent tribal authority because it provides for *concurrent* jurisdiction over a limited set of civil matters between state and tribal courts in Minnesota. *See Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990). Consistent with this principle, Minnesota has declined to exercise concurrent jurisdiction in circumstances such as those present here, because MIFPA, Minn. Stat. § 260.771, subd. 1, adopts the language of 25 U.S.C. § 1911(a) and provides that all child placement proceedings involving Indian children residing on a reservation are deemed to be within the exclusive jurisdiction of the tribe. Scott County authorities, while asserting their right to initiate a concurrent child protection proceeding, Redacted and deferred to the Community's efforts in that regard. *See* Community Respondents' Ex. E, p.2; *see also* Pet. Ex. F, p.10

In sum, because C.P. is an "Indian child" who was domiciled on the Community's Reservation at the time the underlying "child custody proceeding" was initiated, the Community retains inherent jurisdiction over the child custody case at issue, as confirmed by 25 U.S.C. § 1911(a) and Minn. Stat. § 260.771, subd. 1.

C. *Montana* Does Not Divest The Tribal Court Of Jurisdiction

Petitioner contends that the Tribal Court violated her "federal common law rights, recognized in *Montana*, against tribal court jurisdiction over non-members." Pet. ¶ 181. Petitioner's claim shows a fundamental misunderstanding of inherent tribal authority and *Montana*.

In *Montana*, the Supreme Court reaffirmed that Indian tribes retain a variety of inherent powers, but stated that the "exercise of tribal power beyond what is necessary to

protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Although there is a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," the *Montana* court held that tribes retain the inherent sovereign power to regulate (1) "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) the conduct of non-Indians within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. These two categories are commonly referred to as the "*Montana* exceptions."

In the years following the *Montana* decision, the Supreme Court has not held, or even suggested, that an Indian tribe's inherent authority does not reach to matters involving the safety and welfare of Indian children who are domiciled on a tribe's reservation. To the contrary, eight years after *Montana* was decided, the Supreme Court stated that in enacting ICWA, Congress "confirmed" tribes' inherent authority over such matters through Section 1911(a), noting that "[t]ribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA." *Holyfield*, 490 U.S. at 42. Because the Tribal Court's exercise of jurisdiction over the proceeding involving C.P. stems from the Community's inherent authority that has not been divested, such jurisdiction is not dependent on fitting within one of the *Montana* exceptions. Petitioner ignores this critical point.

In confirming its jurisdiction over the underlying proceeding, the Tribal Court persuasively articulated the practical justifications for the Community's exercise of jurisdiction over all Indian children domiciled on its Reservation notwithstanding their tribal affiliation:

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Pet. Ex. F, p.8. The realities of Indian Country underscore why the Community's exercise of the authority confirmed by Section 1911(a) is necessary Redacted

Further, even if the Community's exercise of jurisdiction in the underlying proceeding were outside the scope of its inherent authority, Section 1911(a) would operate as an express congressional *delegation* of authority, the exercise of which is not predicated on satisfaction of a *Montana* exception. *Montana* states that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive *without express congressional delegation*." 450 U.S. at 564 (emphasis added). Redacted

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Because Congress delegated authority over the underlying proceeding to the Community, the Court need not determine whether the Tribal Court's exercise of jurisdiction falls within either *Montana* exception.

Finally, even if the Tribal Court's exercise of jurisdiction is conditioned on satisfaction of either *Montana* exception, such exceptions are met. The first *Montana* exception is satisfied because Redacted

Additionally, Redacted

established the requisite connection to the Community necessary to satisfy the consensual-

relationship exception. The "'consensual relationship' analysis under *Montana* resembles the [federal courts'] Due Process Clause analysis for purposes of personal jurisdiction," the touchstone of which is "'whether the defendant purposefully established minimum contacts'" in the forum jurisdiction. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 474 (1985)). This is because under *Montana*, "'consensual relationships' may create jurisdiction, a holding inconsistent with federal subject matter jurisdiction, though perfectly consistent with principles of personal jurisdiction." *Id.* Redacted

These voluntary contacts solidified Watso's consensual relationship with the Community and satisfy the first *Montana* exception.

The second *Montana* exception is also satisfied because, in the absence of Tribal Court jurisdiction, Redacted would directly threaten the health and welfare of the Community. *Montana*, 450 U.S. at 566. The direct relationship between a tribe's protection of Indian children living on its reservation and the tribe's political integrity, health, and welfare is undeniable. Congress's findings in ICWA underscore the direct connection between the protection of Indian children and the preservation of tribal self-government. Congress found that

"there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. 1901(3); *see also* H.R. Rep. No. 1386 (1978), *reprinted at* 1978 U.S.C.C.A.N. 7530 (tribal control over child custody is "essential").

For these reasons, the Tribal Court's jurisdiction over the underlying proceeding—

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—is directly tied to preserving the political integrity, the economic security, and the health and welfare of the Community. Accordingly, *Montana* does not divest the Tribal Court of jurisdiction over the proceeding involving C.P.

D. Public Law 280 Does Not Preempt The Community's Domestic Relations Code

Petitioner raises *ad nauseam* the erroneous contention that Public Law 280, 28 U.S.C. § 1360, requires the Community to incorporate state child welfare law as a precondition to exercising jurisdiction in the underlying proceeding. Pet. ¶¶ 168, 179, 191, 197, 205, 212, 225. According to Petitioner, Public Law 280 "prohibits [the Community] from enforcing tribal ordinances in subject areas where Minnesota state laws, similar to federal laws, preempt tribal ordinances." Pet. ¶¶ 131, 212. But it clearly does not.

The Supreme Court's seminal decision construing Public Law 280, *Bryan v. Itasca County*, holds that the statute does not subordinate tribes and tribal institutions to the states, but simply authorizes state courts to adjudicate a limited set of private legal disputes, occurring on specified reservations:

> [28 U.S.C. § 1360(a)] seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action." With this as the primary focus of § [1360(a)], the wording that follows in § [1360(a)] "and those civil laws of such state . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State" authorizes application by the state courts of their rules of decision to decide such disputes . . . . [B]oth the Act and its legislative history virtually compels our conclusion that the primary intent of § [1360] was to grant jurisdiction over private civil litigation involving reservation Indians in state court.

Bryan, 426 U.S. at 383-85 (citations and footnotes omitted). In *California v. Cabazon Band of Mission Indians*, the Supreme Court reaffirmed its ruling in *Bryan* that Public Law 280's civil provisions simply provided a state law rule of decision in state court civil actions among Indians, but did not impose state civil law generally on reservations, or in tribal court proceedings. 480 U.S. 202, 208 (1987).

In vacating a district court's grant of a writ of habeas corpus under 25 U.S.C. § 1303, the Eighth Circuit construed the criminal jurisdictional provisions of Public Law 280 to leave intact the inherent sovereign authority of the Omaha Tribe to prosecute a tribal member for vehicular homicide under tribal law, notwithstanding Nebraska state court jurisdiction to prosecute such a crime under state law. The court held that, "Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. *Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority*." *Walker*, 898 F.2d at 675

(emphasis added). This holding is consistent with "'[t]he nearly unanimous view among tribal courts, state courts and lower federal courts, . . . that [P.L.] 280 left the inherent civil and criminal jurisdiction of Indian nations untouched.'" *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1028 n.5 (9th Cir. 2011) (quoting F. Cohen, *Cohen's Handbook of Federal Indian Law* 560-61 (2005 ed.)).

Specifically in the context of ICWA, the United States Court of Appeals for the Ninth Circuit rejected the argument "that Public Law 280 vested the enumerated states with exclusive, not merely concurrent, jurisdiction over civil and criminal matters involving Indians," including child custody matters. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 (9th Cir. 1991). Alaska asserted this position based on the provision in ICWA that permits tribes in Public Law 280 states to reassume jurisdiction over child custody matters by petitioning the Secretary of the Interior. *See* 25 U.S.C. § 1918. Citing to, among other cases, *Bryan* and *Walker*, the Ninth Circuit concluded that, "Public Law 280 was designed not to supplant tribal institutions, but to supplement them." *Venetie*, 944 F.2d at 560. The court found that while 25 U.S.C. § 1918 allowed for tribes to petition to reassume exclusive jurisdiction over child custody matters, it was not intended to divest tribal courts of at least concurrent jurisdiction over such matters in Public Law 280 states. *Id.* at 561. The court also noted, "[i]n addition, the so-called mandatory Public Law 280 states have, to the extent that they have addressed the issue, considered jurisdiction to be concurrent under Public Law 280." *Id.* (citing opinions of the Wisconsin and Nebraska Attorneys General); *see also Doe v. Mann*, 415 F.3d 1038, 1058-61, 1068 (9th Cir. 2005) (concluding that California as a

mandatory Public Law 280 state exercises "concurrent jurisdiction over dependency proceedings involving Indian children" with tribes).

Minnesota respects tribal authority in child welfare matters. In the 2007 Tribal/State Indian Child Welfare Agreement, the Minnesota Department of Human Services explicitly agreed with the eleven tribes located in Minnesota that, "the tribes are the sole interpreters of their constitutions and any tribe may grant its tribal court jurisdiction to hear and determine Indian child welfare matters at its discretion." Available at www.mncourts.gov/mncourtsgov/media/scao_library/CJI/TSA-Tribal-State-Agreement.pdf. *See also* 25 U.S.C. § 1919(a) (permitting states and tribes to "enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which . . . provide for concurrent jurisdiction between States and Indian tribes"). MIFPA incorporated 25 U.S.C. § 1911(a) to recognize exclusive tribal jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled within the tribe's reservation. Minn. Stat. § 260.771, subd. 1. Despite her insistence that Public Law 280 requires the Community to incorporate state law, Petitioner ignores the fact that Minnesota, through Minn. Stat. § 260.771, has declined to exercise any concurrent jurisdiction it may have with respect to the proceeding involving C.P.

Finally, the cases cited by Petitioner confirm that state courts hearing private matters involving Indians will apply state law when it differs from tribal law. *Zander v. Zander*, 720 N.W.2d 360 (Minn. Ct. App. 2006), cited by Petitioner, Pet. ¶ 131, does not hold that Minnesota marital dissolution law "preempts" the Community's Domestic

Relations Code. The case simply holds that Minnesota courts hearing a marital dissolution proceeding involving a member of the Community will apply Minnesota law to the dispute if the comparable tribal law differs. The court applied Minnesota law as "controlling authority in the state district court," while noting the argument that the tribal Code "may apply to dissolutions brought in tribal court . . . ." *Id.* at 369. Likewise, in *Smith*, 96 F. Supp. 2d at 912-14, the court applied Minnesota heirship law to a dispute in federal court, but did not address the issue of what law would apply to an heirship dispute heard in tribal court. Under *Bryan*, *Cabazon*, and *Walker* tribal law would provide the rule of decision in such a case.

In sum, Public Law 280 provides for concurrent civil jurisdiction between state and tribal courts in Minnesota over a limited set of matters, and provides that Minnesota courts will follow Minnesota law in resolving disputes in state court, leaving tribal courts free to apply tribal law in suits brought in their fora. As a result, Petitioner's various illustrations of how the Community has failed to incorporate state law into its Code, including the six-and-a-half-page-long chart documenting purported differences between tribal and Minnesota law, are of no legal consequence. Pet., pp. 30-36.[7] Unanimous and well-settled authority holds that Public Law 280 does not limit inherent tribal autonomy in the field of domestic relations.

[7] Petitioner's assertion that differences in the Community's Code on child placement preferences from the preferences in various Minnesota statutes support some legal claim, Pet., pp. 30-31, is particularly untenable, because ICWA, 25 U.S.C. § 1915(a)-(c), explicitly recognizes tribes' authority to identify placement preferences under tribal law.

IV. PETITIONER'S CONSTITUTIONAL CLAIMS ARE MERITLESS

Petitioner raises three claims under the federal Constitution. Petitioner asserts that:

1) the Tribal Court has restricted Petitioner Watso's rights to care, custody, and control of C.P. in violation of "the federal Due Process Clause." Pet. ¶ 194;
2) the Supremacy Clause requires that federal law (in the form of Public Law 280) preempt tribal law as "supreme." *Id.* ¶ 205; and
3) to the extent that ICWA authorizes Tribal Court jurisdiction in the underlying child custody proceeding, the statute violates Petitioner Watso's "parental rights under the Due Process Clause of the U.S. Constitution." *Id.* ¶ 216.

These claims are all without merit.

A. The Due Process Clause And The Supremacy Clause Do Not Limit The Community's Inherent Authority

Petitioner's claims that the Tribal Court violated her or C.P's rights under the Due Process Clause of either the Fifth or the Fourteenth Amendment fail. The Community is not bound by federal constitutional limitations protecting individual rights against state or federal infringement, except to the extent that Congress legislatively imposes these standards. *See Santa Clara Pueblo*, 436 U.S. at 55-58 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that tribes are not bound by the Fifth Amendment); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 556 (8th Cir. 1958)

(explaining that Indian tribes are not states and, as such, are not bound by the limitations of the Fourteenth Amendment in the exercise of judicial or legislative powers). The Tribal Court cannot violate provisions of the Constitution to which it is not bound.

Petitioners' Supremacy Clause argument fares no better. The Supremacy Clause represents a rule of decision that courts "must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015); *see also Douglas v. Indep. Living Ctr. of S. California, Inc.*, 132 S. Ct. 1204, 1212 (2012) (Roberts, C.J., dissenting) ("The purpose of the Supremacy Clause is instead to ensure that, in a conflict *with state law*, whatever Congress says goes." (emphasis added)). Thus, in the context of Indian affairs, the Supremacy Clause has operated as a limitation on state authority over Indian tribes in areas where the federal government has preempted state authority. *See, e.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976) (Supremacy Clause barred state from imposing taxes on personal property owned by Indians as applied to on-reservation sales by Indians); *Antoine v. Washington*, 420 U.S. 194, 200-01 (1975) (Supremacy Clause precluded application of state game laws to Indians). But given that Indian tribes are "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo*, 436 U.S. at 55-58, the Supremacy Clause does not operate as a limitation on tribes' ability to exercise their undiminished, inherent authority or authority that has been delegated by Congress. (In any case, Petitioner's Supremacy Clause argument is merely a rehash of her erroneous Public Law 280 argument. *See* above, Section III.D.)

B. The Indian Child Welfare Act Does Not Violate The Due Process Clause As Applied To Petitioner Watso

Petitioner contends that to the extent ICWA authorizes the Community's jurisdiction over the proceeding involving C.P., it is unconstitutional as applied to Petitioner Watso because it violates her "parental" rights under "the Due Process Clause of the U.S. Constitution." Pet. ¶ 216. Petitioner's constitutional attack on ICWA is meritless.

As discussed in Section III.B., above, ICWA's Section 1911(a) does not "authorize" tribal court jurisdiction, but "confirm[s]" Indian tribes' inherent jurisdiction over child custody proceedings involving Indian children domiciled on a reservation. *Holyfield*, 490 U.S. at 42. Because Section 1911(a) confirms the inherent authority of tribes that predates the Constitution, it follows that mere confirmation of such jurisdiction by Congress does not violate the Fifth Amendment, especially when Petitioner does not explain *how* Section 1911(a) has actually deprived her of substantive due process rights.

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Alternatively, even if Section 1911(a) is construed as Congress delegating jurisdiction to Indian tribes, Petitioner does not articulate how such delegation was improper. The Constitution gives Congress "plenary and exclusive authority" to regulate Indian affairs. *See Lara*, 541 U.S. at 200 (explaining that the Indian Commerce and

Treaty Clauses are bases for the "plenary and exclusive" power of Congress); *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996) ("If anything, the Indian commerce clause accomplishes a greater transfer of power from the States to the Federal Government than does the interstate commerce clause."). For Congress to legislate constitutionally in the field of Indian affairs, the legislation need only be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977).

ICWA's Section 1911(a) is rationally tied to Congress's management of Indian affairs. In enacting ICWA, Congress found ample support for the proposition that its power over Indian affairs extends to Indian child welfare matters. *See* H. Rep. No. 95-1386, at 16 (1978) ("[A] tribe's children are vital to its integrity and future. Since the United States has the responsibility to protect the integrity of Indian tribes, we can say with the *Kagama* court, 'there arises the duty of protection, and with it the power.'"). Courts addressing this issue have nearly unanimously held that Congress maintains the authority to take action to address critical issues affecting Indian tribes and families, wherever those issues arise. *See, e.g.*, *Hoots v. K.B.*, 663 N.W.2d 625, 636-37 (N.D. 2003); *In re N.B.*, 199 P.3d 16 (Colo. Ct. App. 2007); *see also* Cohen's Handbook of Federal Indian Law § 11.06, at 862 (Nell Jessup Newton ed., 2012). Petitioner has fallen well short of "clearly demonstrat[ing]" that Congress lacked the authority to enact Section 1911(a). *See Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

V. PETITIONER'S ICRA CLAIMS FAIL DESPITE THE FAILURE TO EXHAUST

Petitioner raises several ICRA claims for the first time in the Petition, including claims that the Tribal Court: (1) denied Petitioner Watso and C.P. equal protection of the laws under 25 U.S.C. § 1302(a)(8), Pet. ¶ 233; (2) deprived Petitioner Watso and C.P. of liberty and property without due process of law under 25 U.S.C. § 1302(a)(8), Pet. ¶ 233; and (3) failed to provide notice of certain rights as required by 25 U.S.C. § 1304(e)(3), Pet. ¶¶ 155-57, 183. Assuming tribal remedies have been exhausted, the Court reviews de novo whether a petitioner's rights under ICRA have been violated. *See Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998). But federal courts must defer to tribal courts' determinations of fact unless they are clearly erroneous. *Duncan Energy*, 27 F.3d at 1300.

Petitioner's ICRA claims are tied to her overarching claim that the Tribal Court exceeded its jurisdiction. *See* Pet. ¶ 73. As a result, this Court can deny Petitioner's ICRA claims upon concluding that the Tribal Court acted within its authority for the reasons stated in Section III. If, however, this Court construes Petitioner's ICRA claims as independent of the jurisdictional claim, they must be dismissed for failure to exhaust Tribal Court remedies.

Furthermore, beyond their procedural flaws, Petitioner's due process, equal protection, and improper-notice claims under ICRA facially lack merit.

A. The Tribal Court Did Not Violate ICRA's Notice Provision Governing "Tribal Jurisdiction Over Crimes Of Domestic Violence"

Title 25 U.S.C. § 1304(e)(3) states that "[a]n Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 [habeas] of this title." Petitioner claims that the Tribal Court violated this statute, "because it did not provide notice to Ms. Watso nor C.P. of their rights and privileges under the Indian Civil Rights Act, 25 U.S.C. § 1302." Pet. ¶ 183. The Tribal Court had no obligation to provide such notice. Section 1304(e)(3) provides for no notice of rights under Section 1302, such as Petitioners allege.

Further, when read in the context of Section 1304 as a whole, the notice provision Petitioners cite does not apply to child protection proceedings; it applies when an Indian tribe has detained someone pursuant to the special domestic violence jurisdiction that Section 1304 confers. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Our duty, after all, is to construe statutes, not isolated provisions." (quotations omitted)); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (explaining that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). Congress enacted Section 1304, entitled "Tribal jurisdiction over crimes of domestic violence," in 2013 to give tribes satisfying certain requirements jurisdiction to prosecute non-Indians for a limited set of domestic violence crimes. Pub. L. 90-284, title II, § 204, as added Pub. L. 113-4, title IX, § 904, 127 Stat. 120 (Mar. 7, 2013). Because the child custody proceeding did not involve detention resulting from the

Community's exercise of criminal domestic violence jurisdiction under Section 1304, the Tribal Court was not required to give notice under Section 1304(e)(3).

Finally, assuming *arguendo* that the Tribal Court was required to provide notice under Section 1304(e)(3), Petitioner's claim still fails. "[I]n order for defective notice to form a basis for habeas relief, 'a petitioner must demonstrate that he was prejudiced by the claimed defect.'" *Winningham v. Turner*, 878 F.2d 1062, 1064 (8th Cir. 1989) (quoting *White v. U.S. Parole Comm'n*, 856 F.2d 59, 61 (8th Cir. 1988)). Section 1304(e)(3) requires (1) notice of a detainee's right to petition a federal district court to stay further detention, and (2) notice of the detainee's right to file a federal habeas petition. Petitioner has filed a habeas petition, albeit a defective one. Accordingly, Petitioner's claim must be denied as she identifies no prejudice from the Tribal Court's failure to provide notice.

B. Petitioner Fails To Articulate Any Basis For Her ICRA Equal-Protection Claim

Petitioner asserts that the Tribal Court has denied her "the equal protection of its laws" under 25 U.S.C. § 1302(a)(8). Pet. ¶ 233. Petitioner apparently bases an equal-protection claim on the erroneous assertion that the Community was required to incorporate state and federal laws into its Domestic Relations Code. *Id.* ¶ 73 ("SMSC violates ICRA's equal protection of its laws and deprives liberty and property without due process of law when it does not apply federal law and state law regarding parent-child rights of non-member children and non-member parents." [sic]). Yet even if that

were true, Petitioner does not explain how that omission violates equal-protection guarantees under ICRA.

Petitioners also assert that the Tribal Court has not broadly published opinions since September 2014, Pet. ¶ 136, and that this purported "lack of publication . . . violates the Petitioner's ICRA equal protection and due process rights . . . ." Pet. ¶ 146. While the case digest for the Tribal Court is updated only periodically, all of the court's opinions and orders, unless sealed, are available for review at the Tribal Court clerk's office.[8] Petitioner provides no explanation as to how she has been prejudiced or treated differently than any other party appearing before the Tribal Court. Contrary to the assertions in the Petition at Paragraphs 125 and 146, Redacted

See Community Respondents' Ex. I.[9] And contrary to the assertions in the Petition, ¶¶ 140-43, many state and federal court decisions remain unpublished, where the decision is primarily of import to the parties, as is the case in many family law matters.

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[8] Under the Domestic Relations Code, Children's Court proceedings are closed to non-parties unless the Tribal Court orders otherwise. *See* Pet. Ex. G, p. 76.

[9] Redacted

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Petitioner's failure to develop or provide supporting authority for her ICRA equal protection claim further underscores the need for exhaustion of Tribal Court remedies to the extent this Court construes Petitioner's ICRA claims as independent of her jurisdictional arguments.

C. The Tribal Court Has Provided Petitioner With Due Process

Petitioner asserts that the Tribal Court has denied her due process under 25 U.S.C. § 1302(a)(8) without explaining the basis for that contention. Pet. ¶ 233. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quotations omitted). "The hearing must be 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The record shows that the Tribal Court has repeatedly given Petitioner a meaningful opportunity to be heard throughout the underlying proceedings. The Tribal

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The Tribal Court has afforded Petitioner Watso ample due process.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's request for a writ of habeas corpus, and hold no evidentiary hearing on the matter.

Dated: May 31, 2016

s/ *Richard A. Duncan*

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