No. 18-1723

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kimberly Watso, individually and on behalf of C.H. and C.P., her minor children, and Kaleen Dietrich,

Appellants,

vs.

Emily Piper in her official capacity as Commissioner of the Department of Human Services; Scott County; Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community; and its Judge John E. Jacobson, in his official capacity; Tribal Court of the Red Lake Band of Chippewa Indians; and its Judge Mary Ringhand, in her official capacity,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
THE HONORABLE ANN D. MONTGOMERY, JUDGE

SMSC COMMUNITY APPELLEES' BRIEF

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SUMMARY OF THE CASE

The Plaintiffs/Appellants have abandoned and waived their only remaining claim against the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community ("SMSC Tribal Court") and Judge John E. Jacobson, in his official capacity (collectively, "Community Defendants"), which is a petition under the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1914. Regardless, Section 1914 provides no remedy against tribal court (as opposed to state court) proceedings, and the SMSC Tribal Court and Judge Jacobson are immune from suit.

To the extent the Appellants' arguments regarding the Minnesota Department of Human Services' Indian Child Welfare Manual ("Manual" or "DHS Manual") are directed against the Community Defendants, the SMSC Tribal Court established jurisdiction over C.H. and C.P. prior to a 72-hour hold on the children by local police. No "transfer" of jurisdiction occurred.

The SMSC Tribal Court had jurisdiction to place C.H. and C.P. into temporary custody. Tribal courts on reservations covered by Public Law 280 have at minimum concurrent jurisdiction with state courts over child custody proceedings involving Indian children such as C.H. and C.P. Any remaining claims related to C.P. are moot or barred by the doctrine of claim preclusion.

If oral argument is granted, Defendants/Appellees collectively request 30 minutes for argument.

CORPORATE DISCLOSURE STATEMENT

Defendants/Appellees the Tribal Court of the Shakopee Mdewakanton Sioux Community (the Community is a federally recognized Indian tribe), and Judge John E. Jacobson are not corporations.

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The Community Defendants/Appellees do not contest the Plaintiffs'/ Appellants' Jurisdictional Statement.

STATEMENT OF ISSUES

I. Whether 25 U.S.C. § 1914 provides a cause of action to invalidate tribal court proceedings that Appellants have not waived.

Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005);

25 C.F.R. § 23.103(b)(1).

II. Whether the Community Defendants are immune from suit.

Fort Yates Pub. Sch. Dist. No. 4 v. Murphy, ex rel. C.M.B, 786 F3d 662 (8th Cir. 2015);

N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458 (8th Cir. 1993).

III. Whether the SMSC Tribal Court properly exercised jurisdiction over the child custody proceeding involving C.H. and C.P.

SMSC Domestic Relations Code, Art. VIII;

In re C.M.H. and C.D.P., Children in Need of Assistance, Court File No. CC083-15 (SMSC Children's Court) (Mar. 3, 2016), Memorandum Decision and Order [re Jurisdiction], ECF No. 17;

Indian Child Welfare Act, 25 U.S.C. § 1911;

Fisher v. District Court, 424 U.S. 382 (1989);

Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990);

Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548 (9th Cir. 1991);

Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005);

Morton v. Mancari,417 U.S. 535 (1974);

United States v. Eagleboy, 200 F.3d 1137 (8th Cir. 1999).

IV. Whether any claims alleged against the Community Defendants related to C.P. must be dismissed as moot or bared by the doctrine of claim preclusion.

In the Matter of the Welfare of [C.P.], Red Lake Family & Children's Services v. Watso, et al., Case No. CP-2016-0069 (Red Lake Nation Tribal Court) (Nov. 17, 2017), Order Granting Transfer of Custody of C.P. to Kaleen Dietrich, ECF No. 112;

Watso v. Jacobson, et al., No. 16-cv-00983 (PJS/HB) (D. Minn. Apr. 14, 2016);

Minch Family LLP v. Buffalo-Red River Watershed Dist., 628 F.3d 960 (8th Cir. 2010).

STATEMENT OF THE CASE

A. Factual and Procedural Background

Kimberly Watso is the mother of minor children C.P. and C.H. Complaint ("Compl.") ¶ 1, ECF No. 1; reprinted in Appellees' Appendix ("Apps' App.") at 1-48. Kaleen Dietrich is the maternal grandmother of the children. *Id.* ¶ 5. C.P. is a member of the Red Lake Band of Chippewa Indians ("Red Lake Band"). *Id.* ¶ 2. C.H. is a member of the Shakopee Mdewakanton Sioux Community ("SMSC" or "Community").[1] *Id.* ¶ 3. Neither Watso nor Dietrich are enrolled in an Indian tribe. *Id.* ¶¶ 1, 5.

Initiation of the Child Custody Proceeding in SMSC Tribal Court

On January 22, 2015, an SMSC Child Welfare Officer filed an emergency *ex parte* petition under Chapter VIII of the Community's Domestic Relations Code ("Code"), requesting that the SMSC Tribal Court grant temporary legal and physical custody of C.P. and C.H. to the Community's Family and Children's Services Department ("Department"). *Watso v. Jacobson* (*Watso I*), No. 16-983, ECF No. 1 ¶ 52 (D. Minn. May 31, 2016). The SMSC Tribal Court determined that the matter should not be heard *ex parte*, and held a hearing with Watso present. *Id.* at ¶ 54. During the hearing, the Department presented considerable evidence of

[1] Both the Red Lake Band and the Community are federally recognized Indian tribes. 83 Fed. Reg. 4235, 4238 (January 30, 2018).

chemical use by Watso and C.H.'s father, Isaac Hall. SMSC Tribal Court Order, ECF No. 17 at 2[2]; Appellees' Joint Appendix ("Joint App.") at 604. Based on the evidence, the SMSC Tribal Court opened a child welfare case, deemed the children wards of the SMSC Tribal Court ("children in need of assistance"), and ordered social services to be provided to the parents. ECF No. 17 at 5; Joint App. at 607; SMSC Tribal Court Hearing Transcript, ECF No. 21 at 5; Joint App. at 607.

Approximately one month after the SMSC Tribal Court opened the child welfare case for C.H. and C.P., on February 24, 2015, Watso and Hall brought C.H. to a medical clinic for an examination of an injury to his head. Compl. ¶ 18. The medical exam resulted in a report of possible child abuse or neglect by Watso and Hall. *Id.* ¶¶ 15, 19. After receiving the report of possible child abuse, the Shakopee Police Department (as to C.H.) and the Prior Lake Police Department (as to C.P.) placed the children on a 72-hour health and safety hold. *Id.*, Ex. 3, Apps' App. At 117. The Shakopee Police called the Department upon discovering that C.H. and Hall were Community members.

The Department filed a new *ex parte* motion based on the report in the preexisting child custody proceeding to transfer legal and physical custody of both children from their parents to the Department. *Id.*, Ex. 4; Apps' App. at 119. Watso

[2] Citations to ECF pages are to the page number in the ECF heading.

was notified of the motion and she objected to the SMSC Tribal Court's exercise of jurisdiction. Compl. ¶¶ 130-36. The SMSC Tribal Court overruled Watso's objections, and transferred temporary legal and physical custody of C.P. and C.H. to the Department. *Id.*, Ex. 4; Apps' App. at 119.

Transfer of Children to their Current Placements

Shortly after the commencement of the child custody proceedings, it was established that C.P. was a member of the Red Lake Band, and the Department notified the Red Lake Band. ECF No. 17 at 6; Joint App. at 608. Thereafter, representatives of the Band were included on the SMSC Tribal Court's service list, participated in hearings, and supported the positions taken by the Department, the Guardian *ad Litem*, and the orders entered by the SMSC Tribal Court. *Id.*

Following a period of foster care, the Department and the Guardian *ad Litem* recommended that C.P. be temporarily placed with Dietrich and that he receive therapy to address behaviors driven by anxiety. The SMSC Tribal Court adopted those recommendations on April 21, 2015. The SMSC Tribal Court subsequently held status conferences to monitor the children and received reports from the Department and Guardian *ad Litem* that both C.H. and C.P. were progressing with the assistance of therapy and other social services. *Id.* at 6-7.

Hall and Watso separated during this period. Later in 2015, Watso married another Community member, Ed Watso. *Id.* at 7.

As time progressed, the parents repeatedly failed to comply with the provisions of the SMSC Tribal Court-ordered case plans for reunification with the children. *Id.* Because reunification was not possible, the Department and the Guardian *ad Litem* requested the SMSC Tribal Court to remove C.H. from foster care and place him into the home of his paternal great aunt, who lives on the Community's Reservation. *Id.*; Compl. ¶ 36.

Watso's Jurisdictional Challenge in SMSC Tribal Court and *Watso I*

After nearly eleven months of proceedings in the SMSC Tribal Court, on December 8, 2015, Watso filed a motion to dismiss under Rule 12(b)(1) of the Community's Rules of Civil Procedure on the ground that the SMSC Tribal Court lacked jurisdiction over her and her children. Watso's Mot. to Dismiss, ECF No. 18; Joint App. at 619. The SMSC Tribal Court denied the motion to dismiss on March 3, 2016. ECF No. 17; Joint App. at 603. The SMSC Tribal Court determined it had jurisdiction over the proceeding involving C.H. and C.P. pursuant to Chapter IX (recodified at Chapter VIII) of the Code. *Id.* at 9. The SMSC Tribal Court further held that the Community retains the inherent authority to exercise jurisdiction over child custody proceedings involving Indian children residing or domiciled on its reservation, jurisdiction confirmed by Congress in the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, and the State of Minnesota. *Id.* at 9-14.

Thereafter, on April 14, 2016, Watso filed a petition for habeas corpus under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1304, on behalf of herself and C.P. (the child who is a Red Lake Band member). *See* Pet. ECF No. 1, *Watso v. Jacobson, et al.*, No. 16-cv-00983 (PJS/HB) (D. Minn.) ("*Watso I*"). In the petition Watso asserted preemption, equal protection, and due process claims related to the SMSC Tribal Court's exercise of jurisdiction over C.P. *Id.*

While *Watso I* was pending, in December 2016, the Red Lake Band moved to dismiss the SMSC Tribal Court's child custody proceeding involving C.P. The Red Lake Band asked the SMSC Tribal Court to defer to the Red Lake Band Tribal Court ("Red Lake Court") because the Red Lake Band had started its own child custody proceeding involving C.P. Compl. Exs. 5-6; Apps' App. at 123, 129.

On January 17, 2017, the SMSC Tribal Court, having concluded that the Red Lake Court proceeding would provide appropriate protection for C.P., closed its child welfare proceeding involving C.P. in deference to the Red Lake Band. Compl. Ex. 5. As a result, the parties to *Watso I* stipulated to dismiss the litigation as moot. Stip. for Dismissal, ECF No. 49, *Watso I*, No. 16-983. The Honorable Patrick J. Schiltz dismissed the case *with prejudice on the merits* a day later. Order of Dismissal, ECF No. 51, *Watso I*, No. 16-983; Joint App. at 512. Watso did not appeal from the dismissal with prejudice of her claims regarding C.P.

Closing of the Red Lake Band's Proceeding Involving C.P.

In October 2017, the Red Lake Family & Children Services Department, Watso, and Dietrich stipulated to the transfer of permanent legal and physical custody of C.P. to Dietrich. Red Lake Court Order, ECF No. 112; Apps' App. at 509-511. Based on that stipulation, the Red Lake Court found that awarding custody of C.P. to Dietrich was in his best interests, ordered that Dietrich be awarded custody, and closed its child custody proceeding. *Id.*

B. The District Court Litigation

Thirteen days after Judge Schiltz dismissed *Watso I* with prejudice, Plaintiffs filed this action challenging the proceedings in the tribal courts as well as the conduct of the Commissioner of the Minnesota Department of Human Services ("DHS") and Scott County on multiple grounds. Originally, Appellants alleged four claims in their complaint, including three against the Community Defendants (Counts I, II, and IV). Compl. ¶¶ 148-188.

All Defendants[3] moved to dismiss the claims against them. Mot. to Dismiss, ECF Nos. 12, 29, 36, 46, 53. Before the motions were fully briefed, Appellants

[3] The Defendants originally included Emily Piper in her official capacity as the Commissioner of DHS, Scott County, the Community, the SMSC Tribal Court, Judge John E. Jacobson in his official capacity, the Red Lake Band, the Red Lake Court, Judge Mary Ringhand in her official capacity, Isaac Hall (C.H.'s father) and Donald Perkins (C.P.'s father).

voluntarily dismissed Count II, which was a claim styled as an ICRA petition for habeas corpus similar to the petition in *Watso I*, and Count IV, a 42 U.S.C. § 1983 civil rights claim against the Community Defendants and the Red Lake Defendants. Order, ECF No. 73; Joint App. at 661. Appellants also voluntarily dismissed all claims against the Community and the Red Lake Band (i.e., the Indian tribes). *Id.*

The only remaining claim against the Community Defendants was Count I, a "25 U.S.C. § 1914 ICWA petition to invalidate action upon showing of ICWA violation." Compl. at 37, ¶¶ 149-157. Appellants also continued to pursue Count III, a 42 U.S.C § 1983 claim against Scott County and Commissioner Piper. ECF No. 73; Joint App. at 661. Appellants dismissed all claims against Hall and Perkins. ECF No. 99; Joint App. at 724.

Report and Recommendation of Dismissal

On December 5, 2017, Magistrate Judge Katherine Menendez recommended that Appellants' remaining claim against the Community Defendants, Count I, be dismissed. ECF No. 117; Appellants' Addendum ("Apps' Add.") at 12. [4] The plain

[4] Appellants filed a motion for partial summary judgment while the Defendants' motions were pending. ECF No. 103. The Magistrate Judge recommended that motion be denied as moot because the action should be dismissed. R&R, ECF No. 117 at 24; Apps' Add. at 35. The District Court adopted that recommendation. ECF No. 124 at 11; Apps' Add. at 11.

language of 25 U.S.C. § 1914 "does not create any cause of action against tribes or any basis to invalidate . . . the child-welfare proceedings of a tribal court, which plaintiffs seek to do here." *Id.* at 16. "Section 1914 does not suggest that the parent of an Indian child may petition a federal court to invalidate *a tribal proceeding* for foster care placement or termination of parental rights. And such an interpretation would be inconsistent with ICWA's purpose, which was designed to ensure that *state proceedings* involving Indian children adhered to certain standards." *Id.* at 17 (emphasis in original).

The Magistrate Judge also recognized that no claim made by Appellants against the tribal courts as institutions could survive because the tribal courts "are entitled to the same sovereign immunity that bars any claims against SMSC and the Red Lake Band." *Id.* at 18. The tribal courts, like the tribes, are subject to suit only if Congress authorizes it or they waive their immunity. *Id.* Moreover, because Appellants failed to respond to this argument when it was raised in the Community and Red Lake Defendants' motion papers, Appellants "therefore abandoned any claim that their suit could proceed against the tribal courts." *Id.* at 19.

On the other hand, Appellants, according to the Magistrate Judge, might be able to seek prospective injunctive relief against Judges Jacobson and Ringhand, prohibiting them from "conducting any further tribal proceedings concerning the welfare of C.H. and C.P. and requiring them to dismiss existing proceedings." *See*

id. at 20-21. This "exception" to sovereign immunity applies if a tribal official is acting outside the scope of her or his authority under federal law. *Id.* at 20. However, Appellants "argument that the tribal judges acted outside the scope of their authority is premised entirely on [a] legally incorrect theory." *Id.* at 21.

Appellants' legal theory, based on a combination of Public Law 83-280 ("PL 280"), 28 U.S.C. § 1360, and ICWA, was that the tribal courts either lacked jurisdiction over the child welfare proceedings or had to wait for a state court to authorize tribal court jurisdiction over the proceedings. *Id.* at 10. As the Magistrate Judge explained, PL 280 "delegated jurisdiction to a handful of enumerated states over many criminal and civil matters that arose on the 'Indian country' within those states." *Id.* at 6. The Community Reservation is covered by PL 280, but the Red Lake Reservation is not. *Id.* at 7. "Importantly, although PL 280 gave jurisdiction over some matters to states, it left intact the inherent tribal jurisdiction over many of these matters that preceded the statute." *Id.* (citing *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990)).

ICWA, the other statute Appellants relied on, "was adopted in 1978 in response to the extremely high numbers of Indian children removed from their families and communities through state court child welfare proceedings." *Id.* at 8. "Although ICWA is a lengthy and complex statute, only a few provisions are relevant here"—25 U.S.C. §§ 1911(a) and (b) and 1918. *Id.*

Section 1911(a) specifies when a tribe has exclusive jurisdiction over Indian child welfare proceedings. *Id.* at 8-9. There is "an exception to such exclusivity when a state has jurisdiction over a child welfare proceeding under existing federal law," which has been interpreted to include PL 280. *Id.* at 13. This section states:

> 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.

Section 1918 allows an Indian tribe subject to PL 280 to reassume exclusive jurisdiction over child custody proceedings through a petitioning process. *Id.* at 9.

Section 1911(b) makes "clear that when a pre-existing state child welfare proceeding involving Indian children is underway, tribes can receive jurisdiction via transfer from state courts . . . ." *Id.* Section 1911(b) states:

> 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.

The Magistrate Judge rejected Appellants' jurisdictional arguments: "Unfortunately for the plaintiffs, there is no support for the idea that the State held exclusive jurisdiction in this matter. Nor is there support for their alternative

suggestion that the state and SMSC share jurisdiction, but the law required the State to exercise its jurisdiction first." *Id.* at 11.

Appellants relied heavily on a decision from the United States Court of Appeals for the Ninth Circuit, *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005), to support their interpretation of ICWA. *Id.* at 12. Appellants argued—with no textual support—that the court in *Doe v, Mann* held that the carve out from exclusive tribal jurisdiction based on "existing federal law" in Section 1911(a) granted states exclusive jurisdiction over Indian child welfare proceedings on reservations covered by PL 280, unless the tribe petitioned the Secretary to "reassume" jurisdiction under Section 1918. The Magistrate Judge disagreed.

Doe v. Mann involved an Indian mother's challenge to a state exercising jurisdiction over an Indian child welfare proceeding (not a non-Indian's challenge to a tribe exercising jurisdiction). *Id.* The mother argued that the tribe had exclusive jurisdiction despite the carve out in Section 1911(a). *Id.* The court held that the reference to "existing federal law" in Section 1911(a) includes PL 280; and that because of the carve out, states and tribes covered by PL 280 share "concurrent jurisdiction over Indian child welfare proceedings." *Id.* at 13. "But, *Doe v. Mann* certainly did not hold that the PL 280 carve-out from ICWA's exclusive jurisdiction provisions requires states to exercise exclusive jurisdiction." *Id.* at 12. The language of the statutes does not support this interpretation. *Id.* at 13.

Moreover, the Ninth Circuit had already resolved the issue of whether tribes had concurrent jurisdiction over Indian child welfare proceedings on PL 280 reservations 14 years earlier in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991). *Id.* at 11-12. In *Native Village*, the State of Alaska argued that PL 280, as incorporated by Section 1911(a), stripped Alaska Natives of their jurisdiction over Indian child welfare proceedings and that PL 280 "vested the enumerated states with exclusive, not merely concurrent, jurisdiction over civil and criminal matters involving Indians." *Id.* at 11-12 (quoting *Native Village*, 944 F.2d at 559). The Ninth Circuit rejected that argument, like the Magistrate Judge did, because PL 280 is "designed not to supplant tribal institutions, but to supplement them . . . [PL 280] is not a divestiture statute." *Id.* at 12 (quoting *Native Village*, 944 F.2d at 560). The court in *Native Village* found that Section 1918 served a purpose because it allows PL 280 tribes to reassume exclusive jurisdiction as opposed to sharing concurrent jurisdiction with the state. *Id.* at 12 n.10.

Finally, the Magistrate Judge rejected Appellants' argument that Section 1911(b) requires state court approval before a tribe with concurrent jurisdiction under Section 1911(a) can exercise it, citing two reasons. *Id.* at 14-15. "First, no 'state court proceeding' regarding the welfare of the children at issue here existed at any point, making § 1911(b) inapplicable on its face." *Id.* at 15. "Second, the [Appellants] failed to allege any facts indicating that the children were neither

residing nor domiciled on the SMSC reservation at the time the SMSC Court took jurisdiction over the relevant child-welfare proceedings." *Id.* Without such allegations, Section 1911(b) is not relevant to the case. And, regardless, "the record before the Court demonstrates that C.H. and C.P. were domiciled at an address on the Shakopee Reservation with Ms. Watso and C.H.'s father." *Id.*; *see also* Compl. Ex. 3; Apps' App. at 117 (on reservation address of parents).

Appellants theory for how the DHS Manual contradicts federal law is based on an argument that (1) the state court has exclusive jurisdiction over Indian child welfare proceedings for Indian children that are members of PL 280 tribes or, alternatively, (2) a state court action must precede a PL 280 tribe exercising jurisdiction and be authorized by Section 1911(b). *Id.* at 22. "Unfortunately for the plaintiffs," according to the Magistrate Judge, "this argument fails for the same reason as the rest of the Complaint." *Id.* (determining that neither ICWA nor PL 280 conferred exclusive jurisdiction on the State or required the County to initiate a state court proceeding before referring the report of possible child abuse to SMSC, "which already had child welfare proceedings underway"). *Id.*

District Court's Adoption of the Report and Recommendation

Appellants objected to the Report and Recommendation on December 18, 2017. ECF No. 119; Joint App. at 726. The District Court overruled the objections, adopted the Report and Recommendation, granted the motions to dismiss, denied

Appellants' motion for partial summary judgment, and dismissed the Complaint. ECF No. 124, Apps' Add. at 1.

Appellants objected that the Magistrate Judge incorrectly applied Rules 8 and 12 of the Federal Rules of Civil Procedure and improperly considered Judge Jacobson's conclusion that the children were in need of assistance, which was made during the January 28, 2015 hearing in SMSC Tribal Court. *Id.* at 5. The District Court held that the Magistrate Judge correctly applied Rules 8 and 12 of the Federal Rules of Civil Procedure by accepting the factual averments in the complaint as true and deciding that Appellants' legal theory is incorrect. *Id.* at 5-6. The Magistrate Judge's consideration of Judge Jacobson's conclusion was proper because a court order that does not contradict the allegations in the complaint may be considered at the motion to dismiss stage. *Id.* at 6 (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). And the Magistrate Judge's conclusion did not rest on Judge Jacobson's decision, which is referred to in a footnote of the Report and Recommendation. *Id.* "Rather, it was cited to note that another independent basis to dismiss the Complaint may exist." *Id.*

Appellants renewed their arguments related to *Doe v. Mann* and 25 U.S.C. §§ 1911(a), 1911(b), and 1918. But the District Court held that *Native Village* "undermines [Appellants'] argument that SMSC lacked jurisdiction over the custody determinations." *Id.* at 8. "*Native Village* persuasively rejected

[Appellants' Section 1918] argument." *Id.* And their arguments find "no support in *Doe*. Rather, *Doe* continued to recognize *Native Village*'s holding that 'Public Law 280 states have only concurrent jurisdiction with the tribes over custody proceedings involving Indian children.'" *Id.* (quoting *Doe*, 415 F.3d at 1063 n.32).

The District Court also found Appellants' argument related to Section 1911(b) flawed. *Id.* at 9. "Section 1911(b) only applies in a 'State court proceeding,'" and no state court proceeding existed here. *Id.* "Moreover, there is no requirement that the state initiate proceedings before Scott County could transfer the case to SMSC." *Id.* Such an argument is contradicted by the Supreme Court's statement in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989), that Section 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Id.*

In their objections Appellants focused for the first time on a federal regulation implementing ICWA, 25 C.F.R. § 23.106(b), which states: "where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard." *Id.* at 9. Appellants argued that Section 1911(b)'s requirement of a preceding state court action must apply. *Id.* The District Court found that Section

1911(b) does not require a preceding state court action prior to a tribal court's exercise of jurisdiction over an Indian child. *Id.* This appeal followed.

SUMMARY OF THE ARGUMENT

Appellants have waived their sole remaining claim against the Community Defendants; and, even if Appellants had not waived the claim, the statute they rely on (25 U.S.C. § 1914) does not create a cause of action against tribal courts or a cause of action to invalidate tribal court proceedings. If Appellants did state a valid claim that they did not waive, the claims would be precluded by the Community Defendants' sovereign immunity.

As for the merits of their jurisdictional arguments, which Appellants characterize in their brief as arguments for why the DHS Manual is legally incorrect, the SMSC Tribal Court properly exercised jurisdiction over C.H. and C.P. based on the Community's inherent power and tribal law. Congress did not divest that jurisdiction in either ICWA or PL 280. No decision from the Ninth Circuit, including *Doe v. Mann*, supports Appellants' arguments. To the contrary, the statutes and Ninth Circuit precedent support tribal jurisdiction over the Indian child welfare proceedings that Appellants are challenging.

Finally, any claim that Appellants state against the Community Defendants regarding C.P. is moot and subject to claim preclusion. The Court should affirm the District Court's dismissal of all claims against the Community Defendants.

STANDARD OF REVIEW

This Court reviews the District Court's grant of a motion to dismiss under Rule 12 de novo. *Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008).

ARGUMENT

I. APPELLANTS HAVE WAIVED THEIR ONLY REMAINING CLAIM AGAINST THE COMMUNITY DEFENDANTS AND THE CLAIM IS FACIALLY DEFECTIVE REGARDLESS

A. Appellants Have Waived Their Section 1914 Claim

Appellants' only remaining claim against the Community Defendants is Count I, the purported 25 U.S.C. § 1914 ICWA petition. The Community Defendants moved to dismiss that claim because the statute does not authorize persons to challenge tribal court proceedings. ECF No. 14 at 21. Appellants neither cited Section 1914 nor made any argument as to how they can bring a claim under the statute in any of their briefing in the District Court, even after the Magistrate Judge decided Section 1914 does not allow persons to challenge tribal court proceedings. *See* ECF Nos. 75, 105, 119. Their opening appeal brief omits any citation to the statute or argument in support of their claim. *See* Appellants' Brief ("Apps' Br.") at v.

In matters referred to a magistrate judge for a report and recommendation, litigants are required to present all of their "arguments to the magistrate judge, lest they be waived. When a magistrate judge is hearing a matter pursuant to his or her

limited authority to make a recommended disposition, a claimant must present all his claims squarely to the magistrate judge, that is, the first adversarial forum, to preserve them for review." *Ridenour v. Boehringer Ingelheim Pharm., Inc.*, 679 F.3d 1062, 1067 (8th Cir. 2012) (quotation omitted). Similarly, "parties cannot present arguments to the appellate court that they did not raise before the district court." *Id.* Finally, "[c]laims not raised in an opening brief are deemed waived." *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008).

At every stage, Appellants failed to offer any support for their Section 1914 claim in Count I. Therefore, Appellants have waived their ability to argue that 25 U.S.C. § 1914 applies to a tribal court proceeding. Because this waived claim was the sole remaining claim against the Community Defendants, the District Court's order of dismissal of the Community Defendants must be affirmed by this Court.

B. 25 U.S.C. § 1914 Does Not Apply To A Tribal Court Proceeding

Appellants petition under 25 U.S.C. § 1914 "to invalidate the SMSC tribal court proceeding and the Red Lake Nation tribal court proceeding because they violate the [ICWA] requirements that prior to tribal court jurisdiction there had to be a state court proceedings and parental consent." Compl. ¶ 149.[5] But 25 U.S.C. §

[5] Appellants also requested that the district court "enjoin Scott County to re-initiate its administrative proceedings regarding C.H. and C.P." Compl. ¶ 157. But 25 U.S.C. § 1914 does not provide for the creation, initiation, or re-initiation of state court proceedings. It only allows for the invalidation of such state proceedings.

1914, by its express terms, only applies to foster care placement "under State law." Section 1914 does not mention tribal law, nor a tribal court proceeding. "The language of [25 U.S.C. § 1914] could not be clearer: Congress is authorizing any court of competent jurisdiction to invalidate a state court judgment involving the Indian child." *Doe v. Mann*, 415 F.3d at 1047. Moreover, ICWA generally does not apply to tribal court proceedings, so there is no reason to think that Congress intended for this one section to create a cause of action against tribal courts. *See* 25 C.F.R. § 23.103(b)(1); *Liska v. Macarro*, 2010 WL 3718300, at *4-5 (S.D. Cal. Sept. 17, 2010) (ICWA does not provide enforcement against tribal defendants). Even if not waived, Appellants' attempt to use 25 U.S.C. § 1914 to challenge tribal court action in Count I fails to state a claim on which relief can be granted.

II. THE COMMUNITY DEFENDANTS ARE IMMUNE FROM SUIT

Were the Court to decide that Appellants have stated a claim under Section 1914 against the Community Defendants, those Defendants are immune from such a suit. To avoid tribal sovereign immunity, Appellants argue that their lawsuit only requests prospective, injunctive relief "over the tribal courts and their officials" and falls within the *Ex parte Young* doctrine. *Cf. Ex parte Young*, 209 U.S. 123 (1908); Apps' Br. at 53, 55. Appellants cannot sue the SMSC Tribal Court in a federal action to determine whether a tribal official, Judge Jacobson, is violating federal law that may be prospectively enjoined. Even Appellants' *Ex parte Young*

argument pertaining to Judge Jacobson fails because he is not violating federal law and thus remains immune from suit.

A. Sovereign Immunity Is A Jurisdictional Issue

"[T]ribal sovereign immunity is a threshold jurisdictional question." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011); *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 670 (8th Cir. 2015). "[I]f the Tribe possessed sovereign immunity, then the district court had no jurisdiction." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995). "[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007).

B. The SMSC Tribal Court Is Immune From Suit[6]

The SMSC Tribal Court shares the Community's sovereign immunity from suit. *Fort Yates*, 786 F.3d at 670-71. The Magistrate Judge found that the Appellants had waived any argument to the contrary. ECF No. 117 at 19; Apps'

[6] The Community was dismissed from the action voluntarily by the Appellants in a stipulated order that removed the Community from the case caption. ECF Nos. 71, 73; Joint App. at 661. Nonetheless, Appellants included the Community (and other voluntarily dismissed Defendants) in the caption of their brief. The Community Defendants trust that this was an oversight, but in any event, the Community, as a federally recognized Indian tribe, possesses sovereign immunity from Appellants' suit. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

Add. at 30. Here, Appellants concede that *Ex parte Young* does not apply to the Community or its agencies, Apps.' Br. at 54, but argue that "the tribal court and their officials" are subject to suit "under the *Ex [p]arte Young* doctrine," *Id.* at 55. In *Fort Yates*, this Court rejected the argument that tribal sovereign immunity "does not apply" when the only relief sought was "declaratory and injunctive relief." "The Supreme Court has made clear, however, that a tribe's sovereign immunity bars suits against the tribe for injunctive and declaratory relief." *Fort Yates*, 786 F.3d at 670, citing *Bay Mills*, 134 S. Ct. at 2035. *Fort Yates* squarely holds that the SMSC Tribal Court, as a branch of the tribal government, is immune from suit and must be dismissed.

C. The *Ex Parte Young* Doctrine Does Not Apply In This Case

Ex parte Young held that sovereign immunity "does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The *Ex parte Young* exception only applies to an official acting contrary to applicable federal law. *Cory v. White*, 457 U.S. 85, 91 (1982). *See N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1983) (applying doctrine to tribal officials). The exception does not apply to retrospective relief, *Green*, 474 U.S. at 68, and "does not permit judgments against [tribal] officers declaring that

they violated federal law in the past." *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

Every allegation in the Complaint pertains to conduct well within Judge Jacobson's official capacity and his authority. Because 25 U.S.C. § 1914 does not apply to tribal court proceedings, Judge Jacobson's conduct did not violate that statute. And, as described below, C.H. and C.P. were wards of the SMSC Tribal Court prior to the 72-hour hold of the Shakopee Police. Both children were residing on the Community's Reservation when the Tribal Court case commenced, and C.H. is a member of the Community, meaning Judge Jacobson exercised at least concurrent jurisdiction over the child custody proceedings in the SMSC Tribal Court. Judge Jacobson's exercise of jurisdiction is sanctioned by and in accordance with federal law. Judge Jacobson is therefore immune from suit.

D. Sovereign Immunity Has Not Been Waived

Because the *Ex parte Young* doctrine does not apply, Appellants "bear the burden of proving that either Congress or [the SMSC] has expressly and unequivocally waived tribal sovereign immunity." *Amerind*, 633 F.3d at 685-86 "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

Appellants allege no waiver. None of the federal laws cited in the Complaint waive tribal sovereign immunity. ICRA does not. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). 42 U.S.C. § 1983 does not. *Evans v. McKay*, 869 F.2d 1341, 1345-46 (9th Cir. 1989); *Hester v. Redwood County*, 885 F. Supp. 2d 934, 947-48 (D. Minn. 2012). ICWA does not. *Pitre v. Shenandoah*, 633 Fed. App'x 44, 45 (2nd Cir. 2016). Lack of waiver is fatal to Appellants' claim.

III. THE SMSC TRIBAL COURT PROPERLY EXERCISED JURISDICTION OVER THE CHILD CUSTODY PROCEEDING INVOLVING C.H. AND C.P.

While no remaining count in the Complaint contests the SMSC Tribal Court's jurisdiction directly, Appellants' Section 1983 claim against Commissioner Piper and Scott County carries an implication of improper tribal court action. Such an implication is misplaced, however, as the SMSC Tribal Court had jurisdiction over C.H. and, during the relevant time, C.P.[7]

A. The Community Has Jurisdiction Over Child Custody Proceedings Based On Its Inherent Sovereign Powers

The Community as an Indian tribe has inherent authority to protect its children, and other Indian children residing on its reservation. Congress has not restricted that inherent authority through the passage of PL 280 or ICWA as

[7] The Community Defendants separately brief C.P.'s situation, *infra* at Part IV, because of the mootness of Appellants' case as to him.

Appellants contend. To the contrary, with the passage of ICWA, Congress confirmed tribes' inherent jurisdiction over Indian children on a reservation.

1. Tribal Law Provides Jurisdiction Here

Although jurisdiction to interpret tribal laws "lies within 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), an overview of the Code is instructive as it is that law, adopted pursuant to the Community's inherent authority, that vests the SMSC Tribal Court with jurisdiction over child custody proceedings involving Indian children. 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.

ECF No. 16-1 at 74; Joint App. at 596. 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. at 72; Joint App. at 594.

The SMSC Tribal Court concluded that this language of the Code is clear and unambiguous in its reach. ECF No. 17 at 9; Joint App. at 611. The Code provided the SMSC Tribal Court with the responsibility and the authority to protect children in need of assistance who were domiciled on the Community's reservation if the children were eligible for Community membership (e.g., C.H.), or if they were members of another Indian tribe domiciled or residing on the Community's reservation (e.g., C.P.).

2. Federal Decisional Law Recognizes the Community's Inherent Jurisdiction Over Child Custody Proceedings

"Indian tribes consistently have been recognized as distinct, independent political communities qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." *Native Village*, 944 F.2d at 556 (quotations omitted). Tribal sovereignty extends to both tribal members and tribal territory. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

Tribal sovereign powers include jurisdiction over Indian child custody proceedings involving Indian children within their territory. *See*, *e.g.*, *Fisher v. District Court*, 424 U.S. 382, 389 (1989) (affirming tribal jurisdiction over adoption proceeding involving an Indian child who was a tribal member and

resided on Indian lands); *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (tribes as "separate people" possess "the power of regulating their internal and social relations" (quotation omitted)). The Supreme Court acknowledged this inherent power in *Holyfield* when it stated that tribal jurisdiction over Indian child custody proceedings "is not a novelty" of ICWA and that "ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts." *Holyfield*, 490 U.S. at 42.

C.H. is a member of the Community—that alone is dispositive proof that the Community has jurisdiction over the child custody proceedings involving C.H. Compl. ¶ 30; *Fisher*, 424 U.S. at 389. Further, C.H. (and C.P.) resided on the Community's reservation when the child custody proceedings began. ECF No. 17 at 5; Joint App. at 607. Watso told the SMSC Tribal Court this fact. Watso's Mot. to Dismiss, ECF No. 18 at 2; Joint App. at 620. Since the Community has inherent jurisdiction over both its members and its territory, especially as it pertains to domestic relations, the SMSC Tribal Court had jurisdiction over these Indian children.

The Supreme Court has stated that ICWA "confirmed" tribal court jurisdiction over child custody proceedings such as these. *Holyfield*, 490 U.S. at 41; *see also* 25 U.S.C. § 1911 (confirming tribal jurisdiction over child custody proceedings involving Indian children residing or domiciled within the tribe's

reservation and children declared wards of the tribal court notwithstanding the residence or domicile of the child); 25 U.S.C. § 1903(1)(i) (defining "child custody proceeding" as actions removing an Indian child from its parent such that the child will not be returned upon demand); 25 U.S.C. § 1903(4) (defining "Indian child"). The child custody case of C.H. and C.P. falls squarely within that jurisdiction. C.H. and C.P. were Indian children residing or domiciled on the reservation when the Tribal Court initiated its case as well as when it placed them outside the care of the parents such that they could not be returned upon demand. ECF No. 17 at 5; Joint App. at 607; ECF No. 18 at 2; Joint App. at 620. Both were wards of the Tribal Court when the Shakopee Police reported the potential abuse to the Department. ECF No. 17 at 5; Joint App. at 607.

B. The Community's Jurisdiction Over The Child Custody Case Here Has Not Been Abrogated Or Divested

Tribal "[s]overeign authority is presumed until Congress affirmatively acts to take such authority away." *Native Village*, 944 F.2d at 556. Appellants' claim is premised on a congressional abrogation theory, but the Community's inherent jurisdiction has not been abrogated by any of the laws Appellants' cite in their Complaint. Consequently, the Manual does not contradict or violate federal law.

1. PL 280 Does Not Abrogate the Community's Inherent Sovereign Jurisdiction Over Child Custody Proceedings

Appellants' claims related to the interplay between PL 280 and ICWA are illogical and antithetical to the plain language and purpose of the two statutes. Appellants argue that under Section 1911(a) (the provision of ICWA that grants tribes exclusive jurisdiction under certain circumstances), state courts have exclusive jurisdiction over children who are members of PL 280 tribes, unless the tribe successfully petitions for exclusive and referral jurisdiction under Section 1918(a). Apps' Br. at 44. Appellants rely, oddly, on the statutory language and precedent from the Ninth Circuit to support their arguments.

According to Appellants, ICWA's incorporation of PL 280 as an exception to exclusive tribal jurisdiction under Section 1911(a) means that "Minnesota state courts have exclusive jurisdiction in Minnesota over Indian child welfare proceedings on Public Law 280 reservations." Apps' Br. at 46. Appellants' theory assumes that PL 280 divested tribes of jurisdiction. But PL 280 "is not a divestiture statute." *Native Village,* 944 F.2d at 560 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987), and *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976)); *see also Cohen's Handbook of Federal Indian Law* § 6.04[3][c], at 555 (Neil Jessup Newton ed., 2012) ("The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, the legal scholars is that Public Law 280

left the inherent civil and criminal jurisdiction of Indian nations untouched."); *see also Walker v. Rushing*, 898 F.2d at 675 ("Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority.").

The Ninth Circuit, contrary to Appellants' contention, has squarely rejected Appellants' theory. In *Native Village*, Alaska made the same argument Appellants make: PL 280 "vested the enumerated states with exclusive, not merely concurrent, jurisdiction over civil and criminal matters involving Indians." *Native Village*, 944 F.2d at 559. After reviewing PL 280 and its legislative history, the Ninth Circuit explained that Congress passed PL 280 to supplement tribal institutions, not supplant them. *Id.* at 560. ICWA's incorporation of PL 280 thus does not divest tribes of their child custody jurisdiction; instead, tribes covered by PL 280 exercise concurrent jurisdiction with the state. *Id.* at 560, 62 ("[N]either [ICWA] nor Public Law 280 prevents [the native villages] from exercising concurrent jurisdiction.").[8]

[8] The *Native Village* court also persuasively rejected Appellants' argument that Section 1918(a) is nonsensical if states do not have exclusive jurisdiction, because otherwise there would be no jurisdiction for tribes to "reassume" when they petition the Secretary. According to the Ninth Circuit, "[Section 1918(a)] enable[d] the Secretary of the Interior to grant to a tribe, upon receipt of a proper petition, exclusive jurisdiction (over all or a portion of the appropriate 'Indian Country') or referral jurisdiction of child-custody proceedings." 944 F.2d at 561. "Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states." *Id.* "Thus, there is something for a tribe to 'reassume' under section 1918—namely, exclusive or referral jurisdiction—even if Public Law 280 is read as not divesting the tribes of concurrent jurisdiction." *Id.*

Appellants attempt unsuccessfully to advance their interpretation of ICWA and PL 280 with the Ninth Circuit's opinion in *Doe v. Mann*, a decision post-dating *Native Village* that recognized *Native Village* as good law, and involved a challenge to *state*, not tribal, jurisdiction. *Doe v. Mann*, 415 F.3d at 1039, 1063 n.32. The Ninth Circuit in *Doe* recognized the "practice of asserting concurrent jurisdiction under Public Law 280 over dependency proceedings involving Indian children." *Id.* at 1067-68. The court explained that the question "whether Public Law 280 states have exclusive or concurrent jurisdiction over child custody proceedings" was "resolved by . . . *Native Village of Venetie*, which held that Public Law 280 states have only concurrent jurisdiction with the tribes over child custody proceedings involving Indian children." *Id.* at 1063 n.32.

Finally, as the Magistrate Judge here recognized, adopting Appellants' interpretation "would stand the purpose of ICWA completely on its head." ECF No. 117 at 13; Apps' Add. at 24. Congress found "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 communities and families." 25 U.S.C. § 1901(5). So ICWA "established federal standards that govern state-court child custody proceedings involving Indian children," not tribal-court proceedings. *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2557 (2012); 25 CFR § 23.103(b)(1).

ICWA's "purpose was, in part, to make clear that in certain situations the state did *not* have jurisdiction over child custody proceedings." *Holyfield*, 490 U.S. at 45 (emphasis in original); *see also Doe v. Mann*, 415 F3d at 1047 ("The purpose of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage.") ICWA "expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction," not the other way around. *Native Village*, 944 F.2d at 555. "[ICWA] simply cannot be read to limit tribal jurisdiction over Indian children." ECF No. 117 at 14; Apps' Add. at 25.

2. ICWA Does Not Require A Preceding State Court Action Or Grant Watso A Right To Object To Tribal Court

Appellants argue that 25 U.S.C. § 1911(b) requires a preceding state court action that allows parents to object to tribal court jurisdiction. Therefore, the Community could not exercise jurisdiction over C.H. and C.P. and the Manual violates federal law because it allows for a transfer of cases involving Indian children to tribes without a preceding state court action. Apps' Br. at 32, 44, 45. As the Magistrate Judge and the District Court determined, Appellants are wrong.

Nothing in the language of Section 1911(b) requires the State to initiate a state court child custody proceeding before a tribal court can exercise jurisdiction. The statute becomes applicable only if a state court proceeding already exists, and it requires the transfer of the child custody proceeding from state court to tribal

court if the conditions of the statute are met. 25 U.S.C. § 1911(b) ("In any State court proceeding . . ."). Like the rest of ICWA, Section 1911(b) is a mechanism to control state court proceedings involving Indian children. Here, it is undisputed that no state court proceeding was initiated. Compl. ¶ 149.

Further, 25 U.S.C. § 1911(b) by its terms only applies when the Indian child is not residing or domiciled within his tribe's reservation. C.H. resided on the Community's reservation when the proceedings in the SMSC Tribal Court began, as did C.P., and C.H. resides there now. ECF No. 17 at 5; Joint App. at 607; ECF No. 18 at 2; Joint App. at 620. Section 1911(b) is therefore inapplicable.

Appellants' theory contradicts Congress's purpose in enacting ICWA: to expand tribal jurisdiction. *Native Village*, 944 F.2d at 555. Their interpretation of Section 1911(b)—a mechanism for transferring preexisting cases from state court to tribal court—would significantly shrink tribal jurisdiction by requiring a state court to initiate proceedings before a tribal court could exercise any jurisdiction. In a 2008 decision, the U.S. District Court for the District of Alaska interpreted *Native Village* and *Doe v. Mann* in the same manner as the District Court here did. In *Kaltag Tribal Council v. Jackson*, 2008 WL 9434481, *5 (D. Alaska, Feb. 22, 2008), *aff'd*, 344 Fed. App'x 324 (9th Cir. 2009), *cert. denied*, 562 U.S. 827 (2010), the court held that Section 1911(b) permitted a tribal court to initiate a child custody proceeding as to an Indian child not domiciled or residing on a

reservation, and that the tribal court had concurrent jurisdiction with the state court in that circumstance. The court rejected the argument that Appellants make here, "that any case involving a child domiciled outside of Indian country must originate in state court and be transferred to tribal court." *Id*. Nothing in ICWA or PL 280 compelled such a "strained" interpretation of Section 1911(b). *Id*., and *6.

Appellants theory for how the Manual contradicts federal law depends on this argument: "The Manual is preempted by ICWA and ICWA regulations which require non-Indian relatives receive notice and opportunity to object in state court proceedings prior to a county transferring an Indian child to a tribe."[9] Apps' Br. at 5; *see also id.* at 18-19, 25-27, 36. Because Section 1911(b) does not require the state to initiate a child custody proceeding that would allow a parent to object, under any circumstances, Appellants' argument fails.

Appellants theory for how the Shakopee Police's actions violated 25 C.F.R. § 23.106 also incorrectly assumes that their interpretation of Section 1911(b) is accurate. According to Appellants, 25 C.F.R. § 23.106(b) "reflects that where ICWA parental rights protections are exceeded either by state or federal law, the

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[9] Appellants' arguments in this case have changed brief to brief. They now focus on the Manual and try to shoehorn the rest of their arguments into the argument that the Manual violates federal law. However, if their theories about ICWA Sections 1911(a), (b), and Section 1918(a) are flawed, then their theory that the Manual is legally improper is also flawed.

federal court must apply the higher legal protection for parents." Apps' Br. at 33; Appellants argue that the higher standard is in Section 1911(b), which they say requires initiation of a state court proceeding and the ability for a parent to object to tribal jurisdiction. Apps' Br. at 34. Because they are wrong that the state court must initiate a proceeding, their argument based on 25 C.F.R. § 23.106 also fails.

Finally, Appellants focus much of their brief on an argument centered on *Troxel v. Granville*, 530 U.S. 57 (2000), and *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 117 (8th Cir. 1976). Their argument, as best the Community Defendants can tell, is that parents and family members have due process rights to notice and an opportunity to be heard in a state court proceeding before a child welfare proceeding involving an Indian child is transferred to tribal court. Apps' Br. at 13. And because the Manual does not allow for notice and opportunity to be heard under such circumstances, it violates Appellants' rights under the Fourteenth Amendment's Due Process Clause. *Id.* To the extent this argument is not based on Section 1911(b) (which is unclear to the Community Defendants), it is a new argument raised for the first time on appeal—the Appellants cited neither case to the District Court. *Ridenour*, 679 F.3d at 1067. Regardless, Appellants' argument is flawed because the cases are inapposite.

Appellants cite *Troxel* only for the proposition that the Due Process Clause protects the fundamental right of parents to make decisions concerning the care,

custody, and control of their children. Apps' Br. at 29. The scope or application of a parent's procedural due process rights was not at issue in *Troxel*. *Alsager* did involve the scope and application of a parent's procedural due process rights; however, in that case the parents argued that Iowa provided inadequate notice for a termination of parental rights hearing. *Alsager*, 406 F. Supp. at 24. The court held that termination of parental rights hearings require notice from the state to the parent that contains "both the alleged factual basis for the proposed termination and a statement of the legal standard authorizing termination." *Id.* at 25.

Appellants unsuccessfully attempt to equate the circumstances in this case to the termination of parental rights hearing in *Alsager*. *See* Apps' Br. at 38-39. Appellants argue that a "transfer" of child welfare proceedings involving C.H. and C.P. occurred after the 72-hour hold and "the record shows that a transfer to tribal court means that more-distant tribal relatives are preferred over non-Indian relatives in guardian appointments." *Id.* at 40. But the Shakopee Police did not transfer a child welfare proceeding to anyone—neither it nor any County agency ever started one—and it certainly did not attempt to terminate Watso's parental rights. All the police did was call the Department to report potential child abuse of one of the Community's members. *Alsager* does not support the proposition that the Shakopee Police should have left the Department in the dark about potential child abuse of Indian children until Appellants received notice and a hearing.

Further, as discussed next, tribal preferences would have applied regardless of which forum heard the child welfare proceeding. *See* 25 U.S.C. § 1915(a); Minn. Stat. § 260.771, subd. 7(a). If there was a "transfer" of a child welfare proceeding, it did not cause the application of preferences for placement of C.H. with an Indian. Appellants' generalization about a transfer to tribal court leading to placement with an Indian relative is refuted by the Red Lake Court's placement of C.P. with Appellant Dietrich.

C. Tribal Preferences Are Political, Not Racial, And Would Apply In Tribal Or State Court

Appellants make a flawed argument that the Manual and Scott County's actions are fundamentally unfair to Appellants because of the application of "racial preferences of the tribal codes" without parental consent. Apps' Br. at 47. The Complaint contains no statement of such a claim.

Regardless, it is well-settled that tribal preferences are political and not racial. *Morton v. Mancari*, 417 U.S. 535, 552-53 (1974) (holding that an Indian hiring preference did not constitute racial discrimination). Tribal preferences are "not directed towards a 'racial' group consisting of 'Indians'; instead, [they] appl[y] only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id*. at 553 n. 24; *see also United States v. Eagleboy*, 200 F.3d 1137, 1138-40 (8th Cir. 1999) (rejecting race-based

challenge to preferential treatment of tribal member and explaining how tribal preferences have "never been understood to be based on race").

Appellants' theory regarding tribal preferences suffers from another defect. They maintain that the "racial aspect of the tribal preferences are made acceptable by neither parent objecting in each case resulting in a state court transfer [to tribal court]." Apps' Br. at 47. But tribal preferences apply regardless of whether the Indian child custody proceeding is in state or tribal court—with or without parental consent. According to 25 U.S.C. § 1915(a), "In any adoptive placement of an Indian child under State law," preference must be given (in the absence of good cause to the contrary), "to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *See also* 25 U.S.C. § 1915(b) (requiring preferences be applied in temporary placements of Indian children in addition to the permanent placements contemplated by Section 1915(a)). If the tribe establishes a different order of preference, then the state court must follow that order of preference. *Id.* § 1915(c).

IV. CLAIMS AGAINST THE COMMUNITY DEFENDANTS RELATED TO C.P. ARE MOOT OR BARRED BY CLAIM PRECLUSION

A. Claims Related to C.P. Are Moot

On January 17, 2017, the SMSC Tribal Court closed its proceedings involving C.P. in deference to the Red Lake Court. Compl. ¶ 142. The parties to *Watso I* stipulated to dismissal of the suit on mootness grounds. *Id.* ¶ 146; Stip. for

Dismissal, ECF No. 49, *Watso I*, No. 16-983 (D. Minn. Feb. 9, 2017). Judge Schiltz entered an order dismissing the action with prejudice. ECF No. 51, *Watso I*, No. 16-983 (D. Minn. Feb. 10, 2017); Joint App. at 512. There is no allegation that the Community has been involved in C.P.'s child custody matter since that time.

In November 2017, Watso, Dietrich, and the Red Lake Family & Child Services stipulated to custody of C.P. being awarded to Dietrich. ECF No. 112 at 2; App. at 510. Based on that stipulation, the Red Lake Court found that awarding custody of C.P. to Dietrich was in his best interests, ordered that Dietrich be awarded custody, and closed its child custody proceeding. *Id.* Because the Appellants settled the Red Lake Court proceeding, there is no live controversy remaining with regard to C.P.

"When a case . . . no longer presents an actual, ongoing case or controversy, the case is moot and the federal court no longer has jurisdiction to hear it." *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994). The Court must dismiss claims that become moot at any time during litigation, including on appeal. *E.g., South Dakota v. Hazen*, 914 F.2d 147, 150 (8th Cir. 1990) ("It is of no consequence that the controversy was live at earlier stages in the case; it must be live when we decide the issues.").

B. Claims Related to C.P. Are Barred by Claim Preclusion

Watso previously filed a petition for habeas corpus over the child custody proceeding of C.P., naming three SMSC Tribal Court judges as respondents. That action was dismissed with prejudice, which precludes relitigation of those claims or claims that could have been raised there. *Lundquist v. Rice Mem'l Hosp.*, 238 F.3d 975, 977 (8th Cir. 2001); *see* Compl. ¶141. To determine if claim preclusion bars a claim, this Court considers whether "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter." *Minch Family LLLP v. Buffalo-Red River Watershed Dist.*, 628 F.3d 960, 966 (8th Cir. 2010).

Any claims Appellants did or could assert against the Community Defendants related to C.P. are precluded. First, such claims would involve the same set of factual circumstances as those in the original petition since the Community Defendants have not exercised jurisdiction over C.P. since *Watso I* was dismissed. Second, such claims would involve the same parties as *Watso I*, or persons and entities with interests that are directly aligned with, and "fully represented" by, the parties in *Watso I*. *See Cnty. of Boyd v. U.S. Ecology, Inc.*, 48 F.3d 359, 361-62 (8th Cir. 1995). Third, Judge Schlitz "dismissed [*Watso I*] with prejudice and on the merits." Order of Dismissal, ECF No. 51, *Watso*, No. 16-cv-

00983 (D. Minn. Feb. 10, 2017); Joint App. at 512; *Hintz v. JPMorgan Chase Bank, N.A.*, 686 F.3d 505, 510 (8th Cir. 2012) (holding that a dismissal with prejudice is a final judgment on the merits). Finally, the claims in *Watso I* were jurisdictional and constitutional in nature, and Appellants could have brought the challenges they now make to the SMSC Tribal Court's exercise of jurisdiction over C.P. there.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of the claims of Appellants Watso and Dietrich against the Community Defendants.

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CERTIFICATE OF COMPLIANCE

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Dated: June 29, 2018

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