UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kimberly Watso, individually and on behalf of C.P., minor child, Petitioner, v. John E. Jacobson, et al. Respondents.	Case No. 16-CV-00983 **PETITIONER KIMBERLY WATSO'S MEMORANDUM ON COURT'S AUTHORITY TO HOLD AN EVIDENTIARY HEARING ON FACTS OUTSIDE THE RECORD REGARDING JURISDICTION**

This Court presented the following question:

> Whether, in making a determination on the issues of fact raised by Kimberly Watso's Petition, the Court may consider testimony or documents beyond the record that was available to the Tribal Court.[1]

The answer is yes.

The underlying issue is about the Tribal Court's jurisdiction:

> This is no "normal" jurisdictional issue. The relationship and bond between a mother and child are at stake as are parental rights and rights retained by the child. The jockeying for position over jurisdiction cannot dehumanize the effect on two people — a mother and child — when an otherwise "simple" fact cannot be agreed upon by the parties. This Court must be satisfied that the cornerstone of any decision in this jurisdictional debate is properly determined starting with one basic fact — the residency and domicile of the mother and her child. An evidentiary hearing would resolve that issue.[2]

The underlying facts are further exasperated with the Tribal Court detaining the minor child and with the Shakopee Mdewakanton Sioux Community Council imposing an unjustified no trespass order on Watso so she can not visit its reservation. These facts, and

[1] Or. (July 28, 2016) Dckt. No. 20. The order requested the parties to submit a three-page memorandum on the issue.
[2] Pet. Watso Resp. at 9 (Sealed) (June 30, 2016); Dckt. No. 18.

others, are relevant so that the Court has a complete understanding of the overreaching of SMSC and its Tribal Court regarding Watso's parenting and parental rights as a non-SMSC resident and over her non-resident, non-SMSC minor child.

Although the Petition challenges Tribal Court jurisdiction, SMSC's response to Watso's Petition is essentially an effort to divest this Court of its jurisdiction. While Watso requested an evidentiary hearing on jurisdiction, SMSC did not.[3] But the merits of the Petition cannot be reached without this Court acknowledging that the Tribal Court does not have jurisdiction over non-resident adult and minors. Hence, this Court can make that determination in accordance with Federal Rules of Civil Procedure Rule 43. Cases that involve jurisdictional challenges under Rule 12(b)(1) and Rule 43 are instructive here.

District courts are given "considerable discretion" in deciding whether to hold an evidentiary hearing.[4] "When a motion is based on facts not appearing of record, Fed.R.Civ.P. 43 [ ] provides that a district court 'may hear the matter on affidavits presented by the respective parties,' or 'may direct that the matter be heard wholly or partly on oral testimony or deposition.'"[5] Rule 43, entitled "Taking Testimony," provides the procedure for taking testimony in federal courts. Specifically, Rule 43(c), provides that, "[w]hen a motion relies on facts outside the record, the court may hear the matters on affidavits or it

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[3] "If the defendant thinks the court lacks jurisdiction, his proper course is to request an evidentiary hearing on the issue." *Crawford v. United States,* 796 F.2d 924, 928 (7th Cir. 1986).
[4] *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.,* 528 F.3d 556, 560 (8th Cir. 2008) *citing Stewart v. M.D.F., Inc.* 83 F.3d 247, 251; *see Chaganti & Assocs., P.C., v. Nowotny,* 470 F.3d 1215, 1223 (8th Cir.2006) ("When deciding whether to hold a hearing, a court may also consider the need to conserve judicial resources and the unseemliness of holding, in effect, a mini-trial ....") (internal quotation omitted).
[5] *Stewart,* 83 F.3d at 251. "But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion … the court may inquire by affidavits or otherwise, into the facts as they exist." *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947).

may hear it wholly or partly on oral testimony or depositions." "The rule is most commonly used to resolve preliminary issues in connection with jurisdiction or related types of motions."[6]

Likewise, if an evidentiary hearing is not held to take the testimony of witnesses, the Court can nevertheless rely on affidavits that provided facts outside the record:

> Thus, a party may submit affidavits and documentary evidence in support of or in opposition to a motion to demonstrate facts not found in the record without a need for an evidentiary hearing. *See Sunseri v. Macro Cellular Partners,* 412 F.3d 1247 (11th Cir.2005).[7]

Here, Watso's Tribal Court jurisdictional challenge requires the Court to make a factual determination. Thus, this Court may consider matters outside the pleadings, including affidavits, or other documents, and may hold an evidentiary hearing at which witnesses may testify. The court then decides the factual dispute relevant to the threshold question of jurisdiction.[8]

Dated: August 15, 2016.

MOHRMAN, KAARDAL & ERICKSON, P.A.

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[6] 8 *Moore's Federal Practice,* § 43.05[1] (Matthew Bender 3d ed.); Wright & Miller, 9A *Federal Practice and Procedure: Civil* § 2416 (3d ed. 2013); *Land v. Dollar,* 330 U.S. 731, 735 n. 4 (1947).
[7] *In re Koper*, No. 8-13-74213-LAS, 2016 WL 3078957, at *9 (Bankr. E.D.N.Y. May 23, 2016).
[8] *See Diabate v. Delta Airline,* No. 13-CV-0918 PJS/JJK, 2014 WL 48001, at *5 (D. Minn. Jan. 7, 2014), *aff'd* (July 22, 2014).