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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NIKKI LYNN RICHMAN, on her own behalf and ex. rel C.R. a Minor Child,

Petitioners,

vs.

NATIVE VILLAGE OF SELAWIK, RALPH STOCKER, and ARLENE BALLOT,

Respondents.

Case No.: 3:22-cv-00280-JMK

NATIVE VILLAGE OF SELAWIK'S MOTION TO DISMISS

I. PRELIMINARY STATEMENT

Petitioner and her counsel are attempting to involve this Court in a case that has *already* been decided in Alaska Superior Court. And they are now making arguments to this Court that have already been *explicitly* considered and rejected by the Alaska Superior Court. Indeed, the Alaska Superior Court found Petitioner's arguments to be so legally baseless, that it imposed enhanced attorney's fees on Petitioner and her counsel.

There is no federal jurisdiction here and this case should now be dismissed.

II. RELEVANT BACKGROUND

This case involves a young Alaska Native child, C.R., born in April 2019. (Doc. 1 at ¶ 7). Months later, C.R.'s father murdered C.R.'s mother. (*Id.* at ¶ 15) After murdering C.R.'s mother, the father took C.R. to a friend's house, i.e., Petitioner Nikki Richman.

Petitioner thereupon filed an action in the Venetie Tribal Court seeking a guardianship over C.R. (*Id.* at ¶ 25) The Venetie Tribal Court deemed C.R. as a child in need of aid, and issued an emergency order naming Petitioner as C.R.'s foster parent. (*Id.* at ¶¶ 28-30) Later, it transferred the case to the Selawik Tribal Court. (*Id.* at ¶¶ 32-37)

Petitioner did not want to be in the Selawik Tribal Court. She therefore filed a new action in Alaska Superior Court. (*Id.* at ¶ 34). She then told the Superior Court that "tribal courts do not have jurisdiction."[1] The Superior Court later summed up this history concisely:

> A case first originated in Venetie Tribal Court, when Petitioner filed a Petition for Appointment of Guardian in early 2020. In May of 2021, the Native Village of Selawik passed a resolution seeking transfer of the case to Selawik Tribal Court; and by July 16, 2021, jurisdiction was officially transferred and accepted from Venetie to Selawik. During the pendency of the transfer, Petitioner filed a Petition for Adoption in this court – thus creating the issue of two pending cases in two different jurisdictions.[2]

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[1] Order Granting Motion for Attorney's Fees (November 9, 2022) at 4, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit A.

[2] Order Recognizing Tribal Jurisdiction and Closing Case (May 25, 2022) at 1, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit B.

Extensive litigation thereupon ensued in Superior Court on the issue of whether the Selawik Tribal Court had jurisdiction over this dispute. After hundreds of pages of briefing, the Superior Court rejected all of the arguments being made by Petitioner and her counsel and found those arguments to lack "a good faith basis,"[3] and to be "disingenuous."[4] The Superior Court ordered the case transferred to the Selawik Tribal Court and closed the state court case.[5] The order later reiterated that: "The court hereby recognizes tribal jurisdiction, directs the parties to handle this matter in the court whose jurisdiction has primacy, and closes this case."[6]

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[3] Order Granting Motion for Attorney's Fees (November 9, 2022) at 4-5, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit A.

[4] *Id.* at 5 ("Petitioner, for whatever reason, did not prefer the Selawik Court and argued an empty allegation of due process violation in an attempt to overcome tribal jurisdiction. Petitioner lacked good faith by making a due process argument for which she had no justification. The issue was fully resolved upon notification from Selawik that it intended to exercise jurisdiction over this case. Petitioner, instead of remaining in the tribal courts asked this Court to reinterpret tribal laws and overrule the tribal court's finding that the child qualifies as a tribal member. As previously stated in both of the Court's previous orders, the Village of Selawik is a sovereign nation, entitled to both its own laws and the right to interpret its own laws. Petitioner's argument, like her due process allegation, was not premised on any law or fact within this Court's authority. Petitioner lacked a good-faith basis in raising it. Petitioner's timing, in filing this action here after litigating in the Venetie Court for years, is suspect. Petitioner's hotly contesting the Court's dismissal, based on two disingenuous claims, furthers that suspicion. Had Petitioner simply remained under the tribal jurisdiction, where she originally chose to file this issue, none of the hours of labor and umpteen filings would have been wasted here.")

[5] Order Recognizing Tribal Jurisdiction and Closing Case (May 25, 2022) at 1, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit B, ("The court hereby recognizes tribal jurisdiction, directs the parties to handle this matter in the court whose jurisdiction has primacy, and closes this case.").

[6] *Id.* ("The Native Village of Selawik is a sovereign nation and they had the case first, derived from Venetie Tribal Court. There is nothing in the facts of this case that indicates a deprivation of due process if this case were allowed to proceed in the Selawik Tribal Court.

The Superior Court also imposed enhanced attorney's fees on Petitioner and her counsel for making these frivolous arguments.[7]

The Selawik Tribal Court held a trial in the matter on December 16, 2022. Petitioner and her counsel appeared and proffered argument and evidence to the Selawik Tribal Court.[8] The Selawik Tribal Court rendered its decision in an oral ruling on December 16, 2022 and followed up with its written decision on the same date.[9]

Petitioner and her counsel did not appeal this order, despite being told that they could.[10]

Instead, Petitioner and her counsel did two things. First, they told the Superior Court that the Selawik Tribal Court had conducted the trial without giving them notice or

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Additionally, this court cannot exercise jurisdiction in any proceeding for custody or visitation during the pendency of a proceeding in a court of another jurisdiction. The court hereby recognizes tribal jurisdiction, directs the parties to handle this matter in the court whose jurisdiction has primacy, and closes this case.")

[7] Order Granting Motion for Attorney's Fees (November 9, 2022) at 7, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit A, ("Because Petitioner's good faith in filing this action as questionable, the Court increases the percentage award of attorney's fees.")

[8] Before the hearing, Petitioner's counsel was given notice of the hearing. (Doc. 1 at ¶ 53) At the hearing, the tribal court heard testimony from Petitioner, C.R.'s incarcerated father, C.R.'s paternal grandfather, and C.R.'s maternal grandmother Arlene Ballot. (*Id.* at ¶¶ 54-56)

[9] Order Concerning Child Custody (December 16, 2022), *In the Matter of C.R.*, Tribal Court Case No. NVS-J-21-001, attached hereto as Exhibit C. The written decision was distributed to Petitioner's counsel via email on December 18, 2022. *See* Declaration of James J. Davis, Jr. in Support of Native Village of Selawik's Motion to Dismiss at January 23, 2023) at ¶2.

[10] Declaration of James J. Davis, Jr. in Support of Native Village of Selawik's Motion to Dismiss at January 23, 2023) at ¶3; *see also* Exhibit E.

an opportunity to be heard.[11] They made this argument despite the uncontradicted evidence showing these claims to be demonstrably false.[12] Second, they filed this action requesting a writ of habeas corpus to invalidate the Selawik Tribal Court order. (Doc. 1)

Petitioner's use of 25 U.S.C. § 1303 is improper and this Court has no jurisdiction over this matter. First, the United States Supreme Court has held that federal habeas corpus jurisdiction cannot be used to collaterally attack child custody determinations.[13] Second, 25 U.S.C. § 1303 is a particularly improper statute for seeking such relief, as shown by its plain text,[14] and as held by many federal courts.[15]

Putting these dispositive issues aside, this action is improper for another reason: Petitioner's case is an attack on tribal court jurisdiction, but she voluntarily submitted to

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[11] For an example of Petitioner's arguments in state court about alleged issues in tribal court, *see* Opposition to Registration of Tribal Court Order and Request for Evidentiary Hearing & Motion to Dismiss (December 29, 2022), *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit F.

[12] For an example of the Native Village of Selawik rebutting Petitioner's arguments in state court about alleged issues in tribal court, *see* Reply Memorandum in Support of Motion for Expedited Consideration and Enforcement of Tribal Court Order (January 3, 2023), *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit G.

[13] *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 508 (1982).

[14] *Tavares v. Whitehouse,* 851 F.3d 863, 871-77 (9th Cir. 2017) (holding that the use of the word "detention" in 25 U.S.C. § 1303, as opposed to the word "custody" in other federal habeas corpus statutes, even further limits the reach of 25 U.S.C. § 1303).

[15] *See, e.g., Van Nguyen v. Foley*, 2021 U.S. Dist. LEXIS 207283, *21-22 (D. Minn. Oct. 27, 2021); *Azure-Lone Fight v. Cain*, 317 F. Supp. 2d 1148, 1151 (D. N.D. 2004); *LaBeau v. Dakota,* 815 F. Supp. 1074, 1076 (W.D. Mich. 1993); *Sandman v. Dakota*, 816 F. Supp. 448, 451 (W.D. Mich. 1992); *Weatherwax on Behalf of Carlson v. Fairbanks*, 619 F. Supp. 294, 295-96 (D. Mont. 1985).

that jurisdiction. (Doc. 1 at ¶ 25) In turn, she waived any objection to jurisdiction.[16]

Penultimately, this Court must dismiss this case for a fourth reason: issue preclusion. As noted above, the Superior Court has already and repeatedly recognized tribal court jurisdiction.[17]

Finally, beyond all of the above, this case must be dismissed because Petitioner failed to appeal her case in tribal court despite being told that she could.[18] This is a classic failure to exhaust tribal court remedies, which also necessitates a dismissal.[19]

III. STANDARD OF REVIEW

The Native Village of Selawik first seeks dismissal of this case under Federal Rule of Civil Procedure 12(b)(1), on the basis that this Court lacks the subject matter jurisdiction to consider Petitioner's claim under 25 U.S.C. § 1303. Alternatively, the Native Village of Selawik seeks dismissal of this case under Federal Rule of Civil Procedure 12(b)(6), on the basis that Petitioner has failed to state a claim upon which

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[16] *See, e.g., LaBeau v. Dakota,* 815 F. Supp. 1074, 1076 (W.D. Mich. 1993) ("Plaintiff voluntarily submitted to the jurisdiction of the Tribal Court until it took an action of which she disapproved. In submitting to the court's jurisdiction on the issue of custody in the past, she has waived any objection she may now have to the jurisdiction of the Tribal Court. Thus, plaintiff can prove no set of facts in support of her claim that would entitle her to relief.")

[17] Order Recognizing Tribal Jurisdiction and Closing Case (May 25, 2022) at 1, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit A; Omnibus Order Denying Case Motions 5, 6, 9, and 10, (September 16, 2022) at 2-3, 8, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit D.

[18] Declaration of James J. Davis, Jr. in Support of Native Village of Selawik's Motion to Dismiss at January 23, 2023) at ¶3; *see also* Exhibit E.

[19] *See, e.g., Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987).

relief can be granted. When a case has this posture, where a court is considering a motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6), a court must first resolve the jurisdictional issues under Rule 12(b)(1).[20]

As for Rule 12(b)(1), a federal court is presumed to lack jurisdiction,[21] and the party asserting subject matter jurisdiction has the burden of proving its existence.[22] A challenge under Rule 12(b)(1) can be facial, where a plaintiff's allegations are taken as true but are contested as legally insufficient to establish jurisdiction.[23] Or, the challenge can be factual, where a plaintiff's allegations are not presumed as true, and where the plaintiff must support their jurisdictional allegations with competent proof.[24]

As for Rule 12(b)(6), a complaint must contain enough facts that, if taken as true, would state a legal claim to relief that is plausible on its face.[25] Facts alleged in a complaint are to be taken as true and construed in the light most favorable to the

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[20] *Laborers' Int'l Union of N. Am., Loc. 341 v. Main Building Maint., Inc.,* 435 F. Supp. 3d 955, 999 (D. Alaska 2020) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

[21] *A–Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citing *Stevedoring Servs. of Am., Inc. v. Eggert*, 953 F.2d 552, 554 (9th Cir. 1992)).

[22] *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 773 (9th Cir. 2017) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994)).

[23] *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) and *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)).

[24] *Id.*

[25] *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)).

plaintiff.[26] However, conclusory statements or unwanted inferences or naked assertions of law will not preclude a dismissal, as a claim must be supported by factual allegations.[27]

IV. ARGUMENT AND AUTHORITIES

In its latest effort to undermine the Superior Court's and the Selawik Tribal Court's rulings, Petitioner and her counsel have turned to this Court. They seek habeas corpus relief via 25 U.S.C. § 1303, 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." This argument fails for the following reasons.

A. The United States Supreme Court Has Held That Federal Habeas Corpus Jurisdiction Cannot Be Used To Collaterally Attack Child Custody Determinations.

In *Lehman v. Lycoming County Children's Services Agency,* the United States Supreme Court considered whether a petitioner could invoke federal habeas corpus jurisdiction to collaterally attack a state court decree on parental rights or child custody.[28] The specific habeas corpus statute at issue in *Lehman* was 28 U.S.C. § 2254(a), which provides that:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

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[26] *Id.*

[27] *Ashcroft,* 556 U.S. at 679.

[28] 458 U.S. 502, 508 (1982).

Among other things, *Lehman* noted that "federal habeas has never been available to challenge parental rights or child custody."[29]It also noted that child custody is not the same "custody" that is referred to "in determining the availability of the writ of habeas corpus," and that Petitioner was trying to use habeas to improperly relitigate orders on parental rights.[30] *Lehman* then firmly rejected that federal habeas corpus jurisdiction could be used to collaterally attack decrees on parental rights or child custody.[31]

Lehman thus prohibits Petitioner's use of federal habeas corpus jurisdiction in this case. While *Lehman* rejected a pursuit of habeas corpus relief under a different statute and as to a state court child custody order, nothing about the Supreme Court's holding relied on the specific statute or involvement of a state court. Instead, the holding was

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[29] *Id.* at 511-12.

[30] *Id.* at 510-11 ("Ms. Lehman argues that her sons are involuntarily in the custody of the State for purposes of § 2254 because they are in foster homes pursuant to an order issued by a state court. Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a state criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to state-court judgments. Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the "custody" of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus. They are 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. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley* and *Jones*, and they suffer no "collateral consequences" -- like those in *Carafas* -- sufficient to outweigh the need for finality. The "custody" of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas. Ms. Lehman simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights.")

[31] *Id.* at 510-12.

rooted in how federal habeas corpus relief, in general, does not extend to child custody challenges.[32] And so *Lehman* alone demands dismissal of this case, as it prohibits the only cause of action raised by Petitioner.

B. 25 U.S.C. § 1303 Is A Particularly Improper Statute For Trying To Use Federal Habeas Corpus Jurisdiction To Attack Tribal Court Child Custody Determinations.

Beyond the general bar in *Lehman* against using federal habeas corpus jurisdiction to attack child custody determinations, 25 U.S.C. § 1303 is a particularly improper statute for seeking such relief. This follows first from the plain text of 25 U.S.C. § 1303, and second from the many court decisions that reject Petitioner's use of that statute. And none of Petitioner's inapposite case cites affect this conclusion.

i. The plain text of 25 U.S.C. § 1303 is even more restrictive of federal habeas corpus jurisdiction than other statutes.

25 U.S.C. § 1303 only applies to using federal habeas corpus jurisdiction to test a "detention" by order of an Indian tribe. Meanwhile, other federal habeas corpus statutes, like 28 U.S.C. §§ 2241 or 2255, use the word "custody," as opposed to "detention."

On this note, the Ninth Circuit has previously held that the word "detention" in 25 U.S.C. § 1303 must at least be interpreted similarly to the "custody" language that is used

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[32] *Id.* at 511-12 ("Although a federal habeas corpus statute has existed ever since 1867, federal habeas has never been available to challenge parental rights or child custody.") The Ninth Circuit has also recently cited *Lehman* in orders that reaffirm its holding. *See Hiett v. Merced County Human Servs. Agency,* 2022 U.S. App. LEXIS 2202, *1 (federal habeas is unavailable to challenge the termination of parental rights or the custody of a grandchild); *Henderson v. Becerra,* 2021 U.S. App. LEXIS 25085, *1 (federal habeas is unavailable to challenge a county court's termination of parental rights).

in other habeas statutes.[33] Yet more recently, the Ninth Circuit has held that the use of the word "detention" in 25 U.S.C. § 1303, as opposed to "custody," further limits the reach of the statute in comparison to other habeas statutes, such that the word "detention" is narrower and even more restrictive than the word "custody."[34]

Thus, here, even ignoring how it is already impossible for Petitioner to establish a proper challenge to "custody" under normal federal habeas corpus principles, it is all the more improper for her to challenge a parental rights determination as a "detention." After all, given that "detention" is narrower than "custody," and given that Petitioner's allegations do not speak to the sort of physical confinement that would be needed to satisfy that narrower standard, her requested relief would be especially improper.

ii. Many courts have held that 25 U.S.C. § 1303 cannot be used to challenge tribal court child custody determinations.

Federal courts have repeatedly and explicitly rejected attempts to use 25 U.S.C. § 1303 to challenge tribal court child custody findings.[35] The same should follow here.

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[33] *Jeffredo v. Macarro,* 599 F.3d 913, 918 (9th Cir. 2010); *Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001).

[34] *Tavares v. Whitehouse,* 851 F.3d 863, 871-77 (9th Cir. 2017) ("At the time Congress enacted the ICRA, "detention" was generally understood to have a meaning distinct from and, indeed, narrower than "custody." Specifically, "detention" was commonly defined to require physical confinement. [. . .] We view Congress's choice of "detention" rather than "custody" in § 1303 as a meaningful restriction on the scope of habeas jurisdiction under the ICRA. But to the extent that the statute is ambiguous, we construe it in favor of tribal sovereignty.").

[35] *See, e.g., Van Nguyen v. Foley*, 2021 U.S. Dist. LEXIS 207283, *21-22 (D. Minn. Oct. 27, 2021) ("Courts have found *Lehman* instructive in ICRA cases, however, and have generally rejected attempts by parents to challenge the propriety of a tribal court's custody determination under § 1303. [. . .] Nguyen's case is no different. He has not plausibly alleged that A.J.N. is

iii. Petitioner cannot salvage her 25 U.S.C. § 1303 claim by citing the inapposite cases of *Cobell* and *DeMent*.

In an effort to skirt *Lehman* and seek relief under 25 U.S.C. § 1303, Petitioner cites two cases – *Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974) and *DeMent v Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989) – to argue that the statute can be used "to challenge a tribal court's custody award which exceeded the tribal court's authority under tribal law." (Doc. 6 at 4). Petitioner misreads these cases to argue that, merely by challenging tribal court jurisdiction or due process, she can make a proper claim under 25 U.S.C. § 1303. (*Id.* at 4-5).

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being detained by the Community. In fact, A.J.N. is in the legal and physical custody of Gustafson. [. . .] Instead, Nguyen seeks to challenge the validity of the Tribal Court's custody determination. Nguyen's allegations plainly show that he seeks to relitigate his own parental rights rather than any liberty interest of A.J.N. Habeas relief under § 1303 is not available under these circumstances."); *Azure-Lone Fight v. Cain*, 317 F. Supp. 2d 1148, 1151 (D. N.D. 2004) (internal citations and quotation marks omitted) ("The Indian Civil Rights Act authorizes habeas corpus actions by any person detained to test the legality of his detention by order of an Indian tribe. However, habeas corpus relief under 25 U.S.C. § 1303 is generally not available to challenge the propriety or wisdom of a tribal court's decision in a child custody dispute. Likewise, federal habeas corpus review is generally not available to challenge parental rights or child custody."); *LaBeau v. Dakota,* 815 F. Supp. 1074, 1076 (W.D. Mich. 1993) ("Federal district courts do not have jurisdiction to review the judicial actions of tribal courts, including child custody decisions, under any statute, including the Indian Civil Rights Act."); *Sandman v. Dakota*, 816 F. Supp. 448, 451 (W.D. Mich. 1992) ("Plaintiffs have not brought this action as a habeas corpus action. Even if they had, however, the action would be dismissed because a writ of habeas corpus is not available to test the validity of the child custody decree issued by the tribal court."); *Weatherwax on Behalf of Carlson v. Fairbanks*, 619 F. Supp. 294, 295-96 (D. Mont. 1985) (internal citations omitted) ("The plaintiffs are simply challenging the propriety and wisdom of an Indian tribal court decision in a child custody action. This court concludes, however, that federal habeas corpus relief under 25 U.S.C. § 1303 is not available to test the validity of a child custody decree of an Indian tribal court. 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. Consequently, the court finds it appropriate to dismiss the plaintiffs' petition for habeas corpus relief, since it plainly appears from the face of the petition that they are not entitled to the relief requested.").

Yet Petitioner ignores a key distinction that separates *Cobell* and *DeMent* from this case. *Cobell* and *DeMent* only justified federal jurisdiction when tribal and state courts issued *conflicting* orders, which is the opposite of this case.

Indeed, *Cobell* was a "unique child custody struggle with conflicting jurisdictional claims of the Montana state courts and the Blackfeet Tribal Court," where a tribal court and mother violated a valid order from a state court where both parents had previously and voluntarily litigated.[36] Flouting the state court order, the tribal court even forbade the physical removal of children from a reservation.[37] Meanwhile, the tribal code at issue explicitly disclaimed any tribal court jurisdiction over such matters.[38]

Similarly, *DeMent* also prominently featured unique and inapposite circumstances about tribal and state courts issuing conflicting orders. *DeMent* was upfront about this:

> First, in *Lehman*, the parent seeking federal habeas relief merely sought to collaterally attack the state court's custody decision. In the present case, DeMent does not directly attack the tribal court's decision to award Redner custody. Rather, he alleges that the tribal court illegally took "custody" of the children on the reservation by making them wards of the tribal court and by refusing to enforce the California custody decree. This case no longer represents a child custody battle; it has become a dispute over whether a tribal court violates a non-Indian's due process rights by refusing to give

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[36] *Cobell*, 503 F.2d at 791.

[37] *Id.; see also Wells v. Philbrick,* 486 F. Supp. 807, 809 n.2 (D.S.D. 1980) ("This case is distinguishable from *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974), cert. den. 421 U.S. 999 (1975). In *Cobell*, the mother and grandmother of the children who had actual custody over them were named as respondents. Also, in that case, the Tribal Judge had made an order expressly limiting the children to the confines of the reservation, a circumstance not apparently present here. In any event, the Court has its doubts as to whether habeas corpus is properly available in federal court as a remedy in child custody disputes.")

[38] *Cobell*, 503 F.2d at 795.

> full faith and credit to a state custody decree. Thus, the legal issue involved in this case is distinguishable from that sought to be resolved in the *Lehman* case.
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> Second, we believe that DeMent's children are being detained by the tribe by an order of the tribal court. The tribal court made the girls wards of the court on November 23, 1984 and has refused to enforce the California custody decree. Furthermore, on June 17, 1985, the Oglala Sioux Tribal Council passed Resolution 85-109 declaring that the Tribe has sole jurisdiction over the DeMent children. If DeMent is correct and the California decree is valid, a federal court order may be the only way to compel the tribe to return the children to their father.[39]

Here, no tribal court is refusing to enforce a state custody decree, as no such decree exists. And here, there is no dispute about a tribal court refusing to give full faith and credit to a state custody decree, as no such decree exists. And here, there is no need for a federal court order to enforce a state custody decree, as, again, no such decree exists. Federal district courts have had no problem distinguishing *DeMent* on such a basis.[40]

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[39] *DeMent*, 874 F.2d at 515.

[40] *See, e.g., Van Nguyen v. Foley*, 2021 U.S. Dist. LEXIS 207283, *22-23 (D. Minn. Oct. 27, 2021) ("Nguyen's claim does not fall within the narrow category of claims identified in *DeMent.* Nguyen alleges that, when the tribal court ruled on custody in the dissolution proceeding before it in 2019, his divorce case in California had already been dismissed in favor of tribal jurisdiction and his dissolution petition in Hennepin County had been stayed. He does not allege the existence of any state court custody decree to which the tribal court failed to give credit."); *Nygaard v. Taylor*, 563 F. Supp. 3d 992, 1013 (D.S.D. Sept. 24, 2021) ("the Eighth Circuit has held that a § 1303 habeas corpus action can challenge a tribal custody order in limited circumstances, particularly if the tribal court acts outside of its jurisdiction and refuses to give full faith and credit to the determination of another court.");*Johnson v. Jones*, 2005 U.S. Dist. LEXIS 60249, *8 (M.D. Fla. Nov. 3, 2005 ("It is thus clear that the full faith and credit issue was central to the Eighth Circuit's decision to allow the father to pursue habeas relief. The present case, in contrast, does not involve competing custody decrees. Accordingly, there is no reason to except this case from the general prohibition against exercising habeas jurisdiction in child custody disputes."); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 892 (2d Cir. 1996) (noting that *DeMent,* in involving competing jurisdiction of a state court, was distinct from

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Regardless, *DeMent* and *Cobell* do not control. *DeMent* is not binding precedent. Further, the Ninth Circuit decided *Cobell* in 1974, *before* the Supreme Court decided *Lehman* in 1982. Since then, the Ninth Circuit has not considered if federal courts can entertain a 25 U.S.C. § 1303 claim in a child custody dispute, but it has noted that *Lehman* now controls the analysis.[41] There is certainly no indication that the Ninth Circuit would, or that this Court should, use *Cobell* to stretch 25 U.S.C. § 1303 beyond its text, or beyond common-sense interpretations of that text by other federal courts in the wake of *Lehman*. This is especially so with Petitioner's attempt to create federal jurisdiction in spite of a tribal court and state court *agreeing* about the primacy of the tribal court.

Lehman); *LaBeau v. Dakota,* 815 F. Supp. 1074, 1076 (W.D. Mich. 1993) ("the case concerned the duty of a tribal court to give full faith and credit to a state court custody decree the father had obtained."); *Sandman v. Dakota*, 816 F. Supp. 448, 451 (W.D. Mich. 1992) ("*DeMent* concerned the duty of a tribal court to give full faith and credit to the state court custody decree the father had obtained."); *cf. United Keetoowah Band of Cherokee Indians in Okla. v. Barteaux,* No. 20-CV-8-GKF-JFJ,2020 U.S. Dist. LEXIS 255940, at *5 (N.D. Okla. Sept. 30, 2020).

[41] *Boozer v. Wilder*, 381 F.3d 931, 934 n.2 (9th Cir. 2004) ("A habeas petition is the only avenue for relief from a violation of ICRA. See 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 51-52, 67-70 (1978). We previously entertained a habeas petition alleging a violation of ICRA in a child custody dispute. See *Cobell v. Cobell*, 503 F.2d 790, 792-95 (9th Cir. 1974). However, a person must be detained by a tribe to bring an ICRA habeas petition, 25 U.S.C. § 1303, and it is not clear if K.W.B. is detained within the meaning of the statute. Detention is interpreted with reference to custody under other federal habeas provisions. See *Moore v. Nelson*, 270 F.3d 789, 791-92 (9th Cir. 2001) (relying on habeas cases interpreting custody to analyze detention under ICRA); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879-80, 890-91 (2d Cir. 1996) (holding that ICRA detention is synonymous with custody in other federal habeas statutes). The Supreme Court has held that children placed in foster care are not in state custody for the purposes of federal habeas proceedings under 28 U.S.C. § 2254. *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 510 (1982). Because the district court had jurisdiction under 28 U.S.C. § 1331, we do not decide whether a federal court may entertain an ICRA habeas petition in a child custody dispute after *Lehman*. Likewise, we do not address other possible jurisdictional problems with a habeas petition, such as Boozer's next-friend standing, whether the defendants are proper respondents to a habeas petition, and tribal sovereign immunity under ICRA.")

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C. Even If It Was Legally Proper To Contest Tribal Court Jurisdiction Via 25 U.S.C. § 1303, Petitioner's Challenge Must Fail.

For starters, Petitioner voluntarily availed herself of tribal court jurisdiction, at least until she disapproved of tribal court determinations. (Doc. 1 at ¶ 25) In submitting to this jurisdiction, Petitioner has waived any objection to it, meaning that her claim cannot be supported by factual allegations.[42]

Regardless, the question of tribal court jurisdiction is barred by issue preclusion, which prevents Petitioner from relitigating issues that were raised and resolved by a prior judgment.[43] For issue preclusion to apply, four conditions must be met:

> (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.[44]

Here, the issue at stake is whether the tribal court had jurisdiction to determine C.R.'s custody, which was the identical issue at stake before the Alaska State Superior

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42 *LaBeau v. Dakota,* 815 F. Supp. 1074, 1076 (W.D. Mich. 1993) ("Mrs. LaBeau claims that the Tribal Court acted outside of its jurisdiction because neither she nor her grandson is Indian. The *DeMent* holding is inapplicable to plaintiff's claim, however, because in *DeMent*, the father never submitted to the jurisdiction of the tribal court. In contrast, in the instant case, plaintiff originally obtained custody of her grandson through the Tribal Court and turned to that court to alter her custody arrangement. Plaintiff voluntarily submitted to the jurisdiction of the Tribal Court until it took an action of which she disapproved. In submitting to the court's jurisdiction on the issue of custody in the past, she has waived any objection she may now have to the jurisdiction of the Tribal Court. Thus, plaintiff can prove no set of facts in support of her claim that would entitle her to relief.")

43 *Janjua v. Neufeld,* 933 F.3d 1061, 1065 (9th Cit. 2019).

44 *Id.*

Court. Moreover, the parties indeed litigated this issue, so much so that the Superior Court had to repeatedly recognize and re-recognize tribal court jurisdiction, eventually holding that it necessitated the closing of the state court case.[45]

D. Regardless Of All Of The Above, Petitioner's Case Must Also Fail Because She Failed To Exhaust Tribal Court Remedies.

A tribal court must have a full opportunity to determine its jurisdiction, including the exhaustion of tribal court appeals.[46] Such exhaustion "is required" before a federal court can entertain a claim.[47] This is for good reason, as the Supreme Court has taught:

> The existence of and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties

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[45] Order Recognizing Tribal Jurisdiction and Closing Case (May 25, 2022) at 1, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit B, ("COMES NOW the court to recognize tribal jurisdiction."); *id.* ("The Native Village of Selawik is a sovereign nation and they had the case first, derived from Venetie Tribal Court. There is nothing in the facts of this case that indicates a deprivation of due process if this case were allowed to proceed in the Selawik Tribal Court. Additionally, this court cannot exercise jurisdiction in any proceeding for custody or visitation during the pendency of a proceeding in a court of another jurisdiction. The court hereby recognizes tribal jurisdiction, directs the parties to handle this matter in the court whose jurisdiction has primacy, and closes this case."); Omnibus Order Denying Case Motions 5, 6, 9, and 10, (September 16, 2022) at 8, *In the Matter of C.R.*, Case No. 4FA-21-00332-PR, attached hereto at Exhibit D, ("[t]he Native Village of Selawik is a sovereign nation and presently has jurisdiction over this case."); *id. at* 2 ("The Court's jurisdiction was extinguished upon the notice it received by the Selawik Tribal Court, asserting its jurisdiction over a person it determined to be a member of its tribe."); *id.* at 3 ("Because the tribal courts were already exercising jurisdiction over this motion, the Court cannot exercise jurisdiction over this case simultaneously with a tribal court, since the Selawik Tribal Court continues to exercise its jurisdiction.").

[46] *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987)); *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 954 (9th Cir. 1998).

[47] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

and elsewhere, and administrative or judicial decisions.

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.[48]

Here, though, Petitioner did not exhaust her tribal court remedies. While Petitioner was explicitly informed about her right to appeal the tribal court custody order, and how to appeal that order, Petitioner elected not to do so.[49] Instead, she dashed into federal court without finishing the litigation in tribal court, a tactic that federal courts have roundly rejected in precisely this context.[50]

DATED this 23rd day of January, 2023.

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Native Village of Selawik

By: /s/ Goriune Dudukgian________________
Goriune Dudukgian, ABA No. 0506051
James J. Davis, Jr., ABA No. 9412140

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48 *Id.* at 855-56.

49 Declaration of James J. Davis, Jr. in Support of Native Village of Selawik's Motion to Dismiss at January 23, 2023) at ¶3; *see also* Exhibit E.

50 *See, e.g., Boozer*, 381 F.3d at 937; *DeMent,* 874 F.2d at 517; *Azure-Lone Fight,* 317 F. Supp. 2d at 1151; *see also Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (holding that a failure to exhaust tribal court remedies justified the dismissal of a challenge to tribal court jurisdiction vis-à-vis a child custody determination).

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023,
I served a copy of the foregoing document
via the CM/ECF on:

Michael Walleri

Steven Hansen

/s/ Goriune Dudukgian
Signature