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, Petitioner, vs. NATIVE VILLAGE OF SELAWIK, RALPH STOCKER, and ARLENE BALLOT, Respondents.	Case No. 3:22-cv-00280-JMK

PETITIONER'S OPPOSITION TO NATIVE VILLAGE OF SELAWIK'S MOTION TO DISMISS

Nikki Lynn Richman, by and through the undersigned counsel of record, opposes the Native Village Of Selawik's Rule 12(b) Motion To Dismiss Richman's petition for a Writ of Habeas Corpus pursuant to the Indian Civil Rights Act [IRCA; 25 U.S.C. §1303]. Ms. Richman holds a delegation of parental rights under Alaska State law from the child's father with respect to C.R. (i.e. the child). Ms. Richman challenges the detention of the minor child pursuant to the Tribe's December 16th, 2022 order granting custody of the child to Ms. Arlene Ballot, the child's maternal grandmother.

SUMMARY

Selawik has brought a Rule 12(b) motion to dismiss this matter alleging that this Court lacks subject matter jurisdiction to consider Ms. Richman's claim under

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ICRA.[1] Alternatively, Selawik alleges that Richman has failed to state a claim upon which relief may be granted.[2]

This Court should deny Selawik's motion to dismiss because it is well established that this Court has subject matter jurisdiction to review the exercise of tribal court jurisdiction over non-tribal members and whether a tribal court has exercised its jurisdiction in a manner consistent with due process and equal protection under ICRA. Alternatively, Richman's petition clearly states a claim for which this Court may grant relief.

I. BACKGROUND.

Richman's verified petition contains a detailed factual background of the dispute. For the purposes of this 12(b) motion, in which the factual allegations are accepted as true,[3] the critical facts alleged in the verified Petition include the following

- Neither the father nor Ms. Richman nor the Child are tribal members of Selawik;[4]

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[1] Docket 12, at 6 relying on FRCP 12(b)(1)
[2] Docket 12, at 6-7 relying on FRCP 12(b)(6)
[3] See discussion of Legal Standard below.
[4] Docket 1, at para 10, 14, & 17.

- In January, 2020, the father killed the mother.[5]
- On January 15, 2020, when the child was nine (9) months old, the father placed the child with Ms. Richman and gave Ms. Richman a Power of Attorney/ Delegation of Parental Right under Alaska State law (A.S. 13.26.051) regarding the child;[6]
- Ms. Richman attempted to adopt the child, with the consent of the father in state court.[7]
- The child has lived in the care of Ms. Richman since January, 2020, and there is no allegation that the child has been at risk of harm while in the care of Ms. Richman.[8]
- While various proceedings relating to the child occurred in the Venetie Tribal Court, the Native Village of Venetie recognized Ms. Richman as an "Indian custodian" and allowed the child to remain with Ms. Richman.[9]
- On or about July 14 or 16, the Venetie Tribal Court dismissed all proceedings related to the child.[10]

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[5] Docket 1, at para 15. Since filing the Petition the father has been convicted of killing the mother.
[6] Id. at para 7 & 20
[7] Id., at para. 34 &43
[8] Id., at para. 18-20
[9] Id, at para 24- 31
[10] Id., at para 35-36

- On July 8, 2020 Ms. Richman filed a petition for adoption of the child, with the consent of the father, in the Alaska State Superior Court for the Fourth Judicial District.[11]
- On or about July 16, 2021, the Selawik Tribal Council passed a resolution "accepting transfer of the case" from Venetie to Selawik, without prior notice to Ms. Richman nor the father, and without any Venetie Tribal Court order actually transferring jurisdiction of the matter to Selawik[12]
- Despite the fact that Selawik did not have a tribal court, and without a request from Ms. Richman or the father, on or about September 10, 2021 initiated proceedings as a tribal court, and issued an order granting temporary custody of the child to Ms. Richman.[13]
- On May 26, 2022, the Alaska Superior Court dismissed Ms. Richman's adoption petition in deference to Selawik's claim to jurisdiction. [14]
- On August, 15, 2022, Ms. Richman filed a formal request before the purported Selawik Tribal Court to dismiss its proceedings related to the child because it

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[11] Id., at para 34
[12] Id, at para 37
[13] Id., at para 38- 42
[14] Id. at para 44

- lacks jurisdiction under the terms of its Constitution because the child was not eligible for tribal membership under its Constitution;
- had not organized a tribal court in compliance with its Constitution;
- lacks a body of law which might regulate this proceeding in a manner consistent with the Indian Civil Rights Act; and
- failed to comply with the due process rights requirements under its Constitution and under the Indian Civil Rights Act.[15]

- Selawik never acted upon Ms. Richman's request to dismiss.[16]
- On December 16, 2022 Selawik awarded Ms. Ballot custody of the child after a hearing in which Ms. Richman was not provided notice nor an opportunity to be heard in a manner inconsistent with procedural due process and without a clear finding that Ms. Richman had not provided adequate care of the child as required by substantive due process.[17]

In a recent development, Selawik sought to register its December 16th order with the Alaska Superior Court and to seek a writ of assistance for immediate enforcement of the order to transfer custody to the maternal

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[15] Id., at 45
[16] Id., at para 46
[17] Id., at para 54 - 61

grandmother. The Alaska Superior Court denied the application for registration holding that Selawik's proceedings violated due process.[18]

II. LEGAL STANDARD

The Tribe has presented a motion to dismiss under FRCP 12(b)(1) [dismissal of an action for "lack of subject matter jurisdiction."] and 12(b)(6) [failure to state a claim upon which relief may be granted]. Plaintiff accepts the statement of legal standard presented by the Tribe, with minor modification.[19]

As a general matter, a court must take all allegations of material fact alleged in the complaint as true and construe them in the light most favorable to the nonmoving party with regard to both the FRCP 12(b)(6) motion[20] and a "facial attack" under FRCP 12(b)(1). [21] In contrast, in considering a "factual

[18] Ex. 9- Superior Ct. Order (2/10/2023)

[19] E.g. Plaintiffs have the burden of establishing jurisdiction. See *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994).

[20] *Cousins v. Lockyer*, 568 F.3d 1036, 1067 (9th Cir. 2009); see also *Daniels-Hall v Nat'l Educ. Ass'n,* 629 F.3d 992, 998 (9th Cir. 2010). For this proposition, the Tribe relies on *Leite v Crane Co.,* 749 F. 3d 117, 1121 (9th Cir., 2014) cited by Defendants Docket 12, at 7n23. This case may not be the most appropriate. *Leite* involved the federal officer removal statute, under which "defendants enjoy much broader removal rights under the federal officer removal statute than they do under the general removal statute." 749 F. 3d 117, 1122. Of course, this is not a removal case, and it does not involve a federal officer. *Cousins* and *Daniels-Hall* are more appropriate to this case.

[21] A challenge as to the sufficiency of the pleadings to establish jurisdiction is considered a "facial attack", while a challenge alleging a lack of any factual support for subject matter jurisdiction despite the pleading's sufficiency is considered a "factual attack". As explained in *Grondal v. United States*, 2012 U.S. Dist. LEXIS 19398, at 11-13 (E.D. Wash. Feb. 16, 2012) (Quackenbush, J.). *Leite, supra.*

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attack" upon jurisdiction under FRCP 12(b)(1) the Court may consider evidence outside the pleadings needed to resolve factual disputes as to jurisdiction. See *Assoc. of Am. Med. Coll. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). However, where jurisdiction is intertwined with the merits, the court must "assume the truth of the allegations in a complaint ... unless controverted by undisputed facts in the record." *Roberts v. Corrothers*, 812F.2d 1173, 1177 (9th Cir. 1987); See also *Daniels-Hall v Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). This latter principle applies in this matter, since the Tribe's motion intertwines jurisdictional and merit issues.

A Rule 12(b)(6) dismissal under FRCP 12(b)(6) is proper only in the absence of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) A dismissal without leave to amend is improper unless it is beyond doubt that the complaint "could not be saved by any amendment." *Harris v. Amgen, Inc.* 573 F.3d 728, 737 (9th Cir. 2009).

III. THE COURT HAS SUBJECT MATTER JURISDICTION TO REVIEW THE EXERCISE OF TRIBAL COURT JURISDICTION OVER NON-TRIBAL MEMBERS. (RESPONSE TO FACIAL ATTACK)

It is black letter law that a Federal court has jurisdiction to review the exercise of tribal court jurisdiction over non-tribal members. *National Farmers*

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Union Ins. Co. v Crow Tribe, 471 U.S. 845 (1985) In that case, a non-tribal member sought to enjoin a tribal court proceeding over a personal injury matter. The Court of Appeals held that the federal courts lacked jurisdiction over the questions challenging tribal court jurisdiction. The Supreme Court reversed and held that federal courts have authority to determine, whether a tribal court has exceeded the limits of its jurisdiction, as a matter "arising under" federal law citing 28 USC § 1331. *National Farmers Union Ins. Co. v Crow Tribe,* 471 U.S. at 852-853.

The Supreme Court confirmed this holding in *Strate v A-1 Contractors,* 520 U.S. 438, 448-449 (1997), which was a case brought by a contractor, operating on a Montana Indian Reservation, seeking a declaratory judgement against tribal agencies and officials. The contractor challenged a tribal court judgement arguing that the Tribe lacked jurisdiction over the contractor. The Supreme Court confirmed that Federal court has jurisdiction to review the exercise of tribal court jurisdiction over non-tribal members. *Id*.

In *Nevada v Hicks,* 533 U.S. 353 (2001) the Supreme Court reviewed a suit brought by non-Indian state officials for declaratory judgement seeking to invalidate a tribal court order. The Court once again confirmed its holdings in *Strate v A-1 Contractors,* and *National Farmers Union Ins. Co.* In doing so, J. O'Conner's concurring opinion specifically noted the holding in *National Farmers*

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Union Ins. Co. that "district courts may determine under 28 USC § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

After three (3) US Supreme Court decisions in agreement on the issue, there is no question that this Court has jurisdiction to review whether a tribal order exceeded the lawful limits of its jurisdiction.

IV. ICRA'S *HABEAS* RELIEF IS AVAILABLE TO REVIEW A TRIBAL CHILD CUSTODY ORDER (RESPONSE TO FACIAL ATTACK)

The Indian Civil Rights Act (ICRA) provides "The privilege of the writ of *habeas corpus* shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 USC §1303. The Ninth Circuit has clearly held that ICRA habeas relief is available to review whether a tribal child custody order exceeded the lawful limits of its jurisdiction. *United States ex Rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974) *cert. denied*, 421 U.S. 999 (1975). The case involved a custody dispute between biological parents, both of whom were members of the Blackfeet Tribe initially residing off reservation. The parents originally obtained a custody determination under Montana law. The maternal grandmother petitioned the Blackfeet Tribal Court and obtained a custody order that was inconsistent with the State custody order. The father sought habeas relief under ICRA arguing that the tribal order exceeded the tribal court's jurisdiction under tribal law. The federal court accepted the possibility that

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the State and the Tribe might have concurrent jurisdiction but reviewed both Montana laws and the tribal codes. The Court found that Montana clearly had jurisdiction,[22] but the Tribal court exceeded its jurisdiction as defined by tribal law.[23] Given that the tribal order was inconsistent with tribal law, the federal courts issued a writ of habeas corpus invalidating the Tribal order.

DeMent v Oglala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989) is in accord with *Cobell* holding that ICRA habeas corpus is available to review whether a tribal order exceeded the lawful limits of its jurisdiction. *DeMent* involved a non-Indian father who neither resided nor was domiciled on the tribe's reservation. The father challenged a tribal court's custody order with respect to the children. The Eighth Circuit held the district court had federal question jurisdiction in this case, noting that "The question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 USC §133. *DeMent v Oglala Sioux Tribal Court,* 874 F.2d 513 citing *National Farmers Union Ins. Co. v. Crow Tribe,* 471 US 845, 852 (1985). The Court explained further,

> The ICRA requires tribal courts to exercise their jurisdiction in a manner consistent with due process and equal protection. … Thus, if a tribal court

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[22] 503 F.2d, 794-5
[23] 503 F.2d, at 795

acts outside the scope of its jurisdiction, that action may constitute a due process violation.[24]

DeMent is particularly useful in this matter, in that it followed and addressed the Supreme Court's holding in *Lehman v. Lycoming County Children's Services Agency*,[25] upon which the Tribe chiefly relies. The Eight Circuit specifically rejected the application of *Lehman* to all ICRA habeas actions. 458 US, at 515-516. Specifically, the Court in *DeMent* noted that the father had custody of the child under California law and the Tribe was refusing to give effect to such custody (i.e. denying full faith and credit). *Id*.

The Tribe seeks to distinguish *DeMent* by stating that there is no state court custody order in the present case. But the present case is similar to *DeMent*, in that Ms. Richman has custody under Alaska law by virtue of the delegation of parental rights. A.S. 13.26.051. Selawik is refusing to give effect to Alaska law, and disregarding her lawful custody of the child under Alaska law, just as the Tribal Court in *DeMent* refused to give full faith and credit to the state court order. Additionally, the recent order denying the Tribe's request to register the tribal court order demonstrates a clear conflict between the State and tribal courts; i.e. the state is refusing to register and enforce the tribal court order because the State

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[24] 874 F.2d at 514
[25] 458 US 502 (1982)

court found that the tribal courts process was tainted by bias and other due process violations.

Secondly, in *DeMent* the Eighth Circuit noted that the California courts were unable to provide relief since they lacked jurisdiction to return the children to the father's custody. 458 US, at 515-516. As the recent decision of the State Superior Court demonstrated, the Alaska State Courts lack the authority to dissolve the tribal court custody order; the State Court may simply decline to enforce the Tribal Court order.[26]

The fact that the child is in Richman's physical custody does not moot this Court's authority to issue a writ to dissolve the tribal court custody order. Both the Courts in *Cobell* and *DeMent* noted that the fact that the child was in the physical care of the Petitioner did not moot the habeas relief available under ICRA. *Cobell*, 503 F.2d, at 794; *DeMent,* 874 F.2d at, 516, citing "*Wells v. Philbrick,* 486 F.Supp. 807, 809 (D.S.D. 1980) (Indian father could not challenge validity of tribal council's custody determination in federal habeas proceeding when children were admittedly not in custody of tribe)."

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[26] Plt. Ex. 9

The Tribe correctly asserts that under normal circumstances Federal Courts do not allow petitioners to collaterally attack a tribal child custody order. *Cobell* and *DeMent* stand as exceptions to this broad general rule. Courts considering the matter choose to distinguish rather than repudiate *Cobell* and *DeMent*. The cases cited by Defendants do not stand in opposition to *Cobell* and *DeMent but may be* distinguished. In *LaBeau v Dakota*, 815 F.Supp. 1076 (W.D. Mich. 1993) the Court distinguished *DeMent* based on petitioner's acquiescence to the tribal court's exercise of jurisdiction. *Sandman v Dakota* 816 F.Supp. 448 (W.D. Mich. 1992) was distinguished because the tribal court's jurisdiction was not in question. In *Azure-Lone Fight v. Cain*, 317 F. Supp. 2d 1148, 1151 (D.N.D. 2004) the petition was denied without prejudice to allow exhaustion of tribal processes. In *Weatherwax on Behalf of Carlson v. Fairbanks,* 619 F. Supp. 294 (D. Mont. 1985) the petition was denied because there was no allegation that the Tribal court exceeded its authority. Indeed, the cases cited by Selawik merely confirm that whether ICRA habeas relief is available to challenge a tribal custody order turns on whether tribal courts act outside of their jurisdiction or exceed their authority as defined by tribal law. See *DeMent*, 874 F.2d. at 515-516; *Cobell*, 505 F.2d 794-95

In this case, Richman challenges the tribal court order alleging that the tribe violated her substantive and procedural due process rights in violation of ICRA ,

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including exceeding the Tribe's jurisdiction and authority under the tribe's laws. ICRA habeas relief is available.

If, however, this Court perceives some reason that ICRA does not apply, the Court should allow Richman to amend her petition under *Harris v. Amgen, Inc.* 573 F.3d 728, 737 (9th Cir. 2009) to permit the matter to proceed as a declaratory judgement matter under 28 USC § 1331, for which there is unquestioned subject matter jurisdiction. *Strate v A-1 Contractors, supra.* and *National Farmers Union Ins. Co. supra.*

V. ADEQUATE FACTS EXIST TO ESTABLISH THIS COURT'S SUBJECT MATTER JURISDICTION (RESPONSE TO FACTUAL ATTACK)

The gravamen of Richman's verified petition is that 1) Selawik lacks jurisdiction over the child under federal law and tribal law; 2) Selawik does not have a Tribal Court authorized or organized in compliance with its Constitution, 3) Selawik lacks a body of law governing child in need of aid proceeding in a regularized manner consistent with the Indian Civil Rights Act (25 U.S.C. 1301 et. seq.), and 4) Selawik failed to comply with the due process requirements under its Constitution and ICRA. Adequate facts exist to support subject matter jurisdiction over these claims.

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1. **Selawik's IRA Constitution**. As a preliminary matter, it is important to note that Selawik is organized under the Indian Reorganization Act (IRA) [25 U.S.C. § 5123].[27] Specifically, this means that the majority of Tribal members adopted the Tribe's Constitution and must approve amendments to its constitution by using the Secretarial Election method provided for in the federal statute. 25 U.S.C. § 5123(a). The Tribal Constitution is attached as Exhibit 1.

Organization under the IRA is of critical importance since this fact goes to the very core of the Tribe's sovereign status. Indeed, Selawik's organization under the IRA was the very reason that Selawik was recognized as an Indian Tribe. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir. 1990) reversed on other grounds, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (tribes organized under the IRA are federally recognized tribes) The Tribe's Constitution is the Tribe's basic law and sets forth a number of provisions that are critical to the current dispute, including membership in the tribe, the use of tribal powers, and the existence of a regularized system of tribal law governing child custody in a manner required by due process.

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[27] See Plt. Ex. 4 - Constitution of the Native Village of Selawik Alaska.

2. <u>The child is not eligible for tribal membership under the Tribe's law.</u>

A Tribe has no jurisdiction over non-tribal members unless Congress provides otherwise. *Strate v A-1 Contractors,* 520 U.S. 438, 445-46 (1997); *John v Baker,* 982 P.2d 738 (Alaska, 1999). In the case of child custody, a tribe only has jurisdiction over child custody where the child is a tribal member. *John v Baker,* 982 P.2d 738 (Alaska, 1999). Selawik acknowledges that neither Ms. Richman nor Mr. Rugstad are tribal members. Thus, the only basis for the tribe's jurisdiction in this case rests solely upon whether the child is a member of Selawik. Richman has alleged that the child is not a tribal member, and the only evidence on the matter supports Ms. Richman's contention.

The Constitution for the Native Village of Selawik provides that a person may be a tribal member in three (3) cases: 1) that the person is named on the Tribe's base role, SELAWIK CONST. Art. II, Sec. 1;[28] 2) that the person is a child of a member, SELAWIK CONST. Art. II, Sec. 2; or a Native person sets up a home in the Village, SELAWIK CONST. Art. II, Sec. 4. However, **<u>a tribal member automatically loses their tribal membership if the member leaves the village without an intention of returning to reside in the village.</u>** (emphasis added) SELAWIK CONST. Art. II, Sec. 3. This last provision is to this case.

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[28] i.e. the "names are on the list of native residents made according to the Instruction of the Secretary of the Interior for organization in Alaska…."

The child has never lived in Selawik and the only way that the child could be a tribal member is if she is a child of a tribal member. The attached affidavit of the child's biological father was filed with Selawik in connection with Ms. Richman's request to dismiss the tribal proceedings.[29] As indicated in the affidavit, the child's mother left Selawik in 2017 or 2018 and had no intention to return and reside in Selawik.[30] Thus, the mother lost her Selawik tribal membership in 2017 or 2018. The child was born in 2019, which was after the mother's tribal membership was automatically lost under the Selawik Constitution.

The issue was raised with Selawik by Ms. Richman's request to dismiss the tribal proceedings;[31] however, the Tribe never actually examined the issue, and in its final order never addressed the issue other than to simply summarily rule that the child was a tribal member.[32] The Tribe found the child to be a member without examination of the facts; all the facts supported the conclusion that the child is not a tribal member. There is no tribal enrollment certification from Selawik which would certify that the child is a tribal member. Other than the father's affidavit that the child's mother left the village with no intention to return, there was no

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[29] Ex. 5. (Rustad Aff't) See also Ex. 6 (Request to Dismiss)
[30] Id.
[31] See also Ex. 6 (Request to Dismiss)
[32] Ex. 3

contravening evidence in the tribal records on the matter. Nobody contested that the mother left the village, and there was no evidence presented to suggest that the mother intended to return to reside in Selawik. Thus, the preponderance of all available evidence is that the child is not a member of Selawik.

3. **Richman never voluntarily submitted to Selawik jurisdiction.**

Alternatively, Selawik argues that Ms. Richman voluntarily submitted to Selawik's jurisdiction.[33] This is simply not correct. Selawik cites paragraph 25 of the Richman's Petition (Docket 1 at para 25). The referenced notation alleges that Ms. Richman filed a petition with the Venetie Tribal Court for an appointment of a guardian for the child.[34] Selawik is not Venetie. They are different tribes.

Selawik incorrectly argues that Venetie transferred the case to Selawik.[35] This is also incorrect. Selawik cites Richman's Petition (Docket 1 at para 32-37). The referenced notation alleges that on July 14, and 16, 2021 different Venetie judges "issued order(s) dismissing the case …" (Docket 1 at para para 32-37)[36] Thus Richman's petition, referenced by Selawik, actually indicates that Venetie

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[33] Docket 12, at 5, Citing Docket 1 at para 25.
[34] At the time, Ms. Richman believed that the child was a tribal member of Venetie. As indicated in the father's affidavit, this was discovered to be an error.
[35] Docket 12, at 2 citing Docket 1 at para 32-37.
[36] The referenced allegation also alleges serious due process violations with this action.

dismissed the tribal court proceedings regarding this child. This allegation is supported by the language of the Venetie order, which is submitted as an exhibit to this Court.[37] The Venetie order does not explain why the Venetie Court dismissed the matter. Venetie's dismissal may merely recognize that either Venetie lacked jurisdiction, or that the child was not a child-in-need of aid under the Venetie Children's Code because the child was being adequately cared for by Ms. Richman.

Selawik's argument that Ms. Richman voluntarily submitted to Selawik's jurisdiction is unsupported by any evidence, contrary to the referenced material in Richman's petition, and refuted by the actual evidence which demonstrates that Ms. Richman never voluntarily submitted to the jurisdiction of the Selawik Court.[38]

[37] Ex. 7 – Venetie Order To Dismiss

[38] Richman appeared before the Selawik tribal court to challenge the Tribe's jurisdiction and other matters. Selawik has not argued Richman's appearance amounted to voluntary submission to Selawik's jurisdiction. The order denying registration noted correctly that an appearance to challenge the authority of the tribal court is not voluntarily submission to tribal court jurisdiction. Rather, it is a requirement of exhaustion of tribal remedies. See Ex. 8. The right of a party to demur is a bedrock principle of jurisprudence. *Davidson Bros. Marble Co. v. Gibson*, 213 U.S. 10. (1909) (invalidating a Ninth Circuit Rule requiring waiver of the right to demur)

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4. <u>The Tribe' Selawik Tribal Court is not authorized nor organized in compliance with its IRA Constitution nor the IRA.</u>

Richman alleges that Selawik does not have a Tribal Court authorized or organized in compliance with its Constitution and federal law (i.e. the IRA). This is supported by the affidavit of Darcel Cleary, an independent ICWA advocate that contacted Selawik near the time Selawik initiated tribal proceedings concerning this child.[39] She reports that Selawik officials reported to her that they did not have a tribal court. This is consistent with testimony from the paternal grandmother and the tribal administrator in recent State Court proceedings in which they both confirmed that the Tribal Council started acting as a tribal court for these proceedings, "in order to help the grandmother."[40]

The Selawik Tribal Constitution does not authorize or create a tribal court. Equally, the Constitution does not authorize the Tribal Council to take judicial action. Of course, the tribe may create a tribal court, and such powers would be "reserved powers" under the Selawik Constitution. The Constitution prescribes the process by which such powers are exercised. Specifically, the Tribe's constitution states,

> "*Use of Powers.* The governing body shall put into use such of the powers of the Village as the Village may give to it at general meetings of the

[39] Ex. 8
[40] Ex. 9

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> membership and shall make reports of its action to the membership at general meetings."

SELAWIK CONST. Art. IV, Sec. 3.[41] Additionally, the Tribe's Constitution requires that

> "*Record and Report of Village Decisions*. A record shall be made and kept of all the rules made under sections 1, 2 and 3, which record shall be called the Record of Organization of the Native Village of Selawik".

SELAWIK CONST. Art. IV, Sec. 4.[42]

There is no evidence that the Selawik Tribal Council complied with these terms of its Constitution when it began exercising judicial powers. The silence on this issue is deafening. Specifically, as Selawik points out, this issue was raised by Ms. Richman in opposition to Selawik's effort to register its order in State Court.[43] In response, Selawik produced no tribal ordinance/code establishing a tribal court or child custody law; indeed, Selawik has ignored the entire issue. [44] Most importantly, the Tribe has not produced a Record of Organization respecting the exercise of judicial powers as required by the Tribal Constitution. It is expected that Selawik is unlikely to produce a Record of Organization documenting the authorization and formation of a tribal court because none exists.

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[41] Ex. 4- Constitution of Native Village of Selawik
[42] Ex. 4- Constitution of Native Village of Selawik
[43] Def. Ex. F, at 15-16
[44] See Def. Ex. G

Selawik's submissions to this Court admit that "The Tribe's codes are unwritten".[45] This admission has three implications relevant to these proceedings. First, as an evidentiary matter, the tribe lacks any evidence that the tribal court has been authorized as required by its IRA constitution; i.e. the only evidence in the record is that a Selawik Tribal Court simply do not exist. Second, the admission means that in exercising judicial powers, the Tribe has failed to comply with its tribal constitution requiring recording such actions. SELAWIK CONST. Art. IV, Sec. 4. Third, the admission means that in reviewing whether Selawik's actions exceeded the tribe's authority and power under Tribal law in accord with *DeMent,* this Court can only conclude that Selawik's failure to record its rules authorizing and governing its judicial power over child custody necessarily violates the Tribe's constitution, and that the Tribe's actions entertaining child custody proceedings and issuing tribal custody orders is *ultra vires*. In other words, the order exceeded the Tribe's authority and power **under the Tribe's law**. Under *DeMent,* there is clear evidence that the Selawik order was *ultra vires* and invalid.

5. Selawik lacks a regularized body of law governing child in need of aid proceeding as required by ICRA's due process requirements.

The above admission presents clear evidence that Selawik's proceedings also violated ICRA's due process mandate. Guided by international law principles of

[45] See Def. Ex. E, at 1

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due process, the Ninth Circuit has held that Tribal Court orders are only to be accorded full force and effect when

> there has been opportunity for a full and fair trial before an impartial tribunal **that conducts the trial upon regular proceedings** after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. (emphasis added)

Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) relying upon *Hilton v. Guyot*, 159 US 113, 163 (1895). Accord *John v Baker*, 982 P.2d 738, 763 (Alaska, 1999). While Ms. Richman faults Selawik with violation of many of these due process principles (*infra,)* the fact that Selawik lacks any tribal codes governing judicial and child custody processes means, *a fortiori,* the absence of a regularized process for such determinations required by ICRA's due process mandate, and a violation of due process standards.

6. Other ICRA due process violations.

Richman alleges other ICRA due process violations.

Due Process and equal protection recognize a fundamental liberty interest of a parent to the care, custody and control of their children as one of the most clearly established rights protected by due process and equal protection. *Troxel v Granville,* 530 U.S. 57 (2000); See also *Evans v. McTaggart,* 88 P.3d 1078, 1089 (Alaska 2004) Substantive due process mandates that a third party may not disturb the parent's right to the custody and control of one's children absent a

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failure to provide for one's child. *Id.* Ms. Richman has had physical custody of the child and provided for the care of the child pursuant to a series of Power of Attorney/Delegation of Parental Rights from the father under Alaska law. See A.S. 13 26.051.[46] The evidence will show that Selawik actually determined that Ms. Richman adequately cared for the child.[47] This finding demonstrates a violation of substantive due process in the interference with the father's rights to direct care and custody of the child, and Ms. Richman's parental rights under the delegation of parental rights. Additionally, procedural due process was violated in that there was never any allegation that Ms. Richman or the father failed to provide adequate care for the child, which would require third party care as proposed by the grandmother.

Equally, the Selawik process was tainted by bias which violated the due process guarantee to an unbiased forum. At time stamp 1:49.00 – 1:52:00 of the hearing recording Ms. Amelia Ballot, who signed the Selawik order, was recorded off-record during a break while the Council was waiting for participants to join the teleconference. Amelia Ballot is recorded as stating that they (i.e. the Tribal Council) already knew what was going to happen. She additionally indicated the child was to be moved to Arlene Ballot and it would be the final word. The

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[46] Ex. 1

[47] See Recording of Hearing at timestamp 2:05:24. Richman is seeking leave to file a copy of recording.

statement was made **before** taking testimony. The statement supports Ms. Richman's assertions that the Selawik proceedings were fraught with bias violative of her due process rights. This was the principle reason why the Superior Court declined to register and enforce the Selawik order.[48]

Ms. Richman was clearly not given an opportunity to present witnesses or evidence as required by due process. This was a second reason why the Superior Court denied registration and enforcement of the tribal order. Specifically, a review of the recorded tribal proceedings indicate that Ms. Richman was never offered an opportunity to offer any witnesses. Moreover, Selawik would only take narrative testimony from persons who were present at the hearing, and the tribe restricted the presence of persons other than family members, which Ms. Richman might have called (e.g. teachers, health care providers, etc.). Ms. Richman was not able to present her home study, nor question the grandmother regarding such things that may arise in a normal home study, such as the grandmother's criminal record and history of domestic violence. Ms. Richman sought to dismiss the Selawik proceedings by filling a request to dismiss.[49] As the recording of the hearing illustrates, Selawik ignored the request and simply didn't consider it. While the Superior Court found that this evidence was indices of bias, the evidence

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[48] Ex. 9
[49] Ex. 6 – Request to Dismiss

is clear that Ms. Richman was not afforded an opportunity to be heard which violates ICRA's due process requirements.

VI. ISSUE PRECLUSION DOES NOT APPLY

Selawik argues that this Court may not reconsider tribal court jurisdiction because of issue preclusion. Issue preclusion does not bar this Court from reviewing the tribe's jurisdiction over the child custody proceeding. If issue preclusion applies, it applies to preclude Selawik from contesting the Superior Court's findings of due process violations.

The Alaska Court proceedings were very different than these proceedings, and the issues before the Superior court were not identical to those present here, which the Superior Court clarified in its most recent ruling. A key jurisdictional question is whether the child is a member of Selawik. The State Court ruled that it lacked the authority to question the Tribes decision that the child was a tribal member pursuant to the Parental Kidnapping Prevention Act. See Selawik's Ex. B, citing 28 USCA §1738A(g). While this may have been legally wrong,[50] the State Court clarified that in the proceedings before it, the issue was not "whether the

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[50] The PKPA does not apply to tribal court orders. *John v Baker,* 982 P.2d,738, 764n.190 (Alaska, 1999) It is, however, "instructive". *Id*.

Tribe *should have* granted the child membership, (but) … whether the Tribe actually *did* grant membership."[51] The issue before this Court is very different.

As noted above, "The question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 USC §133. *DeMent v Oglala Sioux Tribal Court,* 874 F.2d 513 citing *National Farmers Union Ins. Co. v. Crow Tribe,* supra. Of course, if the child is not a member of Selawik, the Tribe lacks jurisdiction. Thus, in this Court the question whether the Tribe *should have* exercised jurisdiction by merely declaring the child to be a member is precisely the issue before this Court.

VII. Appeal In Tribal Forum Was Unavailable.

Selawik argues that Ms. Richman failed to exhaust tribal remedies because she failed to file an appeal. The Tribe points to an email from the Tribe's attorney to the undersigned suggesting a possible appeal. The offer was obviously illusionary.

The Tribal Council advised the parties that its decision was "final" at the hearing.[52] Moreover, in the hearing, the Tribe's attorney indicated that whether

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[51] Ex. 9, at p. 19
[52] See Recording of Hearing at timestamp 2:0.05

an appeal from the father would be allowed depended upon the Tribe's code.[53] Of course, we learned that the tribe's code is "unwritten." The Tribe's attorney wouldn't actually commit to the existence of an appeal process, but rather suggested that the tribe would get back to Ms. Richman in thirty (30) days as to whether an appeal would be allowed. For these reasons, the Alaska Superior Court found the availability of an appeal illusionary.[54] In *Cobell,* the Court concluded that the father lacked meaningful remedy in the tribal courts because, the order contained no invitation to participate in tribal appellate processes", and the order spoke with a tone of finality. *Cobell* , supra at, 796.

VIII. CONCLUSION

This Court should deny Selawik's motion to dismiss because it is well established that this Court has subject matter jurisdiction to review the exercise of tribal court jurisdiction over non-tribal members and whether a tribal court has exercised its jurisdiction in a manner consistent with due process and equal protection under ICRA. Alternatively, Richman's petition clearly states a claim for which this Court may grant relief.

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[53] See Recording of Hearing at timestamp 2;05:24
[54] Ex. 9, at 12-18

DATED on the 13th day of February, 2023.

JASON WEINER & ASSOCIATES, P.C.

Michael J. Walleri

Michael J. Walleri, ABA No. 7906060
Attorney for Petitioner

Exhibits
(Previously filed in Support of Richman's Motion for Injunction/Stay)

Ex. 1- Delegation of Parental Rights
Ex. 2 – Order Continuing Visitation
Ex. 3 – Selawik Tribal Court Order
Ex. 4 - Constitution of the Native Village of Selawik Alaska.
Ex. 5- Affidavit of Eric Rustad
Ex. 6 – Request to Dismiss

Exhibits
(filed with this Memo)

Ex. 7 – Venetie Order To Dismiss
Ex. 8 – Aff't of Darcel Cleary
Ex. 9- Superior Ct. Order (2/10/2023)

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Certificate of Service
I certify that on the 13th day of February, 2023
I served a copy of the foregoing document
via CM/ECF to:

James Davis

Goriune Dudukgian

Steve Hanson

/s/ Jennifer Desrosiers

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VENETIE TRIBAL COURT
VENETIE, ALASKA

In the Matter of:

[redacted]
B 04/16/2019

Minor Tribal Member(s)

Case No. 4VEE-20-001
Tribal Court Phone Number:
(907) 849-8212

ORDER TO DISMISS THE CASE & TRANSFER JURISDICTION TO SELAWICK TRIBAL COURT

Village of Venetie, through its Tribal Court, has considered the circumstances of this case and the Petition to Transfer from Selawick Tribal Court and has reconsidered jurisdiction in this case.

The Venetie Tribal Court HEREBY ORDERS that this case be dismissed from the Venetie Tribal Court and that the jurisdiction of this case be referred to the Selawick Tribal Court.

The Village of Venetie respectfully requests that the Tribe continue to be considered a legal Party to the Selawick Tribal Court case, as an intervening tribe.

The Village of Venetie also respectfully requests that Selawick Tribal Court hold a hearing within 60 days of this decision, and allows for unsupervised visitation between the minor child, [redacted] and the following relatives: Sophia & Jim Russad (paternal grandparents), Arlene Ballot (maternal grandmother), and Richard Solomon (maternal Uncle).

DONE BY TRIBAL COURT ACTION THIS 14th DAY OF JULY, 2021.

Ernest S. Erick
Tribal Court Judge

AFFIDAVIT OF DARCEL CLEARY

State of Alaska)
) ss
4th Jud. District)

I, Darcel Cleary, after being sworn, state as follows:

1) I am independent advocate for people in need of assistance.
2) In August, 2021, I was advocating in an ICWA case for a lady who did not live in Selawik but was descended from Selawik people.
3) I contacted Selawik Tribe and talked to Mildred, who was the Selawik ICWA worker.
4) I also talked to Selawik Tribal representative named Tanya.
5) Mildred and Tanya informed me that the Selawik Tribe did not have a Tribal Court.
6) I later contacted Selawik August of 2022 and was told that they do not help people who do not reside in Selawik.

12-28-22
Date

Darcel Cleary

Sworn and Signed before me this 28 day of December, 2022

J Werlein
Notary Public for the State of Alaska.
My Commission expires on 7-6-25.

STATE OF ALASKA
NOTARY PUBLIC
J. Werlein
My Commission Expires July 6, 2025

AFFIDAVIT OF DARCEL CLEARY

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) ss
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

In the Matter of:	)	
	)	
[redacted]	)	Case No. 4FA-21-00332-PR
	)	

ORDER DENYING MOTION TO ENFORCE TRIBAL ORDER
[Motions 12, 13, and 14]

COMES NOW the Court to rule on the Motion to Register Tribal Order and Motion for Writ of Assistance. The Court also rules on the petitioner's Motion to Dismiss and Request for Evidentiary Hearing. This matter originally came before the Court on the issues of subject matter jurisdiction over an adoption petition. Both parties extensively argued this issue, with filings comprising more than 400 pages in the Court's docketed file. Nevertheless, the Court, finding that the Native Village of Selawik ("the Tribe") had enrolled the child as a tribal member and had asserted jurisdiction, the Court did not have subject matter jurisdiction over the adoption. The Tribe succeeded on its motion and was awarded partial attorney's fees, after the Court deducted a portion of that fee due to the Tribe's unreasonable contribution to the excessive filings.

The matter later went before the Selawik Tribal Council ("the Tribal Court") on a placement review and ended in a decision awarding custody to the child's maternal grandmother, Arlene Ballot. Nikki Richman ("Petitioner"), the child's custodian, apparently expressed that she would not comply with the Tribe's order, unless and until this Court enforced it. The Tribe then filed this Motion to Register Tribal Order, along with a Motion for Expedited Enforcement and Writ of Assistance. Petitioner promptly filed a responsive pleading, petitioning the Court to deny the Tribe's motions on the grounds that her due process rights were violated during the Tribal Court's proceeding.

STATEMENT OF FACTS

[redacted] ("the child") was born April 16, 2019, to Eric Rustad ("the father") and Kristen Ballot ("the mother"). The mother and the father were both members of Native Alaskan tribes, but both of them may have relinquished their memberships when they left their tribes with no intent to return. The mother was a member of Selawik. The father was a member of Venetie.

When the child turned nine months old, the mother died. The father was later convicted of murdering the mother. Shortly after the mother's death[1], the father, feeling that he would not be able to care for the child, based on the pending or soon pending charges against him, left the child with a family friend, Petitioner. The father executed a power of attorney in favor of Petitioner for the child, granting her all of his legal rights to make decisions for the child.

Petitioner has raised the child ever since, in Fairbanks. The child is now almost four years old. Petitioner has enrolled the child in activities like soccer and ballet. The child has been a part of the Fairbanks community and has never spent significant time in Selawik or Venetie.

Petitioner testified before this Court and before the Selawik Tribal Court. In both hearings, she testified, that she has encouraged the child's family to visit the child, come see the child at her soccer games and ballet recitals, and to come to Petitioner's home to visit with the child.

The child has several extended family members. Her maternal grandmother is Arlene Ballot. Her maternal great-grandmother is Marie Ballot. She has one sibling, Preston, who lives with a non-party member, Sharon, who also does not live in Selawik. The child's paternal grandparents are Jim and Sophie Rustad ("the paternal grandparents").

[1] Based on the testimony of the parties, the Court believes that only a few days, at most, transpired between the time that the mother was killed and the child was given to Nikki Richman.

Only a few of the child's family members have spent time with the child. The child's paternal grandparents see the child regularly. The maternal grandmother has spent a total of fourteen visitation hours with the child, over the course of a few days. However, at some point, the maternal grandmother sought help from Selawik's tribal leaders to seek custody of the child. The maternal grandmother later testified before this Court that Selawik's tribal leaders formed the Selawik Tribal Court, in order "to help" her obtain custody of the child.

This case has been before three courts. Petitioner originally petitioned the Venetie Tribal Court to adopt the child. Venetie decided not to exercise jurisdiction over the case and dismissed it, apparently, with the expectation that the Native Village of Selawik ("the Tribe"), would handle the case. Petitioner, between the time that Venetie dismissed and Selawik took control, refiled her petition before this Court. Shortly thereafter, the Tribe filed a motion to intervene and a motion to dismiss, asserting that it would exercise jurisdiction over the case.

Despite the mother's purported separation from the Tribe prior to the child's birth, the Tribe granted membership to the child before asserting jurisdiction over the case. Petitioner argued that the Tribe had no jurisdiction, arguing that under its own tribal laws it should not have granted the child membership. Nevertheless, this Court, finding that the Tribe's right to interpret its own laws and its decision to grant the child membership was a colorable jurisdiction claim, granted the Tribe's motion. The case was dismissed and positioned before the Tribal Court.

The Tribal Court issued notice to Petitioner that it would hold a hearing regarding the child's placement. The notice said, "The parties will be allowed to address the Tribal Court, will be allowed to offer witnesses and documentary evidence to the Tribal Court, and will be questioned

by the Tribal Court."[2] Peculiarly, the notice was signed by the Tribe's attorney, despite the fact that the Tribe is Petitioner's opponent in this action. In all other respects, the notice was formatted and in all other respects looked like a court order.

The trial was held in the Tribal Court on December 16, 2022 and lasted two hours and eight minutes. The trial was conducted remotely through Tanya Ballot's cellphone, using a conference call setting. The judges assembled in Tanya Ballot's office. The Tribal Court, also called the Tribal Council, consisted of persons selected from the community as community leaders. Mr. Stocker held the role of chief judge. Amelia Ballot was the presiding judge who signed the ultimate order by the Court.

The hearing ensued in a different, albeit structured and planned process. The chief judge announced the name of the case, the case number, and that the matter to be addressed was the child's placement. He then said this was a "confidential" hearing that was "closed to the public" and that only individuals permitted on the call were the "parents," "relatives," and those who were petitioning for "placement of [redacted]" and their "counsel."[3] The entire hearing was two hours and eight minutes, including several minutes spent connecting participants on the call.

The chief judge instructed that each party would be given five minutes to speak at the opening. Petitioner and the maternal grandmother both spoke for a few minutes. Subsequently, the Tribal Court asked each party a few questions. The Tribal Court asked Petitioner a question first, then asked the maternal grandmother the same question. At one point, the chief judge asked are there "any other persons or witnesses that want to address the council? But, first I will ask Eric

[2] Pl.s' Ex. 4 at 1.
[3] Recorded Hearing in the Selawik Tribal Court, *In re* [redacted] No. NBSJ-21-001, at 03:50:00–03:04:05, (Dec. 16, 2022).

Rustad."[4] A few other times the chief judge called out to the persons on the call if anyone else would like to speak to the council. Several people spoke. Generally, whoever was on the call was allowed to speak for five minutes about nearly anything that the individual chose to. Notably, at least two of the witnesses identified themselves as the maternal grandmother's friends, not family or interested parties.

The Court never asked either party if she had her own witnesses, documents, or evidence to present. The Court proceeded through its process of letting persons on the call speak, it did not provide a time for party-called witnesses, party-offered evidence, or party-examination.

There were times when the Court took a break or lost cellular connection. During one of the breaks, the voice of one of the tribal judges, presumably Amelia Ballot, made a statement. First, she asked if certain people were still on the line or no longer on the line. She then said, "We need to remove [redacted] from Nikki; be faithful to grandma. That's our final word." She then spoke about how she expected they would hear from a couple of other people, namely, the maternal great-grandmother and the maternal grandmother's sister. After some scuffling noises, the last thing on the recording is the judge asking if the phone was on mute.

After the judge's "off-record" but still recorded comments were made, the Tribal Court resumed and heard from six people. First, Petitioner spoke about her concerns for the child's medical condition and schooling and asked how the maternal grandmother would care for those needs. Second, the maternal grandmother spoke about the medical needs and schooling. The maternal great-grandmother spoke about how she and the family are hurting to not have the child with them, especially in wake of the lost life, the child's mother. Fourth, the child's great-aunt (the

[4] *Id.* at 00:42:00–00:42:30.

maternal grandmother's sister) spoke about how they (she and her sister) came looking for the child, after the child's mother's death. She also spoke about how she had purchased things for the child. Fifth, the paternal grandfather spoke about his concern for the maternal grandmother's age and ability to "keep up" with the child's physical energy and needs. He also spoke to Petitioner's being better equipped to provide for the child's education. Lastly, the father spoke about how he believed Petitioner to be best suited to provide a happy home for the child.

The hearing portion ended with a question by the father. The Tribal Court instructed that it would go off-record for a while and reconvene at 1:30 p.m. The father spoke up and said that he would not be able to come to the phone at 1:30 p.m. The father said it would be fine for the Tribal Court to continue without him, so long as Petitioner was present. The Tribal Court questioned him to be sure he wanted to waive his right to be present. The father responded with, "Well, I mean, I can appeal if I don't approve of it, right?" The Tribal Court was silent. The Tribe's attorney spoke:

> Well what's going to happen at 1:30, I guess, Eric Rustad, is the Tribal Council—umm, Tribal Court, it will issue its decision. There's not going to be any more evidence at 1:30. It's going to issue its decision at 1:30 and you will be provided a recording of the decision whether or not you can appeal or not will depend on the tribal say, which we'll provide you a copy of. There won't be any more evidence. It's just going to be the Tribal Court announcing its decision.[5]

The Tribal Court said nothing to affirm or contradict what the Tribe's attorney said.

The Tribal Court reconvened and announced its decision. It awarded custody to the maternal grandmother. In less than two minutes, it listed off the several factors it considered and said that the maternal grandmother was particularly better suited, given her cultural value that she could offer the child. The Tribal Court announced that the child be delivered to the maternal grandmother on December 20, 2022, at 10:00 a.m., in Fairbanks. The order from the Tribal Court

[5] *Id.* at 02:05:40–02:06:30.

did not contain any information about whether Petitioner or the father had a right to appeal or the process for appeal.

Apparently, Petitioner, after a couple of days, had not yet received a copy of the order. Petitioner's attorney emailed the Tribe's attorney, asking if he had a copy of the order and if he had instructions from the Tribal Court or Tribal Code about whether and how Petitioner could appeal this decision. Petitioner never received instructions from the Tribal Court about how or whether this decision could be appealed. Instead, on December 19, 2022, at 10:22 p.m., the Tribe's attorney sent Petitioner's attorney an email, saying that if she wanted to "appeal" the decision, she could send her reasons for appeal to the Tribal Court, presumably the same members, within thirty days. The Tribe's attorney said that the Tribal Court would, over the next thirty days, wait to see if it needed further information from Petitioner and then it would decide if it would take any action regarding her request to appeal. In the same email, the Tribe's attorney informed that law enforcement would be present at Petitioner's house tomorrow morning (December 20) to effectuate the transfer of the child to the maternal grandmother.

The next day, December 20, 2022, the date the Tribal Court ordered for transfer of the child, the Tribe filed two motions with this Court. First, it moved the Court to register the Tribal Court's order, granting it full faith and credit. Second, it moved the Court for a writ of assistance to expedite the removal of the child, through "force" by law enforcement, if necessary.

The Tribe argued that it was entitled to an immediate hearing, within 24 hours, to enforce the order and effectuate its enforcement. However, Rule 24 does not aid *removal from* a child's custodian, it provides *protection from removal* from a child's custodian. Accordingly, the Court did not order immediate, forcible removal of the child, under expedited concerns. In further support, neither party has asserted that the child is in any imminent danger by remaining with the

caretaker she has spent the last three years with. The Court held a hearing at its earliest calendar date, January 26, 2023. At this time, the maternal grandmother intervened.

At the hearing, the Court heard testimony on only those matters that determine whether registration of the order is proper: 1) Was there proper notice of the proceedings? 2) Were due process rights observed? No party raised the issue of whether an appeal process exists in Selawik's judicial system nor whether an appeal would be considered.

Also at the hearing, Petitioner presented evidence that the Tribal Court was not impartial when it decided her claims. Most notably, Petitioner testified that she believed she did not have a chance, based on a comment she overheard of a tribal judge saying that the decision was already made in favor of "grandma," before the trial was complete.

The next issue Petitioner raised was that her attorney was not allowed to speak during the Tribal Court hearing. The Tribe's attorney was allowed to speak and did so. Petitioner's attorney was not. Neither Petitioner, nor her attorney objected on the record to this point.

Next, Petitioner argued that her due process rights were also violated since the Tribal Court never provided a time for her to present her own evidence and her own witnesses. She supported her arguments by drawing the Court's attention to the beginning of the recording where the chief judge says that no one was allowed on the call, except for family and interested parties. Therefore, her witnesses would not have been allowed to join the call.

Petitioner also argued that the child's rights and interests were not properly served. Petitioner represented that the maternal grandmother has a domestic violence conviction against her and that this conviction should reasonably question her fitness as a custodian for the child. Petitioner further explained that the Tribal Court did not institute any kind of a transition plan. She

asserted that removing the child from her care immediately, without time to grow a relationship with the maternal grandmother, would cause the child irreparable harm and emotional trauma.

Petitioner lastly argues that she did not receive proper notice. She says that she believed this hearing was to enquire about how the visitation with the maternal grandmother was progressing. She asserted that she did not know this was a final placement hearing.

In rebuttal and on cross-examination, the Tribe's attorney and the maternal grandmother's attorney refuted Petitioner's claims. They alleged that Petitioner should have asserted on the record that she wanted to bring in witnesses. Notably, the Tribe's attorney said that Petitioner was asked by the Tribal Court if she had any "documents" that she wanted to present to the Tribal Court. They did not address the statements made by the judge who said the matter was already decided and that the grandmother was going to win. Lastly, they refuted her lack of notice arguments, saying that the notice clearly said "placement" and that it would infer custody.

The Court reviewed the recording, provided by the maternal grandmother's attorney, in chambers and upon turning the volume all the way up identified a statement by one of the tribal judges partway through the trial, off the record, making the aforementioned statement: "We need to remove [redacted] from Nikki; be faithful to grandma. That's our final word."[6] Next, it thoroughly listened to the recording, multiple times, and it never found where the Tribal Court asked the parties if they had witnesses, evidence, or "documents" to present.

To ensure that all parties had a full and fair opportunity to address these issues, the Court ordered briefing on these three issues.

1. At the hearing on January 26, 2023, the petitioner, Nikki Richman, represented that a male tribal judge made comments that were not on the official record, but were still recorded.

[6] *Id.* at 01:50:45–01:51:10.

The Court requests that Ms. Richman or her counsel provide the Court with the timestamp reference on the recording for the alleged statement.[7]

2. In search of the aforementioned comment, the Court found a different comment, by a female tribal judge. The Court orders briefing to allow both parties to argue whether this comment implicates a due process violation:

   "We need to remove [redacted] from Nikki and be faithful to grandma. That's our final word."[8]

3. The Court orders both parties to provide a timestamped citation from the official recording from the Selawik Tribal Court for when the Selawik Tribal Court directed either or both parties to present evidence and call witnesses.

Petitioner largely argued her points from the hearing before this Court. Namely, she was not afforded a chance to present evidence and witnesses and therefore was not given a full opportunity to be heard. Also, she was not tried before an impartial tribunal since, at least one of the judges outrightly said that she had decided to rule for grandma, before the evidence was concluded.

The Tribe argues that the judge's statements were not violative of due process, since it was only one judge who said it and it was close to the end of the trial. Additionally, it argues that the judge's statement may have only implicated the judge's leanings, not her ultimate opinion. Next the Tribe argues that Petitioner should have known that she could have presented evidence and witnesses and that she should have interjected into the Tribal Court's process to call those witnesses. Lastly, the Tribe argues that Petitioner lacks standing to argue any points on due process

[7] Ms. Richman's counsel indicated that he filed a separate recording and documents where the alleged comment is recorded. As of 10:45 a.m. on January 27, 2023, the Court is not yet in receipt of that filing.
[8] Recorded Hearing in the Selawik Tribal Court, *In re* [redacted], No. NBSJ-21-001, at 1:50:45–1:51:10, (Dec. 16, 2022).

for failing to exhaust tribal remedies by filing an appeal.[9] The maternal grandmother's attorney majoritively concurs.

DISCUSSION

I. TRIBAL ORDERS ARE AFFORDED FULL FAITH AND CREDIT OVER CHILD CUSTODY CASES IMPLICATING ICWA.

Federal law recognizes Native Alaskan tribes as sovereign nations.[10] As foreign nations, their tribal court orders are generally awarded comity, not full faith and credit.[11] However, whenever ICWA is implicated, when the case is a child custody matter under 25 USCA § 1911, tribal court orders are given full faith and credit instead of comity.[12] The only Indian child custody cases that do not implicate ICWA are those cases that are between divorcing parents.[13] There, the child is not in danger of being removed from the child's cultural community, since the child is represented in the culture of both parents.[14] All other cases, including those involving the grandparents of the child, implicate ICWA, thereby triggering the full faith and credit doctrine.[15]

A full faith and credit award requires the Court to treat the order as if it came from a sister state court.[16] This full faith and credit doctrine bolsters ICWA's intent of respecting and rebuilding the independent decisions of native tribes.[17] In so doing, greater justice is accomplished for all

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[9] The Court read the four additional pages beyond the Court's expressly ordered five-page-limitation to find one last remark by the Tribe's attorney, telling the Court for a fourth time that this Court will surely be reversed if it makes such a ruling. *Exspecta videque.* The Court proceeds on the law, despite the Tribe's attorney's dire prediction.
[10] *State v. Native Vill. of Tanana*, 249 P.3d 734, 743 (Alaska 2011).
[11] *Starr v. George*, 175 P.3d 50, 55 (Alaska 2008); John v. Baker, 982 P.2d 738, 763 (Alaska 1999)
[12] *John v. Baker*, 982 P.2d 738, 761–62 (Alaska 1999).
[13] *Starr*, 175 P.3d at 53.
[14] *Id.* at 55.
[15] *Id.*
[16] *Id.*
[17] *John*, 982 P.2d at 760.

people by acknowledging the sovereignty of the tribes while upholding the individual rights of tribal members in their status as Americans.[18]

Notwithstanding, there are instances when full faith and credit should not be afforded. The petitioner has the burden to overcome the full faith and credit doctrine. The petitioner must show that the Tribal Court 1) lacked subject matter jurisdiction,[19] 2) lacked personal jurisdiction,[20] or 3) violated any parties' due process rights.[21] However, the Court may not consider any objections based on these grounds unless the petitioner has fully litigated the matter in tribal court by exhausting all of her tribal remedies. Accordingly, when a petitioner requests relief from a tribal court judgment, the court must follow this order: determine whether she exhausted all of her tribal remedies, determine whether the tribal court had proper jurisdiction, determine whether due process rights of any party were violated.[22]

II. BEFORE THE COURT CAN CONSIDER A DUE PROCESS CLAIM FROM A TRIBAL COURT, THE PETITIONER MUST HAVE EXHAUSTED ALL TRIBAL REMEDIES.

Absence of an appeal process may, but does not necessarily, violate due process.[23] If a tribal court does not have an appeal process, the state court may analyze whether that factor, alone, violates due process.[24] Nevertheless, ICWA does not generally require that tribal courts have an appeal process.[25]

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[18] *Id.*
[19] *Starr*, 175 P.3d at 55.
[20] *Id.*
[21] *Evans v. Native Vill. of Selawik IRA Council*, 65 P.3d 58, 59 (Alaska 2003).
[22] *Simmonds v. Parks*, 329 P.3d 995, 1013–15 (Alaska 2014).
[23] *John*, 982 P.2d at 764.
[24] *Id.*
[25] *Starr*, 175 P.3d at 59.

The purpose of exhaustion of remedies is to allow the tribal courts full opportunities to completely litigate its matters and develop a "full record."[26] Failing to exhaust tribal remedies usurps the process and respect granted to tribal courts, because it deprives the tribal court of the opportunity to resolve the matter.[27] If the parties fully litigate in the tribal court first, state and federal courts can better define its jurisdictional boundaries and only intervene in tribal court cases where due process requires it.[28] By requiring parties to fully litigate in tribal courts before contesting due process in state or federal courts, the tribal court can remedy any of its own errors without involving the state or federal courts.[29] Nevertheless, once a party has fully litigated the matter in tribal court, the state and federal courts are available to offer "their expertise . . . in the event [that] further judicial review" is required.[30] Exhaustion of remedies is vital to preservation of the sovereign independent authority of tribal courts.[31]

Even if there is a violation of due process, the petitioner must exhaust all tribal remedies before raising it in state or federal court.[32] Further still, the petitioner must submit to the tribal court, even where she intends to later argue bias or incompetence.[33] In sum, the petitioner must give the tribal court the full opportunity to disprove any abstract claim that due process will be violated.[34] Instead, she must fully submit herself to the tribal court, and if her due process rights

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[26] *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856, (1985).
[27] *Id.*
[28] *Id.* at 856–57.
[29] *Id.*
[30] *Id.*
[31] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18–19, (1987).
[32] *Simmonds*, 329 P.3d at 1007–08.
[33] *Id.*
[34] *Id.* at 1016.

were in fact violated, she can then take her claim to state or federal court.[35] In sum, a petitioner can never argue that her due process rights will be violated, only that they have been violated.[36]

The only exceptions to the exhaustion of remedies doctrine are based in jurisdiction. Here, the Court has wholly litigated that issue, as described herein.

The Tribe did not argue exhaustion of remedies at the hearing before this Court on January 26, 2023. When the Court asked for narrow briefing on the comments made during the hearing before this Court, the Tribe, for the first time, raised the argument of exhaustion of remedies. Raising the argument in a closed briefing does not allow Petitioner to respond. Nevertheless, the Court can rule on this matter without further briefing or argument.

Petitioner exhausted all of the remedies that were available to her in the Tribal Court based on three grounds. First, it is unclear whether any appeals process exists in the Tribal Court. Second, if there is an appeals process, Petitioner never received notice of that process from the Tribal Court. Third, notwithstanding the prior two premises, the Tribe cut off Petitioner from making any appeal, by taking this case to state court only four days after the Tribal Court's final ruling.

A. The Tribal Court created no record of a right or process to appeal.

There appears to be no appeal process in the Tribal Court. On the record, the child's father asked the Tribal Court whether he could appeal the decision. The Tribal Council paused. The Tribe's attorney answered for the Tribal Court and said that there would be "no more evidence" and the Tribal Court's order would be final.[37] He further stated that "if" there is an appeal process, the instructions for the appeal would be written in the order from the Tribal Court or attached to

[35] *Id.*
[36] *Id.*
[37] This alone raises separate issues of concern, since the Tribe's attorney was a party to the case, opposing Petitioner. It is a conflict at best for the opposing party's attorney to speak on behalf of the court, who should be impartial and detached from both parties.

that order from the Tribal Court. The Tribal Court sat in silence, apparently in agreement with what the Tribe's attorney said.

There was no appeal instruction in the order nor were instructions attached to the order. There was no further communication from the Tribal Court, other than that the ruling was final. From this, the Court finds that the Tribal Court had no appeal process.

The Tribe's attorney rests his argument on *Simmonds v. Parks*, the only case this Court identified that addressed exhaustion of remedies in tribal courts, in the State of Alaska. However, *Simmonds* is critically different. First, there was no question that "a tribal appellate remedy was available to" the petitioner.[38] He just chose not to exercise it.[39] Second, the petitioner in *Simmonds* was provided detailed notice of his right to appeal and how to make an appeal.[40] Third, that notice appears to have been provided by the appropriate authority, the tribal court.[41] Lastly, the petitioner was the one who refiled the case in state court—after the time for filing an appeal had expired.[42] Here, the Tribe refiled this matter in state court, through its registration request and writ of assistance, twenty-six days before the purported expiration of the appeal window.

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[38] *Simmonds*, 329 P.3d at 1017.
[39] *Id.*
[40] *Id.* at 1014 ("Parks was provided with detailed information on his right to seek review by the Minto Court of Appeals. . . Parks received instructions on how to file an appeal, including the instruction to file a "brief statement of why the Appellant believes that the Order deserves a hearing by the Minto Court of Appeals.' . . . There were no page limitations or substantive restrictions placed on the appellant's statement of appeal, and there were no restrictions on the participation of an attorney in preparing the statement of appeal. Yet Parks failed to file an appeal with the Minto Court of Appeals.").
[41] *Id.*
[42] *Id.*

B. The opposing party's email does not constitute notice of the right to appeal by the Tribal Court.

Second, the Tribal Court's appeal process, as proposed by the Tribe's attorney, was not issued with proper notice. "Notice" from the opposing party does not constitute notice from the Tribal Court. Such informal, "word-of-mouth" notice is insufficient.[43]

Petitioner's attorney, upon receiving no notice from the Tribal Court regarding any appeal process, emailed the Tribe's attorney, to see if he had any notice or codes about the appeal process. The Tribe's attorney responded in an email, that he wrote in his capacity as the Tribe's attorney, at 10:22 p.m., on December 19, 2022, saying that Petitioner could file her appeal with the Tribal Court (presumably the same judges, making this more akin to a motion to reconsider) within thirty days. He advised that the Tribal Court would use the following thirty days to determine if it required any information from Petitioner. Lastly, the Tribal Court would decide "if" it would take any action regarding an appeal. The Tribe's attorney ended the email with a note that Alaska troopers would be on Petitioner's doorstep tomorrow to force her to comply.

This word-of-mouth "notice" from the opposing party cannot fairly constitute notice from the Tribal Court. Even this "notice" does not affirmatively state whether the Tribal Court would consider her appeal. It also did not state what other court or appellate body would serve as the reviewing authority.

Unlike the notice of the hearing, this error was not harmless. Aside from the glaring concern that the Tribal Court's purported "notice" was being issued by the opposing party, the statements about how to appeal were buried in an email at 10:22 p.m., the night before law enforcement were scheduled to arrive to forcibly remove the child. At best, this word-of-mouth,

[43] *Starr*, 175 P.3d at 59.

email notice egregiously lacks proper form, such that it cannot be reasonably viewed as proper notice. At worst, it appears that the opponent speaks for the Tribal Court. This notice was completely different from the trial notice, which appeared more formal. There is sufficient reason to question whether this notice was actually coming from the Tribal Court, since it was not given in the same manner as the notice of the hearing or the order. The "notice" of the right to appeal, through email, by the opponent, without any court letterhead cannot be proper notice.

Unlike the notice for the original trial, this was not harmless error. When a hearing is set before a court, it is the parties who raise the issues that will be tried. However, only the court can issue notice of a right to appeal. The Tribal Court may assent to the Tribe's attorney telling Petitioner and the father that they may or may not have a right to appeal, but that if they did, instructions would be accompanied with the order. An email from the opposing party does not constitute notice from the Tribal Court, especially since it asserted on the record that it would provide notice if there was a right to appeal.

C. *Even if there was a right to appeal and Petitioner was on notice, the Tribe cut-off her remedy by subjecting this case back into State court before the time for appeal had run.*

Lastly, the Tribe usurped the Tribal Court by filing this action back in state court. The Tribal Court's order was issued on December 16, 2022, and stated that the child must be transferred on December 20, 2022, at 10:00 a.m. On December 20, 2022, the Tribe brought this action back into state court, after fighting vehemently to have it removed from this Court only a few months ago. By filing this action, the Tribe did two things. First, it contradicted its own "appeal process." It said that Petitioner would have thirty days to appeal the decision, but immediately filed for an expedited writ seeking enforcement of the Tribal Court's order. Second, by filing in state court, Petitioner was then subject to State court laws, which she complied with by timely filing her

response. The Tribe, at the least, does not come with clean hands on this issue. It cannot argue that Petitioner should have submitted an appeal to the same Tribal Court and simultaneously cut-off that time four days after the order, by threatening forcible entry by law enforcement supported by a writ of assistance.

The Court is convinced that the Tribal Court does not actually have an appeal process. If it does, the notice was insufficient. Even if notice were sufficient, the Tribe reinserted this matter into State court, not Petitioner, before the alleged appeal window had closed. By reinserting the matter into State court, Petitioner was bound to comply with State procedural rules, which she did.

It is the Tribe that cut short her remedy by rushing this case back into State court, only four days after the order's issuance, subjecting all of the parties back to State law. The Tribe cannot assert jurisdiction in good faith, when it failed to even wait out the thirty days it now alleges Petitioner was allotted to appeal the decision. It unilaterally pushed the issue back into State court, compelling Petitioner to respond to the State court action, the writ of assistance.

Petitioner exhausted all tribal remedies that were available to her. The Court may now analyze the jurisdiction and due process arguments.

III. THE TRIBAL COURT HAD JURISDICTION OVER THE PARTIES AND THE CASE.

Tribal orders are generally awarded either comity or full faith and credit.[44] The standard for which is applied, depends on whether ICWA is implicated in the case.[45] However, any court that exercises jurisdiction over any case must first show that it has both subject matter jurisdiction and personal jurisdiction.[46]

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[44] *Id.* at 56–57.
[45] *Id.* at 55.
[46] *Id.*

A. *The Tribal Court had subject matter jurisdiction over the child.*

Indian tribal courts have exclusive jurisdiction over certain cases.[47] However, both state courts and tribal courts have concurrent jurisdiction over custody cases of Indian children.[48] When an Indian child custody case arises between a state court and a tribal court, the state court must defer to the tribal court when 1) the matter is governed by native laws and 2) the tribal court has indicated its desire to rule on the matter.[49]

In determining whether the tribal court can assert jurisdiction, the Court must first determine whether the child is an Indian child. An Indian child is any child that is officially registered with the tribe in question, as a "member." The tribe has the "right to define its own membership for tribal purposes."[50]

Petitioner, from the beginning of this Court's involvement and continuing until now, has asserted that the Tribal Court never had subject matter jurisdiction because the Tribe wrongfully granted membership status to the child. Petitioner bases this claim on the Tribe's own laws compared to the fact that the mother, who left the tribe with the intent never to return, was divested of her membership status. In turn, her child would not be an Indian member, since the mother relinquished her membership prior to the child's birth. Nevertheless, the Tribe decided to grant membership to the child, notwithstanding the mother's purported non-membership status. The key issue in Petitioner's dispute is that this Court's analysis is not bound up in whether the Tribe *should have* granted the child membership, it is grounded upon whether the Tribe actually *did grant* membership.

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[47] 25 U.S.C. § 1911.
[48] *John*, 982 P.2d at 760.
[49] 25 CFR 23.110; 25 U.S.C. 1911(a).
[50] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

It is undisputed that the Tribe granted the child membership status. Because the child is a tribal member and the child's tribe asserted jurisdiction over this case, the Court found that the Tribe had subject matter jurisdiction to hear the case. This issue remains moot. It was decided by this Court months ago. Petitioner opted not to appeal this decision to the Alaska Supreme Court. *Res judicata* applies.

B. The Tribal Court's assertion of personal jurisdiction over the parties is established.

Like subject matter jurisdiction, a court cannot hear a case if it lacked personal jurisdiction.[51] Unlike subject matter jurisdiction, personal jurisdiction can be waived by the parties.[52] Petitioner never asserted that the Tribal Court lacked personal jurisdiction over her. That issue is waived.

IV. THE PROCESS EXECUTED BY THE TRIBAL COURT VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

Although tribal custody orders are awarded full faith and credit, state courts are not bound to blindly rubber stamp tribal orders.[53] Although full faith and credit is a high standard of deference, that deference is not "absolute."[54] Courts must first consider, if raised, whether the order's execution observed all parties' due process rights.[55] Individual, constitutional rights, under both the United States Constitution and the Alaska Constitution, are superior to sister court rulings.[56] Further, custody cases warrant heightened scrutiny over due process rights, especially

[51] *Starr*, 175 P.3d at 55.
[52] *Vanvelzor v. Vanvelzor*, 219 P.3d 184, 188 (Alaska 2009).
[53] *Starr*, 175 P.3d at 57.
[54] *Id.*
[55] *Id.*
[56] *Evans*, 65 P.3d at 60.

where those cases may ultimately terminate parental rights,[57] which implicates the "highest magnitude"[58] of due process.[59]

The Court must have lawful reason to deny registration of a tribal order. Courts cannot disregard a tribal order simply because it disagrees with the substantive outcome.[60] Likewise, courts cannot reject tribal orders because that court believes it is better situated to adjudicate the issue.[61] Courts may only refuse registration of tribal orders that are "constitutionally infirm."[62] An order that is executed in violation of due process is unconstitutional.[63]

Due process has four basic requirements.[64] The petitioner must have received "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[65] The petitioner must have a "full and fair opportunity to be heard before an impartial tribunal that conducted the proceedings in a regular fashion."[66] The Court addresses each below.

A. Petitioner's notice of the hearing was adequate.

Notice need not follow the state's procedural rules, but the notice must still be formally conformed to an official procedure.[67] Informal "word of mouth"[68] notice or "constructive notice"[69]

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[57] *Starr*, 175 P.3d at 58.
[58] *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991).
[59] Court understands that this case is not presently postured to terminate Eric Rustad's parental rights. Nevertheless, the Court recognizes that the Tribal Court's decision to vest custody with the maternal grandmother may be the pivotal legal step that may ultimately terminate his parental rights at a later adoption proceeding.
[60] *John*, 982 P.2d at 764.
[61] *Simmonds*, 329 P.3d at 1016.
[62] *Starr*, 175 P.3d at 56.
[63] *Id.*
[64] *Evans*, 65 P.3d at 60.
[65] *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352, 1356 (Alaska 1974) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950)).
[66] *Starr*, 175 P.3d at 56–57; *John*, 982 P.2d at 763; *Evans*, 65 P.3d at 60.
[67] *Starr*, 175 P.3d at 59.
[68] *Id.*
[69] *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983).

does not constitute proper notice even if the petitioner had "actual advance notice."[70] The tribal court must issue an official notice in order for the petitioner to be charged with notice that complies with due process.[71]

Petitioner argues that her due process right to notice was violated. Specifically, she asserts that the notice she received, which said there would be a "placement" hearing, did not properly apprise her that it was a "custody" hearing. Petitioner testified that she believed the hearing was ordered to discuss how visitation was progressing, not whether the child would be removed from her home.

The Court disagrees. The notice unequivocally stated that the hearing's purpose was to determine the child's placement. The Court understands how "placement" could be confusing as to whether the custody was a temporary order or a permanent order, but it clearly involved custody and said nothing of visitation. The order appeared to be in proper form and had the Tribal Court's case caption at the top. The form and information in the notice would have reasonably apprised petitioner that the hearing concerned with whom the child would be living.

The Court does find that issuance by the Tribe's attorney is concerning. The notice, though it looks like a standard court order, was signed by the Tribe's attorney the opposing party. Conflating the judiciary with the opponent raises concerns. Nevertheless, the Court finds that this issue, alone, does not warrant refusing the registration.

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[70] *Id.*
[71] *Evans*, 65 P.3d at 60.

Even where there is a due process violation, there is a narrow avenue in which the tribal order may still be registered. If there is evidence beyond a reasonable doubt that the error was harmless, the order should still be awarded full faith and credit.

There is no evidence here that Petitioner's notice was inadequate because the Tribe's attorney signed the order. The order's format complied with a typical order. There was no concern that this notice was "from" the Tribal Court, despite the fact that the opposing party signed it. The time, date, place, and subject of the hearing were clear. Petitioner never objected or asserted any harm stemming from confusion about what the process would be or whether the Tribal Court had scheduled the hearing. It appears that this notice, though improperly endorsed by the opponent, not the Tribal Court, was harmless error. There was no confusion about the hearing or what the rules of that hearing would be, based on the fact that the Tribe's attorney signed it. This fact more likely raises concerns of the Tribe's improper role of influence in and upon the Tribal Court. The notice still reasonably apprises Petitioner of everything she needed to know to advocate her position.

B. Petitioner did not have a full and fair opportunity to be heard.

Although none of the six Alaska cases mentioning a "full and fair opportunity to be heard" actually define this term, this issue is clear on its face. There is a reasonable presumption that "full and fair" would entail the opportunity to present evidence and witnesses, beyond the parties' own, uncorroborated testimony. However, the Court does not have to presume anything, because the Tribal Court's order said that Petitioner would be allowed to present evidence and her own witnesses. At the hearing before this Court, the Tribe's attorney, on cross-examination, represented that the Tribal Court specifically asked Petitioner if she had any evidence or documents. Later, the Court asked all parties to provide a citation as to when this occurred. None of the parties provided

a citation, because it did not happen. Instead, the Tribe's attorney and the maternal grandmother's attorney argue that Petitioner should have interjected during the Court's proceeding to present witnesses.

The Court disagrees for two reasons. First, the chief judge began the hearing by telling the parties that no one but the parties and family members were allowed on the call. The chief judge followed that statement with instructions as to how the Tribal Court would proceed. The chief judge did not say that there would be a time for party-called witnesses or party-presented evidence. Second, one time, Petitioner tried to testify about the maternal grandmother's visitation. The Tribal Administrator immediately stopped her and told her that she was only permitted to answer the question asked. This shows that Petitioner was not permitted to deviate from the Tribal Court's structure. Even if she had interjected with witnesses or evidence when she was not asked, it reasonably appears that she would have been cut off just as she was the first time she tried to interject additional testimony.

Also, the queries by the chief judge asking if there were any other witnesses or person who would like to address the Tribal Court, seemed to only address the persons on the call. Those persons were permitted to independently address the Court with their own topics. These invitations did not appear to permit parties to call outside witnesses, especially in light of the chief judge's opening comments about how the call was restricted to family and interested parties only.

The maternal grandmother's attorney asserted a secondary argument. He argued that Petitioner was not denied due process because the process allowed to her was the same as the process allowed to the maternal grandmother. However, the standard for due process is not whether both parties were equally prevented a full and fair opportunity to be heard, it is whether any party was prevented.

This evidence-lacking procedure showed its shortcomings when a tribal judge commented off the record, but on the recording. The judge asked how the court was supposed to know whether Petitioner was being truthful about her efforts to reach out to the maternal grandmother, which could have easily been proven by documentary evidence—showing the text messages. Despite this, the Tribal Court still failed to avail either party an opportunity to present her own evidence or her own witnesses.

C. *Petitioner has sufficiently proven that the Tribal Court appears to be tainted with partiality.*

Due process requires that the adjudicating tribunal be impartial.[72] If a sister court's order was rendered by a partial tribunal, the Court should not enforce or register that order,[73] because impartiality is a "basic ingredient" of due process.[74] A tribunal's failure to impartially try a case "is in itself a constitutional injury."[75] Judges are tasked with a duty to recuse themselves when their "impartiality might reasonably be questioned, even if no actual bias exists."[76] Nevertheless, finding partiality is a high standard.[77]

The Court cannot refuse registration of a tribal order "simply because [it] disagrees with the outcome"[78] or because it believes it is better suited to try the case.[79] Petitioner's discontentment with the Tribal Court's order does not permit state courts to dissect the order and retry the case.[80] Instead, Petitioner bears the burden of proving that the tribunal was partial.[81] Upon that showing,

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[72] *Id.*
[73] *Starr*, 175 P.3d at 57.
[74] *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982).
[75] *RBG Bush Planes, LLC v. Kirk*, 340 P.3d 1056, 1066 (Alaska 2015).
[76] AS 22.20.020(a)(9).
[77] *See generally, Dennis O. v. Stephanie O.*, 393 P.3d 401, 411 (Alaska 2017); *Griswold v. Homer Advisory Plan. Comm'n*, 484 P.3d 120, 129–30 (Alaska 2021); *Liteky v. United States*, 510 U.S. 540, 555 (1994).)
[78] *Simmonds*, 329 P.3d at 1016.
[79] *John*, 982 P.2d at 763.
[80] *Id.* at 764.
[81] *Starr*, 175 P.3d at 56.

the burden shifts.[82] The Court will refuse to register the order, unless the violation was only harmless error, beyond a reasonable doubt.[83] Otherwise, a due process violation invalidates the order and is not subject to full faith and credit.[84]

A tribunal may take several actions that do not deem it partial.[85] Judges may make comments during trial that do not necessarily implicate partiality.[86] Such comments include those that are "critical," "disapproving of," or "hostile" toward a party, as such comments may reasonably be an impartial judge's reaction to evidence presented.[87] Also, a judge may begin to form opinions while listening to evidence.[88] Further, "expressions of impatience, dissatisfaction, annoyance and even anger" can be emitted by an impartial judge.[89] A partiality finding requires more than reasonably expected emotional reactions to evidence.[90] Contrarily, comments that imply a "strong" emotion toward a party likely imply partiality.[91]

A tribunal must make its decision based on evidence "properly and necessarily acquired in the course of the proceedings."[92] Partiality may exist by improper outside influence on the tribunal or "extrajudicial" information that sways the tribunal.[93] If the tribunal shows "a high degree of favoritism or antagonism" the tribunal can be found to be partial.[94] However, the existence or nonexistence of "extrajudicial source[s]" is only a factor in determining impartiality.[95] A court

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[82] *Simmonds*, 329 P.3d at 1005.
[83] *Id.*
[84] *Starr*, 175 P.3d at 57.
[85] *Griswold*, 484 P.3d at 130.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 129.
[89] *Kingery v. Barrett*, 249 P.3d 275, 286 n.43 (Alaska 2011).
[90] *Dennis O.*, 393 P.3d at 411.
[91] *Hanson v. Hanson*, 36 P.3d 1181, 1185 (Alaska 2001) (internal quotation omitted).
[92] *Griswold*, 484 P.3d at 130 (internal quotation omitted).
[93] *Liteky*, 510 U.S. at 555.
[94] *Id.*
[95] *Id.* at 554–55.

may be found to be impartial in the presence of an extrajudicial source, but likewise can be found partial in the absence of an extrajudicial source.[96]

Partiality may exist when a judge possesses a preconceived outcome before all evidence has been presented.[97] Logically, it also infers that a judge who passes judgment upon parties before the evidence is heard must have been influenced by an extrajudicial source. Such judgments cannot be read in harmony with due process's requirement of an impartial tribunal.

The Tribal Court failed to reasonably appear impartial. There are factors that somewhat imply favoritism for the maternal grandmother, but did not, on their own, meet the bar of proving partiality. However, the comment by the tribal judge alone sufficiently shows that the Tribal Court was tainted by at least a measure of partiality.

There are several issues Petitioner raises that did not quite meet the burden here, but contribute to the theory behind the judge's comment. Petitioner alleged 1) that the maternal grandmother has a domestic violence conviction that the Tribal Court failed to consider, 2) that the maternal grandmother had no home studies performed, 3) that the maternal grandmother was completely unaware and incapable of administering life-saving care for the child's acute asthma needs, 4) that the grandmother could not provide any of the school or extracurricular activities the child currently enjoys, and 5) that the maternal grandmother could not provide for the child since she has no income. Petitioner asserts that the Tribal Court must have been biased because it awarded custody to the maternal grandmother, after a two-hour hearing, despite the seeming disparity between hers and the maternal grandmother's abilities to provide care. Nevertheless, the Court is not privileged to review the substance of the decision, for the sake of finding whether it

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[96] *Id.*
[97] *Hanson*, 36 P.3d at 1185.

agreed with the Tribal Court. This Court can only review whether the tribunal was impartial, regardless of the ultimate decision made. These assertions alone failed to meet that high standard.

Also, Petitioner argues that the grandmother's testimony before this Court, that the Tribal Court was formed to "help her" retrieve the child, shows bias. While this statement was concerning, there still could be a reasonable explanation, perhaps, due to her misunderstanding the question. The Tribal Administrator was called to the stand next and stated that the Tribal Court routinely convenes for any matter that arises in Selawik, even though the Tribal Court does not exist in perpetuity. She explained that the Tribal Court's forming for the maternal grandmother was similar to other instances in which, the Tribal Court formed to resolve a dispute, not to advocate for a party.

Notwithstanding, all of Petitioner's complaints were summarily evidenced by the concrete statement by the tribal judge. The tribal judge's comment rises to the threshold of partiality, verifying Petitioner's complaint, for two reasons. First, the word choice betrays her. Second, the timing and comments immediately following the comment show consciousness of guilt.

A. The specific words the tribal judge used indicate partiality.

The word choice is interesting at best; condemning at worst. The Court ordered a separate briefing so that both parties would have a full opportunity to address this comment. None of the parties contested that the Court misheard the comment and misconstrued the judge to be saying anything different than what the Court heard on the recording. "We need to remove [redacted] from Nikki; be faithful to grandma. That's our final word."

The judge's use of plural pronouns is telling. She used "we" and "our." The two opposing parties argued that even if this judge had biases, that it is of no consequence, since she was only one of five judges. The Court disagrees. If one judge affirmatively appears partial, the trial was

not before an impartial tribunal, as that judge is part of the tribunal. Even so, the judge the Court believes to be speaking (based on the sound of her voice when she identified herself at other times during the hearing) was the judge who signed the order. It may be that she had sufficient sway over the other judges to override any who may have opposed her, especially since she *told* the other judges this is what "we" must do, and this *is* "our" final word.

The use of "final word" eliminates the Tribe's arguments that this was just a "judicial leaning." Surely, judges begin to form opinions as they are hearing the evidence. But the very fiber of justice in any system is the requirement that a judge be capable of executing impartiality and openness toward both sides until the evidence has concluded. The Tribe argues that the judge was merely expressing her thoughts on the evidence thus far and was commenting on her leanings based on the evidence. The Court disagrees. The judge could not have been more clear on her standing than to say that it is the Tribal Court's "*final* word."

The Tribe and the maternal grandmother's attorney also argue that if this were error, it was harmless since nearly all of the evidence had been heard. Again, the Court disagrees. There is no supporting law that says a judge may disregard any admissible evidence and make decisions part-way through the trial. Even if there were, the evidence that followed was highly relevant to the child's interest, some of which, had not been previously addressed. Specifically, the witnesses discussed who had contributed to the child's needs, the child's health needs, the child's education, and the physical fitness of both caregivers. These were not mere closing comments, this was highly probative evidence. Ruling on the case before considering this evidence is not harmless error.

"Faithful" strongly indicates extrajudicial influence. The grievous circumstances of this case are not unnoticed by the Court. The Native Village of Selawik is a small tribe of which the maternal grandmother has, apparently, continued to be a faithful member. The death of the child's

mother was truly tragic. In fact, mere weeks elapsed between the Tribal Court's ruling and the child's father's sentencing for the murder of the child's mother. The maternal grandmother herself testified that the Tribal Court was formed "to help" her retrieve custody of the child. The Court understands how any member of Selawik would feel obligated to support a local member during such a heart-breaking time. Nevertheless, it cannot allow those feelings to favor her over the other party in a judicial ruling.

The Native Village of Selawik is a sovereign nation deserving the respect to govern its people, but not at the cost of denying due process. The word "faithful" bears tremendous weight and meaning. A judge should never be "faithful" to anything but the law, certainly never to a party. The notion that the judge felt compelled to *tell* her co-judges to be "faithful" to a party cannot be harmonized with due process afforded by the Constitution.

B. The tribal judge's conduct immediately following her statement supports the evidence of partiality.

The conduct that followed the judge's statement further supported the partiality concern. First, the tribal judge acknowledged that she knew there was more evidence to be heard. Second, she expressed concern when she realized her comment was being recorded.

Right after the tribal judge made this comment, she said they would be hearing from at least two more witnesses after they reconvened.[98] The tribal judge did not misunderstand the posture of the hearing. This assertion of her stance on the case was not a mistake about whether the trial was over. She knew there would be more evidence and unequivocally stated what the outcome would be. Specifically, she noted that she knew they would be hearing from the maternal

[98] Recorded Hearing in the Selawik Tribal Court, *In re* [redacted], No. NBSJ-21-001, at 01:51:00–01:51:17, (Dec. 16, 2022).

grandmother's sister, and the child's great-grandmother. Actually, the Tribal Court ended up hearing from six witnesses after that comment. Nevertheless, the tribal judge stated the court's "final" position, despite the fact that she knew they would hear from at least two more witnesses.

The Tribal Court was "off the record" that was considered to be part of the official trial, but the recording device was still running. A few seconds later, the judge concernedly questioned whether they were "on mute."[99] In today's technological world, this is a common occurrence. The tribal judge was not the first and certainly will not be the last to inadvertently disclose matters intended to be private, because someone forgot to mute the microphone. This statement shows further that the judge was concerned that her words were being heard and portrays consciousness of guilt. This parallels the showing that this was not a mistake, it was an unequivocal premature ruling, preconceived before the evidence was presented, and inadvertently recorded.

All other arguments raised by Petitioner can be reasonably explained in keeping with an impartial court. However, this statement by the tribal judge, alone, shows a clear premature judgment without considering the evidence to come. This statement affirms the concerns that Petitioner raised.

D. *The procedure generally followed by the Tribal Court complied with the "regular fashion" that due process requires.*

Compliance with due process requires that there be some form of organized procedure.[100] Whatever the procedure is, the proceeding in the instant case must actually be carried out in the "regular fashion" of the court's procedure.[101] In deciding whether the procedure complies with due process, the Court should "strive to respect the cultural difference" that formulates tribal court

[99] *Id.* at 01:51:30–01:51:35.
[100] *Simmonds*, 329 P.3d at 1016.
[101] *Evans*, 65 P.3d at 60.

rules.[102] Tribal procedure need not be "identical" to state procedure.[103] Court's should view due process's court procedure as "flexible"[104] and should only reject affirmation of a sister court jurisdiction's procedure where it deprives litigants of the "essential" elements of due process.[105]

There is nothing in the tribal court's procedure that deprives litigants of due process, aside from the separate issue of no opportunity to present evidence or witnesses. Petitioner argues that the way the tribal court conducted trial was patently unfair. The Court disagrees. The five-minute limitation on opening and closing statements was a reasonable limitation that does not violate due process rights. The Court laid out its structure at the beginning and followed that procedure. The Tribal Court's allowing any person to address the Tribal Court in a semi-public forum fashion instead of through party-examination does not run afoul of due process either.

E. Petitioner's claim that her due process rights were violated when her attorney was not permitted to address the Tribal Court is a moot point.

Due process requires that a party be permitted to be "meaningfully represented by counsel."[106] However, Alaska case law has not squarely addressed this issue. In *Simmonds*, the Supreme Court considered a claim that is analogous to the present case.[107] There, the petitioner was permitted to have an attorney, to speak to her attorney during the hearing, and to take advice from her attorney during the hearing.[108] However, the attorney was not allowed to address the Tribal Court and neither the petitioner nor his attorney objected on the record.[109] The parties disputed whether they were given proper notice that the attorney would not be permitted to address

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[102] *Simmonds*, 329 P.3d at 1016.
[103] *John*, 982 P.2d at 763.
[104] *Simmonds*, 329 P.3d at 1016.
[105] *City of N. Pole v. Zabek*, 934 P.2d 1292, 1297 (Alaska 1997).
[106] *Simmonds*, 329 P.3d at 1005 (internal quotations omitted).
[107] *Id.*
[108] *Id.* at 1003.
[109] *Id.* at 1002.

the court.[110] Nevertheless, the attorney was allowed to submit written arguments to the tribal court.[111] The Alaska Supreme Court did not affirmatively answer whether this violated due process.[112] Instead, the issue was precluded by the petitioner's failure to exhaust tribal remedies.[113] Since the petitioner was given proper notice of his tribal remedy and did not utilize it, the Supreme Court did not fully resolve this issue.[114]

Here, Petitioner's attorney was not permitted to address the Tribal Court. The parties did not discuss whether or when notice of this rule was given, neither did they discuss whether Petitioner's attorney could have addressed the Tribal Court on brief. Nevertheless, this issue need not be addressed since the partiality of the Tribal Court alone violated due process. Further development of the record is unnecessary since this one violation of due process is sufficiently shown to have prejudiced Petitioner. Like the Alaska Supreme Court in *Simmonds*, this Court need not address the representation issue.

CONCLUSION

The tribal judge's comment is a concrete, articulated showing of partiality, that necessarily deprived Petitioner of due process. The implication of the comment is that the maternal grandmother was destined to prevail. Nothing in the facts or arguments by any party show that the comment can mean anything else. Further, no party has shown beyond a reasonable doubt that the judge's preconceived ruling was harmless error. Also, the Tribal Court did not allow the parties an opportunity to present evidence and witnesses. Through both of these actions, the Tribal Court denied Petitioner's due process right to a "full and fair opportunity to be heard before an impartial

[110] *Id.* at 1002–03.
[111] *Id.* at 1005.
[112] *Id.* at 1005–07.
[113] *Id.* at 1014.
[114] *Id.* at 1014–15.

tribunal." The Court cannot award full faith and credit to this order and DENIES the Tribe's motions to register the order and for a writ of assistance.

Petitioner filed a motion to "dismiss" the Tribe's motions. The proper disposition of the Tribe's motions is to grant or deny them, not to dismiss them. Therefore, the petitioner's requests to "dismiss" the Tribe's motions are improper and hereby DENIED.

Motion 12: Motion to Register Tribal Order is **DENIED.**

Motion 13: Motion for Writ of Assistance and Expedited Enforcement is **DENIED.**

Motion 14: Motion to Dismiss is **DENIED.**

IT IS SO ORDERED.

DATED this 10th day of February, 2023, at Fairbanks, Alaska.

EARL A. PETERSON
Superior Court Judge

I certify that on 2/10/2023 copies of this form were sent to: Clerk: AP

Wallori
Fletcher / Davis
Hansen