IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Marriage of:

Kenneth Jo Thomas,

Petitioner,

and

Sheryl Rae Lightfoot

Respondent.

Court File No. 778-13

MEMORANDUM OPINION AND ORDER

Introduction.

In this marriage dissolution proceeding, there is, to say the least, considerable complexity overlaying the stresses that virtually always accompany matters of this sort.

There is jurisdictional complexity: the parties were married on the Shakopee Reservation, pursuant to a license issued by this Court pursuant to the Shakopee Mdewakanton Sioux Community's Domestic Relations Code. The Petitioner is a member of the Shakopee Mdewakanton Sioux Community, the Respondent is a member of the Keweenaw Bay Indian Community, and the parties' two children, who are of Chinese ancestry, are not members of any Indian tribe and are not eligible to be members of any Indian tribe.

There are substantial questions with respect to residence: Petitioner asserts that the parties are residents of the Shakopee Mdewakanton Sioux Reservation; but Respondent is, and for the past four years has been, employed as a college professor in British Columbia, and the parties' children live with her.

There are judicial proceedings in multiple jurisdictions: before the Petitioner began the proceedings in this Court the Respondent had initiated litigation in the courts of British Columbia, asking that jurisdiction to dissolve the parties' marriage. The British Columbia court has ordered the Petitioner to pay temporary child support and temporary maintenance. And, after this Court's proceedings began, the Respondent filed an action in the United States District Court for the District of Minnesota seeking injunctive relief to stay or end this Court's involvement in the matter.

To date, the District Court has declined to grant such relief, and therefore this Court today has before it two motions: the Respondent's motion to dismiss for lack of subject matter and personal jurisdiction, and the Petitioner's motion for temporary relief.

In her motion to dismiss, and in her response to the Petitioner's motion for temporary relief, the Respondent argues that there are two reasons why this Court cannot exercise jurisdiction over her, over her marriage, and over the parties' children:. First, she asserts that a section of a federal statute, 28 U.S.C. §1360 (2012) ("Public Law 280") requires any laws adopted by the Shakopee Mdewakanton Sioux Community to be precisely the same as the laws of the State of Minnesota; and she argues that because the Shakopee Mdewakanton Sioux Community's Domestic Relations Code ("the Code") differs in many ways from various of Minnesota' domestic relations laws, the Code's provisions, or at least the diverging portions of the Code, are void, of no effect, and can give this Court no subject matter jurisdiction over the Respondent, or her children, or her

marriage. Second, she asserts that another federal statute, the Indian Child Welfare Act, 25 U.S.C. §§ 1901 – 1963 (2012), operates to deprive the Court of jurisdiction over the parties' children because the children are not tribal members and are not eligible to become members of any federally recognized Indian tribe.

Those are the only two arguments that the Respondent submitted in her brief supporting dismissal. But, during oral argument on the dismissal motion, Respondent's counsel raised a third argument. He suggested that, under the reasoning of an opinion that the Solicitor of the United States Department of the Interior rendered in 1938, the Shakopee Mdewakanton Sioux Community actually has no inherent sovereign powers whatever – that the Community can function as a government only if, and only to the extent that, it has received, and properly is exercising, powers that have been delegated to it by the United States government.

In the Court's view, for the reasons discussed in detail below, none of these three arguments has any force. But, as noted above, there clearly are vitally important questions relating to the Court's jurisdiction – albeit questions that the Respondent has not raised – and those questions will require further proceedings, as is detailed at the conclusion of this opinion.

1. The Respondent's contentions with respect to the effect of the 1938 Opinion of the Solicitor of the United States Department of the Interior concerning the powers of "created" tribes.

The argument that Respondent's counsel made to the Court for the first time during oral argument on December 10, 2013, was as follows:

> MR. KAARDAL: ... if you're not a historical tribe, then you don't have, according to the Solicitor General's opinion, historical powers. And therefore the only powers that Shakopee has in the Constitution are delegated by [the United States Department of the] Interior. And so when we view the [Community's] Constitution from that vantage

> point, that the Shakopee Constitution only has the powers delegated by Interior, this whole notion, the notion of Shakopee exercising sovereign powers and then the government approving it, the federal government approving it, that's not quite what's going on. What's going on is the federal government is ensuring the powers are that delegated are used in a lawful way.
>
> Transcript of December 10, 2013 hearing, at 19, lines 7 – 20.

This argument – that a federally recognized Indian tribe's inherent jurisdiction and powers, its sovereign status, might be different than other tribes' depending upon such things as whether one tribe's members' ancestors did not originally occupy the territory where the tribe's reservation now is located, or upon whether one tribe's present-day membership might consist of persons who are descended from ancestors who were members of different tribes – was put to rest by the United States Congress decades ago. But, given the fact that the argument has emerged here, the history of the issue should be set forth in some detail.

The so-called "historic tribe" question first arose after the passage, in 1934, of the Indian Reorganization Act, 25 U.S.C. 0§461 – 479 (2012) ("the IRA"). In 1936, the Office of the Interior Department's Solicitor was asked by the United States Commissioner of Indian Affairs whether tribal constitutions proposed, under section 16 of the IRA, 25 U.S.C. §476 (1934), for two tribes –the Lower Sioux Indian Community and the Prairie Island Indian Community in Minnesota – could properly give the governments of those Communities the powers to condemn property, to regulate inheritance, and to levy taxes on Community members. The Solicitor responded in the negative, saying –

> Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian

> Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.
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> *Sioux – Elections on Constitutions*, 1 Op. Sol. On Indian Affairs 618 (U.S.D.I. 1979).

Two years later, the Interior Department's Solicitor reiterated and affirmed those views in *Powers of Indian Group Organized Under IRA But Not As Historical Tribe,* 1 Op. Sol. On Indian Affairs 813 (U.S.D.I. 1979).

But whatever effect the Solicitor's views might have had on the manner in which the United States Department of the Interior and its agencies dealt with Indian tribes following the two opinions' issuance, those views are legal nullities now: the opinions have been intentionally and explicitly repudiated by the United States Congress.

On May 14, 1994, in response to their having been informed of some effects, or potential effects of the Interior Department's having drawn distinctions between "historic tribes" and "tribes organized on the basis of their residence upon reserved lands", two United States Senators. John McCain and Daniel Inouye, introduced legislation to amend the Indian Reorganization Act.

The two Senators' discussion, on the Senate floor of the amendment's purposes and the reasons that prompted them to introduce it, are instructive. Senator McCain began:

> Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government.
>
> 140 Cong. Rec. S6146 (May 14, 1994).

He continued –

> ...all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.
>
> Id.

He noted instances where, he had been informed, the Interior Department had used "historic" and "created" classifications for tribes, and he said –

> ...our amendment to Section 16 of the IRA is intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify or implement the categories or classifications.
>
> Id, at S6147.

And he condemned the Interior Department's classification of tribes based upon history, the explicit intent of the amendment in question being to prohibit –

> ...the Secretary [of Interior] or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law.
>
> Id.

Senator Inouye then agreed, noting that Indian tribes stand on an "equal footing" with one another and with the Federal government –

> That is, each federally recognized Indian tribe has the same governmental status as other federally recognized tribes with a government-to-government relationship with the United States.
>
> Id.

The legislation that the Senators introduced on May 14 1994 was adopted, as written, and now appears at 25 U.S.C. §§476(f) and 476(g) (2012), which provide:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations.**
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 [the Indian Reorganization Act] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
>
> **(g) Privileges and immunities of Indian tribes; existing regulations.**
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1934, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

In short, there is nothing in federal law, or in tribal law, that supports a suggestion that the Shakopee Mdewakanton Sioux Community, or any other Indian tribe similarly situated, lacks the inherent sovereign authority to adopt positive law, or that the Community in any way depends, for the power to legislate, upon some delegation from the United States government.

2. <u>The Respondent's contentions with respect to Public Law 280.</u>

The Respondent also argues that Public Law 280, 28 U.S.C. §1360 (2012), limits any exercise of the legislative authority of the Shakopee Community – the limits being set by the civil laws of the State of Minnesota as those laws may change from time to time. The argument is that, if the Shakopee Community does have any legislative power at all, the exercise of that power can in no way deviate

from Minnesota's law, whatever that law may be and however it may change. But the Respondent's argument has no sounder basis in law or in history than does the "historic tribe versus created tribe" argument discussed above.

Any discussion of Public Law 280 in this context must begin with the unanimous decision of the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 393 (1976). As it considered the legislative history and the Congressional intent that underlay Public Law 280, the Supreme Court said:

> Piecing together as best we can the sparse legislative history of [the portions of Public Law 280 relating to civil law, the section] seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State
>
> > "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in ... Indian country ... to the same extent that such State ... has jurisdiction over other civil causes of action."
>
> With this as the primary focus of §4(a), the wording that follows in §4(a) –
>
> > And those civil laws of such State ... that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State"
>
> -- authorizes application by the state courts of their rules of decision to decide such disputes [footnote omitted] Cf. 28 U.S.C. §1652. This construction finds support in the "consistent and uncontradicted references in the legislative history to "permitting" "*State courts to adjudicate* civil controversies" arising on Indian reservations, H. R. Rep. No. 848, pp. 5,6 (emphasis added), **and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.**
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> 416 U.S., at 383-4 (emphasis supplied).

In other words, the Court concluded that Public Law 280 simply authorized the courts of the State of Minnesota to hear and decide civil cases that may arise on the Shakopee Reservation, and to apply the State's law to those cases, but that nothing in Public Law 280 in any way was intended to limit the powers of tribal governments. So, when the Shakopee Community's General Council adopted the Code on May 23, 1995, and in doing so stated that the Community "has the inherent sovereign power to regulate the domestic relations of its members,,. [and] to ... enable them to use their own Tribal forum for resolution of domestic relations issues", the Community was exercising exactly the regulatory function that the Court contemplated when it decided Bryan.

At least one United States District Court has agreed with precisely that analysis (and the Court is aware of no case where any court has ruled to the contrary). In Miodowski v. Miodowski, 2006 WL 3454797 (D. Neb. 2006), the United States District Court for the District of Nebraska considered two cases arising from a divorce degree entered by the tribal court of the Ponca Tribe of Nebraska. Indian tribes in Nebraska are subject to Public Law 280, and both cases before the District Court involved a marriage between a Ponca member and a non-Indian. Prior to the filing of the two cases, the Ponca member had sought and obtained a marriage dissolution order from the Ponca Tribal Court. After that decree had been issued, the non-Indian commenced divorce proceedings in a Nebraska state court, contending that Public Law 280 deprived the Ponca Tribe and its court of any power to terminate her marriage. The Ponca member removed that Nebraska state proceeding to the United States District Court; and thereafter the Ponca Tribe itself filed an original action in the District Court seeking a declaratory judgment that the attempted collateral attack on the tribal court's judgment in state court caused the Tribe irreparable harm.

Resolving the fundamental question relating to the effect of Public Law 280, the District Court said this:

> Short [the non-Indian party] argues that [Public Law 280] divests a tribe of civil jurisdiction in Nebraska unless the tribe has reached an agreement with the State of Nebraska pursuant to 25 U.S.C. §1323 to retrocede jurisdiction back to the tribe. She asks this court to find that the Tribe was without subject matter jurisdiction to enter the divorce decree under [Public Law 280] and remand the case to Douglas County District Court. Short argues that Congress withdrew sovereignty by enacting [Public Law 280], and no retrocession has occurred with the State of Nebraska and the Ponca Tribe. Therefore, she argues, the Tribe has no jurisdiction to hear divorce cases.
>
> Miodowski [the tribal member] contends that [Public Law 280] arguably does not even apply to the Ponca Tribe of Nebraska. However, even if it does, Miodowski argues in the alternative that [Public Law 280] merely grants concurrent jurisdiction and does not deprive the Ponca Tribe of jurisdiction over its civil suits. Miodowski contends that [Public Law 280] does not limit tribal jurisdiction. *See e.g. Walker v. Rushing, 898 F.2d 672, 675* (8th Cir. 1990) ("Nothing in the wording of Public Law 280 ... or its legislative history precludes concurrent tribal authority"). As stated by Felix Cohen:
>
> > The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor of the Department of the Interior, and legal scholars is that Public Law 280 ... left the inherent civil and criminal jurisdiction of Indian nations untouched. This conclusion flows naturally from the Indian law canons of construction, which establish that federal statutes should not be interpreted to remove tribal governmental powers unless the statutes expressly so provide. Public Law 280 ... did not specifically extinguish any tribal court jurisdiction, and the legislative history reflects no such congressional intent.
>
> Felix Cohen, Cohen's Handbook of Federal Indian Law §7.02(1)(c) (2005 edition).
>
> The court finds the Ponca Tribe had jurisdiction over the parties' divorce case. ...The court agrees with Miodowski that [Public Law 280] creates

> concurrent jurisdiction with the Tribe and a state. If a state chooses to "retrocede" jurisdiction, the Tribe alone would then have jurisdiction over the case. Finally, the Ponca Tribe in this case clearly has established a constitution and internal laws for divorce and marriage.
>
> 2006 WL 3454797, at 3.

As with Ponca, so here: the Shakopee Community has the power under its Constitution to adopt a domestic relations code; the Community has exercised that power by enacting the Code; and the Community properly has given this Court the authority to interpret and apply the Code.

As will be discussed below, the Code which the Respondent asks this Court to nullify may dictate that this matter must be dismissed. But if that proves to be true, the dismissal will result because the Code requires it, not because any artificial reading of Public Law 280 vitiates the Community's power to regulate domestic relations in a manner different than is done by the State of Minnesota[1].

(In passing it can be observed that if the Respondent's arguments with respect to Public Law 280 were correct – if all provisions of the Community's Code that diverge from Minnesota law were to be found legally void – then there likely would be no marriage between the parties for any court to dissolve, because the parties' marriage license was issued by the Clerk of this Court and their marriage was solemnized on the Shakopee Reservation under Section 4 of Chapter I of the Code, a section that certainly does not track or incorporate the marriage licensing and solemnizing requirements of Minnesota law.)

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[1] One aspect of the law that the Court will apply, should the Court conclude that it does have subject matter and personal jurisdiction here, is not clear from the face of the Code. The Shakopee Community has not adopted, as positive law, the Uniform Child Custody Jurisdiction and Enforcement Act ("the Uniform Act"). But, as the Court made clear to the parties during the December 10, 2013 oral argument, the Court has in the past, and will here again, apply the Uniform Act's substance and procedures, should it ultimately decide that this matter should not be dismissed. The Uniform Act's procedures and strictures provide a humane, clear, and sensible approach to the vitally important question of child custody, and it is well within the Court's discretion to adopt and utilize those procedures and strictures here.

3. The Respondent's arguments with respect to the Indian Child Welfare Act.

Before discussing the provisions of the Code that may lead the Court to conclude that it does not have jurisdiction here – arguments not discussed by the Respondent's pleadings or motions – the Court must deal, briefly, with the third argument that the Respondent has made. The Respondent asserts that the Indian Child Welfare Act, 25 U.S.C. §§ 1901 – 1963 (2012) ("ICWA") creates a federal mandate that somehow forbids this Court from exercising jurisdiction over the parties' children, because neither child is an "Indian Child" as ICWA defines that term.

The parties agree that neither of their children is a member of an Indian tribe, and that neither is eligible to be a tribal member; so it clearly is true neither is an "Indian child" under ICWA's definition of that term,25 U.S.C. §1903(4) (2012).). It also is true, as the Respondent says, that ICWA expressly does not apply to any child custody determinations made in the context of a divorce, 25 U.S.C. §1903(1) (2012). But those agreed truths – that ICWA has no effect, one way or another, on any child that is not an "Indian child", and that ICWA does not touch the subject of child custody in marriage dissolutions – mean that the statute has nothing to say, expressly or by implication, about the situation that is before the Court.

ICWA is simply is silent about a marriage dissolution proceeding pending in a tribal court where the custody of children of a tribal member is at issue. That silence exists whether the children are tribal members, or may be eligible to be tribal members, or will never be tribal members. So ICWA mandates nothing here:

it brings nothing, one way or the other, to any of the jurisdictional questions that are before this Court.

4. This Court's jurisdiction under the provisions of the Shakopee Mdewakanton Sioux Community's Domestic Relations Code.

Notwithstanding everything that has been said above, there are jurisdictional questions before the Court that appear to be substantial – not because of Public Law 280, not because of ICWA, and not because of questions relating to the "historic" nature of the Shakopee Community, but because of what appears to the Court to follow from clear language in the Code that the Community has adopted.

Three provisions of the Code seem to bear on the question of whether this Court can exercise jurisdiction here. The first is a broad statement set forth in Section 1 of the Introduction to the Code:

> **Section 1.** ***Purpose.***
>
> The Shakopee Mdewakanton Sioux (Dakota) Community has the inherent sovereign power to regulate the domestic relations of its members. No more important power is exercised by Indian Tribes than the power to protect and govern the domestic relations of their members. The purpose of this Code is to inform Shakopee Mdewakanton Sioux (Dakota) Community members of that inherent sovereign authority and enable them to use their own Tribal forum for resolution of domestic relations issues.

The second is a statement in the Code with respect to the specific manner in which that broadly stated regulatory power will be exercised in the context of marriage. Section 1 of Chapter I of the Code (Marriage), in its entirety, says:

> **Section 1.** ***Jurisdiction***
>
> The Shakopee Mdewakanton Sioux (Dakota) Community shall have jurisdiction over all marriages licensed and performed on its Reservation or on any allotted or tribally purchased lands or any public domain lands

designated for Tribal use. The Community shall have original jurisdiction over the domestic relations of its members. **All persons must be residents of the Community as defined by Community law.**

(Emphasis supplied).

The third is the specific statement in the Code pertaining to the Community's jurisdiction over proceedings to dissolve a marriage. Section 1 of Chapter III (Divorce) says:

Section 1. ***Residency requirement.***

The Shakopee Mdewakanton Sioux (Dakota Community shall have **jurisdiction over all persons who have resided on its Reservation** or on any allotted or tribally purchased lands, or any public domain land designated for Tribal use, **for at least 90 days prior to commencing any action** for the dissolution of a marriage before the Courts of the Shakopee Mdewakanton Sioux (Dakota) Community.

(Emphasis supplied).

The Court takes the emphasized references to residence in Chapter III, section 1 – and to a lesser extent, in Chapter I, section 1 – to mean that the Shakopee Community has decided to limit the reach of its jurisdiction over marriage and divorce to persons who reside within the Community. So, at least absent a non-resident party's consent, the Court does not have jurisdiction, in a marriage dissolution proceeding, over a person who is not a resident of the Community.

During oral argument on December 10, 2013, the Court questioned the Petitioner's counsel closely on this point. He responded by arguing that the 90-day reference in Section 1, Chapter III of the Code could be read to mean that the requirement would be satisfied if a person had lived on the Community's Reservation for ninety days at any earlier time. But to the Court this just is not credible: if the Community's intent, when it adopted the Code, were to create

marriage dissolution jurisdiction by virtue of any ninety-day stay on the Shakopee Reservation, however long ago that stay might have been, the Court believes that the Community would have made that intent abundantly clear. Rather, Section 1 of Chapter III of the Code appears to be state a proposition that is common in marriage dissolution law throughout the United States: if a party seeks to invoke the jurisdiction of a government to dissolve the party's marriage, the party must have established residence in the jurisdiction for some defined period immediately before filing the dissolution proceeding.

What is not so universal is the phrase "all persons" in Section 1, Chapter III. It may be argued that the phrase was intended to mean "all petitioners", and not "all parties" – during oral argument the Petitioner's counsel urged the Court to read it that way, and to apply the doctrine of International Shoe Company v. State of Washington, 326 U.S. 310 (1945) to the non-resident spouse. Under the International Shoe case, a state and a state court may exercise jurisdiction over a party if the party has "minimum contacts" with the state. And here, because one of the parties' homes is on the Shakopee Reservation, and because it is undisputed that the Respondent and the parties' children at least have visited that home for periods – though the duration of the visits seems to be disputed – the Respondent and the children may well have had "minimum contacts" with the Reservation. But, whatever might be the application of the International Shoe doctrine to the general jurisdictional reach of Indian tribal governments, the Code does not speak to "minimum contacts". It speaks to residents, and to residence, and it says "all persons", and the Court does not believe that it can ignore those words.

In his Petition, the Petitioner asserts that he, and the Respondent, and the parties' children actually are residents of the Shakopee Reservation, notwithstanding the fact that the Respondent and the children have lived for most

of the last four years in Vancouver, British Columbia, where the Respondent teaches at British Columbia University. The Respondent vigorously, and with very considerable documentary support, denies that she has been a resident of the Shakopee Reservation since long before the parties and their children went to Canada. And each party, in their briefing on the Respondent's motion to dismiss, provided the Court with affidavits attaching quantities of documentary materials: drivers licenses, rental contracts, receipts for the children's summer camps, letters from University administrators, airline travel records, photographs, statements of family friends and professional colleagues, and many other forms of possibly probative materials were filed and have been reviewed by the Court.

Among those materials, the Petitioner emphasizes the fact that, for all the years of their marriage, the parties apparently have signed and filed joint tax returns, both with the United States government and with the State of Minnesota, claiming that the Shakopee Reservation home was their principal residence – and the Petitioner asserts that those returns were not only signed by the Respondent but also were prepared by her. On the other hand, among a large collection of materials, some of which appear to strongly support the conclusion that the Respondent is a resident of British Columbia, the Respondent has furnished the Court with a letter, dated August 25, 2013, addressed to the Canada Revenue Agency and apparently signed by the Petitioner, saying, *inter alia*:

> I currently live at the above address [on the Shakopee Reservation] in the United States. **The children reside with their mother at 4520 Woodgreen Dr. West Vancouver BC V7S 2V1.**
>
> Sheryl R. Lightfoot is entitled to claim both daughters as her dependents on her Canadian Income Tax and Benefit Return.
>
> Affidavit of Sheryl Rae Lightfoot in Response to Motion of Kenneth Jo Thomas

> in Support of Motion Regarding Jurisdiction and Temporary Relief, ¶63.D. and Exhibit MM (emphasis supplied).

Given all this, the Court concludes that it must hold an evidentiary hearing to ascertain the legal residence of the Respondent. Our Rules of Civil Procedure in many ways parallel the Federal Rules of Civil Procedure, and although we are not bound to apply our Rules in exactly the same manner as the Federal Courts apply their Rules, we can and do consider the approach that Federal Courts use in deciding issues that are similar to issues that we confront. *See generally,* Prescott v. SMS(D)C Business Council, 2 Shak. T.C. 104 (Feb. 6, 1996).

Under the Federal Rules, if the Court is confronted with a factual dispute that bears upon its subject matter jurisdiction under Rule 12(b)(1) and/or its personal jurisdiction under Federal Rule 12(b)(2), the District Court has considerable discretion in determining how and when to resolve the dispute. As the United States Court of Appeals for the Second Circuit observed many years ago when it was reviewing a District Court's decision on a factual dispute involving a party's residence where federal jurisdiction depended upon diversity –

> Critical to its resolution is the proper approach to the conflicting factual claims that ordinarily arise when lack of personal jurisdiction is asserted. Fed.R.Civ.P. 12(d) grants a district court judge broad discretion in such cases to hear and decide the motion before trial or to defer the matter until trial. The district court may conduct such a hearing based solely upon papers or by a proceeding in which evidence is taken.
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> CutCo Industries v. Naughton, 806 F.2d 361, 363 (2nd Cir. 1986).

This Court's Rule 12(c) parallels Federal Rule 12(d), and I conclude that we also have the discretion either to defer resolution of factual questions relating to personal and subject matter jurisdiction at trial, or to resolve them earlier. And,

given the clear need that the parties here have for a definite answer to those questions – given the possibility of multiple trials in multiple jurisdictions that the parties may confront – I think it is this Court's duty is to hear testimony, to receive and weigh all relevant evidence pertaining to the Respondent's residence, and to render a decision, as soon as possible.

Consequently, the Clerk of Court will contact the parties' counsel to arrange a telephone conference with the Court, the purpose of which will be to discuss and schedule an evidentiary hearing on the question of the Court's personal jurisdiction over the Respondent. Because the Respondent likely will be in British Columbia, it may well be that the hearing will be conducted using electronic aids; but, although that may create logistical difficulties, the difficulties should not, in the Court's view, be insurmountable[2].

For the foregoing reasons, **IT IS ORDERED:**

1. That both the Respondent's motion to dismiss and the Petitioner's motion for temporary relief will be taken under advisement until the Court rules on its personal jurisdiction over the Respondent; and
2. The Court will hear testimony and receive evidence concerning the residence of the Respondent as soon as is reasonably practicable.

Dated: December 23, 2013

John E. Jacobson, Chief Judge
Court of the Shakopee
Mdewakanton Sioux Community

[2] In the process of scheduling, the Court intends to seek to confer both with the Court in British Columbia that has the parties before it and with the United States District Court for the District of Minnesota, in order that each forum is apprised of, and updated with respect to, the manner in which each of the three pending cases is proceeding.