IN THE UNITED STATES DISTRIC COURT FOR THE DISTRICT OF WESTERN WASHINGTON

GEORGE JONES (Father)
c/o Law Offices of O. Yale Lewis III, LLC
1511 3rd Ave., Ste. 1001
Seattle, WA 98101

On Behalf of MJ, Minor Child
Petitioner,

v.
Lummi Tribal Court and Hon. Mary Cardozo
Respondent,

and

Jackie Jones (Mother)
Respondent.

No: 2:12-cv-1761-JLR-BAT

MEMORANDUM OF LAW RESPONSIVE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

The Order to Show Cause fails to appreciate the difference between jurisdiction and the merits. Jurisdiction, of course, refers to a court's authority to hear a particular matter. Merits, as used in this memorandum, refer to whether the decision by a court of competent jurisdiction is based on the facts and the law. The issue here is jurisdiction, not the merits.

Petitioner stipulates that this court lacks jurisdiction to adjudicate the merits. However, this court clearly has jurisdiction to adjudicate jurisdiction. Such jurisdiction should be exercised immediately because the four-year-old child has been separated from her primary custodial parent for about a month.

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II. STATEMENT OF THE ISSUES

1. **Whether this Court Has Jurisdiction to Hear a *Habeas Corpus* Challenge to Tribal Court Jurisdiction.**

2. **Whether the Authority Cited by the Order to Show Cause Addresses *Habeas Corpus* Relief Where Tribal Court Asserts Jurisdiction Over a Non-member Child, Non-member Parents, and Non-Domiciliaries Not Found on the Reservation.**

3. **Whether Petitioner Is Required to Exhaust Tribal Court Remedies Before Seeking *Habeas* Relief in Federal Court.**

III. ARGUMENT AND AUTHORITY

1. **This Court Has Jurisdiction to Hear a *Habeas Corpus* Challenge to Tribal Court Jurisdiction.**

Habeas corpus relief is available in federal district court to challenge tribal court jurisdiction over a child custody dispute in the 9th Circuit. *United States v. Cobell*, 503 F.2d 790, 795 (9th Cir. 1974) ("We therefore conclude that the Tribal Court lacked jurisdiction to determine the custody of the Cobell children and that the court's order restraining the children was unlawful. The writ of *habeas corpus* was properly granted."). In *Cobell*, the tribal court lacked jurisdiction over the children, even though the parents were enrolled tribal members and the children were living temporarily on the Reservation, because the parents and children were domiciled within the state, off the reservation, and were getting divorced in state court.

Here, the jurisdictional facts point even further away from tribal court jurisdiction. Neither the parents nor the child nor the aunt are tribal members. The child was not living on the Reservation and never *had* lived on the Reservation.

Habeas relief from an invalid tribal court order is also available in the USDC in Eastern District of Washington. In *Detention of TJ*, docket No. 2:09-cv-3111, the father kidnapped the child and took her to the Yakima Reservation. The father then obtained a custody order from the Tribal Court. The mother filed a petition for writ of *habeas corpus*. The USDC acted almost instantaneously, instructing the Tribal Court to appear and state the basis for its jurisdiction over the child.

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Instead, the tribal court vacated its own order. The mother then filed the writ in state court. The sheriff obtained custody of the child the next day and returned the child to the custody of her mother. *See* Decl. of Counsel.

Here, the jurisdictional facts point even further away from tribal court jurisdiction. There, the father was a non-member but living on the Reservation. Here, the mother is a non-member, not living on the Reservation. There, the party who took the child was the father, who had a Constitutional right to make decisions regarding the care and custody of the child. Here, the party who took the child is the aunt, who has no such Constitutional right.

Habeas corpus relief is also available per the Indian Civil Rights Act to determine the appropriateness of a tribal court's exercise of jurisdiction over a child custody dispute in the 8th Circuit. *DeMent v. Ogalala Sioux Tribal Court*, 874 F.2d 510, 515 (8th Cir. 1989). In *Dement,* the father filed for *habeas corpus* relief in district court, alleging that the tribal court illegally took custody of the children by making them wards of the tribal court. *Id.* at 512. Thus, the issue at the heart of the dispute was not child custody. Rather, it was whether the tribal court violated the due process rights of a non-member who did not live on the Reservation. *Id.* The federal district court had jurisdiction over that dispute.

Here, the father is also alleging that the tribal court took custody of his child illegally. The issue is not which parent or non-parent is the proper custodian of the child. The issue is whether the tribal court has jurisdiction to make that determination in the first place.

2. The Authority Cited by the Order to Show Cause Does Not Address *Habeas Corpus* Relief Where Tribal Court Asserts Jurisdiction Over a Non-member Child, Non-member parents, and Non-Domiciliaries Not Found on the Reservation.

The order to show cause cites four cases for the proposition that *habeas corpus relief* is not available to review child custody decisions. However, the petition at bar is not about a child custody decision *per se*. Rather, it is about jurisdiction to render such a decision. None of the cases cited in the Order to Show Cause address the issue of tribal court jurisdiction in the first instance.

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Weatherwax on Behalf of Carlson. In *Weatherwax*, the Petitioners were "simply challenging the propriety and wisdom of an Indian tribal court decision in a child custody dispute." *Weatherwax on Behalf of Carlson v. Fairbanks*, 619 F. supp. 294, 296 (D. Mont. 1985). Here, the Petitioner is not challenging the propriety and wisdom. Rather, he is challenging jurisdiction.

Lehman v. Lycoming. In *Lehman*, the mother filed her petition as a collateral attack on a state court custody decree. *Lehman by Lehman v. Lycoming County*, 458 U.S. 502, 508 (1982). The court held that such an attack represented a profound interference with the state judicial system and finality of state decisions. *Id.* at 516. Thus, it affirmed the denial of the petition for the writ.

Here, the issues are quite different. First, this is not a collateral attack on the merits of the custody decree. Rather, it is an attack on the tribal court's jurisdiction to make a decision on the merits in the first place. Second, the federalism concerns in *Lehman* are not present here. *Lehman* was concerned about the Constitutional balance of power between the states and the federal government. This case is about non-tribal members who were erroneously haled into tribal court. It has nothing to do with states' rights.

In fact, the federalism concerns cited in *Lehman* point away from tribal court jurisdiction. The Constitution embodies a grand compromise between the rights of the states and those of the United States. States have always had jurisdiction over the children within their jurisdiction. The United States has always had jurisdiction over Indian tribes.

By granting the writ, this court would restore that Constitutional balance. The Order to Show Cause has it exactly backwards. *Lehman* supports this court's jurisdiction over this Petition.

Lebeau v. Dakota. *Lebeau* cites the following proposition as black letter law: "A *habeas* action can be brought against a tribal court if it has acted outside its jurisdiction." *LaBeau v. Dakota,* 815 F. Supp. 1074, 1077 (W.D.Mich. 1993). The tribal court had jurisdiction over the

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Petitioner in *LaBeau* because, even though she and her grandchildren were non-members, she consented to tribal court jurisdiction. *Id.* She only brought the petition after she got an outcome she did not like. *Id.*

Here, the Petitioner is a non-member and he does not consent to tribal court jurisdiction. The child, of course, is too young to consent. *Lebeau*, like *Lehman*, points towards this court's jurisdiction over this Petition.

Sandman v. Dakota. *Sandman* was a foster-care case. *Sandman v. Dakota*, 816 F.Supp 448, 449 (W.D.Mich., 1992). The Petitioner did not dispute that the tribal court had exclusive jurisdiction over child custody matters involving the children. *Id.* at 450. Therefore, jurisdiction was not at issue.

Here, Petitioner *is* challenging the tribal court's jurisdiction.

3. Petitioner Is *Not* Required to Exhaust Tribal Remedies Before Seeking *Habeas* Relief in Federal Court.

Exhaustion of tribal court remedies is not required if the assertion of tribal jurisdiction is motivated by a desire to harass, is conducted in bad faith, patently violative of express jurisdictional prohibitions, or futile because of lack of opportunity to challenge the court's jurisdiction. *Dement v. Oglala Sioux Tribal Court*, 874 F.2d 510, 516 (8th Cir. 1989).

Here, the assertion of jurisdiction is patently violative of express jurisdictional prohibitions. Lummi Tribal Court has jurisdiction over the following categories of defendants:

1) Tribal members, 2) Domiciliaries on trust land, 3) Consenting adult non-members, 4) Concurrent with the state of Washington: Children domiciled on trust land for at least six months before the commencement of the action, [see UCCJEA and PL 280], and 5) Temporary emergency jurisdiction over anyone present on the Reservation disturbing the peace.

Here, the child does not fit into any of these categories. She is a non-member, not domiciled on the Reservation, and not even living temporarily on the Reservation. Therefore, Lummi Tribal Court does not have jurisdiction over her.

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The Muckleshoot Tribal Court recently applied fundamental principles of jurisdiction and federal Indian law to determine that it did not have jurisdiction over a child custody dispute analogous to the one at bar. *In Custody of MB and MB*, the mother was a tribal member and the father was a non-member. *Custody of MB and MB, Muckleshoot Tribal Court*, MUC-CiJ-8/12-129 & MUC-CiJ-08/12-130. The children were non-members, domiciled off the Reservation. The court found that it lacked jurisdiction.

> [T]he Court finds that neither child is enrolled, or eligible for enrollment or adoption by the Muckleshoot Indian Tribe. Neither child is a resident of the Muckleshoot Tribe's reservation. Due to their ages, the children do not have the capacity to consent to the jurisdiction of the Court. Therefore, the Court does not have personal jurisdiction over the children.

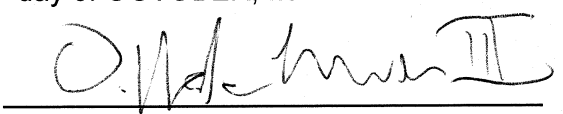
See Decl. of Counsel.

Here, the jurisdictional facts point even further away from tribal jurisdiction. There, the mother was a tribal member. Here, she is not. Not a single party here, including the child, is a tribal member. Lummi Tribal Court is bound by the same law as Muckleshoot. When it fails to follow these laws, it opens itself up to *habeas corpus* review by federal district court.

IV. CONCLUSION

While the Indian Civil Rights Act does not provide *habeas* relief to challenge the merits of a tribal court child custody decision, it *does* provide *habeas* relief to challenge the tribal court's assertion of jurisdiction over such a dispute. Here, the tribal court has no jurisdiction over the child because she is a non-member, non-domiciliary, and not found on the Reservation. This court should follow the example of its sister court in Eastern Washington and hold an emergency hearing on the petition for writ of *habeas corpus*.

DATED in SEATTLE, this **12th** day of OCTOBER, 2012



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