

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

---

UNITED STATES OF AMERICA,

CR 11-50073

Plaintiff,

vs.

FRANCISCO LOPEZ,

Defendant.

---

DEFENDANT'S OBJECTIONS TO  
MAGISTRATE COURT'S REPORT  
AND RECOMMENDATION FOR  
DISPOSITION OF DEFENDANT'S  
MOTION TO DISMISS

Defendant, Francisco Lopez, by and through his attorney, Assistant Federal Public Defender Gary G. Colbath, Jr., pursuant to 28 U.S.C. § 636(b)(1)(C), makes the following objections to the Magistrate Court's Report and Recommendation on Lopez's motion to dismiss issued by the Magistrate Judge on July 10, 2012. Lopez requests that this Court make its own, de novo, determination of the issues presented within the findings and recommendations. *Hudson v. Gammon*, 46 F.3d 785 (8th Cir. 1995).

**BACKGROUND**

The Defendant was indicted for failure to pay legal child support, 18 U.S.C. § 228(a)(3), on July 6, 2011. (CR 1). He filed a motion to dismiss and a supporting legal memorandum on February 27, 2012. (CR 28-29). The government filed its objection to defendant's motion to dismiss, arguing the state support judgment cures all ills of the invalid tribal adoption proceedings.

The Magistrate issued an order on June 6, 2012, ordering both parties to further brief the issues at hand. (CR 45). The Magistrate's Report and Recommendation was handed down on

July 10, 2012. (CR 48). Subsequently, the Magistrate Court rejected defendant's jurisdictional arguments in their entirety and did not rule on the collateral attack issue. Defendant objects to the Magistrate's recommendation denying his motion to dismiss based upon lack of Tribal personal jurisdiction and the inapplicability of the doctrine of comity.

# **1. FACTS**

Defendant respectfully asserts the facts outlined in his Supplemental Memorandum of Law in Support of Motion to Dismiss, (Doc 29), more accurately reflect the facts necessary to disposition of Lopez's motion to dismiss and are fully supported by the record and discovery in this matter. To the extent the Magistrate's statement of facts differs from that supplied by defendant, the defendant specifically objects to the Magistrate's finding of fact on page 3 of her Report and Recommendation which states that the defendant asserts David Martin is the biological father and the government denies that the biological father was ever proven. At a minimum, this is inconsistent with the government's initial response and the Magistrate's order for further briefing. On page 1 of the government's objection to the defendant's motion to dismiss it states, "The child in question in the child support order, J.R.L. was born on (DOB redacted), to his biological parents, Carla T. Kocer and David Martin." (Doc. 36). The Magistrate issued her supplemental order based, in part, on this admission by the government. Afterward, with the defense having no opportunity to file a reply to the order for supplemental briefing, the government switched its position and now claims that the biological father is unknown and was never proven. The initial admission carries great weight on the underlying adoption proceedings as the defendant has been provided with no documentation through discovery, nor could the defendant find any documentation or notice given to Mr. Martin

concerning the termination of his parental rights in the underlying adoption proceeding. In the alternative, even if Mr. Martin's paternity is refuted, the defense maintains that the biological father's parental rights (no matter what his identity is) were never terminated. The same rationale applies to both Mr. Martin and any father unknown at the time.

## **2. PERSONAL JURISDICTION IS LACKING**

The Magistrate correctly recognizes that whether a Tribal court has adjudicative power over a non-tribal member is a federal question. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 324 (2008) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); and *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985)). "If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." *Plains Commerce Bank*, 554 U.S. at 324. (Emphasis added). Furthermore, the Magistrate acknowledges the accuracy of the defendant's position that a collateral attack on personal jurisdiction in a Deadbeat Parents Punishment Act prosecution is permissible. *United States v. Bigford*, 365 F.3d 859 (10th Cir. 2004); *United States v. Kramer*, 225 F.3d 847 (7th Cir. 2000).

However, defendant respectfully disagrees with the Magistrate's interpretation of the Oglala Sioux Tribal Code on this issue. The Oglala Sioux Tribal Code contains specific and detailed provisions governing how its courts obtain jurisdiction over non-members like defendant. Generally, Chapter 1, Section 1, of the code deals with "Jurisdiction over Persons." It provides:

The Oglala Sioux Tribal Court of the Pine Ridge Reservation shall have jurisdiction over all offenses when committed by a member of the Tribe, by non-member Indians who are members of any recognized Tribe under Federal jurisdiction, or by any other person consenting to jurisdiction, as hereinafter provided.

Section 1.1 of the OST code deals with “Consent to Jurisdiction over all Individuals.” It provides:

(a) All leases, permits, easements, or other official actions which authorize the residence of any person within the boundaries of the Pine Ridge Reservation or which authorize any person to do any business within the boundaries of the Pine Ridge Reservation, including all employment contracts with the Tribe or the United States, shall contain the following clause: "The undersigned hereby agrees to abide by the laws and ordinances of the Oglala Sioux Tribe and consents to the civil jurisdiction of the Oglala Sioux Tribal Courts.”

(b) All leases, permits, or other contracts or grant agreements which authorize any person, including but not limited to, the Oglala Sioux Tribe and the United States, to employ employees for the performance of work within the boundaries of the Pine Ridge Reservation shall contain the following clause: “All contracts for employment to perform the work contemplated by this agreement shall contain the following clause: ‘The undersigned employee hereby agrees to obey the laws and ordinances of the Oglala Sioux Tribe and consents to the civil jurisdiction of the Oglala Sioux Tribal Court.’”

Further, jurisdiction over adoption of an Indian child is covered by Chapter 5, sub-chapter 8, Section 8.01, of the OST code. Section 8.01 provides:

The Oglala Sioux Tribal Court shall have jurisdiction in any adoption proceeding involving an Indian child or adoptive Indian parent whose domicile or actual residence is within the original exterior boundaries or upon trust land of the Pine Ridge Indian Reservation or who is a member of the Oglala Sioux Tribe and maintains sufficient contacts therewith, or which is brought under the jurisdiction of this Court by the Indian Child Welfare Act.

Of paramount significance here, the Tribal Code has an explicit provision against the very type of adoption at issue in this case: **“There shall be no adoption of Oglala Sioux Indian children by non-Indians.”** OST Juvenile Code, § 8.04. (emphasis added).

The Magistrate’s Report and Recommendation stresses the fact that the defendant did not contest the adoption in regard to the adoptive mother, Francine. The adoption by Francine is not at issue in this case. The facts of the case are that Francine and defendant were not married. They were two unique, different individuals each seeking to legally adopt the child as the child’s legal guardians and new parents. Such an act would give each of them individual rights and potentially individual obligations. Under the jurisdictional and adoption provisions of the Oglala Sioux Tribe, Francine’s adoption would have been legal only if the biological father’s parental rights were properly terminated. But regardless, the propriety of her adoption of the child is not at issue. Whether that adoption is valid or not does nothing to affect, good or bad, the support obligation alleged imposed on defendant arising from his adoption of the child.

The Magistrate further notes that section 8.01 of the OST Code specifies that it relates to “any adoption proceeding involving an Indian child or adoptive Indian parent.” The Magistrate concludes the statute “does not require that the child *and* both parents be “Indian.” (Doc. 48, p 11). The Magistrate’s analysis goes on further to state that the defendant ignores the fact that Francine was presumably an Indian.

The defendant maintains the fact Francine was an Indian is not dispositive on this issue. It has no significance that one of J.R.L.’s adoptive parents was an Indian other than to permit her

as an individual to adopt J.R.L. The statute does not say parents, plural, nor does it expressly allow for adoptions by parents of mixed heritage. Rather, section 8.01 merely provides authority over “any adoption proceeding involving an Indian child or adoptive Indian parent.” That gave the Tribal court authority to consider the case, given it related to an Indian child, J.R.L. But this statute must be read in conjunction with the principal dictate of section 8.04 of the OST Code mandating that, “There shall be no adoption of Oglala Sioux Indian children by non-Indians.” Defendant, Francisco Lopez, who is a non-Indian, could not lawfully adopt J.R.L. regardless of whether the Tribal court had authority over the proceeding. It also made no difference whether the other petitioner, Francine, was Indian. She was unrelated to defendant who was clearly identified on the petition as a Mexican person, born in Mexico. Section 8.01 confers jurisdiction only over Indian children and/or an Indian parent, not over non-Indians attempting to adopt Indian children. In a case like this where the petitioner (defendant here) is non-Indian and not a member of the Oglala Sioux Tribe, the Tribe has specifically prohibited adoption of an Indian child. The statute does not read at least one Indian parent. It can only be read to require that each and any adoptive parent be Indian.

Next, the record is clear that the defendant did not sign any agreement to consent to the jurisdiction of the Oglala Sioux Tribe. The general appearance made by the defendant does not constitute consent to jurisdiction under the OST Code. A valid, written waiver must be signed in accordance with Oglala Sioux Tribal policy to consent to jurisdiction of the OST courts. There is explicit language in § 8.01 construing jurisdiction over “an Indian child or adoptive Indian

parent.” Mr. Lopez does not fall into either category. Based upon the aforementioned code provisions, personal jurisdiction is lacking over the defendant to enable his adoption of J.R.L. in Tribal Court proceedings. The government could produce no evidence to establish that defendant ever signed anything submitting to Tribal Court jurisdiction or that the Tribal Court provisions were followed in any respect to bring defendant within its jurisdiction.

The OST Juvenile Code establishes original jurisdiction over any adoption proceedings that take place on Oglala Sioux Tribal lands by Indians. Again, since defendant is not Indian nor adopted into the tribe, his adoption of J.R.L. is null and void and cannot stand. The language of the OST Code § 8.04 could not be more clear and unambiguous. The Tribal Court did not have jurisdiction over Mr. Lopez nor the authority to award him custody of a minor Indian child.

The defendant also respectfully disagrees with the Magistrate’s claim on page 12 of the Report and Recommendation that, “Mr. Lopez has failed to show that the provisions of the OST Code preclude the exercise of jurisdiction over him.” The OST Code does not preclude the exercise of jurisdiction over the defendant. However, there are procedures in place, clearly set forth above, that outline how the Tribe gains jurisdiction over a non-Indian. Those procedures were not followed in this instance. There was no consent by defendant to jurisdiction in accordance with Tribal Code and policies in this case.

As the defendant notes above, in instances of personal jurisdiction, a collateral attack is warranted and this is a federal question. *See Bigford and Kramer, supra*. In this case, the underlying adoption that gives rise to a support obligation is null and void. Therefore,

defendant's collateral attack should be sustained and the defendant requests that the indictment alleging a violation of 18 U.S.C. § 228 be dismissed with prejudice.

**3. THE DOCTRINE OF COMITY DOES NOT APPLY**

The Magistrate ultimately disposed of the defendant's motion to dismiss by stating that the doctrine of comity requires that the defendant exercise all Tribal remedies before the Federal Courts may decide this issue. On page 9 of its Report and Recommendation, the Magistrate states, "concerns of comity require that the tribal court be allowed to address the question of whether it has jurisdiction first, before a federal court passes upon the question. *See LaPlante*, 480 U.S. at 15; *National Farmers Union*, 471 U.S. at 857." Defendant asserts that the cases relied on by the Magistrate miss the mark on a personal jurisdiction question. Both *LaPlante* and *National Farmers Union* deal with subject matter jurisdiction questions exclusively. There is no decision or even mention of or issues raised concerning personal jurisdiction in those cases. *Plains Commerce Bank* gives this court power to adjudicate this federal question.

The aforementioned cases dealing solely with subject matter jurisdiction are not applicable in this attack on personal jurisdiction. The law is clear that there shall be no collateral attack on the subject matter of the underlying support order. However, an attack on personal jurisdiction is permissible as a collateral matter which wholly distinguishes the *LaPlante* and *National Farmers Union* decisions.

In addition, the Magistrate does not address the key footnote in *LaPlante* which takes key comity analysis from the *National Farmers Union* decision. Quoting footnote 12:



In *National Farmers Union*, we indicated that exhaustion would not be required where “an assertion of tribal jurisdiction ‘is motivated by a desire to harass or is conducted in bad faith,’ or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction.” 471 U.S., at 856, n. 21 (citation omitted).

*LaPlante*, 480 U.S. at 19 (emphasis added).

Should the court find the subject matter jurisdiction analysis applies to personal jurisdiction, the Defendant asserts that exhaustion in this instance is still not required. The Supreme Court indicated that exhaustion is not required when “the action is patently violative of express jurisdictional prohibitions.” *Id.* It is clear from the record and the arguments above that the Oglala Sioux Tribe has clear jurisdictional provisions which were not followed in this case and that jurisdiction over a non-Indian such as defendant was expressly prohibited absent compliance. Moreover, since the Oglala Sioux Tribe continues to have no jurisdiction over defendant, he has no tribal remedies to exhaust. Without actually going through the steps to consent to the Tribe’s jurisdiction, it has no adjudicative authority over the defendant. The defendant has no desire to jump through the Tribal jurisdictional hoops and give the Tribe authority over him as he has federal remedies available to him in this Court. Because of this, the doctrine of comity does not apply in this case. This Court may rule on defendant’s motion and dismiss this case with prejudice. The issue is properly before the Court for decision.

**4. THE TRIBAL BURDEN UNDER *MONTANA v. UNITED STATES* WAS NOT MET**

The Magistrate recognized on page 9 of the Report and Recommendation, “Any attempt by an Indian tribe to exercise jurisdiction over a non-member is *presumptively invalid* and the burden is on the Tribe to establish the existence of the *Montana* exceptions.” *Plains Commerce Bank*, 554 U.S. at 330 (citing *Montana v. United States*, 450 U.S. 544, 565 (1981)) (emphasis added). The *Montana* exception the Magistrate notes that may give the Tribe jurisdiction is “Indian tribes may exercise civil jurisdiction over non-Indians on their reservations if the non-member enters into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” (Doc. 48, p 8).

The Tribal burden (or really government burden) in this case has not been met in regard to this exception. The Supreme Court placed the burden to establish jurisdiction exclusively on the tribes. As outlined above, the Oglala Sioux Tribe has the specific provisions to obtain jurisdiction. At a minimum, for the Tribe to overcome the presumption that jurisdiction is invalid, it must comply with the procedural safeguards enumerated in its own code. With those provisions having been seemingly ignored, the Tribal burden to establish jurisdiction under any *Montana* exception has not been overcome. The burden is not on the defendant to show that Tribal jurisdiction was not established under these exceptions. The burden is unequivocally placed on the Tribe to show that jurisdiction was established. The government, on behalf of the Tribe, however, made no attempt to meet its said burden.

**CONCLUSION**

Based on a lack of personal jurisdiction and countless deficiencies in the Tribal adoption proceeding, the state support order is null and void and prosecution of the defendant is unwarranted. For the foregoing reasons, Defendant Lopez urges the Court to reject the Magistrate's Report and Recommendations and dismiss his case with prejudice.

Dated 24th day of July, 2012.

Respectfully submitted,

NEIL FULTON  
Federal Public Defender  
By:

/s/ Gary G. Colbath, Jr.  
Gary G. Colbath, Jr., Assistant Federal Public Defender  
Attorney for Defendant  
Office of the Federal Public Defender  
Districts of South Dakota and North Dakota  
703 Main Street, Second Floor  
Rapid City, SD 57701  
Telephone: 605-343-5110; Facsimile: 605-343-1498  
filinguser\_SDND@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2012, a true and correct copy of the Defendant's Objections to Magistrate Court's Report and Recommendation for Disposition of Defendant's Motion to Dismiss was served upon the following person, by placing the same in the service indicated, postage prepaid, addressed as follows:

Sarah B. Collins	<input type="checkbox"/>	U.S. Mail
Assistant U.S. Attorney	<input type="checkbox"/>	Hand Delivery
United States Courthouse	<input type="checkbox"/>	Facsimile
515 Ninth Street	<input type="checkbox"/>	Federal Express
Rapid City, SD 57701	<input checked="" type="checkbox"/>	Electronic Case Filing

/s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr., Assistant Federal Public Defender