UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	))))))))))	Civ. 13-5020-JLV **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: DUE PROCESS**

INTRODUCTION

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971 (1904).

> State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.

Santosky v. Kramer, 455 U.S. 745, 771 (1982). It is very easy to second guess decisions made in real time, with limited information available. Plaintiffs' Second Motion for Partial Summary Judgment: Due Process Violations (Document 108) has done precisely that.

No one disagrees that basic requirements of due process are undoubtedly required at 48-hour hearings. "For all its consequences, 'due process' has never been, and perhaps can never be, precisely defined. 'Unlike some legal rules,' . . . due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances." *Lassiter v. Department of Social*

Serv's, 452 U.S. 18, 24 (1981) (citation omitted). "Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter*, 452 U.S. at 24-25. This is particularly difficult in domestic relations.

During the 48-hour hearings at issue in this suit, the State is trying to determine whether the intrusion into the family unit in order to protect the health and safety of a child due to allegations of child abuse and neglect should *continue*. The Supreme Court's decision in *Lassiter*, teaches that "the nature of the process due in parental rights termination proceedings turns on a balancing of the 'three distinct facts' specified in *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Id.* at754 (citing *Lassiter*, 452 U.S. 18 (1981)).

As in all child custody proceedings, the State has two interests during 48-hour hearings, "a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings . . . '[s]ince the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision' at the *fact finding* proceeding." *Id.* at 766 (citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (emphasis in original)). Thus, because both the parents and the State share an interest in an accurate and just decision in a temporary custody hearing, the critical inquiry under *Matthews* is twofold: (1) exactly what procedures are used, and (2) why those procedures are employed. These two critical inquiries remain in dispute.

Plaintiffs have no doubt painted a draconian picture of Defendants' 48-hour hearings. However, the record contradicts Plaintiffs' version. While the facts of the 48-hour hearing procedures are described in detail below, two particular claims by Plaintiffs must be highlighted.

First, Plaintiffs claim that during 48-hour hearings, indigent parents are never afforded a right to counsel. (Document 108, p. 10.) The transcripts reflect that in in every case in which a parent asked for court-appointed counsel, in response to Judge Davis' inquiry, one was appointed. In ninety-nine percent of 48-hour hearings, the parents appear *pro se*. *See generally* Declaration of Peter Beauchamp ("Beauchamp Decl.") Exhibit ("Ex.") 1. This is the parents' first appearance. Thus, Judge Davis has no opportunity to appoint counsel for indigent parents any *sooner* than the 48-hour hearing. Further, Judge Davis has stated that he "would grant a reasonable continuance for [the parent] to have time to talk with an attorney and appear back in court." Beauchamp Decl. Ex. 1, A10-404 4:6-9.

Judges cannot take testimony from unrepresented parents in 48-hour hearings without the parents waiving their right to remain silent, and right to consult with legal counsel, particularly when one or more of those parents may have criminal cases, some of which involve the incident that led to law enforcements' removal of the child(ren) from the parents' custody, pending against them. "State court judges cannot begin taking evidence against the interests of the parents and children, when they have not yet had the opportunity to consult with, or obtain legal counsel." Beauchamp Decl. Ex. 4, Judge Davis Resp. Inter. No. 12 (citing *In re People ex rel. South Dakota Dept. of Soc. Serv's*, 2004 SD 131, 691 N.W.2d 586.) However, Judge Davis has stated that if a parent requests an evidentiary hearing any time after the 48-hour hearing, he could consider an expedited hearing. *Id.* Plaintiffs' claim that indigent parents are "never afforded a right to counsel" is grossly misleading.

Second, Plaintiffs claim that Defendants have failed to provide parents with adequate notice of the allegations against them because they have only been providing parents at 48-hour hearings with ICWA affidavits since January of 2014. (Document 108, p. 17.) However, Plaintiffs know that the South Dakota Department of Social Services ("DSS") has had a written policy of providing parents at 48-hour hearings with copies of the ICWA affidavit submitted to the court by the DSS specialist who attends the 48-hour hearing. Affidavit of Robert L. Morris in Support of Defendants' Response to Plaintiffs' Motions for Partial Summary Judgment ("Morris Aff."), Exhibit ("Ex.") 23. Plaintiffs are also aware that the ICWA affidavit sets forth the factual basis for the trial court's temporary custody orders ("TCO's"), issued at the conclusion of the 48-hour hearing. Plaintiffs also know that this documentary evidence sets forth the "imminent danger" confronting the child(ren), and the "active efforts" pursued by the DSS specialist to avoid the breakup of the Indian family. Beauchamp Decl. Ex. 7. The ICWA affidavit is also part of the record the trial court considers before issuing a TCO. Morris Aff. Ex. 23.

Based on these representations, Plaintiffs have moved the Court to enter an order granting summary judgment for five separate claims for relief under the Due Process clause. Plaintiffs allege:

> (1) Defendants have failed to give parents adequate notice of the claims against them, the issues to be decided, and the State's burden of proof;
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> (2) Defendants have denied parent the opportunity to present evidence in their defense;
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> (3) Defendants have denied parents the opportunity to confront and cross examine adverse witnesses;
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> (4) Defendants have failed to provide indigent parents with the opportunity to be represented by appointed counsel; and
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> (5) Defendants have removed Indian children from their homes without basing their removal orders on evidence adduced in the hearing, and then subsequently

> issued written findings that bore no resemblance to the facts presented at the hearing.

(Document 108, pp. 7-8.) Contrary to Plaintiffs' assertions, these allegations are not summarily established by the record. As discussed below, the record reflects exactly the opposite.

Plaintiffs' Orwellian version of Defendants' 48-hour hearings is a fiction. Plaintiffs' injection of racial undertones into this case is a deliberate effort to poison the discussion. (Document 108, p. 19.) The facts are clear. Indigent parents cannot protect both their right to counsel, and their right to remain silence, in an evidentiary hearing that requires them to testify before they have had an opportunity to meet with an attorney. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Such is the case in 48-hour hearings. This is precisely what Defendants' procedures afford, a right to be heard *by counsel*.

Plaintiffs' procedure would establish a presumption against such a right. Accordingly, the Court should deny Plaintiffs' Motion for Summary Judgment Re: Due Process (Document 110) and allow further discovery on what procedures are actually used in Defendants' 48-hour hearings, and the reasons for them.

FACTUAL BACKGROUND

In most cases, the facts which precipitate a child's emergency removal or placement develop in the hours preceding a 48-hour hearing. *See generally* Beauchamp Decl. Exs. 1 and 7. If there is any way to avoid emergency removal or placement, law enforcement and DSS are trained to exhaust those alternatives before removal. Morris Aff. Ex. 1 and 23. If no alternative to emergency removal exist, the child(ren) is taken into custody by *law enforcement*, and placed in the custody of DSS. Morris Aff. Ex. 1 and 23.

The 48-hour hearing is conducted in order to determine whether that custody should continue. SDCL 26-7A-18. The 48-hour hearing is not a child custody proceeding under 25 U.S.C. § 1903(1), even though it may result in a child being placed in foster care on an emergency basis. Instead, it is an emergency custody proceeding under 25 U.S.C. § 1922. The state is not permitted to initiate child custody proceedings, as defined in § 1903(1), until at least ten days after the parents and appropriate tribe receive notice of such proceeding. 25 U.S.C. § 1912(a).

At 48-hour hearings involving Indian children, the state's attorney presents Judge Davis with a Petition for Temporary Custody ("PTC") and an ICWA affidavit from a DSS staff member outlining the basis for the child(ren)'s removal, including all exigent circumstances, and the staff members efforts to place the Indian child(ren) within ICWA's placement preferences. Beauchamp Decl. Ex. 7. The efforts made by DSS specialists to exhaust alternatives to emergency removal are also set out in the ICWA affidavit.

The DSS staff member who attends the hearing provides the ICWA affidavit to the parents who attend the hearing, pursuant to the written policy of DSS. Morris Aff. Ex. 23. The ICWA affidavit "provides critical information regarding the allegations against the parents, and are always cited in the PTC." (Document 108, p. 17.)

At the 48-hour hearing, the record before the state court judge consists of a Temporary Custody Petition, an ICWA Affidavit, and in some instances, a police report. Often parents do not attend the 48-hour hearing. Beauchamp Decl. Ex. 1, A10-404; A10-649; A10-544, A10-1010; A10-1012; A10-1035, A11-161; A11-1031; A11-1103; A12-65; A12-89; A12-565; A12-668; A12-791; A12-839; A12-902; A12-1022; A13-246; A13-677; A13-731; A13-738; A14-130. In ninety-nine percent of the cases where the parents appear at the 48-hour hearing, they appear

pro se. *See generally* Beauchamp Decl., Ex. 1. The 48-hour hearing is the first opportunity for the state court judge to appoint counsel for parents.

During the 48-hour hearing, Judge Davis will advise parents of their rights throughout child custody proceedings. That recitation is generally as follows:

> As you now know, there's been events regarding the children in your care, custody and control that have come to the attention of the state, then to the state's attorney's office, and come into this courtroom.
>
> There are a couple different ways to proceed here this morning. The purpose of this hearing is to advise you of the rights that you have and the whereabouts of the children.
>
> You have the right to be represented by an attorney at all stages of the proceedings against you. If you can't afford an attorney, one may be appointed for you if you qualify for the representation. Any money spent for court-appointed counsel is a bill or lien against any property that you own. The commissioners in Pennington County have a legal right and ability to foreclose or collect on that bill and get back money.
>
> The purpose of the 48-hour hearing is to generally to give you an overview of the situation as it stands. The children are in the custody of the Department of Social Services and there may or may not be a petition alleging abuse and neglect of the children filed. This is the first step. At this point in the proceedings, it's everyone's hopes that whatever issues caused the removal of the children are investigated, properly resolved and the family is reunited. That is our purpose here this morning.
>
> You can, if you wish, agree to voluntarily work with the Department of Social Services for a period of time, most often in the 60-day range, and see if the issues that are out there can be resolved and children returned any time within that period. That would be a voluntary situation on your part.
>
> If, at any time during the proceedings, you felt that things weren't going as you thought they should or something came up that didn't feel quite right to you, you certainly have the right to be represented by an attorney and to make that request to the Department of Social Services, the state's attorney's office or the court, and we back the bus up and kind of start over on the proceedings, appoint an attorney.
>
> In some instances, an A&N petition is filed immediately. That alleges that, by either direct action on your part or a failure to act, that the children have been exposed to some harm or danger. You're entitled to a full, formal hearing, an

> adjudicatory hearing, which is in the nature of the trial, which tests the allegations.
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> If the state proves the allegations in the petition, the matter would go on for what is called an adjudicatory hearing. The adjudicatory hearing is governed by statute and it goes to the ultimate care, custody and control of the children. That can include a reunification with the family, a reunification under supervised conditions, some sort of out-of-home placement or other supervised living situation, up to and including a termination of parental rights.
>
> So these are very serious matters. You want to make certain you're aware of your rights and that you exercise them as we move throughout the proceedings . . .

Beauchamp Decl. Ex. 1, A12-219. At the conclusion of this recitation, Judge Davis will ask if the parent(s) would like counsel appointed for them, if they understand their rights, and if they have any questions. *Id.*

Only once in the over 120 cases examined in this litigation did a parent appear at the 48-hour hearing with an attorney. Beauchamp Decl., Ex. 1, A12-302. In over ninety-nine percent of the cases, parents, guardians, and custodians appeared *pro se* at the 48-hour hearing. *See generally* Beauchamp Decl., Ex. 1. In the one case in which the parent appeared with an attorney, which was before Judge Thorstenson, the parent sought to present testimony at the 48-hour hearing. Beauchamp Decl., Ex. 1, A12-302. Judge Thorstenson denied the request but scheduled an evidentiary hearing to be held twelve days later. *Id.* In all other cases, the parents, guardians, and custodians were allowed to comment and ask questions of the court, but they never asked, and were never asked, to present evidence. *See generally* Beauchamp Decl. Ex. 1, and Morris Aff. Ex. 27.

The transcripts reflect that in many instances the child's tribal affiliation or custody status is not always immediately clear at the 48-hour hearing. Beauchamp Decl. Ex. 1, A12-749. Even when tribal affiliation is not in doubt, the tribes do not always immediately request that the case be transferred to the tribal court. Beauchamp Decl. Ex. 1, A10-270. In fact, the practice of

the Rosebud Sioux Tribe is to refuse transfer until there has been an adjudication that the Indian child is abused or neglected. Beauchamp Decl. Ex. 1, Case No. A12-468 at 14:6-11. If the tribe does not request transfer in exclusive jurisdiction cases, or the parents do not agree to transfer in concurrent jurisdiction cases, the trial court decides whether emergency custody should continue, based on the evidence provided.

Plaintiffs' counsel, Dana Hanna, on behalf of his tribal clients, frequently argues at the 48-hour hearing that if the parent is no longer intoxicated, no longer incarcerated, or no longer harboring suicidal ideations, then the imminent harm has passed, and the Indian child(ren) should be restored to their parent or guardian. *See* Beauchamp Decl, Ex. 1, A14-445, 11:5-16. These arguments are received and considered at the 48-hour hearing, but in most cases, this is not sufficient to surmount the trial court's finding regarding the need for continued emergency custody. *Id*., at 11:21-23 (Judge Davis stating, "I'm not certain that the exigent emergency or the situation involving the child is solved simply by [father's] release from jail.").

The ICWA affidavit, and not the PTC, provides the court with the factual basis for a state court's temporary custody order ("TCO"). Based on the ICWA affidavit and any other evidence provided to him, including representations made by parents, grandparents, or other attendees, if appropriate, Judge Davis issues a TCO which indicates that there is probable cause to find that the child(ren) are abused and neglected. Beauchamp Decl. Ex. 2. The TCO further provides that DSS is authorized to return full legal and physical custody of the child(ren) to the parents, guardian, or custodian if DSS concludes that no further *imminent* child protection issues remain. *Id.*

At the conclusion of the 48-hour hearing, the trial court schedules an advisory hearing. SDCL 26-7A-54. The scheduling of the advisory hearing varies by case. Based on the parties'

calendars, it can be convened as early as ten days after the 48-hour hearing. 25 U.S.C. § 1912(a). The advisory hearing initiates "child custody proceedings" as defined in 25 U.S.C. § 1903(1), and includes the entire panoply of procedural and substantive rights required by ICWA. At the conclusion of the advisory hearing, the adjudicatory hearing is scheduled.

Similar to the advisory hearing, the scheduling of the adjudicatory hearing, SDCL 26-7A-82, varies based on the parties' calendar. In Judge Davis's Memorandum of Law in Support of Defendants' Motion to Dismiss, Judge Davis represented that the adjudicatory hearing is "usually held 30 days after the 48-hour hearing, but never longer than 90 days," except in rare circumstances. (Document 34, p. 4.) However, this is incorrect. After reviewing the discovery, the soonest the adjudicatory hearing was convened since 2010 was 39 days after the 48 hour hearing. It is the adjudicatory hearing that serves as the actual fact finding proceeding on the state's allegations of child abuse and neglect; the imminent danger to the child is no longer the primary issue. SDCL 26-7A-82.

If the *parents* are represented by an attorney and request an expedited evidentiary hearing regarding either the PTC, *see* Beauchamp Decl. Ex. 4, Davis Resp. Inter. No. 9., or the ongoing imminent danger, a hearing on the imminent danger to the child and the temporary emergency custody can be held. Beauchamp Decl. Ex. 1, Case No. A12-302; Morris Aff. Ex. 27, A14-456. However, if a *tribe* makes such a request for an expedited hearing, before the parent has had an opportunity to consult with an attorney, it has been denied in every case. Beauchamp Decl. Ex. 1, A12-244; Morris Aff. Ex. 27, A14-456.

As of August 29, 2013, the Pennington County State's Attorney's Office, represented by Mark Vargo and Roxie Erickson, along with the Department of Social Services, represented by LuAnn Van Hunnik and supervisor Deb Horan, met with [tribal] ICWA directors in Rapid City.

Attorney Dana Hanna was present, along with Casey Family Programs representative Eddie Screechowl. One of the issues raised was the length of time between the 48-hour hearing and the advisory hearing without an opportunity for parents to appear before the Court. The State and DSS agreed that in cases either involving a Native American Tribe or that potentially qualified as an ICWA case, and where children were removed from the home, DSS was requesting continued custody, and the children were not placed within the ICWA placement preferences, the State (meaning Pennington County only) would request an advisory hearing within 14 to 20 days. This time period was selected to give DSS time to look for relatives and thereby be able to offer the Court additional information as to the children's temporary placement, as well as to determine whether the children could be safely returned to a parent. In return, the Tribes agreed to assist DSS in locating relatives, such as providing names of individuals for DSS to contact. This process was agreeable to the Tribes. Mr. Hanna and Ms. Erickson went to Judge Pfeifle shortly after this meeting and informed him of their agreement. Judge Pfeifle was in agreement with those advisory hearings being added to his schedule and that procedure has continued with Judge Mandel. Morris Aff. Ex. 1 and 29 - ¶ B.

Judge Pfeifle was the judge regularly assigned to the abuse and neglect docket for 2013, and Judge Mandel was the judge regularly assigned in 2014. Judge Davis was not consulted on this agreement between Mr. Hanna and Ms. Erickson, and he did *not* need to be. Beauchamp Decl. Ex. 4, Davis Am. Ans. Inter. No. 3.

In addition to the foregoing, Defendants are compelled to note certain misstatements, unsupported innuendo, and mischaracterization of the facts and law in Plaintiffs' Motion (Document 108.):

First, on page 7 of their Due Process Brief (Document 108), the Plaintiffs state ". . . [DSS] places the vast majority of [Indian] children in non-Indian homes, thus separating them from both their family and their culture." Plaintiffs' citation to this allegation/argument is a hyperlink to National Public Radio (NPR) blog which contains a pdf.

Not only is it improper to cite to alleged factual information on an NPR blog, it is also improper to imply that DSS intentionally places American Indian children in non-American Indian homes to the exclusion of American Indian homes. Instead of intent, it is a matter of availability.

For the period July 1, 2009 to June 30, 2010, there were anywhere from 721 to 751 licensed foster care homes in South Dakota. Of those, 76 to 86 were licensed American Indian foster care homes. For that same period, there were anywhere from 100 to 110 licensed foster care homes in Rapid City/Pennington County. Of those, anywhere from 18 to 21 were licensed American Indian foster care homes. Morris Aff. Ex. 1 and 17.

For the period July 1, 2013 to January 31, 2014, there were anywhere from 667 to 683 licensed foster care homes in South Dakota. Of those, 53 to 62 were licensed American Indian foster care homes. For that same period, there were anywhere from 91 to 105 licensed foster care homes in Rapid City/Pennington County. Of those, anywhere from 2 to 5 were licensed American Indian foster care homes. There are simply too few Indian foster homes to meet the need. Morris Aff. Ex. 1 and 21.

Second, on page 15 of their Due Process Brief (Document 108), Plaintiffs' state "In addition, the South Dakota Judicial "Guidelines" for 48-hour hearings states (sic) requires that an "ICWA Affidavit" from a qualified expert be submitted at the 48-hour hearing." Plaintiffs then

cite to the hyperlink to the document on the South Dakota UJS website. *Id.* This assertion is also erroneous.

The ICWA Affidavit prepared for and used at the 48 Hour hearing is usually prepared by a CPS Family Services Specialist. There exists no legal requirement that the ICWA Affidavit used at the 48 Hour hearing be prepared by a qualified ICWA expert. DSS issued a policy directive on November 23, 2005 that an ICWA Affidavit was to be used in temporary custody proceedings. Morris Aff. Ex. 1 and 14. In June 2012, the policy was placed in the Child Protection Service ("CPS") Manual. Morris Aff. Ex. 1 and 15.

Third, on page 17 of their Due Process Brief (Document 108), in support of a second alleged constitutional infirmity, the Plaintiffs allege "that it was not until January 2014 that the DSS Defendants, LuAnn Van Hunnik and Kim Malsam-Rysdon (later replaced by Lynne A. Valenti), began providing parents in Judge Davis's 48-hour hearings with a copy of the ICWA Affidavit". This is untrue.

On May 26, 2014 Defendants Van Hunnik and Valenti served responses to the Plaintiffs' Interrogatories and Requests for Production consisting of 26 pages. Curiously, Plaintiffs chose only pages 11 – 15 of those 26 pages to include in Plaintiffs' Summary Judgment Exhibit 6. Defendants provide the Court with the complete set of discovery responses. Morris Aff. Ex. 23.

Plaintiffs inexplicably omitted the following from their disclosure to the Court:

Interrogatory No. 1: State whether DSS has ever had, during the Relevant Time Period, policies or procedures in effect to ensure that parents of Indian children subject to temporary custody proceedings receive copies of the petition for temporary custody and the ICWA affidavit filed in those proceedings prior to or during the 48-hour temporary custody hearing. Describe in detail all such policies or procedures and provide the dates on which they were implemented. Additionally, describe any training that DSS staff receive related to these policies or procedures.

RESPONSE:

Objection is made to the use of the word "ensure" which appears to suggest that DSS guarantee that such documents are provided to the parents. Objection is also made on the basis that the interrogatory presumes that there exists a legal obligation upon DSS. Reference is also

made to SDCL 26-8A-13; SDCL 26-7A-28; and 26-7A-37. The following response is subject to the objection.

No, as to Petition for Temporary Custody. Yes, as to ICWA Affidavit.

As to the Petition for Temporary Custody – such document is prepared by the State's Attorney's office. The DSS usually receives a copy. DSS does not have a policy for distribution of a State's Attorney prepared document.

As to the ICWA Affidavit – it has been the common practice of DSS to provide parent(s) with a copy of the Affidavit prior to June, 2012. Since June 2012, it has been the written policy of DSS to provide a copy of the Affidavit to the parent(s), if present at the 48 Hour Hearing. Whether before or after June 2012, if a parent(s) did not receive a copy, it would be considered an oversight and not intentional on the part of the child protection staff. In addition, by statute the parent and assigned attorneys have access to the complete court file.

Morris Aff. Ex. 23.

In any event, the *fact* is that the ICWA Affidavit has been in use by DSS since November 23, 2005 and continues to be used today. *Id.* at p. 5. In addition, the *fact* is that in addition to the ICWA Affidavit, an Affidavit of the Department has been provided, since January 2013. Morris Aff. Ex. 1.

LEGAL ANALYSIS

The standard this Court applies when considering a motion for summary judgment is well established. Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The court must view the facts, and inferences from those facts, in the light most favorable to the nonmoving party. *See Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); *Helton v. Southland Racing Corp.*, 600 F.3d 954, 957 (8th Cir. 2010) (per curiam). Summary judgment will not lie if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994). "Summary judgment is not the proper method to dispose of factual questions." *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268. For summary judgment purposes, "[a] disputed fact is ... material [if] it would affect the outcome of the suit under the governing substantive law in that a reasonable jury could return a verdict for the nonmoving party." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, 817 N.W.2d 395, 400.

The burden is placed on the moving party to establish both the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Once the movant has met its burden, the nonmoving party may not simply rest on the allegations in the pleadings, but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. *See Anderson*, 477 U.S. at 256; FED. R. CIV. P. 56(e) (each party must properly support its own assertions of fact and properly address the opposing party's assertions of fact, as required by Rule 56(c)).

The underlying substantive law identifies which facts are "material" for purposes of a motion for summary judgment. *Anderson*, 477 U.S. at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* (citing 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 93–95 (3d ed. 1983)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247–48.

Here, the "underlying substantive law" is the three factors discussed in *Lassiter*, i.e. "the nature of the process due in parental rights termination proceedings turns on a balancing of the 'three distinct facts' specified in *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Id.* at754 (citing *Lassiter*, 452 U.S. 18 (1981)). Under *Matthews*, there remains important factual questions about the exact nature of the State's chosen procedures in 48-hour hearings, and even more compelling questions about why such procedures are employed. As a result, Plaintiffs' motion must be denied.

I. Defendants afford all due process at 48-hour hearings.

The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law. U.S. Const. Amend. XIV. "This clause has two components: the procedural due process and the substantive due process components." *Singleton v. Cecil*, 176 F.3d 419, 424 (8th Cir. 1999).

> [D]ue process is not a technical conception with a fixed content unrelated to time, place and circumstances.... Rather, the phrase expresses the requirement of 'fundamental fairness'.... Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation.

Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 24–25 (1981); *see also Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972), quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). There are "three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter*, 452 U.S. at 27.

The private interests of the parents in emergency custody proceedings are admittedly fundamental. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); s*ee, also*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1923); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). However, even with fundamental rights, the right to the care, custody, and control of one's child is not absolute. *Manzano v. South Dakota Dept. of Social Serv's*, 60 F.3d 505, 510 (8th Cir. 1995); *see also, Thomason v. SCAN Volunteer Serv's, Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996).

"[T]he liberty interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Id.* (citing *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987). In other words, "the right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Id.*

"In balancing the interests at stake, *Mathews* expressly directs courts to pay particular attention to the risk of an erroneous deprivation of liberty." *Slaven v. Engstrom*, 848 F. Supp. 2d

994, 1004 (D. Minn. 2012) aff'd, 710 F.3d 772 (8th Cir. 2013). Plaintiffs allege that Defendants have committed "five areas of constitutional violations," which unreasonably contribute to erroneous deprivations. (Document 108, at 7.) Those allegations are:

> (1) Defendants have failed to give parents adequate notice of the claims against them, the issues to be decided, and the State's burden of proof;
>
> (2) Defendants have denied parent the opportunity to present evidence in their defense;
>
> (3) Defendants have denied parents the opportunity to confront and cross examine adverse witnesses;
>
> (4) Defendants have failed to provide indigent parents with the opportunity to be represented by appointed counsel; and
>
> (5) Defendants have removed Indian children from their homes without basing their removal orders on evidence adduced in the hearing, and then subsequently issued written findings that bore no resemblance to the facts presented at the hearing.

Id. Each of these allegations will be addressed in turn. However, before the Due Process claims can be resolved, there is a threshold showing that Plaintiffs must make.

1. Plaintiffs have made no showing that Defendants' have a policy, practice, or custom.

Plaintiffs are confining this motion for partial summary judgment to "the policies and practices employed by Defendant Davis in all of his 48-hour hearings . . . and the policies and practices of the other three named Defendants, each of whom is [allegedly] responsible for one or more of the constitutional deprivations at issue here." (Document 108, at 6, FN 4.) In denying the motion to dismiss, this Court explained that "[l]iability for a government entity under 42 U.S.C. § 1983 can exist only where the challenged policy or practice is "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* (citing *Monell Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). This Court, under the standard for Rule 12(b) motions, accepted the Plaintiffs' allegations as true, and found

that Judge Davis is a "policymaker." (Document 69, p. 21.) Here, however, that burden shifts. Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

"To be sure, 'official policy' refers to formal rules or understanding - often but not always committed to writing - that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986). The State's 42 U.S.C. § 1983 liability attaches "only where the decisionmaker possess *final* authority to establish [State] policy with respect to the action ordered. *Id.* at 481. "The fact that a particular official - even a policymaking official - has discretion in the exercise of particular functions does not, without more, give rise to [State] liability based on an exercise of that discretion." *Id.* at 482. None of the Defendants have final policymaking authority.

"[W]hether an official had final policymaking authority is a question of state law." *Id.* at 483. In this case, the South Dakota Constitution vests original jurisdiction and certain appellate jurisdiction in the circuit courts and judges, and appellate jurisdiction in the South Dakota Supreme Court. SD Const. Art. 5, § 5. The judges of the Seventh Judicial Circuit make decisions based on the law as they understand it, but none are final. Judge Davis's decisions are not "policies, practices, or customs," they are adjudications of 25 U.S.C. § 1922, and the applicable state law procedures. Accordingly, Plaintiffs have not met their burden that Judge Davis is a proper defendant under § 1983. *R.W.T., K.M.R., and T.S.C. v. Dalton*, 712 F.2d 1225 (8th Cir.

1983) (*abrogated on other grounds by Kaiser Aluminum & Chemical Corp. et. al. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990))[1].

In Section IV of the *Dalton* decision, 712 F.2d at 1232-1233, the Eighth Circuit extensively analyzes and applies the First Circuit's decision in *In re Justices of the Supreme Court of Puerto Rico,* 695 F.2d 17, 20-25 (1st Cir.1982), written by then *Judge* Steven Breyer. In that decision, "Judge Breyer cogently demonstrated that in most § 1983 cases, federal courts should refuse to grant relief against state judges." *Dalton,* 712 F.2d at 1232.

As explained by these authorities, Plaintiffs "ordinarily should sue 'the *enforcement* official authorized to bring suit under the statute…'" *Id.* at 1232 (*quoting Supreme Court of Puerto Rico,* 695 F.2d at 21-22." Though that may apply to Defendant Vargo, Plaintiffs' predicate Mr. Vargo's § 1983 liability on Judge Davis's adjudication. Like in *Dalton,* the Plaintiffs in the instant case "characterize their attack as one upon the court's '*practice*…,'" 712 F.2d at 1233 (emphasis added), of interpreting the laws applicable to the cases before them and applying that interpretation. *See Docket 1,* ¶5. However, an attack on the "practices" of a court does not transform judicial acts into acts of enforcement. *Id.* Plaintiffs have not demonstrated that Judge Davis has committed any acts of enforcement.

Plaintiffs specifically argue that they are contesting *judicial acts.* Plaintiffs claim that Judge Davis "routinely consider[s] Petitions for Temporary Custody filed by state officials… and routinely enter[s] orders granting those petitions in a manner that violates federal law." (Document 1, at ¶11.) Judge Davis, by interpreting and applying 25 U.S.C. § 1922 and the South Dakota statutes, is acting in a *judicial* role. The fact that this Court may or may not "disagree with [Judge Davis] does not make [his] determination any less an act of disinterested

[1] While *Dalton* was decided before the Federal Courts Improvement Act of 1996 amended 42 U.S.C. § 1983 to except judicial officer's from being subject to injunctive relief, this legislative action does not change this analysis.

adjudication." *Dalton*, 712 F.2d at 1233 (emphasis added). "Thus, [Judge Davis is] not [a] proper defendant[ ] in this suit." *Id.*

Moreover, the judicial nature of Judge Davis' challenged conduct is highlighted by the South Dakota Supreme Court's ruling in *Cheyenne River Sioux Tribe v. Davis*, 2012 SD 69, 833 N.W.2d 62. (Document 1, at ¶43.) Judge Davis' adjudication of the rights of parents, tribes, and children is based on a judicial interpretation of the laws, which has been affirmed by the South Dakota Supreme Court, and is now a *precedential* authority, which he must follow. Such interpretation of the law is not his "practice" any more than any judicial "precedent" sets a "practice" for all lower courts.

The *Dalton* and *Supreme Court of Puerto Rico* courts also discuss, but do not apply, concerns regarding a Federal District Court's jurisdiction under Article III of the Constitution, because no "case or controversy" exists between plaintiffs and state court judges. *Dalton*, at 1232, n. 10, *Supreme Court of Puerto Rico*, 695 F.2d at 22-23. Instead, these courts frame this issue as a "failure to state a claim" under FED. R. CIV. P. 12 (b)(6) against the improperly named defendant state court judge.[2]

> In short, § 1983 does not provide relief against judges acting purely in their adjudicative capacity, any more than, say, a typical state's libel law imposes liability on a postal carrier or telephone company for simply conveying a libelous message. Just as a dismissal for failure to state a claim would be proper in the latter case, so is it in the former. By joining this interpretation of § 1983, we avoid the constitutional problems that might be raised by a more expansive application of the statute.

[2] The *Dalton* decision is *not* the doctrine of judicial immunity discussed in other cases. *Dalton*, 712 F.2d at 1232; *see e.g. Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 735, 100 S.Ct. 1967, 1976, 64 L.Ed.2d 641 (1980). The *Dalton* Court specifically *declined* to determine the applicability of judicial immunity to cases seeking declaratory and injunctive relief under 42 U.S.C. § 1983. *Id.* Instead, the *Dalton* rationale is a wholly *separate* analysis. *Dalton's express* distinction from judicial immunity and declination to base its conclusion on that issue was recognized by the United States Supreme Court in *Pulliam v. Allen*, 466 U.S. 522, 528, n. 6, 104 S.Ct. 1970, 1974, n. 6, 80 L.Ed.2d 565.

Supreme Court of Puerto Rico, 695 F.2d at 22-23.

Since the decisions in *Dalton* and *Supreme Court of Puerto Rico,* other Federal Courts have considered the jurisdictional issues raised under Article III when a state court judge is sued under § 1983 for adjudicatory acts. *See e.g. Bauer v. Texas,* 341 F.3d 352, 359-62 (5th Cir. 2003). The *Bauer* Court, citing numerous authorities, states:

> The case or controversy requirement of Article III of the Constitution requires a plaintiff to show that he and the defendants have adverse legal interests. The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity. Similarly, a section 1983 due process claim is not actionable against a state judge acting purely in his adjudicative capacity because he is not proper party in a section 1983 action challenging the constitutionality of a state statute. [3]

Bauer, at 359 (citations omitted). *See, also, Brandon v. Reynolds,* 201 F.3d 194, 200 (3rd Cir. 2000) (judges hearing involuntary commitment proceedings of juveniles to alcohol and drug treatment programs are acting in their capacity as neutral adjudicators, and therefore complaint filed for declaratory relief under § 1983 against judges fails to state a claim for relief).

In summary, the Plaintiffs' claims against Judge Davis, as identified in their Motion for Summary Judgment, are barred under § 1983 and Article III of the United States Constitution even though they are not challenging a statute, but rather Judge Davis's adjudication of that statute. *See Dalton, supra.* Federal District Courts lack jurisdiction over such claims, because there is no "case or controversy" against the state court judge acting in their adjudicatory capacity. Plaintiffs' Motion for Summary Judgment clarifies that this is precisely what they are challenging. As such, Plaintiffs' Motion for Partial Summary Judgment should be denied.

[3] While the *Bauer* Court here references a challenge to a *state statute,* the same rationale applies to the instant case. Judge Davis is not a "proper party to a section 1983 action" for the reasons explained in *Dalton* and *Supreme Court of Puerto Rico,* discussed *supra.*

2. The ICWA Affidavit and petition for temporary custody are provided to parents who attend the 48-hour hearing as a matter of policy.

If the Court determines that Defendants' are "policymakers," then the merits of Plaintiffs' claims must be analyzed. First, Plaintiffs accuse Defendants of depriving parents in 48-hour hearings adequate notice of the allegations against them. (Document 108, pp. 14-22.) Specifically, Plaintiffs' allege that Defendants violate the Due Process Clause by withholding from parents copies of the ICWA affidavit and the PTC which are provided to the trial court at the 48-hour hearing. *Id.*

"Adequate notice is that which is '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.' " *Wilburn v. Astrue*, 626 F.3d 999, 1003 (8th Cir. 2010) (citing *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir.1997)). "Further, the notice must 'apprise the affected individual of, and permit adequate preparation for, an impending hearing.'" *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997). Notwithstanding this, "[d]ue process is a flexible concept and determination of what process is due, or what notice is adequate, depends upon the particular circumstances involved." *Id.* In the context of 48-hour hearings, the type of notice due should be sufficient to ensure that parents are not "left in the dark not knowing the allegations against them while suffering the consequence of losing custody of a child" for any period of time. (Document 69, p. 38.) This is precisely the notice parents receive in Defendants' 48-hour hearings.

a. The Notice Provided in the ICWA Affidavit and Oral Advisement is Adequate

Currently, both DSS and the State's Attorney have an established policy to provide the parents, who attend the 48-hour hearing, with a copy of the ICWA affidavit and petition for temporary custody. Morris Aff. Ex. 26. Although providing parents with the PTC has become

established policy recently, DSS has provided parents with the ICWA affidavit as a matter of written policy since long before this lawsuit was filed. Morris Aff. Ex.1. Also, during the 48-hour hearing, Judge Davis advises the parents of the procedure, their right to counsel, their rights going forward, including the applicable burden of proof, and asks the parents if they have any questions. If they have not received any documents in the court's file, he will typically order them to be provided to the parents. Beauchamp Decl. Ex. 4, Davis Ans. Inter. No. 7.

It is undisputed that the PTC was not provided to parents at the 48-hour hearing before May of 2014. Plaintiffs argue that this Court ruled that it would violate the Fourteenth Amendment to keep Indian parents "in the dark" about the allegations against them in 48-hour hearings, and that Defendant Vargo not providing PTCs to parents before May of 2014 kept Indian parents "in the dark". This argument has merit only if the PTC would have informed the parents of specific allegations or provided any additional information other than what the parents were already notified and what the presiding judge states during the hearing.

It therefore important to review what a PTC says and does not say. Three PTCs were attached to Plaintiffs' filings as Exhibit 8 to Beauchamp Declaration. These three PTCs are indicative of what all PTCs look like. They are form documents with identical language, with the only changes made per case being the names of the children and respondents in the case caption, the period of days to fill in in a blank in the first paragraph, the court file number, and the date the children were taken into custody. Each and every PTC states that the reason for the petition is "set forth in the report of the Department of Social Services which is attached hereto." The PTCs further attach a copy of a notice previously provided to the parent. Further, the PTC states that a police report is attached.

Plaintiffs allege that somehow receiving a copy of the PTC itself would have provided parents the opportunity to know what the petition against them alleged. To the contrary, no PTC supplies such information. The attachments to the PTC, such as the DSS report and police report supply such information, but the police report may not be disclosed to the parents without a court order. SDCL 26-7A-29. The PTCs simply indicate that the children were released to DSS by law enforcement "for the reason that the immediate welfare of the child(ren) required that the child(ren) remain in temporary custody and not be released to the care of his/her/their parents." The presiding judge gave this information orally during the 48-hour hearings, and the parents were already notified of the same. SDCL 26-7A-15. There is simply no additional information that the PTC would have afforded the parents if they had received the PTC at the 48-hour hearing. Significantly, Plaintiffs cite to no evidence that would demonstrate that parents would gain any additional information, or even any information bearing on a due process analysis, if the PTCs were given to parents at the hearing. Plaintiffs cite no evidence that since May of 2014, parents are somehow better informed due to receiving a PTC at a hearing, and now are receiving meaningful notice. It is not enough for Plaintiffs to claim providing a PTC is easy to do, or at low cost. Plaintiffs must prove with evidence submitted that Indian parent's due process rights were violated without a PTC provided at the hearing. Plaintiffs have provided no such evidence.

Moreover, as of January 2014, all parents present in court at the 48-hour hearing typically receive a copy of reports provided by DSS, including the Department's Affidavit, and a court report if one has been prepared. Beauchamp Decl. Ex. 5, Vargo Interrog. 2.[4] As of May 2014, all parents who are present at the 48-hour hearing have typically been receiving a copy of the

[4] This interrogatory response contains a typographical error, as it was January 2013, when all parents present at the hearing began receiving the documents as indicated in the interrogatory answer, not January 2014 as it currently reads.

PTC. *Id.* Therefore this issue is both moot and unripe, and the court should deny summary judgment for lack of jurisdiction. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 194 F.supp.2d 977, 983 (D.S.D. 2002)(quoting *Hickman v. Missouri*, 144 F.3d 1141, 1142 (8th Cir. 1998)); *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). *See also* Section II, *infra*. Parents receive *actual* notice of the facts precipitating the child(ren)'s removal, and their legal rights going forward at the 48-hour hearing itself. As such, any alleged deficiency caused by parents' failure to receive the PTC prior to the hearing is harmless, when viewed in the totality.

b. Judge Davis's Oral Advisement Apprises Parents of Their Rights

Plaintiffs allege that Defendants' notice to parents is constitutionally deficient in a third manner, by failing to advise them of their substantive rights under 25 U.S.C. § 1922, and by failing to cite to 25 U.S.C. § 1922 in their PTC's or TCO's. Plaintiffs assertions fly in the face of the actual language used in 25 U.S.C. § 1922.

The "substantive rights" Plaintiffs assert are missing concern whether, in emergency custody hearings, the State must prove that Indian children are imperiled by "imminent physical damage or harm" by some indeterminate standard that is greater than the best interests of the child. This contention is contrary to the plain language of 25 U.S.C. § 1922. "Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, *under applicable State law*, in order to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922 (emphasis added.)

A straightforward reading of § 1922 states that the "applicable State law" is used for emergency removal or placement of an Indian child in order to prevent imminent physical

damage or harm to the child. In other words, there must be a finding of imminent physical damage or harm "under applicable State law" when a State seeks to invoke emergency procedures to protect an Indian child from imminent physical harm or damage. Under South Dakota law, that finding is made based on the best interests of the child standard, using a probable cause burden of proof. Beauchamp Decl. Ex. 2. As such, Judge Davis' advisement is reasonably calculated, under all the circumstances, to apprise Indian parents of their rights pursuant to ICWA, and state law.

3. Parents at 48-hour hearings are not prohibited from presenting evidence or cross examining witnesses by operation of law, but by the fact that they are unrepresented at this stage.

Next, Plaintiffs' allege that Defendants deprive Indian parents of the right to present evidence, to confront and cross examine adverse witnesses, and to meaningful access to counsel. Defendants agree that "[i]f, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." *Lassiter*, 452 U.S., at 28.

However, at the time of the 48-hour hearing, in ninety-nine percent of cases, parents appear without counsel. As a matter of course, Judge Davis asks parents if they would like an attorney appointed, and if they indicate that they do, one is appointed. Beauchamp Decl. Ex. 1.

There is little doubt that the "fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citations omitted). However, it is also true that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Such is the case at 48-hour hearings, not because of Defendants' procedures, but because the 48-hour hearing is the parents initial appearance in child custody proceedings.

This is not a "sit back and wait" policy as alleged by Plaintiffs. (Document 108, p. 18.) Nor is this the situation discussed by the Eighth Circuit in *Whisman v. Rinehart*, 119 F.3d 1303 (8th Cir. 1997). In *Whisman*, State officials took emergency custody of a child, and initiated *no* judicial review of the removal for thirteen days. 119 F.3d at 1310. In this case, the State is initiating judicially reviewed proceedings within 48-hours and offering to appoint counsel for indigent parents immediately.

"The burden of initiating judicial review must be shouldered by the government." *Id.* at 1311. Defendants do. That is why attorneys are appointed for parents at the earliest possible time, so that the parents' rights may be protected. *Whisman* requires the State to promptly initiate a post-deprivation hearing. *Id.* The 48-hour hearing is that hearing.

The procedures established in South Dakota Codified Law are designed first to protect the best interests of the child, and second to ensure a fair process to ensure that this overarching goal is met. Abuse and neglect cases are adversarial in nature. SDCL 26-7A-34. The Supreme Court has recognized, however, that "parents [involved in child custody proceedings] are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation." *Lassiter*, 452 U.S. at 30. To assist them in resolving this distressing and disorienting situation, Judge Davis routinely asks if parents would like an attorney, and if they decline, he advises that they can request one of him at any time in the proceedings. Beauchamp Decl. Ex. 1.

At the 48-hour hearings, parents are not prevented by Judge Davis from offering evidence or testifying, but they are cautioned that their statements may be used against them in later proceedings. *Id.* When parents invoke their right to counsel, Judge Davis is confronted with a dilemma. Thus, during the emergency custody 48-hour hearings, the trial judge has to balance the parents' constitutional right to counsel, and right to remain silence, with their right to a speedy hearing. The trial court must protect the parents from waiving their right to counsel. *In re People ex rel. South Dakota Dept. of Soc. Serv's*, 2004 SD 131, 691 N.W.2d 586. Practically speaking, there are only three ways to accomplish full evidentiary hearings at the 48-hour hearing:

The first option is for parents to proceed *pro se* with giving testimony and cross examining witnesses at the 48-hour hearing, and risk inadvertent statements against interest and waiver of potential defenses. This alternative undermines the policy required by South Dakota law. SDCL 26-7A-31; *In re People ex rel. South Dakota Dept. of Soc. Serv's*, 2004 SD 131, 691 N.W.2d 586.

The next option would be to have a "bullpen" of attorneys at every 48-hour hearing who could be appointed to represent parents at the 48-hour hearing, and if the attorneys deem it advisable, to present evidence and cross examine witnesses. However, the cost to the State for such a "bullpen" would be extreme. Moreover, the newly appointed attorneys would not, in many cases, advise their clients to offer testimony without interviewing their new clients and conducting their own investigation into the facts. This option would increase the State's cost for conducting child abuse and neglect investigations, and it would not likely provide the procedures to which Plaintiffs' claim to be entitled.

The third option is what is currently done. The state court judge appoints an attorney for the parents at the 48-hour hearing; advises the parents of their rights under the law; and sets an advisory hearing on the temporary custody status within ten to fifteen days after the 48-hour hearing. This gives the parents' attorneys the opportunity to interview their clients, engage in discovery, and assess the client's legal interests. If the parents attorney is prepared and requests an expedited hearing, that is ordered, if appropriate. *See* Beauchamp Decl. Ex. 1, Case No. A12-302; Morris Aff. Ex. 1, A14-456.

Of the over 120 transcripts produced in this litigation, there was only one instance in which a parent appeared with counsel at the 48-hour hearing. The parent was granted a "full blown evidentiary hearing" within twelve days of the 48-hour hearing. Beauchamp Decl. Ex. 1, A12-302.

After the 48-hour hearing, the parents' attorney may notice a "show cause" hearing if he or she believes that the child is no longer in imminent danger and ask Judge Davis to terminate the emergency custody proceeding. *See In re T.S.*, 315 P.3d 1030 (2013). If it is an ICWA case, the hearing can be convened no sooner than ten days after the 48-hour hearing. 25 U.S.C. § 1912(a).

However, the fact that there is some period of time between emergency removal and an adjudicatory hearing does not mean that Due Process Rights have been infringed.

> Just as it is lamentable that innocent criminal defendants must await trial in jail or on bail subject to intrusive monitoring and constrained liberty, it is lamentable that innocent parents and their children may have to wait sixty days in a tumultuous world of uncertainty, compromised liberty to interact with each other, and heightened scrutiny. Given no other reasonable alternatives, it is a necessary cost of the protection of children by the judicial system. The search of truth is aided by investigation some reasonable delay is beneficial and necessary to the search for truth, it allows facts to be gathered and issues to be refined. It is a

> delicate balance, but it is not a balance that has been set so as to violate due process and its demands of fundamental fairness here.

Slaven v. Engstrom, 848 F. Supp. 2d 994, 1005 (D. Minn. 2012) aff'd, 710 F.3d 772 (8th Cir. 2013). Nor does it mean that Indian children must remain in state custody for a minimum of ten days -- or even 60 days if allowed by the TCO. At any point from the 48-hour hearing to a "show cause" hearing, if noticed, the child can be returned to the parent by DSS, or the tribal court can transfer the case, without another state court hearing. 25 U.S.C. § 1922.

"Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA." *Holyfield*, 490 U.S. at 42. The only express right conveyed to the tribes under 25 U.S.C. § 1922, is the right to request and receive transfer. Nevertheless, a tribe's right to marshal abuse and neglect cases involving its members goes beyond mere statute, and invokes basic sovereign interests. "Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts." *See Id.* (citing *Fisher v. District Court, Sixteenth Judicial District of Montana,* 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (*per curiam*) (tribal court had exclusive jurisdiction over adoption proceeding where all parties were tribal members and reservation residents); *Wisconsin Potowatomies of Hannahville Indian Community v. Houston,* 393 F.Supp. 719 (WD Mich.1973) (tribal court had exclusive jurisdiction over custody of Indian children found to have been domiciled on reservation); *Wakefield v. Little Light,* 276 Md. 333, 347 A.2d 228 (1975) (same); *In re Adoption of Buehl,* 87 Wash.2d 649, 555 P.2d 1334 (1976) (state court lacked jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order); see also *In re Lelah-puc-ka-chee,* 98 F. 429 (ND Iowa 1899) (state court lacked jurisdiction to appoint guardian for Indian child living on reservation).

However, despite this strong presumption in favor of tribal court jurisdiction of Indian child abuse and neglect cases, Plaintiff Rosebud Sioux Tribe, as a matter of policy, has declined to exercise this sovereign right. Such policy frustrates Congress' intent in enacting ICWA, and stifles the State's ability to meet its duties under § 1922.

As discussed, "'the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision . . . '" *Id.* at 766 (citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (emphasis in original)). If the tribal courts are willing, Defendants have consistently authorized transfer. Therefore, if it were not the policy of the Rosebud Sioux Tribe to refrain from accepting transfer of jurisdiction until the Indian child(ren) has been adjudicated, the tribe could, in a heartbeat, "minimize the risk of unfair, mistaken, and unwarranted removals of Indian children from their families," (Document 108, p. 14.) (citing 25 U.S.C. § 1902). Moreover, if Oglala Sioux Tribe would establish a policy of requesting transfer in every 48-hour hearing, it too could "minimize the risk of unfair, mistaken, and unwarranted removals" of its member from the families. Instead, both tribes have placed the onus of protecting their sovereign rights on the State. The Tribes have a unique ability to provide more process than provided at the State's 48-hour hearings should they so desire, but they have failed to exercise that right. .

4. Judge Davis' TCO's are based on the evidence adduced at the 48-hour hearing, including the ICWA affidavit.

Plaintiffs' final claim is that Judge Davis has failed to base his rulings on the evidence adduced in the 48-hour hearing. (Document 108, p. 33.) Plaintiffs claim that Judge Davis's TCO's could not have been based on the evidence adduced at the 48-hour hearing because he did not "permit the presentation of any testimony." (Document 108, p. 34.) Plaintiffs ignore the fact that the ICWA affidavits are not only evidence, *see Cheyenne River Sioux Tribe v. Davis*, 2012

2012 S.D. 69, 822 N.W.2d 62, 65-66, reh'g denied (Nov. 26, 2012), but *testimonial* evidence underlying the findings made in Judge Davis' TCO's. These affidavits include testimony regarding "active efforts," and imminent harm, which predicate the findings of the TCOs.

It is obvious that Plaintiffs' take issue with the fact that the details of these affidavits are not always discussed on the record during 48-hour hearings, but that does not mean that Judge Davis cannot earnestly rely upon them in his effort to safeguard potentially imperiled children. The "earnest efforts by state officials should be given weight in the Court's application of due process principles." *Santosky*, 455 U.S. at 771. Here, those earnest efforts should be given great weight because the South Dakota Supreme Court has ratified the use of ICWA affidavits and police reports to justified continued custody.

> The report and affidavit set forth facts concerning the need for temporary custody. While these documents might not constitute evidence within the normal bounds of the Rules of Evidence, those rules are not applicable at a temporary custody hearing. *See* SDCL 26–7A–34 (stating that the Rules of Civil Procedure apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted to inform the court of the status of the child and to ascertain the child's history, environment, and condition); SDCL 26–7A–56 (stating that the Rules of Evidence apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted under rules prescribed by the court to inform it of the status of the child and to ascertain the child's history, environment and condition). Therefore, the police report and affidavit provided sufficient evidence of a need for temporary custody to permit the trial courts to proceed here.

Cheyenne River Sioux Tribe v. Davis, 2012 S.D. 69, 822 N.W.2d 62, 65-66, reh'g denied (Nov. 26, 2012). "[S]ubstantial weight must be given to the good-faith judgments of the individuals [administering a program] ... that the procedures they have provided assure fair consideration of the ... claims of individuals." *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976). Here, Judge Davis is using the evidence available to him to make his

findings. His TCO's are based on the evidence adduced at the hearing. *See Davis, supra*. Accordingly, Plaintiffs' Motion for Summary Judgment on this claim should be denied.

II. Plaintiffs are Not Entitled to Declaratory or Injunctive Relief

Plaintiffs' complaint request the issuance of declaratory[5] and injunctive relief pursuant to 42 U.S.C. § 1983 against Defendants to "halt on-going violations of Plaintiffs' federal rights." (Document 1, at ¶¶ 1,73, 112, and 129.) Indeed, the existence of on-going violations and prospective relief being requested are necessary for Plaintiffs' suit to meet the Ex parte Young exception to the Eleventh Amendment (*Ex parte Young*, 209 U.S. 123 (1908)) and to meet the "injury in fact" element of standing. *Park v. Forest Service*, 205 F.3d 1034, 1037 (8th Cir. 2000) ("the "injury in fact" element of standing requires a showing that the plaintiff faces a threat of ongoing or future harm.") Plaintiffs have, however, submitted no facts that establish that the matters they complain about are either violations (see discussion above) or on-going.

The gravamen of Plaintiffs' claims concerns the length of time between the 48-hour hearing and an evidentiary hearing with testimony and cross-examination, to establish whether the emergency removal is still necessary. As of August of 2013, by agreement of the Plaintiffs' counsel Dana Hanna on behalf of his tribal clients, Mr. Vargo's office, and DSS, the Seventh Circuit Judge reviews the temporary custody status of the child every 14 to 20 days, as a matter of course. This agreement was struck without the consultation of Judge Davis, Ms. Van Hunnik, Ms. Valenti, or their attorneys. This agreement was intended as a collaborative effort between the officials of Pennington County and the tribes to address many of the grievances alleged by Plaintiffs. This action provides exactly the relief Plaintiffs' ultimately request from this Court, and did so a year ago.

[5] Plaintiffs' request only declaratory relief against Defendant Judge Davis. Doc. 1, Prayer for Relief, f. 1.

"Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." *Simes v. Arkansas Judicial Discipline and Disability Commission*, 734 F.3d 830, 835 (8th Cir. 2013), quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96. If the actions giving rise to a suit are no longer on-going, the case is moot and there is no longer a case or controversy in existence for purposes of the Court's Article III jurisdiction. *Simes*, 734 F.3d at 835. *See, also, Stevenson v. Blytheville School District #5*, 2014 WL 3882548 (8th Cir. 2014).

The actions that ultimately give rise to Plaintiffs' claims are no longer on-going due to the agreement implemented in August of 2013. As a result, there is no longer a case or controversy for purposes of this Court's Article III jurisdiction, and Plaintiffs' requested declaratory and injunctive relief should be denied on that basis.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court deny Plaintiffs' Motion for Summary Judgment Re: Due Process Clause.

Dated: September 5, 2014

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