IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LISA FLEMING, et al, Defendants.	Case No. 5:13-cv-05020-JLV BRIEF IN SUPPORT OF PLAINTIFFS' REQUEST FOR APPROPRIATE REMEDIES

INTRODUCTION

The four Defendants in this action are largely ignoring this Court's summary judgment ruling of March 30, 2015, *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015) (hereinafter "*Oglala II*"),[1] in which the Court found that the Defendants were violating seven of Plaintiffs' federal rights. Today, more than a year later, the Defendants continue to commit six of those violations, and only partially halted the seventh. As a result, more than one hundred additional Indian families have suffered the injuries *Oglala II* intended to prevent, and new families fall victim every week.

Three of the eight judges on the Seventh Judicial Circuit Court, including its presiding judge, Defendant Hon. Craig Pfeifle,[2] have already disregarded this Court's summary judgment decision. During a 48-hour hearing conducted on May 4, 2015, for

[1] *Oglala I, II,* and *III* are, respectively, this Court's ruling denying Defendants' motions to dismiss; granting Plaintiffs' partial motions for summary judgment; and denying Defendants' motions for reconsideration. *See Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1074 (D.S.D. 2014); 100 F. Supp. 3d 749 (D.S.D. 2015); 2016 WL 697117 (D.S.D. 2016).

[2] At the time this suit was filed, Hon. Jeff Davis was the presiding judge of the Seventh Judicial Circuit, and he was sued in his official capacity. Judge Davis was removed from his post by the Chief Justice of the South Dakota Supreme Court on May 21, 2015, and Judge Craig Pfeifle was appointed to replace him. Judge Pfeifle has been substituted for Judge Davis in this action. *See Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-cv-5020 (Order dated March 7, 2016) (Docket 226).

instance, Judge Pfeifle rejected oral motions made by Dana Hanna, counsel for an intervenor Indian tribe, to implement certain portions of the Court's summary judgment ruling. Judge Pfeifle declared:

> I will address the second portion of your representation to the Court, Mr. Hanna, regarding Judge Viken's opinion. It is my obligation at this point in time to follow the law that the South Dakota Supreme Court has provided to me. Whether or not I agree with Judge Viken in my estimation is not relevant to the inquiry because the Supreme Court of South Dakota has very clearly determined for me in *Cheyenne River Sioux Tribe versus Davis* that [25 U.S.C.] 1922 does not apply to this particular hearing, and until a Court that has the capability to advise me of the same enters a formal order, I simply cannot do anything further than rely upon that representation, so I choose to do so at this particular point in time. I also choose to follow the holding of that particular Court indicating that the manner in which these hearings are held under South Dakota law in terms of the evidence that I have received is appropriate, and I believe that I have followed those dictates, again which I am required to follow, to the letter of the law here this afternoon.

See A15-293 (transcript dated May 4, 2015, filed under seal as Plaintiffs' Exhibit 1R).

Mr. Hanna had previously written Judge Robert Mandel, the Seventh Judicial Circuit judge who heard most of the 48-hour hearings in 2015, to see if he would convene a meeting with Mr. Hanna and representatives from the States Attorney's Office and Dakota Plains Legal Services to discuss how this Court's summary judgment ruling could be implemented in the Seventh Circuit's 48-hour hearings. Judge Mandel declined, and attached to his response a telling article entitled: "Federal law in the state courts: The freedom of state courts to ignore interpretations of federal law by lower federal courts." (This correspondence and the article are attached as Plaintiffs' Exhibit 2R). To Plaintiffs' knowledge, in not one 48-hour hearing in 2015 did Judge Mandel incorporate the procedural protections this Court held in *Oglala II* are required by the Due Process Clause of the Fourteenth Amendment.

The Seventh Judicial Circuit judge assigned to conduct 48-hour hearings this year, Hon. Robert Gusinsky, similarly refuses to provide Indian parents with the procedural protections this Court held are mandatory, including the right to present evidence, to cross-examine state witnesses, to receive the assistance of counsel, and to a decision based on the evidence presented during the hearing. *See* A16-278 (transcript dated April 4, 2016, filed under seal as Plaintiffs' Exhibit 3R).[3]

In short, today's 48-hour hearings are nearly identical to the ones condemned by this Court in its summary judgment ruling. Plaintiffs therefore submit this brief respectfully requesting that the Court now enter an effective remedial order.

THIS COURT HAS THE AUTHORITY AND THE DUTY TO ISSUE AN EFFECTIVE REMEDIAL ORDER

The law has been clear since the earliest days of our Republic that when federal rights are violated, it is the province and the duty of the federal courts to issue an effective remedy. *See Marbury v. Madison*, 1 Cranch 137 (1803). As the Supreme Court confirmed more than a half-century ago:

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

[3] Three transcripts of 48-hour hearings held in within the past three weeks are referenced in this brief. Plaintiffs just learned that none of them will be available in time to be filed with this brief. Plaintiffs will file them just as quickly as the court reporters issue them.

Bell v. Hood, 327 U.S. 678, 684 (1946) (citations omitted). *See also Hutto v. Finney*, 437 U.S. 678, 688 (1978) (holding that a remedial order must cure "each element contributing to the violation" of federal law); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation."); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (confirming that "all necessary and appropriate remedies" are available to a federal court to rectify a constitutional injury). Moreover, when a constitutional violation is presently occurring (as here), the district court should enter an order "to bring [the] ongoing violation to an immediate halt." *Hutto*, 437 U.S. at 687 n.9. *See generally Franklin v. Gwinnett Cnty. Pub. Schls*, 503 U.S. 60, 66 (1992) (citing *Marbury*, 1 Cranch at 163, for the principle that a federal court must effectively remediate each violation of federal law).

The Eighth Circuit has consistently enforced this principle. A district court's duty to effectively remediate a violation of federal law "'has deep roots in our jurisprudence.'" *Rodgers v. Magnet Cove Public Schools*, 34 F.3d 642, 644 (8th Cir. 1994) (citing *Franklin*, 503 U.S. at 66). As the court explained in remediating a civil rights violation:

> The starting point for our analysis is the principle enunciated by the Supreme Court in *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), that where legal rights are invaded and a federal statute provides a right to sue for such invasion, federal courts may use any available remedy to make good the wrong. The existence of a statutory right implies the existence of all necessary and appropriate remedies. *Sullivan v. Little Hunting Park, Inc*., 396 U.S. 229, 239, 90 S.Ct. 400, 405, 24 L.Ed.2d 386 (1969).

Miener v. State of Mo., 673 F.2d 969, 977 (8th Cir. 1982). *See also Maschka v. Genuine Parts Co.*, 122 F.3d 566, 572-73 (8th Cir. 1997) (holding that a district court must provide the victim of a civil rights violation with "'the most complete relief

possible'") (internal citation omitted); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 778 F.2d 404, 433 (8th Cir. 1985) ("Having found [violations of federal law by state and local officials], the district court was responsible for devising a remedy that would correct the constitutional violations that it found."); *Brewer v. Hoxie Sch. Dist. No. 46 of Lawrence Cnty., Ark.*, 238 F.2d 91, 98 (8th Cir. 1956) (similar, citing *Bell v. Hood*).

Given that this Court has not yet entered a remedial order, the Defendants are not in contempt of court for ignoring *Oglala II*. But once such an order is entered, the Defendants must fully and faithfully implement it. At that point, the law review article Judge Mandel gave Mr. Hanna is inapplicable. That article addresses the situation where two courts, one federal and one state, are interpreting federal law *absent* a remedial order. In that situation, each court may be entitled to reach its own interpretation. Once a federal court issues a remedial order directed at particular state officials, however, those officials must comply with it, whether they agree with that order or not. *Cooper v. Aaron*, 358 U.S. 1, 6 (1958) (holding that state officials may not ignore federal court orders "simply because of disagreement with them"). A district court is authorized to employ "stern measures [against state officials] to require respect for federal court orders." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 696 (1979). *See also Hutto*, 437 U.S. at 687 n.9; *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); *Dakota, Minnesota & E. R.R. Corp. v. S. Dakota*, 362 F.3d 512, 518 (8th Cir. 2004**)** (holding that even where the Tenth Amendment prevents the federal government from commandeering state *resources*, this "does not affect 'the power of federal *courts* to order state officials to comply with federal law' because 'the Constitution plainly confers this authority on the

federal courts'" by the Supremacy Clause) (quoting *New York v. United States*, 505 U.S. 144, 161 (1992) (emphasis in original).

Throughout this litigation—as Judge Pfeifle's recent comments illustrate—Defendants have taken the position that they are powerless to remedy violations of federal law due to *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012). That contention is misguided for two reasons.

First, as this Court explained, *Cheyenne River* is not inconsistent with *Oglala II*. For one thing, that case "focused on the first sentence of 25 U.S.C. § 1922 while the issues before this court require application of the second sentence." *Oglala III* at *4. More importantly, *Cheyenne River* does not mention, much less resolve, a single one of the five due process claims decided in *Oglala II*; the words "due process" do not even appear in that decision. It is therefore hard to understand why Defendants persist in citing *Cheyenne River* as an excuse for denying counsel, notice, the right to present evidence, the right to cross-examine, and the right to a decision based on the evidence presented in the hearing. In point of fact, several due process procedures mandated in *Oglala II*, including an evidentiary hearing, are wholly consistent with state law. *See Oglala II* at 767.

Second, if any portion of *Cheyenne River* is inconsistent with *Oglala II*, then the Supremacy Clause preempts those portions of *Cheyenne River*, and Judge Pfeifle must obey ICWA, not *Cheyenne River*. *See* U.S. Const. art. VI, cl. 2. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) (holding that if the purpose of a federal statute would be frustrated by the operation of state law, "the state law must yield to the regulation of Congress."); *Gade v. National Solid Wastes Management*

Ass'n, 505 U.S. 88, 103 (1992) (holding that state law "is pre-empted if it interferes with the methods by which [a] federal statute was designed to reach [its] goal."); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985). As explained above, if Judge Pfeifle refuses to obey federal law voluntarily, he can be ordered to comply with it. *See Washington State Commercial Passenger Fishing Vessel*, 443 U.S. at 696; *Oglala II* at 772; *Oglala Sioux Tribe v. Van Hunnik*, 2016 WL 697117 (Order dated Feb. 19, 2016) ("*Oglala III*") at *9.[4]

THE COURT'S REMEDIES SHOULD PROMOTE ICWA'S PURPOSE

Plaintiffs will now address the seven federal violations identified in *Oglala II* and propose a meaningful remedy for each one. At the outset, it should be noted that at every stage of this litigation, the Court has been sensitive to ICWA's purpose. *See Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 3d 1017, 1034-36 (D.S.D. 2014) ("*Oglala I*"); *Oglala II* at 752-55; *Oglala III* at *3. It would be appropriate to apply that same sensitivity in determining the remedies Defendants must now implement.

Each remedy, in other words, should take into account and seek to promote ICWA's purpose. For instance, in determining what process is due Indian parents in 48-hour hearings, it is important to recognize that ICWA "'was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care

[4] As noted in earlier proceedings in this litigation, the Federal Courts Improvement Act of 1996, 42 U.S.C. § 1983, permits this Court to enter declaratory *and* injunctive relief against all defendants except Judge Pfeifle; as to him, only declaratory relief is permitted, unless he then ignores the declaratory judgment. *See Oglala III* at *5. The 1996 Act states that as to a state judge, "injunctive relief shall not be granted *unless a declaratory decree was violated….*" (emphasis added).

placement, usually in non-Indian homes.'" *Oglala II* at 754 (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). Congress enacted ICWA to ensure that "where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 36 (citing H. Rep. 95-1386 at 24). Accordingly, whenever the state takes custody of an Indian child on an emergency basis, the child's parents must be afforded a prompt hearing with all attendant due process safeguards. *See Holyfield*, 430 U.S. at 36 (noting that ICWA contains "procedural and substantive safeguards . . . [including] notice and appointment of counsel" to help implement the purpose of the Act). In addition, ICWA commands that as soon as the emergency ends, the out-of-home placement must end. *Oglala II* at 766. *See also* Department of Interior *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 FR 10146 (Feb. 25, 2015) ("DOI Guidelines") at 10148 ("the emergency removal/placement must be as short as possible. . . .This shortened timeframe promotes ICWA's important goal of preventing the breakup of Indian families.")

Plaintiffs' proposed remedies directly correlate to ICWA's overarching purpose. These remedies will provide Indian children, their parents, and their tribes with a fair, meaningful, and impartial hearing, and with judicial decisions based on correct legal standards. To be sure, affording these procedural safeguards will require time and resources and the Defendants will no longer be able to whip through 48-hour hearings in five minutes' time. *See Oglala II* at 753 (noting that Defendants 48-hour hearings "usually last less than five minutes.") But that is a small price to pay for justice. As the Court explained: "This [new] process undoubtedly will require additional time and more county and judicial resources but these concerns are not adequate reasons to forego

rights mandated by ICWA and fundamental due process. 'A parent's interest in the accuracy and justice in the decision . . . is . . . a commanding one.'" *Oglala II* at 771 (quoting *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 25 (1981)).

REMEDY No. 1: THE RIGHT TO ADEQUATE NOTICE

Defendants kept Indian families in the dark regarding their rights at 48-hour hearings. These families were not provided prior to (or even during) the 48-hour hearing with a copy of the petition accusing them of abuse and neglect, the ICWA affidavit, or the police report. *See Oglala II* at 770. Judge Davis's standard opening statement in his 48-hour hearings made "no mention of ICWA, appointment of counsel or the burden of proof for a 48-hour hearing," and the same was true for Seventh Circuit Judges Pfeifle, Thorstenson, and Eklund. *Id*. at 760-61. These Judges also "never advised any Indian parent or custodian they had a right to contest the state's petition for temporary custody during the 48-hour hearing," that "they had a right to call witnesses at the 48-hour hearing," or that they "could request a brief continuance of the 48-hour hearing to allow the parent to retain counsel." *Id*. at 761.

Defendant States Attorney Mark Vargo continues to perpetuate these violations. The petitions his office files accusing Indian parents of abusing and neglecting their children never refer to ICWA; instead, they refer exclusively to state law. *See* Exhibits 4R and 5R (two recent petitions filed against Indian parents) (filed under seal). To Plaintiffs' knowledge, no one associated with the States Attorney's office has ever asked a judge on the Seventh Circuit to notify an Indian parent of any of the rights just discussed, nor has anyone from that office provided notice directly to an Indian parent.

To this day, Indian parents are not advised of the rights this Court recognized are mandatory in 48-hour hearings. *See* Exhs. 3R and 6R (transcripts of hearings held April 4 and 18, 2016) (filed under seal).

These practices violate the Due Process Clause. *Oglala II* at 769 ("'One of the core purposes of the Due Process Clause is to provide individuals with notice of claims against them.'") (citing *Oglala I*, 993 F. Supp. 2d at 1037). Indian parents facing 48-hour hearings are entitled to notice that includes the date, time, and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences; the alleged factual basis for the proposed action; and a statement of the legal standard upon which the determination will be made. *Oglala II* at 769, citing *Syrovatka v. Erlich*, 608 F.2d 307, 310 (8th Cir. 1979) (quoting *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 25 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976)). *See also* DOI Guidelines at 10153-54 (listing in detail the notice that should be provided to families and to tribes in ICWA proceedings).

DSS must do more in their ICWA affidavits than describe the emergency that required the child's removal from the home. While that information is relevant, it fails to provide parents with the factual basis of the proposed action, that is, of the grounds supporting DSS's request for *continued* custody. Thus, the affidavit must set forth a factual basis for the state's claim that continued custody is needed "in order to prevent imminent physical damage or harm to the child," the burden of proof mandated by ICWA's § 1922. As the Court recently stated:

> The DSS Defendants miss the point of the court's findings. The issue is not what the Indian parents knew about the reasons their children were initially removed from the parents' custody, but rather the factual basis

> supporting continued separation of the family. This is the information mandated for disclosure to the parents . . . .

Oglala III at *3. In other words, the ICWA affidavit must provide a factual basis for contending that the emergency still exists at the time of the 48-hour hearing.

The Court's remedial order should direct the Defendants to provide Indian parents at the earliest practicable time (and never later than the commencement of the hearing):

1. With a copy of the petition and any police report attached to the petition, the ICWA affidavit, and any other document the state submits in the case; the court should state on the record what documents have been submitted to the court, and the parents should be asked if they were given copies. (*See Oglala II* at 770.)

2. With notice of the procedural rights guaranteed parents and custodians at a 48-hour hearing, including the date, time, and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences of the hearing; the alleged factual basis for the proposed action, that is, evidence that the emergency still exists; to appointed counsel if the parents are indigent and to a brief continuance to enable counsel to become familiar with the facts of the case; to contest the allegations in the petition; to have the state present evidence in support of the petition; to cross-examine the state's witnesses; and to present testimony and to subpoena witness testimony. (*Oglala II* at 769.)

3. With notice of the legal standards governing the proceeding, including notification that the state has the burden of proving that removal of the child from the home is in the child's best interests, as required by state law, and that such removal is

necessary in order to prevent imminent physical damage or harm to the child, as required by § 1922. (*Oglala II* at 754-55, 759-61, 769.)

4. With notice that the parents have a right to request that the state proceeding be transferred to tribal court. *See* 25 U.S.C. § 1911(b).

REMEDY No. 2: THE RIGHT TO PRESENT FORMAL EVIDENCE

Parents in Defendants' 48-hour ICWA hearings are not allowed to present formal evidence, including witness testimony. Judge Pfeifle confirmed on May 4, 2015 that "I do not take formal testimony under oath at [a 48-hour] hearing." *See* Exhibit 1R at 3; *see also id*. at 5 ("Again, I do not take formal testimony at today's hearing.") On the contrary, Judge Pfeifle renders his decision by "rely[ing] on the evidence [submitted by the State]" in documents. *Id.* This has been the practice of all judges on the Seventh Circuit. *See Oglala II* at 761 ("The Seventh Circuit judges never advised Indian parents they had a right to call witnesses at the 48-hour hearing.")

This practice violates the Due Process Clause:

> "Ordinarily, the right to present evidence is basic to a fair hearing. . . ." *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). . . .Judge Davis and the other defendants failed to protect Indian parents' fundamental rights to a fair hearing by not allowing them to present evidence to contradict the State's removal documents.

Oglala II, at 771, 772.

The truncated hearings conducted in the Seventh Circuit not only violate the Fourteenth Amendment but are inconsistent with the hearings expected under state law. The South Dakota Unified Judicial System promulgated the *South Dakota Guidelines for*

Judicial Process in Child Abuse and Neglect Cases ("SD Guidelines"). These Guidelines, as this Court noted, "contemplate that a 48-hour hearing is an evidentiary hearing" that will require substantial time and resources. *Oglala II*, at 767. *See also Oglala III* at *7 ("Despite the comprehensive SD Guidelines, discussed in detail at pages 29-34 of the March 30, 2015 order, the DSS Defendants ignored the SD Guidelines and adopted the policies of Judge Davis as their own."); DOI Guidelines at 10155 ("[At the emergency custody hearing, the state court] should accept and evaluate all information relevant to the agency's determination provided by the child, the child's parents, the child's Indian custodians, the child's tribe or any participants in the hearing.")

Plaintiffs are entitled to a remedy that immediately halts all such violations. Defendants should be ordered to permit Indian parents, custodians, and intervenor tribes to present evidence in 48-hour hearings, including witness testimony.

REMEDY No. 3: THE RIGHT TO CONFRONT AND CROSS-EXAMINE

Parents in Defendants' 48-hour hearings are not permitted to confront and cross-examine adverse witnesses. *See Oglala II* at 761. Yet, in every 48-hour hearing involving an Indian child, a DSS employee files an "ICWA affidavit" with the court accusing the parents of abuse and neglect. *Id.* at 758. It is the policy and practice of the judges on the Seventh Judicial Circuit to base their custody determinations on these affidavits without allowing parents to challenge them, *see id.* at 757, which likely explains why the state prevails 100 percent of the time in these proceedings.

This practice violates the Due Process Clause:

> The United States Supreme Court has "frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins v. McKeithen*, 395 U.S. 411, 428,

> 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (reference omitted). It is a central element of due process that a party has the "right to be confronted with all adverse evidence and to cross-examine witnesses." *Nevels v. Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981). *Ex parte* communications between a Deputy States Attorney, a DSS representative and the judge, whether in the form of undisclosed affidavits and reports or oral communications, violate this fundamental right.

Oglala II at 771. The remedy for this deprivation is simple: Defendants must afford Indian parents with the opportunity to confront and cross-examine adverse witnesses, particularly the DSS employee who signed the ICWA affidavit.[5]

REMEDY No 4: THE RIGHT TO COUNSEL

Defendants agree that indigent Indian parents facing the loss of their children are entitled to court-appointed counsel. Their consistent practice, however, "is to appoint counsel after entry of the temporary custody order. That is, after the court orders foster care placement for the Indian child. . . .This practice defies logic because the damage is already done—Indian parents have been deprived of counsel during the course of what should have been an adversarial evidentiary hearing conducted in advance of a court order imposing out-of-home custody for an Indian child." *Oglala II* at 770. Here, as in other contexts in which a citizen faces the loss of a significant interest in what could be a contested legal claim involving disputed facts, "'[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel.'" *Id*. (quoting *Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)).

[5] The SD Guidelines state that the person who signs the ICWA affidavit should attend the hearing and be prepared "to detail reasonable efforts [to avoid removal of the child] at the 48 hour hearing." *Id*. at 37. Currently, then, this person is present at the hearing but remains immune from cross-examination. That immunity should now end because there is no legal basis to support it.

ICWA requires the appointment of counsel to indigent Indian parents or custodians "in any removal, placement, or termination proceeding." 25 U.S.C. § 1912(b). A 48-hour hearing is a removal hearing, and thus counsel must be appointed.

It would appear that counsel is also required under South Dakota law. *See* SDCL 26-7A-31 (requiring the appointment of counsel to indigent parents in abuse and neglect proceedings). The South Dakota Supreme Court has yet to address this issue squarely but the court has noted the importance of counsel in abuse and neglect proceedings. *See In re People ex rel. South Dakota Dept. of Social Service*s, 691 N.W.2d 586 (S.D. 2004) (holding that a trial court's decision to proceed with an adjudicatory hearing where the unrepresented parent had not waived her right to counsel violated SDCL 26-7A-31).

The Seventh Judicial Circuit can create a system whereby attorneys can be quickly appointed in 48-hour hearings.[6] The 48-hour hearing can be briefly recessed and then resumed after counsel has become familiar with the facts. "Appointing counsel and continuing the 48-hour hearing for a few hours or even a day to allow court-appointed counsel to confer with the Indian parents and become familiar with the critical documents upon which the 48-hour hearing is based would result in an 'equal contest of oppos[ing] interests.'" *Oglala II* at 771 (quoting *Lassiter*, 452 U.S. at 28). The Court's remedial order should mandate this procedure.

As the Court noted in *Oglala II*, the standard practice of Seventh Circuit judges is to warn Indian parents that any money spent on appointed counsel "is a bill or lien

[6] The meeting that Dana Hanna sought to arrange with Judge Mandel would have involved a representative from Dakota Plains Legal Services, who was prepared to discuss the willingness of DPLS to respond promptly to court appointments in 48-hour hearings. In any event, the Seventh Circuit can create a system much like the one it created for court appointments in criminal cases.

against any property you own" and the county can "foreclose or collect on the bill." *Id*. at 759. Defendants should be ordered to stop making those threats. Although there is some authority under state law to impose such a lien up to $1,500, *see* SDCL 26-7A-32 and 23A-40-11, imposition of that lien on Indian parents would violate ICWA. *See* 25 U.S.C. § 1912(b) (stating that if a state does not already provide a right to free counsel, the cost of counsel should be sought from the Secretary of the Interior). Defendants' threats to "foreclose" on the parents' property have a chilling effect and will scare some parents into abandoning their right to counsel. Therefore, these threats should cease.

REMEDY No 5: THE RIGHT TO A DECISION BASED ON THE EVIDENCE PRESENTED AT THE HEARING

There is something fundamentally wrong, as this Court held, with a proceeding in which only one party is permitted to offer evidence, the other party can neither see it nor challenge it and is not allowed to offer any evidence in rebuttal, but the court enters findings of fact anyway. Yet, this is the nature of Defendants' 48-hour hearings. *Oglala II* at 761-62. *See also id*. at 771 n.32 (describing "the standardized temporary custody order which purports to make findings justifying continued state custody though no documents were received in evidence and the State presented no witnesses at the 48-hour hearing.") This lopsided proceeding does not qualify as a "hearing" in any real sense of the word.

Plaintiffs are entitled to an immediate halt to such proceedings. Defendants must establish procedures compliant with due process. "The Due Process Clause requires a judge to base a decision solely on the evidence presented during a hearing" at which both parties may present evidence and cross-examine adverse witnesses. *Oglala II* at

771. "'To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on.'" *Id*. (quoting *Goldberg*, 397 U.S. at 271). Defendants should be directed to provide precisely those types of decisions at the conclusion of a 48-hour hearing.

ICWA provides that whenever a state agency removes an Indian child from the home, that agency must engage in "active efforts" to reunify the family. 25 U.S.C. § 1912(d); *see Oglala II* at 754. The "checklist" orders used in the Seventh Circuit, *see Oglala II* at 761, always include a finding that DSS has made active efforts to reunite the family. That finding, however, is never based on any evidence presented at the hearing. This Court's remedial order should direct DSS to introduce evidence of active efforts at the 48-hour hearing to the extent such evidence is available, and direct Judge Pfeifle (in his official capacity) to make a specific finding on whether DSS engaged in active efforts. *See* DOI Guidelines at 10152 ("The requirement to engage in 'active efforts' begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.")[7]

REMEDY No. 6: THE 48-HOUR HEARING MUST USE THE § 1922 STANDARD

Not one 48-hour hearing held in the Seventh Judicial Circuit has ever employed the standard of proof that Congress mandated in ICWA. That standard is set forth in 25 U.S.C. § 1922, which requires the state to return an Indian child to his/her parents at the

[7] There will be occasions when DSS acquired emergency custody so recently (such as the night before the 48-hour hearing) that no efforts have been made to reunite the family. In those situations, the ICWA affidavit should explain that situation, and the court's findings can incorporate that information. Currently, however, every ICWA affidavit claims that active efforts have been made and every order finds that active efforts were made.

conclusion of the 48-hour hearing unless the state has proven that continued custody is "necessary to prevent imminent physical damage or harm to the child."

During the 48-hour hearing conducted by Judge Pfeifle on May 4, 2015, Mr. Hanna requested that DSS be ordered to meet the § 1922 standard of proof. *See* Exh. 1R at 10. Judge Pfeifle denied that request, stating that "1922 does not apply to [a 48-hour] hearing." *Id*. at 12. Judge Pfeifle stated: "The standard that I use in making that determination [whether to grant continued custody to DSS] is whether I believe that the State's request for continued temporary custody is in the best interests of the child." Exh. 1R at 3. *See also id*. at 5 ("[T]oday's hearing . . . is only a determination, based upon the evidence that I have received, as to whether it is in the child's best interests to continue temporary custody" outside the home.) In two recent 48-hour hearings, one held April 4, 2016 and the other April 18, 2016, Deputy States Attorney Roxie Erickson urged Judge Gusinsky to ignore the 1922 standard and to use South Dakota's best interest of the child standard instead. *See* Exhs. 3R and 6R (filed under seal). This is the same standard Judge Davis had been using. *See Oglala II* at 759 (noting that Judge Davis advised parents that the purpose of a 48-hour hearing "is to determine what is in the best interests of the children in the interim until this A & N [Abuse and Neglect] petition is filed and the matter starts to proceed through the court.")

Using South Dakota's lower standard of proof rather than ICWA's higher standard defeats congressional intent and "ignores the mandate of § 1922." *Oglala II* at 768. A "best interest of the child" standard allows judges and social workers to import the very type of cultural bias and prejudice ICWA was designed to supplant. *See Oglala II* at 754. A state court judge, for instance, may believe that removing a child from an

underprivileged Indian family containing an alcoholic parent is in that child's best interests, but Congress has determined that unless that child faces "imminent physical damage or harm," the best place for that child is with her family.

Defendants do not even *inquire* during the 48-hour hearing whether the emergency that precipitated the child's removal has ceased. There is an irrebutable presumption in these hearings, in essence, that every Indian parent who was intoxicated Saturday night will stay intoxicated indefinitely and that all of those parents are unfit to raise a child. As the transcripts filed with the Court demonstrate, in not one 48-hour hearing involving Indian children who were removed from the home based on an incident of intoxication by a parent was there an inquiry to determine if there was any evidence to justify continued custody by DSS of these children.

The DOI Guidelines confirm that emergency removal of an Indian child is permissible "only as necessary to prevent imminent physical damage or harm to the child." 80 F.R. at 10155 §B.8(a). *See also id*., §B.8(g) ("The emergency removal or placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal or placement no longer exists, or, if applicable, as soon as the tribe exercises jurisdiction over the case, whichever is earlier.")

This Court notified Defendants in 2014 in denying their motions to dismiss that § 1922 is not a statute of deferment and that their 48-hours hearings must employ § 1922's standard of proof. Apparently, it will take a specific order directed at these Defendants to implement that change. The order should ensure that at the conclusion of each 48-hour hearing that results in an out-of-home placement of an Indian child, the temporary custody order expressly cites § 1922 and sets forth the evidence introduced

during the hearing that supports a finding that continued separation is necessary to prevent imminent physical damage or harm to the child.

An overarching concern of Plaintiffs is the fact that the DSS Defendants and Defendant Vargo, as illustrated by the motions for reconsideration they filed, have persistently claimed that they only follow directives from the presiding judge in 48-hour hearings and have no control over, and take no responsibility for, what occurs at these hearings. This Court has just as persistently rejected those contentions. In accordance with the Court's findings, the remedial order should direct the DSS Defendants and Defendant Vargo to undertake all measures within their powers to ensure that Plaintiffs' federal rights are provided to them.

For instance, prior to each 48-hour hearing, Mr. Vargo must file a petition for emergency custody that specifically cites 25 U.S.C. § 1922 and its standard of proof. During each 48-hour hearing, Defendant Vargo should notify the court at the outset that, in his opinion, the parents should be given an opportunity to have counsel appointed for them if they are indigent before the hearing proceeds further. After appointed counsel has been given an opportunity to become familiar with the case, Mr. Vargo should request the court's leave to call as a witness the DSS employee who signed the ICWA affidavit, and submit that witness to cross-examination. He should also identify as part of his opening comments the documents his office has filed with the court, and ask the parents if they were provided with copies. If the court proceeds with the case in a manner that, in his opinion, violates ICWA or the Due Process Clause, Defendant Vargo should dismiss the petition for temporary custody and then, if necessary, file a new petition. If Mr. Vargo is directed by the court to proceed in a manner that in his opinion

violates federal law, Mr. Vargo should make a record of that fact and not just acquiesce in the proceeding. In addition, at the conclusion of any such proceeding, Mr. Vargo should advise the parents that § 1914 of ICWA authorizes them to challenge a foster care placement in "any court of competent jurisdiction," including an appellate court.

Similarly, DSS should not acquiesce in a hearing that violates federal law without making an appropriate record through counsel. DSS should request that their attorney call as a witness the worker who signed the ICWA affidavit. The ICWA affidavit must specifically refer to 25 U.S.C. § 1922 and provide the factual basis for the proposed action to retain continued custody. DSS must seek to introduce evidence, through their counsel, that the Indian child faces imminent risk of physical harm if returned home.[8] Moreover, DSS has the option of allowing a child to remain in the home and be monitored by DSS. Given that ICWA allows out-of-home placement only as a last resort, DSS should be ordered to explain in the ICWA affidavit and during the 48-hour hearing why in-home monitoring is not a viable option in this instance, and the trial court should be directed by this Court to make an express finding on that issue.

REMEDY No. 7: DSS MUST BE ORDERED TO USE THE § 1922 STANDARD IN DETERMINING WHEN TO RETURN AN INDIAN CHILD TO THE HOME

The "checklist" order signed at the conclusion of 48-hour hearings authorized DSS to return Indian children when the emergency was over but left full discretion in the hands of DSS. *See Oglala II* at 768 ("The defendants acknowledge the practice of Judge Davis is to *authorize* DSS to perform the function of determining if, or when,

[8] As noted above, there is nothing in *Cheyenne River* that compels Mr. Vargo or DSS in a 48-hour hearing to violate the Due Process Clause or acquiesce in any such violation. Indeed, "Mr. Vargo has an independent 'obligation to follow federal and state law . . . and to seek justice at all times." *Oglala III* at *8, citing *Oglala II* at 753 (footnote omitted).

imminent risk of physical harm to an Indian child has passed and to restore custody to the child's parents.") (emphasis in original.) This practice, the Court concluded, "does not comply with the requirement of § 1922 to *order* restoration of custody to Indian parents when the risk of imminent physical harm no longer exists." *Id*. (emphasis in original).

This deficiency can be repaired easily: temporary custody orders should order DSS–not just authorize them–to return Indian children to their families as soon as the emergency has ended, that is, as soon as returning the child will not place him/her at imminent risk of physical harm.

ADDITIONAL REMEDY: THE NEED FOR A MONITOR

Rule 53 of the Federal Rules of Civil Procedure authorizes this Court to appoint a monitor, a power that also exists inherently. *See Ex parte Peterson*, 253 U.S. 300, 312-13 (1920); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956). Plaintiffs would not be requesting a monitor had the Defendants made a good faith effort to implement *Oglala II*. But because the Defendants seem committed to continuing their past practices, appointing a monitor to observe 48-hour hearings for at least the next six months is prudent. Plaintiffs are confident that the parties can mutually agree on a local attorney who will attend 48-hour hearings and issue a monthly report. (If the parties are unable to agree, each party can submit two names to the Court and the Court can select a monitor.) Defendants should bear the cost of the monitor. *See Gary W. v. State of La.*, 601 F.2d 240, 245 (5th Cir. 1979).

Courts have appointed monitors in cases, such as this one, involving prolonged, systemic violations of civil rights. *See Ass'n for Retarded Citizens of N. Dak. v. Olson*,

561 F. Supp. 473, 494 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1982);[9] *M.D. v. Abbott*, ___ F. Supp. 3d ___, 2015 WL 9244873 at **108-09 (S.D. Tex. Dec. 17, 2015); *Gary W.*, 601 F.2d at 245-46; *D.G. ex rel. Strickland v. Yarbough*, No. 08-CV-074-GKF-FHM, 2011 WL 6960613 at *5 (N.D. Okla. Dec. 16, 2011). Due to the concerted actions of the Defendants to ignore *Oglala II*, Plaintiffs believe a monitor will help assure that all members of the Plaintiff class finally are secured the rights that that Defendants have long denied them. While it is true that Mr. Hanna will attend some 48-hour hearings and can monitor those, he only represents three of the nine tribes in South Dakota and no out-of-state tribes, and he is counsel for a party in this litigation. A neutral and detached monitor who reports directly to the Court (with copies of reports to counsel) can be of great assistance in ensuring compliance with this hard-fought remedial order.

CONCLUSION

Plaintiffs are entitled to declaratory and injunctive relief that fully implements this Court's rulings and immediately halts the continuing violation of their federal rights. As the Supreme Court emphasized in *Holyfield*:

> It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families vis-à-vis state authorities. . . . Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the State and their courts as party responsible for the problem it intended to correct.

Holyfield, 490 U.S. at 44-45, 45 n. 17 (citing 25 U.S.C. § 1901(5)). Unfortunately, some thirty-eight years after ICWA was passed, the State of South Dakota and its courts

[9] The monitor in *Retarded Citizens* case remained in place for seven years. *See Ass'n of Retarded Citizens of No. Dak. v. Sinner*, 942 F.2d 1235, 1238 (8th Cir. 1991).

remain part of the problem facing Indian families and tribes as they seek to protect their children.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2016, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel of record:

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