IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

AARIN NYGAARD, et al., Petitioners, v. TRICIA TAYLOR, et al., Respondents.	Civil No. 3:19-CV-03016-RAL **TRIBAL COURT RESPONDENTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

COME NOW Respondents Cheyenne River Sioux Tribal Court, Brenda Claymore, in her official capacity as Chief Judge of the Cheyenne River Sioux Tribal Court, Cheyenne River Sioux Tribal Court of Appeals, and Frank Pommersheim, in his official capacity as Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals (hereafter collectively "Tribal Court Respondents"), and for their Reply Brief in Support of Motion to Dismiss state as follows:

SUMMARY OF ARGUMENT

Tribal Court Respondents respectfully submit that this action should be dismissed for lack of subject matter jurisdiction for four reasons. First, the temporary custody order of the Tribal Court does not constitute "detention" within the meaning of the habeas corpus provision of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303. The minor children at issue in this case, C.S.N. and T.R.S., are not wards of the Tribal Court or otherwise detained by the Tribal Court. Rather, they are "at liberty" in the custody of a non-parent guardian pursuant to a court order. *See Lehman v. Lycoming County Children's Services Agency,* 458 U.S. 502, 511 n.12 (1982). Petitioners' reliance on *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989), is misplaced. In *DeMent*, the court noted that its holding was limited to "the facts of this case,"

including the fact that the tribal court took custody of the children by making them "wards of the court" and the fact that the tribal council enacted legislation "declaring that the Tribe has sole jurisdiction over the … children." *Id.* at 515. No such facts exist here. Further, since *DeMent* was decided, the Eighth Circuit has clarified that "incarceration" and the imposition of "penal restrictions" are the *sine qua nons* of "custody" or detention within the meaning of federal habeas statutes, not the entry of child custody orders. *Amerson v. Iowa, Dep't of Human Servs. by Palmer*, 59 F.3d 92, 94 (8th Cir. 1995) (holding that children are not deemed to be in "custody," as that term is used in 28 U.S.C. § 2254, when they are in "state-ordered foster custody" or "housed in state institutions," included secured and unsecured residential and treatment facilities).

Second, Petitioners have not exhausted available Tribal Court remedies. Petitioners ask this Court to order the Tribal Court to give "full faith and credit under comity" to six North Dakota custody orders. Pet. 3 (¶ 6). *See also id.* at 2 (¶ 2), 33 (¶ h). But they did not seek recognition or enforcement of those state court orders in the Tribal Court, with the exception of one interim *ex parte* order from September 12, 2014. *See* Pet. Exh. 13 [doc. 1-13]. The Tribal Court declined to recognize or enforce that order because it found, after an evidentiary hearing, that "the process by which the *ex parte* order was obtained did not fully comply with the prerequisite of due process." Pet. Exh. 62 [doc. 1-62] 12. Petitioners have not filed a petition, motion, or other proper request in the Tribal Court to seek recognition or enforcement under tribal law of any other state court order.

Further, Petitioners ask this Court to issue a writ of habeas corpus, but they have not sought habeas relief in the Tribal Court, as the cases require. *See Nygaard v. Taylor*, Case No. 3:16-cv-00393-PRE-ARS, Slip Op. 20 (D.N.D. May 24, 2017) (Pet. Exh. 59 [doc. 1-59]) (holding that, "the habeas action provided by the ICRA must first be brought in tribal court and federal courts

will not hear the matter until tribal court remedies have been exhausted"); *Valenzuela v. Silversmith*, 699 F.3d 1199, 1207–08 (10th Cir. 2012) (affirming dismissal of federal habeas petition under 25 U.S.C. § 1303 on ground that petitioner failed to exhaust his tribal court remedies, including the tribe's available habeas relief).

Third, the Tribal Court and the Tribal Court of Appeals are part of the tribal judiciary, which is a branch of the tribal government of the Cheyenne River Sioux Tribe, and Petitioners' suit against these institutional defendants is barred by the doctrine of tribal sovereign immunity. The Supreme Court made clear in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that the ICRA does not abrogate tribal sovereign immunity or authorize suits against Indian tribal governments for alleged violations of the Act. *Id*. at 58-59 (noting that, "since the respondent in a habeas corpus action is the individual custodian of the prisoner, ... the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit").

Fourth, Petitioners' claims for declaratory and injunctive relief against all Tribal Court Defendants are improper. The Supreme Court held in *Santa Clara Pueblo*, that the ICRA "does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." 436 U.S. at 72.

Each of these arguments is discussed below. Before proceeding to that discussion, Tribal Court Defendants offer the following factual, legal, and procedural background to aid the Court in its consideration of this matter.

BACKGROUND

A. The Cheyenne River Sioux Tribe

The Cheyenne River Sioux Tribe ("Tribe") is a federally recognized Indian tribe whose sovereignty and right to self-government were recognized and affirmed in the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). The Tribe has a treaty-based government-to-government relationship with the United States.

The Supreme Court has considered the history of the Cheyenne River Sioux Tribe and its treaty relationship with the United States in various cases, including *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Solem v. Bartlett*, 465 U.S. 463 (1984), and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

The Tribe comprises four of the seven bands of the Lakota Sioux – *Minnecoujou, Itazipco, Oohenumpa,* and *Siha Sapa*. It has approximately 22,000 enrolled members, a majority of whom live on the Cheyenne River Indian Reservation ("Reservation") in 16 tribal communities located throughout Ziebach and Dewey counties in north-central South Dakota. The Reservation, which was established pursuant to the Act of March 2, 1889, 25 Stat. 889, contains approximately 2.8 million acres of land and is roughly the size of the State of Connecticut.

The Tribe is organized under Section 16 of the Indian Reorganization Act, 48. Stat. 984 (Jun. 18, 1934), *codified as amended at* 25 U.S.C. § 5123, and is governed by a Constitution and By-Laws. *See* C.R.S.T. Const. and By-Laws (Dec. 27, 1935), as amended Feb. 11, 1966, Jun. 18, 1980, and Jul. 17, 1992 (attached hereto as Respondents' Exhibit A).

B. The Cheyenne River Sioux Tribal Courts

The Tribal Constitution establishes a tribal court "for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe," C.R.S.T. Const., Art. IV, § 1(k), and

the By-Laws provide that, "[t]he tribal courts shall have jurisdiction over claims and disputes arising on the reservation," C.R.S.T. By-Laws, Art. V, § 1(c). *See also* CRST Const., Art. I. The Tribal Courts, which consist of trial courts and an appellate court, are open to tribal members and non-members alike.

The Tribe's judicial system, like those of most modern tribal courts, follows procedures similar to those utilized in federal and state courts around the country. See Remarks, Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 5 (1997) (specifically acknowledging the C.R.S.T. court system). The principle of separation of powers is contained in the Tribe's Constitution. *See* C.R.S.T. Const., Art. IV, § 1(k) ("[d]ecisions of tribal courts may be appealed to tribal appellate courts, but shall not be subject to review by the Tribal Council"). Litigants are afforded due process of law and equal protection of the law. Trial procedures are governed by rules similar to the federal rules of civil and criminal procedure as well as the rules of evidence. Tribal Court judges are bound by their oath of office and follow the American Bar Association Code of Judicial Conduct.

Many of the judges of the Tribal Courts are well-trained and well-recognized jurists and academics. For example, Chief Justice Frank Pommersheim of the Tribal Court of Appeals is a member of the bar of South Dakota and a professor (emeritus) at the University of South Dakota School of Law. A graduate of Columbia University Law School, he serves on several tribal appellate courts, writes extensively in the area of Indian law and is a contributor to the HANDBOOK OF FEDERAL INDIAN LAW by Felix S. Cohen, and has received awards for teaching at the University of South Dakota and its law school.

The State of South Dakota authorizes its courts to give comity to decisions of the Cheyenne River Sioux Tribal Courts. *See* S.D.C.L. § 1- 1-25. *See also*, *e.g.*, *One Feather v. O.S.T. Pub. Safety*

Comm'n, 482 N.W.2d 48, 49 (S.D. 1992); *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D. 1995). Similarly, federal courts afford comity to tribal court decisions. *See*, *e.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987); *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006), *cert. denied*, 549 U.S. 1167 (2007).

The Tribal Court's fair and unbiased tribal procedures lead to fair and unbiased results. For instance, the Tribe itself frequently loses cases in the Tribal Courts. *See*, *e.g.*, *High Elk v. Iron Hawk*, Case No. 05-002-A, 33 Indian L. Rep. 6031 (C.R.S.T. Ct. App. 2006) (per curiam).

C. Tribal Self-Government and the Role of Tribal Courts

The Cheyenne River Sioux Tribe, like other federally recognized Indian tribes, is a sovereign nation that possesses inherent sovereign authority. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788 (2014) (federally recognized Indian tribes "exercise inherent sovereign authority" over their members and territories) (citations omitted); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973) ("[Indian tribes'] claim to sovereignty long predates that of our own Government") (citations omitted); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations"); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, § 4.01[1][a] (2005 ed. & Supp. 2012) ("Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as 'distinct, independent political communities,' qualified to exercise powers of self- government . . . by reason of their original tribal sovereignty") (internal citations omitted).

"Tribal courts play a vital role in tribal self-government." *Iowa Mut. Ins. Co.*, 480 U.S. at 14. Moreover, "the Federal Government has consistently encouraged their development." *Id.* at 14-15; *see also id*. at 16-17 ("[t]he federal policy of promoting tribal self-government encompasses

the development of the entire tribal court system"). *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. §§ 3601 *et seq*. (2000); Indian Tribal Justice and Legal Assistance Act, 25 U.S.C. §§ 3651(6)-(7) (2000) (congressional findings of federal policy acknowledging importance of tribal justice systems to tribal self- determination); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 113 (1995) ("[T]ribal justice systems are essential pieces of the mosaic of tribal self-governance. The U.S. Department of Justice is firmly committed to increasing self-determination for American Indian tribal governments by strengthening tribal justice systems"). *See al*so Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 450 (2005).

The United States Supreme Court has long recognized the inherent authority of tribal courts to adjudicate civil disputes arising in Indian country. *See*, *e.g.*, *Iowa Mutual Ins. Co.*, 480 U.S. at 18-19; *Williams v. Lee*, 358 U.S. at 223. Tribal authority over domestic relations involving tribal members, including custody disputes involving tribal member children, is well-settled. *See*, *e.g.*, *Montana v. U.S.*, 450 U.S. 544, 564 (1981).

The United States Congress has also recognized the inherent authority of tribal courts to decide custody disputes involving Indian children. In the Indian Child Welfare Act ("ICWA"), Pub. L. 95-608, 92 Stat. 3069 (Nov. 8, 1978), *codified as amended at* 25 U.S.C. § 1901, *et seq*., Congress vested exclusive jurisdiction in tribal courts, including the Tribal Courts of the Cheyenne River Sioux Tribe, over certain child custody proceedings involving tribal member children who reside or are domiciled on the Reservation. 25 U.S.C. § 1911(a).[1]

[1] The ICWA defines the term "child custody proceeding" to include a "foster care placement," which shall mean "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1).

Further, the laws of the Tribe expressly grant jurisdiction to the Tribal Court over care and custody proceedings involving children who are members of the Tribe. The Children's Code of the Tribe provides that the Tribal Court "shall have jurisdiction over any child who is a member or eligible to become a member of the Cheyenne River Sioux Tribe no matter where domiciled, residing or found ..." C.R.S.T. Children's Code § 7.01 (*recited in* Pet. Exh. 65 [doc. 1-65] 19). The Children's Code further provides that the Tribal Court "may decline jurisdiction where a forum with concurrent jurisdiction is exercising its authority or in cases where neither the child nor either parent is a Reservation resident in cases where justice may require declination." *Id*.

D. The Tribal Court Proceedings in This Case

In December 2014, the Tribal Court was presented with a petition for temporary custody of two children who are enrolled members of the Tribe, C.S.N. and T.R.S. *See* Pet. Exh. 20 [doc. 1-20]. The petition was filed by children's uncle, Ted Taylor, an enrolled member of the Tribe, and later joined in by the children's aunt, Jessica Ducheneaux, an enrolled member of the Tribe. Mr. Taylor had been instructed by the South Dakota Department of Social Services ("DSS") to file the temporary custody petition in Tribal Court when DSS placed the children in his care and custody following apprehension of the children's mother, Tricia Taylor, an enrolled tribal member, on an arrest warrant.

The petition for temporary custody alleged that the children were in need of care and custody, in part, because their mother had been detained and incarcerated. Recognizing an immediate need to provide for care and custody of the children, the Tribal Court entered an order granting temporary custody to Ms. Ducheneaux.

Petitioners Aarin Nygaard and Terrance Stanley, the fathers of C.S.N. and T.R.S., respectively, initially were not joined in the petition for temporary custody. Mr. Nygaard appealed

the temporary custody order to the Tribal Court of Appeals, Pet. Exh. 29 [doc. 1-29], which vacated the order and remanded the case to the Tribal Court with instructions to include Mr. Nygaard in the proceedings and to afford him a full opportunity to participate. Pet. Exh. 32 [doc. 1-32]. The Tribal Court of Appeals noted that, "[d]ue process and essential notions of Lakota fairness are always necessary ingredients in any legal proceeding involving matters of custody and family relationships." Pet. Exh. 32 [doc. 1-32].

In the spring of 2015, Mr. Nygaard and Mr. Stanley filed a motion to dismiss the petition for temporary custody. Pet. Exh. 34 [doc. 1-34]. They challenged the jurisdiction of the Tribal Court to hear and decide the petition. The gravamen of Petitioners' argument was that the Tribal Court lacked jurisdiction over the case under the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A. The PKPA requires state courts to give full faith and credit to child custody orders duly entered by the courts of other states. 28 U.S.C. § 1738A(a). The PKPA also provides, as a general rule, that state courts may not modify a custody order duly entered by the court of another state. *Id*. There are exceptions to this general rule. *See*, *e.g.*, 28 U.S.C. §§ 1738A(c)(2)(C), 1738A(f), 1738(h). Petitioners asserted that they had secured orders from a North Dakota state court granting them custody of the minor children and that the Tribal Court did not have authority, under the PKPA, to enter a temporary custody order that would modify or disturb those state court orders.

The PKPA, by its express terms, applies to state courts, not tribal courts and the Cheyenne River Sioux Tribe Court of Appeals has ruled but the PKPA does not apply to the Tribe. Pet. Exh. 65 [doc. 1-65] 10-17. This ruling is consistent with the vast majority of decisions made by tribal, state, and federal courts on this issue. *See id.* at 11-13 (collecting cases). However, even assuming, for the sake of argument, that the PKPA did apply to the Tribe, it contains exceptions that, if met,

would allow the Tribal Court to enter a temporary custody order concerning the minor children. One of those exceptions concerns children who are in immediate need of care and custody. 28 U.S.C. § 1738A(c)(2)(C). Another exception concerns children over whom a court has exclusive jurisdiction. 28 U.S.C. § 1738A(f).[2]

On December 22, 2015, the Tribal Court entered an order denying Petitioners' motion to dismiss. Pet. Exh. 47 [doc. 1-47]. Petitioners appealed that order to the Tribal Court of Appeals, which entered a Memorandum Opinion and Order on September 1, 2016, holding that the question of whether or not the Tribal Court would recognize and enforce the North Dakota custody orders would be governed by comity, not full faith and credit: "The central provision of Tribal law that speaks to the issue of the Cheyenne River Sioux Tribal Court potentially recognizing and enforcing a state court order is grounded in the principle of 'comity,' not full faith and credit." Pet. Exh. 55 [doc. 1-55] 5-6. The Court of Appeals noted that, "[t]his 'comity' provision is found in Executive Resolution (#E-233-97-CR)," which the court recited in full. That law establishes comity, not full faith and credit, as the rule by which foreign orders, including foreign custody orders, would be recognized and enforced by the Tribal Courts. *See* Pet. Exh. 55 [doc. 1-55] 5-7.

Previously, in *Eberhard v. Eberhard*, 24 ILR 6059 (Chey. R. Sx. Tr. Ct. App. Feb. 18, 1997), the Tribal Court of Appeals held that the Tribe is a "State," within the meaning of the PKPA, and therefore, it is bound by the terms of the PKPA. The interpretation of the PKPA in *Eberhard* was a common law decision that was subject to alteration by the Tribal Council, the

[2] The Indian Child Welfare Act provides exclusive jurisdiction to tribal courts over child custody proceedings, including foster care placements, involving children who reside or are domiciled on the reservation. 25 U.S.C. § 1911(a). Foster care placements may be initiated by state agencies or other custodians and guardians, including non-parent relatives. *See* 25 U.S.C. § 1903(1)(a).

legislative governing body of the Tribe. *See United States v. Lara*, 541 U.S. 193, 207 (2004) (noting that the common law is subject to the paramount authority of the legislature).

After the Tribal Court of Appeals made its decision in *Eberhard*, the Tribal Council enacted C.R.S.T. Res. No. E-233-97-CR (1997) to establish comity, not full faith and credit, as the principle under which foreign orders or judgments may be recognized in the Tribal Courts. Executive Resolution E-233-97CR, as ratified and amended, provides that the Tribal Courts will only recognize or grant comity to a foreign order or judgment if:

1. The court that issued the order or judgment had both subject matter and personal jurisdiction over the parties;
2. The order or judgment was not fraudulently obtained;
3. The process by which the said order or judgment was obtained fully complied with the prerequisites of impartial administration of justice and fairness, including due notice and a hearing;
4. The order or judgment does not contravene the public policy of the Cheyenne River Sioux Tribe;
5. The order or judgment complies with the laws, ordinances, and regulations of the jurisdiction from it was obtained; and
6. The jurisdiction issuing the order or judgment also grants comity to the orders and judgments of the Cheyenne River Sioux Tribal Court.

C.R.S.T. Res. No. E-233-97-CR (adopted by C.R.S.T. Executive Committee on Aug. 20, 1997, and approved by C.R.S.T. Tribal Council on Sept. 4, 1997), as amended by C.R.S.T. Res. No. 323-05-CR (Aug. 4, 2005).

By making comity the express law of the Tribe, the Tribal Council indicated its view that the Tribe is not bound by the PKPA or subject to its full faith and credit provisions. To clarify its intention, the Tribal Council later enacted Resolution 171-2018-CR (May 4, 2018), which provides that:

> the Cheyenne River Sioux Tribe is not a "State" within the meaning of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and is not subject to the Act's obligations ….

> the custody and visitation orders and judgments of foreign Tribal and State courts may be recognized and enforced by the Cheyenne River Sioux Tribal Courts under the principles of comity set forth in C.R.S.T. Res. No. E-233-97-CR (adopted by Executive Committee on Aug. 20, 1997, and approved by Tribal Council on Sept. 4, 1997), as amended by C.R.S.T. Res. No. 323-05-CR (Aug. 4, 2005), not under principles of full faith and credit ….

Pet. Exh. 63 [doc. 1-63] 5-6.

Although the Tribal Court of Appeals did not expressly rule on the applicability of the PKPA in its Memorandum Opinion and Order of September 1, 2016, it remanded the case to the Tribal Court with a clear instruction to "address the issue of comity," not the issue of full faith and credit. Pet. Exh. 55 [doc. 1-55] 8. *See also id*. at 5-7. The Tribal Court of Appeals ruled that "[i]nterim custody of the children shall remain with Ms. Jessica Ducheneaux during the pendency of said hearing unless the trial judge shall find good cause to the contrary," and the fathers "shall be entitled—if they so desire—to immediate visitation with their respective children under whatever conditions the trial judge chooses to impose." *Id*. at 7.

Petitioners filed a petition for writ of habeas corpus in the U.S. District Court for the District of North Dakota on November 10, 2016, Pet. Exh. 57 [doc. 1-57], and thereafter sought a stay of all proceedings in the Tribal Court, Pet. Exh. 58 [doc. 1-58]. The federal district court entered an order dismissing the habeas action on May 24, 2017. Pet. Exh. 59 [doc. 1-59]. In its order, the district court noted that Petitioners were required to exhaust all available remedies in the Tribal Court. The district court specifically noted that tribal law allowed Petitioners to ask "the tribal court to grant comity to an order from another jurisdiction." *Id*. at 15 (reciting in full Executive Resolution No. E-233-97-CR). The court also noted that Petitioners must seek habeas relief in Tribal Court before seeking such relief in federal court. *Id.* at 20.

Following dismissal of the North Dakota habeas petition, the Tribal Court held a hearing on February 23, 2018, on Petitioner's motion to dismiss and the enforceability of the North Dakota

custody orders. At the hearing, Petitioners were permitted leave to seek enforcement under principles of comity of any of the North Dakota state court orders. Mr. Nygaard sought recognition of an interim *ex parte* order issued September 12, 2014. He declined to seek enforcement of any other state court order. Mr. Stanley did not seek enforcement of any state court order. The Tribal Court declined to grant comity to the interim *ex parte* order of September 12, 2014, in part, because Tricia Taylor was not given notice or an opportunity to be heard prior to issuance of that order.

By order dated April 18, 2018, the Tribal Court granted Petitioners' motion to dismiss the petition for temporary custody, ruling as a matter of law that the Tribal Court was bound by the prior decision of the Tribal Court of Appeals in *Eberhard* decision and, therefore, the PKPA applied and the Tribal Court did not have authority to modify custody orders entered by the North Dakota state court.

Mr. Taylor and Ms. Ducheneaux appealed the dismissal of the petition for temporary custody to the Tribal Court of Appeals. Before taking up the merits of the appeal, the Tribal Court of Appeals ordered the Tribal Court to conduct an evidentiary hearing on certain jurisdictional facts, including the circumstances under which DSS placed the children with Mr. Taylor. *See* Pet. Exh. 64 [doc. 1-64]. The Tribal Court held an evidentiary hearing and issued an order setting forth its findings on the jurisdictional facts on December 20, 2018. Pet. Exh. 68 [doc. 1-68]. The Tribal Court noted, among other things, that visitation for the fathers has been authorized by the Tribal Court, and that Mr. Stanley has exercised visitation, while Mr. Nygaard has not. *See* Pet. Exh. 68 [doc. 1-68] 4.

The Tribal Court of Appeals entered its Memorandum Opinion and Order on February 25, 2019. Pet. Exh. 65 [doc. 1-65]. The Tribal Court of Appeals held that the PKPA does not apply to the Tribe. *Id.* at 10-17. The court overruled its previous decision to the contrary in *Eberhard*. *Id.*

at 20. The court repeated that, "there is a mechanism under Cheyenne River Sioux Tribal Law for the (potential) enforcement of 'foreign' judgments whether they be from state or other tribal courts." *Id.* at 16-17. These laws adhere to the "well-known principle of comity." *Id.* at 17 (*citing* C.R.S.T. Res. No. E-233-97-CR (1997); C.R.S.T. Res. No. 323-05-CR (2005); C.R.S.T. Res. No. 171-2018-CR (2018), Pet. Exh. 63 [doc. 1-63]).

The Tribal Court of Appeals reversed the Tribal Court's order of April 18, 2018, and remanded the case to the Tribal Court for a hearing to "review the status of parental visitation and whether the current award of (temporary) custody of those minor children to the Appellant, Ms. Jessica Ducheneaux, continues to be in the 'best interests of these native children." Pet. Exh. 65 [doc. 1-65] 20. The court noted that it "continues as a matter of law and Lakota tradition and custom to urge all parties to find grounds for mutual cooperation and respect." *Id*. at 21.

Petitioners filed this federal habeas action on August 28, 2019, and have since sought a stay of all proceedings in the Tribal Court pending resolution of this action.

ARGUMENT

I. THIS ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE A TEMPORARY CUSTODY ORDER OF THE TRIBAL COURT DOES NOT CONSTITUTE "DETENTION" WITHIN THE MEANING OF THE INDIAN CIVIL RIGHTS ACT.

Tribal Court respondents respectfully submit that the Court should dismiss this habeas action for lack of jurisdiction under 25 U.S.C. § 1303 because the minor children are not in the "custody" or "detention" of the Tribe or the Tribal Court. Instead, they are "at liberty" in the custody of non-parent guardian pursuant to a court order. *See Lehman*, 458 U.S. at 511 n.12.

Petitioners argue that "children subject to subject to illegal tribal court orders are detained or in custody for purposes of habeas corpus petitions under 25 U.S.C. § 1303." Pet. Resp. [doc. 42] 9. They cite *DeMent* and *United States ex rel. Cobell v. Cobell*, 503 F.2d 790, 795 (9th Cir.

1974), *cert. denied* 421 U.S. 999 (1975), as support for this proposition. However, Petitioners read too much into *DeMent* and *Cobell*. Those cases were limited to their unique facts and are distinguishable from the case at bar.

In *DeMent*, the court held that habeas relief was available to challenge a tribal court order that took custody of minor children and made them "wards of the court." 875 F.2d at 515. The court noted that its holding was limited to "the facts of this case," including the fact that the tribal council enacted legislation "declaring that the Tribe has sole jurisdiction over the … children." *Id.* at 515. There are no such facts in this case and, therefore, no basis to argue that C.S.N. and T.R.S. are subject to the same kind of "detention" at issue in *DeMent.* The children are not wards of the Tribal Court or otherwise detained by the Tribal Court.

Cobell involved a custody dispute on the Blackfeet Reservation and, as in *DeMent*, the tribal court took custody of the children and made them wards of the court. The tribal court order in *Cobell* stated that, "the Court as friend and protector of these children deems it necessary under the circumstances to assume care, custody and control of the children," and "said children be, and they are hereby ordered to be under the care, custody and control of this Court," and "the children are not to be removed from the Blackfeet Reservation by anyone without further order of this Court." 503 F.2d at 792, n.2. Again, there are no such facts in the present case.

Further, *Cobell* involved a question of concurrent jurisdiction involving the State of Montana and the Blackfeet Tribe, and the court specifically found that:

> Although the possibility that two sovereigns may enjoy concurrent jurisdiction in a custody situation is well recognized, Restatement (Second) Conflict of Laws § 79 (1971), we do not believe that such a situation exists here. First, unlike the State of Montana, the jurisdiction of the Blackfeet Tribal Court is limited and does not extend to the full range of domestic relations incidents. Chapter 3 of the Blackfeet Tribal Law and Order Code explicitly disclaims tribal jurisdiction over marriage, divorce and adoption. The Code defers to state law and state jurisdiction for proceedings in those areas. We interpret this relinquishment of jurisdiction to

> encompass a surrender of jurisdiction over custody determinations incident to divorce actions as well.

503 F.2d at 795. There is no similar relinquishment or surrender of tribal court jurisdiction in this case.

Since *DeMent* and *Cobell* were decided, the Eighth Circuit has clarified that "incarceration" and the imposition of "penal restrictions" are the *sine qua nons* of "custody" or detention within the meaning of federal habeas statutes, not the mere issuance of child custody orders. In *Amerson v. Iowa, Dep't of Human Servs. by Palmer*, 59 F.3d 92, 94 (8th Cir. 1995), the Eighth Circuit held that children are not deemed to be in "custody," as that term is used in 28 U.S.C. § 2254, when they are in "state-ordered foster custody" or "housed in state institutions," included secured and unsecured residential and treatment facilities. Although *Amerson* involved 28 U.S.C. § 2254, not 25 U.S.C. § 1303, the courts generally have found the law that has developed with respect to actions for habeas relief under 28 U.S.C. § 2254 and other federal habeas statutes to be applicable by analogy to actions founded upon 25 U.S.C. § 1303. *See*, *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Valenzuela v. Silversmith,* 699 F.3d 1199, 1203 (10th Cir. 2012); *Weatherwax ex rel. Carlson v. Fairbanks*, 619 F. Supp. 294 (D. Mont. 1985).

Petitioners argue that *Amerson* and the other cases cited by Tribal Court Respondents are distinguishable because they do not involve "tribal courts lacking jurisdiction," Pet. Resp. [doc. 42] 10, or "valid state court custody orders between parents," *id*., or a parent, like Tricia Taylor, who Petitioners claim "fled to the Reservation, kidnapping their children in violation of these orders," *id*. at 11. These conclusory allegations are insufficient to distinguish the long line of federal cases holding that federal habeas is not available to challenge parental rights or child custody, even if it is alleged that custody was obtained by means that violate the U.S. Constitution.

See, *e.g.*, *U.S. ex rel. Mueller v. Missouri Div. of Family Services*, 123 F.3d 1021, 1023 (8th 1997) (citing *Lehman*, 458 U.S. at 512).[3]

II. THIS ACTION SHOULD BE DISMISSED BECAUSE PETITIONERS HAVE NOT EXHAUSTED AVAILABLE TRIBAL COURT REMEDIES.

Even if this Court finds that the Tribal Court custody order amounts to "detention," within the meaning of 25 U.S.C. § 1303, this action should be dismissed because Petitioners have not exhausted their available remedies in Tribal Court.

Petitioners ask this Court to order the Tribal Court to give "full faith and credit under comity" to six North Dakota custody orders. Pet. 3 (¶ 6). *See also id.* at 2 (¶ 2), 33 (¶ h). But they did not seek recognition or enforcement of those state court orders in the Tribal Court, with the exception of an interim *ex parte* order dated September 12, 2014, which granted Mr. Nygaard custody of C.S.N. *See* Pet. Exh. 13 [doc. 1-13]. The Tribal Court declined to recognize or enforce that order because it found, after an evidentiary hearing, that "the process by which the *ex parte* order was obtained did not fully comply with the prerequisite of due process." Pet. Exh. 62 [doc. 1-62] 12. Petitioners have not filed a petition, motion, or other proper request in the Tribal Court to seek recognition or enforcement under tribal law of any other state court order.

Petitioners correctly note that the Tribal Court of Appeals relieved them of the obligation to "file a new and independent action" to seek resolution of the comity issue. Pet. Resp. [doc. 42] 6 (citing Pet. Exh. 55 [doc. 1-55] 7). That said, Petitioners were still required to properly present their out-of-state custody orders to the Tribal Court and to seek recognition and enforcement of those orders under principles of comity, whether by petition, motion, or other proper request.

[3] It should be noted that when Ms. Taylor came to the Cheyenne River Indian Reservation in August 2014, there was no state court custody order concerning T.R.S. and the only state court order concerning C.S.N. was an interim order of July 25, 2014, Pet. Exh. 7 [doc. 1-7], which granted joint custody to Mr. Nygaard and Ms. Taylor.

Petitioners were repeatedly informed of this requirement—by the Tribal Court of Appeals, *see*, *e.g.*, Pet. Exh. 55 [doc. 1-55] 3, 5-7, 8, Pet. Exh. 60 [doc. 1-60] 2, Pet. Exh. 65 [doc. 1-65] 16-17, by the Tribal Court, *see*, *e.g.*, Pet. Exh. 61 [doc. 1-61] 2, and even by the U.S. District Court for the District of North Dakota, which noted that, "the appellate court opinion is in essence a blueprint not only for the lower court but also for the petitioners to follow in exhausting their tribal court remedies," Pet. Exh. 59 [doc. 1-59] 21; *see also id.* at 15.

The Tribal Court held an evidentiary hearing on the issue of comity on February 23, 2018, and the only North Dakota custody order presented for recognition and enforcement was interim *ex parte* order dated September 12, 2014. The Tribal Court noted in its order of April 18, 2018, that neither Mr. Nygaard nor Mr. Stanley sought recognition or enforcement of any other state court order. *See* Pet. Exh. 62 [doc. 1-62] 3-4, 11-13.

Petitioners cannot claim that exhaustion of Tribal Court remedies would be futile when they chose not to seek recognition or enforcement of state court orders, as directed, whether by petition, motion, or otherwise, despite being afforded the opportunity to do so. Further, they cannot claim that exhaustion would be futile when tribal law specifically provides that they Tribal Court may decline jurisdiction over child custody cases "where a forum with concurrent jurisdiction is exercising its authority or in cases where neither the child nor either parent is a Reservation resident in cases where justice may require declination." Pet. Exh. 65 [doc. 1-65] 19.

Petitioners draw attention to the age of the Tribal Court proceedings, but they have prolonged those proceedings by declining to seek recognition and enforcement of their out-of-state orders and by seeking continuances and stays, in part to litigate their habeas petitions in this Court and in the U.S. District Court for the District of North Dakota. *See*, *e.g.*, Pet. Exh. 58 [doc. 1-58].

Further, Petitioners ask this Court to issue a writ of habeas corpus, but they have not sought habeas relief in the Tribal Court, as the cases require. *See Nygaard v. Taylor*, Case No. 3:16-cv-00393-PRE-ARS, Slip Op. 20 (D.N.D. May 24, 2017) (Pet. Exh. 59 [doc. 1-59]) (holding that, "the habeas action provided by the ICRA must first be brought in tribal court and federal courts will not hear the matter until tribal court remedies have been exhausted"); *Valenzuela v. Silversmith*, 699 F.3d 1199, 1207–08 (10th Cir. 2012) (affirming dismissal of federal habeas petition under 25 U.S.C. § 1303 on ground that petitioner failed to exhaust his tribal court remedies, including the tribe's available habeas relief).

III. PETITIONERS' CLAIMS AGAINST THE TRIBAL COURT AND THE TRIBAL COURT OF APPEALS AND PETITIONERS' CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

For the reasons set forth herein, *supra* p. 3, and in Tribal Court Respondent's Brief in Support of Motion to Dismiss [doc. 43] 12-13, Petitioners' claims against the Tribal Court and the Tribal Court of Appeals and Petitioner's claims for injunctive and declaratory relief should be dismissed for lack of jurisdiction. Those claims are barred by the doctrine of tribal sovereign immunity and are otherwise not within the grant of authority under the ICRA.[4]

[4] Plaintiff's reliance on the Tenth Circuit's decision in *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F. 2d 682 (10th Cir. 1980), is misplaced. Since *Dry Creek Lodge* was decided in 1980, the Tenth Circuit has held that it must be read "narrowly," *Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y*, 163 F.3d 1150, 1157 (10th Cir. 1998); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984), and has applied it only in those instances where "no tribal court forum existed for the non-Indian party." *Bank of Okla. v. Muscogee (Creek) Nation,* 972 F.2d 1166, 1170 (10th Cir. 1992). Similarly, the Eighth Circuit has noted that *Dry Creek Lodge* applies, if at all, only "if there is no functioning tribal court." *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622-623 (8th Cir. 1997). The Cheyenne River Sioux Tribe has a functioning Tribal Court, which is a forum for all Indians and non-Indians to assert claims, including claims under the ICRA.

CONCLUSION

For the foregoing reason, Tribal Court Respondents respectfully move the Court to dismiss this action.

Dated: April 12, 2021

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CERTIFICATE OF SERVICE

I certify that on April 12, 2021, I caused a true and correct copy of the foregoing to be served by operation of the Court's Case Management/Electronic Case Filing system on all parties and counsel of record as follows:

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