

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

<p>SARAH SHAFF AND KEITH FODNESS,</p> <p>Petitioners,</p> <p>vs.</p> <p>JUDGE BRENDA CLAYMORE, In Her Capacity as the Chief Judge of the Cheyenne River Sioux Tribe, JUDGE MARGARET EGAN, In Her Capacity as a Judge of the Cheyenne River Sioux Tribe, and CHARLES RED CROW, In His Capacity as the Chief of Police of the Cheyenne River Sioux Tribe,</p> <p>Respondents.</p>	<p>Case No. <u>3:23-cv-3029</u></p>
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**PETITION FOR WRIT OF HABEAS CORPUS
AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF**

Petitioners Sarah Shaff (“Shaff”) and Keith Fodness (“Fodness”) (collectively, “Petitioners”), by and through their undersigned counsel, respectfully petition this Court for a writ of habeas corpus to remedy the unlawful restraint on their liberty imposed by Respondents Judge Brenda Claymore, Judge Margaret Egan, and Charles Red Crow (collectively, “Respondents”), respectfully request declaratory and injunctive relief, and do hereby state and allege as follows:

NATURE OF THE CASE

1. Petitioners seek a writ of habeas corpus to remedy the unlawful restraint on their liberty imposed by Respondents. Further, because Respondents Judge Brenda Claymore and Judge Margaret Egan are improperly permitting a civil action (the “Civil Action”) brought by the

Cheyenne River Sioux Tribe (the “Tribe”) for exclusion and removal of Petitioners, both of whom are non-Native American non-Tribal member employees of the Dupree School District No. 64-2 in Ziebach County, South Dakota (the “School District”), from the Cheyenne River Sioux Indian Reservation to proceed in the Cheyenne River Sioux Tribal Court of the Cheyenne River Sioux Indian Reservation, Eagle Butte, South Dakota (the “Tribal Court”), and because Respondent Charles Red Crow is improperly enforcing an exclusion order resulting from the Civil Action, Petitioners bring this action seeking a declaratory judgment that the Tribal Court lacks jurisdiction over Petitioners in this instance. Similarly, Petitioners seek a preliminary and permanent injunction prohibiting the Civil Action for exclusion and removal of Petitioners from proceeding in Tribal Court and prohibiting enforcement of any order of exclusion and/or removal of Petitioners resulting from said Civil Action.

THE PARTIES

2. Petitioner Sarah Shaff is an Elementary School Teacher at the Dupree PK-6 School in Dupree, South Dakota, and was acting as such at all times pertaining to the Civil Action. Shaff is non-Native American and not a member of the Tribe. Shaff is a South Dakota resident who resides off the Cheyenne River Sioux Reservation. The portion of Dupree on which the Dupree PK-6 School is situated is not trust land or allotted land or a dependent Indian Community.

3. Petitioner Keith Fodness is the Superintendent of the Dupree School District and was acting as such at all times pertaining to the Civil Action. Fodness is non-Native American and not a member of the Tribe. Fodness is a South Dakota resident who, as a condition of his employment contract with the School District, is required to live in a house provided by the

School District which is located across the street from the Dupree K-12 School in Dupree, South Dakota.

4. The portion of Dupree on which both the house and Dupree K-12 School are situated is not trust land or allotted land or a dependent Indian Community.

5. The Dupree School District is a political subdivision of the State of South Dakota that operates within the exterior boundaries of the Cheyenne River Sioux Reservation.

6. Respondent Judge Brenda Claymore is the Chief Judge of the Tribal Court. She is named in this suit only in her official capacity. Upon information and belief, it is within Respondent Judge Claymore's authority to terminate Tribal Court consideration of the Tribe's Civil Action against Petitioners.

7. Respondent Judge Margaret Egan is a Judge of the Tribal Court. She is named in this suit only in her official capacity. Upon information and belief, it is within Respondent Judge Egan's authority to terminate Tribal Court consideration of the Tribe's Civil Action against Petitioners.

8. Respondent Charles Red Crow is the Chief of Police of the Cheyenne River Sioux Tribe. He is named in this suit only in his official capacity. Upon information and belief, it is within Respondent Red Crow's authority to prohibit enforcement of any order of exclusion and/or removal of Petitioners resulting from said Civil Action.

9. At the behest of the Tribe, Respondents have acted, have threatened to act, or may act under the purported authority of the Tribe to the injury of Petitioners and in violation of federal law. Because Respondents' actions exceed the Tribe's lawful authority, Respondents are subject to suit for prospective relief in this forum. *Michigan v. Bay Mills Indian Community*, 572

U.S. 782, 796 (2014) (*Ex parte Young* doctrine extends to officials of Indian Tribes); *see also Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019).

JURISDICTION AND VENUE

10. This is an action for habeas corpus pursuant to 25 U.S.C.A. § 1303, declaratory judgment under 28 U.S.C.A. § 2201, and injunctive relief pursuant to Fed.R.Civ.P. 65.

11. Petition for Writ of Habeas Corpus is appropriate under 25 U.S.C.A. § 1303, which states that “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”

12. This Petition for Writ of Habeas Corpus arises under the Constitution of the United States and the Indian Civil Rights Act (ICRA), 25 U.S.C.A. § 1302(a)(8), which provides in part: “No Indian Tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”

13. An order excluding a nonmember from a reservation is subject to review in federal district court under the habeas corpus provisions of 25 U.S.C.A. § 1303. *Penn v. U.S.*, 335 F.3d 786, 789 (8th Cir. 2003); *see also Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 599 (9th Cir. 1983) (non-Indians who have been denied due process in tribal court may seek habeas corpus relief in federal district courts); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2nd Cir. 1996) (an order of permanent banishment is a sufficient restraint on liberty to satisfy the jurisdictional prerequisites for habeas corpus).

14. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.A. § 1331 as it concerns matters arising from the Constitution, laws, or treaties of the United States. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324

(2008) (determining that a tribal court’s “adjudicative authority over nonmembers [of a federally recognized Indian tribe] is a federal question”); *Nygaard v. Taylor*, 563 F.Supp.3d 992, 1023 (D.S.D. 2021) (whether the tribal court has jurisdiction is a federal question allowing federal courts to entertain claims for declaratory relief under 28 U.S.C.A. § 2201).

15. Because the Respondent tribal officials are giving effect to the unlawful exercise of jurisdiction in a manner that injures the Petitioners and violates their constitutional rights, an action for injunctive and declaratory relief is available against said Respondent tribal officials. *Kodiak Oil & Gas (USA) Inc.*, 932 F.3d at 1132 (citing *McDaniel v. Precythe*, 897 F.3d 946, 952 (8th Cir. 2018)).

16. The Respondent tribal officials are not protected by the doctrine of tribal sovereign immunity as “tribal immunity does not bar a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.” *Kodiak Oil & Gas (USA) Inc.*, 932 F.3d at 1131 (quoting *Bay Mills Indian Community*, 572 U.S. 782, 796 (2014)) (emphasis in original).

17. This Court further has subject matter jurisdiction because Petitioners are not required to exhaust all available Tribal Court remedies. “[W]hen a tribal court plainly lacks adjudicatory jurisdiction over an action, ‘the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.’” *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 672 (8th Cir. 2015) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)). Likewise, exhaustion is not required “where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction.” *National Farmer’s Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856, n. 21 (1985).

18. Venue is proper under 28 U.S.C.A. § 1391(b) as acts complained of occurred in this judicial district and, upon information and belief, all Respondents are residents of the State of South Dakota.

FACTS COMMON TO ALL COUNTS

19. The Civil Action filed in Tribal Court by the Tribe against Petitioners and another individual is captioned *Cheyenne River Sioux Tribe v. Sarah Shaff, Cindy Lindskov, and Keith Fodness*, Case No. 23C044. A true and accurate copy of the Emergency Petition for Exclusion and Removal of Sarah Shaff, Cindy Lindskov, and Keith Fodness from the Cheyenne River Sioux Indian Reservation (“Emergency Petition”) is attached hereto as Exhibit A.

20. In the Civil Action, the Tribe sought exclusion and removal of Petitioners Sarah Shaff (Teacher) and Keith Fodness (Superintendent), as well as Cindy Lindskov, Principal at the Dupree Elementary PK-6 School.

21. The Tribe’s Civil Action was authorized and directed by the Cheyenne River Sioux Tribal Council pursuant to a Corrected Tribal Memorandum dated July 21, 2023, which was attached as Exhibit A to the Emergency Petition (Exhibit A of *this* Petition). *Id.* at ¶ 20. The Corrected Tribal Memorandum states that “[t]he Cheyenne River Sioux Tribal Council during Special Session on July 12 2023 approved of a motion to exclude Non-Tribal Members Sarah Schaff [sic], Cindy Lindskov and Keith Fodness from the Cheyenne River Sioux Reservation effective immediately.”

22. The Emergency Petition states that “[t]he Cheyenne River Sioux Tribe brings this action for and on behalf of its members, Lance Frazier and Harold Hollow, and other unnamed members whose peace, health, safety, morals, and general welfare are harmed by the actions of the Defendants.” *Id.* at ¶ 15.

23. The allegations set forth in the Emergency Petition as regards to Petitioners generally mirror the allegations (with one exception discussed below, *infra* ¶ 30) which Lance Frazier (“Frazier”) and Harold Hollow (“Hollow”) brought forth in a separate Civil Complaint (“Civil Complaint”) filed on April 28, 2023, in the Cheyenne River Sioux Tribal Court, Case No. 23C027, wherein they sought damages “in the amount of \$1,200,000.00 and/or \$1,000,000.00” for “punative [sic] distress, emotional distress, mental anguish and racial profiling [and] Defamation of character”. A true and accurate copy of the Civil Complaint is attached hereto as Exhibit B.

24. Frazier and Hollow also submitted complaints against these Petitioners to the South Dakota Department of Education (“Administrative Complaint(s)”) wherein they generally made the same allegations as were made in their Civil Complaint filed in Tribal Court (23C027).

25. The allegations of Frazier and Hollow pursued in the Tribal Civil Action against Petitioner Sarah Shaff (Teacher), Cindy Lindskov (Principal), and Petitioner Keith Fodness (Superintendent) are based solely upon their respective actions or inactions occurring during the course of their employment with the Dupree School District No. 64-2 in Ziebach County, South Dakota. *See* Exhibit A, at ¶¶ 21-39.

26. The allegations of Frazier and Hollow against Petitioner Sarah Shaff (Teacher) are focused primarily on her alleged conduct and treatment of students, including the children of Frazier and Hollow, within the classroom setting. *See id.*, at ¶¶ 21-27. The allegations against Shaff by Frazier and Hollow relate to purported abusive and/or assaultive conduct which they allege occurred during the 2021-2022 school year and through mid-October of the 2022-2023 school year. *See* Plaintiff’s Brief in Opposition of Defendants’ Motion to Dismiss (Case No. 23C044), at 3, a true and accurate copy of which is attached hereto as Exhibit C; *see also* Exhibit

B. Those allegations were apparently reported by Frazier and Hollow in or around October of 2022 to law enforcement officials with the Cheyenne River Sioux Tribe and Ziebach County. *See* Exhibit C, at 3.

27. The allegations of Frazier and Hollow against Cindy Lindskov (Principal) do not allege inappropriate conduct toward anybody, but instead center around Frazier and Hollow's displeasure with the manner and/or results of Lindskov's investigation into the alleged conduct of Shaff and include allegations that Lindskov violated South Dakota's mandatory reporting law. *See* Exhibit A, ¶¶ 28-33.

28. The allegations of Frazier and Hollow against Petitioner Keith Fodness (Superintendent) do not allege inappropriate conduct toward anybody, but instead center around Frazier and Hollow's displeasure with the results of their meeting with Fodness and the manner in which Fodness oversaw Principal Lindskov's investigation and include allegations that Fodness violated South Dakota's mandatory reporting law. *See* Exhibit A, ¶¶ 34-39.

29. Frazier and Hollow filed a Voluntary Dismissal of their Civil Complaint (23C027), and on August 24, 2023, Chief Judge Brenda Claymore entered an Order of Dismissal. A true and accurate copy of the Order of Dismissal is attached hereto as Exhibit D.

30. The one additional claim contained within the Tribe's Civil Action beyond the claims of Frazier and Hollow pertains to Petitioner Sarah Shaff. The additional claim was not presented with the Tribe's Emergency Petition. Instead, the additional claim was presented for the first time in [the Tribe]'s Brief in Opposition of Defendants' Motion to Dismiss (Case No. 23C044), at 4, (Exhibit C) wherein the Tribe claims that "[v]ictim accounts reveal that other children have fallen victim to Ms. Shaff, specifically, – some long before the current victims were alive. Ms. Shaff has sexually abused children. Decl. of E.S. 3-4." The allegations of E.S.

(which are denied) were apparently made by an adult individual in an unverified “declaration” revealing only their initials, recalling events alleged to have occurred more than three decades ago, and which are purported to have occurred during class. A true and accurate copy of the Declaration of E.S. is attached hereto as Exhibit E.

31. After review of the Administrative Complaints against Cindy Lindskov and Petitioner Keith Fodness and the responses submitted, the South Dakota Professional Administrators Practices and Standards Commission voted to dismiss said Administrative Complaints. *See* Brief in Support of Motion to Dismiss and Alternative Petition for Hearing to Reconsider Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness (a true and accurate copy of which is attached hereto as Exhibit F), at 2, n. 1.

32. After an evidentiary hearing on the Administrative Complaint against Petitioner Sarah Shaff, conducted on September 14, 2023, the Commission voted to dismiss said Administrative Complaint. *Id.* at 2.

TRIBAL COURT EXCLUSION ORDER PROCEEDINGS

33. On August 18, 2023, the Tribe filed an ex parte Emergency Petition for Exclusion and Removal of Sarah Shaff, Cindy Lindskov, and Keith Fodness from the Cheyenne River Sioux Indian Reservation (Exhibit A).

34. The Tribe alleged that Shaff, Lindskov and Fodness violated Cheyenne River Sioux Tribal Exclusion and Removal Code, Sec. 11-1-3(8), which provides grounds for removal for “[d]oing or threatening to do any act upon the Reservation which seriously threatens the peace, health, safety, morals and general welfare of the Tribe, its members, or other persons living on the Reservation.”

35. That same day on August 18, 2023, without a hearing on the matter, Respondent Judge Brenda Claymore signed an Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness (“Emergency Exclusion Order”), a true and accurate copy of which is attached hereto as Exhibit G.

36. Judge Claymore found “that the Defendants’ [Shaff, Lindskov and Fodness] conduct constitutes and [sic] emergency requiring that the Defendants be excluded and/or removed from the Cheyenne River Sioux Indian Reservation without a hearing pursuant to the Law & Order Code, Section 11-1-5.” The Order further provided that, “Defendants are notified herein that in light of their conduct, an exigent circumstance exists on the Reservation and that the Defendants shall be excluded and/or removed from the Reservation forthwith...” and “that the Defendants may be excluded and/or removed from the Reservation immediately, by any Tribal or Federal Law Enforcement Officer, because of their conduct in violation of Tribal Law affecting the health, safety, and life of Tribal members.”

37. As a result of the Emergency Exclusion Order, Petitioner Shaff has been barred from entering the Reservation and is unable to perform her job responsibilities as a teacher in conjunction with her employment contract and for the benefit of the Dupree School District.

38. As a result of the Emergency Exclusion Order, Petitioner Fodness has been forced to move out of the house located across the street from the Dupree K-12 School in Dupree, South Dakota, has been barred from re-entering the Reservation and is unable to perform his job responsibilities as superintendent in conjunction with his employment contract and for the benefit of the Dupree School District.

39. On August 31, 2023, Shaff, Lindskov and Fodness, through the undersigned counsel, filed the following documents:

- Notice of Special Appearance (a true and accurate copy of which is attached hereto as Exhibit H);
- Motion to Dismiss and Alternative Petition for Hearing to Reconsider Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness (a true and accurate copy of which is attached hereto as Exhibit I);
- Brief in Support of Motion to Dismiss and Alternative Petition for Hearing to Reconsider Emergency Exclusion Order for Sarah Shaff, Cindy Lindskov, and Keith Fodness (Exhibit F);
- Affidavit of Cindy Lindskov (a true and accurate copy of which is attached hereto as Exhibit J); and
- Affidavit of Keith Fodness (a true and accurate copy of which is attached hereto as Exhibit K).

40. Shaff, Lindskov and Fodness argued primarily that the Cheyenne River Sioux Tribal Court lacks jurisdiction pursuant to the test set forth in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. Shaff, Lindskov and Fodness alternatively argued that the Tribal Court lacked jurisdiction over Lindskov and Fodness pursuant Cheyenne River Sioux Tribe Law & Order Code, Section 11-1-2 because Lindskov owns land within the exterior boundaries of the Reservation and Fodness was legally entitled to reside on the Reservation as a result of his having established a permanent domicile or permanent employment on the Reservation.

41. On September 22, 2023, the Tribe filed the following documents:

- Plaintiff's Brief in Opposition of Defendants' Motion to Dismiss (Exhibit C);
- Affidavit of Lance Frazier (a true and accurate copy of which is attached hereto as Exhibit L);

- Affidavit of Harold Hollow (a true and accurate copy of which is attached hereto as Exhibit M); and
- Declaration of E.S. (Exhibit E).

42. The Tribe conceded that the first *Montana* exception did not apply but argued that the second *Montana* exception applied. The Tribe also argued that Lindskov and Fodness did not fit within the exceptions for persons subject to removal set forth in Cheyenne River Sioux Tribe Law & Order Code, Section 11-1-2.

43. On September 25, 2023, Shaff, Lindskov and Fodness, through the undersigned counsel, filed Defendant's Reply Brief, a true and accurate copy of which is attached hereto as Exhibit N.

44. On September 27, 2023, a hearing was held before Judge Margaret Egan on Shaff, Lindskov and Fodness' Motion to Dismiss and Alternative Petition for Hearing to Reconsider Emergency Exclusion Order.

45. At the conclusion of the hearing, Judge Egan gave her reasoning and ruling from the bench. In her oral bench ruling, Judge Egan ordered that Shaff, Lindskov and Fodness' Motion to Dismiss was granted as to Cindy Lindskov and denied as to Sarah Shaff and Keith Fodness. Judge Egan further ruled that the Alternative Petition to Reconsider Emergency Exclusion Order was to be held in abeyance until such time that an evidentiary hearing on the matter could be held before the Tribal Court. The bench ruling was to be formalized in a separate memorandum opinion, which Judge Egan would draft, and which would be incorporated into an order to be prepared and agreed to by counsel for the parties. The undersigned counsel emailed Judge Egan on October 11 and October 23, 2023, to inquire about the status of the written order.

As of the date of filing of this Petition, however, Judge Egan has not responded to the emails of counsel and no written order has been filed.

46. Judge Egan’s articulated reasoning for her ruling was primarily based upon an application of the alleged facts to the Cheyenne River Sioux Tribe Law & Order Code. Judge Egan granted the Motion to Dismiss as to Cindy Lindskov because Lindskov owns land within the exterior boundaries of the Reservation, and that exception is carved out in Law & Order Code Sec. 11-1-2. As to the exception argued by Fodness—that he was legally entitled to reside on the Reservation as a result of his having established a permanent domicile or permanent employment on the Reservation—Judge Egan noted that said exception had been removed from Sec. 11-1-2 in 2022 and was therefore inapplicable. Judge Egan further ruled that, to the extent that *Montana* applies, the facts alleged fall within the second *Montana* exception.

TRIBAL COURT JURISDICTION PLAINLY LACKING

47. The Tribe, as the party seeking to invoke Tribal Court jurisdiction over non-Indians, bears the burden of establishing such jurisdiction. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654, 659 (2001).

48. No federal statute or treaty specifically provides the Tribal Court with jurisdiction over school employees operating in their official capacities at a state-run school; therefore, the Tribal Court’s jurisdiction must stem from its “retained or inherent sovereignty.” *See Belcourt Public School Dist. v. Davis*, 786 F.3d 653, 657 (8th Cir. 2015) (quoting *Atkinson Trading Co.*, 532 U.S. at 649-50); *see also Murphy*, 786 F.3d at 666.

49. The Tribal Court’s inherent jurisdiction over nonmembers of the tribe must be analyzed “within the framework and principles set forth in *Montana*, which remains the ‘pathmarking case’ on the subject.” *Murphy*, 786 F.3d at 666 (quoting *Nevada v. Hicks*, 533 U.S. 253, 358 (2001)).

50. Given the general proposition set forth in *Montana* that an Indian Tribe’s inherent sovereign powers do not extend to nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are “presumptively invalid.” *Plains Commerce Bank*, 554 U.S. at 330 (quoting *Atkinson Trading Co.*, 532 U.S. at 659).

51. The burden rests on the Tribe to establish that one of the *Montana* exceptions applies. *Murphy*, 786 F.3d at 667 (quoting *Plains Commerce Bank*, 554 U.S. at 330).

52. The *Montana* Court noted two relatively narrow exceptions to the general rule:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, *the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements*. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that *conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*.

Montana v. United States, 450 U.S. 544, 565-66 (1981) (emphasis added).

53. The Tribal Court’s adjudicatory jurisdiction is no broader than the legislative or regulatory jurisdiction of the Tribe. *Nevada v. Hicks*, 533 U.S. at 370, n. 9 (2001) (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)).

First *Montana* Exception

54. Regarding the first *Montana* exception, which enables jurisdiction over non-Indians who enter into a consensual relationship with a Tribe, the Court in *Hicks* elaborated that:

The [*Montana*] Court... obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by arrangements that they (or their employers) entered into...

533 U.S. at 372; *see also* *Murphy*, 786 F.3d at 668 (approving language specifically regarding school districts); *Davis*, 786 F.3d at 658 (approving language specifically regarding school districts).

Second *Montana* Exception

55. The second *Montana* exception enables jurisdiction over non-Indians for claims that involve “conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566.

56. The Court in *Hicks* emphasized the necessarily narrow scope of the second *Montana* exception when it confirmed that, “where nonmembers are concerned, the exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so, cannot survive without express congressional delegation.” *Murphy*, 786 F.3d at 669 (quoting *Hicks*, 533 U.S. at 359) (additional quotations omitted).

57. As the Court in *Plains Commerce Bank* stated:

The conduct must do more than injure the tribe, it must “*imperil the subsistence*” of the tribal community. [*Montana*, 450 U.S. at 566]. One commentator has noted that “th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be *necessary to avert catastrophic consequences*.” Cohen § 4.02[3][c], at 232, n. 220.

554 U.S. at 341.

58. The claims and alleged conduct at issue in this case do not “imperil the subsistence” of the Tribe, and Tribal Court jurisdiction is not “necessary to avert catastrophic consequences.” *Id.*

59. The Court in *Murphy* noted that other courts have found the second *Montana* exception inapplicable to conduct that was either comparable or more detrimental to the Tribe’s subsistence and well-being than the conduct alleged (which is denied) in this case. *Id.* at 670, n. 7; *County of Lewis v. Allen*, 1633 F.3d 509, 515-16 (9th Cir. 1998) (“Having divested itself of sovereignty over the very activities that gave rise to the civil claim [of false arrest, other torts and a civil rights violation stemming from the arrest], nothing in this case can be seen as threatening self-government or the political integrity, economic security or health and welfare of the tribe.... Indian tribes or their members ... may pursue their causes of action in state or federal court.”); *Dolgencorp Inc. v. Mississippi Band of Choctaw Indians*, 846 F.Supp.2d 646, 650 (S.D. Miss. 2011) (holding that the second *Montana* exception did not apply to a case in which a nonmember of the tribe allegedly molested a minor tribal member), *aff’d on other grounds*, 746 F.3d 167 (5th Cir. 2014).

60. The Court in neither of the Eighth Circuit cases (*Davis* nor *Murphy*) found that the school district or their respective employees’ conduct threatened or had any direct effect on the political integrity, economic security, or health or welfare of the Tribes. *Davis*, 786 F.3d at 660 (finding suit against school district and employees relating to claims including excessive force and defamation did not satisfy second exception to *Montana* test); *Murphy*, 786 F.3d at 670 (finding suit against school district over failure to protect children from violence did not satisfy second exception to *Montana* test).

61. Finally, the allegations against Petitioners, which include allegations of abusive and/or assaultive conduct as alleged against Shaff and violation of South Dakota’s mandatory reporting law as alleged against Fodness, would be criminal offenses, not subject to an exercise of civil authority. *South Dakota v. Frazier*, 2020 WL 6262103 (D.S.D. 2020), at * 4, n. 3 (citing *Montana* at 566).

62. The Tribal Court plainly lacks adjudicative jurisdiction over the Tribe’s Civil Action for exclusion and removal of these Petitioners because the alleged conduct at issue in this case does not “imperil the subsistence” of the Tribe, and Tribal Court jurisdiction is not “necessary to avert catastrophic consequences.” *Plains Commerce Bank*, 554 U.S. at 341.

FIRST CLAIM FOR RELIEF
(Constitutional and Civil Rights Violations)

63. Petitioners re-allege and incorporate by reference paragraphs 1 through 62 of this Petition as though fully set forth herein.

64. Respondents’ continued restraint on the liberty of Petitioners is unlawful and contravenes the Fifth Amendment of the Constitution of the United States and the Indian Civil Rights Act (ICRA). The Fifth Amendment provides, “No person shall be ... deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V. Additionally, the ICRA provides in part: “No Indian Tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” 25 U.S.C.A. § 1302(a)(8). Respondents’ exclusion of Petitioners from the Reservation constitutes an unlawful restraint on their liberty without due process of law.

65. Accordingly, Respondents' continued restraint on Petitioners' liberty is contrary to the U.S. Constitution, ICRA, and Petitioners' constitutional and civil rights under both, and a Writ must issue in the interests of justice.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment)

66. Petitioners re-allege and incorporate by reference paragraphs 1 through 65 of this Petition as though fully set forth herein.

67. The Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201, *et seq.* empowers the Court to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

68. An actual and justiciable controversy exists regarding the Tribal Court's jurisdiction to exclude these non-Native American non-Tribal member Petitioners from the Cheyenne River Sioux Reservation.

69. Because no exceptions exist as to these Petitioners within the framework and principles set forth in *Montana* and its progeny, Petitioners are entitled to a declaratory judgment that the Tribal Court lacks jurisdiction to adjudicate the Tribal Court Civil Action.

THIRD CLAIM FOR RELIEF
(Preliminary and Permanent Injunction)

70. Petitioners re-allege and incorporate by reference paragraphs 1 through 69 of this Petition as though fully set forth herein.

71. The assertion, exercise and maintenance of Tribal Court jurisdiction over these Petitioners in the Tribal Court Civil Action is unlawful.

72. If Respondents Judge Brenda Claymore and Judge Margaret Egan, are not enjoined from maintaining the Tribal Court Civil Action, and if Respondent Charles Red Crow is

not enjoined from enforcing the unlawful order of the Tribal Court, Petitioners face irreparable injury in the form of their continued inability to perform their job responsibilities in conjunction with their employment contracts and for the benefit of the Dupree School District.

73. As such, Respondents Judge Brenda Claymore and Judge Margaret Egan should be enjoined from maintaining the Tribal Court Civil Action against Petitioners.

74. Further, Respondent Charles Red Crow should be enjoined from enforcing the unlawful order of the Tribal Court.

WHEREFORE, Petitioners pray for relief as follows:

1. Assume jurisdiction over this matter under habeas corpus pursuant to 25 U.S.C.A. § 1303 (habeas corpus) and 28 U.S.C.A. § 1331 (federal question jurisdiction);
2. Assume venue of this matter under 28 U.S.C.A. § 1391(b);
3. Expedite consideration of this action pursuant to 28 U.S.C.A. § 1657 because it is an action brought under 25 U.S.C.A. § 1303 (habeas corpus) and procedure is guided by chapter 153 of Title 28, where the rules of a habeas corpus may be applied, and because this action requests temporary or preliminary injunctive relief;
4. Schedule a hearing on this Petition at the earliest date deemed appropriate by the Court;
5. Grant Petitioners' request for a Writ of Habeas Corpus pursuant to 28 U.S.C.A. § 2243, and issue said Writ ordering that Respondents' unlawful restraint on Petitioners' liberty immediately be declared null and void;
6. For declaratory judgment that the Cheyenne River Sioux Tribal Court does not have jurisdiction over the Petitioners as purported by the continuation of the Tribal Court Civil Action;

7. For an injunction prohibiting Respondent Judge Brenda Claymore and Judge Margaret Egan from continuing to entertain and adjudicate claims against Petitioners in the Tribal Court Civil Action;

8. For an injunction prohibiting Respondent Charles Red Crow from enforcing the unlawful Exclusion Order of the Tribal Court; and

9. For such other and further relief as the Court deems appropriate, just and equitable.

Respectfully submitted this 3rd day of November, 2023.

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The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Sarah Shaff and Keith Fodness</p> <p>(b) County of Residence of First Listed Plaintiff <u>Meade</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) A. Jason Rumpca (605) 224-5825 319 S. Coteau St., Pierre, South Dakota 57501</p>	<p>DEFENDANTS Judge Brenda Claymore; Judge Margaret Egan; Charles Red Crow</p> <p>County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input checked="" type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <p><i>(For Diversity Cases Only)</i></p> <table style="width:100%;"> <tr> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
	PTF	DEF		PTF	DEF																				
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT *(Place an "X" in One Box Only)* Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p>PERSONAL INJURY</p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p style="text-align: center;">INTELLECTUAL PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 <p style="text-align: center;">SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<p>REAL PROPERTY</p> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p>CIVIL RIGHTS</p> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<p>PRISONER PETITIONS</p> <p>Habeas Corpus:</p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <p>Other:</p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<p style="text-align: center;">LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<p style="text-align: center;">FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District *(specify)* 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
 25 USCA § 1303; 28 USCA § 2201 and Fed. R. Civ. P. 65

Brief description of cause:
 Request for Writ of Habeas Corpus, Delcaratory, and Injunction Relief relative to lacking Tribal Court Jurisdiction

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE: 11/3/23 SIGNATURE OF ATTORNEY OF RECORD: 

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____