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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV MOTION TO COMPEL AND MOTION TO EXPEDITE

INTRODUCTION

This Court's Order Granting Motion for Expedited Discovery (hereinafter "Discovery Order") (Docket 71) states in relevant part that Defendants "shall provide plaintiffs with a complete list of 48-hour ICWA hearings from January 1, 2010, through the present," and that once the list is provided, "Plaintiffs will be responsible for

obtaining the 48-hour hearing transcript for every third case at plaintiffs' expense." *Id*. at 13. Any state-created privacy interests in these transcripts, the Court explained, "'must yield to the federal interest in discovering' whether the defendants in this action have engaged in policies, practices and customs which violate plaintiffs' constitutional rights." *Id*. (citing *Ginest v. Bd. of County Comm'rs of Carbon Cnty.*, 306 F. Supp. 2d 1158, 1159-60 (D. Wyo. 2004)). Moreover, the Court stated that the process of obtaining these transcripts should be expedited to accommodate Plaintiffs' anticipated motion for preliminary injunction. The Court "found that injunctive relief is available if plaintiffs prevail on the merits," and that expedited discovery of the transcripts "is necessary for the preliminary injunction hearing." Discovery Order at 5.

Defendants produced the list of ICWA cases in a timely manner. Counsel for Defendant Davis, Nathan Oviatt, then informed Plaintiffs that these 48-hour ICWA hearings would be transcribed *only* when the judge who presided over each hearing signs an order directing the court reporter to issue a transcript.

The Protective Order submitted by the parties to the Court (Docket 77), incorporates that signature process and attaches a model order (drafted by Mr. Oviatt) that the Plaintiffs planned to use to obtain each transcript. The Protective Order also fully safeguards the state-created privacy interests in each ICWA transcript by guaranteeing that no transcript will be available for public inspection until either all parties agree on appropriate redactions or the Court approves of its release. The Court signed the Protective Order on February 21, 2014 (Docket 78.)

Thus, everything was on track for the complete implementation of the Court's Discovery Order. It is now clear, however, that unless this Court grants a supplemental remedy, the Discovery Order will be thwarted and, in large measure, rendered nugatory.

Defendant Davis has signed transcript orders for the ICWA cases over which he presided. However, the majority of ICWA cases decided since January 1, 2010, were presided over by five other judges of the Seventh Circuit: Judges Eklund, Trimble, Thorstensen, Pfeifle, and Mandel. These five judges are represented by Robert B. Anderson. Mr. Anderson recently notified counsel for Plaintiffs that all five of his clients are refusing to sign the orders that Plaintiffs' counsel prepared for their signatures, even though he has examined the Discovery and Protective Orders. Mr. Anderson declined to provide a reason why his clients are refusing to sign the orders.

When Plaintiffs learned that the five judges would not sign transcript orders, Plaintiffs asked Judge Davis to sign them. After all, Judge Davis is a defendant in this litigation and thus has a personal obligation to ensure that the Discovery Order is implemented. As the Presiding Judge of the Seventh Circuit, he must have the authority to sign an order directing the production of a transcript in all cases decided in the Seventh Circuit. Judge Davis, however, declined. Citing no authority in support, Judge Davis contends that his is not permitted to order a transcript in any case in which he is not the presiding judge. This even includes Judge Thorstensen's cases, Judge Davis claims, despite the fact that Judge Thorstensen left the bench a year ago (thereby conferring on an ex-judge the power to determine whether one of her hearings will ever be transcribed).

Given the refusal of Judge Davis to sign any transcript orders other than his own and the refusal of Judges Eklund, Trimble, Thorstensen, Pfeifle, and Mandel (hereinafter,

the "five judges") to sign any transcript orders at all, Plaintiffs have a right without any apparent remedy. That is, Plaintiffs have a right under the Discovery Order to obtain every third transcript on the ICWA list, but that right exists only in theory because most of the judges whose hearings are being investigated refuse to permit those hearings from being transcribed. Plaintiffs must therefore return to the Court and pursue this motion to compel.[1]

ARGUMENT

For the reasons explained below, this Court has at least three options to enforce compliance with its Discovery Order. The Court can:

1. Order Judge Davis to sign all the transcript orders; or

2. Order the five judges to sign their respective orders; or

3. Order the court reporters to produce the transcripts without signed orders from the five judges.

1. The Court Can Order Judge Davis to Sign All the Transcript Orders

Federal courts have the inherent authority to enforce their orders. Otherwise, no party would ever need to heed them. *See Frew v. Hawkins*, 540 U.S. 431, 432 (2004) ("Federal courts are not reduced to [issuing orders] and hoping for compliance. Once entered, that [order] may be enforced."); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 (1979) (holding that state officials

[1] In addition to needing the transcript for each 48-hour ICWA hearing, Plaintiffs also need all the accompanying documents filed in connection with the hearing, such as the petition, ICWA affidavit, and the court's findings and conclusions. Nathan Oviatt, counsel for Defendant Davis, agreed to produce all of these accompanying documents in response to a Request for Production. However, Mr. Oviatt recently notified Plaintiffs that he must withdraw that stipulation pending the outcome of this Motion to Compel. If the Court grants the Motion and orders production of the transcripts, Mr. Oviatt will ensure that all of the accompanying documents are produced as well.

may face "stern measures to require respect for federal-court orders."); *see also Hutto v. Finney*, 437 U.S. 678, 690 (1978); *U.S. v. Bryan*, 339 U.S. 323, 330-31 (1950).

Judge Davis is obligated to take all necessary steps to ensure that the Discovery Order is fully implemented. *See United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 736 (8th Cir. 2001) (holding that a party may be held in contempt of court unless the party shows (1) that good faith efforts were made to fully comply with the order, and (2) full compliance was impossible due to factors beyond the party's control).

South Dakota law guarantees that all records in an Abuse and Neglect proceeding will be available for inspection by the parties involved in the proceeding (even though the proceeding itself is closed to the public). SDCL 26-7A-37 provides:

> Records of court proceedings... [in abuse and neglect cases] shall be open to inspection by or disclosure to the child's parents, guardian, or custodian and by other respondent parties involved in the proceedings, their attorneys, the child's attorney and by any department or agency having custody of the child.

The Discovery Order recognizes that Plaintiffs in this class action litigation have a federal right to obtain and inspect the 48-hour transcripts. Therefore, Judge Davis has a duty to take all steps within his power to produce the transcripts covered by the Discovery Order, a duty consistent with SDCL 26-7A-37.

This Court can order Defendant Davis to sign all the transcript orders as a means to ensure full compliance with the Discovery Order. This is true even if, as Judge Davis contends (without citation to any authority), South Dakota law prohibits him from doing so. State officials can be required to undertake activities that violate state law when those activities are necessary to implement a federal order. *See Passenger Fishing Vessel*, 443 U.S. at 695 ("State-law prohibition against compliance with the District Court's decree

cannot survive the command of the Supremacy Clause of the United States Constitution, [and state officials] may be ordered to prepare a set of rules that will implement the [district court's order] even if state law withholds from them the power to do so." (citations omitted). *See also North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971) (ordering school officials to comply with a district court order to desegregate public schools even though state law prohibited desegregation).

Even if Judge Davis cites in his brief some authority for his position, it has been settled for more than two centuries that a state law cannot override a federal court order. As Chief Justice John Marshall stated for a unanimous Court in 1809, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. 115, 136 (1809).

The Supreme Court's decision in *Passenger Fishing Vessel* is instructive. In that case, a Federal District Court interpreted an Indian treaty as guaranteeing Indian tribes in the state of Washington a right to harvest a certain number of salmon each year, a number far in excess of the amount permitted under that state's fish and game laws. *See* 443 U.S. at 671-73. However, a Washington statute expressly required state agencies to regulate the state's fisheries in a manner that would prevent treaty tribes from taking the number of fish to which they were entitled under the District Court's order. *See id*. The Supreme Court had to determine whether state officials could be required to comply with the District Court's order despite the fact that such compliance would violate state law.

The Court, citing the Supremacy Clause and cases interpreting it, held that state law must always yield to federal law when the two conflict. *Id*. at 695. A treaty is the

"supreme law of the land" under Article VI, and therefore state employees in Washington have no discretion to ignore it. *See id*. Moreover, because the District Court had issued an order defining the right of Indian tribes to harvest fish pursuant to the treaty, the District Court "clearly may order [the defendants] to obey that judgment" by issuing supplemental decrees to ensure compliance. *Id*. at 693 n.32 (citations omitted); *see also id.* at 696 (holding that the District Court may resort to "stern measures" to ensure that its earlier decrees are implemented fully); *Swann*, 402 U.S. at 44-46 (ordering state officials to transport black students to an all-white school despite a state law expressly prohibiting such conduct); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 233-34 (1964) (holding that a federal court may order state officials to take action pursuant to a federal court order that is contrary to their duties under state law).

Judge Davis has the authority to sign transcript orders, and he has already signed those orders in his own cases. However, Judge Davis claims that he cannot fully implement this Court's Discovery Order due to an impediment created by state law. If such an impediment exists, it must yield. Plaintiffs are entitled to a supplemental decree ordering Defendant Davis to sign all the transcript orders.

2. <u>The Court Can Order the Other Five Judges to Sign Orders</u>

The All Writs Act, 28 U.S.C. § 1651, provides the Court with ample authority to compel the five judges to sign their respective transcript orders. The All Writs Act states in relevant part that every federal court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

The principle is well established that where, as here, non-parties are frustrating the implementation of a federal court order, the court may grant supplemental relief under the All Writs Act directed at those non-parties. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977) ("the power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and even encompass those who have not taken any affirmative action to hinder justice.") (citations omitted.); *United States v. Yielding*, 657 F.3d 722, 728 (8th Cir. 2011) ("The power conferred by the All Writs Act 'extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order.'" (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174, (1977)); *USCOC of Greater Missouri, LLC v. Cnty. of Franklin, Mo.*, 636 F.3d 927, 932-33 (8th Cir. 2011); *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 365 n. 6 (8th Cir.2007) ("'[T]he All Writs Act has been held to give the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act.'") (quoting 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3691 (3d ed.1998));*United States v. Confederate Acres Sanitary Sewer and Drainage System*, 767 F. Supp. 834, 837-38 (W.D. Ky. 1990) (ordering non-party to comply with sewage emission restrictions when municipality, against which the court's order was directed, failed to limit that party's sewage emissions); *see also Passenger Fishing Vessel*, 443 U.S. at 673 (noting that the District Court, in order to ensure implementation of its original decree, had issued a

supplemental decree directed to "persons who were not parties to the proceeding"); *United States v. Field*, 193 F.2d 92, 95–96 (2d Cir. 1952) (holding that each federal district court has "two different powers": one power authorizes the court to issue all orders within its jurisdiction, and the other power authorizes the court to then issue any supplemental order necessary to implement the original order, including orders against non-parties); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 413-14 (2d Cir. 2002) (affirming the use of the All Writs Act to require compliance by a non-party with a federal court order).

The Court's decision in *Nelson v. Harris*, 394 U.S. 286 (1969), is instructive even though that case did not involve the application of the All Writs Act to a non-party. In *Nelson*, the Court affirmed the application of the All Writs Act to allow a person petitioning for writ of habeas corpus to obtain discovery relevant to his petition, despite the fact that Congress had not created a process for such discovery. The Court held that permitting discovery would assist the district court in deciding whether to grant the habeas petition. *Id*., 394 U.S. at 299-300. Here, Plaintiffs *are* entitled to discovery under both statutory law and the Discovery Order. Surely, then, this Court has the authority under the All Writs Act to compel the production of that discovery.

The five judges are frustrating the implementation of this Court's Discovery Order, rendering it nugatory in substantial part. This situation is particularly compelling given that (1) the transcripts are indispensable to Plaintiffs' case, (2) these judges need only undertake the ministerial task of allowing a transcript to be produced, and (3) each

transcript is fully protected by the Court's Protective Order.[2] Accordingly, ample authority exists under the All Writs Act for the Court to order these judges to sign the transcript orders.

3. The Court Can Order the Reporters to Produce the Transcripts

As just explained, the All Writs Act authorizes this Court to issue all writs in aid of its jurisdiction. Nathan Oviatt has advised Plaintiffs that an order is required to obtain an ICWA hearing transcript. If that is true, Plaintiffs see no reason why this Court cannot issue such an order pursuant to the All Writs Act directed to the various court reporters in the cases whose names and numbers have already been given to Mr. Anderson. If this is the option selected by the Court, Plaintiffs will gladly provide the Court with those names and numbers.

CONCLUSION

The Court's Discovery Order is being undermined in large measure by Judge Davis, who is refusing to sign transcript orders in any cases but his own, and by the five judges, who are refusing to sign any orders. Plaintiffs therefore seek an order compelling the production of these transcripts.

Given that this case will be stymied until the transcripts are produced, Plaintiffs respectfully request that this matter be resolved expeditiously. Plaintiffs suggest that the Defendants be given ten (10) days in which to submit a responsive brief and that Plaintiffs be given five (5) days for reply. Plaintiffs would welcome the filing of a brief

[2] Plaintiffs are not questioning the motive of these judges. However, it happens to be the case that the judges whose acts are being questioned, and whose acts will be disclosed in these transcripts, are the same judges refusing to permit the transcripts from being produced.

by the five judges by the same deadline as provided to the Defendants, and a copy of this motion is being sent to their attorney, Mr. Anderson.

Respectfully submitted this 17th day of March, 2014.

By: /s/ Stephen L. Pevar
Stephen L. Pevar
Dana L. Hanna
Rachel E. Goodman

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants, and that I sent by electronic mail a copy of this Motion to counsel for the five judges, Robert Anderson, listed below:

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