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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC WILLIAM HESS,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR,
1849 C Street, N.W.
Washington, D.C. 20240, and

DEB HAALAND, in her official capacity as the Secretary of the U.S. Department of the Interior,
1849 C Street, N.W.
Washington, D.C. 20240,

THE CHEROKEE NATION,
and CHUCK HOSKIN, Jr.,
Principal Chief of the Cherokee Nation
W.W. Keeler Tribal Complex 17675 S. Muskogee Ave. Tahlequah, OK 74464

Defendants.

Case No. 1:22-cv-3385-CJN

RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW

Plaintiff, Isaac Hess, hereby files the following in response to the FEDERAL DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW:

RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW- 1

1. The Federal Defendants, US Department of the Interior and Deb Haaland (hereinafter "Defendants"), have claimed that pursuant to a Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6), the case against them must be dismissed, but they only provided arguments for the Rules 12(b)(6) defense. They claimed that a Rules 12(b)(1) defense (lack of subject matter jurisdiction) applied when they stated that the Plaintiff lacks standing because the damages were not traced directly back to them. The Defendants' statement that the Plaintiff did not trace the damages directly to them is in reality nothing more than not stating "a claim upon which relief can be granted", which is a Rules 12(b)(6) defense. For a Rules 12(b)(1) defense to be valid, however, there would have to exist a law that prohibited this court from hearing the matter because subject matter jurisdiction is granted or limited by law. The Defendants did not provide any law that prohibits this Court from hearing this case. Neither Rules 12(b)(1) or 12(b)(6) are actually applicable. This Court has subject matter jurisdiction over this matter as outlined by the laws provided in the original petition. The claim upon which relief can be granted has also been provided to the court. The Plaintiff will clarify, expound, and demonstrate these hereinafter.
2. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Subject matter jurisdiction is also based upon 28 U.S.C. § 1362. This Court has jurisdiction to grant a declaratory judgment pursuant to 28 U.S.C. § 2201, and to grant injunctive relief pursuant to 28 U.S.C. § 2202. Venue is proper in this judicial district (District of Columbia) pursuant to 28 U.S.C. § 1391(e). This Court has

personal jurisdiction over the federal agency defendants. All of these laws provide this Court with subject matter jurisdiction over this case, and therefore the Rules 12(b)(1) defense of lack of subject matter jurisdiction is not applicable.

3. To properly understand how the Defendants have wronged the Plaintiff, and to better "state a claim upon which relief can be granted" (Rules 12(b)(6)), the basic principles of sovereignty must be understood. Two types of sovereignty in the world are external and internal. To be externally sovereign means that the sovereign government has the ability to act independently and autonomously in the face of external forces and is subject to no other sovereign force. To be internally sovereign means that the sovereign government has power and control over its people and over its territory, which affects all its individuals, associations, and also the territory under its control. A sovereign government can be both externally and internally sovereign. Other sovereign governments can be simply internally sovereign and not also externally sovereign because a separate external sovereign imposes certain restrictions upon their government. This is precisely what exists within the United States. The external sovereign is the United States. Various internal sovereigns include the several states and Indian tribes, which are ultimately subject to the external sovereign. The United States, by virtue of being the external sovereign, can and does impose restrictions on the internal sovereigns including the several states and the Indians tribes by enacting laws as allowed under the United States Constitution and Treaties. Because the United States is the external sovereign of the several states and the Indian tribes, there exists certain responsibilities which must be fulfilled in order to maintain external sovereignty of all of them. These responsibilities are enumerated in the United States Constitution, Treaties, and Federal law.

4. The Treaty of 1866 simply solidifies the relationship between the United States and the Cherokee Nation as outlined in previous treaties, in which the Cherokee Nation agreed to be subject to the United States as their external sovereign. As per the terms of the treaties, any limitations placed upon the internal sovereignty of the tribe and its members can only be imposed by an act of Congress which explicitly includes them, or by voluntary limitation through the tribe enacting a tribal law on itself.

5. One responsibility of the United States as the external sovereign of the several states and the Indian tribes is to keep one internal sovereign from exploiting another internal sovereign by preventing them from becoming externally sovereign over one another through imposition of their own laws or court rulings. Federal law 25 U.S. Code § 2 was implemented for that purpose. It states "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." This means that under federal law, the Defendants have the management of ALL Indian affairs. This is an imposition of authority by the external sovereign over the tribes, done as per the terms of the treaties by an act of Congress, for the ultimate management of ALL of the Indians' affairs and of ALL matters arising out of their relations, including relations with the several states. The word *all* denotes that there is no limit. It is altogether encompassing. As the Defendants pointed out, there is a trust relationship that is maintained with the tribes and their members and they are supposed to allow the Indian tribes to maintain as much sovereignty as possible, as prescribed by Congress in 25 U.S.C. § 3601. In order for the Indian tribes to maintain their internal sovereignty to be subject only to the United States and the explicit laws that limit certain portions of that internal sovereignty, the Defendants are responsible for

managing the enumerating of which federal laws apply or do not apply to the tribes. They are also responsible for managing all cases where the several states or other internally sovereign governments attempt to impose restrictions upon the Indian tribes or their members, in an attempt to impose themselves as external sovereigns over the Indian tribes. It is not allowed under treaty for states to impose themselves as external sovereigns over the Indian tribes.

6. On any occasion when a state attempts to impose itself as an external sovereign over an Indian tribe by dictating, through their laws or their courts, a limit upon the internal sovereignty of Indian tribes, it establishes an Indian affair arising out of Indian relations. On any occasion when an Indian tribe attempts to impose itself as an external sovereign over a state, it also constitutes an Indian affair arising out of Indian relations. According to 25 U.S. Code § 2, the Defendants have the responsibility to manage both of these scenarios.

7. There have been at least eighteen (18) different and diverse rulings in regards to the applicability of 28 U.S.C. § 1738A (hereinafter called the UCCJEA) to the Indian tribes by courts in various states and different Indian tribes since 2004. According to the Department of the Interior's Bureau of Indian Affairs' website, the Bureau of Indian Affairs is required to keep track of all tribal court proceedings as a part of tribal court establishment when the tribal courts have replaced the Courts of Indian Offenses. Therefore, the Defendants knew about the diverse cases, yet chose to be negligent in their duty to manage the Indian affairs concerning the applicability of the UCCJEA to the Indian tribes and their members. Some courts have ruled that the UCCJEA applies to the Indian tribes and others have ruled that it does not apply to them unless the Indian tribe has passed a tribal law to be bound by it. The courts that ruled that the UCCJEA does not

apply to the Indian tribes, recognized the internal sovereignty of the tribes over their people which can only be abridged by explicit limitation of Congress. The courts that ruled that the UCCJEA does apply to the Indian tribes claimed that the purpose of the law was to limit all internal sovereigns of the United States, regardless of the law not explicitly including the Indian tribes.

8. The Mashantucket Pequot Tribal Court even concluded that "it had jurisdiction over the father's claim for joint legal custody, even though he and the child resided in Connecticut, because the child was a tribe member and the court had jurisdiction over its tribal members wherever they resided." (Father J v. Mother A, 6 Mash.Rep. 297, 2015 WL 5936866 (Mash. Pequot Tribal Ct. 2015)). Their court again ruled that "Focusing only on the question of jurisdiction, it noted that the federal statute giving full faith and credit to child custody determinations, 28 U.S.C.A. § 1738A(g), applied only to "states," which did not include Native American tribes, and that the UCCJEA referenced that statute. Furthermore, it found, the fact that the State of Indiana had adopted an optional provision in the UCCJEA to recognize tribes as "states of the United States" did not mean that the tribe was bound by Indiana law. Because the tribe had not consented to or adopted the UCCJEA, the court held, it did not apply to this court. Honoring tribal sovereignty, the court declined to defer its jurisdiction to the Indiana court as the more appropriate forum." (Mother H v. Father H, 6 Mash.Rep. 424, 2017 WL 3039105 (Mash. Pequot Tribal Ct. 2017)). Additionally, in the state of Arizona, it was ruled that the "[p]rovision of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) requiring state courts to treat tribes as if they were states of the United States for purposes of applying UCCJEA's jurisdictional standards did not require tribal courts to abide by UCCJEA, where tribe did not adopt its own version of UCCJEA." (Ariz. Rev. Stat. Ann. § 25-

1004(B). Holly C. v. Tohono O'odham Nation, 452 P.3d 725 (Ariz. Ct. App. Div. 2 2019)). As far as the Plaintiff can tell, there has never been a conclusive ruling from a federal court or management and guidance by the Defendants in regards to the applicability of the UCCJEA to Indian tribes and their members, as required by 28 U.S.C. § 1331 and 25 U.S. Code § 2. The Defendants' negligence in this matter has led to confusion and uncertainty that any of the court rulings thus far are correct in their decisions about the applicability of the UCCJEA to the Indian tribes.

9. The United States Supreme Court explicitly stated in 1993 that they had not yet decided whether or not an Indian tribe's civil authority over its members extends over them when not residing in Indian Country. They stated "this Court need not determine whether the Tribe's right to selfgovernance could operate independently of its territorial jurisdiction..." (*Oklahoma Tax Comm'n v. Sac and Foc Nation*, 508 U.S 114 (1993)). Directly after the United States Supreme Court ruled in this case that a decision had not been made in regards to an important part of the Indian tribes' sovereignty over their own members, the Defendants' responsibility to manage all Indian affairs required them to have made a clarifying declaration in regards to the subject. They could have used, as a guiding principle of their declaration, what the United States Supreme Court said, that the "tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law." (W*hite Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136, 142. Pp. 123-126.). This informs us that the Indian tribes have sovereignty over both their land AND their tribal members. The United States Supreme Court has recognized again and again that the fundamental principle of Indian tribes' internal sovereignty is the supreme control over a sovereign's lands and their citizens, while not expressing that the control

over their citizens is directly tied to their lands. Therefore, we must conclude as the Mashantucket Pequot Tribal Court ruled, that the Indian tribes maintain jurisdiction over their tribal members regardless of where they live and the UCCJEA does not apply to them without the tribe passing their own version of the UCCJEA. Because of the negligence of the Defendants, as the external sovereign, not managing this Indian affair issue, as they are required by law to do, they have allowed the various jurisdictions to rule vastly differently on the topic instead of establishing who actually has jurisdiction in child custody cases. The Plaintiff and others are actively being damaged by adverse rulings against them as a consequence of courts who are upset when their jurisdiction was challenged. One such adverse ruling directly affected the Plaintiff when his children were placed full time with their confessed abusive mother by a state court that became extremely prejudiced against him due to the challenge of jurisdiction. The state court had not demonstrated any prejudice toward the Plaintiff until after the jurisdictional challenge was made. This injustice toward the Plaintiff was done by the state court despite no proof having been presented to their court that they had jurisdiction, and is a direct reflection of the confusion created by the Defendant's negligence by not managing the required clarification about the UCCJEA.

10. The Defendants, at any time since the passage of the UCCJEA in 1994, and certainly since the various diverse rulings that have occurred by the various states and Indian tribes after its passage, could have clarified the law to outline the applicability to the Indian tribes in order to fulfill their responsibility to manage all Indian affairs. If the Defendants did not feel that they could legally make such a decision because of 28 U.S.C. § 1331, then it was incumbent upon them to have sought for the clarification of the UCCJEA with the federal courts so they would not remain negligent in their duties of managing all

Indian affairs. Because of the negligence of the Defendants in not issuing or seeking clarification of this Indian affair, the Plaintiff has sustained damages, specifically the wrongful dismissal of the case in the Cherokee Nation court because the court did not know if it had jurisdiction and also the adverse ruling in the state court. If it were not for the negligence of the Defendants in their management of Indian affairs and having the applicability of the UCCJEA to Indian tribes decided, the Plaintiff would have known exactly which court has jurisdiction over the child custody case prior to filing. The Plaintiff would not have gone to the effort and expense to file in more than one court, causing bias and prejudice against the Plaintiff from all the judges involved because jurisdictional challenges occurred. The jurisdictional challenges were the root cause for all of the adverse actions taken against the Plaintiff in regards to the child custody matter among all of the courts involved. No jurisdictional challenges should have been necessary had the Defendants managed Indian affairs properly.

11. The Plaintiff is not seeking to have the Defendants enforce or impose anything upon the Cherokee Nation because, as stated, that would violate the fundamental principles of their internal sovereignty unless done by an act of Congress. Rather, the Plaintiff is simply seeking to have the issue that the Defendants have previously failed to manage, as required by federal law and which is an Indian affair and relation issue, resolved by Declaratory Relief so that jurisdiction is properly known by all the states and Indian tribes for all cases of child custody involving members of Indian tribes. The damages caused to the Plaintiff by the Defendants' lack of action over managing the Indian affairs involved, would then be remedied, and the Plaintiff could then move forward to have all other issues resolved in the proper courts. This issue involves a question of federal law and its applicability to the various internal sovereigns, which can only be decided by a

federal court as outlined by Congress in 28 U.S.C. § 1331. Only the external sovereign of both the Indian tribes and the several states, through this federal court, can resolve this issue now because of the Defendants' negligence regarding this issue of not managing the necessary clarification in regards to the matter. Once resolved by this court through the Declaratory Relief, all other courts will be able to determine who actually has jurisdiction in this matter and should act accordingly thereafter.

12. The Plaintiff only wants the Declaratory relief to specifically state that if an Indian tribe has adopted the UCCJEA, then it applies to them and the various states must treat them as a state in terms of its applicability. If an Indian tribe has not passed a law to adopt the UCCJEA, then they are not bound by it and retain exclusive jurisdiction over the child custody and visitation decisions for all tribal children regardless of where they reside. This Declaratory Relief will not force an Indian tribe to take up child custody cases because they can always pass a law adopting the UCCJEA, so they only have to handle cases where the child lives in the reservation. All that this will do is clarify who has jurisdiction and then the Indian tribes can then decide how to run their own courts in the application of that jurisdiction. This Declaratory Relief will simply be helping the Indian tribes, in the trust relationship that the United States has with them, to understand their jurisdiction, as to when they have it and when they do not. This will also help to inform the various states about tribal jurisdiction and help the Indian tribes to retain their sovereignty.

13. If this Court and the Defendants believe that the Commissioner of Indian Affairs must also be involved or be the only party involved as a part of this suit for proper remedy to be provided because of 25 U.S. Code § 2, the Plaintiff asks that the Court please allow the Motion for Joinder of the Commissioner of Indian Affairs instead of simply

dismissing the case. The Plaintiff did not realize that the Commissioner of Indian Affairs needed to be included originally because the final responsible parties are the Defendants because the Commissioner of Indian Affairs only acts under the Defendants' direction.

14. The Plaintiff denies all claims unless specifically admitted so that it cannot be claimed that the Plaintiff agreed to something that was not specifically addressed in this response.

For the reasons stated above, Plaintiff respectfully requests that the Court deny the FEDERAL DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW and allow the case to continue forward against the Defendants so that the issue of tribal jurisdiction and the applicability of the UCCJEA to the Indian tribes can finally be resolved, despite the Defendants' failure to manage this part of Indian affairs and relations previously.

DATED: February 3, 2023

By: /s/ Isaac William Hess
_____
Isaac William Hess, Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I electronically filed the above and foregoing document with the Clerk of Court via the email for the civil office for filing and caused it to be e-mailed to the Defendants' e-mail addresses listed in his signature on the motion.

/s/ Isaac William Hess

Isaac William Hess