IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

TIJAY COLES,

Petitioner,

v. Civil No. 18-CV-109-J

JENNIE FERRIS, Acting Warden,
Wind River Detention Center,
Fort Washakie, Wyoming; and
TERRI SMITH, CHIEF JUDGE WIND RIVER
TRIBAL COURT, SHOSHONE AND ARAPAHO TRIBES
IN WYOMING, WIND RIVER INDIAN RESERVATION,

Respondents.

ORDER DISMISSING PETITION FOR HABEAS CORPUS PURSUANT TO 25 U.S.C. § 1303

This matter came before the Court on a Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 of the Indian Civil Rights Act.[1] Doc. 1. A preliminary review of the Petition was made, consistent with Rule 4 of the Rules Governing Section 2254 Cases in

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[1]The purpose of the Indian Civil Rights Act was "to ensure that the American Indian is afforded the broad Constitutional rights secured to other Americans . . . [in order to] protect individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess. 6 (1967). *See Santa Clara Pueblo v. Martinez*, 439 U.S. 49, 61, note 4, (1978).

the United States District Court.[2] The Court found that a hearing on threshold jurisdictional issues was warranted prior to deciding whether the Petition should be dismissed or not. Thus, a hearing was held by telephone conference call on July 23, 2018, with Wendy Owens appearing for and with Petitioner TiJay Coles; Assistant U. S. Attorneys C. Levi Martin and David Kubicek appeared and participated on behalf of Jennie Ferris, Acting Warden of the Wind River Detention Center in Fort Washakie, Wyoming; and Judge Terri Smith for the Wind River Tribal Court, Shoshone and Arapaho Tribes in Wyoming, Wind River Indian Reservation, also appeared and participated in the telephone hearing.

The Court has reviewed the petition, and all written submissions with attachments or other materials that were filed by the parties, the arguments of counsel, and the applicable law. In accordance with the Court's oral ruling and for the reasons stated during the hearing, as reflected more fully in the transcript of the proceedings incorporated herein by reference as if set forth in full, the Court finds and Orders that the Petition for Habeas Corpus Pursuant to 25 U.S.C. § 1303 must be dismissed for lack of jurisdiction.

Background and Contentions of the Parties

The Petitioner in this case asserts he is entitled to habeas relief pursuant to 25 U.S.C. § 1303, and asks for an order directing his release from custody, or a hearing as

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[2] As in *Tortalita v. Geisen*, 2018 WL 3195145, n.1 (D.N.M. 2018), this Court likewise determines that the rules governing 28 U.S.C. § 2254 apply to actions to 25 U.S.C. § 1303. See 28 U.S.C. § 2254, Rule 1(b) ("Other Cases. The district court may apply any or all of these rules to a habeas corpus petition [not brought by a person in custody under a state-court judgment].").

to legality of his detention. The allegations in the Petition assert Coles was arrested on April 26, 2018 for DUI, Driving without a License, Aggravated Assault and Battery, Open Container, and Eluding in a vehicle for crimes that "originated in the City of Riverton[.]" At the hearing, counsel for Coles explained that she believed the incident leading up to Coles's arrest started in Riverton and then, Cole drove to the reservation in his car. He was arrested on the Reservation by BIA Officer Josh Bragg. Coles was transported to the Wind River Correctional Facility by Officer Bragg on April 27, 2018.

On May 31, 2018, Coles filed a motion to dismiss for lack of personal jurisdiction with the Wind River Tribal Court claiming he is not an Indian as defined under Federal and Tribal law. A hearing before the Tribal Court was held June 11, 2018, and on June 12, 2018 the Tribal Court Judge denied the motion to dismiss finding Coles to be subject to personal jurisdiction in the Tribal Court. On June 29, 2018, Coles pled guilty to DUI, Aggravated Assault and Battery, and Eluding. A sentence of 95 days, with credit for time served of 65 days, from the time of the hearing was imposed. When the habeas corpus petition was filed in this Court, Coles was in custody and detained in the Wind River Reservation Detention Center. During the telephone hearing, the Court was advised by Coles was involved in an assault on another inmate at the detention facility, and has been sentenced to another 58 days for that offense.

The findings of the Tribal Court are included with the Petition, at Doc. 1, 16-17, and are also set out below. The Tribal Judge considered testimony of Lonnie Warren, an enrolled member of the Northern Arapaho Tribe living in Riverton, who informed the Tribal

Court that she "took TiJay Coles into her family as her adopted son, not legally, under Tribal Customs." A person named Mary Brown testified. She was previously employed by the Northern Arapaho Department of Family Services and was the case worker assigned to Coles, who had been removed from his family and was a Ward of the Inter-Tribal Court, and in the care, custody, and control of the Northern Arapaho Department of Family Services. She also noted that Coles's father was an enrolled member of the Northern Arapaho Tribe.

Coles's attorney in Tribal Court argued he is a non-Indian who does not live within the Wind River Indian Reservation and does not have significant ties to the Northern Arapaho Tribe. The prosecutor, in response, argued he is a descendent of the Northern Arapaho Tribe, had been a Ward of the Tribal Court, and by Ms. Brown's testimony, had significant ties to the Wind River Indian Reservation.

The Findings of Fact and Conclusions of Law made by the Tribal Judge are as follows:

1. TiJay Coles is a descendent [sic] of the Northern Arapaho Tribe.
2. TiJay Coles['] biological father is an enrolled member of the Northern Arapaho Tribe.
3. TiJay Coles resides in Riverton, Wyoming, within the exterior boundaries of the Wind River Indian Reservation.
4. TiJay Coles was a Ward of the Tribal Court for several years, receiving services of the Northern Arapaho Department of Family Services.
5. TiJay Coles had and maintains significant ties to the Wind River Indian Reservation.
6. In accordance with the Northern Arapaho Tribal customs and beliefs, tribal member Lonnie Warren brought TiJay Coles into her family as her adopted son.

7. TiJay Coles meets the requirements of **Shoshone-Arapaho Tribal Law and Order Code Section 1-8-8(2)(c)** descendant member of the any [sic] Indian Tribe who is a resident or domiciliary of the Wind River Reservation, or who has significant family or cultural contacts with the Wind River Indian Reservation.
8. TiJay Coles is a descendant member of the Northern Arapaho Tribe who has maintained significant family and cultural contacts with members of the Northern Arapaho Tribe, including Lonnie Warren, who adopted him into their family in accordance to Northern Arapaho Tribal Customs and Traditions.

IT IS HEREBY ADJUDGED, ORDERED AND DECREED, that the Court declares TiJay Coles to be a decedent [sic] member of the Northern Arapaho Tribe, with significant ties to the Wind River Reservation, and is an Indian in accordance to of [sic] **Shoshone-Arapaho Tribal Law and Order Code Section 1-8-8-(2)(c)**[.] The Motion is denied.

Doc. 1, 17.

Now, in his Petition, Coles claims jurisdiction under 25 U.S.C. § 1303, the Indian Civil Rights Act ("ICRA"). This statute provides:

> The 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. (emphasis supplied).

As a person who has been detained, Coles is entitled to invoke 25 U.S.C. § 1303 to seek relief and test the legality of his detention.

Coles claims that the order of detention and the charges are illegal and in violation of § 1302 of ICRA. He claims that (1) that he does not meet the definition of "Indian" as defined under ICRA and (2) that it is impossible to exhaust remedies through the Wind River Tribal Court because the Joint Tribal Business Council no longer exists. It appears that his argument is essentially that requiring him to exhaust would be futile or there is no

remedy available.

Among other things, Coles also relies on *State of Wyoming v. U.S. EPA,* 875 F.3d 505, 509 (10th Cir., nunc pro tunc to Feb. 22, 2017), which found that Congress diminished the boundaries of the Wind River Indian Reservation, amending and superseding the original opinion filed in 849 F.3d 861 (Feb. 22, 2017), *cert denied* by the Supreme Court on June 25, 2018 (Docket 17-1156 and 17-1164). This appears to be significant to Coles because he says he was living in Riverton at the time of the offense and was not residing on the Wind River Indian Reservation. He also claims to be non-native, and thus, the Tribal Court has no personal jurisdiction over him. He asserts that ICRA requires tribes to make publicly available the criminal laws of the government and they have not done so. Part of this claim raises what is a less than convincing argument that there is no way to determine whether there is any mechanism or way to exhaust remedies under tribal law, because the Shoshone & Arapaho Law and Order Code ("S&A LOC") is "currently unavailable."[3] Counsel for Coles claims she could find nothing, after making Google searches and trying to locate the S&A LOC on the internet. This seems somewhat disingenuous as counsel is a Legal Aid attorney, licensed to practice in Wyoming, with a practice out of Gillette. Counsel for Coles in Tribal Court was also a Legal Aid attorney licensed to practice in Tribal Court who is located in Lander, and the Court presumes that appearing in Tribal Court would require some working knowledge about the S&A LOC. The

[3]Respondent Smith did acknowledge that the Tribal Court's website is being updated and switching to a new provider. However, during this time (and prior) the S&A LOC has been available on Westlaw.

S&A LOC is available on Westlaw. This is still the code governing operations in the Tribal Court and on the Reservation. The Court was able to access the S&A LOC on Westlaw without difficulty.

S&A LOC, Section 15-1-5 provides that a criminal defendant may appeal as of right from any final judgment of conviction, except convictions from traffic offenses may be appealed only with the permission of the Court of Appeals. The S&A LOC also provides for a writ of habeas court in Section 15-2-2 and an application for such a writ may be filed by any person or guardian of a person who is wrongfully detained by another. The application shall state the facts constituting such wrongful detention, the name of the person detained and the place of detention, and shall be served upon the Clerk of the Court of Appeals. A hearing must be called within two days, unless that lands on a weekend or legal holiday. A three judge court sits at the hearing.

Coles has argued that because the Joint Business Council for the two Tribes has been dissolved and subsequently replaced by the Wind River Inter-Tribal Council, there remains nothing in the S&A LOC that provides him with sufficient rights. However, as Respondent Smith notes, this is a change in the executive branch that did not displace the S&A LOC. Respondent Smith includes a public resolution in her materials which recognizes the Wind River Inter-Tribal Council as the Governing Authority in the Shoshone and Arapaho Law and Order Code. Doc. 7, Ex. B.

Discussion

1. Exhaustion

Petitions for writ of habeas corpus for relief from Tribal Court convictions may be brought pursuant to 25 U.S.C. § 1303. The rules governing 28 U.S.C. § 2254 apply to actions under 25 U.S.C. § 1303. 28 U.S.C. 2254(b)(1), applicable in § 1303 cases, provides:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State [Tribal] court shall not be granted unless it appears that--
> (A) the applicant has exhausted the remedies available in the courts of the State [Tribe]; or
> (B)(I) there is an absence of available State [Tribal] corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Coles argues that it was impossible to exhaust remedies through the Tribal Court because the Joint Tribal Business Council no longer exists. As noted above, the S&A LOC provides for appeals and application to the Tribal Court for a writ of habeas corpus. This is clearly provided in the S&A LOC and readily available. Dissolution of the Joint Business Council and replacement by the Wind River Inter-Tribal Council did not displace the S&A LOC, and supporting evidence includes a public resolution persuasively aids the Court in addressing that issue. Doc. 7, Ex. B.

Criminal defendants in Tribal Court may appeal their convictions as a matter of right to the Tribal Court of Appeals. S&A LOC § 15-1-5(1). Further, those who claim they may

be held unlawfully may also seek a writ of habeas corpus from the Tribal Court. S&A LOC § 15-2-2(1). Coles did not seek either of these avenues of relief in the Tribal Court.

In *Toya v. Toledo*, 2017 WL 3995554, *3 (D.N.M. 2017), the court stated:

> A) Exhaustion
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> Before turning to the merits of Petitioner's claims, the Court must first address exhaustion, as "[w]hen presented with a petition for habeas relief pursuant to § 1303, the federal court must, in the first instance, determine whether the petitioner has exhausted his tribal remedies." *Steward v. Mescalero Apache Tribal Court*, CIV 15-1178 JB/SCY, 2016 WL 546840 at *2 (D.N.M. 2016) (citing *Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1209 (10th Cir. 1999)). "Under the tribal exhaustion rule, until petitioners have exhausted the remedies available to them in the tribal court system, it is premature for a federal court to consider any relief." *Valenzuela v. Silversmith*, 699 F.3d 1199, 1207 (10th Cir. 2012) (alterations and quoted authority omitted). "In order to satisfy the exhaustion requirement, a criminal defendant must pursue a direct appeal or show that such an appeal would have been futile." *Alvarez v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016). "[T]he aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984).
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> However, "exhaustion of tribal court claims is not an inflexible requirement." *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Rather,
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> > ...[a] balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights.
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> *Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation*, 554 F.2d 845, 846 (8th Cir. 1977) (quoted authority omitted); accord *Selam*, 134 F.3d at 953. Accordingly, the tribal exhaustion doctrine is subject to a narrow set of exceptions, one of which is showing that requiring resort to tribal remedies would be futile. *Steward,* 2016 WL 546840 at *2 (citing *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 n.21 (1985)); see also *Valenzuela,* 699 F.3d at 1207. Courts have held that where there are informal remedies available to a

> petitioner, but none that are formal, the petitioner is not required to exhaust his tribal remedies. See *Necklace*, 554 F.2d at 846 (holding that in the absence of formal habeas procedures, the petitioner was not required to exhaust informal tribal remedies); see also *Wounded Knee v. Andera,* 416 F. Supp. 1236, 1239 (D.S.D. 1976) ("[i]f a tribal remedy in theory is non-existent in fact or at best inadequate, it might not need to be exhausted.") (citing *Schantz v. White Lightning*, 502 F.2d 67, 70 n.6 (8th Cir. 1974)).

Toya v. Toledo, No. CIV 17-0258 JCH/KBM, 2017 WL 3995554, at *2–3 (D.N.M. Sept. 9, 2017), report and recommendation adopted, No. CV 17-0258 JCH/KBM, 2017 WL 4325764 (D.N.M. Sept. 26, 2017).

Considering the discussion in *Toya v. Toledo*, as well as the specific provisions in the S&A LOC providing for appeal of criminal convictions or applications for writs of habeas corpus, the Court finds that Coles has failed to exhaust his remedies. None of the narrow exceptions to the requirement for exhaustion discussed above apply here. There is nothing that shows those remedies would be futile or that they are available only in theory, not fact, or that the process is merely illusory. Where the Petitioner has not exhausted tribal court remedies, the district court should not exercise jurisdiction. On this basis alone, the Court finds that the petition should be dismissed for lack of jurisdiction and the relief requested denied. But a brief discussion of the other issues that raised concerns about exercising jurisdiction in this case will be addressed below.

2. ICRA – District Court jurisdiction to review Tribal Court decisions

The Report and Recommendation to the district court discussed ICRA and the § 1303 writ in *Tortalita v. Geisen*, Slip copy, 2018 WL 3195145 (D.N.M. 2018). The opinion

summarizes pertinent applicable law and is instructive.

> Indian tribes are inherently sovereign. "Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a separate people, with the power of regulating their internal and social relations." *United States v. Wheeler,* 435 U.S. 313, 322 (1978) (quotation omitted) superseded by statute as recognized in *U.S. v. Lara*, 541 U.S. 193 (2004). As a result, the United States Constitution's Bill of Rights does not operate as a restriction on tribal governments. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978); United States Commission on Civil Rights, The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights, at 4 (1991) [hereinafter ICRA Report]. Concerned that the rights of individual tribal members were not adequately protected in tribal courts, Congress enacted ICRA, a "modified version of the bill of rights," ICRA Report at 5, which was intended to strike a balance between tribal sovereignty and what Congress perceived as a need to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans." *Santa Clara Pueblo,* 436 U.S. 49, 61 (1978) (quotation omitted).
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> The codification of ICRA was years in the making and the subject of remedies was thoroughly vetted prior to the Statute's enactment. Id. at 62. Legislative history makes clear that when determining how to address alleged ICRA violations, Congress specifically rejected a proposal which would have allowed federal courts to conduct de novo reviews of all tribal convictions. *Id.* at 67. Ultimately, Congress determined that the sole remedy for violations of the Act would be review by way of habeas corpus. See *Nero v. Cherokee Nation of Oklahoma,* 892 F.2d 1457, 1461 (10th Cir. 1989) ("The Supreme Court in *Santa Clara Pueblo,* expressly invoking concerns about preserving tribal autonomy and self-government, reasoned that the statutory scheme and the legislative history of Title I of the ICRA indicate Congress deliberately decided not to provide federal remedies other than habeas corpus in order to limit the Act's intrusion into tribal sovereignty.").
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> From its inception, the writ of habeas corpus was designed to be a mechanism through which one could challenge the legality of his or her confinement. At common law, the writ was used solely to challenge a court's jurisdiction to commit an individual to prison. See, e.g., *Ex parte Watkins*, 28 U.S. 193, 197 (1830). However, the writ has long since been codified and its scope has expanded to address a multitude of post-conviction challenges from questions of jurisdiction to collateral attacks on constitutional violations. See *Withrow v. Williams*, 507 U.S. 680 (1993) (finding that habeas

> jurisdiction extends to Miranda violations); *Stone v. Powell,* 428 U.S. 465 (1976) (discussing the expansion of the writ of habeas corpus). As with most principles of law that withstand the test of time, habeas corpus jurisprudence has evolved, resulting in debates over federalism, finality, and the safeguarding of rights. See, e.g., *Withrow,* 507 U.S. 680 (1993); *Wainwright v. Sykes*, 433 U.S. 72 (1977).
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> While the breadth and reach of the writ of habeas corpus may be argued amongst scholars and jurists alike, the significance of the writ, both historically and practically, is rarely called into question. This is likely why Congress determined that the writ should be available under ICRA. Importantly, though, whether considering habeas corpus under 28 U.S.C. §§ 2241-2255, or as it applies to ICRA pursuant to 25 U.S.C. § 1303, **the Court may not treat a habeas petition as an appeal and substitute a final judgment of its own making for that of the convicting court. What the Court may do upon granting a petition for habeas corpus is order the petitioner to be released, vacate the petitioner's sentence, and/or fashion an equitable remedy that is within the purview of the Court's habeas jurisdiction.** 28 U.S.C. § 2255(a) (providing that, in a habeas action, a federal prisoner may move the court to vacate, set aside, or correct his or her sentence). See also *Davis v. United States,* 417 U.S. 333, 343–44 (1974) (explaining that 28 U.S.C. § 2255 was designed to afford to federal prisoners "a remedy identical in scope to federal habeas corpus [under 28 U.S.C. § 2254].").
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> A sentence reversal, then, as Petitioner requests, would require the Court to act in its appellate capacity and would run afoul of the confines of habeas corpus review. As the Tribal Respondents highlight in their brief, the terms "vacate" and "reverse" have, at times, been used almost interchangeably in ICRA actions. However, the terms implicate very different results. In light of the sanctity of tribal sovereignty, and the need to safeguard not just the rights of the individual, but also the rights of the tribe, it is imperative that the Court stay within its own lane when crafting appropriate relief in this case.

Tortalita v. Geisen, No. 1:17-CV-684-RB-KRS, 2018 WL 3195145, at *2–3 (D.N.M. Apr. 24, 2018), report and recommendation adopted, No. 1:17-CV-684-RB-KRS, 2018 WL 2441157 (D.N.M. May 31, 2018) (bold emphasis supplied). See also *Van Pelt v. Giesen*, 2018 WL 2187658 (D.N.M. 2018) (the same).

Generally, Tribal Courts do not have criminal jurisdiction over non-Indians, but they do have criminal jurisdiction to prosecute Indians for criminal offenses arising on the Reservation or in Indian country. Likewise, a state and its subdivisions generally lack authority to prosecute Indians for criminal offenses arising in Indian country. *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1006 (10th Cir. 2015.) Part of the inherent sovereignty of the Tribe permits them to prosecute non-member Indians to the same extent as Tribal members. Thus, the questions about whether Coles is an "Indian" have been raised. To some extent, this issue must be considered in tandem with the exhaustion requirements when determining whether the Tribal Court has jurisdiction.

Tribal Court jurisdiction must be considered by the Tribal Court in the first place. In *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, a district court decision in a civil tort case the court stated:

> Federal courts do not "readjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied on comity for some other valid reason." *AT & T Corp. v. Coeur d'Alene Tribe,* 295 F.3d 899, 904 (9th Cir. 2002).
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> See also *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 19, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the [plaintiff's claim] and resolved in the Tribal Courts.")

Lesperance, 259 F.Supp.3d 713 (D. W.D. Mich. 2017) (civil).

In deciding jurisdictional issues, findings of fact by the Tribal Court are reviewed for

clear error and the district court defers to the Tribal Court's interpretation of tribal law. See *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010), citing *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756-757 (8th Cir. 2004):

> The Supreme Court has repeatedly recognized Congress's commitment to a "policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); see also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 107 S.Ct. 971, 94 L.Ed.2d 10 (1986) (citing cases). Consistent with this policy, the Supreme Court has determined that "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual*, 480 U.S. at 16, 107 S.Ct. 971. Thus, in this Circuit, we "defer to the tribal courts' interpretation" of tribal law. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir.1993) (deferring to tribal court's decision that the tribal constitution gave the tribal court personal jurisdiction over non-Indians), cert. denied, 512 U.S. 1236, 114 S.Ct. 2741, 129 L.Ed.2d 861 (1994); see also *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir.1994) ("The Tribal Court's determinations of federal law should be reviewed de novo while determinations of Tribal law should be accorded more deference."), cert. denied, 513 U.S. 1103, 115 S.Ct. 779, 130 L.Ed.2d 673 (1995). Similarly, a tribal court's findings of fact are reviewed under a "deferential, clearly erroneous standard." *Duncan Energy*, 27 F.3d at 1300. It is only when the tribal court applies federal law that the tribal court's determinations are accorded no deference and are reviewed by the district court de novo.

Thus, the Tribal Court's findings of fact, set out above, are subject to a deferential, clearly erroneous standard of review.

3. Who is an Indian?

Under 25 U.S.C. § 1301, for purposes of ICRA, the following definition of "Indian" applies:

> (4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

Petitioner [and Respondent] cites *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) as providing the two part test used to determine whether someone is an Indian for purposes of jurisdiction. The test for determining Indian status considers (1) the person's degree of Indian blood; and (2) tribal or government recognition of a person as Indian. *Bruce* says that the first prong requires ancestry living in America before Europeans arrived, but because this is rarely provable in that way, the general requirement is only of "some" blood; evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy the first prong. 394 F.3d at 1223.

As to the second prong discussed in *Bruce,* it "probes whether the Native American has a sufficient non-racial link to a formerly sovereign people." 394 F.3d at 1224, quoting *St. Cloud*, 702 F. Supp. at 1461. And, the *Bruce* court stated:

> When analyzing this prong, courts have considered, in declining order of importance, evidence of the following: "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir.1995) (citing *St. Cloud,* 702 F. Supp. at 1461).

Id. It continued:

> Tribal enrollment is "the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative." *Broncheau,* 597 F.2d at 1263; accord *Antelope,* 430 U.S. at 646 n. 7, 97 S.Ct. 1395 ("[E]nrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction ....") (citations omitted); *Keys,*

> 103 F.3d at 761 ("While tribal enrollment is one means of establishing status as an 'Indian' under 18 U.S.C. § 1152, it is not the sole means of proving such status.") (citation omitted); *Ex parte Pero,* 99 F.2d 28, 31 (7th Cir.1938) ("The lack of enrollment ... is not determinative of status.... [T]he refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *St. Cloud*, 702 F. Supp. at 1461 ("[A] person may still be an Indian though not enrolled with a recognized tribe."). Nor have we required evidence of federal recognition. Rather, we have emphasized that there must be some evidence of government or tribal recognition. See *Keys*, 103 F.3d at 761(concluding that where child was shown to have Indian blood and was treated by tribe as a member of the tribe, district court properly found that she was an Indian); accord *Ex parte Pero,* 99 F.2d at 31; *Lewis v. State*, 137 Idaho 882, 55 P.3d 875, 878 (Ct. App. 2001). This stems from the recognition that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n. 18, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76, 27 S.Ct. 29, 51 L.Ed. 96 (1906); *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897).

Id. at 1224-1225. See also *United States v. Zepeda*, 792 F.3d 1103, 1106, 1110 (9th Cir. 2015) (a case brought under the Indian Major Crimes Act, requiring the government to prove that the defendant has some quantum of Indian blood, whether or not traceable to a federally recognized tribe); *United States v. Keys*, 103 F.3d 758, 760 (9th Cir. 1996) (tribal enrollment is one means of establishing status as an "Indian," but not the sole means).

In Coles's case, the Tribal Court Opinion and Order of June 13, 2018 listed a number of key factors to establish the Indian status of Coles. He had been adopted by enrolled members of the Tribe under traditional tribal law and custom; was provided social services by the Northern Arapaho Department of Family Services; was a ward of the Tribal

Court as a child;[4] the Tribal Court made determinations about his care and custody; he currently receives prescriptions from the local Indian Health Services Program; and, he is a descendant of a tribal member who has maintained significant family and cultural contacts with tribal members. He is recognized by the Northern Arapaho Tribe and the Tribal Court as an Indian under S&A LOC 1-8-8(2)(c). Tribal recognition of de facto membership or Indian status is at the core of tribal sovereign authority. *Santa Clara Pueblo v. Martinez*, 463 U.S. 49, 72 (1978). Nothing indicates these are clearly erroneous fact findings, and they are not really meaningfully disputed by Coles. Applying the deferential standard of review required, the Tribal Court's findings will not be disturbed.

Conclusion

Most important to the Court's decision here, Coles has failed to exhaust tribal remedies, including exercising the ability to appeal or seek a writ of habeas corpus under the S&C LOC. He offers nothing that suggests those remedies are futile or illusory; nothing he offers supports any determination that the exhaustion requirement should be excused.

The Court must give deference to the Tribal Court's findings of fact, including those that support the finding that Coles is an Indian, as guided by the factors and considerations enunciated in the *Bruce* case and others. The Tribal Court's Order and Opinion will not be disturbed.

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[4]Counsel at the hearing advised that Coles turned 18 in March of 2018. He was then no longer a ward of the Tribal Court.

The Court finds and concludes that the Petition should be dismissed for lack of jurisdiction. For the foregoing reasons and as stated by the Court at the hearing, it is

ORDERED that the "Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303" shall be, and hereby is, **DISMISSED for lack of jurisdiction.**

Dated this 24th day of July 2018.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE