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May 24, 2004

Cathy Catterson, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1518

VIA FEDERAL EXPRESS

Re: Doe v. Mann, et. al., No. 04-15477

Dear Clerk of Court:

Enclosed for filing in the above-referenced matter are:

1. One Original and 15 Copies of Brief of Amicus Curiae Elem Indian Colony In Support of Appellant for Reversal; and

2. Proof of service.

By copy of this letter, counsel of record is served with the same.

Sincerely,

Brad S. Jolly

cc: Jeffrey L. Bleich, Munger, Tolles & Olson, LLP
Caroline Todd, Law Offices of Caroline Todd
Meg Halloran, Deputy Attorney General, State of California
Robert and Barbara Driskell
Robert L. Weiss, Deputy Lake County Counsel

SUMMARY AND REQUEST FOR ORAL ARGUMENT

This case presents the question of whether the State has subject matter jurisdiction over child custody proceedings involving Indian children domiciled within Indian country. The State of California, without notifying or contacting the Elem Indian Colony, entered its Reservation, removed one of its children, and initiated a child custody proceeding in state juvenile court which resulted in the termination of parental right and foster care and adoptive placement with a non-Indian family. But, the Tribe has exclusive jurisdiction over child custody proceedings involving Indian children domiciled on the Reservation as a matter of federal law. This is clear under binding precedent and the Tribe was dealing with the minor's custody through its own institutions when the State unlawfully intruded itself into the Tribe's internal affairs.

The Tribe's sovereignty and self-government has been gutted by the District Court and the Tribe's families and children have been left vulnerable to all of the evils the ICWA was designed to prevent, as demonstrated by the State's actions in this case.

The Tribe requested to participate in oral argument in its Motion to Intervene originally filed with the Court, but the Court did not rule on that issue. The Tribe renews its request to participate in oral argument under FRAP 29(g) and respectfully requests 20 minutes for its argument.

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IDENTITY OF AMICUS AND AUTHORITY FOR FILING

The Elem Indian Colony of Pomo Indians ("Tribe") is the federally recognized Indian tribe involved in the case before the Court. The mother, Appellant Mary Doe, is a member of the Tribe and the minor, Intervenor Jane Doe, is eligible for membership. Jane Doe was residing on the Tribe's Reservation with her extended family when the State removed her and initiated proceedings to terminate parental rights and place Jane Doe in a non-Indian adoptive home. The Tribe has exclusive jurisdiction over Jane Doe's custody and care and the State's purported exercise of jurisdiction is invalid. The Tribe has been granted amicus status by order of the Court dated May 14, 2004.

ARGUMENT

I. SUBJECT MATTER JURISDICTION OF THE STATE WITHIN THE RESERVATION CAN ONLY BE CONFERRED BY CONGRESS AND CANNOT BE WAIVED OR "CREATED."

The Elem Indian Colony of Pomo Indians ("Tribe") is a federally-recognized Indian tribe whose existence pre-dates by centuries that of the United States and California, and which possesses unique attributes of sovereignty of which it has never been divested. "The present right of tribes to govern their members and their territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (Rennard Strickland, et al. eds., 1982). As

governments pre-dating the United States, Indian tribes retain "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). As a result, tribes have always maintained "a semi-independent position . . . as separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside." *McClanahan v. Ariz. State Tax Comm'n.*, 411 U.S. 164, 173 (1973).

Indian affairs are a matter within the paramount authority of the federal government, *Williams v. Lee*, 358 U.S. 217, 219-20 & n. 4 (1959), and, as a result, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980). Congress possesses extremely broad authority over Indian tribes and Indian affairs pursuant to the Indian Commerce Clause. U.S. CONST. art. 1, § 8, cl. 3; *see Wheeler*, 435 U.S. at 322-23. This authority is broader than, for example, Congress' power over interstate commerce because

> the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade *but have been divested of virtually all authority over Indian commerce and Indian tribes*.

Seminole Tribe v. State of Florida, 517 U.S. 44, 62 (1996) (emphasis added). State authority and jurisdiction in this case is therefore defined and limited by supreme federal law.

Because of Indian tribes' sovereign status, they are generally insulated by a "historic immunity from state and local control." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). Therefore, generally, states have *no* jurisdiction within Indian country. *Williams*, 358 U.S. 217. "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan*, 411 U.S. at 170 -171. There is perhaps no area of tribal jurisdiction which is stronger than its authority over domestic relations. Tribal authority over domestic relations is so fundamental that it remains fully intact over such matters even on non-Indian fee lands. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). Thus, the Tribe's interest and authority here is perhaps at its strongest.

This case involves the subject matter jurisdiction of the state and, therefore, it is not subject to waiver or consent and cannot be fixed by the passage of time. *E.g., United States v. Cotton*, 535 U.S. 625, 630 (2002). The state either was vested with subject matter jurisdiction as a matter of federal law or it was not. In the case of matters involving Indians and arising within Indian country, that jurisdiction must be expressly granted by Congress or else it simply does not exist.

II. PUBLIC LAW 280 DOES NOT DELEGATE ANY JURISDICTION TO THE STATE OVER CHILD CUSTODY PROCEEDINGS INVOLVING CHILDREN DOMICILED WITHIN INDIAN COUNTRY.

As mentioned, a state may exercise jurisdiction over an Indian tribe and within Indian country if Congress expressly provides for it. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). It is true that, pursuant to P.L. 280, California was delegated limited civil jurisdiction within Indian country geographically located within the State. 28 U.S.C. § 1360(a). However, this limited amount of jurisdiction includes absolutely no civil regulatory jurisdiction nor civil adjudicatory jurisdiction which is not private civil litigation involving individual Indians.

A. The State's Entering the Reservation, Removing Children, and Determining Family Relationships Is an Exercise of Civil Regulatory Jurisdiction Beyond the Delegation in P.L. 280.

P.L. 280 simply does not grant the State civil *regulatory* authority within Indian country. *Bryan*, 426 U.S. at 385, 388-90 (1976). The Supreme Court has consistently recognized that Indian tribes retain exclusive inherent sovereign authority over both their members and their territory. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). P.L. 280 does not alter this inherent tribal authority.

> [N]othing in [P.L. 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of... tribal governments as did exist and a conversion of the affected tribes into little more than "'private, voluntary organizations'" – a possible result if tribal

> governments and reservation Indians were subordinated to the full panoply of civil regulatory powers . . . of state and local governments.

Bryan, 426 U.S. at 388. In short, the exercise of state civil regulatory jurisdiction within Indian country "would result in the destruction of tribal institutions and values." *California v. Cabazon Band*, 480 U.S. at 208. In other words, any exercise of civil regulatory authority by the State is prohibited by federal law, regardless of P.L. 280. This is a matter that has long been settled by the Supreme Court and the State cannot validly argue against it.

Before the State attempts to apply its laws on the Reservation, it must first be determined whether the law is criminal/prohibitory and, therefore, applicable, or civil/regulatory and, therefore, beyond the authority of the State to enforce. *Id.* In this case, the State entered the Tribe's jurisdiction without consent or approval of the Tribe, removed a child from the Tribe's jurisdiction, and initiated child custody proceedings pursuant to State law. The minor was domiciled on the Reservation and every matter giving rise to this proceeding arose on the Reservation completely outside of the State's territory. The Department of Social Services ("DSS") exists and derives its authority from the laws of the State of California. CAL. WELF. & INST. CODE § 10550 *et seq.* By virtue of this authority, when DSS or its agents act in their official capacity, the laws of California "are necessarily given effect." *Fransisco v. State*, 556 P.2d 1, 2 (Ariz. 1976). As a result, DSS' authority on the Reservation

"must be defined by the state's ability to extend the application of its laws to an Indian residing on a reservation." *Id.* Clearly, P.L. 280 does not provide the State with any authority to apply its laws giving DSS authority onto the Reservation.

Furthermore, the State has applied its own standards governing the family-child relationship and child care – laws which are clearly civil regulatory in nature. No reasoned argument can be made that the State attempted to apply criminal/prohibitory laws on the Reservation. As in *Bryan*, this was clearly an action civil in nature.[1] Even California's own law declares that child custody orders "shall not be deemed a conviction of a crime for any purpose." CAL. WELF. & INST. CODE § 203. Standards of child care and custody are a regulation of the family relationship and child rearing. Thus, the application of state law to the proceedings in state court was itself an exercise of civil regulatory jurisdiction outside the State's authority.

This is not a case where the State can assert any interest due to off-Reservation contacts. The State's exercise of civil regulatory jurisdiction here completely supplanted the Tribe's customs and values applicable to such matters and effectively rendered the Tribe's self-government ineffective. It is long settled that state jurisdiction in child custody matters "plainly would interfere with the powers of self-

[1]The lack of jurisdiction in this case does not mean the State lacks jurisdiction to enforce its otherwise criminal/prohibitory laws related to child abuse, such as sexual abuse of a minor and similar crimes.

government conferred upon the [] Tribe," precluding state jurisdiction. *Fisher v. Dist. Ct.*, 424 U.S. 382, 387 (1976). The State cannot reasonably assert any basis for its jurisdiction under existing law.

B. The Adjudication of the Child Custody Proceeding Itself Was Outside the Scope of P.L. 280 as a Public, not Private, Civil Action.

Separate and apart from the State's lack of civil regulatory jurisdiction, the State lacked adjudicatory jurisdiction in this case as well. P.L. 280 does not allow for exercises of jurisdiction by California that are public in nature. *State ex rel. Dep't. of Human Serv. v. Whitebreast*, 409 N.W.2d 460, 463-64 (Iowa 1987). The Supreme Court has already determined that the civil aspect of P.L. 280 is "primarily intended to redress the lack of adequate Indian forums for resolving *private legal disputes* between reservation Indians, and between Indians and other *private citizens*, by permitting the courts of the States to decide such disputes." *Bryan*, 426 U.S. at 383 (emphasis added). The Court stressed that it was merely a "grant jurisdiction over *private civil litigation* involving reservation Indians in state court." *Id.* at 384 (emphasis added).

The Supreme Court has suggested which types of actions are within the State's adjudicatory authority: "contract, tort, marriage, divorce, insanity, descent, etc., but . . . not . . . laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private'

laws." *Id.* 385, n.10. It is fairly straightforward that "private civil litigation" involving Indians and arising within Indian country references litigation between two private individuals and nothing more. This case is nothing of the sort.

When a state agency brings an action against an individual, it is acting pursuant to state law and attempting to enforce state regulatory laws. *Whitebreast,* 409 N.W.2d at 463. As a result, such actions cannot be characterized as "private civil litigation" and are, therefore, outside the scope of the State's authority under P.L. 280. *Id.* at 463-64. The juvenile case here was initiated by the State through one of its governmental subdivisions, DSS – without a doubt, a public body. It is charged with administering regulatory laws and its function is clearly regulatory in nature. The Department is charged with "provid[ing] on behalf of the general public . . . reasonable support and maintenance for needy and dependent families and persons." CAL. WELF. & INST. CODE § 10001(a). DSS clearly acts on behalf of the State and "general public," not on behalf of, or even in the place of, a private individual. There can be no reasonable argument that when the state brings an action to enforce its regulatory laws, the action is not "private civil litigation." This is not a private voluntary adoption proceeding over which the State could properly exercise P.L. 280 jurisdiction, but an action of the state to enforce regulatory laws and exercise police power.

The fact that P.L. 280 does not delegate to the State authority to adjudicate public actions is consistent with and a necessary corollary to its withholding of civil regulatory jurisdiction. In fact, it would be impossible for the State to exercise adjudicatory jurisdiction over public causes of action while not illegally exercising civil regulatory jurisdiction within Indian country. DSS is charged with the administration of the State's child welfare laws which, "comprehensively regulates state services for the care and protection of children." *Newton v. County of Napa*, 266 Cal.Rptr. 682, 686 (Cal.Ct.App. 1990). When it initiates an action in juvenile court, it is an exercise of state police power, not the resolution of a private dispute. *See United States v. Ballek*, 170 F.3d 871, 875 (9th Cir. 1999) (referring to child welfare actions as exercise of state police power).

If the State's adjudicatory jurisdiction extended to public causes of action such as this one, it would render its lack of civil regulatory jurisdiction nothing but empty words. The State could bring civil actions against individual Indians for violation of state environmental laws, labor laws, and building codes under the guise of "adjudicatory jurisdiction." A finding that the State has court jurisdiction over actions that are public in nature would accomplish precisely what the Supreme Court has unequivocally said P.L. 280 did not intend: "the undermining or destruction of such tribal governments . . . and a conversion of the affected tribes into little more than 'private, voluntary organizations.'" *Bryan*, 426 U.S. at 388.

Under no reasonable construction can an action brought by DSS to remove a child from her home, terminate her parental relationship, and place her in another home against the child's and parent's wishes be construed as "private civil litigation" or even the enforcement of "private laws." Under well-settled supreme federal law, the State lacked subject matter jurisdiction over the juvenile proceedings involved in this case. The District Court's decision otherwise was incorrect and wholly inconsistent with binding Supreme Court precedent.

III. THE ICWA REAFFIRMS EXCLUSIVE TRIBAL JURISDICTION OVER THIS MATTER AND DOES NOT PROVIDE A SOURCE OF CONGRESS DELEGATING SUBJECT MATTER JURISDICTION TO THE STATE.

The District Court apparently correctly determined that P.L. 280 did not grant the State jurisdiction over child custody proceedings involving on-Reservation domiciliaries. But, the District Court then took a disturbing and novel turn and found that, somehow, the ICWA provides jurisdiction to the State. The District Court's reading was wholly incorrect and inconsistent with the entire purpose for which the ICWA was enacted. Under the District Court's decision, tribes in California are left in a worse position after the enactment of a statute intended to benefit them than if the statute never existed.

A. The Statutory Language of the ICWA Is Clear That the Tribe Has Exclusive Jurisdiction over Child Custody Proceedings.

"Interpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 301 (1989). In this case, the ICWA provides, in plain terms, "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a). Prior to enactment of this provision, the Supreme Court had already held that, in the absence of an Act of Congress, tribes maintain exclusive jurisdiction over child custody proceedings involving Indians and arising on the Reservation. *Fisher*, 424 U.S. at 388-89. Thus, this provision of the ICWA is an affirmation of existing tribal inherent sovereignty completely within the authority of Congress. *See United States v. Lara*, __ U.S. __, 124 S.Ct. 1628, 1632-37 (2004) (holding that Congress can reenable tribal inherent sovereign authority by statute).

P.L. 280 would permit the State to exercise jurisdiction over private adoption proceedings and voluntary terminations of parental rights arising on-Reservation because that is private civil litigation. But, it does not permit state jurisdiction over any involuntary child custody proceedings. These are acts of the State pursuant to its police powers and outside the scope of P.L. 280.

Existing case law directly supports this and in no way suggests that P.L. 280 permits the State to exercise adjudicatory jurisdiction over non-private child custody proceedings. In *Fisher v. Dist. Ct., supra*, the Supreme Court noted that P.L. 280 could affect its determination, but that case involved a private adoption. 424 U.S. at 383-84, 388. In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), the Court stated in a footnote, without analysis, that the "existing federal law" language of the ICWA jurisdictional affirmation "would appear to refer to Pub. L. 280." 490 U.S. at 43, n.16. However, that case also involved a private adoption. *Id.* at 37-38.

This Court has also dealt somewhat with the jurisdictional relationship between states and tribes under the ICWA and P.L. 280. Although the issue before the Court involved the existence of tribal jurisdiction and not state jurisdiction, it also only dealt with private adoption. *Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548, 551, 560 (9th Cir. 1991). In fact, the Court expressly noted "It is not disputed that private adoption cases are included within this transfer of civil jurisdiction from the federal government to the states." *Id.* at 560. The Court made no comment whatsoever with respect to non-private child custody proceedings. Thus, not only was the Court not faced with the question of whether states possessed jurisdiction over non-private child custody proceedings, it limited its entire determination to state and tribal jurisdiction over private adoption proceedings.

Every case which has even mentioned that states may have P.L. 280 jurisdiction over child custody proceedings has only been in the context of private adoption proceedings, which do fall within P.L. 280's scope of delegation. The rule that tribal jurisdiction over non-private proceedings under ICWA is exclusive has also been the position of P.L. 280 states that have faced the issue. The Wisconsin Attorney General has issued an opinion specifically discussing the extent of state jurisdiction over ICWA cases under P.L. 280. That opinion provides that "the state has not been granted general jurisdiction over child custody matters involving Indian children who reside or are domiciled within a reservation." 70 Wis. Op. Atty. Gen. 237 (1981). The reasoning is that "those proceedings . . . involve some aspect of the state's regulatory jurisdiction such as involuntary termination of parental rights." *Id.* However, the opinion also determined that "[b]y comparison, where the proceeding is not between the state and an individual, but rather primarily involves only private persons as in a voluntary foster care placement, state law may be applied under Pub. L. No. 280's jurisdictional grant." *Id.*

By its plain terms, the ICWA only allows state jurisdiction over proceedings involving children domiciled on-Reservation when there is some *other* federal law which provides that jurisdiction. There is no such other federal law in this case and the plain language of the ICWA affirming exclusive tribal jurisdiction must be followed.

B. ICWA's Provisions Allowing for Retrocession Do Not Alter the Scope of P.L. 280 or Exclusive Tribal Jurisdiction under the ICWA.

The District Court determined that the ICWA's provisions which permit a tribe to petition the Secretary of Interior for retrocession of jurisdiction indicates that states must have subject matter jurisdiction over cases such as this one. The District Court acknowledged that private adoption proceedings would be the subject of such a retrocession, but determined that retrocession over only private proceedings "is illogical." *Doe v. Mann*, 285 F.Supp.3d 1229, 1238 (N.D.Cal. 2003). Not only is this reasoning irrational in terms of finding a grant of subject matter jurisdiction, but is in error presuming that retrocession that included only private proceedings would be somehow "immaterial" or "minor."

Fundamentally, subject matter jurisdiction cannot be found by implication or waiver. Federal law makes it clear that such jurisdiction can be found only where Congress expressly provides for it.[2] No reasonable argument can be made that the retrocession provisions of the ICWA, 25 U.S.C. § 1918, somehow constitute a grant of jurisdiction to the State that P.L. 280 does not itself provide. To determine

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[2]Although it is true that the State may be able to exercise some jurisdiction in matters which do not infringe on the Tribe's self-government or are not preempted by federal law, *White Mountain Apache Tribe v. Bracker*, 488 U.S. 136, 145 (1980), no such argument can be made here. As mentioned above and determined by the Supreme Court in *Fisher*, state jurisdiction in cases such as these is precluded under the doctrine of infringement and the ICWA itself would preempt any state jurisdiction.

otherwise would not only be inconsistent with the controlling plain language of Section 1911(a), but would require the Court to find that Congress implicitly expanded the delegation of jurisdiction in P.L. 280 by providing a means of eliminating P.L. 280.

The retrocession of jurisdiction over private adoption proceedings is not immaterial or minute. Private adoption proceedings are one of the most significant aspects of the ICWA. The significant federal cases dealing with state jurisdiction over child custody proceedings *all* involve private adoptions. *E.g., Holyfield*, 490 U.S. at 37-38; *Fisher*, 424 U.S. at 383-84; *Native Village of Venetie v. Alaska*, 944 F.2d at 560. The legislative history of the ICWA is replete with discussions of states obtaining coerced voluntary relinquishments of parental rights. H.R. REP. NO. 1386, 95th Cong., 2nd Sess. 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533. The Supreme Court itself recognized in *Holyfield* that eliminating state jurisdiction over private adoption proceedings was key to the ICWA's provisions and directly within Congress' intent. 490 U.S. at 50-51.

Regardless, it is not the District Court's place to determine what types of proceedings are "material" or "important" to a particular tribe. Private adoption may be of extraordinary consequence to a tribe. The ICWA itself specifically recognizes adoptions "under tribal law or custom" in defining "parent." 25 U.S.C. § 1903(9). Customary and traditional adoptions are fundamental aspects of tribal existence and

the definition of tribal families and the tribe as a community. Private adoptions can be of paramount importance to the political, cultural, and social structure and existence of a tribe. Foreign private adoption proceedings necessarily disrupt traditional relationships and can be an anathema to tribal familial structure and tribal community identity. The importance of private adoption proceedings, of course, may vary from tribe to tribe, but it certainly is not the place of the District Court to determine that importance for *any* tribe, much less all tribes. The paternalistic determination of the District Court for all of nearly 600 federally recognized Indian tribes is, bluntly, offensive.

The ICWA itself is designed to recognize and incorporate individual tribal values and traditions instead of supplanting them with the values and culture of outsiders. The provision on retrocession is precisely consistent with this structure. Whether or not a tribe seeks retrocession over private child custody proceedings is completely left within the discretion of the tribe, ensuring that the importance or significance of restoring exclusive tribal jurisdiction over those matters is left with the tribe itself.

Finally, in relying on the Department of Interior's regulations on reassumption petitions, the District Court completely ignored that the regulations themselves do not concede there is state jurisdiction over non-private child custody proceedings. The regulations provide that they are for tribes which occupy a reservation where "a state

asserts any jurisdiction" under P.L. 280. 25 C.F.R. § 13.1(a) (emphasis added). The absence of the term "possesses jurisdiction" is not insignificant. Most importantly, the regulations provide:

> On some reservations there are disputes concerning whether certain federal statutes have subjected Indian child custody proceedings to state jurisdiction. . . Tribes located on those reservations may wish to exercise exclusive jurisdiction . . . without the necessity of engaging in protracted litigation. The procedures in this part . . . permit such tribes to secure unquestioned exclusive . . . jurisdiction over Indian child custody matters without relinquishing their claim that no Federal statute had ever deprived them of that jurisdiction.

Id. § 13.1(b). Thus, the regulations do not concede or even acknowledge any state authority over non-private child custody proceedings pursuant to P.L. 280. The District Court's use of the regulations to "create" subject matter jurisdiction was wholly inconsistent with the regulations themselves.

C. The District Court's Reasoning That ICWA Would Be "Illogical" If State Jurisdiction Were Not Allowed Is Contrary to ICWA's Purpose.

The District Court determined that a lack of state jurisdiction over child custody proceedings involving children domiciled on-Reservation "would gravely undermine the ICWA statutory scheme, making its provisions illogical." *Doe*, 285 F.Supp.2d at 1237. This turns the ICWA on its head and undermines its very purpose and intent. The District Court missed the entire reason behind the enactment of the

ICWA in the first instance and, as a result, placed Indian tribes and Indian children into a position worse than if the ICWA had never been enacted.

The ICWA was enacted to deal with "abusive child welfare practices" of the states. *Holyfield*, 490 U.S. at 32. The ICWA itself provides that "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). The legislative history itself focuses on the fact that states themselves are *the problem* with the status of Indian child welfare and their handling of Indian child custody proceedings was disturbing, violated constitutional rights, and was antithetical to tribal existence. H.R. REP. NO. 1386 at 8-12.

The ICWA was not enacted to merely protect the interests of children or even parents, as with most child welfare legislation. Instead, the ICWA recognizes the unique interests of tribes in the care and custody of Indian children and the preservation of Indian families. The ICWA finds that " that there is no resource that is more vital to the continued existence and integrity of *Indian tribes* than their children." *Id.* § 1901(3) (emphasis added). It declares the policy of the United States "to promote the stability and security of *Indian tribes*." *Id.* § 1902 (emphasis added). The House Report plainly states that ICWA "seeks to protect . . . the rights of the

Indian community and *tribe* in retaining its children in its society." H.R. REP. NO. 1386 at 23 (emphasis added).

The Supreme Court recognizes that ICWA is concerned with "the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Holyfield*, 490 U.S. at 50. The provisions of the ICWA "must, accordingly, be seen as a means of protecting . . . the tribes themselves." *Id.* The ICWA is designed to ensure that *tribal* standards apply to child custody proceedings, including whether removal is warranted in the first instance, not "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." H.R. REP. NO. 1386 at 24. In the case of children domiciled on-Reservation, "these goals are pursued through the establishment of exclusive tribal jurisdiction." *Holyfield*, 490 U.S. at 37, n.6. The finding that ICWA somehow mandates state jurisdiction for on-Reservation domiciliaries is fundamentally contrary to this purpose.

Nothing in the ICWA is designed to provide benefits to states or to give states additional authority. On the contrary, the ICWA is designed to *limit* state authority with respect to Indian children – both on and off-Reservation. This purpose cannot seriously be debated, but even if there was ambiguity, it must be resolved in favor of tribes. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Further, the ICWA is remedial legislation and, as such, must be construed broadly to effectuate its purpose,

Tcherepnin v. Knight, 389 U.S. 332, 336 (1967), and exceptions must be construed narrowly, *Medler v. United States*, 616 F.2d 450, 453 (9th Cir. 1980).

This Court has itself noted the jurisdictional scheme of the ICWA "expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction." *Native Village of Venetie v. Alaska*, 944 F.2d at 555. Yet, the District Court apparently read the ICWA as serving the purpose of ensuring some "court" would exercise jurisdiction over Indian children, thereby expanding state court jurisdiction. The District Court applied "a white, middle-class standard" to its reading of the ICWA by not acknowledging that its primary purpose with respect to providing for the best interests of Indian children was to protect them from the exercise of state jurisdiction whenever possible.

The District Court's reading of the ICWA in a manner which would provide for state subject matter jurisdiction over non-private child custody proceedings even where established federal law provides no such jurisdiction exists is a bastardization of the ICWA and a full-scale undermining of its purpose. It cannot stand as a basis for finding state subject matter jurisdiction.

D. The Tribe Has a Forum to Deal with Child Custody Matters And, in Any Event, the Lack of Any Tribal Forum Does Not Permit the State to Exercise Subject Matter Jurisdiction it Otherwise Lacks.

A large part of the District Court's reasoning seems to be based on its assumption that no "tribal court or other quasi-judicial body exists to hear this case." *Doe*, 285 F.Supp.2d at 1238. Unfortunately, the District Court was completely wrong. But, even if there were no tribal system to deal with child custody proceedings, that does not vest the state with subject matter jurisdiction – it is elemental law that the absence of another forum does not establish subject matter jurisdiction.

1. The Tribe's Executive Committee and its family structure are the institutions which exercise the Tribe's exclusive jurisdiction.

It is true that the Tribe does not have a tribal court and perhaps there is nothing that resembles an Anglo-style judicial system that an outsider would recognize. But, this does not mean that there is no system for dealing with this case or any other child custody proceeding. The Tribe is governed by the General Council, which is composed of all qualified voters of the Tribe. ELEM INDIAN COLONY CONST. art. III, § 1.[3] The General Council elects from its members the Executive Committee, which carries out the actions of the General Council. *Id.* art. III, § 3, art. VII, § 2. The

[3]A copy of the Tribe's Constitution are attached for the Court's convenience. Since the Constitution is substantive law, the Tribe is not adding to the record or presenting evidence.

Executive Committee has the authority to act for the Tribe whenever the General Council is not in session. (Elem Indian Colony Motion to Intervene, Decl. of Chairman Thomas at 2). Without question, the General Council has the authority to make child custody determinations. ELEM INDIAN COLONY CONST. art. VII, § 1(g), (h), (I), § 3. When the General Council is not in session, that authority lies with the Executive Committee.

The Executive Committee is the precise body with jurisdiction to hear the case which the State brought in its juvenile court. The ICWA does not mandate the existence of any tribal court as a prerequisite to exclusive tribal jurisdiction over on-Reservation children. The language of the ICWA provides that "An Indian tribe" has exclusive jurisdiction. 25 U.S.C. § 1911(a). This is consistent with Congress' policy of self-government and ensuring that tribe's have the authority to determine what bodies or institutions will deal with child custody proceedings.

In addition to the Executive Committee, the Tribe's extended family structure and community deals with child care and custody. In fact, in this case, the Tribe was exercising its exclusive jurisdiction over the custody of Jane through that institution when the State illegally usurped that jurisdiction. When Mary was removed from the Reservation by the State, she was residing with her extended family, all members of the Tribe. *Doe*, 285 F.Supp:2d at 1231. She had been placed there to ensure her proper care. (*See* Appellant's ER at 5). Although it turned out that the particular

relatives in question may not have been a proper placement, the State interjected itself before the Tribe or the family could take action – *one day* after Mary discovered the problems and before anyone notified the Tribe or extended family. (Appellant's ER at 6). The actions by the family constitute the Tribe's exercise of jurisdiction over the care and custody of Jane.

Although the Tribe's methods of dealing with child custody may be foreign to the State and the District Court, that does not make them any less valid than the court procedures utilized in Anglo culture. Instead, they are a reflection of the Tribe's process of dealing with these matters in accordance with its own values, culture, and traditions. While the Executive Committee is available for more formal governmental action, the security and authority of the family deals with these matters until formal governmental action is requested or required.

Such methods of dealing with child custody and domestic relations within the family or clan structure are not unique to the Elem Indian Colony. For instance, Hopi Villages retain their inherent and independent authority to deal with all domestic relations and child custody matters. HOPI CONST. art. VII, § 2(a). It is not the Hopi Tribal Court which deals with these matters and, in fact, the Hopi Tribal Court has no such authority. *Id.* art. VII, § 2(c). Although such matters of resolving child custody determinations may be foreign to the State and Anglo courts, that does not make them invalid and it is not the place of the State or the District Court to question,

chastize, challenge, or otherwise deprecate the system within the Tribe for resolving its internal matters. Nor would anyone ever suggest that placing that authority with the Hopi Villages and Clans would allow the State of Arizona to take Hopi children from their homes and send them to non-Indian families.

Dealing with child custody matters in accordance with Tribal custom and tradition and within the existing structure of the Tribal community is precisely the intent of the ICWA. The House Report itself acknowledges: "By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child." H.R. REP. NO. 1386 at 11. The ICWA provides that child custody proceedings involving Indian children are to "reflect the unique values of Indian culture" and are to be governed by "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5), § 1902. The entire basis of the ICWA is to correct the wrongful removal of Indian children from their tribes, their families, and their culture by federally guaranteeing that tribal institutions, values, standards, and traditions govern child custody proceedings. The ICWA is designed to protect tribes from outside interference when tribal institutions and values are not recognized or respected by states.

2. Even if the Tribe lacked institutions for resolving child custody matters, it does not grant the State subject matter jurisdiction.

Even if the Tribe did not have institutions to deal with child custody matters, it cannot vest the state court with subject matter jurisdiction. Subject matter jurisdiction involves the authority of a court to proceed – without subject matter jurisdiction any action of the court is void and invalid. *E.g., Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920). In this case, the subject matter jurisdiction of the State is defined and limited by federal law. As discussed, the only method for the State to obtain subject matter jurisdiction in this case is through an express grant of Congress. No such grant exists here.

The District Court's decision provides for state subject matter jurisdiction because it cannot see a tribal court. There is simply no basis in the law for finding "subject matter jurisdiction by default." This has particular import in the case of Indian affairs and, perhaps, is at its strongest in dealing with the placement and care of Indian children. Even if the state's and District Court's incorrect assumption that there is no other forum for child custody matters were correct, that cannot create subject matter jurisdiction in the state courts. *See Owens Valley Indian Hous. Auth. v. Turner*, 185 F.3d 1029, 1034, *vacated as moot*, 201 F.3d 444 (9th Cir. 1999). Even other states have recognized this in the context of state-tribal relations. *E.g., Meier v. Sac & Fox Indian Tribe*, 476 N.W.2d 61, 64 (Iowa 1991). The State either had

subject matter jurisdiction or it did not as a matter of law – it cannot be created at the whim of the State or the District Court on the grounds of convenience.

Nonetheless, ICWA provides a mechanism for dealing with any issues that may arise from a lack of tribal institutions. It expressly permits states and tribes to enter into agreements governing jurisdiction over child custody proceedings. 25 U.S.C. § 1919(a). If the State truly is concerned with the welfare of the Tribe's children in terms of Tribal institutions, the State needs to approach the Tribe for an agreement – without such action, any concern of the State for the Tribe's children is disingenuous. When Congress has spoken directly to the matter, it was error for the District Court to substitute its own unreasoned method for creating jurisdiction where none exists as a matter of federal law.

3. This case demonstrate precisely why Congress chose to statutorily recognize exclusive tribal jurisdiction and preclude state jurisdiction.

The proceedings of this case in the juvenile court are the "poster child" for the enactment of the ICWA. The problems identified by Congress which resulted in the need for the ICWA are all present in this case. The State's actions in this matter are abhorrent. Congress expressly found, "many social workers . . consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." H.R. REP. NO. 1386 at 10. Congress discovered:

> In judging the fitness of a particular family, many social workers . . . make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family.

Id. at 10. In this case, Mary's parental rights were terminated because, in the state's Western view, she failed to take her child from extended family placement and successfully reunify with her her child. (Appellant's ER at 8-9).

Similarly, Congress also found that parents often sought the assistance of state social workers, which the state would use as an excuse to begin child custody proceedings. H.R. REP. NO. 1386 at 11. Here, Mary approached the State to seek assistance because she had discovered there may have been sexual abuse in her daughter's placement with certain extended family members. *Doe*, 285 F.Supp.2d at 1231. The State then used this to initiate child custody proceedings. *Id.*

Congress also recognized that states do not provide counsel to parents involved in state custody proceedings. H.R. REP. NO. 1386 at 11. One of Mary's claims in this case is ineffective legal counsel appointed by the State. Congress also noted that states too often refuse to consider extended family placements or adoptions and, instead, consistently place Indian children in non-Indian homes, resulting in the destruction of Indian families, Indian tribes, and Indian culture. *Id.* at 9; 25 U.S.C.

§ 1901(4). Here, the Tribe sought to have the State, at least, place Jane with appropriate extended family members and even presented a resolution of the Executive Committee naming the family. *Doe*, 285 F.Supp.2d at 1231. The State ignored the Tribe's act, instead placing Jane in a non-Indian home apart from her culture and her tribe. Not only is this a direct violation of ICWA's placement preferences, but also its full faith and credit provisions. 25 U.S.C. § 1911(d), § 1915(a). The State proceeded as though the ICWA were never enacted.

It may be that the District Court may have been somewhat motivated by an interest in preventing the "undoing" of the state juvenile proceedings. However, that cannot be a valid reason for finding the State had jurisdiction. The Supreme Court itself has instructed:

> Whatever feelings we might have as to where the [child] should live . . . it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children – not what the outcome of that determination should be. The law places that decision in the hands of the [Tribe]. Had the mandate of the ICWA been followed . . ., of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation. [] It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe – and perhaps the children themselves – in having them raised as part of the [Tribe's] community. Rather, we must defer to the experience, wisdom, and compassion of the [Tribe] to fashion an appropriate remedy.

Holyfield, 490 U.S. at 53-54. Thus, such issues are irrelevant to the determination here. In any event, the harm of any possible separation with the adoptive family which might occur must be contrasted to the harm to the child, the family, and the Tribe in having the child removed from her culture and community.[4]

CONCLUSION

"If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity." *Wisconsin Potowatomies of Hannahville Indian Comm'y. v. Houston*, 393 F.Supp. 719, 730 (D.Mich. 1973). The District Court's decision is contrary to all applicable law and must be reversed.

Dated: May 24, 2004.

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[4]The Court should be aware that the Tribe is prepared to resolve this matter through the Executive Committee by conducting any necessary hearings and issuing any orders or resolutions necessary to secure a proper permanent placement of Jane Doe.