No. 04-15477

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY DOE,
Plaintiff and Appellant,

v.

JOHN DOE I, et al.,
Defendants and Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
HONORABLE MARILYN HALL PATEL
CASE NO. C 02-3448 MHP

PLAINTIFF-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1
STATEMENT OF THE ISSUE 1
STATEMENT OF THE CASE 2
STATEMENT OF FACTS 5
A. Events Giving Rise to the State Court Custody Proceedings 5
SUMMARY OF ARGUMENT 10
STANDARD OF REVIEW 16
ARGUMENT 17
A. Before ICWA, States Lacked Jurisdiction Over Reservation Indians Unless Congress Expressly Conferred Such Authority 17
1. PL 280's Permits States to Resolve Private Legal Disputes, Not Regulatory Matters, Involving Reservation Indians 20
B. As the District Court Concluded, Under Bryan and Cabazon, California Had No Jurisdiction Over the Involuntary Custody Proceedings Involving Appellant's Daughter 22
C. Congress Enacted ICWA To Redress State Encroachment Of Tribal Sovereignty And To Reaffirm Exclusive Tribal Jurisdiction Over Custody Proceedings Involving Reservation Children 24
1. ICWA Confirms That Tribes Have Inherent Sovereignty, Subordinate Only to the Federal Government, Over Indian Child Custody Proceedings Involving Reservation Children 28
2. ICWA Confirms in Unambiguous Terms That a Tribe's Jurisdiction over Child Custody Proceedings Involving Indian Children Domiciled on the Reservation is Exclusive as to the State 30
D. The District Court's Ruling Wrongly Suggests That PL 280 States May operate Differently Than Other States and May Exercise Civil Jurisdiction Over Involuntary Custody Proceedings Involving Indian Children Domiciled on the Reservation 31
1. The District Court's Finding is Unsupported by ICWA's Legislative History 35
2. The District Court's Finding Expressly Contravenes Congressional Intent to Codify Existing Law 38

TABLE OF CONTENTS
(continued)

Page

3. The District Court's Decision Also Directly Conflicts with the Contemporaneous Interpretation of ICWA by the Wisconsin Attorney General's Office and Two Decades of Practice in That PL 280 State 40
4. The District Court's Finding is Contrary to ICWA's Remedial Purpose and Violates the Bedrock Canons Of Construction Relating to Indian Sovereign Rights and Remediation 42

E. THE DISTRICT COURT ERRED IN ITS READING OF ICWA'S REASSUMPTION PROVISIONS 45
1. ICWA Section 1918 Allows Tribes in PL 280 States to "Reassume" Exclusive Jurisdiction Over Private Indian Child Custody Proceedings 47
2. Appellant's Position Does Not Render ICWA's Reassumption Provision "Illogical" 49
   a. A Tribe's Exercise of Exclusive Jurisdiction Over Involuntary Indian Child Custody Proceedings in a Public Law 280 State is Consistent with ICWA's Comprehensive Statutory Scheme of Effecting Tribal Control Over Indian Child Custody Proceedings While Not Saddling Tribes With Responsibilities They Cannot Or Do Not Wish To Handle 50
   b. The District Court's Assumption That Involuntary Proceedings Are Inherently "More Difficult And Resource-Intensive" Is Unfounded 56
   c. This Court Has Rejected the District Court's Precise Logic Regarding the Function of ICWA's Reassumption Provisions 58

F. THE DISTRICT COURT FAILED TO RESOLVE THE AMBIGUITY IN ICWA IN FAVOR OF INDIAN TRIBES 61

CONCLUSION 62

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Artichoke Joe's Cal. Grand Casino v. Norton,
353 F.3d 712 (9th Cir. 2003) 42

Bryan v. Itasca County,
426 U.S. 373 (1976) .... passim

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) .... passim

DeCoteau v. District County Court,
420 U.S. 425 (1975) 18, 19

Dennis v. Higgins,
498 U.S. 439 (1991) 44

Fisher v. District Court,
424 U.S. 382 (1976) 17, 18, 28, 30

Howlett v. Salish & Kootenai Tribes of the Flathead Reservation,
529 F.2d 233 (9th Cir. 1976) 56

McClanahan v. Arizona State Tax Comm'n,
411 U.S. 164 (1973) .... passim

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 42

Mississippi Choctaw Indian Band v. Holyfield,
490 U.S. 30 (1989) .... passim

Monell v. New York City Dept. of Social Servs.,
436 U.S. 658 (1978) 44

Montana v. Blackfeet Tribe,
471 U.S. 759 (1980) 15, 16, 61

Native Village of Venetie I.R.A. Council v. Alaska,
944 F.2d 548 (9th Cir. 1991) .... passim

Rice v. Rehner,
463 U.S. 713 (1983) 16, 34, 43

SEC v. Zandford,
535 U.S. 813 (2002) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Sycuan Band of Mission Indians v. Roache,
54 F.3d 535 (9th Cir. 1994) 22

Three Affiliated Tribes v. Wold Eng'g,
476 U.S. 877 (1986) 17

United States v. Cabaccang,
332 F.3d 622 (9th Cir. 2003) 16

United States v. Errol D.,
292 F.3d 1159 (9th Cir. 2002) 45, 61

United States v. Gonzalez-Mendez,
150 F.3d 1058 (9th Cir. 1998) 21

United States v. Kagama,
118 U.S. 375 (1886) 17

United States v. Quiver,
241 U.S. 602 (1916) 28

Washington v. Confederated Tribes,
447 U.S. 134 (1980) 29

Williams v. Lee,
358 U.S. 217 (1959) .... passim

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832) 29

State Cases

In re C.H.,
79 P.3d 822 (Mont. 2003) 45

In re Cari B.,
763 N.E. 2d 917 (Ill. App. Ct. 2002) 45

Iowa v. Whitebreast,
409 N.W. 2d 460 (Iowa 1987) 23, 24, 28

Federal Statutes

18 U.S.C. § 1151 19

18 U.S.C. § 1162(a) 18

25 U.S.C. § 1901(4) 11, 30, 44

TABLE OF AUTHORITIES
(continued)

Page(s)

25 U.S.C. § 1901(5) 25, 55, 57

25 U.S.C. § 1903(4) 3

25 U.S.C. § 1911(a) .... passim

25 U.S.C. § 1911(b) 12, 28, 51, 52

25 U.S.C. § 1911(d) 10

25 U.S.C. § 1912(f) 10

25 U.S.C. § 1914 31

25 U.S.C. § 1918 .... passim

25 U.S.C. § 1918(a) 12, 28, 48, 51

25 U.S.C. § 1918(b)(2) 51, 52

25 U.S.C. § 1919 51

25 U.S.C. § 1923 39

25 U.S.C. § 232 32

25 U.S.C. § 233 32

25 U.S.C. §§ 1321-22 19

25 U.S.C. §§ 1701-1712 32

25 U.S.C. §§ 1721-1735 32

25 U.S.C. §1903(12) 53

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343(a)(3) 1

28 U.S.C. § 1360 19

28 U.S.C. § 1360(a) 19

28 U.S.C. § 1367(a) 1

42 U.S.C. § 1983 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Act of Aug. 15, 1953, ch. 505 § 7, 72 Stat. 590 19

Act of July 2, 1948, ch. 809, 62 Stat. 1224 32

Act of June 8, 1940, ch. 276, 54 Stat. 249 32

Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 32

Fed. R. Civ. P. 12(b)(1) 4

Fed. R. Civ. P. 12(b)(6) 4

Fed. R. Civ. P. 54(b) 1, 5

Maine Indian Claims Settlement Act,
Act of October 10, 1980; 94 Stat. 1785 32

Rhode Island Claims Settlement Act,
Act of Sept. 30, 1978, Public Law 95-395, 92 Stat. 817 32

State Statutes

1981 Wisc. AG LEXIS 7 (Nov. 23, 1981) .... passim

Cal. Wel. & Inst. Code § 300 4

Cal. Wel. & Inst. Code § 300(b), (d) 22

Federal Regulations

25 C.F.R. 13.1(c) 51, 52

44 Fed. Reg. 45092 (July 31, 1979) 52

44 Fed. Reg. 67584 (Nov. 26, 1979) 27, 43, 44, 61

Indian Child Welfare Act of 1977,
S. Rep. No. 95-597 (November 4, 1977) .... passim

Indian Child Welfare Act of 1978,
H.R. REP. NO. 95-1386 (1978) .... passim

Treatises

Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction*, 22 UCLA L. Rev. 535 (1975) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

Tribe's official website: http://www.elemnation.com/historeview.htm 6

JURISDICTIONAL STATEMENT

The district court properly exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and 1367(a). By an opinion dated September 29, 2003, the district court dismissed Appellant's First Claim for Relief with prejudice. (Excerpt of Record "ER" 21.)[1] On January 21, 2004, the district court certified its order as final pursuant to Fed. R. Civ. P. 54(b). ER 65.

Appellant timely filed her notice of appeal on February 9, 2004. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

May California, as a Public Law 280 ("PL 280") State, arrogate from Indian Tribes their sovereign jurisdiction over involuntary child custody proceedings involving an Indian child domiciled on her tribe's reservation, where (1) the United States Supreme Court has expressly held that PL 280 precludes states from exercising civil regulatory jurisdiction over Reservation Indians, and (2) 25 U.S.C. § 1911(a) – the Indian Child Welfare Act ("ICWA") expressly recognizes exclusive tribal jurisdiction over Indian child custody proceedings – and sought to eliminate State encroachment into tribes' exclusive jurisdiction over such proceedings.

STATEMENT OF THE CASE

This case concerns whether the State of California, a so-called "Public Law 280 state," may permanently remove an Indian child from the custody of her parents domiciled on tribal lands and place her in the custody of non-tribal parents over the objection of the Indian parents and Tribe. The District Court's decision upholding California's jurisdiction over such matters conflicts with federal law and the sole legal opinion, rendered by a PL 280 State contemporaneously with ICWA's enactment, to address this issue. *See Bryan v. Itasca County*, 426 U.S. 373 (1976) (PL 280 States have civil jurisdiction over private lawsuits, but not regulatory matters, involving Reservation Indians); 1981 Wisc. AG LEXIS 7 (Nov. 23, 1981) (tribes in PL 280 states have exclusive jurisdiction over their internal child custody matters). Plaintiff-Appellant Mary Doe ("Mary" or "Appellant") seeks relief pursuant to ICWA, in which Congress condemned the practice of States removing Indian children from their tribes through involuntary custody proceedings and reaffirmed the exclusive sovereign jurisdiction of Indian tribes over custody matters involving Indian children who reside or are domiciled on their Reservations.

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[1] Pursuant to Ninth Circuit Rule 30-1, Appellant has separately filed an

Mary Doe[2] is an enrolled member of the Elem Indian Colony ("Elem Indian Colony" or "Tribe"). Her daughter Jane Doe, a protected "Indian child" under ICWA, *see* 25 U.S.C. § 1903(4), lived with Appellant on the Elem Reservation in Lake County, California. In 1999, the Lake County Department of Social Services ("DSS") removed Jane from the Tribe's Reservation over Appellant's objection and initiated proceedings in Lake County Superior Court that resulted in (1) Jane's placement in foster care, (2) the termination of Mary's parental rights, and (3) Jane's eventual adoption by non-tribal parents who were selected by the State court against the Tribe's wishes.

In July 2002, Appellant filed this action in federal district court challenging Defendant-Appellees' ("Appellees")[3] conduct in the custody proceedings. ER 1. Her First Claim for Relief alleged that Appellees' exercise of subject matter jurisdiction over the underlying involuntary custody proceedings violated ICWA because Section 1911(a) of that Act recognizes that such jurisdiction rests exclusively with the Tribe, and

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Excerpts of Record.

[2] Unless noted otherwise, pseudonyms are used in place of the parties' actual names pursuant to the district court's sealing order.

custody determinations concerning her daughter are therefore beyond the State's authority.[4]

In October 2002, Appellees moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ER 155. Appellant opposed the motion. ER. 156. After a hearing, ER 102-150, the district court took the motions to dismiss under submission for over ten months. In an Opinion dated September 29, 2003, the district court dismissed Appellant's First Claim with prejudice.

In the Opinion on review, the district court agreed with Appellant that no Federal law (including PL 280) divested the Tribe of its exclusive jurisdiction over involuntary child custody proceedings. The district court determined, however, that ICWA's statutory scheme and the regulations promulgated to enforce its provisions effectively divested the Tribe of its exclusive jurisdiction unless the Tribe affirmatively reassumed that authority. ER 33:4-33:23; ER 32:10-11. Specifically, the court concluded

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[3] Appellees are: The Hon. Arthur Mann, The Hon. Robert L. Crone Jr., and the Lake County Superior Court, Juvenile Division, and the DSS.

[4] Appellant's other claims, which included substantive and procedural violations of ICWA, 42 U.S.C. § 1983, the Fourteenth Amendment, and California Welfare and Institution Code §§ 300 *et seq.*, are not at issue on this appeal.

that Congress could not have intended for tribes in PL 280 States to assume full responsibility for child custody when some of those tribes may have inadequate resources. ER 32:10-11 ("[G]ranting tribes exclusive jurisdiction over child custody proceedings would gravely undermine the ICWA statutory scheme, making its provisions illogical."). Thus, according to the district court, the Tribe could assert its exclusive jurisdiction over Jane's involuntary custody proceedings only by "reassuming" that authority. In so holding, the district court rejected Appellant's argument that the Tribe has never been divested of its exclusive jurisdiction over involuntary custody proceedings involving Indian children domiciled on the reservation. In addition, the court's decision created a direct conflict with the long-standing interpretation of ICWA by at least one other PL 280 State. *See, e.g.*, 1981 Wisc. AG LEXIS 7.

On January 23, 2004, the district court granted Appellant's motion to enter a final judgment dismissing the First Claim pursuant to Fed. R. Civ. P. 54(b). ER 65. This appeal followed. By order dated April 28, 2004, this Court granted Appellant's motion for expedited hearing.

STATEMENT OF FACTS

A. Events Giving Rise to the State Court Custody Proceedings

Mary Doe is a member of the Elem Indian Colony ER 4, ¶ 12, and the

biological mother of Jane Doe. Prior to the events that gave rise to this action, Jane resided on the Elem reservation. As a person eligible for membership in the Tribe, Jane is a protected "Indian child" within the meaning of ICWA. ER 5, ¶ 22.

The Elem Indian Colony is one of the four main villages that comprised the Southeastern Pomo Nation, a matriarchal society whose California history stretches back nearly 8,000 years. Before their lands were forcibly taken by the Europeans, the Pomo civilization populated, managed and controlled over 2 million acres of land and waterways including 50 miles of lake shoreline. Today, having lost almost 99% of their aboriginal land, the Elem Indian Colony resides on a 50-acre reservation on which 80 of the Tribe's 250 members live.[5]

Mary lived on the Reservation for over twenty years, and Jane lived on the Reservation among her family and other tribal members from the time Jane was born until her involuntary removal by Appellee DSS in late 1999. ER 5, ¶¶ 23-25.[6]

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[5] This information was gathered from the Tribe's official website. *See* http://www.elemnation.com/historeview.htm

[6] Appellant's residence on the reservation was likewise continuous except for a short period after her house burned down and for temporary stays with

In June 1999, while living on the Reservation with Appellant's cousin, Jane confided to her mother she had been sexually assaulted by an adolescent male cousin. ER 5-6, ¶ 25-27. Appellant immediately sought to obtain trauma services for her daughter. DSS responded by removing Jane from the reservation and placing her in the custody of Mr. and Mrs. D, where she would remain throughout the ensuing dependency proceedings. ER 6, ¶¶ 27-28.

After removing Jane from the Reservation, DSS initiated a petition against Mary under the California Welfare and Institution Code ("WIC") alleging that she had failed to make adequate alternative living arrangements for Jane to prevent her abuse, and that Mary was unable to provide regular care for daughter. ER 6, ¶¶ 29-30. Though Mary was not provided proper notice of the hearing on the petition, as required by W.I.C. § 335(a), Judge Mann conducted the June 14, 1999 hearing in her absence. ER 6, ¶ 3. At that hearing, Judge Mann declared Jane a dependent of DSS and ordered her placed in foster care. ER 7, ¶ 32.

A second hearing took place on July 6, 1999. Again, Appellant did

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relatives and friends on neighboring reservations. ER 5-6, ¶¶ 24-25. Appellant, however, always considered her permanent home to be the reservation and never had an intent to establish residence elsewhere.

not receive proper notice, which this time was mailed to a post office box to which she did not have access. ER7, ¶ 33-34. The hearing was continued, but again Appellant was not given proper notice. At the continued hearing, without Appellant present, Judge Mann ordered that custody of Jane remain with DSS. ER 7, ¶¶ 35-36.

On August 9, 1999, Appellant made her first appearance to be heard on Jane's disposition. ER 7, ¶ 37. The court continued the Disposition Hearing several times. Appellant never received notice of the eventual hearing date – October 4, 1999 – and, thus, was not present to contest the DSS Report and Recommendation, which contained false allegations concerning Appellant's parental fitness. *Id.* Judge Mann adopted the Report's findings in Appellant's absence and placed Jane under the DSS's supervision for foster placement. ER 8, ¶¶ 38-39.

Appellant requested that DSS place Jane with Appellant's great aunt, a licensed foster care parent and member of the Tribe who DSS had earlier determined would be a suitable placement for Jane. ER 8, ¶ 42. Instead, the DSS placed Jane with foster parents, Mr. and Mrs. D, who reside in Lake County and who are not members of the Tribe. ER 9, ¶ 44.

In March 2000, the juvenile court set a hearing pursuant to WIC § 366.26 to establish a selection and implementation plan for Jane. ER 9,

¶¶ 45-47. That hearing took place in February 2001 without Appellant, who again did not receive proper notice from the court. ER 9, ¶ 49. Despite Appellant's absence, Judge Mann received considerable evidence that Jane should be returned to Appellant, or alternatively, placed with family members within the Tribe. *First*, the Tribe issued an official resolution establishing that adoptive placement of Jane with Appellant's cousin and his wife, both Tribal members with whom Jane had temporarily resided, would serve Jane's best interests and satisfy the Tribe's prevailing cultural and social standards. ER 9-10, ¶ 50. *Second*, an ICWA expert witness with extensive knowledge of the cultural standards and childrearing practices within the Indian community testified that termination of Appellant's parental rights would disserve Jane's best interests. ER 10, ¶ 52. In response, DSS presented only one expert, who had no experience with tribal customs or childrearing practices, that supported Jane's adoption by Mr. and Mrs. D. ER 10, ¶ 51.

At a February 2001 hearing, again held in Appellant's absence, Judge Mann found that Jane's return to Appellant's custody would not be in Jane's best interest. ER 10, ¶ 53. Despite ICWA's provisions granting tribes' exclusive jurisdiction over Indian children domiciled or residing on their reservation, *see* 25 U.S.C. § 1911(a), requiring that courts accord full faith

and credit to Tribal resolutions, *see* 25 U.S.C. § 1911(d), and mandating that a termination order be supported by evidence beyond a reasonable doubt, *see* 25 U.S.C. § 1912(f), Judge Mann terminated Appellant's parental rights over the Tribe's objection. ER 10, ¶ 53. With Appellant's rights having been terminated, Defendants Mr. and Mrs. D petitioned to adopt Jane. On September 28, 2001, Judge Robert Crone approved the adoption petition. ER 10, ¶ 54.

SUMMARY OF ARGUMENT

This appeal presents a critical issue – one of first impression for the federal courts – that profoundly affects the relationship between Indian tribal governments and state governments and the continued viability of tribal culture in PL 280 States: whether PL 280 authorizes a state to exercise civil jurisdiction over involuntary custody proceedings involving an Indian child domiciled on her tribe's reservation, and thereby divest the tribe of its otherwise exclusive jurisdiction over such proceedings pursuant to ICWA.

In 1978, Congress addressed the decades-long dismantling of Indian families and the disintegration of tribal culture by passing ICWA. Studies at the time of ICWA's enactment showed that State agencies were systematically removing Indian children from their homes and placing them with Tribal members in derogation of the Tribe's inherent sovereignty. At

the time, between one-quarter and one-third of all Indian children were separated from their tribal families largely as a result of the nation's Indian assimilation policy. 124 CONG. REC. H37035 (daily ed. Oct. 13, 1978); 124 CONG. REC. 12532 (May 3, 1978). In California, there were *more than times* as many Indian children placed into adoptive homes as non-Indian children, and nearly three times as many Indians as non-Indians placed into foster care. Indian Child Welfare Act of 1977, S. REP. NO. 95-597, at 46-47 (November 4, 1977), reprinted in SENATE REPORTS, Vol. 13168-11 (hereinafter "S. REP. NO. 95-597").

To address this "cultural genocide," ICWA created numerous jurisdictional and procedural safeguards for custody matters involving Indian children domiciled on the reservation to reverse the damage to tribes caused "by the removal, often unwarranted, of their children from them by nontribal public and private agencies" for placement "in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4).

ICWA established a comprehensive structure for assuring that Tribes would determine or influence child custody decisions in all proceedings involving Indian youth. As a preliminary matter the Act confirmed the inviolable sovereignty of tribes over proceedings such as the one at issue here – *non-private* custody proceedings involving Indian children domiciled

on the reservation. *See* 25 U.S.C. § 1911(a); 1981 Wisc. AG LEXIS at *7, 11. As for children not domiciled on the reservation who fell outside the exclusive sovereignty of the tribe, ICWA established a new mechanism by which Tribes could require that a civil custody matter be referred from State courts to tribal courts, *see* 25 U.S.C. § 1911(b), placing presumptive jurisdiction over these matters in the Tribes. *See Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991).

ICWA also established a new mechanism for tribes to "reassume" authority over the *private* custody proceedings that, by virtue of PL 280 and possibly other federal law, were not already within the tribes' exclusive domain – e.g., private custody proceedings involving reservation-domiciled children, voluntary termination of parental rights. *See* 25 U.S.C. § 1918(a); 1981 Wisc. AG LEXIS at *10-11. *Cf. Bryan*, 426 U.S. at 383. Regrettably, as this case demonstrates, continued misunderstanding of the interplay between ICWA and PL 280 in California perpetuates the very problems Congress sought to eradicate in 1978.

Against this backdrop, in 1999, the Lake County Department of Social Service removed Appellant's daughter Jane from the Tribe's reservation and commenced involuntary dependency proceedings in Superior Court that resulted in (1) Jane's placement in foster care among non-tribal members,

(2) the permanent termination of her Indian parent's parental rights, and (3) Jane's eventual adoption by non-tribal parents who were selected by the court against the formal wishes of the Tribe's council.

The district court's decision upholding the State's exercise of jurisdiction must be reversed for three reasons. *First*, the court's decision contravenes controlling Supreme Court authority, which holds that Public Law 280's grant of civil jurisdiction over reservation Indians covers only "private legal disputes" between an Indian and another Indian or private citizen. *Bryan*, 426 U.S. at 390. As a matter of law, Reservation Indians are not subject to states' civil regulatory laws, and their sovereignty in this area remains inviolate. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (1987). The district court itself acknowledged that Jane's dependency and adoption proceedings involved the state's exercise of its civil regulatory power, placing this activity beyond the scope of authority granted to the States by PL 280. ER 29-32. Thus, California manifestly exceeded its civil jurisdiction under PL 280.

Second, the district court's decision subverts the language and purpose of ICWA, which Congress enacted to *eliminate* State encroachment upon tribes' fundamental sovereignty. The decision below would expand *sub silentio* the jurisdictional authority of PL 280 states to permit State

encroachment of tribes' inherent sovereign powers. Not only is such a result unsupported by the Act's text or legislative history, but it would undermine ICWA's purpose "'to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society . . . . by establishing a Federal policy that where possible, an Indian child should remain in the Indian community, and by making sure that Indian child welfare determinations are not based on a white, middle class standard which, in many cases – including this case – forecloses placement with [an] Indian family.'" *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 37 (1989) (alteration in original).

Notwithstanding the controlling case law and unequivocal federal policy, the district court relied on two letters in the legislative history from the Departments of Interior and Justice as demonstrating a contrary legislative intent to strip the tribes of their exclusive jurisdiction. In particular, the court emphasized the language from a letter to the House Committee by then-Assistant Attorney General Patricia Wald, in which she expressed her doubts that a draft of Section 1911(a) was meant to displace State court jurisdiction. ER 33:1-3. The district court failed to acknowledge, however the opposition of ICWA's sponsors to many positions advocated by the government, and, more significantly, the absence

of *any* evidence that Congress adopted these positions. *See, e.g.*, 124 CONG. REC. H12850 (daily ed. Oct. 14, 1978) (Letter from Congressman Udall to Patricia Wald). Indeed, even if the legislative history were ambiguous as to Congress' intent, established canons of interpretation compel a decision in favor of the Tribe. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1980).

Third, the district court's holding is in direct conflict with the only legal opinion addressing the interplay between ICWA's exclusive jurisdictional provision and PL 280. In 1981, the Wisconsin Attorney General's Office was asked to issue an opinion whether the tribes' jurisdiction over their internal child custody matters was exclusive as to the PL 280 state. Issuing what remains the only other legal opinion to squarely address the issue, the AG's office reached "the inescapable conclusion" that Wisconsin tribes "have exclusive regulatory jurisdiction over child custody proceedings involving [reservation children]." 1981 Wisc. AG LEXIS 7 at *12-13. In so concluding, this contemporaneous decision of another PL 280 State expressly rejected the analysis relied on by the district court below.

Finally, in interpreting ICWA the district court failed to apply fundamental canons of statutory interpretation, two of which have unique relevance in federal Indian law cases. First, "statutes are to be construed liberally in favor of the Indians' with ambiguous provisions interpreted to

their benefit." *Montana*, 471 U.S. at 766. Second, because ICWA is a remedial statute, it must be construed "flexibly to effectuate its remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 819 (2002). The district court's interpretation of ICWA, moreover, transforms ICWA into a divestiture statute, which may not be done by implication or in the absence of an express federal intent to do so. *Rice v. Rehner,* 463 U.S. 713, 720 (1983).

Accordingly, this Court should reverse the district court's decision, and remand with instructions to vacate the state court's adoption order so that the Tribe may resolve the child custody issues over which, as ICWA recognizes, it retains exclusive jurisdiction.

STANDARD OF REVIEW

The question of whether the Tribe had exclusive jurisdiction over the child custody proceedings instituted and overseen by Appellees turns entirely on the interpretation of ICWA and PL 280. This is a pure question of law that this Court reviews de novo. *See United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) ("The construction or interpretation of a statute is a question of law that we review de novo.").

ARGUMENT

A. Before ICWA, States Lacked Jurisdiction Over Reservation Indians Unless Congress Expressly Conferred Such Authority

Before PL 280's enactment in 1953, the federal government and the Indian tribes shared criminal and civil jurisdiction over Indians for conduct occurring on the reservation. *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 879 (1986); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction*, 22 UCLA L. Rev. 535, 540-41 (1975). Because tribes were regarded as "a separate people, with the power of regulating their internal and social relations," *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), states could not infringe on tribes' rights "to make their own laws and be ruled by them" unless specifically authorized by Congress. *See Williams v. Lee*, 358 U.S. 217, 220 (1959); 1981 Wisc. AG LEXIS at *2 ("States should refrain from exercising jurisdiction where essential tribal relations are involved, [which include] family matters, including child custody, involving members domiciled or living on the reservation.").

Thus, it was well established that tribes had exclusive jurisdiction over involuntary custody proceedings involving tribal members and their children who were domiciled on the reservation. For example, in *Fisher v. District Court*, 424 U.S. 382 (1976), the Supreme Court considered whether Montana had jurisdiction over a state court adoption proceeding involving a

Northern Cheyenne child domiciled on her tribe's reservation. *Id.* at 383-84. The Supreme Court applied the long-standing rule that "resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 386 (quoting *Williams*, 358 U.S. at 220). "State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court." *Id.* at 387. Because "no federal statute sanctions this interference with tribal self-government," *id.* at 388, and "the adoption proceeding [was] appropriately characterized as litigation arising on the Indian reservation, *the jurisdiction of the Tribal Court [was] exclusive.*" *Id.* at 389 (emphasis added) . . *See also DeCoteau v. District County Court*, 420 U.S. 425, 427-29 (1975) (parties agreed that state court could not institute involuntary foster care proceedings against tribal children if they were domiciled on the reservation.).

Public Law 280 changed that landscape for certain tribes (and states) by expressly granting six states, including California, criminal[7] and civil[8]

[7] *See* 18 U.S.C. § 1162(a).

jurisdiction over "Indian country"[9] within their borders, and permitting the remaining states to assume such jurisdiction at their option.[10] *Cabazon*, 480 U.S. at 207. As the Supreme Court made clear, however, the jurisdiction confirmed by PL 280 was limited (*Bryan v. Itasca County*, 426 U.S. 373 (1976)) and PL 280 States lack of jurisdiction over Reservation Indians as to any power not expressly conferred by Congress. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973).

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[8] *See* 28 U.S.C. § 1360. Section 1360(a) provides:

> Each of the [six states] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

[9] "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. This definition applies to both criminal and civil jurisdiction. *DeCoteau*, 420 U.S. at 427 n.2.

[10] *See* Act of Aug. 15, 1953, ch. 505 § 7, 72 Stat. 590, *as amended* 25 U.S.C. §§ 1321-22.

1. **PL 280's Permits States to Resolve Private Legal Disputes, Not Regulatory Matters, Involving Reservation Indians**

Two Supreme Court decisions provide the analytic framework for assessing the bounds of a PL 280 state's exercise of civil jurisdiction over Reservation Indians. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court considered whether Minnesota could assess a property tax on a Chippewa tribe member's mobile home located on his tribe's reservation. *Id.* at 375.

Canvassing the sparse legislative history concerning civil jurisdiction under PL 280, the Supreme Court determined that PL 280's grant of civil jurisdiction was "intended to redress the lack of adequate Indian forums for resolving *private legal disputes* between reservation Indians" and other private citizens. *Id.* at 383 (emphasis added). Congress' grant of jurisdiction was thus quite limited. Rather than subject reservation Indians "to the full panoply of civil regulatory powers . . . of state and local governments," *id.* at 388, PL 280 vested states with civil authority over "private civil lawsuits involving reservation Indians in state court." *Id.* at 385; *see also id.* at 388 ("[I]f Congress in enacting PL 280 had intended to

confer upon the States general civil regulatory powers . . . over reservation Indians, it would have expressly said so.").[11]

Subsequently, the Supreme Court both reaffirmed and clarified *Bryan* in *Cabazon*, in which issue was whether PL 280 authorized California to apply provisions of its penal code to gambling on Indian reservations. The Court reiterated the test established by *Bryan*: a PL 280 State's law that is "civil in nature" is "applicable only as it may be relevant to private civil litigation in state court." *Cabazon*, 480 U.S. at 208. The Court then elaborated on the test for determining which state laws apply to Reservation Indians under PL 280:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law

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[11] The limits of PL 280, as interpreted in *Bryan*, were well-known to Congress when it enacted ICWA two years later. *See United States v. Gonzalez-Mendez*, 150 F.3d 1058, 1061 (9th Cir. 1998) (Courts "presume that Congress enacts statutes with full knowledge of the existing law."); *Venetie*, 944 F.2d at 544 (same). Thus, Congress could not have intended that PL 280 states would exercise the civil regulatory power upheld by the district court in this case. Rather, absent a clear indication to the contrary – and there is none in the text or legislative history, *infra* at Section D-1– Congress must be presumed to have understood in 1978 that a state could not remove an Indian child from her reservation and institute involuntary custody proceedings over her. Such power – like all exercises of civil regulatory jurisdiction over Reservation Indians – rested exclusively with the tribes in 1978, and remains there today.

> generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

Id. at 209. This Court has consistently applied the rule in *Bryan* and *Cabazon*, noting that PL 280 "granted California and certain other states jurisdiction over . . . civil causes of action on Indian reservations," but "left civil regulatory jurisdiction in the hands of the Tribes." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 539 (9th Cir. 1994).

B. As the District Court Concluded, Under *Bryan* and *Cabazon*, California Had No Jurisdiction Over the Involuntary Custody Proceedings Involving Appellant's Daughter

The district court agreed with Appellant that the involuntary dependency and adoption proceedings involving Jane were civil regulatory matters[12] and that PL 280 does not vest states with jurisdiction over such

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[12] It cannot be seriously disputed that the Appellees' institution of involuntary custody proceedings against Appellant and her daughter Jane involved the exercise of California's civil regulatory power. Appellees asserted jurisdiction over Jane pursuant to Cal. Wel. & Inst. Code sections 300(b) and (d), which, the district court correctly determined, "regulat[e] parenting when a parent's activity harms a child's well-being." ER 31:23-24. The relevant inquiry under "*Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger permitted activity . . . or whether all but a small subset of a basic activity is prohibited." ER 30:13-15 (quotations omitted). As the district court observed, "California courts have consistently held that state child dependency proceedings in juvenile court

matters involving reservation Indians. ER 29:18-32:8. The district court agreed with Appellant that California's welfare laws, which governed the contested custody proceedings, were civil, not criminal, in nature because they "formed part of a larger regulatory scheme of permitted activity (citing *Cabazon)*." ER 31:17-18. The court also correctly acknowledged that the procedure was regulatory "because the State [was] a party to the child custody proceedings at issue in this action, it can in no way be viewed as a private litigant." ER 30:3-4.

The district court's analysis that PL 280 does not confer jurisdiction over involuntary custody proceedings is consistent with the Iowa Supreme Court's decision in *Iowa v. Whitebreast*, 409 N.W. 2d 460 (Iowa 1987), which addressed the same issue in Iowa, a state that had assumed civil jurisdiction under PL 280. In *Whitebreast*, the Iowa Supreme Court considered whether PL 280 conferred jurisdiction on Iowa to hear and decide a child support dispute brought by a State agency involving a reservation Indian child. The trial court held it did not, and the Iowa Supreme Court affirmed. *Id.* at 461. Applying PL 280, the court observed that "if this were a truly private cause of action brought by one Indian to

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are civil actions designed to protect the child, not reprove the parent for

enforce a support order against another either Indian or non-Indian, we would not decline to adjudicate the merits of the controversy." *Id.*

The court found it "inescapable" that the agency's "function [was] clearly regulatory in nature," and thus its action "clearly falls within the broader category of the state's 'general civil regulatory power." *Id.* at 464. Thus, the court held, under *Bryan* and *Cabazon*, that Iowa had no basis for exercising civil jurisdiction over the matter. *Id.* at 464.

Whitebreast, then, confirms that under PL 280, California and other states lack jurisdiction to impose their child welfare regulatory authority on Indian children domiciled on their tribes' reservations.

C. Congress Enacted ICWA To Redress State Encroachment Of Tribal Sovereignty And To Reaffirm Exclusive Tribal Jurisdiction Over Custody Proceedings Involving Reservation Children.

In 1978, Congress enacted ICWA in response to overwhelming evidence that States were systematically encroaching on the jurisdiction of Indian tribes and removing Indian children from their families for placement with non-Indian families or institutions.

From 1974-1977, Congress conducted extensive hearings and

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violating a prohibition." *Id.*

received detailed studies about the treatment of Indian child-custody matters in the several states, including many PL 280 states. This information revealed that between 25 to 35 percent of all Indian children had been removed from their families and placed with foster parents, adoptive homes or institutions – at least five times greater than that of non-Indian children. *See* H.R. REP. NO. 95-1386 at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 [hereinafter "H.R. REP. NO. 95-1386"]. Of those Indian children removed, approximately 90 percent were placed with non-Indian families. *Id.* Congress also observed that this phenomenon had taken a particular toll in California, where more than eight times as many Indian children were placed in adoptive homes than were non-Indian children, and nearly three times as many Indian children were placed in foster care. 124 CONG. REC. 12533 (daily ed. May 3, 1978). As of 1977, approximately 1 out of every 26th Indian child in California had been adopted, 92.5% by non-Indian families. *See id.*

Congress attributed much of the responsibility for the Indian child welfare crisis to the policies and practices of state agencies and courts, finding that the States "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); *see also* 124 CONG. REC.

H38102 (daily ed. Oct. 14, 1978) (statement of Rep. Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being place in jeopardy.").

Noting the "serious threat [posed to tribes'] existence as on-going self governing communities," 124 CONG. REC. H38102 (daily ed. Oct. 14, 1978) (statement of Rep. Udall), Congress concluded that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life." H.R. REP. NO. 95-1386, at 9. Indeed, Congress perceived this situation to be a "domestic crisis," 124 CONG. REC. H38103 (daily ed. Oct. 14, 1978) (statement of Rep. Udall), of "cultural genocide." 124 CONG. REC. S 9994 (daily ed. Apr. 1, 1977) (statement of Sen. Abourezk). Senator Abourezk from New Mexico concluded that State agencies were "literally stealing Indian children" and admonished the Federal government for its previous inaction. *Id.* The crisis affected tribes in both PL 280 and non-PL 280 states.

Based on nearly five years of hearings and testimony, Congress decided to "statutorily define[] the respective jurisdiction of State and tribal governments in matters relating to child placements," S. REP. NO. 95-597, at 10. In particular, Congress concluded that the federal government must confirm that primary control over Indian child custody matters resides in the

tribes' hands, and clarify the narrow circumstances in which States could involve themselves in tribal affairs. H.R. REP. NO. 95-1386, at 9; *see also* 124 CONG. REC. S 9994 (daily ed. Apr. 1, 1977). Accordingly, ICWA affirmed that "exclusive jurisdiction over the welfare of those Indian children who are domiciled on an Indian reservation" rests with the tribe. S. REP. NO. 95-597, at 12; *see also Holyfield*, 490 U.S. at 42 (ICWA "*confirmed* that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.") (emphasis added). In doing so, Congress established a federal policy of "keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes." 44 Fed. Reg. 67584, 67585-86 (Nov. 26, 1979) (hereinafter "Custody Guidelines"); *see also id.* at 67592 ("Congress has established a policy of preferring tribal control over custody decisions affecting tribal members. . . .").

In addition to solidifying tribes' absolute and exclusive jurisdiction over non-private child custody determinations involving Indian children domiciled on Indian lands, ICWA created a framework for a tribe to secure jurisdiction over child custody matters that were not already within the

tribe's exclusive domain – e.g., private child custody disputes, voluntary adoption proceedings, and certain custody decisions involving off-reservation Indian children. 1981 Wisc. AG LEXIS at *19-20; *Whitebreast*, 409 N.W. 2d at 463. Specifically, Section 1911(b) expressly authorized (1) concurrent, but presumptively tribal jurisdiction over proceedings involving *non*-reservation children, while Section 1918(a) allowed tribes in PL 280 States to "reassume" a State's jurisdiction over the *private* custody proceedings involving reservation-domiciled children.[13]

1. ICWA Confirms That Tribes Have Inherent Sovereignty, Subordinate Only to the Federal Government, Over Indian Child Custody Proceedings Involving Reservation Children.

Tribes, as sovereign entities, inherently possess exclusive jurisdiction over internal, domestic affairs involving Indians on tribal lands is well established. *Fisher*, 424 U.S. at 386-89 (holding that tribe had exclusive jurisdiction over adoption arising on its reservation when all parties were members of the tribe residing on the reservation); *United States v. Quiver*, 241 U.S. 602, 03-04 (1916) (acknowledging "the settled policy of Congress

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[13] ICWA's reassumption provision applies to *any* tribe that became subject to state jurisdiction by any federal law. 25 U.S.C. § 1918(a). At the time of

to permit the personal and domestic relations of the Indians with each other to be regulated according to their tribal customs and laws"); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832) ("Indian nations [are] distinct political communities [with] territorial boundaries, *within which their authority is exclusive . . . .*") (emphasis added). As "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *Washington v. Confederated Tribes*, 447 U.S. 134, 154 (1980), the states lack jurisdiction over Indian reservation activity unless the federal government *expressly* confers that authority upon them. *See McClanahan*, 411 U.S. at 170-71 ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply."); *Williams*, 358 U.S. at 221 ("Significantly, when Congress has wished the States to exercise this power [jurisdiction], it has expressly granted [it]."). In recognition of this sovereignty, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," *McClanahan*, 411 U.S. at 168, and state infringement "on the right of reservation Indians to make their own laws and be ruled by

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ICWA's enactment, PL 280 was the most significant of these laws, but hardly the only one. *See* note 7, *supra*.

them" will not be lightly inferred. *Williams*, 358 U.S. at 219.

It is against this "backdrop of Indian sovereignty," *McClanahan*, 411 U.S. at 173, and the strong presumption of a tribe's exclusive jurisdiction over its internal affairs, that ICWA must be viewed. Only one conclusion is possible: ICWA did not "bestow" tribal sovereignty over custody proceedings involving Indian children living on reservations; ICWA confirmed that the tribes already had it. Thus, "when a question of tribal power arises, the relevant inquiry is whether any limitations exist to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act." *Venetie*, 944 F.2d at 556-67 (emphases added) (citations omitted).

2. ICWA Confirms in Unambiguous Terms That a Tribe's Jurisdiction over Child Custody Proceedings Involving Indian Children Domiciled on the Reservation is Exclusive as to the State

Despite federal recognition of inherent tribal sovereignty, many states unlawfully encroached on tribes' exclusive jurisdiction over child custody proceedings arising on the reservation in the pre-ICWA era. *See, e.g.*, 25 U.S.C. § 1901(4); *Fisher*, 424 U.S. at 389. Recognizing the need to "clarify who has jurisdiction over Indian child placements," S. REP. NO. 95-597, at 9, Congress enacted ICWA to *confirm* the existence of the tribe's exclusive jurisdiction:

> 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). *See also Holyfield*, 490 U.S. at 39 ("In enacting ICWA Congress *confirmed* that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.") (emphasis added); H.R. REP. NO. 95-1386, at 21 ("The provisions on exclusive tribal jurisdiction *confirm* the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation.") (emphasis added).[14]

D. The District Court's Ruling Wrongly Suggests That PL 280 States May Operate Differently Than Other States and May Exercise Civil Jurisdiction Over Involuntary Custody Proceedings Involving Indian Children Domiciled on the Reservation.

The plain language of ICWA confirms it did not intend to disturb inherent sovereign rights of tribes that pre-dated the Act. ICWA decrees that tribes retain exclusive jurisdiction over custody proceedings involving

[14] To provide tribes with a means to enforce their exclusive tribal jurisdiction, in the instance a State erroneously asserts jurisdiction over child custody proceedings involving on-reservation children, ICWA authorizes tribes to petition the courts to "invalidate such action." 25 U.S.C. § 1914.

Indian children domiciled on the reservation, "except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a).[15] The district court's holding that ICWA's provisions relating to PL 280, in some manner, permitted PL 280 states to impinge on tribes' exclusive jurisdiction, violates the plain text of ICWA and contravenes controlling Supreme Court precedent restricting PL 280's application to private legal disputes between Reservation Indians and other citizens. The district court's apparent conclusion that ICWA somehow enlarged the jurisdictional reach of PL 280 States cannot be squared with ICWA.

Although the district court conceded that PL 280 did not extend State

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[15] Though PL 280 is the only jurisdiction-conferring law at issue in this case, Section 1911(a) contemplates that its provisions will apply to any federal law that grants States jurisdiction over child custody matters concerning Reservation Indians. Congress passed many pre-ICWA statutes that gave states limited jurisdiction over the tribes within their borders. *See, e.g.*, Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (civil jurisdiction to New York), codified at 25 U.S.C. § 233; Act of July 2, 1948, ch. 809, 62 Stat. 1224 (criminal jurisdiction to New York) codified at 25 U.S.C. § 232; Act of June 8, 1940, ch. 276, 54 Stat. 249 (criminal jurisdiction to Kansas). Congress has continued to pass such legislation since ICWA's enactment. *See, e.g.*, Maine Indian Claims Settlement Act, Act of October 10, 1980; 94 Stat. 1785; Public Law 96-420, codified at 25 U.S.C. §§ 1721-1735; Rhode Island Claims Settlement Act, Act of Sept. 30, 1978, Public Law 95-395, 92 Stat. 817, codified at 25 U.S.C. §§ 1701-1712.

civil regulatory jurisdiction over child custody cases arising in Indian country, ER 29:18-32:8, it nonetheless speculated that Congress may have mistakenly assumed that PL 280 did divest tribes of such jurisdiction and thus, *sub silentio*, expanded PL 280 at the time it enacted ICWA. *See* ER 33:21-23 ("It seems much more likely that Congress [in enacting ICWA] assumed Public Law 280 did apply to [give States jurisdiction over] a broad range of child custody proceedings . . . ."). The remarkable conclusion that Congress deprived tribes of their exclusive jurisdiction by implicitly adopting a mistaken understanding of prior law is wrong and should be reversed for several reasons.

First, nothing in the text or history of ICWA suggests that Congress misunderstood federal law or intended ICWA to expand the civil jurisdictional authority of PL 280 states. That ICWA itself is the "existing Federal law" that would expand the civil jurisdictional authority of PL 280 states is unsupported by the plain language of Section 1911(a). Had Congress intended in ICWA to grant PL 280 states more jurisdiction than provided by PL 280, 1911(a)'s exception clause would not refer to "existing Federal law." Rather, Congress would have directly referenced exceptions provided within ICWA, for example, by using the phrase "except as otherwise provided herein" or similar language. To construe Section

1911(a)'s reference to "existing Federal law" as a reference to the Act itself is nonsensical and contravenes the plain language. Indeed, the district court's conclusion is not only unsupported by ICWA's words, it contradicts the legislative history and clearly expressed Congressional intent to codify, not modify, prior law respecting the tribe's jurisdiction. The district court's decision leaves tribes in PL 280 states worse off than prior to ICWA's enactment, when states could not apply their regulatory laws to reservation conduct in these circumstances. If ICWA's legislative history teaches us anything, it is that Congress could not – and did not – intend such a result.

Second, the district court's decision directly conflicts with – and, indeed, does not mention – the only legal authority to have squarely addressed the issue before this Court as well as 20 years of practice in at least one other PL 280 State. 1981 Wisc. AG LEXIS 7.

Finally, the court's conjecture that Congress impliedly expanded the jurisdiction of PL 280 states based on a mistaken understanding of law violates numerous fundamental canons of statutory construction. This includes the canon of statutory construction that absent *express* Congressional mandate, Indian sovereignty is not to be limited. *See McClanahan*, 411 U.S. at 170; *Rice*, 463 U.S. at 720 ("Repeal by implication of an established tradition of immunity or self-government is

disfavored.").

1. The District Court's Finding is Unsupported by ICWA's Legislative History.

The only evidence cited by the district court of Congress's "concern[] about the feasibility of tribal jurisdiction," ER 33:26, in PL 280 states is found in the comments made by the then-Assistant Attorney General Patricia Wald of the Department of Justice ("DOJ"). Prior to ICWA's enactment, the DOJ raised numerous objections which were outlined in two letters, dated February 9 and May 23, 1978, submitted to the House of Representatives. H.R. REP. NO. 95-1386, at 35-41. One objection pertained to the language of Section 1911(a), which provided for exclusive tribal jurisdiction over child custody proceedings involving reservation children. The DOJ asserted that the then-current House draft of Section 1911(a) "would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, *inter alia,* there may not be in existence tribal courts to assume such State-Court jurisdiction as would apparently be obliterated by this provision." *Id.* at 40.

The Department of Interior ("DOI") expressed similar concerns with the draft of Section 1911(a): "We believe that reservations located in States

subject to Public Law 83-280 should be specifically excluded from section 101(a) [Section 1911(a)], since the provisions of section 108, regarding retrocession of jurisdiction, deal with the reassumption of tribal jurisdiction in those States." *Id.* at 32 (quoting June 6, 1978 Letter from Office of the Secretary, U.S. Department of Interior to Congressman Udall).

There is no evidence that Congress shared or adopted these Government agencies' concerns regarding the feasibility of tribal jurisdiction in PL 280 states. In fact, the evidence reveals otherwise. Indeed, rather than give credence to the DOJ's objections and interpretations, Congress expressed disappointment in the DOJ's attempts to frustrate passage of ICWA. In a letter to the DOJ, Congressman Udall asserted:

> I firmly believe that the future and integrity of Indian tribes and Indian families are in danger because of this [domestic] crisis [in part caused by state courts and agencies]. I regret very much that the Department of Justice has not seen fit to cooperate fully with the Congress in resolving this crisis, but, rather has raised constitutional and other objections with little legal support for these positions.

124 CONG. REC. H38103 (daily ed. Oct. 14, 1978) (statement of Rep. Udall) (*quoting* October 2, 1978 Letter from Congressman Udall to Patricia Wald).

Second, and more significantly, Congress directly responded to the concerns raised by the DOI and the DOJ: it revised the legislation to reflect

certain concerns and declined to make other changes deemed "unnecessary" or "not meritorious." For instance, Congress *rejected* Interior's recommendation that "reservations located in States subject to [PL 280] . . . be specifically excluded from [Section 1911(a)]." H.R. REP. NO. 95-1386, at 32.

Congress did not exclude PL 280 States as the DOI requested but instead modified the language of Section 1911(a) to add the current phrase, "except where such jurisdiction is otherwise vested in the State by existing Federal law," (25 U.S.C. § 1911(a)), which – under *Bryan* and *Cabazon* – *does not* include PL 280.

That the Congressional record is silent about exempting PL 280 from Section 1911(a) of the Act speaks volumes that Congress did *not* intend to change existing law concerning the scope of tribal or State jurisdiction in PL 280 states or elsewhere. Rather, any such intent would have been expressly stated. *See* S Rep. No. 95-597, at 6 ("Nothing in this Act shall be construed to either enlarge or diminish the jurisdiction over child welfare matters which may be exercised by either State or tribal courts or agencies except as expressly provided in this Act."). Given Congress's fastidious attention and careful response to suggestions by the DOJ and other agencies, the district court's view that Congress, by the exception clause in Section 1911(a),

implicitly denied tribes in PL 280 states of a core aspect of their inherent sovereignty – based on a mistaken understanding of PL 280 – is simply untenable.

2. The District Court's Finding Expressly Contravenes Congressional Intent to Codify Existing Law.

It is evident from ICWA's legislative history that whatever effect Congress intended Section 1911(a)'s exception clause to have, Congress clearly intended to codify, *not* modify, the existing law concerning exclusive tribal jurisdiction:

> The provisions on exclusive jurisdiction confirms the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation. H.R. REP. NO. 95-1386, at 21.
>
> Section 101(a), …states existing law with respect to tribal jurisdiction. 124 CONG. REC. H38103 (daily ed. October 14, 1978) (statement of Rep. Udall)
>
> The act statutorily defines the respective jurisdiction of State and tribal governments in matters relating to child placements. To the extent the act provides for jurisdictional division between States and tribes, it is declarative of law as developed by judicial decision. S. REP. NO. 95-597, at 10.

Nor can it be said that Congress was unaware that PL 280 does not apply to involuntary custody proceedings involving reservation children. *See* Indian Child Welfare Act of 1977: Hearing Before the United States Senate Select Committee on Indian Affairs, 95th Cong. (1977) ("1977

Senate Hearings"), at 132 (Statement of Marlene Echohawk, Ph.D., National Congress of American Indians) ("*Bryan* [*v. Itasca County*, 426 U.S. 373(1976)] supports the position that states may not impose their dependency, neglect, and delinquency laws and regulations on Indian people who live in Indian country in P.L. 83-280 states.").

Congress' intent to codify, not modify, existing law is also clearly expressed in ICWA's provisions exempting Section 1911(a) from the effect of a separate tolling in Section 1923 of the Act. Congress enacted Section 1923 to toll the effective date of ICWA until 180 days after its enactment in order to "avoid such disruptions of pending state court proceedings," allowing for States and other officials to "familiarize themselves with the act's [new] provisions." 124 CONG. REC. H38108 (daily ed. Oct. 14, 1978); *see also* 25 U.S.C. § 1923. Congress, however, specifically excepted Section 1911(a) from the amendment because "section [1911(a)] . . . *[merely] states existing law with respect to tribal jurisdiction*." *Id.* (emphasis added). Indeed, Congress' direct reference to "existing Federal law" in Section 1911(a) plainly demonstrates an intent to adopt prior judicial holdings regarding the scope of tribal jurisdiction. *See Venetie*, 944 F.2d at 554 ("Congress is presumed to be knowledgeable about existing law pertinent to any new legislation it enacts.").

3. The District Court's Decision Also Directly Conflicts with the Contemporaneous Interpretation of ICWA by the Wisconsin Attorney General's Office and Two Decades of Practice in That PL 280 State

As noted, the decision of at least one PL 280 State issued near the time ICWA was enacted flatly reject the position adopted by the lower court. In 1981, the Wisconsin Department of Health and Social Services ("WDHSS") asked the state's Attorney General ("AG") to issue an opinion on the identical issue before this Court:

> What jurisdiction do the Indian tribes and the state have over child custody proceedings involving Indian children who reside or are domiciled within the reservation of a PL 280, Wisconsin Indian tribe or of the non-PL 280 Wisconsin Menominee Tribe? Is the tribes' jurisdiction concurrent or exclusive as to the state?

1981 Wisc. AG LEXIS 7 at *1.

The AG's analysis began with the fundamental principles that child custody matters involving Reservation Indians concern "essential tribal relations" that are traditionally within the exclusive purview of tribes, *id.* at *2 (citing *Williams*, 358 U.S. at 220), and may be subject to state control only if "specifically authorized by federal legislation." *Id.* at *3 (citing *McClanahan*, 411 U.S. 464). "The only federal statute which may grant the state some jurisdiction over such matters is [PL 280]". *Id.* at *5. Relying on *Bryan*, the AG concluded that PL 280 States lack jurisdiction over

"proceedings that involve some aspect of the states regulatory jurisdiction such as involuntary termination of parental rights." *Id.* at *7.

For good measure, the AG also considered whether any other source of federal law authorized Wisconsin's assertion of jurisdiction. *See* 1981 Wisc. AG LEXIS at *8. It found none – in part, because of all the issues subject to a tribe's jurisdiction, none is more fundamental to tribal sovereignty than control over child custody. *Id.* at *9 (citations omitted). "[T]here can be no greater threat to essential tribal relations, and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children." *Id.* at *9 (citations omitted). Indeed, as the AG recognized, it was the states' insensitive intrusion into tribal child custody proceedings that prompted ICWA's enactment in the first place. *Id.* at *12. Thus, "the inescapable conclusion" was that PL 280 and non-PL 280 tribes "have exclusive regulatory jurisdiction over child custody proceedings involving [reservation children]." *Id.* at *12-13. That conclusion is equally inescapable here, where California asserted its civil regulatory power – power it did not have over tribes – to terminate Appellant's parental rights, institute dependency hearings over Jane, and oversee Jane's adoption by non-tribal parents.

4. **The District Court's Finding is Contrary to ICWA's Remedial Purpose and Violates the Bedrock Canons Of Construction Relating to Indian Sovereign Rights and Remediation**

The district court's decision ignores basic canons of interpretation, some of which have unique application to Indian tribes. "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (quotations omitted). Thus, where, as here, Congress enacts legislation for the benefit of an Indian tribe, courts must resolve any "doubt[s to] benefit the Tribe, for 'ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Id.* at 729 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982)). This canon must apply *a fortiori* with respect to ICWA, since the Department of the Interior expressly incorporated this canon into the Act's regulatory scheme:

> ICWA, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act *shall be liberally construed* in favor of a result that is consistent with these preferences. *Any* ambiguities in *any* of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

Custody Guidelines 44 Fed. Reg. at 67586 (emphases added). Here, Appellant offered compelling textual, legislative, and historical arguments concerning the proper jurisdictional interpretation of ICWA and PL 280. By refusing to acknowledge the manifest uncertainties of its own position, the district court violated a cornerstone principle of federal Indian law that ambiguities must be construed to the Indians' benefit. The district court failed to do so here.

The district court failed to apply a second basic canon of federal Indian law: Indian sovereignty is not to be limited absent a clear statement by Congress to do so. *Rice,* 463 U.S. at 720 ("Repeal by implication of an established tradition of immunity or self-government is disfavored."); *see also McClanahan*, 411 U.S. at 170-71 ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has *expressly* provided that State laws shall apply.") (emphasis added).

Rather than honor the proscription that sovereignty may not be reduced by implication, the district court embraced conjecture that Congress misunderstood the scope of "existing federal law" as it related to involuntary child custody cases and it relied on this to deprive tribes of their long-recognized exclusive jurisdiction. The district court's decision that PL 280 states may exercise jurisdiction over matters that were beyond their purview

before ICWA's enactment thus flouts ICWA's remedial purpose, and contravenes established canons of statutory construction.

The district court's reading of ICWA also completely ignores its remedial purpose and thus subverts Congress's established policy of preferring tribal control over custody decisions affecting tribal members. Custody Guidelines, 44 Fed. Reg. 67592(C.3); *see also* 124 CONG. REC. S 9994 (daily ed. Apr. 1, 1977) (statement of Sen. Abourezk). ("[N]or is there any reason to believe that the Indian community itself cannot, within its own confines, deal with problems of child neglect when they do arise."). As a remedial statute, ICWA must be read broadly to effect its overarching purpose: to recognize and protect tribal culture by limiting state encroachment on Indian child custody matters. *See, e.g.*, 25 U.S.C. § 1901(4); Custody Guidelines, 44 Fed. Reg. at 67586(A) ("[These guidelines] apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose."). The district court's failure to do so violates the general canon of construction that remedial statutes "should be 'liberally and beneficently construed'" to achieve their purposes. *Dennis v. Higgins*, 498 U.S. 439, 442 (1991) (*quoting Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 684 (1978)); *United States v. Errol D.*, 292 F.3d 1159, 1163 (9th Cir.

2002). Indeed, the district court's decision turns this canon on its head.

Congress enacted ICWA, first and foremost, to redress State encroachment and "eliminate the abuses and injustices," 124 CONG. REC. S 9994 (daily ed. Apr. 1, 1977) (statement of Sen. Abourezk), against Indians that had violated their sovereignty. *See supra* Section A; *see also In re C.H.*, 79 P.3d 822, 827 (Mont. 2003) ("[B]ecause ICWA is a remedial statute, its terms should be liberally construed to achieve their purpose."); *In re Cari B.*, 763 N.E. 2d 917, 921 (Ill. App. Ct. 2002) ("The ICWA is a remedial statute designed to protect the rights of 'Indian children' as 'Indians.'"). The cases over which the district court deprived tribes of exclusive jurisdiction—involuntary dependency proceedings—are precisely the types of cases in which State encroachment and abuse were rampant. Thus, rather than further the remedial purpose of ICWA to end this abuse, the district court's ruling serves to narrow the scope of remediation and produce more of the very harm ICWA was designed to prevent.

E. THE DISTRICT COURT ERRED IN ITS READING OF ICWA'S REASSUMPTION PROVISIONS.

As additional support for its decision, the district court reasoned, incorrectly, that Congress included Section 1918 to require tribes in PL 280 states to petition for reassumption of their exclusive jurisdiction over

involuntary child dependency programs in order to exercise exclusive jurisdiction. ER 34:8-10. This finding cannot withstand scrutiny. The district court concluded that because "Congress was clearly concerned about the feasibility of tribal jurisdiction" in PL 280 states and "some tribes in PL 280 states may not have the administrative or judicial structures to hear child custody proceedings," Congress enacted Section 1918 to "offer tribes who had the necessary structures the opportunity for self-governance." ER 33:22-23, 26-27; 34:1-2. Therefore, the district court found, to construe ICWA as "granting tribes [in PL 280 states] exclusive jurisdiction over child custody proceedings would gravely undermine ICWA's statutory scheme, making its provisions illogical." ER 32:10-11.

In reaching this conclusion, the district court rejected Appellant's position that Section 1918 applied only to the type of jurisdiction over child custody matters that was confirmed by PL 280, namely "*private* child custody proceedings regarding children living on a reservation." ER 32:12-14 (emphasis added). Specifically, the district court found "such an interpretation ignores the relevant legislative history." ER 32:20. The court also concluded that it would be "illogical" for tribes to choose to take on "the more difficult and resource-intensive involuntary proceedings, such as parental termination and foster care placement," while relieving themselves

of jurisdiction over the supposedly less burdensome private custody proceedings. ER 12:14-17. The district court is wrong on both counts. Moreover, the district court's precise logic regarding Section 1918's function was rejected by this Court in *Venetie*, 944 F.2d 548.

1. ICWA Section 1918 Allows Tribes in PL 280 States to "Reassume" Exclusive Jurisdiction Over Private Indian Child Custody Proceedings.

Section 1918 provides:

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of . . . [PL 280], or pursuant to any other Federal law,[16] may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary [of the Interior] for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.[17]

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[16] It is undisputed that no other federal law would divest tribes of their exclusive jurisdiction in the State of California; therefore the phrase "pursuant to any other Federal law" is not at issue here.

[17] Section 1918, unlike Section 1911(a), requires that tribes present a "suitable plan" to reassume jurisdiction. This requirement logically flows from the fact that tribes in PL 280 states or in other states in which tribes became subject to some State jurisdiction over Indian child custody proceedings are expanding their existing jurisdiction while simultaneously divesting States of jurisdiction acquired under PL 280 or other applicable federal law. Congress therefore conditioned the ability to expand tribal jurisdiction upon the ability to exercise that jurisdiction.

25 U.S.C. § 1918(a). Because, as the district court recognized, PL 280 does not confer civil regulatory authority to States over tribes regarding reservation conduct, the State jurisdiction to which tribes ever "became subject" under PL 280 concerned *private,* non-regulatory child custody proceedings. *Cabazon*, 480 U.S. at 209-10; *Bryan*, 426 U.S. at 384-85. Indeed, as the Wisconsin Attorney General concluded:

> For nonregulatory proceedings, such as voluntary termination of parental rights, the tribal courts, and state courts pursuant to Pub. L. No. 280, have concurrent jurisdiction. To eliminate this concurrent jurisdictional relationship *over private child custody matters* covered by the ICWA and within Pub. L. No. 280 definition of "civil causes of action," the tribe would . . . have to comply with 25 U.S.C. sec. 1918 and reassume exclusive jurisdiction . . . .

1981 Wisc. AG LEXIS at *11 (emphasis added). Having examined the Congressional Record, the Wisconsin AG noted that "[t]he [legislative] history behind ICWA lends additional support to [this] opinion," particularly in light of ICWA's remedial purpose to end State encroachment of recognized tribal sovereignty. *Id.* at *12.[18]

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[18] In *Venetie*, this Court explicitly endorsed the reasoning of the Wisconsin Attorney General's opinion, approving the portion of the opinion holding that division of jurisdiction between States and tribes was concurrent with

2. Appellant's Position Does Not Render ICWA's Reassumption Provision "Illogical"

Contrary to the district court's supposition, preserving the original limits of PL 280 jurisdiction is entirely consistent with tribal interest in self-governance. Contrary to the court's assumption that tribes in PL 280 states would wish to be relieved of all child custody jurisdiction that they did not petition to reassume, ICWA reflects the strong desire to preserve and nurture all jurisdiction not otherwise granted to the States. Congress's preference for tribal control is evidenced in ICWA's statutory scheme allowing for deference to tribal decisions regarding the extent of jurisdiction over child custody matters tribes wish to exercise. *See* 25 U.S.C. § 1911(a); *Holyfield*, 490 U.S. at 36-37; 1981 Wisc. AG LEXIS at *10-11. It is therefore the district court's opinion, not Appellant's position, that renders ICWA's reassumption provision "illogical" in light of ICWA's policy of preferring tribal control over matters affecting tribal members.[19]

Indeed, properly read, Section 1918 reveals the importance not only of

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respect to private, "nonregulatory proceedings." 944 F.2d at 561. Thus, in so doing, this Court implicitly acknowledged the important distinction.

[19] Indeed, there is no factual basis for court's assumption that involuntary custody proceedings are somehow more "difficult," "resource-intensive" and therefore of more significance than voluntary proceedings at all. *See infra* at Section E-2-b.

preserving existing exclusive jurisdiction but also of reclaiming *any* jurisdiction that could, in State hands, impinge on tribal sovereignty over child welfare. *See* 25 U.S.C. § 1918.

a. A Tribe's Exercise of Exclusive Jurisdiction Over Involuntary Indian Child Custody Proceedings in a Public Law 280 State is Consistent with ICWA's Comprehensive Statutory Scheme of Effecting Tribal Control Over Indian Child Custody Proceedings While Not Saddling Tribes With Responsibilities They Cannot Or Do Not Wish To Handle

ICWA's comprehensive statutory scheme reflects Congress's conclusion that tribes are entitled to determine for themselves the appropriate level of tribal control over custody proceedings involving Indian children who reside or are domiciled on the reservation. ICWA's scheme affirmed existing tribal jurisdiction over Indian child custody proceedings and "expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction" to the extent that tribes wished to exercise further control over such proceedings. *Venetie*, 944 F.2d at 955. To the extent that tribes desired to cede or share their jurisdiction over Indian child custody proceedings, ICWA provided tribes with the means to do so. For instance, as to foster care proceedings for Indian children who were not domiciled or residing on Indian lands, the Act permits tribes to transfer

proceedings from State to tribal courts subject to declination by the tribal court.[20] 25 U.S.C. § 1911(b). The Act also permits tribes to share or delegate their authority by entering into mutual agreements with States or other tribes regarding the care, custody, and jurisdiction over Indian children. 25 U.S.C. § 1919[21]; 25 C.F.R. 13.1(c).

Section 1918 operates in the same manner. For tribes that are presently under State jurisdiction by virtue of federal law, the Act provides that the tribes may petition the Secretary of the Interior for reassumption of jurisdiction over the types of child placement matters that were within a State's jurisdiction under PL-280, namely *private* placements, 25 U.S.C. § 1918(a), or retrocede or relinquish part of their jurisdiction over non-private child custody proceedings. *Id.* § 1918(b)(2).

Moreover, Section 1918 expressly addressed the district court's exact

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[20] Section 1911(b) establishes "concurrent but presumptively tribal jurisdiction" over child custody proceedings involving non-reservation children, *Venetie*, 944 F.2d at 561, since the party opposing the transfer bears the burden of demonstrating that an exception should be found to tribal jurisdiction. *See* Custody Guidelines, 44 Fed. Reg. at 67592.

[21] Section 1919's language is broad and permissive, allowing tribes, subject to State consent, to self-regulate the level of authority they wish to exercise over child custody proceedings and the care of Indian children. Consistent with ICWA's jurisdictional scheme, this provision reflects Congress' recognition that tribes are the best judges of their own and their children's interests.

concern about overburdening tribes. Section 1918 allows a tribe to "reassume," or secure, *unquestioned* exclusive, concurrent, or partial jurisdiction over Indian child custody proceedings involving reservation children. *See* Reassumption Guidelines, 44 Fed. Reg. at 45092(A)(2).

To the extent that a Tribe does not believe it is equipped to exercise the full measure of its sovereign powers of exclusive jurisdiction, Section 1918(b)(2) provides a means to relinquish varying degrees of jurisdiction over whatever categories of custody proceedings a tribe desires. *See* 25 U.S.C. § 1918(b)(2).[22]

The provision thus anticipates the difficulties faced by inadequately funded tribes by encouraging them to form consortiums or other communal entities that will enable the tribes to personally serve their members' needs rather than relinquishing responsibility to the states. *See* 25 CFR 13.1(c).

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[22] Section 1918(b)(2) provides:

> [W]here the Secretary determines that the jurisdictional provisions of section [1911(a)] are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section [1911(b)], or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section [1911(a)] over limited community or

ICWA's jurisdictional scheme therefore reflects both Congress's belief that tribes are more knowledgeable about the needs of Indian children than non-Indian state and county officials and the Federal policy of preserving exclusive tribal jurisdiction over involuntary child custody proceedings and honoring tribal decisions regarding the exercise of jurisdiction over all child custody proceedings affecting their members.

Likewise, the district court expressed concern that under-resourced tribes may not even have the infrastructure necessary to resolve involuntary child custody disputes. In fact, it noted that "Plaintiff does not contend that an Elem Indian Colony tribal court or other quasi-judicial body exists to hear this case." ER 33: 24-25. Such a conclusion is not only factually but legally inconsequential under ICWA.

As an initial matter, the district court's finding regarding the existence of a tribal entity to hear the case is contradicted by the record. "Tribal court" is defined in ICWA § 1903 to include "*any* . . . administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (emphasis added); *see also* S. REP. NO. 95-597, at 15

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geographic areas without regard for the reservation status of the area affected.

("The definition of 'tribal court' . . . is intended to include tribally established administrative boards, commissions or other alternative tribal mechanisms which exercise adjudicatory powers or jurisdiction over child welfare matters in the name of the tribe."). In her Complaint, Plaintiff alleged sufficient facts to support her claim that Elem maintained a Tribal Council which had jurisdiction over child custody proceedings and acted with respect to recommending placement for Jane Doe. ER 9-10, ¶ 50; ER 11, ¶ 61. In addition, Elem has a governing body, its Tribal Council, which not only has authority over child custody matters concerning tribal members but which exercised that authority when it issued a resolution specifically addressing the issue of placement of Jane Doe. ER 115:12-116:1;[23] *see also*

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[23] Moreover as the district court itself conceded, Section 1911(a) does not require tribes to maintain "tribal courts" (as defined in ICWA) in order to exercise exclusive jurisdiction. ER 33:25-26; *see also* H.R. REP. NO. 1386, at 21 (amending S. 1214 by discarding prior language of "maintain a tribal court which exercises jurisdiction over child welfare matters" and adding an "Indian tribe shall have exclusive jurisdiction"). The district court concluded, however that because "Congress was clearly concerned about the feasibility of tribal jurisdiction in section 1918," tribes in PL 280 states must demonstrate the existence of a "tribal court or other quasi-judicial body" in order to reassume exclusive jurisdiction. As previously demonstrated, however, tribes in PL 280 states need not petition for reassumption of exclusive jurisdiction over involuntary child custody proceedings involving reservation children since PL 280 never subjected tribes to state jurisdiction over those proceedings. Thus, a tribe's maintenance of a "tribal court or

Elem Indian Colony's Amicus Brief, at 22.

More importantly, to inquire – as the district court did – whether the Tribe maintained a "tribal court or other quasi-judicial body " to hear this dispute is to ask the wrong question and, in the process, demonstrates why ICWA was passed in the first place. ER 33:24-25. The district court's analysis betrays the very substitution of non-Indian, westernized judgments for tribal values and customs that Congress recognized as threatening the fabric of tribal culture. *See* 25 U.S.C. § 1901(5); *Holyfield*, 490 U.S. at 37.[24] As this Court noted two years before ICWA's enactment:

> To lawyers, used to thinking of courts as the interpretative arm of government, it does seem strange that a single legislative and executive arm

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other quasi-judicial body" is irrelevant as a matter of law to the question of exclusive tribal jurisdiction.

[24] In addition, the district court's comments and intimations about possible shortcomings in the Tribe's governance speak for themselves:

> Now, I guess the thing that concerns me is that—how do you avoid a situation where you have –some of the tribal counsel [sic] that is very—for want of a better term, very incestuous?....But suppose on that council is sitting one of the persons who was the perpetrator of this—or maybe – you know, several members of the family who were the perpetrators of the abuse?

ER 120:14-17, 22-25; *see also* ER 12:23-13:1 (opposing counsel discussing why he believes the Tribe is "not set up" internally to adequately handle custody proceedings).

> of government should be permitted to interpret the law, but we deal here not with state law, not with federal law, but with Indian law enacted by Indians. The Indians...are free to structure their government as they see fit. Nothing precludes them from vesting, as they did, the power of interpretation in a tribal council rather than in a tribal court.

Howlett v. Salish & Kootenai Tribes of the Flathead Reservation, 529 F.2d 233, 240 (9th Cir. 1976). A tribe's maintenance of a westernized notion of a "court" or other "quasi-judicial body" is therefore legally irrelevant to the inquiry. The district court's holding to the contrary warrants reversal of its decision.

In sum, a reading of ICWA as affirming tribes' exclusive jurisdiction over involuntary child custody proceedings involving reservation children, including reservation children in PL 280 states, is consistent with the purpose of Section 1918 and Congress' intent in enacting the provision.

b. **The District Court's Assumption That Involuntary Proceedings Are Inherently "More Difficult And Resource-Intensive" Is Unfounded**

In addition to lacking support in ICWA, the district court's supposition also lacks any factual basis. The district court's assumption that involuntary proceedings, such as parental termination and foster care placement, are inherently "more difficult and resource-intensive" is entirely

unfounded. More importantly, the court's willingness to presume what degree of jurisdiction is in the Tribe's own best interest reflects the very impulse to impose nontribal standards on tribal affairs that prompted Congress to pass ICWA in the first place. *See, e.g.*, 124 CONG. REC. S 9994 (daily ed. Apr. 1, 1977) (statement of Sen. Abourezk) ("It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials."); 25 U.S.C. § 1901(5).

There is no evidence whatsoever that tribes consider voluntary child custody proceedings less significant than involuntary proceedings where both have the capacity to result in the displacement of tribal children. Indeed, the evidence is to the contrary. In enacting ICWA, Congress acknowledged the detrimental effects of the "[m]any cases" of so-called "voluntary" adoptions of Indian children that are all too often the result of State coercive action:

> Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments.

HR. REP. NO. 95-1386, at 11.

Moreover, as recent legislative efforts to amend ICWA show, Congress and tribes are very much concerned about tribal protections in voluntary adoptions and other voluntary child custody proceedings. H.R. 1448 was introduced specifically "to address problems with Native American adoptive placements" in which "[u]nethical attorneys were locating children and arranging many adoptions without due process," in some instances concealing the child's Native heritage in order to expedite adoption. 1996 WL 539136 at *1. During hearings held on H.R. 1448, tribes were vocal in their criticism of ICWA's current failure to require "notice to tribes regarding voluntary adoptions or enforcement of the terms of ICWA." *Id.* at *3. In light of H.R. 1448, it is therefore evident that reassuming exclusive jurisdiction of voluntary child custody proceedings involving reservation children is not insignificant to tribes.

c. This Court Has Rejected the District Court's Precise Logic Regarding the Function of ICWA's Reassumption Provisions

The district court's finding that Appellant's interpretation of Section 1918 to permit PL 280 tribes to reassume exclusive jurisdiction over private custody proceedings was "illogical" is, ironically, precisely the same reasoning this Court has rejected. In *Venetie*, 944 F.2d at 548, plaintiff

adoptive mothers and native villages sued the State of Alaska because the state failed to accord full faith and credit to the official adoptive decrees of the native villages resulting from voluntary adoptive proceedings. Alaska relied on ICWA's reassumption provision, 28 U.S.C. § 1918, to argue that PL 280 as extended in ICWA "stripped the villages of whatever authority they may have had to make child-custody determinations," rendering the tribal adoptive decrees void. *Id.* at 559. This Court rejected that claim, noting the Supreme Court had "adopted the view that Public Law 280 is not a divestiture statute." *See id.* at 560. That is, the Supreme Court "has rejected all interpretations of Public law 280 which would result in an undermining or destruction of tribal governments." *Id.* at 560. This Court therefore concluded, consistent with Appellant's position here, that the tribes retained concurrent jurisdiction with the State of Alaska over voluntary, private adoption proceedings, which the State was required to respect.

In reaching this conclusion, the Court rejected the State of Alaska's position, like that of the district court's, that the Court's holding would render Section 1918 "meaningless." The State of Alaska had argued that in order for Section 1918 to be meaningful, PL 280 must be read to have divested tribes of *all* of its jurisdiction over private child custody proceeding, or otherwise there is nothing to "reassume." *Id.* at 561. The Court held that

Section 1918 of ICWA and PL 280 could be "harmonized without construing Public Law 280 as a divestiture statute." *Id.* It reasoned that because exclusive jurisdiction was broader than concurrent jurisdiction, the tribe could acquire something *more* by petitioning to reassume, and therefore Section 1918 is not rendered meaningless. *See id.* Similarly, granting the Elem Indian Colony here exclusive jurisdiction over Jane Doe's custody proceedings does not render Section 1918 "illogical" or meaningless, as the district court found, because reassumption will allow the Tribe to secure jurisdiction broader than it currently enjoys without reassumption--namely, exclusive jurisdiction over *private* child custody proceedings, a form of jurisdiction which the Tribe shares concurrently with the State of California and which, as previously discussed, is a significant area of tribal concern. The district court need not read PL 280 nor ICWA as having divested the Tribe of its exclusive jurisdiction over involuntary child custody proceedings in order to infuse Section 1918 with meaning "as long as there is something for [the] [T]ribe to reassume." *Id.* at 561. At any rate, giving the State of California the "benefit of doubt" and "conclud[ing] that Public Law 280 and the Indian Child Welfare Act are, at best, ambiguous" as to whether PL 280 tribes have exclusive or concurrent jurisdiction over involuntary child custody proceedings, requires resolving any ambiguity to the benefit of the

Tribe. *Id.* at 562 (citing *Montana*, 471 U.S. at 766).

F. THE DISTRICT COURT FAILED TO RESOLVE THE AMBIGUITY IN ICWA IN FAVOR OF INDIAN TRIBES

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *United States v. Errol D., Jr.*, 292 F.3d 1159, 1163 (9th Cir. 2002) (interpreting relationship between Major Crimes Act, 18 U.S.C. § 1153, and General Crimes Act, 18 U.S.C. § 1152). Due to the trust relationship between the United States and Indian tribes, statutes relating to Indian matters "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan*, 426 U.S. at 392; *Errol D.*, 292 F.3d at 1163. If ever that canon applies, it must apply here because the Bureau of Indian Affairs embedded it in ICWA's regulations. *See* Custody Guidelines 44 Fed. Reg. at 67586. As noted above, Section 1911(a) grants tribes exclusive jurisdiction over custody proceedings involving children domiciled on the reservation, "except where such jurisdiction is otherwise vested in the State by existing Federal law." In light of this canon requiring liberal construction in favor of Indians, Section 1911(a)'s reference to "existing Federal law" must be read to preserve the Tribal jurisdiction to the maximum possible extent.

Here, when addressing the question at the heart of this appeal, the

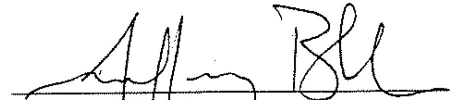
court granted *no* deference to the tribes. Instead, the court concluded that Appellant's position would render ICWA's provisions "illogical," based upon the district court's own concerns about the resources tribes would have to devote to involuntary custody proceedings. ER 32:9, 11. In so doing, the court construed the ambiguous phrase "existing federal law" *against* tribal jurisdiction. This reading was plain error, particularly given the district court's recognition that the grant of state jurisdiction in PL 280 did *not* extend to involuntary child custody proceedings. ER 29:9-31:24; *see also Cabazon*, 480 U.S. at 209-10; *Bryan*, 426 U.S. at 384-85. Section 1911(a), as written, simply does not grant states jurisdiction over involuntary child custody proceedings over children domiciled on Indian reservations.

CONCLUSION

For the foregoing reasons, the district court's order dismissing Appellant's First Claim for Relief should be reversed. Furthermore, this Court should hold that under Section 1911(a) of ICWA, Indian tribes in PL

280 states have exclusive jurisdiction over child dependency proceedings involving Indian children domiciled on the reservation.

Respectfully submitted,



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Dated: May 27, 2004

CERTIFICATION OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) and 9th Circuit Rule 32-1, the attached answering brief is proportionately space, has a typeface of 14 points or more, and contains 13,407 words.

Dated: May 27, 2004

By:
Jeffrey L Bleich

STATEMENT OF RELATED CASES

Petitioner is not aware of any related cases pending in this circuit.