No. 04-15477

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY DOE,

Plaintiff-Appellant,

v.

JOHN DOE I, et al.

Defendants-Appellees.

Appeal from the United States District Court
Northern District of California
Honorable Marilyn Hall Patel
Case No. C 02-3448 MHP

BRIEF OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION AND THE TANANA CHIEFS CONFERENCE, AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT DECISION

BERTRAM E. HIRSCH
P.O. Box 220145
Great Neck, NY 11022
(718) 347-3022

JACK F. TROPE
Association on American
Indian Affairs, Inc.
966 Hungerford Dr., Ste. 12-B
Rockville, MD 20850
(240) 314-7155

ETHAN G. SCHUTT
General Counsel, Legal Dept.
Tanana Chiefs Conference, Inc.
122 First Avenue, Suite 600
Fairbanks, AK 99701-4897
(907) 452-8251

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae parties the Association on American Indian Affairs, the National Indian Child Welfare Association and the Tanana Chiefs Conference, Inc. make the following disclosures:

1. The parties are not a subsidiary or affiliate of a publicly owned corporation.

2. No corporation owns 10% or more of any of the parties' stock.

Bertram E. Hirsch JT
Respectfully Submitted,

Bertram E. Hirsch
P.O. Box 220145
Great Neck, NY 11022
(718) 347-3022

Jack F. Trope, Executive Director
Association on American Indian Affairs
966 Hungerford Drive, Suite 12-B
Rockville, MD 20850
(240) 314-7155

Ethan G. Schutt
General Counsel
Legal Department
Tanana Chiefs Conference, Inc.
122 First Avenue, Suite 600
Fairbanks, AK 99701-4897
(907) 452-8251

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Public Laws

Regulations

Legislative History

Miscellaneous

STATEMENT OF INTEREST

The Association on American Indian Affairs (AAIA) is an 82 year old Indian advocacy organization located in South Dakota and Maryland and governed by an all-Native American Board of Directors. The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act and, at the invitation of Congress, AAIA was closely involved in the drafting of the Act. Since 1978, the Association has continued to work with tribes to implement the Act, including the negotiation of tribal-state agreements to better serve Indian children, training for tribal and state employees and officials about Indian child welfare, and legal assistance in contested cases.

The National Indian Child Welfare Association (NICWA) began in 1987. NICWA is a private, non-profit membership organization based in Portland, Oregon which is dedicated to the well-being of American Indian children and families. Its members include tribes, individuals, both Indian and non-Indian, and private organizations from around the United States concerned with Indian child and family issues. NICWA is a national voice

for American Indian children and families, and as such, is deeply involved in promoting compliance with the Indian Child Welfare Act. NICWA does this through its program activities to train tribal, state and private agency social workers on the Indian Child Welfare Act, provide assistance with child welfare program development to tribal governments and facilitate information sharing on critical public policies that affect American Indian children and families. Its primary constituencies are tribal governments, urban Indian social service programs and, in particular, the frontline staff who work with Indian children and families. NICWA is the only Native American organization focused specifically on issues of child abuse and neglect and tribal capacity to prevent and respond effectively to these problems.

Tanana Chiefs Conference (TCC) is a tribal consortium organized as an Alaska non-profit corporation. TCC represents 42 Athabascan tribal entities including 37 federally recognized Athabascan tribes throughout Interior Alaska. TCC actively supports the development of fair and effective tribal courts throughout its extensive geographical region. TCC also provides technical assistance to its member tribes for the operation and improvement of existing tribal courts. TCC represents tribes within a Public Law 83-280 jurisdiction—Alaska. As such, the interests of TCC and its

member tribes necessarily will be impacted by the decision of this Court in settling jurisdictional matters under the Indian Child Welfare Act in a Public Law 280 state.

ARGUMENT

THE INDIAN CHILD WELFARE ACT (ICWA) DID NOT GRANT JURISDICTION TO PUBLIC LAW 280 STATES OVER INVOLUNTARY CHILD CUSTODY PROCEEDINGS

In the District Court decision, the trial judge correctly concluded that Public Law 83-280 (hereinafter "P.L. 280") did not grant the state of California jurisdiction over involuntary child custody proceedings. Doe v. Mann, 285 F.Supp.2d. 1229, 1235-1237 (N.D.Cal. 2003). However, she concluded that such a holding would "undermine the ICWA statutory scheme, making its provisions illogical." Id. at 1237. Thus, based upon her analysis of ICWA, she ruled that the state of California had jurisdiction over involuntary child custody proceedings, absent a reassumption of exclusive jurisdiction by the tribe pursuant to 25 U.S.C. 1918. Id. at 1239. In essence, she ruled that in enacting ICWA, Congress' intent was to expand state jurisdiction to an area not covered by P.L. 280. Such a reading of the ICWA flies in the face of the clear intent of ICWA to narrow state jurisdiction and expand tribal jurisdiction. It is also inconsistent with the legislative history

underlying the relevant sections – sections 101(a) [25 U.S.C. 1911(a)] and 108 [25 U.S.C. 1918].

The Indian Child Welfare Act was enacted in 1978. 25 U.S.C. 1901 et seq. The ICWA "was the product of rising concern in the mid-1970s over the consequences to Indian children, Indian families and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1988). The evidence presented before Congress revealed that "25-35% of Indian children had been separated from their families and placed in foster homes, adoptive homes or institutions." Id.

Studies by the Association on American Indian Affairs (AAIA) had reported that Indian children were placed in foster care far more frequently than non-Indian children. This was true of all 19 states surveyed, 7 of which were P.L. 280 states, with Indian placement rates ranging from 2.4 times the non-Indian rate in New Mexico to 22.4 times rate in South Dakota. The percentage of Indian children placed in non-Indian foster homes in those states that reported this information ranged from 53% in Wyoming to 97% in New York. Hearing on S. 1214 before the Select Committee on Indian Affairs,

United States Senate, 95th Cong., 1st Sess. (1977) at 539 (hereinafter "1977 Senate Hearing").

Moreover, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the Indian placements were in non-Indian homes.". Holyfield, supra, 490 U.S. at 33. All but one of the states surveyed also had a greater rate of Indian children placed for adoption than was the case for non-Indians. The Indian adoption rate in the most extreme case -- the State of Washington (a P.L. 280 state) -- was 18.8 times the non-Indian rate. 1977 Senate Hearing, supra, at 539. The percentage of Indian children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota (also a P.L. 280 state). Id. at 537-603.

Congress found that this extraordinary and unwarranted rate of placement in out-of-home non-Indian households was not in the best interests of Indian tribes, families and children. In enacting ICWA, Congress was concerned about both the "impact on the tribes themselves of the large numbers of children adopted by non-Indians ... [and] the detrimental impact on the children themselves of such placements outside their culture." See Holyfield, supra, 490 U.S. at 49-50. Congress noted that "[r]emoval of Indian children from their cultural setting seriously impacts on long-term tribal survival and has damaging social and psychological impact on many

individual Indian children." Id. at 50 quoting from findings of Congress' American Indian Policy Review Commission reprinted in United States Senate Report 597, 95th Cong., 1st Sess. (1977) (hereinafter "S. Rep. 95-597") at 52.

Congress determined that a large part of the cause for this Indian child welfare crisis which was devastating Indian tribes, children and families rested with State agencies and courts. Congress found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). The House Committee Report specifically recognized "'...the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of the Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.'" House Report 1386, 95th Cong., 2nd Sess. (1978) (hereinafter "H.Rep. 95-1386") at 19, cited in Holyfield, supra, 490 U.S. at 45, n. 18. See also statement by Rep. Morris Udall, House sponsor of the ICWA, to the effect that "'state courts and agencies and their procedures share a large part of the responsibility' for crisis threatening 'the future and integrity of Indian tribes

and Indian families.'" Holyfield, supra, 490 U.S. at 45, n.18. State systems operated in virtually an unfettered fashion. As Cong. Robert Lagomarsino, Republican co-sponsor of the ICWA stated in explaining his support for the ICWA, "[g]enerally there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents." 124 Cong.Rec. H12849 (Oct. 14, 1978). The result of this systemic failure was summarized in the House Report as follows:

> (1)...many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> (2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law...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 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.
>
> (3)...agencies established to place children have an incentive to find children to place.
>
> H. Rep. 95-1386, supra, at 10-12.

For these reasons, the primary mechanism utilized by Congress to address this crisis was to "curtail state authority" and to strengthen tribal authority over child welfare matters. Holyfield, supra, 490 U.S. at 45, n. 17. The ICWA "'is based upon the fundamental assumption that it is in the

child's best interest that its relationship to the tribe be protected..." Id. at 37. Thus, the Act recognizes exclusive tribal jurisdiction over reservation resident or domiciled Indian children, except in limited circumstances, 25 U.S.C. 1911(a), provides for the transfer of off-reservation state court proceedings to tribal court, absent parental objection or good cause to the contrary, 25 U.S.C. 1911(b), recognizes the right of Indian tribes to intervene in state court, 25 U.S.C. 1911(c), requires state courts to accord full faith and credit to tribal public acts, records and court judgments, 25 U.S.C. 1911(d), requires notice to Indian tribes by state courts, 25 U.S.C. 1912(a), provides Indian tribes with the right to challenge and invalidate state placements that do not conform with certain of the Act's requirements, 25 U.S.C. 1914, and recognizes, as a matter of federal law, tribally-established placement preferences for state placements of off-reservation Indian children. 25 U.S.C. 1915(c).

Moreover, the ICWA includes a number of other provisions which are designed to keep families together or ensure placement with extended family or tribal members. These provisions also directly or indirectly serve to protect the relationship between the tribe and tribal children. Thus, the Act establishes stringent substantive standards for involuntary foster care placement of an Indian child or termination of an Indian parent's parental

rights, 25 U.S.C. 1912(e) and (f), requires (absent a different tribal standard) that adoptive placements of Indian children under state law be made preferentially with the child's extended family, other members of the Indian child's tribe or other Indian families, in that order, absent good cause, 25 U.S.C. 1915(a), requires (absent a different tribal standard) that foster care placements of Indian children under state law be made preferentially with the child's extended family, a tribally-licensed foster home, an Indian foster home licensed by a non-Indian entity or a tribally-approved or Indian-operated facility, in that order, absent good cause, 25 U.S.C. 1915(b), and requires the cultural and social standards of the Indian community to be applied in meeting the placement preferences. 25 U.S.C. 1915(d). The Act also requires active efforts to provide remedial and rehabilitative services before a child may be removed from his or her family (except in emergency situations), 25 U.S.C. 1912(d) and 1922, provides procedures governing voluntary relinquishments, 25 U.S.C. 1913, provides access to tribes and adoptees to certain state records, 25 U.S.C. 1912(c), 1915(e), 1917 and 1951(b), and authorizes tribal-state agreements on child welfare. 25 U.S.C. 1919.

Notwithstanding this clear legislative intent to expand tribal authority and limit state authority, the District Court judge interpreted ICWA's

provisions in a way that resulted in a holding that ICWA expanded state jurisdiction in P.L. 280 states beyond that accorded to states by P. L. 280 itself – which, unlike ICWA, was a law specifically designed to increase state jurisdiction. Yet, the child welfare practices of P.L. 280 states, including California, were a prominent part of the legislative history of the ICWA. The studies of AAIA that served as part of the impetus for the enactment of ICWA included statistics about seven P.L. 280 states, whose performance as a whole was similar to that of non-P.L. 280 states. 1977 Senate Hearing, supra, at 537-603. Moreover, numerous tribal witnesses from P.L. 280 states testified at Congressional hearings about how the Indian child welfare crisis was affecting their tribes and communities. See "Indian Child Welfare Program", Hearings before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, United States Senate, 93rd Cong., 2d Sess. (1974) at 116-120 (Testimony of Mel Sampson, Northwest Affiliated Tribes accompanied by Louie Cloud, Vice-Chairman, Yakima Tribal Council and incorporates prepared statement of Roger Jim, Sr., Yakima Tribal Councilman and President, Affiliated Tribes of Northwest Indians), 161-177 (Testimony of Michael Chosa, Administrative Assistant, American Indian Child Placement and Development Program, Milwaukee, Wisconsin, Betty Jack, Chairman of the Board for that program

and Victoria Gokee, Red Cliff Reservation and Director of that program), 223-230 (Testimony of Mel Tonasket, NCAI President from Confederated Tribes of the Colville Indian Reservation, discussing circumstances at Colville and in Washington) and 367-379 (Testimony of William Blackwell, Grand Portage Ojibwa Band, and Thomas Peacock, Fond du Lac President and Director, Indian Youth Program, Duluth, Minn.); 1977 Senate Hearing, supra, at 76-93 (Testimony of Goldie Dennie, Director of Social Services, Quinault Nation), 163-168 (Testimony of Ramona Bennett, Chairwoman, Puyallup Tribe), 191-192 (Testimony of Faye LaPointe, Coordinator, Tacoma Indian Center), 261-272 (prepared statement of Virgil Gunn, Chairman, Health, Education & Welfare Committee, Confederated Tribes, Colville), 273-275 (prepared statement, Yakima Indian Nation), 280-283 (prepared statement of Nez Perce Tribal Executive Committee and Allen Slickpoo, Chairman, Health, Education & Welfare Committee), 284-288, (prepared statement, Oneida Tribe of Indians of Wisconsin, Inc.), 290 (prepared statement of Goldie Denny for Quinault Indian Nation), 300-306, (prepared statement, Seattle Indian Center) and 309-312 (prepared statement of Mauneluk Association); Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d. Sess. (1978) at 65-74 (hereinafter "1978

House Hearings") (Testimony of Goldie Denny, Director of Social Services, Quinault Indian Nation), 76-77 (Testimony of Mel Sampson, Chairman, Health, Education & Welfare Committee, Yakima Indian Nation), 77-79 (Testimony of Faye LaPointe, Coordinator of Social Services, Puyallup Tribe), 107-112 (Testimony of Vera Harris, Acting Director, Tsapah Child Placement Agency, Washington and Elizabeth Cagey, Tacoma Indian Center), 152-156 (Testimony of Trilby Beauprey, Director, Alternative Living Arrangements Program, Great Lakes Inter-Tribal Council, Inc., Wisconsin), 203-206 (prepared statement of Faye LaPointe), 209-211 (prepared statement of Tacoma Indian Center) and 262-273 (prepared statement of Trilby Beauprey). In fact, both Congressional members and committees took note of child welfare practices in P.L. 280 states in their deliberations. See, e.g., 124 Cong. Rec. H12849 (Oct. 14, 1978) (remarks of Cong. Lagomarsino describing Wisconsin's Indian child welfare practices) and H.Rep. 95-1386, supra, at 9. Thus, Congress' findings in 25 U.S.C. 1901(4) and (5) that the States have failed to recognize Indian tribal relations and social and cultural standards and that an alarming high percentage of children had been removed by non-tribal agencies and placed in non-Indian foster and adoptive homes were just as applicable to P.L. 280 states as they were for non-P.L. 280 states.

The District Court judge reached her erroneous conclusion that the ICWA intended to recognize state jurisdiction over involuntary child custody proceedings in P.L. 280 states, absent tribal reassumption of jurisdiction, through an analysis of 25 U.S.C. 1911(a) and 1918 and reference to two letters from the Departments of Justice and Interior. 25 U.S.C. 1911(a) provides that:

> 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. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S.C. 1918 provides a process whereby tribes may petition to reassume jurisdiction over Indian child custody proceedings in any case where a State has obtained jurisdiction pursuant to some federal law, including P.L. 280. Her reasoning was essentially that: (1) if Congress was recognizing that tribes already have exclusive jurisdiction over "more difficult and resource-intensive" involuntary child custody proceedings, it would have been "illogical" for Congress to force tribes to petition for reassumption under 1918 before they could exercise jurisdiction over "the few child custody proceedings that could be understood as private civil actions, such as private adoptions", and (2) Congress was concerned about the feasibility of tribal jurisdiction and thus

created the section 1918 process to address this concern. Doe v. Mann, supra, 285 F.Supp.2d at 1238-1239.

An understanding of the derivation of sections 1911(a) and 1918, as well as legislative history pertaining to the Department of Interior and Justice letters, clearly reveals that the Judge's analysis was in error – particularly given the strong presumption against state jurisdiction in ICWA that she had to overcome to make a finding that the ICWA actually had the effect of expanding the jurisdiction of P.L. 280 states.

The exception in section 1911(a) was first added to the ICWA by the House Committee on Interior and Insular Affairs during its markup and approval of H.R. 12533. H. Rep. 95-1386, supra, at 3. Although, the legislative history of this Committee amendment does not elaborate the intent, id. at 21, Congress's purpose can be understood from a review of the overall history of section 1911(a) and the context within which the exception was added.

In the 95th Congress, the ICWA was first introduced on April 1, 1977. Section 101(a) of this bill [S. 1214] provided for tribal exclusive jurisdiction over the placement of Indian children "residing" within an Indian reservation where a tribal court existed. For an Indian child "resid[ing]" within a reservation not having a tribal court or "domiciled" within an Indian reservation,

Section 101(b) provided for State court jurisdiction only if the Indian child's tribe received notice of, and was afforded the right to intervene in, the child placement proceeding. The bill did not include any special provisions for tribes located in P.L. 280 States. Section 101(a) and (b) applied to all tribes. Therefore, all tribes, including those in P.L. 280 States, were recognized as having exclusive jurisdiction over the voluntary or involuntary placement of their reservation-resident children while State jurisdiction was extended to the placement of children of tribes in both P.L. 280 States and non-P.L. 280 States where the child was domiciled on a reservation or where the child resided on a reservation not having a tribal court. 1977 Senate Hearing, supra, at 7-8; see also 123 Cong. Rec. S5332-5333 (April 1, 1977).

The Select Committee on Indian Affairs reported S. 1214 on November 3, 1977. S. Rep. 95-597, supra. The Senate passed the measure on November 4, 1977 without amendment. 123 Cong. Rec. S18874-S18877 (November 4, 1977). In the Senate-passed version of the ICWA, section 102(a) retained tribal exclusive jurisdiction over the placement of reservation-resident Indian children where a tribal court existed, but recognized "State agency" authority to temporarily remove Indian children faced with an "immediate threat to the[ir] emotional or physical well-being." However, tribal exclusive jurisdiction over placement was protected even in the case of "[t]emporary removals beyond the

boundaries of a reservation." S. Rep. 95-597, supra, at 3-4; see also 123 Cong. Rec. S18874-18875 (November 4, 1977).

With respect to children domiciled on an Indian reservation where the tribe "possesses but does not exercise jurisdiction over child welfare matters," the State (except in emergency circumstances) had jurisdiction only where jurisdiction was transferred to the state pursuant to a tribal-state agreement. Where no agreement existed, the federal government was charged with the responsibility to protect such children. Id.

Thus, this 1977 Senate-passed measure recognized tribal exclusive jurisdiction over voluntary and involuntary placements involving reservation-resident or domiciled Indian children in both P.L. 280 states and non-P.L. 280 states. In essence, it would have displaced much of the State concurrent jurisdiction over private or voluntary terminations of parental rights and foster care or adoptive placements that P.L. 280 otherwise provided and, instead, made these voluntary proceedings subject to exclusive tribal jurisdiction.[1]

On April 18, 1978, the House Subcommittee on Indian Affairs of the House Interior and Insular Affairs Committee amended and reported S. 1214. The reported bill was introduced as H.R. 12533 on May 3, 1978. 124

[1] Under S. 1214, as passed, P.L. 280 State concurrent jurisdiction over these types of voluntary or private proceedings was not displaced when individuals alone were involved, i.e., when no "nontribal public or private agency" was involved.

Cong.Rec. H3560-3562 (May 3, 1978); H.Rep. 95-1386, supra, at 28. Section 101(a) of this bill simply provided: "An Indian tribe shall have jurisdiction exclusive as to any State over any placement of an Indian child who resides on or is domiciled within the reservation of such tribe."[2] This text was similar in intent to the Senate-passed bill, but more clearly expressed the recognition of tribal exclusive jurisdiction over reservation resident and domiciled Indian children. The text included no exception for P.L. 280 states and thus would have eliminated all jurisdiction provided to states by that law.

It was this version of the bill upon which both Assistant Attorney General Patricia Wald and Assistant Secretary of the Interior Forest Gerard were commenting when they raised their concerns about the displacement of State jurisdiction in P.L. 280 states. The language in H.R. 12533 did literally displace any existing State court jurisdiction based on P.L. 280, thereby, in effect, amending P.L. 280 and the Department of Justice understood that this was the literal effect of the language, even though the bill retained from earlier ICWA versions another provision very similar to the current Section 1918 reassumption provision.

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[2] Amici are unaware of any published materials that include this version [H.R. 12533] of the ICWA, although it is mentioned in published materials. It is in the possession of one of the counsel for amici, however. Thus, for the Court's convenience, we have reproduced relevant sections of H.R. 12533 in an appendix.

The response by the House Committee on Interior and Insular Affairs was the section that is now codified as 25 U.S.C. 1911(a) which includes the phrase "except where jurisdiction is otherwise vested in the State by existing Federal law". What is striking about this language is that it refers to existing Federal law. It does not purport to change that law. The actual language makes this clear, as does the absence of legislative history to support any other interpretation. The specific analysis of Section 101(a) in H. Rep. 95-1386, supra, at 21, simply restates the language of the exception without offering further insight into its intent. Given that the earlier drafts of the ICWA would have narrowed state jurisdiction to varying degrees, it would be remarkable, indeed inconceivable, that Congress would have intended to achieve exactly the opposite result (expanded state jurisdiction) through the inclusion of this exception without ever stating anywhere that it intended to do so.

As for section 108 [25 U.S.C. 1918], the first version of this section was included in the bill that initially passed the Senate. Section 102(i) of that bill provided that where "a state has assumed jurisdiction over child welfare of any Indian tribe" under P.L. 280 or any other Federal law, the "Indian tribe may reassume the same jurisdiction over such child welfare matters as any other Indian tribe not affected by such Acts" upon "establish[ing] and provid[ing]

mechanisms for implementation of such matters ...subject to the...approval of the Secretary of the Interior." S.Rep. 95-597, supra, at 5; 123 Cong. Rec. S18876 (Nov. 4, 1977).

Section 108 of H.R. 12533, the next iteration of the bill, contained a similar reassumption of jurisdiction provision applicable to tribes subject to State jurisdiction under P.L. 280 or other Federal law, tribes in Oklahoma, and tribes in Alaska "now or hereafter recognized by the Secretary as having powers of self-government." Reassumption required a federally-approved "suitable plan" for the exercise of jurisdiction. This section somewhat incongruously co-existed with the section 101(a) text providing for exclusive tribal jurisdiction in all circumstances, regardless of whether a tribe was located in a P.L. 280 state. See Appendix A.

The final version of section 108 (25 U.S.C. 1918) emerged at the House Committee on Interior and Insular Affairs markup. The most important change involved the addition of the criteria for reassumption in 25 U.S.C. 1918(b), criteria which were added in an amendment prepared by Cong. Risenhoover of Oklahoma. H.Rep. 95-1386, supra, at 5. The existence of these criteria was a critical part of the District Court's analysis in this case. The judge concluded that it would be "illogical" for these provisions about reassumption to be in the ICWA if Congress had not

intended tribes in P.L. 280 states to go through that process before they could exercise exclusive jurisdiction. Doe v. Mann, supra, 285 F.Supp.2d at 1238.

Amici submit that this language does not mandate such a conclusion – that there are a number of factors that refute this interpretation and that explain why this provision was included in the ICWA in a satisfactory manner without transforming the ICWA into a statute that expanded state jurisdiction.

First, as noted, the essence of what is now Section 1918 – namely, a mechanism for reassuming lost jurisdiction -- was part of the 1977 Senate-passed ICWA in November, 1977 and H.R. 12533 in May 1978, long before the Section 1911(a) exception was approved by the House Committee in June, 1978. Indeed, at the time the substantively similar precursor to Section 1918 was included in the ICWA, the precursor to Section 1911(a) did not include the exception and unequivocally stripped States of any jurisdiction over child custody proceedings involving on-reservation resident or domiciled Indian children. Thus, the existence of the section 1918 reassumption provision cannot by itself transform the section 1911(a) exception into a state jurisdiction expanding provision, especially when there is no textual or legislative history that would cause the sections to be read together in that way.

Second, the legislative history of Section 1918 notes that subsection (b) "was adopted...in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma."[3] H.Rep. 95-1386, supra, at 24-25. It is also clear that Congress intended that tribes whose reservations have been disestablished or diminished by virtue of Federal law be permitted to utilize section 1918 to reassume jurisdiction over these areas as the criteria explicitly reference "former reservation area(s)" and jurisdiction over "limited community or geographic areas without regard for the reservation areas of the area affected." 25 U.S.C. 1918(b)(1)(ii) and 25 U.S.C. 1918(b)(2).[4] The varying

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[3] In Oklahoma, Congress opened up vast areas of tribal lands in 1898 for non-Indian settlement and most Oklahoma reservations, which has left most tribes with only scattered parcels of land. Act of June 28, 1898, ch. 517, 30 Stat. 495, 504. In the case of Alaska, Congress transferred almost all of the Alaska Native village and reservation land to Alaska Native corporations in 1971 as part of a comprehensive settlement of Alaska Native land claims. 43 U.S.C. 1601 et seq. The status of this land for jurisdictional purposes was in doubt for many years, although it has been somewhat clarified by some recent decisions. See, e.g., Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), John v. Baker, 982 P.2d 738 (Alaska, 1999) and In the Matter of C.R.H., 29 P.3d 849, 852-853 (Alaska 2001). Thus, the "unique circumstances" of Oklahoma and Alaska result from factors not generally present in other states that fall under P.L. 280 or similar statutes.

[4] It is also worth noting that the Senate-passed bill included "disestablished and former reservations, as well as the pre-diminishment area of diminished reservations in the definition of the term "reservation". S.Rep. 95-597, supra, at 16. Those terms were deleted from the definition of "reservation" in ICWA, 25 U.S.C. 1903(10), an additional indication that Congress intended issues relating to disestablished or diminished reservations to be dealt with through section 1918.

circumstances of tribes that might be petitioning under section 1918 for reasons having nothing to do with P.L. 280 provide a cogent explanation for the provisions in section 1918 – an explanation that fits far better with the overall intent of ICWA than does the Judge's formulation.

Another explanation for the provisions in 25 U.S.C. 1918 was rejected by the District Court as "unreasonable and without textual support" – namely the argument that the "interpretation of Public Law 280 was unsettled at the time that Congress considered ICWA" and that section 1918 was a "fail-safe provision for tribes to reassume jurisdiction if the courts found that Public Law 280 did apply to child custody proceedings." Doe v. Mann, supra, 285 F.Supp.2d at 1238. Yet, contrary to the Judge's findings in this regard, this explanation is both reasonable and has support in the legislative history and subsequent BIA regulations. For example, in a letter to the House Committee on Interior and Insular Affairs supporting ICWA, the Attorney General LaFollette of Wisconsin stated, "A primary concern is whether the tribes or the states have jurisdictional responsibility for Indian child welfare matters. The current jurisdictional uncertainty in Public Law 280 states such as Wisconsin will be eliminated by the proposed legislation." (emphasis added). 1978 House Hearings, supra, at 290. Indeed, that there was uncertainty about P.L. 280 for many years after Bryan v. Itasca County, 426 U.S. 373 (1976) is reflected by the

surfeit of litigation regarding the scope of P.L. 280 over the years. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991), cert. den., 503 U.S. 997 (1992). Moreover, in the regulations implementing the reassumption section at 25 C.F.R. 13.1(b), the Bureau of Indian Affairs stated,

> On some reservations there are disputes concerning whether certain federal statutes have subjected Indian child custody proceedings to state jurisdiction or whether any such jurisdiction conferred on a state is exclusive of tribal jurisdiction. Tribes located on those reservations may wish to exercise exclusive jurisdiction or other jurisdiction currently exercised by the state without the necessity of engaging in protracted litigation. The procedures in this part also permit such tribes to secure unquestioned exclusive, concurrent or partial jurisdiction over Indian child custody matters without relinquishing their claim that no Federal statute ever deprived them of that jurisdiction.

Thus, it is clear that there was uncertainty at the time that the ICWA was enacted about the scope of P.L. 280, notwithstanding the recent Bryan v. Itasca County decision, and it is reasonable to understand the provisions of 25 U.S.C. 1918(b) as a "fail safe" provision within that framework.

The legislative history also indicates that the District Court's reliance upon letters from Assistant Attorney General Wald and Assistant Secretary Gerard to divine Congress' legislative intent was inapposite. The judge particularly focused on some language in Assistant Attorney General Wald's letter expressing concern that "some tribes in Public Law 280 states may not

have had the administrative or judicial structures to hear child welfare proceedings." Doe v. Mann, supra, 285 F.Supp.2d at 1238. Yet, the record is clear that Congress did not simply adopt and follow the recommendations of the Executive Branch. Congressman Lagomarsino, a minority co-sponsor of the ICWA, noted that "Many suggestions of the Departments of Interior, Justice, and HEW have been included in the text ... of some 30 specific suggestions made by Justice and Interior which are contained in their letters in the committee report, 22 are now part of the bill." At the same time, however, he noted that "[t]hose not included were considered and found either unnecessary or not meritorious". 124 Cong. Rec. H12850 (October 14, 1978). Likewise, Chairman Udall, in an October 2, 1978 letter to Assistant Attorney General Wald, stated that "The Committee very carefully considered the Department's concerns set forth in your February 9 and May 23 letters, and amended the bill to meet some of the Department's objections. On other points, the Committee did not agree with your position". Id. Indeed, Cong. Udall's letter made it clear that the Department of Justice continued to be very unhappy with the bill even after these changes had been made. In the letter, he stated that he "regret(ted) 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...I[t] would be a shame and a travesty for the Department to recommend a veto." Id. Under these circumstances, relying upon letters from the Executive Branch to ascertain Congressional intent is particularly inappropriate.

In fact, in this regard, it is important to again note that Senate versions of the ICWA specifically posited exclusive tribal jurisdiction upon the existence of a tribal court. 1977 Senate Hearing, supra, at 7-8, 123 Cong. Rec. S5332-5333 (April 1, 1977), S. Rep. 95-597, supra, at 3-4 and 123 Cong. Rec. S18874-18875 (November 4, 1977). This language was deleted in the final bill. Indeed, the final version of the ICWA contains a broad definition of "tribal court" that includes "any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. 1903(12). This was clearly intended to facilitate a tribe's ability to flexibly exercise jurisdiction utilizing institutions that already existed within the tribe or could readily be established.

Finally, if Congress was so concerned about tribal capacity, there are a number of provisions in the bill that would be inexplicable. 25 U.S.C. 1911(b) enables tribes, whether or not in a P.L. 280 State and without Section 1918 reassumption, to petition a State court for the transfer of jurisdiction to a tribal court of a voluntary or involuntary foster care placement or termination of

parental rights proceeding involving an Indian child not domiciled or resident on a reservation. Under this provision, where an involuntary Indian child custody proceeding originates in a State court, a tribe in a P.L. 280 State can secure a transfer of jurisdiction and, ipso facto, acquire exclusive jurisdiction over a proceeding involving an Indian child not resident or domiciled on the reservation. This is a substantial expansion of tribal jurisdiction beyond reservation boundaries without a requirement that reassumption take place. Similarly, under 25 U.S.C. 1911(a), tribes in P.L. 280 States have exclusive jurisdiction over children who are tribal wards, without filing a reassumption petition, even if they later become potential victims of neglect or abuse outside reservation boundaries. This was also a substantial expansion of tribal jurisdiction. Prior to the enactment of this provision, Indian children outside reservation boundaries were commonly the subject of dependency and neglect proceedings in State court even if they were tribal court wards, just as non-Indian children who may be the wards of a State court are generally subject to such proceedings in another state when they leave the state where the wardship order was entered.

These provisions make no sense if Congress was so concerned about tribal capacity that, as the District Court held, it crafted the Section 1911(a) exception and section 1918 reassumption provisions in order to contract the

jurisdiction of P.L. 280 tribes over involuntary child custody proceedings involving reservation resident or domiciled children. The judge's decision leads to the illogical conclusion that Congress was more concerned with providing tribes in P.L. 280 States with an opportunity to exercise jurisdiction over child custody proceedings involving Indian children resident and domiciled off-reservation than it was with assuring that those tribes would have exclusive jurisdiction over reservation resident and domiciled Indian children. This is not only anomalous, it is wholly in conflict with the purposes of the ICWA as laid out in the legislative history and articulated in 25 U.S.C. 1901 and 1902. Nothing in the ICWA or its legislative history even hints that the distinctions and discriminations emanating from the district court's decision were considered or adopted by Congress.[5]

Finally, it is also noteworthy that both S. Rep. 95-597, supra, at 12, 37-53 and H. Rep. 95-1386, supra, at 27, noted the importance of the 1975-1976 findings and recommendations of Task Force IV of the American

[5] In 1978, as reflected by the earlier Senate version of the bill, the federal government provided child protection and related services on reservations similar to the services provided by State social services agencies. See S.Rep. 95-597, supra, at 3-4, 123 Cong.Rec. S18874-18875 (1977). These federally funded services would have undoubtedly lessened concerns over the tribal ability to exercise jurisdiction over child custody proceedings on the reservation.

Indian Policy Review Commission in shaping the ICWA. Congressman Udall also noted that the ICWA "result[ed, in part from] days of [Commission] hearings...on the subject of foster care and adoptive placement of Indian children." 124 Cong. Rec. H12848 (October 14, 1978). The findings and recommendations of Task Force IV on child custody matters drew significantly from a review of the problems experienced by Indian tribes, families and children in 19 States, including Alaska, California, Idaho, Minnesota, Oregon, Washington and Wisconsin, all P.L. 280 states, and New York and Oklahoma, both states that asserted jurisdiction over reservation Indians pursuant to other federal statutes. S.Rep. 95-597, supra, at 46-50. With respect to child custody matters, jurisdiction was the most significant focus of Task Force IV and the Commission. Id. at 44-45, 50-52. The first recommendation of Task Force IV stated that federal legislation should be enacted to "address the problems of Indian child placement," and that this legislation should affirm that the "custody of an Indian child domiciled on a reservation shall be subject to the exclusive jurisdiction of the tribal court where such exists." Id. at 52. This recommendation, adopted by the Commission in its Final Report to Congress, id. at 40, and by the Senate, id. at 12, was made with respect to all States, whether subject to P.L. 280 or not. The Commission's

recommendations, therefore, more reliably indicate the intent of ICWA's jurisdictional provisions than anything Interior or Justice had to say.

Given this background, the District Court was simply wrong to ascribe undue weight to the letters from the Departments of Interior and Justice. The legislative intent can be ascertained far more accurately by looking at how Congress responded to the concerns expressed by tribes in P.L. 280 States, members of Congress from these States, and the recommendations of the American Indian Policy Review Commission. Inherent in the district court's decision is a conclusion that notwithstanding the uniform applicability of the Congressional findings laid out in 25 U.S.C. 1901(4) and (5), Congress intended to facilitate the ability of tribes in non-P.L. 280 States to ameliorate State court and social service agency abuses through the exercise of exclusive jurisdiction over involuntary child custody proceedings involving reservation children, yet at the same time it also intended to recognize State court and social service agency jurisdiction over reservation children and families of tribes in P.L. 280 states, thereby reducing the ability of tribes in those states to ameliorate these same abuses. Congress clearly did not believe that Indian children in P.L. 280 states faced less risk of the identified State abuses. Thus, the ICWA's entire raison d'etre and history belie the district court's conclusion.

In sum, the text and legislative history of Section 1911(a) make it clear that the House intended no more than to recognize the exclusive jurisdiction of tribes established in developing case law and to maintain in regard to states the jurisdictional status quo under P.L. 280 and similar laws. This status quo had been altered in a manner designed to reduce state jurisdiction in earlier drafts of the ICWA, see p. 12-15, supra, and Congress never expressed an intent in text or legislative history that its final version of ICWA was intended to go to the opposite extreme – to effectively amend P.L. 280 to expand State jurisdiction to include civil regulatory jurisdiction over child custody proceedings, absent reassumption by affected tribes. The district court's implication of such a Congressional intent is error.

CONCLUSION

In recognizing that "no resource...is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. 1901(3), the purpose of the ICWA was to maximize tribal self-determination over decision-making involving the custody of on-reservation Indian children. This was effectuated by reaffirming the basic principle that all tribes have exclusive jurisdiction over involuntary child custody proceedings, which was the type of proceeding that, according to the Congress, see 25 U.S.C. 1901(4) and (5), most threatened the continued

existence and integrity of tribes and the well-being of Indian families and children when conducted under State jurisdiction.

The judgment of the district court should be reversed.

DATED this 1st day of June, 2004.

Respectfully submitted,

ASSOCIATION ON AMERICAN INDIAN AFFAIRS
NATIONAL INDIAN CHILD WELFARE ASSOCIATION
TANANA CHIEFS CONFERENCE

By: Bertram E. Hirsch
JT

BERTRAM E. HIRSCH
P.O. Box 220145
Great Neck, NY 11022
(718) 347-3022

JACK F. TROPE, Executive Director
Association on American Indian Affairs
966 Hungerford Drive, Suite 12B
Rockville, MD 20850
(718) 347-3022

ETHAN G. SCHUTT
General Counsel
Legal Department
Tanana Chiefs Conference, Inc.
122 First Avenue, Suite 600
Fairbanks, AK 99701-4897
(907) 452-8251

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief is in compliance with Fed. R. App. P. 29(d), 32(a)(5), and 32(a)(7) since it is written in a proportionally spaced typeface of 14 points and contains 6,519 words.

Jack F. Trope