No. 04-15477

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY DOE,
Plaintiff-Appellant,

vs.

ARTHUR MANN, in his Official Capacity, ROBERT L. CRONE, JR., in his Official Capacity, LAKE COUNTY SUPERIOR COURT JUVENILE DIVISION, MR. D, MRS. D, and DEPARTMENT OF SOCIAL SERVICES of LAKE COUNTY,
Defendants-Appellees, and

JANE DOE,
Intervenor.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF AMICUS CURIAE MORONGO BAND OF MISSION INDIANS IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		i
IDENTITY OF AMICUS AND AUTHORITY FOR FILING		1
INTRODUCTION AND SUMMARY		2
ARGUMENT		4
I.	THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT WILL COMPLICATE AND FRUSTRATE EFFORTS OF INDIAN TRIBES IN CALIFORNIA TO DEVELOP CHILD DEPENDENCY PROGRAMS TAILORED TO UNIQUE TRIBAL NEEDS AND RESOURCES	4
II.	THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT IMPROPERLY IMPOSES THE PETITION REQUIREMENTS OF SECTION 1918 OF THE ICWA	6
III.	THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT CREATES CONFUSION AND CONFLICT WITH REGARD TO ADJUDICATION OF CHILD CUSTODY PROCEEDINGS BY INDIAN TRIBES IN CALIFORNIA	10
IV.	THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT IMPAIRS THE ABILITY OF INDIAN TRIBES TO HANDLE ICWA CASES IN A MANNER ACCEPTABLE TO THE TRIBE	12
CONCLUSION		15

TABLE OF AUTHORITIES

Cases

Page

Doe v. Mann,
285 F. Supp. 2d 1229 (D.N.D. Cal. 2003) 7, 8, 9, 13

Fisher v. District Court,
424 U.S. 382 (1976) 11, 12

Mississippi Band of Choctaw Indians v. Holyfield,
490 U.S. 30 (1989) 3, 7, 9, 15

Statutes and Regulations

25 U.S.C. § 1901 et seq. 1

25 U.S.C. § 1901(3) 5

25 U.S.C. § 1902 6

25 U.S.C. § 1903(12) 12

25 U.S.C. § 1911(a) 1, 8, 11

25 U.S.C. § 1911(b) 4, 9, 11

25 U.S.C. § 1918 6

25 U.S.C. § 1918(a) 7

25 U.S.C. § 1918(b) 10

25 U.S.C. § 1918(b)(2) 13

25 U.S.C. § 1919(a) 13

25 U.S.C. § 1919(b) 14

42 U.S.C. § 5106c 5

25 C.F.R. part 13 9

25 C.F.R. § 13.12 10

67 Fed. Reg. 46327 (July 12, 2002) 1

Children's Justice Act, Pub. L. No. 99-401(Aug. 27, 1986) 1, 4

State Statutes

Cal. Welf. & Inst. Code § 10553.1 5

IDENTITY OF AMICUS AND AUTHORITY FOR FILING

The Morongo Band of Mission Indians ("Tribe" or "Morongo Tribe") is a federally recognized Indian tribe exercising jurisdiction over the Morongo Indian Reservation in Riverside County, California. According to the Bureau of Indian Affairs' most recent list of Indian tribes eligible for federal services because of their Indian status, the Tribe is one of 107 federally recognized Indian tribes in California. 67 Fed. Reg. 46327 (July 12, 2002).

The Tribe's interest derives from the fact that the District Court's ruling, if allowed to stand, will complicate and frustrate the Tribe's efforts to develop and implement a comprehensive intertribal child dependency program ("Program"). The Program includes both a social services division and a tribal court, as part of the American Indian Children's Tribal Court Program, a program sponsored in part by the State of California through funds derived from the federal Children's Justice Act, Pub. L. No. 99-401(Aug. 27, 1986). As a case of first impression, this Court's ruling will have far-reaching implications for the implementation and enforcement of the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq., in California, issues of vital interest and concern to the Morongo Band of Mission Indians.

INTRODUCTION AND SUMMARY

This case presents the question of whether the State of California has jurisdiction under Public Law 280 over child custody proceedings involving an Indian child domiciled within Indian country. The Morongo Band of Mission Indians supports the Appellant, Mary Doe, in her argument that Section 1911(a) of the ICWA provides exclusive tribal jurisdiction over such matters, and that neither Public Law 280, nor any other "existing federal law" authorizes the exercise of jurisdiction by the State. As amicus, the Tribe does not repeat those arguments here. Rather, the Tribe argues the District Court decision should be reversed for four reasons: 1) the District Court's decision, if allowed to stand, will complicate and frustrate the efforts of Indian tribes in California, such as the Morongo Band of Mission Indians, to exercise their sovereign powers over child dependency proceedings, in violation of the spirit and letter of the Indian Child Welfare Act; 2) the District Court's decision improperly imposes the petition requirements of section 1918 of the ICWA; 3) the District Court's decision creates confusion and conflict regarding Indian child custody adjudications and dependency proceedings, which should be resolved in favor of exclusive tribal jurisdiction, in accordance with the policies implemented by the Act; and 4) the District Court's

decision impairs the ability of Indian tribes to handle ICWA cases in a manner acceptable to the tribe.

From the perspective of the Morongo Band of Mission Indians, the District Court's finding of State jurisdiction contravenes a fundamental purpose of the ICWA: the strengthening of the practical capability and legal jurisdiction of Indian tribes to resolve custody proceedings involving Indian children. As the Supreme Court has acknowledged, the "provisions concerning jurisdiction over Indian child custody proceedings" are "at the heart of the ICWA." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989).

The facts of this case illustrate the problems Congress sought to address in the ICWA. The disregard of the interests of the Elem Indian Colony, which appears to border on disrespect, revealed in the state child dependency proceedings at issue here underscores the need for an interpretative approach that is faithful to the original purpose and goals of the ICWA. Moreover, the federal statutes here should be interpreted in the context of the practices of tribal communities having experience with implementing the ICWA.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT WILL COMPLICATE AND FRUSTRATE EFFORTS OF INDIAN TRIBES IN CALIFORNIA TO DEVELOP CHILD DEPENDENCY PROGRAMS TAILORED TO UNIQUE TRIBAL NEEDS AND RESOURCES.

The development of a tribal child dependency program is a powerful expression of tribal sovereignty, and one that requires a tribal government to make important decisions regarding the protection of its children. The Morongo Band of Mission Indians is one of many tribes developing culturally appropriate methods to deal with the critical issue of child dependency. With more than 100 tribes in the State of California, the Morongo Tribe's intertribal Program is one of many ways in which a tribe's responsibility toward its children and future generations is manifested.

The Program is designed to address child abuse and neglect matters that arise within the tribal lands of each tribal participant.[1] It includes a social services division as well as a tribal court exclusively for these matters. As noted, the Program is funded by the State of California through the Children's Justice Act, a federal program that provides grants to states to improve the investigation,

[1] The Program is also designed to accept the transfer of child dependency proceedings originating in a state court system involving children residing outside of Indian Country pursuant to Section 1911(b) of the ICWA.

prosecution, and judicial handling of cases of child abuse and neglect. *See* 42 U.S.C. § 5106c.

The Program has been the catalyst for the development of tribal laws designed specifically to address the issues of child protection and court procedures. Through this Program, the Tribe has developed a children's code, and a tribal court code, and is developing a series of protocols and agreements with the State and with local governments to ensure intergovernmental cooperation. The Program includes entering into an intergovernmental agreement with the State of California Department of Social Services for access to federal foster care funds. *See* Cal. Welf. & Inst. Code § 10553.1 (providing for state-tribal agreements regarding the use of federal funds for child welfare services to Indian children).

Congress, in passing the ICWA, recognized that the vitality and longevity of an Indian tribe's cultures, values, and communities depend in part on the effective protection of its children. "There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. . . ." 25 U.S.C. § 1901(3). The protection of Indian children rests largely on Indian tribes' abilities to make effective decisions regarding their welfare. This responsibility manifests in a tribe's efforts to address child custody issues in a culturally-appropriate manner that makes the best use of tribal resources. The District

Court's decision complicates and frustrates these efforts, and throws into doubt the Tribe's jurisdiction to carry out its children's dependency program. Further, the District Court's decision violates Congress' policy to "promote the stability and security of Indian tribes" by imposing processes not required by the ICWA, and by inviting more state government interference in the exercise of tribal authority over its citizens and its territory. 25 U.S.C. § 1902.

II. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT IMPROPERLY IMPOSES THE PETITION REQUIREMENTS OF SECTION 1918 OF THE ICWA.

The District Court's holding unlawfully imposes on the Tribe (and on every tribe in a P.L. 280 state), in the absence of authorizing federal law, the petition requirements of 25 U.S.C. § 1918 to reassume exclusive jurisdiction over public child custody proceedings involving Indian children residing or domiciled within Indian Country. The holding also deprives the Tribe of the ability to initiate its own such proceedings without the threat of State interference contrary to the Indian Child Welfare Act. Congress provided a remedy and a mechanism through Sections 1918 and 1919 of the ICWA by which an Indian tribe without the means to address child custody issues within its exclusive jurisdiction may retrocede all or some of its jurisdiction or authorize a state government or another Indian tribe to exercise such jurisdiction. Therefore, the District Court's ruling with respect to

exclusive jurisdiction seriously undermines future and existing tribal dependency programs the Indian Child Welfare Act was designed to encourage and protect.

Acknowledging that P.L. 280's grant of state jurisdiction over private civil litigation matters did not include California's child dependency proceedings, the District Court nevertheless held that limiting P.L. 280 in that way would render sections of the ICWA "illogical," and undermined the ICWA's "statutory scheme." *Doe v. Mann*, 285 F. Supp. 2d 1229, 1237 (D.N.D. Cal. 2003). This ruling is contrary to the Supreme Court's ruling in *Holyfield.* In that case, the Court acknowledged "the centrality of the exclusive jurisdiction provision to the overall scheme of the ICWA." 490 U.S. at 41 (emphasis added). The Court noted: "In enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States." *Id.* at 42 (emphasis added). Exclusive tribal jurisdiction was part and parcel of the ICWA's purpose of protecting 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." *Id.* at 37 (citation omitted).

Section 1918 provides:

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of [Public Law 280], or pursuant to any other Federal law, 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 for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

25 U.S.C. § 1918(a).[2] Rather than interpret this provision in light of the overall purpose and policy behind the Act, and the admittedly limited scope of P.L. 280, the District Court held that the Elem Indian Colony did not have exclusive jurisdiction "unless plaintiff can demonstrate that the Elem Indian Colony has reassumed jurisdiction over child custody proceedings pursuant to Section 1918 of ICWA." 285 F. Supp. 2d at 1239. Thus, the District Court imposed the provisions of Section 1918 on any tribe (located in a P.L. 280 state) that intends to exercise exclusive jurisdiction over <u>any</u> child custody proceeding, rather than the limited number covered under P.L. 280.

The District Court's holding in improperly expanding the scope of Section 1918 would require the Morongo Tribe, and any other tribe participating in the intertribal Program, to petition the Secretary of the Interior to reassume jurisdiction. As part of its petition, the Tribe would have to submit a comprehensive plan containing the service area and statistics, the provision of services, any funding sources, and tribal membership requirements, among other

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[2] By excluding a similar reference to P.L. 280 from Section 1911(a), Congress manifested its intent to ensure that tribes in all states exercise exclusive jurisdiction in the absence of some <u>other</u> law. The District Court failed to identify any other basis in federal law as to why exclusive jurisdiction does not exist.

requirements. 25 U.S.C. § 1918(b); *see also* 25 C.F.R. part 13 (regulations implementing Section 1918). Under a proper interpretation of P.L. 280, these provisions should cover only private child custody proceedings involving reservation domiciliaries. By requiring a tribe to submit a petition subject to the federal administrative process, the District Court has, without support in law or fact, subjected the Tribe to requirements not mandated by any reasonable interpretation of the ICWA.

Moreover, the District Court's finding that "[r]equring tribes to petition the Secretary of the Interior for reassumption over the few child custody proceedings that could be understood as private civil actions, such as private adoptions, is illogical if the tribes already have jurisdiction over most of the more difficult and resource-intensive involuntary proceedings. . . ." is based on a misunderstanding of the ICWA's effect on such private civil actions. 285 F. Supp. 2d at 1238. In *Holyfield*, the Supreme Court held that ICWA applied to voluntary adoptions, and vacated an adoption order issued in state court. 490 U.S. at 53. The implication is important, and was the subject of Justice Stevens' dissent: a parent's choice of forum and the manner in which he or she may voluntarily relinquish parental rights is subverted by the ICWA. Ensuring that a tribe in a P.L. 280 state satisfies certain requirements, however paternalistic and intrusive those requirements may

be, is no doubt within Congress' power, and within its contemplation in passing a federal law that mandates where tribal domiciliaries initiate private adoption proceedings. Under P.L. 280, both state and tribal forums are available to Indian Country residents who wish to initiate private child custody proceedings covered by the ICWA. There is nothing "illogical" about limiting the petitioning process of Section 1918 to private civil actions in P.L. 280 states when viewed in the context of the effect of exclusive tribal jurisdiction over such actions.[3]

The District Court's decision is thus inconsistent with the ICWA and places an undue burden on tribes' efforts, like those of the Morongo Tribe, to address child welfare issues within tribal communities.

III. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT CREATES CONFUSION AND CONFLICT WITH REGARD TO ADJUDICATION OF CHILD CUSTODY PROCEEDINGS BY INDIAN TRIBES IN CALIFORNIA.

The District Court's decision authorizes the State to initiate its own child dependency proceedings involving an Indian child living in Indian Country even if

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[3] The Tribe also notes that Section 1918(b) is silent on whether a tribe must include a plan for providing social services for children removed from parental custody in its petition. Rather, the regulations promulgated under that section require petitioning tribes to address the sufficiency of social services. 25 C.F.R. § 13.12. Therefore, Section 1918(b) is not specific to involuntary child custody proceedings, and is flexible enough to accommodate circumstances where a tribe does not possess exclusive jurisdiction over all child custody proceedings arising in Indian Country.

proceedings are pending within the child's tribe. The ICWA does not resolve this type of jurisdictional conflict, except where the transfer procedures of Section 1911(b) apply, which generally apply to proceedings involving an Indian child domiciled outside of Indian Country. 25 U.S.C. § 1911(b).

That section provides that the state court shall transfer the matter to a tribal court "absent good cause to the contrary" and "absent objection by either parent." *Id.* A state court's determination of "good cause" is unnecessary if the tribe possesses exclusive jurisdiction. If permitted to stand, the District Court's decision would render Section 1911(a) superfluous, and would improperly expose tribal programs to the transfer provisions of Section 1911(b) when to matters over which a tribe should exercise exclusive jurisdiction.

In a case decided before the ICWA, the Supreme Court held that the Northern Cheyenne Tribe had exclusive jurisdiction over an adoption proceeding arising on the Northern Cheyenne reservation. *Fisher v. District Court*, 424 U.S. 382 (1976). In that case, the Northern Cheyenne tribal court had found that the mother of the minor child involved had neglected him, awarded temporary custody to another tribal member, and declared the minor a ward of the court. *Id.* at 383. Shortly before the tribal court entered an order awarding the mother temporary custody for a short period, the foster parents brought an adoption proceeding in

state court. *Id.* at 383-84. In finding that the Northern Cheyenne Tribe possessed exclusive jurisdiction, the Court stated "[s]tate-court jurisdiction plainly would interfere with the powers of self-government" and "would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court." *Id.* at 387-88. These principals apply here as well. The District Court's decision invites this same type of conflict in child dependency proceedings, which can cause substantial confusion and delay in protecting an Indian child.. That unsatisfactory result can be avoided by reversing the District Court's decision and affirming tribal jurisdiction.

IV. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT IMPAIRS THE ABILITY OF INDIAN TRIBES TO HANDLE ICWA CASES IN A MANNER ACCEPTABLE TO THE TRIBE

In the ICWA, Congress envisioned that Indian tribes would exercise their governmental responsibilities through judicial or administrative bodies "vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (defining "tribal court"). "Tribal Court" is defined specifically to include administrative bodies. For a small Indian tribe, an administrative body may be adequate to resolve the few cases that may arise within its territory. An intertribal effort, however, may require greater infrastructure and resources to address cultural and

governmental differences among the participating tribes.[4] Some tribes, however, for practical or financial reasons may not be in a position to handle child dependency matters. The ICWA provides a mechanism for these tribes to resolve this issue through either the retrocession provisions of Section 1918(b)(2) or through an intergovernmental agreement pursuant to Section 1919 with a state or another tribe.

Section 1918(b)(2) authorizes the Secretary of the Interior to "accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section [1911(b)] . . . ." 25 U.S.C. § 1918(b)(2). Therefore, Congress has authorized the delegation of tribal authority to states by way of secretarial approval. This option would enable tribes without adequate resources to authorize the state to initiate child dependency proceedings arising in Indian Country.

Another option authorizes tribes and states to resolve jurisdictional issues by agreement. Section 1919(a) provides: "States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings . . . ." 25 U.S.C. § 1919(a) (emphasis added). Through this language, Congress has authorized a tribe

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[4] The District Court's statement that the responsibilities of exclusive jurisdiction are "resource-intensive" and "difficult" assumes a great deal about a tribe's ability to effectively manage tribal resources to accommodate a tribal child dependency system. 285 F. Supp. 2d at 1238.

to delegate its jurisdictional authority to another state or tribe.[5] Either party may revoke these agreements with 180 days written notice. *Id.* § 1919(b). Typically, this provision becomes more relevant when tribes seek access to federal foster care funds or other funds available for social services. However, the creation of intertribal programs, or the creation of negotiated tribal-state partnerships can provide effective tools for addressing child dependency issues.

By including these two options, Congress provided tribes unable to exercise exclusive jurisdiction with a means to authorize another government to resolve child dependency issues within tribal lands in a manner acceptable to the Tribe. The ICWA provides ways for P.L. 280 tribes lacking formal courts or administrative systems for determining child dependency matters to nonetheless address child dependency concerns. By upholding state court jurisdiction, the District Court's decision in practical and legal effect eliminates these ways for tribes to address child custody matters. States have little incentive to enter into agreements if they are deemed to have such jurisdiction in the absence of an agreement.

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[5] For example, the tribal participants in the Program may delegate their jurisdictional authority to allow the Program to preside over child dependency proceedings involving members of those tribes.

CONCLUSION

"Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA." *Holyfield*, 490 U.S. at 41. The ICWA confirmed those powers tribes already possessed, which could not be divested without an explicit statement from Congress. The District Court's decision unlawfully interferes with the Tribe's efforts to exercise that authority and invites additional state incursion into a paramount act of tribal self-governance. For the foregoing reasons, the District Court's decision should be reversed.

Respectfully submitted,

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Dated: June 8, 2004

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,189 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14 point Times New Roman.

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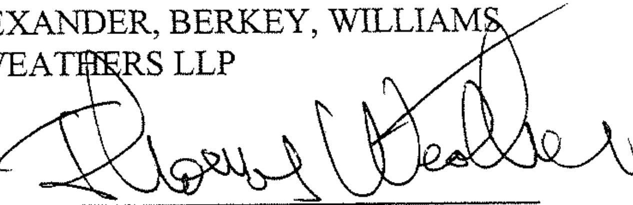

Dated: June 8, 2004

By:________________________
Thomas Weathers

DECLARATION OF SERVICE BY U.S. MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is 2000 Center St., Suite 308, Berkeley, California, 94704.

On June 8, 2004, I caused to be served the following document(s) in Mary Doe v. Arthur Mann, et al., Docket No. 04-15477:

1) **BRIEF OF AMICUS CURIAE MORONGO BAND OF MISSION INDIANS IN SUPPORT OF APPELLANT**

by depositing a copy in the United States mail at Berkeley, California, in an envelope with first class postage fully paid, addressed as follows:

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On June 8, 2004, I caused to be filed an original and fifteen copies of the above-entitled brief with the Clerk of the Court, Ninth Circuit Court of Appeals, via same day Courier, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on June 8, 2004, at Berkeley, California.

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Martha Morales