No. 04-15477

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY DOE,
Plaintiff and Appellant,

v.

JOHN DOE, 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

DEFENDANT-APPELLEE'S RESPONDING BRIEF

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JURISDICTIONAL STATEMENT

Appellee contends that this court should not find subject matter jurisdiction as lower federal courts typically lack subject matter jurisdiction to review state court decisions. (*Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983).) Further the doctrines of res judicata and collateral estoppel justify this court finding that Appellant is barred from establishing subject matter jurisdiction. Appellant and her tribe, the Elem Indian Colony ("Tribe"), while appearing in the state court proceedings, never appealed any decision of the Juvenile Court. Federal District courts should have no authority to review final state court judgments, even when federal constitutional issues are raised where the litigant failed to raise the federal claims in the state court tribunals. (*Id.*, 484-486.)

STATEMENT OF THE ISSUE

Did Appellant's Tribe, having no internal infrastructure, "tribal court" or administrative body capable of shielding and protecting Indian children on its reservation from child abuse and sexual molestation, have "exclusive jurisdiction" over Jane Doe and the State of California Juvenile Dependency proceedings, despite the fact that Public Law 280 ("PL 280), codified at 28 U.S.C. §1360 and 18 U.S.C. §1162, expressly grants jurisdiction over civil matters between Indians or to which

they are parties, that arise in all areas of Indian country in the State of California, to the State of California?

STATEMENT OF THE CASE

Jane Doe is an Indian child, who was abandoned by her mother to live with relatives on the Tribe's reservation where she was again repeatedly sexually assaulted and abused. The Tribe had no internal infrastructure, Tribal Court or Tribunal that could adequately protect her or any child from ongoing child abuse. As a result, Appellant solicited the help of the Lake County Department of Social Services, Family Services Division ("Department") to protect Jane. Based upon Appellant's history of substance abuse, having abandoned her daughter to abusive relatives and the minor being sexually abused, the Department removed the minor from the abuse through a California Welf. & Inst. Code §300 proceeding which commenced on June 14, 1999.

Appellant participated in the state court proceedings as did her Tribe after it intervened in the Juvenile Court proceedings. At no time during the state court proceedings did Appellant or her Tribe assert that the Tribe had exclusive jurisdiction, seek to transfer the case to any tribal forum, or challenge the state court's jurisdiction. Nor did the Tribe have or offer any viable alternative placement options at the critical stages of the juvenile proceedings to that of the initial foster care placement. On February 16, 2001, the Juvenile Court terminated Appellant's parental

rights after she failed to engage in services, contact the Department, visit her child, or successfully reunify with her. At no time did Appellant or the Tribe appeal any of the state court proceedings. On September 28, 2001, in a separate state court proceeding, Mr. & Mrs. D. adopted Jane. No appeal was ever taken as to the state court adoption by Appellant or her Tribe.

On July 18, 2002, Appellant, not her Tribe, filed this current federal action. On November 18, 2002, the Department's motion to dismiss was heard along with a similar motion brought by the other Appellees. On September 30, 2003, the District Court granted parts of the motions to dismiss, finding that the Superior Court of the State of California was not divested of jurisdiction, that the Tribe did not have exclusive jurisdiction, that the Tribe had no tribal court and that the Tribe had not "reassumed" jurisdiction pursuant to the Indian Child Welfare Act ("ICWA") section 1918. The District Court further invited Appellant or her Tribe to come forth "within 30 days and produce evidence that the Elem Indian Colony reassumed jurisdiction over child custody proceedings pursuant to ICWA section 1918." Neither Appellant or the Tribe were able to bring forth any such evidence. The matter was subsequently stayed for various reasons. On January 22, 2004, the District Court granted Appellant's motion certifying this issue regarding state court jurisdiction for immediate appellate review, and the within appeal ensued shortly thereafter.

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STATEMENT OF FACTS

The minor, "Jane Doe", was born on May 18, 1992, and is now 12 years old. Since she was 7 years old, Jane has lived in the home of her adoptive parents, "Mr. D. & Mrs. D." Mrs. D. is a Native American Indian. (SER 55,72,84.)

Prior to coming under the protection of the Department, Jane's biological mother, Mary Doe, already had a history of substance abuse which extended a number of years. (SER 67,55.) The mother had a history of dropping Jane and her siblings off with relatives and not returning for days. Relatives reported that when Jane and her siblings were dropped off, they were dirty and appeared malnourished. (SER 67,55.) In the Spring of 1998, Jane was sexually molested by her mother's boyfriend. After the molestation by the mother's boyfriend, Mary Doe dropped Jane off with relatives and told them that she did not want anything to do with the minor. (SER 67,55.) The minor was then 6 years old and had hickeys on her neck, scabies in her vaginal area, and some vaginal bleeding and clotting. (SER 67,55.) On June 9, 1999, the minor disclosed additional ongoing sexual abuse by a cousin that she was living with at a different relatives home, that of her grandmother. (SER 68,55.)

It was Appellant who contacted the Department for assistance. (AOB 7.) The minor had not been living with her for several months. (SER 68,55.) The Department did not want to leave the minor with Appellant due to her substance abuse and as they believed she had failed to protect the minor in the first place by

leaving her in such a bad environment. (SER 67-68.) Appellant even acknowledged that she knew the molesting juvenile cousin had previously tried to kill another person in that very same home in which she left Jane to live. When Appellant was asked why she didn't just take her daughter from the abusive living situation she had left her in for months, she responded because "those people get violent." (SER 67.) When the minor was asked if she would like to go live with her mother, she stated "no," that she was afraid of her mother. (SER 68.)

So on June 9, 1999, the Department did remove the minor from her grandmother's and cousin's home on the Elem Indian reservation and placed her with Mr. & Mrs. D, where she remained and became their adopted child on September 28, 2001. (SER 55,42.) Once the minor was with Mr. & Mrs. D., among other things, she had her first dentist appointment. Jane had nine cavities and subsequently had two root canals and many fillings. (SER 56.) Prior to the adoption, the case went through the California Juvenile Dependency system. (SER 30.) While Appellant was not at the initial Detention hearing on June 14, 1999, nor the Jurisdiction hearing on July 6, 1999, she had been sent several notices, including one for the initial Disposition hearing that was set for August 9, 1999. (SER 7,81,86.)

Like all previous notices, the notices were sent to Appellant's last know address. (SER 7.) Early on the Tribe was also notified of their right to intervene in the matter. (SER 80.) Appellant appeared at the August 9, 1999 Disposition hearing

and the matter was continued in open court to September 13, 1999. Although Mary was ordered to appear on that date, she did not. (SER 90,92.) Also on August 9, 1999, Appellant had one visit with her daughter and then again disappeared from her life. (SER 57,84.) Between August 9, 1999 and the next Six Month Review Hearing on March 27, 2000, Appellant did not exercise any of her scheduled visitation rights. Appellant may have seen her daughter one time at a family funeral in October of 1999. (SER 57,84.)

After terminating reunification services to Appellant, the Superior Court set the matter for a Permanency Planning Hearing. (SER 87.) Notice was mailed to Appellant's attorney of record and published. (SER 7,34.) After several continuances, the matter was heard on December 11, 2000. (SER 7.) The Appellant was present at that contested permanency planning hearing as well as on its continuation date of February 1, 2001, at which time the matter was continued to February 16, 2001. (SER 7.) On February 16, 2001, Appellant was not present. At that hearing, the court took more evidence and made its ruling terminating her parental rights. (SER 34,106.)

With respect to the Tribe, during the early phases of the case, the Department looked to the Tribe for a suitable placement with a relative or another member of the Tribe. Those efforts were unsuccessful. (SER 71-74.) Also during the time period in which Appellant was extended to try and reunify with her daughter, the Tribe also

did not participate in the process until the final proceedings regarding the termination of parental rights. (SER 71-74.) At the hearing on October 30, 2000, the Tribe intervened and appeared for the first time with counsel, and sought placement with a relative. (SER 101.) After numerous continuances and permanency hearings, to avoid disrupting the minor's stable living situation, on February 16, 2001, the court found the permissible "good cause" basis provided for in the ICWA to not disrupt the child's secure placement with Mr. & Mrs. D., and terminated Appellant's parental rights. (SER 34,72-74.)

Despite being present at various hearings during the Juvenile Dependency Court process, at no time did Appellant or her Tribe appeal directly or by way of extraordinary writ, any ruling made by the Superior Court, or challenge the State of California's jurisdiction. (SER 30.) Additionally, at no time during the proceedings in the Superior Court did Appellant or her tribe seek to remove the proceedings to a "Tribal Court" or other administrative body established to protect abused Indian children, as there was no "tribal court" or such administrative body in existence to which the matter could have been transferred. (SER 30,ER 33-34.)

The Federal District Court even provided Appellant time to establish the existence of a tribal court which she could not do. (ER 34.) Additionally, no appeal or challenge was ever taken as to the private adoption of the minor by Mr. & Mrs. D., which was finalized on September 28, 2001. (SER 30.) Appellant

waited over a year and a half from February 16, 2001, the date her parental rights were terminated, to even file her current Federal action on July 18, 2002. (SER 7.)

SUMMARY OF ARGUMENT

Public Law 280, the civil component codified at 28 U.S.C. 1360, reserves in a few specifically identified states, California being one of them, civil jurisdiction over "civil" matters occurring on tribal reservations. The reason Congress reserved jurisdiction in these select PL 280 states was due to their lack of internal resources and infrastructure to resolve criminal and civil matters internally. With that law in mind, when Congress enacted the ICWA, it granted all tribes, except those within PL 280 states, exclusive jurisdiction over child welfare matters relating to children residing on their reservation. As to the tribes within PL 280 states, Congress expressly excluded them from its broad grant of exclusive jurisdiction. With respect to the PL 280 tribes, Congress established a procedure whereby any PL 280 tribe could still obtain exclusive jurisdiction, but only upon the approval of a petition to the Secretary of the Interior ("Secretary") establishing that the tribe did in fact have adequate resources, infrastructure and tribal court to reassume jurisdiction over child welfare matters occurring on their reservations.

The Department rejects Appellant's contention that PL 280 does not apply to child abuse occurring on tribal reservations as she wrongly asserts that the state's prohibiting child abuse is a form of regulating parenting, and therefore not reserved

to the state's by PL 280. However, the focus is not on "parenting," but on child abuse. Child abuse is not a regulated activity anywhere in the State of California. Child abuse is not reserved for Indian tribes or anyone. Unlike bingo, the activity of child abuse is not permitted anywhere in the entire United States. While bingo, taxing, hunting and commerce are things which lend themselves to regulation, there is no permissible form of child abuse. Appellant's entire "regulatory" analysis is inapplicable to child abuse. The state's statutory child welfare and protection laws do not impermissibly intrude into limited tribal sovereignty. Tribal sovereignty can be limited by Congress, which it did in enacting the ICWA and depriving PL 280 state tribes of having exclusive jurisdiction unless granted by the Secretary. Congress' grant of authority to the State of California by virtue of PL 280 gave California the express right to involve itself in child welfare matters occurring on Indian reservations within the state. As such, there is no need to subject this Congressionally sanctioned state intrusion into Indian affairs to the "regulatory/prohibitory" analysis as Appellant has. That analysis has only been used and is only necessary to review independent state laws regulating activities on reservations that Congress has not clearly granted the state to regulate, and which in fact may remain within their limited sovereignty.

As a fundamental prerequisite for any PL 280 tribe to obtain exclusive jurisdiction, that tribe must have a tribal court. The ICWA and common sense

require that before a PL 280 tribe could reassume exclusive jurisdiction, it must have a bona fide tribal court. Appellant's tribe has no tribal court or internal mechanism to prevent child abuse. If it did, Appellant would never had to have resorted to calling the Department, but would have used her own internal tribal resources and placement options. As no adequate internal tribal resources existed, Appellant and her tribe acquiesced to the services and placement made by the Department.

ARGUMENT

1. APELLANT NOR HER TRIBE CAN ESTABLISH THE CONDITION PRECEDENT TO IT HAVING ANY FORM OF JURISDICTION, THAT BEING THE EXISTENCE OF A "TRIBAL COURT."

Appellant's Tribe has no Tribal Court or administrative body vested with authority over child custody proceedings, or any form of infrastructure necessary for the protection of Indian children living on a reservation from child abuse. (ER 33-34, 38.) In order for a tribe to even have an opportunity to establish any form of jurisdiction, be it concurrent or exclusive within the State of California, and before even receiving the requisite authority from the Federal government through the Secretary, the California tribe would need to have a "tribal court." The Indian Child Welfare Act, 25 *U.S.C.* §§1901 et. seq., enacted by Public Law 95-608 on November 8, 1978, sets forth the definition of "tribal court." ICWA section §1903 (12) states:

> "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. [(hereinafter, "tribal court".)]

The District Court noted that Appellant "does not contend that an Elem Indian Colony tribal court or other quasi-judicial body exists to hear this case." (ER 33.) The District Court further ruled that unless Appellant "can demonstrate that the Elem Indian Colony has reassumed jurisdiction over child custody proceedings pursuant to section 1918 of ICWA, the court finds as a matter of law that plaintiff cannot state a claim for exclusive jurisdiction by the tribe." (ER 34.) The District Court even invited Appellant to produce evidence within thirty days that her Tribe had reassumed jurisdiction by having a tribal court or other quasi-judicial body. (ER 38.)

Appellant's Tribe has no Tribal Court and had such a "judicial" body, official or quasi-judicial body existed, Appellant could have easily made a basic threshold showing at the early pleading stage of the proceedings. Appellant still attempts to avoid the issue all together by focusing on theoretical and academic questions. Appellant had only one response to the District Court's conclusion that her Tribe did not have any form of tribal court. Appellant's position to this conclusion is: "Such a conclusion is not only factually but legally inconsequential under ICWA." (AOB 53.) Even Appellant's Tribe's constitution and by-laws are devoid of any specific provisions or procedures on how it could or would remove, place or protect children

suffering child abuse on its reservation. (http://www.elemnation.com/bylaws.html.)

The strongest provisions related to its powers are:

> (g) To promulgate and enforce ordinances, consistent with this constitution and bylaws and federal law, governing initial and future enrollment for membership, loss of membership, adoption of members; the use of tribal land and assets; the conduct of elections; the manner of making, holding and revoking assignments of tribal land or interests therein; the licensing of non- members coming on the Rancheria for purposes of hunting, fishing, trading or other business; and all other necessary ordinances....
> (i) To take such actions as are necessary to carry into effect any of the foregoing powers.

The Tribe's governing board deals with "membership" and its property, not child custody matters.

A. There are Five Provisions within ICWA Regarding Tribal Acquisition and Exercise of Jurisdiction.

The ICWA sets up five basic provisions regarding tribes participation and exercise of jurisdiction in Indian child custody proceedings that must be considered along with the definition of tribal court before one can even begin to analyze the question of "exclusive jurisdiction." These provisions are set forth in sections 1911, 1918 and 1919 of the ICWA.

The first provision relates to an express grant of exclusive jurisdiction to tribes in most of the states within the United States where the tribes' jurisdiction has not been restricted by Public Law 280, codified in 28 U.S.C. 1360 and 18 U.S.C. 1162 ("PL 280"). However, tribes within California, such as Appellant's Tribe, are covered by PL 280, and therefore do not have exclusive jurisdiction. The phrase set

forth below in ICWA section 1911(a) "except where such jurisdiction is otherwise vested in the State by existing Federal law" is a reference to PL 280. (*Mississippi Band of Choctaw Indians v. Holyfield* , 490 U.S. 30, 41, ftn. 16 (1989).) As there is no other federal statute that expressly reserves jurisdiction away from tribes and reserves it to the states, PL 280 is the intended reference and explicit grant of reserved jurisdiction in the State of California. Accordingly, the first process is provided for in ICWA section 1911(a), which reads as follows:

> (a) 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**. 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. (*Id.*)(emphasis added.)

The second provision regards a transfer of custody proceedings to a tribal court in those situations where the child was not domiciled or residing with the reservation of the Indian child's tribe. However, implicit within this process is the prerequisite that a tribal court actually exists to which the custody proceeding can be transferred. This second procedure is provided for in ICWA section 1911(b), as follows:

> (b) Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that

> such transfer shall be subject to declination by the tribal court of such tribe. (*Id.*)

Additionally, this procedure does not grant exclusive jurisdiction to any tribal court, be it in a PL 280 state or not, as there is a "good cause" exception reserved to the state courts not to transfer such cases.

A third process allows for a tribe to intervene in the state court proceedings, this would appear to apply to PL 280 states where there is no tribal court with exclusive jurisdiction or to non-PL 280 states that have not exercised their exclusive jurisdiction or did not have exclusive jurisdiction due to where the child resided at the time the custody dispute arose. This third procedure is set forth in ICWA section 1911(c), which reads as follows:

> (c) State court proceedings; intervention. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding. (*Id.*)

The fourth process is set forth in ICWA section 1918, which appears to have been Congress' way to address the concerns of the United States Attorney General's Office regarding tribes within states where the tribes lacked an adequate infrastructure to protect their own members from civil and criminal "lawlessness." This forth procedure provided a mechanism to extend the possibility for tribes in PL 280 states to actually reassume jurisdiction that would have otherwise been precluded had Congress enacted a wholesale deprivation of jurisdiction to all tribes within PL

280 states. This fourth process is a mechanism that allows tribes in PL 280 states to assume jurisdiction after the Secretary makes a determination that the requesting tribe has an adequate infrastructure in place to actually protect its own members from internal criminal and civil abuses and wrongdoings. Section 1918 of the ICWA states:

> Reassumption of jurisdiction over child custody proceedings.
>
> (a) Petition; suitable plan; approval by Secretary. Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), 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.**
> (b) Criteria applicable to consideration by Secretary; partial retrocession.
> (1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things...:
> (iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.
> (2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act [25 USCS § 1911(a)] are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act [25 USCS § 1911(b)], or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) [25 USCS § 1911(a)] over limited community or geographic areas without regard for the reservation status of the area affected.
> (c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval. **If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval.** The Indian

> tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval....
> [25 USCS § 1918]. (*Id.*)[emphasis added.]

Appellant also concedes the initial reference in subsection (a) of ICWA section 1918 is to PL 280. (AOB 47, ftn.16.) This subsection could correctly be read to state in more simple terms: Any PL 280 tribe may reassume jurisdiction over child custody proceedings if it submits a suitable plan to exercise such jurisdiction that is approved by the Secretary of the Interior. (*Id.*)

In subsection (b)(2) of ICWA section 1918, Congress provided a mechanism for even those PL 280 tribes that did not have the infrastructure or resources to reassume complete and exclusive jurisdiction as provided for and specifically referenced to in ICWA section 1911(a), to petition to partially reassume jurisdiction over a limited portion of their tribal grounds.

Subsection (c) of ICWA section 1918 goes on to require the Secretary to publish in the Federal Register and to also notify any affected state of the granting of such a petition. In those cases where the petition and safeguards are inadequate to protect the Indian members of a PL 280 tribe, the Secretary is required to provide technical assistance to such tribe.

A fifth and more informal arrangement is also provided for tribes in general to enter into agreements with state agencies for the purpose of exercising limited, exclusive or shared jurisdiction or involvement in custody proceedings. Such agreements would allow tribes in PL 280 states to enter into agreements with local state protective service agencies to obtain and exercise some of the jurisdiction reserved in the states. ICWA section 1919 provides:

> Agreements between States and Indian tribes
> (a) Subject coverage. 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, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes....

With respect to ICWA §1919, California has enacted *Welf. & Inst. Code* §§10553.1 & 306. *Welf. & Inst. Code* §10553.1 provides the implementation method for agreements referred to in ICWA §1919. *Welf. & Inst. Code* §306 even makes provision for an Indian representative to act in the same capacity as state social workers.

The very fact that the ICWA provides a procedure for tribes to intervene, transfer, reassume or enter into agreements regarding jurisdiction, confirms Congress' recognition that not all tribes have "tribal courts," do not have exclusive jurisdiction and lack adequate infrastructures to handle child custody matters.

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B. Components of Bona Fide Tribal Courts.

Appellant's characterization of the question as to whether or not her Tribe had a tribal court as being "irrelevant" is tantamount to an admission that her tribe has no tribal court. As the Tribe had no court of any kind, the hypothetical question of "if" it had a court vested or with jurisdiction over child custody proceedings is moot. Notwithstanding the fact Appellant's tribe had no tribal court and did not comply with any federal requirements to reassume jurisdiction or establish a bona fide tribal court, in looking at the other components of the definition of tribal court, Appellant's Tribe does not appear to satisfy any of them.

The requirement imposed by the ICWA for those tribes which do in fact have a tribal court capable of adjudicating and enforcing its orders and decisions, is that such a court must be either a "Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." (ICWA §1903(12).) A Court of Indian Offenses (also known as a "Code of Federal Regulations Court") is defined in 25 C.F.R. §§11.100 et. seq., which establishes for certain identified tribes in Indian country (as defined in 18 *U.S.C.* 1151), a Court of Indian Offenses. The Tribe is not one of those enumerated in the Code of Federal Regulations, although there is a tribe from the State of Washington, and a few from the State of California expressly limited to enforcing fishing regulations. Again,

Appellant's Tribe is not one of them. 25 *C.F.R.* §11.100(b) sets forth the purpose of the regulations as follows:

> (b) It is the purpose of the regulations in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction.

Subsection (c) of 25 *C.F.R.* §11.100 verifies that for tribes establishing a "law and order code," elect to have such a law and order code "tribal court," the tribe must file its enacting and authorizing documents with the Assistant Secretary of Indian Affairs. Subsection (c) provides:

> The regulations in this part shall continue to apply to tribes listed under §11.100(a) until a law and order code which includes the establishment of a court system has been adopted by the tribe in accordance with its constitution and by-laws or other governing documents, has become effective, **and the Assistant Secretary -- Indian Affairs or his or her designee has received a valid tribal enactment identifying the effective date of the code's implementation**, and the name of the tribe has been deleted from the listing of Courts of Indian Offenses under §11.100(a). (*Id.*)

There are some additional authorities that seem to indicate that approval of some type or minimum filing requirements with some branch of the United States government are required for a non-Code of Offenses Tribal Court. (See: Barsh & Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 Law & Contemp Prob 25 (1976); Stacy L. Leeds, 311 *Cross-*

Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective, 76 N. Dak. L. Rev. 311 (2000).

Appellant however has a completely different view. Appellant's approach is similar to her failure or attempt to exhaust any of her state court remedies. Appellant's position is simply that her Tribe is completely sovereign, that it does not need to have ever petitioned or received any form of approval from the Secretary, or have any form of infrastructure, plan or "court system" to protect its members from child abuse. Appellant's assertion that her Tribe has exclusive jurisdiction and that she doesn't need to establish that it has any form of credible child welfare and custody procedures or tribal court is unfounded. Appellant's groundless assertion essentially is that if her Tribe merely has a "form of consortiums or other communal entities that will enable the tribes to personally serve their member's needs rather than relinquishing responsibility to the states," that such quixotic forums would be sufficient. (AOB 52.)

In fact, it was the complete lack of an internal infrastructure that allowed Jane to be abused for many years prior to the Department coming to her rescue. Prior to the Department's involvement, relatives and the Tribe allowed her to be shuttled from relative to relative, to be dirty and malnourished, for her teeth to rot, and to be sexually abused and traumatized. Jane Doe was never a "ward of a tribal court," and if she was as Appellant somewhat claims, the type of protection and treatment she

received while a ward of her Tribe is the exact reason that Congress did not globally grant exclusive jurisdiction to tribes in PL 280 states and required the Secretary to very the adequacy of their plans for intervention.

2. CALIFORNIA IS A PUBLIC LAW 280 STATE AND THEREFORE THE STATE, NOT THE TRIBE, HAS JURISDICTION OVER CHILD ABUSE AND CHILD CUSTODY MATTERS.

A. Child Abuse is a Civil Matter Covered by PL 280.

While Congress was trying to extend jurisdiction and bolster the legitimacy of tribal governments, Congress also recognized that tribes within some states lacked the requisite resources and internal infrastructure to adequately protect their own members. There was a sense of "lawlessness" created in the absence of a strong internal infrastructure to enforce criminal laws and to protect basic civil rights within tribes within certain states. California was one of those states that Congress deemed that the tribes within this state, by and large, lacked the requisite infrastructure to protect its members.

In any statutory scheme, laws tend to fit within two broad classes, being either criminal or civil in nature. As a result, Public Law 280 is codified in two places, 28 U.S.C. 1360 and 18 U.S.C. 1162, which respectively read as follows in pertinent parts:

> § 1360. State civil jurisdiction in actions to which Indians are parties
>
> (a) Each of the States listed in the following table **shall have jurisdiction over civil causes of action between Indians or to which**

Indians are parties which arise in the areas of Indian country listed opposite the name of the State 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:

State of	Indian country affected
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. (*Id.*) (emphasis added.)

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or

Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of — Indian country affected

Alaska..... All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

California..... All Indian country within the State.

Minnesota..... All Indian country within the State, except the Red Lake Reservation.

Nebraska..... All Indian country within the State.

Oregon..... All Indian country within the State, except the Warm Springs Reservation.

Wisconsin..... All Indian country within the State.... (*Id.*)

Public Law 280 is the only statute Appellee could find that would limit a tribe's jurisdiction and is in fact the statute referred to in ICWA §1911.

ICWA §1911(a) in its grant of exclusive jurisdiction to tribes in most states, expressly reserved jurisdiction in California and other PL 280 states. The language in ICWA §1911(a) "except where such jurisdiction is otherwise vested in the State by existing Federal law" is a reference to PL 280. The United States Supreme Court in the case of *Mississippi Band of Choctaw Indians v. Holyfield*, *supra*, noted this as well. The Court stated:

> Section 1911(a) does not apply "where such jurisdiction is otherwise vested in the State by existing Federal law." **This proviso would**

> **appear to refer to Pub. L. 280, 67 Stat. 588, as amended, which allows States under certain conditions to assume civil and criminal jurisdiction on the reservations.** Title 25 U. S. C. § 1918 permits a tribe in that situation to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior. The State of Mississippi has never asserted jurisdiction over the Choctaw Reservation under Public Law 280. See F. Cohen, Handbook of Federal Indian Law 362-363, and nn. 122-125 (1982); cf. United States v. John, 437 U.S. 634 (1978). (Id., at 41, ftn. 16.)

The United States Supreme Court's recognition that the reference in ICWA section 1911(a) is to PL 280 makes it clear that child welfare proceedings are within the jurisdiction reserved to California by PL 280 and by ICWA §1911(a).

While tribes generally have autonomy over their internal affairs, Congress has expressly conferred jurisdiction to some specific states over Indian affairs as in California. (28 *U.S.C.* §1360.) The tribes within these states are commonly called "Public Law 280 tribes" ("P.L. 280 tribes"). In these states, even if a child is domiciled or resides on the reservation, the state may acquire and maintain valid jurisdiction. (*Mississippi Band of Choctaw Indians v. Holyfield, supra* at 41, ftn. 16); *Native Village of Venetie I.R.A. Council* v. *Alaska*, 944 F.2d 548, 561-562 (9th Cir. 1991); 25 *U.S.C.A.* § 1911(a).) Tribes from California and other P.L. 280 states may not exercise exclusive jurisdiction over an Indian child custody proceeding under the ICWA, unless they have reassumed jurisdiction under the ICWA. (*Native Village of Venetie I.R.A. Council* v. *Alaska*, 944 F.2d 548, 561-562 (9th Cir. 1991); *California Judges Bench Guide, The Indian Child Welfare Act,*

Mary J. Risling, Law Offices of California Indian Legal Services, Article IV. Applicable Law, section D.1., page 59 (1998 ed.).) As P.L. 280 is "existing Federal law," Appellant cannot justifiably claim that her Tribe has "exclusive jurisdiction."

This Ninth Circuit, in its decision in the case of *Native Village of Venetie I.R.A. Council* v. *Alaska*, *supra,* 561-562 (9th Cir. 1991), clearly supports this interpretation and the effect of P.L. 280 as divesting Appellant's California tribe of jurisdiction. In *Native Village of Venetie I.R.A. Council* v. *Alaska*, the court was presented with situations where there was in fact a "tribal court." The tribal court had exercised concurrent jurisdiction to grant adoptions by two Indian mothers who sought the full, faith and credit of the tribal court adoption decrees under the ICWA. The State of Alaska and its agencies, in attempting to thwart the Indian mothers' rights to public assistance for them and the minors, would not recognize the adoptions as binding due to its claim that it had exclusive jurisdiction. In any event, the language and analysis in *Native Village of Venetie I.R.A. Council* v. *Alaska* makes clear the impact of P.L. 280 and the lack of "exclusive jurisdiction" in the tribal courts in P.L. 280 states. This court stated:

> For some tribes, the exclusive and referral jurisdiction provisions of sections 1911(a) and (b) became effective automatically following the enactment of the Act. However, tribes located within so-called Public Law 280 states, n8 which include Alaska, can invoke such jurisdiction only after petitioning the Secretary of the Interior. *See id.* §1918(a). Upon receipt of a proper petition, the Secretary has several options.

> He may grant the tribe exclusive jurisdiction over the entire reservation as provided in section 1911(a), allow the tribe to exercise exclusive jurisdiction only over a limited community or geographic areas, or permit the tribe to exercise only referral jurisdiction pursuant to section 1911(b). *See id.* §1918(b)(2). (*Native Village of Venetie I.R.A. Council* v. *Alaska*, 944 F.2d 548, 556-567 (9th Cir. 1991).)

This court in *Native Village of Venetie I.R.A. Council* v. *Alaska*, went on to give some background on P.L. 280 as follows:

> Enacted in 1953, Public Law 280 mandated the transfer of civil and criminal jurisdiction over "Indian country" from the federal government to the governments of five states, n16 and permitted other states to assume such jurisdiction voluntarily. In 1958, Alaska was added to the list of mandatory Public Law 280 jurisdictions. See Act of Aug. 8, 1958, Pub. L. No. 85-615, §2, 72 Stat. 545....
>
> It is not disputed that private adoption cases are included within this transfer of civil jurisdiction from the federal government to the states....
>
> The legislative history behind Public Law 280 is sparse, but **Congress's primary motivation in enacting the legislation seems to have been a desire to remedy the lack of adequate criminal-law enforcement on some reservations...."The primary concern of Congress enacting Pub. L. 280...was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."** [citation omitted.] ... In fact, certain tribes were exempted from the provisions of Public Law 280 because these tribes had a "'tribal law-and-order organization that function[ed] in a reasonably satisfactory manner.'" [citation omitted.] In short, Public Law 280 was designed not to supplant tribal institutions, but to supplement them....
>
> Finally, we note that Congress was aware, while drafting the Indian Child Welfare Act, that the U.S. Department of Justice viewed Public Law 280 as providing for concurrent jurisdiction among state and tribal courts...."As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280." [citation omitted.]

> In sum, giving the benefit of doubt to Alaska, we conclude that Public Law 280 and the Indian Child Welfare Act are, at best, ambiguous as to whether states have exclusive or concurrent jurisdiction over child custody determinations where the tribe has not petitioned for exclusive or referral jurisdiction. [citations omitted.] Accordingly, resolving the jurisdiction ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents them from exercising concurrent jurisdiction. (*Native Village of Venetie I.R.A. Council* v. *Alaska*, 944 F.2d 548, 561-563 (9th Cir. 1991).)

As the Supreme Court noted in *Byran v. Itasca County*, 426 U.S. 373 (1976) of the sparse legislative history on Public Law 280 and the civil component codified in USCA 1360, §4, there are a lack of forums to resolve disputes between Indians. (*Id.* 379.) As PL 280 remains on the books and there still remains a lack of forums and civil structures in PL 280 states to resolve civil issues between Indians in their private affairs, then an even deeper void exists to resolve one of the more sacred components of their most private civil affairs, that being family matters, and more particularly, child abuse within a family. It is troubling that Appellant in essence says, yes, state courts have jurisdiction, and state law applies as to perhaps a breach of contract claim or even a tort claim between two Indians, which could even include restraining orders, but not to child abuse.

California state courts have jurisdiction and state law would apply if Jane or another Indian child wanted to sue their parent and abuser in state court based upon the torts of battery, assault, infliction of emotional distress or negligent infliction of emotional distress because their mother's boyfriend or cousin raped them over

many years, or beat them and left scars. It is unconscionable to think Congress would provide a state court civil venue in PL 280 states to seek monetary damages, yet when it comes to physical abuse and molesting of Indian children, causing irreparable damage to their person and soul, there would be no "civil" protection or basis for a state court to intervene. Appellant's position leaves an abused Indian child on their own to find their way into a State or Federal court and seek civil injunctive relief from their abuse, but yet still no refuge outside their abusive family if the Tribe doesn't have adequate resources in place to operate their own form of foster care, as was the case with Appellant, her Tribe and Jane. If the romantic notion of "extended Indian family" actually existed in Appellant's Tribe, Jane would never have come to the attention of the Department by Appellant herself.

B. Private Rights & Family Relations Fall Within the Civil Laws of the State.

The Court in *Byran* noted that PL 280, section 28 U.S.C. §1360, deals with private rights and status. There is not much more private than what goes on in one's family. And, families that participate in child abuse typically do it in private and not in public view for obvious reasons. Status as to whether a child is an "abused child" or not, regardless of whether Indian or non-Indian, is one that requires state court civil determinations and intervention. As the Court in *Byran* observed, even the very title of the bill, "A bill to confer jurisdiction on the

states..., with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes" connotes that its very purpose is to bestow jurisdiction upon the States. (Id. at 386.)

Also as the Court in *Bryan* stated:

> certain tribal reservations were completely exempted from the provisions of Pub. L. 280 precisely because each had a "tribal law-and-order organization that functions in a reasonably satisfactory manner." H.R. Rep. No. 848, p.7, n12. Congress plainly meant only to allow state courts to decide criminal and civil matters arising on reservations not so organized." (426 *Byran* 373, 386-387.)

The Court in *Bryan* further stated:

> ...the focus of Pub. L. 280- extending state jurisdiction to those reservations with the least developed and most inadequate tribal legal institutions; presumably those tribes evincing the least "acculturation and development" in terms of the mainstream of American society. (*Id.* at 388, ftn. 13.)

Obviously then state jurisdiction and assistance was required in the PL 280 states to create civil stability and safety for Indian children in their homes on those PL 280 tribal reservations that lacked the infrastructure and tribal courts necessary to adequately protect their children from unwanted child abuse.

As such, the attempt by Congress in enacting P.L. 280 was to prevent lawlessness on the reservations. What Appellant suggests is that as long as her Tribe does not interfere and exercise their purported "exclusive jurisdiction," she and her relatives can neglect and abuse Jane in the State of California free of governmental interference and intervention. This type of reasoning highlights the

very problem and risk that Indian children were at without Congress making provision for the State of California to intervene by its enactment of P.L. 280. What Congress did not intend in the ICWA was that a parent could simply sit on her hands and then come in years after her child is removed and an adoption finalized, and then claim for the first time that she is entitled to have her child back because her tribe had "exclusive jurisdiction." Appellant's position is that since the Tribe had "exclusive jurisdiction" and did not exercise it, no one else had the right to step in and protect the minor child from further child abuse.

Appellant's position falls squarely within the very parameters and circumstances that the ICWA and P.L. 280 were enacted to prevent. The ICWA recognizes that there are some circumstances in which the parents behavior is outside of acceptable Indian custom and tradition, and in such cases it is imperative that the State come in and protect the child. Such protection does serve the purposes of the ICWA so that the removed child has the best opportunity to be raised without the abuse of a parent who is acting outside of the very heritage the ICWA seeks to preserve. Due to the express grant of jurisdiction by the federal government to the State of California, the Superior Court was the only viable resource to protect Jane from the abuses within Appellant's Tribe and from the neglect of Appellant. As such, Appellant's argument that the Superior Court lacked "jurisdiction" because her tribe had "exclusive jurisdiction" is without merit.

3. APPELLANT'S HAIRSPLITTING DISTINCTIONS BETWEEN VARIOUS FORMS OF REGULATIONS IS UNNECESSARY, AS THE TERMS OF ICWA PLACE JURISDICTION IN PL 280 STATES.

A. There are No Permissible Forms of Child Abuse Being Regulated.

Appellant's exhaustive efforts to attempt to classify child custody and child protective services as being "regulatory" and therefore exempted from PL 280, thus confirming "exclusive jurisdiction" on Appellant's Tribe is unnecessary. ICWA §1911(a) specifically makes PL 280 applicable to all child custody proceedings. The Supreme Court in its decision in *Mississippi Band of Choctaw Indians* (*supra*, 25) and this court in its decision in *Native Village of Venetie I.R.A. Council* (*supra*, 26) establish the State of California's jurisdiction in child custody matters over Indians living on PL 280 tribal reservations at the time of their removal. Even Appellant acknowledges that PL 280 is the only "other federal law" that would restrict the jurisdiction of tribes in Indian country. (AOB 47, ftn.16.) Appellant acknowledges in her brief: "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. (*Id.*)

The detour or distraction Appellant creates by attempting to move away from the clear language of ICWA §1911(a) into the inapplicable analysis of what state laws would constitute being "regulatory" and therefore an impermissible intrusion into the limited sovereignty of tribal governments is unnecessary. There also is no

need to analyze the state laws to determine if they impermissibly regulate "parenting." It is a federal law, the ICWA, that expressly authorizes state court jurisdiction in PL 280 states and others.

Of the authorities cited by Appellant, not one shows a state law that was specifically authorized to be exercised by a federal statute. It is in the context of the application of state law in the absence of any other authorizing statute like the ICWA, that requires federal courts, and the Supreme Court, to make the hairsplitting analysis of whether the state law is regulatory or not as discussed in *Bryan* and *California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).*

Taxing, fishing, hunting, bingo, card games and gambling are things involving the public that lend themselves to regulation. You can regulate what is taxed, how much to tax, or where to hunt and what to hunt, or where and under what circumstances gambling or bingo can take place. However, there is nothing about family matters and raising children that is subject to regulation. Such things as what time children go to bed; what shows they can watch; what they can play; what they can hear; what they can wear; where they can travel; where they can work; what they eat; what chores they must do; whether they pray; what their religion is or isn't; what personal hygiene they must use; or, how they are disciplined: children are not subject to state regulation at all. Child abuse also is

not regulated. There is no permissible form of child abuse or a permissible manner in which to abuse a child, Indian or not, on a reservation or not.

With respect to Indians or non-Indians, on or off a reservation, the only intrusion into their private affairs of being family by the State of California is when any family, Indian or non-Indian, anywhere in the state, cross the line and abuse their children. How a family is family is not regulated at all, but all families are prohibited from abusing their children. Unlike the gambling that was being regulated as the Court in *Cabazon* noted as follows, no where is child abuse being condoned:

> The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. [citation omitted.] Also, as the Court of Appeal notes, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18. Indeed, the permitted bingo games *must* be open to the general public. Nor is there any limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games which a participant may play, or the amount of money which a participant may spend, either per game or in total. In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular. (*Id.* 210-211.)

The Court in *Cabazon* was influenced by noting that 400 card rooms were flourishing in the State of California and clearly condoned by the State. Contrast that to even one case of child abuse, there is not one place in the State of California

where child abuse is condoned and requires regulations on how to do it. Child abuse is unequivocally condemned in the state and within Indian tribes.

The civil component of PL 280 further provides that states will have jurisdiction over tribes regarding "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." (28 U.S.C. 1360.) As shown, the imposition of child welfare laws within the State of California on tribes within the state are of general application throughout the state, as child abuse is uniformly condemned everywhere in the State of California.

Child abuse is a family matter and private affair, and the state child welfare laws and system are civil in nature. (ER 31-32.) Pursuant to the terms of 28 U.S.C. §1360, state courts have jurisdiction over all "civil causes of action between Indians or to which Indians are parties." (*Id.*) When an Indian child is abused on a reservation, regardless of whether the abuse is by an Indian or non-Indian, and a children's protective services agency gets involved, the Indian child and her parents are involved in an action to which "Indians are parties" and which is also "between Indians." The fact that a governmental agency is also a party to a juvenile dependency proceeding does not change the fact that child custody proceedings are still a civil action to which an Indian is a party and which is between Indians.

With subjects like hunting or taxing that lend themselves to a "regulatory/prohibitory" analysis there may not be a bright line test. One test though for areas subject to being regulated is to look at how the activity comports with public policy. Obviously there is a strong public policy against child abuse. Further, with respect to child abuse, there is a bright line test, and it doesn't require regulation. Child abuse is a lot like pornography, you know it when you see it.

In *Cabazon*, a case looking at local statutes that dealt with the subject of bingo and table card games which lent themselves to regulation, the Court stated: "**The applicable state laws governing an activity** must be examined in detail before they can be characterized as regulatory or prohibitory." (*Id.* at 211, ftn. 10.)(emphasis added.) The statutes that Appellant attempts to bring into question before this court are contained in the California Welf. & Inst. Code, commencing in substantive part in section 300. The statutes deal with "child abuse," and the "activity" of abusing children, not the amorphous concept of parenting or raising a family. There are few if any statutes on raising a family, only statutes regarding what happens when the private affairs of being "family" go array and result in child abuse.

Appellant's only illogical choice is to try and get beyond the plain language and purpose of ICWA 1911(a) and Public Law 280. Appellant would like to skirt

the specific "civil laws" in question and the real subject, "child abuse," and try and focus on a broader generic concept and category of "parenting."

If child abuse was just a subset of parenting, then following such logic, gambling and bingo are not really the subject being regulated. Based upon such logic, "what is really being regulated is the permissible activity of spending money." We aren't talking about global concepts though, the Court's analysis has not been on a generic activity like gambling, but specific statutes and specific forms of gambling. Appellant is hard pressed to point to one form of child abuse that is being allowed and regulated within the State, as well as to point to one statute that generically regulates how families go about their private affairs of being family. Further, there is no public policy in favor of child abuse. Similar to the statement in the dissenting opinion of Justice Stevens in the *Cabazon* case, Appellant's contention that in essence public policy supports families or "parenting," does not mean that it supports child abuse. In reference to gambling and bingo, Justice Stevens wrote: "To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour." (*Cabazon*, at 225.)

While the Court in *Cabazon* noted with respect to Bingo that the federal government has pumped millions of dollars into assisting tribes develop internal economic resources through bingo and gaming facilities (*id.* at 217-218), no state or branch of the federal government has spent a dime on promoting child abuse anywhere. Accordingly, not only does the civil component of PL 280 set forth in 28 U.S.C. 1360 grant states jurisdiction over child custody matters regarding Indians living on reservations, the prohibitory components of PL 280 set forth in 16 U.S.C. 1160 also provide the PL states with a basis to prohibit child abuse as well.

B. Unlike Child Abuse, the "Regulatory" Analysis Was Used to Support the Sovereignty of Tribes That Was Still Reserved Within Their Jurisdiction.

While there are efforts to preserve or bolster the qualified sovereignty of Indian tribes, that effort has been to the more traditional regulatory powers of government which have not been specifically limited by Congress. It was to these non-restricted or non-reserved traditional regulatory areas of governmental functions that the High Court applied its "regulatory" analysis to determine if a state law was "regulatory" and thus outside the purview of PL 280. Again, ICWA specifically placed protecting Indian children on reservations from child abuse within the jurisdiction of state courts such that Appellant's strained

"regulatory/prohibitory" analysis to child abuse is inapplicable and inappropriate. (ICWA §1911(a).)

The Court in *Byran* employed its "regulatory/prohibitory" analysis for more traditional governmental regulatory activities and purposes as follows:

> Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation. Public L. 280 was only one of many types of assimilationist legislation under active consideration in 953. H.R. Rep. No. 848, pp. 3-5; Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655, 662 (CA91975). n13. And nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than "private, voluntary organizations," United States v. Mazurie, 419 U.S. 544, 557 (1975) - a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. n14 The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c), providing for the "full force and effect" of any tribal ordinances or customs "heretofore or hereafter adopted by an Indian tribe... if not inconsistent with any applicable civil law of the State," contemplates the continuing vitality of tribal government. (*Byran,* 426 U.S. at 387.)

In *Bryan*, the court further stated:

> Much has been written on the subject of a devastating impact on tribal governments that might result from an interpretation of §4 as conferring upon state and local governments general civil regulatory control over reservation Indians/.... The suggestion is that since tribal governments are disabled under many state laws from incorporating as local units of government, Goldberg, supra, at 581, general regulatory control might relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying them,

> particularly if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation. Present federal policy appears to be returning to a focus upon strengthening tribal self-government, see, e.g., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq. (1970 ed., Supp. V). (*Byran*, 426 U.S. at 389, ftn. 14.)

It was the enactment of the ICWA that was designed to reduce assimilation of Indian culture in the area of child abuse.

The point is that it was the sovereign and public status of Indian forms of government that were in fact reserved to the tribes that the Court was trying to protect. In that context the Court was restricting state governments from usurping the regulatory function of tribal governments to preserve their qualified sovereignty. With the enactment of the ICWA, there is nothing about prohibiting child abuse and states' intervention in PL 280 states that undermines Indian government. There is nothing supportive to PL 280 tribes without tribal courts by state government staying out of child abuse problems on their reservations.

4. INDIAN TRIBES DO NOT HAVE INVIOLABLE SOVEREIGNTY CREATING EXCLUSIVE JURISDICTION OVER CHILD CUSTODY MATTERS OF INDIANS LIVING ON RESERVATIONS.

Indian tribes have limited sovereignty, not the inviolable sovereignty romantically portrayed by Appellant. However, it must be remembered that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." (*Washington v.Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).) That Court went on to state: "'Chief among the powers

of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. [citations omitted]'" (*Id.* at 153.) But where Congress has limited tribal jurisdiction by PL 280 and the ICWA, the states do have jurisdiction as so vested in them by Congress, not by virtue of any preexisting inherent state sovereignty over Indian tribes. Additionally, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." (*United States v. Wheeler*, 435 U.S. 313, 323 (1978).) Accordingly, subject to such restraints and parameters, it would appear more accurate to view tribes, especially within PL 280 states, as having "limited sovereignty" rather than the mischaracterization of their sovereignty as being "inviolable" as Appellant has done. (AOB 11). As to PL 280 tribes who have not reassumed jurisdiction, there has been a defeasance of their tribal sovereignty by Congress in its enactment of ICWA and specifically section 1911(a).

The federal cases and even the other authority Appellant relies upon to assert that Indian tribal authority is inviolable and establishes "exclusive jurisdiction" is grossly misapplied by Appellant. At the core of the authorities relied upon by Appellant, in addition to being non PL 280 states, there is a fundamental component that Appellant's Tribe lacks, and that is the existence of a verifiable and bona fide tribal court. The key cases Appellant relies upon, like, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989), to support her assertion

that "ICWA affirmed that 'exclusive jurisdiction over the welfare of those Indian children who are domiciled on an Indian reservation' rests with the tribe" (AOB 27), arise out of non-PL 280 states in which the tribes in question have bona fide tribal courts. (*Id.*) The same is true of *DeCoteau v. District County Court* 420 U.S. 425 (1975) [tribal court established in 1974] and *Fisher v. District Court* 424 U.S. 382 (1976.)

Even within the overly relied upon attorney general opinion from the State of Wisconsin, which is a PL 280 state, Appellant failed to point out that among the various statements attributed to that attorney general's purported cart blanche endorsement of exclusive jurisdiction being vested in all tribes was the following statement:

> **It is my understanding that most tribes in Wisconsin have adopted procedures to handle some child custody proceedings under the ICWA as well as domestic relations matters not covered by the Act. It is therefore my opinion that the exercise of state regulatory jurisdiction over tribe members residing on a reservation where the tribe is exercising jurisdiction over child custody matters constitutes an impermissible infringement upon tribal sovereignty. If a tribe is not exercising such jurisdiction, it is unlikely that a court would find that state action infringes upon that tribe's sovereignty.** (70 Op. Atty Gen. Wis. 237 [at Lexis 4 of 8])(emphasis added.)

Without a true tribal court, it is doubtful the Attorney General of Wisconsin would really contend a PL 280 tribe would have exclusive jurisdiction.

///

5. THE ICWA WAS ENACTED TO AFFECT HOW STATE COURTS AND AGENCIES EXERCISED THEIR JURISDICTION OVER INDIANS, IT WAS NOT A COMPREHENSIVE RESTORATION OF "EXCLUSIVE JURISDICTION" TO ALL TRIBES AS APPELLANT ASSERTS.

The main purpose of the ICWA was to impose standards upon how states exercised their jurisdiction over Indians and to preserve Indian families. Appellant's position that Jane should have been left to the non-existent child custody proceedings and nonexistent tribal court of Appellant's Tribe is repugnant to the very purpose of the ICWA. Further, the ICWA contains provisions within it that affirm the extent non-PL 280 tribes and PL 280 tribes have or can exercise jurisdiction in relation to state governments. Had the ICWA been intended to completely restore exclusive jurisdiction in all tribes, including PL 280 tribes, the stated purpose of the ICWA would have so stated and the provisions would have reflected such a Congressional intent. If that was the purpose, the ICWA certainly would have been written much differently and could have more simply stated: "All Indian tribes in Indian country shall have exclusive jurisdiction over any foster-care placement, guardianship or adoption proceeding." There would have been no need to impose standards on how the tribes enforced their own individual cultural standards. Obviously such cultural preserving procedures in the ICWA were enacted to be imposed upon state governments, courts and agencies to significantly impact how they exercised state jurisdiction over Indians on or off a reservation.

Nowhere in the purpose, policy or provisions of the ICWA does it reveal that it was enacted to affirm the complete "exclusive jurisdiction" of all tribes, whether in PL 280 states or not. Appellant's contention that the ICWA was intended to create a procedure for tribes to reassume jurisdiction solely over non-intensive resource private placement services is nonsensical. The initial sections of the ICWA reveal the purpose and policy of the act as follows:

> § 1901. Congressional findings
>
> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--
>
> (1) that clause 3, section 8, article I of the United States Constitution [USCS Constitution, Art. I, § 8, cl 3] provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes [Tribes]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) 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. (*Id.*)(emphasis added.)

§ 1902. Congressional declaration of policy

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the **establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children** in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.(*Id.*)(emphasis added.)

These statements do not strip states of their jurisdiction. In fact, the ICWA acknowledges the "recognized jurisdiction" of the States. The act then goes on to "establish standards" for the exercise of that recognized jurisdiction. It is illogical to assume that these standards were meant only to apply to tribes who by virtue of the ICWA would now have exclusive jurisdiction confirmed upon them or have their existing jurisdiction subject to the culturally preserving provisions of the ICWA.

Stripping the states of their role and jurisdiction in providing child protective services to Indian children in PL 280 states and others was never the intent of Congress. In the materials submitted by Appellant, in the Senate Report No. 95-597, submitted by Mr. Abourezk from the Select Committee on Indian Affairs, Mr. Abourezk also stated in his "Summary of Major Provisions" the following:

> 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. However, there are new provisions too. The act provides that tribes may request transfer of placement cases from State to Tribal courts and that in the absence of good cause to the contrary such transfers shall be ordered; **it authorizes tribes presently under State civil and criminal jurisdiction by virtue of Federal law to apply to the Secretary of Interior for return of jurisdiction over child placement matters to the tribes** (this includes tribes whose reservations have been disestablished or diminished by virtue of Federal law, or who are otherwise under State jurisdiction, including tribes in Oklahoma)....
>
> The Task Force recommendations stressed the two points previously stated in the oversight transcripts: return total jurisdiction over child welfare matters involving children from reservation areas when a tribe expresses a desire to exercise such jurisdiction and provide adequate financial assistance to tribes and organizations to allow them to establish Indian controlled family development programs at the local level. (S. Rep. No. 95-597, at 10,12)

These comments affirm the purposes of ICWA sections 1911 and 1918 with respect to PL 280 states not having exclusive jurisdiction but being left the opportunity to petition the Secretary to establish that they have developed the resources and necessary infrastructure to protect their children and provide adequate child welfare services. Additionally, the noted need even at the time of the introduction of the ICWA for more resources for tribes, and in particularly PL 280 tribes, further affirms that many PL 280 tribes lacked the adequate resources to establish their own tribal courts and Indian child welfare protective services infrastructure, as are still lacking as is evidenced by Appellant's tribe and lack of any recent amendments to PL 280 or the ICWA.

The issue of lack of funds, resources and internal infrastructures is highlighted even more by Mr. Abourezk's comments and noted success of tribes that have such resources:

> Indian people again called for tribal jurisdiction in Indian child placement matters and requested congressional support in the way of increased appropriations for child welfare services. They requested that these appropriations be made directly available to the tribes to reduce unnecessary overhead costs and stressed the fact that adequate funding would have a major impact on improving the situation. Tribal witnesses indicated that some tribes such as the Quinault Nation in Washington, have begun work in this area and have been extremely successful. Quinault and others have shown major increases in the number of available Indian foster and adoptive homes and they have greatly decreased the number of children now in placement by as much as 40 percent. (S. Rep. No. 95-597, at 12-13.)

Sadly it is the very lack of resources and internal infrastructure that has left many tribes within PL 280 states subject to state court jurisdiction. Yet for the safety of the children, until tribes such as Appellant's have the internal resources, child welfare services and tribal courts, the state is the only entity that can provide protection to children like Jane on Appellant's reservation. Had Appellant's tribe been in a position to provide appropriate placement alternatives and services instead of waiting over a year and half into Jane's Indian foster care placement to try and halt her adoption, Jane could have been placed within her Tribe. (SER 101.)

While not the most significant, Appellant's mischaracterization that "Congress expressed disappointment in the DOJ's attempts to frustrate passage of

ICWA" (AOB 36) is not true nor the first such mischaracterization by Appellant.[1] In this instance, it was not Congress by way of some form of resolution or proclamation that acted, it was solely Representative Udall, who while greatly respected, was not "Congress." Rep. Udall basically was displeased with the critique of his bill by the United States Attorney General's Office. Apparently though, the concerns expressed by the U.S. Attorney General's office was not to reinvest all jurisdiction in all tribes exclusive of PL 280 states. The process for PL 280 states to reassume jurisdiction appear to be Congress' way of addressing the concerns expressed by the Attorney General (whose opinion should be given much greater weight than the incompletely quoted opinion of the Attorney General of Wisconsin). Through apparent modifications to ICWA sections 1911, 1918 and 1919, the concerns and interpretation from the United States Attorney General's office through an Assistant Attorney General appear to have carried some weight. Assistant Attorney General Patricia M. Wald in her May 23, 1978 letter to Congressman Udall, states:

> §101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law No. 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." (H.R. Rep. No. 96-94, at 52.)

Additionally with all of the explicit references to PL 280 in the Congressional record and the concern to provide a method for PL 280 tribes

to reassume jurisdiction, amongst many others, Appellant's assertion that: "Congress did not exclude PL 280 States as the DOJ 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," is simply untrue. (AOB 37.)

The Congressional record clearly supports Appellee's position that the ICWA was not intended to strip states of their jurisdiction and confirm exclusive jurisdiction upon non-PL 280 tribes and PL 280 tribes. The Congressional record further confirms that the central purpose of the ICWA was to establish minimum Federal standards employed by states when removing Indian children from tribal reservations or any other land geographically located within the states' boundaries. The conclusion of House Report 95-1386 states:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian Tribe. (H.R. Rep. No. 95-1386, at 7541)

The clear language of the ICWA and the Congressional history establish that the basic concerns behind the adoption of PL 280 were incorporated into the ICWA through sections 1911, 1918 and 1919, and that PL 280 tribes lacking the

internal infrastructure who have not petitioned the Secretary to reassume jurisdiction, are in fact barred by PL 280 and section 1911(a) of the ICWA from having exclusive jurisdiction. There is nothing ambiguous about the ICWA in relationship to Appellant and her Tribe, as they have not petitioned the Secretary to reassume jurisdiction and establish a tribal court, and therefore are rightfully excluded from having exclusive jurisdiction" by virtue of section 1911(a) of the ICWA.

Interpreting the ICWA and PL 280 as Appellant has suggested will not provide a construction "most favorable" to Indians. Appellant's suggested interpretation will hurt Indians. It will result in more children in PL 280 states living on reservations with inadequate internal child welfare services and resources from receiving any protection at all. It would leave children in the condition Jane was in prior to state government intervention. It would deprive children on reservations without adequate internal infrastructures the chance for a new life with a new family that loves and cares for them as Jane has found with her new parents that she calls "momma" and "papa," Mr. & Mrs. D. (SER 57.)

CONCLUSION

The state's action was necessary to protect Jane. While the Department used state law to carry out their functions, it acted pursuant to express authority to do so by Congress through its enactment of the ICWA and PL 280. As the Tribe

admittedly has no "tribal court," just as Congress feared in PL 280 states, there was no one else to intercede on behalf of Jane than the Department and the courts of the State of California.

The interpretations offered by Appellant would obviate the need for state child welfare agencies or state courts to get involved at any level in involuntary child welfare matters on Indian reservations. Anytime a tribe attempted to remove an Indian child on a reservation from his or her parent due to child abuse, the parent, tribe or child could simply bring any dispute regarding the removal of an Indian tribe to federal court for resolution. In the event that a particular tribe did not have a sufficient police force or social services agency to remove any Indian child under an immediate threat of physical or sexual abuse or general neglect, the tribe could simply call upon the United States Marshal or perhaps the FBI. Where a U.S. Marshal would take such children in the event the tribe lacked sufficient internal or affiliated tribal placements is unknown. Additionally, as the ICWA does not define "child abuse," it is unclear what standard the U.S. Marshal would apply in determining whether to remove a child. Once any dispute was in federal court, the U.S. Attorney's office and some public defenders could decide on some basis how to proceed in the matter and to provide legal representation to indigent parents and their Indian children.

The very purpose of PL 280 was to prevent abuse to children living on Indian reservations and by Jane's placement in an Indian home pursuant to the ICWA, Jane's best interests and Congress' concerns have been carried out by the Department.

June 28, 2004

Respectfully Submitted,

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Endnotes:

[1] Appellant's statement of facts are mere "allegations" in her unverified complaint, hence all of her references to it at ER 1-18, are disputed. Despite the District Court's inaccurate reference in the Docket to the wrong defendants (No.'s 18 & 20), Appellee's facts are based in documents and statements reviewed in the original records and from certified state court records, findings of fact and judgments for which judicial notice was requested in the District Court.

Further, Appellant represents that: "The district court agreed with Appellant that the involuntary dependency and adoption proceedings involving Jane were civil regulatory matters." (AOB 22.) This is a stretch, because the district court was merely revealing its analysis of the parties presentation of issues. The court was looking at Appellant's proposition that child welfare laws were "regulatory" and was considering the *Cabazon* Court analysis which it rejected in this sought after application, as it likewise rejected Appellant's argument. The court concluded its analysis of Appellant's argument as follows: "Although plaintiff has made a convincing argument based on Public Law 280 case law, **her interpretation must ultimately fail** because granting tribes exclusive jurisdiction over child custody proceedings would gravely undermine the ICWA statutory scheme, making its provisions illogical. (ER 32:9-11.) By the court's finding the tribe had not reassumed jurisdiction, the only conclusion is that the court found PL 280 applicable, not precluded based upon an inappropriate application of the Court's "regulatory/prohibitory" analysis. For the same reason, Appellant's statement that the "district court conceded that PL 280 did not extend State civil regulatory jurisdiction over child custody cases arising in Indian country" (AOB 33) is also inaccurate.

Appellant also asserts that: "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.'" (AOB 23, citing the court's decision at ER 30:3-4.) This is not true as the court's mere reiteration of Appellant's "claim" is not an acknowledgement by the court that it adopted, accepted and acknowledged Appellant's proffered claim. What the court said, with the insertion of the first two omitted words by Appellant was: "**Plaintiff claims** that because the state is 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.) This is not an acknowledgment by the court as Appellant contends.

CERTIFICATION OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) and 9th Circuit Rule 32-1, this Appellee's brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,814 words based upon the computerized word count function of the software used, excluding the Table of Contents and Table of Authorities.

June 28, 2004

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