

A05-1631 & A05-1615
STATE OF MINNESOTA
IN SUPREME COURT

Prm 6/29/06

2006

In the Matter of the Welfare of the Child of G.W. and T.T.B., Parents

AMICUS CURIAE BRIEF FOR NATIONAL INDIAN CHILD WELFARE ASSOCIATION

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TABLE OF CONTENTS

INTEREST OF AMICUS.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
In enacting the ICWA, Congress exercised its broad powers under the Indian Commerce Clause to address a “crisis of massive proportion” threatening the existence of Indian tribes and causing long-term harm to Indian children and families, and the ICWA must be broadly interpreted to remedy the problems addressed.....	2
A. Congress necessarily intended to give the Act a broad scope because of the massive problem it meant to remedy.	2
B. In the ICWA, Congress clearly recognized and reinforced tribal sovereignty as an essential means of achieving the Act’s objectives.....	11
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989)	3
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	3
<i>Custody of A.K.H.</i> , 502 N.W.2d 790 (Minn. Ct. App. 1993).....	17
<i>In re Adoption of Halloway</i> , 732 P.2d 962 (Utah 1986).....	11
<i>In re Adoption of Lindsay C.</i> , 280 Cal. Rptr. 194 (Cal. Ct. App. 1991)	9
<i>In re Adoption of M.T.S.</i> , 489 N.W.2d 285 (Minn. Ct. App. 1992).....	11, 15, 17
<i>In re Adoption of Mellinger</i> , 672 A.2d 197 (N.J. Super. Ct. App. Div. 1996)	8
<i>In re Adoption of Riffle</i> , 922 P.2d 510 (Mont. 1996)	11
<i>In re Andrea</i> , 10 P.3d 191 (N.M. Ct. App. 2000)	13
<i>In re Angus</i> , 655 P.2d 208 (Or. Ct. App. 1982), cert. denied, 464 U.S. 830 (1983)	8
<i>In re Appeal of Pima County Juvenile Action</i> , 635 P.2d 187 (Ariz. Ct. App. 1981), cert denied, 455 U.S. 1007 (1982)	9
<i>In re Crystal K.</i> 276 Cal.Rptr. 619 (Cal. Ct. App. 1990), cert. denied, 502 U.S. 862 (1991)	9
<i>In re Custody of S.B.R.</i> , 719 P.2d 154 (Wash. Ct. App. 1986)	3, 9
<i>In re Custody of S.E.G.</i> , 521 N.W.2d 357 (Minn. 1994)	11, 16, 17
<i>In re Guardianship of Ashley Elizabeth R.</i> , 863 P.2d 451 (N.M. Ct. App. 1993).....	14
<i>In re J.M.</i> , 718 P.2d 150 (Alaska 1986)	9
<i>In re K.H. and K.L.E.</i> , 981 P.2d 1190 (Mont. 1999)	8
<i>In re Marriage of Skillen</i> , 956 P.2d 1 (Mont. 1998)	13, 14
<i>In re Welfare of B.W.</i> , 454 N.W.2d 437 (Minn. Ct. App. 1990).....	11, 17
<i>In re Welfare of S.N.R.</i> , 617 N.W.2d 77 (Minn. App. 2000)	16
<i>In re Youpee' Adoption</i> , 1991 WL 134556, 11 Pa. D & C.4th 71 (Pa. Comm. Pl.1991)..	13
<i>J.W. v. R.J.</i> , 951 P.2d 1206 (Alaska 1998).....	11
<i>McClanahan v. Arizona Tax Comm'n.</i> , 411 U.S. 164 (1973).....	3
<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30 (1989)	passim
<i>Navajo Nation v. Hodel</i> , 645 F. Supp. 825 (D. Ariz. 1986)	3
<i>People in Interest of J.L.G.</i> , 687 P.2d 477 (Colo. Ct. App. 1984).....	9
<i>Quinn v. Walters</i> , 881 P.2d 795 (Or. 1994)	10
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	3
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	3

Statutes

Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2000)	passim
Minnesota Indian Family Preservation Act, M.S.A. §§ 260.751 to 260.835	14, 15, 18

Other Authorities

3 Norman J. Singer, <i>Sutherland Statutory Construction</i> , § 60:1 (6 th ed. 2001).....	8
Carolyn Attneave, <i>The Wasted Strengths of Indian Families</i> , 32 (1977)	9
<i>H.R. Rep. No. 85-1386</i> , at 9 (1978) as reprinted in 1978 U.S. C.C.A.N. 7530	4
<i>Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93rd Cong., 2d Sess. (1974)</i>	4
Minnesota Department of Human Services, <i>Social Services Manual</i> , § XIII-3511(1999) available at http://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs_id_016961.hcsp	15
Minnesota Tribal/State Agreement on Indian Child Welfare (1998), available at http://www.dhs.state.mn.us/main/groups/children/documents/pub/dhs_id_052906.pdf	14, 15
Peter K. Wahl, <i>Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota</i> , 26 Wm. Mitchell L. Rev. 811 (2000).	15
U.S. Dept. of Health and Human Services, Admin. for Children and Families, Region V, <i>Child and Family Final Assessment, Services Reviews, Final Assessment</i> , Minnesota (2001), available at http://basis.caliber.com/cwig/ws/cwmd/docs/cb-web/searchform (Final Reports, Minnesota).....	5
U.S. Dept. of Health and Human Services, Admin. for Children and Families, Region V, <i>Child and Family Services Reviews, Statewide Assessment Instrument (1999)</i> available at http://basis.caliber.com/cwig/ws/cwmd/docs/cb-web/searchform (Statewide Assessments, Minnesota)	5
U.S. Government Accounting Office (GAO), <i>Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used To Target Guidance and Assistance to States</i> (2005), GAO-05-290, available at www.nicwa.org/policy/law/icwa/GAO_report.pdf	5

INTEREST OF AMICUS

Amicus curiae is an Indian organization - the National Indian Child Welfare Association (NICWA) - that specializes in Indian child welfare. Amicus has a substantial interest in the issue raised in this case.¹

NICWA is the most comprehensive source of information on American Indian child welfare and works on behalf of Indian children and families. It provides public policy, research, and advocacy; information and training on Indian child welfare; and community development services to a broad national audience including tribal governments and programs, state child welfare agencies, and other organizations, agencies, and professionals interested in the field of Indian child welfare. NICWA works to address the issues of Indian child abuse and neglect through training, research, public policy, and grassroots community development. It also works at a national level to support compliance with the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2000).

SUMMARY OF ARGUMENT

This case involves the issue of whether there exists good cause to deny the Yankton Sioux Tribe jurisdiction to determine the fate of X.T.B, a child who is an enrolled member of the Tribe and who has been placed since December, 2003 in a non-Indian, non-relative home that was never agreed to by the Tribe. This case also determines the future of the Tribe itself. This case goes to the heart of the problems

¹ Mark C. Tilden authored this brief in whole and no monetary contribution was made by any party in the preparation or submission of this brief.

addressed by Congress in the ICWA – the protection of tribes’ existence, the protection of the exercise of tribal sovereignty over matters affecting their interest, and the protection of a child’s right to maintain a connection with his or her tribe. These interests were recognized and confirmed in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).

In response to a nationwide crisis resulting from the permanent placement of Indian children in non-Indian homes and institutions, Congress passed the ICWA to safeguard Indian interests at all stages of a child custody proceedings involving an Indian child. The Act is remedial in nature and broad in scope. Congress specifically found it to be in the best interest of an Indian child to have his or her tribe decide his or her future. Because of the importance of these issues to the tribes and their children, Congress created a presumption that cases initiated in state court should be transferred to a tribe, absent exceptional circumstances not present here. *See Holyfield*, 490 U.S. at 36.

The decision of the Court of Appeals should be affirmed. Its decision fulfills the broad, remedial intent of ICWA while the decision of the trial court leaves the matter in the hands of precisely those institutions viewed as most responsible for damaging Indian interests.

ARGUMENT

In enacting the ICWA, Congress exercised its broad powers under the Indian Commerce Clause to address a “crisis of massive proportion” threatening the existence of Indian tribes and causing long-term harm to Indian children and families, and the ICWA must be broadly interpreted to remedy the problems addressed.

- A. Congress necessarily intended to give the Act a broad scope because of the massive problem it meant to remedy.**

Under the Constitution of the United States, Congress has broad powers to legislate for the good of Indian tribes. U.S. Const. art. I, § 8, cl. 3; *see also, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *McClanahan v. Arizona Tax Comm'n.*, 411 U.S. 164, 172 n.7 (1973) (federal authority derives from Indian Commerce and Treaty clauses); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (“[It is an] undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters...”); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs”). Indeed, it is now recognized that the Indian Commerce Clause makes “Indian relations ... the exclusive province of federal law.” *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

The Federal Government has, through extensive legislation and course of dealings, established a “trust relationship” with the Indians of the United States. The ICWA was passed in the exercise of that trust responsibility. 25 U.S.C. § 1901 (2000); *Navajo Nation v. Hodel*, 645 F. Supp. 825, 827 (D. Ariz. 1986) (“The ICWA does create a special trust relationship between the government and the Indians for purposes of the statute.”). Its enactment stemmed from a growing tribal and federal concern in the late 1960s and early 1970s that the intentional and unintentional practices of non-tribal public and private child welfare agencies led to the disproportionate, wholesale, and often unwarranted, separation of Indian children from their families. *Holyfield*, 490 U.S. at 32-33. The separation usually led to the subsequent permanent placement of those children

in non-Indian foster or adoptive homes and institutions. 25 U.S.C. § 1901(4). These practices eventually reached a level that caused tribes to fear for their very survival.

By 1974, so many tribal children were lost to the states' foster care systems and public and private adoption agencies that the tribes' survival had become a "crisis...of massive proportion". *H.R. Rep. No. 85-1386, at 9 (1978) as reprinted in 1978 U.S.C.C.A.N. 7530, 7532 (hereinafter House Report)*.

The House Interior and Insular Affairs Committee explained:

[T]his committee has been charged with the initial responsibility in implementing the plenary power over, and responsibility to, the Indians and Indian tribes. In the exercise of that responsibility, the committee has noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

House Report, at 19.

The Senate Subcommittee on Indian Affairs conducted oversight hearings to address the crisis. These hearings produced overwhelming evidence documenting state practices damaging to Indian children, families and tribes. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93rd Cong., 2d Sess. (1974)*. Indeed, "[s]tudies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. (citations omitted). Adoptive placements counted significantly in this total: in the State of Minnesota, for

example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes. (citation omitted)." *Holyfield*, 490 U.S. at 32-33.

The Minnesota statistics were alarming at that time. Even more alarming for this appeal is that it is not much better today—28 years later. In April 2005, the U.S. Government Accounting Office (GAO) issued a report titled "Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used To Target Guidance and Assistance to States". GAO-05-290, available at <http://gao.gov/cgi-bin/getrpt?GAO-05-290>. It noted that "[i]n 23 states, for example, American Indian children represented less than 1 percent of all children served in foster care in fiscal year 2003. In five states, however, at least one-quarter of the foster care population was American Indian, as shown in table 3." *Id.* at 13. In Table 3, Minnesota is listed as number 6 with 15 percent of children served in foster care who were Native American.

In addition, in the Minnesota Child and Family Services Reviews, an area needing improvement was "American Indian children continue to be over-represented in the foster care population...11% were American Indian and they were 2% of the Minnesota child population." U.S. Dept. of Health and Human Services, Admin. For Children and Families, Region V, *Child and Family Final Assessment, Services Reviews, Final Assessment*, Minnesota (2001), available at <http://basis.caliber.com/cwig/ws/cwmd/docs/cb-web/searchform> (Final Reports,

Minnesota), Item 17 and Item 38 ("Area Needing Improvement . . . [the disproportionate percentage of American Indian children in foster care] in one particular county); *see also* at the same website (Statewide Assessments, Minnesota), U.S. Dept. of Health and Human Services, Admin. for Children and Families, Region V, *Child and Family Services Reviews, Statewide Assessment Instrument (1999)*, Section II.F.4 , Agency Responsiveness to Community, ("[b]etween 1992-1998, Indian children represented 11.2 percent of all Minnesota children in out-of-home placement with an average of 2,082 children in placement for that time period. The [Minnesota] department has instituted several strategies and initiatives to address the disproportionate number of Indian children in out-of-home placement, to train and educate local social services about the Indian Child Welfare Act (ICWA) and the Tribal State Agreement, and to improve the delivery of child welfare services to Indian children and families throughout the state [of Minnesota].", Section IV, 8.2.2, Foster Care Population Flow, ("American Indian children continue to be over-represented in the foster care population. . . . [eleven percent were American Indian and they were two percent of the state's (sic) population."), and Section IV, 8.2.11, other permanency issues, (The level of the disproportionate over-representation of Indian children in the foster care system is "a factor of approximately five," which "has remained relatively constant between 1994 and 1998", and explaining Table 6, a higher percentage of . . ."American Indian children exited to finalized adoptions than did children of other races."))

Thus, currently in the state of Minnesota, more Indian children are still disproportionately over-represented in its foster care system, with many resulting in adoptions. The ICWA was clearly intended to remedy this problem.

Hearings were again held in 1977 and 1978. At these hearings there was considerable focus on the crisis facing tribes as a result of the “massive removal of their children” to the states’ foster care systems and public and private adoption agencies and the ultimate permanent placement of those children in non-Indian settings. *Holyfield*, 490 U.S. at 34.

Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen’s Association explained the unmitigated erosion to the tribes’ existence caused by the tribes’ loss of their children. He lamented:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes’ ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Id. at 34. (quoting *Hearings on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. (1978).

The Chief’s view was shared by the members of Congress. Congressman Morris Udall said “Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy”, and Congressman Lagomarsino stated: “[t]his bill is directed at conditions which ... threaten ... the future of

American Indian tribes ...” *Id.* at 34 n.3 (*quoting* 124 Cong. Rec. 38102 (1978)). In 1978, after long consideration by the Congress, the Act was passed. *Id.* at 33-34.

As set forth in 25 U.S.C. §1901, the Congress found:

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal 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.

In the Act, the Congress recognized that it had the responsibility to protect and perpetuate tribes and to protect their present and future tribal members. 25 U.S.C.

§ 1901(2). It declared 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 ...” 25 U.S.C. § 1902.

This background makes clear, and the BIA Guidelines stress, that ICWA is a remedial statute and must be liberally construed to achieve its goals. *Holyfield*, 490 U.S. at 52; *In re K.H. and K.L.E.*, 981 P.2d 1190, 1195 (Mont. 1999) (recognizing remedial nature of ICWA); *In re Adoption of Mellinger*, 672 A.2d 197, 197 (N.J. Super. Ct. App. Div. 1996) (same); *In re Angus*, 655 P.2d 208, 211 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983) (same); Guidelines for State Courts; Indian Child Custody Proceedings,

44 Fed. Reg. 67583, 67586 (Nov. 26. 1979 (BIA Guidelines); 3 Norman J. Singer, *Sutherland Statutory Construction*, § 60:1 (6th ed. 2001).

It is difficult to imagine a law more protective of Indian children and tribes than the ICWA. The Act's jurisdictional, substantive and procedural requirements guard Indian children against the permanent separation from their families and tribes, protect the integrity of Indian families, and improve the chances that Indian tribes will survive as viable sovereign, political entities. *Holyfield*, 490 U.S. at 49-50; *see also*, *People in Interest of J.L.G.*, 687 P.2d 477, 478 (Colo. Ct. App. 1984) ("Congress passed [ICWA] with the express purpose of protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families); *In re J.M.*, 718 P.2d 150, 152 (Alaska 1986) (same); *In re Adoption of Lindsay C*, 280 Cal. Rptr. 194, 196 (Cal. Ct. App.1991) (same); *In re Crystal K.* 276 Cal.Rptr. 619 (Cal. Ct. App. 1990), *cert. denied*, 502 U.S. 862 (1991); *In re Appeal of Pima County Juvenile Action*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981), *cert denied*, 455 U.S. 1007 (1982) ("[t]he Act is based on the fundamental assumption that it is in the Indian child's best interests that its relationship to the tribe be protected."); *In re Custody of S.B.R.*, 719 P.2d 154, 156 (Wash.Ct.App. 1986) (same).

ICWA must be interpreted to remedy the problem addressed. Through the ICWA, Congress has made a determination that tribes be given every opportunity to maintain their membership, that Indian children have a right to their heritage, and that their right to determine the future of their children be protected and fostered. Indian children who grow up in a non-Indian setting become spiritual and cultural orphans as adults. They do

not entirely fit into the culture in which they were raised and yearn throughout their life for the family and tribal culture robbed from them as children. *Holyfield*, 490 U.S. at 33, n. 1. As adults, they disproportionately experience problems with identity, drug addiction, alcoholism, incarceration and, most disturbingly, suicide.²

The ICWA and its history plainly show Congress' intent to protect the existence and integrity of tribes and to protect and foster the best interest of Indian children which thereby perpetuates the tribal relations of Indian peoples of our Nation. The Appellate Court's judgment to transfer jurisdiction is entirely consistent with Congress' intent and

² Carolyn Attneave, *The Wasted Strengths of Indian Families*, 32 (1977); Robert Bergman, *The Human Cost of Removing Indian Children From Their Families*, 35 (S. Unger ed. 1977). Indeed, in *Quinn v. Walters*, 881 P.2d 795 (Or. 1994), the Supreme Court of Oregon ruled that there was insufficient admissible evidence in the record to prove the child whose adoption was sought was an Indian child within the meaning of the ICWA. The remarkable feature of this case is the dissent's castigation of the majority's hyper-technical basis for its decision grounded on Oregon's hearsay evidentiary law. It is prophetic:

When the power is used to remove an Indian child from the surrounding most likely to connect the child with his or her cultural heritage, that decision unintentionally continues the gradual genocide (footnote omitted) of the Indians in America...[ICWA was] previously enacted to prevent unintended genocide...Congress knew that there is no Indian tribe without members. Congress listened, and learned that a tribe has no heart except the hearts of its members and that the spirit of its members is the spirit of the tribe. Congress understood that the life of a tribe exists only in its future and its future is its children. Congress knew that all children are desirable to parents and that part of the joy of parenting is guiding the child's future.

Listening, knowing, and understanding, Congress acted to save the tribe by saving its future existing only in its children. Congress enacted The Indian Child Welfare Act of 1978, 25 U.S.C. §1901 *et seq.*

Id. at 801-802 (Fadeley, J. dissenting).

with previous pronouncements by Minnesota courts. *See e.g., In re Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994); *In re Welfare of B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990); *In re Adoption of M.T.S.*, 489 N.W.2d 285 (Minn. Ct. App. 1992).

B. In the ICWA, Congress clearly recognized and reinforced tribal sovereignty as an essential means of achieving the Act's objectives.

In the ICWA, Congress specifically found that to achieve its goals it needed to protect and preserve tribal sovereignty. 25 U.S.C. § 1901(2). Thus, through the ICWA, it declared a policy “to promote the stability and security of Indian tribes and families,” that is, a policy that would strengthen tribal self-government and improve internal tribal relations. 25 U.S.C. § 1902; *J.W. v. R.J.*, 951 P.2d 1206, 1212 (Alaska 1998) (“...Congress was concerned with two goals: protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families.” (citations omitted)); *In re Adoption of Riffle*, 922 P.2d 510, 513-514 (Mont. 1996) (same). By acknowledging tribal authority over these matters, Congress exercised its judgment in the way it saw best “to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.” *Holyfield*, 49 U.S. at 36-37, *citing House Report* at 23 (emphasis added). Indeed, the Supreme Court of the United States quoted with approval language from an ICWA decision of the Supreme Court of Utah which wrote: “The protection of [the tribe’s ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interests of the parents.” *Id.* at 53, *quoting In re Adoption of Halloway*, 732 P.2d 962, 969-970 (1986). In *Holyfield*, the

Supreme Court pointed out the most obvious parts of the ICWA that were crafted to accomplish Congress' goals to protect tribal sovereignty. It began by noting the jurisdictional elements of the ICWA which recognized the scope of tribal sovereignty in an Indian child custody proceeding:

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court. (footnotes omitted).

Holyfield, 490 U.S. at 36. In addition, it noted that Congress also provided federal funds under Title II of the Act for the establishment and operation of on and off-reservation child and family service programs.³ *Id.* at 37 n.6. Such programs were intended to directly strengthen tribal self-government and improve internal tribal relations.

Under this statutory regime, this Court must recognize that the Act cannot be interpreted to prevent the Yankton Sioux Tribal Court from deciding the future of X.T.B.

³ See, 25 C.F.R. Part 23. "The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort." Purpose of Tribal Gov't Grants, 25 C.F.R. § 23.22 (2006); see also, Purpose of Off-Reservation Grants, 25 C.F.R. § 23.22 establishing same objective for off-reservation programs

Indeed, “the main effect of [the ICWA] is to curtail state authority. *See especially* §§ 1901, 1911-1916, 1918.” *Holyfield*, 490 U.S. at 44-45 n.17; *see also* House Report at 21.

Courts have consistently held in ICWA cases that it is the sovereign prerogative of a tribe to determine the future of its children. In *Holyfield*, the U.S. Supreme Court held that twins born out-of-wedlock to parents who were enrolled members of the Choctaw Indian Tribe and residents and domiciliaries of the Choctaw Reservation located in Mississippi were “domiciled” on that reservation within the meaning of the ICWA’s exclusive jurisdiction provision even though neither the parents nor the children were present on the reservation when the twins were born. Thus, the state court lacked jurisdiction to enter an adoption decree even though the twins were “voluntarily surrendered” for adoption. The Court wrote “[t]hese congressional objectives make clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA’s jurisdictional scheme is inconsistent with what Congress intended.” *Holyfield*, 490 U.S. at 51.

Similarly, Congress intended for Indian tribes to have presumptive jurisdiction to determine custody issues involving their tribal children, and state law or policy that interferes with that intent must stand aside. *In re Adoption of Holloway*, 732 P.2d at 968; *In re A.B.*, 663 N.W.2d 625, 633 (N.D. 2003); *In re Marriage of Skillen*, 956 P.2d 1, 10-11 (Mont. 1998); *In Re J.L.P.*, 870 P.2d 1252, 1256 (Colo. Ct. App. 1994); *In re Youpee’s Adoption*, 1991 WL 134556, 11 Pa.D & C.4th 71 (Pa. Comm. Pl.1991); *see In re Andrea*, 10 P.3d 191, 195 (N.M. Ct. App. 2000) (children’s court transfer follows the congressional intent underlying ICWA where its unclear if 1911(b) applied); *In re*

Guardianship of Ashley Elizabeth R., 863 P.2d 451, 453 (N.M. Ct. App.1993) (in 1911(b) case, construction of the term ‘Indian custodian’ is in conformity with the Congressional declaration of policy ‘to promote the stability and security of Indian tribes and families.’”); *In re Armell*, 550 N.E.2d 1060, 1065-66, (Ill. App. Ct. 1990) (Congress intended uniformity of terms and state laws should not frustrate that intention; thus "good cause" not to transfer jurisdiction should not be interpreted by individual state law)

In *In re Marriage of Skillen*, a non-ICWA case involving a dissolution proceeding, the Supreme Court of Montana turned to its ICWA cases to help guide its decision to determine if the tribal court was the preferred forum. 956 P.2d at 15. It stressed the clear import from its ICWA cases of Congress’ intent contained in ICWA’s statutory presumptions favoring a tribal role in Indian child custody proceedings across the board. 956 P.2d at 10. For example:

- “granting the tribe, as opposed, to the Bureau of Indian Affairs, ultimate authority to determine whether a child is eligible for tribal membership, and thus, final authority to determine whether a child satisfies the ICWA definition of Indian child” (citations omitted) *id.*
- "stating that the ICWA is paramount to a natural parent’s desire for anonymity” (citations omitted) *id.*
- “interpreting broadly language from the tribal court to conclude that Indian child was a ward of the tribal court and subject to exclusive tribal jurisdiction pursuant to the ICWA” (citations omitted) *id.*

- “recognizing a family member’s right to intervene pursuant to the ICWA even after considerable steps in adoption proceedings had occurred.” (citations omitted) *id.*

ICWA cases informed the Montana Supreme Court’s jurisdictional analysis in three ways:

First, that Congress felt the need to curtail states in these matters indicates that state courts are apt to exercise jurisdiction when the best interests of the Indian child do not necessarily support that assumption of jurisdiction. In other words, it puts states on notice that they are, in fact, a significant part of the problem, and that they should weigh their potential assumption of jurisdiction very judiciously. (citation omitted). Second, the ICWA indicates that regardless of the child’s residence, tribal courts are uniquely and inherently more qualified than state courts to determine custody in the best interests of an Indian child. . . . Finally, the ICWA demonstrates confidence in the tribal forum, not only for the substantive expertise of its perspective, but also for its ability to make a fair and appropriate determination and to serve the interests of all the parties, including the state. (citation omitted.)...

956 P.2d at 11-12. In the end, it was emphatic that any disregard for the clear policy contained in the ICWA statutory presumptions favoring a tribal role in an Indian child custody proceeding would diminish tribal sovereignty. True to its word, it ultimately favored tribal jurisdiction in the dissolution proceeding.

Likewise, the State of Minnesota legislature has clearly indicated its intent to favor tribal court jurisdiction by passing the Minnesota Indian Family Preservation Act, Minn. Stat. Ann. §§ 260.751 to 260.835. Similar to 25 U.S.C. § 1911(b), it specifically provides for transfer of jurisdiction in 260.771, Subd. 3, which, *a fortiori*, evinces the statutory presumption that it is in the best interest of an Indian child for its tribe to decide its fate. *See, In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992). Moreover,

when viewed in its entirety, the Minnesota Act patently evinces an overall intent to favor a tribal role in Indian child custody proceedings by going beyond the Federal ICWA requirements in some areas.⁴

The courts of Minnesota have also demonstrated an intent to favor a tribal role in Indian child custody proceedings. *See, e.g., In re Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994); *In re Welfare of S.N.R.*, 617 N.W.2d 77, 83 (Minn. Ct. App. 2000) (in determining membership, ICWA is to be liberally construed in favor of a result consistent

⁴ The Tribal/State Agreement on Indian Child Welfare between the State of Minnesota and eleven tribal Nations in Minnesota reflects such intent.

It provides in relevant part: "In passing the Indian Child Welfare Act, Congress stated: 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 operations of child and family service programs.

Minnesota established the above concept as state policy and passed the Minnesota Indian Family Preservation Act (citation omitted) in 1985 to strengthen and expand parts of the federal act. The Minnesota law and its amendments emphasize the State['s] interest in supporting the preservation of the cultural heritage of Indian children and recognize tribes as powerful resources in doing so...This Agreement was developed to provide a mechanism for maximizing the participation of tribes in decisions regarding Indian children, especially in the provision of Indian child welfare services in addressing barriers to implementing those services for the protection of Indian families and children and for preventing foster placements and non-Indian adoptions.

The Minnesota *Tribal/State Agreement on Indian Child Welfare*, pp. 4-5 (1998) available at http://www.dhs.state.mn.us/main/groups/children/documents/pub/dhs_id_052906.pdf. *See also*, Minnesota *Social Services Manual*, § XIII-3511(1999) available at http://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs_id_016961.hcsp; Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 Wm.Mitchell.L.Rev. 811, 832-838 (2000).

with deference to tribal judgment and in furtherance of Congressional intent); *In re Custody of A.K.H.*, 502 N.W.2d 790, 795 (Minn. Ct. App. 1993) (intervention by an Indian tribe in an intra-family dispute will further the purpose of the Act); *In re Adoption of M.T.S.*, 489 N.W.2d 285, 286 (Minn. Ct. App. 1992) (presumption created by ICWA that the Indian child's best interests are best served by placement with extended family member); *In re Welfare of B.W.*, 454 N.W.2d 437, 443 (Minn. Ct. App. 1990) (consistent with ICWA more stringent state law to be applied); *In re Welfare of M.S.S.*, 465 N.W.2d 412, 416 (Minn. Ct. App. 1991) (same).

In *In re Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994), this Court found that a trial court's determination that good cause existed to deviate from ICWA placement provisions under 25 U.S.C. §1915 was an abuse of discretion. 521 N.W.2d at 358. In examining the "one important way in which the Act achieves its goals" it quoted what the U.S. Supreme Court had to say about 1911(b): "In interpreting this provision, the United States Supreme Court noted, 'It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities, vis-à-vis, state authorities.' (citation omitted). The Court concluded, 'Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.' (citation omitted)." 521 N.W.2d at 359. This Court also observed that the U.S. Supreme Court placed much importance on Congress' intent to "protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society . . . by

establishing ‘a Federal policy that, where possible, an Indian child should remain in the Indian community,’ and by making sure that Indian child welfare determinations are not based on ‘a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.’” *Id.* at 359. With that backdrop, this Supreme Court held that good cause may include a child’s need for stability, but this was not equivalent to a need to be adopted by non-Indians

In arriving at its conclusion, this Court clearly indicated its intent to favor a tribal role in Indian child custody proceedings because of the palpable harms the ICWA was intended to remedy. It wrote “The plain language of the Act read as a whole and its legislative history clearly indicate that state courts are part of the problem the ICWA was intended to remedy. (citing *Holyfield*). Furthermore, the report from our own Task Force on Racial Bias in the Judicial System indicates that insensitivity to minority cultures remains a problem in child welfare cases. (citing the report).” *Id.* at 362-63. Specific to Native Americans, it observed “[t]his report shows that despite the enactment of statutory schemes to prevent placement of minority children outside their communities, these children are still ‘vastly over-represented within the foster care system.’ (citation omitted). ‘For Native American children in particular, their over-representation in out-of-home placements exceeded white children by over 10 times.’ (citation omitted).” *Id.* at 363 n.6. This Court summed up its views “Congress, in conjunction with numerous Indian tribal governments and the Bureau of Indian Affairs, has carefully and thoughtfully set out the nation’s policy to prevent the destruction of Indian families and Indian tribes and to protect the best interests of Indian children by preventing their

removal from their communities.” *Id.* at 366. This Court’s approval of the transfer of jurisdiction would enforce the clear and unequivocal federal and state policy of having a tribal court decide the fate of one of its Indian children.

In sum, the statutory scheme of the ICWA clearly evinces Congress’ intent to recognize and reinforce tribal sovereignty through the Act’s jurisdictional, procedural and substantive provisions. This intent is reinforced by the Minnesota Indian Family Preservation Act and prior Minnesota state court precedent. To deny the Yankton Sioux Tribal court the opportunity to decide the fate of X.T.B. would interfere with Congress’ goal of protecting and preserving tribal sovereignty, the tribe itself, and X.T.B.

CONCLUSION

The ICWA was passed to protect tribes as viable sovereign, political entities and their present and future members. The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with proportional font. The length of this brief is 5,683 words. This brief was prepared using Microsoft Word 2003 software.

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