IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0539

IN THE MATTER OF:

J.S.,

A Youth in Need of Care

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Deborah Christopher, Presiding

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STATEMENT OF THE ISSUES

I.The failure of the State to comply with the Indian Child Welfare Act tainted the entire proceedings, placing the Father at a disadvantage, warranting invalidation.

a.The State and the district court failed to provide notice, as required by 25 U.S.C. § 1912(a).

b.The State failed to make active efforts to provide services and promote the relationship between the Father and J.S.

c.The State failed to provide the required expert testimony for establishing guardianship and the continued placement of J.S. outside of his Father's care.

STATEMENT OF THE CASE

This is an appeal by S.F., Father to J.S., of an award of guardianship of his minor son to foster parents. On July 26, 2013, the Twentieth Judicial District, Lake County, granted guardianship of J.S. to his foster parents over the objection of the Father. The district court determined that guardianship was in J.S.'s best interest and that further efforts at unifying J.S. and the Father would be unproductive. The district court further determined that termination of the Father's parental rights was not in the child's best interest.

This case is governed by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, et. Seq. (1978). The Father alleges the State failed to comply with the ICWA. The State ignored key requirements of the ICWA, primarily related to notice, reasonable efforts and expert testimony.

STATEMENT OF THE FACTS

S.F. is the Father of J.S., now age 15. S.F. is an enrolled member of the Curyung Tribe, located in Dilligham, Alaska.[1] J.S.'s biological Mother, B.S., is an enrolled member of the Salish Kootenai tribe. J.S. is now an enrolled member of the Curyung Tribe. The Indian Child Welfare Act applies to this proceeding.

J.S. and his five siblings were removed from their Mother's care in 2001. At the time of removal, J.S.'s father was unknown. (D.C. Doc. 2.) J.S. was adjudicated a Youth in Need of Care by stipulation of the Mother on February 14, 2002. (D.C. Doc. 29.) The Mother named S.F. as the putative father. S.F. was served with notice that he had been named as a putative father on September 9, 2002 , one year after J.S. had been removed from his Mother's care. (D.C. Doc. 47.) In February 2003, the Mother successfully argued that the State had an obligation to establish paternity for J.S. (D.C. Doc. 74.) In September 2004, paternity testing was completed which concluded that S.F. was the biological father of J.S. (D.C. Doc. 86.) At this point, J.S. had been in the legal custody of the state for two and half years.

The Mother's parental rights were terminated in March 2003. (D.C. Doc. 77.)

[1] The Curyung Tribe is one of many Alaskan tribes incorporated under the umbrella of the Bristol Bay Corporation.

Between September 2004, when paternity was established, and August 2006, two Permanency Plan hearings were held, along with a Motion to Appoint Surrogate Parent. The Father was not served with notice of these hearings nor was he appointed counsel. (*See* D.C. Docket.) In August 2006, two years after paternity was established, the State filed a petition to terminate the Father's parental rights. (D.C. Doc. 109.) The Father was personally served but there is no record that the Father's tribe was served or provided any notice. Father appeared at the termination hearing, requested and was appointed counsel. (D.C. Doc. 115.) Ultimately, in October 2006, the State moved to dismiss the petition to terminate. (D.C. Doc. 127.)

In November 2007, the State filed its second petition to terminate the Father's parental rights. (D.C. Doc. 140.5.) The Father was served, but there is no record of notice to the Curyung Tribe. The Father filed a Motion to Dismiss, arguing that ICWA had not been strictly followed. (D.C. Doc. 149.5.) The State responded to the Father's motion to dismiss, arguing that J.S. had not been determined to be an Indian child and, therefore, ICWA did not apply. (D.C. Doc. 150.) On that same day, the Confederated Salish Kootenai Tribes (CSKT) filed a Notice of Intervention, noting that no certified notice had been send to the Indian tribes affected by J.S.'s removal, as required by the ICWA. (D.C. Doc. 151.) In response, the State sent a Notice of Hearing via certified mail with return receipt to

the Legal Department and ICWA Specialist for the Bristol Bay Corporation. A Notice of Involuntary Custody Proceeding was sent to the Bristol Bay Corporation in Dillingham, Alaska. The certificate of service indicated notice was sent by registered mail with return receipt requested but there is no record of receipt. (D.C. Docs. 154, 155.)

In February 2008, the Curyung Tribe's request for intervention was granted. (D.C. Doc. 164.) The Father filed a second motion to dismiss the petition to terminate on the basis that application of ICWA was a threshold issue that required determination, prior to termination, that active efforts had not been made and that no treatment plan had been offered to the Father. (D.C. Doc. 174.) The State agreed to dismiss its second petition to terminate and extend temporary legal custody until hearing on the issue of the ICWA was held. (D.C. Doc. 183.)

A show cause hearing on the issue of the ICWA was held on May 1, 2008. The parties agreed that the Father should be provided with a treatment plan. (D.C. Doc. 185.5.) Permanency hearings were held May 2008, May 2009 and June 2010. In the 2010 permanency report, the State acknowledged that no treatment plan had been ordered for the Father, stating the Father "was never interested in or willing to participate in a Treatment Plan." (D.C. Doc. 242.) A status hearing regarding the non-existence of a treatment plan for the Father was held on March

31, 2011. Over objection of the Father, the State's proposed treatment plan was order by the district court. (D.C. Doc. 264.)

In November 2011, the State filed its third petition to terminate the Father's parental rights, alleging the Father was unwilling to complete a treatment plan, had not made efforts to visit with J.S., and had represented through counsel that he wished to relinquish his parental rights. (D.C. Doc. 275.) A hearing on the third petition to terminate was held on April 12, 2012. The district court denied the petition, determining that the State had failed to provide the testimony of an appropriate ICWA expert and failed to provide active efforts. (D.C. Doc. 298.)

> So the Court is denying the petition to terminate at this time because it fails with regard to the issues that were required by the active involvement under the ICWA act and because we need to get a specific person who can speak to the requirements of that act with regard to this child
>
> .

(4/12/2012 Tr. at 66.)

The expert called by the State was familiar with the CSKT customs but completely unaware of any customs and traditions of the Curyung Tribe. The district court noted that the State had failed to actively engage the Father. The district court ordered that temporary legal custody be extended for three months, that the Father's treatment plan be revised to include specific dates for initiation and completion of tasks and that the State make active efforts to assist the Father with completion. (4/12/2012 Tr. at 66.)

Between April 2012 and the guardianship hearing, the Father was making substantial efforts at completing his treatment plan. (D.C. Docs. 301, 303.) However, J.S. was hesitant about visitation with his Father. J.S. had been in the same foster care placement, with many of his siblings (two of whom had been adopted by the same family) for six years. J.S. had indicated to his counsel, the child protection specialist and the district court that he wished to remain in his current foster care placement. At that time, the State's proposed permanency plan was a concurrent plan of reunification with the Father or guardianship with the foster family. (D.C. Doc. 303.)

On November 13, 2012, the State filed a petition for legal guardianship. (D.C. Doc. 328.) The Father filed his objection and petitioned that the matter be transferred to tribal court. (D.C. Doc. 336.) A transfer hearing was held, at which time the Curyung tribal court indicated it declined to accept jurisdiction. (2/21/2013 Tr. at 6.) A hearing on the petition for guardianship was held on March 14, 2013. Testimony was provided by Nikki Grossberg, Regional Administrator for the Department of Health and Human Services, Child and Family Services, and Chris Itumulria, Tribal Children's Service Worker for the Curyung Tribe.

Grossberg testified to the Father's compliance with his treatment plan and her contact with the Father and with J.S. The Father had substantially complied with his treatment plan. Grossberg stated that his non-compliance was primarily

related to his inability to understand J.S.'s needs. (3/14/2013 Tr. at 25-26.) She further testified that she had spoken with J.S., then age fourteen, who consistently expressed a desire to remain in his foster placement. (3/14/2013 Tr. at 6.) Itumulria, who was identified as an ICWA expert over the objection of the Father, testified that the Curyung tribe supported the guardianship and did not wish to see the Father's rights terminated. (3/14/2013 Tr. at 41.)

On July 26, 2013, the district court issued its order, granting guardianship of J.S. to the foster family. In granting guardianship, the district court cited the consent of the Curyung tribe, the wishes of J.S., the active efforts made by the State and the Father's lack of progress on his treatment plan. (D.C. Doc. 364.)

The Father filed this timely appeal.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact to determine whether they are clearly erroneous. *In re M.P.M.*, 1999 MT 78, ¶ 12, 294 Mont. 87, 976 P.2d 988. Findings of fact are clearly erroneous if they are not supported by substantial evidence; or, if so supported, the district court misapprehended the effect of the evidence; or, if so supported and the district court did not misapprehend the effect of the evidence, this Court is left with the definite and firm conviction that a mistake has been committed. *In re S.M.*, 1999 MT 36, ¶ 15, 293 Mont. 294, 975 P.2d 334. This Court reviews a district court's conclusions of law

to determine whether its conclusions are correct. *In re M.P.M.,* ¶ 12.

"A district court's application of the law to the facts of a case is a legal conclusion which we review to determine whether the interpretation of the law is correct." *In re J.W.C.,* 2011 MT 312, ¶ 15, 363 Mont. 85, 265 P.3d 1265 (quoting *In re C.H.,* 2000 MT 64, ¶ 9, 299 Mont. 62, 997 P.2d 776).

SUMMARY OF THE ARGUMENT

A natural parent's right to care for and maintain custody of their child is a fundamental liberty interest that must be protected by fundamentally fair procedures. *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 168 P.3d 629. ICWA was established to "protect the best interests of Indian children and to promote stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902. These minimum standards were developed to provide greater protections to Indian families, who historically, had been separated by the state at an alarming rate without consideration for their cultural heritage.

With this principle in mind, the district court erred when it determined that the State had complied with the ICWA in regards to notice, active efforts and expert testimony, and awarded guardianship of the youth to the foster family.

ARGUMENT

I. THE FAILURE OF THE STATE TO COMPLY WITH THE INDIAN CHILD WELFARE ACT TAINTED THE ENTIRE PROCEEDINGS, PLACING THE FATHER AT A DISADVANTAGE, WARRANTING INVALIDATION.

In 1978, Congress enacted the Indian Child Welfare Act in response to the systematic destruction of Indian families and tribal integrity caused by state agencies and courts' failure to recognize essential tribal relationships within tribal communities and families. 25 U.S.C. § 1901(5). Intended to "protect the best interests of Indian children and to promote stability and security of Indian tribes and families" minimum Federal standards for the removal of Indian children from their families were established. 25 U.S.C. § 1902. These minimum standards were developed to provide greater protections to Indian families, who historically, had been separated by the state at an alarming rate without consideration for their cultural heritage.

The need for strict compliance with the ICWA is underscored by the statutorily protected right of the child, parent or tribe to petition the court to invalidate the proceedings upon a showing of non-compliance.

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent

> jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1914.

Under Section 1914, an ICWA action may be invalidated upon a petition showing **any** provision of Sections 1911, 1912 or 1913 was violated.

This case has a long, well established record reflecting the State's failure to comply with the requirements of the ICWA, specifically relating to notice, expert testimony, active efforts and placement priority.

This Court addressed invalidation under 25 U.S.C. § 1914 in *In re M.E.M.*, 209 Mont. 192, 679 P.2d 1241, (1984). There, the mother appealed the termination of her parental rights, alleging that the district court failed to follow the requirement of the ICWA during the temporary legal custody proceedings. She made no allegation that the ICWA was violated during the termination proceedings, but argued that violations during the temporary proceedings invalidated the entire proceeding. This Court concluded that violations occurring during temporary custody proceedings would not require invalidation of the permanent custody proceedings. *In re M.E.M.*, 209 Mont. at 195, 679 P.2d at 1243.

More recently, this Court revisited the issue of invalidation. In *In re K.B. & T.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836, non-compliance with regards to

notice, active efforts and expert testimony were addressed. The Mother successfully showed violation of the ICWA and this Court was "compelled to make sure [the ICWA] was followed. 25 U.S.C. § 1902." *In re K.B. & T.B.*, ¶ 35. Accordingly, this Court reversed termination.

In its Guidelines for State Court; Indian Child Custody Proceedings, the BIA has clearly set forth the policy of ICWA:

> Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in any individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. *Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.*

44 Fed. Reg. 67584, 67586 (Nov. 26, 1979) (emphasis added).

Every procedural safeguard should implemented when the State handles a case with Indian children. Historically, the failure of the government to do so resulted in the demise of thousands of Indian families. It follows then that the

remedy for violations identified under 25 U.S.C. §§ 1911, 1912 or 1913 is invalidation.

A. The State and the district court failed to provide notice, as required by 25 U.S.C. § 1912(a).

The notice requirements for proceedings subject to the ICWA are as follows:

> In any involuntary proceeding in a state court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a).

This case was initiated in 2001, upon removal of J.S. from his Mother's care. Approximately one year later, the State made efforts to identify J.S.'s father and the Mother provided Father's name. In July 2002, the State was aware the Father, then only named as a putative father, was likely a member of an Alaskan tribe.

(D.C. Doc. 38). Under 25 U.S.C.§ 1912 (a), the State had a statutory obligation to provide notice to the Father and his tribe.

Although the State did provide notice to the Father, the notice did not comply with the ICWA. Notice to the Father should have contained information stating that the Father had the right to intervene. The Father was provided with a copy of the Motion to Extend Temporary Legal Custody, Report to the Court and Notice of Hearing. None of the provided documents informed the Father of his right to intervene, to contest the proceedings, to have counsel or the application of the ICWA.

Moreover, the State did not provide notice in any manner to the Father's tribe. If the State was unaware of the Father's tribe, 25 U.S.C. § 1912(a) provides clear instruction on providing notice to the Secretary of the Interior, who then bears the burden of identifying and notifying the tribe. The State failed to provide notice to the tribe or the Secretary, a clear violation of the ICWA.

Additional opportunity to provide notice to the Father and his tribe occurred multiple times between the child's removal in 2001 and 2007. The State should have provided notice upon the establishment of paternity in September 2004 (two years after identification of Father), upon petition for appointment of a surrogate parent in 2005, upon placement of J.S. in a new, non-ICWA compliant foster home in May 2006, upon filing of the August 2006 petition to terminate parental rights,

and upon filing of the November 2007 petition to terminate the Father's parental rights. Not until the Father moved to dismiss the November 2007 petition on the basis of the ICWA non-compliance, did the State make any efforts to notify the Father's tribe.

Finally, on December 31, 2007, six years after the initiation of this action and five years after identifying J.S.'s Father, the State provided notice to the Curyung Tribe of their involvement with an Indian child. This delay is a clear violation of the notice requirements of the ICWA. The lack of timely notice adversely affected the Curyung Tribes'a ability to participate, advocate and protect the rights of the Father as a tribal member.

The failure to provide notice, in accordance with the ICWA, is a violation of the ICWA. This clear and repeated violation should result in invalidation, as allowed in 25 U.S.C. § 1914.

B. <u>The State failed to make active efforts to provide services and promote the relationship between the Father and J.S.</u>

One of the added protections and safeguards under the ICWA requires that the State make active efforts to prevent the breakup of Indian families.

> "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C.S. § 1912(d).

The State is required to make active efforts from removal until the termination hearing. There is no clear rule or definition of active efforts. However, it is well established that active efforts constitutes significantly more than passive efforts. Active efforts implies a requirement that the child protection specialist do more than just draft a treatment plan and leave the parent to their own devices to complete the plan. Under active efforts, the child protection worker must "take the [parent] through the steps of the plan. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child." *A.A. v Dept. of Family & Youth Services*, 982 P.2d 256, 261**,** (Alaska 1999), citing Craig J. Dorsay, *The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual* 157-58 (1984).

Here, no treatment plan was even ordered for the Father until March 2011, ten years into this case. Ten years lapsed before a case plan was developed to facilitate a relationship between the Father and J.S. Arguably, the lack of a treatment plan could not satisfy reasonable efforts, let alone a heightened requirement of active efforts.

At the April 12, 2012 termination hearing, the district court expressed significant doubt the State had made active efforts to assist the Father.

> So the issue that remains is did the State do what they had agreed to on the parenting plan so that they actually handled their responsibilities especially under ICWA. And it appears to the Court based on the testimony that they did not…
>
> I think the problem I've got, though, based on the testimony, unless there's testimony from the State with regard to the active involvement of the child protective specialist. I mean, based on the testimony of the State's expert in that area she indicated that she did not in fact do any of those things. That makes it very difficult for the Court to find that.

(Tr. 4/12/2012 at 50, 60,61.)

Ultimately, the district court denied the petition due to these concerns. "So the Court is denying the petition to terminate at this time because it fails with regard to the issues that were required by the active involvement under the ICWA act." (4/12/2012 Tr. at 66.)

From the time the Father was identified as the putative Father in 2002 through April 2012, the State did not make active efforts. This decade long failure to comply with the active efforts requirement is precisely the violation that 25 U.S.C. § 1914 was meant to remedy.

C. The State failed to provide the required expert testimony for establishing guardianship and the continued placement of J.S. outside of his Father's care.

Maintaining or removing an Indian child outside of the custody of his or her parent or Indian custodian mandates the support of expert testimony.

> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e).

Recently, this Court determined that the failure to elicit testimony regarding serious emotional or physical damage required reversal of termination. *In re K.B. & T.B.*, ¶ 28. There, the ICWA expert was questioned regarding "best interest" and whether the children would be "at risk" if returned to their Mother's care. There was no testimony of serious emotional or physical damage. Although the district court could consider the all the evidence in making a determination of termination, such evidence must include the testimony of a qualified expert witness. *In re K.B. & R.B.*, was an appeal from termination, as opposed to Father's appeal of guardianship here. Nonetheless, the statutory requirement for clear, expert testimony is the same – only the burden of proof differs.

At the guardianship hearing, the State presented the testimony of Grossberg and Itumulria. Grossberg was not identified as an expert witness, nor does her testimony address the issue of "serious emotional or physical damage". The only other witness, Itumulria, was qualified as an expert witness over the objection of the Father. The scope of Itumulria's testimony as it relates to "serious emotional or physical damage" is as follows:

> Q. Have you after reviewing all those documents formed an opinion as to whether the Department's proposed guardianship by Joseph's current foster family is in his best interests?
> MR. LARRIVEE: We would renew our objection, Your Honor.
> THE COURT: Objection is noted for the record. You may answer, sir.
> THE WITNESS: Can you repeat the question again, please?
> Q. (BY MS. VON JENTZEN:) Chris, have you formed an upon as to whether the Department's proposed guardianship by Joseph's foster family is in his best interests?
> A. The tribal court formed an opinion to go along with the guardianship with the Yonkins.
> Q. And do you concur with the tribal court's opinion?
> A. Yes, I do.
> Q. Do you believe that given the length of time that Joseph has been in his current placement that a change in his placement at this time would likely result in serious emotional and physical harm?
> MR. LARRIVEE: Objection; lack of --
> THE WITNESS: He's been noted in the system for 11 years, and I do believe changing at this time would do some serious emotional harm since he can make his own choices at the age of 14.

(3/14/2013 Tr. at 45-46.)

Inquiry into the best interest of the child does not meet the statutory requirement for expert testimony under the ICWA. "To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result." *44 Fed. Reg. 67593*, § D.3.c. (1978), *In re K.B. & T.B.*, ¶ 30. Itumulria's testimony does not meet this standard. It does not support the ultimate finding of the district court that continued custody by the Father would result in serious emotional or physical damage to the child. See, e.g., *Marcia V. v. Office of Children's Services*, 201 P.3d 496, 506 (Alaska 2009); *Steven H. v. Deptertment of Economic Security*, 190 P.3d 180, 185 (Arizona 2008).

In *C.J. v. Department of Health and Social Services, 18 P.3d 1214*, (Alaska 2001) the Alaska Supreme Court held it was an error for the lower court to rely upon the expert's conclusions when the "conclusions appear to be little more than generalizations about the harms resulting from a parent's absence and provide little discussion of the particular facts of this case." *C.J.*, ¶ 1218. This Court should find the same.

CONCLUSION

Throughout this proceeding, the State failed to comply with the statutory requirements of the ICWA. Compliance with the ICWA is not optional. It is mandated by federal law.

Between 2001 and 2007, the State failed to provide any notice to the Father's tribe. The State failed to obtain a treatment plan for the Father until 2011, and until the district court denied their petition to terminate in 2012, the State was not making active efforts to improve the relationship between the Father and J.S. or effect reunification between the Father and J.S. J.S. had been in custody of the State for over a decade and in the same foster care placement for six years before the State began making efforts to comply with the ICWA. By the time the State got serious about following the ICWA, J.S. was a teenager, attached to and a part of his foster care family. Instead of strengthening and providing tools to preserve an Indian family and Indian culture as intended by the ICWA, the State's disregard of its statutory requirements contributed to the strained relationship between the Father and J.S.

The failure to comply with the ICWA tainted the entire proceedings. The failure to follow the ICWA contributed to the attitude of the youth in regards to his relationship with his Father. With each passing year that the State failed to provide active efforts and failed to notify the Curyung tribe, J.C. became more and more

established in his foster care placement. J.C.'s stated wishes of remaining in his foster care placement appear to be the single most important factor that the district court relied upon when granting guardianship. Despite this factor, the twelve years preceding the guardianship hearing cannot be ignored or viewed in isolation in determining a final outcome.

For the reasons set forth herein, the award of guardianship should be reversed and this matter should be remanded to the district court with instructions to follow ICWA in all respects.

Respectfully submitted this 20th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed and/or hand delivered to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,902, excluding Table of Contents, Table of Authorities, Signature Block, Certificate of Service, Certificate of Compliance, and Appendices.

_____
ELIZABETH CUNNINGHAM THOMAS

APPENDIX