IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LISA FLEMING, et al, Defendants.	Case No. 5:13-cv-5020-JLV PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MARK VARGO

On March 30, 2015, this Court granted summary judgment to the Plaintiffs on seven federal claims: two claims under the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* ("ICWA"), and five under the Due Process Clause of the Fourteenth Amendment. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015) (hereinafter "*Oglala II*").[1] All seven rulings are significant, but one has the potential of reducing *by seventy-five percent* the number of Indian children in foster care in Pennington County. This uniquely impactful ruling stems from the Court's recognition that whenever an Indian child has been removed from his or her home on an emergency basis by state officials, then at the initial hearing following that removal (the "48-hour" hearing), those officials must satisfy the higher burden of proof required by ICWA's § 1922 rather than the lower burden of proof set by state law if they wish to retain custody of that child.

[1] *Oglala I, II,* and *III* are, respectively, this Court's ruling denying Defendants' motions to dismiss; granting Plaintiffs' motions for partial summary judgment; and denying Defendants' motions for reconsideration. *See Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1074 (D.S.D. 2014); 100 F. Supp. 3d 749 (D.S.D. 2015); No. 13-CV-5020, 2016 WL 697117 (D.S.D. Feb. 19, 2016).

Section 1922 requires that at the initial hearing following the removal of an Indian child, the child must be returned unless the state proves that continued placement outside the home is "necessary to prevent imminent physical damage or harm to the child." Thus, the federal standard, for reasons discussed below, narrows the inquiry to *physical* damage or harm.

In sharp contrast, state law, as interpreted by the South Dakota Department of Social Services ("DSS"), authorizes DSS to seek continued custody whenever returning the child to the home "would likely result in serious emotional or physical damage to the child." The DSS (or "state") standard thus allows DSS to consider a category of evidence—emotional damage—barred by the federal standard.

In every 48-hour hearing in which DSS requests continued custody of an Indian child, DSS files with the court an affidavit, called the "ICWA Affidavit," that sets forth the grounds on which its request is being made. *See* Deposition of DSS Supervisor D.H. ("D.H. Dep.") at 95-98 attached to the Declaration of Stephen L. Pevar ("Pevar Declaration") as Ex. 1-Vargo.[2] DSS created a model ICWA Affidavit for caseworkers to use, a copy of which was introduced during depositions as Exhibit 17 and is attached to the Pevar Declaration as Ex. 2-Vargo. As noted in paragraph 13 of the ICWA affidavit, the standard used in 48-hour hearings is whether returning the Indian child "would likely result in serious emotional or physical damage to the child." Similarly, every Temporary Custody Order issued since at least January 1, 2010, that granted DSS the authority to

[2] Consistent with the Court's recent stipulated protective order (Docket 253), DSS employees other than past and present named Defendants will be identified by their initials rather than their names.

retain custody of an Indian child found as a matter of fact that "continued custody of the child(ren) by the parents or Indian custodian is likely to result in serious emotional or physical harm to the child(ren)." Plaintiffs have already filed with the Court more than 50 Temporary Custody Orders, *see* Declaration of Beauchamp (Docket 111) Ex. 2, and all of them use that standard.[3]

The "emotional or physical damage" standard has governed 48-hour hearings in the Seventh Judicial Circuit for at least the past five years in determining whether to return a child to the parents. *See* Deposition of Luann Van Hunnik ("Van Hunnik Dep.") at 80 (agreeing that for at least the past five years, the "emotional or physical damage" standard "was the standard [DSS] would use in the 48-hour hearings") (attached to Pevar Declaration as Ex. 3-Vargo). *See also* Deposition of DSS Supervisor "M.A." ("M.A. Dep.") at 68-69 (acknowledging that "emotional or physical damage" was "the standard that [she was] trained to use at the 48-hour hearing") (attached to Pevar Declaration as Ex. 4-Vargo); D.H. Dep. at 97 (agreeing that the "emotional or physical damage" standard "has been in use at least for the last decade").

Thus, DSS believes it is authorized by state law to seek continued custody of an Indian child whenever the DSS caseworker assigned to the case believes the child would likely suffer serious physical *or* emotional harm if returned home. The latter option is not permitted under the ICWA standard, which only allows consideration of physical damage or harm.

[3] As this Court has noted, the judges presiding over 48-hour hearings typically advise Indian parents that custody will be determined based on "the best interests of the child." *See Oglala II*, 100 F. Supp. 3d at 760 (quoting Judge Jeff Davis informing parents that placement of their child will depend on "the best interests" of that child). The orders signed by these judges, however, employ instead the "emotional or physical damage" standard and not "best interests of the child."

For thirteen years until her retirement in April 2015, Ms. Van Hunnik was the Regional Manager of Region 1 of DSS, which encompassed Pennington County. Ms. Van Hunnik made the following two admissions in her deposition. First, the "emotional or physical damage" standard permits DSS to seek continued custody of an Indian child based *exclusively* on evidence of emotional damage. *See* Van Hunnik Dep. at 80 (agreeing that DSS "could rely exclusively on evidence of emotional damage" in deciding whether to seek continued custody of an Indian child).

Second, in approximately seventy-five percent of Indian custody cases, continued custody is sought based exclusively on emotional damage. *See id.* at 87-88 (agreeing that it "would be safe to say that around three-quarters" of the time, the request for continued custody was "based on emotional injury, not physical injury."); *see also* D.H. Dep. at 98 (agreeing that Ms. Van Hunnik's estimation of seventy-five percent was "pretty accurate"); Deposition of DSS Supervisor S.W. ("S.W. Dep.") at 69 (agreeing with the seventy-five percent estimation) (attached to the Pevar Declaration as Ex. 5-Vargo).

Ms. Van Hunnik's testimony thus indicates that for at least the past five years, **roughly three-fourths of the Indian children whose custody in foster care was extended at 48-hour hearings should have been returned to their homes instead because it was based on evidence not permitted by § 1922**. Had DSS employed the higher standard required by federal law rather than the state standard, hundreds of Indian children who subsequently spent days,

weeks, or months in foster care would have been reunited with their families at the 48-hour hearing.

This Court ruled in its March 30, 2015, summary judgment decision that DSS must employ the § 1922 standard in 48-hour hearings and not the state standard. *See Oglala II* at 765 (stating that deferment of § 1922, as sought by Defendants, "would undermine the Congressional declaration that a State's emergency custody authority immediately terminated when 'imminent physical damage or harm to the child' is no longer present."); *see also id*. at 754. Given that *Oglala II* was issued fifteen months ago, we should have seen since then a precipitous drop in the number of Indian children whose custody DSS sought to retain in 48-hour hearings, now that DSS may no longer seek continued custody based exclusively on emotional harm. For three reasons, this has not occurred.

First, it was only two weeks ago that DSS finally switched to the § 1922 standard. Defendant Lisa Fleming, who replaced Ms. Van Hunnik as Regional Manager upon her retirement, conceded during her recent deposition that DSS—despite this Court's decision in *Oglala II*—continued to employ the state standard until two weeks ago. (Plaintiffs will file the relevant pages of Ms. Fleming's deposition transcript as soon as the deposition has been transcribed.)[4]

Second, the judge who has heard all ICWA cases in the Seventh Judicial Circuit during 2016, Hon. Robert Gusinsky, allowed DSS to continue using the state standard until eight weeks ago, when he announced that he would henceforth employ the § 1922 standard. *See* Deposition of Roxanne Erickson

[4] Plaintiffs are scheduled to depose Defendant Lynne Valenti, the State Director of DSS, on July 20, 2016. Plaintiffs intend to ask Defendant Valenti why she ignored *Oglala II* for more than a year, even ignoring it after the Court denied DSS's motion to reconsider on February 19, 2016.

("Erickson Dep.") at 37 (attached to Pevar Declaration as Ex. 6-Vargo) (explaining that Judge Gusinsky held an informal meeting in late April or early May 2016 in which he told Ms. Erickson and other attorneys "that this is the [new] standard for 48-hour hearings, 1922."). Judge Gusinsky instructed DSS at the meeting to begin citing the § 1922 standard in all of the proposed orders DSS submits to the court in Indian custody cases. *Id*. ("[Judge Gusinsky] wanted to be sure that our orders were changed to reflect the standard that he had agreed was the standard.").[5]

The third reason why this Court's ruling on § 1922 has been inoperative is because the State's Attorney for Pennington County, Defendant Mark Vargo, and the person Mr. Vargo has assigned to handle abuse and neglect cases in Pennington County, Deputy State's Attorney Roxanne Erickson, *see* Erickson Dep. at 5-7, is failing to properly employ the federal standard. Indeed, Mr. Vargo's interpretation of § 1922 threatens to forever prevent Plaintiffs from obtaining the benefit of this Court's ruling on § 1922.[6] The instant motion for partial summary judgment seeks to remove this final obstacle to the implementation of § 1922 in Defendants' 48-hour hearings.

Plaintiffs deposed Ms. Erickson on May 25, 2016. Ms. Erickson testified that she interprets the word "harm" in § 1922's standard "physical damage or harm" *as including emotional harm*. *Id*. at 131 ("So I think the argument could be

[5]DSS did not begin using the federal standard until six weeks *after* Judge Gusinsky announced that he was going to use it. Thus, there is every reason to believe that DSS would still be ignoring *Oglala II* had Judge Gusinsky not switched to the federal standard.

[6]Plaintiffs refer to this as the "Vargo" interpretation because Defendant Vargo has delegated to Ms. Erickson the authority to handle abuse and neglect case and Ms. Erickson has made this interpretation.

made that 'harm' would also include emotional harm to the child. . . . [T]hat is how I would read it, that you have to show some form of harm which could include emotional harm."). Thus, Defendant Vargo continues to use the state standard rather than the federal standard, given that Ms. Erickson interprets the federal standard to authorize DSS to consider emotional harm in determining whether to seek continued custody of an Indian child at the 48-hour hearing.

Jeffrey Hurd, counsel for Defendant Hon. Judge Robert Pfeifle, provided a helpful summary of Ms. Erickson's testimony on the § 1922 controversy. During Ms. Erickson's deposition, counsel for DSS, Robert Morris, asked counsel for Plaintiffs, Stephen Pevar, if Mr. Pevar was interpreting the words "physical damage or harm" to mean "physical damage or physical harm." Mr. Pevar replied: "Yes." Mr. Hurd then stated:

> Bob, I think he's always asserted that. I think where they got their wires crossed [is] Roxanne [Erickson] said, "I don't believe that's true." So when [Mr. Pevar] says, "Why do you think they changed that standard?" she says, "I don't think they changed that standard."

Id. at 136.[7]

Consequently, we are now back to square one: Defendant Vargo persists in misapplying § 1922 and, as a result, the state standard is still being employed at 48-hour hearings in determining whether to keep Indian children in foster care. Counsel for DSS at these hearings, Roxanne Erickson, sees no difference

[7] Mr. Hurd, who became involved in this case only recently, is correct in stating that Plaintiffs have "always" asserted that Defendants are required to base their 48-hour hearing decisions on physical damage, not emotional. This Court understood this from the outset. *See Oglala I*, at 1031 ("Plaintiffs complaint alleges Mr. Vargo . . . ignores ICWA's § 1922 requirement that emergency placement of an Indian child terminate immediately when the imminent physical danger has been removed.")

between the state standard and the ICWA standard and interprets § 1922 as if it authorizes DSS to consider emotional damage at 48-hour hearings.[8] Plaintiffs are therefore compelled to file the instant motion and seek a ruling on whether Defendant Vargo may construe and apply § 1922 in the manner in which Ms. Erickson is doing so. For reasons stated below, Plaintiffs believe that Mr. Vargo's construction and application of § 1922 is inconsistent with federal law and undermines this Court's decisions in *Oglala I, II,* and *III.*

LEGAL ARGUMENT

Congress created different burdens of proof applicable to the different stages in the Indian custody process. A comparison of ICWA's §§ 1912 and 1922 demonstrates this fact. Section 1922 controls the initial emergency hearing and, at this stage, state officials must prove that continued custody is "necessary to prevent imminent physical damage or harm to the child." If state officials subsequently file a formal petition accusing the parents of abuse and neglect, an evidentiary hearing is held, and this hearing must comply with the requirements of § 1912. The burden of proof at that hearing is "clear and present danger" for placement in foster care, *see* 25 U.S.C. § 1912(e), and "beyond a reasonable doubt" for an adoption. *See* 25 U.S.C. §1912(f).

[8] Theoretically, DSS could argue that it does not matter how Ms. Erickson interprets § 1922 because DSS decides which cases to pursue, not Ms. Erickson. Such an argument, however, is inconsistent with the facts. During the deposition of DSS Supervisor S.W., Mr. Pevar asked her why DSS had filed a petition in one of her cases accusing two Indian parents of abuse and neglect, given that there did not seem to be a justification for it. S.W. explained that she had not asked Ms. Erickson to file that petition but Ms. Erickson filed one anyway, and that Ms. Erickson is the one who generally decides which cases to pursue. According to S.W., Ms. Erickson has filed a number of formal petitions against Indian parents that had not been requested by DSS. *See* S.W. Dep. at 242 ("There are times at which [DSS has] requested a formal petition when it's been declined [by Ms. Erickson] and times at which [DSS has not] requested one and one has been filed.") (attached to Pevar Declaration as Ex. 6-Vargo).

Significantly, at the § 1912 hearing, Indian parents have greater protections than in emergency § 1922 hearings because the court must receive evidence showing that the state has undertaken active efforts to reunite the family and that those efforts have failed, *see* 25 U.S.C. § 1912(d), and a "qualified expert witness" familiar with Indian culture and norms must testify concerning the child's condition. *See* 25 U.S.C. § 1912(e).

Congress carefully crafted the burden of proof in emergency custody hearings and confined the consideration to physical damage or harm, not emotional damage or harm. Defendant Vargo's interpretation of § 1922 is inconsistent with (1) the language of § 1922, (2) the legislative history of § 1922, and (3) the overarching purpose of ICWA.

1. <u>The Language of § 1922</u>

Section 1922 employs the words "physical damage or harm." If "harm" is given Mr. Vargo's expansive interpretation—*e.g.* "harm" means *all* harm, both physical and emotional—then the word "physical" is redundant. Congress could have deleted the word "physical" because, according to Mr. Vargo, "harm" incorporates all harm.

Mr. Vargo's construction of § 1922 therefore violates the cardinal principle of statutory interpretation that a statute must be construed so as not to render any portion of it redundant. *See U.S. v. Alaska*, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'") (citing *Gustafson v. Alloyd*, 513 U.S. 561, 574 (1995)).

In order for "physical" to have any meaning, it must modify both "damage" and "harm," as otherwise it is surplusage: "harm" would already include physical harm. Yet, a court should not interpret a statute in a manner that fails to take into account all of its language. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 824 (8th Cir. 2009) (rejecting an interpretation that would render certain words redundant); 2A Sutherland Statutory Construction §46:6 ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."). Thus, the qualifying adjective "physical" has to refer to both "damage" and "harm," as otherwise a court would have to presume that Congress included the word "physical" for no reason.

The Bureau of Indian Affairs ("BIA") is the federal agency tasked with overseeing compliance by state officials with the Indian Child Welfare Act. The BIA recently issued a Final Rule interpreting ICWA, and the rule devotes a separate section to a discussion of § 1922 (and cites this Court's decision in *Oglala Sioux Tribe* as reflecting the proper construction of § 1922). *See Indian Child Welfare Act Proceedings,* 81 Fed. Reg. 38864 (June 14, 2016) ("BIA Final Rule") https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf at 38793-95. This section of the Rule begins by stating: "The final rule does not provide a definition of 'imminent physical damage or harm.' The Department has determined that statutory phrase is clear and understandable as written, and that no further elaboration is necessary." *Id*. at 38793. Given established rules of statutory construction, the BIA was correct in its assumption. Defendant Vargo's interpretation is inconsistent with the language of the statute.

2. The Legislative History

In addition to being inconsistent with the language of § 1922, Defendant Vargo's interpretation of § 1922 is inconsistent with its legislative history. Section 1922 was § 112 in the bill that became the Indian Child Welfare Act. The House Report that accompanied that bill states:

> Section 112 would permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child *in order to prevent imminent physical harm to the child* notwithstanding the provisions of this title. Such emergency removal and/or placement is to continue only for a reasonable length of time and the committee expects that the appropriate State official or authority would take expeditious action to return the child to the parent or custodian; transfer jurisdiction to the appropriate tribe; or institute a proceeding subject to the provisions of this title.

H.R. 95-1386 (1978) at 25 (emphasis added). Thus, the House Report is further proof that Defendant Vargo's argument is untenable.

3. The Overarching Purpose of ICWA

The overarching purpose of ICWA has been discussed at length by this Court: ICWA was intended to narrow the circumstances under which state officials may remove Indian children from their homes and, when such removal must occur, to expedite their return. *See Oglala I*, 993 F. Supp. 3d at 1028, 1034; *Oglala II*, 100 F. Supp. 3d at 754.

Allowing state officials to seek continued custody of Indian children at 48-hour hearings based on emotional harm will result in out-of-home placement of numerous children who would be returned home if the § 1922 standard were used instead. Congress rejected at this emergency stage a standard that is slippery, amorphous, and subjective, and too easily alleged, particularly given the

lack of testimony at this hearing from a qualified expert witness and lack of evidence on active efforts to reunite.

The BIA's Final Rule explains that Congress "established a high bar" to govern the outcome of the initial (emergency) hearing because Indian parents do not receive at that hearing "the full suite of protections" mandated by ICWA at subsequent hearings, such as "those in 25 U.S.C. § 1912." BIA's Final Rule at 38794. Defendant Vargo's construction of § 1922 is thus inconsistent with the overarching purpose of ICWA because it lowers the bar, thereby resulting in many more Indian children being removed from their homes than Congress intended to allow.

Plaintiffs obtained favorable rulings in *Oglala II* only to have the Defendants file motions for reconsideration. Those rulings were reaffirmed on February 19, 2016. *See Oglala III*. Yet, as discussed in Plaintiffs' brief on the issue of remedies (Docket 239), the Defendants have yet to implement the vast majority of those rulings. Moreover, as shown here, Defendant Vargo is circumventing this Court's ruling on § 1922 by interpreting and applying it in a manner contrary to its language, its legislative history, and with the remedial purpose of the Indian Child Welfare Act.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court (1) declare that Defendant Vargo's interpretation of 25 U.S.C. § 1922 violates the Indian Child Welfare Act, and (2) enjoin Defendant Vargo from any further application of that interpretation. Removal of Indian children at

Defendants' 48-hour hearings must be based on physical damage or harm, not emotional damage or harm.

Respectfully submitted this 5th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2016, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel of record:

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