

INDEX

INTRODUCTION.....	1
I. THE STANDARD ON MOTIONS TO DISMISS.....	5
II. THE INDIAN CHILD WELFARE ACT CLEARLY APPLIES TO THIS CASE AND REQUIRES FEDERAL COURT REVIEW.....	8
III. THE STATE COURT CASE IS OVER; ABSTENTION NO LONGER APPLIES.....	14
IV. SECTION 1914 REQUIRES THIS COURT TO REVIEW THE STATE COURT DECISIONS.....	16
CONCLUSION.....	19
CERTIFICATE OF SERVICE.....	21

CASES:

<i>Schy v. Susquehanna Corp.</i> , 419 F.2d 1112, Fed. Sec. L. Rep. (CCH) 92548 (7th Cir. 1970).	5
<i>Kennedy v. Tangipahoa Parish Library Bd. of Control</i> , 224 F.3d 359 (5th Cir. 2000), <i>reh'g and reh'g en banc denied</i> , 239 F.3d 367 (5th Cir. 2000).....	6
<i>Rennie & Laughlin, Inc. v. Chrysler Corp.</i> , 242 F.2d 208 (9th Cir. 1957).....	6
<i>Cottrell, Ltd. v. Biotrol Intern., Inc.</i> , 191 F.3d 1248 (10th Cir. 1999).....	6
<i>Horwitz v. Board of Educ. of Avoca School Dist. No. 37</i> , 260 F.3d 602 (7th Cir. 2001).....	6
<i>Duran v. Carris</i> , 238 F.3d 1268 (10th Cir. 2001).....	6

<i>Chance v. Armstrong</i> , 143 F.3d 698 (2d Cir. 1998)	6
<i>Woodford v. Community Action Agency of Greene County, Inc.</i> , 239 F.3d 517 (2d Cir. 2001).	6
<i>McCall v. Pataki</i> , 232 F.3d 321 (2d Cir. 2000)	7
<i>Roebuck v. Florida Dept. of Health & Rehabilitative Services, Inc.</i> , 502 F.2d 1105 (5th Cir. 1974)	7
<i>Kochlacs v. Local Bd. No. 92</i> , 476 F.2d 557 (7th Cir. 1973)	7
<i>Crockard v. Publishers, Saturday Evening Post Magazine of Philadelphia, Pa.</i> , 19 F.R.D. 511 (E.D. Pa. 1956)	7
<i>Posr v. Court Officer Shield No. 207</i> , 180 F.3d 409 (2d Cir. 1999).	7
<i>Menkowitz v. Pottstown Memorial Medical Center</i> , 154 F.3d 113 (3d Cir. 1998)	7
<i>Mott v. City of Flora</i> , 3 F.R.D. 232 (E.D. Ill. 1943)	7
<i>Davis v. Ruby Foods, Inc.</i> , 269 F.3d 818, (7th Cir. 2001)	7
<i>Travel Magazine, Inc. v. Travel Digest, Inc.</i> , 191 F. Supp. 830 (S.D. N.Y. 1961)	7
<i>Mitchell v. E Z Way Towers, Inc.</i> , 269 F.2d 126 (5th Cir. 1959).	7
<i>Ybarra v. City of San Jose</i> , 503 F.2d 1041 (9th Cir. 1974).	7
<i>Tompkins v. United Healthcare of New England, Inc.</i> , 203 F.3d 90, (1st Cir. 2000)	7
<i>Lada v. Wilkie</i> , 250 F.2d 211 (8th Cir. 1957).	7

<i>Tauzin v. Saint Paul Mercury Indem. Co.</i> , 195 F.2d 223 (5th Cir. 1952)	7
<i>Kent v. Walter E. Heller & Co.</i> , 349 F.2d 480 (5th Cir. 1965)	7
<i>Morrow v. Winslow</i> , 94 F.3d 1386 (10th Cir. 1996)	9,15
<i>Comanche Indian Tribe v. Hovis</i> , 53 F.3d 298 (10th Cir. 1995)	9
<i>Kiowa Tribe v. Lewis</i> , 777 F.2d 587, 592 (10th Cir. 1985)	9
<i>Navajo Nation v. District Ct.</i> , 624 F.Supp. 130, 134-35 (D. Utah 1985)	9
<i>In the Interest of Mahaney</i> , 20 P.3d 437 (Wash.2001)	11
<i>In re Adoption of M.T.S.</i> , 489 N.W.2d 285 (Minn.App.1992)	11,12
<i>State, ex rel Juvenile Department v. Tucker</i> , 710 P.2d 793 (Ore. 1985)	11,12
<i>Guardianship of K.L.F.</i> , 608 A.2d 1327 (N.J.1992)	12
<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30, 54, 109 S.Ct. 1597, 1611, 104 L.Ed.2d 29, 50	12
<i>In the Matter of C.H.</i> , 997 P.2d 776 (Mont.2000)	12
<i>In the Interests of L.J.</i> , 220 Neb. 102, 368 N.W.2d 474, 483	12
<i>In re Custody of S.E.G.</i> , 521 N.W.,2d 510 (Minn. 1994)	13
<i>In re Welfare of M.S.S.</i> , 465 N.W.2d 412 (Minn.App 1991)	13
<i>In re Pima County Juvenile Action</i> , 635 P.2d 187 (Ariz.App. 1981)	14

<i>Younger v. Harris</i> , 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)	14
<i>Middlesex County Ethics Committee v. Garden State Bar Ass'n</i> , 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)	14
<i>Tyrer v. City of South Beloit, Ill.</i> , 456 F.3d 744 (7th Cir. 2006)	15
<i>Kingsway Financial Services, Inc. v. Pricewaterhousecoopers, LLP.</i> , 420 F. Supp. 2d 228 (S.D. N.Y. 2005).	15
<i>Allegheny County v. Frank Mashuda Co.</i> , 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959)	16
<i>IFC Interconsult, AG v. Safeguard Intern. Partners, LLC.</i> , 438 F.3d 298 (3d Cir. 2006), <i>cert. denied</i> , 127 S. Ct. 136 (U.S. 2006)	16
<i>Colorado River Water Conservation Dist. v. U. S.</i> , 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)	16
<i>New Orleans Public Service, Inc. v. Council of City of New Orleans</i> , 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).	16
<i>Younger v. Harris</i> , 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).	16
<i>Doe v. Mann</i> , 415 F.3d 1038 (9 th Cir. 2005).	18
<i>R.R. Comm'n v. Pullman Co.</i> , 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)	12
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)	12
<i>La. Power & Light Co. v. Thibodaux</i> , 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959)	12
<i>Huffman v. Pursue</i> , 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975)	12
<i>Phelps v. Hamilton</i> , 59 F.3d 1058, 1063-1064 (1995)	12
<i>Doe v. Mann</i> , 285 F.Supp.2d 1229 (2003)	14

Rooker v. Fidelity Trust Co.,
263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) 19

District of Columbia Court of Appeals v. Feldman,
460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). 19

Bianchi v. Rylaarsdam,
334 F.3d 895, 896(9th Cir.2003). 19

Johnson v. De Grandy,
512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) 19

Montana v. Blackfeet Tribe of Indians
471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). 19

OTHER AUTHORITY:

Fed. R. Civ. P. Rule 12(b)(6) 5

25 U.S.C. §1901-1963 8

25 U.S.C. §1912(f) 8

25 U.S.C. §1912(d) 8

25 U.S.C. §1911(b) 8

25 U.S.C. §1914 8,9

*The Indian Child Welfare Act: In Search of a Federal Forum
to Vindicate the Rights of Indian Tribes and Children Against
the Vagaries of State Law*,
73 N.D. L. Rev. 395, 432 (1997) 9

H.R.Rep. N. 1386, 95th Cong., 2d Sess. 9, p.24 (1978)
reprinted in 1978 U.S.C.C.A.N. 7530, 7532 11

Guidelines for State Courts; Indian Child Custody Proceedings,
Federal Register 67,593 11,13

*The Psychological Parenting and Permanency Principles
in Child Welfare: A Reappraisal and Critique*,
52 Amer.J. Orthopsychiatry, 223, 226 (1982) 12

<i>State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test</i> , 27 Gonz.L.Rev. 353, 387 (1992)	13
25 U.S.C. §1901(5)	16

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

IN THE MATTER OF THE ADOPTION)	
OF BABY BOY L., A MINOR CHILD)	
)	
CHRISTOPHER YANCEY)	
)	
Plaintiff,)	
)	
vs.)	Case No. <u>CIV-09-597-C</u>
)	
1) TIMOTHY THOMAS)	
2) TAMMY THOMAS,)	
)	
Defendants.)	

**PLAINTIFF’S RESPONSE TO
DEFENDANT’S MOTION TO DISMISS**

COMES NOW the Plaintiff, Christopher Yancey (hereinafter “Yancey” or the “Father”), and in response to the Motion to Dismiss filed by the Defendants herein, states as follows.

INTRODUCTION

This case is about a young Indian man who, as a minor, got his girlfriend (also a minor) pregnant, and immediately dropped out of school and went to work to support his new family. A few months later, his girlfriend decided that she wasn’t ready for motherhood, and broke up with her boyfriend, lying to him that she had miscarried. Her family then threatened the young man that if he didn’t leave his girlfriend alone, they would get a protective order against him.

The girlfriend then found an adoption attorney, who was able to quickly connect her with a couple from out of state who wanted to adopt the child. The adoption attorney told the pregnant child that she would have to come clean with the Father, which she did at the Father's job when she was late in the pregnancy. She and her family surprised the Father with the fact that she was still pregnant, that they were going to adopt out the child, and told him that there was nothing the young man could do to stop that adoption.

When the baby was born, the Father tried to go see him, but was prevented from visiting the child upon the orders of the Mother and adoptive parents. Within days, the baby was whisked off to Missouri by the adoptive parents, who knew full well that the Father opposed the adoption and wanted to raise his child. The adoptive parents commenced an action to terminate the Father's parental rights shortly thereafter. On November 5, 2002, the Father commenced a custody action in Seminole County, where both the Mother and Father, both sets of grandparents, and all of the witnesses who testified at trial, resided. The Father requested emergency custody but conceded the issue of jurisdiction to the Oklahoma County Judge for decision since the adoption case was filed first. A temporary custody order was issued to the Father which was to become effective upon either a determination by the District Court of Oklahoma County that the Court "did not have jurisdiction in the case ... or a denial of Petitioner's request that [the Father's] parental rights be terminated."

After the Trial Court in Oklahoma County determined that it had jurisdiction, the matter came on for trial on December 19, 2002, at which time the Trial Court ruled that the Indian Child Welfare Act (ICWA) applied and continued the case so the Act could be followed. Days later, the adoptive parents abandoned the Oklahoma County adoption and

started new adoption proceedings in Cleveland County. The case was tried to conclusion in Cleveland County and the Father's parental rights were terminated. The trial court determined that: 1) neither the ICWA or the Oklahoma Indian Child Welfare Act ("OICWA") were relevant because the "existing Indian family exception" as recognized in Oklahoma, controlled the Indian child custody proceeding; and 2) the child was eligible for adoption without the consent of the father because he had neglected to contribute to the support of the mother to the extent of his financial ability during the pregnancy.

The Father appealed and the Court of Civil Appeals affirmed. On December 7, 2004, the Supreme Court granted certiorari and held that: 1) the "existing Indian family exception" was no longer a viable doctrine in Oklahoma insofar as Indian child custody proceedings are concerned; and 2) even if it were, the evidence was insufficient in this case to support a finding that the child was eligible for adoption without the consent of the father. The adoption failed. Immediately thereafter, the Father filed a motion for emergency hearing on remand demanding a return of custody of his son, or at a minimum, visitation. The Court denied the motion. The next day, the adoptive parents filed notice of a third application for termination of rights (in the same failed adoption case), this time asserting that the Father had not supported the child during the appeal process. Father filed a motion for temporary custody and to dismiss the case and transfer it to the court of origin, Seminole County, which was also denied.

On January 24, 2006, the adoptive parents filed a new petition for adoption in the same, failed adoption case, as well as a fourth application to terminate the Father's parental rights. On February 14, 2006, the Trial Court convened a custody hearing, correctly ruled that ICWA applied, but found that the adoptive parents had proven by clear

and convincing evidence that custody of the minor child by the Father was likely to result in severe emotional damage to the child. The Court incorrectly found that good cause had been shown to avoid the ICWA placement preferences. On appeal, both the Court of Civil Appeals, as well as the Supreme Court ignored the clear mandates of ICWA and affirmed the Trial Court. This was the first of many setbacks suffered by the Father based upon the sympathetic argument proposed by the prospective adoptive parents that “this is the only parents this child has ever known” and to actually follow the mandates of ICWA would be harmful to the child. The courts seem to ignore the fact that this “sympathetic” condition was created, by force, by the prospective adoptive parents, contested at every step by the natural Father.

On February 21, 2007, the adoptive parents filed yet a fifth application to terminate the Father’s parental rights. On January 28, 2008, the Father filed a motion to transfer the case to Tribal Court, as provided under ICWA. On February 19, 2008, the Trial Court denied the Father’s motion to transfer and determined that the prospective adoptive parents had proven, by clear and convincing evidence, that the Father had failed to support the child (despite never being ordered to do so) for the period of twelve out of the fourteen months preceding the application to terminate. The Court further determined that the Father had failed to establish or maintain a substantial and positive relationship with the child during the same period. Once again, the Trial Court ignored the clear mandates of ICWA, holding for the “kidnappers” argument, that the prospective adoptive parents had, albeit wrongfully, custody of the child for so long that it would be “dangerous” to the child to allow the Father either custody or visitation. This decision terminated the Father’s parental rights. Father appealed to the state appellate court, petitioned for certiorari to the

Oklahoma Supreme Court and the United States Supreme Court, and also filed an action in federal court (case no. CIV-08-539-C).

In the first Western District action (“*Yancey I.*”), filed while an appeal of the state trial court was pending, this Court dismissed the case, noting that “the Plaintiff is still attempting to work his way through the state court system while simultaneously appealing to this Court”, and holding that abstention was appropriate. Although the Court may have held out hope that the Oklahoma Supreme Court would correct the mistakes of the lower courts (“there is a very real possibility that the Plaintiff will receive from that court the relief that he is seeking from this Court.”); sadly, that did not occur, the Oklahoma Supreme Court denied certiorari. The import of that decision was to make final the termination of the Father’s parental rights, thus ending the state court litigation¹. The state court involvement being concluded requires this court, as a court of competent jurisdiction, to review the state court decision to determine if it meets the requirements of ICWA.

ARGUMENT AND AUTHORITIES

I. THE STANDARD ON MOTIONS TO DISMISS

A motion to dismiss the complaint may be made by the defendant for failure to state a claim upon which relief can be granted, and granted by the court on such grounds. Fed. R. Civ. P. Rule 12(b)(6): *Schy v. Susquehanna Corp.*, 419 F.2d 1112, Fed. Sec. L. Rep.

¹ It should be noted that the state court adoption is proceeding. However, since the Father’s parental rights have now been terminated and his consent is no longer necessary to the adoption, it is assumed he has no standing or participation in the final adoption hearing.

(CCH) 92548 (7th Cir. 1970). Motions to dismiss on such grounds are viewed with disfavor in the federal courts because of the possible waste of time in the case should the dismissal be reversed and because the primary objective of the law is to obtain a determination of the merits of any claim. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359 (5th Cir. 2000), *reh'g and reh'g en banc denied*, 239 F.3d 367 (5th Cir. 2000); *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208 (9th Cir. 1957).

Granting the defendant's motion to dismiss for failure to state a claim is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading, but also to protect the interests of justice. *Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248 (10th Cir. 1999). Such motions assume the truth of a pleading's factual allegations and their inferences. *Horwitz v. Board of Educ. of Avoca School Dist. No. 37*, 260 F.3d 602 (7th Cir. 2001). The court must assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted. *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001).

It may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test; the issue is whether the plaintiff is entitled to offer evidence to support the claims. *Chance v. Armstrong*, 143 F.3d 698 (2d Cir. 1998); *Woodford v. Community Action Agency of Greene County, Inc.*, 239 F.3d 517 (2d Cir. 2001). A motion to dismiss challenges the legal sufficiency of the complaint to state a cause of action, and a complaint must be upheld, as against a motion to dismiss, as long as it states a claim on which relief can be granted, or if any valid claim may be proved under it, baseless though the claim may eventually prove to be, and inartfully as the complaint may be pleaded.

McCall v. Pataki, 232 F.3d 321 (2d Cir. 2000); *Roebuck v. Florida Dept. of Health & Rehabilitative Services, Inc.*, 502 F.2d 1105 (5th Cir. 1974); *Kochlacs v. Local Bd. No. 92*, 476 F.2d 557 (7th Cir. 1973); *Crockard v. Publishers, Saturday Evening Post Magazine of Philadelphia, Pa.*, 19 F.R.D. 511 (E.D. Pa. 1956); *Posr v. Court Officer Shield No. 207*, 180 F.3d 409 (2d Cir. 1999). The motion must be denied if it appears that the facts set forth in the complaint, including the inferences drawn from the allegations (*Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir. 1998)); are sufficient to require an answer by the defendant (*Mott v. City of Flora*, 3 F.R.D. 232 (E.D. Ill. 1943)); if it adequately puts the defendant on notice of the essential elements of the plaintiffs' cause of action (*Davis v. Ruby Foods, Inc.*, 269 F.3d 818, (7th Cir. 2001)); if it shows a right of recovery (*Travel Magazine, Inc. v. Travel Digest, Inc.*, 191 F. Supp. 830 (S.D. N.Y. 1961)); if the complaint sets out with sufficient detail the claim which the plaintiff asserts against the defendant, so that the latter can responsively plead to it (*Mitchell v. E Z Way Towers, Inc.*, 269 F.2d 126 (5th Cir. 1959)); or if it raises an unsettled legal principle (*Ybarra v. City of San Jose*, 503 F.2d 1041 (9th Cir. 1974). The rule in this respect is very liberal. Complaints in the federal courts should not be dismissed if there is any theory on which they can be sustained. *Tompkins v. United Healthcare of New England, Inc.*, 203 F.3d 90, (1st Cir. 2000). If the facts alleged reveal that the plaintiff is entitled to any relief (*Lada v. Wilkie*, 250 F.2d 211 (8th Cir. 1957); or any kind of relief (*Tauzin v. Saint Paul Mercury Indem. Co.*, 195 F.2d 223 (5th Cir. 1952); or if the plaintiff can recover on any state of facts which may be proved under the allegations as laid, the complaint should not be dismissed. *Kent v. Walter E. Heller & Co.*, 349 F.2d 480 (5th Cir. 1965).

II.

**THE INDIAN CHILD WELFARE ACT CLEARLY APPLIES
TO THIS CASE AND REQUIRES FEDERAL COURT REVIEW**

The Indian Child Welfare Act (“ICWA”), imposes various procedural and substantive obligations on state courts when an “Indian child” is the subject of a child custody proceeding. 25 U.S.C §1901-1963. Pursuant to the ICWA, Title 25 U.S.C §1912(f), parental rights shall not be terminated absent proof, beyond a reasonable doubt, that continued custody of the child by the Indian parent is likely to result in serious emotional or physical damage to the child. Further, pursuant to Title 25 U.S.C §1912(d), parental rights shall not be terminated absent clear and convincing proof that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those programs have proven unsuccessful. Central among these federally mandated obligations are certain limitations on the exercise of state court jurisdiction. In foster care and parental rights termination proceedings, the state court is required “in the absence of good cause to the contrary” and subject to tribal court declination, to “transfer [the] proceeding to the jurisdiction of the [child's] tribe, absent objection by a parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe.” 25 U.S.C §1911(b). The “referral jurisdiction” subsection contains no federal law exception comparable to the proviso in the “exclusive jurisdiction” subsection.

Last, the ICWA specifically authorizes collateral review of state-court child custody proceeding orders:

“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. Until recently², little federal court recourse to the collateral review provision had been made, and that component of the law was described by one commentator as a “toothless saber.” B. J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Law*, 73 N.D. L. Rev. 395, 432 (1997) (“To date, no federal court has invalidated an arguably erroneous state court decision because the majority of federal courts have emasculated their authority to do so under the principles of full faith and credit. Section 1914 has proven to be a toothless saber”).

This case is a “poster child” for the reason why Congress passed Section 1914 allowing federal courts to review the decisions of the state courts. Based on what the Defendants concede is the law of the case, the prospective adoptive parents unlawfully transported this Indian baby out of state, and unlawfully barred the Father from any type of relationship with his child. The Supreme Court of Oklahoma has now ruled that not only should the Father have had the more extensive federal protections of ICWA (compared to state law), that even according to the lower state law standards, the termination was unsupported by law or fact. Essentially, in full knowledge that this Indian Father wanted to

² *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996) (abstaining *sua sponte* in challenge to state-court adoption proceeding); *Comanche Indian Tribe v. Hovis*, 53 F.3d 298 (10th Cir. 1995) (relitigation by tribe of exclusive jurisdiction claim barred by collateral estoppel); *Kiowa Tribe v. Lewis*, 777 F.2d 587, 592 (10th Cir. 1985) (relitigation by tribe of ICWA-applicability claim barred by *res judicata*); *Navajo Nation v. District Ct.*, 624 F. Supp. 130, 134-35 (D. Utah 1985) (declining to issue declaratory relief over propriety of state trial court's exercise of jurisdiction where issue pending before state supreme court), *aff'd on mootness grounds*, 831 F.2d 929 (10th Cir. 1987).

raise his own Indian child, the prospective adoptive parents kidnaped the child, intending to use the legal system to force a *de facto* adoption through the passage of time rather than by legal methods. However, once the initial “mistake” was addressed by the Oklahoma Supreme Court, instead of immediately returning the child to the Father, the Defendant decided that there was nothing that would ever justify “taking this child from the only home he has ever known”; not ICWA, not OICWA, and not the fact that this Father’s parental fitness has never even been questioned. This type decision is exactly what Congress referred to when it passed Section 1914, fearing Indian child welfare decisions “based on a white middle-class standard which, in many cases, forecloses placement with [an] Indian family”. H.R.Rep. No.1386, 95th Cong., 2d. Sess. 9, p.24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

The justification that length of time with the prospective adoptive parents supports this adoption violates both the letter and spirit of ICWA. Title 25 U.S.C. §1912 (f) provides that parental rights may not be terminated “in the absence of a determination, supported by evidence beyond a reasonable doubt, 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.” The adoptive parents argued to the Defendant Trial Court that the possibility that the child will experience separation anxiety associated with a change of custody meets the ICWA requirement 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”. Simply put, symptoms of separation anxiety from a change of custody, cannot as a matter of law, constitute serious emotional or physical damage to the child as a result of the natural Father’s custody. The BIA guidelines for

state courts addresses this specific issue as follows:

“The first subsection is intended to point out that the issue of which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically, two questions are involved. First, is it likely that **the conduct of the parents will result in serious physical or emotional harm to the child?** Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct? . . .

Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. 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

A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be “in the best interests of the child” for him or her to live with someone else....”

Guidelines for State Courts; Indian Child Custody Proceedings, Federal Register 67593.

The purpose of this section is to allow fact specific deviation from ICWA protections in cases where the natural parent is actually dangerous, physically or emotionally, to the child, all judged by the natural parents’ “likely future harm”³. *In the Interest of Mahaney*, 20 P.3d 437 (Wash. 2001); *In re Adoption of M. T. S.*, 489 N.W.2d 285 (Minn.App.1992); *State ex rel Juvenile Department v. Tucker*, 710 P.2d 793 (Ore.1985)(the state must prove “actual physical or emotional harm resulting from the acts of the parents”). In other words, the issue is not whether the child will suffer separation anxiety as a direct result of the

³ Virtually all of the ICWA cases across the country begin with the Indian child being taken from the home by state welfare officials due to abuse or neglect. Plaintiff’s counsel was unable to locate any cases that started with an illegal private adoption.

adoptive parents spiriting him off to Missouri knowing that the Father would not consent to the adoption; the issue is whether or not the natural Father's future conduct would actually be dangerous to the child. *State ex rel Juvenile Department v. Tucker*, 710 P.2d 793 (Ore.1985). As stated in the case of *Adoption of M.T.S., a Minor Child*, 489 NW.2d 285 (Minn.1992):

“Under these standards, placing the child [according to ICWA preferences] is presumptively in his best interests. Although the record indicates that the [adoptive parents] provided [the child] with a loving foster home, the fact that separation from them will be initially painful to [the child] is not good cause to defeat the preference created by the ICWA.” (Citations omitted).

In fact, at least one court has opined that if the State had met their duty to protect the child, they would have required frequent and extended visitation with the parent during the litigation and appeals process, which would have greatly decreased any separation anxiety from a change of custody. *Guardianship of K.L.F.*, 608 A.2d 1327 (N.J. 1992). The emotional attachment between a non-Indian custodian and an Indian child should not outweigh the interests of the Tribe in having that child raised in the Indian community. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54, 109 S.Ct. 1597, 1611, 104 L.Ed.2d 29, 50. Normal emotional bonding does not constitute an “extraordinary” emotional need to negate the ICWA presumptions. *In the Matter of C.H.*, 997 P.2d 776 (Mont.2000). Some courts have suggested that theories of parental bonding may in fact be relied upon too often to keep children in foster care, rather than return them to their parents. *In the Interests of L.J.*, 220 Neb.102, 368 N.W.2d 474, 483; Malcolm Bush and Harold Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52 *Amer.J. Orthopsychiatry*, 223, 226 (1982).

Several authors have questioned whether the “Anglo” best interest of the child test

should even be an element of good cause. Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 Gonz.L.Rev.353, 387 (1992). ICWA appears to be silent on the issue, but the Guidelines suggest that the best interest test has no place in determining good cause. *Guidelines for State Courts; Indian Child Custody Proceedings*, Federal Register 67,593; see also *In re Custody of S.E.G.*, 521 N.W.2d 510(Minn.1994).

One of the more interesting aspects of this case is that if the Father was a convicted sex offender or child molester, under ICWA, his parental rights could not be terminated unless and until the Court determined, by clear and convincing evidence, 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. §1912(d) provides in pertinent part:

“Any party seeking to effect a ... 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.”

However, this young Father has nothing on his record other than a relentless quest to regain his child. How is it that problem parents seem to be better able to defend their parental rights than their criminal free counterparts? At least one court has held that active efforts to prevent the breakup of the Indian family must be proven beyond a reasonable doubt. *In re Welfare of M.S.S.*, 465 N.W.2d 412 (Minn.App 1991). In the case at bar, NO efforts were provided to prevent the breakup of the Indian family. The total lack of such attempts emphasizes two points in favor of this Court exercising review over this case. First, this section of the ICWA was designed to force the state courts, when they were

faced with parents who had a myriad of personal problems which made them less than adequate parents, but were not dangerous to the child, to attempt to fix those problems before out-of-home placement was even considered. Of course, in this case, this Father has no such parental or personal shortcomings which would require remediation, which begs the question as to why this child was allowed to be taken from him in the first place. Essentially, the dictates of the ICWA were not followed in 2002, and the only excuse for not following them today is that the Court erred seven years ago.

Secondly, this section shows that the ICWA was designed to stop states from doing exactly what they did in this case, taking an Indian child from an Indian father simply because the mother and the white adoptive parents believed that they would provide a better home for the child. The Arizona Court of Appeals spoke to this after a failed adoption of an Indian child in *In re Pima County Juvenile Action*, 635 P.2d 187 (Ariz.App.1981):

“There is no evidence as to appellant’s fitness as a parent or any attempt to preserve the parent-child relationship. In fact, the contrary appears. Appellant was entitled to the return of her child, then only seven months old, when she revoked her relinquishment. Any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to [ICWA]. The evil which Congress sought to remedy by the [ICWA] was exacerbated by the conduct here under the guise of “best interests of the child.”

III.

THE STATE COURT CASE IS OVER; ABSTENTION NO LONGER APPLIES

Defendants move to dismiss this case pursuant to Younger Abstention Doctrine, as articulated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Ass’n.*, 457 U.S. 423, 102 S.Ct.

2515, 73 L.Ed.2d 116 (1982), and as applied to an ICWA related case by the Tenth Circuit in *Morrow v. Winslow*, 94 F.3d 1386 (1996). The Younger Doctrine espouses a strong federal policy against federal court interference with ***pending*** state judicial proceedings. *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423,429, 102 S.Ct. 2515,2521, 73 L.Ed.2d 116 (1982). This Court cited *Younger* and *Middlesex* in *Yancey I.*, for the proposition that a federal court should not interfere in an “ongoing” judicial proceeding. (Memorandum Opinion and Order, p.3, incorporated herein by reference). However, there is a distinct difference between *Yancey I.* and the case at bar; in *Yancey I.*, the case was ongoing and pending in state court, a distinction that this Court pointed out no less than eight times in the Order, in the case at bar the state court case is over⁴, the Father’s parental rights have been terminated, and that order is final. Abstention no longer applies because it only deals with *ongoing* or *pending* judicial proceedings.

The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. *Tyrer v. City of South Beloit, Ill.*, 456 F.3d 744 (7th Cir. 2006); *Kingsway Financial Services, Inc. v. Pricewaterhousecoopers, LLP.*, 420 F. Supp. 2d 228 (S.D. N.Y. 2005). There is a general presumption against abstention by a federal court. *Id.* Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court will clearly serve an important

⁴ Defendants may argue that the case is not over until the adoption is finalized. However, the fact that the Father’s parental rights have been terminated, and his consent is not necessary for the adoption, may well mean he has no further standing to even participate in these final, perfunctory proceedings.

countervailing interest. *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959); *IFC Interconsult, AG v. Safeguard Intern. Partners, LLC.*, 438 F.3d 298 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 136 (U.S. 2006). Abstention from the exercise of federal jurisdiction is the exception, not the rule. *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Absent an important countervailing interest, federal courts have the virtually unflagging obligation to exercise the jurisdiction given them. *Allegheny County v. Frank Mashuda Co.*, *supra*; *Colorado River Water Conservation Dist. v. U. S.*, *supra*. Courts no more have the right to decline to exercise jurisdiction which is given, than they do to usurp that which is not given. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

IV.

SECTION 1914 REQUIRES THIS COURT TO REVIEW THE STATE COURT DECISIONS

Section 1914 of ICWA provides an independent basis for federal court jurisdiction, which specifically calls for the federal judicial review of state court decisions:

“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. Where the case of *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996), was fatal to the Plaintiff in *Yancey I.*, that case strongly supports not only a denial of this

motion to dismiss, but also a §1914 federal court review of the now completed state court termination of parental rights. In *Morrow*, the plaintiff was an Indian who fathered a child with a non-Indian who placed the child for adoption without plaintiff's consent. 94 F.3d at 1388. The plaintiff objected to the adoption and the state court trial judge set the matter for a hearing to determine whether the plaintiff's consent was necessary for the adoption. *Id.* It was at this point that the plaintiff went into federal court; right in the middle of the state court termination of parental rights proceeding. As highlighted by this Court in *Yancey I.*, the *Morrow* court abstained from interfering in an **ongoing** state court judicial proceeding. However, while abstaining from the review of an ongoing state proceeding, the Tenth Circuit also set out the guidelines and appropriateness of the *post-judgment* review of ICWA decisions by a federal court, directly applicable to the case at bar.

In analyzing whether the federal courts should exercise jurisdiction to review completed state court ICWA decisions, the Tenth Circuit in *Morrow* first discussed that the ICWA was designed to protect the best interests of Indian children and parents from, *inter alia*, “abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption and foster care placement, usually in non-Indian homes”. *Id.* at 1394. The Court said:

“As part of this protection, § 1914 allows a petition to invalidate a state court . . . termination of parental rights action on the grounds that it violated §§ 1911, 1912, or 1913, to be brought in any court of competent jurisdiction. We have held that federal district courts have jurisdiction under 28 U.S.C. § 1331 over complaints in which a plaintiff alleges a violation of §§ 1911, 1912, or 1913. *Roman-Nose v. New Mexico Dep’t of Human Services*, 967 F.2d 435, 437 (10th Cir.1992). *Morrow* alleged violations of §§ 1912 and 1913, and therefore, under § 1914 and *Roman-Nose*, we believe there is jurisdiction to hear *Morrow*'s claims in either federal or state court since those courts fall within the definition of “any court of competent jurisdiction” in § 1914.”

Id. In *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005), the Ninth Circuit also explained this provision as it might be affected by the *Rooker-Feldman Doctrine*⁵. In *Mann*, an Indian mother challenged the state's authority to terminate her parental rights, and a year and a half after her rights were terminated, the mother brought an action in federal court. *Id.* The Court addressed whether a federal court could essentially hear the appeal of the state court case, said:

[B]y a process of elimination, a "court of competent jurisdiction" must include inferior federal courts, or the provision is meaningless. If the section only referred to state appellate courts, there would be no need for Congress to create this cause of action; Doe already has the right to appeal an adverse decision to California's higher courts. It is highly unlikely that the provision grants tribal courts the power to invalidate state court judgments.

. . . This court finds that section 1914 grants federal courts the power to review state custody proceedings such as those here; therefore, the *Rooker-Feldman* doctrine does not apply to the action at bar."

Id. at 1045. Responding to the argument that a "court of competent jurisdiction" really referred to the state court's ability to police themselves, the Court held that it was the duty of federal courts to assure, by independent review, that the states are following the mandates of ICWA: "[i]t would thus be ironic indeed if Congress then permitted only state courts, **never believed by Congress to be the historical defenders of tribal interests,**

⁵ *Rooker-Feldman* refers to two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). In simple terms, "[u]nder *Rooker-Feldman*, a federal district court is without subject matter jurisdiction to hear an appeal from the judgment of a state court." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 896(9th Cir.2003). Typically, the *Rooker-Feldman* doctrine bars federal courts from exercising subject-matter jurisdiction over a proceeding in "which a party losing in state court" seeks "what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

to determine the scope of tribal authority under the Act.” *Id.* at 1046.

Finally, if there is any doubt as to whether section 1914 requires federal court review, such doubts must be resolved in favor of Indians, in this case, the Father. Federal courts are required to liberally construe a federal statute in favor of Indians, with ambiguous provisions interpreted for their benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). The purpose of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage. Resolving any ambiguity in favor of the Indians yields a conclusion that Indians have a forum in federal court to challenge state child custody decisions. *Doe v. Mann*, 415 F.3d 1038,1047 (9th Cir. 2005)(“[w]e thus conclude that § 1914 provides the federal courts authority to invalidate a state court foster care placement or termination of parental rights if it is in violation of §§ 1911, 1912, or 1913.”).

CONCLUSION

What has happened to this Father is wrong on so many levels. It was wrong that the Mother lied to the Father and led him to believe she had miscarried. The Mother and the adoptive parents were also wrong to intentionally exclude the Father from the life of his son, and continue that exclusion for the last seven years. The adoptive parents were wrong to spirit the child out of state knowing that the Father wanted to raise his son. The lawyers were wrong to force a private adoption at all costs, including the abusive use of legal process to reach that goal. The original Trial Court was wrong in ignoring the clear mandates of the ICWA and doing exactly what the federal Act was designed to prevent;

taking Indian children, by force if necessary, and raising them as whites. Most recently, the state courts were wrong again when they paid lip service to the ICWA, but wholly ignored its dictates. Finally, it is morally, ethically, and legally wrong to not immediately return this child to a Father who has not even had his fitness as a parent questioned. Rather, the only basis for not returning this child to the Father is the passage of time, something for which everyone but the Father is to blame. The only hope that this Father has is exactly where Congress placed the authority to intervene and prevent what has already happened in this case, the United States District Court.

WHEREFORE, Plaintiff respectfully requests that Defendant's Motion to Dismiss be denied and for such other and further relief as the Court deems fair and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 10th day of August, 2009, I electronically transmitted the above and foregoing instrument to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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s/ Jerry L. Colclazier
Jerry L. Colclazier