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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV PLAINTIFFS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT RE: VIOLATIONS OF 25 U.S.C. § 1922

INTRODUCTION

Plaintiffs respectfully submit this motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1. As discussed below, there is no genuine dispute as to any material fact regarding the legal claims presented herein, and Plaintiffs are entitled to judgment as a matter of law.

"The purpose of ICWA [the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*], as declared by Congress, is to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.'" *Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-5020 (D.S.D. Order Denying Motions to Dismiss, Jan. 28, 2014) ("MTD Order") (Docket 69), at 16 (quoting 25 U.S.C. § 1902). ICWA seeks to accomplish these purposes by significantly restricting the ability of state officials both to remove Indian children from their families and, for those children who are removed, to place them in non-Indian homes. In enacting ICWA, Congress recognized that nothing "is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). "The wholesale separation of Indian children from their families," Congress concluded, "is perhaps the most tragic and destructive aspect of American Indian life today," resulting in a crisis "of massive proportions." H.R. Rep. No. 95-1386 p. 9 (1978). *See also Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2561 (2013) (recognizing ICWA's "primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families.")

An important provision of ICWA is Section 1922, which provides:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official or agency involved *shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child* and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25 U.S.C. § 1922 (emphasis added).

This Court's MTD Order resolved several critical issues with respect to § 1922. First, § 1922 is not, as Defendants claimed, "a statute of deferment" that authorizes state officials to defer applying ICWA's protections until after Defendants' temporary custody ("48-hour") hearings occur. MTD Order at 31-32. On the contrary, as this Court held, § 1922 imposes immediate duties on state officials that apply in 48-hour hearings. *Id*. Section 1922 "provides a substantive right to Indian parents" in 48-hour hearings consistent with Congress's goal of "curb[ing] the alarmingly high rate of removal of Indian children from Indian parents." *Id*. at 32.

State officials involved in the removal of an Indian child from the home "shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922. This means, as this Court next explained, that South Dakota officials involved in 48-hour hearings must perform two tasks as part of those hearings. First, these officials must prove *during* the 48-hour hearing that the emergency that required the child's removal from the home continues to exist. MTD Order at 32-33. Second, if the state demonstrates a continuing emergency, then *at the conclusion* of the hearing the court must order the state agency to which custody has been placed to return the child to the home as soon as the emergency terminates. *Id*.

Section 1922's twin duties effectuate ICWA's congressional purpose. The first duty ensures that Indian children will be removed from their families only in very narrow circumstances, while the second duty ensures that those children who are removed will be reunited with their families at the earliest possible time.

Plaintiffs' complaint alleges that Defendants are failing to perform both duties mandated by the second sentence of §1922. *See* Plaintiffs' Class Action Complaint for Declaratory and Injunctive Relief (Docket 1) at ¶ 95. This Court held that if those allegations are true, Plaintiffs will have set forth a claim upon which relief may be granted:

> A plain reading of the [second] sentence contemplates that the emergency which existed when the child was taken from the home may no longer exist at the time of the 48-hour hearing or prior to placement.
>
> The plaintiffs' complaint alleges defendants violate their substantive duties under § 1922 during 48-hour hearing because there is never an "inquiry into whether the cause of the removal has been rectified, nor does the court direct DSS to pursue that inquiry after the hearing." (Docket 1 at ¶ 95). Accepting as true the allegations in the complaint, plaintiffs set forth a valid claim for relief. Defendants' motions to dismiss on this basis are denied.

MTD Order at 33. *See also In re T.S.*, 315 P.3d 1030, 1040 (Okla. App. 2013) (interpreting second sentence of § 1922 in a similar fashion as this Court).[1]

Accompanying this brief is a Statement of Undisputed Facts ("SUF"). The SUF provides detailed proof that Defendants do not comply with either of their two § 1922 duties, and that their compliance in the future is unlikely. Indeed, in response to a recent Request for Admission, Defendant Hon. Jeff Davis stated that he *continues* to view § 1922 as a statute of deferment, despite this Court's ruling earlier this year.[2]

[1] To Plaintiffs' knowledge, only two courts have had occasion to interpret the second sentence of § 1922: this Court and *In re T.S.* Both courts interpreted that sentence in the same manner, a consistency that is not surprising given the clear language of that sentence.

[2] *See* Request for Admission No. 32: "Admit that in your memorandum of law (Docket 34) you state that 25 U.S.C. § 1922 is a 'statute of deferment' and that you continue to believe that is true." Answer: "Admit." (A copy of this Request for Admission is attached to Declaration of Peter W. Beauchamp in Supp. of Pls.' Motion for Partial Summ. J. ("Beauchamp Decl.") Ex. 3.)

The significance of what is at stake here cannot be understated. The population of South Dakota is approximately 814,000, of which 8.9 percent is American Indian/Alaska Native.[3] Based on data collected by the State, however, of the 1,485 children in state-mandated foster care in 2010, 52.5 percent were American Indian/Alaska Native, whereas only 30.1 percent were white, 6.3 percent Hispanic, 2.4 percent African American, 0.5 percent Asian or Pacific Islander, and the rest were identified as other races or ethnicities or combinations of races/ethnicities.[4] Thus, per capita, an American Indian child in South Dakota is eleven times more likely to be sent to foster care than a non-Indian child.

Section 1922 is a uniquely important vehicle for keeping Indian children out of foster care, and yet Defendants routinely violate it. Specifically, Defendants were ordered by this Court to produce the transcripts of every third 48-hour hearing conducted since January 1, 2010, *see* Order Granting Motion for Expedited Discovery (Docket 71), resulting in the production of more than 120 hearing transcripts. In more than 90 percent of those hearings, the court entered orders granting the request of the Department of Social Services ("DSS") for continued custody of the Indian children involved in the case.[5] SUF ¶ 2. Thus, each year, Defendants remove approximately 150 children from their families. *Id*. If Defendants would stop viewing § 1922 as a statute of deferment and

[3] U.S. Census Bureau: State and County QuickFacts, "South Dakota," *available at* http://quickfacts.census.gov/qfd/states/46000.html.

[4] *See* CWLA, *South Dakota's Children 2012*, *available at* http://www.cwla.org/advocacy/statefactsheets/2012/southdakota.pdf.

[5] Plaintiffs are prepared, if the Court wishes, to submit all 120-plus transcripts for the Court's review. For now, Plaintiffs have selected fifty-seven. *See* Beauchamp Decl. Ex. 1. These include about thirty of Judge Davis's hearings and the remaining transcripts are from hearings held by other judges on the Seventh Judicial Circuit. All of the transcripts cited in this brief and the accompanying Statement of Uncontested Facts are included in Exhibit 1.

start complying with it, the number of Indian children in foster care would likely decrease significantly.

SUMMARY JUDGMENT STANDARD

A district court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although "the moving party . . . bears the initial burden of proving that summary judgment is appropriate," *Hanson v. F.D.I.C.*, 13 F.3d 1247, 1253 (8th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), this burden may be satisfied by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325.

In response to a motion for summary judgment, the nonmoving party must "go beyond the pleadings and by affidavit or otherwise designate specific facts showing that there is a genuine issue for trial." *Planned Parenthood of Minnesota/S. Dakota v. Rounds*, 372 F.3d 969, 972 (8th Cir. 2004) (internal quotation marks omitted) (citing *Commercial Union Ins. Co. v. Schmidt*, 967 F.2d 270, 271 (8th Cir. 1992)). This is an "affirmative burden on the non-moving party," *Commercial Union Ins. Co.*, 967 F.2d at 271, and only "when the record permits reasonable minds to draw conflicting inferences about a material fact" may summary judgment be denied. *Ozark Interiors, Inc. v. Local 978 Carpenters*, 957 F.2d 566, 569 (8th Cir. 1992) (citing *Donovan v. General Motors*, 762 F.2d 701, 703 (8th Cir. 1985); *Wermager v. Cormorant Township Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983)).

ARGUMENT

As discussed above, the second sentence of § 1922 creates two duties. First, state officials conducting a 48-hour hearing must prove during the hearing that the emergency that necessitated the Indian child's removal from the home continues to exist. Second, whenever the state meets that burden and the court places custody of the child with DSS, the court must order DSS at the conclusion of the hearing to return the child to the home as soon as the emergency has terminated. *See* MTD Order at 32-33.

Defendants persistently violate Plaintiffs' substantive rights under 25 U.S.C. § 1922 in both respects. The facts with regard to both issues are not in genuine dispute, and Plaintiffs are entitled to judgment as a matter of law on both claims.

The twin duties created by § 1922 are *non*discretionary: "The State authority, official or agency involved *shall* insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child . . . ." 25 U.S.C. § 1922 (emphasis added). When a legislature tells executive officials that they "shall" do something, this generally creates a mandatory rather than a discretionary duty, as it certainly does here. *See Board of Pardons v. Allen*, 482 U.S. 369, 378 n.10 (1987) (noting that the presence of the word "shall" in a statute implies the imposition of nondiscretionary duties); *Hennepin Cnty. v. Fed. Nat. Mortgage Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014) ("We have determined that the use of 'shall' in a statute makes what follows mandatory."); *Ctr. for Spec. Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 700 (8th Cir. 2012) (noting that statutory language of "must" and "shall" connotes a mandatory duty); *United States v. Carter*, 652 F.3d 894, 899 (8th Cir. 2011) (interpreting

"shall" as creating a mandatory duty); *Capella U., Inc. v. Exec. Risk Specialty Ins. Co.*, 617 F.3d 1040, 1052 (8th Cir. 2010) (similar); *Stanfield v. Swenson*, 381 F.2d 755, 757 (8th Cir. 1967) ("When used in statutes the word 'shall' is generally regarded as an imperative or mandatory."); *A-G-E Corp. v. U.S. By & Through Office of Mgmt. & Budget*, 753 F. Supp. 836, 852 (D.S.D. 1990), *aff'd*, 968 F.2d 650 (8th Cir. 1992) (similar); *Push Pedal Pull, Inc. v. Casperson*, 971 F. Supp. 2d 918, 927 (D.S.D. 2013) ("[T]he Agreement's forum selection clause is mandatory, rather than permissive, because it requires that disputes related to the Agreement 'shall' be venued 'exclusively' in the state court in Minnehaha County.").

Indeed, the only instances when courts have interpreted the word "shall" as creating a discretionary duty have been when the statute's overarching design compelled that interpretation. *See, e.g., Dubois v. Thomas*, 820 F.2d 943, 948 (8th Cir. 1987). Such an interpretation cannot possibly apply here, however, given that ICWA is intended to curb the alarmingly high rate of Indian children in state foster care, and § 1922 plays an indispensable role in accomplishing that result. Congress would not have created all of ICWA's protections only to allow state agencies to defer applying them until much later in the foster care process, thereby allowing state officials to continue to exercise the very discretion to remove Indian children from their homes that prompted passage of ICWA in the first place.

I. Defendants Failed to Prove *During* 48-Hour Hearings that an Emergency Continued to Exist

This Court interpreted § 1922–consistent with its unambiguous, mandatory language–as requiring Defendants to demonstrate that the emergency that necessitated removing an Indian child from his or her home "[continues to] exist *at the time of the 48-*

hour hearing." MTD Order at 33 (emphasis added). Yet, the undisputed facts prove that in not one hearing conducted since January 1, 2010 did Defendants make such a showing. SUF ¶ 3. Indeed, Judge Davis steadfastly believes that § 1922 is a statute of deferment, thus rendering the protections of ICWA inapplicable to his 48-hour hearings. Consistent with that belief, Judge Davis has never implemented either of the twin duties mandated by § 1922 in any of his hearings. SUF ¶¶ 3, 38.

Parents should not be deprived of their children (and children should not be separated from their parents) in the perfunctory and insensitive fashion that has become a matter of routine in the Seventh Judicial Circuit. Plaintiffs do not know if Defendants treat white families with the same dispatch and disregard as they do Indian families, as Plaintiffs have not examined 48-hour transcripts involving white families. But what is certain is that week in and week out, Defendants flagrantly violated §1922 of the Indian Child Welfare Act and everything it was designed to accomplish.

For instance, the vast majority of Defendants' 48-hour hearings during the past four years took less than five minutes to complete judging from the length of the transcripts, and much of that time was consumed by the judge reading a list of rights to the parents in attendance. SUF ¶ 5. This phenomenon is astounding, given that more than 90 percent of those hearings resulted in orders removing Indian children from their homes. In many of those hearings, the parents were not asked any questions except to establish their identities. *Id*. Most egregiously, in none of the hearings were parents

given an opportunity to present any evidence or cross-examine adverse witnesses, and were relegated to spectators as the state took away their children. *Id.*[6]

What is clear from the transcripts is that in not one 48-hour hearing did Defendants seek to prove that continued removal of the child from the home was "necessary to prevent imminent physical damage or harm to the child," as required by § 1922. SUF ¶ 3. (Of course, we should not expect to see such evidence, given that Judge Davis views § 1922 as irrelevant to 48-hour hearings.) Indeed, in the vast majority of Judge Davis's cases, no evidence was even introduced to justify the child's initial removal, much less to justify any continued removal of the child from the home. *See* Beauchamp Decl. Ex. 1.

Thirty-one of these 48-hour hearings are discussed in Plaintiffs' SUF. As the transcripts of these hearings illustrate, Defendants have a policy, practice, and custom of failing to establish during their 48-hour hearings that granting the request of DSS for continued custody is "necessary to prevent imminent physical damage or harm to the child," as required by § 1922. Five troubling examples are the following: (1) a father going through divorce was denied custody of his children solely because his estranged wife got into trouble with the police, even though no evidence was introduced suggesting (much less proving) that the children would be at risk staying with the father; (2) a mother lost custody of her daughter merely because the daughter's babysitter had become intoxicated, without any showing that the mother had an inkling that such a thing might occur; (3) when a father asked the presiding judge, Judge Davis, what he had done wrong to lose custody of his son, Judge Davis replied, "I honestly can't tell you," and then

[6] The failure of Defendants to provide these rudimentary procedural safeguards is discussed in more detail in Plaintiffs' Second Motion for Partial Summary Judgment: Due Process Violations, being filed separately.

issued an order removing the child from the home anyway; (4) a mother abused by her boyfriend lost custody of her child even though the abuser was not being allowed to return to the home and the mother asked the judge not to punish her for what the abuser had done; and (5) a father who tried to discuss the merits of his case during the 48-hour hearing was informed by the presiding judge that the details of child custody removals were not to be discussed in 48-hour hearings. *See* Beauchamp Decl. Ex. 1 (Case Nos. A11-1004, A11-645, A10-1191, A11-497, and A10-1320, respectively).

The facts are not in genuine dispute, and these facts show that not one 48-hour hearing that Judge Davis has held complied with 25 U.S.C. § 1922. Indeed, Defendant Davis rejects the very notion that § 1922 restrains his discretion in 48-hour hearings. He has established for his courtroom an unshakeable policy and practice of not considering whether the removal of an Indian child from his or her home "is necessary to prevent imminent physical damage or harm to the child" as required by § 1922.

Judge Davis's policy and practice of ignoring his duties under § 1922 entitles Plaintiffs to a remedy pursuant to 42 U.S.C. § 1983. First, Judge Davis is a "policy maker" for purposes of § 1983 liability. *See Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Judge Davis "is one who 'speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue,' that is one with 'the power to make official policy on a particular issue.'" MTD Order at 19 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)).

"An 'official policy' involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to

establish governmental policy." MTD Order at 20 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). Here, Judge Davis has made a deliberate choice to ignore the duties required of him by 25 U.S.C. § 1922. Judge Davis has even chosen to ignore what this Court informed him in its MTD Order about the applicability of § 1922 to his 48-hour hearings.

Similarly, Defendant Mark Vargo, State's Attorney for Pennington County, and Defendants LuAnn Van Hunnik and Lynne A. Valenti, respectively the person in charge of Child Protection Services for Pennington County and the Secretary of the South Dakota Department of Social Services, are policy makers for their offices, and have acquiesced in Judge Davis's decision to ignore § 1922 in 48-hour hearings. In not one transcript is there any indication that these Defendants or their subordinates made any attempt to introduce the evidence required by § 1922, except in those few hearings in which a Deputy State's Attorney happened to mention that a parent was no longer in the home for one reason or another. SUF ¶ 38. Furthermore, although the ICWA affidavits prepared by DSS employees and submitted in 48-hour hearings often discussed the events that led up to the child being removed from the home, they almost never discussed in any meaningful or detailed fashion whether the child would likely suffer injury if returned to the home, the critical inquiry under § 1922. *Id.*[7]

Accordingly, Plaintiffs are entitled to judgment as a matter of law that Defendants have violated and continue to violate Plaintiffs' rights under §1922 by failing to determine during each 48-hour hearing whether continued custody is necessary to prevent

[7] Exhibit 7 of the Beauchamp Decl. includes the ICWA affidavits from all of the cases whose transcripts are being provided.

imminent damage or harm to the child. The facts surrounding this claim are not in reasonable or genuine dispute.

II. Defendant Davis Failed to Instruct DSS to Return Indian Children to their Homes as Soon as the Emergency Had Terminated

This Court has interpreted § 1922–consistent with its unambiguous, mandatory language–as requiring state courts at the conclusion of any hearing in which custody of an Indian child is granted to DSS to *direct* DSS to return the child to the home as soon as the emergency has terminated. MTD Order at 33. Yet, the undisputed facts show that Judge Davis (and all the other judges on the Seventh Judicial Circuit) only *authorize* DSS to return Indian children to their homes once the emergency has ended. DSS is never directed, instructed, or ordered to do so. SUF ¶ 38.

As detailed in Plaintiffs' SUF, not one temporary custody order issued by Judge Davis (or by any other judge on the Seventh Judicial Circuit) directed, instructed, or ordered DSS to return an Indian child to the home when the emergency terminated. Rather, DSS was merely authorized to take that action, thus leaving the matter to the discretion of Defendants Van Hunnik and Valenti and their subordinates. Each temporary custody order contained the following provision:

> The Department of Social Services *is hereby authorized* to return full and legal custody of the minor child(ren) to the parent(s), guardian or custodian (without further court hearing) at any time during the custody period granted by this Court, if the Department of Social Services concludes that no further child protection issues remain and that temporary custody of the child(ren) is no longer necessary.

See Beauchamp Decl. Ex. 2 (emphasis added). Similarly, in not one single 48-hour hearing did the court verbally direct, instruct, or order DSS to return an Indian child to the home when the emergency had ceased. SUF ¶ 37.

There is a critical difference between authorizing an activity and requiring an activity. As the Eighth Circuit has held, "the word 'authorize' [ ] ordinarily denotes a power to act as opposed to an obligation to act." *Shopen v. Bone*, 328 F.2d 655, 659 (8th Cir. 1964); *see also Andrus v. Allard*, 444 U.S. 51, 62 n.17 (1979) (noting that a statute that "merely *authorized* but did not *order*" an activity implied a permissive duty); *Smith v. Mark Twain Nat. Bank*, 805 F.2d 278, 287 (8th Cir. 1986) (holding that a duty to act had not been created by an agreement that "does not *require* a sale; it merely *authorizes* a sale."). *See also Soden v. Murphy*, 2007 WL 5110318, *3 (E.D. Mo. 2007) (holding that a statute that only authorizes agency action fails to creates a mandatory duty); *Davidson & Associates, Inc. v. Internet Gateway, Inc.*, No. 4:02-CV-498-CAS, 2003 WL 23709467, at *4 (E.D. Mo. 2003) (noting that an agreement that "authorized" suit to be filed in a certain jurisdiction did not prohibit the filing of that suit in a different jurisdiction); *Fed. Gasohol Corp. v. Total Phone Mgt., Inc.*, 24 F. Supp. 2d 1149, 1150-51 (D. Kan. 1998) (similar); *Vann v. Hous. Auth. of Kansas City, Mo.*, 87 F.R.D. 642, 669 (W.D. Mo. 1980) (holding that a statute that authorizes agency action "is not mandatory and does not require" the agency to undertake that action).

Section 1922 provides that agency officials who have custody of Indian children in foster care "shall" return those children to their homes when the out-of-home placement "is no longer necessary." 25 U.S.C. § 1922. Yet, neither Judge Davis nor any other judge on the Seventh Judicial Circuit directs, instructs, or orders DSS to return an Indian child to his or her home when the emergency that necessitated removal has terminated. Plaintiffs are therefore entitled to summary judgment on this claim.

III. Plaintiffs are Entitled to an Effective Remedy

Plaintiffs Oglala Sioux Tribe, Rosebud Sioux Tribe, and the Indian families in Pennington County that comprise the Plaintiff Class suffer violations of their rights under § 1922 nearly a hundred times a year at the hands of the Defendants. Plaintiffs are thus entitled to an effective and immediate remedy.

Plaintiffs' complaint requests the issuance of declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 against state officials to halt on-going violations of Plaintiffs' federal rights. *See* Docket 1 at ¶¶ 1, 73, 112, and 129. Section 1983 authorizes this Court to grant precisely this type of prospective relief. *See Ex parte Young*, 209 U.S. 123 (1908); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989); *Brandon v. Holt*, 460 U.S. 464, 471-72 (1985); *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 897 (8th Cir. 2000) ("Under *Young*, a party may sue a state officer for prospective relief in order to stop an ongoing violation of a federal right. Injunctive relief remains generally available under this doctrine against continuing violations of federal law."); *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995) (upholding the right of an Indian tribe to seek prospective relief against state officials under § 1983 for violating the tribe's federal rights, and noting that "*Ex parte Young* recognized that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law.") Moreover, this Court has recognized that "Plaintiffs may seek a determination of their ICWA rights under § 1983 in federal court." MTD Order at 36.

Now that Plaintiffs have demonstrated violations of their ICWA rights, this Court has the power to grant all necessary and appropriate remedies. *See Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 66 (1992) ("The longstanding general rule is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.") As the Eighth Circuit stated more than three decades ago in holding that the violation of federal law by state officials confers authority on the federal courts to devise an effective remedy pursuant to § 1983:

> The starting point for our analysis is the principle enunciated by the Supreme Court in *Bell v. Hood*, 327 U.S. 678, 684 (1946), that where legal rights are invaded and a federal statute [such as § 1983] provides a right to sue for such invasion, federal courts may use any available remedy to make good the wrong. The existence of a statutory right implies the existence of all necessary and appropriate remedies.

Miener v. State of Missouri, 673 F.2d 969, 977 (8th Cir. 1982) (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)). *See also Fond du Lac Band of Chippewa Indians*, 68 F.3d at 256 (citation omitted) ("Where necessary to ensure compliance with federal law, the Supreme Court has approved broad injunctive relief aimed at state officials.").

A state court judge who engages in a policy, practice, or custom that violates federal law can be sued in federal court under § 1983 in the same manner as any other state official. *See Pulliam v. Allen*, 466 U.S. 522, 539 (1984) (authorizing the issuance of a federal injunction against a state magistrate when "in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm."). In the wake of *Pulliam*, however, Congress amended § 1983 by passing the Federal Courts Improvement Act ("FCIA"). The FCIA bars the issuance of injunctive relief against a

judge unless a declaratory judgment is first issued and proven ineffective in halting the federal violations. Since then, courts have recognized that the FCIA did nothing to change the existing rule (confirmed in *Pulliam*) that meaningful relief must be issued pursuant to § 1983 against state magistrates who violate federal law. The only thing the FCIA did is require that declaratory relief be ordered against those judicial defendants prior to injunctive relief. *See Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 765 (9th Cir. 2010); *LeClerc v. Webb*, 270 F. Supp. 2d 779, 793 (E.D. La. 2003) ("Defendants can make no colorable argument that the FCIA did anything to alter the landscape with respect to declaratory relief. Declaratory relief against judges acting in their judicial capacities was well-established before the FCIA."); *Tesmer v. Granholm*, 114 F. Supp. 2d 603 (E.D. Mich. 2000).

Accordingly, Plaintiffs are entitled to an order that compels the Defendants to fulfill both of their § 1922 duties. An injunction should issue, requiring Defendants Vargo, Van Hunnik, and Valenti to seek to introduce evidence *during* 48-hour hearings to meet the state's burden of proving that continued removal of the Indian child is "necessary to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922. Those Defendants must also be ordered, consistent with § 1922, to return an Indian child to the home as soon as the emergency has terminated. *See id*. Corresponding declaratory relief should also be issued against Judge Davis, declaring that in all future 48-hour hearings, Indian parents (or Indian custodians, as that term is defined in 25 U.S.C. § 1903(6)) may not lose custody of their children unless the state has proven that removal from the home is "necessary to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922. Additionally, Plaintiffs are entitled to summary judgment against

Judge Davis declaring that at the conclusion of any 48-hour hearing in which Judge Davis grants custody of an Indian child to DSS, Judge Davis must order DSS to return the child to the home as soon as the emergency has terminated.

CONCLUSION

For many years now, Defendants have turned § 1922 on its head, interpreting the statute as a basis to *ignore* the requirements of the Indian Child Welfare Act rather than as a command to *implement* those requirements. Plaintiffs respectfully request judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1 on the claims presented above.

Respectfully submitted this 11th day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I electronically filed the foregoing Brief with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants:

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