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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' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs' lawsuit contains three central claims for relief, one of which seeks to vindicate rights guaranteed by the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901 *et seq*. This week, the United States Supreme Court issued an opinion in *Adoptive Couple v. Baby Girl*, No. 12–399 (U.S. June 25, 2013), which has significant bearing on Plaintiffs' ICWA claims. Plaintiffs respectfully submit this Notice of Supplemental Authority in further opposition to the three Motions to Dismiss (Dkts. 33, 37, 39) currently pending before this Court.

The Supreme Court's decision in *Baby Girl* fully supports Plaintiffs' argument that Congress intended to substantially curb state discretion in the removal of Indian children from their homes and provide Indian parents with immediate procedural protection against the loss of their children. First, the *Baby Girl* decision emphasizes (just as the Plaintiffs do in their complaint and briefs) that ICWA was intended to prevent "the unwarranted removal of Indian children from intact Indian families." *Id.*, slip op. at 10. The Court quotes from the legislative record on this point: "[t]he purpose of [ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families *and the placement of such children in foster or adoptive homes*." *Id.* (emphasis added). Notably, the Court recognizes that "the primary mischief the ICWA was designed to counteract was the unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." *Id.* at 9.

More specifically, *Baby Girl* discusses § 1912(d) of ICWA, one of the provisions at issue in this case. Defendants argue in their briefs that none of the procedural protections mandated by ICWA apply at their 48-hour hearings, even though these hearings determine whether the State will be allowed to continue to keep an Indian child in foster care for another

sixty days.[1] The *Baby Girl* decision makes clear that ICWA's federal standards apply *before* a state court can order foster care placement of an Indian child. In section B of the opinion, which deals with Section 1912(d)'s "active efforts" requirement, the Supreme Court expressly recognizes that the active efforts required by Section 1912(d) must be undertaken before an Indian child is removed from his or her family and placed in foster care: "Indian parents who are already part of an 'Indian family' are provided with access to 'remedial services and rehabilitative programs' under 1912(d) so that their 'custody' might be 'continued' *in a way that avoids foster-care placement* under 1912(e)." *Id.*, slip op. at 13 (emphasis added.). Section 1912(d) was designed to apply, the Court explained, "to state social workers who might otherwise be too quick to remove Indian children from their Indian families." *Id.*, at 14. *See also id.*, Sotomayor, J., dissenting, slip op. at 7 ("In other words, [§ 1912(d)] requires that an attempt be made to cure familial deficiencies before the drastic measure[ ] of foster care placement . . . can be taken.").

Defendants contend in their Motions to Dismiss that ICWA has no application to South Dakota's 48-hour hearings and that state social workers and state courts are free to remove Indian children from their families for sixty days without regard to ICWA's restraints. For reasons explained in *Baby Girl*, that contention is wholly inconsistent with the purpose of ICWA. ICWA was designed to impose minimal federal standards for the removal of Indian children from their homes. Thus, contrary to Defendants' claims, it is inconceivable that Congress would permit state social workers and state courts to engage in practices for sixty days that Congress had already determined were harmful to Indian families.

[1] These 48-hour hearings are held after a child has already been taken into state custody. The purpose of the hearing is to determine whether to return the child to his or her home or keep the child in foster care until the next hearing, which is typically held sixty days later.

WHEREFORE, Plaintiffs respectfully request that the Court consider this supplemental authority, which was not available at the time Plaintiffs filed their responses opposing the three pending Motions to Dismiss.

Respectfully submitted this 28th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 28, 2013, 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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