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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' STATEMENT OF UNDISPUTED FACTS RE: DEFENDANTS' VIOLATIONS OF 25 U.S.C. § 1922

INTRODUCTION

On January 28, 2014, the Court granted Plaintiffs' motion to obtain transcripts of every third temporary custody ("48-hour") hearing involving an Indian child conducted by Defendants since January 1, 2010. *See Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-5020 (D.S.D. Order Granting Motion for Expedited Discovery Jan. 28, 2014)

(Docket 71). Pursuant to that Order, Plaintiffs have now obtained and carefully examined more than 120 transcripts (and additional transcripts are expected soon). Based on this examination, the material facts enumerated below are not in reasonable or genuine dispute and this Court is entitled to conclude that Defendants are failing to perform both of the duties required of them by 25 U.S.C. § 1922 of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* [1]

STATEMENT OF UNDISPUTED FACTS

1. Approximately one hundred 48-hour hearings involving Indian children are held each year by Defendants. (This figure was computed based on the number of transcripts that Plaintiffs received in discovery.)

2. The transcripts that were produced demonstrate that in at least 90 percent of Defendants' 48-hour hearings, orders were issued removing Indian children from their homes. It appears that in 100 percent of the hearings decided by Defendant Hon. Jeff Davis on the merits, Judge Davis issued orders removing Indian children from their homes. *See* Declaration of Peter W. Beauchamp in Support of Plaintiffs' Motion for Partial Summary Judgment ("Beauchamp Decl.") Ex. 1.[2] Given that many of the families

[1] As discussed in Plaintiffs' accompanying brief, this Court has recognized that 25 U.S.C. § 1922 requires Defendants to undertake two tasks in connection with their temporary custody ("48-hour") hearings. First, Defendants must prove *during* the hearing that the emergency that required the Indian child's removal from the home continues to exist. *See Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-5020 (D.S.D. Order Denying Motions to Dismiss Jan. 28, 2014) (Docket 69) at 32. Second, if the Department of Social Services ("DSS") satisfies that burden and demonstrates a continuing emergency, then *at the conclusion* of the hearing, the court must order DSS to return the child to the home as soon as the emergency terminates. *Id*. *See* 25 U.S.C. § 1922 ("[the state official or agency that removes 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.") The facts conclusively demonstrate that Defendants are not performing either duty.

[2] Plaintiffs are willing, if the Court wishes, to produce a copy of all 120-plus transcripts. As an alternative, Plaintiffs have selected 57 of these transcripts, which comprise nearly all of the hearings conducted by Judge Davis, along with hearings from the other judges on the Seventh Judicial Circuit that are cited in this Statement of Undisputed Facts. These transcripts are contained in Exhibit 1 of the Beauchamp Decl.

involved in these hearings have more than one child, a total of at least 150 Indian children a year are removed from their homes as a consequence of these hearings.

I. Defendants Fail To Prove *During* their 48-Hour Hearings That an Emergency Continues to Exist

3. 25 U.S.C. § 1922 requires a prompt hearing whenever an Indian child is removed from the home to determine whether continued out-of-home placement is "necessary to prevent imminent physical damage or harm to the child." However, *in not one 48-hour hearing* did Defendants determine whether continued out-of-home placement was necessary to prevent imminent physical damage or harm to the child, except in fewer than five cases when the issue was raised by a parent or by an attorney representing an Indian tribe. *See* Beauchamp Decl. Ex 1. Judge Davis concedes that: (a) not once in any of the 48-hour hearings over which he presided did the court inquire whether the cause of the child's emergency removal had been rectified prior to the hearing; and that (b) he knows of only three 48-hour hearings, Case Nos. A12-571, A12-468, and A12-36, conducted in the Seventh Judicial Circuit since January 2010 in which an inquiry was made by the court into whether the cause of the child's emergency removal had been rectified. Beauchamp Decl. Ex. 4, Davis Am. Interrog. No. 9. Furthermore, in two of those three cases, the inquiry into whether the cause of the child's emergency removal had been rectified was initiated by counsel for an Indian tribe, and not by the court. *See* Beauchamp Decl. Ex. 1, Case Nos. A12-571 and A12-36.

4. One reason why Defendants never complete the mandatory § 1922 inquiry is because Judge Davis believes that § 1922 is a "statute of deferment," that is, that § 1922 authorizes state courts to defer applying the protections contained in ICWA until proceedings that occur *after* 48-hour hearings are held. Defendant Davis admitted that

this is his position in response to a request for admission. *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 the Beauchamp Decl. as Exhibit 3.) Judge Davis confirmed this point in a recent 48-hour hearing. During that hearing, counsel for an Intervenor Indian Tribe asked Judge Davis to determine whether there was any "pending imminent threat of danger" in returning an Indian child to the mother, who was present in the courtroom. Judge Davis replied: "ICWA doesn't apply to a 48-hour hearing, Mr. Hanna, and I decline your invitation. We'll be in recess." *See* Beauchamp Decl. Ex. 1-Case No. A14-444 (June 23, 2014), Transcript at 13-14.[3]

5. Another reason why Defendants never complete the § 1922 inquiry is because as a matter of policy, practice, and procedure, Defendants do not permit testimony to be given during a 48-hour hearing. This fact was admitted by Judge Davis in response to Request for Admission No. 19 (attached to the Beauchamp Decl. as Ex. 4) (Judge Davis admits that "no oral testimony is taken at a 48-hour hearing."); *see also* Beauchamp Decl. Ex. 1-Case No. A13-609 (September 9, 2013) (Pfeifle, J.) Transcript at 2 ("We will not take testimony [during a 48-hour hearing]."); Case No. A13-616 (September 12, 2013) (Pfeifle, J.) Transcript at 2 ("we do not take evidence" during a 48-hour hearing); Case No. A14-47 (January 24, 2014) (Mandel, J.) Transcript at 2 ("This is an informal proceeding, and by that I mean that there's no testimony taken.") As a result of the fact that (a) Defendants allowed no testimony at 48-hour hearings, (b) Defendants allowed no cross-examination at 48-hour hearings, (c) often the only questions asked of the parents

[3] The file numbers assigned to these hearings by the state court reveal the year of the case. Call cases that begin with A10 were filed in 2010; A11 is 2011; A12 is 2012; A13 is 2013, and A14 is 2014.

in a 48-hour hearing were for purposes of identification and to see if they understood their rights, and (d) Defendants never conducted the inquiries required by 25 U.S.C. § 1922, Defendants' 48-hour hearings were completed rather quickly. Judging from the length of the transcripts that were produced, the average length of time it took to complete a 48-hour hearing, Plaintiffs estimate, was under four minutes. A number of these hearings appear to have been completed in about sixty seconds.

6. The following 31 cases, listed below in chronological order and whose transcripts are included in the Beauchamp Decl. Ex. 1, demonstrate that Defendants never on their own initiative conducted a § 1922 inquiry in any 48-hour hearing. For instance, in Case No. A10-50 (January 11, 2010) (Davis, J.), no facts were mentioned in the hearing regarding the emergency that caused the child's removal or whether the emergency had terminated. In fact, Judge Davis granted a request from the Department of Social Services ("DSS") for 60 days of additional custody before he asked the parents if they understood their rights. *See* Transcript at 4.[4]

7. Case No. A10-270 (February 25, 2010) (Davis, J.): Once again, Judge Davis did not require DSS or the State's Attorney to present any facts as to the emergency that caused the children's removal or whether the emergency had terminated. Neverthelss, Judge Davis signed an order granting DSS additional custody for 60 days. The parents were not asked any questions until the very end of the hearing, after Judge Davis had already announced his intentions to sign the order allowing DSS to keep their children. *See* Transcript at 4-5.

[4] As used in this Statement, the term "60 days" is a close approximation. At times, the next hearing is set a few days less than 60 days, depending on the day of the week the next hearing would fall on. Also, the term "additional" custody as used herein refers to the fact that DSS already has *physical* custody of the child. What DSS is requesting in all of these 48-hour hearings is *legal* custody for an additional period of time, usually 60 days until another hearing is held.

8. Case No. A10-306 (March 8, 2010) (Davis, J.): Here again, the court sought no evidence during the hearing as to why the removal was necessary or whether the emergency had ceased. Nevertheless, Judge Davis signed an order granting DSS custody for 60 days.

9. Case No. A10-358 (March 8, 2010) (Davis, J.): Again, no facts were discussed during the hearing as to why removal was necessary or whether the children could be safely returned. Nevertheless, Judge Davis signed an order granting DSS custody for an additional 60 days.

10. Case No. A10-460 (April 5, 2010) (Davis, J.): Similarly, no facts were mentioned, and yet Judge Davis signed an order granting DSS custody for 60 days. The only questions Judge Davis asked the mother and father were whether they were present and could hear him.

11. Case No. A10-783 (July 12, 2010) (Davis, J.): The State's Attorney claimed during the hearing that the mother was involved in a car accident while intoxicated and that the father was unavailable. No one discussed whether the emergency had terminated and the mother was now able to care for the children. Nevertheless, Judge Davis signed an order granting DSS custody for 60 days.

12. Case No. A10-1064 (September 27, 2010) (Davis, J.): As in all of his other hearings, Judge Davis granted DSS's request for a 60-day continuation of custody without considering the facts of the case, neither what caused DSS to take custody nor whether the emergency had terminated.

13. Case No. A10-1116 (October 14, 2010) (Thorstenson, J.): Similar to Judge Davis, Judge Thorstenson (filling in for Judge Davis)[5] did not inquire as to the emergency that necessitated the child's removal from the home or whether that emergency had terminated. When Judge Thorstenson, without conducting any factual hearing, announced her intention to grant DSS's request for 60 days of additional custody, the mother asked: "You can't do it any sooner than that?" *See* Transcript at 5. Judge Thorstenson then set the next hearing for 45 days instead of 60.

14. Case No. A10-1119 (October 14, 2010) (Thorstenson, J.): Without conducting any factual investigation during the hearing, Judge Thorstenson informed the father that the court was "going to go ahead and adopt the recommendations of the State's Attorney to leave the child right now in the care of DSS and hopefully they can work with you on other options for where the child may be." *See* Transcript at 5. The father responded: "I would like to know what the allegations were." *Id*. Judge Thorstenson would not tell him, stating: "I don't want you discussing the details of the case, but work with DSS and see what they can do." *Id*. at 6.

15. Case No. A10-1191 (November 8, 2010) (Davis, J.): The mother and father both attended the hearing. All that is discernable from the transcript is that the mother apparently had been intoxicated and her son was taken from her custody. The father, however, informed Judge Davis "I wasn't intoxicated," and the father requested that the boy be released to his custody. *See* Transcript at 4. In response, Judge Davis claimed that the court had only two options: "to allow you to work with" DSS to regain custody

[5] Each year, Judge Davis selects one of the judges on the Seventh Judicial Circuit to preside over all of the 48-hour hearings unless a substitute is necessary on a particular date due to a conflict. Judge Davis presided over the 48-hour hearings in 2010, Judge Eklund in 2011, Judge Thorstenson in 2012, Judge Pfeifle in 2013, and Judge Mandel in 2014.

of his son "or set the matter for a full, formal hearing." *Id*. at 5. The father again asked why he was losing custody of his son, and when Judge Davis did not supply an answer, the father and Judge Davis then had this conversation:

> THE FATHER: I would just like to know what I did wrong that my son is not with me. That's all I'm asking.
>
> THE COURT: That, sir, I honestly can't tell you at this point because noting has been checked out and verified to come to me yet.

Id. at 5. Notably, a representative from DSS was in the courtroom during the hearing. Judge Davis did not explain why the court was unwilling to ask DSS to supply a response to the father's (legitimate) question. What is clear, however, is that Judge Davis did not know whether the emergency had ceased, and saw no need to address that question. Instead, the court granted DSS's request for continued custody for 60 days.

16. Case No. A10-1238 (November 18, 2010) (Eklund, J.): No evidence was presented in this hearing. The Deputy State's Attorney merely asked the court to allow DSS to continue custody for 60 days "to keep things moving and give the mother an opportunity to work with DSS and certainly, if she wants counsel appointed, we can address those issues as well." *See* Transcript at 4. Judge Eklund responded: "Okay. I'll grant that temporary custody order then." *Id*. at 5. The proceedings were then recessed.

17. Case No. A10-1320 (December 13, 2010) (Thorstenson, J.): No evidence was offered during the hearing regarding why the removal was necessary or whether the emergency had terminated. However, the father asked why his child had been taken, given that the last disturbance at the home "was over two months ago." *See* Transcript at 2. The court replied: "Okay. I don't want to get into the details of your case specifically

just because that's stuff that's going to be coming out." *Id*. at 2-3. Judge Thorstenson then set the next hearing for 60 days and granted DSS's request for custody until that time.

18. Case No. A11-497 (May 23, 2011) (Davis, J.): The transcript is unclear as to why her son was removed but apparently it had to do with an allegation that the mother had been the victim of an assault by the father of the child. The mother informed Judge Davis, however, that the father "is gone," that she has nothing more to do with him, and she sees no reason why her son should not be returned. *See* Transcript at 4. Judge Davis declined to consider whether the boy could safely be returned, telling the mother that "the harsh reality is the department has the ability to return him to you at any time during these proceedings." *Id*. The mother then asked: "Your Honor, I'm sorry, but why am I getting punished for what his dad did?" *Id*. at 5. Rather than conduct an evidentiary hearing, Judge Davis signed an order granting custody to DSS for 60 days.

19. Case No. A11-645 (July 5, 2011) (Eklund, J.): A mother brought her child to a babysitter. Later that day, the child was placed into DSS's custody when the babysitter became intoxicated and was seen stumbling. The mother stated at the hearing that the babysitter was sober when she dropped off her daughter and she had no idea that this might happen. Yet the court made no effort to determine whether the mother was in the least bit culpable for this incident, nor did the court require DSS to provide any basis for believing that the child would be in danger if returned to the mother. Instead, the court granted DSS's request for 60 days of additional custody, informing the mother that in the meantime she could "attempt to work things out" with DSS. *See* Transcript at 3.

20. Case No. A11-1004 (November 7, 2011) (Eklund, J.): Judging from the sparse facts in the transcript, the parents apparently were going through a divorce, the mother

had custody of the children, and the father was living in Oklahoma. As soon as the father heard that his children had been taken into state custody, he rushed to Rapid City to attend the 48-hour hearing. He told the court: "I have money, I have everything for my kids. I have been in Oklahoma for two months . . . . I want my kids." *See* Transcript at 2. Rather than ask DSS to offer some legitimate basis for denying the father's request, the court granted DSS's custody request for 45 days.

21. Case No. A11-1075 (December 5, 2011) (Eklund, J.): The transcript of this hearing is fifteen sentences in length. The mother was present but the court did not even ask her to verify her name. The court granted custody to DSS for 60 days without any discussion of the facts, nor did the court advise the mother of her rights.

22. Case No. A12-219 (March 1, 2012)(Davis, J.): This is the only transcript produced in discovery in which Judge Davis told Indian parents that they "would want to be aware of your rights under the Indian Child Welfare Act and see that they're exercised." Transcript at 5. However, Judge Davis did not advise the parents what those rights were, and he violated their rights under 25 U.S.C. § 1922. Indeed, counsel for an Intervenor Tribe asked the court "to order the state to present some kind of factual basis to support the finding" that the child should be removed from the home. *Id*. at 8. The court denied the motion and granted custody to DSS.

23. Case No. A12-245 (March 8, 2012) (Thorstenson, J.): Counsel for Intervenor Tribe asked the court to continue the hearing for ten days rather than grant DSS's motion for 60-day custody, and specifically invoked ICWA. *See* Transcripts at 14-15. The court denied the request. There was no discussion as to whether the emergency had terminated.

24. Case No. A12-468 (May 14, 2012) (Thorstenson, J.): Judge Thorstenson informed DSS that she would "like" the children to be returned to the home if it was safe to do so. *See* Transcript at 10. Unfortunately, the court conducted no hearing to determine if it *was* safe to return the child to the home. Instead, the court signed an order granting DSS's request for custody of 60 days.

25. Case No. A12-648 (July 9, 2012) (Davis, J.): Here again, Judge Davis failed to require that any evidence be introduced concerning why the child had been removed from the home. After reading a list of rights, Judge Davis asked the mother if she wanted an attorney. When the mother said she did, the court told her to "fill out an application." *See* Transcript at 6. The hearing was then recessed and Judge Davis signed an order granting DSS further custody for 60 days.

26. Case No. A12-712 (August 2, 2012) (Thorstenson, J.): The Deputy State's Attorney informed the court that the children were placed with DSS because the adults in the home were inebriated. *See* Transcripts at 9. However, while that fact might explain the emergency that precipitated the removal, it does not address the § 1922 issue of whether "such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." *See id.* The court conducted no inquiry into that subject but instead signed an order allowing DSS to retain custody until the next hearing in 60 days.

27. Case No. A12-749 (August 20, 2012) (Thorstenson, J.) Counsel for Intervenor Tribe asked the court "to hear evidence" on the issue of whether to grant DSS's motion for continued custody. *See* Transcript at 16. The court denied the motion and granted DSS's request to extend custody for 60 days.

28. Case No. 12-867 (September 24, 2012) (Thorstenson, J.): This case is similar to all the others, in that no evidence of a continuing emergency was mentioned. However, it is significant because when counsel for Intervenor Tribe requested an evidentiary hearing, the court denied the request based on one ground. According to Judge Thorstenson: "ICWA does not apply to emergency [48-hour] hearings." *See* Transcript at 11.

29. Case No. A13-20 (January 7, 2013) (Pfeifle, J.): Counsel for Intervenor Tribe informed the court that although the parents had been incarcerated, the father was no longer in jail and, therefore, the children should be returned to the father "unless the State is ready to present some kind of evidence to suggest why the placement requirements of the Indian Child Welfare Act should not govern." *See* Transcript at 12. The court, however, denied counsel's request, conducted no evidentiary hearing, and granted continued custody to DSS for 30 days.

30. Case No. A13-30 (January 10, 2013) (Pfeifle, J.): Counsel for Intervenor Tribe asked the court to hold an evidentiary hearing because the father was prepared to testify that although the mother had difficulties with child care, the father "is ready, willing, and able to take custody" of his child, that the father had already found a "responsible caretaker" to care for the child while the father was working, and that the father would testify as to "what he can do to ensure the safety of the child." *See* Transcript at 11. The court denied the request, granting continued custody to DSS for 30 days.

31. Case No. A13-49 (January 22, 2013) (Pfeifle, J.): Counsel for Intervenor Tribe asked the court to return the child to the mother because, now that the mother had been released from jail, "there is no longer any legal justification" for separating the family.

See Transcript at 9. Specifically invoking § 1922, counsel asked that a hearing be convened "in which the State will have the burden of showing that continued placement is necessary for the protection of the child." *Id*. at 10. The court denied counsel's motion and instead granted DSS's motion to continue custody for 60 days.

32. Case No. A13-609 (September 9, 2013) (Pfeifle, J.): Even though counsel for Intervenor Tribe informed the court that, in the Tribe's opinion, the child would not be in imminent danger if returned to the home and counsel requested an evidentiary hearing, the court denied counsel's request and ordered continued custody for 30 days to DSS. *See* Transcript at 8.

33. Case No. A13-616 (September 12, 2013) (Pfeifle, J.): Counsel for Intervenor Tribe informed the court that the mother is no longer incarcerated and that the father has always been available to care for the child, and that therefore the state cannot meet its burden to prove imminent danger. *See* Transcript at 8. However, the court denied the request to reunite the family and granted DSS continued custody for 30 days.

34. Case Nos. A14-444, A14-445, and A14-446 (June 23, 2014) (Davis, J.): Judge Davis held three 48-hour hearings back-to-back and the court reporter combined all three hearings into one transcript. In not one of these hearings did Judge Davis conduct the inquiry required by § 1922. To the contrary, as noted earlier, when counsel for an Intervenor Indian Tribe asked Judge Davis to include such an inquiry in the hearing, Judge Davis denied the request on the grounds that, in his opinion, "ICWA doesn't apply to a 48-hour hearing." *See* Transcript at 14.

II. Defendants Fail to Instruct DSS that the Agency Must Return Indian Children to their Homes As Soon As the Emergency Has Terminated

35. Plaintiffs received more than 120 transcripts of 48-hour hearings conducted since January 1, 2010. Plaintiffs also received the Temporary Custody Orders that were entered in nearly all of those cases.[6] Every one of these orders contains 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. (Emphasis added.)

See Beauchamp Decl. Ex. 2.

36. Thus, DSS was *authorized* by these orders to return custody of Indian children to their homes when the emergency has terminated but DSS was *never ordered* to do so. *See* Beauchamp Decl. Ex. 2.

37. Similarly, in their oral directives during the hearings, presiding judges never ordered DSS to return an Indian child to the home when the emergency ended. At most, the presiding judges indicated a preference for that result, and merely authorized DSS to return the child. *See, e.g.*, Beauchamp Decl. Ex. 1-Case No. 11-1060 (December 1, 2011) (Eklund, J.) Transcript at 4 (stating that DSS "will be authorized in this case" to return the children to the parents); Case No. A12-468 (May 14, 2012) (Thorstenson, J.) Transcript at 12 (stating that DSS has "the authority" to return the child); Case No. A12-712 (August 2, 2012) (Thorstenson, J.) Transcript at 9 (stating that the court gives "the

[6] Plaintiffs have attached to the Beauchamp Decl. as Exhibit 2 all of the orders that were issued in each of the hearings whose transcripts are included in Exhibit 1, except for three that were not provided to Plaintiffs. Thus, the court will have the transcripts of approximately 57 hearings along with the orders that were issued following each of those hearings.

Department authority to return the children"); Case No. A13-609 (September 9, 2013) (Pfeifle, J.) Transcript at 9 (stating that DSS has "the capability" to return the child); Case No. A13-616 (September 12, 2013) (Pfeifle, J.) Transcript at 9 (stating that if DSS determines "that return of custody is appropriate, that may happen."); Case No. A13-845 (December 23, 2013) (Mandel, J.) Transcript at 6 (stating that DSS is "authorized" to return the child); Case No. A14-444 (June 23, 2014) (Davis, J.) (stating that under his order, DSS could return the children "without further proceedings" but not ordering DSS to return the children at any particular time).

38. Counsel for Plaintiffs have read all of the hearing transcripts and all of the orders following those hearings that have been produced in this lawsuit. In not one hearing and in not one order was DSS directed, instructed, or ordered to return an Indian child to his or her home at any particular time. In addition, in not one transcript is there any indication that the State's Attorney or any DSS employee made any attempt to introduce the evidence required by § 1922, except in those few hearings in which the State's Attorney happened to mention that a parent was incarcerated or hospitalized. 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 comprehensive manner whether the child would likely suffer injury if returned to the home.[7]

Respectfully submitted this 11th day of July, 2014.

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

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I electronically filed the foregoing Plaintiffs' Statement 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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