IN THE SUPREME COURT OF THE STATE OF ALASKA

NATIVE VILLAGE OF TUNUNAK, Appellant, v. STATE OF ALASKA, OCS, et al., Appellee.	)	Supreme Court No. S-14670

Trial Court Case No. 3AN-11-02236PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE JUDGE FRANK A. PFIFFNER

APPELLEE STATE OF ALASKA'S BRIEF IN RESPONSE TO TRIBE'S PETITION FOR REHEARING

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25 U.S.C. § 1915 - Placement of Indian children

(a) Adoptive placements; preferences
In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with
(1) a member of the child's extended family;
(2) other members of the Indian child's tribe; or
(3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences
Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

COURT RULES

Alaska Appellate Rule 506. Rehearing.

(a) Grounds for Petition. The court may order a rehearing of a matter previously decided if, in reaching its decision:
(1) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or
(2) The court has overlooked or misconceived some material fact or proposition of law; or
(3) The court has overlooked or misconceived a material question in the case.
A rehearing will not be granted if it is sought merely for the purpose of obtaining a reargument on and reconsideration of matters which have already been fully considered by the court.

(b) Time for Filing -- Form of Petition. An original and five copies of a petition for rehearing must be filed within 10 days after the date of notice of the opinion or other decision. Date of notice is defined in Civil Rule 58.1(c) and Criminal Rule 32.3(c). The petitioner shall specifically state which of the grounds for rehearing specified in paragraph (a) exists, and shall specifically designate that portion of the opinion, the brief, or the record, or that particular authority, which the petitioner wishes the court to consider. The petition shall be prepared in conformity with Rule 513.5(b) and when filed shall be accompanied by proof of service on all parties. No petition for rehearing shall exceed five typewritten pages. No memoranda or briefs in support of a petition for rehearing, and no response to a petition for rehearing, shall be received unless requested by the court.

ARGUMENT

The Tribe and the amici ask the Court to change its decision based on arguments that do not materially differ from those addressed in the appellate briefing and this Court's opinion.[1] Consequently, the State will rely on its prior briefing.

The scope of this Court's review of a petition for rehearing is whether "(1) [t]he court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or (2) [t]he court has overlooked or misconceived some material fact or proposition of law; or (3) [t]he court has overlooked or misconceived a material question in the case."[2] "Rule 506(a) was not intended to allow parties to raise new arguments after they have had a chance to analyze an appellate court's decision. Rule 506(a) implicitly limits rehearing to legal principles or propositions that were raised by the parties in the normal course of the appeal."[3] In the event the Court finds that the standard has been met, the State would not oppose rehearing.

Regardless of whether rehearing is granted, the State is beginning the process of working with tribes to improve adherence to the Indian Child Welfare Act (ICWA)'s placement preferences. Some of the options that the Office of Children's Services (OCS)

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1 At Br. 1-9; *see Native Vill. of Tununak v. State, DHSS, Office of Children's Services*, 334 P.3d 165, 172, 177 (Alaska 2014) (discussing Tribe's policy concerns in detail and acknowledging that "while we do not disregard the Tribe's policy concerns, neither may we disregard the holding of the Supreme Court on this matter of federal law.").

2 Appellate Rule 506(a).

3 *Carpentino v. State*, 42 P.3d 1137, 1139 (Alaska Ct. App. 2002) (quoting *Booth v. State*, 903 P.2d 1079, 1090 (Alaska App.1995)) (emphasis added).

is evaluating include statutory and regulations changes that could address tribal concerns and clarify how state adoption laws affect ICWA. State statutes could, for example, clarify how ICWA should be applied in Alaska; make it legal under state law for a family member to formally seek to adopt by informing the court during a placement hearing that a family member is interested in adopting the child; simplify the current statutory requirements of an adoption petition; or trigger expanded notice provisions when an adoption petition is filed. As an example, the Michigan Court of Appeals recently arrived at the same conclusion as this Court in interpreting the U.S. Supreme Court's *Adoptive Couple v. Baby Girl*[4] decision to require competing, formal adoption petitions before the federal ICWA placement preferences apply.[5] But the Michigan Court then turned to the Michigan state ICWA statute, which has more rigorous placement preferences, and found that they did apply despite the absence of competing adoption petitions.[6]

OCS is also evaluating internal policy changes that would delay identifying a child's placement as "adoptive" (as defined by ICWA § 1903(iv)) until parental rights have been terminated or other relevant factors exist. This would help ensure that ICWA 1915(b)'s placement preferences apply for most of the duration of a CINA case—so that OCS is subject to 1915(b) challenges to its placement decisions for the longest possible period of time without the requirement of a formal adoption petition.[7] This

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4 *Adoptive Couple v. Baby Girl* 133 S. Ct. 2552, 2556 (2013).

5 *See In re KMN*, No. 322329, 2015 WL 806982 (Mich. Ct. App. Feb. 26, 2015).

6 *Id.*

7 Family members are contacted by OCS as part of OCS' search for (continued)

ensures that tribes, family members denied placement, and parents can hold OCS to its commitment to work diligently to find ICWA preferred placements.

In addition, OCS and other stakeholders are currently working with the court system to make it easier for families to file an adoption petition without attorney assistance.[8] OCS is also considering how to improve identification of possible ICWA-preferred placement options, including partnering with tribes to increase outreach to tribally-affiliated families, and shifting internal resources to allow OCS's ICWA specialists to devote even more time to helping locate potential Native placements.

In conclusion, although the Tribe's policy concerns are not grounds for rehearing, the State is moving forward with several policy solutions to address the Tribe's concerns.

DATED April 15, 2015.

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(continued) 1915(b) placement preferences at the beginning of a case. Family members who are) denied placement or visitation receive notice of their right to request a review hearing to challenge that denial in state court. *See* AS 47.10.080(p); AS 47.14.100(e),(m). The court will also inquire and make findings about whether OCS has adhered to ICWA's placement preferences at status and permanency hearings throughout the case. *See, e.g.*, AS 47.10.080(l).

[8] In a March 3, 2015 email from Assistant Forms Attorney Danielle Bailey, the court system requested feedback from the State and other tribal and adoption bar stakeholders regarding new, simplified adoption forms.

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CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on April 15, 2015 a true and correct copy of the *Appellee State of Alaska's Brief in Response to Tribe's Petition for Rehearing* and this *Certificate of Service* were served by U.S. Mail to the following:

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