LAW OFFICE OF
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TRIBAL LAW AND ORDER COMMISSION TESTIMONY

OF

JUDGE RAQUEL MONTOYA-LEWIS

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Members of the Tribal Law and Order Commission, I am Raquel Montoya-Lewis, Chief Judge for the Upper Skagit Indian Tribal and Associate Professor of Law at Western Washington University's Fairhaven College of Interdisciplinary Studies. I served as the Chief Judge for the Lummi Nation for the last three years and recently left that position to open a law and consulting firm, serving individuals, Indian tribes, and businesses seeking to do business in Indian Country. I sit as a trial and appellate court judge for several other tribes, as well as the Northwest Intertribal Court System. I am from the Pueblos of Isleta and Laguna, two federally recognized tribes in New Mexico.

Given where we are, and who I am, I am uncomfortable leading with my credentials and would prefer leading in the traditional manner. This is an example of the two worlds in which tribal people exist and our legal systems are situated. As a Native woman from the Pueblo of Isleta, the important parts of who I am lie with my great great grandmother Tzashima, her daughter Mary Perry, and my grandmother Mae Paisano, all from the Pueblo of Laguna. They lie with my grandfather Bartolo Montoya and father Vincent Paul Montoya and my mother Barbara Karmel Montoya. I am the child of my ancestors and everytime I sit as a judge, I consider my ancestors and the children several generations from now whom I affect with how I rule.

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You have asked me here today to speak as a tribal court judge about the impact of tribal courts on children and child welfare. As a judge, I have presided over criminal and civil calendars, therapeutic courts and restorative justice and alternative dispute resolutions models. In every forum and nearly every case, children are impacted. They are impacted when their parents cannot parent due to drug and alcohol issues landing them in court, they are impacted when their needs were not met as children and they become involved in the juvenile justice system. They are impacted when their parents divorce and resolve their child custody issues in court. So, I am here not on my own behalf, but on behalf of the children I see each week in my courtroom, who with their families and community ask only that we do our best for each of them, and keep their best interest at heart while we make decisions that impact their lives this day, each day, in ways we know and ways we do not.

Most tribes will tell you that Indian child welfare lies at the heart of their concerns and that they would commit more resources to bettering their services for children and their families if they had them. There are few families in tribal communities who have not been touched by the child welfare system in some way. Most families have had children in foster care, have parents who grew up in foster care or institutional settings, have stories of family members adopted to non-Indian families. Foster care and child welfare have touched our communities in pervasive ways. For many tribes, contact with state child welfare systems resulted in the loss of our children to state foster care, sometimes several generations. I have cases in my courtrooms where I can go back three or four generations before I can find a child who grew up with his or her parents and who did not have contact with the child welfare system.

Due to that history, many tribes have sought to take over child welfare from state systems entirely, creating their own Indian child welfare departments. The health and wellbeing of tribal children is a central, core value of tribal communities. We work hard to improve outcomes for children in child welfare. It is, however, enormously difficult to provide court and social services to these children and families when funding is minimal at best or non-existent at worst.

Tribal courts and child welfare departments, however, have managed to do a great deal with very little. If you spend time in tribal courts and tribal communities, you will see rich and innovative ideas in the field of child welfare practice. Tribes have moved forward with little or no funding support, becoming rich in ideas of how to do good child welfare casework while being poor in resources.

The tribal court system benefits Indian families in key ways. While tribal courts are often extremely busy, we have the ability to structure calendars that allow us to review child welfare cases every 60 days, or much sooner if necessary. We have the flexibility to address the needs of these families immediately when emergencies arise. We approach case management as a team, and I often tell families appearing in front of me that we all have the same goal: to reunify their family. We do not always meet that goal. I have found, however, in discussing these issues in public forums like these, that goal stands in contrast to the approach by state child welfare systems. While I don't think state child welfare systems start out seeking to terminate parental rights, the pace at which they move contrasts distinctly from tribal court approaches to child welfare.

The vast majority of cases I see in child welfare include some component of the criminal system as well. Tribal courts address these issues from hundreds of different

viewpoints. The Tribal Law and Order Act provides tribes with some necessary tools to address these cases, but it also complicates tribal court practice. We have law-trained judges who are also Native, like myself, and lay judges who preside over courts using a traditional/customary approach. While the Act provides for US Attorneys with special training and duties specific to the tribal communities in their districts, tribal courts themselves need to be accorded the recognition we deserve as bodies that can not only address the issues our communities face, but also may be uniquely situated to resolve those issues differently than the federal and state courts can. Despite the efforts of many tribal judges and the good intentions of state courts, we find ourselves continually justifying our existence and our skill sets.

I can provide you two examples from the past year. Last year, I presided over a complex case involving a suit between a non-Native landowner on the reservation and a Native landowner. Both pieces of property were owned in fee, but the Native landowner anticipated working with the tribe to place the land into trust. He filed suit in tribal court and she filed suit in state court. The case in my court went to trial first. After a hearing, I issued written findings of fact and conclusions of law, as well as a decision and order addressing some legal questions in the case. Rather than giving my ruling recognition and finding that the plaintiff in state court as estopped from making arguments in the state court she failed to raise in the tribal court, the state court held another full trial. Ultimately, the state court came to the same conclusion I did, after two expensive trials. In another similar instance, I presided over a complex civil case that went to a jury. The plaintiff won, then sought attorney's fees. After I had issued written findings of fact and conclusions of law on that issue, the defendant appealed to the tribal court of appeals.

The three judge panel on the court of appeals affirmed. The defendant refused to honor the judgment and pay the awarded damages. The plaintiff's attorney who was awarded attorneys fees attempted to bring an action in state court to enforce the judgment against the defendant's attorney. The state court seemed to have very little understanding of the tribal court, despite having met me and been at least minimally familiar with the court. The case continues to be litigated in state and tribal court, despite their being a simple fix: granting full faith and credit to my order.

These cases are an example of the suspicion and misunderstanding that exists between state and federal courts and tribal courts. So as we move forward in increasing jurisdiction, sentencing options, and developing therapeutic courts, it's important that our local communities understand, at minimum, and collaborate, in the best case scenario.

Our challenges in tribal courts are many, but we have some unique advantages as well. As a tribal court judge, I have the opportunity to get to know the families very well. In most cases, I know not just the parents and the children in the case, but their extended family and their history. If a family has multiple generations of involvement in the child welfare system, I know that and can address those issues in a systematic way, recognizing that these families are complex systems and that the parents come to the court not solely borne out of their own difficulties and bad choices, but also out of the pattern of abuse and neglect that has been part of their family for generations.

The communities in tribes further allow us to expand the circle of support for children in care. We can rely on these cultural families to provide a continuing source of support and tribal engagement for tribal youth. We can engage elders in the community to work with youth and provide guidance in structured and unstructured ways. There is

an extraordinary opportunity for tribes to be at the forefront of alternative ways of resolving disputes.

Although developing therapeutic courts can be expensive, there are significant benefits of these kinds of courts. I have presided over and developed Healing to Wellness Drug Courts, Family Treatments Courts, Criminal ReEntry Courts and Child Welfare courts and would like to develop Domestic Violence/Batterer's Intervention courts. While there are many models available, each model should be tailored to the unique needs of each tribe and responsive to the cultural needs of the participants. For example, in most state run drug courts, participants are addressed individually by the judge. In many tribal Wellness Courts, participants are addressed as a group. The purpose of this is to build community and accountability among participants to each other. As drug court participants move through different stages and new participants come in, they can be supports to one another, as well as truth tellers.

Running a court in this manner is not cheap. On a regular criminal calendar when I am presiding over a court that runs similarly to a state court, I can do 75 hearings in a morning—much of that is paperwork. But if I am working in a therapeutic court environment, spending time with each defendant and working to identify and address her needs directly, I can spend one hour on just her alone. There is no doubt in my mind and in my experience that the therapeutic approach benefits the individual, and therefore the community, far more. But when tribal courts have minimal funding, it can be difficult to fund therapeutic courts that require more judicial and staff time. Such courts require funding, judicial training, case management, probation support, and community engagement.

Supporting the therapeutic court model for child welfare cases should be a goal of any movement forward in funding tribal courts. Family Treatment Courts can provide wraparound services, engage all family in identifying and solving problems, and reintroduce the family to the community they may have become alienated from. These kinds of courts are far more culturally appropriate to tribal communities but when tribal courts have no stable source of funding, it is difficult to ensure that such courts can be supported long term, which is necessary since many programs like this take 12 to 24 months to complete successfully.

Most funding for tribes comes tied to requirements that often fly in the fact of tribal cultural values. The passage of the Fostering Connections Act allowed tribes to apply to receive Title IV-E funding directly from the federal government to fund child welfare programs. This was a good step forward in funding child welfare cases so that tribes could take over the management of their own child welfare cases at funding parity or close to parity with the state. However, Fostering Connections requires that if a tribe receives IV-E funding, it must follow the federally mandated permanency planning timelines that apply to state court child welfare cases. In addition, if a child is placed in an extended family placement that is not licensed foster care, that case and the child are not eligible for IV-E funding ever, even if the child is later moved to licensed foster care or the placement becomes licensed.

Those of us who work in the field of child welfare immediately recognize the importance of resolving child welfare cases efficiently. All children deserve stability and most agree that a child in foster care lacks stability. No one wants to see a child stay in foster care one minute longer than is absolutely necessary to ensure her safety. The

concept of permanency planning makes sense. The application of permanency planning timelines without regard to the unique cultures that exist among the 527 federally recognized tribes does not.

Today, just over 30 years after the passage of the Indian Child Welfare Act, Indian children are far overrepresented in the child welfare system. Indian children are more likely to be confirmed as suffering from abuse or neglect than non-Indian children. In Washington state, for example, the most recent data analyzed by the Washington State Institute for Public Policy showed that Indian children were three times more likely to be reported as suffering abuse or neglect than any other group and six times more likely to remain in long term foster care (foster care lasting more than two years).

These data show that Indian children are disproportionately represented in child welfare systems. Providing direct funding for tribes to manage their own child welfare cases seems like a reasonable way to begin to allow tribes to address these issues as the sovereign nations that they are. Requiring that tribes do so in the same manner as states, however, ignores the unique status of tribes as sovereign nations and the unique culture and history of tribal communities. It is critical that a frank and honest discussion about those important cultural differences begin and that we work together to address those issues in a way that recognizes that history, takes into account the needs of children in care, and appropriately balances the complexity of these cases with the need for permanency that each child has.

States have consistent funding to develop their courts and innovations in their court systems through federal Court Improvement Project (CIP) monies. Most of our state court counterparts were shocked to learn that tribes have no access to CIP funds.

We cannot apply for them from state CIP funds and there are no federal CIP funds specifically allocated to tribal courts. Thus, in addition to having no stable funding base, tribal courts have no access to CIP funds that could be used to improve and develop our courts. The National Council of Juvenile and Family Court Judges have supported this need, showing a growing collaboration between that organization and the tribes and tribal courts.

Tribal courts are an active, viable part of the legal systems in this country. We must be viewed as partners in justice and be given parity with our state counterparts. One of the main reasons that this recognition is critical is the protection of Indian children and families. Many of the children and families we see in tribal court also have cases in state court. However the communication between the state and tribal courts often leaves much to be desired. In states where the tribe and the state have concurrent jurisdiction over Indian children and youth, if communication between the local state court and the tribe is poor, cases can be ongoing in both jurisdictions with little or no coordination. Indeed, in some states, prosecutions of delinquent acts by Indian youth can be ongoing in tribal and state court for the same act. If a tribe is attempting to utilize a model of restorative justice, or a traditional model of resolving a youth's violation of the law and the state court prosecutors do not see the value of those proceedings, they will prosecute the youth for the same act in their court, often with extremely varied results for the youth. In my court, most of the youth in delinquency court are cross system youth—they are either currently the subject of child welfare proceedings or have been in care at some point in their lives. Subjecting them to dual prosecutions with varying kinds of

consequences simply because the courts do not communicate cannot be seen as a best practice in any light.

I am grateful for the opportunity to participate in the conversation today with us as we work together to improve outcomes for tribal children and families. Doing so honors the best traditions of this country and its oldest citizens. What we do in this time impacts tribal children for generations to come. I come here today on behalf of those children, the children of my children, their children and beyond.

Thank you.