IN THE COURT OF APPEALS

FOR THE

ROSEBUD SIOUX TRIBE

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In the Matter of:
J.R.B., E.A.B., L.W.B.,
E.M.B., E.R.B., and F.M.B.,
Minor Children

CA88-03

And Concerning
Wayne Boyd, Respondent and Appellee

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O R D E R

This case having received complete appellate review, including oral argument, and the Court having issued opinion and being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED, that the appeal is dismissed and the case remanded to the tribal juvenile court for a prompt hearing and disposition on the merits of the claims set forth in the dependency and neglect petition.

Dated this 21st day of December, 1988.

BY THE COURT:

/s/ Mary T. Wynne
CHIEF JUSTICE

ATTEST:

Carmen Hinds
Clerk
(SEAL)

IN THE COURT OF APPEALS
FOR THE
ROSEBUD SIOUX TRIBE

I hereby certify that I have carefully examined the within document and compared the same with the original now on file and of record in this office and that it is a true and correct copy of the same and that the above is a correct copy of the filing thereon.

Dated this 27 day of December, 19 88.

Carmen Hinds
Clerk of Courts

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And Concerning
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APPEAL FROM THE ROSEBUD

SIOUX TRIBAL JUVENILE COURT OF THE

ROSEBUD SIOUX TRIBE

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HONORABLE SHERMAN J. MARSHALL

Presiding Judge

- - - - - - - - - - - -

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BEFORE

JUSTICES WYNNE, ROUBIDEAUX, AND POMMERSHEIM

OF THE ROSEBUD SIOUX TRIBAL COURT OF APPEALS

OPINION FILED 12-21--88

Case # CA 88-03
Pommersheim, Associate Justice, For the Court.

I. Background

The Appeal in this matter is grounded in the following set of facts. On June 7, 1988, a dependency and neglect petition was filed by the South Dakota Department of Social Services in the South Dakota Circuit Court for Mellette County, which is located in White River, South Dakota. This petition alleged that Wayne Boyd, the appellee and natural father of the minor children who are the subject of this action, had sexually and emotionally abused some of these children. This petition concerned only four of the six named children in this action, namely: E.M.B, seven years of age and born on August 9, 1981; L.W.B., nine years of age and born on December 16, 1978; E.R.B., four years of age and born on April 16, 1984; and F.M.B., age twenty-three months and born on December 24, 1986.

On the same day, June 7, 1988, the appellee, Wayne Boyd, filed a petition in the Rosebud Sioux Tribal Court requesting the tribal court, pursuant to the Indian Child Welfare Act (ICWA),[1] to accept transfer jurisdiction in this matter. On June 10, 1988, the appellants, Webster and Evelyn Two Hawk, who are the maternal grandparents of the children involved in this case, and a maternal aunt, Naomi Krogman, filed an answer and petition in

[1]25 U.S.C. §§ 1901-63 (1983). Mr. Boyd's petition refers incorrectly to the governing statute at the Indian Civil Rights Act, although the petition correctly mentions transfer and the appropriateness of the tribal court for hearing dependency and neglect petitions involving Indian children.

tribal court opposing transfer from state court to tribal court.

After an attempt by the appellants to intervene in the state court proceedings apparently failed, they filed their own petition and application to terminate the parental rights of the father, Wayne Boyd, in Circuit Court for Mellette County. Their petition was dated July 7, 1988, and named all six children who are the subject of the action, including J.B.B., age sixteen and born on August 4, 1972, and E.A.B., age fourteen and born May 14, 1974, in addition to the four (4) minor children named in the Department of Social Services petition. The petition alleged sexual and emotional abuse of the children by the appellee, which subjected them to an environment that was injurious to their health.

On July 13, 1988, the Rosebud Sioux Tribal Juvenile Court held a hearing on the appellee's petition requesting the tribe to seek transfer jurisdiction from state to tribal court and the appellants' petition opposing a transfer of jurisdiction from state to tribal court. On July 21, 1988, Chief Judge Sherman Marshall of the Rosebud Sioux Tribal Court signed an order denying appellants' petition for denial of transfer and further ordered that a motion to transfer jurisdiction, pursuant to § 1911(b) of the ICWA,[2] be filed in the Circuit Court for Mellette

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[2]"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiciton of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian

County. This motion was filed in Circuit Court on July 20, 1988, and on July 26, 1988, Circuit Judge Donald Heck signed an order transferring those proceedings to the Rosebud Sioux Tribe. At the time of transfer, there had been no hearing in state court on the merits of the dependency and neglect petition.

A notice of appeal was filed in tribal court on August 2, 1988. An order granting temporary emergency custody of E.M.B., L.W.B., E.R.B., and F.M.B. to the Child and Family Services Division of the South Dakota Department of Social Services was signed by Chief Judge Marshall on August 9, 1988, and remains in effect. The two other children, J.B.B and E.A.B., are in the custody of their father, Wayne Boyd, the appellee. There has been no hearing in tribal court on the merits of the allegations contained in the original dependency and neglect petition.

This case is governed by the ICWA. It is uncontroverted that all six of the minor children involved are either enrolled tribal members of the Rosebud Sioux Tribe or eligible for enrollment in Rosebud Sioux Tribe and therefore meet the definition of "Indian child" which is set out in the ICWA at 25 U.S.C. § 1903(4);[3] and that the dependency and neglect petition

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child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe." 25 **U.S.C.** § 1911(b) (1983).

[3]'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 **U.S.C.** § 1903(4) (1983).

which sought to remove the children from the home and terminate the rights of the natural father, Wayne Boyd, the appellee, is a "child custody proceeding" pursuant to the ICWA as set out at 25 U.S.C. § 1903(1).[4] These two requirements are the necessary predicate for application of the ICWA. All other interested parties, including Wayne Boyd, the appellee, and Webster and Evelyn Two Hawk, the appellants, are enrolled members of the Rosebud Sioux Tribe. The deceased mother of the children in this case and the spouse of Wayne Boyd, Ms. Brook Boyd, was also an enrolled member of the Rosebud Sioux Tribe.

II. Issues

This appeal raises two significant issues. They are whether this matter is a proper one for interlocutory appeal and whether appellants have standing to bring the appeal. Each issue will be treated in turn.

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[4] '[C]hild custody proceeding' shall mean and include--
(i) 'foster care placement' which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
(ii) 'termination of parental rights' which shall mean any action resulting in the termination of the parent-child relationship;
(iii) 'preadoptive placement' which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
(iv) 'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. 25 **U.S.C.** § 1903(1) (1983).

A. Interlocutory Appeal

There has been no hearing, much less a final order or judgment entered on the merits of the underlying dependency and neglect petition. The appellants filed their appeal pursuant to the tribal court order denying their petition to prevent transfer of the case from the Circuit Court for Mellette County to the Rosebud Sioux Tribal Court. Therefore the appeal is clearly interlocutory in nature and raises the question of whether it is proper under the Rosebud Sioux Tribal Code.

The tribal code and the rules of this court at the time of this appeal[5] neither explicitly authorized nor prohibited interlocutory appeals. In the absence of direct tribal law on point, the most fruitful analogy is that afforded by federal practice.[6] Rule 5 of the Federal Rules of Appellate Procedure (FRAP) permits interlocutory appeals upon petition of the appellant in accordance with the requirements established by

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[5]The rules of this Court were amended on September 19, 1988, and now specifically provide:

> No interlocutory appeals shall be allowed in either criminal or civil matters unless expressly authorized by the Presiding Justice. The decision of whether or not to accept interlocutory appeals shall be based upon the findings of fact, conclusions of law and ruling entered by the Tribal Judge upon the Appellant's motion to file an interlocutory appeal. Rule 2, Rules of Procedure, Rosebud Sioux Tribal Court of Appeals.

[6]See also the recent opinion of this court in Rosebud Housing Authority v. Greaves, _____ I.L.R. _____ (1988) which deals, in part, with the question of interlocutory appeals and also adopts the analogy to federal practice as its governing rationale.

statute at 28 U.S.C. § 1292(b).

The federal statute referred to in FRAP 5, 28 U.S.C. § 1292(b), provides that interlocutory appeals may be taken when a district (i.e., trial) judge shall be of the opinion that the appeal involves a controlling question of law as to which there is a difference of opinion and when an immediate appeal may materially advance the ultimate termination of the litigation and he or she shall so state in writing. The Court of Appeals which would have jurisdiction of such an appeal may thereupon, in its discretion, permit such an appeal. These requirements are eminently sound in seeking to conserve judicial resources and to respect the judicial doctrine of finality, while at the same time recognizing the potential of unique circumstances that would permit an interlocutory appeal.

In this case, no such written application was made to the trial judge. Obviously, this could not be expected. Nevertheless, the record in this case, including appeal briefs as developed and submitted by counsel, are entirely devoid of facts and argument to meet the fair and reasonable requirements of 28 U.S.C. § 1292(b). The order appealed from is not a final order or judgment resolving the lawsuit. Nor is there any demonstration that the appeal involves a controlling question of law as to which there is a difference of opinion. Counsel cite no authority and this court is unaware of any authority that supports, or would support, a claim that a tribal court denial of a petition opposing transfer of an ICWA case to tribal court

involves such controlling issues, in which there is a recognized difference of opinion within the legal community.

There is likewise no evidence in the record or the briefs of counsel to suggest that such an appeal would materially advance the ultimate termination of the litigation. In fact, the likelihood of excessive prolongation of the litigation seems more evident. For example, although the posture and record of the case to date centers on the issue of transfer pursuant to § 1911(b) of the ICWA, it is clear to this court that there is reason to believe that this case might well turn on the issue of exclusive jurisdiction under § 1911(a).[7] The current state of the record, unfortunately, makes it impossible to discern whether the children who are the subjects of this action are domiciliaries or residents of the reservation[8] or otherwise reside in Indian country[9] within the original, now diminished,

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[7]An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 **U.S.C.** § 1911(a) (1983) (emphasis added).

[8]'[R]eservation' means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation. 25 **U.S.C.** § 1903(10) (1983).

[9]The term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running

boundaries[10] of the Rosebud Sioux Reservation. For the reasons discussed above, the decision of the trial court to deny a petition opposing transfer of an ICWA action from state to tribal court is wholly inappropriate for review as an interlocutory appeal.

B. Standing

Despite the inappropriateness of this appeal for interlocutory review, the Court believes it necessary to review the issue of standing of the appellants, as maternal grandparents, to bring this appeal in tribal court, which opposes the transfer from state to tribal court.

The ICWA reflects a national commitment:

> [t]o protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, . . .[11]

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through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 **U.S.C.** § 1151 (1983).

[10]Mellette County was originally part of the Rosebud Sioux Reservation as established by the Great Sioux Agreement of 1889, 25 Stat. 896. However, the United States Supreme Court ruled, inter alia, in the case of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1979) that the Mellette County Act of 1910, which opened part of the county to non-Indian homesteaders, also embodied the intent of Congress to "disestablish" Mellette County from the Rosebud Sioux Reservation.

[11]25 **U.S.C.** § 1902 (1983).

This commitment permeates the Act, including, for example, the requirement set out at 25 U.S.C. § 1911(b) that state courts transfer any child custody proceeding, "in the absence of good cause to the contrary,"[12] to the tribe, "absent objection by either parent," upon petition of either parent, or the Indian custodian, or the Indian child's tribe. This language evinces a strong commitment to tribal courts as the preferred forums in such matters. In this case, the father, the appellee, filed a petition in tribal court to transfer the dependency and neglect action in state court to tribal court. The maternal grandparents filed a petition opposing transfer from state court to tribal court in tribal court. The language of the ICWA does not permit maternal grandparents to do this.

The plain meaning of § 1911(b) is clear. Three parties have the right to initiate transfer proceedings from state court to tribal court: the parents, the Indian custodian and the Indian child's tribe. Each of these terms is specifically defined in the Act.[13] Although the record is sparse, for purposes of this

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[12]See the Bureau of Indian Affairs guidelines provided at 44 Fed. Reg. 67584-67595 (Nov. 26, 1979). See also the discussion at pp. 12-13 infra.

[13]'Parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established. 25 U.S.C. § 1903(9) (1983).

'Indian custodian' means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child. 25 U.S.C. § 1903(6) (1983).

'Indian tribe' means any Indian tribe, band, nation, or

appeal, the Court assumes that the appellants in this action meet the requirement as an "Indian custodian" to whom "temporary physical care, custody, and control has been transferred by the parent of an Indian child."

Only two of these parties may oppose or prohibit transfer. A petition for transfer shall be granted "absent objection of either parent"[14] and any "transfer shall be subject to declination by the tribal court of such tribe."[15] There is no provision permitting the Indian custodian to object to a petition for transfer once it is filed. In such a comprehensive statutory scheme, such an omission permits no other reading than a clear reflection of Congressional intent not to permit an "Indian custodian" to oppose transfer.

This reading of the statute makes paramount sense. If the parents of the child and the child's tribe want the action transferred to tribal court, that transfer ought not to be frustrated by an Indian custodian whose legal and cultural interests do not rise to that of the parent or tribe. No other interpretation of the ICWA is as reasonable or plausible. Therefore, the appellants have no standing to oppose the petition

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other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43. 25 **U.S.C.** § 1903(8) (1983).

[14] 25 **U.S.C.** § 1911(b) (1983).

[15] Id.

to transfer and consequently have no standing to bring this appeal.[16]

This does not, however, mean that the appellants have no standing to participate in tribal court hearings on the merits of the dependency and neglect petition that undergirds this appeal. In fact, the exact opposite is true. As members of the extended family of these children and as "Indian custodians" under the ICWA, the appellants must be afforded a full and complete opportunity to participate in any hearing relative to the placement of the children and the adjudicatory disposition of the dependency and neglect petition. Recognition of such a right is in full accord with the thrust of the ICWA to maximize participation of members of the Indian family, as well as the traditional custom of Lakota people to respect the rights of members of the extended family.

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[16]It is noteworthy to observe that the procedural posture of this case is somewhat irregular and should not arise under normal circumstances involving the ICWA. The appellee, as the parent of these children, should have filed his request for transfer from state to tribal court directly in state, not tribal, court. Under the ICWA, he has standing to do so and in fact, this is the procedure set out at 25 **U.S.C.** §1911(b). He should not have filed a petition in tribal court requesting the tribe to seek transfer of the case. The ICWA does not authorize or require such a procedure. The appellee was apparently proceeding pro se at that time and his mistake is therefore understandable. The tribal court's hearing on this matter was not required by the ICWA and represents an exercise of tribal court discretion, rather than anything due as a matter of right or law under the ICWA. Nevertheless, this proceeding is properly governed by the substantive principles of the ICWA.

III. Conclusion

It is important to recognize that despite the fact that this appeal is being disposed of on procedural grounds; namely that this proceeding constitutes an improper interlocutory appeal and that the appellants lack standing, this Court would, nevertheless, also find against the appellants on the merits of their claim opposing transfer from state to tribal court. This case represents a prototypical example of an ICWA case that should be transferred from state to tribal court. All the Indian children live in "Indian country" on or near the Rosebud Sioux Reservation. The Indian children have lived in the area all their lives. The appellants and appellee, all who are members of the Rosebud Sioux Tribe, also live in this area.

The guidelines established by the Bureau of Indian Affairs and which are published at 44 Fed. Reg. 67584-67595 (Nov. 26, 1979)[17] provide the court with ample guidance to construe the

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[17]These guidelines begin with the following policy declaration:

> Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is

phrase in the ICWA which requires transfer from state to tribal court "absent good cause to the contrary." These conditions which help to establish "good cause to the contrary" include:

> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
> (ii) The Indian child is over twelve years of age and objects to the transfer.
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
> (c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.
> (d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

None of the conditions which support a decision not to transfer to tribal court are present in the instant case.

Transfer in this case also accords with the Rosebud Sioux Tribal Code provisions which provide specific guidance to this court concerning the appropriateness of transfer. These conditions include the following reasons for accepting transfer:

(1) Child has strong ties with Reservation and/or extended

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most consistent with these preferences. Id. at 67585-67586 (emphasis added).

The BIA followed the rulemaking procedures of the Administrative Procedure Act in adopting the Guidelines but did not publish them as regulations "because they are not intended to have binding legislative effect." Id. at 67584.

family;
(2) Eligible for enrollment or is enrolled in the Rosebud Sioux Tribe;
(3) Child has recently moved from the reservation;
(4) Child has been abandoned;
(5) Parents requested that child be returned and raised on the Reservation;
(6) Child desires to return to the Reservation;
(7) Child's on-reservation family is stable and strong;
(8) The reservation has resources available to meet the needs of the child,[18]

and the following reasons for opposing transfer:

(1) child is of mixed marriage where primary family ties and/or identity are with the non-member;
(2) Child is old enough to reason and does not want to return to the Reservation;
(3) Child has no ties with the Reservation;
(4) Child has multiple problems, for which there are no possible on-reservation programs or resources;
(5) When either parent contests the transfer;
(6) Child not eligible for enrollment or enrolled.[19]

Though the record in this appeal is not as complete as the Court would like, reasons (1), (2), (5), and (7) for accepting transfer are clearly established by the record and none of the reasons for refusing transfer are established by the record.

The two grounds asserted (though clearly not proved) for opposing transfer to tribal court are allegations of improper "political influence" and a possible conflict of interest[20] within the prosecutor's office. Neither of these grounds are sufficient to block transfer. The claims of undue political

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[18]Rosebud Sioux Tribal Code Chapter 3-1-4(H)(3)(a) (1986).

[19]Rosebud Sioux Tribal Code Chapter 3-1-4(H)(3)(b) (1986).

[20]This conflict of interest included the fact that two non-law trained employees of the tribal court, including the prosecutor's secretary, might have to testify about instances of abuse alleged in the dependency and neglect petition.

influence by unnamed tribal officials are simply not substantiated by the record. Not a single witness gave convincing testimony on this issue, and the tribal trial court's finding on this issue was proper and sound. Even if such convincing testimony was provided, this court stands as a bulwark against such inappropriate influence. Tribal sovereignty and the deference accorded to tribal courts to review the parameters of their own powers as set out by the Supreme Court in National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1986) and Iowa Mutual Ins. v. LaPlante, 480 U.S. 9 (1987), cannot be achieved without a full and impartial consideration of these matters within the tribal court system itself, which also includes tribal appellate review. After such review and disposition on the merits of the dependency and neglect petition, an appeal which asserts that the tribal court exceeded its jurisdiction by accepting transfer from state court may be properly taken within the federal system.

The second ground which involves a possible conflict of interest within the tribal prosecutor's office is credible, but does not require the extreme action of refusing transfer to tribal court. A legitimate conflict of interest may develop within any prosecutor's office and the appropriate remedy in such matters is to obtain a special prosecutor to handle the case. It does not require the drastic measure of requiring the tribe to forego jurisdiction over such an important matter involving the potential removal of Indian children from their home and the

termination of the parental rights of a father, who is a tribal member living on or near the reservation. The tribal prosecutor's written representation to this court that the tribe should forego transfer in this instance seems curiously remiss and at odds with his duty to represent the legal interests of the Rosebud Sioux Tribe with exactitude and integrity.

In conclusion, the appellants have no standing to bring this appeal, nor is the appeal a proper one for interlocutory review. Therefore the appeal is dismissed and the case remanded to the tribal juvenile court for a prompt hearing and disposition on the merits of the claims set forth in the dependency and neglect petition.

IT IS SO ORDERED.

BY THE COURT, Justices Pommershiem, Wynne and Roubideaux concurring.