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Statement by Eric Mehnert and Rhonda Decontie collected by Rachel George on December 5, 2014

Eric Mehnert

Rhonda Decontie

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General Information

Private or Public Statement? - Private

Statement Provider: Eric Mehnert and Rhonda Decontie

Date: December 5, 2014

Location: Indian Island, Maine

Previous Statement? N/A

Statement Gatherer: Rachel George

Support Person: N/A

Additional Individuals Present: N/A

Recording Format: Audio

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Recording

RG: Alright. It is December 5th, 2014, we're here at Indian Island, Maine. My name is Rachel George and I'm here today with—

RD: Rhonda Decontie

EM: Eric Mehnert

RG: Fantastic. And the file number is P 201412-00147. Eric, have you been informed, understood, and signed the consent form?

EM: I have.

RG: Great, and Rhonda, have you been informed, understood, and signed the consent form?

RD: Yes.

RG: Perfect. And I have to let both of you know that if at any point during this recording you indicate that there is a child or elder currently in need of protection, or that there is imminent

risk of serious bodily harm or death to an identifiable person or group, including yourselves, that that information may not be protected as confidential. Do you both understand?

EM: I understand.

RD: Yes.

RG: Excellent. Can you tell me a little bit about work you guys do here at the tribal court?

EM: Um, the tribal court is a function of the Nation sovereignty and sovereign rights and as part of the work that we do, some of the work that we do involves child welfare and child welfare protective proceedings. We do work and receive cases under ICWA from the state. We also have jurisdiction over criminal matters, civil matters. We do a fair amount of parental rights and responsibility work, custodial work, lots of our work is modification, involving children. We claim concurrent jurisdiction with the state over children that are from a Native parent and a non-Native parent as part of the tribal jurisdiction under ICWA. *[00:02:04.03]*

RG: Can you tell me how long each of you have been involved in your positions here?

RD: I've been here a little over three years.

EM: Started as an assistant clerk and is now the head clerk of the tribal court (*referring to Rhonda*).

RD: Yes.

EM: I have been the chief judge of the Nation for six years now.

RG: And how do both of you come into this work?

RD: By luck (*laughter*).

EM: Um, I came into the work—I've been an attorney for about thirty years now and I--my focus of my practice has always been civil rights work and I had an opportunity to interview with the Chief and Council of the Penobscot Nation for this position - did the interview and had been offered an opportunity to come work for the Nation. *[00:03:05.07]* It has been the best job I have ever had and I've had some really good jobs (*laughing*) but that's how I came to it.

RG: Can you both tell me a little bit about the child protective cases that you deal with?

EM: Sure. Um, we receive—some of our cases come from the state where they're referred from the state where a case will be started where a state had taken a Native child into custody under a preliminary protection order. If they discern that the child is Native and that is one of the issues that is out there that often times, the questions aren't asked up front by the social worker or the assistant attorney general, the state is supposed to take certain a action under ICWA and determine whether or not the parents want the child to be transferred to the Nation

and they are supposed to notify the Nation as well so that the Nation could chose to intervene so we get some of those cases. We also have cases here which are initiated here by a Nation's department of social services. And those are cases that are brought directly here. They initiate the same way with a preliminary protection order: Is there a child in jeopardy?

RG: Is there anything you'd like to add?

RD: No.

RG: Um, I'm going to ask a couple very specific questions about working with the Indian Child Welfare Act and challenges that you have found—if you don't have direct experience with that just let me know, we can move on to the next one. Could you, either of you, describe your experiences or challenges you have found in initial identification of a child as a Native American—or in this case as a Penobscot member?

EM: We just had one with the parent who wanted us to do an adoption as far as—finding where they are, whether they meet the census requirements. That's a challenge. It's been a challenge for individuals who are not on the reserve—

RD: That have children that are not on the census but could you ask your question again?

RG: Experiences or challenges you have found in initial identification of a child as Native American or specifically in this case as Penobscot?

RD: I don't—

EM: I think that ones we see here that come directly here are children that are on the census—

RD: Or are eligible.

EM: Exactly right—or are eligible for the census. Off the reserve it's a little bit tougher because we only see them if the parents want the action transferred here or the Nation as an intervener in that state action that moves a case to be brought here. One of the issues that we have identified, and Rhonda and I were looking at the order just a little bit earlier—there was a case involving three Native children that went all the way through the state court system to the point where the state made a placement for the permanency guardian for them—and that never should have happened. That—they did not identify them as Native children until after they had made the permanency guardianship placement.

RG: And this is a recent case?

RD: '09 is the order.

RG: Wow. What kind of actions can be taken if it comes down to that?

EM: If we know of it, we take action. *[00:07:40.04]* Rhonda has an extraordinarily good working relationship with the clerk at the court here in Penobscot county. And she can contact them and speak to them about anything that we see there. If—in this particular case. This was a case actually out of Portland, Maine—we received a copy of the order—and I assume the order was drafted by an assistant attorney general, I don't think it was drafted by the judge—that came in and said that the court had actually taken jurisdiction over these three Native children, had placed them in a permanency guardianship.

And the exact words they used were: “They recognized that the ICWA required that the court transfer a child custody proceeding to the jurisdiction of the tribe. When the Indian child’s tribe petitioned the state court, they acknowledged that good cause did not exist to deny transfer. They attempted to order that we take jurisdiction of the proceeding.” And their exact words were: “The Penobscot Nation shall take jurisdiction of this proceeding and provide planning and placement for the above-named child. The state court has no jurisdictional authority over the Penobscot Nation and no jurisdictional authority over the tribal court.” And that was a problem for us, and then they went on to say that: “Due to the entry of a permanency guardianship order in this matter, the district court retains any jurisdiction necessary in order to appoint or remove a permanency guardian and to establish further rights or contact between the child and the parents.”

In essence, they said, “We're sort of going to make this sort of window dressing. We're going to claim that we transferred the case to you but we actually retained full authority to do anything about this case.” So under their proposed order, if we had accepted the jurisdiction and chosen to appoint a different guardian, say a Native American guardian, the district court could disagree and say, “Oh no, we're not going to allow you to do that.” We refused to accept that order and what we were able to do was reach out the chief justice of the Maine supreme court who was fantastic. When we explained the concerns we had about this order and she quickly put us in contact with the chief judge of the state district court who was also fantastic. Once we explained the concerns, they immediately got on it and the order was modified to reflect the fact that the state court does not have jurisdiction over the tribal court with regards to ICWA children. So those are the things that we've done in the past. Unfortunately, we don't have the power to reach out and pull children into the court. *[00:10:42.21]* We'd like to but that is not a power that we have. That rests with the department of social services.

RG: Is that something that happens very often? To your knowledge?

EM: I think that the challenge has been, in fact I know that the challenge has been—about five years ago, the Nation department of social services started to work with the State Department of Health and Human Services on what was called a IV E agreement. And IV E is Title IVE of the Social Security Administration Act which is an act that provides the funding to care for children taken into foster care, particularly special needs children taken into foster care. And in order to take care of those children, the Nation needs access to those funds. The agreement was negotiated about five years ago. Everyone said that it made sense and in fact, I think you find



under the Land Claims Settlement Act, and the Federal Treaty which adopted or incorporated the Land Claims Settlement Act, the state is required to pass those funds on to the Native children.

In fact the agreement has never been fully executed, though we have heard from the department of health and human services that they are prepared to move forward, they have told us for what it's worth that it's been hung up in the Attorney General's Office. And that they can't get—can't seem to get beyond that. And that's both in the previous administration, the Baldacci administration, and in the current administration, the LePage administration. So that's a challenge in taking cases from the state—is that as I understand our—the Nation's department of social services is reluctant to pull kids from the jurisdiction of the state until they are certain that they can have the funds in place that they can provide the necessary services for those children and that's been the challenge. *[00:13:15.01]*

RG: Have you received any updates about where that agreement is currently or recently have you received any updates about that?

EM: I think about a year ago, we met with a couple of individuals—the Nation's department of social services was the lead. I sat in on the meeting and we met with a couple of individuals from DHHS. They were telling us at that point in time that they had concerns about how they would fit—the way IV E works, in order to get the funding, you have certain questions, audit questions you have to answer and they had concerns—those are automated in their filing system. And they had concerns about how we would input those into their system. My perspective is that I don't see that that was a huge hurdle. Again, I'm not in those departments but I don't see that as a huge hurdle because my—we have 6 cases out there right now. They can be hand put—inputted in—that should be able. We should be able to get that, and get that access for those children. I don't know. I know that the Nation's department of social services is now working on being one of the first Nations to have direct IV E funding—that is that they have started to draft the implementation plan to do their funding so they wouldn't have to go through the state to get the federal funds.

RG: That's fantastic.

EM: It's absolutely fantastic. It's a huge, huge state and I think Rhonda—and one of the things that is actually interesting. I just came back and did a tribal court review in San Carlos, Arizona and we were discussing child protective issues. And Rhonda has said this, and I attribute it to her all the time, she has said that the work that we do with child protective proceedings is the most important work that we can do because the children are the tribe's biggest asset. Without them, there is no tribe. And that's really what it has come down to for us as we look at -- what can we do to help that IV E process? That's why she's been spending so much time working on the forms, ensuring that they meet the IV E obligations.

RG: Can you tell me a little bit about that—about the work that you've been doing on the forms?

RD: It's just revising and putting in the verbiage that needs to be in there. And it's been a great project and I'm pretty much done. We just need to um, reference our code and do a little, you know, reviews and then we'll be good to go but they are all up to date and they are all good. They are very nice (*laughing*). I'm very proud of them.

EM: They are a huge thing because the issue is—that audit process, the funding line—if the language of your orders does not track what the federal government requires, you cannot get the funding. So what Rhonda has been doing is making sure the language that exists in the tribal orders will meet that IV E requirement. That's a huge, huge process. I mean I couldn't tell you from the—if I were to try and draft those orders from the top of my head, it would be a nightmare, I wouldn't even come close. I would not get all in the information in that needs to be in there. [00:17:03.02] And that's why they are so important to have.

RG: What's the next step now that those forms are very close to being completed?

EM: Um, they—the next step here—I know that the head of the department of social services: Sonya Dana Lacoute, is going out with the court administrator and with another member of our team, Donna Brown—to go out and meet with the feds on IV E implementation. We haven't been as closely involved as far as the implementation process goes as to what they are going to have to do as far as next steps. But we're hoping that by having them with the court team there that we make sure we are in compliance with everything that they need done and if there's additional things that we need to do, we're all set to go. One of the things that we've been working on—Rhonda's been working on—I keep saying "we" but that's a royal "we." It's really Rhonda that's doing all the work. Is that for us --the next step is probably the clerks book and the judicial bench book and what that is is a—that is a, essentially a book that the judge and clerk use in conjunction with one another to ensure that—part of child protective work requires that things be done on certain timelines—and to ensure that those timelines are met and to ensure that the judge is using the right legal standards.

There is a need for what we call a judicial bench book. Usually you can set them up as a clerks book and a judicial bench book. We're joining them together so that the clerk and the judge can look at the book and go, Ok, the first thing we did was a preliminary protection order. When we do the PPO, what is it that the judge has to find and what is it that the clerk does once the judge does find that? Does the timeline start to run? Who is notified? How are they notified? Those kind of things are the kind of things that we look to—we don't codify it because we don't make the law, the council makes the law. We're trying to set it into a procedure so that its something that is easily replicable.

RG: Yeah. Could you describe your experiences or challenges that you have found in the state notifying tribal child welfare about children that are Native American or in this case, Penobscot?

EM: Have you had any notifications?

RD: No.

EM: I think that's the—I don't think that there is a requirement that the state notify the court—

RD: I think they notify the chief. I think we have gotten a few calls and we referred them to the chief.

RG: And how about in—or anything you've seen in the state working with the tribes to identify Native American kids? Anything that you know? (*Phone rings*)

RD: How the state identifies Native kids?

RG: How the state works with the tribe to identify that a child is Penobscot or eligible to be on the census?

RD: I mean, I would think—I would know what they would do but they don't really *[00:20:49.13]* like I said, once we get it here, we send it down to the chief.

EM: I've talked to some of the state workers and they have said that the way that they do their identification is to ask.

RD: Ok.

EM: And that's not sufficient. It really is not sufficient to simply ask. You have cases where the parent—one parent may not be there and may be Native and the other parent comes in and you ask, “Is your child Native American?” and in that case they might be 50% Native American which would certainly qualify for the Nation census and the parent goes, “No.” Because they don't want the father or the mother to have any input and the state won't follow up. There is no follow up to my knowledge as to: can we check. And I think that's a really interesting question because it's not hard to give a call and say, is this child on the census?

RD: Or the parents?

EM: Or are the parents on the census, yeah?

RD: Because we have a census book here which shows—so if the parents are at least 50, the child is eligible. One parent.

RG: Yeah, what would you recommend as the practice that is implemented so that cases like that, children don't fall through the cracks?

EM: I think the hard part for that is I don't know what their numbers are on a daily basis, how many filings they have. There's always a challenge. There's a challenge of—one way to do it certainly would be to have the census, the Nation's census published, and they could just look at it and check. [00:22:38.09] But I think probably the better way to do it would be to—I'm going to put work on your shoulders—would be to have the state call and ask.

RD: And that takes a matter of two minutes. I can look that right up.

EM: Or maybe email. "Is this—are either one of these parent's Native?" That would be an email to Rhonda would be a simple thing to do and she could respond to them at the end of the day. These are, I can look at these five and tell you if they are or are not. Um, and that would be the ability to at least then you check it—or with—

RD: Or with all tribes.

EM: Yeah. They'd have to send it to all tribes but I don't think that's a hard thing to do. To simply say, this is mom and dad, um, they don't even have to identify the child, they just identify mom and dad. Is either mom or dad Native? And then if they are then at least they can do a follow-up. And it might take us a little bit longer but it would ensure that there was some protection there. Rather than simply asking somebody who might not have an interest in self-reporting.

RG: To your knowledge, have there been any cases that have come to you where both or one parent is Native but the way their blood quantum works, their child would not necessarily fall under census for one specific tribe. So for example say they were 1/4 Micmac and 1/4 Penobscot—50% Native American but their child wouldn't necessarily fall under one tribe's census. Have either of you dealt with that, and if so—how would you go about handling a case like that?

EM: I don't think we've had that specific case—and the Penobscot's blood quantum is 25%. So if they were 1/4, we'd absolutely take them but I think what we'd find is that we look—the Nation takes the broadest possible perspective on the exercise of its sovereign rights and particularly under the ICWA for Native children. If they are an Indian child as defined by the Act, we will take jurisdiction. And we'll go from there.

RG: Yeah, could you describe your experience, experiences or any challenges you've found in child custody hearings surrounding ICWA?

EM: You know it's been really interesting. We have taken a number of child custody matters where we have one parent that's Native and the other that's non-Native and initially, we've had experiences where the non-Native parent is anxious about coming to the tribal court and what has happened because of the way the Nation has instructed the court about how it wants it to work—the instructions the court have received is to be a problem solving court so we use mediation, we use something we call guardian ad litem plus the state court system I think calls it a parenting coordinator. Um, but we have the ability to really be pretty intensive about the services that we provide here and we've ended up having non-Native parents actually saying that they want to stay here, that they don't want to go anywhere else because they find that this



court is particularly attentive to trying to make sure the children get the services and to ensure that the parents to the extent that their involvement is healthy—that they're involved with their children. Um, so that's been our experience. Our experience has been that we have had a number of times where non-Native parents have said, “No we want to stay here.”

RG: Getting back to the topic of jurisdiction, how often does the state agree to transfer jurisdiction to the court here?

EM: Um, that's a hard number for us to put a finger on because we don't know what they're transferring and not transferring. I had a recent meeting with the state and asked them to start keeping those numbers as to cases that are or have a Native child identified and then how many are being transferred. But I don't know that at this point in time. Um, I think that our last word that we heard—there were six cases involving Penobscot system that were still in the state court system.

RG: And is that—what are the reasons for that primarily? That you would say

EM: I would say the reasons, as I understand them—that they are primarily the issue of funding—that the IV E funds have not been guarded to flow through to the Nation's department of social services and the concerns about ensuring that those children get the services that they need has been a challenge.

RG: To your knowledge, have there been any instances where the state refuses to transfer a case to the tribe?

EM: I think this case would be the only one I can think of. Well it says it's trying to transfer the case but it was really a refusal to transfer and that was corrected once it was pointed out to the judge. My guess as I said is that I believe this order was probably drafted by the assistant attorney general rather than the judge, and the judge signed it. *[00:29:29.28]*

RG: Do either of you have any experience working with an expert witness under ICWA or for ICWA cases?

EM: You're talking about an expert witness that would identify the child as a Native child or—I mean, we deal with expert witnesses all the time who come in and tell us as to whether or not they think the child has been abused, where the parents are, and certain things. But as far as specifically identifying whether the child is Native or not—is that the expert that you are looking for?

RG: Yeah.

EM: I can't think of one. The only time I can think that we had a Native expert on a cultural matter was—

RD: That was for a probate though.

EM: John Mitchell he gave us some cultural perspective on a case.

RG: Can you talk to me a little about what that process was like?

EM: Um, when we have an expert witness come in—much—the Penobscot Nation has adopted the Maine rules of Evidence as the governing rule for evidence so the process for identifying the individual as an expert or qualifying the individual as an expert is much the same--there has to be questions as to the individuals qualification as to how they would know and how they would qualify as an expert. There might be questions about where did they learn their information? What information do they have? Once they have been qualified as an expert, they then testify on custom and tradition and the historical custom and traditional of a Nation. Um, and that's where that will be the basis of the decision that we start with unless it's something in the criminal area which is mandated by the treaty that the Nation signed with the feds.

RG: Just so you know, I was double-checking that I'm not missing any questions. I have like five million different versions of questions so I just wanted to make sure that I got everything. What are challenges—or what are the challenges of having child welfare cases involving Penobscot children remain in state courts?

EM: I think one of the first challenges you'll always face—and I didn't do a lot of child protective work in the state court. I did a little bit around individuals who had mental health issues. But I think one of the first challenges you always face is the cultural relevance or the cultural knowledge of the social worker that's coming into a household. One of the cases that I recall is a social worker came in and said that part of the problem that put the child at risk was that mom was feeding the child cold ravioli out of a can. I grew up growing cold ravioli and I actually said, "If that's the case then my mom was in serious trouble because she was a terrible cook." [00:32:57.26] Um, and she fed us cold ravioli all the time. But the real point with that is for someone who doesn't understand, who comes from a middle class, white, suburban background—to come in and evaluate a home that they have no knowledge as to what it's like is they're are going to put their cultural biases in place and I think Rhonda spoke a little bit about the differences of growing up on the reserve and not on the reserve and I think those kind of issues really come sharply into focus when you have somebody—when you put it in the state court system. Because, I don't think there's an understanding for individuals who have not had that kind of experience to understand what a household will contain and the benefits of that household on the reserve.

RD: And the benefits of keeping the child in the community. You know not being able to grow up there is difficult. And one of the things we talked about last time was the kids that are placed off reserve or in a non-Native home is having some sort of recognition for them and I thought, social services put it well that we have welcoming songs for them at our gatherings and I can't wait to see that happen because you know, I know which ones are out there. I know



which ones that don't have connections, you know, they don't have the benefits of going to school here or the other school programs or what have you that are highly culturally relative to them. And so I think that's one of—my biggest issues or concern when they are in the state.

EM: And tied to that as well is in the state court system, is there is less while they are mandated to do a kinship placement and kinship investigation, I think that's less likely to occur if it's in the state court system than if it's here. I mean, most of the placements we do here are with a family member. Um and that's a—in my mind—a huge benefit to the child. I think probably the other difference here is because we can, in part, this is just a huge benefit of our current docket load—we don't have the—we don't carry the same dockets that the state do and we can be pretty intensive about making sure that we're watching and seeing what is happening with a child, that services are being provided and that the child's needs are being met. And I think the studies that I've read show that it is better for a child to be in their home so long as they are not being physically, sexually, or emotionally abused—and get services provided to them then it is to pull them out. And especially, as Rhonda has said—not only to pull them out into a culture that is entirely foreign to them has got to be incredibly dislocating.

RG: Are there any strengths to having child welfare cases that involve Penobscot children considered in state courts?

EM: Do you see any?

RD: No.

EM: I don't. I don't think that their...I think the state courts do—try to do—an exceptional job and really work hard to do the best they can but their volume is so great that—and they have so many cases that they have to deal with that they can't bring the kind of time. And it really is about time that we can bring to a case. *[00:37:52.10]* They can meet all the timelines. There is no doubt in my mind that they'll meet all the timelines but when it comes down to saying, what's going on with a child? We have cases—I know most of the children by name that are in the system. And I know where they are in the system. I know where their placements are. And I can ask : what's going on with this child? I'm glad they've moved from Kids Peace—now they're with an aunt on an Island. How are things going with that aunt and when are they coming up and have they spoken to their sister recently? Um, you know, that's a benefit that you only get when you get to carry the number of cases that we carry. If you are carrying 100 cases, there's no judge that I know of that can know the names of 100 kids and 100 cases and then handle the criminal matters that they handle in the state court system. So I don't see any benefit to having it in the state court system.

RD: I know one that you gave extra time and attention to it—you typically don't have to do reviews every six months but because of where the placement was, which was residential, I

mean, you upped those. You know—I want to know every I think it was every two and a half, three months, we'd come in and do reviews until he went with a family member. Which, I mean, he gives a lot of time and attention.

RG: That's fantastic. And in what ways do you see ICWA and the Adoption and Safe Families Act working together and in what ways do you see them not working together?

EM: We haven't done hardly any work with the ASFA, and so I don't that we can really. I can't really answer that question.

RG: What strengths does state child welfare possess in ensuring ICWA compliance?

EM: I think that there—I know there is—a focus at least from the state judiciary on ICWA compliance. I know that there is a real concern from the judge's perspective that they are following up on it. I know that the state court system has a form as part of their form order where they are supposed to make that inquiry. So I think that's a strength to them. I can't tell you where I think it goes to in the future. I had met with the former director of their child protective services but she was just let go. I think maybe three weeks ago, two weeks ago. And she had said in the past that she was committed to seeing additional training on ICWA and that she wanted to bring in tribal members to train state social workers on ICWA. I don't know where that goes now. [00:41:07.15]

RG: Um, what weaknesses does state child welfare possess in ensuring ICWA compliance?

EM: I think their weakness is that—in identifying Native children. I think the idea of saying that you are going to rely on self-report without any kind of follow-up is essentially no follow-up and it's no system. If the idea that that you're going to walk into a household and go, “Okay, tell me whether”—and first off, I think that if they look at a child and they go, “They don't look Native to me.” They don't even bother to ask the question and so I don't think that they are really—I think that is one of the challenges. I think that in the state DHHS, that there's a true system in place. One of the things that has been out there is a recommendation that the fed DHHS should modify their audit questions so that they have a series of five or six questions that require the state to prove that they have asked the ICWA questions before they get their federal money. And that would get their attention, I am certain.

RG: Are there any strengths and weaknesses that you've noticed?

RD: I don't know.

RG: No worries. What strengths and or weaknesses does Penobscot Nation possess in ensuring ICWA compliance?

EM: I would say that this staff—the staff here at the court are aggressive if they find that there is a—if they have word that there is a child that is a Native child out there, there are phone calls made to the court system to figure out what is going on with a case and whether there is any—where we are with a case, who's intervened. And if we can, we have stable attorneys who work here, who practice here that we try to get appointed on any case that is in the state



system. We urge them and parents to seek their appointment. And we haven't had a chance—and that's probably something we should work on—to see if we can formalize that process in this state court system. I mean we've been very fortunate. Our public defender here is really exceptional. [00:43:44.13]

We have cases—we run a wellness court here and the wellness court—the premise behind the wellness court is that the criminal behavior, anti social behavior, is really a symptom of a problem. And therefore—and the wellness court—we're looking at it being some kind of substance abuse, that's the underlying problem. And the substance abuse is really self-medication probably for some other challenges that the individual faces. So what we've had a lot of success of in the past is while an individual may be arrested, on the island, brought to the Penobscot wellness court and said, “okay, they are going to sign up in wellness court.” They may have a number of charges in the state court as well. We can't affect those charges in the state court but our public defender here gets appointed to those cases there and then works with the state court system to see that the work that we're doing here meshes with that system and that we get the best possible result and outcome for the individual which has been a huge benefit.

It would be nice if we could more with that as far as child protective matters. Although, I will share with you, my perspective is any Native child that's in the system, in the state court system should be here. That's my perspective—I wouldn't really want to set up something that says yes state, we can facilitate you keeping a child in the state court system. Um, just because I don't think they can deliver the services that we can deliver here.

RD: Yeah.

RG: Is there anything you'd like to add?

RD: No.

RG: Can you talk about the importance of having an attorney or a judge in this case—someone in the, or anyone really in DHHS that is engaging with child welfare cases that involve Penobscot child—the importance of those individuals having a knowledge of Native American family structure and culture?

RD: The benefits of our attorneys or judges—um. I think the group that we work with are very understanding of cultural—they're always—if they do have questions—actually it's a prosecutor that refers to me as something about cultural...*(interruption—recording stops)*.

EM: The issue of how fortunate we are to have attorneys who understand the family structures and some of the Native culture. I think we all continue, all of us who are non-Native continue

to learn but we're fortunate here that we have individuals who are interested in learning constantly.

RD: I mean even when we went to training, they were on the tribal track. They were very proactive and Judge (*inaudible*) has attended some of our traditional song and dance and stuff like that too, so.

RG: When you say attorneys do you mean attorneys specifically within the Penobscot Nation that work here...

RD: Yes

RG: ...or attorneys out and abroad in the state of Maine.

RD: It would be our defender and our prosecutor.

EM: They—we have—we have a public defender and prosecutor who are employed part-time by the Nation. Um, and then we have a number of attorneys who work on a contract basis like the state court system does who are paid attorneys that come in and practice before us. And we have some—we are very, very fortunate that the individuals we get in here are dedicated and committed and do some do really, really good work. Some are pretty aggressive (*laughing*).

RG: That's great. Could you speak to the importance for a Native child who is placed in out-of-home care to be placed within a reasonable proximity to his/her family or community.

EM: That really—

RD: Yeah, I think that's highly important. You know, just keeping them connected, keeping them close. I don't know. I always see a community of somebody kind of going like this (*probably making a hand gesture*) and when you're out it's very unfortunate.

EM: And I'll echo that. I think one of the greatest things that I find about working in the community is how close it is. I mean, it's a classic that one of its greatest strengths is one of its greatest weaknesses and people here will laugh because I have all of these funny sayings that I'll say but it really is very true. Um, sometimes it can be hard for members of the community because everybody knows what everybody else is doing but the other side of that is—it is amazing. I'm thinking of one case in particular where the brother, the woman had a mental health break down, her child came into care. And the brother had a criminal history, a fairly significant criminal history and he stepped in and did some amazing things for her and then in another child protective case, this is a classic (*laughter*).

So we have a child protective case and one of the concerns is that someone identified a child walking down the street—about a 4 year old child. And this is an individual that I've said has, as I said not only a criminal record here but a criminal record with the feds, so it's a pretty significant criminal record. And he went out, made sure that the child was protected, called the child's mother—grandmother (*correcting*), had the grandmother come pickup the child, he did all kinds of things to make sure the child was protected and the challenge was in a child



protective matter, he had to come and testify about what he saw and he came into court and he had to be subpoenaed in and he didn't come the first time he was subpoenaed so he was in on a contempt motion. And (*laughing*) everyone that was there--from the Department of Social services attorney through all the other attorneys were complimentary to him saying, "You know we really appreciate that you stepped up and did this. You really were a good Samaritan." And his response was, "Well I only like kids, I don't like adults." But the real benefit—that's what I see as a real benefit is that individuals *[00:51:09.14]* here protect the children and will do everything they can to protect the children. And that's a great—it really does make it so that when we're working out solutions that we can find ones that are in the best interest of the child.

RG: Do you think the Indian Child Welfare Act is enough to protect the rights of Native children and families?

EM: Child protective proceedings? I think that there are some unique issues in Maine because of how the land claims settlement act works that while I think ICWA goes a long way towards ensuring that the rights are there, I think one of the issues that we've talked about a couple of times now is—you can have the act but if they are not asking or verifying and confirming and if there's not accountability for it, it's not enough. I am certain that there are children that are Native children that have gone through the state system that have not—that should not have. I am certain that the fact is that there are cases where the caseworker came in and said, "It doesn't look like a Native child to me, I'm not going to—why bother that question?" Or if they ask the question, they accept the answer without any kind of independent confirmation. *[00:52:53.26]*

RG: Can you speak to the unique situation in Maine that makes ICWA protecting the rights of Native kids and families not enough? Or a challenge?

EM: The, I think that the—what makes the situation unique in Maine or makes it a challenge is that the way that the Land Claims Settlement Act works is that the Nation signed a treaty with the feds and the fed treaty says, "Okay, we're going to incorporate the provisions of what the Maine legislature has enacted as part of their Land Claims Settlement Act." The challenge with that is that when the feds do something that either expands jurisdiction like in VAWA and (*unclear*). Unless Maine takes some action, the tribe doesn't get the benefit from that federal expansion. I think what that leads to is a belief in the Attorney General's Office that the Nation is not a separate Nation. In fact, I think they will tell you they don't believe that there should be a nation within the state. That they think the Nation is just a municipality. And I think that mindset creates issues like we saw with this December, this order from 2009 which is: we're going to keep jurisdiction the state court even though we say we're going to transfer it under ICWA. Um, I think it's a mindset issue more than I think it's a legal issue. I think that's the challenge.

RG: What would you recommend as a way to kind of combat that mindset challenge?

EM: I'd recommend that the feds sign a new treaty with the Nation and get rid of the Land Claims Settlement Act. I think that in some point in time—and I know that's probably too flippant. But my perspective is that there—there are—there is a belief system that is in place because of the Maine Land Claims Settlement Act that until that is revisited and perhaps reframed to some degree that that mindset is going to continue in the Attorney General's Office. That they are going to continue to believe that the Nation is not a Nation, that it is a municipality and it's still under their authority. And as long as that continues, there are going to be problems. That's to my mind—that's one of the biggest issues that's out there.

And you look at it—and when you look at it in a historical context, one of the things—Collin Woodard down with the Portland Press Herald, wrote a series of articles and one of the articles that he wrote on was the murder of Peter Francis that occurred back in the sixties. And when you look at tribal state relations with respect to the Attorney General's Office in the context of that case as a microcosm of what that relationship has been—you can really see how problematic that is and I think that challenge carries through to today and until, until you can convince the state—until the state is convinced. I grew up in Orono. I went to high school in Orono, graduated in 1978 and I used to think, “Oh I live in a great state, there's no discrimination here.” And I became a civil rights attorney and thought I was going to be going to Mississippi or Alabama or some place like that. And when I got involved with working with the Nation, it was eye opening as to some of the challenges that the Native people have faced here in Maine and continue to face. I do not understand (*laughs*) I don't understand how **[00:58:17.15]** when you look at things like casinos—I don't believe that casinos are a regressive tax, they are a tax on the poor. But if you're going to do it, why would you give it to an out-of-state corporation and deny the Native American peoples to run them on—you wouldn't have to do what Maine has done which was violate Land Claims as it's own morality code. Which is, “Oh we don't want gambling in the state.” Fine, don't do gambling in the state, give it to the Native American people and let them do it on their Nation's plans and you haven't changed the Maine's laws at all.

Instead you give it to um, out of state corporations who ship millions of dollars out of state and I can tell you I have a sister in law who works for the BJA and she talks about a place in Oregon where the tribal members and community were having a terrible time getting along. When the tribal members got a casino, they took their money and invested it in the town and in the school saying, “You know what, we live here, the services that are provided are important not only to us—not only to the community but to us as well.” And now the relationship between the town and community is fantastic. When I think of that—when you look at Tolowa and VAWA—the nation has been and this court—I travel around to a lot of courts and I've practiced—I've been practicing for 30 years. I've been the chief of enforcement for the Massachusetts Commission against Discrimination. I sit on the Maine Advisory Group to the US Commission on Civil Rights. I'm licensed to practice in the US Supreme Court, and I practice in the federal courts in Maine, Massachusetts, Vermont, New York. I've practiced in the state courts in Maine, Rhode Island, Massachusetts, Vermont, New York, Pennsylvania, and the federal court in Pennsylvania as well. This court provides some of the greatest due-process protections.



In fact, I can say categorically, it provides better due-process protection than any other court. And the reason for that is, when an individual is charged with a crime here, they come in and when they're arraigned, they can't plead guilty until they have talked to a public defender. They cannot enter a plea of guilty until after they understand what that plea might do to them. Whether it be a drug plea, whether it might be theft plea, whether it's a domestic violence plea—they have to understand. That doesn't happen in other courts. And it happens here because the Nation has said that, "We want to ensure our people that we protect individuals from crimes but also that the individuals who commit crimes have their rights protected and that they know what they are agreeing to." And yet, when we say that we want to exercise jurisdiction under the Violence Against Women Act, that we say we are going to exercise jurisdiction over a non-Native who commits an offense here, the response is, "Oh, you can't do that." I don't understand that. I just don't understand that. [01:01:49.21]

RG: If you could change anything or make anything happen for a Native child involved with ICWA, what would you do? Either at the tribal, state, or federal level?

EM: When you say—if we could change anything—are you talking of—that if the child is in the system?

RG: In the state system specifically.

RD: Have them transferred to you know, whichever—where they're from—and kept close. I just, it's hard for me when I hear especially kids that grow up in the community and then they're removed or placed. And I do know the shortage of placements as well—but I grew up on a reservation all my life and I moved into town briefly in my twenties and I remember the first few nights just crying. Because I never lived in an apartment, I never had a neighbor beside me or under me that I could hear screaming at their kids or whatever they were doing. Even if they were just singing—I remember a lullaby one time—it made me cry because I just wasn't used to that. So, it's very hard you know, when I see that kids that have to leave.

EM: I would echo that. I think that if there was anything I could do, I would bring them back to the community. Um, there is an incredible strength in this community. We see it in our wellness court in the morning. It is amazing to me. We've taken individuals—we have had individuals—one who is literally homeless, living outdoor. And the interaction that they have with other members of the community now. These are individuals who are trying to recover their sobriety. And we've had one individual tell another member—and they don't know each other than that they are community members, "I got a job. Let me see if you can get a job where I'm working." This morning we had one individual go to one of the young members of the—in the wellness court was saying that the transfer case is gone on my car and I don't even know what that means and the other one's a mechanic and he's going, "I can fix it." And that sense of community you don't find outside the reserve. [01:04:46.09] And to take a child out

and place them outside the reserve, I think is an incredible—does I want to say—a disservice I guess. An incredible disservice to the child.

RG: Is there anything else that either of you would like to add that you think is important that the commission knows?

EM: I can't think of anything.

RD: I think you've done a great job covering it all.

RG: Thank you for your time. I'm very appreciative that you took the time of what I'm sure is very busy.

EM: We appreciate that you're doing the work that you're doing. It's really important work. It's—I think that ensuring—and I'm excited to see what the report is and I'd be really excited to see how people respond to that report. I think there are an awful lot of people who were like me growing up who say, “Oh there's not discrimination in Maine.” And when they see a report that starts talking about what has happened to Native children, when you start talking about what happened with the Carlisle school, “kill the Indian, save the child” philosophy that was at the Carlisle school. And what happened to Native children that were being taken out of their homes—and when you start talking about Natives didn't have the right to vote in the state until the '50s and '60s—needs to be brought to the forefront and so people understand that their perceptions of reality aren't really reality.

RG: Thank you both.

EM: Thank you.

RD: Thank you.

[END OF RECORDING]