

Stephen A. Doherty  
Patrick L. Smith  
SMITH, DOHERTY & BELCOURT, P.C.  
410 Central Avenue, Suite 522  
Great Falls, MT 59401  
Phone: (406) 452-9791  
Fax: (406) 452-9787  
*Attorneys for Montana Indian Education Association*

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

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**COLUMBIA FALLS** Elem. School Dist. No. 6 and  
)  
H.S. Dist. No. 6, **EAST HELENA** Elem. Dist. No. 9,  
)  
**HELENA** Elem. Dist. No. 1 and H.S. Dist. No. 1,  
)  
**BILLINGS** Elem. Dist. No. 2 and H.S. Dist. No. 2,  
)  
**WHITE SULPHUR SPRINGS** Elem. Dist. No. 8  
)  
and H.S. Dist. No. 8, **TROY** Elem. Dist. No. 1 and H.S.  
)  
Dist. No. 1, **MEA-MFT, MONTANA SCHOOL**  
)  
**BOARDS ASSOCIATION, MONTANA RURAL**  
)  
**EDUCATION ASSOCIATION, SCHOOL**  
)  
**ADMINISTRATORS OF MONTANA, ALAN and**  
)  
**NANCY NICHOLSON, PETER & CHERYL**  
)  
**MARCHI, MICHAEL & SUSAN NICOSIA**, for  
)  
themselves and as parents of their minor children,  
)  
Plaintiffs,  
)  
v.  
)  
**THE STATE OF MONTANA**,  
)  
Defendant.  
)  
\_\_\_\_\_

No. **BDV-2002-528**

**MONTANA  
INDIAN EDUCATION  
ASSOCIATION'S  
AMICUS CURIAE BRIEF**

The Montana Indian Education Association—in conjunction with the Blackfeet Tribe of the Blackfeet Nation, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation, the Crow Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Nation, the Northern Cheyenne Tribe, the state-recognized Little Shell Tribe, the Crow Tribe Education Department, the Indian Law Resource Center of Helena, the Montana Indian School Board Caucus, the Montana Association of Bilingual Education, the Indian Impact Schools of Montana, the Blackfeet Community College, the Lame Deer School Parent Indian Education Committee, the Colstrip School Parent Indian Education Committee, the Montana Peoples Action and Indian Peoples Action (hereinafter referred to as the “Tribal Amici”) — respectfully submit this Amicus Curiae brief for the Court’s consideration. MIEA and the other Tribal entities deeply

appreciate the Court's order allowing the filing of this brief. Should the Court wish additional briefing and/or argument at the conclusion of the trial, MIEA and the Tribal Amici stand ready to submit any additional information and/or argument for the Court's consideration.

### Introduction

The importance of this lawsuit to those who are involved and concerned with Indian education in Montana cannot be overstated. There have been thousands of words spoken and written, long distances traveled, and far too many hearings attended, in the thirty year effort to breathe life into the Constitutional provision adopted by the framers in 1972, commonly known as the Indian Education Article. It is the position of Tribal Amici that the plainly elegant language found in Article X, Section 1, Subsection 2, has not been implemented. The Indian Education Article provides:

The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

The provision is unique: no other state constitution in the Nation contains such a commitment in its educational goals to preserve tribal cultural integrity. This language, brimming with promise, has been stripped of practical meaning and application by over three decades of neglect, and in some instances, outright hostility by the State's legislative and executive branches. The State's failure to implement and enforce this Constitutional mandate has resulted in diminished educational sensitivity and understanding by generations of Montana's students. As a result, lowered expectations for the educational achievements of Indian students attending both on reservation and off-reservation schools, has become institutional.

This Court has the opportunity, for the first time, to fulfill the original purpose of the framers, to choose a different course—the Constitutionally mandated course—which seeks to build a bridge of understanding between Indian and non-Indian cultures. Not only will all future Montanans benefit from this bridge of understanding, the goal of preserving tribal cultural integrity will be advanced, rather than stifled. Now is the time to seize the opportunity and give effect to this Constitutional mandate, less the matter is ignored for another thirty years and further injury is inflicted to the framers' commitment to advance Indian education for Montana's future generations.

This amicus brief will first focus on the Constitutional language itself, the discussions

of the delegates' intentions during the 1972 Constitutional Convention, and subsequent judicial decisions. Next, the brief will describe but a portion of the significant and massive work done by Indian educators to work with the State in implementing the constitutional language at issue. Of particular note is the introduction and passage of HB 528, the "Indian Education for All" Act. An outgrowth of extensive legislative investigation, the Act's primary purpose was to fully vitalize the Constitution. The Act focused on two distinct aspects of Indian Education for All: One, it is necessary to educate all of Montana's students, Indian and non-Indian alike, about the distinct and unique cultural, historical and legal aspects of Montana's Indians; and Two, that the State has an obligation, primarily through its teacher education and professional development programs, to recognize and address the unique and distinct needs of Indian students in schools, both on and off Montana's seven reservations. The brief discusses other states' legislative efforts to remedy the discrepancies between Indian and non-Indian students in their states illustrating that, while Montana has a unique constitutional commitment to Indian education, Montana's legislative and funding efforts lag considerably behind other states that have no similar constitutional mandate. Finally, the devastating outcomes of not implementing the constitutional language and its effects on Indian students will be described.

Tribal Amici believe that the Court, upon a thorough review of the language, intentions, decisions, history, and data will be led to the inexorable conclusion that the Constitution has been violated and that absent responsible, limited, and prudent judicial intervention, this sorry state of affairs will continue indefinitely.

### **1. Standard of Review**

The Court is called upon to decide whether the State of Montana has fulfilled its commitment under Article X, Section 1, Subsection 2 of its Constitution. Tribal Amici ask the Court to resuscitate and enforce this language by finding that the State has failed in its duty to implement the Indian Education Article, and that this failure violates the Constitution. The Indian Education Article declares:

The state recognizes the distinct and unique cultural heritage of the American Indians and is *committed* in its educational goals to the preservation of their cultural integrity. Art. X, Sec. 1(2), Mont. Const. (emphasis supplied).

When this Court interprets the constitution, it is governed and guided by the rules of construction applicable to interpreting legislation. Great Falls Tribune Co., Inc. v. Great Falls Pub. Sch. Bd. of Trustees, 255 Mont. 125, 128-29, 841 P.2d 502, 504 (1992).

Accordingly, the Court must construe Article X, Section 1, Subsection 2, of the Montana Constitution according to the plain meaning of the language therein. State ex rel. Woodahl v. Dist. Ct., 162 Mont. 283, 292, 511 P.2d 318, 323 (1973). When a provision is plain, unambiguous, direct and certain, the provision speaks for itself and there is nothing left for the court to construe. Hammill v. Young, 168 Mont. 81, 85-86, 540 P.2d 971, 974 (1975).

The framers of the 1972 Constitution in plain and unambiguous language *committed* themselves to include Indian education in its guarantee of equal educational opportunity. That is the word they chose to state their purpose and intent. The plain meaning of “commit” is “to pledge; to carry into action . . . “ The Merriam Webster Dictionary, 162 (1994). It is against that backdrop that the State’s action (or inaction) must be evaluated.

The lead plaintiffs in this case correctly submit that the State has failed in its duty to adequately fund all Montana schools, thereby negating the schools’ ability to fulfill their obligation to provide a free quality public elementary and secondary education. (Pl’s Cmplt., ¶¶ 1, 4.) The State has an obligation to design and implement a school funding system that guarantees all students equality of educational opportunity. (Id. at ¶ 39.) Part of this guarantee includes Article X, Section 1(2), which commits Montana to provide Indian education for *all* students. (Id. at ¶ 40.) The State of Montana has historically and consistently failed to meet its constitutional obligations under its own Constitution. (Id. at ¶ 42.) Tribal amici agree and bring special attention to the fact that the Indian Education Article has never been appropriated any funding despite the State’s *commitment* to provide Indian Education to all Montana students.

In 1989, the Montana Supreme Court reviewed District Court Judge Loble’s exhaustive analysis of the State’s system of school funding in Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), and affirmed his conclusion that the system violated the constitutional guarantee of equal education. Importantly, the Court specifically determined that Article X, Section 1, Subsection 2, the Indian Education Article, “establishes a *special burden* in Montana for the education of American Indian children which must be addressed as a part of the school funding issues.” Id., 236 Mont. at 58, 769 P.2d at 693 (emphasis supplied).

Consistent with the framers’ intent and the Montana Supreme Court’s unequivocal conclusion that the Indian Education Article establishes a *special burden* for the education of Indian students, the state legislature *must* provide adequate funding for providing a quality

education for Montana's public school students, Indian and non-Indian alike, in order to comply with the State Constitution. The State has altogether failed to provide any funding for the Indian Education Article, and thus has clearly run afoul of the Constitution. The Indian Education Article means what it says, but means nothing at all if not implemented, and implementation needs funding.

There are no other on-point legal citations to the Indian Education Article. There has been no other litigation specifically regarding this Constitutional provision.

## **2. The 1972 Montana Constitutional Convention**

In 1933, the Montana Supreme Court held that Indian students should be included in the opportunity to attend free public school facilities. Grant v. Micheals, 94 Mont. 452 (1933). Montana then assumed the responsibility of educating Indian children, the same as non-Indian children, and opened its public school doors to Indian communities. Id. In 1972, Indian education became a specific Constitutional obligation when Montanans overhauled their nineteenth century constitution. The Constitutional Convention consisted of a wide variety of delegates representing all ends of the political spectrum, ages, and interests. What is significant is that not one of this remarkably diverse group of convention delegates was Indian.<sup>1</sup>

Delegate (later State Senator) Dorothy Eck of Bozeman introduced an amendment to the Majority proposal on Education and Public Land. She emphasized then the duality of concerns now expressed by the Tribal Amici.

During one of our very early hearings in the Bill of Rights Committee, there appeared before us two young Indian students representing student groups of the Fort Peck Reservation. They came asking what we could do . . . to assure them that they would have the opportunity-in their schools . . . to develop a real feeling of pride in themselves for their own heritage and culture, also a hope that other students all over Montana would recognize the importance and the real dignity of American Indians in the life of Montana.

Volume VI, Constitutional Convention Proceedings. Id. at 1949. Note: The complete text of the debate transcripts concerning the Indian education clause is attached as Exhibit 1.

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<sup>1</sup>This contrasts with the record-breaking number of currently elected Indian legislators, six Representatives and one Senator, who served in the 2003 legislative session.

Delegate Champoux, in a speech that was oddly prescient, spoke of the need to answer the request of the Indian people.

Are we to tell the Indian people that their history has no place in our schools? . . . that their ways, their governments were wrong and that they must accept ours, because ours are better? Or will we help them to retain their ethnic identity and make their adaptation as Americans? If there is ever to be a solution to the Indian problem in this country, it will only come about when our educational system provides the knowledge which is needed to understand and respect the cultural difference between us and the state helps to preserve and protect their cultural integrity. Id. at 1952.

Delegate Harbaugh then proposed an amendment to Delegate Eck's amendment which would insert "in its educational goals." Id. at 1953. Delegate (later State Senator) Chet Blaylock spoke to both the amendment to the amendment and the amendment.

Through the years, we have given the Indian a great many things that didn't prove to be too good for the Indians. We gave them treaties which we later broke . . . Now, the Indians have appeared before our committees at this Convention and they have asked for . . . this inclusion in our Constitution . . . And I think this is the least we can do. Id. at 1954.

Delegate Harbaugh explained his intent and how he envisioned the new subsection two would tie in with subsection one, the general education article.

I used the word "goals" because I think that this ties the statement in with the goals which are set forth in subsection 1. And since this is going to be included in the Education Article, it would seem to me to be appropriate to use the word "goals" and to relate back to the goals which are mentioned--the broad goals for education--in subsection 1. Id. at 1955.

The Harbaugh Amendment was adopted on a voice vote and the amended Eck proposal passed on a 83 to 1 roll call vote. Id. at 1957.

The Indian Education Article was bound by the delegates' intention and placement to the general education article. The framers' intent created a legally binding compact with future generations of Montanans, both Indian and non-Indian. Unfortunately, that intent has not been met by Montana's elected representatives who shape public policy. The State of Montana has ignored this fundamental agreement with its People and also ignored its Constitutional obligations, to the detriment of all Montanans.

### **3. Past Attempts to Breathe Life into the Constitution**

In the last three decades, those working in Indian education have made concerted efforts to carry out the framers' intent to create an equal educational system for both Indian and

non-Indian students. These efforts were made to assist the State in fulfilling its commitment, in its educational goals, to preserve tribal cultural integrity so that Indian students can succeed and thrive in public schools and so that Montana students do not grow up ignorant on tribal matters, further contributing to racial tensions, misunderstanding and stereotyping. Indian educators have attended and advocated at multitudinous meetings, held conferences, published state plans, and testified many times at the State Legislature in support of Indian education bills.

**a. Early legislative efforts**

Early legislative efforts to implement the Indian Education Article were few, sporadic and largely ineffective. One year after the Constitution was adopted, a bill was enacted that *mandated* all teachers, both pre-service and those tenured, to take classes in American Indian studies. See To Promote a Better Understanding: 1995-96 Activities of the Committee on Indian Affairs (hereinafter "Better Understanding", Legislative Services Division, at 1, Attached as Exhibit 2; Mont. Code Ann. 20-4-213 (1973); 37 A.G. Op. 75 (1977). This law met with opposition, however, and in 1979 it was amended making such instruction discretionary with the local school district. Better Understanding, at 1, 2; Mont. Code Ann. 20-4-213 (2003); 39 A.G. Op. 11 (1981).

**b. Senate Joint Resolution No. 11**

The Montana Legislature did not substantively address its constitutional commitment to Indian education again until 23 years later, in 1995, when it adopted Senate Joint Resolution No. 11. The resolution tasked the Committee on Indian Affairs with studying these issues:

1. the degree to which Montana public schools are in compliance with the Indian Education Article;
2. the role of Indian studies in the university system curriculum and teacher education curriculum; and,
3. the general public's knowledge about historical and contemporary Indian issues. Better Understanding, Id. at 2.

Resolution No. 11 was needed to assess the education community's efforts to bring the Indian Education Article to reality, therefore the Committee on Indian Affairs surveyed the Constitutional Convention delegates about their intent behind the constitutional language. While not legally dispositive, the delegates responded that their intent was to educate Indians and non-Indians alike, both students and the general public. Id. at 9. Since their intent was to

educate, implementation would have to be through the legislature, the Office of Public Instruction (“OPI”), the Board of Public Education and the Governor’s Office. Id. at 9, 10. The bipartisan Legislative Committee on Indian Affairs concluded:

. . . the Constitutional Convention delegates intended Article X, section 1, subsection (2), to be more than mere recognition of American Indians in the new Constitution. Rather, the delegates intended that the preservation of American Indian cultural integrity would be effected through educational programs available to both Indians and non-Indians. Responsibility for the implementation of this provision was left unclear. However, the delegates did envision a role for the Legislature either by mandating programs or by encouraging educational agencies to develop appropriate programs. Id. at 10.

The Committee on Indian Affairs then surveyed Montana public schools to determine what districts were doing to implement the Indian Education Article. The results of the legislative change, which made discretionary the 1973 mandate to teach Indian studies to teachers, were telling. Only 7% of the district responding were so doing. The report concluded: “It is obvious that local trustees have opted not to implement the Indian studies law in their district.” Id. at 14.

In category after category of the 1995 survey, the districts revealed how little had been done to meet the constitutional mandate. The discretionary nature of the legislative action insured that when discretion was used, the result was overwhelmingly clear: little or no effort was made to implement the law or its underlying constitutional mandate.

Given the clearly ineffectual efforts to act, the districts, however, when asked if they would offer Indian studies or courses *if resources were available* responded overwhelmingly yes, with 67% of the district’s revealing that resources were key. Id. at 17, 18. Ninety-five percent of the schools responding would use curriculum materials relating to American Indian studies, if such materials were available. Id. at 23. However, despite this answer that there are no resources available to implement Indian education in schools, when asked if they were using existing resources, such as the Indian law related education curriculum, developed by OPI and provided to every Montana school, three-fourths of the schools indicated that they were not using it even though over one-half of the schools knew of the existence of the materials. Id.

The Indian community has long decried the lack of Indian teachers and the lack of non-Indian teachers who understand the cultural background of Indian students. Although Indian

students make up about 10% of the K-12 population in Montana, Indian teachers account for less than 2% of the total number of teachers. Yet, very few school districts actively recruit Indian personnel, and most school districts are not requiring any specific training in Indian studies for their teachers and administrators and are not using PIR days to provide such instruction.

A number of districts and schools indicated that the survey did not apply to them because they had few, if any, Indian students enrolled. However, it was the position of the Committee on Indian Affairs from the beginning of the study that the Indian Education Article applies to all schools, not just those with a significant Indian population. "It may be just a matter of educating school districts about their constitutional responsibility and hoping that they will take this responsibility seriously by introducing Indian studies into their curricula." Id. at 24, 25.

The Committee on Indian Affairs formally adopted several conclusions including:

1. The intent of Article X, section 1, subsection (2), of the Montana Constitution is for all public schools to develop appropriate policies and programs to recognize and preserve the value of the American Indian culture and traditions.
2. Many public schools do not provide any instruction or sponsor any activities relating to Indian history and culture.
3. Very few school districts require any specific training in Indian studies for their certified personnel, nor do they provide such instruction through inservice training.
4. There are not enough Indian teachers and administrators in public schools, and many non-Indian teachers lack a basic knowledge of Indian history, culture, and contemporary issues. Id. at 53-54 (emphasis in original).

Given the research, hearings and findings, it is dispiriting that the Committee on Indian Affairs eventually recommended only one piece of token legislation to the next legislative session: Mont. Code Ann. Sec. 20-1-306 recognizes "American Indian Heritage Day" on the fourth Friday of September. The work to implement Montana's constitutional promise, however, would not remain dormant forever. A bill brought forward during the 1999 legislative session reactivated and renewed efforts to revitalize the Constitution.

### **c. House Bill 528: "Indian Education for All"**

In 1999, advocates of Indian education once again took up the cause to give the Indian Education Article meaning and make it a reality. Representative Juneau was the chief House

sponsor and then Senator Doherty was the chief Senate sponsor of the bill which directed the education community to comply with the constitutional commitment to Indian education. After a rather tortured legislative history, it was passed by the Legislature and signed into law by Governor Racicot. It is now codified at Mont. Code Ann. §§ 20-1-501 to 20-1-503, and has become known as “Indian Education for All.” This statute, the latest in a long line of efforts to bring the Indian Education Article to life, mandates that:

1. Every Montanan, Indian and non-Indian alike, is encouraged to learn about the unique cultural heritage of American Indians in a culturally responsible manner;
2. Every educational agency and all personnel must work cooperatively with Montana tribes when providing instruction, implementing goals or adopting rules; and,
3. Educational personnel must provide the means by which school personnel can gain an understanding and appreciation of American Indian people.

In October 1999, MIEA and the Montana Advisory Council for Indian Education (MACIE) sponsored a statewide Indian Education forum and found that “while there have been many efforts and positive actions taken toward improving the achievement and success of Indian students in Montana’s schools, many of the key issues remain unchanged because those efforts were not institutionalized.” Montana Schools, Newsletter of the Montana Office of Public Instruction, (Special Edition on Indian Education), attached as Exhibit 3, Vol: 44, No. 1, November 2000, at 15-17 (hereinafter “Montana Schools”).

Governor Racicot eventually created a task force, consisting of members from the Board of Public Education and the Board of Regents, to create specific strategies for meeting the State’s commitment to Indian education. The committee named itself “Indian Education for All” after the law it was attempting to implement.

The Indian Education for All committee held a hearing on January 24, 2000 where Indian educators once again testified. The committee, given past efforts to implement the Indian Education Article—such as the 1973 Indian studies law and the 1995 Joint Resolution, and the American Indian Heritage Day statute—was determined to identify the reasons for the lack of success of previous efforts. Montana Schools, at 15. The committee found two primary reasons for those sad results:

1. Lack of funding for the programs’ implementation; and
2. Absence of an adequate oversight mechanism. Id.

The committee grouped its recommendations into five categories necessary to implement Indian Education for All, and concluded, “We are optimistic about the ability of these recommendations to effect real change in Montana schools and communities.” *Id.* All eyes focused on the Indian Education Article. The Board of Public Education, now mobilized, adopted the committee’s recommendations, and created its own action plan. OPI was energized and created a fifty point action plan. The Office of the Commissioner of Higher Education and the Board of Regents also created action plans. Professional educators and educational advocates were in agreement. Curriculum guides were to be developed, professional development plans were to be drafted, teacher standards were envisioned. Accreditation standards would play a part. Guidance and direction would be forthcoming from OPI.

In short, all the myriad elements of the education community’s tool chest for delivery of education services seemed to be fully engaged. It finally seemed as though an unmovable object had suddenly become mobile. The Indian education movement, finally, had taken off. Although OPI worked hard and did incorporate some Indian specific content and performance standards—that all Montana students should know and understand—and also integrated some Indian education requirements into its accreditation standards—that all schools must meet—the problem once again came down to finances. Although there are policies, action plans, and curriculum guidance through the standards, there is *no money* to enforce these provisions or any financing to assist schools in meeting these requirements. Tragically, the momentum and promise of Indian Education for All has, once again, ground to a halt.

There were several attempts to fund Indian Education for All in the 2001 and 2003 legislative sessions to specifically assist the OPI with its efforts. In 2001, both the Office of Public Instruction and Governor Mart supported a \$120,000 funding request to assist the OPI with developing resources for teachers and providing professional development to schools, but the motion to approve failed in the appropriations education subcommittee. Representative Juneau, three times on the floor of the House of Representatives, requested the general fund appropriations bill be amended to include the \$120,000, but that negligible amount was voted down all three times. In 2003, the Office of Public Instruction again requested that \$120,000 be appropriated for its work in implementing Indian Education for All. Representative Bixby offered HB 495 that would appropriate \$120,000 over the biennium toward these efforts. The bill was tabled in the House Appropriations Committee. Representative Bixby then, on the

floor of the House of Representatives, attempted to amend the general fund appropriations bill to include the funding. It again failed to pass. Subsequent to these failed legislative efforts, elementary students from St. Labre, St. Charles, St. Xavier school, and Browning Schools recognized the State's insincerity, did some of their own fund raising, including collecting pennies, traveled to Helena, and presented \$7,304 to Governor Martz to fund Indian Education for All efforts.

The public record is clear: the Montana Legislature and governors have simply not provided the funds necessary to implement the law designed to bring the constitutional language to life. Curriculum guides do not drop out of the sky. Development plans do not write themselves. Accreditation standards are not met simply because they are on paper. OPI has, to its credit, struggled to do what it can, but the bottom line result is yet another broken promise to Indian people and to all Montanans.

#### **4. Wisconsin, Minnesota, and New Mexico**

Montana's Constitution has a very unique and progressive clause committing the state to provide Indian education to its citizens. Although other states lack a similar constitutional obligation, several have legislatively implemented strategies for Indian education to help remedy the educational discrepancies between Indian and non-Indian students in their states. Most notable are Wisconsin, Minnesota and New Mexico, which go far beyond, legislatively, where Montana, despite its constitutional commitments, has feared to tread.

Wisconsin enacted its comprehensive "Act 31" in 1989, and in doing so, addressed several educational needs and included provisions requiring the incorporation of Wisconsin Indian history, treaties and tribal sovereignty into the public school curriculum at grades 4, 8 and 10. Wisc. Stat. Ann. §§ 115.28 (17)(d); 118.01(c) 7 and 8; 118.19(8); 121.02(1)(h); 121.02(1)(l)4 (2003). The 1989-1991 biennial bill appropriated funding for the statutory Indian Studies Program. At the same time that Wisconsin was comprehensively addressing Indian education, Montana had yet to provide a single cent to fulfill its constitutional commitment.

The Minnesota American Indian Education Act of 1988 requires the State of Minnesota to provide unique and comprehensive services to meet the needs of Indian people within Minnesota. Minn Stat. Ann. §§ 124D.71 to 124D.82. (2003). The Minnesota legislature appropriated about \$7.4 million for the 1997-1999 biennium for a variety of programs to

benefit Indian students and to assist more Indian people to become teachers. Gregory C. Knopff (ed.), American Indian Communities in Minnesota, K-12 Education, prep. By Sen. Coun. & Res., Dec. 22, 1998. See <http://www.senate.leg.state.mn.us/departments/scr/report/bands/k12.htm>. In 1999, the same year Minnesota was providing millions of dollars to fulfill its legislative commitment to Indian education, Montana was legislatively interpreting its constitutional obligation to Indian education in Mont. Code Ann. §§ 20-1-501 because the constitutional commitment had not been met, and had yet to provide a single cent to fulfill its obligation.

New Mexico recently passed its comprehensive “Indian Education Act,” legislation designed to address many of the unique educational needs of Indian students. N.M. Stat. Ann. §§ 22-23A-1 through sec. 22-23A-8 (2003). The purposes of the Act are similar to Montana’s Constitutional language: ensuring equitable and culturally relevant learning environments, and educational opportunities and instructional materials for Indian students enrolled in public schools. *Id.* at 22-23A-2. The New Mexico legislation goes beyond where Montana dares to tread and calls for developing partnerships and formal government-to-government relationships between the Tribes, Urban Indian communities, and the State. *Id.* The Act creates an “Indian Education Division” within the department of education with an appointed assistant superintendent for Indian education. *Id.* at 22-23A-5. There is also a statutory-based “Indian Education Advisory Council.” *Id.* at 22-23A-6. The state Indian Education Division is required to present an Indian education status report, including a myriad of data, to all tribes, and public schools located within Indian reservations are required to report to their respective tribes. *Id.* at 22-23A-7. New Mexico also established an “Indian education fund” to assist with the implementation of its legislation, which was supported by \$3.5 million in state funds. *Id.* at 22-23A-8. While New Mexico was creating a comprehensive statutory scheme to provide Indian education, the Montana legislative and executive branches failed to appropriate a single cent to fulfill their obligation.

These states, despite their lack of a constitutional obligation to provide Indian education, have surpassed Montana by providing comprehensive strategies and mandated programs, while also providing the necessary implementation funding in order to remedy the educational discrepancies between Indian and non-Indian students. Montana has yet to appropriate a single cent to fulfill its constitutional obligation and commitment to Indian

people.

### **5. The Effects on Indian Students**

In the decisive case of Brown v. Board of Education, 347 U.S. 483 (1954), the United States Supreme Court was faced with determining whether “separate but equal” was inherently unequal, in violation of the U.S. Constitution. In determining that indeed it was, the Court made some of the most famous remarks in jurisprudence history. The Court began by taking into account the role of public education in modern society: “We must consider public education in the light of its full development and its present place in American life throughout the Nation.” Id. at 492-93. The importance of public education cannot be overstated, as evidenced by the Supreme Court’s astute and practical observations:

*Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. Id. (emphasis supplied).*

Tribal Amici bring this Court’s attention to Brown v. Board of Education to emphasize the importance of evaluating Montana’s failure to fund with a firm understanding of the sociological realities that Indian students face in both on and off Reservation schools and from the perspective of real-world consequences of a lack of education in today’s world. Tribal Amici wish to underscore how important it is to Indian students that the Indian Education Article of Montana’s Constitution be faithfully and fully implemented. Under the circumstances, as summarized below, the legislative and executive branches’ decision to not spend resources on Indian education, but rather to divert funds elsewhere, serves to ensure a continuing violation of the Montana Constitution.

In 2001, the Montana Advisory Committee to the U.S. Commission on Civil Rights<sup>2</sup>

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<sup>2</sup>The U.S. Commission on Civil Rights in an independent, bipartisan, fact-finding agency of the federal government.

released a report, Equal Educational Opportunity for Native American Students in Montana Public Schools (“Report”). Attached as Exhibit 4. The Report addresses the lack of equal educational opportunity for Indian students in Montana, identifies many significant disparities in the education of Indian children in Montana, and reiterates the importance of all students learning about Indians.

The Report concluded by making the following findings:

1. Indian children in Montana public schools are in a crisis situation, as evidenced by disparities in education, including dropout rates that are double those of non-Indian students, low achievement levels and test scores, and few high school graduates with little advancement to higher education.
2. Montana Indians and non-Indians alike are adversely affected by the public education system’s failure to educate all of its students.
3. Although the state of Montana has made numerous affirmations and other pronouncements concerning Indian education, those efforts have not reaped tangible outcomes, and as a result the state has failed to meet its obligation with regard to Indian education.
4. Indian and non-Indian children, as well as teachers and administrators, are harmed by public education’s failure to consistently incorporate Indian issues in the curriculum.
5. Teachers and administrators do not receive adequate information about Indian issues in their professional course of study, and therefore cannot share Indian history and culture in their classes in the public schools. The teaching of Indian history and culture should begin in kindergarten and continue through high school. Indian studies should be integrated throughout the curriculum and should be an integral part of the accreditation requirements, not an optional offering.
6. There is not enough knowledge of and use of practical projects and programs that will work for Indian children. Better ways of identifying and implementing nonmandated resources such as technical assistance from agencies and individuals who can give helpful and experienced guidance have not been sufficiently utilized. Report, at 61.

Although the Report used data from 1994-95, those figures were consistent with historical data showing huge discrepancies between the academic achievement and educational attainment levels between Indian and non-Indian students. In fact, even when reviewing current data, little has changed. Indian students continue to lead in all educational areas where no group wishes to lead. OPI data shows that Montana’s Indian students, as a group, still have the highest drop-out rates, lowest achievement on educational achievement assessments, highest risk behavior, and a disproportionate number of special education students.

In 2001, there were 16,324 Indian students enrolled in Montana's public schools, to make up 10.9% of the total school population. Although about 40% of these Indian students attend public schools off the reservations (mostly in Montana's major cities), the trend of dire data is consistent across the state. One of the most serious issues is the disparity of educational achievement for Indian students in Montana's public schools as demonstrated by the alarmingly low graduation rate. OPI data shows that over a four-year span, from the 1998-99 school year through the 2001-02 school year, the average Indian student dropout rate was 10.5% compared to 3.4% for white students. Montana Statewide Dropout Report 2001-02, OPI, April, 2003, at 4 (hereinafter "Dropout Report") and attached as Exhibit 5. Further, Indian students drop out of grades 7 and 8 at a rate more than *twelve times* that of white students; and Indian students drop out of high school at a rate of more than three times that of white students. Id. However, the OPI dropout data is calculated and reported using an event rate (a snapshot of those who drop out in a single year). Id. at 2.

The MIEA uses the OPI data to develop a more comprehensive picture following the total number of Indian students over time using a cohort rate. Id. at 2. For example, this data shows that in 1996-97, 1,372 Indian students were enrolled in ninth grade across Montana's public schools. See American Indian High School Dropout Issues, at 6, (November 7, 2002) ("MIEA Drop Out Study"), attached as Exhibit 6. Four years later, in 1999-2000, 681 of those Indian students graduated from high school. Id. This shows, in MIEA's rough cohort sample, that approximately 50% of Indian students drop out before completing high school. OPI Superintendent McCulloch, in her State of Education Address to the 2001 Legislature, pledged to fight "... the devastatingly high drop out rate among American Indian students. Something must be done to address this issue, and together we can find a solution." She also stated that the education system is "losing too many of our Montana Indian students; they cannot be left behind." Id. at 2.

In addition to drop out rates, Indian students are consistently left behind on nearly all measures for educational achievement. Each year, the Iowa Test of Basic Skills (ITBS), a mandated standardized test, is taken by every Montana student in grades 4, 8 and 11. According to OPI data, Indian students, as a group, significantly lag behind their non-Indian counterparts on this test. Student scores are broken into categories called "stanines"—that of "novice," "nearing proficiency," "proficient," and "advanced." These stanines are indicative of

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how well each student performs in the tested areas of reading and math. The data is substantially similar every year, with the majority of Indian students scoring in the “novice” and “nearing proficiency” stanines while the majority of white students score in the “proficient” and “advanced” stanines.

For example, the stanine percentages for the 2002-03 ITBS show:

		% Novice	% Nearing Proficient	% Proficient	% Advanced
Grade 4:	White	7%	12%	59%	22%
	Indian	25%	24%	46%	5%
Grade 8:	White	11%	14%	58%	17%
	Indian	36%	21%	40%	4%
Grade 11:	White	7%	11%	59%	23%
	Indian	26%	25%	42%	6%

This data shows Indian students not only scoring lower than their white counterparts, but actually shows that their performance on the standardized test is only about half of that of white students. OPI disaggregated ITBS data charts attached as Exhibit 7.

Despite pledges and promises, Montana’s Indian students continue to be left behind and continue to wait for the state to fulfill its constitutional obligation. This sorry situation cannot realistically be expected to improve in any appreciable manner if the legislative and executive branches are allowed to persist in their refusal to implement the Indian Education Article.

In 2003, Superintendent McCulloch was once again candid in her assessment of Indian education during her State of Education address to the Montana Legislature. She again discussed the challenges facing Indian students, including the high drop out rates, and reiterated that, “All Montana students deserve the opportunity to understand the rich American Indian culture and history in Montana . . . *Without financial support, our Constitutional promise of ‘Indian Education for All’ will remain only a paper promise.*” (emphasis added).

See <http://www.opi.state.mt.us/streamer/keynote/speechtext.html>

### Conclusion

The framers of Montana’s Constitution did not include one delegate of Indian heritage. But the debates they had and the language they forged clearly recognizes the rich and unique status of Tribal peoples and governments in Montana. The Montana Supreme Court has

acknowledged this position in the one case that has previously touched upon the Indian Education Article in the Constitution.

Montanans of all heritages have struggled long and hard to bring meaning to the framers' intent. But the sad fact remains clearly evident that the Constitutional language has not found its way into the day-to-day educational workplace. Historically, it is evident that subsequent legislative investigation has led to some legislative action. The Legislative and Executive branch's good intentions and lofty language, however, has not been followed by solid, monetary commitments.

The repeated refusal and failure to fund has violated the spirit of the core values expressed in constitutional and legislative enactments. The failure to fund has rendered the promises in the Constitution and subsequent legislation meaningless. Generations of Montana's students have been deprived of the opportunity to experience the cultural, historical and legal richness of the diverse Indian peoples of Montana. Students of Indian heritage have become invisible by being relegated to the back of the bus and ignored—saddled with lower expectations and burdened by lower achievements.

The language of Article X, Section 1, Subsection 2 is clear and plain. The State's recognition of the distinct and unique cultural heritage of Indian people must be accompanied by a solid, realistic commitment in Montana's educational goals to the preservation of their cultural integrity.

Supreme Court Justice Hugo Black, in a seminal Indian law case on the interpretation of Indian Treaties, stated that "Great nations, like great men, should keep their word." Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142, (1960). The language of Montana's Constitution should bind the intent of the framers to the practical day-to-day delivery of quality educational services. Such is the promise of Montana's Constitution. Now is the time for this Court to insure that the great State of Montana, like great men and women, keeps its word.

DATED this 15<sup>th</sup> day of January, 2004.

Respectfully submitted,

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Stephen A. Doherty

Patrick L. Smith  
SMITH, DOHERTY, & BELCOURT, P.C.  
815 E. Front Street, Suite 3  
Missoula, MT 59802  
Phone: (406) 721-1070  
Fax: (406) 721-1799  
*Attorneys for MIEA*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Montana Indian Education Association's Amicus Curiae Brief and accompanying Exhibits was served this 15th day of January, 2004 on the following people by first-class mail, postage prepaid.

Mr. Brian Morris  
Ali Bovington  
Montana Attorney General  
Justice Building  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

James G. Molloy  
310 Broadway  
P.O. Box 1711  
Helena, MT 59624

Brain K. Gallik  
35 N. Grand  
P.O. Box 6580  
Bozeman, MT 59771-6580

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