(1.0 CLE) This presentation will cover recent federal developments in Indian law and policy focusing on the Indian Child Welfare Act, Tribal jurisdiction over non-Indians, Tribal Sovereign Immunity and Information on the ongoing dispute over the Dakota Access Pipeline.

Speakers: Chrissi Nimmo, Kate Fort
Legal Challenges to ICWA: An Analysis of Current Case Law

By Matt Newman and Kathryn Fort

INTRODUCTION

The 2013 Supreme Court decision *Adoptive Couple v. Baby Girl* placed the Indian Child Welfare Act (ICWA) in the public spotlight. The elevation of a voluntary adoption subject to the Indian Child Welfare Act brought down incredible media scrutiny. The decision in *Baby Girl* motivated many interest groups, including tribal governments, non-Native child welfare organizations, and adoption and foster care advocates to closely examine ICWA issues at every level, from national policy to local implementation.

After *Baby Girl*, tribal advocates exerted tremendous effort to have the Bureau of Indian Affairs (BIA) reexamine its history of antipathy for ICWA enforcement. This process began in informal ICWA listening sessions hosted by the BIA and culminated in the publication of updated 2016 ICWA regulations and guidelines.¹

While Indian Country celebrated the BIA’s actions, anti-ICWA advocates mobilized a detailed and strategic legal campaign to not only reverse this progress, but also dismantle the foundational precedents and statutes which form the backbone of ICWA, not to mention federal Indian law as a whole.

Since 2015, these legal challenges have come in one of three waves. The first wave consisted of federal lawsuits attacking ICWA on the whole, on the grounds that it is an unconstitutional federal statute violating individual rights to due process, and equal protection, that it exceeds Congress’s authority over Indian affairs. The second wave is comprised of federal lawsuits aimed at state laws implementing and expanding provisions of ICWA. Finally, the third wave has been the concerted efforts of the same plaintiffs in the federal cases identifying and participating in state appellate cases.

WAVE I

*National Council for Adoption v. Jewell*

The National Council for Adoption (NCFA) filed the inaugural legal challenge against the BIA’s ICWA reforms in May 2015. Styled as an Administrative Procedures Act (APA) suit, the 54-page complaint laid out many of the elements and themes which have been incorporated into previous ICWA challenges, including claims that: (1) ICWA denies Indian children due process and equal protection by subjecting their dependency cases to its provisions; (2) ICWA and the federal guidelines commandeer state agencies for federal purposes; and (3) ICWA exceeds Congress’s authority to legislate in the area of Indian affairs. Interestingly, NCFA focused extensively on a charge that the guidelines carried the weight of a legislative rule, and as such,
required formal notice of rulemaking and public comment. Specifically, NCFA highlighted the guidelines’ use “require,” “must,” and “shall” as indicators that the BIA intended the guidelines to be binding, legislative rules.²

In defending the guidelines, the BIA raised several jurisdictional and legal defenses. First, the BIA dismissed the characterization that the guidelines were legislative rules under the APA.³ As to NCFA’s constitutional claims, the BIA relied on the long line of U.S. Supreme Court and federal circuit case law finding laws pertaining to tribes and tribal members were not “racial in nature,” but rather based on their political status as “distinct, independent communities” under the Constitution.⁴

In two orders, the district court denied NCFA’s requested relief and dismissed the case. In its first order, the court ruled on NCFA’s APA claims, finding the organization lacked standing to sue the BIA because it failed to demonstrate it suffered any cognizable injury from the guidelines.⁵ Additionally, the court agreed with the BIA that the guidelines did not rise to the level of “final agency action” necessary for judicial review under the APA because the BIA published the guidelines as nonbinding “advisory guidance” that left state court judges as the ultimate decision makers regarding the guidelines application in an ICWA case.⁶

In its second order, the court dismissed the remainder of the claims for lack of subject matter jurisdiction. Specifically, the court held NCAF had failed to show the guidelines violated equal protection principles, citing the long line on Indian law precedents upholding tribal citizenship as a political, rather than racial, classification.⁷ The court further dismissed NCFA’s due process and commandeering claims.⁸

NCFA timely appealed the district court’s decision to the Fourth Circuit Court of Appeals in February 2016. Briefs in the case are yet to be filed, however, and the appeal remains pending.

B. **Carter v. Washburn**

In July 2015, plaintiffs represented by the nonprofit Goldwater Institute filed a class action lawsuit against the BIA and the State of Arizona challenging various provisions of state and federal law as they applied to Indian child welfare proceedings. The proposed class of plaintiffs includes all Native children in the Arizona foster care system who reside outside of a reservation as well as all foster parents, preadoptive, and prospective adoptive parents who are not members of the Native child’s extended family.

The suit specifically targeted ICWA’s transfer, active efforts, burdens of proof for removal, burdens of proof for termination of parental rights, and placement preferences provisions, as well
as corresponding sections in the revised guidelines, and an Arizona law requiring the state Department of Child Safety to “ensure compliance with ICWA.”

The Gila River Indian Community and the Navajo Nation each intervened in the suit on the grounds that four of the named child-plaintiffs were citizens of the two tribes. The BIA filed a motion to dismiss the suit on grounds similar to those in National Council for Adoption: (1) plaintiffs lacked standing to sue, and (2) plaintiffs failed to state a claim upon which relief could be granted. Although the district court held oral argument on the BIA’s motion to dismiss, plaintiffs amended their complaint and effectively mooted the previous motion to dismiss. While the BIA re-filed its motion to dismiss, the district court has not yet rendered a decision. Simultaneously, the BIA and the plaintiffs began filing separate pleadings to initiate discovery in the case concerning certification of the class. The case remains pending before the district court.

**WAVE II**

*Doe v. Piper*

In June 2015, the birth parents of an Indian child filed a federal suit in Minnesota challenging the constitutionality of the Minnesota Indian Family Preservation Act (MIFPA). Plaintiffs challenged MIFPA’s provisions (1) requiring notice to tribes in cases of voluntary adoptions and (2) guaranteeing a tribe’s right to intervene in voluntary adoptions, arguing such provisions violated the birth parents’ due process right to parent their child and direct their child’s upbringing, and discriminated against their child based on race.

Additionally, plaintiffs sought to preliminarily and permanently enjoin MIFPA’s application to their child’s voluntary adoption proceeding in state court. Plaintiffs named as defendants various state officials charged with administering MIFPA, as well the commissioner of health and human services for the Mille Lacs Band of Ojibwe, in which the birth mother was an enrolled citizen.

Tribal and State attorneys successfully defeated the preliminary injunction and soon after, the Tribe and the State filed separate motions to dismiss the suit. After a hearing on the joint motions to dismiss, the district court granted the Tribe’s motion and dismissed all claims levied against it on the basis the Tribe enjoyed sovereign immunity from suit. However, the district court issued a split decision on the motions to dismiss, removing the health commissioner as a defendant but allowing the case to continue against the state government officials. The court agreed with the plaintiffs’ claim they faced irreparable harm because of the requirement to notify the tribe, even though the harm would not arise until they provided notification. Finally, even with the health commission’s promise that the tribe would not intervene in this matter, the court found that this issue was not moot because it had both the potential to reoccur and not be resolved timely. The case is awaiting trial on the constitutional issues.
**Doe v. Pruitt**

In a nearly identical case to *Doe v. Piper*, an Oklahoma couple, birth parents of an Indian child eligible for membership in the Cherokee Nation, filed a federal lawsuit challenging the constitutionality of the Oklahoma Indian Child Welfare Act (OICWA). Like *Doe v. Piper*, plaintiffs’ federal lawsuit specifically targeted the OICWA provisions requiring notice to tribes in cases of voluntary adoption, and guaranteeing a tribe’s right to intervene in voluntary adoptions. Additionally, plaintiffs incorporated certain arguments from the *National Council for Adoption* suit; specifically, that OICWA was beyond the scope of the legislative powers the federal Constitution conferred to states.

The state and tribal attorneys filed respective motions to dismiss the suit, arguing plaintiffs lacked standing to bring the suit and failed to properly state a claim upon which relief could be granted. Although the district court held oral argument on the motions to dismiss in January 2016, it has not issued a decision in the case.

**C.E.S. v. Nelson**

In September 2015, foster parents of children enrolled in the Grand Traverse Band of Ottawa and Chippewa Indians sought and received from Michigan federal court an ex parte temporary restraining order against a tribal prosecutor, a tribal social worker, and a state court judge, all of whom were involved in the children’s state court dependency case. During those state proceedings, the tribe sought, and the judge granted, a motion to transfer the children’s case to the tribal court for further proceedings. The federal restraining order prevented any further state proceedings regarding the placement of the children to occur. Like many of the plaintiffs in Wave One cases, the Michigan plaintiffs claimed certain MIFPA provisions violated their individual constitutional rights; specifically that transferring the case to tribal court violated the children’s due process rights and discriminated against the children based on their race.

The tribe defeated the preliminary injunction, and later filed a motion to dismiss citing tribal sovereign immunity as plaintiffs named tribal officials as defendants in the suit. Before the district court could rule on the motion, the parties stipulated to voluntarily dismiss the suit without prejudice. The children’s dependency case was transferred to tribal court where adoption proceedings are continuing.

**Wave III and Beyond**
In addition to the federal cases currently in litigation, there have been a number of state appellate cases that have attracted heightened interest from the plaintiffs in the federal litigation summarized above.

- The Washington Supreme Court strongly upheld ICWA and the principles behind it in *In re T.A.W.*, despite claims from the appellant and amici regarding ICWA’s constitutionality.
- In Arizona, the Court of Appeals decided a case on statutory language, rather than on the broad constitutionality of the law, even though it was invited to do so by appellees and amici.
- The California Court of Appeals also recently upheld both state and federal laws concerning the placement of a Choctaw child with her extended family, even under intense media scrutiny and multiple appeals.

It is likely that one of these cases will head to the Supreme Court. The foster parents in the California case have filed a petition for *certiorari* after the California Supreme Court denied review of the case. Depending on the decisions in lower federal courts, it appears inevitable that at least one party will seek review from the nation’s highest court. Given the spread of the cases across the country, the possibility of a split in the circuits has increased considerably in the past year. The future of the lawsuits is unclear, but it is to be expected that Indian Country will continue to fight for enforcement of ICWA and the newest guidelines and regulations.

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2 Court documents for this case can be found at turtletalk.wordpress.com/fort/icwa/national-council-for-adoption-v-washburn. Plaintiff’s Complaint at 21-22, turtletalk.files.wordpress.com/2015/05/complaint.pdf.
3 Defendant’s Motion to Dismiss at 19, turtletalk.files.wordpress.com/2015/08/lps-243803-v1-national_council_for_adoption_v_jewell_-memorandum_in_support_of_motion_to_dismiss__for_judgment_on_the_pleadings Filed Sept. 11__2015.pdf.
6 Id. at 12.
7 Order on Motion to Dismiss at 10-11, turtletalk.files.wordpress.com/2015/08/ncfa-69-order-on-motion-to-dismiss.pdf.
8 Id. at 11-13.
Resources:


Case Filings: https://turtletalk.wordpress.com/fort/icwa/

Bios:
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The Perpetual Legal Fight Over Tribal Water and Land

The Dakota Access Pipeline (“DAPL”)

The Energy Companies:

Enbridge Energy Partners, LP (a Canadian company) and Marathon Petroleum Corporation (an Ohio-based American company) own 75% and 25%, respectively, of a 49% stake in the Bakken Holdings LLC, which owns 75% of the entire Bakken Pipeline System. The Bakken Pipeline System will bring petroleum from the Bakken Formation underlying parts of Montana and North Dakota in the United States down to the gulf shore. The financing assembled to construct the Bakken Pipeline System is in excess of $2.5 billion, with a total original expected cost of more than $3.7 billion.

Energy Transfer Partners and Sunoco Logistics respectively own 60% and 40% of the remaining 51% of Bakken Holdings LLC. The Bakken Pipeline System includes both the DAPL and the ETCO pipeline projects. Phillips 66 owns the other 25% of the Bakken Pipeline System.

DAPL is a new 30-inch diameter pipeline from the Bakken/Three Forks production area in North Dakota to market centers in Patoka, Illinois. DAPL is expected to initially deliver in excess of 470,000 barrels per day ("bpd") of crude oil and has the potential to be expanded to 570,000 bpd. The pipeline has six origin locations in North Dakota and delivers to Patoka. The construction of terminals began in January 2016, mainline pipeline construction began in May 2016, and all major materials and equipment have been procured.

The original planned completion on the pipeline was January, 2017.

The Opposition:

Numerous groups stand in strong opposition to the Dakota Access pipeline project through 4 different states (North Dakota, South Dakota, Iowa, Illinois). The opposition is primarily centered on the following issues:
Potential pollution of streams, rivers, lakes & aquifers near the pipeline
Destruction of farmland & cultural plants
Harming wildlife and sensitive natural areas
Prolonging the transition to clean, renewable energy
Destruction of culturally important and sacred sites

The Standing Rock Sioux Tribe, which has publicly opposed the pipeline crossing Sioux treaty lands since 2014, is at the heart of the protests, although the Cheyenne River Sioux Tribe has also intervened in the case. The pipeline would cross under the Missouri river twice once completed. The Tribe and it supporters claim that the land where DAPL is “currently” mapped to cross the Oahe Lake is “unceded treaty land” because the tribe never accepted the money offered by the U.S. in exchange for the land. Even if the land is deemed to be ceded, the tribe may arguably retain some rights to the lake.

One oil leak could decimate the tribe’s water supplies and destroy their cultural plants. Tribal officials have written letters to multiple state and government agencies, including the BIA, Department of Civil Works, the EPA and the Army Corps of Engineers. Tribal members and many others believe that continuing construction is unlawful. After the Corps approved permits for the pipeline construction amid wide scale protests, the Standing Rock Sioux Tribe filed for a preliminary injunction to stop construction on August 4, 2016. After the hearing date was set, the tribe was issued a 48-hour notification by Energy Transfer Partners that construction would commence on August 10, 2016. Currently, Native Americans, ranchers, farmers and others are protested along a highway in North Dakota blocking Energy Transfer Partners’ employees from accessing the pipeline construction site. Energy Transfer Partners initially agreed to stop construction until after the judge ruled in the case, but then began digging in areas that the Standing Rock Sioux Tribe had argued contained sacred sites. On Sunday, September 4, 2016 the Standing Rock Sioux called for a temporary restraining order to prevent further destruction of sacred sites and a hearing was set for Monday, September 5, 2016. The United States and the Corp of Engineers joined the call for the temporary restraining order although they oppose the Tribe on the underlying issue.

On September 9, 2016, Judge Boasberg denied the Standing Rock Sioux Tribe’s request for an injunction because the tribe could not show that it would “suffer injury that would be prevented by any injunction the Court could issue” and also held that the Army Corp of Engineers had given the Tribe “a reasonable and good-faith opportunity to identify sites of importance to it.”

That same day the Obama administration, through DOI, DOJ and the Department of the Army, issued a press release acknowledging the concerns of the Standing Rock Sioux and other tribes regarding DAPL and pipelines generally. The Army stated that they would not authorize construction of the DAPL on Army Corps land bordering or under Lake Oahe until they could determine whether there was a need to reconsider their previous decision. They also implemented a plan to host formal, government-to-government consultations on 1) what the
federal government could do to better ensure meaningful tribal input into infrastructure-related reviews and 2) whether new legislation should be proposed to Congress to alter the existing statutory framework. The first such consultation occurred at National Congress of American Indians on Tuesday, October 12, 2016, and continued through the end of November 2016.

In the meantime, the Obama administration asked Energy Transfer Partners to voluntarily cease all construction within 20 miles of the Lake Oahe until it could be determined whether the construction was violating NEPA.

The Standing Rock Sioux appealed the District Court’s order denying the Tribe’s request for a preliminary injunction to the D.C. Circuit Court. An emergency injunction pending appeal was requested when, immediately after the initial district court decision denying the injunction, Energy Transfer Partners began digging a large trench in the disputed area despite the efforts of the water protectors. The Tribe argued that significant and irreversible damage would be done even during the pendency of the appeal if no emergency injunction pending appeal was put in place. The Court entered an administrative order enjoining construction activity on the DAPL for 20 miles on both sides of the Missouri River at Lake Oahe to maintain the status quo while they considered the merits of entering an emergency injunction pending appeal.

After briefing and a hearing on the Tribe’s appeal, however, the D.C. Circuit Court ruled on October 9, 2016 to dissolve the Tribe’s administrative injunction and denied the Tribe’s Motion for injunction pending appeal. It was a fairly simple per curiam order, which stated that the Tribe had not carried its burden of persuasion on the factors examined by the court. The court went on to observe that Energy Transfer Partners still lacked an easement that they needed to move forward with their planned work at Lake Oahe, and that the decision by Army Corp of Engineers staff on that issue was still weeks away. Despite this, DAPL workers have “rights of access to the limited portion of pipeline corridor not yet clear—where the Tribe alleges additional historic sites are at risk.” At that time, only the request from the Obama administration that Energy Transfer Partners voluntarily pause construction at the location protected the historical sites.

On Monday, October 11th, 2016 one day after the D.C. Circuit Court decision lifting the administrative injunction, hundreds of people gathered at the worksite to peacefully demonstrate, protest, and pray. According to some reports, close to one hundred law enforcement officers came to the site, in riot gear and with large, armored vehicles, to order the trespassing demonstrators off the property. The access road to the area was closed to prevent additional protestors from coming to the site. Twenty-seven people were arrested as they peacefully left the work site. Many people, including the ACLU, have condemned the military-style operation against the water protectors, and have condemned the actions of the law enforcement officers and the continued “heated” rhetoric coming from the Morton County Sheriff’s Office. In December 2016 a proposed order to allow out of state attorneys to represent the arrested protestors was filed with the North Dakota Supreme Court. There have been more than 500 arrests related to the protest in Morton County North Dakota and close to 200 protestors have
requested public defenders be appointed by the District Court. Comments on the rule were due December 30, 2016.

December 4, 2016 Update

The U.S. Army Corps of Engineers announced that it would not grant the pipeline the easement necessary to cross Lake Oahe, just upstream of the Standing Rock Reservation. The Corps stated that a more involved “Environmental Impact Statement” (“EIS”) will have to be prepared prior to the grant of the easement. This must include “robust consideration and discussion of alternative locations” including information on the first proposed crossing of the Missouri River (see map below). Additionally the EIS must include a detailed discussion of “potential risk of an oil spill, and potential impacts to Lake Oahe, the Standing Rock Sioux Tribe’s water intakes and the Tribe’s water rights as well as treaty fishing and hunting rights.” Finally, the Corps stated the EIS should include “additional information on the extent and location of the Tribe’s treaty rights in Lake Oahe.”

Suggested reading material:

https://nycstandwithstandingrock.wordpress.com/standingrocksyllabus/comment-page-2/#comments

http://sacredstonecamp.org/
LAND AS A JURISDICTIONAL BASIS
(for and over tribes)

General Rules of Jurisdiction

Tribes have no criminal jurisdiction over non-Indians, with the limited exception of non-Indians who commit acts of domestic violence against Indians on Indian land pursuant to the Violence Against Women Act. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); 42 U.S.C. § 13925. Tribes do not have civil jurisdiction over non-Indians on or off tribal land unless there is explicit consent or certain other conditions are met. (See Montana; Plains Commerce below). Tribes are immune from civil suits in state and federal courts absent an explicit waiver of sovereign immunity or congressional action that allows suit. See Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The Indian Civil Rights Act applies to cases in tribal court and guarantees due process, but habeas is the only available relief as there is no private civil cause of action against tribal defendants. 25 U.S.C. §§ 1301, et seq. (No tribe shall “deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). There is no statutory or common law right to remove tribal court cases or to provide for federal review. In most cases involving civil jurisdiction or regulation by tribes, the mechanism to get to federal court is for the defendant to request an injunction to prohibit the tribal court (or some executive branch) from taking action because of lack of jurisdiction under federal common law. Lower federal courts have refused to recognize and enforce tribal court judgments because of lack of due process. See Bird v. Glacier Electric Cooperative, Inc., 255 F.3d 1136 (2001). Further, no U.S. Supreme Court has ever affirmed tribal civil court jurisdiction over a non-Indian defendant, but many cases state it may exist under limit circumstances described in the cases below. However, it is undisputed that there are likely thousands of cases where tribal courts have exercised civil jurisdiction over non-Indians through explicit consent or pursuant to some variety of factors discussed in the cases below. Cherokee Nation, for example, has exercised jurisdiction in hundreds of debt and garnishment cases; employment issues; child support and other civil matters.

Tribal civil jurisdiction over non-members

Dollar General Corporation et al., v. Mississippi Band of Choctaw Indians, 579 U. S. ____ (2016)

Per Curiam.
The judgment is affirmed by an equally divided Court.

Discussion
5th Circuit Decision https://www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-60668-CV1.pdf
The affirmance of the 5th Circuit Decision meant that Dollar General must answer a tort action in Mississippi Choctaw District Court on allegations that it is liable for alleged sexual abuse by one of its employees against a Choctaw youth.

**Facts and procedural background:** Dollar General leased trust land on the Choctaw reservation for a Dollar General Store and received a business license from the tribe. Per the terms of the lease, Dollar General agreed to tribal court jurisdiction and the application of tribal law concerning any disputes involving the lease. The store manager agreed to participate in a tribal youth job training program that would place an unpaid, minor, intern in the store to gain job experience in exchange for work provided. The minor alleged he was sexually molested by the store manager. The minor’s parents filed a tort action in Mississippi Choctaw District Court. Dollar General and the manager moved to dismiss for lack of subject matter jurisdiction. The Motion was denied, they appealed to the Mississippi Choctaw Supreme Court which affirmed the lower court decision finding the tribal court had jurisdiction. Dollar General and the manager then filed for an injunction in Federal District Court in Mississippi seeking to enjoin the tribe from hearing the case in tribal court because of lack of subject matter jurisdiction. The Federal District Court granted the tribe’s motion for summary judgment as to Dollar General but found the tribe did not have jurisdiction over the store manager, Dollar General appealed.

The Fifth Circuit’s reasoning for the “consent” to tribal jurisdiction, was that Dollar General explicitly consented to civil jurisdiction by trading the unpaid labor of a Choctaw member minor, through an agreement with the tribe, for the minor’s receipt of job experience and training. This decision was based on a long line of Supreme Court cases discussing tribal authority/jurisdiction over non-fee lands within the reservation.

**Prior U.S. Supreme Court jurisdictional decisions:**


Montana 1: “To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Montana 2: “A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

*Strate v. A-1 Contractors,* 520 U.S. 438 (1997): Whether tribe had adjudicatory jurisdiction over a tort claim involving an accident on a federally owned/state maintained highway within the reservation between two non-members. Tribal court did not have jurisdiction.
In light of the citation of Montana, Colville, and Fisher, the Iowa Mutual statement emphasized by petitioners does not limit the Montana rule. In keeping with the precedent to which Iowa Mutual refers, the statement stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, "[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts." 480 U. S., at 18.


Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. In Strate, for example, even though respondent A-1 Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident, we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember "was not a party to the subcontract, and the [T]ribes were strangers to the accident." 520 U. S., at 457 (internal quotation marks and citation omitted). A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not "in for a penny, in for a Pound."

Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316, (2008): Whether there was tribal jurisdiction over a suit involving a member claim of discrimination and breach of contract against a bank who sold a parcel of fee land to non-Indians. Tribal court did not have jurisdiction.

The Tribal Court lacks jurisdiction to hear that claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land, and “a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction,” Strate, supra, at 453. Montana does not permit tribes to regulate the sale of non-Indian fee land. Rather, it permits tribal regulation of nonmember conduct inside the reservation that implicates the tribe’s sovereign interests. 450 U. S., at 564–565. With only one exception, see Brendale, supra, this Court has never "upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land," Nevada v. Hicks, 533 U. S. 353.

Interestingly, none of the cases relied on by the Fifth Circuit involved “trust” land located on the reservation, which was the case in Dollar General. However, the Supreme Court has held that land being trust status alone did not give rise to jurisdiction when it held the tribal court lacked jurisdiction over tort claims against state officers executing a state search warrant on trust property. See Nevada v. Hicks 533, U.S. 353 (2001) Also, on appeal, Dollar General argued that its alleged conduct, negligent hiring of an employee who allegedly committed sexual assault, occurred off reservation, but the Fifth Circuit did not analyze that argument as it was not raised below.
**Civil jurisdiction over tribes/employees in state/federal court**

*Brian Lewis and Michelle Lewis v. William Clarke*, No 15-1500 Oral Argument held January 9, 2017


**Facts and Procedural Background:** Respondent Clarke was an employee of the casino owned by the Mohegan Tribe. He was on duty transporting casino patrons from the casino when he struck and injured Petitioners Lewis, on the interstate 70 miles from the casino. The Lewis’ filed a tort suit in state court in Connecticut naming the tribe and Clarke in his individual capacity, they later amended, dropping the tribe and suing Lewis only in his individual capacity for alleged negligence while employed by and on duty with the tribe. The Connecticut Supreme Court held that Clarke was covered by the tribe’s immunity in his official capacity. Per the tribal-state compact that allows class three gaming in the state, the tribe established a tort claim process that was available to the Petitioners, and a claim related to the same accident was allegedly settled through that process for $700,000 through the tribe’s tort claim process. The Lewis’ appealed the decision of the Connecticut Supreme Court.

**Lewis arguments:** Court improperly analyzed in what capacity Clarke was “acting” when it should have analyzed in what capacity he was “sued.” Expanding the sovereign immunity of the tribe to an employee, on duty, but off the reservation is inequitable (because some tribes do not have tort claim processes and in this case non-economic damages are limited and punitive damages are disallowed) and provides greater immunity to tribal employees than is allowed for state of federal employees.

**Tribe argument:** Employee was acting within the scope of his duties in his official capacity as an employee and because tribal law requires indemnification of the employee, this is in reality a suit against the tribe which is barred by sovereign immunity. Regardless of how the suit is styled, employee is being sued in his official capacity.

**U.S. Argument:** Tribal sovereign immunity does not extend to tribal employees acting within the scope of their duties if sued in their official capacity, but federal common law official immunity does apply and may be considered upon remand.
Synopsis of recent attacks on the Indian Child Welfare Act (ICWA)

In March, 2016, the Bureau of Indian Affairs (BIA) proposed to address areas of long-term Indian Child Welfare Act (ICWA) non-compliance by proposing draft federal regulations to govern the implementation of ICWA in state courts and agencies. On June 17, 2016, the BIA issued final regulations for Indian Child Welfare Act Proceedings, as well as Frequently Asked Questions regarding the final rule. In addition, the Solicitor for the U.S. Department of the Interior issued a Memorandum describing BIA’s authority to issue the regulations. The final regulations became binding in December 2016, and at the same time, the BIA issued Guidelines for Implementing the Indian Child Welfare Act.

In response to these reforms, a network of ICWA opponents filed multiple lawsuits challenging the Guidelines and ICWA’s constitutionality. The National Indian Child Welfare Association (NICWA), the Native American Rights Fund (NARF), the National Congress of American Indians (NCAI), and the ICWA Appellate Project at Michigan State University College of Law—collectively known as the ICWA Defense Project—are working collaboratively to defend ICWA and the long overdue reforms.

This memorandum summarizes the pending litigation and describes some of the legal and communications strategies developed by these partner organizations to inform, advance, and unify a coordinated effort across Indian Country in response to these attacks.

I. Virginia Litigation: National Council for Adoption v. Jewell

In May 2015, the National Council for Adoption sued the BIA in the federal Eastern District of Virginia. The case names two Indian children as co-plaintiffs: one a member of Navajo Nation, and the other a member of the Pascua Yaqui Tribe.

The lawsuit raised several administrative complaints concerning the publication of the Guidelines, as well as challenges to the BIA’s authority to promulgate specific sections of the Guidelines, such as: the Guidelines’ placement preferences provisions, the Guidelines’
requirement that adoption agencies follow ICWA’s placement preferences, and the Guidelines’
requirement that adoption agencies conduct a diligent search to identify placement options that
satisfy these requirements.

In addition, the Plaintiffs claimed that ICWA itself offends the constitutional rights of Indian
children, specifically: the right to equal protection of the laws; the right to freely disassociate
from a child’s tribe; and the right to form a familial bond with a child’s foster parents.

The ICWA Defense Project filed an amicus brief supporting the U.S. Department of Justice’s
(DOJ) motion to dismiss the case at the procedural level. After an oral argument in December
2015, the Court issued two separate orders dismissing the Plaintiffs’ case. The first order
addressed Guidelines, finding that because the Guidelines are non-binding agency
recommendations of best practice they do not constitute “final agency action” subject to judicial
challenge. Furthermore, because the Court deemed the Guidelines non-binding, it also ruled that
the Guidelines posed the Plaintiffs no injury or harm—necessary requirements to have standing
to bring a federal lawsuit. In its second order, the Court ruled on the merits that neither the
Guidelines nor ICWA itself offend any of the constitutional concerns raised by the Plaintiffs.
The Court therefore granted the motion to dismiss.

The case remains ongoing as Plaintiffs have appealed the trial judge’s decision to the Fourth
Circuit Court of Appeals. Since March 2016, the parties have agreed to five orders extending the
time for filing briefs. The current order makes the opening brief due on January 31, and the
response brief due on March 14.

II. Minnesota Litigation: Doe v. Jesson

In June 2015, the birth parents of an Indian child filed a lawsuit in the federal District Court of
Minnesota challenging the constitutionality of the Minnesota Indian Family Preservation Act
(MIFPA). The Plaintiffs specifically targeted MIFPA’s provisions requiring notice to tribes in
cases of voluntary adoptions, and guaranteeing a tribe’s right to intervene in voluntary adoptions.
The Plaintiffs also sought a preliminary injunction of MIFPA’s application to their child’s
voluntary adoption proceeding in state court.

The ICWA Defense Project immediately reached out to the attorneys for the child’s tribe and
provided research and technical assistance in forming a response. The tribe successfully
defeated the preliminary injunction because the judge found that Plaintiffs suffered no
irreparable harm by having to notify the tribe of the adoptive proceeding in state court. Soon
after, the tribe and the state filed separate motions to dismiss the suit, with briefing was
completed by late September. The court held a hearing on the motions on November 3, 2015,
and issued a written order on February 25th, 2016. The court granted the tribe’s motion and
dismissed all claims levied against the tribe. The court did not, however, grant dismissal to the
state defendants, and the case is proceeding. There is currently a protective order governing
discovery, which is to be completed by November 12. Any dispositive motions, such as a motion
for summary judgment, are due by January 1, 2017.

III. Arizona Litigation: Carter et al. v. Washburn
In July 2015, the Goldwater Institute—a Phoenix-based conservative think tank—filed a federal class action lawsuit challenging the constitutionality of ICWA and the revised Guidelines. The lawsuit was brought on behalf of two Indian children—a child eligible for membership in the Gila River Indian Community and a child eligible for membership in the Navajo Nation—through their next friend, attorney Carol Coghlan Carter, and two potential adoptive couples. The proposed class of plaintiffs includes all Native children who are in foster care in Arizona and live off reservation and all foster parents, pre-adoptive, and prospective adoptive parents who are not members of the Native child’s extended family. The suit specifically targets ICWA’s transfer, active efforts, burdens of proof for removal, burdens of proof for termination of parental rights, and placement preferences provisions, as well as corresponding sections in the revised Guidelines, and an Arizona law which requires the Arizona Department of Child Safety to “ensure compliance with ICWA.”

The Gila River Indian Community and the Navajo Nation each sought to intervene in the suit, which was granted on September 29. In addition, the U.S. Department of Justice filed a motion to dismiss. Both the ICWA Defense Project and Casey Family Programs filed respective amicus briefs in support of that motion. The court postponed certifying the class until after it decides the motions to dismiss. The court held oral argument on the federal government’s motion to dismiss and the Navajo Nation’s motion to intervene in December 2015. Plaintiffs then filed an amended complaint, which the court accepted. This effectively mooted the previous motions to dismiss, and both Arizona and DOJ refiled their motions to dismiss in April. The court held oral argument on the federal government’s motion to dismiss and the Navajo Nation’s motion to intervene in December 2015. Plaintiffs then filed an amended complaint, which the court accepted. This effectively mooted the previous motions to dismiss, and both Arizona and DOJ refiled their motions to dismiss in April. Gila River Indian Community and Navajo Nation have also filed motions to dismiss. The court did not require the amici (ICWA Defense Project and Casey Family Programs) to refile their briefs. In the meantime, both the federal government and the Goldwater Institute have filed separate pleadings to initiate discovery in the case.

IV. Oklahoma Litigation: Doe v. Pruitt

In August 2015, the birth parents of an Indian child eligible for membership in the Cherokee Nation filed a lawsuit challenging the constitutionality of the Oklahoma Indian Child Welfare Act (OICWA). Plaintiffs filed the suit in the federal Northern District Court of Oklahoma and specifically targeted the OICWA provisions requiring notice to tribes in cases of voluntary adoption, and guaranteeing a tribe’s right to intervene in voluntary adoptions. Additionally, the Plaintiffs allege the OICWA is beyond the scope of the legislative powers the federal Constitution confers to states.

The Plaintiffs requested a permanent injunction of Oklahoma’s enforcement of OICWA. Oklahoma and the Cherokee Nation have both filed motions to dismiss in the case, and a motion hearing was on January 12, 2016. A written decision is expected any time.

V. Michigan Litigation: C.E.S. v. Nelson

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1 Because young children are considered to lack the capacity to form the intent necessary to bring a lawsuit, federal rules require “next friends” to do so on their behalf.
In September 2015, the foster parents of children who are members of the Grand Traverse Band of Ottawa and Chippewa Indians (the Band) sought and received an ex parte temporary restraining order against a tribal prosecutor, a tribal social worker, and a state court judge, preventing any proceedings regarding the placement of the children to occur. The foster parents asserted that the transfer provisions of the Michigan Indian Family Preservation Act (MIFPA) were unconstitutional.

The Plaintiffs filed the suit in the federal Western District Court of Michigan claiming that the MIFPA provisions to transfer the case to tribal court: violated the children’s’ due process rights and discriminated against Indian children based on their race. The ICWA Defense Project assisted the tribal attorneys with research, written memorandums, and technical assistance on the tribe’s response.

The Band defeated the preliminary injunction and filed a motion to dismiss under the doctrine of tribal sovereign immunity as Plaintiffs named tribal officials as defendants in the suit. In January, the parties stipulated to a voluntary motion for dismissal without prejudice. The adoption proceedings are continuing in tribal court.

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VI. California Litigation: In re Alexandria P

In the long running “Lexi” cases, the California courts have repeatedly applied ICWA’s foster care placement preferences to place a Choctaw child with her extended family and siblings living in Utah. When the case began, all parties agreed to place the child in a non-ICWA compliant foster home in order to keep her in California and close to her father. As time went on, however, the child’s permanency plan changed from reunification to permanency, and California Child Protective Services and the Choctaw Nation identified the child’s extended family in Utah as a first-tier ICWA placement.

The foster family appealed the placement decision to the California Court of Appeals, which remanded and reheard the case on three separate occasions. In July 2016, the Court of Appeals issued its final decision, holding the trial court correctly applied ICWA and the affirmed the child’s placement with her family in Utah. The foster family appealed to the California Supreme Court, which denied further review.

The foster family has now taken its fight to the U.S. Supreme Court by filing a petition for writ of certiorari. Briefings in the petition for writ of certiorari were completed on December 20, 2016 and will be considered by the Court during the January 6, 2016 conference.

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In addition to the federal cases listed above, the ICWA Defense Project monitors important cases in both federal and state courts, including on-going cases in Utah, California, Nevada, and Arizona.
How can tribes and allies work together to help defend ICWA?

The ICWA Defense Project has received a number of supportive phone calls, emails, and visits from people wanting to know how they can join the efforts to form a unified response to these attacks on ICWA. The ICWA Defense Project is committed to supporting a strong, collaborative, unified effort, but we will need your help as this work moves forward in the upcoming months.

1. **Educate state and federal policymakers as well as state officials about the need for the updated Guidelines and new Regulations.**

For over 35 years, inconsistent interpretations and implementation of ICWA’s provisions have left practitioners unsure of its application, while families, adoptive parents, and children were left unprotected under the law. The revised Guidelines and new Regulations provide the clarity and certainty that Native children and families deserve. We encourage tribes to contact policymakers and state officials to share information about the updated Guidelines and new Regulations and why they are so critically necessary. More information is available to help guide these conversations [here](#) and [here](#). If you are interested in supporting these efforts and need information please contact David Simmons ([desimmons@nicwa.org](mailto:desimmons@nicwa.org)) at NICWA or John Dossett ([jdossett@ncai.org](mailto:jdossett@ncai.org)) and Julian Nava ([jnava@ncai.org](mailto:jnava@ncai.org)) at NCAI.

2. **Contact your State Attorney General and/or Child Welfare Services Agency.**

A factor that may influence the outcome in these cases—particularly if they are appealed—is the filing of amicus briefs or motions to intervene by state child welfare agencies. We encourage tribes to discuss these cases with their state’s attorney general and children’s services agency now. Specifically, we encourage tribes to remind these entities of:

- State law, policies, or tribal-state agreements that support ICWA and positive tribal-state relations
- Previous support of ICWA during other cases (state or federal);
- The importance of ICWA both to tribal sovereignty and to the well-being of American Indian and Alaska Native children and families;
- The need for the revised ICWA Guidelines and new binding ICWA Regulations.

Some state attorneys general have already been approached with requests to support anti-ICWA litigation positions. As such, it is incredibly important constituents immediately contact state attorneys general and children’s services agencies to ensure these state government agencies stand with Indian Country and ICWA.

In many states, tribal and state representatives, including child welfare agencies and judicial staff, meet regularly to discuss issues relevant to ICWA policies and procedures. These are ideal venues to encourage state child welfare officials and attorneys general to support ICWA. We
encourage tribes and tribal child welfare staff and program directors to discuss these cases in these meetings and invite state officials into the discussion.

The ICWA Defense Project encourages tribes to use our tools, materials, and messaging when having these conversations. If you are interested in supporting these efforts and need additional information please contact Matt Newman at NARF (mnewman@narf.org), Kate Fort at the ICWA Appellate Project (fort@law.msu.edu), or David Simmons at NICWA (desimmons@nicwa.org).

3. Work with us on a coordinated legal response.

The ICWA Defense Project is working on coordinating the tribal response in each state where litigation has arisen, as well as across Indian Country. We are identifying opportunities for intervention and amicus briefs, and locating attorneys and local experts to help support and coordinate these various efforts. It is important that filings and statements from Indian Country support coordinated tribal positions and avoid repetitive or contradictory arguments. If you would like to learn more about these efforts or if your tribe or organization is interested in joining in efforts to file amicus briefs or motions to intervene please contact attorneys Matt Newman (mnewman@narf.org) or Erin Dougherty Lynch (dougherty@narf.org) at NARF. If you would like to be added to a list of tribes and individuals who will receive updates on the work of the ICWA Defense Project and action items to support these efforts, please contact Cherokee Nation Assistant Attorney General Chrissi Ross Nimmo (chrissi-nimmo@cherokee.org) and Kate Fort director of the ICWA Appellate Project at Michigan State University College of Law (fort@law.msu.edu).

4. Alert the ICWA Defense Project to other cases.

Please contact us to let us know if you or your tribe is involved in a child welfare case where any attorney is arguing that ICWA does not apply or that ICWA is unconstitutional. In addition, if your tribe is involved in an ICWA appeal and would like strategy or amicus support, please let us know. Because we are seeing a pattern of legal arguments across children’s cases nationwide, we would be happy to provide legal assistance to tribes seeking to counter these claims. For more information please contact Kate Fort at the ICWA Appellate Project at Michigan State University College of Law (fort@law.msu.edu).

5. Work with us on a coordinated media response.

Partner organizations have launched a collaborative national communications strategy to counter the media attacks already underway from anti-ICWA special interests. Because it is critical to recalibrate the narrative and aggressively push back on the campaign of misinformation and discriminatory attacks on Native Americans, we will need substantial support from Indian Country to do this vital work. Help us identify families willing to share their ICWA success stories with the media. Participate in messaging and media outreach webinars, and ask your tribal leaders to do so as well. Support and contribute to our social media campaigns. Use our materials and resources to draft letters to your editor, op-eds, and blog posts. Build consensus
within your tribal community that this work is worth investing in. If you are interested in supporting these efforts or have been contacted by a media outlet, please contact Erin Dougherty Lynch at NARF (dougherty@narf.org) or Kate Fort at the ICWA Appellate Project (fort@law.msu.edu).

6. **Fundraise.**

As with previous efforts to defend ICWA, there are considerable costs associated with developing a strong response. Tribes have been very generous with their support for similar efforts, and we are greatly appreciative. Funds raised will help to cover the costs of legal fees, the national media campaign, and the significant internal costs currently being absorbed by the non-profit organizations leading the ICWA Defense Project. Please consider fundraising or donating to the organizations coordinating this effort by contacting Kim Christenson (kchristensen@nicwa.org) at NICWA, Morgan O’Brien (morgan@narf.org) at NARF, Jamie Gomez (Jamie_Gomez@ncai.org) at NCAI, or Kate Fort at MSU College of Law (fort@law.msu.edu).

Thank you for your interest in this work and your dedication to ICWA and the well being of Native children and families.