CASE NUMBER 10-6239

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHRISTOPHER YANCEY,
Appellant,
v.
TIMOTHY THOMAS and TAMMY THOMAS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
DISTRICT COURT CASE NUMBER CIV 09-597 C
HONORABLE ROBIN CAUTHRON, DISTRICT JUDGE

BRIEF FOR APPELLANT CHRISTOPHER YANCEY

Jerry L. Colclazier, OBA #13814
COLCLAZIER & ASSOCIATES
404 North Main Street
Seminole, OK 74868
Telephone: (405) 382-1212
Facsimile: (405) 382-1214
-and-
Barbara Smith, OBA #14670
401 E. Boyd
Norman, OK 73069
Telephone: (405) 447-2224
Facsimile: (405) 447-4577
ATTORNEYS FOR APPELLANT

January 3, 2011

Oral Argument Not Desired

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES ii

TABLE OF AUTHORITIES. iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 5

SUMMARY OF THE ARGUMENT 10

ARGUMENT AND AUTHORITIES. 11

I. THE STANDARD OF REVIEW. 11

II. TITLE 25 U.S.C. §1914 MANDATES FEDERAL REVIEW OF STATE COURT ICWA DECISIONS 13

III. NEITHER THE FULL FAITH AND CREDIT CLAUSE OR TITLE 28 U.S.C. §1738 BAR FEDERAL COURT REVIEW UNDER SECTION 1914 16

IV. THE STATE COURTS VIOLATED THE ICWA 23

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 33

CERTIFICATE OF SERVICE 34

EXHIBIT 1: FINAL ORDER AND MEMORANDUM DECISION . . 35

CERTIFICATE OF INTERESTED PARTIES

In accordance with 10th Cir. R. 46.1, the undersigned attorney hereby appears as counsel for the Appellant/Plaintiff Christopher Yancey in the subject case.

Further, in accordance with 10th Cir. R. 46.1 , the undersigned certifies that there are no interested parties and/or attorneys not otherwise disclosed, who are now or have been interested in this litigation or any related proceeding.

TABLE OF AUTHORITIES

CASES:

Schy v. Susquehanna Corp.
419 F.2d 1112, Fed. Sec. L. Rep. (CCH) 92548 (7th Cir. 1970). . . . 11

Kennedy v. Tangipahoa Parish Library Bd. of Control
224 F.3d 359 (5th Cir. 2000), *reh'g and reh'g en banc denied*,
239 F.3d 367 (5th Cir. 2000). 12

Cottrell, Ltd. v. Biotrol Intern., Inc.
191 F.3d 1248 (10th Cir. 1999). 12

Horwitz v. Board of Educ. of Avoca School Dist. No. 37
260 F.3d 602 (7th Cir. 2001). 12

Duran v. Carris
238 F.3d 1268 (10th Cir. 2001). 12

Chance v. Armstrong
143 F.3d 698 (2d Cir. 1998) 12

Woodford v. Community Action Agency of Greene County, Inc.
239 F.3d 517 (2d Cir. 2001). 12

McCall v. Pataki
232 F.3d 321 (2d Cir. 2000). 13

Lada v. Wilkie
250 F.2d 211 (8th Cir. 1957). 13

Tauzin v. Saint Paul Mercury Indem. Co.
195 F.2d 223 (5th Cir. 1952). 13

Kent v. Walter E. Heller & Co.
349 F.2d 480 (5th Cir. 1965). 13

Mississippi Band of Choctaw Indians v. Holyfield,
490 U.S. 30, 54, 109 S.Ct. 1597, 1611, 104 L.Ed.2d 29, 50 14

Doe v. Mann
285 F.Supp. 2d 1229 (9th Cir. 2003). 15

Kiowa Tribe of Okla. v. Lewis,
777 F.2d 587(10th Cir. 1985) 16

Comanche Indian Tribe v. Hovis,
53 F.3d 298 (10th Cir. 1995) 16

Methvin v. Methvin,
1942 OK 176, 127 P2d 186. 18

Coppedge v. Clinton,
72 F2d 531 (10th Cir.1934). 18

Roman-Nose v. New Mexico Dept. Of Human Services,
967 F.2d 435 (10th Cir. 1992). 19

Morrow v. Winslow,
94 F.3d 1386 (10th Cir. 1996). 19

Doe v. Mann,
415 F.3d 1038 (9th Cir. 2005). 21

Montana v. Blackfeet Tribe of Indians,
471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). 22

In the Interests of Mahaney,
20 P.3d 437 (Wash.2001). 27

In re Adoption of M.T.S.,
489 N.W.2d 285 (Minn.App.1992) 27

State ex rel Juvenile Department v. Tucker,
710 P.2d 793 (Ore.1985). 27

Guardianship of K.L.F,
608 A.2d 1327 (N.J. 1992). 28

In the Matter of C.H.,
997 P.2d 776 (Mont. 2000). 28

In the Interests of L.J.,
220 Neb.102, 368 N.W.2d 474, 483. 28

In re Custody of S.E.G.,
521 N.W.2d 510 (Minn. 1994). 29

In re Welfare of M.S.S,
465 N.W.2d 412 (Minn.App 1991). 29

In re Pima County Juvenile Action,
635 P.2d 187 (Ariz.App. 1981). 30

OTHER AUTHORITY:

Title 25 U.S.C. §1901 1

Title 28 U.S.C. §1331. 1

Title 28 U.S.C. §1343. 1

Title 28 U.S.C. §1332. 1

Title 25 U.S.C. §1914. 1

28 U.S.C. § 1783. 16

25 U.S.C. § 1901-1963. 23

25 U.S.C.§ 1912 (f). 23

25 U.S.C.§ 1911 (b). 24

H.R.Rep No. 1386, 95th Cong., 2d Sess. 9, P.24 (1978) 25

Guidelines for State Courts; Indian Child Custody Proceedings,
Federal Register 67,593 27

The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique,
52 Amer.J. Orthopsychiatry, 223, 226 (1982) 28

PRIOR OR RELATED APPEALS

Yancey v. Bonner, Case no. 08-6220

JURISDICTIONAL STATEMENT

This action arose under the Indian Child Welfare Act (ICWA), Title 25 U.S.C. § 1901, *et.seq*. The District Court had jurisdiction of the cause pursuant to Title 28 U.S.C. §1331, Title 28 U.S.C. §1343, and Title 28 U.S.C. §1332.

The United States Court of Appeals has jurisdiction pursuant to Title 28 U.S.C. §1291, as the District Court order represents a final decision terminating all matters as to all parties and causes of action.

STATEMENT OF ISSUES PRESENTED

1. Whether the Indian Father has a right to have his state court termination of parental rights decision reviewed by the federal court pursuant to Title 25 U.S.C. §1914?
2. Whether the Trial Court properly dismissed the case?

STATEMENT OF THE CASE

This case is about a young Indian man, Christopher Yancey (hereinafter the "Father" and "Yancey") who, as a minor, impregnated his girlfriend (also a minor, hereinafter the "Mother"). A few months later, the Mother decided that she wasn't ready for motherhood, and broke up with him, lying that she had miscarried. Later still, the Mother found an adoption attorney, who was able to quickly connect her with a couple from out of state who wanted to adopt the child. The adoption attorney

told the pregnant child that she would have to come clean with the Father, which she did at the Father's job, late in the pregnancy. She and her family surprised the Father with the fact that she was still pregnant, that they were going to adopt out the child, and told him that there was nothing the young man could do to stop that adoption.

When the baby was born, the Father tried to go see his son, but was prevented from visiting the child upon the orders of the Mother and adoptive parents. Within days of birth, the baby was whisked off to Missouri by the adoptive parents, who knew full well that the Father opposed the adoption and wanted to raise his child. The adoptive parents then commenced an action to terminate the Father's parental rights shortly thereafter. The Father commenced a custody action in Seminole County, where both the Mother and Father, both sets of grandparents, and all of the witnesses who testified at the ultimate trial, resided.

After the trial court in Oklahoma County determined that it had jurisdiction, the matter came on for trial, at which time the Court ruled that the ICWA applied and continued the case so the Act could be followed. After moving the case to Cleveland County, the case was tried to conclusion and, not surprisingly, the Father's parental rights were terminated. The trial court determined that: 1) neither the ICWA nor the Oklahoma Indian Child Welfare Act ("OICWA") were relevant because the "existing Indian family exception" as recognized in Oklahoma, controlled the Indian child

custody proceeding; and 2) the child was eligible for adoption without the consent of the father because he had neglected to contribute to the support of the mother to the extent of his financial ability during the pregnancy.

The Father appealed and the Oklahoma Supreme Court granted certiorari and held that: 1) the "existing Indian family exception" was no longer a viable doctrine in Oklahoma insofar as Indian child custody proceedings are concerned; and 2) even if it were, the evidence was insufficient in the case to support a finding that the child was eligible for adoption without the consent of the father. The adoption failed. Immediately thereafter, the Father filed a motion for emergency hearing on remand demanding a return of custody of his son, or at a minimum, visitation, which was denied.

On January 24, 2006, the adoptive parents filed a new petition for adoption in the same, failed adoption case, as well as a fourth application to terminate the Father's parental rights. In a custody hearing, the Appellee correctly ruled that ICWA applied, but found that the adoptive parents had proven by clear and convincing evidence that due to the length of time that the child had been with the prospective adoptive parents, a change of custody to the Father would likely result in severe emotional damage to the child. As such, the Court incorrectly found that good cause had been shown to avoid the ICWA placement preferences.

On January 28, 2008, the Father filed a motion to transfer the case to Tribal Court, as provided under ICWA. On February 21, 2007, the adoptive parents filed yet a fifth application to terminate the Father's parental rights. On February 19, 2008, the Trial Court denied the Father's motion to transfer and determined that the prospective adoptive parents had proven, by clear and convincing evidence, that the Father had failed to support the child (despite never being ordered to do so) for the period of twelve out of the fourteen months preceding the application to terminate. The Court further determined that the Father had failed to establish or maintain a substantial and positive relationship with the child during the same period. Once again, the Trial Court ignored the clear mandates of ICWA, holding for the "kidnappers" argument, that the prospective adoptive parents had, albeit wrongfully, custody of the child for so long that it would be "dangerous" to the child to allow the Father either custody or visitation. Father attempted federal court review twice, but the court abstained from hearing the cases.[1] The state court ultimately terminated the Father's parental rights and the Father filed the instant complaint. The Respondents moved to dismiss, and the Court dismissed the case. From that final order, Appellant filed this timely appeal.

---

[1] When the Father filed his first complaint in federal court against the Trial Judge pursuant to Section 1914 of the ICWA, the adoptive parents' attorneys (Charles Alden) provided "free" legal services to the judge, raising the question whether the Appellee could remain unbiased while being defended in Court by "free" counsel provided by one of the litigants.

STATEMENT OF FACTS

1. Baby Boy L. was born out of wedlock on October 4, 2002; Yancey is the undisputed father.(Aplt.App. at 5, ¶4). The Mother was 16 years old at the time she became pregnant; Yancey was 17 years old at the time.(Aplt.App. at 5, ¶4). There is no dispute that Yancey is a member of the Muscogee (Creek) Indian Nation of Oklahoma. (Aplt.App. at 5, ¶5). The Mother lived with Yancey from January, 2002, until early May, when she moved out. (Aplt.App. at 5, ¶6). Shortly after she moved out, the Mother told the Father, in an effort to break off the relationship with him, that she had miscarried and lost the baby. (Aplt.App. at 5, ¶6).

2. In July, 2002, the Mother came to a decision to place the baby for adoption. (Aplt.App. at 5, ¶7). On July 19, 2002, the Mother met with the attorney for the prospective adoptive parents, where she told the attorney that she had lied to the Father about losing the baby and that the Father may be unaware of the pregnancy. (Aplt.App. at 5, ¶7). Upon the advice of the attorney, the Mother went to the Father's job and informed him that she was "still pregnant", almost eight months pregnant. (Doc.No.1, Complaint, ¶7). The Father immediately offered support to the Mother, which offer was rejected, telling the Father that her attorney had advised her not to accept any support from the Father. (Aplt.App. at 5, ¶7). The Father contacted Indian Legal Aid and even filled out an application, which after a long waiting

period, was denied. (Aplt.App. at 6, ¶7).

3. On October 4, 2002, Baby Boy L. was born. (Aplt.App. at 6, ¶8). Yancey learned of the birth through third parties, and went to the hospital and attempted to make contact with his baby. (Aplt.App. at 6, ¶8). The Father was informed by the Mother and hospital staff that he could have no contact with the baby and that he must leave immediately. (Aplt.App. at 6, ¶8). Again, the Father offered support to the Mother, which was rejected, and he was told that "the adoption was already through, and all the paperwork was done" and that there was nothing he could do. (Aplt.App. at 6, ¶8). Shortly thereafter, being barred from even a glimpse by his Father, the baby was transported to Missouri to the home of the prospective adoptive parents where he has resided since that time. (Aplt.App. at 6, ¶8).

4. On October 10, 2002, the Mother relinquished her parental rights in Oklahoma County and a petition was filed to terminate the Father's parental rights so the child could be adopted without the Father's consent; the petition made only one allegation; that the Father failed to contribute to the Mother during pregnancy. (Aplt.App. at 7, ¶9). After the Trial Court in Oklahoma County determined that it had jurisdiction, and ruled that the Indian Child Welfare Act (ICWA) applied, the case was continued so the Tribe could be formally notified and allowed to intervene. (Aplt.App. at 7, ¶11). On December 26, 2002, a second adoption case was filed in

Cleveland County[2] and the Oklahoma County action was dismissed.(Aplt.App. at 8, ¶12). The case was tried to conclusion in Cleveland County and the Father's parental rights were terminated. (Aplt.App. at 8, ¶12). The trial court determined that: 1) neither the Indian Child Welfare Act ("ICWA") or the Oklahoma Indian Child Welfare Act ("OICWA") were relevant because the "existing Indian family exception" as recognized in Oklahoma controlled the Indian child custody proceeding; and 2) the child was eligible for adoption without the consent of the father because he had neglected to contribute to the support of the mother to the extent of his financial ability during the pregnancy. (Aplt.App. at 8, ¶12).

5. The Father appealed, and the Oklahoma Supreme Court granted certiorari and held that: 1) the "existing Indian family exception" was no longer a viable doctrine in Oklahoma insofar as Indian child custody proceedings are concerned; and 2) even if it were, the evidence was insufficient in this case to support a finding that the child was eligible for adoption without the consent of the

---

[2] That was not the first time that the Mother's counsel moved a case from Oklahoma County to Cleveland County after the original trial court determined that the Indian Child Welfare Act would apply. Indeed, in the matter of the *Adoption of Baby Girl B*, 2003 OK CIV APP 24, adoption proceedings were originally filed in Oklahoma County, which on April 13, 2001, ruled that the ICWA applied. The adoptive parents requested and were granted a stay in order to seek appellate relief. However, similar to the case at bar, counsel then dismissed the Oklahoma County case and filed new adoption and termination proceedings in Cleveland County.

father. (Aplt.App. at 8, ¶13). The adoption supposedly failed.

6. On December 22, 2004, the Father filed a motion for emergency hearing on remand demanding a return of custody of his son, or at a minimum, visitation. (Aplt.App. at 8, ¶13). On January 12, 2005, the Court denied the motion. (Aplt.App. at 8, ¶13). The next day, the prospective adoptive parents filed notice of a third application for termination of rights (in the same failed adoption case), this time asserting that the Father had not supported the child during the appeal process. (Aplt.App. at 8, ¶13). Father filed a motion for temporary custody and to dismiss the case and transfer it to the court of origin, Seminole County. (Aplt.App. at 9, ¶14).

7. On January 24, 2006, the adoptive parents filed a new petition for adoption in the same, failed adoption case, as well as a fourth application to terminate the Father's parental rights. (Aplt.App. at 9, ¶16). On February 14, 2006, the Trial Court convened a custody hearing, ruled that ICWA applied, but found that the adoptive parents had proven by clear and convincing evidence that custody of the minor child by the Father was likely to result in severe emotional damage to the child (Aplt.App. at 9, ¶16). The Court found that good cause had been shown to avoid the ICWA placement preferences. (Aplt.App. at 9, ¶16). That Order was wholly unsupported by competent evidence, and clearly in violation of ICWA. The Oklahoma Court of Civil Appeals, as well as the Supreme Court, ignored the clear

mandates of ICWA and affirmed the Trial Court.(Aplt.App. at 9, ¶16).

8. On February 21, 2007, the prospective adoptive parents filed a fifth application to terminate the Father's parental rights. (Aplt.App. at 9, ¶17). On January 28, 2008, the Father filed a motion to transfer the case to Tribal Court. (Aplt.App. at 9, ¶17). On February 19, 2008, the Trial Court denied the Father's motion to transfer and determined that the prospective adoptive parents had proven, by clear and convincing evidence, that the Father had failed to support the child (despite never being ordered to do so) for the period of twelve out of the fourteen months preceding the application to terminate.(Aplt.App. at 10, ¶17). The Court further determined that the Father had failed to establish or maintain a substantial and positive relationship with the child during the same period. (Aplt.App. at 10, ¶17). Solely in order to protect his appellate rights, the Father appealed that decision to the Oklahoma Supreme Court.

9. On May 20, 2008, before the record was assembled or any briefing was filed in the state court appeal, the Father filed a complaint (Yancey I., CIV-08-539) in federal court. The federal court abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and dismissed the case. The Father appealed to this Court, which affirmed. (Case No. 08-6220, incorporated herein by reference).

10. Having been denied federal court review, the Father proceeded on the

state appeal, and on September 18, 2008, the Oklahoma Court of Civil Appeals affirmed. (Aplt.App. at 40). On December 1, 2008, the Oklahoma Supreme Court denied certiorari. (Aplt.App. at 59).

11. On June 5, 2009, the Father filed a second complaint (Yancey II., CIV-09-597) in federal court. Determining that the state court adoption had not yet been completed at the trial court level, the federal court again abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and dismissed the case.

12. On May 18, 2010, the state trial court terminated the parental rights of the Father. (Aplt.App. at 93). That Order is now final, although the status of the adoption is unknown. On May 19, 2010, the Father filed the instant case in federal court. On September 20, 2010, the Trial Court dismissed the case with prejudice. From that Order, the Father timely filed this appeal.

SUMMARY OF THE ARGUMENT

The ICWA protects Indian Fathers from having their parental rights terminated by state court judges without evidence beyond a reasonable doubt that their custody of their child, in terms of that parent's actions, is likely to result in serious emotional or physical damage to the child, and, that active efforts have been made to remediate that perceived harm, and those efforts have proven unsuccessful. In the case at bar,

the child was wrongfully, without notice and hearing, taken from his Father. Thereafter, even recognizing the mistake, the state courts have adopted the myth that removing the child from his prospective adoptive parents constitutes serious emotional or physical damage to the child sufficient to obviate the express dictates of ICWA.

Title 25 U.S.C §1914 provides that an aggrieved parent may petition a "court of competent jurisdiction" to review, and "invalidate" any actions which violate ICWA. The only way that statute makes sense is if a "court of competent jurisdiction" is a federal court reviewing the decisions of the state court, either at the trial court or even after appellate review. Congress did not intend for the state courts to thumb their noses at the ICWA, while the federal courts either abstain, or give res judicata effect to the faulty state court decisions that caused the problem in the first place. Yancey has a statutory right to the federal review of the state court decisions.

ARGUMENT AND AUTHORITIES

I.

THE STANDARD OF REVIEW

A motion to dismiss the complaint may be made by the defendant for failure to state a claim upon which relief can be granted, and granted by the court on such

grounds. Fed. R. Civ. P. Rule 12(b)(6): *Schy v. Susquehanna Corp.*, 419 F.2d 1112, Fed. Sec. L. Rep. (CCH) 92548 (7th Cir. 1970). Motions to dismiss on such grounds are viewed with disfavor in the federal courts because of the possible waste of time in the case should the dismissal be reversed and because the primary objective of the law is to obtain a determination of the merits of any claim. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359 (5th Cir. 2000), *reh'g and reh'g en banc denied*, 239 F.3d 367 (5th Cir. 2000).

Granting the defendant's motion to dismiss for failure to state a claim is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading, but also to protect the interests of justice. *Cottrell, Ltd. v. Biotrol Intern., Inc.,* 191 F.3d 1248 (10th Cir. 1999). Such motions assume the truth of a pleading's factual allegations and their inferences. *Horwitz v. Board of Educ. of Avoca School Dist. No. 37*, 260 F.3d 602 (7th Cir. 2001). The court must assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted. *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001).

It may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test; the issue is whether the plaintiff is entitled to offer evidence to support the claims. *Chance v. Armstrong*, 143 F.3d 698 (2d Cir. 1998): *Woodford v. Community Action Agency of Greene County, Inc.*, 239 F.3d 517 (2d Cir.

2001). A motion to dismiss challenges the legal sufficiency of the complaint to state a cause of action, and a complaint must be upheld, as against a motion to dismiss, as long as it states a claim on which relief can be granted, or if any valid claim may be proved under it, baseless though the claim may eventually prove to be, and inartfully as the complaint may be pleaded. *McCall v. Pataki*, 232 F.3d 321 (2d Cir. 2000). If the facts alleged reveal that the plaintiff is entitled to any relief *(Lada v. Wilkie*, 250 F.2d 211 (8th Cir. 1957); or any kind of relief (*Tauzin v. Saint Paul Mercury Indem. Co.*, 195 F.2d 223 (5th Cir. 1952); or if the plaintiff can recover on any set of facts which may be proved under the allegations as laid, the complaint should not be dismissed. *Kent v. Walter E. Heller & Co.*, 349 F.2d 480 (5th Cir. 1965).

II.
TITLE 25 U.S.C. §1914 MANDATES FEDERAL REVIEW OF STATE COURT ICWA DECISIONS

Section 1914 of the ICWA specifically provides for the judicial review of state court decisions:

> "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."

Two questions arise from this statute. First, what constitutes a "court of competent jurisdiction"; and secondly, what "actions" are reviewable by that court? To answer these questions, one must look to the history of ICWA and Section 1914.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989), the Supreme Court analyzed the history behind the passage of the ICWA in 1978. The Court said that the ICWA was the "product of rising concern" over the consequences to Indian children, families and tribes, of "abusive child welfare practices" that resulted in the separation of large numbers of Indian children from their families by placing them in non-Indian homes. *Id.* at 32. The cause of the problem centered around "state authorities", at the top of which were the state courts, who provided the judicial approvals of those same "abusive child welfare practices", which resulted in such widespread damage to native Americans. *Id.* at 44, ("State courts and agencies and their procedures share a large part of the responsibility" for the crisis threatening "the future and integrity of Indian tribes and Indian families", 124 Cong.Rec. 38103 (1978)(letter from Morris K. Udall to Assistant Attorney General Patricia M. Wald); cited by *Holyfield* at 45, fn.18. The Court specifically noted that the state courts were exactly the problem that Congress intended to correct, having "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities

and families". *Id.* at 45.

One cannot seriously contend, in light of this historical distrust of the state courts, that Congress intended those same state courts to serve as "courts of competent jurisdiction". A better example of the fox guarding the henhouse could not be found. The only rational interpretation is that Congress intended the federal courts to serve as courts of competent jurisdiction, to review and invalidate, if necessary, the decisions of the state courts which violate the ICWA. As stated by the Ninth Circuit in *Doe v. Mann*, 285 F.Supp.2d 1229 (2003):

> "[Plaintiff] is clearly requesting this court to "invalidate" the state court's termination of her parental rights and placement of Jane in foster care. "Invalidation" by definition requires the court to revisit the state court proceeding and overturn the decision. In addition, by a process of elimination, a "court of competent jurisdiction" must include inferior federal courts, or the provision is meaningless. If the section only referred to state appellate courts, there would be no need for Congress to create this cause of action; [plaintiff] already has the right to appeal an adverse decision to [state] higher courts."

Having established that the only logical interpretation of Title 25 U.S.C §1914, is that the federal courts have the duty, and obligation, to review the state court actions, the question remains as to what "actions" are reviewable, and when. Obviously, a trial court decision terminating an Indian parent's parental rights, as in the case at bar, would be reviewable. If the trial court's decision is reviewable, does one lose federal review because he avails himself of state court appellate review? In

light of the fact that the problems created by the state courts which precipitated the ICWA, were not only faulty trial court decisions, but also the, just as faulty, appellate decisions, it makes no sense to eliminate federal court review if a litigant attempts to first exhaust his state court appeal, before or concurrent to, federal court review.

It is clear that Congress intended the federal courts to serve as "courts of competent jurisdiction" to review the decisions of both state trial courts and state appellate courts, whenever sought. In this case, the federal Trial Court should have reviewed the state court decision, regardless of whether it was presented before or after the state court appeal.

III.

NEITHER THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION OR TITLE 28 U.S.C. §1738 BAR FEDERAL COURT REVIEW UNDER SECTION 1914

The Trial Court found that Section 1914 "does not trump the Full Faith and Credit Clause of the Constitution and/or the principles of comity outlined in 28 U.S.C. §1738.", and cited to the cases of *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587 (10th Cir. 1985) and *Comanche Indian Tribe of Okla. v. Hovis*, 53 F.3d 298 (10th Cir. 1995). Both of these cases are inapposite to the case at bar and fail to support the

Trial Court's dismissal.

In the *Kiowa* case, decided before the landmark *Holyfield* case, the facts are uniquely similar to the case at bar. The child involved was born out of wedlock, with an Indian father and a non-Indian mother. *Id*. at 589. The mother consented to adopt out the child to white adoptive parents, who took immediate custody. *Id.* The father was incarcerated, and was later found to be unfit and his parental rights were severed. *Id.* At that point the differences between the Kiowa case and the case at bar become legally and substantially significant. Unlike in the case at bar, the Kiowa Tribe appealed that decision to the Kansas Supreme Court, and exhausted that state's appellate process, all *before* filing in the federal forum. In the instant case, the Father twice attempted to go into federal court[3], before his parental rights were terminated by the state trial court on May 18, 2010.

The *Kiowa* case is distinguishable for a second reason. In *Kiowa*, this Court affirmed the District Court's dismissal of the federal court action on the grounds of *res judicata,* stating that the Tribe could not relitigate in federal court those claims it lost in the Kansas state court and Kansas Supreme Court. However, in *Kiowa*, the underlying judgment was final, having been appealed to the highest state court. That

[3] Case no. CIV-08-539 was filed on May 20, 2008; Case no. CIV-09-597 was filed on June 5, 2009.

would not apply to this case, because both times Yancey went into federal court, the order terminating parental rights had not yet even issued, much less been appealed and decided by the Oklahoma Supreme Court. In Oklahoma, a judgment is not final until the highest appellate court has decided the case. *Methvin v. Methvin,* 1942 OK 176, 127 P2d 186. In *Methvin*, the Court said:

> "It is the general rule that a judgment is not final in the sense that it is conclusive upon the parties until the losing party has failed, within the time allowed by law, to perfect his appeal, or having properly perfected his appeal, until the highest court whose decision is invoked by either party upholds the decision of the trial court."

The Tenth Circuit recognized this holding in *Coppedge v. Clinton,* 72 F2d 531 (10th Cir.1934), when it held that a judgment of an Oklahoma state court, from which an appeal was pending in the Supreme Court of Oklahoma, was held under Oklahoma law not to be a bar under the doctrine of res judicata to a suit involving the same issues between the same parties in a Federal court. Consequently, the holding that §1914 would not allow for federal court review "after the state court has rendered a final judgment", would not be applicable to the case at bar.

If this Court intended to state that §1914 review can never be had in federal court after the adoption case has been commenced in state court[4], then that is not

[4] "It seems rather to state simply where such actions may initially be brought". *Id.* at 592.

supported by the statute itself, or any directive from the Supreme Court, and would make the entire statute meaningless. Indeed, since adoption cases are always "brought" in a state or tribal forum, and in this case, was brought in state court by the adoptive parents, the federal courts could never be courts of competent jurisdiction. Such an interpretation was certainly not promoted by this Court in *Roman-Nose v. New Mexico Dept. Of Human Services*, 967 F.2d 435 (10th Cir. 1992). In *Roman-Nose*, this Court held that the federal court ***was*** an appropriate forum to review a final state termination order. Under that authority, the Trial Court clearly erred in dismissing this case.

If abstention is proper before the state trial court rules on the ICWA issues (whose forum was selected by the Respondents), and is res judicata after the state court rules, then §1914 makes no sense. As stated in the dissent in *Morrow v. Winslow*, 94 F.3d 1386 (1996):

> "Moreover, given our holding in *Kiowa Tribe of Okla. v. Lewis,* 777 F.2d 587, 590-92 (10th Cir.1985), *cert. denied,*479 U.S. 872, 107 S.Ct. 247, 93 L.Ed.2d 171 (1986), that section 1914 may not be used to challenge the legality of a state custody determination *after* a final decision has been made in the state courts, the majority's proposal to require abstention until that final decision has been made will in essence strip section 1914 of any meaningful application whatsoever."

Where *Morrow* was fatal to the Father in *Yancey I.* and *II.*, that case strongly supports not only a denial of this motion to dismiss, but also a §1914 federal court

review of the now completed state court termination of parental rights. In *Morrow,* the plaintiff was an Indian who fathered a child with a non-Indian who placed the child for adoption without plaintiff's consent. 94 F.3d at 1388. The plaintiff objected to the adoption and the state court trial judge set the matter for a hearing to determine whether the plaintiff's consent was necessary for the adoption. *Id.* It was at this point that the plaintiff went into federal court; right in the middle of the state court termination of parental rights proceeding. As highlighted by this Court in *Yancey I.* and *II.*, the *Morrow* court abstained from interfering in an **ongoing** state court judicial proceeding. However, while abstaining from the review of an ongoing state proceeding, the Tenth Circuit also set out the guidelines and appropriateness of the *post-judgment* review of ICWA decisions by a federal court, directly applicable to the case at bar.

In analyzing whether the federal courts should exercise jurisdiction to review completed state court ICWA decisions, the Tenth Circuit in *Morrow* first discussed that the ICWA was designed to protect the best interests of Indian children and parents from, *inter alia*, "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption and foster care placement, usually in non-Indian homes". *Id.* at 1394. The Court said:

> "As part of this protection, § 1914 allows a petition to invalidate a state court . . . termination of parental rights action on the grounds that it violated §§ 1911, 1912, or 1913, to be brought in any court of competent jurisdiction. We have held that federal district courts have jurisdiction under 28 U.S.C. § 1331 over complaints in which a plaintiff alleges a violation of §§ 1911, 1912, or 1913. *Roman-Nose v. New Mexico Dep't of Human Services,* 967 F.2d 435, 437 (10th Cir.1992). Morrow alleged violations of §§ 1912 and 1913, and therefore, under § 1914 and *Roman-Nose*, we believe there is jurisdiction to hear Morrow's claims in either federal or state court since those courts fall within the definition of "any court of competent jurisdiction" in § 1914."

Id. Although the Tenth Circuit in *Morrow* did not reach the res judicata or *Rooker-Feldman* issues, in *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005), the Ninth Circuit ruled that the *Rooker-Feldman Doctrine*[5] would not prevent federal court review of state decisions under 25 U.S.C. §1914. In Mann, an Indian mother challenged the state's authority to terminate her parental rights, and a year and a half after her rights were terminated, the mother brought an action in federal court. *Id*. The Court addressed whether a federal court could essentially hear the appeal of the state court

---

[5] *Rooker-Feldman* refers to two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). In simple terms, "[u]nder Rooker-Feldman, a federal district court is without subject matter jurisdiction to hear an appeal from the judgment of a state court." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 896(9th Cir.2003).Typically, the *Rooker-Feldman* doctrine bars federal courts from exercising subject-matter jurisdiction over a proceeding in "which a party losing in state court" seeks "what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

case, said:

> "[B]y a process of elimination, a "court of competent jurisdiction" must include inferior federal courts, or the provision is meaningless. If the section only referred to state appellate courts, there would be no need for Congress to create this cause of action; Doe already has the right to appeal an adverse decision to California's higher courts. It is highly unlikely that the provision grants tribal courts the power to invalidate state court judgments.
>
> . . . This court finds that section 1914 grants federal courts the power to review state custody proceedings such as those here; therefore, the Rooker- Feldman doctrine does not apply to the action at bar."

Id. at 1045. Responding to the argument that a "court of competent jurisdiction" really referred to the state court's ability to police themselves, the Court held that it was the duty of federal courts to assure, by independent review, that the states are following the mandates of ICWA: "[i]t would thus be ironic indeed if Congress then permitted only state courts, **never believed by Congress to be the historical defenders of tribal interests**, to determine the scope of tribal authority under the Act.". *Id.* at 1046.

Finally, if there is any doubt as to whether section 1914 requires federal court review, such doubts must be resolved in favor of Indians, in this case, the Father. Federal courts are required to liberally construe a federal statute in favor of Indians, with ambiguous provisions interpreted for their benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). The purpose

of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage. Resolving any ambiguity in favor of the Indians yields a conclusion that Indians have a forum in federal court to challenge state child custody decisions. *Doe v. Mann*, 415 F.3d 1038,1047 (9th Cir. 2005)("[w]e thus conclude that § 1914 provides the federal courts authority to invalidate a state court foster care placement or termination of parental rights if it is in violation of §§ 1911, 1912, or 1913.").

IV.
THE STATE COURTS VIOLATED THE ICWA

The ICWA imposes various procedural and substantive obligations on state courts when an "Indian child" is the subject of a child custody proceeding. 25 U.S.C §1901-1963. Pursuant to the ICWA (Title 25 U.S.C §1912(f)), parental rights shall not be terminated absent proof, beyond a reasonable doubt, that continued custody of the child by the Indian parent is likely to result in serious emotional or physical damage to the child. Further, pursuant to §1912(d), parental rights shall not be terminated absent clear and convincing proof that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those programs have proven unsuccessful. Central among these federally mandated obligations are certain limitations on the

exercise of state court jurisdiction. In foster care and parental rights termination proceedings, the state court is required "in the absence of good cause to the contrary" and subject to tribal court declination, to "transfer [the] proceeding to the jurisdiction of the [child's] tribe, absent objection by a parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe." 25 U.S.C §1911(b). The "referral jurisdiction" subsection contains no federal law exception comparable to the proviso in the "exclusive jurisdiction" subsection. Lastly, the ICWA specifically authorizes collateral review of state-court child custody proceeding orders pursuant to Title 25 U.S.C §1914.

This case is a "poster child" for the reason why Congress passed Section 1914 allowing federal courts to review the decisions of the state courts. Based on the established law of the case, the prospective adoptive parents unlawfully transported this Indian baby out of state, and unlawfully barred the Father from any type of relationship with his child. The Supreme Court of Oklahoma has now ruled that not only should the Father have had the more extensive federal protections of ICWA (compared to state law), that even according to the lower state law standards, the termination was unsupported by law or fact. Essentially, in full knowledge that this Indian Father wanted to raise his own Indian child, the prospective adoptive parents kidnaped the child, intending to use the legal system to force a *de facto* adoption

through the passage of time, rather than by legal methods. However, once the "mistake" was addressed by the Oklahoma Supreme Court, instead of immediately returning the child to the Father, the Respondents argued that there was nothing that would ever justify "taking this child from the only home he has ever known"; not ICWA, not OICWA, and not the fact that this Father's parental fitness has never even been called into question. This type of decision is exactly what Congress referred to when it passed Section 1914, fearing Indian child welfare decisions "based on a white middle-class standard which, in many cases, forecloses placement with [an] Indian family". H.R.Rep. No.1386, 95th Cong., 2d. Sess. 9, p.24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

The state court also violated the ICWA by terminating the Father's parental rights for failing to pay child support, something which had never been ordered and which had been refused by the Respondents when it was voluntarily paid by the Father. ICWA does not allow for the termination of rights without proof, beyond a reasonable doubt, that continued custody of the child by the Indian parent is likely to result in serious emotional or physical damage to the child, as well as clear and convincing proof that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those programs have proven unsuccessful.

The justification that length of time with the prospective adoptive parents supports this adoption violates both the letter and spirit of ICWA. Title 25 U.S.C. §1912 (f) provides that parental rights may not be terminated "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The adoptive parents argued to the Appellee that the possibility that the child will experience separation anxiety associated with a change of custody meets the ICWA requirement that the continued custody of the child by the parent or Indian custodian is likely to result in "serious emotional or physical damage to the child". Simply put, symptoms of separation anxiety from a change of custody, cannot as a matter of law, constitute serious emotional or physical damage to the child as a result of the natural Father's custody. The BIA guidelines for state courts addresses this specific issue as follows:

> "The first subsection is intended to point out that the issue of which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically, two questions are involved. First, is it likely that **the conduct of the parents** will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?. . .
>
> Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social

> behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child . . ..
>
> A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else...."

Guidelines for State Courts; Indian Child Custody Proceedings, Federal Register 67593. The purpose of this section is to allow fact specific deviation from ICWA protections in cases where the natural parent is actually dangerous, physically or emotionally, to the child, all judged by the natural parents' "likely future harm"[6]. *In the Interest of Mahaney*, 20 P.3d 437 (Wash. 2001); *In re Adoption of M.T.S.*, 489 N.W.2d 285 (Minn.App.1992); *State ex rel Juvenile Department v. Tucker*, 710 P.2d 793 (Ore.1985)(the state must prove "actual physical or emotional harm resulting from the acts of the parents"). In other words, the issue is not whether the child will suffer separation anxiety as a direct result of the adoptive parents spiriting him off to Missouri knowing that the Father would not consent to the adoption; the issue is whether or not the natural Father's future conduct would actually be dangerous to the

---

[6] Virtually all of the ICWA cases across the country begin with the Indian child being taken from the home by state welfare officials due to abuse or neglect. Petitioner's counsel was unable to locate any cases that started with an illegal private adoption.

child. *State ex rel Juvenile Department v. Tucker*, 710 P.2d 793 (Ore.1985). As stated in the case of *Adoption of M.T.S., a Minor Child*, 489 NW.2d 285 (Minn.1992):

> "Under these standards, placing the child [according to ICWA preferences] is presumptively in his best interests. Although the record indicates that the [adoptive parents] provided [the child] with a loving foster home, the fact that separation from them will be initially painful to [the child] is not good cause to defeat the preference created by the ICWA." (Citations omitted).

In fact, at least one court has opined that if the State had met their duty to protect the child, they would have required frequent and extended visitation with the parent during the litigation and appeals process, which would have greatly decreased any separation anxiety from a change of custody. *Guardianship of K.L.F.*, 608 A.2d 1327 (N.J. 1992). The emotional attachment between a non-Indian custodian and an Indian child should not outweigh the interests of the Tribe in having that child raised in the Indian community. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54, 109 S.Ct. 1597,1611, 104 L.Ed.2d 29, 50. Normal emotional bonding does not constitute an "extraordinary" emotional need to negate the ICWA presumptions. *In the Matter of C.H.*, 997 P.2d 776 (Mont.2000). Some courts have suggested that theories of parental bonding may in fact be relied upon too often to keep children in foster care, rather than return them to their parents. *In the Interests of L.J.*, 220 Neb.102, 368 N.W.2d 474, 483; Malcolm Bush and Harold Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A*

Reappraisal and Critique, 52 *Amer.J. Orthopsychiatry*, 223, 226 (1982).

Several authors have questioned whether the "Anglo" best interest of the child test should even be an element of good cause. Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 Gonz.L.Rev.353, 387 (1992). ICWA appears to be silent on the issue, but the Guidelines suggest that the best interest test has no place in determining good cause. *Guidelines for State Courts; Indian Child Custody Proceedings*, Federal Register 67,593; see also *In re Custody of S.E.G.*, 521 N.W.2d 510(Minn.1994).

One of the more interesting aspects of this case is that if the Father was a convicted sex offender or child molester, under ICWA, his parental rights could not be terminated unless and until the Court determined, by clear and convincing evidence, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. However, this young Father has nothing on his record other than a relentless quest to regain his child. How is it that problem parents seem to be better able to defend their parental rights than their criminal free counterparts? 25 U.S.C.§1912(d) provides in pertinent part:

> "Any party seeking to effect a ... termination of parental rights to an Indian child under state law shall satisfy the Court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

At least one court has held that active efforts to prevent the breakup of the Indian family must be proven beyond a reasonable doubt. *In re Welfare of M.S.S.*, 465 N.W.2d 412 (Minn.App 1991). In the case at bar, NO efforts were provided to prevent the breakup of this Indian family. The total lack of such attempts emphasizes two points in favor of the federal court exercising review over the Defendant's decisions. First, this section of the ICWA was designed to force the state courts, when they were faced with parents who had a myriad of personal problems which made them less than adequate parents, but were not dangerous to the child, to attempt to fix those problems before out-of-home placement was even considered. Of course, in this case, this Father has no such parental or personal shortcomings which would require remediation, which begs the question as to why this child was allowed to be taken from him in the first place. Essentially, the dictates of the ICWA were not followed in 2002, and the only excuse for not following them today is that the Court erred five years ago.

Secondly, this section shows that the ICWA was designed to stop states from doing exactly what they did in this case, taking an Indian child from an Indian father simply because the mother and the white adoptive parents believed that they would provide a better home for the child. The Arizona Court of Appeals spoke to this after a failed adoption of an Indian child in *In re Pima County Juvenile Action*, 635 P.2d

187 (Ariz.App.1981):

> "There is no evidence as to appellant's fitness as a parent or any attempt to preserve the parent-child relationship. In fact, the contrary appears. Appellant was entitled to the return of her child, then only seven months old, when she revoked her relinquishment. Any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to [ICWA]. The evil which Congress sought to remedy by the [ICWA] was exacerbated by the conduct here under the guise of "best interests of the child."

CONCLUSION

What has happened to this Father is wrong on so many levels. It was wrong that the Mother lied to the Father and led him to believe she had miscarried. The Mother and the adoptive parents were also wrong to intentionally exclude the Father from the life of his son, and continue that exclusion for the last six years. The adoptive parents were wrong to spirit the child out of state knowing that the Father wanted to raise his son. The lawyers were wrong to force a private adoption at all costs, including the abusive use of legal process to reach that goal. The original Trial Court was wrong in ignoring the clear mandates of the ICWA and doing exactly what the federal Act was designed to prevent; taking Indian children, by force if necessary, and raising them as whites. Most recently, the state courts were wrong again when they paid lip service to the ICWA, but wholly ignored its dictates. Finally, it is

morally, ethically, and legally wrong to not provide relief to a Father who has not even had his fitness as a parent questioned. Rather, the only basis for not returning this child to the Father is the passage of time, something for which everyone but the Father is to blame. The only hope that this Father has is exactly where Congress placed the authority to intervene and prevent what has already happened in this case, the United States District Court.

WHEREFORE, Appellant respectfully requests that the District Court's decision to dismiss the case be reversed and remanded with direction to hear this most important case, and for such other and further relief as the Court deems fair and equitable.

Respectfully submitted,

s/ Jerry L. Colclazier
Jerry L. Colclazier, OBA #13814
COLCLAZIER & ASSOCIATES
404 North Main Street
Seminole, OK 74868
Telephone: (405) 382-1212
Facsimile: (405) 382-1214
-and-
Barbara Smith
401 E. Boyd
Norman, OK 73069
Telephone: (405) 447-2224
Facsimile: (405) 447-4577
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Section 1.

As required by Fed. R. App. 32(a)(7)©) , I certify that this brief is proportionally spaced and contains 9,252 words.

Complete one of the following:
[x] I relied on my word processor to obtain the count and it is WordPerfect by Corel .

[ ] I counted five characters per word, counting all characters including citations and numerals.

Section 2. Line count

My brief was prepared in a monospaced typeface and contains 1,043 lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Jerry L. Colclazier
Jerry L. Colclazier

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of January, 2011, a true and correct copy of the Appellant's Brief was mailed, postage prepaid, and to the following:

Charles F. Alden, III.
Alden, Leonard, and Dabney
One Leadership Square, Suite 850
211 N. Robinson
Oklahoma City, OK 73102

I further certify that on the 3rd day of January, 2011, the original and seven true and correct copies of the Appellant's Brief were mailed, postage prepaid, and e-submitted to:

Mr. Patrick Fisher
Clerk of the Court
United States Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

I further certify that all privacy redactions have been made to the attached document, and with the exception of those redactions, the document submitted in digital form is an exact copy of the written document filed with the clerk, and the digital submission has been scanned for viruses by AVG, and according to the program is free of viruses.

s/ Jerry L. Colclazier
Jerry L. Colclazier

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CHRISTOPHER YANCEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case Number CIV-10-534-C
	)	
TIMOTHY THOMAS and TAMMY THOMAS,	)	
	)	
	)	
Defendants.	)	

ORDER OF DISMISSAL

Plaintiff filed the present action to challenge several decisions made by state courts in Oklahoma related to the adoption of child L. Plaintiff argues that the adoption decisions are contrary to the language of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. ("ICWA") and that the ICWA gives this Court the power to collaterally review the adoption proceedings to ensure the state courts complied with the statute. Defendants filed the present motion pursuant to Fed. R. Civ. P. 12(b)(6) arguing that any consideration of the issues decided in the state courts is barred by the Rooker-Feldman[1] doctrine and/or res judicata. Plaintiff objects to Defendants' motion arguing that 25 U.S.C. § 1914 trumps both the Rooker-Feldman doctrine and res judicata and permits collateral review.

There is apparently some question regarding the finality of the state court proceedings. Defendants state that the adoption has not been finalized but that Plaintiff's parental rights

[1] The doctrine is named after the two cases from which it was developed: Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

have been terminated. Plaintiff argues the state court case is final because his rights were terminated and he will not be permitted to proceed any further in any state court proceeding. As will be seen, it is unnecessary to resolve this question as, under either scenario, this Court lacks the power to undertake the review sought by Plaintiff.

If the state court proceedings are not final, the very same reasoning which applied in Yancy I (CIV-08-539) and II (CIV-09-597) would apply here and the Court would abstain from considering Plaintiff's claim under the Younger[2] abstention doctrine. Recognizing this fact and the fact that continuing to pursue the case in the face of two clear decisions would likely be sanctionable, Plaintiff argues the state court case is final and therefore eligible for review under § 1914.

Section 1914 states:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Plaintiff's Complaint clearly states he proceeds under § 1914 and his brief focuses on how this statute applies. The fatal flaw in Plaintiff's argument, however, is that the Tenth Circuit has held § 1914 does not trump the Full Faith and Credit Clause of the Constitution and/or the principles of comity outlined in 28 U.S.C. § 1738.

---

[2] Younger v. Harris, 401 U.S. 37 (1971).

The Circuit considered the issue for the first time in Kiowa Tribe of Okla. v. Lewis, 777 F.2d 587 (10th Cir. 1985), where it stated:

> We cannot read § 1914's reference to "any court of competent jurisdiction" as the type of clear and manifest authorization that federal courts need before they upset the ordinary principles of federal-state comity embodied in 28 U.S.C. § 1738 and the Full Faith and Credit Clause. It seems rather to state simply where such actions may initially be brought.

Id. at 592. Later in Comanche Indian Tribe of Okla. v. Hovis, 53 F.3d 298 (10th Cir. 1995), the Circuit reaffirmed its earlier holding, stating: "Under Kiowa, it is clear that § 1914 is not an independent ground to relitigate state court decisions." Id. at 304. Thus, the Circuit has clearly held that § 1914 does not provide a mechanism to review a final state court decision. Therefore, Plaintiff's case must be dismissed.

For the reasons set forth here in, Defendants' Motion to Dismiss (Dkt. No. 11) is GRANTED. Because no amendment can cure the defect in Plaintiff's case, the matter is DISMISSED with prejudice. A separate judgment shall enter.

IT IS SO ORDERED this 20th day of September, 2010.

ROBIN J. CAUTHRON
United States District Judge

Jerry Colclazier

From: okwd_ecf_notice@okwd.uscourts.gov
Sent: Monday, September 20, 2010 10:36 AM
To: okwdecf@okwd.uscourts.gov
Subject: Activity in Case 5:10-cv-00534-C Yancey v. Thomas et al Order on Motion to Dismiss

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

Western District of Oklahoma[LIVE]

Notice of Electronic Filing

The following transaction was entered on 9/20/2010 at 10:35 AM CDT and filed on 9/20/2010
Case Name: Yancey v. Thomas et al
Case Number: 5:10-cv-00534-C
Filer:
Document Number: 15

Docket Text:
ORDER granting [11] Defendants' Motion to Dismiss. Signed by Honorable Robin J. Cauthron on 9/20/10. (lg,)

5:10-cv-00534-C Notice has been electronically mailed to:

Charles F Alden, III lawyer0187@aol.com, meredithtjohnson@aol.com

Jerry L Colclazier jerry@colclazier.com, amie@colclazier.com

Margaret L Stockwell firm@stockwelllaw.com

5:10-cv-00534-C Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1041971380 [Date=9/20/2010] [FileNumber=1822108-0

] [322d77e9ef57849d60caced5de6898c79771ad89ccea92f1ae8c61c2c200f9dc9a9
2266e3d38d20c72d05f17317be0b6441eae27e1b57d9cffdc1c27acd4f1b8]]