



ICWA DEFENSE PROJECT MEMORANDUM DECEMBER 27, 2016

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,¹ 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. 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*](#)

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.

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.

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) at NICWA or John Dossett (jdossett@ncai.org) and Julian Nava (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.