



ICWA APPELLATE CLINIC
MICHIGAN STATE UNIVERSITY
COLLEGE OF LAW

**ICWA DEFENSE PROJECT
MEMORANDUM
JULY 29, 2015**

Synopsis of recent attacks on the Indian Child Welfare Act (ICWA)

In February 2015, the Bureau of Indian Affairs (BIA) published its revisions to the [Guidelines for State Courts and Agencies in Indian Child Custody Proceedings](#). The new guidelines address areas of Indian Child Welfare Act (ICWA) non-compliance that have occurred over the past 36 years. In March 2015, the BIA announced its intent to advance further reform by proposing for the first time ever, legally binding federal regulations, [Regulations for State Courts and Agencies in Indian Child Custody Proceedings](#), to govern the implementation of ICWA in state courts and agencies. The BIA received over 2,100 public comments during the notice and comment period that closed mid-May. The BIA will review these comments and then promulgate final regulations, likely by early spring 2016. A network of ICWA opponents has responded to the reforms by filing 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 Clinic 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 to it introduced this year. This memo will summarize the pending litigation and describe some of the legal and communications strategies these partner organizations have developed to inform, advance, and unify a coordinated effort across Indian Country to respond to these attacks.

Virginia Litigation: [National Council for Adoption v. Jewell](#)

On May 27, 2015, the National Council for Adoption filed a suit against the BIA in the federal Eastern District of Virginia. The suit names as defendants the Secretary of the U.S. Department of the Interior Sally Jewell and Assistant Secretary of the Bureau of Indian Affairs Kevin Washburn. It involves two children: one a member of Navajo Nation, and the other a member of the Pascua Yaqui Tribe.

The Complaint for Declaratory and Injunctive Relief objects to the Guidelines' placement preferences provision, which prescribes an "independent best interest of the child test." The complaint also objects to the Guidelines' requirement that adoption agencies follow ICWA's placement preferences and conduct a diligent search to identify placement options that satisfy these requirements. Using these provisions, the Complaint alleges that the 2015 Guidelines

- Violate of the procedural requirements of the Administrative Procedure Act (APA) that requires the federal government to follow specific procedures when an agency promulgates regulations;
- Require state courts to violate the Due Process and Equal Protection rights of Indian children and their birth parents;
- Require state courts and agencies to violate the Tenth Amendment by expending their own resources to carry out federal objectives.

The Complaint further alleges that the substantive provisions of ICWA violate the United States Constitution. Specifically, they contend these provisions of ICWA

- Violate the equal protection rights of Indian children by denying them the benefit of the same “best interests” determination provided to non-Indian children in foster care and adoption placement proceedings;
- Violate their liberty interests under the Due Process Clause when the placement preferences are applied to remove them from a foster or pre-adoptive family with whom they have formed a “familial bond”;
- Violate the due process rights of parents of Indian children by interfering with their ability to direct the upbringing of their children; specifically, to determine an adoptive placement for their children outside of the ICWA’s placement preferences, and discriminate against such parents on the basis of their children’s “Indian ancestry”;
- Are beyond the constitutional authority of Congress to legislate.

As a remedy, the Complaint requests that the court declare the Guidelines unlawful as they violate the Tenth Amendment and order the Department of the Interior to withdraw the Guidelines. Plaintiffs also request that the court declare that the substantive provisions of ICWA “violate the Constitution and accordingly cannot be applied” to the Plaintiffs.

The ICWA Defense Project is currently in discussion with the U.S. Department of Justice about next steps. A decision about venue is due after August 20, 2015.

Minnesota Litigation: [*Doe v. Jesson*](#)

On June 3, 2015, birth parents filed a second lawsuit challenging the constitutionality of the [Minnesota Indian Family Preservation Act](#) (MIFPA) under the Fourteenth Amendment. The birth parents brought the case on behalf of their Indian child, who is eligible for membership in the Mille Lacs Band of Ojibwe, and a potential adoptive couple.

The suit names as defendants Lucinda Jesson, Commissioner of the Minnesota Department of Human Services; Lori Swanson, Minnesota Attorney General; and Samuel Moose, Commissioner of Health and Human Services for the Mille Lacs Band of Ojibwe. The plaintiffs filed the Complaint for Declaratory and Injunctive Relief in the federal District Court of Minnesota. It specifically targets the MIFPA provisions that (a) require notice to tribes in cases of voluntary (private) adoption, and (b) protect a tribe’s right to intervene in voluntary (private) adoptions. The petitioners make several larger claims. Specifically, the petitioners allege these MIFPA provisions

- Violate the parents’ fundamental due process rights to parent, the parent and child’s fundamental due process rights to privacy, and the adoptive parents’ and child’s right to family integrity under the Fourteenth Amendment;
- Discriminate against Indian children based on their race in violation of the Fourteenth Amendment.

The complaint specifically requests both a preliminary and a permanent injunction of the state’s enforcement of the notice and intervention provisions of MIFPA. It stresses that the timing of such injunctions is critical to the potential adoption. It further requests that the court declare these provisions of MIFPA unconstitutional.

The ICWA Defense Project immediately reached out to the attorneys for the tribe and provided research and technical assistance in forming a response. Mille Lacs successfully defeated the preliminary injunction. The judge found that the plaintiffs would suffer no irreparable harm by having to notify the tribe on the adoptive proceeding in state court. The tribe and the state have filed separate motions to dismiss the case, and the plaintiffs’ responses are due at the end of July.

Arizona Litigation: [*Carter et al. v. Washburn*](#)

On July 7, 2015, the Goldwater Institute—a Phoenix-based conservative think tank—filed a lawsuit challenging the constitutionality of ICWA and the revised Guidelines. This class action lawsuit is 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.

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.

The suit names as defendants the Assistant Secretary of the Bureau of Indian Affairs Kevin Washburn, Secretary of U.S. Department of the Interior Sally Jewell, and Director of the Arizona Department of Child Safety Gregory McKay. The Complaint for Declaratory and Injunctive Relief was filed in Arizona federal district court and specifically targets the transfer, active efforts, burdens of proof for removal, burdens of proof for termination of parental rights, and placement preferences provisions of ICWA, 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.” Using these specific provisions of ICWA, the petitioners make six larger claims. Specifically, the petitioners allege

1. Provisions of ICWA collectively subject Indian children to unequal treatment in the child welfare system solely on the basis of race in violation the Fifth Amendment’s Equal Protection Clause;
2. ICWA and the Arizona law violate the Fifth Amendment’s guarantee of due process under the law, specifically (a) the transfer provisions of ICWA, which do not require petitioners to have “minimum contacts” with tribal jurisdictions, and (b) the Guidelines’ failure to provide a separate best interest test with regard to placement preference selection. The complaint alleges these provisions violate the petitioners’ procedural due process rights and the children’s substantive due process right to a “family-like” relationship with their temporary caregivers;
3. The Arizona law is similarly a violation of the Fourteenth Amendment’s equal protection and due process guarantees;
4. ICWA violates the Tenth Amendment because it is not tied rationally to Congress’ unique obligation toward Indians and because domestic relations are matters reserved for the states;
5. Tribes’ authority to determine membership forces children to associate with tribes against their will and in violation of the First Amendment’s right not to associate
6. The transfer provisions of the Guidelines exceed the authority delegated in ICWA to the BIA.

In addition to the federal cases listed above, the ICWA Defense Project is monitoring important cases in **Michigan, Oklahoma, Utah and Nebraska**.

How can tribes and allies work together to help defend ICWA?

The partner organizations of the ICWA Defense Project have 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. This list of is a starting point for this collective effort. 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 proposed Regulations. For over 35 years, inconsistent interpretations and implementation of ICWA’s provisions have left practitioners unsure of its application, and families, adoptive parents, and children unprotected under the law. The revised Guidelines and proposed 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 Guidelines and Regulations and why they are so necessary. More information is available to help guide these conversations [here](#). If you are interested in supporting these efforts and need information please contact David Simmons (desimmons@nicwa.org) or John Dossett (jdossett@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(s) 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 revised ICWA Guidelines and binding ICWA Regulations

Some states' attorneys general have already been approached with requests to support anti-ICWA positions in litigation. For this reason, it is incredibly important their constituents immediately contact state attorneys general and children's services agencies.

In many states, tribal representatives and state representatives (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. Please find talking points to guide these conversations attached to this memo. If you are interested in supporting these efforts and need additional information please contact Addie Smith, NICWA government affairs staff attorney (addie@nicwa.org).

3. Work with us on a coordinated legal response. The 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 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).

4. Alert the ICWA Defense Project to other adoption cases. Please contact us to let us know if you or your tribe is involved in an adoption case where any attorney is arguing that ICWA does not apply or that ICWA is unconstitutional. Because we are seeing a pattern of legal arguments across adoption cases nationwide, we would be happy to provide legal assistance to tribes seeking to counter these claims. For more information please contact Kate Fort (fort@law.msu.edu) director, ICWA Appellate Clinic at Michigan State University College of Law.

5. Support the media strategy. 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 Nicole Adams, NICWA executive communications manager (nicole@nicwa.org).

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, or Jamie Gomez (Jamie_Gomez@ncai.org) at NCAI.

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