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Indian Child Welfare Act Annual Case Law Update and Commentary

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Cover Page Footnote

Kathryn E. Fort is the Director of the Indian Law Clinic at Michigan State University College of Law and runs the ICWA Appellate Project. She graduated from MSU College of Law in 2005. Adrian (Addie) T. Smith is an attorney with Youth, Rights & Justice in Portland, Oregon, and was previously the Government Affairs and Advocacy Staff Attorney at the Nation Indian Child Welfare Association. She graduated from Washington University in St. Louis Schools of Law and Social Work in 2012.

INDIAN CHILD WELFARE ACT ANNUAL CASE
LAW UPDATE AND COMMENTARY

Kathryn E. Fort and Adrian T. Smith

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INDIAN CHILD WELFARE ACT ANNUAL CASE LAW UPDATE AND COMMENTARY

*Kathryn E. Fort and Adrian T. Smith**

ABSTRACT

There are, on average, 200 appellate cases addressing the Indian Child Welfare Act (ICWA) annually—though this number includes published and unpublished opinions.¹ There are usually around thirty reported state appellate court cases involving ICWA issues every year. There has never been a systematic look at the cases on appeal including an analysis of who is appealing, what the primary issues are on appeal, and what trends are present. This article seeks to fill that void.

This article provides a comprehensive catalog of published ICWA jurisprudence from across all fifty states in 2017. Designed as a quick reference for the ICWA practitioner, this article summarizes key case decisions that have interpreted the law in meaningful, significant, or surprising ways. It also tracks current attempts by ICWA's opponents to overturn the law. By providing an overview of last year's ICWA cases, this article is meant to keep practitioners up-to-date so they can be effective in the juvenile courtroom without sorting through and reading the dozens of cases published across all fifty jurisdictions.

I. INTRODUCTION

In 1978, Congress recognized “that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and

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¹ Data on file with the authors and journal.

families” and that this led to “an alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.”² To address this nationwide issue, Congress passed the Indian Child Welfare Act.³ ICWA creates “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes” that state administrative and judicial bodies must follow and enforce.⁴

Because of this fundamental structure—a federal law, interpreted and litigated in state courts—tracking appellate litigation interpreting ICWA is relatively easy. Indeed, state court decisions make up the body of ICWA case law and have influence beyond the state in which they are decided. That is because state courts often turn to “sister jurisdictions” when deciding matters related to ICWA precisely because it is a federal law applied across the states.⁵ For this reason, unlike other child dependency attorneys, an ICWA practitioner has to stay up to date on decisions from across the country in addition to decisions in their home state. This can be particularly difficult for those with an active caseload and limited access to legal databases, such as in-house tribal ICWA attorneys, parents’ attorneys, and child advocates (including guardians ad litem or children’s attorneys). It has become increasingly evident that practitioners are in need of an annual published account of the

² 25 U.S.C. § 1901-1963 (4)–(5) (1978).

³ 25 U.S.C. §§ 1901 (1978). For an overview of ICWA’s provisions, requirements, and an introduction to the law, see *A Practical Guide to the Indian Child Welfare Act*, NATIVE AMERICAN RIGHTS FUND, <https://www.narf.org/nill/documents/icwa/> [<https://perma.cc/M6Q3-W4ZP>]; B.J. JONES ET AL., *THE INDIAN CHILD WELFARE ACT HANDBOOK* (2nd ed. 2008); *Indian Child Welfare Act Judicial Benchbook*, NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, http://www.ncjfcj.org/sites/default/files/NCJFCJ_Benchbook_Final_Web.pdf.

⁴ 25 U.S.C. § 1902 (1978).

⁵ See, e.g., *Dep’t of Human Servs. v. J.G.*, 317 P.3d 936, 945 n.11 (Or. Ct. App. 2014) (looking to decisions of sister states when interpreting the Act); *In re Esther V.*, 248 P.3d 863, 871 (N.M. 2011); *In re Welfare of R.S.*, 805 N.W.2d 44, 65 (Minn. 2011); *In re A.R.*, 310 P.3d 1007, 1014 (Colo. Ct. App. 2012). See *In re N.B.*, 199 P.3d 16, 19 (Colo. App. 2007) (for a discussion of cases from the “several states” regarding ICWA’s application in step-parent adoptions), which was cited to in *In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016) (applying WICWA to step-parent adoptions), which was further cited to and discussed in *S.S. v. Stephanie H.*, 388 P.3d 569, 574 (Ariz. Ct. App. 2017) (applying ICWA to a private abandonment and step-parent adoption proceeding).

cases.⁶ Although much of family law is under the purview of the states,⁷ ICWA, which is grounded in the federal government’s trust responsibility to tribes and Indian people, holds a unique place in child welfare jurisprudence.⁸ It is a federal law that must be implemented in state courts—jurisdictions where there can be a great deal of legislative diversity.⁹

ICWA’s provisions include, among other elements, requirements that a state inquire into the membership status of a tribal child,¹⁰ provide tribes and parents notice of child welfare proceedings,¹¹ ensure that tribes are given the opportunity to intervene in the such proceedings,¹² transfer jurisdiction to the tribal court,¹³ provide active efforts,¹⁴ and present testimony of a qualified expert witness¹⁵ before placing an Indian child in foster care or

⁶ In 2017 alone, Professor Fort’s clinic handled inquiries in sixty-three different cases from more than thirty tribes handling cases in more than twenty states. Additionally, for the past few years, Professor Fort has been collecting ICWA cases and discussing them online, and the need for a formal compendium has become increasingly obvious based on the inquiries from around the country that both authors have received on a weekly basis. *See ICWA Appellate Project*, TURTLETALK, <https://turtletalk.wordpress.com/icwa/>.

⁷ *But see generally* JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (2014) (arguing family law has long been the purview of the federal government *and* the states, despite Supreme Court dicta stating otherwise).

⁸ *See* 25 U.S.C. § 1901 (1)–(2) (1978).

⁹ While federal funding under IV-E of the Social Security Act requires states to pass certain standards for foster care placements and termination of parental rights, there are many areas of state law that vary by state. *See, e.g., Consent to Adoption* (2017), CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/pubPDFs/consent.pdf> [<https://perma.cc/M8L9-NJEQ>]; *Representation of Children in Child Abuse and Neglect Proceedings* (2014), CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/pubPDFs/represent.pdf> [<https://perma.cc/L3QZ-NN7T>]; *Rights of Unmarried Fathers* (2014), CHILD WELFARE INFORMATION GATEWAY, <https://perma.cc/LBK7-3N35>; *Definition of Child Abuse and Neglect* (2016), CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/pubPDFs/define.pdf> [<https://perma.cc/X5Q7-D9N7>]. Even in an area where state law is arguably quite similar—child abuse and neglect cases, for example—the vocabulary across the states varies tremendously. Indeed, the authors of this article debated whether to call them “abuse and neglect cases” (Michigan terminology) or “child dependency cases” (Oregon terminology).

¹⁰ 25 U.S.C. § 1912(a) (1978).

¹¹ *Id.*

¹² 25 U.S.C. § 1911(c) (1978).

¹³ *Id.* at §1911(b).

¹⁴ 25 U.S.C. § 1912(d) (1978).

¹⁵ *Id.* at §1912 (e)-(f).

terminating the parental rights to the Indian child, both under heightened burdens of proof.¹⁶

Courts have interpreted ICWA to apply in conjunction with, and in some instances on top of, state child welfare laws.¹⁷ When an Indian child, as defined in the law, is subject to a child custody proceeding, *also* defined in the law, state courts must follow its standards and implement its protections.¹⁸ Though ICWA is not the only federal intrusion into state child welfare proceedings, it is one of the few laws that Congress has not required states to incorporate into their codes in order to receive federal child welfare funding. While many states have incorporated parts of the Act only a handful have passed comprehensive Indian child welfare acts.¹⁹

To best serve the active practitioner, this article first provides an overview of case data, including information on where there were reported and unreported decisions interpreting ICWA, what provisions courts most commonly interpreted, and what themes arose in 2017. The article then provides descriptive commentary on a handful of 2017 state and federal cases that best illuminate the described themes. It closes with a full compendium of 2017 cases, which is topically organized for those practitioners who may not have access to this information.

II. SUMMARY OF THE DATA AND NATIONAL TRENDS

As the numbers illustrate, ICWA is litigated more often than non-practitioners might imagine. State courts of appeal interpret the

¹⁶ *Id.*

¹⁷ *See In re K.S.D.*, 904 N.W.2d 479, 482 (N.D. 2017); *Valerie M. v. Ariz. Dept. of Economic Sec.*, 198 P.3d 1203, 1207 (Ariz. 2009)(collecting cases).

¹⁸ 25 U.S.C § 1903(1); *see also* *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989) (applying ICWA in “child custody proceedings” involving an “Indian child” as defined by the Act).

¹⁹ *See, e.g.*, Michigan Indian Family Preservation Act, MCL 712B.1-41. MICH. COMP. 712B.1-.41 (2013) (comprehensive state ICWA); Minnesota Indian Family Preservation Act, MINN. STAT. §§ 260.751-835. (2015) (comprehensive state ICWA); Washington Indian Child Welfare Act, WASH. REV. CODE §§13.38.010-190. (2011) (comprehensive state ICWA); Nebraska Indian Child Welfare Act, NEB. REV. STAT. §§ 43-1501-1516 (2015) (comprehensive state ICWA); ARIZ. REV. STAT. ANN. § 8-453 (A) (20) (2014) (merely requiring compliance with ICWA); COLO. REV. STAT. § 19-1-126 (2002) (requiring compliance with ICWA, specifically provisions related to inquiry, notification, determination, transfer to tribal court); Or. Rev. Stat. §§ 419A.116, 419B.090, 118, 150, 171, 185, 192, 340, 365, 366, 452, 476, 498, 500, 875, 878, 923 (imbedding ICWA standards in relevant areas across Oregon’s dependency code).

law across the country at a rate of one every other day. There are, on average, 200 appellate cases annually—including published and unpublished opinions.²⁰ While unpublished opinions cannot be used as precedent, the authors include those cases in the numbers here. The question of why so many ICWA cases are unpublished is an unanswered one. A vast majority of these unpublished opinions addressed the issue of inquiry and notice—an area so common and well-established that there may no longer be a need to report these opinions—but beyond this topic, no clear pattern in unpublished cases emerges. For example, eight active efforts cases were unreported, as were three placement preference cases and three determinations regarding whether the case was a foster care proceeding under ICWA. In one case, Washington’s court of appeals spent considerable time discussing and weighing one of the most important questions in an ICWA case—who may be a qualified expert witness (QEW) as required by the law?²¹ The opinion is unreported, however, so the ultimate holding—that a tribal social worker who is a member of the tribe she works for may be a QEW—has no legal precedent in Washington.²² While there is no clear reason for the sheer number of unreported ICWA cases, not counting or reading them severely understates the state ICWA appellate docket. The authors have only summarized reported cases, but practitioners may want to keep in mind that unreported ones may still provide significant legal research and reasoning useful to their case work.

Generally, thirty ICWA cases are reported in state appellate courts every year. However, there has never been a systematic look at the cases on appeal that includes an analysis of who is appealing, what the primary issues are on appeal, and what trends are present. Legal databases make both published and unpublished cases more readily available to practitioners and scholars, but the sheer volume of cases can be overwhelming. The authors of this article read every case as they were released through daily alerts from both Westlaw and LexisNexis. Each case was coded by the primary ICWA topic

²⁰ Data on file with the authors and journal.

²¹ *In re Dependency of K.S.*, 199 Wash. App. 1034 (2017) (unpublished opinion); 25 U.S.C. § 1912(e)–(f) (1978).

²² *In re Dependency of K.S.*, 199 Wash. App. 1034.

on appeal.²³ The cases were also coded with the date, the court, the child's tribe,²⁴ the appellant, and how the court ruled.²⁵

In 2017 there were 214 appealed ICWA cases.²⁶ Thirty-four of those cases were published.²⁷ Supreme Courts in Alaska (six cases), Montana (two cases), Arizona, Nevada, Utah, South Dakota, Vermont, and North Dakota all decided ICWA cases this year, and all of them were reported.²⁸ The remaining opinions, published and unpublished, were authored by states' intermediate courts of appeal. The number of ICWA appellate cases varied significantly by jurisdiction, as does the number of cases which the courts chose to report.²⁹

The most litigated issues were notice and inquiry,³⁰ followed by active efforts, termination of parental rights (which includes burden of proof issues), placement preferences, transfer to tribal court, and issues concerning qualified expert witness testimony.³¹ This year more than half of the notice cases were remanded for

²³ Active efforts, qualified expert witness, inquiry, notice, transfer to tribal court, foster care proceeding (burden of proof), termination of parental rights (burden of proof), guardianship, Indian custodian, intervention.

²⁴ In notice cases, often there are a number of tribes identified as potential tribes for the child. We collect up to three named tribes and put them in the order they appear in the case.

²⁵ Affirm, remand, reverse, or dismissed.

²⁶ Cases are collected from both Westlaw and Lexis over the course of the year via case alerts that collect cases from all fifty states and using the search terms "Indian Tribe," "American Indian," "Native American." The cases are sorted by case name, the date, the court, the state, whether the case is reported or not, the top two issues, up to three named tribes, the outcome of the case, and who appealed the case.

²⁷ Data on file with the authors and journal.

²⁸ It is important to note that Alaska, Montana, North Dakota, and South Dakota, either do not have or use their court of appeals for child welfare cases; In these states, appeals are taken directly to the state supreme court. *See* Section III for a summary of these cases.

²⁹ California leads the states with 152 cases, but only five were reported. California has both the most number of cases, and one of the lowest percentages of unreported cases at three percent. Alaska is second with six opinions, three reported; followed by Michigan and Texas which each had five opinions, two reported. Kansas, Arizona, and Washington had a total of four cases. Although, Washington did not publish any of their decisions and Kansas and Arizona published two and three respectively. Both Arkansas and Utah had three cases, although none were reported in Arkansas all three were reported in Utah. Montana (2/1), North Carolina (2/1), and Minnesota (2/0) had two. Finally, the following states had one ICWA case: Connecticut, Indiana, Iowa, Massachusetts, Nebraska, Nevada, Ohio, Oregon, South Dakota, Missouri, Vermont, North Dakota, Illinois, and Wisconsin.

³⁰ Notice (132), Inquiry (twenty-nine).

³¹ Placement Preferences (seven), Active Efforts (ten), Termination of Parental Rights (nine), Transfer to Tribal Court (four), and QEW (four).

proper notice. Fifty-seven different tribes were named as a child's possible tribe. In twenty-six cases, the tribe was unknown (the parent or court did not know the name of tribe). In seventeen cases the tribe was unnamed (the court did not record name of the tribe in the opinion, sometimes for the purposes of anonymity).

If a majority of appealed cases were affirmed, that could indicate the ICWA appeals are unfounded. However, just under fifty percent of the appealed cases were affirmed, which means over fifty percent were reversed outright or sent back to the lower court.³² Finally, of all the cases, only three were appealed by tribes (Navajo Nation, Nenana Native Village, and Gila River Indian Community). Parents appealed the rest.

Beyond the numerical breakdown of the data, there are a few clear trends in litigation this year. More courts are beginning to use and implement the new federal regulations.³³ However, because so many states were comfortable with, and had precedent concerning, the 1979 BIA Guidelines, courts continue to use and cite to the non-binding 2016 BIA Guidelines³⁴ in their opinions.³⁵ Often the language of the new guidelines is echoing the language of the front

³² Of the 214 total appeals, ninety-seven were remanded and six were reversed. Of the thirty-four reported cases, only eighteen were affirmed, while fifteen were remanded or reversed. Of those fifteen cases, all but two were appealed by the parents.

³³ *In re K.S.D.*, 904 N.W.2d 479, 487 (N.D. 2017) (“There is a line of authority that upholds termination of parental rights absent an ICWA qualified expert witness. We choose to follow the other branch of authority because the United States Code and the United States Code of Federal Regulations require—and do not merely suggest—that a qualified expert witness testify on the ICWA requirements in all ICWA terminations.”).

³⁴ In 2015 and 2016, there was a flurry of activity on ICWA from the executive branch. In 2015, the Bureau of Indian Affairs released the first new Guidelines in more than thirty years. These updated Guidelines incorporated much of the case law and best practices that had developed around the law since 1978. However, in 2016, the Department of the Interior released federal regulations regarding ICWA. 25 CFR pt. 23 (2016). These Regulations, after a review and comment period, became binding. At the same time, the BIA released 2016 Guidelines which replaced the 2015 Guidelines and provide interpretation to the Regulations. All of this activity created significant confusion in the courts. This year's data indicates that confusion is still working its way through the state appellate systems.

³⁵ *See, e.g., L.L.*, 395 P.3d 1209, 1212 (Colo. App. 2017) ¶ 16 (“Although the 2016 Guidelines are not binding, we consider them persuasive.”); *B.H. v. People ex rel. X.H.*, 138 P.3d 299, 302 n.2 (Colo.2006) (referring to the 1979 guidelines). This case goes on to provide dual citations to both the Guidelines and the Regulations.

matter of the new regulations.³⁶ Given state court familiarity with ICWA guidelines (on the books since 1979) versus federal regulations (rarely, if ever, applied in state court child welfare cases), ICWA advocates and practitioners should have predicted this outcome. While both the Regulations and the Guidelines came out in 2016, there are cases on appeal still addressing underlying petitions from 2014 or 2015, forcing courts to determine which authority governs their decisions.³⁷ Regardless, the Regulations cannot be easily overlooked due to their binding nature. For this reason, additional judicial education on the BIA's 2016 ICWA work and the difference between binding regulations and persuasive guidelines should be a high priority for child welfare organizations.³⁸

In addition, states are also wrestling with how ICWA applies to privately initiated terminations of parental rights. These cases include step-parent adoptions, terminations under abandonment statutes, and terminations in voluntary adoptions. Generally, the trend has been to apply ICWA (or relevant state law) to these cases to ensure the parent whose rights are being terminated receives notice and protections against a termination. Though decided in 2016 and not included in this survey, the Washington Supreme Court determined the state ICWA law applied to a non-Indian father in a step-parent adoption.³⁹ Recently, Arizona held similarly, and then Utah found for an unmarried father whose rights were being

³⁶ The Regulations were released with about 100 pages of federal commentary responding to the comments to the Regulations and explaining the purposes of the Regulations. This commentary can be found at 81 Fed. Reg. 38778 (2016). Compare 81 Fed. Reg. 38829 (2016) (“3. Qualified Expert Witness”), with Guidelines for Implementing the Indian Child Welfare Act 53-4 (Dec. 2016).

³⁷ Compare *In re* L.M.B., 398 P.3d 207 (Kan. Ct. App. 2017) (applying rescinded 2015 Guidelines), with *S.S. v. Stephanie H.*, 388 P.3d 569 n. 5 (Ariz. Ct. App. 2017) (“Rules recently issued by the Bureau of Indian Affairs . . . addressing ‘requirements for state courts in ensuring implementation of ICWA in Indian child-welfare proceedings’ are informative.”).

³⁸ See *supra* note 34. See also *In re* S.E., 527 S.W.3d 894, 901 n. 5 (Mo. Ct. App. 2017) (misunderstanding the Tribe's reliance on binding federal regulations as reliance on non-binding guidelines). Some courts still look to sister states rather than any federal guidance. See *People ex rel. A.O.*, 896 N.W.2d 652, 655 (S.D. 2017). Depending on the state, briefing in appellate child dependency cases is often confidential. It is difficult to determine what sources the briefs provide to the judges.

³⁹ *In re* adoption of T.A.W., 354 P.3d 46 (Wash. Ct. App. 2016); see *supra* note 6.

terminated in a voluntary adoption involving outright fraud.⁴⁰ However, at the very end of 2017, the Wisconsin Court of Appeals found that United States Supreme Court precedent meant that a parent who had abandoned their child did not get the protections ICWA provides.⁴¹

While this trend of applying ICWA more broadly in state courts continued, outside national groups began a federal campaign to dismantle ICWA. In 2015, the Goldwater Institute filed a class action lawsuit in Arizona federal court.⁴² Their goal was to get a class certified that included every American Indian child in foster care and their non-Indian foster parents or prospective adoptive parents.⁴³ While they brought multiple claims, all of them were fundamentally based on the idea that ICWA is a law based on race rather than citizenship.⁴⁴ In that light, they further claimed that ICWA harms children rather than helps them by keeping them in foster care longer; however though there is no data to demonstrate that claim. In 2017, the district court dismissed that case for lack of standing.⁴⁵ Also, in 2015, the National Council for Adoption brought a similar claim in federal court in Virginia,⁴⁶ and two other cases were filed in federal court attacking state ICWA laws.⁴⁷ Plaintiffs have brought three federal lawsuits in Minnesota challenging tribal Indian child welfare jurisdiction,⁴⁸ and this year, foster parents and the state of Texas have filed a challenge to ICWA in federal district court in Texas.⁴⁹

⁴⁰ See *S.S. v. Stephanie H.*, 388 P.3d 569, (Ariz. Ct. App. 2017), *cert denied*, 138 S.Ct. 390 (2017); *In re adoption of No. 20150434 B.B.*, 2017 UT 59, 2017 WL 3821741 (Utah 2017).

⁴¹ *In re M.J.*, No. 2017AP1697, 2017 WL 6623390 (Wis. Ct. App. 2017); see *infra* Section III, for a description and short analysis of this decision.

⁴² Complaint for Declaratory and Injunctive Relief, *A.D. v. Washburn* (D. Ariz. 2015) (No. 15-cv-01259).

⁴³ *Id.*

⁴⁴ *Id.* at *21.

⁴⁵ A.D. by Carter v. Washburn, No. 15-cv-01259, 2017 WL 1019685 (D. Ariz. March 16, 2017); see *infra* Section III, for a summary of the case.

⁴⁶ Complaint and Prayer for Declaratory and Injunctive Relief, Nat'l Council for Adoption v. Jewell, 156 F.Supp.3d 727 (E.D.Va. 2015) (No. 15-cv-00675).

⁴⁷ *Doe v. Piper*, No. 15-cv-02639, 2017 WL 3381820 (D. Minn. Aug. 4, 2017); *Order, Doe v. Hembree* (N.D. Okla. March 31, 2017) (No. 15-CV-00471).

⁴⁸ *Petition for Habeas Corpus, Watso v. Jacobson* (D. Minn. April 4, 2016) (No. 16-cv-00983); *Complaint for Declaratory and Injunctive Relief, Watso v. Piper* (D. Minn. Feb. 23, 2017) (No. 17-cv-00562); *Complaint for Declaratory and Injunctive Relief, Americans for Tribal Court Equality v. Piper* (D. Minn. Oct. 10, 2017) (No. 17-cv-04597).

⁴⁹ *Prayer for Declaratory and Injunctive Relief, Texas v. Zinke* (N.D. Texas Oct. 25, 2017) (No. 17-cv-00868).

These challenges and federal court cases represent a shift in litigation strategy. Prior to 2015, virtually no ICWA cases were filed in federal court. While 25 U.S.C. § 1914 allows a parent or tribe to bring a case to a “court of competent jurisdiction”(a term undefined by the law), if there is a violation of certain parts of the law, federal courts generally do not hear these cases since they originate in trial courts.⁵⁰ This move to federal court is problematic for a few reasons.

The first is that these cases are often brought by a coalition of anti-Indian law groups who have determined the emotional stories behind some ICWA cases may provide an entry into removing federal Indian law protections more broadly. Indeed, tribes have tried to access federal courts for years to enforce ICWA and have failed.⁵¹ The second is that federal court judges very rarely hear child welfare cases. When they do, they hear federal child abuse and exploitation cases criminal cases that are completely different from the civil child-welfare context where ICWA applies. Explaining the civil nature of a child-welfare proceeding, that eighty-five percent of all state child-welfare cases are based on neglect rather than abuse, or that ICWA provides protections to children and families in a system that many concede is otherwise broken, takes time and briefing space. A federal judge may have never seen a dependency case or understand the process of one. Finally, these constitutional arguments are now leaking into state ICWA cases. Prior to this particular trend, states, tribes, and parents litigated what ICWA provisions meant, but they rarely litigated whether ICWA was fundamentally sound law. Now tribal attorneys on the front lines of ICWA work are facing both the regular litigation and protracted Constitutional arguments in both state and federal courts.⁵²

⁵⁰ Westlaw shows eleven reported cases in the federal courts discussing the “court of competent jurisdiction” provision of ICWA.

⁵¹ *See, e.g., Navajo Nation v. Superior Court of Wash.* BB 10.2.1(f), 47 F. Supp .2d 1233 (E.D. Wash. 1999); *Comanche Indian Tribe of Okla. v. Hovis*, 53 F.3d 298 (10th Cir. 1995); *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587 (10th Cir. 1985).

⁵² *See S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App.) cert. denied., subnom *S.S. v. Colo. River Indian Tribes*, 138 S. Ct. 380 (2017); *Petition for Writ of Certiorari, Superior Court of Tulare Cty.* (Nov. 27, 2017) (No. 17-789).

III. CASES OF NOTE

The authors have chosen to highlight and summarize the cases below because they present relevant issues or sit in a unique procedural posture that reflects the current challenges to and interpretations of ICWA. The cases are listed in reverse chronological order. They address issues of jurisdiction, placement preferences, qualified expert witnesses, intervention, and notice. Those cases that involve attorneys or groups that are known for their aggressive anti-ICWA agenda and reliance on arguments that ICWA is unconstitutional are demarcated with an asterisk. A full listing of the thirty-four published cases are in section IV.

A. State Cases

In re M.J., Wisconsin Court of Appeals.⁵³ In this termination-of-parental-rights case, the Wisconsin Court of Appeals held the father was neither protected by § 1912(d) and (f) nor the corresponding Wisconsin Indian Child Welfare Act (WICWA) provisions, Wis. Stat. § 48.028(4)(e)1-2, because the decision in *Adoptive Couple v. Baby Girl*⁵⁴ governs the case.⁵⁵ In this case, the county filed a termination of parental rights petition and then moved for summary judgment, alleging no genuine disputes of material fact existed as to whether father had abandoned the child and asserting that the termination provisions of ICWA and WICWA were inapplicable because father had never had custody of child.⁵⁶ Father argued the ICWA and WICWA provisions were applicable regardless of custody and requested a bench trial on those issues.⁵⁷ The trial court granted summary judgment, and father appealed.⁵⁸

The court of appeals found that the language of the termination provisions of WICWA “contain virtually identical language” to ICWA.⁵⁹ It then found, citing to *Baby Girl*, that “[b]oth sets of statutes plainly indicate their provisions only serve to protect a ‘pre-existing’ state of custody and to prevent the ‘discontinuance

⁵³ *In re M.J.*, 379 Wis.2d 750 (Wisc. Ct. App. Dec. 28, 2017).

⁵⁴ *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 691(2013).

⁵⁵ *In re M.J.*, 379 Wis.2d. at *9–11.

⁵⁶ *Id.* at *4.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at *9.

of a relationship.”⁶⁰ Because father did not dispute whether he ever had custody of the child and whether under Wisconsin statute⁶¹ he had abandoned the child, the court found the protections of ICWA and WICWA did not apply to his termination proceeding.⁶²

In re J.J.T., Texas Court of Appeals.⁶³ In this involuntary termination of parental rights case, the El Paso Texas Court of Appeals held the plain language of 25 U.S.C. § 1911(c) allowed the tribe to intervene in the middle of the termination of parental rights proceeding in question. It also held “the state[’s] procedural rule which would deny the right to intervene in a child custody proceeding because the tribe *did not file a written pleading prior to the hearing* directly conflicts with [the] purpose [of ICWA],” was preempted, and allowed the tribe to intervene by oral motion.⁶⁴ The tribe also appealed because the state failed to provide it notice before the proceeding, pursuant to U.S.C. § 1912(a), and because the evidence was insufficient to meet the ICWA 25 U.S.C. § 1912(f) termination-of-parental-rights standard, but the court remanded because the lower court erred when it denied the tribe’s motion to intervene and did not reach those issues.

In re K.S.D., North Dakota Supreme Court.⁶⁵ In this termination of parental rights case, the Supreme Court of North Dakota held there was nothing in the record to support ICWA’s termination-of-parental-rights requirement of evidence beyond a reasonable doubt, including the testimony of a qualified expert witness that continued custody by the parents would likely result in serious emotional or physical damage to the children.⁶⁶

⁶⁰ *Id.*

⁶¹ Wis. Stat. § 48.515(1) (2018).

⁶² *In re M.J.*, 379 Wis.2d 750 at *9. The court rejected the father’s argument that a provision of WICWA and a provision of the 2016 Federal Regulations specifically forbid the court from implementing the Existing Indian Family Exception Doctrine. Wis. Stat. § 48.028(3)(a) and 25 C.F.R. § 23.103(c), respectively, require the court to apply the entirety of the Act regardless of the father’s custody. *In re M.J.*, 379 Wis.2d 750 at *10–11. The court explained the Existing Indian Family Doctrine ensures that the Act is applied and the “general applicability of ICWA and WICWA to [the father] as a parent of an Indian child, however, is a separate from whether” WICWA’s termination provisions apply to a parent who has never had custody of an Indian child. *Id.* at *11.

⁶³ *In re J.J.T.*, No. 08-17-00162-CV, 2017 WL 6506405 (Tex. App. 2017).

⁶⁴ *Id.* at *3 (emphasis added).

⁶⁵ *In re K.S.D.*, 904 N.W. 479 (N.D. 2017).

⁶⁶ *Id.* at 488.

The court *sua sponte* raised the issue of whether the state followed ICWA’s § 1912(f) termination standards at the termination trial, stating:

Because the Petitioner did not provide testimony from a qualified expert witness that the continued custody of the children by the parent is likely to result in serious emotional or physical damage to the children, this ruling is subject to post-judgment invalidation under 25 U.S.C. § 1914. Were we to affirm the result in this case, even absent a proper objection, our affirmance would provide the children no certainty or stability because either parent or the tribe could collaterally attack the judgment at any time.⁶⁷

The court went on to find that ICWA’s termination standards do not preempt state termination law because they can be “harmonized” with state law.⁶⁸ Ultimately the court concluded that in ICWA cases, petitioners must “prove the state law grounds for termination by clear and convincing evidence, and must prove the additional federal requirement beyond a reasonable doubt” as § 1912(f) requires.⁶⁹ Because neither of the state child welfare workers specifically testified as the qualified expert witness and because “the plain terms of the federal law strongly suggest that neither...could be an expert witness” the record was void of evidence necessary under § 1912(f).⁷⁰

In re A.F., Fourth District California Court of Appeals.⁷¹ In this placement-preferences case out of the Fourth District of the California Court of Appeals, the court evaluated a letter from the Campo Band of Mission Indians that gave a preferred placement for a child under 25 U.S.C. § 1915, the federal regulations, and the 2016 ICWA Guidelines. After the state removed the child from her parent’s home, she was placed with a cousin who lived on the

⁶⁷ *Id.* at 485.

⁶⁸ *Id.* at 485–86.

⁶⁹ *Id.*

⁷⁰ *Id.* at 487.

⁷¹ *In re A.F.*, 226 Cal. Rptr. 3d 89 (Ct. App. 2017).

reservation.⁷² The State Child Welfare Agency and Tribe preferred this placement and recommended the child remain at that placement.⁷³ The paternal grandmother disagreed, filed de facto parent papers, and gained standing in the case.⁷⁴

Under ICWA's definition of extended family member, both grandmother and first cousin have equal weight.⁷⁵ However, the Tribe submitted a letter to the court stating it preferred the child stay with her cousin. The court determined that under the law, the 2016 ICWA Regulations, and the 2016 ICWA Guidelines, that the Tribe could only change the placement preferences by resolution and that the resolution had to be objective and not on a child-by-child basis.⁷⁶ The court noted that any tribal-state agreement entered into under 25 U.S.C. § 1919 would be considered a resolution under the Regulations.⁷⁷

In re B.B., Utah Supreme Court.⁷⁸ In this case, the Utah Supreme Court held, contrary to the district court's conclusion, that the father was a "parent" for purposes of ICWA because he met the federal standard for acknowledging paternity.⁷⁹ Therefore the Court also found that under § 1914 the father had the right to petition the court to invalidate the action terminating the mother's parental rights.⁸⁰

Using Utah's general principles of statutory interpretation; the court found the plain language of ICWA did not answer the question of "what is required for an unmarried biological father to be considered a parent for the purposes of ICWA?"⁸¹ The court then determined that "acknowledge" and "establish," the terms used in ICWA's 25 U.S.C. § 1903(9) definition of parent (and more specifically which unwed fathers are parents), are properly construed as plain-language terms.⁸² Because the dictionary definitions both lacked a timing element and were otherwise too broad and vague, the court turned to federal law for context.

⁷² *Id.* at *2.

⁷³ *Id.* at *3.

⁷⁴ *Id.*

⁷⁵ 25 U.S.C. § 1903(2) (1978).

⁷⁶ *In re A.F.*, 226 Cal. Rptr. 3d at *7–8.

⁷⁷ *Id.* at n.10.

⁷⁸ *In re B.B.*, 2017 UT 59, 2017 WL 3821741 (Utah 2017).

⁷⁹ *Id.* at *22.

⁸⁰ *Id.* at *24.

⁸¹ *Id.* at *14.

⁸² *Id.* at *17.

Adopting the reasoning in *Mississippi Band of Choctaw Indians v. Holyfield*,⁸³ the court found there was no reason to rely on state law definitions for a “critical term” in ICWA because where Congress intended a term in that law to be defined by state law, it explicitly stated so.⁸⁴ The court also noted that imputing a state-law definition of paternity would “impair” the purpose of ICWA.⁸⁵

The court then applied a federal reasonability standard to both the time and manner in which unwed fathers may acknowledge or establish their paternity and be recognized as parents under ICWA.⁸⁶ In this case, the court deemed the father’s actions both timely and sufficient.⁸⁷ Here, he resided with and provided for the birth mother for the first six months of her pregnancy.⁸⁸ When she went to Utah after six months, the plan was that the father would join her; but the mother cut off contact and placed the child for adoption without informing the father.⁸⁹ When the father learned of the adoption proceedings, he immediately alerted his tribe, consulted with a local attorney who referred him to Utah legal services with whom he filed a motion to intervene, a motion for paternity testing, and a paternity affidavit expressly acknowledging that he was the child’s father.⁹⁰

The court then determined that 25 U.S.C. § 1914 allows for any parent “from whose custody [of a] child was removed” to challenge a termination action in an appellate court. Then finding that because the father was a parent, as defined by ICWA, who had legal custody of the child by virtue of his paternity (and “to the extent he did not have physical custody of the Child, it was because of Birth Mother’s misrepresentation”), he could bring his action under § 1914.⁹¹ Because the father, therefore, had a right to intervene in the adoption proceedings—which were involuntary for him—the court remanded.⁹²

This private adoption proceeding also implicated the state-law issue of subject matter jurisdiction. Namely, whether the court

⁸³ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

⁸⁴ *In re B.B.*, 2017 UT 59 at *17.

⁸⁵ *Id.* at *19.

⁸⁶ *Id.* at *20.

⁸⁷ *Id.* at *22.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at *24.

⁹² *Id.* at *25.

could void birth mother's termination of parental rights by holding that she failed to give valid consent (because ICWA's 25 U.S.C. § 1913 timing requirement was not fulfilled), and therefore, whether the district court lacked subject matter jurisdiction to terminate her parental rights.⁹³ The majority of the court found that the issue was not properly before it and therefore failed to reach the merits.⁹⁴ Nonetheless, the dissent to Part I of the opinion includes an interesting discussion on whether the § 1913 requirement of ten days means ten calendar days or ten twenty-four-hour periods.⁹⁵

*In re D.H. Jr., Kansas Supreme Court.*⁹⁶ In this termination of parental rights case, the Kansas Supreme Court held that where there is evidence that a child may be an "Indian child" as defined by ICWA, the court must follow ICWA until the tribe advises the court otherwise.⁹⁷ Finding that the 2015 ICWA Guidelines "control here," the court reasoned that the state had failed to provide adequate notice both because it omitted the name, birthdate, and lineage of paternal grandmother (with whom the child was placed) and because after the tribe requested additional information the state took no steps to provide notice as required by those Guidelines (and other state's case law).⁹⁸

⁹³ *Id.* at *6–11.

⁹⁴ *Id.* at *1.

⁹⁵ *Id.* at *11–13.

⁹⁶ *In re D.H.*, 83 N.E.3d 1273 (Kan. 2017).

⁹⁷ *Id.* at *9.

⁹⁸ *Id.* Mother also claimed inadequate assistance of counsel based on the behavior of her first attorney, an individual who consented to disbarment after his representation of mother was discontinued. *Id.* at *8 (citing *In re Daniel J. Arkell*, 304 Kan. 754 (2016) (at the time of disbarment, Arkell had five different complaints lodged against him)). Counsel folded mother's no-contest statement over so she could not see the allegations to which she was admitting and told her "that she needed to sign the document if she wanted to get her child back and she did not need to worry about what it said." *Id.* at *7. He also advised "she should not pursue the issue of whether there was native parentage of her son because the tribe would 'come take her child away.'" *Id.* The court ultimately found that although the attorney's conduct was "well below" what is permitted and that there was "no excuse" for his actions, because the misconduct occurred very early in the proceedings and the question at hand is what is in the best interest of the child, the district court properly concluded that mother was not actually prejudiced. *Id.* at *8. The court did however, "point out" that "unique to this case even if we do not require the State to provide additional information to the tribe [concerning paternal grandmother's name and lineage], Mother has a strong argument for remand because her attorney, since disbarred, advised her not to pursue notice to the [tribe] under the Act." *Id.* at *10.

In re L.M.B., Kansas Court of Appeals.⁹⁹ In this termination-of-parental-rights case, the Kansas Court of Appeals held the trial court should have “followed” the 2015 ICWA Guidelines when determining whether a witness fulfills the qualified expert witness requirement of ICWA.¹⁰⁰ It also found the individual offered as a witness, who was a member of the child’s tribe, had a PhD in Native American History, teaches Indian studies, and teaches classes on ICWA, met the requirements of the first—“and most preferred”—category of expert delineated in the 2015 ICWA Guidelines.¹⁰¹ In addition, the court found the harmless-error rule applies in ICWA cases and citing *In re Tamika R.*, 973 A.2d 547, 553 (R.I. 2009), held that “the qualified expert testimony at the termination hearing effectively cured any possible harm that resulted from not having such testimony at the adjudication stage.”¹⁰² Notably, *Tamika R.* stands for the opposite proposition—that later expert testimony cannot cure a previous violation of ICWA’s QEW requirement.

The court also “looked to” the 2015 ICWA Guidelines to determine what “constitutes” active efforts (those rehabilitative efforts that ICWA requires the state social service agency to provide).¹⁰³ After reviewing the fifteen examples provided by the BIA, the court found that the efforts ICWA requires the states to provide can be grouped into two categories: “(1) active efforts to involve the children’s tribe and family members to assure that the children’s Indian culture is protected and respected[;] and (2) active efforts to keep the family together and help the parents obtain necessary resources.”¹⁰⁴ The court found, and the parties agreed, that the state had provided active efforts to protect children’s relationships with family and tribe. Parties disputed whether the state did more than “merely create” a case plan for parents.¹⁰⁵ In spite of testimony that the caseworker had treated this case no differently than any other and arguments about the additional efforts the caseworker could have provided, the court found that by engaging the tribe and extended family, the state had met its burden. The court recalled that as it had previously held, “it is simply not the

⁹⁹ *In re L.M.B.*, 398 P.3d 207 (Kan. Ct. App. 2017).

¹⁰⁰ *Id.* at 217–18.

¹⁰¹ *Id.*

¹⁰² *Id.* at 223.

¹⁰³ *Id.* at 219.

¹⁰⁴ *Id.* at 220.

¹⁰⁵ *Id.* at 221.

case that active efforts means absolutely every effort.”¹⁰⁶ Of note, to assess the active efforts provided, the court reviewed “the State’s efforts (*through its contractor*, St. Francis) related to the case plan.”¹⁰⁷ The Kansas Supreme Court declined to review this case.

***Gila River Indian Community v. DCS, Arizona Supreme Court.**¹⁰⁸ In this preadoptive/adoptive placement proceeding, the Arizona Supreme Court held that § 1911(b), which allows for transfer to tribal court, does not apply to state preadoptive and adoptive placements. The court went on to hold that the section also does not *prohibit* the transfer of such actions to tribal court.¹⁰⁹ The court reasoned the plain language of § 1911(b) applies to foster care and termination of parental rights proceedings and *requires* transfer absent good cause or parental objection.¹¹⁰ The court then stated that “[s]ection 1911(b) is silent as to the *discretionary* transfer of preadoptive and adoptive placement actions, but we do not interpret that silence to mean prohibition.”¹¹¹

The court then went on to clarify that “tribes have inherent authority to hear child custody proceedings involving their own children” and that “[a]s a result, although ICWA does not govern the transfer of preadoptive and adoptive placement actions, state courts may nonetheless transfer such cases involving Indian children to tribal court.” The court cited the 2016 ICWA Guidelines and Regulations as “support” for this conclusion.¹¹² Although the trial court concluded that “good cause” existed to deny the tribe’s motion for transfer, the Arizona Supreme Court affirmed the decision for a different reason: the hearing in question was a preadoptive/adoptive placement hearing not subject to § 1911(b).¹¹³ The court noted, however, it had “no occasion here to discuss grounds other than § 1911(b)—such as Arizona statutes or *forum non conveniens* doctrine—that might support transfer” and that its holding “does not

¹⁰⁶ *Id.* (internal quotations omitted).

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Gila River Indian Cmty. v. Dep't of Child Safety*, P.3d. 286, 242 (Ariz. 2017).

¹⁰⁹ *Id.* at 288.

¹¹⁰ *Id.* at 290.

¹¹¹ *Id.* at 290–91 (emphasis added).

¹¹² *Id.* at 291.

¹¹³ *Id.* at 292.

preclude transfer to tribal court of preadoptive or adoptive placement [proceedings].”¹¹⁴

In re A.O., South Dakota Supreme Court.¹¹⁵ In this termination-of-parental-rights case, the South Dakota Supreme Court held the lower court’s denial of the mother’s and tribe’s joint request for transfer because it was not timely and not in the child’s best interest without a hearing was improper.¹¹⁶ The court reasoned that transfer is “generally mandatory when requested,” that “the burden to establish good cause to the contrary is on the opposing party,” that “the determination whether a petition is timely must be made on a case-by-case basis,” and that “the court should make specific findings.”¹¹⁷ Thus, because the court is “required to consider all the particular circumstances of a case, not simply the amount of time that had passed since the proceedings first began” the court was required to “afford Mother [and tribe] a full opportunity to present evidence and argument” before making a determination about both timeliness and the children’s best interest.¹¹⁸

****S.S. v. Stephanie H.***¹¹⁹ In this private termination of parental rights proceeding, the Arizona Court of Appeals held that ICWA §§ 1912(d) and (f) applies when an ex-husband tries to terminate his former wife’s rights to their Indian child for a step-parent adoption.¹²⁰ Reasoning the “plain language does not limit the scope [of ICWA] to proceedings brought by state-licensed or public agencies,” and that because “Congress explicitly excluded dissolution and delinquency proceedings...[h]ad it also intended to exclude private termination proceedings...it would have done so expressly”,¹²¹ the court found ICWA applied. The court also found that because ICWA applies to “any action resulting in the termination of the parent-child relationship” where parent “means any biological parent...of an Indian child” the fact that mother is

¹¹⁴ *Id.* at 291.

¹¹⁵ *In re A.O.*, 896 N.W.2d 652 (S.D. 2017).

¹¹⁶ *Id.* at 656.

¹¹⁷ *Id.* at 655.

¹¹⁸ *Id.* at 655–56.

¹¹⁹ *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017).

¹²⁰ *Id.* at 574.

¹²¹ *Id.* at 573.

non-Native is not of consequence.¹²² This follows a long line of case law holding the same.

In applying § 1912(d) to the case, the court held “[c]onstruing ICWA broadly to promote its stated purpose, we interpret the ‘active efforts’ requirement of § 1912 (d) in an abandonment proceeding to include informal private initiatives aimed at promoting contact... and encouraging [a] parent to embrace his or her responsibility to support and supervise the child.”¹²³ The court then explains what this may mean:

In the abstract, “active efforts” to prevent a parent from abandoning a child might include, *inter alia*, informing the parent about the child's educational progress and interests; sending the parent photographs of the child; keeping the parent informed of irregular but significant expenses, such as medical expenses, to which the parent would be expected to contribute; and, where appropriate, inviting the parent to school and extracurricular events and allowing the child to accept communications from the parent.¹²⁴

The court then found that the father—rather than assisting the mother in establishing a relationship with the children—had forbidden her from contacting him. It also found that the drug and alcohol treatment offered were active efforts, but *successful* (where section 1912(d) requires an effort to be unsuccessful).¹²⁵ Finally, the court dispensed with an equal protection argument in two sentences concluding both that ICWA is based on “political status and tribal sovereignty” and the requirements of ICWA in question in this case “are rationally related to the government’s desire to protect the integrity of Indian families and tribes.”¹²⁶

The Arizona Supreme Court declined to review this case on April 18, 2017. On July 17, 2017, the children, represented by the Goldwater Institute filed a Petition for Certiorari to the United States

¹²² *Id.* at 574 (internal quotation marks omitted).

¹²³ *Id.* at 575.

¹²⁴ *Id.*

¹²⁵ *Id.* at 575–76.

¹²⁶ *Id.* at 576.

Supreme Court. The Court denied the Petition on October 30, 2017.¹²⁷

B. *Federal Cases*

Because ICWA is implemented in state court, federal cases involving the law are usually rare. However, due to a series of affirmative attacks on the law in federal court, which started in 2015, there have been seven published federal opinions (District Court, Appellate Court, and Supreme Court) over the past three years.¹²⁸ This article only includes decisions from 2017, but does note when a case is currently under appeal.

**A.D. by Carter v. Washburn*¹²⁹

In 2015, the Goldwater Institute (the Institute) filed a federal class action lawsuit challenging the constitutionality of ICWA and the revised 2016 ICWA Guidelines.¹³⁰ The proposed class of plaintiffs included all Native children who are in foster care in Arizona and live off reservation, all foster parents, pre-adoptive, and prospective adoptive parents who are not members of the Native child's extended family.¹³¹ The Goldwater Institute argued that ICWA's transfer, active efforts, burdens of proof for removal, burdens of proof for termination of parental rights, and placement preferences provisions, violate equal protection and due process for both the children and foster and adoptive families.¹³²

The district court held the plaintiffs lacked standing to bring the case and dismissed the case.¹³³ The court found the plaintiffs did not articulate specific injury in fact to avoid dismissal under federal standing doctrines—specifically, the plaintiffs could not provide specific facts that any of the ICWA provisions challenged specifically delayed placement, adoption, or otherwise harmed the children in foster care.¹³⁴ In addition, though the plaintiffs were

¹²⁷ S.S., et al. v. Colorado River Indian Tribes, 138 S. Ct. 380 (2017).

¹²⁸ Data on file with the authors and journal.

¹²⁹ A.D. by Carter v. Washburn, No. 15-cv-01259, 2017 WL 1019685 (D. Ariz. March 16, 2017). (On appeal to the Ninth Circuit *Carter v. Washburn, No. 17-15839.).

¹³⁰ Complaint for Declaratory and Injunctive Relief, A.D. v. Washburn, (D. Ariz. 2015) (No. 15-cv-01259).

¹³¹ *Id.*

¹³² *Id.*

¹³³ A.D. by Carter, No. 15-cv-01259, 2017 WL 1019685.

¹³⁴ *Id.* at *11.

allowed leave to amend, and claimed there were so many potential plaintiffs to make joinder impossible, they were unable to find any plaintiffs able to show injury in fact.¹³⁵ The Institute filed an appeal in the Ninth Circuit, which is briefed and awaiting oral argument.¹³⁶

**Doe v. Piper*¹³⁷ and **Doe v. Hembree*¹³⁸

In both of these cases, attorneys representing the biological parents of Indian children argued that *state* ICWA laws requiring notice to the child's tribe and the right of intervention to the tribe violated the parents' rights to privacy. Also, in both of these cases, the courts dismissed the cases as moot.

IV. ALL REPORTED CASES

As a federal law implemented by state courts, ICWA holds a unique place in child welfare jurisprudence. Included below is a comprehensive listing of all reported 2017 state and federal cases involving the Indian Child Welfare Act. This quick reference should allow busy practitioners the opportunity to quickly find and review all new case law on any given ICWA topic that may arise in their caseload without the tedious work of searching through fifty jurisdictions and numerous topics.

This survey reinforces what ICWA practitioners know—that while the federal cases take a lot of the attention and use anecdotes to make broad anti-ICWA arguments, day-to-day ICWA practice involves family in crisis and need. A vast majority of ICWA appeals are done by parents, hoping the promise and protections of the law will help them reunify with their children. Families in poverty run a high risk of losing their children. ICWA cannot change that reality, but it can force states, and tribes, to provide tailored, useful services to those families. The federal lawsuits do nothing to address this reality, but instead try to remove a law that provides some of the few identifiable protective factors for children and families. Instead, what the lawsuits should do is shine a spotlight on a broken child welfare system, where ICWA is one of the few laws that provide *support* for families in crisis.

¹³⁵ *Id.*

¹³⁶ Appellants' Opening Brief, A.D. by Carter v. Washburn (Ninth Cir. Sept. 1, 2017) (No. 17-15839).

¹³⁷ *Doe v. Piper* No. 15-cv-02639, 2017 WL 3381820 (D. Minn. Aug. 4, 2017).

¹³⁸ Order, *Doe v. Hembree* (N.D. Okla. Mar. 31, 2017) (No. 15-CV-00471).

A. *State Cases*

Unreported cases and those that were reported but only to clarify the child involved was not ICWA-eligible have not been included. Those cases that involve entities who are a part of the organized efforts to dismantle ICWA (e.g., The Goldwater Institute and American Academy of Adoption Attorneys) are denoted with an asterisk “*”.

Title, citation

Date of Decision

Court

Named Tribe¹³⁹

Active Efforts

**S.S. v. Stephanie H.*, 388 P.3d 569, 241 Ariz. 419

Jan. 12, 2017

Arizona Court of Appeals

Colorado River Indian Tribes

Arizona Supreme Court Denied Petition for Review April 18, 2017.

Petition for Certiorari filed with U.S. Supreme Court July 17, 2017. Docket No: 17-95

In re L.M.B., 398 P.3d 207, 2017 WL2617155

June 16, 2017

Kansas Court of Appeals

Citizen Potawatomi

Petition for Review filed with Kansas Supreme Court

In re M.L.M., 388 P3d 1226, 283 Or App 353

Jan 11, 2017

¹³⁹ The “named tribe” is the most specific information available in the case, and there is “reason to believe” the child might be an Indian child. Future drafts of this document will indicate whether the tribe initiated the appeal or not. An “unnamed” tribe means the tribe’s name does not appear in the opinion. An “unknown” tribe means the parent does not know the tribe’s name but has stated there is a tribal affiliation.

Oregon Court of Appeals
Choctaw Nation
Petition for Review with Oregon Supreme Court Denied
April 27, 2017.
395 P3d 11, 316 Or 439

Child Custody Proceeding

In re M.R., 7 Cal App 5th 868, 212 Cal Rptr 3d 807
Jan. 20, 2017
California Court of Appeals 4th District
Unnamed Tribe

Indian Custodian

In re E.R., __Cal.Rptr.3d__, 2017 WL 6506974
Dec. 20, 2017
California Court of Appeals 1st District
Cloverdale Rancheria

Inquiry and Notice

In re Breanna S., 8 Cal. App. 5th 636, 214 Cal. Rptr. 3d 98
Feb. 14, 2017
California Court of Appeals 2nd District
Pascua Yaqui

In re J.L., 10 Cal. App. 5th 913, 217 Cal. Rptr. 3d 201
April 5, 2017
California Court of Appeals 4th District
Unknown Tribe

In re L.L., 395 P3d 1209, 2017 WL 1089561
March 23, 2017
Colorado Court of Appeals
Apache

In re A.D., 413 P.3d 290, 2017 WL 1739170
May 4, 2017
Colorado Court of Appeals
Unnamed Tribe

In re D.H. Jr., 401 P.3d 163, 2017 WL 3327067
Aug. 4, 2017
Kansas Court of Appeals
Cherokee Nation

Adoption of Uday, 70 N.E.3d 928, 91 Mass. App. Ct 51
Feb.16, 2017
Appeals Court of Massachusetts
Cherokee Nation

In Interest of C.C., 2017 WL 3184319
June 30, 2017
Court of Appeals of Texas
Unnamed

In re A.G., 2017 WL 3085084
July 20, 2017
Ohio Court of Appeals
Unnamed

Michelle M. v. Dept. of Child Safety, 401 P.3d 1013, 243 Ariz. 64
Aug. 31, 2017
Arizona Court of Appeals
Navajo Nation/Oglala
Sioux/Spirit Lake

In re L.W.S., 804 S.E.2d 816, 2017 WL 3863197
Sept. 5, 2017
North Carolina Court of Appeals
Cherokee Nation

In re C.A., __P.3d__, 2017 COA 135
Oct. 19, 2017
Colorado Court of Appeals
Unnamed

In re K.G., __P.3d__, 2017 COA 153
Nov. 30, 2017
Colorado Court of Appeals
Cherokee Nation/Choctaw Nation

Intervention

In re J.J.T., 2017 WL 6506405, ___ S.W.3d ___
December 20, 2017
Texas Court of Appeals
Navajo Nation

Foster Care Proceeding

In re L.L., 395 P3d 1209, 2017 WL 1089561
March 23, 2017
Colorado Court of Appeals
Apache

In re Detmer/Beaudry, ___NW2d___, 2017 WL 3614234
Aug. 22, 2017
Michigan Court of Appeals
Sault Ste. Marie Tribe of Chippewa Indians

Guardianship Proceeding

Jude M. v. State, DHSS, OCS, 394 P3d 543, 2017 WL 1533373
April 28, 2017
Alaska Supreme Court
Unnamed Tribe

Paternity

In re B.B., ___P.3d___, 2017 WL 3821741
Aug. 31, 2017
Utah Supreme Court
Colorado River Sioux Tribe
Stayed pending a United States Supreme Court Petition for
Certiorari

Placement Preferences

In re J.J.W., 902 NW2d 901, 2017 WL 2491888
June 8, 2017
Michigan Court of Appeals
Sault Ste. Marie Tribe of Chippewa Indians

In re C.B.D., 387 Mont. 347, 394 P3d 202
9-May 2017
Montana Supreme Court
Crow Tribe

In re P.F., 405 P3d 755, 2017 WL 3668103
Aug 24, 2017
Utah Court of Appeals
Cherokee Nation

Termination of Parental Rights

Bob S. v. State, DHHS, OCS, 400 P3d 99, 2017 WL 3202761
July 28, 2017
Alaska Supreme Court
Native Village of Selawik

In re S.E., 527 S.W.3d 894
Sept. 12, 2017
Missouri Court of Appeals
Nenana Native Village

In re M.J., 2017 WL 6623390
December 28, 2017
Wisconsin Court of Appeals
Lac du Flambeau of Lake Superior Chippewa

In re A.J.B., 414 P.3d 552, 2017 UT App 237
December 29, 2017
Utah Court of Appeals
Ute Indian Tribe

Transfer

In re A.O., 896 N.W.2d 652, 2017 WL 2290151
May 24, 2017
South Dakota Supreme Court
Oglala Sioux Tribe

**Gila River Indian Community v. DCS*, 395 P.3d. 286, 242 Ariz. 277
June 13, 2017

Arizona Supreme Court
Gila River Indian Community

Qualified Expert Witness

In re L.M.B., 398 P.3d 207, 2017 WL2617155
June 16, 2017
Kansas Court of Appeals
Citizen Potawatomi

Caitlin E. v. State, DHHS, OCS, 399 P.3d 646, 2017 WL 2609221
Jun 16, 2017
Alaska Supreme Court
Orutsaramiut Native Council

In re D.B., 414 P.3d 46, 2017 COA 139
Nov. 2, 2017
Colorado Court of Appeals
Navajo Nation

In re K.S.D., 904 N.W. 479, 2017 ND 289
Dec. 2, 2017
North Dakota Supreme Court
Cheyenne River Sioux Tribe

Withdrawing Consent

In re J.J.W., 902 N.W.2d 901, 2017 WL 2491888
8-Jun 2017
Michigan Court of Appeals
Sault Ste. Marie Tribe of Chippewa Indians
On appeal to the Michigan Supreme Court

B. *Federal Cases*

Constitutionality of ICWA

**A.D. by Carter v. Washburn*, No. 15-cv-01259, 2017 WL 1019685
(D. Ariz. March 16, 2017)
Navajo Nation, Gila River Indian Community

On appeal to the Ninth Circuit **Carter v. Washburn*, No. 17-15839.

Emergency Proceedings

Oglala Sioux v. Fleming, 993 F.Supp.2d 1017 (D.S.D. 2014); 100 F.Supp.3d 749 (D.S.D. 2015); 220 F.Supp.3d 986 (D.S.D. Dec. 15, 2016)

Oglala Sioux Rosebud Sioux

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Notice and Intervention in Voluntary Proceedings

**Doe v. Piper*, No. 15-cv-02639, 2017 WL 3381820 (D. Minn. Aug. 4, 2017)

Mille Lacs Band of Ojibwe

**Doe v. Hembree*, Order, No. 15-CV-00471 (N.D. Okla. March 31, 2017)

Cherokee Nation