20. ENFORCEMENT OF ICWA REQUIREMENTS

Disclaimer: *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

25 U.S.C. § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

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

Disclaimer: The above provision of the Indian Child Welfare Act is set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.

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Frequently Asked Questions

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20.1 Who may petition a court under § 1914?

The Indian Child Welfare Act (ICWA) provides that "any parent or Indian custodian" or "the Indian child's tribe" may petition a "court of competent jurisdiction" under § 1914. Although § 1914 uses the conjunctive "and," a tribe has independent standing to petition. *In re Phillip A.C., II*, 149 P.3d 51 (Nev. 2006). Likewise, any parent or Indian custodian has independent standing to petition. *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

20.2 What is a "court of competent jurisdiction" under § 1914 of the ICWA?

The term is not defined in the Act or its legislative history, but generally a court of competent jurisdiction is one which has jurisdiction over the relevant subject matter under federal, state, or, in some cases, tribal law. Section 1914 does not create jurisdiction that does not already exist or preempt it when it exists. *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005). In *Slone v. Inyo County Juvenile Court*, 282 Cal. Rptr. 126 (Ct. App. 1991), the parents of an Indian child had their parental rights terminated by a California juvenile court in a dependency case. They instituted an action based on § 1914 in a California superior court to invalidate the juvenile court's decision. The court of appeals held that the ICWA did not preempt California's jurisdictional rules, which required a state court to have subject matter jurisdiction before it considered an action. It looked at § 1914 and found that given that the phrase "any court of competent jurisdiction" was not defined in the Act or its legislative history, Congress assumed that those state courts that

enforced the ICWA would already have subject matter jurisdiction over the action. Only the juvenile court had jurisdiction to hear the case, so the superior court was not a court of competent jurisdiction under § 1914.

Practice Tip:
To reduce the later need to resort to § 1914, the tribe is encouraged to immediately intervene when it receives notice of an ICWA proceeding. It should be noted that by intervening, the tribe is not automatically seeking a transfer of jurisdiction, which is separate procedure, although practitioners will often combine an intervention with a motion to transfer proceedings to the tribal court. The practitioner may also want to consider a transfer to tribal court where it appears that violations of the ICWA are occurring while the case is in state court. Also, the practitioner has the option of appealing a decision to a state appellate court.

The case law from the federal courts has been confusing and inconsistent. Some federal courts have foreclosed a petitioner from bringing a § 1914 action on the grounds that once the petitioner has participated in state court it is bound by that decision based on claim and issue preclusion law, s*ee, e.g., Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587 (10th Cir. 1985); *Comanche Indian Tribe of Okla. v. Hovis* (*Hovis II*), 53 F.3d 298 (10th Cir. 1995), or based on the abstention doctrine that forecloses a federal court from intruding in an on-going state proceeding. *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996).

Other federal courts have allowed a petitioner access. In *Mann II*, 415 F.3d 1038, the Ninth Circuit found no reason to foreclose a § 1914 action in federal court, even where the parties had participated in the state court proceeding. This accords with an earlier decision in the Tenth Circuit, *Roman-Nose v. New Mexico Dep't of Human Servs.*, 967 F.2d 435 (10th Cir. 1992), which found no reason to prevent a federal court action by parents who participated in a New Mexico state court ICWA proceeding. The court ruled that the federal court had subject matter jurisdiction under the ICWA to proceed, although it recognized the later possibility of defenses, such as res judicata, being raised by the opposing party.

Under these circumstances, it is difficult to recommend to a practitioner to forgo a state court proceeding because of uncertainty in the competing set of precedents. A petitioner (most likely the tribe or Indian custodian because the parent will already be a respondent in the state proceeding) is therefore placed in a difficult position because it may have to forgo participation in a state ICWA proceeding to file a § 1914 petition in federal court, yet some federal case law indicates that is not necessarily true.

20.3 Is there a time limit to petition under § 1914?

There is no time limit set forth in § 1914 in which to file a petition. As a result, some state courts have resorted to state statutes of limitations. As one court observed: "'When Congress does not establish . . . a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.' The United States Supreme Court has mandated that courts 'borrow the most closely analogous state limitations period.' The limitations period will necessarily vary from state to state." *State v. Native Village of Curyung*, 151 P.3d 388, 411 (Alaska 2006) (citations omitted). As the court points out, however, the result of using state statutes of limitation is uncertainty and inconsistency. Thus, use of these statutes may very well be contrary to the intent of Congress to provide a uniform federal standard under the ICWA in terms of the basic applicability of the statute. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1987) (holding domicile to be defined by federal law, not individual state laws).

Even where a petition is timely filed, some state courts have ruled that their error preservation rules apply in an ICWA proceeding. *See, e.g., In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998); *In re Pedro N.*, 41 Cal. Rptr. 2d 819 (Ct. App. 1995). But others disagree. *See, e.g., In re L.A.M.*, 727 P.2d 1057 (Alaska 1986). A party or practitioner is well-advised to object to any error based on the ICWA at the trial court level, otherwise a failure to timely object may be considered a waiver or harmless error even where the challenge is brought under § 1914.

20.4 Does § 1914 provide a basis to raise ICWA violations for the first time on appeal.

Yes. *In re S.M.H.*, 103 P.3d 976, 982 (Kan. Ct. App. 2005); *In re S.R.M.*, 153 P.3d 438 (Colo. Ct. App. 2006).

20.5 Is invalidation of a foster care placement or termination of parental rights mandatory under § 1914 upon a showing the Act has been violated?

Yes. *See, e.g., In re L.A.M.*, 727 P.2d 1057 (Alaska 1986); *In re Morgan*, 364 N.W.2d 754 (Mich. Ct. App. 1985); *In re H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986). Some courts have held that if a separate stage of the case is not tainted by the earlier proceeding invalidation is not necessarily required of a later, valid proceeding. *In re S.W.*, 727 N.W.2d 144 (Minn. Ct. App. 2007).

20.6 Is § 1914 available to invalidate a placement in violation of § 1915?

No. *Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999).

20.7 Does a claim for relief under 42 U.S.C. § 1983 to remedy an ICWA violation displace the remedy under § 1914?

No. In fact, § 1914 supplements the remedies under 42 U.S.C. § 1983. *State v. Native Village of Curyung*, 151 P.3d 388 (Alaska 2006).

20.8 What oversight is there for compliance?

To a very large extent, oversight has been left to the judicial system. For example, the judicial system has been used to enforce compliance through case law, court rules, and bench manuals (see the *Practical Guide*'s Federal and State Resources section).

Also, one court observed, "*every* attorney involved in matters concerning Indian children subject to the Indian Child Welfare Acts is under an affirmative duty to insure full and complete compliance with these Acts [federal and state ICWAs]." *In re Baby Girl B.*, 2003 OK CIV APP 24, ¶¶ 78-83, 67 P.3d 359, 374. Any failure of the attorney may result in finding of malpractice. *Doe v. Hughes*, 838 P.2d 804 (Alaska 1992).

20.9 What other mechanisms are available to ensure compliance with the Act?

One mechanism that could help ensure compliance with the ICWA is a tribal-state agreement under § 1919 of the Act. These agreements can place requirements upon states and institutionalize tribal involvement in the process in a manner which will improve overall compliance. In addition, from a practical point of view, practitioners are encouraged to work with state agencies, juvenile judges, etc., to educate and facilitate compliance with the ICWA and the initiation of routine procedures to assist in that compliance.

Another mechanism is for the tribe to become actively involved in the state child welfare planning and review processes. Title IV-B of the Social Security act mandates that states' plans developed pursuant to that act must provide a description, developed in consultation with Indian tribes in the state, of the specific measures to be taken by the state to comply with the Indian Child Welfare Act. 42 U.S.C. § 622(b)(11) (2000). In addition, the Children's Bureau within the United States Department of Health and Human Services performs Child and Family Service Reviews (CFSR) of all state systems. The Children's Bureau considers tribes to be important "stakeholders" in this process and tribal representatives are encouraged to participate in the CFSR process through serving on Statement Assessment development teams, participating as consultant reviewers or case-specific interviews, among other things.

20.10 What enforcement mechanisms are possible to ensure private agencies comply with the Act?

With respect to private agencies, parties involved in an ICWA proceeding may seek intercession by the public agency responsible for licensing the foster care facility or approving the adoptive home. Parties may also ask a court to enter compliance orders against private agencies.

**** Access to the full-text of opinions and additional materials is at www.narf.org/icwa ****

The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.

FEDERAL CASES

United States Supreme Court
Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1987)

Circuit Courts of Appeal
Comanche Indian Tribe of Okla. v. Hovis (*Hovis II*), 53 F.3d 298 (10th Cir. 1995)
Doe v. Mann (*Mann II*), 415 F.3d 1038 (9th Cir. 2005)
Kiowa Tribe of Okla. v. Lewis, 777 F.2d 587 (10th Cir. 1985)
Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996)
Native Village of Venetie I.R.A. Council v. Alaska, 155 F.3d 1150 (9th Cir. 1998)
Roman-Nose v. N.M. Dep't of Human Servs., 967 F.2d 435 (10th Cir. 1992)

District Courts
Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)
Navajo Nation v. Superior Court, 47 F. Supp. 2d 1233 (E.D. Wash. 1999)

STATE CASES

Alaska
Doe v. Hughes, 838 P.2d 804 (Alaska 1992)
In re Erin G., 140 P.3d 886 (Alaska 2006)
In re L.A.M., 727 P.2d 1057 (Alaska 1986)
State v. Native Vilage of Curyung, 151 P.3d 388 (Alaska 2006)
In re T.N.F., 781 P.2d 973 (Alaska 1989)

California
In re Daniel M., 1 Cal. Rptr. 3d 897 (Ct. App. 2003)
In re Desiree F., 99 Cal. Rptr. 2d 688 (Ct. App. 2000)
In re Jonathon S., 28 Cal. Rptr. 3d 495 (Ct. App. 2005) (certified for partial publication)
In re Krystle D., 37 Cal. Rptr. 2d 132 (Ct. App. 1994)
In re Pedro N., 41 Cal. Rptr. 2d 819 (Ct. App. 1995)
Slone v. Inyo County Juvenile Court, 282 Cal. Rptr. 126 (Ct. App. 1991)

Colorado
In re S.R.M., 153 P.3d 438 (Colo. Ct. App. 2006)

Iowa
In re J.D.B., 584 N.W.2d 577 (Iowa Ct. App. 1998)
In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993)

Kansas
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In re S.M.H., 103 P.3d 976 (Kan. Ct. App. 2005)

Michigan
In re Kreft, 384 N.W.2d 843 (Mich. Ct. App. 1986)
In re Morgan, 364 N.W.2d 754 (Mich. Ct. App. 1985)

In re N.E.G.P., 626 N.W.2d 921 (Mich. Ct. App. 2001)

Minnesota
In re S.W., 727 N.W.2d 144 (Minn. Ct. App. 2007)

Nebraska
In re Enrique P., 709 N.W.2d 676 (Neb. Ct. App. 2006)

Nevada
In re Phillip A.C., II, 149 P.3d 51 (Nev. 2006)

New Jersey
In re Child of Indian Heritage (*Indian Child II*), 543 A.2d 925 (N.J. 1988)

New Mexico
In re Begay, 765 P.2d 1178 (N.M. Ct. App. 1988)

Oklahoma
In re Baby Girl B., 2003 OK CIV APP 24, 67 P.3d 359
In re M.D.R., 2002 OK CIV APP 74, 50 P.3d 1160