AUTHORITY OF THE FEDERAL GOVERNMENT TO OVERSEE AND ENFORCE THE IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT (ICWA)

INTRODUCTION

ICWA does not give any federal agency direct responsibility for states' compliance with the law.[1] Nonetheless, at least three federal agencies – the Departments of Interior, Health and Human Services and Justice – have been provided with some statutory authority to oversee and enforce the implementation of the Indian Child Welfare Act by states. This paper will describe the sources of federal authority and responsibility to enforce ICWA, actions that have been taken by federal entities utilizing this authority, and additional measures that agencies could take if they fully exercised the authority that they have to oversee and enforce ICWA implementation. Where best practices already exist which could help inform policymakers as to possible future strategies for enforcement, these will be identified.

SOURCES OF AUTHORITY TO ENFORCE THE ICWA

THE UNITED STATES CONSTITUTION

The constitutional basis for federal oversight of state compliance with the Indian Child Welfare Act may be based upon three clauses of the Constitution. The first is the Indian Commerce Clause which authorizes Congress to "regulate commerce" with the "Indian tribes.[2] The second is the Spending Clause which provides Congress with the power "to pay the Debts and provide for ... the general Welfare of the United States....[3] The third is the Fourteenth Amendment which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indian Commerce Clause

The struggle for control over Indian affairs between the states and the federal government dates back to the birth of the United States. Indeed, state-central government conflict during the Confederation Congress, which was created by the Articles of Confederation in 1781, was one of the aspects of that document which demonstrated the inherent weaknesses of the United States government which had been created by the Articles.[4] The difficulty arising from the lack of total federal control of Indian affairs was one of the primary factors which led directly to the formation

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[1] *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States"* (United States Government Accountability Office, April 2005) at 4.
[2] U.S. Const. art. I, § 8, cl. 3
[3] U.S. Const. art. I, §8, cl. 1
[4] Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 Am. Indian L. Rev. 134, 151-52 & nn.145-54 (1993)

of the United States constitutional government which exists today.[5]

For this reason, the United States Constitution which replaced the Articles of Confederation contains an Indian Commerce Clause, empowering Congress "[t]o regulate Commerce...with the Indian tribes."[6] This clause, as well as "the dependent relation of such tribes to the United States",[7] "provides Congress with plenary power to legislate in the field of Indian affairs . . . ."[8] In fulfilling the federal government's responsibilities, "Congress' authority over Indian matters is extraordinarily broad."[9] The plenary power of Congress in Indian affairs has generally been interpreted to mean an "untrammeled" and "absolute or total" federal constitutional power over Indian affairs.[10]

Thus, Congress has the power and duty to enact legislation which benefits Indian people. Indeed, in *Seminole Nation of Florida v. Florida*,[11] the Court found that the Indian Commerce clause is a broader delegation of authority to the federal government than the Interstate Commerce clause.

The Indian Child Welfare Act was specifically enacted pursuant to Congress' authority under the Indian Commerce Clause.[12]

The Spending Clause

The Spending Clause provides Congress with the power "to pay the Debts and provide for ... the general Welfare of the United States...."[13] It has long been held that Congress may use this power to condition acceptance of a grant by a state upon the state taking certain actions that Congress could not otherwise require it to take.[14] This is to ensure that the funds are used by the States to provide for the general welfare in the way that Congress intended when it approved the funding. The legitimacy of Congress' exercise of power is dependent upon the state voluntarily

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[5] *Id.* at 152-54 & nn.155-62 (quoting John Jay, Benjamin Franklin & James Madison regarding the need for a strong central government with complete power over Indian affairs; Madison proposed an Indian commerce clause).

[6] The very first Congress acted quickly to exercise its new power in Indian affairs. In the first five weeks of its existence it enacted four laws regarding Indian affairs, e.g., Act of August 7, 1789, ch. 7, 1 Stat. 49; Act of August 20, 1789, ch. 10, 1 Stat. 54, and thereafter enacted the Indian Trade and Intercourse Act of July 22, 1790, ch. 23, 1 Stat. 137, which prevents state dealings with tribes without federal approval.

[7] *United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 697 (1916).

[8] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)); *accord Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

[9] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

[10] Charles F. Wilkinson, *American Indians, Time, and the Law* at 78-79 (1987). See also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.")

[11] 517 U.S. 44 (1996)

[12] U.S. Const. art. I, § 8, cl. 3.

[13] U.S. Const. art. I, § 8, cl. 1.

[14] *National Federation of Independent Business v. Sebelius*, 133 S.Ct. 2566, 2601 (2012).

and knowingly accepting the terms of the grant.[15]

The Social Security Act is an exercise of Congressional authority pursuant to this clause.[16] Of particular relevance here are the sections of the Social Security Act that provide funding for state child welfare programs, Titles IV-B and IV-E.[17]

The Fourteenth Amendment

The Fourteenth Amendment provides, in relevant part:

> "Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Congress' power under §5 enforcing the provisions of the Fourteenth Amendment has been described as "remedial" in nature. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.[18]

The right of parents to raise their children has been recognized as a fundamental liberty interest.[19] The "integrity of the family unit" has been protected under both the due process and equal protection clauses and it has been recognized that parents' right to the care and custody of their child "undeniably warrants deference and, absent a powerful countervailing interest, protection."[20]

Pursuant to this amendment, the Congress has passed civil rights statutes that may serve as the basis for the Department of Justice to take action in regard to violations of ICWA.

THE TRUST RELATIONSHIP

In exercising its authority over American Indian and Alaska Native affairs, the Courts have found that there is a "distinctive obligation of trust incumbent upon the [federal]

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[15] *Id.*
[16] *Steward Machine v. Davis*, 301 U.S. 548 (1937).
[17] 42 U.S.C. 620 *et seq.* and 42 U.S.C. 670 *et seq.*
[18] *City of Bourne v. Flores*, 521 U.S. 507, 524-530 (1997).
[19] *Santosky v. Kramer*, 455 U.S. 745, 752-754 (1982).
[20] *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Government that "involves moral obligation of the highest responsibility."[21] There is no specific case that originally established this document, but the basis for this special legal relationship between Indian people and the federal government is generally considered to be derived from both the Indian Commerce Clause and over 400 treaties signed by the federal government.[22] This trust relationship applies to all Federal agencies and to Federal action outside Indian reservations.[23] Although the Supreme Court has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people,"[24] the Supreme Court recently clarified that the nature of that relationship is defined by the statutes that Congress has enacted. While common law principles can help interpret these statutes, "the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities'" (citations omitted).[25]

In enacting the Indian Child Welfare Act, the Congressional findings specifically refer to the duty of the United States "as trustee" to protect Indian children and recognize that Congress "has assumed the responsibility for the protection and preservation of Indian tribes" through statutes and treaties.[26]

FEDERAL STATUTES

As stated in the recent Attorney General's report, "Thirty-four years after ICWA's passage, full implementation of the act remains elusive." The Departments of Interior ("Bureau of Indian Affairs"), Health and Human Services ("Administration for Children and Families") and the Department of Justice all have roles in ensuring that state and local courts and agencies comply with the mandates of ICWA.

There are three main potential sources of statutory law which may provide these federal agencies with the authority to oversee the implementation of the Indian Child Welfare Act by the states. The first are provisions of the Indian Child Welfare Act itself. The second are the provisions in the Social Security Act which provide funding to states for child welfare programs provided those programs meet certain federal requirements. The third possible source of federal authority would be the Civil Rights Acts which provide a cause of action when a person has been denied rights established by law.

It is worth noting these statutes must be viewed in tandem with the trust relationship described above. On the one hand, the parameters of the trust relationship are informed by the

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[21] *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).
[22] See, e.g., Rebecca Tsosie, *The Indian Trust Doctrine After The 2002-2003 Supreme Court Term,* 39 Tulsa Law Review 271, 272 (2003).
[23] See, e.g., *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981), *cert. den.* 454 U.S. 1081 (1981); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990).
[24] *United States v. Mitchell*, 463 U.S. 206, 225 (1983).
[25] *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011).
[26] 25 U.S.C. 1901(2) and (3).

statutes that Congress has enacted. On the other hand, how statutes are interpreted is affected by the trust relationship. The trust relationship has given rise to unique canons of construction in Indian law.[27] Of most relevance here is the canon that establishes the precept that "statutes are to be construed liberally in favor of the Indians . . . ."[28] These principles suggest that grants of authority to the United States to enforce statutes on behalf of Indian tribes and people should be interpreted in a manner that supports the ability of the United States to fulfill its trust responsibility.

Indian Child Welfare Act (ICWA)

Overview

The ICWA was enacted in response to a tragedy that was taking place within the Indian community. Enormous numbers of Indian children had been removed from their families and tribal communities without just cause. The ICWA was landmark bipartisan legislation which, although it has been imperfectly implemented, has provided vital protection to Indian children, families and tribes. It has formalized the authority and role of tribes in the Indian child welfare process.[29] It has forced greater efforts and more painstaking analysis by agencies and courts before removing Indian children from their homes.[30] It has provided procedural protection to families and tribes to prevent arbitrary removals of children.[31] It has required recognition by agencies and courts alike that an Indian child has a vital interest in retaining a connection with his or her Indian heritage, specifically recognizing that placement with a child's extended family or other tribal families (when out-of-home placement cannot be avoided) is in the child's best interests.[32] Each year thousands of child custody and adoption proceedings take place in which

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[27] *Oneida County v. Oneida Indian Nation,*470 U. S. 226, 247 (1985).

[28] *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

[29] See, e.g., 25 U.S.C. 1911(a) (exclusive tribal jurisdiction over Indian children resident or domiciled on the reservation); 25 U.S.C. 1911(b) (transfer of off-reservation state court proceedings to tribal court); 25 U.S.C. 1911(c) (recognizing the right of Indian tribes to intervene in all state court child custody proceedings involving children who are members or eligible for membership in the tribe); 25 U.S.C. 1911(d) (requiring state courts to accord tribal court judgments full faith and credit); 25 U.S.C. 1912(a) (requiring notice to Indian tribes by state courts in involuntary child custody proceedings); 25 U.S.C. 1914 (providing Indian tribes with the right to challenge state placements that do not conform with the Act's requirements in federal court); 25 U.S.C. 1915(c) (recognizing, as a matter of federal law, tribally-established placement preferences for state placements of off-reservation Indian children); 25 U.S.C. 1915(e) (recognizing right of Indian tribes to obtain state records pertaining to the placement of Indian children); and 25 U.S.C. 1919 (authorizing tribal-state Indian child welfare agreements).

[30] 25 U.S.C. 1912(d) (requires active efforts to provide remedial and rehabilitative services before Indian children may be removed from the care of their parents).

[31]25 U.S.C. 1912(e) and (f) (establishing substantive standards for involuntary foster care placement of an Indian child or termination of parental rights of the parent of an Indian child which exceed those provided under state law).

[32] See, e.g., 25 U.S.C. 1915(a) (requiring that adoptive placements of Indian children under state law be made preferentially with the child's extended family, other members of the Indian child's tribe or other Indian families, in that order, absent good cause to the contrary); 25 U.S.C. 1915(b) (requiring that foster

the Indian Child Welfare Act is applied. The ICWA applies to all child custody proceedings where a child may be removed from his or her parent or Indian custodian except for divorce proceedings or where the placement results from an act by a youth that would be considered a crime if the youth were an adult.[33]

Although progress has been made as a result of ICWA, recent analyses of national child welfare data indicate that the out-of-home placement of Indian children is still disproportionate to the percentage of Indian youth in the general population and that Indian children continue to be regularly placed in non-Indian homes, an indication of the continuing need for the federal government to step up its oversight in this area.[34]

Authority provided by ICWA

Department of the Interior

ICWA vests considerable authority in the Department of the Interior. The Secretary is authorized to "promulgate such rules and regulations as may be necessary to carry out the provisions of the Act",[35] receive notices of child custody proceedings when the child's tribe cannot be identified[36], provide appointed counsel for indigent parents when state law does not provide for same[37], approve re-assumption by tribes of exclusive jurisdiction over child custody proceedings,[38] provide grants to tribes and off-reservation Indian organizations for the operation of child and family service programs[39], enter into funding agreements with HHS[40], and collect and release information about adoption decrees entered since 1978.[41]

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care placements of Indian children under state law be made preferentially with the child's extended family, a tribally-licensed foster home, an Indian foster home licensed by a non-Indian entity or a tribally-approved or Indian-operated facility, in that order, absent good cause to the contrary); 25 U.S.C. 1915(d) (requiring that the cultural and social standards of the Indian community must be applied by the state court when it applies the placement preferences); and 25 U.S.C. 1917 (providing adopted Indians who have reached the age of 18 with the right to access their adoption records for the purpose of establishing their Indian tribal membership).

[33] 25 U.S.C. 1903(1).

[34] See, e.g., Alicia Summers, Steve Woods, & Jesse Russell, National Council of Juvenile and Family Court Judges, *Technical Assistance Bulletin: Disproportionality Rates for Children of Color in Foster Care* 7 (2012) (finding that although Native children make up 0.9% of the United States population they make up 1.9% of children in foster care); Rose M. Kreider, *Interracial Adoptive Families and Their Children: 2008*, *in* National Council for Adoption Factbook V 109 (2011) (reporting that in 2008 more Indian children in adoptive placements lived in non-Indian adoptive homes than Indian adoptive homes).

[35] 25 U.S.C. 1952.

[36] 25 U.S.C. 1912(a).

[37] 25 U.S.C. 1912(b).

[38] 25 U.S.C. 1918.

[39] 25 U.S.C. 1951 and 1952.

[40] 25 U.S.C. 1933.

[41] 25 U.S.C. 1951.

The central issue is the meaning of the statutory language granting authority to the DOI to issue rules and regulations. A key question is whether this language provides the Department with the authority to issue regulations governing ICWA compliance by state agencies and courts, as opposed to only regulations governing internal Interior Department functions. DOI adopted the narrow interpretation in 1979 and, accordingly, the Department chose to address the substantive requirements in the Act by issuing non-binding Guidelines.[42]

An analysis of recent United States Supreme Court case law suggests that it is very likely that the Department of the Interior has the authority to issue regulations binding on state courts and agencies. The rationale for that conclusion is as follows.

Under *Chevron v. NRDC*,[43] a Court considers two questions in considering whether to defer to and accept an agency's regulation interpreting a statute. First, the Court asks whether Congress has directly spoken to the issue before the Court. If it has, that is the end of the inquiry. If the statute is silent or ambiguous, however, then the question is whether administration of the statute was delegated to the agency and whether the agency's interpretation was based upon a permissible construction of the statute. In the recent case of *City of Arlington, Tex. v. FCC*,[44], the Court specifically held that the principle of deference applies even to agency determinations of its own statutory authority. In short, if the agency concludes that it may act to fill in a "regulatory gap" in the statute, the Court will defer to the agency's exercise of authority if it is based upon a permissible construction of the statute.

Thus, legislative intent is critical. There are a number of factors present here that would support a decision by the Department of the Interior (DOI) that Congress authorized DOI to promulgate binding ICWA regulations beyond those already issued.

First and foremost, the ICWA regulatory language is general in scope. The statute provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act."[45] The Court has frequently recognized this type of language as a broad delegation of authority.

The case of *Gonzalez v. Oregon,*[46] is instructive. In holding that the Attorney General did not have authority to issue the "Interpretive Rule" in question in that case, the Court contrasted regulatory language similar to that in ICWA (language which provided for the issuance of regulations "necessary or proper to carry out the provisions of" the statute) with the narrower delegations to the Attorney General at question in that case. One provision in the Controlled

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[42] Bureau of Indian Affairs, *Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed.Reg. 67584 (November 26, 1979).
[43] 467 U.S. 837, 842-843 (1984).
[44] 133 S.Ct. 1863 (2013).
[45] 25 U.S.C. 1952.
[46] 546 U.S. 243, 258-259 (2006).

Substances Act (the statute in question) specified only certain areas in which the Attorney General could regulate, and another section of the law provided that he may promulgate "rules, regulations and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter." By contrast, neither type of limiting language is present in the ICWA delegation section. In fact, in the *City of Arlington* case, the Court stated that there was not "a single [Supreme Court] case in which a general conferral of rulemaking or adjudicative authority has been found insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field."[47]

Secondly, an interpretation that DOI has authority to promulgate ICWA regulations is consistent with some of ICWA's underlying principles and approach. As stated in *Mississippi Band of Choctaw Indians v. Holyfield*,[48] the primary mechanism utilized by Congress to address the Indian child welfare crisis was to "curtail state authority". It was for this reason that Congress established "minimum federal standards" in ICWA to be applied in state child custody proceedings. 25 U.S.C. § 1902.

Thirdly, the authority for the Department of Interior to act can also be derived from the statute itself which has some "regulatory gaps" and ambiguities. For example, terms as "active efforts" and "good cause" are not defined in the statute.

Finally, it is worth noting that there are other examples of the Department of the Interior using a general regulatory delegation to develop regulations that go beyond simply defining the administrative duties of the agency. The Native American Graves Protection and Repatriation Act (NAGPRA) regulations are one example. The language in NAGPRA provides that the "Secretary shall promulgate regulations to carry out this Act..."[49] Based upon this language, DOI has promulgated substantive regulations interpreting various provisions in the law that apply to third parties and the courts.[50]

The main authority that could be viewed to the contrary is a line of cases that has held that if the interpretation of a statute is left to the courts, then an agency's actions to implement the statute are not entitled to deference.[51] *Kelley v. EPA*[52] is worth considering in this respect. In *Kelley*, the D.C. Circuit Court of Appeals declined to enforce the EPA regulation in question finding it relevant that the agency had developed "an extensive quasi-legislative scheme", as opposed to simply defining certain ambiguous terms in the statute. If ICWA is interpreted as manifesting a Congressional intent to delegate responsibility for interpreting the statute to state courts, this could support a finding that DOI does not have authority to issue binding regulations

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[47] 133 S.Ct. at 1874.
[48] 490 U.S. 30, 45 n.17 (1988).
[49] 25 U.S.C. 3011.
[50] 43 C.F.R. Part 10.
[51] See, e.g., *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990).
[52] 15 F.3d 1100, 1108 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995).

to which deference should be provided. This is similar to the argument made by the Department of Interior in 1979 when it decided to issue Guidelines, rather than regulations.[53]

Given all of the reasons cited above, however – particularly the broad scope of the delegation language in the statute – a conclusion by DOI that it has authority would appear to be on strong ground, especially if the regulations are carefully crafted to clarify the statute based upon the agency's expertise. As indicated in the recent holding in *City of Arlington*, the Court will defer to the decision of an agency in regard to its own jurisdiction if it is a feasible construction of the statute. It would seem at a minimum that a conclusion that DOI has authority to issue regulations would be "feasible", even if it is not the only way to read the statute.

This change from DOI's 1979 interpretation might also be supported by referencing the experience of the last 35 years in regard to ICWA implementation. ICWA litigation has resulted in divergent interpretations of a number of ICWA provisions by state courts which could be viewed as undermining ICWA's attempt to create consistent minimum federal standards. In addition, no court has found the general imposition of ICWA requirements upon state courts to be unconstitutional, a fear that appeared to underlie some of the BIA's caution regarding whether to move forward with binding regulations in 1979.[54]

In terms of Constitutional issues, if ICWA itself is constitutional, then regulatory action to implement ICWA based upon a proper delegation of authority would also be constitutional.[55] In this regard, the Supreme Court has found that imposition of federal requirements upon state courts is on stronger constitutional grounds than imposing requirements on state executive functions (absent a spending clause connection).[56] Also, in *Seminole Nation of Florida v. Florida*,[57] the Court found that the Indian Commerce clause is a broader delegation of authority to the federal government than the Interstate Commerce clause. Thus, a constitutional challenge based upon a lack of federal authority is unlikely to succeed.

No court has found ICWA generally unconstitutional, although the Supreme Court in the recent case of *Adoptive Couple v. Baby Girl*,[58] did suggest without explanation that a decision in favor of the Indian father under the facts of that case could raise "equal protection" concerns and Justice Thomas wrote a concurring opinion (which no other Justice joined) expressing his opinion that the ICWA is unconstitutional.[59] The only reported appellate cases to find the ICWA unconstitutional, found it unconstitutional as applied. These two California cases ruled it would be unconstitutional to apply ICWA to certain Indian children and families that lack a substantial

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[53] 44 Fed.Reg. at 67584.
[54] *Id.*
[55] See *Mistretta v. United States*, 488 U.S. 361, 372 (1989).
[56] See *Printz v. United States*, 521 U.S. 898 (1997).
[57] 517 U.S. 44 (1996)
[58] 133 S.Ct. 2552 (2013).
[59] *Id.* at 2565. Justice Thomas' opinion was based upon an interpretation of the Indian Commerce clause that was significantly narrower than has been stated by the Supreme Court in the past.

relationship with an Indian tribe.[60] These constitutionally-based decisions have not been followed by other states and have been rejected by other California judicial districts.[61] Even if these cases were considered good law and there is some subset of ICWA cases that would raise constitutional concerns, this would not implicate the ability of DOI to issue regulations covering all cases where ICWA is constitutionally applied.

It should be noted that even when Courts find that an agency does not have delegated authority under a given statute, its regulations and other policy documents may be entitled to deference based upon the multi-part test enumerated in *Skidmore v. Swift & Co.*[62] The *Skidmore* test provides that the weight to be provided to such agency action depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade..."[63] This is similar to the approach that Courts have used in determining whether to follow the Guidelines. Thus, the worst case scenario is that regulations that might be adopted would be treated in a manner similar to the Guidelines.

Department of Health and Human Services

There are two statutory provisions in ICWA which directly pertain to the Department of Health and Human Services (HHS): (1) a section that permits HHS to enter into agreements with Interior to make funds available for Indian child and family service programs[64], and (2) a section that authorizes ICWA funds to be used as match for programs under the jurisdiction of HHS, including Title IV-B and Title XX, and which also provides that for the purpose of qualifying for assistance under a federally assisted program, tribal licensing shall be deemed the equivalent of state licensing.[65] While these sections do not directly authority HHS oversight over ICWA, at a minimum they indicate that HHS and Interior should be coordinating to promote the implementation of various aspects of the Act.

Department of Justice

There are no specific references to the Department of Justice in ICWA. However, there is an explicit finding in ICWA that the United States has a "direct interest, as trustee in protecting Indian children", a recognition of the "special relationship between the United States and Indian tribes and their members, and a finding that Congress "has assumed the responsibility for the

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[60] *In re Bridget R.*, 49 Cal.Rptr.2d 507 (Ct. App. 1996) and *In re Alexandria R.*, 53 Cal.Rptr.2d 679 (Ct.App. 1996).

[61] See generally Lewerenz and McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 William Mitchell Law Review 684 (2010).

[62] 323 U.S. 134 (1944). See also *United States v. Mead Corporation*, 533 U.S. 218, 234-235 (2001).

[63] *Id.* at 140.

[64] 25 U.S.C. 1933.

[65] 25 U.S.C. 1931(b).

protection and preservation of Indian tribes" through statutes and treaties.[66] This could be viewed as placing ICWA compliance within the penumbra of the Attorney General's trust responsibility, thereby supplying the Attorney General with the authority to file suit in case where systemic ICWA violations have been identified. The ability of the United States to sue on behalf of tribes and Indian people to protect their interests, particularly when defined by federal statute, has been long recognized.[67] Thus, while there is no explicit statutory language in ICWA concerning the Attorney General's right to file suit to enforce the law, the Congressional findings arguably could be viewed as implicit authority for the Attorney General to take such an action.

The Social Security Act - Titles IV-B and IV-E

Overview

The basic federal child welfare statute can be found in Titles IV-B and IV-E of the Social Security Act.[68] This statute has provided core funding for state child welfare systems and established certain requirements that must be included in state statutes in order for states to receive these funds. Titles IV-B and IV-E are intended to operate in tandem to prevent the need for out-of-home placement of children, and, where such placement cannot be avoided, to provide protections and permanent placements for the children involved.

Together, Titles IV-B and Title IV-E are the basis for many of the requirements that have become part of the child welfare systems across the country. A few key requirements are requirements for case plans, case review systems, reasonable efforts to prevent removal of children and to reunify them with their families after renewal, prioritizing health and safety of children and promoting permanency for children.[69]

Title IV-E also requires the collection of foster care and adoption data which has been implemented through the Adoption and Foster Care Analysis and Reporting System (AFCARS).[70]

Tribes receive direct funding under both Titles IV-B and IV-E. An "Indian tribal organization" may receive Title IV-B, Part 1 funds directly from the federal government if it "has a plan for child welfare services approved under this subpart."[71] This section has been implemented by a tribal-specific regulation which specifies how tribes need to comply with the requirements of Title IV-B, Part 1.[72]

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[66] 25 U.S.C. 1901; 25 U.S.C. 1901 (2) and (3).
[67] See, e.g., *Heckman v. United States*, 224 U.S. 413 (1912).
[68] 42 U.S.C. 620 *et seq.* and 42 U.S.C. 670 *et seq.*, respectively.
[69] *Id.*
[70] 42 U.S.C. 679; 45 C.F.R. 1355.40.
[71] 42 U.S.C. 628.
[72] 45 C.F.R. 1357.40.

Title IV-B, Part 2 provides funding for child welfare services designed to prevent the breakup of the family. There is a 3% allocation for tribes.[73]

Since 2008, tribes, tribal organizations and tribal consortia at their option can apply directly to the Department of Health and Human Services (HHS) to administer the Title IV-E foster care and adoption assistance entitlement program and receive direct funding from HHS. Except in limited circumstances, tribal plans for administration of the program must fulfill similar requirements as the statute sets out for state plans.[74]

Tribal-state agreements are an alternative to direct funding from the federal government (HHS). When tribes request to enter into a IV-E agreement with a state, the state is required to negotiate with the tribe in good faith.[75]

Pursuant to regulations, states are required to develop a Child and Family Service Plan (CFSP) as part of implementing their Title IV-B program, a five-year strategic plan that sets forth the vision and the goals to be accomplished in order to strengthen the state's overall child welfare system. Each year, states must submit an Annual Progress and Services Report (APSR) which provides an annual update on the progress made toward accomplishing the goals and objectives in the CFSP. Tribes are one of several "stakeholders" that are supposed to be engaged as part of the APSR process. These documents are prerequisites to receive funding under Title IV-B.[76]

A parallel process takes place providing for a periodic review of state child welfare systems to determine compliance with federal statutory requirements, a process known as Child and Family Services Reviews or CFSRs.[77] The CFSR consists of a statewide assessment by the child welfare agency utilizing AFCARS data and other information gathered by the state, followed by an onsite review during which cases are reviewed and stakeholders identified and interviewed. The goal of the process is to determine whether the state is in compliance with outcome measures and systemic factors that have been identified by HHS through regulation, as well as in compliance with federal child welfare requirements in general. The Children's Bureau conducts the reviews in partnership with state child welfare staff and other stakeholders. Tribes are considered possible "stakeholders", but a separate and distinct obligation to consult with tribes as sovereigns is not specifically recognized in the regulations or other policy documents. Following the review, states prepare Program Improvement Plans to address deficiencies identified in the review.

Although "the two processes have always been linked...integration has often been difficult in practice."[78] One of the goals of recent bulletins issued by HHS has been to better

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[73] 42 U.S.C. 629f(b)(3); 45 C.F.R. 1357.50.
[74] 42 U.S.C. 679c.
[75] 42 U.S.C. 671(a)(32).
[76] 45 C.F.R. 1357.15 and 1357.16.
[77] 45 C.F.R. 1355.31 through 1355.37.
[78] ACYF-CB-PI-14-03 (2014) at 3.

integrate these requirements by incorporating requirements relevant to the CFSR process into the CFSP.[79]

Authority provided by the Social Security Act

In the child welfare statutes administered by HHS under the Social Security Act, there are some important references that relate to the issue of ICWA compliance. The most direct reference to ICWA is a requirement that Title IV-B state plans "contain a description, developed after consultation with tribal organizations...in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act."[80] There are also provisions in the statute that mandate tribal-state collaboration. While these sections do not directly authorize federal oversight of ICWA, enforcement of these requirements may indirectly enhance enforcement of ICWA. These include the Title IV-B requirement that recipients of Court Improvement Project funds meaningfully collaborate with tribes ("where applicable") [81] and a requirement that states negotiate tribal-state Title IV-E agreements with tribes, when requested.[82]

The Civil Rights Act

Overview

42 U.S.C. 1983 provides for a remedial cause of action when any person has been deprived "of any rights, privileges, or immunities secured by the Constitution and laws..." Statutes which create individual rights are presumptively enforceable pursuant to §1983.[83] Injunctive relief against state actors violating individual rights protected by federal law is one of the remedies available under §1983 when the rights violation results from a policy statement, ordinance, regulation, or decision or governmental custom.[84]

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[79] *Id.*

[80] 42 U.S.C. 622(b)(9).

[81] 42 U.S.C. 627h (b)(1)(C). The purpose of the Court Improvement Program is to better integrate child welfare social work practice with judicial processes.

[82] 42 U.S.C. 672(a)(32). Of course, there are many other avenues for indirectly impacting ICWA compliance. For example, if more tribes are able to operate the Title IV-E program, presumably they will in a position to play a more proactive role with the state in ICWA cases. Covering all such scenarios is beyond the scope of this paper.

[83] See, e.g., *Gonzaga Univ. v. Doe,* 536 U.S. 273, 284 (2002); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005); *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

[84] *Monell v. Department of Soc. Svcs.*, 436 U.S. 658, 680-681 (1978). There is an argument that could be made that the Department of Justice through the Office of Juvenile Justice and Delinquency Prevention (OJJDP) also has authority under the Juvenile Justice and Delinquency Prevention Act (JJDPA), 42 U.S.C. 5601 *et seq.*, specifically to oversee the implementation of the application of ICWA in certain juvenile justice proceedings (those that involve actions that would not be a crime if committed by an adult). However, the authorization language in the statute (42 U.S.C. 5672(d)) provides that the Department of Justice may "establish such rules, regulations, and procedures as are necessary for the

Another potentially relevant section is 42 U.S.C. 2000d which provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Authority provided under the Civil Rights Act

A number of courts have ruled that ICWA is a statute which falls under this category of statutes subject to a §1983 enforcement action.[85] The most recent example is a case in the Federal District Court for South Dakota where the Court denied a motion to dismiss a class-action lawsuit filed by Indian parents and tribes challenging the continued removal of Indian children in Pennington County, South Dakota, explicitly finding that violations of the ICWA can give rise to a §1983 cause of action.[86]

Nonetheless, there is a question as to whether the Attorney General has the right to bring actions to enforce the provisions of §1983. At least one Circuit Court of Appeals has ruled that he does not have that authority, dismissing a suit by the United States against the Philadelphia Police Department.[87] In essence, the Court held that Congress must specifically provide him with the authority to bring a civil rights claim -- which it did specifically in areas like housing and employment discrimination, but did not do in the case of the more generic civil rights statute (§1983).

Among the provisions in the Civil Rights Act which clearly authorize enforcement activity by the United States General is §2000d, the section that prohibits discrimination on the basis of race, color or national origin by programs that receive federal funds.[88] Discrimination can be established when there is a showing of (1) intentional discrimination or (2) a disparate impact caused by the policies of or actions by the recipient of the funds.[89] Generally, the enforcing agency is the funding agency, but agencies such as HHS may refer cases to the Department of Justice to represent its interests in court. There are some complexities in using

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exercise of the functions of the Office and only to the extent necessary to ensure that there is compliance with the specific requirements of this title..." This limiting language lessens the likelihood that the JJDPA could be viewed as an authority for direct federal enforcement of the ICWA provision, although it does raise the possibility that a technical amendment to the statute when it is reauthorized could provide authorization for OJJDP to issue rules or regulations on this issue in the future. Of course, this does not prevent OJJDP from supporting efforts to promote ICWA compliance through grants, technical assistance or other activities that do not rise to the level of actual enforcement.

[85] *Oglala Sioux Tribe v. Van Hunnik*, 2014 WL 317657 (D.S.D. 2014); *State, Dep't of Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 409-412 (Alaska 2006); see also *Native Village of Venetie v. Alaska,* 944 F.2d 548 (9th Cir.1991).

[86] *Oglala Sioux Tribe v. Van Hunnik, id.*

[87] *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980).

[88] 42 U.S.C. 2000d.

[89] 28 C.F.R. 42.104(b)(2).

this statute to enforce ICWA, however, one being that coverage of ICWA is based upon political status, not race, color or national origin. Nonetheless, if policies can be documented that are having a disparate impact on Indian families and which the funding agency cannot remedy on its own, it may be possible for the Justice Department to utilize this statute as the basis for enforcement litigation.

ENFORCEMENT ACTIONS TAKEN BY FEDERAL AUTHORITIES

Department of Interior

To date, federal actions to enforce the requirements of ICWA have been limited. Pursuant to the authority granted to it by ICWA, the Department of Interior has promulgated regulations addressing issues of notice, payment of appointed counsel, re-assumption of jurisdiction and child welfare grants.[90] The Bureau of Indian Affairs has also issued "Guidelines for State Courts; Indian Child Custody Proceedings."[91] The guidelines are recommendations and not binding upon the states. Currently, the Guidelines are under review with a goal of strengthening the Guidelines. Issuing regulations in place of the Guidelines is under consideration.

Department of Health and Human Services

HHS has implemented the Title IV-B ICWA state plan requirement in Program Instruction documents (PI). In the PI pertaining to the 2010-2014 plans, HHS required states to include in their Child and Family Service Plans (CFSP) a description, developed in consultation with Indian Tribes in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act (ICWA). Among the components that States were supposed to address in consultation with Tribes and in the CFSP were:

- "Notification of Indian parents and Tribes of State proceedings involving Indian children and their right to intervene;
- Placement preferences of Indian children in foster care, pre-adoptive, and adoptive homes;
- Active efforts to prevent the breakup of the Indian family when parties seek to place a child in foster care or for adoption; and
- Tribal right to intervene in State proceedings, or transfer proceedings to the jurisdiction of the Tribe."[92]

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[90] 25 C.F.R. Parts 13 and 23.
[91] 44 Fed. Reg. 67584 (1979).
[92] ACYF-CB-PI-09-06 (2009) at 9.

In its most recent PI on this topic, the Children's Bureau has required states in their final report on the 2010-2014 plan to describe the consultation process with tribes since the last APSR and over the five years, including specific information on the name of Tribes and Tribal representatives with whom the State has consulted. Citing any available data, the state is supposed to assess the level of compliance and the progress made to improve compliance with ICWA during the five years, as informed by consultation with Tribes. In addition to looking at the components listed above, the state is supposed to report on any laws or policies that have been changed to increase ICWA compliance, and trainings that been held. The state is also directed to exchange copies of its CFSP and APSRs with the tribes.[93]

In that same PI, the Children's Bureau has included a similar, albeit slightly expanded version of these requirements for the 2015-2019 CFSP. The State must "specifically describe the process used to gather input from tribes for the development of the 2015-2019 CFSP" as well as "information on the outcomes or results of these consultations." It must also describe its "plan for ongoing coordination and collaboration with tribes in the implementation and assessment of the CFSP and monitoring and improvement of the state's compliance with the ICWA, as well as any barriers to this coordination and the state's plans to address these barriers." It must also identify sources of data to assess the state's ongoing compliance with ICWA, including input obtained through tribal consultation, and assess the state's level of compliance with the ICWA. Finally, it must describe the specific steps the state will take during the next five years to improve or maintain compliance with ICWA based on the discussion with tribes.[94]

If enforced, these requirements can help with ICWA compliance, although by themselves they do not constitute enforcement of the Act so much as create a process between states and tribes to promote compliance with the Act. Even this lesser goal has been challenging to achieve, however, as these procedural requirements have not been enforced rigorously in the past. A 2005 study by the Government Accounting Office (GAO) found extensive non-compliance by States with the ICWA implementation reporting requirements in the bulletins implementing Title IV-B in place at that time, with little response from ACF other than reiterating that states should be doing this.[95]

As described earlier, the tribal role in the CFSR process is not so well defined. Tribes are classified as "potential stakeholders" only. States are required to provide data on three ICWA requirements in the AFCARS: 1) identification of Indian children; 2) notification of tribes; and 3) adherence to the placement preferences. This is a limited data set, however, that has been characterized as "insufficient for ACF to assess the states' efforts to implement the law's requirements."[96]

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[93] ACYF-CB-PI-14-03 (2014) at 6-7.
[94] *Id.* at 19-21.
[95] *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States"* (United States Government Accountability Office, April 2005) at 47-49.
[96] *Id.* at 5.

Department of Justice

The activities of the Department of Justice to specifically enforce the Indian Child Welfare Act to date have been focused on involvement in individual cases as a party or *amicus curiae*. Recent cases in which DOJ has been involved include *Adoptive Couple v. Baby Girl*[97] (as an intervener) and *Oglala Sioux Tribe v. Van Hunnik*[98] (as an *amicus*).

ADDITIONAL ACTIONS THAT COULD BE TAKEN

Collectively, the Departments of Interior, Health and Human Services and Justice could be exercising more effective oversight over ICWA compliance than is the case currently. As recognized in the recent Report of the Attorney General's National Task Force on Children Exposed to Violence, "Because ICWA is a federal statute, successful implementation will be best assured through strong, coordinated support from the Bureau of Indian Affairs in the Department of the Interior, DHHS Administration for Children and Families, and the Office of Juvenile Justice and Delinquency Prevention within the Department of Justice."[99] To that end, it would be feasible and useful for the three responsible federal agencies to develop a comprehensive plan for ICWA compliance, developed in full consultation with tribes.

In terms of the individual agencies, there are additional actions that each agency can take pursuant to existing authority:

Department of the Interior

The most substantial and direct action that could be taken by the Department of the Interior would be to promulgate and adopt regulations that would be binding upon states. As laid out earlier in this paper, ICWA's regulatory authorization language can be the basis for issuing such regulations. In crafting regulations, it would be important that they be based upon specific legislative history and intent wherever possible, as well as the agency's "unique expertise", with a focus upon filling in the "regulatory gaps" in the statute by defining the meaning of key terms.

Interior may supplement whatever it includes in the regulations with commentary or broader policy guidance on implementing ICWA. This guidance may go beyond whatever may be explicitly included in the regulations. If there are any subject areas that are determined not suitable for regulations, the Guidelines could be strengthened in those areas. To the extent that some of the regulations/guidelines can be advanced through agency action, as opposed to court action, it would make sense for Interior to coordinate with HHS to promote implementation of the regulations/guidelines by utilizing the review, oversight, and sanctioning authority of HHS to

[97] 133 S.Ct. 2552 (2013).
[98] 2014 WL 317657 (D.S.D. 2014).
[99] *Report of the Attorney General's National Task Force on Children Exposed to Violence* (December 12, 2012) at 121.

achieve those goals.

Of course, it is essential that any regulations or changes to the guidelines be developed through full consultation with tribes.

Department of Health and Human Services

HHS has the authority to expand its role in enforcing the requirements of the Indian Child Welfare Act if it were to fully utilize its authority to oversee state compliance with the requirements of Titles IV-B and IV-E of the Social Security Act. First of all, HHS can place a higher priority on the Title IV-B provision requiring state plans to include a description of how the state will comply with ICWA. Although the current requirements (on paper) are a good start, HHS could specifically consult with tribes to improve the process to ensure that each state has a process that requires real collaboration with tribes and includes robust measures to promote ICWA compliance. Moreover, HHS can make it clear that it will reject any IV-B plan where that section of the plan has been developed without the required tribal input and which does not include specific steps to promote ICWA compliance.

It can then measure the success of the plan through the CFSR process by making ICWA compliance one of the standards for review. Questions specific to Native children would need to be included and weight given to these measures similar to that give to other measures that used to determine overall performance. The review could also measure the quality of tribal-state collaboration, including access to tribal services, use of tribally-licensed foster homes and collaborative decision-making on individual cases.

In order for this review to be effective, there would need to be a number of other related changes to the system. First of all, more data elements would need to be collected through the AFCARS that would track specific ICWA requirements. As noted earlier, ACF requires states to provide limited data on a few Indian Child Welfare Act requirements, but there is more data that would need to be routinely collected. For example, whether the ICWA is being applied to all children who it covers would be important information to know – for example, was the child a member or eligible for membership in an Indian tribe. In addition, ICWA identifies several legal requirements that shaped Congress' thinking about what procedures lead to good outcomes for Native children. For example, were active efforts made to prevent removal? This information would be added to the data set and integrated with those in the Social Security Act in determining appropriate outcomes for Indian children. The exact data elements would need to be developed in consultation with tribes and should also take into account any future regulations that might be promulgated by the Department of the Interior to enforce ICWA.

It is worth noting that states have been supportive of broader data requirements. In its recommendations to HHS, the American Public Human Services Association (APHSA) stated the following: "Additional data elements unique to Indian children included in ICWA that relate to positive (and sometimes different) outcomes for Indian children would include items such as

'if a Native American, is the child a member or eligible for membership in a tribe; has notice been sent to the child's tribe(s); has the child been placed with a relative or other Indian family,' etc. The actual list of measurements would be developed through consultation among federal, state and tribal representatives. These representatives would also need to work together to determine how elements can best be used to determine levels of ICWA compliance and to identify specific areas where improvement is needed. As with all children, this information would be folded into the more robust assessment and quality assurance systems that states would be utilizing (and which would involve collaboration with tribes at the local level)."[100]

It would also be necessary for the CFSR process to review an adequate number of Indian cases including, preferably, a separate process of review, which includes questions for that review that track unique needs and legal requirements that pertain to Indian children. Both Washington State and Oregon have developed review systems in collaboration with tribes that go into more depth in terms of how cases involving Indian children are being handled by the state which could be viewed as Best Practices. For example, in Washington, a process has been developed involving review of more than 200 cases involving Native American children on a biennial basis. Questions are asked about how Indian status is determined, engagement of family and tribes, maintaining cultural connections, compliance with requirements governing voluntary placements, transfer to tribes, and tribal involvement in placement preferences, among other things.[101] Among the inquiries made in the Oregon review are questions about active efforts, maintenance of family, community and cultural connections, and qualified expert witnesses.[102] APHSA has also recommended similar systemic changes, recommending that the review process should "define specific measures to evaluate how Indian children are being treated by the child welfare system in terms of their unique needs and legal requirements (and how this can be improved) and ensure that these measures and resultant improvement plans are developed in collaboration with tribes and appropriate Indian organizations."[103]

Another key to successful use of the CFSR process in this manner would be tribal consultation and participation in all aspects of the CFSR review process (pre-planning for CFSR, review process, and development of the Program Improvement Plan). As recommended by APHSA, deficiencies identified in the CFSR review process specific to outcomes for American Indian and Alaska Native children would need to be addressed in the Program Improvement Plan.

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[100] *States' Child and Family Services (CFSR) and Program Improvement Plan (PIP) Redesign: Recommendations* (American Public Human Services Association and National Association of Public Child Welfare Administrators, May 9, 2011) (hereinafter "APHSA and NAPCWA Recommendations") at 20.

[101] *Indian Child Welfare Case Review Questions and Decision Rules* (Washington Department of Social & Health Services, The Children's Administration). See also *Indian Child Welfare Case Review: State and Regional Results, 2009 Report* (Washington State Tribes and the Washington Department of Social & Health Services, The Children's Administration).

[102] *ICWA Addendum for Oregon CFSRs* (in possession of author).

[103] APHSA and NAPCWA Recommendations at 20.

There are a number of other actions that HHS might take that are within its authority that could indirectly promote ICWA compliance. For example, it could promulgate regulations laying out in more details what the requirement that states must negotiate IV-E agreements with tribes in good faith (if requested) actually means. Although tribal-state IV-E agreements and ICWA agreements under 25 U.S.C. 1919 are different documents, many IV-E agreements do have sections addressing ICWA compliance.[104] Thus, were the federal government to take stronger action to enforce the statutory requirements, it could indirectly promote better ICWA compliance. It is beyond the scope of this analysis to describe all such actions by HHS that could be useful, but it is worth remembering that there are these indirect regulatory mechanisms that can play a role in promoting ICWA compliance, as can technical assistance to states by providers who are knowledgeable about the unique needs and legal requirements applicable to Indian children, families and tribes. Of course, such actions are not in lieu of federal actions that would directly oversee ICWA compliance described elsewhere in this document.

Department of Justice

While the Department of Justice has become involved in particular cases involving ICWA interpretation, it has not brought any cases based upon the systematic violation of the rights of Indian children, families and tribes. Ideally, the Civil Rights Division of the Justice Department could conduct investigations regarding ICWA compliance with the goal of more systematically and proactively bring legal action where areas of widespread non-compliance with ICWA can be documented.

While the extent of the Justice Department's authority to file suit to enforce ICWA rights has not been definitively established, there are a number of theories that can support the exercise of that authority (as previously described).

- The trust responsibility has been interpreted to provide the United States with the right to file suit on behalf of Indian tribes and Indian people.[105] The ICWA specifically references the "special relationship" between the United States and Indian tribes and their members and refers to the United States as "trustee". This could be viewed as implicit statutory authority for the Justice Department to act to enforce ICWA.
- The special relationship between Indian people and the federal government could also serve as the basis for the filing of actions to protect the constitutional rights of Indian people, including those implicated by ICWA non-compliance.
- If state or local policies or practices can be shown to have a disparate impact upon Native Americans involved in the child welfare system (e.g., increased removals of Native American children or fewer licensed Native American homes where such variations

[104] Trope & O'Loughlin, "*A Survey and Analysis of Select Title IV-E Tribal-State Agreements including Template of Promising Practices*" (Association on American Indian Affairs, March 2014), prepared for Casey Family Programs and available at www.indian-affairs.org and www.narf.org.
[105] See, e.g., *United States v. Minnesota,* 270 U. S. 181 (1926).

cannot be attributed to legitimate health and safety needs of children), a cause of action may exist under 42 U.S.C. 2000(d) which applies to all entities receiving federal assistance. (Efforts to obtain voluntary compliance would need to precede the filing of a lawsuit.)[106]

In addition, the Office of Juvenile Justice and Delinquency Prevention may have a role in ensuring ICWA compliance in the context of status offenses although it does not currently have statutory authority to issue binding regulations to govern these cases.

CONCLUSION

It is certainly true that oversight and enforcement of ICWA by the federal government would be enhanced if there were explicit oversight authority delegated by legislation to a specific agency or agencies. Nonetheless, federal agencies are not currently utilizing the authority that they do have to a maximum extent. Were they to do so, significant progress in improving ICWA compliance is possible.

[106] See 28 C.F.R. 42.108.