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Crow Dog vs. Spotted Tail: Case Closed?

By Hon. Timothy Connors and Vivek Sankaran

In 1868, Chief Spotted Tail signed a United States government treaty with an X. Spotted Tail was a member of the Brule Sioux Tribe, related by marriage to Crazy Horse. The government treaty recognized the Black Hills as part of the Great Sioux reservation. As such, exclusive use of the Black Hills by the Sioux people was guaranteed.

Monroe, Michigan, native Gen. George Custer changed all that. In 1874, he led an expedition into that protected land, announced the discovery of gold, and the rush of prospectors followed. Within two years, Custer attacked at Little Big Horn and met his demise. Spotted Tail kept his tribe out of the battle. A year later, the Black Hills were confiscated by the United States.

Crow Dog was also a Brule Sioux. He disagreed with Spotted Tail's actions and advocated a more forceful resistance for the survival of the tribe. In 1881, the two quarreled; only Crow Dog survived.

In accordance with Sioux law, the tribal council met to address the reality of Spotted Tail's widow and offspring. The survival of the tribe and its migratory camp life was wholly dependent on the cooperation of all members. Punishment, retribution, or the application of an abstract system of justice or morality was not the driving force. Conflict termination and the peaceful reintegration of all members into a dependent coexistence was the necessity.

The council ordered a transfer of items from Crow Dog to Spotted Tail's survivors for their continued support, and the matter was resolved. Or so they all thought.¹

The United States Supreme Court Speaks

The Territorial District Court of Dakota didn't like the tribal court's decision. Crow Dog was arrested, tried for murder, and convicted. He was then sentenced to death. While in the marshal's custody, Crow Dog petitioned the United States Supreme Court for writs of habeas corpus and *certiorari*. Less than one month before his scheduled execution, the Supreme Court spoke: Crow Dog was to be set free. The Territorial District Court of Dakota had no jurisdiction over physical altercations between tribal members on Indian land. Title 28; Sec. 2146 of the United States Revised Statutes granted "exclusive jurisdiction over such offenses...to the Indian tribes respectively," and Spotted Tail's X on the 1868 treaty didn't abrogate that right.²

While the tribal court appreciated the United States Supreme Court's upholding the law of the land, Congress didn't. Within two years it enacted the Major Crimes Act, extending federal jurisdiction to major felonies occurring between Indians in Indian country. That act still rules today. Some opine that Congress would

not have acted with such alacrity if it had been Spotted Tail (the perceived pacifist) who had survived Crow Dog (the perceived militarist) under the same tribal court decision. In any event, nearly a century passed before the Supreme Court upheld judgment in favor of the tribe against the United States for its illegal taking of the Black Hills.³

What's This Have to Do with Us? Plenty.

In 2008, the Michigan Supreme Court formed a special committee to help Michigan judges and practitioners learn about the federal Indian Child Welfare Act of 1978 (ICWA), understand the need for states to comply with the act, and discuss its effective implementation in Michigan. Congress passed ICWA to prevent continued disruption of Indian tribes and families through state government child welfare practices. Despite the act's existence for more than 30 years, state courts' awareness and acceptance of the act continued to lag. The same issues surrounding tribal court sovereignty faced by Crow Dog, Spotted Tail, and the Brule Sioux in 1881 remained.

In 2009, the State Court Administrative Office published a resource guide with the stated goal to make ICWA's requirements the "best interests" considerations for Indian children, families, and tribes.⁴ As an outgrowth of that work, a follow-up subcommittee recommended changes to the Michigan Court Rules to reflect recognition and implementation of ICWA. On January 27, 2010, the Michigan Supreme Court approved those changes, which took effect May 1. A second subcommittee continues to meet on proposed state legislation to reflect the federal statute. This subcommittee has followed the work of the state of Wisconsin where, after three years of meetings, proposed legislation was signed by Gov. Jim Doyle in December 2009.

During 2010, the Michigan Supreme Court is sponsoring ICWA training and educational dialogue for state court judges, tribal representatives, attorneys, Department of Human Services (DHS) workers, and court staff as a first step toward implementing the stated goal. Planning is also underway for tribal, federal, and state justice communities in Minnesota, Wisconsin, and Michigan to meet in Michigan to promote and sustain collaboration, education, and the sharing of resources for the benefit of a more positive

Fast Facts

Indian sovereignty issues are alive today in Michigan family courts.

Active efforts are underway to increase communication, cooperation, and collaboration among tribal, state, and federal justice systems.

Regional training is available for interested attorneys, funded by the Governor's Task Force on Children's Justice. For more information, contact Jean Kordenbrock at jean@kordenbrocklaw.com.

future.⁵ As Michigan Supreme Court Justice Michael Cavanaugh noted in his opening remarks at the Indian Child Welfare Act Forum in 2008:

The congressional findings that form the introductory provisions of the Act are refreshing in their honest and forthright recognition of the problem and its roots—and I quote: that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children....⁶

Recognition and enforcement of ICWA in our state courts is fundamental to the survival and integrity of our 12 federally recognized tribes.

It was against this backdrop that we, as a clinical law professor and a state court judge, asked ourselves the following questions: How can we offer this experience to our law students—our future advocates and decision makers? What steps can we take to ensure that our future family court practitioners understand and accept the historical and current significance of this work? What issues surface in tribal court-state court relations that underscore overarching issues in all family court litigation?

With these questions in mind, we designed and taught a family law litigation workshop, which this year focused on issues related to ICWA. Students read the decisions and appellate briefs (including those submitted by their colleagues from the University of Michigan Child Advocacy Clinic) of the Michigan Supreme Court's seminal ICWA decision of *In re JL*.⁷ That decision held:

- The Adoption and Safe Families Act does not relieve DHS from ICWA's requirements.
- The clear and convincing standard applies to ICWA 1912(d).
- ICWA requires that active efforts be affirmative rather than passive and must be more than reasonable efforts required by state law.
- ICWA-required services do not have to be current or for the benefit of the subject child; however, services provided too long ago to be relevant to current circumstances can raise reasonable doubt and defeat termination. Past efforts for other children must be shown to be relevant.
- When a petition for termination is based on a prior termination, the petitioner cannot fulfill ICWA requirements merely by showing that services were provided in the prior case.
- The Court declined to adopt a futility test.
- Under ICWA, DHS cannot simply discontinue services once a petition has been filed to terminate parental rights predicated on a prior termination.
- Termination on the basis of the doctrine of "anticipatory neglect" or presumption of unfitness is inconsistent with ICWA; however, lower courts may take into account past conduct in conjunction with current evidence.⁸

The students received a visit from Michigan Supreme Court Justice Michael Cavanaugh and Michigan Court of Appeals Judge Elizabeth Gleicher, both of whom were involved at the appellate

stage of the case. In addition, the students received specific instruction from Frank Vandervoort, a University of Michigan clinical law professor and recognized expert in ICWA who is also involved in ICWA training for state and tribal court personnel. Finally, the students had a personal audience with Chief Justice Marilyn Kelly in the Hall of Justice where, among other things, the significance of the Michigan Three Fires Tribes in the courtroom's design was discussed.

The students took part in additional exercises designed to highlight the unique challenges facing lawyers representing clients in all legal proceedings involving children, including those governed by ICWA. Exercises were designed to educate the students about interviewing and counseling clients in emotional distress. Attention was given to balancing zealous advocacy for the clients' wishes while remaining sensitive to the needs of the children, whose best interests remain the court's paramount concern. As the class progressed, students learned that this dynamic complicates strategic decisions that must be made regarding presentation of the case, including filing motions, calling and questioning witnesses, making objections, and negotiating with other parties. Additionally, students learned with actors foreign to other civil proceedings, such as the Friend of the Court, mediators, social workers, and guardians *ad litem*.

The class culminated with the students trying the *In re JL* case at the trial court level in a mock trial in front of judges unfamiliar with ICWA. Thus, the students' challenge was to educate the court

By the end of the class, we felt comfortable that these students knew more about ICWA and family court practice than many, if not most, practicing attorneys.



Photo by Frank Weir, Legal News

on the applicable substantive law while also effectively advocating their client's position. By the end of the class, we felt comfortable that these students knew more about ICWA and family court practice than many, if not most, practicing attorneys. It was our hope that this experience educated and inspired their continued commitment to this critical area of the law.

Final Thoughts

The work involving ICWA occurring in Michigan and our experience teaching the family law litigation workshop has reinforced in us the importance of emphasizing humility and respect when addressing the needs of families enmeshed in difficult legal proceedings. Our hope is that these efforts will contribute to a child welfare system rooted in understanding families, allowing them to plan for their children, and providing them with a sense that they were treated with dignity throughout the legal system. The attainment of these modest goals will only enhance the prospects for vulnerable families across the state. ■

Timothy Connors is a Washtenaw County Circuit Court judge assigned to the civil and family court divisions. He served as chief judge of the Washtenaw County Trial Court from 1998 to 2001. He has served as an adjunct professor at Wayne State University Law School since 1993 and as a lecturer on the University of Michigan Law School faculty since 2008. Judge Connors is active in Michigan tribal-state court partnerships.

Vivek Sankaran is a clinical assistant professor of law at the University of Michigan Law School. He teaches in the Child Advocacy Law Clinic and directs the Detroit Center for Family Advocacy.

FOOTNOTES

1. Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* 100-101 (Cambridge University Press, 1994).
2. Supreme Court of the United States *Ex parte Kang-shun-ca*, 109 US 556; 3 S Ct 396; 27 L Ed 1030 (1883).
3. *United States v Sioux Nation of Indians*, 448 US 371; 100 S Ct 2716; 65 L Ed 2d 844 (1980).
4. ICWA Special Committee, *Indian Child Welfare Act of 1978: A Court Resource Guide* (State Court Administrative Office, updated May 2010), available at <<http://courts.michigan.gov/scao/resources/publications/manuals/cws/ICWACIResourceGuide.pdf>> (accessed May 30, 2010).
5. *Walking on Common Ground: Michigan Regional Conference*, October 11-12, 2010.
6. *Remarks of Justice Michael Cavanagh: Indian Child Welfare Act Forum, October 6, 2008*, 89 Mich B J 23 (February 2010).
7. *In re JL*, 483 Mich 300; 770 NW 2d 853 (2009).
8. Sorrells, Fraser, Myers, and Allen, *Indian Children and Termination of Parental Rights*, 89 Mich B J 28 (February 2010).

Standing in front of the jury box from left to right: Washtenaw County Bar Association President Brad McLampy; Michigan Supreme Court Justice Michael F. Cavanagh; Kyenna Slater, executive director, Washtenaw County Bar Association; Hon. Elizabeth L. Gleicher, Michigan Court of Appeals judge; and Frank Vandervoort, clinical professor of law, University of Michigan, stand with students from the University of Michigan Family Law Trial Advocacy class, taught by Judge Timothy P. Connors and Professor Vivek Sankaran, on March 10, 2010 at the Washtenaw County Courthouse.