



What's happening in the courts?

Professor Barbara Atwood

University of Arizona

Rogers College of Law

Adoptive Couple v. Baby Girl (US 2013)



The Court's three holdings...

- **ICWA's heightened burden of proof for terminating parental rights under 1912(f) *does not apply to parent who never had custody of child.***

- **ICWA's requirement of active efforts to prevent breakup of Indian family under 1912(d) *does not apply to parent who "abandoned" child before birth.***

- **Adoptive placement preferences under 1915(a) *do not apply where no alternative party has formally sought to adopt child.***

THE LONG SHADOW OF ADOPTIVE COUPLE

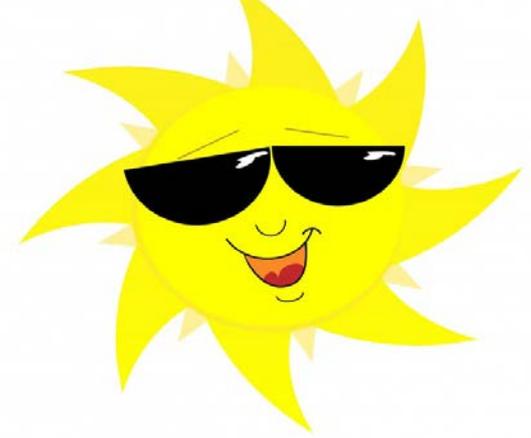
- **Birth parents who once had custody or exercised visitation may lose ICWA protections under §1912 if child is not presently in their custody.**

- **If *Indian* parent has never exercised custody, ICWA's protections may not apply.**
- **If ICWA-compliant placement has not filed formal adoption petition, placement preferences won't apply – even in child welfare proceedings.**

On the brighter side..



- **Courts in both Washington and Michigan have relied on state ICWA statutes to get around Adoptive Couple**



- **Several courts have refused to follow EIF doctrine, post-Adoptive Couple**
- **UGLALA SIOUX TRIBE V. VAN HUNNIK (S.D.D.C. 2015) – coming up!**

In Arizona

- Petition for cert filed in Charlotte G. v. Dep't of Child Safety (Ariz. App. 2014). Mother, in challenge to termination of her parental rights, argues that state failed to adhere to ICWA.
- Non-ICWA decision of relevance: Roberto F. v. Dep't of Child Safety (Ariz. App. 2014). Appeal of order terminating parental rights divests juvenile court of jurisdiction to grant adoption.

Today's challenges to ICWA

National Council for Adoption v.

Jewell (E.D. Va., filed May 27, 2015):

**Broad challenge to 2015 Guidelines
and to ICWA itself**

- **PLAINTIFFS:**

- Birth parents of Pascua Yaqui child in voluntary relinquishment
- Navajo child (appearing through Az GAL) whose non-Indian foster parents wish to adopt
- Adoption policy organization and Arizona adoption agency

- **DEFENDANTS: Sally Jewell & Kevin Washburn**

Claims in NCFA

- **APA**
- **Due Process**
- **Equal Protection**
- **10th Amendment**
- **ICWA beyond congressional power**

Plaintiffs seek injunction compelling D's to withdraw 2015 Guidelines and declaratory judgment that custody provisions of ICWA as applied to Plaintiffs are unconstitutional

And here in our backyard...

A.D. v. Washburn (D.Ariz. July 6, 2015)

Class action challenging transfer, burden of proof, and placement provisions of ICWA and 2015 Guidelines

Plaintiffs seek declaration that particular provisions of ICWA and 2015 Guidelines are unconstitutional and injunction barring enforcement.

The purported class action

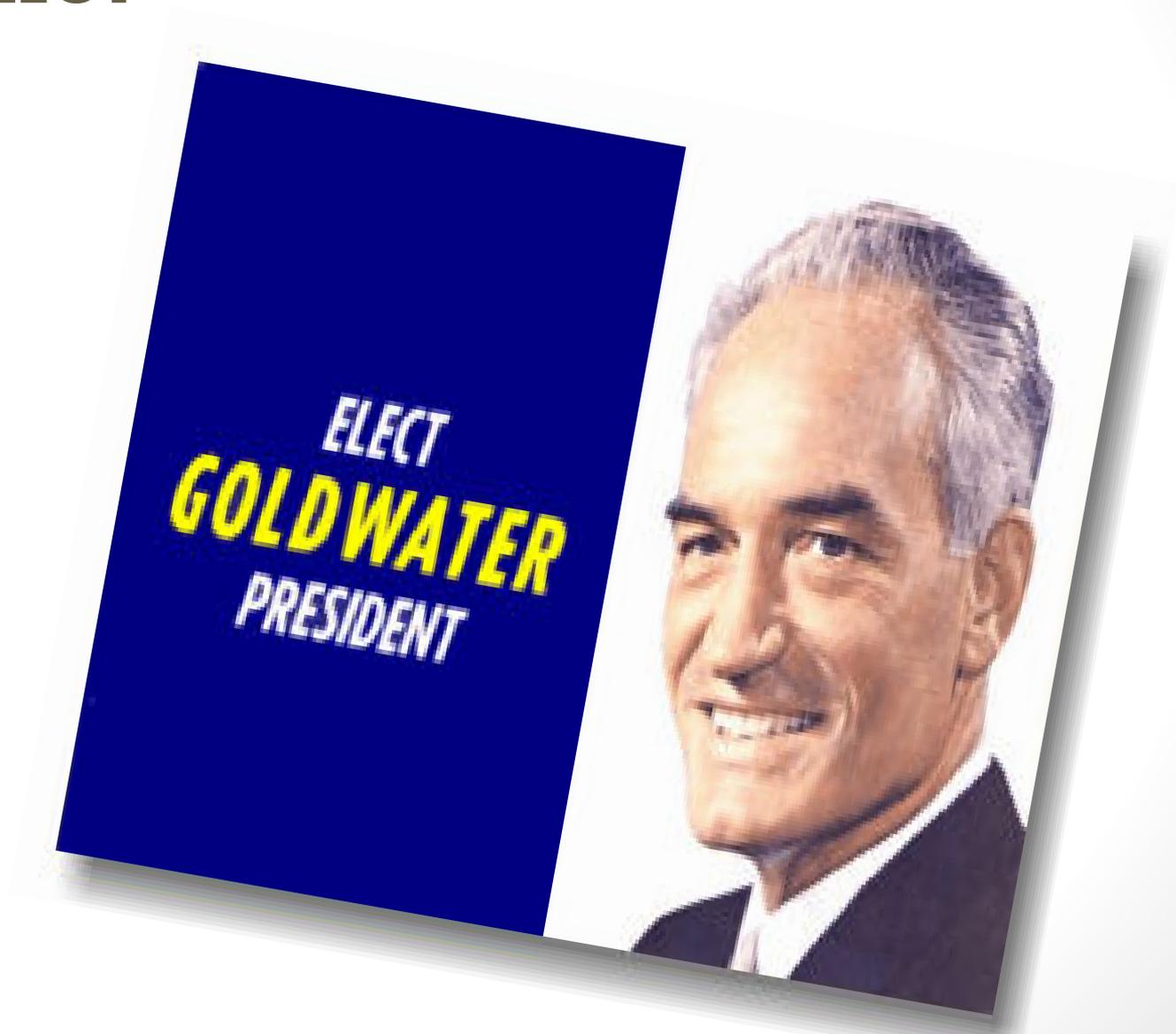
PLAINTIFFS

- Gila River Indian Community infant
- 5-year-old Navajo boy
- Non-Indian foster parents

Suing “on behalf of themselves and all off-reservation Arizona resident children with Indian ancestry and all off-reservation Arizona-resident foster, preadoptive, and prospective adoptive parents in child custody proceedings involving children with Indian ancestry”

- **DEFENDANTS:** Jewell, Washburn, and Gregory McKay, director of Arizona DCS
- **CLAIMS:**
 - **Equal Protection**
 - **Due Process**
 - **10th Amendment**
 - **ICWA beyond congressional power**
 - **Freedom of association under First Amendment**
 - **2015 Guidelines contrary to ICWA**

Outrageous? Predictable? Ironic?



The Arizona ICWA Guide

A collective work in progress!

WHAT TOPICS SHOULD THE GUIDE ADDRESS?

AZ ICWA Guide