



NICWA

National Indian Child Welfare Association

Summary of the *Brackeen (Texas) v. Zinke* Decision

October 15, 2018

On October 4, 2018, Judge Reed O'Connor in the Northern District of Texas Federal Court issued his decision in *Brackeen (Texas) v. Zinke*, a lawsuit challenging the constitutionality of the Indian Child Welfare Act (ICWA) and the 2016 ICWA regulations. In the court's decision on the plaintiff's motion for summary judgement, the court granted all but one of the plaintiff's claims finding the ICWA statute and 2016 regulations unconstitutional. To reach this decision, the court had to ignore decades of federal court precedent that affirmed inherent tribal sovereignty and the government-to-government relationship between tribal nations and the United States as enshrined in the U.S. Constitution, countless federal laws, and treaties between tribal nations and the U.S. government.

The lawsuit was filed on October 25, 2017, by the State of Texas and a non-Indian foster family in Texas who had an American Indian child placed with them. The foster family is represented by an attorney that also represented clients challenging ICWA in *Adoptive Couple v. Baby Girl* (2013) and *Natl. Council for Adoption v. Jewell* (2017). The foster family, the Brackeens, had petitioned a Texas district court to find good cause under ICWA to deviate from the placement preferences and adopt the child, but their petition was denied. Soon after, the attorney general of Texas filed a federal lawsuit alleging ICWA was unconstitutional on several grounds and the 2016 ICWA regulations were unlawful. On December 15, 2017, the complaint was amended to include the States of Louisiana and Indiana as plaintiffs and two foster families in different states (Nevada and Minnesota). The Department of Health and Human Services was also added as a defendant for the federal government with the Department of Interior. Besides the federal government, tribal intervenors named as defendants include the Morongo Band of Mission Indians, Quinault Indian Nation, Cherokee Nation, and Oneida Nation of Wisconsin.

The decision relied heavily on viewing ICWA as a race-based law that violates the Equal Protection Clause of the United States Constitution and exceeds Congress's authority under the Indian Commerce Clause. This is in stark contrast to previous decisions by the United States Supreme Court that have upheld the federal governmental interest in legislating Indian affairs. This includes two United Supreme Court decisions regarding ICWA cases that did not find ICWA unconstitutional.

The next steps in the lawsuit have already begun with the tribal defendants asking Judge O'Connor to stay the decision pending appeal to the United States Fifth Circuit Court of Appeals (suspending implementation of the decision). In addition, one of the foster family plaintiffs are attempting to introduce new evidence into the court record regarding a newborn sibling of one of the foster children involved in the case. There will likely be a number of different procedural issues coming before the federal district court that will need to be addressed in the near future so as more is known, NICWA with our ICWA Defense partners will provide that information.

The immediate impact of the decision is uncertain pending motions to stay and appeal, but certainly it will have a chilling effect on ICWA compliance in those states that were plaintiffs and possibly in other states that are closely watching this case. This creates greater uncertainty for hundreds of American Indian and Alaska Native families and children who are currently in or will come into state child welfare systems over the next several months, especially in the plaintiff states. NICWA is also concerned how this will impact tribal-state relations and ongoing efforts to implement ICWA's 2016 regulations. This includes efforts underway between states and tribes to develop intergovernmental agreements, enforce state ICWA laws, participate in court collaborations, train caseworkers and attorneys, share program resources and information, and support administrative policy development. With increasing cooperation between states and tribes to implement ICWA, there are very serious questions about how this will impact the progress being made and the potential to return to widespread increases in the number of vulnerable Native children being removed from their homes and communities.

If you would like to become involved or want to learn more about the case, NICWA has advocacy and communication materials available. Please contact David Simmons, NICWA government affairs and advocacy director, at desimmons@nicwa.org or call 503-222-4044, ext. 119.