***BRACKEEN V. ZINKE* CASE SUMMARY**
OCTOBER 15, 2018

The past several years have seen a dramatic increase in the number of legal challenges brought by opponents of the Indian Child Welfare Act (ICWA), all with the goal of undermining ICWA and tribal sovereignty. This memorandum provides an overview of the federal district court's decision in *Brackeen v. Zinke*.

I. Overview of the decision

Last week in the case *Brackeen v. Zinke*, Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas ruled that the Indian Child Welfare Act (ICWA), and the 2016 ICWA Regulations, are unconstitutional. In short, Judge O'Connor held:

- That ICWA's placement preferences (§§ 1915(a)-(b)), its collateral attack provision (§ 1913(d)), and its invalidation provision (§ 1914), as well as corresponding provisions in the Final Rule (25 C.F.R. § 23.129-132) violate the Constitution's guarantee of equal protection. The judge held that, because ICWA is not limited only to tribal members, but also applies to children eligible for membership in a Tribe, ICWA operates as a race-based statute and was not sufficiently narrowly tailored to achieve Congress's stated interests.

- That the provision that allows for tribal placement preferences to supersede ICWA's preferences is an unconstitutional delegation of Congressional authority. The judge concluded both that the ability to set preferences is a legislative power that Congress cannot delegate (as opposed to a regulatory power that Congress can delegate), and that Indian Tribes are not proper recipients of delegated powers because Congress can delegate only to other Federal actors.

- That ICWA unconstitutionally "commandeers" State governments to do the Federal government's bidding, violating principles of federalism that protect States from undue Federal influence. Judge O'Connor also relied on this finding to conclude that ICWA overstepped Congress's authority under the Indian Commerce Clause.

- That the 2016 ICWA Regulations violate the Administrative Procedure Act, both because they implement those sections of ICWA that the judge found to be unconstitutional, and because the Bureau of Indian Affairs (BIA) in promulgating the Regulations did not

sufficiently explain why, almost 40 years after the BIA first decided not to issue binding regulations, it had changed course and issued binding regulations.

Judge O'Connor rejected only one of the Plaintiffs' central claims: he held that, because the United States Supreme Court has never held that foster families have a fundamental right to maintain custody of their foster children, the Plaintiffs' due process claim—that ICWA disrupted their familial relationships with the Indian children at issue in the case—failed.

II. This decision is unprecedented and conflicts with decades of federal Indian law

This decision is in many ways unprecedented—never before has a federal court found ICWA unconstitutional, and the Supreme Court has consistently rejected arguments that federal Indian statutes violate the Equal Protection Clause or exceed Congress' authority under the Indian Commerce Clause. However, while jarring and terribly disappointing, it is important to note that the decision is likely not broadly applicable throughout the United States. Ordinarily, relief in a federal district court case is limited to the parties in the case, and while courts sometimes do issue broader injunctions, the court to date has issued no such broader injunction in this case.

There also have been some recent developments that may have bearing on the applicability of the case in the immediate term. On Wednesday, October 10, 2018, the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians, who previously intervened in the case as defendants, asked Judge O'Connor to stay his decision pending appeal to the United States Court of Appeals for the Fifth Circuit. Meanwhile, one of the plaintiff foster families has sought to introduce additional evidence into the record concerning a newborn sibling to one of the children at issue in the case, presumably as part of a last-minute attempt to bolster the plaintiffs' standing on appeal and their opposition to the stay. Judge O'Connor likely will rule on these issues within the next few weeks.

The arguments Judge O'Connor relied upon to hold ICWA and the regulations unconstitutional are contrary to the Constitution, congressional intent, and decades of well-established federal Indian law. Indian Country stands with the Tribal Defendants and remains committed to ensuring that this decision is reversed. You can be sure that Indian Country will fight this decision with everything at our disposal.

If you have any questions about the legal issues in this case, please contact the Native American Rights Fund attorneys Dan Lewerenz (lewerenz@narf.org) or Erin Dougherty Lynch (dougherty@narf.org). In addition, ICWA's legislative history includes a wealth of information about the mass removal of Indian children from their homes by state actors. ICWA's entire legislative history can be found at https://narf.org/nill/documents/icwa/federal/lh.html and is organized chronologically in searchable electronic documents.