NICWA
National Indian Child Welfare Association

Summary of the *Brackeen (Texas) v. Zinke* Decision
October 9, 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 subjecting ICWA to a strict scrutiny standard of judicial review regarding its constitutionality rather than a rational basis test typically used to establish federal Indian law precedent. Rational basis is used when a law is considered to have a rational basis for a legitimate government interest and there is no suspect classification at issue. A suspect classification involves a presumptively unconstitutional distinction made between individuals based upon race, national origin, religious affiliation, or alienage (citizens vs. non-citizens). The court's decision to use strict scrutiny signaled their belief that there was no rational basis for concluding there was a legitimate governmental interest in providing requirements like placement preferences under ICWA, so the law must be race-based, and requires states to carry out unconstitutional policies that discriminate against different individuals (e.g., foster parents who are Indian and those who are not). The adoption of the use of a strict scrutiny standard in this case as it progresses could also spur constitutional challenges to many other federal Indian laws.

The next steps in the lawsuit will involve all or some of the defendants asking for a stay of the decision (suspending the implementation of the decision) pending appeal to the Fifth Circuit Court of Appeals.

There may also be additional procedural motions to rehear or clarify parts of the decision. As more is known about the next steps in the case, NICWA 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 those 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.