
***BRACKEEN V. ZINKE* CASE SUMMARY**
**FEBRUARY 6, 2019**

Over the past several years, opponents of the Indian Child Welfare Act (ICWA), and of tribal sovereignty generally, have embarked on a new legal strategy: direct challenges to the constitutionality of ICWA in the Federal courts. Although two earlier challenges were defeated, the most recent attack on ICWA won initial success in the U.S. District Court for the Northern District of Texas. This memorandum provides an overview of the decision in *Brackeen v. Zinke*, case No. 17-cv-00868-O (N.D. Texas).

## I. Overview of the decision

In *Brackeen*, several individual plaintiffs (foster parents, adoptive and potential adoptive parents, and a birth parent) and three States (Texas, Indiana, and Louisiana) challenge the constitutionality of ICWA on multiple grounds, and also allege that the 2016 Regulations (Final Rule) promulgated by the Department of the Interior (DOI) violate the Administrative Procedure Act (APA). Defendants are Secretary Zinke and DOI, as well as the Department of Health and Human Services and officials of that Department. In addition, Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, and Quinault Indian Nation (Tribal Defendants) intervened as Defendants.

On October 4, 2018, Judge Reed O'Connor ruled that ICWA is unconstitutional, and that the Final Rule violates the APA. Specifically, 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. Judge O'Connor first asserted that the political relationship between the Federal Government and Indian Tribes, recognized by the U.S. Supreme Court in *Morton v. Mancari*, 417 U.S. 535 (1974), is limited only to Indians living on or near reservations. Judge O'Connor then reasoned 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 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 Congress's authority. The judge concluded that the ability to set preferences is not a regulatory power, but rather a legislative power that Congress cannot 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 perform federal functions, 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 Final Rule violates the APA because it implements sections of ICWA that the judge found unconstitutional, and because the Bureau of Indian Affairs (BIA) in finalizing the Final Rule did not sufficiently explain why, almost 40 years after the BIA first decided not to issue binding regulations, it changed course and issued binding regulations.

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

It is hard to overstate how far this opinion strays from the precedent that has governed Indian law for centuries: never before has a federal court found ICWA unconstitutional, and the Supreme Court has consistently rejected arguments that federal Indian statutes violate equal protection or exceed Congress's authority under the Indian Commerce Clause. Should Judge O'Connor's reasoning on equal protection prevail, potentially dozens of Federal statutes and regulations that define "Indian" to extend beyond only tribal members would be subject to constitutional challenge. Should his reasoning on delegation prevail, numerous other statutes and regulations that affirm tribal authority and/or delegate Federal powers to Tribes would also be at risk.

## III. Recent Developments

On October 25, 2018, the Attorney General for the State of Texas sent a letter to the Texas Department of Family and Protective Services stating that ICWA is no longer applicable in Texas in either current or future child welfare proceedings involving Indian children, and state law should be applied instead. On October 29, 2018, Judge O'Connor denied a motion by the Tribal Defendants to stay the Federal District Court's decision. On November 19, 2018, the Tribal Defendants filed a motion to stay the Federal District Court's decision pending appeal in the Fifth Circuit Court of Appeals.

On November 30, 2018, the U.S. Department of Justice filed its notice of appeal, and on December 3, 2018, the Fifth Circuit granted the stay of the Northern District of Texas's decision pending the appeal to the Fifth Circuit. Navajo Nation's motion to intervene as a Defendant on appeal was granted by the Fifth Circuit on January 25, 2019. Oral arguments in the appeal before the Fifth Circuit are scheduled for March 13, 2019, in New Orleans, Louisiana.

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