



NICWA

National Indian Child Welfare Association

Fifth Circuit Court of Appeals Hears Oral Arguments in ICWA Case March 14, 2019

On March 13, 2019, the United States Court of Appeals in the Fifth Circuit heard oral arguments from plaintiffs and defendants in the *Brackeen v. Bernhardt* case. Several representatives from tribal nations and Native organizations were in attendance, including the National Indian Child Welfare Association's executive director, Sarah Kastelic; board member Robert McGhee; and former board member Derek Valdo. You can find a recording of the oral argument [here](#) (*Enter docket number 18-11479 in Search*). Under appeal in the Fifth Circuit by the defendants in this case (federal government and tribal intervenors) is a decision by Judge Reed O'Connor in the United States Federal District in Northern Texas that found ICWA unconstitutional. You can find a copy of the federal district court decision [here](#). To reach this decision, the federal district 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. A decision from the Fifth Circuit is expected within the next six months. Should either side wish to appeal the ruling, the most likely next step is a petition for cert to the U.S. Supreme Court.

Despite the lack of significant experience with federal Indian law and tribal issues, the three-judge panel, including Judges Jacques Wiener, Jr., James Dennis, and Priscilla Owen, appeared to be open minded and asked several good questions, predominantly centered on anti-commandeering claims and Congress's authority to pass laws that direct state action as a valid form of preemption. One of the claims by the plaintiffs is that ICWA unlawfully commandeers state resources to assist the federal government in enforcing ICWA's requirements. Additionally, the legal parties addressed issues of whether certain parties have standing in the case, application of equal protection with ICWA (whether ICWA is a race-based law), Congress's plenary power and the delegation of federal authority, the Administrative Procedures Act and the clear and convincing evidence standard applied in certain ICWA regulations provisions, and the spending clause. Overall, the judges seemed to be receptive to the defendants' arguments.

The lawsuit was originally 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 that 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 additional private individuals (birth parent, adoptive, and pre-adoptive parents) 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 Navajo Nation was later granted permission to join the lawsuit as a defendant by the Fifth Circuit Court of Appeals.

NICWA and our ICWA Defense partners, the National Congress of American Indians, Native American Rights Fund, and the Association on American Indian Affairs, are engaged with our federal, state, and tribal partners in this litigation. NICWA is leading work with our ICWA Defense partners on communications with the media and policy-related strategies with Congress, state, and private agency partners. If you have questions about the lawsuit or how you can help, please direct them to NICWA Government Affairs and Advocacy Director David Simmons at desimmons@nicwa.org.