



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

January 2019

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Hot Topics

Tribes and ICWA Allies File Briefs Challenging Texas Federal District Court ICWA Decision

The United States and the four intervening tribes (Morongo, Quinault, Oneida Nation, and Cherokee Nation) as defendants in *Brackeen (Texas) v. Zinke* were joined by nine amicus curiae (friend of the court) briefs that were filed on January 16, 2019, in the Fifth Circuit Court of Appeals (federal court). The defendants filed the briefs in the Fifth Circuit appealing a previous federal district court decision in Texas. The briefs address several important issues related to the constitutionality and importance of the Indian Child Welfare Act (ICWA). Some of the parties that filed amicus curiae briefs included 325 tribes and 57 tribal organizations, 21 states, members of Congress, Indian law and constitutional law scholars, 30 leading child welfare organizations, and a brief presenting the perspective of Native women. All of the briefs discussed the reasons ICWA is constitutionally sound, but also provided proof of the wide support for ICWA both in and outside of Indian Country. You can find copies of the briefs [here](#). On January 25, the Fifth Circuit also approved a petition from Navajo Nation to be an intervenor tribe. This is in addition to the existing four intervening tribes. The plaintiffs' (states and private parties) briefs and supportive amicus briefs are due February 6, 2019.

The prior federal district court decision that is being challenged in the Fifth Circuit Court of Appeals was rendered on October 4, 2018, by Judge Reed O'Connor in the Northern District of Texas Federal Court. The plaintiffs in the case brought the lawsuit challenging the constitutionality of ICWA and the 2016 ICWA regulations. In the district 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. You can find a copy of the federal district court decision [here](#).

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 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 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 States Supreme Court decisions regarding ICWA cases that did not find ICWA unconstitutional.

The Fifth Circuit will consider all of the briefs filed in the case by the plaintiffs, defendants, and the amicus curiae supporting each side during the next two months leading to oral arguments. **The oral argument is scheduled for March 13, 2019, in New Orleans, Louisiana.** Sometime after oral arguments, the court will publish its ruling(s) in the case. If they haven't already, tribes and ICWA allies are encouraged to continue educating their state counterparts (attorneys general, governors, and child welfare directors) and policymakers on the importance of ICWA.

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.

Administration for Children and Families Releases Guidance on Family First Prevention Services Act

The Administration for Children and Families (ACF) published a substantial portion of expected federal guidance on the Family First Prevention Services Act (FFPSA) on November 30, 2019 (ACYF-CB-PI-18-10). The guidance instructs tribes on how to implement many sections of the new law, including what qualifies as eligible prevention services for children and families being served in the child welfare system. The FFPSA statute requires ACF to specify specific tribal requirements and criteria related to the provision of prevention services contained within the law and allowing the use of cultural services unique to the tribal community being served. Overall, the new guidance provides tribes with significant flexibility regarding the use of cultural services to help prevent removal of children either prior to or after reunification with their family, and services to help the child's parents rehabilitate in these situations. You can find a copy of the federal guidance for tribes [here](#).

Some highlights of the new FFPSA guidance for tribes are the following:

- Tribes can claim for prevention services within the eligible categories of services that they deem culturally appropriate and meet the unique needs and context of the community instead of only being able to use evidence-based services described in the law.
- In meeting the requirement that prevention services must be trauma informed, tribes may define what a trauma-informed service is in a way that reflects the components of historical trauma unique to their communities.
- Tribes can define the practice criteria used to define different prevention services (e.g. values base, longevity of practice, community approval, traditional basis, evaluation) rather than having to adhere to those identified in the law. Tribes are not required to meet the requirement for amounts of expenditures in different practice categories.
- Tribes may use alternative evaluation strategies to evaluate their prevention services such as exploratory, community-based participatory research, and qualitative designs.
- Tribes are not required to meet maintenance of effort requirements (requirement to continue expending the same or higher levels of tribal funding in prevention services in addition to amount of FFPSA funds received).

FFPSA is contained within the larger [Bipartisan Budget Act of 2018](#) (under Division E, Title VII) that was enacted into law in February of 2018. The FFPSA contains prevention services funding for states and tribes that operate the Title IV-E Foster Care and Adoption Assistance program, and also has implications for American Indian and Alaska Native (AI/AN) children who are in state care and are eligible for the protections of ICWA, especially for AI/AN children subject ICWA's requirement for active efforts to prevent removal and rehabilitate families.

The FFPSA's funding is available to support prevention services such as parent training/education, individual and family counseling, and mental health and substance abuse treatment. Prevention services can be

supported for up to 24 months and are available to children who are candidates for foster care or a foster child who is pregnant or parenting foster children. Candidates for foster care include children who are at risk of being removed from their homes (parent or relative caregiver home) and placed in foster care. Also included are children who have been returned home after being in foster care and are at risk of re-entering foster care. Parents and relative caregivers are also eligible to receive these prevention services.

Tribes that operate the Title IV-E program directly through the federal government are eligible to seek reimbursement for the new prevention services. The services will be reimbursed at 50% until fiscal year 2026, when they will be reimbursed at the tribe's Federal Medical Assistance Percentage or FMAP, which can be as high as 83%. This level of reimbursement is much higher than other Title IV-E program components (administrative and training services). Tribes that have an agreement with a state to operate the Title IV-E program may also be eligible to seek reimbursement for the new services, depending upon the terms of their agreement and the state's decision on whether they choose to offer the prevention services in their state (optional).

Administrative Policy

NICWA Submits Comments on National Foster Care Standards

On August 1, 2018, the Administration for Children and Families published a proposed set of [national foster care standards](#) for comment by states and tribes with comments due October 1, 2018. NICWA filed comments that you can see [here](#). ACF is required to identify a national set of foster care standards as authorized under the Family First Prevention Services Act (Bipartisan Budget Act of 2018 under Division E, Title VII). The national standards are for licensing of both relative and non-relative foster families. The new law requires ACF to "identify reputable model licensing standards with respect to the licensing of foster family homes (as defined in section 472(c)(1) of the Social Security Act)." After the standards have been fully established, tribes and states that operate the Title IV-E Foster Care and Adoption Assistance program will be required to do the following:

- Provide information on whether the state or tribe's foster care standards are consistent with the national standards and if not, provide reasons why they are not.
- Provide information on whether the state or tribe waives non-safety licensing standards for relative foster family homes, and if so, how caseworkers are trained to use the waiver authority and whether the agency has developed a process or provided tools to assist caseworkers in waiving these non-safety standards to quickly place children with relatives.

There is no penalty for states or tribes that use different foster care standards than the national ones, but NICWA has raised concerns about how these will be used in future technical assistance and training with tribes by ACF. In addition, the national standards have not adequately taken into consideration unique cultural issues for AI/AN children and families and issues related to tribal authority to establish foster care standards.

Budget

Government Shutdown Finally Ending—At Least Until February 15

With fiscal year 2018 funds expiring on September 30, 2018, Congress moved to pass a mix of separate appropriations bills and a continuing resolution for federal agencies that were not covered under the separate appropriations bills. The Departments of Health and Human Services, Education, Labor, and Defense all had separate appropriations bills that were passed and signed by the president that continue funding through September 30, 2019. All other agencies, such as Bureau of Indian Affairs (BIA) and Indian Health Services (IHS) under the Department of Interior appropriations bills, were under a continuing resolution that expired December 21, 2018. With funding expired for federal programs and operations contained under seven of the federal appropriations bills and no path to pass the remaining appropriations bills, the government began a process of shutting down many operations that were not considered essential. This included vital health and social services, as well as other basic services, that tribal communities depend on.

On January 25, 2019, congressional leaders and the president reached an agreement to end the longest government shutdown in modern history (35 days). The agreement allows for funding of the closed federal programs and agencies until February 15, 2019, at which point another deal will have to be reached. The

800,000 affected federal employees will return to work for that time period and also receive back pay for the past 35 days. This includes both IHS and BIA staff. Contract and compact payments to tribes will also be resumed as soon as Congress approves and the president signs the agreement.

Human services programs that are essential to AI/AN people, both on and off tribal lands, have been hit hard by this government shutdown. By some reports federal agencies have had to furlough staff positions that do things like process the mail, which often contains requests by state child welfare agencies to assist in locating the tribe of an AI/AN child who is in a state child welfare proceeding in state court. These notices are often handled by BIA staff and are time sensitive. The proceedings could include very serious decisions affecting the future placement of a child or even the parent's parental rights. Other potential impacts included financial assistance to help needy families that are unemployed and living in poverty and need BIA general assistance to pay basic living expenses. In addition, BIA also processes requests for burial assistance to help with funeral expenses and foster care payments to AI/AN children who are placed out of home with a substitute caregiver. These assistance programs are essential to AI/AN people of all ages not losing further ground when it comes to being able to meet basic expenses or unexpected emergencies.

Judicial

Opponents of ICWA Continue to Mount Challenges to ICWA in Federal Courts

While tribes have been successful so far in defending against several lawsuits challenging ICWA since 2015, opponents of ICWA continue to file lawsuits in federal court. At this time, three different federal lawsuits challenging ICWA have been filed. One of the lawsuits was filed by the State of Texas with the original complaint amended to include two more states (Louisiana and Indiana), which is the first time since the passage of ICWA that a state has sued the federal government challenging ICWA (*Brackeen [Texas] v. Zinke*; see description under Hot Topics). One additional lawsuit was filed by a tribe asking for relief from due process and ICWA violations (*Oglala Sioux Tribe v. Flemming [Van Hunnik]*). All of the lawsuits filed by opponents of ICWA are alleging violations of the United States Constitution. The constitutional claims are varied but include allegations that ICWA is a race-based law and deprives Native children and non-Native foster parents of constitutional protections while in state child welfare court proceedings. In the *Brackeen (Texas) v. Zinke* case, constitutional claims were also made that ICWA interferes with state authority to regulate child welfare matters. A number of these constitutional claims have very serious implications for tribal sovereign authority beyond ICWA and federal acknowledgment of tribes as governments.

Below are the lawsuits that have been filed that challenge ICWA. You can find [descriptions](#) and case materials regarding the cases on the Turtle Talk website under the ICWA Appellate page under Open Case Materials:

- *Brackeen (Texas) v. Zinke*—Northern District of Texas Federal District Court
- *Watso v. Piper*—on appeal to Eighth Circuit Court of Appeals
- *Americans for Tribal Court Equality v. Piper D.*—Minnesota Federal District Court (stayed pending appeal in *Watso v. Piper*)

Tribal challenge to ICWA and due process failures in South Dakota District Court:

- *Oglala Sioux Tribe v. Fleming (Van Hunnik)*—on appeal to Eighth Circuit Court of Appeals

The ICWA Defense Project (National Indian Child Welfare Association, Native American Rights Fund, National Congress of American Indians, and the Michigan State University Indian Law Clinic's ICWA Appellate Project) are working with tribes and other allies to defend Native children's rights and ICWA in these cases. If you are interested in learning more about how you can get involved or provide support, please contact either David Simmons at the National Indian Child Welfare Association (desimmons@nicwa.org) or Erin Dougherty at the Native American Rights Fund (dougherty@narf.org).

For more information relating to this update, please contact NICWA Government Affairs Director David Simmons at desimmons@nicwa.org.