



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

October 2019

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Hot Topics

Fifth Circuit Court of Appeals Overturns Lower Federal Court Decision: Rules That ICWA is Constitutional

On August 9, 2019 the United States Court of Appeals in the Fifth Circuit released their decision in the *Brackeen v. Bernhardt* case overturning a lower federal court's decision that the Indian Child Welfare Act (ICWA) was unconstitutional. In the Fifth Circuit's decision they ruled that ICWA was constitutional and did not violate the equal protection or anti-commandeering clauses of the United States Constitution or the non-delegation doctrine of the Constitution. You can find a copy of the decision [here](#). In addition, the Fifth Circuit said the federal government did not exceed its authority when it promulgated ICWA's regulations (Final Rule) and the interpretation by the Bureau of Indian Affairs regarding Section 1915 of ICWA (placement preferences) was reasonable. The decision also addressed a challenge by the defendants as to whether the plaintiffs had standing to challenge ICWA. The court examined these issues and decided that the plaintiffs did have standing to bring the lawsuit. In the final paragraph of the decision the Fifth Circuit Court of Appeals summarized their decision as follows:

For these reasons, we conclude that Plaintiffs had standing to bring all claims and that ICWA and the Final Rule are constitutional because they are based on a political classification that is rationally related to the fulfillment of Congress's unique obligation toward Indians; ICWA preempts conflicting state laws and does not violate the Tenth Amendment anticommandeering doctrine; and ICWA and the Final Rule do not violate the nondelegation doctrine. We also conclude that the Final Rule implementing the ICWA is valid because the ICWA is constitutional, the BIA did not exceed its authority when it issued the Final Rule, and the agency's interpretation of ICWA section 1915 is reasonable. Accordingly, we AFFIRM the district court's judgment that Plaintiffs had Article III standing. But we REVERSE the district court's grant of summary judgment for Plaintiffs and RENDER judgment in favor of Defendants on all claims.

While the decision was joined by all three judges who heard the case, one judge, Judge Priscilla Owen, filed a partial dissent. You can find a copy of the dissent in the full decision linked above. In Judge Owen's dissent, she states that parts of ICWA and the regulations commandeer state's in violation of the 10th Amendment of the United States Constitution. The partial dissent does not change or modify the Fifth Circuit's decision but does provide additional insight into how one judge was viewing certain issues within the lawsuit. Following the decision, the plaintiffs have filed a petition with the Fifth Circuit for a rehearing of the case through an en banc review. This is a review of the case by all judges who sit on the Fifth Circuit Court of Appeals. While these types of reviews are infrequently granted, this case does contain very important and fundamental issues of federal Indian law that have implications for other federal Indian laws too. The plaintiffs asked for and were granted an extension of time to submit their petition for rehearing of the case to October 1, 2019. Following the filing of the plaintiffs petition, the Fifth Circuit will make a decision about whether to rehear the case en banc.

NICWA and our Protect ICWA Campaign partners, the National Congress of American Indians, the Association on American Indian Affairs, and the Native American Rights Fund, are engaged with our federal, state, and tribal partners in this litigation. NICWA is leading work with our Protect ICWA Campaign partners on 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.

Administrative Policy

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, as well as 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 (i.e., requirements 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 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). Tribes with state agreements will not have the same flexibility in what services they can have reimbursed as tribes operating Title IV-E directly, but NICWA along with other advocacy groups are looking at opportunities for how tribes in agreements and even tribes that don't operate Title IV-E might be able to benefit from this new law.

Budget

House and Senate Approve Continuing Resolution to Fund the Federal Government

On September 26, 2019 the Senate passed a continuing resolution (CR) that was adopted by the House earlier that funds the federal government through November 21, 2019. The President is expected to sign the bill soon. The CR provides funding for federal agencies at levels that are largely the same as fiscal year 2019 funding levels. Congress will need to complete the budget process for FY 2020 by November 21 if they are to avoid a government shutdown as we saw in FY 2019. There are still a number of larger policy issues that Democrats and Republicans have yet to find agreement on that could prove challenging to completing the budget process including the President's demands for additional funding for border wall construction.

Tribes in many ways feel the impact of stop gap measures like CR's and government shutdowns more than state governments because the majority of federal funding for tribes is considered discretionary and subject to yearly changes. Tribal advocates have been pushing Congress to provide advanced appropriations for critical federal programs, like those provided under Indian Health Services, Bureau of Indian Affairs and Bureau of Indian Education, to reduce the impact of CR's and government shutdowns on the most vulnerable within Indian Country.

The National Indian Child Welfare Association has provided testimony in person to the House of Representatives Interior Appropriations Subcommittee on BIA Human Services programs since the early 1990s, and on March 7, 2019, NICWA board member Aurene Martin provided NICWA's testimony for fiscal year 2020. NICWA's testimony focused on BIA Human Services programs such as ICWA grants for on- and off-reservation programs and BIA Social Services programming. In addition, NICWA also highlighted the need to provide funding for the prevention and treatment grant programs under the Indian Child Protection and Family Violence Prevention Act (P.L. 101-630). Since this law was enacted in 1991, no funding has been appropriated for the child abuse and domestic violence prevention and treatment grant programs. The law authorizes up to \$43 million of funding for these programs. You can find a copy of NICWA's testimony on our home page under News From NICWA [here](#).

Judicial

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

While tribal nations and the federal government 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 and are pending. Another recent action is the filing of a cert. petition to the United State Supreme Court in the *Oglala Sioux Tribe v. Flemming [Van Hunnik]* case. In this case, the Eighth Circuit Court of Appeals overturned a lower federal court decision that ordered South Dakota to change policies that deprived Native parents of due process in state child custody proceedings and alleged ICWA violations. The Eighth Circuit said the appeal should have been heard in state court rather than federal court.

All of the lawsuits filed by ICWA opponents claim that ICWA violates 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 custody proceedings. 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. Bernhardt*—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)*—Cert. Petition to the United States Supreme Court

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