

American Indian Law and Policy Alert

Akin Gump
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Fifth Circuit Upholds Indian Child Welfare Act as Constitutional

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On Friday, August 9, 2019, in *Brackeen v. Bernhardt*, No. 18-11479, the U.S. Court of Appeals for the 5th Circuit declared that the Indian Child Welfare Act (ICWA) and its implementing federal regulations (“the Final Rule”) are constitutional. The Court affirmed the district court for the Northern District of Texas’ October 2018 ruling regarding the Plaintiffs’ standing to sue, but reversed the district court’s grant of summary judgment in favor of the Defendants, handing a big win to Tribal Nations and pro-ICWA advocates across Indian Country.

In *Brackeen*, three States (Texas, Louisiana and Indiana), as well as seven individuals who have—or are attempting to—adopt Indian children, brought suit to challenge the legality of the ICWA and the Final Rule. The Indian children involved in this case are members or eligible for membership in the Navajo Nation, Cherokee Nation, Ysleta del sur Pueblo Tribe and White Earth Band of Ojibwe Tribe. In addition to the Federal Defendants, five tribes (the Cherokee Nation, Oneida of Wisconsin, Quinault Indian Nation, Morongo Band of Mission Indians and Navajo Nation) intervened as Defendants.

The 5th Circuit first affirmed the district court’s ruling that Plaintiffs had standing to challenge the ICWA and the Department of the Interior’s (“Department”) Final Rule. One set of Individual Plaintiffs, the Brackeens, met the case-or-controversy requirement to assert an equal protection claim as to ICWA section 1915 and Final Rule sections 23.129-32 because the regulatory burdens at issue in those provisions are capable of repetition, yet evading review next time the Brackeens (or any other families) seek to adopt an Indian child. Additionally, the State Plaintiffs met the requirements to bring claims under the Administrative Procedure Act (APA), Tenth Amendment, and nondelegation doctrine.

On the merits, the 5th Circuit reversed the district court’s grant of summary judgment, holding that the ICWA and the Final Rule are constitutional because: (1) “they are based on a political classification that is rationally related to the fulfillment of Congress’s unique obligation toward Indians”; (2) the “ICWA preempts conflicting state laws and does not violate the Tenth Amendment anticommandeering doctrine”; (3) the “ICWA and the Final Rule do not violate the nondelegation doctrine”; and (4) “the Final Rule implementing the ICWA is valid because the ICWA is constitutional, the BIA did

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not exceed its authority when it issued the Final Rule and the Agency's interpretation of ICWA section 1915 is reasonable.”

The 5th Circuit held that the district court erred in concluding that the ICWA definition of “Indian Child” was a race-based classification, holding instead that the definition is really a political classification consistent with both Congress’s plenary power and the U.S. Supreme Court’s precedent. Applying a rational basis review, the 5th Circuit concluded that “the special treatment ICWA affords Indian children is rationally tied to Congress’s fulfillment of its unique obligation toward Indian nations and its stated purpose of ‘protecting the best interests of Indian children and promoting the stability and security of Indian tribes.’”

Enacted in 1978, the purpose of the ICWA is to protect the best interests of Indian children and Indian tribes and families. Congress passed the ICWA in response to a crisis in which significant percentages of American Indian and Alaska Native children were separated from their families and tribes by state child welfare and private adoption agencies, and adopted or placed in foster care outside of their communities. Today, the ICWA sets federal requirements that apply to state adoption and custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.

This lawsuit is one of several federal court cases across the country in which non-Native American entities and adoptive and foster parents have sought to challenge and strike down the ICWA as unconstitutional. Indian Country applauds the 5th Circuit’s decision as a victory for ICWA and the reaffirmation of the inherent sovereign authority of Tribal Nations.

For more information about the district court’s ruling, see the Akin Gump alert [here](#).

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