

Federal Court Strikes Down Indian Child Welfare Act as Unconstitutional

October 9, 2018

In *Brackeen v. Zinke*, No. 4:17-cv-868-O (N.D. Tex.), the U.S. District Court for the Northern District of Texas declared that the Indian Child Welfare Act (ICWA) and its implementing federal regulations (the Final Rule) are unconstitutional. In particular, the Court held that the ICWA relies on impermissible racial classifications and unlawfully directs states to carry out adoption and custody cases in a specific manner. This decision is a threat to the future of the ICWA. The ICWA is currently only invalid in that district and as against the Plaintiffs, and may be stayed while it is appealed to the Fifth Circuit Court of Appeals. However if the Fifth Circuit of Appeals agrees that the ICWA and the Final Rule should be struck down, this case would be a prime candidate for Supreme Court review.

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.

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 were 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, four tribes (the Cherokee Nation, Oneida of Wisconsin, Quinault Indian Nation and Morongo Band of Mission Indians) intervened as Defendants. The Court denied the Navajo Nation's motion to intervene.

On Thursday, October 4, 2018, the Court issued an order granting Plaintiffs' motions for summary judgment in nearly all respects, and declaring portions of the ICWA and the Final Rule unconstitutional—specifically 25 U.S.C. §§ 1901-1923, 1951-1952 and 25 C.F.R. §§ 23.106-122, 23.124-132, 23.140-141. The Court ruled in favor of the Plaintiffs on all but one of their six claims.

Contact

Donald R. Pongrace
Email
Washington, D.C.
+1 202.887.4466

Pratik A. Shah
Email
Washington, D.C.
+1 202.887.4210

Allison C. Binney
Email
Washington, D.C.
+1 202.887.4326

- I. The Court granted Plaintiffs' equal protection claim on the ground that the ICWA imposes racial classifications that do not survive strict scrutiny.
- II. The Court granted the state Plaintiffs' non-delegation doctrine claim on the ground that the ICWA impermissibly granted Indian tribes the authority to reorder congressionally enacted adoption placement preferences by tribal decree.
- III. The Court granted Plaintiffs' Tenth Amendment anti-commandeering claim on the ground that the ICWA requires state courts and executive agencies to apply federal standards and directives to state created claims.
- IV. The Court granted Plaintiffs' claim challenging the Final Rule under the Administrative Procedure Act, to the extent that it implemented invalid sections of the ICWA. The Court held in the alternative that the Final Rule exceeded the scope of the Interior Department's statutory regulatory authority under the ICWA and reflected an "impermissibly ambiguous construction of the statute" that did not warrant *Chevron*
- V. The Court denied the individual Plaintiffs' substantive due process claim on the ground that the Supreme Court has not applied the fundamental rights of custody and of keeping families together to foster families.
- VI. The Court granted Plaintiffs' Indian Commerce Clause claim on the ground that Congress cannot rely on the commerce power to commandeer the states.

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 is concerned and tribal nations are in the process of discussing the next steps for protecting the ICWA.