

What Pediatricians and Health Professionals Need to Know about ICWA: History, Perspective, and Impact

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American Academy of Pediatrics
DEDICATED TO THE HEALTH OF ALL CHILDREN®



STAGE SETTING

- Indian Child Welfare Act (ICWA) context and history
- What is ICWA?
- Why does ICWA matter for health professionals?
- Ongoing threats to ICWA and efforts to protect it



LEARNING OBJECTIVES

- Gain an understanding about the need for and history of the Indian Child Welfare Act (ICWA), and why it is considered gold standard child welfare policy.
- Learn the requirements of ICWA and develop insight into how the law plays out in practice, including practical application for pediatricians and other health care professionals.
- Discuss what challenges may arise in Indian child welfare cases and guidance for preserving family and community connections.
- Learn about recent legal threats to ICWA and ongoing efforts to preserve the law to ensure continued protections for the best interests of Indian children and families.



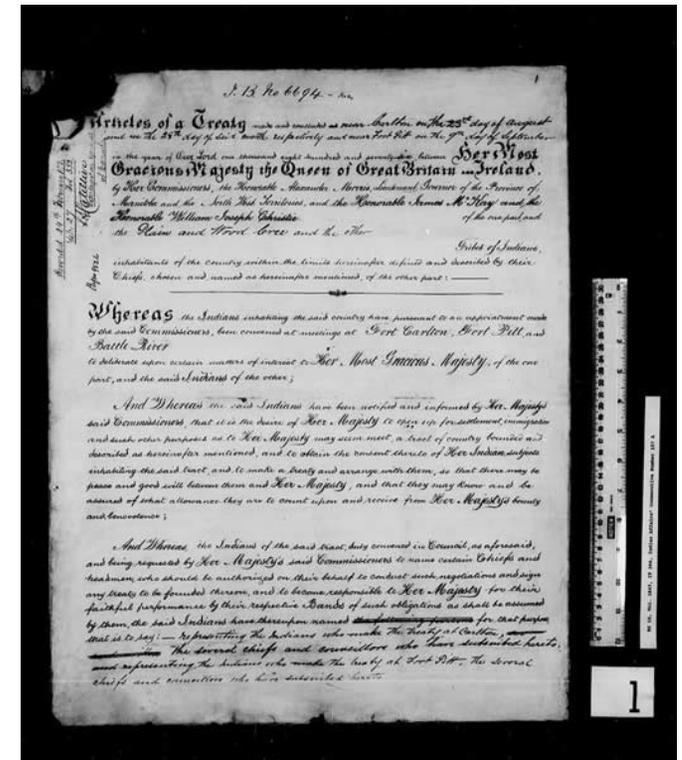
ICWA IN HISTORICAL CONTEXT

- Longstanding policies of removal and adoption to non-Native families
- Boarding schools
- Federal policy created pressure for cultural assimilation
- Resulted in eliminating connection to Native culture and communities



ICWA IN SOCIO-POLITICAL CONTEXT

- Late 20th century progress on rights and sovereignty
- American Indian Movement
- Indian Civil Rights Act of 1968 (P.L. 90-284)
- Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638)
- Indian Child Welfare Act of 1978 (P.L. 95-608)



RELEVANCE FOR HEALTH PROFESSIONALS

- Historical trauma impacts children's health
- Native children have unique health needs
 - Higher risks for suicide, injury, chronic conditions, maltreatment, witnessed violence
- ICWA a key consideration for your patients
- Your expertise is vital



TODAY'S SPEAKER

- Jack Trope
- Senior Director, Indian Child Welfare Programs, Casey Family Programs



What Pediatricians Need to Know about the Indian Child Welfare Act - History, Perspective, & Impact:

A webinar sponsored by
Casey Family Programs
and the American
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Presented on
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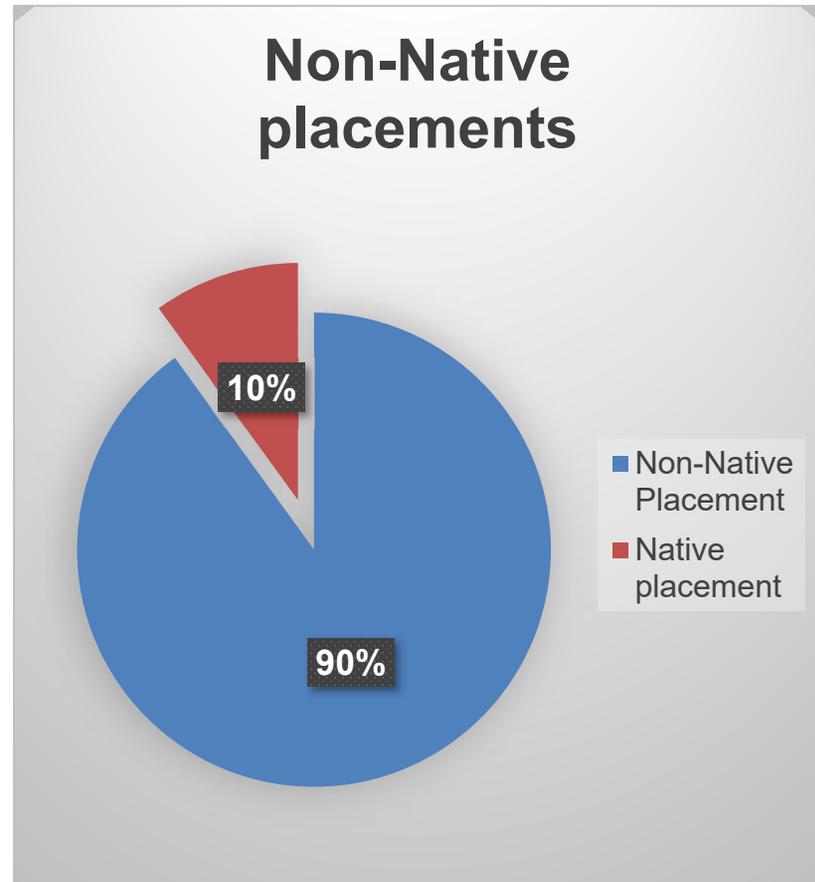
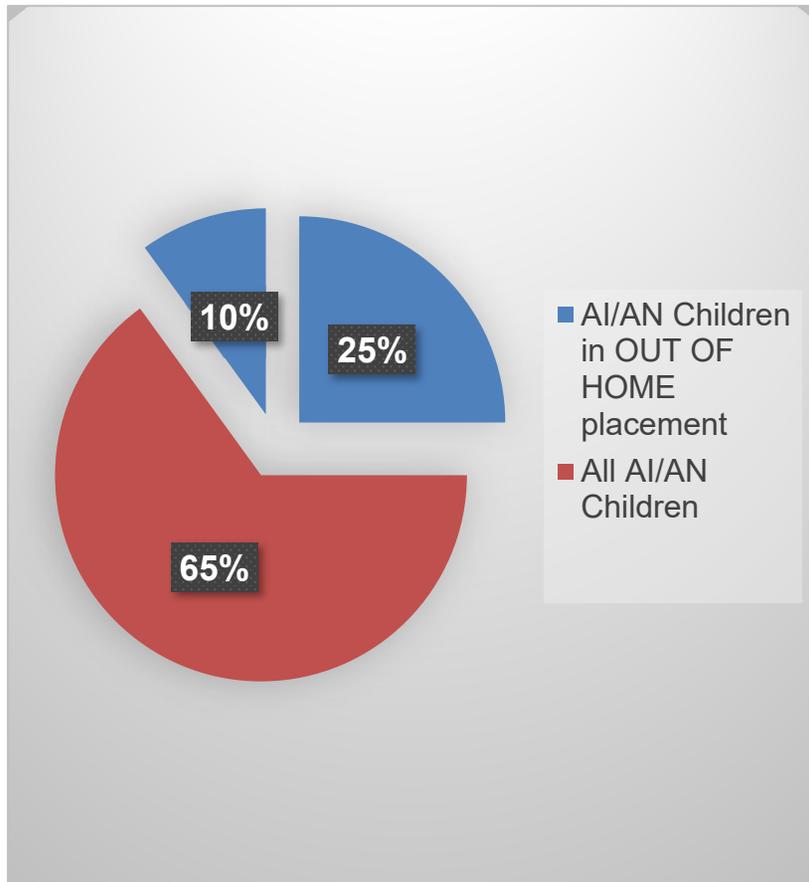
Prepared by
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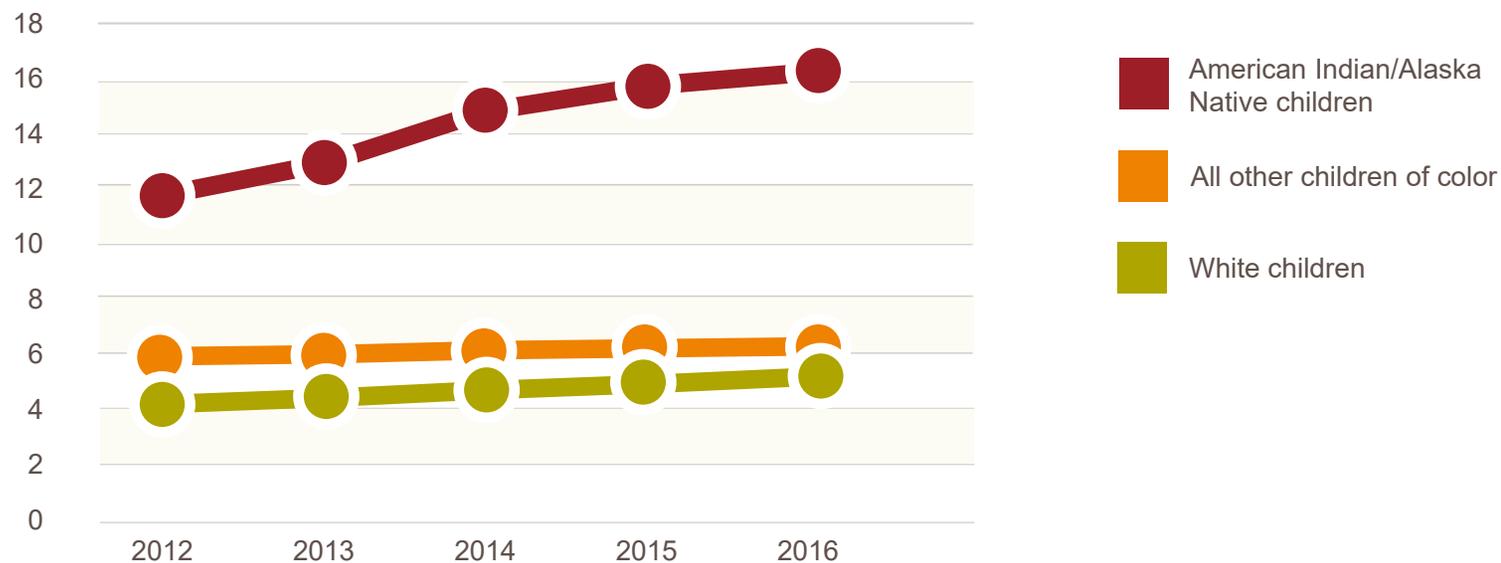
Association on American Indian Affairs 1960-70s found:



Becky video

[https://www.youtube.com/
watch?v=tYMG13pKq4Y](https://www.youtube.com/watch?v=tYMG13pKq4Y)

Disparity continues for American Indian/ Alaska Native children in care (per 1,000 children) (56% placed with non-Native families)



Indian Child Welfare Act of 1978

- ICWA is based upon Indian Commerce Clause, plenary power of Congress, and trust relationship between federal government and Indian tribes/people
- Core of the Act is the recognition of tribal sovereignty and the important role of tribes in protecting the well-being of tribal children
- Response to problems identified in state child welfare systems

Indian Child Welfare Act of 1978

- Act pertains to children in state systems; it does not apply to children under tribal jurisdiction; families who currently live or have a permanent home on the reservation are subject to the Tribal Code, not ICWA
- Purpose of Act: to curtail state authority
- Adds federal standards to state child welfare law, but does not replace state law except where state law is inconsistent with ICWA

Indian Child Welfare Act of 1978

- Emphasis on protecting the rights of biological parents and extended family
- Congress believed that this would advance the best interests of Indian children

Indian Child Welfare Act of 1978 – Rights of parents

- Some of the most important rights are:
 - Active efforts before removal and termination
 - Higher legal standard must be met before removal of child or termination of parental rights
 - Foster care placement – clear and convincing evidence
 - TPR – beyond a reasonable doubt
 - Must have testimony of Qualified Expert Witness (QEW).
 - Parents can seek transfer to tribal court or veto transfer and have input into the placement of their children
 - Preferred placement with extended family

Indian Child Welfare Act of 1978

- Congress recognized the important role of tribes in protecting the well-being of Indian children and keeping children connected with their tribal community and culture
- It also recognized that tribes had an interest in keeping children part of their communities if they are to survive and thrive in the future

Indian Child Welfare Act of 1978

➤ Tribal rights

- Right to Notice
- Right to Intervene
- Right to have case transferred to tribal court (subject to certain exceptions)
- Exclusive jurisdiction over children resident and domiciled on the reservation or wards of the tribal court (except for limited circumstances)

Indian Child Welfare Act of 1978

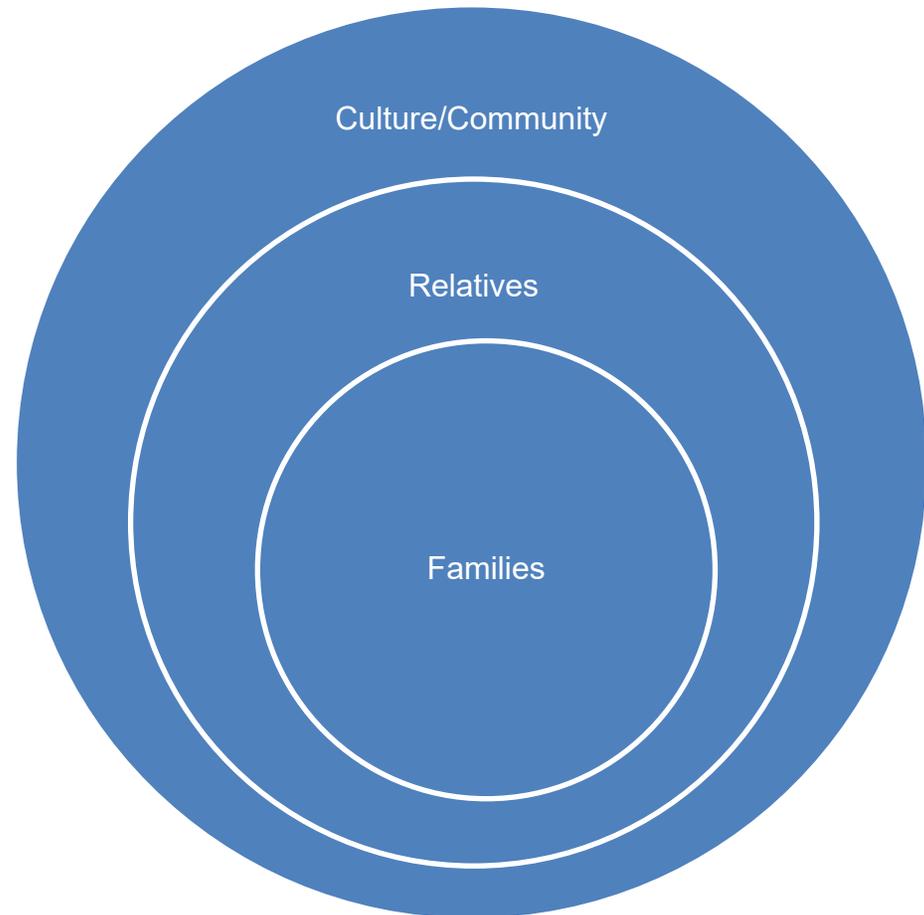
➤ Connection with tribal community

- Placement preferences (after extended family) – tribal foster homes, tribal families, other Indian families (unless tribe sets its own standards)
- Social and cultural standards of the Indian community to be applied

Indian Child Welfare Act = "Gold Standard" of child welfare



Why the *Gold Standard* of child welfare?



Research Supporting the Gold Standard

Native children have the:

- Highest rate of placement in kinship care
 - Children in kinship care have fewer placements and are more likely to safely reunify with parents
- Lowest rate of aging out of care without a permanent family

Federal Regulations: Overview

June 14, 2016 – ICWA Regulations Adopted

- First binding regulations since Act was enacted in 1978
- Took effect on December 12, 2016 for all child custody proceedings commenced after that date
- In December 2016, revised ICWA Guidelines released based upon the new regulations which supersede both the 1979 and 2015 Guidelines

When Does ICWA Apply?



**Indian
child**



**Child custody
proceeding**

“Indian Child”

[25 U.S.C. §1903(4)]

Means: *“any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”*

Child Custody Proceeding

[25 U.S.C. §1903(1)]

- i) Foster care proceeding;
- ii) Termination of parental rights;
- iii) Pre-adoptive placement;
- iv) Adoptive placement.

When does ICWA apply

[25 C.F.R. §23.103]

Courts may not consider

- Whether a parent ever had custody of the child
- The extent to which parents or children are connected to the Tribal cultural, social, religious, or political activities
- The Indian child's blood quantum

When does ICWA apply [25 C.F.R. §23.108; Guideline B.7]

- A tribe determines the child's membership or eligibility for membership
- A state court may not substitute its own judgment for the tribe's determination
- A state court may make a judicial determination based upon the information available to it if a tribe does not respond to repeated inquiries

Emergency Removals

[25 C.F.R. §23.113, Guideline C.5]

- State may only remove or place a child on an emergency basis to prevent imminent physical damage or harm
 - Must terminate immediately once the danger is no longer present
 - Court has the obligation to promptly hold a hearing on the removal and has a continuing obligation to determine whether the potential damage or harm is still present
 - Applies to both children domiciled on reservation who are temporarily off reservation and children domiciled off reservation
 - Should normally not be continued for more than 30 days
- Any petition for a court order should include information about steps taken to notify the tribe

Active Efforts

[25 C.F.R. §§23.2 and 120; Guideline E.5]

- Active efforts – affirmative, active, thorough and timely efforts to maintain or reunite a child with his/her family
 - Active efforts must involve assisting the parents/Indian custodian through the steps of a case plan and with accessing or developing necessary resources
 - Should be conducted in partnership with tribe, child, parents, extended family and consistent with tribe's social/cultural standards

Active Efforts

[25 C.F.R. §23.2]

Examples of active efforts include:

- A comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification
- Identifying appropriate services and helping parents to overcome barriers, including actively assisting the parents in obtaining such services
- Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family
- A diligent search for the Indian child's extended family members
- Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe
- Keeping siblings together whenever possible
- Supporting regular visits with parents or Indian custodians
- Identifying community resources, including housing, financial, transportation, mental health, substance abuse, and peer support services
- Post-reunification services

Standard of Proof

[25 C.F.R. §23.121]

- Must show serious physical or emotional harm to the child, including testimony of Qualified Expert Witness; heightened standard of proof applies
- Must show a causal connection between conditions in the home and serious physical or emotional harm to the child
 - Evidence of poverty, single-parenting, inadequate housing, substance abuse, or non-conforming social behavior by itself cannot meet the standard of proof unless the causal connection is shown

Qualified Expert Witness [25 C.F.R. §23.122]

Qualified Expert Witness:

- Must be qualified to testify whether statutory standard is met
- Should normally be qualified to talk about prevailing social and cultural standards of the Indian child's tribe
- May be exception where knowledge about social and cultural standards is "plainly irrelevant" to the circumstances at issue, e.g., testimony on sexual abuse
- It is recommended that the QEW be familiar with the child, make contact with parents and extended family members involved in the child's life, and view interactions between the parents and child.
- Social worker handling case cannot be QEW

Placement Preferences

[25 U.S.C. § 1915]

- Placement preferences apply to all foster care, pre-adoptive and adoptive placements.
- Foster care placement preferences:
 1. Relative
 2. Tribally-licensed or approved foster home
 3. Indian home licensed by non-Indian entity,
 4. Tribally approved or operating institution, Provided that it is the least restrictive setting for the child and within reasonable proximity to the child's home, taking into account special needs
- Adoption placement preference:
 1. Relative
 2. Other members of the child's tribe
 3. Other Indian families
- Tribe may set a different set of preferences which must be followed by state court

Placement Preferences

[25 C.F.R. §23.132, Guideline H.4]

Placement preferences apply to all foster care, pre-adoptive and adoptive placements. Good cause should be based upon one or more of the following (and is not simply a “best interests” determination):

- The request of one or both parents if they have reviewed the placement options that would comply with the preferences
- The request of the child if of sufficient age and capacity
- The presence of a sibling attachment that can only be maintained through a specific placement
- Extraordinary physical, mental, or emotional needs, such as specialized treatment services
- Unavailability of a preferred placement after a diligent search
 - Guidelines indicate diligent search includes contacting the child, parents, all known extended family and the tribe and diligently following up with those contacts

Placement Preferences

[25 C.F.R. §23.132, Guideline H.5]

A placement may not depart from the preferences based

- Solely upon ordinary bonding or attachment in a placement that was made in violation of ICWA
 - Commentary to the Regulations notes that “(s)ome theories, such as certain bonding and attachment theories, presented by experts in foster care, termination of parental rights, and adoption proceedings are based upon Western or Euro-American norms and may have little application outside that context.”
 - Guidelines state that a best practice is for courts and agencies to carefully consider whether the child’s relationship with a non-preferred placement outweighs the long-term benefits of maintaining connections with the family and tribal community
- Upon the socio-economic status of one placement versus another.

Transfer to Tribal Court

[25 C.F.R. §§23.115 and 23.117]

The tribe, parent, or Indian custodian a child custody proceeding may request orally or in writing that a case be transferred to tribal court

- The right to request applies to each distinct child custody proceeding
- May be requested at any stage of the proceeding

State Court must transfer the case unless

- Either parent objects to the transfer
- Tribal court declines jurisdiction
- State court determines that “good cause” exists to deny transfer

Participation/Access [25 C.F.R. §§ 23.136 and 23.137]

- Court should allow alternative methods of participation in court hearings:
- telephone,
 - videoconferencing,
 - other methods

Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke)

- Federal District Court for the Northern District of Texas
 - Foster parents, biological parents, and states of Texas, Louisiana and Indiana are plaintiffs
 - Three specific cases are listed in the complaint – cases from Texas, Minnesota and Nevada involving Navajo, Cherokee, Yselta del Sur and White Earth children
 - Four tribes intervened (a fifth has intervened at the appellate level)

Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke)

- District Court ruled that the Indian Child Welfare Act is unconstitutional on several grounds
 - It is a race-based law that violates the Equal Protection Clause
 - It commandeers state agencies and courts to enforce federal law in violation of the Tenth Amendment which protects states' rights
 - It improperly delegates authority to tribes to change the placement preferences
- First court decision finding ICWA unconstitutional in its totality in the 40 years since enactment
- Court also ruled regulations are invalid as a violation of the Administrative Procedures Act

Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke) - Issues

Equal Protection

- Plaintiffs arguments – ICWA violates equal protection
 - Statute used ancestry as a proxy for race; inclusion of the eligibility language in the Indian child definition brings children under the statute simply because they are related to a tribal ancestor by blood
 - Strict scrutiny must be applied and the ICWA is overbroad and not narrowly tailored to accomplish statute’s goals
- United States/tribes arguments – ICWA does not violate equal protection
 - Indian legislation is based upon political status, not race; definition of child is based upon citizenship/membership and not the child’s race
 - Rational relationship” standard established in Morton v. Mancari applies, not the “strict scrutiny” standard, and ICWA meets that standard
 - If one section of ICWA violates equal protection, then sever that section from the statute but leave the rest of the statute intact

Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke) - Issues

Tenth Amendment (states' rights)

- Plaintiffs arguments: violates 10th Amendment; commandeers states
 - Requires federal standards in state created causes of action
 - State courts and legislatures appear responsible for federal standards
 - Shifts the cost of federal regulations to the states
 - Regulates states, not individuals
 - Places requirements on state agencies, not just courts
- United States/tribes arguments – ICWA valid preemption of state law
 - Valid under Indian Commerce and Supremacy clauses; preempts contrary state laws.
 - Supreme Court has upheld laws that modify state law causes of action.
 - ICWA mostly directed to courts and to both individuals and states, except for information requirements that do not raise 10th Amendment issues
 - Spending Clause may also be grounds for upholding the ICWA

Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke)

- The ruling has been appealed to the 5th Circuit Court of Appeals and argument was held on March 13
- The 5th Circuit has granted a stay of the trial court decision pending its ruling
- Amicus brief were filed in support of ICWA on behalf of 321 tribes and numerous national Indian organizations, 21 states and 31 child welfare organizations (led by Casey Family Programs), as well a number of law professors
- 1 state and a handful of organizations filed in opposition to ICWA – most notable group is the American Academy of Adoption Attorneys

For Further Information

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