# QUESTIONS & ANSWERS: THE BRACKEEN DECISION

**Recently a federal appellate court - the Fifth Circuit Court of Appeals, issued *Brackeen v. Haaland*, a very important decision regarding the Indian Child Welfare Act (ICWA). This Q&A document is intended to answer some of the questions that might arise for Tribal and county Social Workers, attorneys and bench officers.This Q&A does not answer many questions that are certain to arise in the coming months and is not intended to serve as definitive legal advice.**

**Our goal is to provide basic information to help all of those working is the field of Indian Child Welfare. We encourage you to visit www.caltribalfamilies.org for updated information, webinars and analysis of this court decision and other ICWA issues.**

CALIFORNIA TRIBAL FAMILIES COALITION

## Background

In October 2017, state plaintiffs Texas, Louisiana, and Indiana (Plaintiffs), and individuals who were non-Indian foster families to Indian children, including the Brackeens, filed a lawsuit in the federal District Court of Northern Texas challenging the constitutionality of ICWA. Five tribes, Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians and Navajo Nation intervened in the case. In October 2018, the District Court struck down ICWA, finding ICWA violated equal protection, commandeered state legislative functions, and the District Court struck down the 2016 BIA ICWA Regulations.

The case was appealed to the United States Fifth Circuit Court of Appeals and oral arguments were heard on March 13, 2019. Then in August 2019, a three-judge panel of the Fifth Circuit released their decision on Brackeen and reversed the decision from the Northern District of Texas. In response, the Plaintiffs filed a request for rehearing *en banc*, the whole panel of Fifth Circuit judges. The State of California and twenty-five other states, and the District of Columbia, filed *amici* briefs asking the Fifth Circuit to uphold ICWA. These twenty-seven jurisdictions are home to 94% of the federally recognized tribes and 60% of the national American Indian and Alaska Native population. After 14 months of waiting, the Fifth Circuit issued a sharply divided 325-page decision.

## 1) How was ICWA upheld in *Brackeen*?

The Court of Appeal was sharply divided in their decision, so a few portions of the Northern District of Texas decision were upheld. However, since the judges' positions on some portions were evenly split, those parts of the decision only apply to the Northern District of Texas, possibly all of Texas, Louisiana, and Mississippi. But the majority of the appellate judges agreed that Congress had the authority to enact ICWA, which is why we believe this court decision is a triumph for tribes, tribal families, and tribal children!

## 2) Does ICWA Still apply in California after *Brackeen*?

Yes! The decision does not set precedent in California. Also, in 2006 and 2018, California expanded ICWA protections by adopting into state law the ICWA requirements and the 2016 BIA Final Rule (aka BIA ICWA Regulations) through Senate Bill 678 and later with Assembly Bill 3176. These efforts passed in California with bipartisan support. Because California has already added ICWA provisions and the BIA Final Rule into California law, Brackeen has no impact on California ICWA cases.

## 3) If ICWA still exists, what does *Brackeen* mean for my case?

If you have a case in California, it means that all the ICWA provisions and the 2016 BIA Final Rule still apply to your case. If you are finding that a California court or county are not following ICWA, please let California Tribal Families Coalition know. We will be monitoring the issue in California.

## 4) What about the BIA ICWA Regulations, do they still apply in California?

Yes! In 2018, California passed Assembly Bill 3176, which amended 32 sections of the California Welfare & Institutions Code to include key provisions of the 2016 BIA Final Rule. As such, the BIA ICWA Regulations are in full force and effect in California.

## 5) What if the case is from a non-California tribe, does ICWA still apply to that case?

Yes! If the tribe is from outside of California but the case is in a California Superior Court, the protections afforded through Senate Bill 678 and Assembly Bill 3176 apply to all federally recognized Indian tribes.

## 6) What does anti-commandeering mean and why does it matter?

Anti-commandeering means that the federal government is prohibited from telling states to use their personnel and resources to enforce federal laws and programs. In *Brackeen*, the State Plaintiffs argued that the federal government, through ICWA, is commanding states to operate and use state resources a specific way. Some of the arguments by the State Plaintiffs about anti-commandeering were upheld in *Brackeen*, but again, the decision is limited to the Northern District of Texas and possibly the State Plaintiffs. Most of the challenges to ICWA brought by the State Plaintiffs, including the right to transfer a case to tribal court, the right to examine documents, and the right to seek invalidation of a case for ICWA violations were upheld in the *Brackeen* decision, because they were found to not be the federal government commandeering states. Lastly, since the federal ICWA provisions were put into California state law through Senate Bill 678 anti-commandeering prohibitions do not apply.

## 7) What needs to be done differently today, since the *Brackeen* decision was issued?

For California state court ICWA cases, there is nothing different that must be done. All ICWA cases should move forward, normally, the same way as before the *Brackeen* decision was released.

**We hope this has been helpful. Again, please visit the CTFC website at: www.caltribalfamilies.org for updated information, webinars and analysis of this court decision and other ICWA issues.**