ICWA DEFENSE PROJECT
MEMORANDUM
DECEMBER 7, 2017

The past two years have seen a dramatic increase in the number of legal challenges brought by opponents of the Indian Child Welfare Act (ICWA), all with the goal of undermining ICWA and tribal sovereignty. In the most recent case, Texas v. Zinke, the State of Texas is challenging the constitutionality of ICWA and the 2016 ICWA Regulations. ICWA has never been challenged as unconstitutional by any state, until now, and this case is therefore of significant concern to the ICWA Defense Project partners.

This memorandum provides an update on this litigation and describes some of the legal and communications strategies developed by the National Indian Child Welfare Association (NICWA), the Native American Rights Fund (NARF), the National Congress of American Indians (NCAI), and the ICWA Appellate Project at Michigan State University College of Law—collectively known as the ICWA Defense Project—to inform, advance, and unify a coordinated response across Indian Country to this attack on ICWA.

I. Context for recent attacks on the Indian Child Welfare Act

In March 2016, the Bureau of Indian Affairs (BIA) addressed areas of long-time ICWA non-compliance by proposing draft federal regulations to govern the implementation of ICWA in state courts and agencies. On June 17, 2016, the BIA issued final Regulations for ICWA Proceedings, as well as Frequently Asked Questions regarding the final rule. In addition, the Solicitor for the U.S. Department of the Interior issued a Memorandum describing BIA’s authority to issue the regulations. The final regulations became binding in December 2016; and at the same time, the BIA issued new Guidelines for Implementing the Indian Child Welfare Act.

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In response to these reforms, a network of ICWA opponents filed multiple lawsuits challenging the BIA’s actions as well as ICWA’s constitutionality. The ICWA Defense Project members are working collaboratively to defend ICWA and the long overdue reforms.

II. Texas v. Zinke

On October 25, 2017, the State of Texas and foster parents Chad and Jennifer Brackeen filed suit in Federal District Court for the Northern District of Texas challenging ICWA and the 2016 ICWA Regulations. This is the first time that a state has challenged the constitutionality of ICWA and its Regulations and, as such, this of significant concern to the ICWA Defense Project partners.

The Complaint seeks declaratory and injunctive relief and requests that the court: (1) vacate and set aside the 2016 ICWA Regulations under the theory that the Regulations violate the Administrative Procedures Act (APA); (2) declare that Sections 1901–1923 (including Section 1915) and 1951–1952 of ICWA violate the Constitution; and (3) enjoin the Department of Interior (DOI) from implementing or administering those sections.

A. Challenges to the 2016 ICWA Regulations

Plaintiffs challenge the 2016 ICWA Regulations primarily on the basis of an equal protection claim that ICWA discriminates on the basis of race. This is a familiar argument the Project has seen in virtually all of the other challenges to ICWA over the last two years. In addition, Plaintiffs assert the Regulations violate the Constitution’s Tenth Amendment because they exceed Congress’s Commerce authority and are an impermissible commandeering of state resources. Again, these are familiar arguments made in both National Council for Adoption v. Jewell and A.D. v. Washburn, otherwise known as the Goldwater litigation.

Plaintiffs make a variety of other arguments. Plaintiffs argue the Regulations coerce states to engage in unconstitutional conduct by threat of losing federal child welfare grants, constituting an abuse of Congress’s Spending Clause power. They also argue the Regulations

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2 The work of the ICWA Defense Project has helped to get many of these federal cases dismissed, though the attacks continue. Previous ICWA Defense Memos included updates on National Council for Adoption v. Jewell (Eastern District of Virginia) Doe v. Jesson (District of Minnesota), and Doe v. Pruitt (Northern District Court of Oklahoma), C.E.S. v. Nelson (Western District Court of Michigan) and In re Alexandria P (California), in addition to federal and state cases in the Eighth Circuit Court of Appeals, Utah, California, Minnesota, Michigan, Ohio, Nevada, and Arizona. A.D. v. Washburn, otherwise known as the Goldwater case, was dismissed by the District of Arizona in March of this year and is currently on appeal to the Ninth Circuit Court of Appeals.

3 Notably, counsel representing the Brackeens is not new to ICWA challenges; attorney Matt McGill is a well-known ICWA opponent and was involved in National Council for Adoption, which we highlighted in a previous ICWA Defense Project memo.
unconstitutionally delegate to Tribes legislative power that is reserved to Congress, and the Regulations’ departure from ICWA’s placement preferences is arbitrary and capricious because they are contrary to Section 1915 of ICWA and are an “unexplained and unsupported departure” from the 1979 Guidelines. Finally, Plaintiffs offer a due process claim that preventing the Brackeens from adopting interferes with a familial relationship, and Texas individually claims it is harmed because it has to spend money meeting new requirements under the 2016 ICWA Regulations.

B. Challenges to ICWA

The Plaintiffs also assert broad constitutional challenges to ICWA’s Sections 1901–1923 and 1951–1952. Plaintiffs bring the same Tenth Amendment, equal protection, due process, spending clause, and non-delegation arguments as mentioned above. Sections 1931–1934 and 1961–1963 of ICWA are not challenged.

III. What you can do to respond to Texas v. Zinke

The ICWA Defense Project has received a number of inquiries from people wanting to know how they can join the unified effort to respond to these attacks on ICWA. The ICWA Defense Project is committed to supporting a strong, collaborative, unified effort, but we will need your help as this work moves forward in the upcoming months.

A. Contact your state Attorney General and urge them to support ICWA

Representatives from the state of Texas have reached out to Attorneys General of other states asking for their support. For this reason, the ICWA Defense Project urges Tribes, tribal organizations, and individuals to reach out to their state Attorney General’s office and ask that they support ICWA and deny any request from Texas to support its efforts to derail this critical protection for Indian children and tribal communities. The California Tribal Families Coalition has taken the lead on this, and a letter template is also available. If you would like assistance with this, please contact Kate Fort (fort@law.msu.edu) at MSU College of Law or Erin Dougherty Lynch (dougherty@narf.org) or Matt Newman (mnewman@narf.org) at the Native American Rights Fund.

B. Discuss the importance of ICWA in meetings with elected representatives and the DOI

Tribal representatives frequently travel to Washington, D.C., to meet with elected representatives and the Department of the Interior on a variety of issues, many of which do not relate to child welfare. But that does not mean that you can’t also mention your support of ICWA at these meetings. The ICWA Defense Project encourages Tribes to use our tools, materials, and messaging when having these conversations. If you need some talking points for these meetings, please contact Derrick Beetso (dbeetso@ncai.org) at the National Congress of American Indians.
IV. Other cases and future collaboration

In addition to Texas v. Zinke, the ICWA Defense Project monitors important cases in both federal and state courts, including on-going cases in the Eighth and Ninth Circuit Courts of Appeals, certiorari petitions in the United States Supreme Court, California, Minnesota, Ohio, Nevada, and Arizona. The ICWA Defense Project aims to provide a coordinated tribal legal response in each state where litigation has arisen, as well as across Indian Country. It is important that filings and statements from Indian Country support coordinated tribal positions and avoid repetitive or contradictory arguments. If you would like to learn more about these efforts or if your tribe or organization is interested in joining in efforts to file amicus briefs or motions to intervene please contact us at the email addresses below.

Do you have a case we should know about? Need help with the media? Please contact us to let us know if you or your tribe is involved in a child welfare case where an attorney is arguing that ICWA does not apply or that ICWA is unconstitutional. In addition, if your Tribe is involved in an ICWA appeal and would like strategy or amicus support, please let us know. We are happy to provide legal assistance to Tribes seeking to counter these claims. Please contact Kate Fort (fort@law.msu.edu) at MSU College of Law or Erin Dougherty Lynch (dougherty@narf.org) or Matt Newman (mnewman@narf.org) at the Native American Rights Fund.

Thank you for your interest in this work and your dedication to ICWA and the well-being of Native children and families.