

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

CHAD EVERET BRACKEEN,
JENNIFER KAY BRACKEEN, FRANK
NICHOLAS LIBRETTI, HEATHER LYNN
LIBRETTI, ALTAGRACIA SOCORRO
HERNANDEZ, JASON CLIFFORD, and
DANIELLE CLIFFORD,

and

STATE OF TEXAS,
STATE OF LOUISIANA, and
STATE OF INDIANA,

Plaintiffs,

v.

UNITED STATES OF AMERICA; RYAN
ZINKE, in his official capacity as Secretary of
the United States Department of the Interior;
BRYAN RICE, in his official capacity as
Director of the Bureau of Indian Affairs;
JOHN TAHSUDA III, in his official capacity
as Acting Assistant Secretary for Indian
Affairs; the BUREAU OF INDIAN
AFFAIRS; the UNITED STATES
DEPARTMENT OF THE INTERIOR; ALEX
AZAR, in his official capacity as Secretary of
the United States Department of Health and
Human Services; and the UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants,

CHEROKEE NATION, et al.,

Intervenor-Defendants.

Civil Action No. 4:17-cv-868-O

**DECLARATION OF MATTHEW D. MCGILL IN SUPPORT OF INDIVIDUAL
PLAINTIFFS' OPPOSED MOTION FOR LEAVE TO SUPPLEMENT THE RECORD**

I, Matthew D. McGill, declare as follows:

1. I am an attorney with the law firm of Gibson, Dunn & Crutcher, LLP. I am licensed to practice law in the District of Columbia and the State of New York and am admitted

pro hac vice to practice in the Northern District of Texas. I represent Chad Everet Brackeen, Jennifer Kay Brackeen, Frank Nicholas Libretti, Heather Lynn Libretti, Altagracia Socorro Hernandez, Jason Clifford, and Danielle Clifford in this matter, and my business address is 1050 Connecticut Avenue NW, Suite 300, Washington, D.C., 20036.

2. Attached hereto in the Appendix as Exhibit A is a redacted true and correct copy of the letter that I sent on September 10, 2018 to Trevor Woodruff, Deputy Commissioner of the Texas DFPS, and Audrey Carmical, the General Counsel for the Texas DFPS.

3. Attached hereto in the Appendix as Exhibit B is a redacted true and correct copy of the letter that Trevor Woodruff sent to me in reply on September 20, 2018.

4. Attached hereto in the Appendix as Exhibit C is a redacted true and correct copy of the letter that I sent on October 10, 2018 to Trevor Woodruff, Deputy Commissioner of the Texas DFPS.

5. I declare under penalty of perjury that the foregoing is true and correct. Executed on October 10, 2018.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Matthew D. McGill

EXHIBIT A

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Matthew D. McGill
Direct: +1 202.887.3680
Fax: +1 202.530.9662
MMcGill@gibsondunn.com

September 10, 2018

VIA ELECTRONIC MAIL

Trevor Woodruff, Esq.
Deputy Commissioner
Texas Department of Family Protective Services
P. O. Box 149030 MC E611
Austin, TX 78714-9030
trevor.woodruff@dfps.state.tx.us

Audrey Carmical, Esq.
General Counsel
Texas Department of Family Protective Services
P. O. Box 149030 MC E611
Austin, TX 78714-9030
audrey.carmical@dfps.state.tx.us

Dear Mr. Woodruff and Ms. Carmical:

I represent Chad and Jennifer Brackeen, a married couple and plaintiffs in the currently pending litigation *Brackeen, et al. v. Zinke, et al.*, No. 4:17-cv-868-O (N.D. Tex.). Mr. and Mrs. Brackeen are the adoptive parents of [REDACTED]. [REDACTED] was born to [REDACTED] and [REDACTED], an unmarried couple, on August 28, 2015. In June 2016, when [REDACTED] was ten months old, Child Protective Services (“CPS”), a division of the Texas Department of Family and Protective Services (“DFPS”), placed him in the Brackeens’ foster care. The Brackeens petitioned to adopt Leo in July 2017, and in January 2018 the adoption was finalized.

It has come to our attention that [REDACTED] biological mother, [REDACTED], recently gave birth to a baby girl, [REDACTED] sister. We understand that CPS has placed [REDACTED] sister in foster care. I am writing to notify you that the Brackeens would like to make themselves available for this baby girl as either a foster home or an adoptive home, and to request that CPS consider the Brackeens for foster or pre-adoptive placement of [REDACTED] sister.

Both Texas and Federal law regarding foster and adoptive placements express a preference that, wherever possible, siblings should be kept together. Texas regulations state that “[s]iblings” generally “should be placed together.” 40 Tex. Admin. Code § 700.1309(3); *see also In Interest of B.D.A.*, 546 S.W.3d 346, 377 n.46 (Tex. App. 2018) (citing 40 Tex.

GIBSON DUNN

September 10, 2018

Page 2

Admin. Code § 700.1309(3)). Likewise, the Texas Child Protective Services Handbook instructs that, in selecting an adoptive home, “[s]taff must consider the child’s need for placement with siblings,” and “[i]n providing adoptive services, CPS is asked ... whenever possible to keep siblings in the same adoptive home.” Tex. Dep’t of Family & Protective Servs., CPS Handbook § 6931.42 (Feb. 2017). Texas has instituted this preference for placing siblings together in order to carry out federal law which requires states to make “reasonable efforts” generally “to place siblings removed from their home in the same foster care ... or adoptive placement” in order for a state to be eligible for federal adoption-program funding. 42 U.S.C. § 671(a)(31)(A).

In light of the preference in both Texas and Federal law for keeping siblings together, I ask CPS to consider placing Leo’s sister on a foster or pre-adoptive basis in the Brackeens’ home. I also would request that CPS initiate visitation between the siblings as soon as is practicable, in order to facilitate the forging of a relationship between them. Thank you in advance for your consideration.

Sincerely,



Matthew D. McGill

cc: David Hacker, Special Counsel for Civil Litigation, Office of the Texas Attorney General

EXHIBIT B



Texas Department of Family and Protective Services

Commissioner
H. L. Whitman, Jr.

September 20, 2018

Mr. Matthew D. McGill
Attorney at Law
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306

Via Electronic Mail

RE: Brackeen Family Correspondence

Dear Mr. McGill:

Thank you for your correspondence regarding your clients, Mr. and Mrs. Brackeen. Let me begin by saying how much we sincerely thank Mr. and Mrs. Brackeen for welcoming [REDACTED] into their home, and are very excited for the family. It is absolutely wonderful when foster parents and members of the community provide such love, nurturing, and support for children in DFPS' care.

We share your strong interest in the preference for children being placed with siblings. Likewise, we are certain you share a belief in the importance of parental rights, and appreciate DFPS' work in making every effort to reunify biological families. To this end, in this particular case, DFPS continues to determine whether it can identify a biological parent or relative of [REDACTED] sibling. If found, that will be the first placement sought. In the event that a biological parent or relative cannot be found, DFPS would certainly look to pursue placement of [REDACTED]'s sister in the Brackeen home. Such placement would of course be subject to any requirements of the Indian Child Welfare Act, which as you know remains in effect.

Regarding visits between the siblings, we absolutely agree that visitation is important. I understand that the first visit between the children will occur this weekend.

Thank you again for your letter. If you have additional questions, or if there is anything further I can do, please let me know.

Sincerely,

Trevor A. Woodruff

Letter to Mr. Matthew D. McGill
Brackeen Family
Page 2

cc: Mr. David Hacker *Via Electronic Mail*
Special Counsel for Civil Litigation
Office of the Texas Attorney General

Ms. Audrey Carmical *Via Electronic Mail*
DFPS General Counsel

EXHIBIT C

1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Matthew D. McGill
Direct: +1 202.887.3680
Fax: +1 202.530.9662
MMcGill@gibsondunn.com

October 10, 2018

VIA ELECTRONIC MAIL

Trevor Woodruff, Esq.
Deputy Commissioner
Texas Department of Family Protective Services
P. O. Box 149030 MC E611
Austin, TX 78714-9030
trevor.woodruff@dfps.state.tx.us

Dear Mr. Woodruff:

Thank you very much for your letter of September 20, 2018 concerning the sibling of my clients' adoptive child, [REDACTED]. In your letter, you state that the first placement sought for [REDACTED]'s sister would be with a "biological parent or relative," but that if such a placement "cannot be found, DFPS certainly would look to pursue placement in the Brackeen home." Your letter, however, goes on to note that any placement of [REDACTED]'s sister "would of course be subject to the requirements of the Indian Child Welfare Act."

I write in response for three reasons. First and foremost, my clients want me to express their gratitude that DFPS is willing to consider them as a placement for [REDACTED]'s sister; they believe that unifying [REDACTED] and his sister in their family will bring great benefits to both children. Second, my clients want me to express their hope that DFPS soon will complete its work to identify the biological father of [REDACTED]'s sister so that she can move into a permanent placement either with that family or else the Brackeens.

Finally, as you doubtless are aware, on October 4, the U.S. District Court for the Northern District of Texas declared all relevant provisions of the Indian Child Welfare Act to be unconstitutional and also set aside the legislative regulations that the Department of Interior issued with respect to ICWA in 2016. Dkt. 167, *Brackeen, et al. v. Zinke, et al.*, No. 4:17-cv-868-O (N.D. Tex.) (attached). As you know, the State of Texas is a party to that litigation. Accordingly, Texas and its agency, DFPS, is bound by that judgment and its declaration of ICWA's unconstitutionality. DFPS, therefore, cannot apply ICWA or Interior's 2016 regulations with respect to the placement of [REDACTED]'s sister; she must be placed in accordance with Texas law, without regard to ICWA or the 2016 regulations. And as your letter of September 20 seems to recognize, if the biological father of [REDACTED]'s sister cannot be located within a reasonable time, Texas law provides that, absent circumstances not present here, [REDACTED] and his sister "should be placed together." 40 Tex. Admin. Code § 700.1309(3).

October 10, 2018

Page 2

Thank you for your continued consideration of this important matter.

Sincerely,



Matthew D. McGill

cc: David Hacker, Special Counsel for Civil Litigation, Office of the Texas Attorney General