

# *Haaland v. Brackeen* - ICWA at the Supreme Court

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# Disclaimer

- The views and opinions expressed in this presentation are my own and do not necessarily represent those of the Gila River Indian Community.

# BRIEF OVERVIEW AND HISTORY OF ICWA

# ICWA - Congressional Findings

## § 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that “The Congress shall have Power \* \* \* To regulate Commerce \* \* \* with Indian tribes<sup>1</sup>” and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as

trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

(Pub. L. 95-608, §2, Nov. 8, 1978, 92 Stat. 3069.)

## Some history

### From Florence----Indians Steal Away Two Civilized Apa- che Girls.

The following appeared in Monday's extra  
MINER:

A letter from Mr. Jos. Collingwood, dated June 18, informs us that two Apache girls, which Mr. D. C. Thompson raised, were missing and it was feared that they had been carried off by some Apaches from the San Carlos reservation, who had come to Florence in company with some white soldiers. Mr. and Mrs. Thompson were inconsolable for the loss of their adopted children. Mr. Thompson had gone in pursuit of the thieves.

Florence is on the Gila river, in this Territory. The Apache girls alluded to were taken by some soldiers when quite young, and given to Mr. and Mrs. D. C. Thompson, who have raised them to girlhood as they would have done were they their own natural children. They were, of course, devoted to their benefactors, and to be thus torn from them and civilized life, and inducted into savage life, will go hard with them. The girls can be found, and should be taken from the Indians and given to their adopted parents.

- *Weekly Miner* (Prescott),  
June 28, 1873 p. 1

# ICWA - Congressional Policy

## **§ 1902. Congressional declaration of policy**

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

(Pub. L. 95-608, §3, Nov. 8, 1978, 92 Stat. 3069.)

# ICWA - Basic Principles

- Requirement of notice and right of Indian tribe to intervene in state court child custody proceedings
- Right of Indian tribe to seek transfer of proceedings to tribal court
- Standards applied in proceedings to protect Indian children and families
- Placement preferences for Indian children

# ICWA - State Child Custody Proceedings

- Foster care placement
- Termination of parental rights
- Pre-adoptive placement
- Adoptive placement
- Generally, dependency or abuse/neglect proceedings are done in “phases.”

HOW WE GOT HERE

# Previous Supreme Court ICWA decisions

- ICWA was adopted in 1978; there have only two Supreme Court cases interpreting ICWA:
  - *Mississippi Band of Choctaw Indians v. Holyfield* (1989)
  - *Adoptive Couple v. Baby Girl* (2013)

# Justice Thomas (concurring) in *Adoptive Couple*

\*2571 Because adoption proceedings like this one involve neither “commerce” nor “Indian tribes,” there is simply no constitutional basis for Congress' assertion of authority over such proceedings. Also, the notion that Congress can direct state courts to apply different rules of evidence and procedure merely because a person of Indian descent is involved raises absurd possibilities. Such plenary power would allow Congress to dictate specific rules of criminal procedure for state-court prosecutions against Indian defendants. Likewise, it would allow Congress to substitute federal law for state law when contract disputes involve Indians. But the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians. Accordingly, application of the ICWA to these child custody proceedings would be unconstitutional.

# What happened after *Adoptive Couple*?

- July of 2014 - Goldwater Institute sends “recruiting letter” to foster and adoption agencies in Arizona
- BIA issues *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* (eff. February 25, 2015)
- BIA promulgates 25 CFR Part 23 (BIA ICWA Rule) (eff. June 14, 2016)

# *Brackeen* challenge

- Challenge to ICWA strategically brought in a judicial district (N.D. Tex.) with no federally-recognized Indian tribes.
- Federal district court ruled that ICWA was unconstitutional in 2018.
- Case was appealed to the federal Fifth Circuit.
- Fifth Circuit initially reversed, found ICWA constitutional, and rendered judgment for the defendants.

## *Brackeen* challenge (cont.)

- Plaintiffs sought “en banc” review, which was granted (16 judges).
- En banc decision filed April 6, 2021 and all opinions totaled 325 pages.
- All parties filed petitions for certiorari with the Supreme Court, which were granted.
- Briefing is complete and the case is set for extended oral argument on November 9, 2022.
- Decision in mid-2023...

# Issues in *Brackeen*

- Do the plaintiffs have standing to challenge ICWA?
- Did Congress have the authority to enact ICWA under Article I of the Constitution?
- Does ICWA's "Indian child" classification violate Equal Protection?
- Do ICWA's general "Native American" preference provisions violate Equal Protection?

## Issues in *Brackeen* (cont.)

- Does ICWA “commandeer” state actors in violation of the Tenth Amendment?
- Do the provisions of ICWA allowing Indian tribes to alter placement preferences violate the non-delegation doctrine?

POSSIBLE OUTCOMES

# Uncertainty

- Because of the numerous issues and combinations of possible outcomes, it is nearly impossible to plan for a post-*Brackeen* world assuming any outcome other than ICWA being upheld.
- Let's take a look at some of the major components of ICWA.

# Tribal Intervention

- Currently ICWA makes intervention a statutory right under 25 U.S.C. § 1911(c).
- *Gila River Indian Community v. Dept. of Child Safety*, 242 Ariz. 277 (2017):
  - “Similarly, other courts have held that § 1911(c), which recognizes a tribe's right to intervene in foster care placement and termination proceedings, does not bar state courts from allowing intervention in adoption proceedings. *See In re Appeal in Maricopa Cty. Juvenile*, 136 Ariz. at 533, 667 P.2d 228 (“Although [ICWA] explicitly provides a tribe with the right to intervene in foster care and termination proceedings, **it does not preclude a trial court from exercising its discretion in allowing intervention by a tribe in an adoption proceeding.**”).” 242 Ariz. at 283 ¶ 25.

# Transfer to Tribal Court

- Currently permitted under 25 U.S.C. § 1911(b).
  - Exclusive jurisdiction provision of 25 U.S.C. § 1911(a) might require inquiries of whether a child is an “Indian child.”
- *Gila River Indian Community v. Dept. of Child Safety*, 242 Ariz. 277 (2017):
  - “When enacting ICWA, Congress recognized, rather than granted or created, tribal jurisdiction over child custody proceedings involving Indian children.” 242 Ariz. at 283 ¶ 20.
  - “Thus, tribes have the inherent authority to hear child custody proceedings involving their own children.” *Id.* ¶ 21.

# A.R.S. STAND-ALONE PROVISIONS

# Notice in TPR Cases

- A.R.S. § 8-535. Notice of initial hearing; waiver; guardian ad litem

A. After the petition has been filed, the clerk of the superior court shall set a time and place for the initial hearing. Notice of the initial hearing and a copy of the petition shall be given to the parents of the child, the guardian of the person of the child, the person having legal custody of the child, any individual standing in loco parentis to the child, **the tribe of any Indian child** as defined by the federal Indian child welfare act of 1978 (25 United States Code section 1903) and the guardian ad litem of any party as provided for service of process in civil actions.

# Notice in Permanent Guardianships

- **A.R.S. § 8-872. Permanent guardianship; procedure**

B. The person who files the motion shall serve notice of the hearing and a copy of the motion on all parties as prescribed in rule 5(c) of the Arizona rules of civil procedure, including any person who has filed a petition to adopt or who has physical custody pursuant to a court order in a foster-adoptive placement. In addition to the requirements of rule 5(c) of the Arizona rules of civil procedure, the notice shall be sent by certified or registered mail, return receipt requested, to any parent, Indian custodian and **tribe of an Indian child** as defined in the Indian child welfare act of 1978 (25 United States Code section 1903).

# Placement Preferences in Child Welfare Cases

- A.R.S. § 8-514. Placement in foster homes

C. Notwithstanding subsection B of this section, the order for placement preference of a Native American child is as follows:

1. With a member of the child's extended family.
2. In a licensed family foster home approved or specified by the child's tribe.
3. In an Indian foster home licensed or approved by an authorized non Indian licensing authority.
4. In an institution approved by the Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs pursuant to 25 United States Code chapter 21.

# Placement Preferences in Child Welfare Cases

- A.R.S. § 8-514.02. Placement of child

A. The department may place a child with a parent, a relative or a person who has a **significant relationship** with a child.

- *Is membership in the same Indian tribe a significant relationship?*

LOOKING TOWARD THE FUTURE

# Possibilities

- A state ICWA statute?
  - Currently, 11 states - CA, IA, MI, MN, NE, OK, OR, KS, WA, WI, NM
  - SB 1773 introduced in the 55<sup>th</sup> Legislature (2021)
  - A state statute “solves” any 10th Amendment issues
- Greater use of intergovernmental agreements
- Continued intergovernmental cooperation