GODFREY & KAHN S.C.

Indian Nations Law *Flash*

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

Fifth Circuit Squarely Rejects Challenge to ICWA

The Fifth Circuit issued its much anticipated decision Friday, August 9, in a case brought by a coalition of plaintiffs seeking to invalidate the Indian Child Welfare Act of 1978 (ICWA). The Court's decision is a resounding victory for Indian country.

In *Brackeen v. Bernhardt*, (5th Cir. 2019), plaintiffs, including would-be non-Indian adoptive parents of Native children and the states of Texas, Louisiana and Indiana, sued the federal government to challenge both the ICWA and the Final Rule adopted to implement it. The district court granted the plaintiffs summary judgment, holding that ICWA and the Final Rule violated equal protection, the Tenth Amendment-based prohibition against federal "commandeering" of state resources and the nondelegation doctrine, and that the challenged portions of the Final Rule were invalid under the Administrative Procedure Act (APA).

The Fifth Circuit reversed Friday, holding that (1) the special rules that ICWA applies to Indian children are not race-based distinctions subject to Fourteenth Amendment strict scrutiny but, rather, a political classification based on the unique relationship between the United States and tribes, (2) the special treatment of Indian children under ICWA "is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of "protecting the best interests of Indian children and promoting the stability and security of Indian tribes," (3) the requirements that ICWA places on state courts are consistent with the Supremacy Clause and do not implicate the anti-commandeering mandate of the Tenth Amendment, (4) the requirements that ICWA places on state agencies do not violate the anti-commandeering mandate because they "do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals, (5) ICWA, as an exercise of the Congress' plenary power over Indian affairs under the Commerce Clause, preempts inconsistent state laws, (6) provisions of ICWA permitting tribes to adopt placement preferences do not run afoul of the non-delegation doctrine since "[t]he Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine" and the preferences constitute a "deliberate continuing adoption by Congress of tribal law as binding federal law," (7) the Final Rule does not violate the APA because, in promulgating it, "BIA relied on its own expertise in Indian affairs, its experience in administering ICWA and other Indian child-welfare programs, state interpretations and best practices, public hearings, and tribal consultations. … and … BIA's current interpretation is not arbitrary, capricious, or an abuse of discretion because it was not sudden and unexplained" and (8) the Final Rule's recommendation that a deviation from prescribed placement preferences be supported by "clear and convincing evidence" is entitled to Chevron deference and did not contradict congressional intent.