

# BRACKEEN V. HAALAND: That One Big ICWA Case

First, we breathe together and remember:

**ICWA IS CONSTITUTIONAL!**<sup>1</sup>

The decision is upsetting but limited, and there were lots of good things in it too. So, let's see if you have to worry about how the decision may affect your case

**Is your case in tribal court?**

YES

NO

Well, take another deep breath. Nothing changed overnight.

**Are you reading this before June 1, 2021?**<sup>5</sup>

YES

NO

**Is your case in Texas, Louisiana, or Mississippi?**<sup>4</sup>

NO

YES

Check Turtle Talk or NARF to see if there is a "stay" in the case.<sup>5</sup>

**Is there a "stay" in the case?**

YES

NO

Some experts argue federal decisions don't apply in state court.<sup>6</sup>

**Does the judge in your case agree that federal decisions don't apply in state court?**

YES

NO

**Ok, is this a private action like a guardianship, adoption, or third-party termination?**<sup>7</sup>

YES

NO

**GREAT!**

**The Brackeen decision doesn't apply in your case.<sup>2</sup>**

All of the usual ICWA provisions apply, so keep on keeping on. Continue current practice.

**WELL,** here is the bad news if the state is involved in your case:

the family in the case will likely not receive active efforts to reunify the family. The state also will not have to put on a qualified expert witness. Finally, the judge will not have to meet a "clear and convincing" burden if they are finding good cause not to follow the placement preferences.<sup>8</sup>

There is still a lot you can do both in your case and to defend ICWA- just flip this page over.



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# BRACKEEN V. HAALAND

***There is still a lot you can do both in your case and to defend ICWA.***

**Is there anything I can do if the judge is applying *Brackeen v. Haaland* to my case?**

Yes. The Tribe can still intervene as a party to the case. You can still petition to transfer the case to tribal court. You can continue to work with the state case worker to ensure the family is treated fairly and offered as many services as possible. And the Tribe can put on their own witness to discuss any cultural or tribal aspects to the case.<sup>9</sup>

**Hold on, is it true this case headed to the U.S. Supreme Court?**

Maybe. There is no way to know, but it is pretty likely at least one of the parties will ask the Supreme Court to review the case. We probably won't know that for several months at least.<sup>10</sup>

**What?! Several months! Is there an easy way to keep track of the case?**

Yes. Send NARF an email at [icwa@narf.org](mailto:icwa@narf.org). Ask NARF to add you to their email list and be sure to include the name of the Tribe or Tribal organization you work for. If the *Brackeen v. Haaland* case does go to the Supreme Court and there is a tribal amicus brief, NARF will let you know. Remember you can always find case updates by checking Turtle Talk or NARF.<sup>11</sup>

1. *Brackeen v. Haaland*, No. 18-11479, slip op at 3 (5th Cir. April 6, 2021).
2. The Indian Child Welfare Act only applies in state courts. 25 U.S.C. § 1911.
3. *Brackeen v. Haaland* mandate issue date (when it goes into effect) is June 1, 2021.
4. The U.S. Court of Appeals for the Fifth Circuit covers the states of Texas, Louisiana, and Mississippi.
5. A “stay” in a case means that the opinion is not in effect as long as the stay lasts. There are often stays pending an appeal or Supreme Court review.
6. *Brackeen v. Haaland*, No. 18-11479 slip op at 1 (Costa J. concurrence in part and dissent in part) (citing *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993)).
7. The provisions of ICWA struck down in the case did so under the anti-commandeering doctrine, which only applies as to states, not private parties.
8. *Brackeen v. Haaland*, No. 18-11479 slip op at 4, 6.
9. *Id.* at 5.
10. According to Supreme Court rules, all parties in this case have 150 days to decide whether to file a petition for certiorari (which is asking the Court to review the case).
11. Visit <https://icwa.narf.org/> or <https://turtletalk.blog/tag/brackeen-v-haaland/>.



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