

# ***FEDERAL INDIAN LAW UPDATE & IMPACT ON TRIBAL-STATE COURTS***



# 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>3</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>

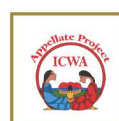
**Hold on, is it true this case headed to the U.S. Supreme Court?**

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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# UNITED STATES V. COOLEY

## WHAT YOU NEED TO KNOW:

INDIAN TRIBES POSSESS INHERENT AUTHORITY TO TEMPORARILY DETAIN AND SEARCH NON-INDIANS FOR FEDERAL OR STATE CRIMINAL OFFENSES UNDER THE SECOND MONTANA EXCEPTION.

**POLICE**  
**APSÁALOOKE**



# COMPETING THEORIES OF TRIBAL POWERS?



MONTANA  
"EXACT  
OPPOSITE"



"OVERRIDING  
INTERESTS OF  
THE FEDERAL  
GOVERNMENT"



MONTANA 2 OR  
INHERENT  
SOVEREIGNTY



AFFIRM AND LET CONGRESS  
SORT IT OUT



TRIBAL POLICE  
AS PRIVATE  
CITIZENS



THE ANSWER?  
MONTANA 2



# POLICE OFFICER CASE REPORT

**Case Number: BO16027059**

**NAME OF COMP./ REP. PARTY/VICTIM:**  
On View of Officer

**ADDRESS AND TELEPHONE NUMBER**  
Crow Police Department

**PERSON(S)/VEHICLE(S) INVOLVED:**

**Driver (arrested):** Cooley, Joshua James (DOB: 04/15/1984)

**Vehicle: WHITE IN COLOR 2007 DODGE RAM 1500 PICKUP BEARING WY REGISTRATION: 3-23876 (VIN: 3D7KS19D67G746110)**

**Passenger:**

**Juvenile Male Child Approximately 2 years of age**

**Narrative:**

TRIBAL POLICE OPERATING  
UNDER A 638 CONTRACT  
(UNDER FEDERAL  
CONTROL). . .

TRIBAL POLICE OPERATING UNDER A 638 CONTRACT (UNDER FEDERAL CONTROL). . .

**REGISTRATION: 3-23876**

(VTN: 3D7K) TRIBAL POLICE HOLD

In the performance of THE STATE AND not uncommon for me to come along motorists along Highways  
that are in need of FEDERAL COPS. . . various occasions I have rendered assistance to individuals  
out of gas, experiencing mechanical difficulties, or were lost. It is also often the case that due to  
phone service area FEDERAL AND worker, motorists have no way to contact anyone for help.

As part of a function [REDACTED] ARRIVE. . . [REDACTED] Highway Safety Officer for the Crow Indian Reservation only one of my responsibilities as a function of my position, but I am duty bound as a law enforcement officer to ensure the [REDACTED] the roadways of the Crow Indian Reservation stop and conduct a [REDACTED] of the Dodge. [REDACTED] THEY HAVE THE [REDACTED] TRIBAL COP SEARCH [REDACTED]

I had been traveling e RETRIVE THE  
Dodge. I activated the CONTRABAND. . .  
traffic of the road hazard created by having two vehicles parked along the shoulder of the road  
intentionally did not activated TO AVOID LATER  
the Dodge to feel as though I COMPLICATIONS  
botted the Dodge. I turned around and appro  
ear of my police unit so as to warn oncoming  
equipment as I did not want the occ  
lling them over".

FROM THE INTERROGATION AND SEARCH. BUT WHY?

THE NINTH CIRCUIT

I knocked on the truck and asked  
down slightly and I could make a  
truck. I announced "law enforcement  
EVIDENCE AS  
OBTAINED IN VIOLATION  
OF THE CONSTITUTION.

I shined my flashlight into the front driver compartment where I could see the figure of a man seated. The man was subsequently identified as: Cooley, Joshua James (DOB: 04/15/1984). It appeared as if Joshua had raised his right hand as he was looking out the window toward me and motioned his hand.



## COOLEY'S IMPACTS ON TRIBAL POWERS?

HOLDING: NONMEMBER CRIMINAL ACTIVITIES  
FIT MONTANA 2 "LIKE A GLOVE"

\*TRIBAL TICKETS FOR  
CIVIL OFFENSES  
SHOULD BE  
PRESUMPTIVELY VALID  
GOING FORWARD

\*TRIBAL CIVIL FORFEITURE OF  
NONMEMBER PROPERTY USED TO  
VIOLATE TRIBAL LAW SHOULD BE  
VALID GOING FORWARD

\*TRIBAL COURT CONTEMPT POWERS  
AGAINST NONMEMBERS SHOULD BE  
VALID GOING FORWARD

# Native American 1200.005

HOLDING: SCOTUS  
CONCERNED WITH  
THE APPLICATION OF  
TRIBAL LAWS TO  
NONMEMBERS

\*POSSIBLE  
RECONSIDERATION OF  
THE JUDICIAL POLICY  
BEHIND THE  
MONTANA TEST

\*TRIBAL ENFORCEMENT OF  
STATE AND FEDERAL  
LAWS AGAINST  
NONMEMBERS  
PRESUMPTIVELY VALID  
GOING FORWARD

ARE OLIPHANT'S  
DAYS NUMBERED?



IF  
FLETCHER



CAN'T  
FIX IT

WE'RE ALL SCREWED ○

\*NOT TRUE