



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #DEN-18-050

**TITLE: Protecting ICWA After *Brackeen v. Zinke***

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**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, Congress passed the Indian Child Welfare Act (ICWA) in 1978 to stop the systematic removal of Indian children by public and private agencies, taking 25–35% of all Indian children from their homes, families, and communities often unnecessarily, without notice to their tribes, or due process; and

**WHEREAS**, ICWA is the gold standard for child welfare policy and practice, as recognized by 18 leading national and regional child and family advocacy organizations, and should be afforded to all children; and

**WHEREAS**, for 40 years, ICWA has successfully protected the best interests of Indian children by promoting stability and security among Indian children and families, and ensuring tribal governments with their state partners have a protective role in keeping Indian families together and helping Indian children retain their cultural identity and heritage; and

**WHEREAS**, across the United States, Indian children continue to be removed from their homes by state authorities at much higher rates than non-Indian children; and

**WHEREAS**, in 2016, the Department of the Interior promulgated ICWA's implementing regulations in its Final Rule for Indian Child Welfare Act Proceedings (81 Fed. Reg. 38778-01 (June 14, 2016)) to provide clarity in implementing the law and uniformity in its application; and

**WHEREAS**, ICWA and its Final Rule have come under attack in recent years by the non-Indian adoption industry and by hired legal guns from anti-ICWA groups like the Goldwater Institute; and

**WHEREAS**, anti-ICWA groups and individuals have launched frivolous litigation in federal and state forums, attacking the constitutionality of ICWA and spreading misinformation about the impact of ICWA by perpetuating negative stereotypes of Indian children, families, and tribal communities; and

**WHEREAS**, in October 2017, the State of Texas and a non-Indian foster family, later joined by Louisiana, Indiana and non-Indian foster families from Minnesota and Nevada, filed a lawsuit against the United States, Department of the Interior, Bureau of Indian Affairs, and the Department of Health and Human Services in the Northern District of Northern Texas to declare much of ICWA and the Final Rule unconstitutional in *Brackeen v. Zinke*, No. 4:17-cv-868-O (N.D. Tex.); and

**WHEREAS**, at the summary judgment stage, the District Court issued a decision based upon cursory legal analysis on October 4, 2018, holding that ICWA relies on impermissible racial classifications; and

**WHEREAS**, the District Court declared various provisions of ICWA and its Final Rule as unconstitutional; and

**WHEREAS**, Indian Country is particularly troubled by the District Court's application of a strict scrutiny review in its equal protection analysis, leading to its determination that provisions related to placement preferences and tribal membership are unconstitutional; and

**WHEREAS**, the District Court determined that ICWA included a racial classification, in large part because the definition of an Indian child includes both children who are members of Indian tribes and those who are "simply eligible" for membership who have a biological parent who is a member; and

**WHEREAS**, the Court's decision is a threat to the future of ICWA and to other federal laws applicable to Indians based on the unique political status of Indian tribes and their government to government relationships with the federal government, especially those federal laws that are applicable to individuals who are eligible but not yet enrolled members of federally recognized tribes; and

**WHEREAS**, *Brackeen v. Zinke* is expected to be appealed to the Fifth Circuit Court of Appeals and if the District Court's decision is affirmed, the case would be a prime candidate for review by the United States Supreme Court; and

**WHEREAS**, action is needed to preserve ICWA and the political classification of Indian tribes as sovereign nations under the law.

**NOW THEREFORE BE IT RESOLVED**, that the National Congress of American Indians (NCAI) supports the litigation efforts in *Brackeen v. Zinke* to ensure that ICWA and the unique political status of Indian tribes and their government to government relationships with the federal government are protected; and

**BE IT FURTHER RESOLVED**, that NCAI will work with tribal leaders and organizations to develop a strategy and action plan that includes litigation, administrative, and legislative efforts to protect ICWA in light of *Brackeen v. Zinke* and in anticipation of future attacks on ICWA; and

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

### CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2018 Annual Session of the National Congress of American Indians, held at the Hyatt Regency in Denver, Colorado October 21-26, 2018, with a quorum present.

  
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Jefferson Keel, President

ATTEST:

  
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Juana Majel Dixon, Recording Secretary