

Brief Summary of Holdings from April 6, 2021 Fifth Circuit Opinion, *Brackeen v. Haaland*

ISSUE	HOLDING
Standing	<ul style="list-style-type: none"> • Held unanimously or by majority that Plaintiffs have standing on almost all issues. • Equally divided on standing to challenge two provisions of ICWA (§§ 1913 and 1914) on equal protection grounds and therefore the lower court’s finding of standing is affirmed without precedential opinion.
Authority Under Article I of the Constitution to Enact ICWA	<ul style="list-style-type: none"> • Majority held Congress had authority to enact ICWA.
Equal Protection Challenge	<ul style="list-style-type: none"> • Majority held ICWA’s “Indian Child” classification is a political classification rationally related to the fulfillment of Congress’ unique obligation and not unlawfully race-based in violation of equal protection. • Equally divided on whether two provisions of ICWA violate equal protection and therefore the lower court’s finding that they unconstitutionally violate equal protection are affirmed without precedential opinion: <ul style="list-style-type: none"> - Adoptive placement preferences for “other Indian families” (25 U.S.C. § 1915(a)(3)) - Foster care placement preference for “licensed Indian home” (25 U.S.C. § 1915(b)(iii))
Anti-Commandeering Challenge	<p>UNCONSTITUTIONAL PROVISIONS</p> <ul style="list-style-type: none"> • Majority held that the following provisions are unconstitutional under the anti-commandeering doctrine and the lower court’s decision is affirmed: <ul style="list-style-type: none"> - Requiring states to perform “active efforts” (25 U.S.C. § 1912(d)) - Requiring states to use qualified expert witnesses when seeking foster care placement or termination of parental rights (25 U.S.C. § 1912(e), (f)) - Requiring state agencies and officials to keep and make available certain records of placement ((25 U.S.C. § 1915(e)) • Equally divided on several provisions and therefore the lower court’s finding that these provisions are unconstitutional under the anti-commandeering doctrine are affirmed without precedential opinion: <ul style="list-style-type: none"> - Requiring state agencies and officials to follow the placement preferences (25 U.S.C. § 1915(a) and (b)) - Requiring state agencies and officials to follow the notice provisions (25 U.S.C. § 1912(a)) - Requiring state courts to keep and make available records as to placement (25 U.S.C. § 1951(a)) <p>CONSTITUTIONAL PROVISIONS</p> <ul style="list-style-type: none"> • Majority held several provisions that grant private rights in state child custody proceedings validly preempt state law and do not commandeer states: <ul style="list-style-type: none"> - Right to intervene (25 U.S.C. § 1911(c)) - Right to appointed counsel (25 U.S.C. § 1912(b)) - Right to examine documents (25 U.S.C. § 1912(c)) - Right to an explanation of consent (25 U.S.C. § 1913(a)) - Right to withdraw consent (25 U.S.C. § 1913(b) – (d))

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	<ul style="list-style-type: none">- Right to seek invalidation (25 U.S.C. § 1914)- Right to seek return of custody (25 U.S.C. § 1916(a))- Right to obtain tribal information (25 U.S.C. § 1917)• Majority held several provisions validly preempt contrary state law as they apply to state courts:<ul style="list-style-type: none">- Placement preferences (25 U.S.C. § 1915(a) and (b))- Heightened placement and termination standards (25 U.S.C. § 1912(e) and (f))
Non-Delegation Doctrine	<ul style="list-style-type: none">• Majority held that the provision allowing Tribes to establish an order of adoptive and foster preferences that is different than the order set out in § 1915(a) and (b) does not violate the non-delegation doctrine and therefore the lower court’s ruling is reversed (25 U.S.C. § 1915(c)).
Administrative Procedure Act (APA) Challenge to the Final Rule	<ul style="list-style-type: none">• Majority held that that the Bureau of Indian Affairs did not violate the APA by issuing regulations for ICWA in the form of the Final Rule.• Majority held that the Final Rule violated the APA to the extent it implemented unconstitutional provisions consistent with the court’s majority finding that § 1912(d) and (e) and § 1915(e) commandeered states. Note that 25 CFR § 23.144 creates a severability clause.• Majority held the Final Rule interpreting that § 1915’s “good cause” standard to deviate from the placement preferences requiring a clear and convincing evidence standard violates the APA. 25 C.F.R. § 23.132 (b).