Anishinabe Legal Services Newsletter

Serving the Leech Lake, Red Lake, & White Earth Reservations

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The Race for ICWA: How Brackeen v. Zinke is Impacting the Future of the Indian Child Welfare Act

By: Taylor L. R. Burdick
Staff Attorney

In early October 2018, the United States District Court for the Northern District of Texas ruled that certain provisions of the Indian Child Welfare Act were unconstitutional. The Indian Child Welfare Act (ICWA) is a federal statute directing states and tribes on how to proceed when dealing with a child protection case involving an Indian child. As of right now, the decision only applies to the Louisiana, Indiana, and the Northern District of Texas. However, this decision is setting the stage for the next battle in Federal Indian Law nationwide.

Despite compelling government interests in the preservation of a tribe's inherent sovereign rights over its citizens and of protecting its families and children, the Court in *Brackeen v. Zinke* determined that the law is a violation of the Equal

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From the Director:

By: Cody Nelson
Executive Director

Boozhoo friends! For this newsletter, our program attorneys have selected topics of interest involving federal Indian law. This newsletter is made possible because of a generous donation from the Minnesota Chapter of the Federal Bar Association. Thank you!!

New Staff

ALS is pleased to welcome three new staff members this fall. Attorney Ellen Weinberg joined our program as a

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From the Director

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full time staff attorney in October 2018. She brings more than 25 years of experience as an attorney to the program (and over 10 as a legal aid attorney), and is housed out of our White Earth Reservation satellite office. Attorney Weinberg is primarily representing clients before the White Earth Tribal Court in CHIPS, Civil Commitment, Guardianship, and Housing Eviction actions.

Paralegal Rita Holler re-joined ALS in November 2018. She primarily specializes in Social Security Disability Advocacy and is housed out of our Leech Lake Reservation office in Cass Lake. Paralegal Holler received her Associates Degree in Applied Science/Paralegal Studies from Bryant and Stratton College; ALS is thrilled to have her back on the team!

ALS is also happy to welcome our fall intern Heather Strong. Heather is in her 2nd year at the Leech Lake Tribal College, majoring in STEM. We are very grateful to the Leech Lake Tribal College for providing ALS with this additional staffing help.

Grants and Special Projects

ALS would like to thank the Initiative Foundation and the Blandin Foundation for generously supporting a strategic planning and organizational development project currently underway. With this grant funding, ALS has contracted with an area expert consultant to examine our mission, vision, strategies, and to strengthen program operations.

ALS would also like to thank the James B. Linsmayer Foundation for a generous grant award allowing us to expand travelling legal help-desk clinics into rural underserved population centers.

Further, ALS would like to thank the Minnesota State Bar Association for their generosity in supporting ALS through grant funding.

We have a number of additional special projects underway, including a grant to provide free legal services to victims of crime with their corresponding civil legal needs. If you are in need of legal advice or court representation, we may be able to help. Please give us a call at (218) 335-2223 or toll free at 1-800-422-1335. You can also apply online at https://www.justice4mn.org/a2j/

There are also resources available online at www.alslegal.org

Miigwech!

Mary Shequen-Smith retires after 40 years of legal services!

Miigwech Mary!



Fond Farewell

ALS also wishes the fondest of farewells to lead paralegal Mary Shequen-Smith, who has recently retired from ALS. Mary started at ALS in 1979 and has been with the program ever since. She will be greatly missed by program staff, partners/stakeholders, and clients alike.

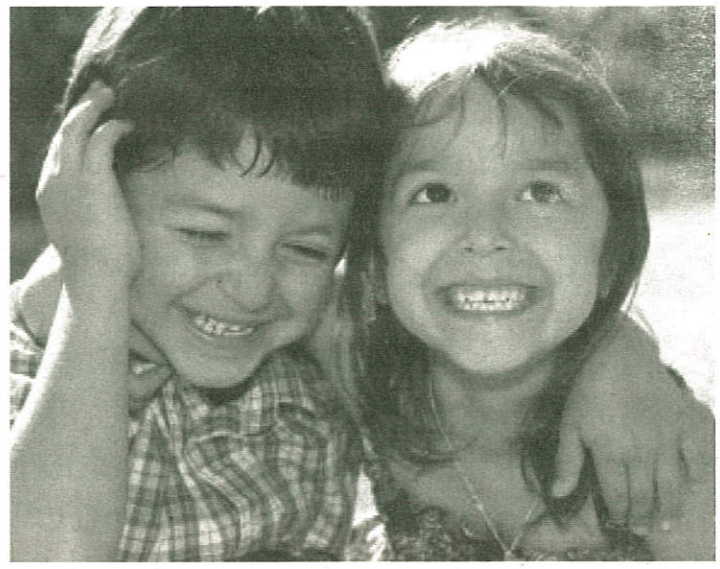
The Race for ICWA

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Protection and Due Process clauses of the 5th Amendment because it uses race or ancestry to classify Indian children. Attacks like this on ICWA have been happening for decades, without success. Saying that the law is unconstitutional because it uses race to classify Indian children is the favored argument of the Goldwater Institute, a conservative think tank that often backs attacks against ICWA.

The "race-based" argument against ICWA not only misunderstands the precedent in Federal Indian Law, but also misses the point of the statute all together. ICWA was codified in 1978 in response to the massive number of Indigenous children being removed from their homes and cultures and placed with non-Native families and group homes. The policies behind ICWA were that tribes had a vested interest in preserving their families and that the tribes themselves were best suited to decide how to deal with child protection cases involving their citizens. The law was also viewed as a way for tribes to assert their inherent sovereignty for their citizens.

The Plaintiffs in *Brackeen* used *Rice v. Cayetano* as the basis of their argument. In that case, the Supreme Court needed to determine whether voting restrictions for the Office of Hawaiian Affairs (OHA) were unconstitutional because they only allowed those persons who were Native Hawaiian to vote for the office. The Supreme Court there determined that the law was a violation of Equal Protection because it used ancestry as a proxy for race to determine voter qualification. *Cayetano* was also distinguishable because Native Hawaiians were never classified as "domestic dependent nations" the way that Native Americans were; thus, their political status is on different grounds than that of the defendants in *Brackeen*.



The Defendants in *Brackeen* used *Morton v. Mancari* as the foundation of their argument. In that case, the Supreme Court was faced with whether to find hiring preferences in the Bureau of Indian Affairs (BIA) towards Native Americans a violation of Equal Protection. In that case, the Court determined that the tribes had a vested interest in being governed by people from their own communities. The Court made the distinction that citizenship in a Native American tribe was a political classification, not a racial one. Those same politically-based hiring preferences continue to this day.

The distinction between a racial (or ancestral) classification and a political one is significant. If the law uses race to classify, then it will be subject to Strict Scrutiny – the highest level of scrutiny possible, and rarely a successful hurdle. Whereas if the law uses political classes then it is only subject to Rational Basis examination – the lowest bar to meet, and almost always successful. In *Brackeen*, the Court was persuaded that ICWA classifies based on race or ancestry because it includes children who are not actually citizens of a tribal nation, but who are

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The Race for ICWA

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only eligible for citizenship. Also because it allows as a placement priority "any eligible Indian family," not just one from the child's own tribe. This distinction misses the point in that tribal citizenship, or eligibility thereto, is political, not racial. Tribal nations are free to determine their own citizenship criteria and are not bound by the racial restrictions assumed by the *Brackeen* court.

The implications involved in this case are far-reaching. As Professor Matthew Fletcher of Michigan State University College of Law put it in an interview for Indian Country Today, "this is the fight of the 21st century." If the Defendants win, it will be a re-affirmance of the sovereign rights of Indigenous nations to govern their own citizens. If the Defendants do not win, ICWA will face major reconstruction and tribal sovereignty will be reduced in a way we have not seen in forty years.

On November 19, 2018 the Defendant Nations of Cherokee, Oneida, Quinault, and Morongo filed a Notice of Appeal to the Fifth Circuit Court of Appeals. The Defendants will have forty days from that date to submit their Appellate Brief. The case will likely be decided by the Supreme Court.

Collins v. Virginia: US Supreme Court Clarifies the Automobile Exception

By: Jerome Song
Staff Attorney

This case stems from incidents that occurred during the summer of 2013 in Albemarle county Virginia when two separate police officers observed the rider of a black and orange motorcycle having an extended frame commit traffic infractions.[1] Through a license plate search, the police officers discovered that the vehicle's tags had not been active for several years, and the suspected the driver of the motorcycle was a man named Ryan Collins.[2] The police officers accessed Mr. Collins social network site and observed pictures of the same black and orange motorcycle with an extended frame outside of his girlfriend's house.[3] They obtained the girlfriends address and an officer drove to the house to conduct surveillance.[4]

The officer noticed what appeared to be a motorcycle covered by a white tarp sitting in the driveway and that part of the motorcycle's wheel and accents of chrome were visible.[5] The officer then walked onto the property, removed the white tarp, and recorded the VIN.[6] He took a photograph of the motorcycle, and ran the VIN number through the police computer database which confirmed that the motorcycle had been stolen.[7] Without first obtaining a warrant, the officer performed all of these actions.[8] Mr. Collins arrived at the house where he agreed to talk to and was questioned by the of-

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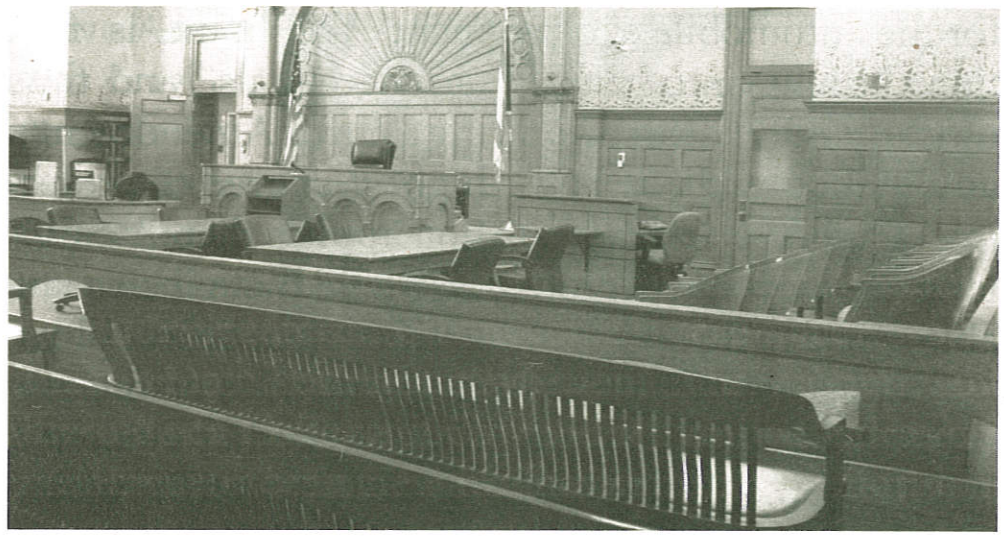
Collins v. Virginia

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ficer about the motorcycle.[9] Mr. Collins eventually admitted that he knew the motorcycle did not have a title and was subsequently arrested for receipt of stolen property.[10] During a pre-trial motion, Mr. Collins moved to suppress evidence arguing that the officer's search of the motorcycle was unconstitutional because he did not have a warrant or consent to enter the property, and that he had trespassed on the curtilage of private property and conducted the search without the legitimacy of probable cause or exigent circumstances.[1]

The trial court denied his motion and Mr. Collins was convicted of receipt of stolen property.[2] The Virginia Court of Appeals affirmed holding that the officer had probable cause and that "numerous exigencies" justified his search. [3] The Supreme Court of Virginia also upheld the conviction holding that the Fourth Amendment automobile exception applied and that the officer had probable cause to believe that contraband existed thus the warrantless search was justified.4 The Supreme Court of the United States (SCOTUS) granted certiorari in 2017 and reversed the decision of the Virginia Supreme Court.

SCOTUS in an 8-1 ruling reversed the decision of the Virginia Supreme Court.[5] The Court held that the Fourth Amendment's automobile exception does not permit a police officer without a warrant to enter private property in order to search a vehicle parked a few feet from the house in an area known as the curtilage of a house.[6] The court did not rule on the Virginia Court of Appeals basis on the search being reasonable due to exigent or emergency circumstances.[7] To understand Collins versus Virginia one must first understand



two components of the Fourth Amendment, as this case arises at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home.[8]

At its most basic level, the Fourth Amendment of the Constitution protects against unreasonable searches and seizures, and requires warrants to search and arrest have probable cause in order to be issued. One exception is what is termed the automobile exception which justifies the warrantless searches of automobiles in limited circumstances. The basic tenet behind the automobile exception is the mobility of a vehicle and its ability to be quickly moved out of the locality or jurisdiction in which a warrant must be sought.[1] Vehicles have come to include items such as a ship, motor boat, wagon or automobile.[2] The exception was further justified due to what the Court would term the pervasive regulation of vehicles capable of traveling on the public highways, and vehicles are subject to governmental regulation including periodic inspection and licensing requirements.[3] When these justification

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for the automobile exception "come into play," officers may search an automobile without having obtained a warrant so long as they have probable cause to do so.[4]

Curtilage can be described as an area adjacent to the home and to which the activity of home life extends such as front porch, side garden, or area outside the front window.[5] In essence this Court has stated curtilage to be "part of the home itself for Fourth Amendment purposes."[6] With this inclusion of curtilage to the home, SCOTUS has held "when it comes to the Fourth Amendment, the home is first among equals" and thus the Fourth Amendment's highest degree of protection applies there.[7] SCOTUS held that when a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred, and thus the search is presumptively unreasonable absent a warrant.[8]

Collins versus Virginia offered clarity into whether a vehicle parked within the curtilage is subject search without a warrant via the automobile exception. SCOTUS held quite clearly in this case that it is not, and that a search within the curtilage requires a warrant absent an exception. The dissent authored by Justice Alito argues that the automobile exception should apply in this case and that the search was in no way violated the Fourth Amendments requirement that a search or seizure be reasonable.[9] Collins versus Virginia SCOTUS held that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein.[10]

1 Id. at 1
2 Id. at 1
3 Id. at 2
4 Id. at 2
5 Id. at 2
6 Id. at 2
7 Id. at 2
8 Id. at 2
9 Id. at 2
10 Id. at 2
11 Id. at 3
12 Id. at 3
13 Id. at 3
14 Id. at 3
15 Id. at 3
16 Id. at 14
17 Id. at 14
18 Id. at 3
19 Id. at 4
20 Id. at 4
21 Id. at 4
22 Id at 5 See *California v. Carney*, 471 U.S. 386, 392-93 (1985)
22 Id at 5 See *California v. Carney*, 471 U.S. 386, 392-93 (1985)
23 *Collins*, 584 U.S. ___ at 6 (2018)
24 *Florida v. joardines*, 569 U.S. 1, 6 (2013).
25 Id.
26 Collins, 584 U.S. ___ at 6 (2018).
27 Id. at 24
28 Id. at 14

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The Need for Implied Warranties/Covenants of Habitability in Indian Country

By: Steven Campbell
Staff Attorney

It is well known that tribal members across Indian Country are often forced to live in substandard housing. Most tribes have a Tribal Housing Designated Entity (THDE) that administers tribal housing programs on their respective reservations. THDEs receive yearly block grant funding from the federal government through the Native American Housing Assistance and Self-Determination Act of 1996(25 U.S.C. 4101et seq.) aka NAHASDA. NAHASDA contains statutory language that requires all THDEs to make yearly inspections of each housing unit under their control:

NAHASDA Section 403 (b) Periodic Monitoring-Not less frequently than annually, each recipient shall review the activities conducted and housing assisted under this Act to assess compliance with the requirements of this Act. Such review shall include onsite inspection of housing to determine compliance with applicable requirements. {emphasis added} The results of each review shall be included in the annual performance report of the recipient submitted to the Secretary under section 404 and made available to the public.

THDEs are also required by NAHASDA to maintain housing units in good repair: See 25 U.S.C. 4133 Title II Section 203(e) MANAGEMENT AND MAINTENANCE- Each recipient shall develop policies governing the management and maintenance of housing assisted with grant amounts under this Act.

So, THDEs must make yearly inspections of each housing unit and report those inspections to HUD, Office of Native American Programs in the HUD mandated Yearly Performance Report. The above requirements are designed to ensure that the best possible housing is provided to Native American families and that said housing is maintained in a habitable condition. If THDEs fail to meet the above requirements or fail to make timely repairs on a consistent basis HUD can withhold funding under NAHASDA. NAHASDA was enacted with a goal of respecting tribal self-governance at the same time requiring professional, quality tenant services to Indian families.



Sadly, many THDEs fall short of the above goals. Many Native families reside in substandard conditions. See National Congress of American Indians Housing and Infrastructure report at www.ncai.org/policy-issues:

American Indians and Alaska Natives face some of the worst housing and living conditions in the United States. Barriers to housing development in

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The Need for Implied Warranties/Covenants

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Native communities include limited private investment opportunities, low-functioning housing markets, and poverty.

Forty percent of on-reservation housing is considered substandard (compared to 6 percent outside of Indian Country) and nearly one-third of homes on reservations are overcrowded. Less than half of the homes on reservations are connected to public sewer systems, and 16 percent lack indoor plumbing.

Most Tribal Codes do not have a written statute that mandates the application of Implied Warranties of Habitability. The legal doctrine of Implied Warranties of Habitability has been recognized since 1900. Black's Law Dictionary Ninth Edition defines the Implied Warranty of Habitability as follows:

(1900) In a residential lease, a warranty from the landlord to the tenant, that the leased property is fit to live in and that it remain so during the term of the lease-also termed covenant of habitability.

Every state except Arkansas recognizes the doctrine of warranties of habitability either by statute or common law. One of the main remedies under the warranty of habitability is the right of tenants to withhold payment of rent if the landlord refuses to make timely repairs to maintain the residence. Courts have also allowed an off-set in rent if the landlord fails to meet the warranties of habitability. Tenants may have to pay the contested rent into the Court or an escrow account.

Minnesota has a very good law that protects tenant rights to live in a habitable rental unit. **Minn. Stat. § 504B.161 (2018)** provides that every residential lease in the state has an implied covenant of habitability - meaning basically that when a landlord rents residential premises under either a written or an oral lease, no matter what the lease says, the law reads into the lease that the landlord has the legal duty to keep the rented home or apartment in habitable condition.

Tribes should pass legislation similar to M.S.A. 504B.161. There is no better use of sovereignty than to protect Native American families from substandard housing. Tribes should provide the same legal protections all other citizens enjoy when it comes to housing rights. Urge your Tribal Council to adopt the doctrine of Implied Warranties of Habitability. Legal advocates invoke the doctrine in tribal courts as a defense to eviction actions. Native families should not be treated as second class citizens required to live in substandard housing conditions we deserve better-demand THDEs be accountable.

On average, 2/3 of eligible individuals are turned away from legal services statewide due to resource limitations:

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