Court Cases: Adoption, gaming suits aim at tribal sovereignty

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The Maverick Gaming lawsuit, however, goes further. The plaintiff is arguing that gaming compacts between Washington state and tribes are based on race, and therefore discriminate unconstitutionally against people who run non-tribal casinos. The argument takes aim at the inherent right of tribal nations to govern themselves, and at centuries of U.S. law that recognizes tribal governments' political parity alongside their state and federal counterparts.

Advocates and legal experts say the Maverick case and others like it threaten a return to the Termination Era policies of the 1950s, when the U.S. government sought to end the political status of Indigenous tribes forever.

ICWA at Supreme Court

A prominent case involving the Indian Child Welfare Act—with potential far-reaching repercussions—is pending before the U.S. Supreme Court.

The case, *Brackeen v. Haaland*, argued before the U.S. Supreme Court in November, focuses on the right of Native American families to have preference over non-Native families in the adoption placements of Native kids.

As in the Maverick case above, the plaintiffs in *Brackeen v. Haaland* claim the preference is based on race, rather than the political sovereignty of tribal nations.

A ruling in their favor could fundamentally rewrite the way the U.S. government regards tribal nations, casting policies created by treaty or agreements between sovereign nations in doubt.

"It could have really big impacts on basically every law Congress has passed that has to do with tribes and tribal citizens," said Rebecca Nagle, a journalist, citizen of the Cherokee Nation and host of the 'This Land' podcast, which has explored the Brackeen case in detail.

"It's really the legal foundation for the rights of Indigenous nations in this country."

Same underlying arguments

The two cases share a set of underlying arguments based on the idea that federal laws that outline the U.S. government's obligations to Indigenous nations—including the Indian Child Welfare Act and the Indian Gaming Regulatory Act—violate the equal protection clause of the Fourteenth Amendment.

Those bringing the cases argue that such laws are racially discriminatory against non-Indigenous people.

The political status of tribal nations is laid out in the Constitution and affirmed by hundreds of years of legal precedent. The U.S. government had to negotiate and, in nearly 400 cases, sign treaties with Native American tribes because of their political, cultural and military strength. Just as the federal government honors the treaties it has signed with France or Germany, it's bound by those it has agreed to with sovereign Indigenous nations.

"You don't make treaties with a race or an ethnic group," said Daniel Lewerenz, an assistant law professor at the University of North Dakota and attorney with the Native American Rights Fund. "You make treaties with a political entity, with a sovereign."

That relationship—one between political entities—has been the way U.S. and European leaders have negotiated with tribal nations since before the country's founding, according to Lewerenz, a member of the Iowa tribe of Kansas and Nebraska.

Old arguments gain ground

The arguments in both the Maverick and Brackeen lawsuits echo claims made for decades by groups seeking to end tribal sovereignty.

One such group is the Citizens Equal Rights Alliance (CERA), which attacks tribal sovereignty on the basis that the federal laws enshrining it discriminate against everyone who isn't a member of one of the 574 federally recognized Native American tribes in the United States.

Those bringing the cases argue that such laws are racially discriminatory—against non-Native people.

"How does the federal government promote tribal sovereignty and not discriminate against the rest of us?" asked Lana Marcussen, CERA's attorney for 25 years.

A 2018 report by the Montana Human Rights Network listed CERA as an anti-Indigenous hate group. CERA rejects the label.

Travis McAdam, the researcher who authored that report and has been monitoring anti-Indigenous groups for decades, said CERA is the major national advocacy group for a dispersed anti-Indigenous movement mostly made up of small, local groups who focus on specific tribal sovereignty issues like water rights, casinos or hunting and fishing rights.

"Anywhere there is a local organization or community members that are opposing tribes on tribal sovereignty or basically anything, eventually CERA is going to show up," McAdam said.

"At its core, the anti-Indigenous movement is about destroying tribal sovereignty, getting rid of tribes and erasing tribal culture."

In effect, CERA has for decades nurtured ideas long rejected by Congress, the courts and a succession of U.S. presidents. But within the current climate of rising extremism and white nationalism, McAdam worries a major ruling would bring them back into the mainstream.

"Anti-Indigenous groups have used those taking points for decades, but the idea that tribal sovereignty and treaty rights somehow penalize nonmembers—that argument fits into mainstream circles now much better than it did a decade ago," McAdam said.

In the Termination Era beginning in the 1950s, the federal government enacted policies based on a viewpoint similar to the one espoused by CERA and Marcussen: that Indigenous people should assimilate into American society and give up their Indigenous identities, and that the rights negotiated in treaties and codified in federal laws were preventing them from doing so.

Congress quickly passed 46 laws terminating 109 tribes around the United States, including 62 in Oregon—more than any other state.

The result was disastrous for Native Americans.

Termination unilaterally dissolved tribal membership and ended the U.S. government's obligations toward terminated tribes, including the services guaranteed in treaties in exchange for land. Termination policies also allowed the government to seize millions of acres of tribal lands rich with minerals and timber.

"The justification for termination was that the federal trust responsibility between the federal government and tribes was holding Native Americans back," Nagle said.

"It's just kind of a rinse and repeat argument, that equality for Native people is treating Native people the same as everybody else. That's a very coded way to talk about erasing the special trust relationship that the U.S. federal government has with tribes."

Members of suddenly landless tribes scattered, with many moving from their former reservations to cities under federal relocation policies aimed at forcing assimilation. Termination caused dire social disarray and further impoverishment. For the leaders of terminated tribes, it also squashed the ability to prevent such harm.

All three branches of the U.S. government firmly repudiated termination policy in the 1960s and '70s, pushing proponents to the political sidelines. Two presidents from opposing parties refused to enforce termination, the courts reaffirmed treaty rights, and in 1975 Congress replaced it with the current federal tribal policy known as self-determination.

Indigenous leaders and activists pushed for more protections of their rights, and Congress soon passed more laws, including the Indian Child Welfare Act, the Indian Healthcare Improvement Act, and the American Indian Religious Freedom Act.

And after decades of work, many terminated tribes eventually won back federal recognition of their sovereignty—but not their land, in most cases.

So modern-day efforts to undermine tribal sovereignty ring familiar to people like Lewerenz, the Native American Rights Fund attorney.

"The people who have tried to get whatever it is that Indians have — whether that's land or fish or children — have always done so by trying to claim the mantle of equality," Lewerenz said.

Key cases share attorney

Maverick Gaming and Chad and Jennifer Brackeen are also backed by the same legal team.

The Brackeens are challenging ICWA, a 1978 law that requires caseworkers to give preference to Indigenous families in foster and adoption placements of children who are members of a federally recognized tribe.

The law was aimed at correcting centuries of injustice.

Between 1819 and 1969, the federal government took many thousands of Indigenous kids from their homes and forced them to attend brutal schools that employed "systematic militarized and identity-alteration methodologies," according to a report released by the U.S. Department of the Interior in May.

After the federal government ended mandatory attendance at American Indian boarding schools, officials continued to remove overwhelming numbers of Indigenous kids from their families and place them in foster or adoptive care outside their communities.

When Congress passed ICWA in 1978, studies showed that state child welfare agencies and private adoption companies were taking between 25% and 35% of Native kids from their families. And 85% of those children were placed with non-Indigenous families.

Native families are still four times as likely as white families to have kids removed from their homes, according to the National Indian Child Welfare Association.

But some private adoption companies and evangelical groups argue that the law gives preference to Indigenous people as a racial group and therefore violates the equal protection clause of the Fourteenth Amendment to the Constitution.

The Brackeens, a white couple, sought to adopt a 4-year-old girl in foster care, the baby sister of a boy they had already adopted. Devout evangelical Christians, the Brackeens told The New York *Times* they saw adoption of foster kids as a way to "rectify their blessings."

The Navajo Nation wanted to place the girl, who is Cherokee and Navajo, with a Navajo family, as laid out by the Indian Child Welfare Act. But when that placement fell through, both Indigenous nations supported the Brackeens' adoption.

Despite their happy ending, the Brackeens are the lead plaintiffs in a federal lawsuit claiming the act is based on a racial preference that unfairly prioritizes Indigenous families as adoptive parents.

For a child welfare dispute that started out in a small Texas family court, the Brackeen case draws unusual firepower.

Texas Attorney General Ken Paxton intervened in the case on the couple's behalf.

And Matthew McGill, an attorney with the high-powered firm Gibson, Dunn & Crutcher who argued the Citizens United case before the Supreme Court in 2010, took the Brackeens' case pro bono. He argued on their behalf before the U.S. Supreme Court in November.

His law firm is also known for representing Chevron in the longstanding lawsuit filed by Indigenous communities in Ecuador, as well as Energy Transfer Partners, architect of the Dakota Access Pipeline. The latter proposal has drawn fierce opposition from the Standing Rock Sioux Tribe, along with the Yankton Sioux, the Oglala Sioux and the Cheyenne River Sioux Tribes, who say the pipeline's route under nearby Lake Oahe threatens their main source of drinking water and could pollute the waters they hold sacred.

McGill also successfully argued the Supreme Court case that led to the court's 2018 ruling allowing states to legalize sports betting. The firm counts among its clients several major international casino operators.

Two years after McGill's win in the sports betting case, Washington Gov. Jay Inslee signed a bill allowing sports betting only under Washington's tribal-state gaming compacts, setting the stage for the Maverick lawsuit.

In January 2022, McGill filed the Maverick lawsuit, as well. He did not respond to requests for an interview.

On its surface, the case is connected to his litigation around betting and gaming. But the legal arguments parallel those of the Brackeen adoption case.

Lewerenz said both cases could result in rulings that cast tribes as "merely private associations of people with a common racial ancestry."

"If that happens," Lewerenz said, "then it's hard to understand why they would have any governing power, any political power."

Nagle said that power flows from tribes' unique position as sovereign nations that predate the United States.

"What racial group in the United States has its own land?" she asked. "Its own water rights and environmental regulations? Its own police force, its own elections, its own government?"

Tribes fear they stand to lose almost everything: their right to self-governance, the resources to preserve their culture and traditions, and the main economic engine that provides for basic tribal services.

But for those with interests in the private casino industry, such a change could be a boon. The same goes for corporations looking to develop oil and gas leases without interference from Indigenous nations, whose right to co-manage the lands they stewarded for millennia is increasingly recognized by the federal government.

Gaming change could devastate tribes

The Washington State Legislature authorized gambling only for the state lottery, for tribes, for charitable and nonprofit gaming and, in a much more limited capacity, as a financial boost for bars. But dozens of non-tribal, for-profit card rooms have expanded the category.

"Those food and beverage establishments have somehow become these massive mini casinos," said Rebecca George, executive director of the Washington Indian Gaming Association.

That's where Maverick stepped in.

Its CEO, Eric Persson, declined repeated requests for an interview. But in press releases and news articles about the lawsuit his company filed, Persson says he supports tribal sovereignty.

In fact, Persson is a member of the Shoalwater Bay Indian Tribe, a tiny community located an hour southwest of Hoquiam, Washington, where he grew up. The tribe gave Persson a partial scholarship every semester, according to his spokesman, from undergrad through law school at Georgetown University. Persson is one of over 100 members the tribe estimates it has helped send to college.

Now, the tribe says, his lawsuit could devastate the tribe's ability to provide government services to its citizens—including its scholarship fund.

The Shoalwater Tribe is fighting for survival on several fronts. Its reservation is a tiny piece of land. The single square acre set aside by the U.S. government in 1866 is big enough to house the tribal headquarters and not much else. Rising sea levels caused by climate change have eaten into that territory as the ocean has slurped up houses on what used to be forested land above high tide.

"Half the reservation is underwater," said Larry Kerns, the tribe's chief financial officer.

The tribe is using gaming revenue to painstakingly buy back small chunks of its homelands, including areas atop nearby hills that would be a safer place to live. The tribe now owns nearly 5,000 acres.

"It's our land and we want it back," Kerns said. "Unfortunately, we have to buy it back. They stole it from us, and we have to buy it back."

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The Shoalwater tribal government made about $7 million last year in gaming revenue, according to Kerns. It pays for most of the tribe's governmental services, including education, tribal housing, elders' pensions, child welfare services, tribal policing and administration.

"Gaming income funds basically everything," Kerns said. "Without it, we'd have to cut our programs by about 70 percent."

The Maverick case threatens it all.

In 2018, the company bought about half the card rooms in the state, adding to the casinos and card rooms it already owned in Nevada and Colorado.

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Underscore News

The Shoalwater Casino funds most of the tribal services.