

Indian Child Welfare Act Legal Update

March 27, 2023

Hon. Shawna Schwarz

Santa Clara County Superior Court
March 2023

Hon. Mark Vezzola

Former Chief Judge
Pala Band of Mission Indians and Chemehuevi Indian Tribal Courts
Senior Associate Counsel for the Pechanga Band of Indians

Agenda:

- ICWA Appeals Update
- New Program to Provide Attorneys to California Tribes involved in ICWA dependency cases
- What *Brackeen v. Haaland* decision might mean for California

Objectives:

- Discuss the main legal issues underlying ICWA appeals in the last few years
- Describe the steps courts can take to minimize the chances of an ICWA appeal
- Describe the purpose, scope and limitations of California's new Tribal Dependency Representation Program
- Identify the issues in the *Brackeen v. Haaland*
- Discuss how the *Brackeen v. Haaland* decision may apply in the California context

Quick Overview of the Process – as of Jan. 2019, per AB3176

- Initial Inquiry
- Further Inquiry
- Notice

ICWA Appeals Update

- By the numbers
- Four main questions addressed by appeals
 - 1) Can you cure failure of initial inquiry with later inquiry?
 - 2) Can you supplement the record with post appeal evidence?
 - 3) Must a parent/appellant claim ICWA heritage or provide evidence of ICWA heritage on appeal?
 - 4) Is failure to ask extended family reversible per se?
- Is failure to ask extended family members reversible per se? At least five tests to determine.
 - 1) Presumptive affirmance rule: Defect harmless unless parent proffers on appeal why further inquiry would lead to different result.
 - 2) Reason to believe rule: Defect harmless unless record contains info suggesting reason to believe such that absence of further inquiry was prejudicial.

- 3) Readily obtainable information rule: Defect harmless unless record indicates there was readily obtainable info that would bear meaningfully upon whether child is Indian and probability of obtaining meaningful information is reasonable.
- 4) Substantial evidence test: Error should be reviewed under hybrid substantial evidence/abuse of discretion standard. If record is insufficient, then there is not substantial evidence to support the ruling and court abused discretion.
- 5) Automatic reversal rule: Reversal is automatic and required.

Waiting for Dezi C.

- Used the Reason to Believe Rule
- Review granted Sept. 2022
- Request to de-publish denied
- Does the outcome matter?

Steps to minimize ICWA reversals

- Because early identification of Indian children is critical to the proper implementation of the [Indian Child Welfare Act of 1978 \(ICWA\) \(25 U.S.C. § 1901 et seq.\)](#), the statute must be interpreted in a way that requires all participants—child protective agencies, the parents, all counsel, and the juvenile courts—to work together to determine whether children are Indian children. The child protective agencies and the juvenile courts have a key role to play in this determination. (In re Ezequiel G.)
- Judges
- Counsel
- Child welfare services

State Funded Attorneys for Tribes

- Redressing inequity. Tribes only party in dependency case not entitled to state funded attorney;
- Tribal Dependency Representation Program starting soon:
 - Will provide federally recognized California tribes with limited base funding to hire attorneys for ICWA cases
 - Not available to out of state tribes
 - Not available to unrecognized tribes
- Funding will flow from CDSS to tribes. Court will have no role in appointment or payment of attorneys;
- Tribal rights not affected:
 - Tribe can choose to be represented by non-attorney
 - Tribal rights to remote appearance at no charge under WIC 224.2(k) unaffected
 - Special *pro hac vice* rules – Govt Code § 70617(e)(3) & rule 9.40(g)

Brackeen v. Haaland: Background

What is the *Brackeen v. Haaland* case?

- Case out of Texas pending in the U.S. Supreme Court
- The Brackeen family adopted an Indian boy and girl (with Cherokee and Navajo parents);
- The states of Texas, Louisiana, and Indiana were plaintiffs in the lower court case and on appeal;

- Cherokee Nation, Oneida Nation, Quinault Nation, Morongo Band of Mission Indians, and later the Navajo Nation joined as parties to defend the ICWA.
- White adoptive parents feel they are being discriminated against.
- Policy interests against the special relationship between tribes and the federal government.
- ICWA is inconvenient for states.

Brackeen v. Haaland: Issues

- Do aspects of ICWA violate the non-delegation doctrine?
- Does ICWA unlawfully “commandeer” state resources, courts and agencies to implement federal law and policy?
- Do the ICWA Placement preferences violate equal protection?
- Is the definition of “Indian child” is racial (rather than political) in violation of equal protection?
- Is ICWA beyond the scope of of congressional authority to “regulate Commerce . . . with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3?

Brackeen Impacts in California

- The State of California has committed itself to strengthening and sustaining an effective government-to-government relationship between the State and Tribes (Executive Order B-10-11; Executive Order N-15-19)
- California has protected cultural and political rights of Indian and Native American children in the Foster Care Bill of Rights (WIC 16001.9)
- California has passed state law re-codifying the ICWA (AB 1325, AB 3176, and SB 678) including requirements to consult with tribes on placements of their children

Brackeen Impacts in California

Non-delegation doctrine

- Affects very narrow aspects of ICWA. Doesn’t necessarily impact CA laws incorporating ICWA

Anti-commandeering doctrine

- No obvious impact because CA law which voluntarily incorporates

Scope of Congressional Article I Authority

- Might impact CA law on placement preferences, but NOTE that CA law has an independent requirement to consult with tribe on placement

Equal protection

- Placement preference for “other Indian families
- Placement preferences in general
- Might impact CA law on placement preferences, but NOTE that CA law has an independent requirement to consult with tribe on placement
- Definition of Indian child includes child who is not a tribal member but a “biological member of a child”
- Definition of Indian child is inherently racial
- Might impact CA law but requires analysis to see if government-to-government relationship, consultation, Foster Care Bill of Rights etc. continue in force

ICWA Inquiry: Reported California Cases 2021 - 2023

Breakdown of Issues

Is genetic testing information alone enough to give reason to believe or know?						
	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5	Dist. 6
Yes						
No		<u>In re J.S.</u> 2 nd DCA Div. 7, 62 Cal.App.5th 678 (2021)				

Can failure of initial inquiry at the outset of the case be cured by proper inquiry at a later stage in the case?						
<i>Failure of inquiry at the outset of the case does not require reversal of jurisdictional and dispositional findings.</i>						
	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5	Dist. 6
Yes	<u>In re S.H.</u> 1 st DCA Div. 1, 82 Cal.App.5th 166	<u>In re Baby Girl M.</u> , 2 nd DCA Div. 5, 83 Cal.App.5th 635	<u>J.J. V. Superior Court</u> 3 rd DCA 81 Cal.App.5th 447	<u>In re Dominick D.</u> 4 th DCA Div. 2, 82 Cal.App.5th 560 <u>In re T.R.</u> 4 th DCA, Div. 2, 87 Cal.App.5th 1140		
No						

Is it permissible to supplement the record with post-appeal evidence of ICWA Inquiry?						
	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5	Dist. 6
Yes		<u>In re Allison B.</u> , 2 nd DCA Div. 1, 79 Cal. App.5th 214 <u>In re E.L.</u> , 2 nd DCA Div.6, 82 Cal.App.5th 597 (Review granted 11/30/2022 S276508)				
No		<u>In re M.B.</u> , 2 nd DCA Div. 7, 80 Cal. App. 5 th 617		<u>In re E.V.</u> , 4 th DCA Div. 3, 80 Cal.App.5th 691 <u>In re G.H.</u> , 4 th DCA Div. 3, 84 Cal.App.5th 15 <u>In re Ricky R.</u> , 4 th DCA Div. 2, 82 Cal.App.5th 671	<u>In re E.C.</u> , 5 th DCA, 85 Cal.App.5th 123	

Does there need to be some claim or evidence of Indian heritage on appeal?						
	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5	Dist. 6
Yes		<u>In re Ezequiel G.</u> , 2 nd DCA Div. 3, 81 Cal.App.5th 984		<u>In re A.C.</u> 4 th DCA Div. 2, 65 Cal.App.5th 1060		
No		<u>In re Y.W.</u> 2 nd DCA Div. 7, 70 Cal.App.5th 542 <u>In re H.V.</u> , 2 nd DCA Div. 5, 75 Cal. App. 5th 433		<u>In re A.R.</u> , 4 th DCA Div. 3, 77 Cal.App.5th 197 <u>In re K.T.</u> , 4 th DCA Div. 2, 76 Cal. App. 5th 732		

Is failure to ask extended family members about Indian ancestry *per se* reversible error?

	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5	Dist. 6
Yes		<p><i>In re A.C.</i>, 2nd DCA Div. 1, 75 Cal.App.5th 1009 291</p> <p><i>In re. A.C.</i>, 2nd DCA Div.5, 86 Cal.App.5th 130</p> <p><i>In re Antonio R.</i>, 2nd DCA Div. 7, 76 Cal. App. 5th 421</p> <p><i>In re H.V.</i>, 2nd DCA Div. 5, 75 Cal. App. 5th 433</p> <p><i>In re J.C.</i> 2nd DCA Div. 7, 77 Cal.App.5th 70</p> <p><i>In re Y.W.</i> 2nd DCA Div. 7, 70 Cal.App.5th 542</p> <p><i>In J.K.</i>, 2nd DCA Div. 6, 83 Cal.App.5th 498</p> <p><i>In re Oscar H.</i>, 2nd DCA Div. 8, 84 Cal.App.5th 933</p>		<p><i>In re A.R.</i>, 4th DCA Div. 3, 77 Cal. App. 5th 197</p> <p><i>In re Benjamin M.</i> 4th Div. 2, 70 Cal. App.5th 735</p> <p><i>In re E.V.</i>, 4th DCA Div. 3 , 80 Cal.App.5th 691</p> <p><i>In re Ricky R.</i> , 4th DCA Div. 2, 82 Cal.App.5th 671</p> <p><i>In re. D.B.</i>, 4th DCA, Div. 2 87 Cal.App.5th 239</p>	<p><i>In re E.C.</i> 5th DCA, 85 Cal.App.5th 123</p> <p><i>In re K.H.</i> 5th DCA, 84 Cal.App.5th 566</p>	<p><i>In. re. I.F.</i> 6th DCA 77 Cal. App. 5th 152</p>
No		<p><i>In re Adrian L. (2022)</i> , 2nd DCA Div.1, 86 Cal.App.5th 342</p> <p><i>In re Darian R.</i>, 2nd DCA Div. 1, 75 Cal. App. 5th 502</p> <p><i>In re Dezi C.</i>, 2nd DCA Div. 2, 79 Cal.App.5th 769 (LEAVE TO APPEAL GRANTED)</p> <p><i>In re J.W.</i>, 2nd DCA Div. 8, 81 Cal.App.5th 384</p> <p><i>In re M.M.</i>, 2nd DCA Div. 8, 81 Cal.App.5th 61 (REVIEW GRANTED – Further action deferred pending consideration of Dezi C.)</p> <p><i>In re. S.S.</i>, 2nd DCA Div. 1, 75 Cal. App. 5th 575</p>	<p><i>In re G.A.</i>, 3rd DCA, 81 Cal.App.5th 355 (REVIEW GRANTED but on hold pending outcome of Dezi C.)</p> <p><i>In Kenneth D.</i>, 3rd DCA, 82 Cal.App.5th 1027</p>	<p><i>In re Y.M.</i>, 4th DCA Div. 1, 82 Cal.App.5th 901</p>		

ICWA Inquiry & Further Inquiry At-a-Glance

Inquiry

Possible inquiry results

What is triggered by responses

Court & Agency have affirmative and continuing duty to inquire whether child for whom petition may be or has been filed, is or may be Indian child. (WIC § 224.2(a))

Initial inquiry

Duty to inquire begins at initial contact, including inquiring of reporter of abuse/neglect if child may be Indian child. (WIC § 224.2(a))

If child is placed into temporary custody, Agency has duty to inquire whether child is Indian child. (WIC § 224.2(b))

At first appearance, court shall inquire of each participant present whether s/he knows or has reason to know child is an Indian child. Court shall instruct parties to inform court if party later receives information that provides reason to know child is Indian child. (WIC § 224.2(c) & (d))

Further inquiry

If court or Agency has reason to believe child is Indian child, but does not have sufficient information to determine there is reason to know that child is Indian child, court and Agency shall make further inquiry as soon as practicable.

(WIC § 224.2(e))

Non-federally recognized Indian child

Indian child

Reason to know
(WIC § 224.2(d))

Reason to believe
(WIC § 224.2(e))

Non-Indian

- ICWA does not apply
- Court may allow child's non-federally recognized tribe to participate (WIC § 306.6)

- Child whose Indian status can be confirmed
- ICWA applies
- Tribe may intervene

- Further inquiry
- Treat as Indian child until court declares on record child is not Indian child

- Further inquiry

Application of ICWA minimum federal standards:

- Notice
- Active efforts
- Qualified expert witness
- Placement preferences
- Findings (higher standards)
- Transfer

If court finds that proper and adequate further inquiry and due diligence have been conducted and there is no reason to know child is Indian child, court may make finding that ICWA does not apply; however, later receipt of new information requires further inquiry. (WIC § 224.2(i)(2))

- Continuing duty to inquire throughout life of case
- ICWA does not apply

ICWA Inquiry, Notice & Findings Overview

Agency completes initial ICWA inquiry under WIC §224.2(a) & (b), and if there is reason to believe child is Indian child¹, further inquiry per §224.2(e). Agency shall include all inquiry details in court report.

At first appearance, on record the court shall:

Inquire of each party and each participant present whether s/he knows or has reason to know that the child is an Indian child.¹ (See specific questions.²)

Court shall instruct³ all parties to inform court if they later receive information that provides reason to know the child is an Indian child.¹

(Simply asking if the family has Native American / Eskimo heritage is no longer sufficient.)



Findings:

- ICWA notice is not necessary.
- ICWA does not apply.

Regular statutes apply.

At every hearing court shall instruct parties to inform³ if any new ICWA information.

Findings:

- Agency has done further §224.2(e) inquiry and there is no reason to know child is Indian child; and
- ICWA does not apply.

OR

- Agency is ordered to complete further §224.2(e) inquiry, and
- File evidence of the inquiry, including contacts w/ extended family members, tribes, BIA, CA DSS, and/or others.
- Court assesses if "reason to know" child is Indian child.

Findings:

Agency has presented evidence of due diligence to identify and work with tribes child may be member of or eligible for.

OR Agency is required to exercise due diligence to identify, work with tribes to verify child's status, provide notice, and file proof of due diligence and notice.

AND

AND

Notice has been given as required by law.

Apply ICWA unless and until Court can confirm child is NOT an Indian child.⁶

Agency sends notice (ICWA-030) to:

- Federally-recognized tribes (all bands, if family does not specify which),
- The Bureau of Indian Affairs, and
- The Secretary of the Interior.

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Return receipts

- Before proceeding, confirm that tribe(s) received notice at least 10 days before hearing.
- Continue to send notice for each hearing until responses from all tribes.

What if no response from all tribes?

- No more "60-day rule."
- Based on evaluation of underlying evidence, all of the circumstances and evaluation of agency due diligence reports, upon finding of "proper and adequate further inquiry and due diligence," court can determine there is "no reason to know" and find ICWA does not apply. (WIC §224.2(i)(2))

Letter: child not member, not eligible for membership

Findings:

- ICWA does not apply.
- No more notice unless further information gives reason to know child is Indian child.

Letter: child is member of tribe

OR

Letter: child eligible for membership and is biological child of member

ICWA applies

All responses (letters and return receipts) must be part of court file.

Notice on ICWA-030 by registered mail, return receipt requested for hearings that culminate in foster care placement, TPR, preadoptive placement, or adoptive placement.

All other notices to tribe same way as other parties.

Relevant issues:

- Active efforts
- Intervention
- Transfer
- Placement preferences
- Qualified expert witness
- Findings (higher standards)
- Tribal customary adoption

1 Definition of Indian child:

25 U.S. Code § 1903(4): Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe; and
WIC §224.1(b): An unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless that person or their attorney elects not to be considered an Indian child for purposes of the Indian child custody proceeding.

2 At the first appearance in court of each party, the court must ask each participant present at the hearing:

From JV-410:

- Whether the participant is aware of any information indicating that the child is a member or citizen or eligible for membership or citizenship in an Indian tribe or Alaska Native Village and if yes, the name of the tribe or village;
- Whether the residence or domicile of the child, either of the child’s parents, or Indian custodian is on a reservation or in an Alaskan Native Village, and if yes, the name of the tribe or village;
- Whether the child is or was ever a ward of a tribal court, and if yes, the name of the tribe or village; and
- If the child, either of the child’s parents, or the child’s Indian custodian possesses an identification card indicating membership or citizenship in a tribe or Alaska Native Village, and if so, the name of the tribe or village.

Or...

§ 224.2(c)

Ask whether the participant knows or has reason to know that the child is an Indian child. (see fn. 5 for “reason to know”)

Rule 5.668(c), whether:

- The participant knows or has reason to know the child is an Indian child;
- The residence or domicile of the child, the child’s parents, or Indian custodian is on a reservation or in an Alaska Native village;
- The child is or has ever been a ward of a tribal court; and
- Either parent or the child possesses and identification card indicating membership or citizenship in an Indian tribe.

3 Rule 5.668(c)(2) The court must also instruct all parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child, and order the parents, Indian custodian, or guardian, if available, to complete *Parental Notification of Indian Status* (form ICWA-020).

4 The Agency should be conducting further inquiry before the first hearing in court, except in an emergency situation per WIC §319(b)(1)-(9).
Rule 5.668(c)(3) If there is reason to believe that the case involves an Indian child, the court must require the agency to conduct further inquiry per WIC §224.2(e).

5 WIC §224.2(d) Reason to know. The circumstances that may provide reason to know the child is an Indian child include the following:

- Person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child’s extended family informs the court that the child is an Indian child;
- The residence or domicile of the child, the child’s parents, or Indian custodian is on a reservation or in an Alaska Native village;
- Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
- The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- The court is informed that the child is or has been a ward of a tribal court; or
- The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.

Rule 5.668(d) If it is known, or there is reason to know, the case involves an Indian child, the court must proceed in accordance with rules 5.481 et seq. and treat the child as an Indian child unless and until the court determines on the record after review of the report of due diligence described in WIC §224.2(g) that the child does not meet the definition of an Indian child.

6 WIC 224.2(i) Treat child as Indian child

When there is reason to know that the child is an Indian child, **the court shall treat the child as an Indian child unless and until** the court determines on the record and after review of the report of due diligence as described in WIC §224.2(g), and a review of the copies of notice, return receipts, and tribal responses required pursuant to §224.3, that the child does not meet the definition of an Indian child as used in §224.1 and the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).



Tribal Dependency Representation Program: Information Sheet for California Courts

Background

The federal Indian Child Welfare Act (ICWA) and corresponding state law protect certain rights of a federally recognized Indian tribe in state court proceedings involving a child who is a member or eligible for membership in the tribe, including a right to intervene in the proceedings.¹ Prior to 2023, however, neither federal nor state law provided a source of funding for tribes to hire attorneys if they wished to participate in ICWA cases. In juvenile dependency cases (where the vast majority of ICWA cases arise) tribes were the only party to a case who were not entitled to appointed counsel.

In 2022, the California Legislature enacted SB 124 which added section [10553.14](#) to the Welfare and Institutions Code and appropriated funding for the Tribal Dependency Representation Program. The program provides funding for federally recognized tribes in California or whose lands extend into California to hire legal counsel to represent the tribe in juvenile dependency cases in California courts. As a result, California tribes may be hiring attorneys more regularly to represent them in juvenile dependency cases governed by ICWA.

Program Details and Eligibility

This funding program will be administered by the California Department of Social Services (CDSS), Office of Tribal Affairs (OTA). The courts will not have a role in appointing attorneys for tribes under this program. The funding for this program is very limited. Each California tribe (which includes border tribes with lands that extend into California) is entitled to an initial \$15,000.00 allotment of funding. If additional funds are appropriated by the Legislature or if some tribes do not want their allocation of funding, OTA, in consultation with tribes, will develop a formula for distributing remaining funds to participating tribes.

Importantly, this funding is NOT available to out-of-state tribes. OTA estimates that roughly half the ICWA cases in California involve Indian children who are members or eligible for membership in out-of-state tribes. Funding is NOT available to unrecognized tribes although they have rights to participate under section 306.6 of the Welfare and Institutions Code and often do not have resources to assert their rights.

Tribal Rights of Participation not Affected

No tribe is required to participate in this program. Tribes retain all their existing rights to participate in ICWA cases through an authorized representative who is not an attorney.² For more information on

¹ 25 U.S.C. § 1911(c); Welf. & Inst. Code, § 224.4.

² See California Rules of Court, rule 5.534(e).

tribal rights of participation, see “ICWA Information Sheet: Tribal participation in State court proceedings governed by ICWA.”³

Other Considerations

Pro Hac Vice Rules for Attorneys Representing Tribes in ICWA cases

If a tribe elects to be represented by an attorney who is admitted to practice in another state but not in California, special rules apply to those attorneys applying to appear as counsel *pro hac vice*. Section 70617(e)(3) of the Government Code⁴ exempts an attorney representing a tribe in a child welfare matter under the federal Indian Child Welfare Act from the fees imposed for an application to appear *pro hac vice*. California Rules of Court, rule 9.40(g)⁵ similarly exempts an attorney applying to appear *pro hac vice* to represent a tribe in an ICWA case from the normal requirement to associate with an active licensee of the State Bar of California and the restrictions on repeated appearances.

Remote appearances

Section 224.2(k) of the Welfare and Institutions Code,⁶ effective January 1, 2023, provides tribes in ICWA cases with a right to remote participation at no charge:

Notwithstanding any other provision, an Indian child’s tribe may participate by telephone, or other remote appearance options, in proceedings in which the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) may apply. The method of appearance may be determined by the court consistent with court capacity and contractual obligations, and taking into account the capacity of the tribe, as long as a method of effective remote appearance and participation sufficient to allow the tribe to fully exercise its rights is provided. Fees shall not be charged for court appearances established under this subdivision conducted in whole or in part by remote means.

This means tribes and their attorneys should be allowed to appear remotely at no charge.

Facilitating Tribal Participation

Tribes have often experienced challenges in exercising their right to participate in ICWA cases, including access to resources for counsel. Courts considering best practices to facilitate tribal participation including prioritizing ICWA cases on the calendar, facilitating remote appearances, and other strategies may consult the Judicial Council’s ICWA best practices publication.⁷

³ Available at: <https://www.courts.ca.gov/documents/icwa-Tribal-Participation-factsheet.pdf>

⁴ Available at:

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=70617.&nodeTreePath=33.16.1&lawCode=GOV

⁵ Available at: https://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_40

⁶ Available at: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=224.2.&lawCode=WIC

⁷ Available at: <https://www.courts.ca.gov/documents/ICWABestPracticesGuide-October2020.pdf>

SEC. 16. Section 10553.14 is added to the Welfare and Institutions Code, to read:

10553.14. (a) The Tribal Dependency Representation Program is hereby established to provide funding to assist any federally recognized Indian tribe located in California, or with lands that extend into California, in funding legal counsel to represent the Indian tribe in a California Indian child custody proceeding, as defined by subdivision (d) of Section 224.1, that is initiated or ongoing in the juvenile court. An Indian tribe may designate another entity to administer the allocation of funds on a tribe's behalf upon designation by the tribe for this purpose. There shall be no tribal share of cost for any agreement executed under this section.

(b) To be eligible for an allocation of funds under this allocation, an Indian tribe shall enter into an agreement with the department pursuant to subdivision (a) of Section 10553.1 or in accordance with Section 1919 of Title 25 of the United States Code.

(c) An Indian tribe that seeks funding pursuant to this section shall submit an annual letter of interest to the State Department of Social Services. The letter shall include all of the following:

(1) The approximate number of Indian child custody proceedings, as defined by subdivision (d) of Section 224.1, involving an Indian child who is a member of the tribe or eligible for membership in the tribe that were initiated or ongoing in the juvenile court in the preceding 12 months.

(2) The approximate number of cases in an appellate court or the California Supreme Court involving an Indian child in which the tribe was an active participant in the preceding 12 months.

(3) The approximate number of Indian child custody cases for which the tribe will be served by the legal counsel funded through the allocation provided by this section in the upcoming year.

(4) If the tribe plans to designate another entity for representation, the name of that entity.

(d) Subject to an appropriation in the annual Budget Act for the express purpose described in this section, the State Department of Social Services shall provide each eligible Indian tribe, as described in subdivision (a), that enters into an agreement pursuant to subdivision (b) and submits a letter of interest pursuant to subdivision (c), an annual base allocation of fifteen thousand dollars (\$15,000) for the purpose described in subdivision (a). If the annual Budget Act provides for an allocation of funds of more than fifteen thousand dollars (\$15,000) per eligible tribe, then each eligible tribe shall receive an adjusted allocation within and for that same fiscal year. The adjusted allocation shall be based on a methodology considering the number of Indian children in foster care or prospective adoptive placements through the juvenile court. The allocation methodology and the implementation plan shall be established by the department in government-to-government consultation with tribes on or before June 30, 2023. The department shall provide an update to legislative staff and stakeholders on the progress of implementation of this section, preferably by January 1, 2023, but no later than February 1, 2023.

(e) An Indian tribe that receives funds pursuant to this section shall submit a progress report to the department. The progress report shall be submitted on or before September 30 following the close of the fiscal year in which funding was received. The report shall include all of the following information:

(1) The total number of Indian child custody proceeding hearings and the number of hearings attended by the Indian tribe with legal representation paid for with this allocation.

(2) The counties in which the hearings were held.

(3) The total number of appellate proceedings and the number of appellate proceedings in which counsel paid for with this allocation appeared on behalf of the tribe.

(f) The department shall seek federal approvals or waivers necessary to claim federal reimbursement under Title IV-E of the federal Social Security Act (42 U.S.C. Sec. 670 et seq.) in order to maximize funding for the purpose described in this section.

(g) Notwithstanding the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), the department may implement, interpret, or make specific this section without taking any regulatory action.

(h) This section shall be implemented only to the extent that funding is expressly provided in the annual Budget Act for this purpose.

(i) It is the intent of the Legislature that the state provide the adequate level of funding for legal representation for tribes in child welfare proceedings pursuant to this section, and that the state consider how well the objectives of this policy are being met with the funding appropriated in the annual Budget Act.



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Tribal participation in State court proceedings governed by ICWA.

Under ICWA and corresponding state law, an Indian child's tribe must receive notice of any state court proceedings governed by ICWA involving an Indian child. These proceedings include dependency proceedings, some delinquency proceedings, some family code proceedings and probate guardianship proceedings concerning an Indian child. (see 25 USC § 1903; Fam. Code §§ 170, 177, 3041, Prob. Code § 1459.5, WIC §§ 224, 224.1 CRC 5.480 & 7.1015) Federal and state law mandate and acknowledge a number of substantive and procedural rights of an Indian child's tribe in such state court proceedings, including a right to participate in various ways and an absolute right to intervene in such proceedings "at any point".

Rights if a tribe chooses not to intervene:

An Indian child's tribe is not required to formally intervene in proceedings. If the tribe acknowledges the child, all of ICWA's substantive requirements apply even if the tribe does not intervene. A non-intervening tribe must continue to receive notice of all court hearings involving the child. The tribe must be consulted with respect to the placement of the child. (CRC 5.482(g)) The tribe must be consulted with respect to case planning for both the Indian parents and the Indian child and those case plans must use the available resources of the tribe, extended family members, other Indian service agencies and individual Indian caregivers. (CRC 5.484 (c); CRC 5.690 (c); WIC § 361.7)

Whether or not the tribe intervenes, a representative of the Indian child's tribe is entitled to be present at all court proceedings involving the Indian child (CRC 5.530 (B) (7)) and may address the court, receive notice of hearings, examine all court documents relating to the dependency case, submit written reports and recommendations to the court, and perform other duties and responsibilities as requested or approved by the court. (CRC 5.534 (i))

Right of Intervention:

An Indian child's tribe may intervene, orally or in writing, at any point in the proceedings and may, but is not required to, file with the court the *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of their intent to intervene. (CRC rule 5.482 (e); WIC § 224.4; 25 USC § 1911 (c))

The juvenile court has no discretion to deny a tribe's request to intervene. (*In re Desiree F.* (2000) 99 Cal.Rptr.2d 688, 83 Cal.App.4th 460)

Rights of the Intervening Tribe:

A tribe, as an intervening party, is entitled to all rights afforded to any party in a proceeding, including the right to sit at counsel table, the right to examine witnesses, and the right to be given copies of documents. See CCP §387; see also CRC 5.482(e) and Judicial Council form ICWA-040.

Who May Appear on Behalf of the Tribe:

The tribe may choose to be represented by an attorney at the tribe's expense, but the tribe may also designate any person to represent them in court, and this representative must be given the same rights and courtesies as the attorneys involved. (CJER ICWA Bench Handbook, 2013 at page 32).

The court may not limit the tribe's ability to participate effectively in the case if the tribe chooses to be represented by a non-attorney.¹ States' laws regulating attorneys and the practice of law cannot interfere with or burden the federally protected right of the tribe to participate in the proceedings.²

California Rule of Court, rule 5.534 specifically addresses this issue:

(i) Tribal representatives (25 U.S.C. §§ 1911, 1931-1934)

The tribe of an Indian child is entitled to intervene as a party at any stage of a dependency proceeding concerning the Indian child.

(1) The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf.

The California Rules of the Court, Rule 5.534(i)(1) permits intervention by an attorney or by a representative and makes no distinction between the rights granted to each respectively.

¹ *State v. Jennifer M.*, 277 Neb. 1023, 1024 (2009)

² *State ex rel Juvenile Department of Lane County v. Shuey*, 119 Ore.App. 185 (1993); *In the Interest of N.N.E.*, 752 N.W.2d 1 (2008)

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IN OPINION

OPINION: *Haaland v. Brackeen*: The Most Important Case You Haven't Heard About

KELLY RANASINGHE ON DECEMBER 21, 2022

SHARE



The month before Christmas in 1948. Reverend F. O'Grady, the head of Kamloops Indian School,[1] penned a letter to the parents of his students:

It will be your privilege this year to have your children spend Christmas at home with you. This is a privilege which will be granted if you observe the following regulations of the Indian Department [...] I ask you to observe the above regulations in order that this privilege of going home for Christmas may be continued from year to year. If the children are not returned on time they will not be allowed to go home for Christmas next year."

Rev. F. W. O'Grady.

[Kamloops Indian School.]

The phrase "*if the children are not returned on time they will not be allowed to go home...*" sent a dark and explicit message. The children of Kamloops could be returned and taken at will. The letter was less of a greeting, and more of a reminder that Indian children were the property of the Kamloops Indian School and, more specifically, Reverend O'Grady.

This infamous letter could easily have come from one of the 350 Indian residential schools which operated between 1850 and 1960 throughout the United States. For over a century, these camps operated with cold efficiency to "sever the cultural and economic
 ← connection between Indian Tribes, Alaska Native Villages, the Native Hawaiian community, and their territories" and fulfill the "broader goal of Indian territorial dispossession for the expansion of the United States."^[2]

Indian children became the vulnerable pawns of a cruel, racist system bent on colonialism. But far worse than land, was the damage done to Indian children and families through a child welfare system weaponized and imbued with Christian evangelism, racism, and a strong dose of white savior mentality. The entire process was encapsulated in the words of General Pratt, the founder of the infamous Carlisle Indian School:

"A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."

On Nov. 9, 2022, seventy four years after O'Grady wrote his letter, the United States Supreme Court heard arguments in *Haaland v. Brackeen*, the Supreme Court case which threatens to overturn the Indian Child Welfare Act (ICWA).

ICWA (pronounced Ick-Wah) was enacted in 1978 as part of "the rising concern ... over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families" and the adoption of Indian children through non-Indian homes.

Over four decades, ICWA established the "gold standard" of child welfare, setting high bars for family-finding, relative placement and family preservation within the foster care system. ICWA became a benchmark for ethical, effective child welfare practice. To use the words of the tribal scholar and advocate Victoria Sweet, ICWA was "a law to right wrongs."^[3]

In 2017 four individual plaintiffs, alongside the states of Texas, Louisiana and Indiana, filed lawsuits to overturn ICWA. They argued that the legal requirements aimed at maintaining Indian children with their families and tribes (called "placement preference"), violated the equal protection clause of the Constitution.



Kelly Ranasinghe

By classifying Indian children by race, the plaintiffs asserted ICWA ran afoul of the Constitution and equal protection by engaging in race-based discrimination. The undercurrent through many of their assertions was also that ICWA was generally ineffective in protecting Indian children and created barriers to adoption.

At the same time, they asserted that ICWA maintained Indian children in “dangerous” homes. Earlier this year, the winding cases reached the Supreme Court and were consolidated in *Haaland v. Brackeen*.

The arguments of petitioners are evocative and emotional, but ultimately are familiar remonstrations of federal overreaching and sweeping statements about child safety.

But even the most superficial analysis shows they were without merit. The plaintiff’s argument hinges on ICWA improperly classifying children by race, and thereby violating Equal Protection.

Racial classification requires “strict scrutiny,” a heightened standard of judicial review.

However, nearly every amici brief has correctly pointed out tribal affiliation is a *political* not racial classification. Indeed, as one amici correctly pointed out, ICWA “turns on the child’s connection to a federally recognized “Indian tribe” — a distinct political community — not the child’s race.”^[4] Indeed, it is a well laid out principle that the tribe, not anyone else, defines who is a member.

Further, it is clear ICWA is dramatically effective at protecting children. In one spectacular paragraph California’s amici brief noted that “... an Indian child in 1976 (pre-ICWA) was *1,500 times more likely to be in foster care* than a non-Indian child ... [but] by 2012, Indian children were only 4 times more likely to be in foster care.” (Brief of California et.al.) Likewise, California noted that “90 percent of Indian children in foster care are placed in family-based settings” versus group homes or short-term residential treatment facilities. This is “the highest percentage of any major racial or ethnic group.” (Id.) This is very clear evidence that ICWA is working.

Along their way to the Supreme Court, the parties have gathered a host of powerful allies on either side, with the petitioners defending ICWA far outnumbering the plaintiffs who seek to dismantle it.

← e seeking to overturn ICWA were joined by a small collection of conservative institutions including the Cato Institut →
 Goldwater Institute, and the “Christian Alliance for Indian Child Welfare and ICWA Children and Families.”

In contrast, the protectors of ICWA marshaled a virtual army of *amici* consisting of “497 Tribal Nations, 62 Native organizations, 23 states (including California, Alaska, Arizona Utah, New Mexico the District of Columbia), 87 congresspeople, and 27 child welfare and adoption organizations.”^[5] This number reflects ICWA’s widespread support across both party lines, organizations and advocacy groups.

SEE ALSO

As of Nov. 9, 2022, the case has now been fully briefed and argued before the court. It is clear that *Haaland* is a watershed moment for the Supreme Court. For almost forty years ICWA has been part of the fabric of American child welfare law.

Indeed, ICWA is so much of a standard that is has been referred to as establishing “the values and practices that have become central to child welfare practice.”^[6]

ICWA is also a constant reminder to child welfare professionals to be mindful of cultural humility, family integrity and racial power dynamics in their work.

Throughout the nation, child welfare attorneys, social workers, and advocates wait with baited breath, hoping that the Supreme Court will do the right thing, and preserve the Indian Child Welfare Act.

*Kelly Ranasinghe is a child welfare attorney in Imperial County and a Board Certified Child Welfare Law Specialist. The opin’
 voiced in this article are solely those of the author and do not reflect the opinion of any government agency.*

[1] Kamloops Indian School was the largest residential school in British Columbia.

[2] Bureau of Indian Affairs, Report of the Federal Boarding School Initiative, Pg. 5 (May 2022), available at, https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf

[3] Victoria Sweet, Bringing our Children Home, GA Child Welf. Conf. (2017).

[4] Brief of the ACLU, *Brackeen v. Haaland*, available at, <https://www.aclu.org/legal-document/brackeen-v-haaland-supreme-court-amicus-brief>

[5] National Indian Child Welfare Association, Supporters File 21 Amicus Briefs to Uphold the Indian Child Welfare Act in *Haaland v. Brackeen*, Aug. 23, 2022, available at, <https://www.nicwa.org/supporters-file-21-amicus-briefs-to-uphold-the-indian-child-welfare-act-in-haaland-v-brackeen/>

[6] National Indian Child Welfare Association “Setting the Record Straight: The Indian Child Welfare Fact Sheet” available at, <https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf>

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WELFARE AND INSTITUTIONS CODE

Section 16001.9

16001.9. (a) All children placed in foster care, either voluntarily or after being adjudged a ward or dependent of the juvenile court pursuant to Section 300, 601, or 602, shall have the rights specified in this section. These rights also apply to nonminor dependents in foster care, except when they conflict with nonminor dependents' retention of all their legal decisionmaking authority as an adult. The rights are as follows:

(1) To live in a safe, healthy, and comfortable home where they are treated with respect. If the child is an Indian child, to live in a home that upholds the prevailing social and cultural standards of the child's Indian community, including, but not limited to, family, social, and political ties.

(2) To be free from physical, sexual, emotional, or other abuse, corporal punishment, and exploitation.

(3) To receive adequate and healthy food, adequate clothing, grooming and hygiene products, and an age-appropriate allowance. Clothing and grooming and hygiene products shall respect the child's culture, ethnicity, and gender identity and expression.

(4) To be placed in the least restrictive setting possible, regardless of age, physical health, mental health, sexual orientation, and gender identity and expression, juvenile court record, or status as a pregnant or parenting youth, unless a court orders otherwise.

(5) To be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available.

(6) To not be locked in any portion of their foster care placement, unless placed in a community treatment facility.

(7) To have a placement that utilizes trauma-informed and evidence-based deescalation and intervention techniques, to have law enforcement intervention requested only when there is an imminent threat to the life or safety of a child or another person or as a last resort after other diversion and deescalation techniques have been utilized, and to not have law enforcement intervention used as a threat or in retaliation against the child.

(8) To not be detained in a juvenile detention facility based on their status as a dependent of the juvenile court or the child welfare services department's inability to provide a foster care placement. If they are detained, to have all the rights afforded under the United States Constitution, the California Constitution, and all applicable state and federal laws.

(9) To have storage space for private use.

(10) To be free from unreasonable searches of personal belongings.

(11) To be provided the names and contact information for social workers, probation officers, attorneys, service providers, foster youth advocates and supporters, Court Appointed Special Advocates (CASAs), and education rights holder if other than the parent or parents, and when applicable, representatives designated by the child's Indian tribe to participate in the juvenile court proceeding, and to communicate with these individuals privately.

(12) To visit and contact siblings, family members, and relatives privately, unless prohibited by court order, and to ask the court for visitation with the child's siblings.

(13) To make, send, and receive confidential telephone calls and other electronic communications, and to send and receive unopened mail, unless prohibited by court order.

(14) To have social contacts with people outside of the foster care system, including, but not limited to, teachers, coaches, religious or spiritual community members, mentors, and friends. If the child is an Indian child, to have the right to have contact with tribal members and members of their Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe.

(15) To attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices.

(16) To participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities, including, but not limited to, access to computer technology and the internet, consistent with the child's age, maturity, developmental level, sexual orientation, and gender identity and expression.

(17) To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity and expression, mental or physical disability, or HIV status.

(18) To have caregivers, child welfare and probation personnel, and legal counsel who have received instruction on cultural competency and sensitivity relating to sexual orientation, gender identity and expression, and best practices for providing adequate care to lesbian, gay, bisexual, and transgender children in out-of-home care.

(19) To be placed in out-of-home care according to their gender identity, regardless of the gender or sex listed in their court, child welfare, medical, or vital records, to be referred to by the child's preferred name and gender pronoun, and to maintain privacy regarding sexual orientation and gender identity and expression, unless the child permits the information to be disclosed, or disclosure is required to protect their health and safety, or disclosure is compelled by law or a court order.

(20) To have child welfare and probation personnel and legal counsel who have received instruction on the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care.

(21) To have recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship

in an Indian tribe or Alaskan village; to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village.

(22) (A) To access and receive medical, dental, vision, mental health, and substance use disorder services, and reproductive and sexual health care, with reasonable promptness that meets the needs of the child, to have diagnoses and services explained in an understandable manner, and to participate in decisions regarding health care treatment and services. This right includes covered gender affirming health care and gender affirming mental health care, and is subject to existing laws governing consent to health care for minors and nonminors and does not limit, add, or otherwise affect applicable laws governing consent to health care.

(B) To view and receive a copy of their medical records to the extent they have the right to consent to the treatment provided in the medical record and at no cost to the child until they are 26 years of age.

(23) Except in an emergency, to be free of the administration of medication or chemical substances, and to be free of all psychotropic medications unless prescribed by a physician, and in the case of children, authorized by a judge, without consequences or retaliation. The child has the right to consult with and be represented by counsel in opposing a request for the administration of psychotropic medication and to provide input to the court about the request to authorize medication. The child also has the right to report to the court the positive and adverse effects of the medication and to request that the court reconsider, revoke, or modify the authorization at any time.

(24) (A) To have access to age-appropriate, medically accurate information about reproductive health care, the prevention of unplanned pregnancy, and the prevention and treatment of sexually transmitted infections.

(B) At any age, to consent to or decline services regarding contraception, pregnancy care, and perinatal care, including, but not limited to, abortion services and health care services for sexual assault without the knowledge or consent of any adult.

(C) At 12 years of age or older, to consent to or decline health care services to prevent, test for, or treat sexually transmitted diseases, including HIV, and mental health services, without the consent or knowledge of any adult.

(25) At 12 years of age or older, to choose, whenever feasible and in accordance with applicable law, their own health care provider for medical, dental, vision, mental health, substance use disorder services, and sexual and reproductive health care, if payment for the service is authorized under applicable federal Medicaid law or other approved insurance, and to communicate with that health care provider regarding any treatment concerns or needs and to request a second opinion before being required to undergo invasive medical, dental, or psychiatric treatment.

(26) To confidentiality of medical and mental health records, including, but not limited to, HIV status, substance use disorder history and treatment, and sexual and reproductive health care, consistent with existing law.

(27) To attend school, to remain in the child's school of origin, to immediate enrollment upon a change of school, to partial credits for any coursework completed, and to priority enrollment in preschool, afterschool programs, a California State University, and each community college district, and to receive all other necessary educational supports and benefits, as described in the Education Code.

(28) To have access to existing information regarding the educational options available, including, but not limited to, the coursework necessary for career, technical, and postsecondary educational programs, and information regarding financial aid for postsecondary education, and specialized programs for current and former foster children available at the University of California, the California State University, and the California Community Colleges.

(29) To attend Independent Living Program classes and activities, if the child meets the age requirements, and to not be prevented by caregivers from attending as a consequence or punishment.

(30) To maintain a bank account and manage personal income, consistent with the child's age and developmental level, unless prohibited by the case plan.

(31) To work and develop job skills at an age-appropriate level, consistent with state law.

(32) For children 14 to 17 years of age, inclusive, to receive a consumer credit report provided to the child by the social worker or probation officer on an annual basis from each of the three major credit reporting agencies, and to receive assistance with interpreting and resolving any inaccuracies.

(33) To be represented by an attorney in juvenile court; to have an attorney appointed to advise the court of the child's wishes, to advocate for the child's protection, safety, and well-being, and to investigate and report to the court on legal interests beyond the scope of the juvenile proceeding; to speak to the attorney confidentially; and to request a hearing if the child feels their appointed counsel is not acting in their best interest or adequately representing their legal interests.

(34) To receive a notice of court hearings, to attend court hearings, to speak to the judge, to view and receive a copy of the court file, subject to existing federal and state confidentiality laws, and to object to or request the presence of interested persons during court hearings. If the child is an Indian child, to have a representative designated by the child's Indian tribe be in attendance during hearings.

(35) To the confidentiality of all juvenile court records consistent with existing law.

(36) To view and receive a copy of their child welfare records, juvenile court records, and educational records at no cost to the child until the child is 26 years of age, subject to existing federal and state confidentiality laws.

(37) To be involved in the development of their own case plan, including placement decisions, and plan for permanency. This involvement includes, but is not limited to, the development of case plan elements related to placement and gender affirming health care, with consideration of the child's gender identity. If the child is an Indian child, the case plan shall include protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and

maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community.

(38) To review the child's own case plan and plan for permanent placement if the child is 10 years of age or older, and to receive information about their out-of-home placement and case plan, including being told of changes to the plan.

(39) To request and participate in a child and family team meeting, as follows:

(A) Within 60 days of entering foster care, and every 6 months thereafter.

(B) If placed in a short-term residential therapeutic program, or receiving intensive home-based services or intensive case coordination, or receiving therapeutic foster care services, to have a child and family team meeting at least every 90 days.

(C) To request additional child and family team meetings to address concerns, including, but not limited to, placement disruption, change in service needs, addressing barriers to sibling or family visits, and addressing difficulties in coordinating services.

(D) To have both informal and formal support people participate, consistent with state law.

(40) To be informed of these rights in an age and developmentally appropriate manner by the social worker or probation officer and to be provided a copy of the rights in this section at the time of placement, any placement change, and at least once every six months or at the time of a regularly scheduled contact with the social worker or probation officer.

(41) To be provided with contact information for the Community Care Licensing Division of the State Department of Social Services, the tribal authority approving a tribally approved home, and the State Foster Care Ombudsperson, at the time of each placement, and to contact any or all of these offices immediately upon request regarding violations of rights, to speak to representatives of these offices confidentially, and to be free from threats or punishment for making complaints.

(b) The rights described in this section are broad expressions of the rights of children in foster care and are not exhaustive of all rights set forth in the United States Constitution and the California Constitution, federal and California statutes, and case law.

(c) This section does not require, and shall not be interpreted to require, a foster care provider to take any action that would impair the health and safety of children in out-of-home placement.

(d) The State Department of Social Services and each county welfare department are encouraged to work with the Student Aid Commission, the University of California, the California State University, and the California Community Colleges to receive information pursuant to paragraph (28) of subdivision (a).

(Repealed and added by Stats. 2019, Ch. 416, Sec. 3. (AB 175) Effective January 1, 2020.)

Brackeen v. Haaland – things to think about in California

Issue in Brackeen

- ▶ Do aspects of ICWA violate the non-delegation doctrine?
- ▶ Does ICWA unlawfully “commandeer” state resources, courts, and agencies to implement federal law and policy?
- ▶ Do the ICWA Placement preferences violate equal protection?
- ▶ Is the definition of “Indian child” is racial (rather than political) in violation of equal protection?
- ▶ Is ICWA beyond the scope of congressional authority to “regulate Commerce . . . with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3?

Questions for California Courts

- ▶ Does this invalidate corresponding California statutes?
- ▶ Does this apply when California has voluntarily incorporated ICWA standards into state law? The state led a coalition of States supporting ICWA and specifically arguing that it does not violate or commandeer state resources.
- ▶ Does this affect California law requiring consultation with tribes on placement? Does this affect requirements in the Foster Care Bill of Rights protecting Native American and Indian Children’s rights to maintain their cultural and political connection to their tribes?
- ▶ Does this affect California law requiring consultation with tribes? Does this affect requirements in the Foster Care Bill of Rights protecting Native American and Indian Children’s rights to maintain their cultural and political connection to their tribes?
- ▶ Does this affect California’s ability to pass legislation in this area as they have done in the WIC and other codes?

California laws relevant to ICWA

- ▶ Executive Order B-10-11 (Commitment to government-to-government relationship)
- ▶ Executive Order N-15-19
- ▶ Foster Care Bill of Rights (Welf. & Inst. Code § 16001.9) (Protecting cultural and political connection between tribes and their children in foster care)
- ▶ SB 678 (Stats 2006, ch 838) (Weaving ICWA requirements throughout the WIC, Family and Probate Codes)
- ▶ AB 1325 (Stats 2009, ch 287) (Recognizing Tribal Customary Adoption)
- ▶ AB 3176 (Stats 2018, ch 833) (Weaving 2016 federal ICWA regulations into California law)



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Delinquency – Child’s Indian Status – Right to Political and Cultural Connections – ICWA Requirements

Overview

The Indian Child Welfare Act (“ICWA” 25 U.S.C. §§1901 *et. seq.*) and corresponding state law are the source of significant legal rights and protections for Indian children and their tribes. Some, but not all of ICWA’s requirements apply to **all** juvenile cases, including delinquency cases. In addition, ICWA is not the **only** reason why a child’s Indian status and American Indian heritage is of importance in a delinquency case. Whether or not ICWA itself applies, children who identify as American Indian have unique legal protections and access to unique resources.

Duty of Inquiry

A juvenile probation department has an affirmative and continuing duty to inquire about a child’s Indian status, that is, whether the child is a member or eligible for membership in an Indian tribe and the child of a member of an Indian tribe. Inquiry must occur whenever the department makes contact with a child that could result in a petition under Section 601 or 602 (Welf. & Inst. Code § 224.2(a)) and whenever a child is placed in the temporary custody of the probation department pursuant to Welfare and Institutions Code § 307 (Welf. & Inst. Code § 224.2(b).) The duty to inquire begins at initial contact and the probation officer must complete this inquiry even if the child comes into contact with the probation department as a result of conduct that would be considered a crime if the child were an adult. (*In re. W.B.* (2012) 55 Cal. 4th 30, 40)

This duty of inquiry includes asking the child, parents, legal guardian, Indian custodian (if any), extended family members and others who have an interest in the child whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled. (Welf. & Inst. Code § 224.2(b).) If this inquiry gives the probation officer “reason to believe” that the child is an Indian child, the probation officer must make further inquiry as soon as practicable. The purpose of further inquiry is to discover whether the child is a member (citizen) of a federally recognized Indian tribe and includes at a minimum:

1. Interviewing the child, parents, Indian custodian, and extended family members to gather the information required in Welf. & Inst. Code § 224.3(a)(5). (Welf. & Inst. Code § 224.2(e)(1)). Essentially this is a family tree back to great-grandparents;
2. Contacting the Bureau of Indian Affairs and California State Department of Social Services for assistance in identifying the names and contact information of the tribes the child may be a member or eligible for membership in; and
3. Contacting the tribes and any other person that may reasonably be expected to have information regarding the child's membership or citizenship status or eligibility. This contact with the tribes is distinct from sending notice on the form ICWA-030. You must make these contacts even if you are not required to send the ICWA-030 notice. This contact must include at a minimum contacting the tribe's designated agent for receipt of ICWA notice by telephone, facsimile or email and sharing information with the tribe necessary to make a membership determination. If the tribe determines the child is a member or eligible for membership you must share information about the current status of the child and the case. (Welf. & Inst. Code § 224.3(e)(3)).

If as a result of this inquiry the probation officer knows or has reason to know that the child is an Indian child, then ICWA requirements beyond inquiry may apply in certain circumstances.

When do ICWA requirements beyond inquiry apply?

All of the remaining ICWA requirements such as notice, active efforts, qualified expert witness testimony and heightened evidentiary standards apply only when a child is either in foster care or at risk of entering foster care and one of the three additional factors apply:

1. The petition under Welfare and Institutions Code section 601 or 602 alleges only status offenses and no conduct which would be criminal if the child were over age 18. (This includes allegations such as a child refuses to obey the orders of a parent or guardian, is beyond parental control, violates age-based curfew ordinances, or is truant or disobedient in school or has engaged in underage drinking or underage possession of alcohol or tobacco because even though this conduct is prohibited in the Penal Code, such conduct would not be a crime if committed by an adult.) (*In re. W.B.* at 42);
2. The court has set a hearing to terminate parental rights (regardless of whether or not there was "criminal" conduct) (*In re. W.B.* at 59); or
3. The court has placed the child in foster care, or in an adoptive or pre-adoptive placement, due to abuse or neglect in the child's home. (*In re. W.B.* at 60). In these situations, the court must make a specific finding that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home. (*In re. W.B.* at 59) Without such a specific finding it is presumed that the placement is based at least in part on the child's criminal conduct. (*In re. W.B.* at 60) If there is such a finding, then ICWA requirements apply regardless of whether the conduct which brought the child before the court was criminal in nature.

Significance of Native American & Indian Identification (regardless of ICWA application)

Services for Native American Children

Following inquiry, if a child and the child's family identify as Native American, that is, as possessing native heritage or a cultural connection with an Indian tribe, then, whether or not ICWA itself applies, as **in all cases** the family's cultural identity is important for case planning and placement purposes. Native American children and their families may be entitled to a broad range of services which should be used whenever possible when developing case plans. You can find these services in your area by looking here <http://www.courts.ca.gov/5807.htm>. Programs may have different eligibility requirements. Some services are available to all individuals who self-identify as American Indian or indigenous while others may only be available to members of federally recognized tribes.

Following inquiry, if a child is an Indian child that is or may be placed in a foster care placement, identifying the child's tribe is important and legally required under the Welfare and Institutions Code apart from ICWA itself. A child's tribe is a required member of the Child and Family Team (CFT) convened for development of the child's case plan, including provisions relating to services and placement. Collaboration with the child's tribe is required as a matter of state law and may expand options available for the child through the provision of culturally appropriate services and through application of tribal standards to assessments and placement approvals. (Welf. & Inst. Code § 16501(a)(4))

Legal Rights of All Native American and Indian Children in Foster Care (regardless of ICWA)

If the child is a member or eligible for membership in a tribe, you are required to look to tribal members when seeking a foster care placement for an Indian child (ie a child who is a member or eligible for membership in a tribe) regardless of whether ICWA applies to the case. (Welf. & Inst. Code §§ 727.1 (a); 16501.1 (c))

All children placed in foster care have rights as specified in California law, commonly known as the Foster Youth Bill of Rights. (W.I.C. §16001.9) Native American children, regardless of membership in a federally recognized tribe, enjoy the following rights:

1. To receive adequate clothing and grooming and hygiene products that respect the child's culture and ethnicity.
2. To be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available. (This is also the first order of placement in the ICWA placement preferences.)
3. To participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities.

4. To attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices.

Indian children who are placed into foster care are entitled to all the same rights as other foster children under WIC 16001.9 and also have unique protections for their cultural and political identity as Indian children. These protections for the cultural and political rights of Indian children in foster care apply equally whether they are placed in foster care under WIC §§300, 601 or 602 (WIC 16001.9(a).) These protections include the right to:

1. a placement that upholds the prevailing social and cultural standards of the child's Indian community, including, but not limited to, family, social, and political ties; (WIC 16001.9(a)(1))
2. be provided with names and contact information for representatives of the child's Indian tribe and to communicate with these individuals privately; (WIC 16001.9(a)(11))
3. have contact with tribal members and members of the child's Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe; (WIC 16001.9(a)(14))
4. engage in traditional Native American religious practices; (WIC 16001.9(a)(15))
5. have probation personnel who have received instruction on ICWA and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care; (WIC 16001.9(a)(20))
6. recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship in an Indian tribe or Alaskan village; to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village; (WIC 16001.9(a)(21))
7. have a representative of the child's Indian tribe in attendance during hearings; (WIC 16001.9(34))
8. a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community; (WIC 16001.9(37))

Probation and social services must ensure that all of these rights are respected, including assisting a child to become enrolled with the child's tribe when the child is eligible for membership but requires enrollment.



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Tribal participation in State court proceedings governed by ICWA.

Under ICWA and corresponding state law, an Indian child's tribe must receive notice of any state court proceedings governed by ICWA involving an Indian child. These proceedings include dependency proceedings, some delinquency proceedings, some family code proceedings and probate guardianship proceedings concerning an Indian child. (see 25 USC § 1903; Fam. Code §§ 170, 177, 3041, Prob. Code § 1459.5, WIC §§ 224, 224.1 CRC 5.480 & 7.1015) Federal and state law mandate and acknowledge a number of substantive and procedural rights of an Indian child's tribe in such state court proceedings, including a right to participate in various ways and an absolute right to intervene in such proceedings "at any point".

Rights if a tribe chooses not to intervene:

An Indian child's tribe is not required to formally intervene in proceedings. If the tribe acknowledges the child, all of ICWA's substantive requirements apply even if the tribe does not intervene. A non-intervening tribe must continue to receive notice of all court hearings involving the child. The tribe must be consulted with respect to the placement of the child. (CRC 5.482(g)) The tribe must be consulted with respect to case planning for both the Indian parents and the Indian child and those case plans must use the available resources of the tribe, extended family members, other Indian service agencies and individual Indian caregivers. (CRC 5.484 (c); CRC 5.690 (c); WIC § 361.7)

Whether or not the tribe intervenes, a representative of the Indian child's tribe is entitled to be present at all court proceedings involving the Indian child (CRC 5.530 (B) (7)) and may address the court, receive notice of hearings, examine all court documents relating to the dependency case, submit written reports and recommendations to the court, and perform other duties and responsibilities as requested or approved by the court. (CRC 5.534 (i))

Right of Intervention:

An Indian child's tribe may intervene, orally or in writing, at any point in the proceedings and may, but is not required to, file with the court the *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of their intent to intervene. (CRC rule 5.482 (e); WIC § 224.4; 25 USC § 1911 (c))

The juvenile court has no discretion to deny a tribe's request to intervene. (*In re Desiree F.* (2000) 99 Cal.Rptr.2d 688, 83 Cal.App.4th 460)

Rights of the Intervening Tribe:

A tribe, as an intervening party, is entitled to all rights afforded to any party in a proceeding, including the right to sit at counsel table, the right to examine witnesses, and the right to be given copies of documents. See CCP §387; see also CRC 5.482(e) and Judicial Council form ICWA-040.

Who May Appear on Behalf of the Tribe:

The tribe may choose to be represented by an attorney at the tribe's expense, but the tribe may also designate any person to represent them in court, and this representative must be given the same rights and courtesies as the attorneys involved. (CJER ICWA Bench Handbook, 2013 at page 32).

The court may not limit the tribe's ability to participate effectively in the case if the tribe chooses to be represented by a non-attorney.¹ States' laws regulating attorneys and the practice of law cannot interfere with or burden the federally protected right of the tribe to participate in the proceedings.²

California Rule of Court, rule 5.534 specifically addresses this issue:

(i) Tribal representatives (25 U.S.C. §§ 1911, 1931-1934)

The tribe of an Indian child is entitled to intervene as a party at any stage of a dependency proceeding concerning the Indian child.

(1) The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf.

The California Rules of the Court, Rule 5.534(i)(1) permits intervention by an attorney or by a representative and makes no distinction between the rights granted to each respectively.

¹ *State v. Jennifer M.*, 277 Neb. 1023, 1024 (2009)

² *State ex rel Juvenile Department of Lane County v. Shuey*, 119 Ore.App. 185 (1993); *In the Interest of N.N.E.*, 752 N.W.2d 1 (2008)