

# ICWA and the Impact of the 2023 Supreme Court Decision

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of ICWA!**

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CONFERENCE**

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# Learning Objectives

- Understand some of the history and practice of the Indian Child Welfare Act
- Understand the basic requirements of the Indian Child Welfare Act
- Learn how the 2023 *Haaland v. Brackeen* decision impacted the practice and future of the law



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# Traditional Child Welfare

- Before western influence children were kept safe through various extended family and community interventions – the natural helping system
  - Natural helpers and healers
  - Oral tradition
  - Traditional ceremonies
  - Clan/tribal/community



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# The Need for ICWA

- Disruption of traditional child protection system and supports
  - Hostilities, removal from lands, outlawing tribal religions and practices, displacement of family and community roles, forced dependence, and removal of children (boarding school)
- Indian Adoption Project
- Large # of removals by public and private agencies



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# 1960–1970

## Indian Country Child Welfare Findings

- 25–35% of all AI/AN children nationwide were removed from their homes
  - 85% placed in non-Indian homes
- AI/AN children brought up in non-Indian homes suffered from a variety of adjustment and emotional disorders
  - Isolation from their families and culture
- Many AI/AN mothers were pressured and coerced into “voluntarily” relinquishing their parental rights.



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# 1978 Indian Child Welfare Act

Congress found:

...that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the **United States has a direct interest, as trustee, in protecting Indian children** who are members of or are eligible for membership in an Indian tribe.  
25 U.S.C. § 1901(3)



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# What Does ICWA Do?

- Establishes minimum federal standards for public and private removal of Indian children from their families
- Recognizes tribes inherent tribal jurisdiction over child custody proceedings
- Provides funding to tribes for the operation of child and family programs



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# ICWA is necessary because it:

- Requires that agencies and courts consider tribal values
- Empowers tribes to care for and serve their children
- Counterbalances bias in individuals and systems
- Expands the resources available to AI/AN children
- Protects the best interests and unique rights of AI/AN children as tribal citizens
- Fulfills the federal trust responsibility



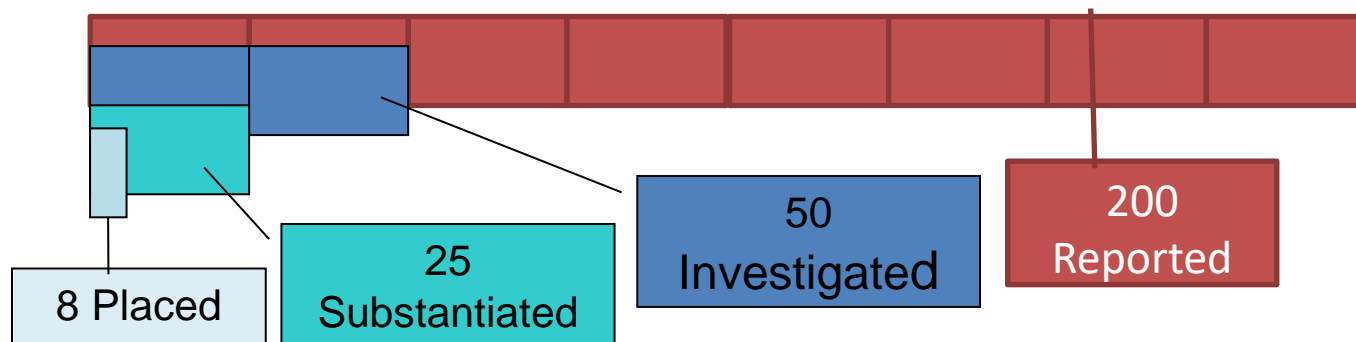
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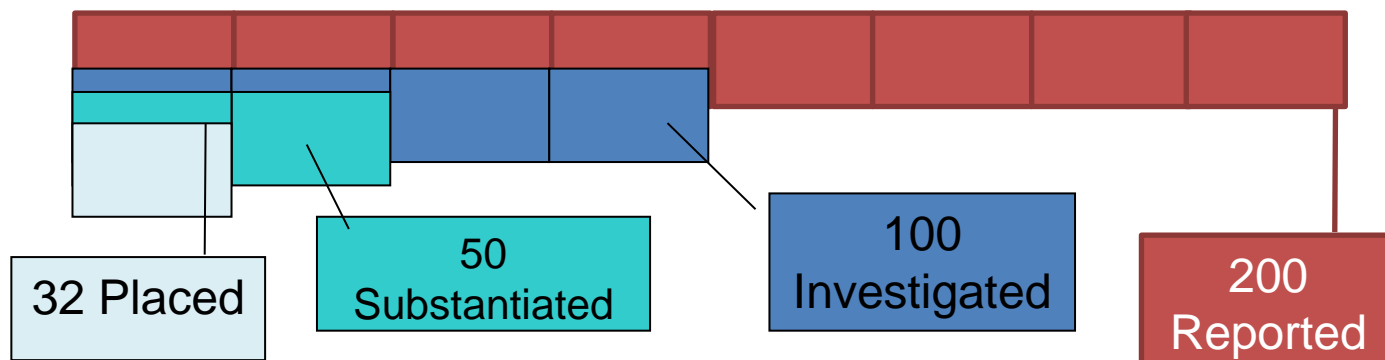
# AI/AN Treatment: Disparities

## White/Caucasian Children



CSSP, 2007

## American Indian/Alaska Native Children



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# Disproportionality By State (2021)

State	Disproportionality rate (2017)	% of children who are AI/AN	% of children in foster care who are AI/AN
Minnesota	16	1.7	27.2
Wisconsin	5.4	1.3	7
North Dakota	4.6	8.6	39
South Dakota	4.1	13.8	57
Nebraska	3.88	1.3	4.9
Oregon	3.53	1.6	5.6
Hawaii	3.5	0.2	0.6
Washington	3.2	1.8	5.7
Montana	3.2	10.7	34.2
Utah	3.1	1.1	3.3
Alaska	2.5	21.2	53
Iowa	2.1	0.4	0.9
North Carolina	1.8	1.3	2.4
California	1.8	0.5	0.9
Idaho	1.6	1.4	2.2



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# Regulations and Guidelines

- December 12, 2016, ICWA *regulations* go into effect.
- December 12, 2016, ICWA revised *guidelines* go into effect
- Regulations carry force of law and are legally binding
- Guidelines are persuasive, but don't carry the force of law.



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# Application

ICWA applies to:

- 1) **All state child custody proceedings**
  - Foster care, guardianship, and adoptive placements
  - Termination of parental rights
  
- 2) Involving and **Indian Child**  
(voluntary and involuntary)
  - Unmarried
  - Under 18 years of age
  - Tribal member or child of tribal member and eligible for membership

\*Indian Child is term used in ICWA for AI/AN child who is a member or eligible for membership in federally-recognized tribe



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**25 USC § 1903(1), (4); 25 CFR § 23.2, 23.103 and FR A.3(e)**

# Application: What is a “Child Custody Proceeding”?

## Other state child custody proceedings covered:

- Status offenses, such as truancy or incorrigibility, that result in foster care, termination of parental rights or adoption
- Status offense could be adjudicated as a part of a juvenile delinquency proceeding that is not based upon the commission of a crime

## ICWA does not apply to:

- 1) Juvenile delinquency proceedings
- 2) Custody disputes between parents
- 3) Voluntary placements made by parents where child can be returned upon parent's demand
- 4) Tribal court child welfare proceedings



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**25 CFR § 23.103 and FR A.2/A.3(a) and FR A.3(e)**

# Application: Who is an Indian child?

- State court must ask each participant if they *know or have reason to know* if child is an Indian child
- If reason to know, but can't confirm, court must:
  - Confirm due diligence was used to identify and work with child's tribe(s)
  - Treat child as an Indian Child until confirmed (Y or N)



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**25 USC § 1903(4); 25 CFR § 23.107 and FR A.3 (c); B.2**

# Notice

- Notice must be sent by *registered or certified mail* with return receipt to child's tribe(s) and child's parents (or Indian custodian).
- Copy of notice must be sent to BIA regional office of state where proceeding occurs.
- Notice is required for each initial proceeding and proceeding thereafter (best practice - hearings).
- Emergency proceedings require notice, but not formal, legal notice.



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**25 USC § 1912(a); 25 CFR § 23.111 and FR B.6**

# Notice

See BIA website for tribal agents contact information <https://www.bia.gov/bia/ois/dhs/icwa>

If parent or Indian Custodian appears without attorney, court must inform them of right to counsel, right to petition transfer to tribal court, right to object to transfer, right to request additional time, and right to intervene.



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**25 USC § 1912(a); 25 CFR § 23.111 and FR B.6**



# Jurisdiction: What must the court do?

- The state court must make a determination of the residence and domicile of the child
- Contact the tribe to determine if the child is a ward of the court, especially if child resided on tribal lands
- If the residence or domicile is on tribal lands or the child is a ward of the tribal court, the state court **must** dismiss the case, notify the tribe of its jurisdiction, and transmit all information to the tribe



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**25 USC § 1911(a); 25 CFR § 23.110 and FR B.5**

# Transfer of Jurisdiction

- Upon petition by the tribe, parent, or Indian custodian, a child custody proceeding (FC or TPR) must be transferred to tribal court
  - The right to request a transfer occurs at each proceeding and at each stage of the proceeding
- UNLESS the following occurs
  - Either parent objects to the transfer
  - Tribal court declines jurisdiction
  - State court determines that “good cause” exists to deny transfer



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**25 USC § 1911(b); 25 CFR § 23.115-117 and FR C.1-C.2**

# Transfer: Good Cause

## Good cause *restrictions*:

- The court may not consider:
  - Whether or not the case is at an advanced stage when the tribe or parents/custodian have not received notice at an advanced stage
  - Whether there were prior proceedings where transfer was not requested
  - Whether transfer could affect the placement for the child
  - The child's contacts with the tribe or community
  - Reservation socio-economic conditions or any negative perception of tribe or BIA social services or tribal court



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**25 CFR § 23.118 and FR C.3**

# Emergency Removal

The state may exercise temporary emergency jurisdiction when the child is at risk of *imminent physical damage or harm*

- Children domiciled on tribal lands who are temporarily off, and children domiciled off tribal lands
- Temporary emergency custody cannot be continued for more than 30 days unless court makes all the following determinations:
  - Restoring child to parent or Indian custodian would subject child to imminent physical damage or harm
  - Court has been unable to transfer proceedings to the child's tribal court
  - It has not been possible to initiate a child custody proceeding



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**25 USC § 1922; 25 CFR § 23.113 and FR A.2; FR B8**

# Intervention

- Tribes have a right to intervene in any ICWA proceeding at any point in the proceeding (involuntary or voluntary)
- When a tribe intervenes, it is guaranteed all the privileges of any other party
- Courts should allow alternative methods of participation court proceedings (telephonic, videoconferencing, etc.)



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**25 USD § 1911(c); 25 CFR 23.111, 23.133 and FR B.7(d)**

# Intervention: What's it look like?

## Monitoring

Means following the case and reviewing records and other information, and sometimes making recommendations.

## Active participant

Means monitoring and participating in some or all court hearings and case reviews and making recommendations.

## Advanced participant

Means monitoring and participating in all court hearings and case reviews, providing recommendations, and assisting in the coordination of services or resources for the family.

\*May change depending on tribal resources, agreement with case plan goals, changes in placement, or rulings by the court



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# Involuntary Foster Care Placements

No foster care placement may be ordered without:

- 1) **Active efforts** to provide remedial services to prevent family breakup (25 USC § 1912(d))
- 2) **Clear and convincing evidence** of serious emotional or physical damage (25 USC § 1912(e))
- 3) **Qualified expert witness** testimony (25 USC § 1912(e))
- 4) Following **placement preferences** (25 USC § 1915(b))



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# Active Efforts vs Reasonable Efforts

Active efforts are engaging families with appropriate services

**25 USC § 1912(d); [25 CFR § 23.2](#) and FR A.4; FR B.1**

Reasonable	Active
Referral	Arranging Services, Aiding Transportation, Helping family engage
Managing Case	Proactively engaging in diligent casework, follow-up, visits, service provision
Meeting minimum policy standards	Creatively meeting the needs of the family involved (e.g., more face-to-face contact than required by policy)
Mainstream service provision	Culturally appropriate service provision
Updating tribe/tribal social worker	Seeking service and case management suggestions and actively co-case managing where tribe has available personnel



# Foster Care Standards: What does it actually mean?

Evidence must show *causal relationship* between conditions in home and risk for serious emotional or physical damage to the child

Evidence of factors by themselves without additional contributing factors does not prove serious emotional or physical damage:

- community or family poverty
- single parenthood
- custodian age
- crowded or inadequate housing
- substance abuse, or nonconforming social behavior



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**25 CFR 23.121 and FR D.3**

# Qualified Expert Witnesses

Testimony of qualified expert witnesses is **required** to support a state court's decision to place the child outside of his/her home

- It must be part of the evidence presented
- Court or agency should request the assistance from the tribe or the regional BIA office to locate an appropriate QEW
- A QEW should have specific knowledge of the child's tribe, culture and customs



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**25 USC §1912 (e)-(f); 25 CFR § 23.122 and FR D.4**

# Foster Care: Placement Preferences

Member of child's extended family

Foster home specified by Indian child's tribe

Indian foster home approved by an authorized non-Indian agency

An institution for children approved by an Indian tribe

\*The tribe can create a different order of placement preferences by resolution

**25 USC § 1915(b); 25 CFR § 23.131(b)**

# Placement Preferences: Good Cause

- The party seeking to assert good cause must show by clear and convincing evidence
- Court's determination must be on the record and should be based on:
  - Request of parents or child, if appropriate
  - Presence of siblings
  - Child's *extraordinary* physical, mental, or emotional needs
  - Unavailability of placement after diligent search
- The court may not consider:
  - The socio-economic status of one placement versus another, or
  - Ordinary bonding or attachment

## Guidelines:

- A judge is *not* required to follow a parent's request.
- Courts can determine good cause doesn't exist even when factors from regulations present  
(Sec. H)

**25 CFR 23.132**

# Involuntary TPR

Termination of parental rights may not be ordered without:

- 1) **Active efforts** to provide remedial services to prevent family breakup §1912(d)
- 2) Evidence “**beyond a reasonable doubt**” that “continued custody of a child by the parent is likely to result in serious emotional or physical damage to the child.” § 1912(f)
- 3) A **qualified expert witness** (QEW) testimony § 1912(f)
- 4) **If adoption occurs, placement preferences** must be followed § 1915(b)



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# Adoption Placement Preferences

The child's **extended family**  
(as defined by the tribe)

Other members of the  
**child's tribe**

Other Indian families



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*\* The tribe can change this order by resolution.*

**25 USC § 1915 (a); 25 CFR § 23.130**

# Key ICWA Requirements

## Adoption

- Consent to adopt from parent(s)- not valid before 11 days after birth and done in court
- Consent can be revoked prior to termination of parental rights and up to two years after adoption is finalized if fraud and duress occurred
- Adoptive placement vacated – notice to tribe and notice to parent(s) and an opportunity to seek custody if parents voluntarily relinquished their parental rights



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# Key ICWA Requirements

## Voluntary Placements

- Notice in voluntary proceedings is *not* required by ICWA (some states require legal notice)
- Placement preferences must still be followed in voluntary foster care and adoptive placements
- Parents can voluntarily consent to foster care placement, TPR, and adoption (executed in writing and recorded before a judge)
- Parents can withdraw consent to *termination of parental rights* or *adoption* of an Indian Child at any time prior to the entry of the TPR or adoption.



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# Voluntary Consent

- Consent must be obtained by BOTH parents
  - If voluntary consent cannot be obtained from both parents then the rights of the non-consenting parent must be terminated by involuntary procedures
- An unwed father must be treated as a father if he has acknowledged or established paternity (guidelines)
  - Establishment can be based on tribal law or custom as well as state law
  - Acknowledging paternity in the proceeding at hand
  - DNA testing



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**FR A.2**

# Haaland v. Brackeen Decision

Majority decision written by Justice Barrett

Article 1 of the US Constitution

- Congress has broad authority to pass legislation impacting Native people and tribal nations
- Court cited Indian Commerce Clause, Treaty Clause, structure of US Constitution, and federal trust relationship as basis

“Our cases leave little doubt that Congress’s power in this field is muscular, superseding both tribal and state authority.” (Page 10)

“In sum, Congress’s power to legislate with respect to Indians is well established and broad.” (Page 12)



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# Haaland v. Brackeen Decision

## Anti-Commandeering

- ICWA applies to both public and private parties and therefore does not meet the test for unlawfully commandeering states
- State courts can be compelled to apply placement preferences, but state agencies are not
- Data requirements are ancillary to state court obligations to follow ICWA

“When a federal statute applies on its face to both private and state actors, a commandeering argument is a heavy lift—and petitioners have not pulled it off.” (Page 22)

“But this argument [ICWA requires state agencies to perform “diligent search” for preferred placements] fails for another reason too: Section 1915 does not require anyone, much less the States, to search for alternative placements.” (Pages 23-24)



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# *Haaland v. Brackeen* Decision

## Equal Protection and Delegation of Powers

- Court held that the plaintiffs did not have standing to raise these issues (no traceable harm to parties)

“We do not reach the merits of these claims because no party before the Court has standing to raise them. Article III [of the US Constitution] requires a plaintiff to show that she has suffered an injury in fact that is ‘fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.’ Neither the individual petitioners nor Texas can pass that test.” (Page 29)



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# Haaland v. Brackeen Decision

Justice Gorsuch concurring opinion with Justice Sotomayor and Jackson joining in part

- Detailed history of federal-state removals of Native children and need for ICWA
- US Constitution provides safeguarding of tribal sovereignty
- ICWA is constitutional and necessary

“In adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is in keeping with the Constitution’s original design.” (Page 38)



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# *Haaland v. Brackeen* Decision

Justice Kavanaugh concurring opinion writing for himself

- Court did not address merits of equal protection and see's plaintiffs' issues in this area as serious



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# *Haaland v. Brackeen* Decision

Justice Thomas dissenting opinion

- No clear authority of Congress to enact ICWA

Justice Alito dissenting opinion

- ICWA exceeds congressional authority
- ICWA subordinates best interests of Indian children to tribal interests
- ICWA unlawfully applies to children who are not members of tribes



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Read the full decision [https://www.supremecourt.gov/opinions/22pdf/21-376\\_7148.pdf](https://www.supremecourt.gov/opinions/22pdf/21-376_7148.pdf)

# So, What's Next?

## Seizing the moment and advocating for change

- Better services for children and families
- More funding for tribes
- Policies that make it easier to use cultural services and keep Native children and youth connected to their culture
- More education for tribal and state leaders on ICWA and state caseworkers



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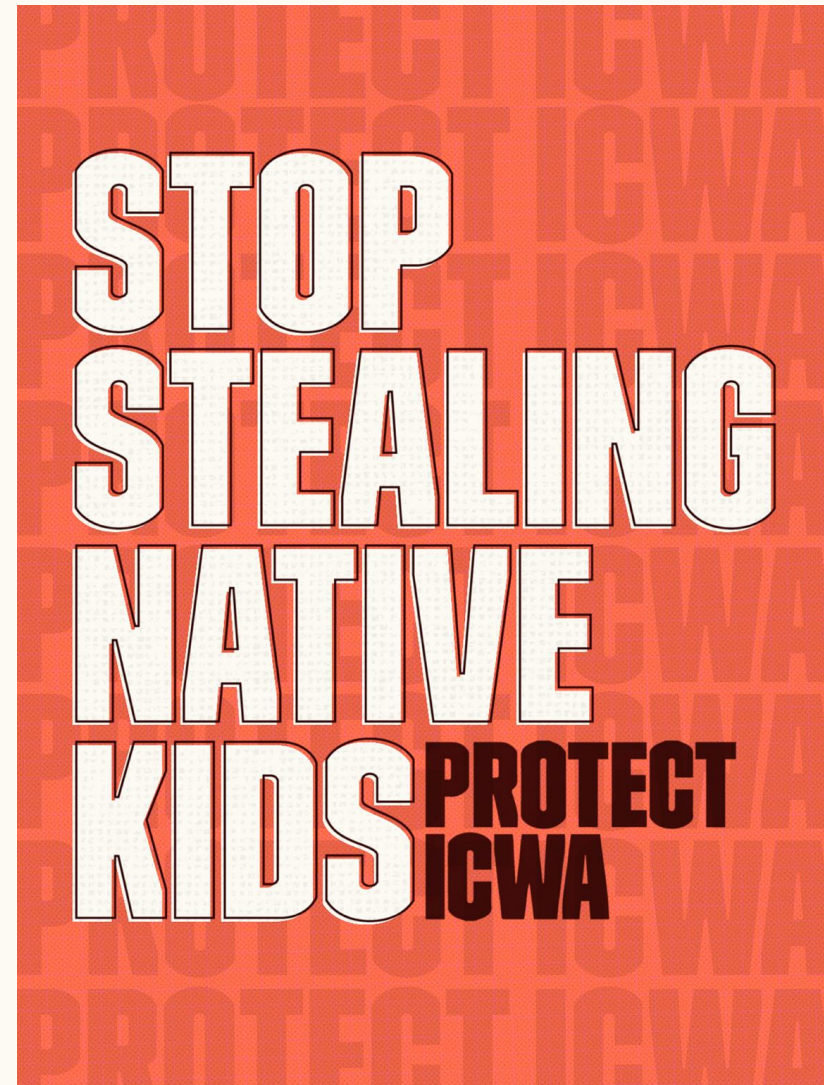


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# Resources

## Factsheet - Disproportionality in Child Welfare

[https://www.nicwa.org/wp-content/uploads/2021/12/NICWA\\_11\\_2021-Disproportionality-Fact-Sheet.pdf](https://www.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf)

## Understanding ICWA Placements Using Kinship Care Research

<https://www.nicwa.org/wp-content/uploads/2020/01/2019-Understanding-ICWA-Placements-Using-Kinship-Care-Research-Final.pdf>

## Contemporary Attachment and Bonding Research

<https://www.nicwa.org/wp-content/uploads/2020/10/Contemporary-Attachment-and-Bonding-Research-Final.pdf>



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# Resources

## 2016 ICWA Regulations

<https://www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings>

## NICWA/NARF Summary of ICWA Regulations

<https://www.nicwa.org/wp-content/uploads/2017/04/NICWA-NARF-ICWA-Regulations-Summary.pdf>

## 2016 Guidelines for Implementing the Indian Child Welfare Act

<https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf>

## ICWA Designated Agents Listing

<https://www.bia.gov/bia/ois/dhs/icwa/agents-listing/>



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# Resources

## Native American Rights Fund

- Practical Guide to ICWA

<http://www.narf.org/nill/documents/icwa/index.html>

- ICWA Newsfeed <https://icwa.narf.org/>

## NICWA Resources for Services Providers

<https://www.nicwa.org/service-providers/>

## NICWA Latest News

<https://www.nicwa.org/latest-news/>



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# Resources

Tribal Child Welfare Codes as Sovereignty in Action: A Guide For Tribal Leaders

[https://turtletalk.files.wordpress.com/2016/08/nni\\_nicwa\\_tribalcodesurvey.pdf](https://turtletalk.files.wordpress.com/2016/08/nni_nicwa_tribalcodesurvey.pdf)

State ICWA laws

<https://turtletalk.blog/icwa/comprehensive-state-icwa-laws/>

A Survey and Analysis of Tribal/State ICWA Agreements and Promising Practices

[https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa\\_tribal-state\\_agreements\\_report.pdf](https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa_tribal-state_agreements_report.pdf)



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# Thank You for Attending Our Session!

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<https://www.nicwa.org/get-involved/>



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