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ORIGINAL ARTICLE

The Indian Child Welfare Act during the *Brackeen* years

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Abstract
From 2017 through 2022, while the Indian Child Welfare Act ("ICWA") was under direct constitutional attack from Texas, state courts around the country continued hearing appeals on ICWA with virtually no regard for the decision-making happening in *Haaland v. Brackeen* in the federal courts. For practitioners following or working on both sets of cases, this duality felt surreal, as they practiced their daily work under an existential threat. The data in this article draw from the authors' previous publications providing annual updates on ICWA appeals, and now include cases through 2021. It provides a description of appellate data trends across this time period, as well as for each year, while also highlighting key appellate decisions from jurisdictions across the country. Perhaps what this article demonstrates more than any single thing is the amount that ICWA is a part of child welfare practitioners' daily lives now, in a way that will be difficult to upend, regardless of the Supreme Court's ultimate decision.

KEYWORDS
appellate, child protection, data, Indian Child Welfare Act, tribal nations

INTRODUCTION

In 2017, the state of Texas and a set of foster parents filed the first complaint in what was to become *Haaland v. Brackeen*.[1] This constitutional challenge to ICWA has implications for both the law itself, but also federal Indian law more broadly. The Act has survived similar challenges in the past, though none directly from a state, for over forty years.[2] Despite this challenge wending its way through the federal court system, state courts and agencies continued to apply the law with very little acknowledgement of the case, even after the federal district court in Texas declared the Act unconstitutional.[3] The case is currently pending in the Supreme Court and will be decided sometime before the end of June 2023.[4] While the decision could well fundamentally change both ICWA practice and federal Indian

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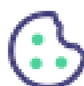

law, the persistence of tribes and states working together to try to achieve better outcomes for Native children and families will not stop.

This article begins with a very brief introduction to ICWA, followed by a description of the methods used to analyze ICWA appeals. The article then gives some overarching trends, followed by a year-by-year analysis of ICWA appeals from 2017 to 2022, including case descriptions of key cases for each year. At the end, the article briefly looks beyond *Brackeen* to provide some possible areas of work depending on the Court's decision.

THE INDIAN CHILD WELFARE ACT AND APPELLATE PRACTICE

In 1978, Congress acknowledged "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[5] In addition, prior to 1978 "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies."[6] After years of testimony and activism by Native activists, tribes and non-profit organizations, Congress passed the Indian Child Welfare Act (ICWA).[7]

ICWA created "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" that state courts must follow.[8] The law applies to cases that involve both Indian children[9] and a "child custody proceeding"[10] as defined in the law. Determining who is an Indian child for the purposes of applying ICWA leads to some of the thorniest appeals described below.

ICWA's requirements include that the state court must inquire into the membership status of every child,[11] provide tribes and parents notice in child welfare proceedings involving an Indian child,[12] ensure that tribes are given the opportunity to intervene in such proceedings,[13] transfer jurisdiction to the tribal court upon request of the tribe or parent,[14] require that the party removing a child or terminating parental rights to provide active efforts to prevent the breakup of the family,[15] and present testimony of a qualified expert witness[16] before placing an Indian child in foster care or terminating the parental rights of an Indian child. The Act also requires higher burdens of proof for both placing a child in foster care and terminating parental rights.[17]

Because family law is often said to be under the purview of the states,[18] there can be legislative diversity in state child welfare laws, policies, and processes. However, all states follow the requirements of the Social Security Act to receive funding for their child protection and foster care systems.[19] ICWA, therefore, is one of many federal requirements of family dependence proceedings, but one of the few laws not required to be incorporated into state law to receive federal funding.[20] As such, most state courts have interpreted ICWA to apply in conjunction with, and in some instances preempting, state child welfare laws.[21] Many states have incorporated parts of ICWA into their state laws, while an increasing number have passed comprehensive state Indian child welfare acts.[22]

In addition, after the Supreme Court decided *Adoptive Couple v. Baby Girl*[23] in 2013, there was a flurry of federal action. In 2015, the Department of the Interior released new Guidelines,[24] as well as proposed Regulations,[25] kicking off a year-long notice and comment period. In June 2016, the Department of the Interior released the final set of comprehensive and substantive Federal Regulations regarding ICWA.[26] At the same time, the BIA released 2016 Guidelines which replaced the 2015 Guidelines and provide interpretation to the Regulations.[27] That makes this analysis of 2017–2021 case law particularly relevant, as it is the first window into what compliance issues remain after the passage of these regulations; and what compliance issues have arisen because of these regulations.[28]

Unfortunately, there are very little data on trial level ICWA compliance. The data the federal government collects do not accurately identify Indian children as defined by law, but rather American Indian

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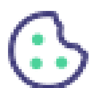

and Alaska Native children as determined by their self-identified race. This means the data are both over and under inclusive and cannot accurately determine outcomes in cases governed by ICWA.[29] Attempts to include ICWA specific data in federal requirements have been met with substantial resistance from the Children's Bureau and the BIA.[30] Some states have piecemealed together data. However, these data can vary in reliability by county, or only measure certain outcomes.[31]

ICWA appellate cases provide a small slice of data, representing just a piece of the total trial level cases involving ICWA on a yearly basis. Even the question of what percentage of trial cases these appellate cases represent is impossible to determine. As such, it is also impossible to know whether these appeals are in fact a representative sample of the issues trial courts face. Based on the authors' experience working with tribes and states, however, it does give a glimpse of common issues confounding state courts and agencies. That said, what the data do show is a vast majority of cases are appealed by parents, so the issues are necessarily skewed toward their concerns and appealable issues.

METHODOLOGY

Neither author has a background in data or statistics. This article leans heavily on the collection of cases and author expertise in what the cases decide. This article should not be misunderstood as a rigorous data study, but rather a compilation of observations of years of reading hundreds of ICWA opinions. These all are read for the research questions at hand: What trends, if any, do these opinions show in ICWA compliance and application? What are the trends in ICWA appellate litigation?

Legal databases make both published and unpublished cases readily available to the practitioner and scholar, assuming they can pay for the subscription fee. Prof. Fort read every case involving ICWA as they were released through daily alerts from Westlaw using the search terms "Indian Tribe," "Tribal Court," Federal Indian law," American Indian," and "Native American," from LexisNexis using the search terms "Indian tribe," "American Indian," and "Tribal Court," as well as subscriptions to all opinion releases from the Washington and Alaska court systems. She then sorts them by case name, date, court, county, state, whether the case is reported or not, the top two issues, up to three named tribes, the outcome of the case, and who appealed the case. Her work is not coded by a second reader, and over the years the issue descriptions have changed slightly but remain similarly classified. In addition, while unpublished opinions cannot be used for precedent in legal argument, the authors include those cases in the numbers to reflect the actual litigation topics practitioners encounter, as they are relevant to illustrate how many cases appellate courts are encountering and what issues arise.

The classifications are as follows:

Active Efforts: Opinions that primarily discuss the finding (or lack thereof) of active efforts in either a foster care or termination proceeding.[32]

Appointment of Counsel: Opinions that focus on ICWA's requirement that indigent parents receive appointed attorneys.[33]

Best Interest: Opinions that primarily discuss the court's analysis of the best interest determination regarding an Indian child above all other issues.

Consent to Termination: Opinions that primarily discuss an order terminating parental rights where arguments center on whether the parents' consented to the termination.[34]

Foster Care Proceeding: Opinions that discuss what constitutes a foster care proceeding under ICWA's definition.[35]

Guardianship: Opinions that discuss a determination that ICWA applies to a guardianship.[36]

ICWA Finding: Cases where a parent has appealed the issue that the lower court made no specific finding that ICWA did or did not apply after an inquiry.

Improper Removal: Opinions that discuss the application of section 1920 of ICWA, requiring the return of the child to the parent if they were improperly removed.[37]

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Indian Child: Opinions that discuss a court's determination of whether the child is an Indian child under ICWA's definition—including whether there is "reason to know the child is an Indian child." These cases happen after inquiry, so are not coded under that category.[38]

Interlocutory Appeal: Opinions that discuss a court's determination that an order in an ICWA case is appealable, which may include an analysis of section 1914.[39]

Inquiry: Opinions that primarily discuss social services or the court's failure to ask questions about or investigate a parent's claim they may be American Indian or Alaska Native. This category may include cases where notice was sent without enough information, though should be limited to the issue being a lack of inquiry rather than incorrect notice. Subclassifications of this include "duty of inquiry," which was how some California courts described these cases for a time, as well as "further inquiry" which is what the agency is supposed to do after the initial inquiry comes back with information indicating the child may be an Indian child. Most recently, this also includes "relative inquiry" where an agency failed to do initial or further inquiry of relatives beyond the parents.[40]

Jurisdiction: Opinions that discuss a state court's determination that it has jurisdiction to hear the case.[41]

Reason to Know: Opinions that primarily discuss the threshold for whether there is a reason to know there is an Indian child involved in a child welfare proceeding. Over time, most of these cases have become coded as "Inquiry" cases.[42]

Notice: Opinions that primarily discuss the adequacy of notice to tribes. This includes notice that goes to the wrong tribe, goes to the wrong address, does not go to enough tribes, or was not updated with new information.[43]

Placement Preferences: Opinions that primarily discuss the placement order of one or more children.[44]

Qualified Expert Witness (QEW): Opinions that primarily discuss qualified expert witness testimony in either a foster care or termination proceeding.[45]

Removal: Opinions that discuss the evidentiary standards for the removal of a child from the home. These may include both emergency and non-emergency proceedings.[46]

Termination of Parental Rights: Opinions that discuss the entirety of the elements of a termination, where no one element was elevated over the others. These include active efforts, qualified expert witness, and the burden of proof.[47]

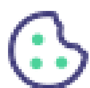
Transfer to Tribal Court: Opinions that primarily discuss an order either denying or granting a transfer of jurisdiction to tribal court.[48]

Vacated Adoption: Opinions that discuss a parent's attempts to show fraud or duress to overturn a consent to adoption.[49]

Ward of the Tribal Court: Opinions that primarily discuss the court interpretation of whether a child is the ward of the tribal court for jurisdictional purposes.[50]

After sorting the cases, Prof. Fort used the Excel pivot table tool to find trends in appellate cases each year and across the five years. Based on this data analysis, the authors worked together to pick cases to highlight. They selected the cases that either reflect trends or show case unique legal reasoning by the court. Because of the legal importance of precedent, authors have chosen to only highlight and summarize reported cases, but practitioners may want to keep in mind that unreported ones may still have significant legal research and reasoning useful to their cases.[51]

Each year there are around two hundred ICWA appellate cases in state courts.[52] In 2017, there were two hundred and fourteen appealed ICWA cases and thirty-four were published.[53] In 2018, two hundred and six ICWA cases were appealed, and forty-nine were published. In 2019, there were two hundred and twenty-six cases appealed and forty-two published. In 2020, there were two hundred and five cases, and only twenty-six were published. Finally in 2021, there were two hundred and twenty-six cases, and thirty-eight were published. Though not a part of the article, reported cases in 2022 were already up to fifty as of October.[54] As these numbers illustrate, ICWA is litigated more often than non-practitioners might imagine, and there is much information to be gleaned from analysis of appellate case data and qualitative assessment of key cases themselves.



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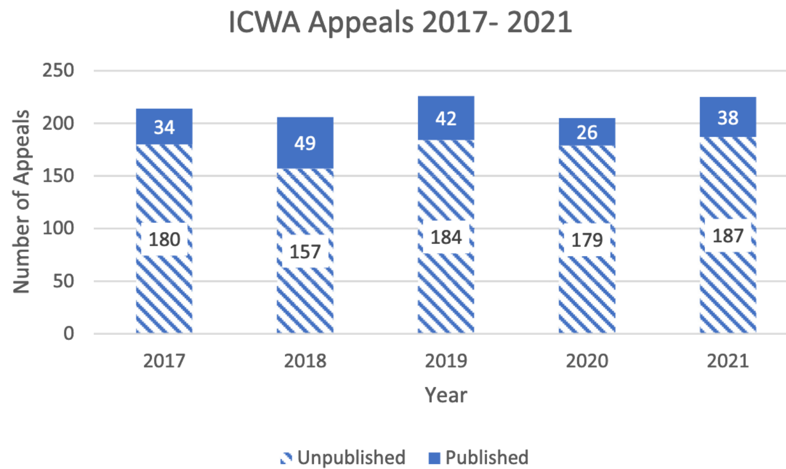
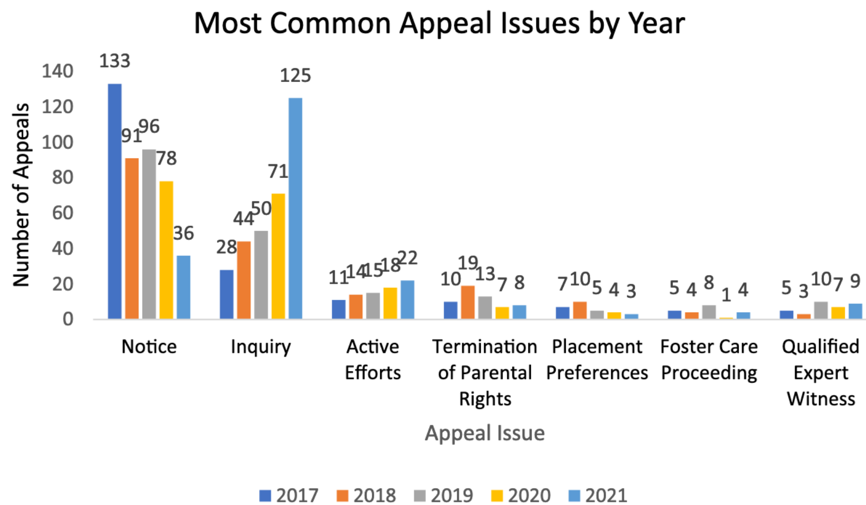


DATA TRENDS

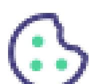
Summary of five years

For the past five years, there have been over 200 appealed ICWA cases every year for a total of 1077 cases. One hundred and eighty-seven of these cases over the years have been reported, or 17% of the cases. Due to the size of the full data set, the following five-year trend discussion focuses on the one hundred and eighty-seven reported cases.



Number of reversals and parental appeals

More than 40% of all appealed cases are remanded or reversed (80/187). Although statistics are not widely published, for comparison, in 2017–2020 in California Courts of Appeal, 10–13% of all child welfare cases were reversed,[55] in 2020 in the North Carolina Court of Appeals 12.5% of child welfare cases were reversed,[56] and in 2019 in Alaska 27.3% of all civil cases (not just child welfare) were reversed.[57] This disparity in the number of reversed or remanded non-ICWA cases



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versus ICWA cases on appeal highlights that courts and agencies are still struggling with ICWA's application, 40 years after the law was passed.

A vast majority of ICWA appeals come from parents. Eighty-seven percent of appeals are brought by one or both parents (164/187). It is also important to note that 51% (85/164) of the cases parents appealed involved an initial determination of ICWA's application, whether that be through inquiry, notice or the court's determination of whether the child involved is an Indian child. These data indicate that agencies and courts are still struggling with the first step in an ICWA case—whether they have an ICWA case at all. Nearly half of all parental appeals are reversed or remanded (77/164).This combination of data indicates there are still significant concerns with the application of ICWA at the trial court level when it comes to parental rights.

Tribal appeals and tribal appellate participation

The case statistics show that Tribes themselves rarely appeal. Tribes only appealed nine times in the reported cases, and the courts affirmed the lower court decision five of those nine times. The type of appeals from Tribes are unsurprising, including transfer to tribal court (3), right of tribal intervention (3), qualified expert witnesses (1), termination of parental rights (1), and whether a case involved a child custody proceeding (1). There are no clear statistical reasons for the limited number of tribal appeals, but based on their experience, authors are aware of a few possible reasons.

First, Tribes are usually aware and concerned that an appeal will mean an extension of the underlying child welfare which can lead to less stability for a child. Often a Tribe's position is to *avoid* an appeal in the first place.[58] In addition, many Tribes do not have the capacity to take a case up on appeal; either these Tribes lack counsel, or their counsel does not have the capacity to manage an appeal.[59] In addition, if they do, they may not have the ability to appear in the state where the case arose without putting themselves in danger of "unauthorized practice of law," a complaint that can lead to losing their license, unless they contact and work with local counsel through the jurisdiction's *pro hac vice* rules.[60] Unfortunately, in the vast majority of ICWA cases across the country, Tribes are the only unrepresented party. Although new Children's Bureau guidance discusses the importance of tribal attorneys in state ICWA cases and even opens up IV-E funds for this purpose, access to this complicated program is prohibitive, and the authors are only aware of one Tribe nationally who has received tribal attorney funding for state ICWA cases via this path.[61] Section II of ICWA also anticipated funding for "off reservation ICWA cases," including support for tribal attorneys, this program, however, is currently unfunded.[62]

An issue of related concern is that Tribes are often not notified of an appeal by the appellant—even when the Tribe may have intervened in the case below.[63] State rules of appellate procedure and even state e-filing systems do not always contemplate and accommodate the Tribe as a party at the appellate level in a child welfare proceeding. In fact, many state appellate court rules simply do not contemplate *intervenor* party briefs in general, so Tribes are forced to choose between filing an *amicus* brief or attempting motion practice on appeal to ensure their status as a party.[64] Filing as an *amicus* has considerable drawbacks, including limited page numbers,[65] and a general perception that those briefs are less important than principle briefs.[66] If the tribal attorney can get past all of that, the court or agency may also be unwilling to share even basic information with the Tribe if it considers that information to be confidential making it difficult to write a persuasive and topical brief.[67]

Unfortunately, without any tribal brief on appeal, appellate courts lack guidance regarding the Tribe's position. The lack of a brief or participation is sometimes misinterpreted as a lack of concern for the child or family or an alignment of tribal and parental interests. In some decisions, the court's confusion is apparent, and its ignorance of the Tribe's position comes through in the opinion.[68]

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Issue trends

A trend that weaves through each of the issue trends described below is state court's use, and interpretation, of the Federal Regulations.[69] As noted above, the promulgation of the regulations was the first time the federal government issued binding guidance on ICWA's application. State courts are generally deferring to the Regulations on issues where they are on point. Some go so far as to engage in the *Chevron* test—or a state equivalent—to recognize the authority of the BIA to promulgate regulations and give deference to the implementing agency's interpretations.[70]

Where the Regulations are not on point, or where there are omissions, courts turn to the 2016 BIA Guidelines, as well as the hundreds of pages of "front matter" that preface the Regulations to describe the public comments received and interpretive choices made in the final rule.[71] Generally, the Regulations, as an exercise, have been a success—courts use them. Authors' review of cases has shown that they have given state court judges helpful interpretations on an often-misunderstood law that had previously been interpreted counter to both legislative history and its "spirit." Through this, they have also promoted more consistent compliance. However, this also means courts are interpreting the regulations strictly, and in some cases overturning years of precedent that was beneficial based on the court's understanding of the new language.[72] As always, the devil is in the (language) details.

Reason to know, inquiry, and notice

ICWA requires notice to Tribes, parents, and Indian custodians be sent when a court "knows or has reason to know that an Indian child is involved."[73] What constitutes reason to know remains unclear and inconsistent both across the states and within states, and has not been helped by the Regulations.[74] The reading most in line with the intent of ICWA and the 2016 Regulations is a low threshold that includes "tribal heritage" and/or "Indian ancestry."[75] While this low bar may not, in some states, trigger the protections of ICWA,[76] evidence of any sort should at least trigger state agencies to inquire further with the child's affiliated tribes before determining the child is not enrolled or eligible for enrollment with an enrolled parent. Every Tribe determines its membership differently.

Further, while the regulations require due diligence to verify whether a child is an Indian child,[77] there is no operational definition of this standard.[78] States may decide, either through policy, case law, or statute, that this will include outreach to Tribes and family members through phone calls, emails, and faxes as soon as information about tribal heritage arises. However, a timely, accurate, and formal notice process as required by the law ensures Tribes receive detailed family ancestry information and a clear understanding of the timelines of the case and the best way to respond, whether that alone is due diligence, however, remains unclear.

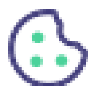
Qualified expert witnesses ("QEWs")

Qualified Expert Witnesses who must testify on behalf of the party placing an Indian child in foster care (including guardianship) or terminating the parental rights of the child are a unique requirement to ICWA.[79] They are the state's witnesses intended to bring tribal cultural considerations into the courtroom, and provide expert advice on the necessity of removal, guardianship, or termination.[80]

The regulation's language has caused more and more states to prioritize an expert who can validate the need for a change in custody rather than bring forward issues of cultural misunderstandings.[81] In the wake of these cases, states should use multiple state QEWs to meet both aspects of the QEW requirement. Further, tribal, parent, and children's attorneys may need to bring in their own witnesses to provide context--especially when disagreeing with the QEW's testimony.

Transfer

ICWA allows parents and Tribes to request a case be transferred from state court to tribal court.[82] This transfer "shall" happen absent an objection from the parent, the tribal court, or if the state court finds good cause to the contrary.[83] Given the overburdened and under resourced state systems, it is hard to understand why state courts are so reluctant to transfer cases to their tribal counterparts and so open



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to finding reason for good cause. In five years, Tribes appealed three denial of transfer to tribal court cases, while the child's representative also appealed three transfer *to* tribal court cases.[84] Tribes won transfer to tribal court in one out of the three cases,[85] while the child representatives won a denial of transfer to tribal court in two out of their three cases.[86] There is one reported case from 2021 that was appealed by both the Tribe and the parent where the court affirmed the denial of transfer.[87] Regardless, the numbers are frankly too small to draw significant conclusions.

Tribes that develop respectful relationships with state judges are more easily able to get cases transferred. However, issues of distrust often involve courts far from the Tribe requesting the transfer and putting this burden on Tribes, to build trust with state courts, further reduces their ability to work on their own systems. Indeed, there is limited evidence that state Supreme Courts may be marginally more likely to transfer a case based on the law, rather than subjective standards about the tribal court system.[88] State court administrators should take up the mantle to train their judges on tribal court systems and encourage state judges to reach out to tribal counterparts—much as they do under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCJEA")—when making transfer decisions.

Active efforts

The sixteen active effort cases over the past five years are the clearest example of courts relying on the regulations when making determinations.[89] Parents appealed fifteen out of sixteen active efforts cases, and courts affirmed seven or 43% of the cases. More than half the time, appellate courts are sending cases back to the trial level for compliance with active efforts findings.[90] This appears to be an area where state courts are deferring to the definitions of a key term as it is defined by the administering agency—here the BIA. By all accounts, it appears the regulations have in fact improved understanding and increased compliance with this aspect of ICWA. As advocates anticipated, courts give weight both to those actions on the list and those actions missing from the list, turning to the 2016 BIA Guidelines for additional guidance.[91]

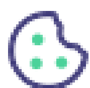
Practitioners are often concerned, rightfully so, with active efforts on the micro-level, meaning the obligations of the individual caseworker to provide specific services to remedy concerns in the family's case plan. However, beyond that, those thinking and writing in this area must also assess the macrolevel of service provision—in other words, how do systems ensure that quality and culturally relevant services and supports are available for Indian families regardless of where they live. Whether, in fact, state systems can meet those needs is also in question. As with all macro issues in the child welfare system, until agencies address this issue at a broad level, individual caseworkers will continue to struggle to meet the requirements of the Act.

2017

Trends

In 2017, there were 214 appealed ICWA cases. Thirty-four of those cases were published. Supreme Courts in Alaska (six cases), Montana (two cases), Arizona, Nevada, Utah, South Dakota, Vermont, and North Dakota all decided ICWA cases this year, and all of them were reported.[92] The remaining opinions, published and unpublished, were authored by states' intermediate courts of appeal.

The number of ICWA appellate cases varied significantly by jurisdiction, as did the number of cases which the courts chose to report. California led the states with 152 total cases, but only five were reported. California had both the greatest number of cases, and one of the lowest percentages of reported cases at three percent. Alaska was second with six opinions, three reported; followed by Michigan and Texas, which each had five opinions, two reported. Kansas, Arizona, and Washington had a total of four cases. Washington did not publish any of their decisions, and Kansas and Arizona published two and three, respectively. Both Arkansas and Utah had three cases, although none were reported in Arkansas while all three were reported in Utah. Montana (2/1), North Carolina (2/1), and



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Minnesota (2/0) had two. Finally, the following states had one ICWA case: Connecticut, Indiana, Iowa, Massachusetts, Nebraska, Nevada, Ohio, Oregon, South Dakota, Missouri, Vermont, North Dakota, Illinois, and Wisconsin.

The most litigated issues were notice and inquiry, followed by active efforts, termination of parental rights (which includes burden of proof issues), placement preferences, transfer to tribal court, and issues concerning qualified expert witness testimony.[93] In 2017, more than half of the notice cases were remanded to require proper notice be sent. Fifty-seven different Tribes were named as a child's possible tribe. In twenty-six cases, the tribe was unknown (the parent or court did not know the name of Tribe). In seventeen cases, the tribe was unnamed (the court did not record the name of the Tribe in the opinion, sometimes for purposes of anonymity).

Just under fifty percent of the appealed cases were affirmed, which means over fifty percent were reversed outright or sent back to the lower court.[94] Finally, of all the cases, only three were appealed by tribes (Navajo Nation, Nenana Native Village, and Gila River Indian Community). Parents appealed the rest.

Beyond the numerical breakdown of the data, there are a few clear trends in litigation in 2017. More courts were using and implementing the new federal regulations.[95] However, because so many states were comfortable with and had precedent concerning the 1979 BIA Guidelines, courts continue to use and cite the non-binding 2016 BIA Guidelines in their opinions.[96] Given state court familiarity with ICWA guidelines (on the books since 1979) versus federal regulations (rarely, if ever, applied in state court child welfare cases), ICWA advocates and practitioners should have predicted this outcome. While both the Federal Regulations and the BIA Guidelines came out in 2016, there are cases on appeal still addressing underlying petitions from 2014 or 2015, forcing courts to determine which authority governs their decisions.[97]

In addition, states were also wrestling with how ICWA applies to privately initiated terminations of parental rights. These cases include stepparent adoptions, terminations under abandonment statutes, and terminations in voluntary adoptions. Generally, the trend has been to apply ICWA (or relevant state law) to these cases to ensure the parent whose rights are being terminated receives notice and protections against a termination. Though decided in 2016 and not included in this survey, the Washington Supreme Court determined the state ICWA law applied to a non-Indian father in a stepparent adoption.[98] In 2017, Arizona held similarly, and then, Utah found for an unmarried father whose rights were being terminated in a voluntary adoption involving outright fraud.[99] However, at the very end of 2017, the Wisconsin Court of Appeals found that United States Supreme Court precedent meant that a parent who had abandoned their child did not get the protections ICWA provides.[100]

Notable cases

In re K.S.D.,[101] *North Dakota Supreme Court, standard of evidence*

In this termination of parental rights case, the Supreme Court of North Dakota held there was nothing in the record to support ICWA's termination-of-parental-rights requirement.[102]

The court found that ICWA's termination standards do not preempt state termination law because they can be “harmonized” with state law,[103] concluding that in ICWA cases, petitioners must “prove the state law grounds for termination by clear and convincing evidence, and must prove the additional federal requirement beyond a reasonable doubt.”[104] Because neither of the state child welfare workers specifically testified as the qualified expert witness and because “the plain terms of the federal law strongly suggest that neither…could be an expert witness” the record was void of evidence necessary under 25 U.S.C. § 1912(f).[105]

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In re B.B.,[106] Utah Supreme Court, termination of parental rights

In this voluntary termination case where a father's consent was deemed unnecessary, the Utah Supreme Court held, contrary to the district court's conclusion, that the father was a “parent” for purposes of ICWA and under 25 U.S.C. § 1914 had the right to petition the court to invalidate the action terminating the mother's parental rights.[107] The court applied a federal reasonability standard to both the time and manner in which unwed fathers may acknowledge or establish their paternity.[108]

Gila River Indian Community v. DCS,[109] Arizona Supreme Court, transfer

In this preadoptive/adoptive placement proceeding, the Arizona Supreme Court held that 25 U.S.C. § 1911(b), which allows for transfer of foster care proceedings and termination of parental rights proceedings to tribal court, does not apply to state preadoptive and adoptive placements. The court went on to hold that the section also does not *prohibit* the transfer of such actions to tribal court.[110] The court reasoned the plain language of 25 U.S.C. § 1911(b) applies to foster care and termination of parental rights proceedings and *requires* transfer absent good cause or parental objection.[111] The court then stated that “[s]ection 1911(b) is silent as to the *discretionary* transfer of preadoptive and adoptive placement actions, but we do not interpret that silence to mean prohibition.”[112]

2018

Trends

In late 2018, the Northern District of Texas declared ICWA unconstitutional.[113] While the case was stayed by the Fifth Circuit,[114] 2019 would have been the first year for state appellate courts to take the case into consideration. Only three did,[115] and all of them declined to follow or extend it, including a court *in* Texas.

In 2018, there were 206 appealed ICWA cases, but only forty-nine were published. Supreme Courts in seven different states issued reported ICWA-related opinions that year, including Alaska (three cases), Montana (seven cases), South Dakota (two cases), Michigan, Minnesota, Nebraska, and North Dakota.[116] Meanwhile, Alaska had another eight unreported decisions, Montana another three, and Nevada issued one. The remaining opinions, published and unpublished, were authored by states' intermediate Courts of Appeal.

California led the states with 125 cases, but only nine were reported. California has both the greatest number of cases, and one of the lowest percentages of unreported cases at about seven percent. Alaska is second with eleven opinions, three reported; followed by Montana with ten opinions, and seven reported. Michigan had eight opinions but reported only two, while Colorado issued eight opinions and published all eight. Ohio, Arizona, and Texas each issued four opinions, and reported two, one, and two, respectively. Illinois issued three unreported opinions. Indiana, Iowa, New Jersey, and Washington each issued two unreported opinions. Missouri, Oklahoma, and South Dakota each issued two reported decisions. Finally, Connecticut, Idaho, Kansas, and Nevada issued one unpublished opinion each, and Minnesota, Nebraska, and North Dakota each published their one decision.

The most litigated issues were notice and inquiry,[117] followed by active efforts, termination of parental rights (which includes burden of proof issues), placement preferences, foster care proceeding, tribal customary adoption, and determination of an Indian child.[118] Of the 206 total cases, seventy-four were remanded and five were reversed. Of the forty-nine reported cases, twenty-five were affirmed; twenty-two were remanded or reversed; one was dismissed; and one was affirmed in part and reversed in part.

During 2018, exactly half of the notice cases were remanded for proper notice (forty-two), and two were reversed. Slightly more than half of the inquiry cases were remanded as well (twenty). Fifty-seven different tribes were named as possible tribes of the children in these cases. In twenty-six cases, the

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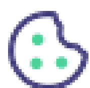


tribe was unknown (the parent did not know name of his or her tribe). In seventeen, the tribe was unnamed (the court did not record name of tribe in the opinion).

Like 2017, most the year's active efforts cases—eleven out of thirteen—were unreported.[119] Of the thirteen cases in eight different states, only one was remanded for the trial court to make specific active efforts findings.[120]

In addition, a little more than half of the termination of parental rights cases were reported.[121] In every single case, the termination was affirmed. Finally, there were more placement preference cases in 2018 than 2017, and only two of the nine cases were published.

There are a few trends worth noting for 2018. While the total number of cases was down, the number of reported cases increased considerably given the small sample size. This indicates one reason to distinguish published cases from unpublished cases; this way, the count does not seem artificially inflated by the number of reported cases. The types of cases remained generally the same as 2017.

In all the cases reviewed by the authors for 2018, no ICWA case was appealed by a Tribe. An additional trend this year is the increased number of cases interpreting state laws that implement ICWA. California and Michigan in particular had cases that rested heavily on interpretations of state law.[122] California's tribal customary adoption law, a unique state law that allows a state court to apply tribal law in the context of an adoption, was interpreted four times by California state courts.[123] In addition, Michigan had a procedurally difficult and complex case involving a father consenting to termination in the face of a state termination hearing.[124] The outcome of that case was based exclusively on the Michigan Supreme Court's reading of the Michigan Indian Family Preservation Act rather than a reading of ICWA. The cases summarized are only those in which courts interpreted ICWA, but practitioners should be aware of state-specific law holdings insofar as they apply to Indian children.

Two states had an uptick in the number of opinions they issued—Montana and Colorado. Colorado's Court of Appeals issued several considered opinions regarding inquiry and notice for which it provided specific and detailed remand instructions.[125] Remand instructions in child welfare cases are particularly important and should be an area of focus for ICWA appellate practitioners. The most obvious example of a problematic reversal or remand on appeal was in *Adoptive Couple v. Baby Girl*,[126] after which no state court held a placement hearing regarding the child's best interest. Because a remand or reversal can end up changing the placement of a child immediately, appellate attorneys should consider providing specific instructions on that issue in the conclusion portions of their briefs.[127]

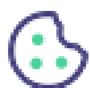
Montana's reported cases ran the gamut of ICWA issues, including active efforts, the determination of who may be considered an Indian child under the law, notice, and the termination of parental rights. While the Montana court continued to apply *Adoptive Couple v. Baby Girl*[128] to its paternity cases, to the detriment of Native fathers, it also applied the regulations strictly.[129]

Notable cases

Matter of Welfare of S.R.K.,[130] Minnesota Court of Appeals, QEW

In this termination of parental rights case, the Minnesota Court of Appeals held the QEW testimony did not support a finding to terminate parental rights as to the father in this case. There, parents' rights were terminated after a QEW signed a notarized affidavit before trial stating that "[c]ontinued custody of the children by the parent(s) is likely to result in serious physical and/or emotional damage to the child," but testified at trial that she had no opinion about whether children could be returned to the parents, that her affidavit remained true, and that she had not honestly considered the child's father when preparing the affidavit.[131]

The appellate court then found that the testimony of the QEW supported the finding that continued custody by the mother would be detrimental to the children and that this evidence coupled by the other evidence met the beyond a reasonable doubt standard of proof.[132] With regard to the father, however, the court found that termination had been improper because the agency had failed to provide testimony from a QEW that supported a finding that continued custody would be detrimental to the child.[133]



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Diego K. v. State Dept. of Health & Soc. Srvs.[134] *Alaska Supreme Court, burden of proof*

In this Alaska case regarding the standards for removing a child from the home, the Alaska Supreme Court found the trial court did not meet the standards required under ICWA when it failed to base its decisions on admitted evidence and sworn testimony.[135] Over the two years, the court held six status hearings.[136] Those hearings were informal, and the court admitted no evidence. The court then ordered the child to be removed from the home, and based its removal and active efforts findings on information provided in the review hearings.[137] The Alaska Supreme Court initially remanded that order for additional removal findings, and the trial court amended its order to explain the findings were based on the previous, unsworn testimony of the social workers.[138] Upon its second appeal, the Supreme Court, noting that the Alaska Evidence Rules apply in all Child in Need of Aid (CINA) cases, reversed.[139]

In that opinion, the Alaska Supreme Court discussed the relatively informal nature of CINA cases and how courts may choose to schedule informal hearings for updates. Ultimately, however, the Alaska Supreme Court held that when the discussion at the hearing shifts from updates to making specific legal and factual findings, those findings must be based on evidence—including sworn testimony to meet the requirements of ICWA.[140]

In re B.Y.,[141] *Montana Supreme Court, active efforts*

In this termination of parental rights case, the Montana Supreme Court held that findings regarding active efforts must be documented in detail. In this case, neither the hearing transcripts nor written orders discussed how the agency had made active efforts before removal and termination.[142] After reciting the 2016 regulations, the Supreme Court stated that under ICWA, "the district court must document in detail in the record how active efforts have been made by clear and convincing evidence prior to removal and beyond a reasonable doubt prior to termination," and because the trial court in this instance had failed to provide that documentation, it erred.[143]

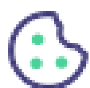
2019

Trends

In 2019, sixteen different states issued decisions for a total of 214 opinions, 49 of which were reported. There were far fewer state Supreme Courts issuing decisions this year, and in the states that did have Supreme Court decisions, those states do not have intermediate appellate courts for their child welfare cases.[144] Alaska had six reported decisions, Maine had three, Montana three, and South Dakota one. Meanwhile, Alaska had another seven unreported decisions, and Montana another one. The remaining opinions, published and unpublished, were authored by states' intermediate Courts of Appeal.

Eleven cases cited to the Northern District of Texas's decision in *Brackeen v. Zinke*, though only six were reported.[145] No court followed the federal court's lead in finding ICWA unconstitutional. During 2019, the Fifth Circuit overturned the lower court's case in August.[146] Only one reported case, *In re Austin J.*, cited to the decision. In addition, by the fall, the Fifth Circuit had granted a rehearing of the case *en banc*, which further eroded any confidence in the appellate court's decision.[147]

California led the states with 144 cases, but only two were reported. California always has both the greatest number of cases, and one of the highest ratios of reported to unreported cases. Alaska was second with thirteen opinions, six reported; followed by Texas with nine opinions, and five reported. Michigan had seven opinions and did not report any of them, while Nebraska issued six opinions and published all four. Both Washington and Arizona issued five opinions and reported two; Ohio issued five and reported three. New York and Montana each issued four opinions and reported three. Colorado, Maine, and Minnesota each issued three opinions, Indiana and New Jersey issued two, and West Virginia, Utah, South Dakota, Oregon, North Carolina, New Mexico, Kansas, and Illinois all had one decision apiece.



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Most active efforts cases—nine out of 14—were unreported. This may reflect how fact specific most active efforts cases are. There is a drawback, however, because the inconsistent determinations of active efforts continue. Eleven of the active efforts cases were affirmed, but three were remanded, or affirmed in part and vacated in part. Alaska continues to have the greatest number of active efforts cases.

In two cases, the Alaska Supreme Court nodded to the definition requiring the efforts to be "affirmative, active, thorough, and timely"[149] but affirmed. In another case, the court discussed them at length and remanded.[150] Similarly, in Montana, the court engaged with the Regulations and the 2016 BIA Guidelines and remanded the case for lack of active efforts.[151]

The most litigated issues were notice and inquiry,[152] followed by active efforts, termination of parental rights (which includes burden of proof issues) and qualified expert witness, foster care proceeding, determination of an Indian child, reason to know, transfer to tribal court, and placement preferences.[153]

Of all the cases in 2019, 108 or around 50% were reversed or remanded.[154] Almost two thirds of the notice cases were remanded (58), and nearly 70% of the total inquiry cases were remanded (34). But, of the reported cases, only 13 were remanded or reversed and remanded. Approximately 80 tribes were named as potential tribes in the cases.

There were six cases appealed by tribes in 2019, and the Navajo Nation appealed four of them.[155] Related to this, there were also a number of transfers to tribal court cases. 2018 was an outlier with only one transfer case on appeal. In 2019, there were six. Of those cases, the Navajo Nation appealed two of them, children's attorneys appealed two, and the parents appealed two. As usual, the appeals by the children's attorney were to avoid transfer, and the courts were split on their outcomes.[156] The Navajo Nation also had split results, with the Colorado Court of Appeals reversing the lower court and ordering the transfer, and the Texas Court of Appeals affirming the lower court's denial of transfer.[157]

Notable cases

In re Shirley T.,[158] Supreme Court of Maine, transfer to tribal court

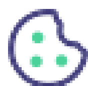
In this child protection matter, the Supreme Court of Maine found a denial of transfer to tribal court was proper. Here, the mother, the aunt (who was the guardian), the father, and the tribe moved to transfer the case to the Oglala Sioux Tribe's court, which is in South Dakota.[159] The state and child's attorney presented evidence of the extensive services and successful placement of the children in Maine which transfer would disrupt, as well as evidence of children's extensive connections and repeated child protection proceedings in Maine.[160]

The Supreme Court found the plain language of ICWA's good cause provision ambiguous and then turned to the 2016 BIA Guidelines to interpret its meaning, noting that they *prohibit* a finding of good cause based on "whether the Tribal court could change the child's placement,"[161] but "[u]nlike placement considerations, evidentiary hardships imposed by a transfer of jurisdiction *are* an acceptable basis for a finding of good cause."[162] Based on this analysis, the court found the tribal court denial of transfer was proper because: "[a]lthough the court issued some findings that superficially appear to regard the children's placement their desire to remain in Maine, their substantial contacts to Maine, and the preservation of the children's familial relationships in Maine—a more fulsome review of the record establishes that the court's focus was instead the difficulty in the presentation of evidence that would occur if jurisdiction were transferred."[163]

Oliver N. v. Dep't of Health and Human Services,[164] Alaska Supreme Court, qualified expert witness

In consolidated cases, courts terminated the parental rights of two different families to two different Indian children. The Supreme Court held because the qualified expert witnesses lacked qualifications to testify as to whether returning the child to the parent's case as likely to cause serious emotional or physical damage to the child, the witnesses did not meet the QEW standard under the Federal Regulations.[165]

In one case, the qualified expert testimony was provided by the president and chairman of the board of Ninilchik Native Association and president of Ninilchik Village Tribe.[166] He had no formal



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college education or training in childhood trauma or mental health but testified that he had "seen plenty of it," "worked with a lot of… cases," and been through mental health classes with the tribe.[167] In the other case, the qualified expert witness was a member of the Orutsararmiut Tribe, held a bachelor's degree in social work, had served as a Department ICWA Worker for two years, had previously been a protective services specialist, received ICWA training, and was previously certified as an ICWA expert by an Anchorage Superior Court.[168] In both cases, the trial court accepted these individuals as QEW under ICWA.[169] Parents appealed arguing that under the Federal Regulations neither individual qualified as an ICWA expert witness.[170]

The court found "[t]he 2016 regulations and the accompanying commentary indicate that the primary consideration in determining whether an expert is qualified under ICWA is the expert's ability to speak to the likelihood of harm to the child if returned to the parent's custody; knowledge of tribal customs and standards is preferred, but such knowledge alone is insufficient."[171] The court noted that a "tribal expert does not need to be qualified to speak to the likelihood of harm to the child if there is a second qualified expert who can, but in proceedings involving only one expert, ICWA requires that the expert meet the [full] qualifications."[172]

In re Dupree M.,[173] New York Court of Appeals, transfer to tribal court

In this New York case, the state filed a petition alleging neglect involving an Indian child against mother.[174] Over the child's objection, the mother and the Unkechaug Indian Nation, a state recognized Indian tribe, requested transfer to tribal court.[175] The court granted the motion, and the case was transferred to tribal court.[176] The child's attorney appealed, arguing because the proceeding did not result in a foster care placement, transfer was not appropriate under ICWA.

The Supreme Court[177] first confirmed that under New York State law the rights and protections of ICWA extend to tribes who are recognized by the state of New York.[178] The court then turned to whether transfer to tribal court was appropriate. It began its analysis by reminding that under ICWA and identical state law "state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction."[179] Then, citing to the Federal Regulations the Court found the definition of a foster care placement includes "any action that *may* culminate in" a foster care placement,[180] making transfer proper here.[181]

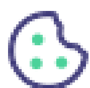
2020

Trends

In 2020, there were 206 ICWA decisions, keeping the total number of cases above 200 even during the pandemic year. However, of those, only 25 were reported. Twelve different states issued those reported decisions, including Alaska with one reported decision; Arkansas with one, California with eight (which is unusual—California was wrestling with the reason to know issue, detailed in the *Austin J.* summary below, and all but one of the reported cases was on this issue), Colorado had four, Illinois had one, Montana had one, Nebraska had one, North Carolina had three, Washington had two, and Ohio, Texas, and Utah all had one. The number of ICWA appellate cases varied significantly by jurisdiction, as did the number of cases which the courts chose to report.

There were three cases appealed by Tribes in 2020. Notice to tribes of cases that go up on appeal remains a major issue for tribal practitioners, as are state appellate court rules that simply do not contemplate intervenor party briefs at the state appellate level. In 2020, a major decision by the Colorado Court of Appeals did not include the tribal nation whose children were in the case. One of the authors of this article became aware of the case after the decision, and the Nation was able to participate at the Colorado Supreme Court.[182]

As usual, most cases involved notice (75) and inquiry (71). In addition, cases that addressed the issue of "reason to know," "Indian child," and "application of ICWA," among others—in other words,



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cases dealing with whether ICWA applies in the first place, accounted for 171 of the 205 cases that went up this year. This question of who is an "Indian child" and when ICWA applies takes up disproportionate amounts of judicial and agency time. This was the theme of the year's appeals: when is there reason to know, what constitutes due diligence to verify whether the child's Indian status or to request a finding that the child is not an Indian child; and therefore, when does ICWA no longer apply.

However, this year the Washington Supreme Court issued one of the most important cases on inquiry and notice since at least the *In re Morris* case in Michigan in 2012. Detailed below, this powerful opinion describes the importance of ICWA, its application, and the need to ensure it is enforced properly. Her opinion united the Washington Supreme Court and was a bright spot in this contentious area of the law.

Beyond that, active efforts to rehabilitate or reunify the Indian family were addressed in 16 appeals, and the issue of the qualified expert witness was addressed in 4. There were also two transfer to tribal court cases and three guardianship cases.

Notable cases

Matter of Dependency of Z.J.G.,[183] Washington Supreme Court, reason to know

In this dependency proceeding, the Agency's petition stated there was a reason to know that the children were Indian children, while also noting that the "[m]other has Tlingit Haida heritage and is eligible for membership with Klawock Cooperative Association ("KCA"). She is also identified as having Cherokee heritage on her paternal side. Father states he may have native heritage with Confederated Tribes of the Umatilla in Oregon."[184] Moreover, the mother and the father testified that the mother was eligible for membership in Tlingit & Haida and KCA, and that the children were eligible for membership.[185] The trial court then applied non-ICWA removal standards after it found that this information did not show the children were members of or eligible for membership in with a parent who is a member of a tribe, and thus there insufficient to create "reason to know" the children were Indian children.[186,187]

The Supreme Court determined where *any* participant in the proceeding indicates that the child has "tribal heritage" there is "reason to know" the child is an Indian child.[188] The Court explained that that it was adopting this broad interpretation of the "reason to know" standard because it respects a Tribe's exclusive role in determining membership, comports with the canon of construction for interpreting statutes that deal with issues affecting Native people and Tribes, is supported by the statutory language and implementing Federal Regulations, and serves the underlying purposes of ICWA and WICWA.[189] Further, the court noted that tribal membership eligibility varies widely from tribe to tribe, and tribes can, and do, change those requirements frequently, so state courts cannot and should not attempt to determine tribal membership or eligibility.

The Supreme Court found further support for its holding in the unique language of WICWA. The statutory protections of WICWA apply when a court has reason to know "the child is or *may be* an Indian child."[190] The language "may be" suggests that a court has a "reason to know" not just when there is an indication that the child is an Indian child but also when there is an indication that the child may be an Indian child. However, the Court did not rest its reasoning entirely on this, making the decision useful for sister states without similar state law language.

The Court restated the 2016 BIA Guidelines, reminding that when the court has "reason to know" the child is or may be an Indian child, the child *must* be treated as an Indian child until it is determined on the record that the child does not meet the definition of Indian child. It concluded that based on this broad interpretation of the term "reason to know," the language in the petition, and the testimony of the parents created reason to know that the children were Indian children, and the trial court was required to apply ICWA standards of removal.[191]

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In re Guardianship of Eliza W.,[192] *Nebraska Supreme Court, child custody proceeding*

In this guardianship case, the Nebraska Supreme Court held that ICWA and the Nebraska Indian Child Welfare Act (NICWA) apply in all intrafamily disputes that fit within the definition of foster care proceedings, except "an award, in a divorce proceeding, of custody to one of the parents."[193]

In re Austin J.,[194] *& In re T.G.,*[195] *Second Appellate District California Courts of Appeal, reason to believe, duty to inquire*

California courts have been wrestling with California's unique statutory duties of inquiry, § 224.2(a) and further inquiry[196] § 224.2, (e), triggered by "reason to believe" a child is an Indian child; and notice, triggered by "reason to know" a child is an Indian child. Even within the same district, the courts came to different conclusions. This discussion between the courts in California is ongoing, spreading through cases in 2021 and 2022.

2021

Trends

In the spring of 2021, the Fifth Circuit issued a very long split decision on ICWA's constitutionality.[197] Only two state ICWA cases cited to this opinion on appeal.[198] In 2021, all four parties to the case filed petitions for *certiorari* to the United States Supreme Court, and the Court granted *cert.* in *Brackeen* in February 2022.[199] This outcome was widely anticipated due to the extremely long and fractured lower court opinion.

However, ICWA litigation continued apace. In 2021, there were 226 appellate ICWA cases. Of those, 38 of them were reported. As always, California led with 150 cases total, but only seven reported. Otherwise, states with reported cases included Alaska (four), Colorado (four), North Carolina (three), South Dakota (three), New Mexico (two), Montana (two), as well as Arkansas, Illinois, Maine, Missouri, North Dakota, Ohio, Oklahoma, Utah, Vermont, Washington, and Connecticut.

The issues addressed by the reported cases included five active efforts cases, eighteen cases addressing either notice, inquiry, or the determination of an Indian child, two placement preference cases, two qualified expert witness cases, as well as cases involving paternity, appointment of counsel, intervention, Indian Custodian, and transfer to tribal court.

The appeals were again overwhelmingly brought by parents, with 35 out of 38 reported cases coming from one or both parents. This year, however, the issues parents appealed ran from active efforts to paternity. As usual, most of the appeals from parents involved establishing an ICWA case in the first place, focusing on inquiry and notice. In one case, both the mother and Tribe appealed a transfer to tribal court but did not win the appeal.[200]

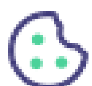
One Tribe appealed one case in a particularly unusual foster care proceeding in Missouri.[201] The Tribe was found to have standing to challenge a change in an adoptive placement.[202] What made this case odd were the attorneys of record for the foster parents[203] and the attorney of record for the children.[204] They were attorneys who had previously brought ICWA challenges in federal court,[205] but not usually at the trial level in Missouri.

In this last year of cases included in this article, states and tribes showed no slowing in their ICWA work, continuing to implement state ICWA laws,[206] addressing changes in their agency procedures based on state court appellate decisions, working with non-profits and organizations to continue to improve their ICWA practice.[207]

Notable cases

People in re K.C.,[208] *Colorado Supreme Court, reason to know*

In this case, the Chickasaw Nation responded to an ICWA notice stating: "At this time, the children do not qualify as 'Indian Children' under [ICWA]" that, "[a]lthough the ICWA does not yet apply in



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this case, we have a vested interest in the welfare of children who are eligible for citizenship with the Chickasaw Nation." The Nation therefore requested that the Department advise the children's parent or legal custodian to complete, on behalf of the children, enclosed applications for Chickasaw citizenship. The Department, however, did not have either mother or father to complete these applications.[209] At termination, the court held ICWA did not apply.

The Court of Appeals concluded that in dependency and neglect proceedings, when an Indian nation communicates to the department its desire to obtain membership for eligible children, the Department must, at the earliest possible time, deposit the nation's response with the court, and the court must then conduct an "enrollment hearing."[210] The Department Petitioned for *Certiorari* to the Colorado Supreme Court.

The Supreme Court, relying on the cannons of construction grounded in Indian law, found nothing in ICWA (or under Colorado's implementing statute) that provides for the type of best interests enrollment hearing that the division noted. The Court further noted that creating an enrollment hearing "appears to conflict with the Nation's exclusive right to decide matters of tribal citizenship—particularly because as described it includes no participation from the tribe."[211] This, the Court found, was a question for Congress.

As to whether the Department had an affirmative obligation to enroll the children, the Court turned to the Federal Regulations list of what constitutes active efforts, noting that these efforts only applied to Indian children, and even so, do not include the act of enrolling a child.[212] Citing to the 2016 BIA Guidelines, the court concluded the Department is under no legal obligation to enroll (or to assist in enrolling) an eligible child, but "hasten[ed] to add that [it] in no way intend to foreclose [the Department] from providing such assistance or from advising respondent parents as to the ramifications (and potential benefits) of their children's enrollment in a tribal nation. Indeed, in each case, it might well be the best practice to do so."[213]

Matter of G.J.A.,[214] *Washington Supreme Court, active efforts*

In this dependency case, the Washington Supreme Court held ICWA and WICWA do not permit the application of the futility doctrine. The Department is not excused from providing active efforts unless it can demonstrate to the court it has made sufficient active efforts and those efforts "have proved unsuccessful."

Matter of D.A.,[215] *Oregon Court of Appeals, placement preferences*

In this permanency case, the Oregon Court of Appeals found that that the child's placement in a guardianship in Texas did not violate ICWA's 25 U.S.C. § 1915 placement requirements. After reiterating the 25 U.S.C. § 1915(b) placement requirements of ICWA that:

> The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.[216]

The Court then found that, under Oregon rules of statutory construction, in this context, the "shall" made the provision mandatory, but that the provision otherwise "contains some wiggle room by virtue of the word 'reasonable.'"[217] The Court expounded on this by stating, "we understand Congress's use of the word 'reasonable' to mean that the juvenile court must place the child as close to home as it is objectively reasonable to do while also satisfying the other placement requirements in section 1915(b)." Then, given the statutory structure, the Court found the circumstances relevant to whether an Indian child's proximity to home is "reasonable" included any special needs that the child has, the restrictiveness of different placements, the preferential status of any placements available to the child, and other considerations that go to the child's best interests.[218] Because the guardianship placement in Texas was the only relative placement available to the child, was the most family-like setting, allowed the children to stay together, and was supported by the tribe, the Court found that it was "reasonable" in context.[219] The Court also noted "[m]oreover, the children are no longer on a plan of reunification, but durable guardianship, which is relevant to what is reasonable."[220]

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State ex rel. Children, Youth & Families v. Douglas B.,[221] *New Mexico Court of Appeals, QEW*
In this child protection case, the New Mexico Court of Appeals held that the proffered QEW was not qualified to testify as to whether the child's continued custody by parents is likely to result in serious emotional or physical damage to child, following an Alaska case described earlier in this article.

The Court of Appeals, using cannons of statutory interpretation noted that QEW is not defined by ICWA, so it was appropriate to turn to the Federal Regulation 2016 BIA Guidelines, because interpretation of a law by the agency charged with its administration should be given substantial weight. The court found the definition promulgated by the BIA splits the QEW requirement into two separate components: (1) a "qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent … is likely to result in serious emotional or physical damage to the child," and (2) the witness "should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe."[222] The Court then held that the use of the word "must" in the first portion of the definition imposes a mandatory requirement while the use of the word "should" in the second portion of the definition does not.[223] The Court then found the QEW was qualified to testify with respect to the prevailing social and cultural standards of the Tribe, but was not qualified to opine as to whether the child's continued custody was likely to result in serious emotional of physical damage to the child. The Court focused its analysis on the 2016 BIA Guidelines' language, which states "that an expert witness who is qualified to draw this causal connection must have an 'expertise beyond normal social worker qualifications.'"[224] Noting that this witness was, in fact a tribal caseworker, the court found that as this case involved allegations of substance abuse, domestic violence, self-harm, suicidal ideation, and household hazards, and "the QEW did not demonstrate that she had the requisite expertise in these areas to opine as to 'a causal relationship between [these] particular conditions … and the likelihood that continued custody of child will result in serious emotional or physical damage to [child]'" as required by the Federal Regulations.[225]

State ex rel. Children, Youth & Families v. Maisie Y.,[226] *New Mexico Court of Appeals, active efforts*
In this termination of parental rights case, the New Mexico Court of Appeals held that the court could not terminate parental rights by taking judicial notice of the adjudication finding by clear and convincing evidence that mother abused or neglected her children.[227] The Court reasoned that because New Mexico's law embeds ICWA into its statutes in a way that requires proof beyond a reasonable doubt to its "grounds" for termination, as well as the ICWA standard that "continued custody is likely to result in serious emotional or physical damage" these previous findings were insufficient to meet those burdens.[228] The Court, overturning its own precedent, found the trial court also erred because the same standard—beyond a reasonable doubt—also applies to findings of active efforts at the termination trial when ICWA applies because "active efforts" is one of the "grounds" for termination that must also be proven and such a finding was not made.[229]

ICWA BEYOND *BRACKEEN*

First and foremost, true data on ICWA compliance and the treatment of ICWA-eligible children in state child welfare systems are woefully lacking. That said, here are some lessons learned from the secondary data authors present here: Tribes continue to operate in state systems that do few favors for their families. Considerable resources—both financial and labor—are spent trying to make state systems respect tribal ones. Trial level state court systems have little fundamental understanding about tribes, how they work, and why they are in their courtrooms on behalf of tribal families, let alone the law passed to educate them on just these issues.

The solution most often suggested to address this kind of issue is more judicial and practitioner education on ICWA. However, in her new book, Professor Dorothy Roberts points out education alone is not solving the issue of disparate impacts in child welfare.[230] When there are annual repeated patterns in the data such as this, the time has come to consider more radical solutions to a broken

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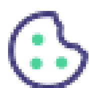


system. This includes seriously considering the arguments of abolitionists like Professor Roberts. Tribal systems offer just this opportunity: governments able and ready to create new and different—or indeed old and traditional—systems of care to protect children, strengthen families, and promote resiliency without causing the harm we know state systems perpetuate. This must be done, however, while at the same time, working on legislation that fundamentally changes how Indian children are treated in state child welfare systems.

The appeals show that when tribal children stay in state systems, their parents and their tribes may need to appeal state decisions to ensure they are provided the rights they are entitled to under ICWA. This includes the right to notice, the right to active efforts for reunification, the right to a qualified expert witness, and the right to stay with their family and community. At least half the time, appellate courts find the trial courts are *not* providing those rights and reverse the trial level.

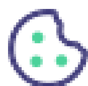
Decreasing state child welfare cases that involve Indian children is also an important step in protecting ICWA so that it will be there for the children and families who do need it. The *Brackeen* case comes from child welfare proceedings in Texas, Minnesota, and Nevada state systems, and, at least in the Texas and Minnesota proceedings, even when the state agency and the state court agree with the Tribes and try to place children with tribal families, stranger foster parents have the power to complain all the way to the United States Supreme Court. Keeping these cases out of state systems in the first place could prevent this kind of challenge--whether that be through stronger prevetion systems or increased tribal system capcity.

However, regardless of the outcome of the Supreme Court case, the work after *Brackeen* based on these data remains similar to the work activists are doing today. First, tribal systems must be fully funded. This includes lobbying Congress to find innovative ways to allow tribes to access the millions of dollars available to states without forcing Tribes to replicate broken state systems.[231] Ultimately, tribes should be able to file as many cases as possible under their own tribal jurisdiction—which makes transfer from state courts unnecessary.

With expanded tribal funding, the tribe's decisions on a case can be based solely on the needs of the family—not the capacity of the tribal system. The best path to funding would be to allow Tribes to contract and compact (via P.L. 638) Social Security funds for child welfare.[232] Additionally, increasing the BIA ICWA on reservation funds which are already contracted and compacted for most tribes could create an immediate increase in capacity for tribal systems. Over the years, tribes have demonstrated they provide better general services, social services, and mental and physical healthcare services to their members than state or federal governments have ever been able to accomplish with the funding and freedom of contracting and compacting. Finally, states could provide increased funding to tribal child welfare systems either directly, through contracts, or by creating a more streamlined and approachable processes for Title IV-E passthrough funding.[233] States are already paying for these children in their own child welfare systems and should see supporting tribes to work with these families as an obvious solution.

Second, states must pass their own ICWA laws to enshrine the Act's protections into state law. This includes working with national groups like the Uniform Law Commission to develop a model or uniform state ICWA to assist in the state goals. This work can mean simply translating the federal law and the principles it enshrines into state standards, or it can mean bringing together stakeholders from across the state to reimagine, with ICWA and the work of the ULC as the backbone, what a better child welfare system can be for Indian children in that state. When these laws are passed states show a renewed commitment to ICWA and practitioners are less likely to "forget" to include this federal law in their state court practice. Similarly, state child welfare agencies should include ICWA's requirements in their state regulations and policy and procedures manuals.[234] ICWA should not be an afterthought or an extra addition to social work practice and caseworkers should not be expected to turn to the federal code to work with Indian children and families.

Third, passing court rules that ease practice restrictions on tribal attorneys in state courts and integrate the logistics of tribal participation and requirements of ICWA, so tribes are not the only unrepresented party in child welfare systems and when they do intervene they are able to fully participate, should also be considered. In their experience, the authors have noted that when tribes are represented in state court by attorneys, cases move faster and are less likely to go up on appeal. If they



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do go up on appeal, the briefs in the cases provide the courts with strong legal reasoning. ICWA cases are particularly complicated, and the tribal representative is often the only one with significant knowledge of the Act. Along with court rules, states could develop state specific ICWA Benchbooks, or provide judges with the National Council of Juvenile and Family Court Judges' ICWA Benchbook in a manner tailored to their states practice. In addition, states should develop model ICWA court orders for judges to use in common State child welfare proceedings.[235] This ensures that when the judge is hearing an ICWA case, they have a reference guide at their fingertips and an order that requires them to correct questions and make the appropriate findings while the parties are before the court.

And finally, an issue in many ways represented by the data holes in this article, getting the federal and state governments to do accurate data collection on the number of children who are ICWA eligible in state court systems and their treatment in those systems is essential. These data will help with funding requests, provide an understanding of where tribal children are in the broader population, and help Tribes be accessible to their tribal members.

CONCLUSION

The past five years of ICWA practice under the existential threat of *Haaland v. Brackeen* has changed very little. However, the constant refrain from practitioners, agency workers, and jurists is what happens next? While it is virtually impossible to predict how the Supreme Court's ruling will affect ICWA, advocates and practitioners are working on several areas to blunt a negative outcome.

Tribes will not suddenly stop advocating for their children and families in state systems if the Supreme Court rules against the Indian Child Welfare Act—nor will they lose their inherent jurisdiction over their member children. Their work will not suddenly disappear. The arguments made in the cases detailed here will continue in a different form. Tribes will continue to negotiate and litigate to ensure the protection of, and best outcomes for, their children and there is still much to to be learned from the numerous ICWA appeals across state courts eah year.

ENDNOTES

[1] Complaint and Prayer for Relief, *Brackeen v. Zinke*, 338 F.Supp.3d 514 (N.D. Tex. 2018) (No. 17-cv-00868). The MSU Indian Law Clinic represents the tribal intervenors in this case with co-counsel Jenner Block and Kilpatrick Townsend.

[2] *C.E.S. v. Nelson*, Stipulation of Voluntary Dismissal, No. 15-cv-982 (W.D. Mich. Jan. 27, 2016); *National Council of Adoption v. Jewell*, 2017 WL 944066 (4th Cir. 2017); *Doe v. Hembree*, Order, No. 15-cv-471 (N.D. Okla. Mar. 3, 2017); *Doe v. Piper*, 2017 WL 3381820 (D. Minn. 2017); *Carter v. Tahsuda*, 743 Fed.Appx. 823 (9th Cir. 2018); *Watso v. Jacobson*, 929 F.3d 1024 (8th Cir. 2019), *cert denied*, 140 S.Ct. 1265 (2020); *Fisher v. Cook*, Order Dismissing Case, No. 19-cv-2034 (W.D. Ark. May 28, 2019); *Americans for Tribal Court Equality v. Piper*, Voluntary Dismissal, No. 17-cv-4597 (D. Minn. Sept. 6, 2019); *Whitney v. Bernhardt*, Notice of Dismissal, No. 19-cv-299 (D. Maine Aug. 23, 2019); *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021); R.P. v. Los Angeles County Dept. of Children & Family Serv's, et al., *cert denied*, 137 S.Ct. 713 (2017); *S.S. v. Colo. River Indian Tribes*, *cert denied* 138 S.Ct. 380 (2017); *Renteria v. Superior Court*, *cert denied* 138 S.Ct. 986 (2018); R.K.B. v. E.T., *cert denied* 138 S.Ct. 1326 (2018); *In re* A.B., 663 N.W.2d 625, 636 (N.D. 2003); *see also In re A.A.*, 176 P.3d 237, 240 (Kan. App. 2008); *In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 610-11 (Cal. Ct. App., 3rd. Dist. 2006); *In re Interest of Phoenix L.*, 708 N.W.2d 786, 797-89 (Neb. 2006), *rev'd on other grounds*; *Matter of M.K.*, 964 P.2d 241, 244 (Okla. Ct. App. 1998); *In re Marcus S.*, 638 A.2d 1158, 1159 (Maine 1994); State *ex rel. Children's Services Div. v. Graves*, 848 P.2d 133, 134 (Or. Ct. App. 1993); *In re Miller*, 451 N.W.2d 576, 579 (Mich. App. 1990); *Matter of Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980) *In the Matter of Application of Angus*, 655 P.2d 208 (1982), *review den.* 294 Or. 569, 660 P.2d 683 (1983), *cert. den.* 464 U.S. 830 (1983).

[3] *Brackeen v. Zinke*, 338 F.Supp.3d 514 (N.D. Tex. 2018).

[4] *See Haaland v. Brackeen*, No. 21-376, docket available https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-376.html.

[5] 25 U.S.C. § 1901(5).

[6] 25 U.S.C. § 1901(4).

[7] 25 U.S.C. § 1901 et. seq. (2012). *See also* Kathryn E. Fort, American Indian Children and the Law: Cases and Materials (2020); Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act,

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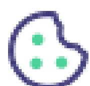

https://www.narf.org/nill/documents/icwa/; B.J. Jones et al. The Indian Child Welfare Act Handbook (2nd ed. 2008); *NCJFCJ Releases Indian Child Welfare Act Judicial Benchbook*, National Council of Juvenile and Family Court Judges, (Oct. 31, 2017) http://www.ncjfcj.org/ICWABenchbook.

[8] 25 U.S.C. § 1902.

[9] 25 U.S.C. § 1903(5).

[10] *Id.* at § 1903(1).

[11] 25 U.S.C. § 1912(a).

[12] *Id.*

[13] *Id.* at § 1911(c).

[14] *Id.* at § 1911(b).

[15] *Id.* at § 1912(d).

[16] *Id.* at §§ 1912(e)(f).

[17] *Id.*

[18] *See* Jill Elaine Hasday, Family Law Reimagined (2015) (arguing family law has long been the purview of the federal government *and* the states, despite Supreme Court dicta stating otherwise); Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J. L. & Pub. Pol'y 267 (2009); Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. Davis L. Rev. 623 (2014).

[19] 42 U.S.C. §§ 601-681.

[20] While access to federal funding under IV-E of the Social Security Act requires states to pass certain standards for foster care placements and termination of parental rights, there are many areas of state law that still vary by state. *See, e.g.*, Child Welfare Info. Gateway, Consent to Adoption (October, 2021), https://www.childwelfare.gov/pubPDFs/consent.pdf; Child Welfare Info. Gateway, Representation of Children in Child Abuse and Neglect Proceedings, (June, 2021) https://www.childwelfare.gov/pubPDFs/represent.pdf; Child Welfare Info. Gateway, Rights of Unmarried Fathers (August, 2017), https://www.childwelfare.gov/pubPDFs/putative.pdf; Child Welfare Info. Gateway, Definitions of Child Abuse and Neglect (2016) https://www.childwelfare.gov/pubPDFs/define.pdf.

[21] *See In re K.S.D.*, 904 N.W.2d 479, 482 (N.D. 2017); *Valerie M. v. Ariz. Dep't. of Econ. Sec.*, 198 P.3d 1203, 1207 (Ariz. 2009) (collecting cases).

[22] *E.g.*, Michigan Indian Family Preservation Act, MCL § 712B.1-41 (comprehensive state ICWA); Minnesota Indian Family Preservation Act, Minn. Stat. § 260.751-.835 (2023) (comprehensive state ICWA); Washington Indian Child Welfare Act, Wash. Rev. Code. § 13.38.010-.190 (2011) (comprehensive state ICWA); Nebraska Indian Child Welfare Act, Neb. Rev. Stat. § 43-1501-1516 (2015) (comprehensive state ICWA); Ariz. Rev. Stat. § 8-453 (2014) (merely requiring compliance with ICWA); Colo. Rev. Stat. § 19-1-126 (2019) (requiring compliance with ICWA and specifically-inquiry, notification, determination, transfer to tribal court); Or. Rev. Stat. § 419A.116, 419B.090, .118, .150, .171, .185, .192, .340, .365, .366, .452, .476, .498, .500, .875, .878, .923 (2019) (imbedding ICWA standards in relevant areas across Oregon's dependency code).

[23] 570 U.S. 637 (2013).

[24] Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (Feb. 25, 2015) (rescinded and replaced by 25 C.F.R. pt. 23).

[25] Bureau of Indian Affairs, Indian Child Welfare Act (ICWA) Proceedings, Rulemaking Docket, https://www.regulations.gov/docket/BIA-2015-0001/document (the notice and comment period included nearly 2000 comments for and against the regulations as well as six public meetings).

[26] 25 C.F.R. pt. 23 (2016).

[27] U.S. Dep't of Interior, Guidelines for Implementing the Indian Child Welfare Act, (Dec. 2016) https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf.

[28] *See, e.g.*, *People in re A-J.A.B.*, 511 P.3d 750 (Colo. Ct. App. 2022), *People in re M.M.*, 517 P.3d 87 (Colo. Ct. App. 2022), *People in re E.M.*, 507 P.3d 113 (Colo. Ct. App. 2021).

[29] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (tribes determine their own citizenship criteria, which is separate and apart from an individual's race. In addition, the reporting of the federal data through the Adoption and Foster Care Analysis and Reporting System (AFCARS) system is done by individual social workers who may mark a tribal citizen as a member of a different race, may mark a person who self-identifies as American Indian but is not a tribal citizen under the American Indian/Alaska Native, or may improperly mark someone as not AI/AN when they are).

[30] *See Complaint, California Tribal Families Coalition v. Azar*, No. 20-cv-06018 (N.D. Cal, Aug. 27, 2020). The MSU Indian Law Clinic represents the plaintiffs in this lawsuit.

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[31] *See, e.g.*, California Child Welfare Indicators Project, Measure 4 E, https://ccwip.berkeley.edu/childwelfare/reports/4E/MTSG/r/fcp/s (placement of Indian children), Casey Family Programs, Native American and Alaska Native Children Data Overview 2021 https://www.casey.org/media/ICWA-data.pdf (using data from AFCARS); National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care Dashboard, 2010–2020 (using data from AFCARS), https://ncjj.org/AFCARS/Disproportionality_Rates_for_Children_of_Color.aspx.

[32] 25 U.S.C. §§ 1912(e), (f); 25 C.F.R. § 23.2, § 23.120.

[33] 25 U.S.C. § 1912(b).

[34] *Id.* at § 1912(f); *Id.* at § 1913; 25 C.F.R. §§ 23.124-28; 25 C.F.R. §§ 23.136-37.

[35] 25 U.S.C. § 1903(1); 25 C.F.R. § 23.103.

[36] 25 U.S.C. § 1903(1); 25 C.F.R. § 23.103.

[37] 25 U.S.C. § 1920.

[38] *Id.* at § 1903(4); 25 C.F.R. §§ 23.108-09.

[39] 25 U.S.C. § 1914.

[40] 25 U.S.C. § 1912(a); 25 C.F.R. § 23.107.

[41] 25 U.S.C. § 1911; 25 C.F.R. § 23.110.

[42] 25 U.S.C. § 1912(a).

[43] *Id.*; 25 C.F.R. § 23.111.

[44] 25 U.S.C. § 1915; 25 C.F.R. §§ 23.129-32.

[45] 25 U.S.C. §§ 1912 (e), (f); 25 C.F.R. § 23.122.

[46] 25 U.S.C. § 1912(e); 25 U.S.C. § 1922; 25 C.F.R. §§ 23.113-14.

[47] 25 U.S.C. § 1912(f); 25 C.F.R. §§ 23.120-23.123.

[48] 25 U.S.C. § 1911; 25 C.F.R. §§ 23.115-19.

[49] 25 U.S.C. § 1913(d).

[50] *Id.* at § 1911(a).

[51] In addition, cases that are sometimes unpublished can later become published, or vice versa. While most address the issue of inquiry and notice—an area so common and well-established that there may no longer be a need to report these opinions—there remain several unreported decisions addressing unique or unusual areas of the law. *See, e.g.*, *In re C.S.* (Iowa Ct. App. 2019) (transfer to tribal court); *In re S.B.* (Minn. Ct. App.) (rev. denied) (constitutionality of ICWA and the Minnesota Indian Family Preservation Act); *In re T.D.* (Cal. Ct. App. 2019) (determination of Indian Child).

[52] Data on file with the authors and journal.

[53] *Id.*

[54] This seems to be driven by a decision by the California Courts of Appeal to publish more of their decisions. As of October 6, California had reported thirty ICWA cases, considerably more than in past years, *infra* III. B., C., D., E., F.

[55] Judicial Council of California, 2020 Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19 (2020), www.courts.ca.gov/12941.htm#id7495.

[56] Judicial Branch of North Carolina, 2020–2021 Statistical and Operational Report of the North Carolina Appellate Courts (2021), www.nccourts.gov/documents/publicaitons/nc-courts-statistical-and-operational-reports.

[57] Alaska Court System, Alaska Court System Statistical Report FY 2020 (2020), www.courts.alaska.gov/admin/index.htm#annualrep.

[58] This is based on Authors seventeen years of experience representing tribes in ICWA proceedings.

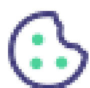
[59] *See State es rel. Juvenile Dept. of Lane County v. Shuey*, 850 P.2d 378, 379–380 (Or. Ct. App. 1993).

[60] Model Code of Pro. Resp. r. 5.5 (Am Bar Ass'n 2019).

[61] Children's Bureau, Utilizing Title IV-E Funding to Support High-Quality Legal Representation and Promote Child and Family Well-Being (2021), https://www.acf.hhs.gov/cb/policy-guidance/im-21-06.

[62] Nat'l Cong. of American Indians, FY 2021 Indian Country Budget Request Advancing Sovereignty through Certainty and Security (2021), https://www.ncai.org/resources/ncai-publications/indian-country-budget-request/fy2021.

[63] *See* Tribe's Motion for Permission to File an Amicus Curiae Memorandum, *In re Dependency of Z.J.G.*, No. 98003-9, 471 P.3d 853 (Wash. 2020). The MSU Indian Law Clinic represented the Tribes in this case.



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[64] *Compare* Brief of Respondent Intervenor Sault Ste. Marie Tribe of Chippewa Indians, *In re J.J.W. and E.L.W.*, Nos. 333625, 334095, 902 N.W.2d 901 (Mich. Ct. App. 2017), *with* Brief of Amicus Curiae Sault Ste. Marie Tribe of Chippewa Indians, *In re Williams*, No. 155994, 915 N.W.2d 328 (Mich. 2018) (in the same case, the tribal intervenor was advised to file as an amicus at the Michigan Supreme Court, despite filing as an intervenor the Michigan Court of Appeals). The MSU Indian Law Clinic represented the Tribe in this case.

[65] *Compare* Wash. R. App. P. 13.4 *with* Wash. R. App. P. 10.4.

[66] This reasoning is one of the reasons the four tribes intervened as parties in the *Brackeen v. Bernhardt* case. This intervention was to ensure there was a principle tribal brief on appeal, and to provide information the court that could not be provided by any of the other parties. *See* Brief in Support of Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians' Motion to Intervene as Defendants, *Brackeen v. Zinke*, No. 17-cv-868, 338 F.Supp. 514 (N.D. Tex. 2018). The MSU Indian Law Clinic represents the tribes in this case.

[67] (Author) has been told by one court clerk in West Virginia that she could be convicted of a misdemeanor for even knowing about a case involving the MSU Indian Law Clinic's tribal client, even though the state had violated federal law by not notifying that tribe of the case in the first place.

[68] *See In re L.D.*, 414 P.3d 768 (Mont. 2018) (where a less than five-page brief from the Tribe may have cleared up the issue at hand in the case).

[69] *See, e.g, In re K.S.D.*, 904 N.W.2d 479, 487 (N.D. 2017); *In re K.L.* 451 P.3d 518 (Mont. 2019); *Matter of Dependency Z.J.G.*, 471 P.3d 853 (Wash. 2020).

[70] *See State in Interest of L.L.*, 2019 UT App 134, 454 P.3d 51, 54. (Utah Ct. App. 2019). (citing to *Chevron, U.S.A., Inc v Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45, 104 S. Ct. 2778, (1984) and 25 C.F.R. § 23.122(a) (2017)).

[71] *See In re Shirley T.*, 199 A.3d 221 (Me. 2019).

[72] *See In re E.A.M.* (Colo, 2022).

[73] 25 U.S.C. 1912(a).

[74] *Compare In re Dependency of Z.J.G.*, 471 P.3d 853 (Wash. 2020) *with In re E.A.M.*, 516 P.3d 924 (Colo. 2022); and *compare In re Austin J.*, 261 Cal. Rptr.3d 297 (Cal. Ct. App. 2020) *with In re T.G.*, 272 Cal.Rptr.3d 381 (Cal. Ct. App. 2020).

[75] *See In re Morris*, 815 N.W.2d 62 (Mich. 2012); 81 Fed. Reg. 38803 (explaining the purpose of 25 C.F.R. § 23.107 is to allow a court to determine a child is an Indian child when the tribe is unable to respond, not to use the provision to limit ICWA's reason to know standard).

[76] *See In re C.C.*, 932 N.E.2d 360 (Ohio Ct. App. 2010).

[77] 25 C.F.R. § 23.107(b)(1).

[78] The question of what constitutes "due diligence" in this area is being considered by the Colorado Supreme Court in the October 2022 term in *In re Jay J.L.*, No. 22SC348.

[79] 25 U.S.C. §§ 1912(e)(f).

[80] *Id.*

[81] *Oliver N. v. Dep't of Health & Social Serv's*, 444 P.3d 171 (Alaska, 2019), State *ex rel. Dep't Children, Youth & Families Dep't v. Douglas B.*, 511 P.3d 357 (N.M. Ct. App. 2021).

[82] 25 U.S.C. § 1911(b).

[83] *Id.*

[84] *People in re C.R.W.*, 962 N.W.2d 730 (S.D. 2021), *In re L.R.B.*, 487 P.3d 1058 (Colo. Ct. App. 2019), *People in re E.T.*, 932 N.W.2d 770 (S.D. 2019), *In re Dupree M.*, 171 A.D.3d 752 (N.Y.App. Div. 2019), *In re Shirley T.*, 199 A.3d 221 (Me 2019), *In re Navajo Nation*, 587 S.W.3d 883 (Tex. Ct. App. 2019), *In re C.J. Jr.* 108 N.E.3d 677 (Ohio Ct. App. 2018), *Gila River Indian Community v. Dept. of Child Safety*, 395 P.3d 286 (Ariz. 2017), *In re A.O.*, (S.D. 2017).

[85] *L.R.B.*, 487 P.3d 1058.

[86] *E.T.*, 932 N.W.2d 770; *C.J. Jr.*, 108 N.E.3d 677.

[87] *C.R.W.*, 962 N.W.2d 730.

[88] *See, e.g.*, *In re T.F.*, (Iowa 2021); *In re Tavian B.*, 292 Neb. 804 (2016), *In re M.S.*, 237 P.3d 161 (Okla. 2010).

[89] *In re M.L.M.*, 388 P.3d 1226 (Oregon Ct. App. 2017), *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017), *In re Adoption of Micah H.*, 918 N.W.2d 834 (Neb. 2018), *In re B.Y.* 432 P.3d 129 (Mont. 2018), *In re I.C.*, 450 P.3d 1029 (Oregon Ct. App. 2018), *In re Mercedes L.*, 923 N.W.2d 751 (Neb. 2020), *Bill S. v. Dep't of Health & Social Serv's*, 436 P.3d 976 (Alaska, 2020), *Sam M. v. Dep't of Health & Social Serv's*, 442 P.3d 731 (Alaska, 2020), *In re K.L.*, 451 P.3d 518 (Mont. 2020), *In re D.J.S.*, 456 P.3d 820 (Wash. Ct. App. 2020), *Clark J. v. Dep't of Health & Social Serv's*, 483 P.3d 896 (Alaska, 2021), *In re G.J.A.*, 489 P.3d 631 (Wash. 2021), *Ronald H. v. Dep't of Health & Social Serv's*, 490 P.3d 357 (Alaska 2021), *In re C.H.* 962 N.W.2d 632 (S.D. 2021),

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People in re A.A., 967 N.W.2d 810 (S.D. 2021), *State ex rel. Children, Youth & Family Serv's v. Maisie Y.*, 489 P.3d 964 (N.M. Ct. App. 2021).

[90] *B.Y.*, 432 P.3d 129, *K.L.*, 451 P.3d 518, *D.J.S.*, 456 P.3d 820, *Clark J.*, 483 P.3d 896, *G.J.A.*, 489 P.3d 631, *C.H.*, 962 N.W.2d 632, *Maisie Y.*, 489 P.3d 964.

[91] *K.L.* at 526–7, *B.Y.* at 132, *G.J.A.* at 910–11.

[92] It is important to note that Alaska, Montana, North Dakota, and South Dakota, either do not have or use their Court of Appeals for child welfare cases. In these states, appeals are taken directly to the state supreme court. *See* Section III for a summary of these cases.

[93] Notice (132), Inquiry (twenty-nine), Placement Preferences (seven), Active Efforts (ten), Termination of Parental Rights (nine), Transfer to Tribal Court (four), and QEW (four).

[94] Of the 214 total appeals, ninety-seven were remanded, and six were reversed. Of the thirty-four reported cases, only eighteen were affirmed, while fifteen were remanded or reversed. Of those fifteen cases, all but two were appealed by the parents.

[95] *In re K.S.D.*, 904 N.W.2d 479, 487 (N.D. 2017) ("There is a line of authority that upholds termination of parental rights absent an ICWA qualified expert witness. We choose to follow the other branch of authority because the United States Code and the United States Code of Federal Regulations require—and do not merely suggest—that a qualified expert witness testify on the ICWA requirements in all ICWA terminations.").

[96] *See, e.g.*, L.L., 395 P.3d 1209, 1212 (Colo. App. 2017) ¶ 16 ("Although the 2016 Guidelines are not binding, we consider them persuasive."); *B.H. v. People ex rel. X.H.*, 138 P.3d 299, 302 n.2 (Colo. 2006) (referring to the 1979 BIA Guidelines). This case goes on to provide dual citations to both the 2016 BIA Guidelines and the Federal Regulations.

[97] *Compare In re L.M.B*, 398 P.3d 207 (Kan. Ct. App. 2017) (applying rescinded 2015 Guidelines), *with S.S. v. Stephanie H.*, 388 P.3d 569 n. 5 (Ariz. Ct. App. 2017) ("Rules recently issued by the Bureau of Indian Affairs … addressing 'requirements for state courts in ensuring implementation of ICWA in Indian child-welfare proceedings' are informative.").

[98] *In re adoption of T.A.W.*, 354 P.3d 46 (Wash. Ct. App. 2016); *see supra* note 6.

[99] *See S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017), *cert denied*, 138 S.Ct. 390 (2017); *In re adoption of No. 20150434 B.B.*, 2017 UT 59, 2017 WL 3821741 (Utah 2017).

[100] *In re M.J.*, No. 2017AP1697, 2017 WL 6623390 (Wis. Ct. App. 2017).

[101] *In re K.S.D.*, 904 N.W.2d 479 (N.D. 2017).

[102] *Id.* at 488.

[103] *Id.* at 485–86.

[104] *Id.*

[105] *Id.* at 487.

[106] *In re B.B.*, 417 P.3d 1 (Utah 2017).

[107] *Id.* at 28.

[108] *Id.* at 25.

[109] *Gila River Indian Cmty. v. Dep't of Child Safety*, 395 P.3d. 286, 242 (Ariz. 2017).

[110] *Id.* at 288.

[111] *Id.* at 290.

[112] *Id.* at 290–91 (*emphasis added*).

[113] *Brackeen v. Zinke*, 338 F.Supp.3d 514 (2018).

[114] *Id.*

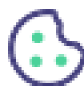
[115] *In re R.R.*, 2018 WL 6062404 (Cal. App. Ct. Nov. 20, 2018); *People in re M.D.*, 920 N.W.2d 496 (S.D. 2018); *Interest of A.M.*, 570 S.W.3d 860 (Tex. App. 2018).

[116] It is important to note that Alaska, Montana, North Dakota, and South Dakota, do not have or use their Court of Appeals for child welfare cases; appeals are taken directly to the state supreme court.

[117] Notice was the subject of litigation in eighty-six cases, and inquiry was the subject of litigation in forty-three cases.

[118] The numbers of cases for each category of litigation are as follows: Placement Preferences (nine), Active Efforts (thirteen), Termination of Parental Rights (eighteen), Indian Child (twelve), Tribal Customary Adoption (four), Transfer to Tribal Court (one), and QEW (one).

[119] *In re B.Y.*, 432 P.3d 129 (Mont. 2018); *In re Adoption of Micah H.*, 918 N.W.2d 834 (Neb. 2018), *Terry S. v. Superior Court*, No. A148984, 2018 WL 300078 (Cal. Ct. App. Jan. 5, 2018); *In re K.R.*, No. A153781, 2018 WL 6428088 (Cal. Ct. App. Dec. 7, 2018); *In re D.R. Wolf*, No. 343001, 2018 WL 6070462 (Mich. Ct. App. Nov. 20, 2018); *In re S.D.M.*, No. 78142-1-I, 2018 WL 5984147



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(Wash. Ct. App. Nov. 13, 2018); *Jude M. v. State*, 394 P.3d 543, 547 (Alaska 2017); *Vanessa W. v. Dep't of Child Safety*, No. 1 CA-JV 17-0461, 2018 WL 2147213 (Ariz. Ct. App. May 10, 2018); *Ronald H. v. State*, No. S-16725, 2018 WL 1611648 (Alaska Mar. 28, 2018); *In re A.F.*, No. 17-0487, 2018 WL 1282575 (Mar. 13, 2018); *In re C.P.*, No. F075660, 2018 WL 1045063 (Cal. Ct. App. Feb. 26, 2018); *Janice H. v Dep't of Child Safety*, No. 1 CA-JV 17-0343, 2018 WL 893981 (Ariz. Ct. App. Feb. 15, 2018); *Charles V. v. State*, No. S-16575, 2018 WL 913105 (Alaska Feb. 14, 2018).

[120] *In re B.Y.*, 432 P.3d 129 (Mont. 2018).

[121] Ten out of eighteen cases were reported.

[122] *See In re J.Y.*, 241 Cal.Rptr.3d 856 (Cal. Ct. App. 2018); *In re A.S.*, 239 Cal.Rptr.3d 20 (Cal. Ct. App. 2018); *In re Williams*, 915 N.W.2d 328 (Mich. 2018).

[123] *In re J.Y.*, 241 Cal.Rptr.3d 856 (Cal. Ct. App. 2018); *In re A.S.*, 239 Cal.Rptr.3d 20 (Cal. Ct. App. 2018); *In re L.S.* 2018 WL 3371960 (Cal. Ct. App. July 11, 2018); *In re A.S.*, 2018 WL 3196529 (Cal. Ct. App. June 29, 2018).

[124] *Williams*, 915 N.W.2d 328 (Mich. 2018) (The Indian Law Clinic at MSU represented the Tribe in this case).

[125] *In re J.L.*, 428 P.3d 612, 616–17 (Colo. Ct. App. 2018).

[126] 570 U.S. 637, 133 S.Ct. 2552 (2013).

[127] *Compare In re J.J.W.*, 902 N.W.2d 901, 919 (Mich. Ct. App.) (vacating an order denying an adoption petition, vacating the order removing children from petitioners with no instructions as to where the children should go), *with In re Williams* 915 N.W.2d 328, 337 (Mich. 2018) (describing where the children should stay during the remand).

[128] *Matter of P.T.D.*, 424 P.3d 619 (Mont. 2018).

[129] *Matter of B.Y.*, 432 P.3d 129 (Mont. 2018).

[130] 911 N.W.2d 821 (Minn. 2018).

[131] *Id.* at 825–26.

[132] *Id.* at 831. Other evidence showed long-term agency involvement, testimony from a psychologist of mother's poor life choices, belief that the children should not be returned, and testimony that mother was not engaging in any of the required services. *Id.*

[133] *Id.* at 832.

[134] 411 P.3d 622 (Alaska 2018).

[135] *Id.* at 624.

[136] *Id.* at 626.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 629.

[140] *Id.* The court also held that the parents' preserved this issue for appeal, both by objecting to testimony and by requesting that the court swear in a witness. In addition, the parents could not have known at the time of testimony that the court would later rely on that unsworn evidence to make removal findings months later.

[141] 432 P.3d 129 (Mont. 2018).

[142] *Id.* at 130.

[143] *Id.* at 131. Notably, the appellate court found that the trial court correctly applied ICWA because there was "reason to know" the children were Indian children as indicated in the agency's affidavits.

[144] It is important to note that Alaska, Montana, North Dakota, and South Dakota, do not have or use their Court of Appeals for child welfare cases; appeals are taken directly to the state supreme court. See Section III for a summary of these cases. That said, last year Montana only had two reported cases.

[145] *In re Navajo Nation*, 587 S.W.3d 883 (Tex. Ct. App. 2019) (noting the existence of the case); *T.W. v. Shelby County Dept' of Human Resources*, 293 So.3d 386 (Ala. Ct. App. 2019) (noting the court is not bound by a federal district court decision); *In re D.E.D.I.*, 568 S.W.3d 261 (Tex. Ct. App. 2019) (noting the existence of the case); *People in re E.T.*, 932 N.W.2d 770 (S.D. 2019); *In re L.R.D.*, 128 N.E.3d 926 (Ohio Ct. App. 2019) (discussed in a concurrence).

[146] *Brackeen v. Bernhardt*, 937 F.3d 406 (2019).

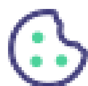
[147] *Brackeen v. Bernhard*, 942 F.3d 287 (2019).

[148] 25 C.F.R. § 23.1.

[149] *Sam M. v. Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 422 P.3d 731, 736 (Alaska 2019).

[150] *Bill S. v. Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 436 P.3d 976 (Alaska 2019).

[151] *In re K.L.* 451 P.3d 518 (Mont. 2019).



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[152] Notice (95), Inquiry (50).

[153] Placement Preferences (5), Active Efforts (14), Termination of Parental Rights (12), Indian Child (7), Transfer to Tribal Court (6), and QEW (10).

[154] Of the 226 total cases, 104 were remanded and 4 were reversed. In addition, 11 were dismissed for various reasons. Of the 42 reported cases, 26 were affirmed, while 13 were remanded or reversed, 1 was dismissed, and 2 was affirmed in part and reversed in part.

[155] *In re Navajo Nation*, 587 S.W.3d 883 (Tex. App. 2019); *People in re L.R.B.*, 487 P.3d 1058 (Colo. Ct. App. 2019); *Navajo Nation* v. Dep't of Child Safety, 441 P.3d 982 (Ariz. Ct. App. 2019); *Interest of Y.J.,* No. 02-19-235-CV, 2019 WL 6904729 (Texas Ct. App. Dec. 19, 2019).

[156] *In re E.T.* 932 N.W.2d 770 (S.D. 2019); *In re Dupree M.*, 97 N.Y.S.3d 680 (2019); *see* Fletcher & Fort, *Children and the Guardians ad Litem*.

[157] *In re* L.R.B. 487 P.3d 1058 (Colo. App. 2019); *In re Navajo Nation*, 587 S.W.3d 883 (Tex. App. 2019).

[158] 199 A.3d 221 (Me. 2019).

[159] *Id.*

[160] *Id.* at 222–23.

[161] *Id.* (citing 2016 BIA Guidelines).

[162] *Id.* at 228–29. The court also cited to ICWA's Legislative History which refers to the good cause determination in ICWA's transfer provision as a "modified *forum non conveniens* analysis." *Id.* at 229 (citing H.R. Rep. No. 95–1386 at 1 (1978)).

[163] *Id.* at 226.

[164] 444 P.3d 171 (Alaska 2019).

[165] *Id.* at 175, 176.

[166] *Id.* a 175.

[167] *Id.* at 176.

[168] *Id.* at 176.

[169] *Id.* at 177.

[170] *Id.*

[171] *Id.* at 179. Specifically, the court reasoned:

"25 C.F.R. § 23.122(a) and the new guidelines 'recognize[d] the difference between the mandatory word 'must' and the admonitory word 'should': the ability to testify about the risk of harm is required of every qualified expert witness, but the ability to testify about 'the prevailing social and cultural standards' is not essential in every case.' We acknowledged that the new regulations require an expert witness be qualified to testify to the relevant causal relationship—'whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.' Connecting the new regulations to the guidelines and our precedent, we stated that '[t]he expert witness who is qualified to draw this causal connection must have an 'expertise beyond normal social worker qualifications.'"

Id. at 177–78.

[172] *Id.* at 179–80. The court also noted that although the expert in the mother's case had worked for the Department, her qualifications were not greater than a "normal social worker" as also required by the regulations. *Id.* at 179 ("in every case in which we found an expert to be clearly qualified the expert 'had substantial education in social work or psychology and direct experience with counseling, therapy, or conducting psychological assessments[.]"). But see case from 2022 QEW Alaska.

[173] 97 N.Y.S.3d 680 (2019).

[174] *Id.*

[175] *Id.* at 681.

[176] *Id.*

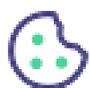
[177] In New York the intermediate appellate court is called the Supreme Court.

[178] *Id.* at 682.

[179] *Id.* (citing to *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30, 36 (1989)); *Id.* at 683 (citing to Social Services Law § 39 (6)).

[180] *Id.* at 683 (citing to 25 C.F.R. 23.2 *Child Custody Proceeding* (2)).

[181] *Id.* at 684. Notably the child also argued that because the New York State ICWA regulations were not updated until one month after the proceeding in question, they did not apply to the case.



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[182] *In re K.C.*, (Colo). The MSU Indian Law Clinic represented the tribe in this case.

[183] 471 P.3d 853 (Wash. 2020). The MSU Indian Law Clinic represented the Tribe in this case.

[184] *Id.* at 857.

[185] *Id.*

[186] *Id.* at 859.

[187] *Id.*

[188] *Id.* at 865.

[189] *Id.* at 866–67.

[190] *Id.* at 869.

[191] *Id* at 870.

[192] 938 N.W.2d 307 (Neb. 2020).

[193] *Id. citing to* 25 U.S.C. § 1903(1); N.E. Code § 43-1503(3).

[194] 261 Cal.Rptr.3d 297 (Cal. Ct. App. 2020).

[195] 272 Cal.Rprt.3d 381 (Cal. Ct. App. 2020).

[196] As explained in *T.G.* a duty of further inquiry requires interviewing, "as soon as practicable," extended family members, contacting the Bureau of Indian Affairs and "[c]ontacting the tribe or tribes and any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility." Cal WIC Code § 224.2, subd. (e)(1)–(3). This informal contact with the tribe must include "sharing information identified by the tribe as necessary for the tribe to make a membership or eligibility determination." Cal. WIC Code § 224.2, subd. (e)(3).

[197] *Brackeen v. Haaland*, 994 F.3d 249 (Fifth Cir. 2019).

[198] *Ronald H. v. Dep't of Health & Social Services*, 490 P.3d 357 (Alaska 2021) (citing to Costa J.'s concurrence and dissent noting no state court is bound by the federal court's decision); *In re F.K.*, 967 N.W.2d 371 (Table) (Iowa, 2021) (in an unpublished decision, the court pointed it out it was basing its reasoning on state law, not federal).

[199] *Haaland v. Brackeen*, 142 S.Ct. 1205 (Feb. 28, 2022).

[200] *People in re C.R.W.*, 2021 S.D. 42.

[201] *State ex rel. Choctaw Nation of Oklahoma v. Sifferman*, 633 S.W.3d 876 (Mo. Ct. App. 2021).

[202] *Id.* at 880.

[203] Paul Clement.

[204] Matthew McGill.

[205] Matthew McGill is the attorney of record for the Brackeens in *Haaland v. Brackeen*.

[206] Oregon and New Mexico.

[207] NCJFCJ, Technical Assistance Bulletin, Indian Child Welfare Act (ICWA) Courts: A Tool for Improving Outcomes for American Indian Children and Families (April 26, 2021) https://www.ncjfcj.org/publications/icwa-courts-a-tool-for-improving-outcomes-for-american-indian-children-and-families/.

[208] 487 P. 3d 263 (Colo. 2021) (The MSU Indian Law Clinic represented the Tribe in this matter).

[209] *Id.* at 267.

[210] *Id.*

[211] *Id.* at 273.

[212] *Id.*

[213] *Id.* at 274.

[214] 489 P.3d 631 (Wash. 2021).

[215] 499 P.3d 876 (Or. Ct. App. 2021).

[216] *Id.* at 879.

[217] *Id.* at 879–80.

[218] *Id.* at 880.

[219] *Id.*

[220] *Id.*

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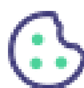

[221] 511 P.3d 357 (N.M. Ct. App. 2021).

[222] *Id.* at 364 (citing 25 C.F.R. § 23.122(a) (emphases added)).

[223] *Id.* at 362.

[224] *Id.* at 366 (citing to U.S. Dep't of the Interior, BIA, Guidelines for Implementing the Indian Child Welfare Act, 53–54).

[225] *Id.* at 367.

[226] 489 P.3d 964 (N.M. Ct. App. 2021).

[227] Notably, this case also involved an issue regarding mother's right to counsel, although her right to counsel under ICWA was not addressed, the court did find that although she told her counsel she wished to be unrepresented, because she never affirmatively waived her right on the record and because she was prejudiced by her own unpreparedness, her rights were violated. *Id.* at 969.

[228] *Id.* at 971.

[229] *Id.* at 973–74.

[230] Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World 9–10 (2022).

[231] *See* (Fort, Kate), Beyond *Brackeen*: Funding Tribal Systems, __ Fam. L.Q. __ (2023).

[232] This solution is expanded on in Fort, Kate, *Beyond Brackeen: Funding Tribal Systems*, forthcoming, Family L. Q.

[233] This is done already in Washington state through the Tribal Payment Only program. *See*, Washington State, Department of Children, Youth and Families, ICW Policies and Procedures, Chapter 11, Payments for Children in Tribal Care or Custody, https://www.dcyf.wa.gov/indian-child-welfare-policies-and-procedures/11-payments-services-children-tribal-care-or-custody.

[234] For example, Montana has created a policy and procedure manual specific to working with tribal families. Child and Family Services Manual: Legal Procedures Indian Child Welfare Act, 305-1 *et seq*., https://dphhs.mt.gov/assets/cfsd/cfsdmanual/305-1.pdf.

[235] Oregon has both a benchbook and established forms that are publicly available. See Oregon Judicial Department, *Oregon Indian Child Welfare Act Dependency Benchbook* (2021), https://www.courts.oregon.gov/programs/jcip/Documents/ORICWA%20Benchbook%20011222.pdf.

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