



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

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Hot Topics

Fifth Circuit Court of Appeals Issues En Banc Decision in Brackeen ICWA Case

On April 6, 2021, the Fifth Circuit Court of Appeals en banc (reviewed before all sitting judges within the federal circuit) issued their long-awaited decision in the *Brackeen v. Haaland* Indian Child Welfare Act (ICWA) case (formerly known as *Brackeen v. Bernhardt*). The decision, which took nearly 14 months to be issued, is 325 pages long and unusually complex compared to typical en banc decisions. The full decision is comprised of multiple, individual decisions on different issues, some which attracted a majority of the court and others that were evenly split with eight judges on each side. One large question before the court was whether ICWA was constitutionally based. A majority of the court found that ICWA was constitutionally based, citing Congress's plenary power to enact legislation like ICWA for the benefit of Indian people. However, the court also found some specific requirements of ICWA, such as active efforts and qualified expert witness, in violation of the commandeering doctrine of the U.S. Constitution that prohibits the federal government from commandeering, or taking control of the resources of state governments, in this case namely state agencies. Nonetheless, the vast majority of ICWA requirements remain intact after the decision.

The issue of the application of this decision also has some complexity, but generally speaking the decision is not applicable outside the states within the jurisdiction of the Fifth Circuit Court of Appeals (Texas, Louisiana, and Mississippi). In addition, the decision is only binding upon federal courts, which don't hear ICWA cases, and is not binding upon state courts. This will allow state courts within the Fifth Circuit to decide whether they will incorporate the decision and how. For now, this decision should not change ICWA's current application in states outside the Fifth Circuit.

NICWA and the other Protect ICWA Campaign partners (the National Congress of American Indians, Native American Rights Fund, and Association on American Indian Affairs) are working together to get more detailed information out as soon as possible, but want everyone to realize that this is a very complex, unusual, and lengthy decision that will take time to fully comprehend. NICWA would also like to thank our Protect ICWA Campaign partner attorneys for the hard work they are doing to develop an accurate and practical understanding of this decision. Please watch for new information on our website, social media, and email blasts.

Congress Approves COVID-19 Relief Bill

On March 11, 2021, President Biden signed into law the [American Rescue Plan of 2021](#) (P.L. 117-2). The legislation was first approved by the House, then amended and approved by the Senate, then approved with Senate amendments by the House. The legislation provides a variety of relief benefits and boosts to existing federal programs to address impacts from the pandemic. This is the sixth COVID relief bill that Congress has passed since the beginning of the pandemic and is second in terms of the overall cost at \$1.9 trillion (the first was the \$2.2 trillion package that passed on March 27, 2020).

While the legislation has several important benefits for individuals and families, it contains fewer child welfare provisions than in the last relief bill. Key provisions focus on stimulus checks for individuals and families and relief funding for states, tribes, and local and municipal governments. Many of the child welfare provisions that were in the House passed [HEROES Act](#) (116th Congress, H.R. 6800) did not make it into the American Rescue Plan of 2021. Part of the reason for this was the COVID relief bill passed in December of 2020, the [Consolidated Appropriations Act 2021 \(P.L. 116-260\)](#), contained a number of child welfare provisions (P.L. 116-260) and decisions by congressional leadership to narrow the scope of the 2021 COVID relief bill.

Key provisions in the law include the following:

- Increases to Child Abuse Prevention and Treatment Act grant funding—\$100 million in additional funds for the state grant programs and \$250 million additional for Community-Based Child Abuse Prevention (CBCAP) grant program (tribes eligible for CBCAP grant program).
- The Maternal, Infant, and Early Childhood Home Visiting Program received an additional \$150 million (tribes are eligible for this program).
- Stimulus checks for individuals and families of up to \$1,400 per person were included. The full amount of the checks begin to phase out when individuals have income above \$75,000 per year, heads of households have income over \$112,500 per year (single parents), and married couples have income above \$150,000 per year.
- A boost in unemployment benefits by \$300 per week through September 6, 2021; the first \$10,200 of benefits are tax free for households with less than \$150,000 of income per year.
- Aid to states, tribes, territories, and local governments (\$350 billion). Tribes will be eligible for \$20 billion in aid.
- Enhanced supplemental nutrition benefits. The 15% increase in SNAP program benefits (Supplemental Nutrition Assistance Program, formerly known as food stamps) for eligible recipients will be extended through September 2021. The Special Supplemental Nutrition Program for Women, Infants, and Children will receive an additional \$880 million to improve participation and benefits temporarily. States will also be able to continue the Pandemic EBT program through the summer that provides free and reduced-priced meals to eligible children who are in schools that are closed. An additional \$1.4 billion funding for nutrition programs for seniors that fall under the Older Americans Act was included.
- States and local governments will receive \$20 billion for housing assistance to help renters that need help paying their rental payments. A portion of the funding will also be available for homeowners that need assistance paying their mortgages. An additional \$4.5 billion for the Low Income Housing Energy Assistance Program to help income eligible persons pay their utility bills was included. An additional \$5 billion for states and local governments to help those at-risk of becoming homeless secure housing and \$5 billion for helping those who are homeless locate housing was included.
- Expansion of the federal Child Tax Credit to \$3,600 for each child under six years of age and \$3,000 for each child under 18 years of age. This is available for single parents with incomes under \$75,000 and two-parent households with incomes under \$150,000. In addition, the tax credit is fully refundable. Parents can receive the benefit monthly or in a lump sum each year.
- The Earned Income Tax Credit is expanded for individuals without children by almost threefold, the minimum age to claim the credit is dropped to age 19, and the upper age limit is eliminated.
- Schools receive additional support with an additional \$125 billion for K-12 schools that are working to return children and youth to in-person instruction. Almost \$40 billion is reserved for colleges and universities to support emergency financial aid and defraying costs related to declining enrollment and increased costs related to keeping students safe during the pandemic.
- An additional \$39 billion for childcare providers to help pay operating costs, support families who are struggling to meet childcare expenses, and purchase personal protective equipment and related supplies was included.

Key provisions for tribal nations and American Indian and Alaska Native people in the law include:

- Over \$772 million for tribal government services (i.e., general assistance, assistance to tribal governments, public safety, and child welfare).
- Over \$6 billion for Native health systems including \$420 million for mental health and behavioral health services under Indian Health Services. In addition, \$140 million for improving technology and telehealth access.
- An additional \$1.2 billion for Housing and Urban Development (HUD) Tribal & Native Hawaiian housing programs (\$498 million for Homeowners Assistance Program for Tribes and Native housing programs, \$450 million for the Indian Housing Block Grant, and \$280 million for the Indian Community Development Block Grant).
- An additional \$1.1 billion for Native education programs, including Bureau of Indian Education schools, tribal education agencies, tribal colleges and universities, and Alaska Native education programs.
- An additional \$1 billion for tribal childcare programs and supports and \$75 million for Temporary Assistance to Needy Families benefits through the Pandemic Emergency Assistance Fund.
- An additional \$100 million for critical infrastructure projects in tribal communities.
- An additional \$20 million for a new emergency Native language preservation and maintenance grant program through the Administration for Native Americans to mitigate impacts of COVID-19 on Native language communities.
- An additional \$19 million for tribal communities' efforts to combat domestic violence through the Family Violence Prevention & Services Act (\$18 million) and "Stronghearts" Native Domestic Violence Hotline (\$1 million).
- Increases to the Maternal, Infant, and Early Childhood Program and Child Abuse Prevention and Treatment, Community-Based grant programs saw increases that will also benefit tribal grantees.

Children's Bureau Releases Guidance on Child Welfare Programs and Funding

On March 10, 2021, the Children's Bureau released guidance on a number of programs and funding that were contained in the Consolidated Appropriations Act (P.L. 116-260) that was approved by Congress in December 2020. The child welfare provisions in this law responded to a number of concerns related to COVID-19 impacts on children and families involved in the child welfare system. The guidance, [ACYF-CB-PI-21-04](#), provides guidance on John H. Chafee Foster Care programs (transitional living), Court Improvement Program, Family First Prevention Services Program, and funding for the Title IV-B, Subpart 2 program (Mary Lee Allen Promoting Safe and Stable Program). Additional guidance was released for the Kinship Navigator Program [ACYF-CB-PI-21-05](#). The guidance addresses programs that both tribes and states are eligible for.

Temporary suspension of aging out foster care youth and permitting re-entry of youth who have left foster care previously. The program instruction requires states and tribes operating the John H. Chafee Foster Care program to temporarily stop discharging youth to age out of the foster care system and permit their re-entry into foster care if they have previously left foster care (youth leaving from January 27, 2020–April 20, 2021) if it is solely due to age and education or employment requirements. The reentry requirement stays in effect until September 30, 2021. In addition, the tribal or state child welfare agency must inform all youth who were discharged from foster care from January 27, 2020, through April 20, 2021, of the opportunity to reenter foster care and conduct a public awareness campaign about this option. Tribes are eligible to operate the John H. Chafee Foster Care program directly through the federal government or through an agreement with a state.

Temporary suspension of age and education and employment requirements for Title IV-E foster care maintenance payments (maintenance payments go to foster care providers to support basic needs of foster children in their care). Tribal and state Title IV-E agencies must submit a certification by April 23, 2021, that they will implement the aging out of foster care and reentry of youth who have left foster care requirements above. You can find a copy of the certification form [here](#) (Attachment C of the guidance).

Related to the requirements to help prevent further youth from aging out of foster care during the pandemic, the Children's Bureau is also providing temporary flexibility in how the additional Chafee funds in the December 2020 COVID relief bill (P.L. 116-260) can be used (see Attachment A of the guidance). The Children's Bureau mentions being able to use more than 30% of Chafee funds for room and board, living expenses, driver's assistance, technology access, personal protective equipment, and direct financial assistance to eligible youth. The additional Chafee funds are available in both fiscal year 2021 and 2022.

Temporary flexibility for use of Education and Training Voucher (ETV) Program. As part of the Chafee program, states and tribes can use a portion of their funds for vouchers to support youth who have aged out of foster care to pursue post-secondary education. The pandemic disrupted the plans of many youth who were on track to enroll in or continue post-secondary education and whom virtual options did not fit their educational needs. The program instruction provides additional flexibility by waiving educational requirements (e.g., the youth must make satisfactory school progress). In addition, the maximum education and training voucher has been increased to \$12,000 for Fiscal Years 2021 and 2022 and funding can be used beyond just basic costs of attending classes, such as access to technology (laptops, printers, WiFi, etc.).

Additional Court Improvement Program funds. The Court Improvement Program allows states and tribes to support a variety of activities to improve collaboration between child welfare agencies and courts, improve court juvenile proceedings, and enhance training and data collection. Tribes share a \$1 million set-aside that funds around eight tribal grants each year. In the 2021 COVID relief bill an additional \$500,000 was reserved for tribal Court Improve Program grantees. The additional funds can be used to ensure timely conducting of court hearings, technology considerations related to court hearings, programs or services for families, and training for court personnel. Please contact your regional Administration for Children and Families office for further details about distribution of the funding.

Additional Title IV-B, Subpart 2 emergency funding (\$85 million). The additional funding for tribes and states that receive the funds is to continue current programs and services in child welfare that have identified by tribal and state grantees. Tribal governments receive 3% of the overall funding in both discretionary and mandatory sections of the program, so they would be eligible for \$2.55 million of the additional funds. Currently, there are over 300 tribes that receive funding from this program. Please contact your regional Administration for Children and Families office for further details about distribution of the funding.

No new requirements for tribes and states to use flexibility in prevention services under Title IV-E. The Family First Prevention Services Act created a new component of services that are reimbursable under the Title IV-E program, which is prevention services to help children at home (before removal and after being returned home from a removal) avoid removal and placement in foster care. The new prevention services component contains matching requirements, but the December 2020 COVID relief bill provides that tribes and states with approved Title IV-E prevention services plans will receive 100% reimbursement with no non-federal match required for prevention services provided until September 30, 2021. At this point, there are no tribes with approved Title IV-E prevention services plans, but a few states have approved plans that you can see [here](#). Tribes with Title IV-E agreements with states that have approved prevention services plans should contact their state to learn more about how they can access these funds. There may also be opportunities for prevention services provided by states to also benefit Native children and families involved in state child welfare proceedings (Indian Child Welfare Act cases) and tribes should contact their state to see what prevention services the state will be offering and how they will be provided.

Temporary flexibility in operating the Kinship Navigator Program under Title IV-E. Program instruction [ACYF-CB-PI-21-05](#) provides guidance on flexibility in operating the Kinship Navigator Program from April 1, 2020, through September 30, 2021. The Kinship Navigator Program provides support to relatives who may be interested in providing support and a possible placement to a child that needs an out-of-home placement, such as foster care or guardianship. While there are currently no tribes approved to operate the Kinship Navigator portion of Title IV-E, a number of tribes with agreements with states to operate Title

IV-E are working with states that are working to gain access to the program. One of the major barriers is the clearinghouse that evaluates proposed evidence-based practices that can be reimbursed has yet to approve a kinship navigator model. The guidance provides discusses the increased federal funding match available to states and presumably tribes that operate the Title IV-E program and are approved for the prevention services component. To facilitate access to this higher level of federal match, the state or tribe must submit an assurance that the kinship navigator program they are using is in the process of being evaluated to develop an evidence-base to help meet the Title IV-E requirements for states and tribes in this area. While this flexibility is not likely to help tribes much between now and September 30, 2021, when the flexibility ends, it could produce additional efforts to examine tribally based kinship navigator program models that are being used in Indian Country. Some states have developed partnerships with tribes and are collaborating to improve data collection on tribal prevention and kinship navigator program services that may be approved later for reimbursement under Title IV-E.

Biden Administration Issues Executive Order to Improve Relationships with Tribal Nations

On January 26, 2021, the president issued an [Executive Order](#) to strengthen tribal consultation and the nation-to-nation relationship. The Executive Order supports and improves upon earlier Executive Orders (like Executive Order 13175, November 6, 2000) to require all federal agencies to submit a plan within 90 days to implement Executive Order 13175, as well as provisions in President Biden's Executive Order, and to develop the agency plan in consultation with tribal nations and tribal officials. Also required are annual progress reports from federal agencies on their progress to implement the Executive Order and the naming of an individual within each agency to coordinate activities. With the timelines set in the Executive Order, it is anticipated that outreach to tribal nations will be occurring soon. This might come from acting officials in many federal agencies where political appointments have not been confirmed yet, and possibly through existing tribal/federal advisory committees like the Department of Health and Human Services Secretaries Tribal Advisory Committee or Administration for Children and Families Advisory Committee.

Legislation

House Passes Child Abuse Prevention and Treatment Act with Increased Funding for Tribes

On March 16, 2021, the House of Representatives passed the [Stronger Child Abuse Prevention and Treatment Act](#) (H.R. 485). The legislation reauthorizes the Child Abuse Prevention and Treatment Act (P.L. 93-247) and addresses some of the challenges tribes have had accessing the Community-Based Child Abuse Prevention grant program under this law, as well as supporting a study of culturally based child abuse and neglect strategies that tribal communities have successfully employed. Congressman Bobby Scott (D-VA), with several co-sponsors, including Congressman Raul Grijalva (D-AZ) who has championed the tribal provisions, worked to ensure tribal grants were increased within the bill and support for additional data on tribal efforts in child abuse and neglect prevention.

The Child Abuse Prevention and Treatment Act is the federal government's primary source of targeted funding for child abuse and neglect prevention. It includes funding to support child abuse and neglect prevention programs, services, research, and demonstration projects. In the legislation, the tribal set-aside for supporting community-based grants to address child abuse and neglect prevention has been increased from 1% to 5%. The current 1% set-aside has only funded a couple of tribal grant programs each three-year grant cycle. The other opportunity for tribal nations is a study authorized under the legislation that would be conducted by the Government Accountability Office in coordination with tribes to examine some of the challenges that tribes have to obtain funding for child abuse and neglect prevention services, promising practices that tribes are using, and barriers to improved data collection. A study like this has never been conducted and could be very helpful in supporting advocacy to increase funding for child abuse and neglect prevention programs for tribes.

NICWA is working with members of the Senate on the introduction of legislation and encourages you to contact your senators to sign on as co-sponsors. Currently, Senator's Warren (D-MA) and Murkowski (R-AK) are coordinating introduction of the legislation.

Native American Child Protection Act Approved in House of Representatives

On May 12, 2021, the House of Representatives approved the Native American Child Protection Act (H.R. 1688) with the bill now moving to the Senate for consideration. The legislation was introduced in the House on March 9, 2021, with Congressman Ruben Gallego (D-AZ) and Don Young (R-AK) as original co-sponsors. The legislation reauthorizes two different grant programs for tribes and funding for a resource center focused on child maltreatment and family violence under the Indian Child Protection and Family Violence Prevention Act (P.L. 1010-630). The legislation not only reauthorizes the grant programs and resource center funding but also significantly increases the authorization levels to \$93 million. The authorization for the grant and resource funding lapsed in 2011 and is needed for Congress to be able to appropriate funding to the grant programs and resource center.

The grant programs and resource center were originally authorized in the Indian Child Protection and Family Violence Prevention Act (P.L. 101-630) in 1990, but no funds have ever been appropriated by Congress except for a one-year appropriation of a few million dollars for the resource center in the 1990s. NICWA will be working with tribes and Indian organizations to educate congressional members on the needs for the funding in the legislation to address child abuse and domestic violence in tribal communities. NICWA encourages tribes and tribal advocates to contact their Senators and ask them to sign on as co-sponsors to the Senate legislation. Senator Lujan (D-NM) is coordinating the introduction of the legislation in the Senate.

Violence Against Women Act Passes House with Tribal Provisions

On March 17, 2021, the House of Representatives passed the [Violence Against Women Reauthorization Act of 2021](#) (H.R. 1620). The legislation reauthorizes a critical law that provides resources and support for tribal communities in their efforts to protect victims of domestic violence. The legislation contains several grant programs, many of which tribes are eligible for, that support activities to prevent domestic violence, improve coordination among different service providers, and a variety of services to victims. Specific tribal provisions include:

- Clarifications with regards to tribal criminal jurisdiction in domestic violence.
- Clarification regarding definitions of crimes of domestic violence, dating violence, obstruction of justice, sexual violence, sex trafficking, stalking, and assault of law enforcement or corrections officer within a tribal criminal jurisdiction context.
- Grants to strengthen tribal criminal justice systems in exercising special tribal criminal jurisdiction related to domestic violence.
- Reimbursement for tribes exercising special criminal jurisdiction related to domestic violence and arrest and prosecution of offenders, detaining inmates, providing health care and indigent legal defense services for offenders, and costs related to probation and rehabilitation services subject to a rule established by the Department of Justice in consultation with tribal governments.
- Grants to support forensic-medical and advocacy services for victims of domestic violence in Indian Country.
- Enhancements to the ability of tribes to access and submit information from federal criminal databases.

The pathway for passage of the legislation in the Senate is less clear than it was in the House, so advocates for victims of domestic violence are encouraged to contact their senators and share their thoughts about the House legislation, particularly as it applies to tribal communities, tribal jurisdiction, and program services for victims.

Administrative Policy

Children's Bureau Issues Guidance to Allow Some Cultural Adaptations in Evidenced-Based Prevention Services

On January 13, 2021, the Children's Bureau released an Information Memorandum (IM) that provides new guidance on the use of cultural adaptations to approved evidence-based prevention services ([see](#)

[ACYF-CB-IM-21-04](#)) under Title IV-E of the Social Security Act (also known as Title IV-E program). Prevention services under the Title IV-E program include mental health services, parent training, and substance abuse prevention and treatment. Prevention services are a new component of the Title IV-E program that was authorized in 2018 under the [Family First Prevention Services Act](#) (P.L. 115-123, Division E, Title VII).

The IM clarifies that states and tribes that are in agreements to operate the Title IV-E Program may seek reimbursement for certain adapted (culturally or otherwise) prevention services and programs already approved by the Title IV-E Prevention Services Clearinghouse. Allowable adaptations are discussed in the IM, along with more substantial adaptations that will not be allowed to seek reimbursement.

In the IM, the Children's Bureau recognizes the importance of providing cultural services to AI/AN children and families to address longstanding disparities and disproportionality affecting AI/AN families and urges states to consult with tribes to develop plans for culturally adapting prevention services and programs. This policy clarification opens the door for states and tribes to work together to develop prevention services that are more culturally appropriate and eligible for funding support under the Title IV-E program.

NICWA Shares Priorities with Biden-Harris Transition Team

When a new presidential administration begins preparing to take office, they develop a transition team that involves people with experience in different areas of government services and working with different populations. The Biden-Harris transition team was established before the election and has been meeting with different groups and organizations since its inception. NICWA was contacted to meet with transition team members that have experience in Department of Health and Human Services programs, like child welfare, and in Bureau of Indian Affairs programs. Prior to contact with the transition team members, NICWA contributed to the Indian child welfare section of the [National Congress of American Indian's transition document](#) that was disseminated to the Biden-Harris team. NICWA highlighted critical policy gaps that have created barriers to Native children and families receiving child welfare services and concerns about implementation of the Indian Child Welfare Act. The transition team has been reaching out to Indian Country through several different tribal organizations and NICWA has been participating in as many of those as possible to ensure child welfare issues are discussed. As the new administration takes office and new political appointments for federal agencies are announced, NICWA will be reaching out to encourage tribal outreach and engagement and sharing our experiences with Indian child welfare issues. NICWA has shared with the Biden-Harris transition team that all agency political appointees should have experience in working with tribal nations or at least a demonstrated interest in learning how to effectively engage Indian Country and support for basic tenets of federal Indian policy and administrative consultation policy.

Tribes and Advocacy Organizations File Lawsuit Challenging Removal of AFCARS Data Elements

On August 27, 2020, a coalition of tribes and advocacy organizations filed a [lawsuit](#) in the Federal District Court in the Northern District of California claiming the removal of Adoption and Foster Care Analysis Reporting System (AFCARS) data elements by the Trump Administration for American Indian and Alaska Native and LGBTQ+ children was unlawful. The plaintiffs include the California Tribal Family Coalition, Yurok Tribe, Cherokee Nation, Facing Foster Care in Alaska, Ruth Ellis Center, Ark of Freedom Alliance, and True Colors. The lawsuit asserts that the U.S. Department of Health and Human Services, Administration for Children and Families violated the Administrative Procedures Act when the agency issued its May 12, 2020, AFCARS Final Rule. The Final Rule eliminated over 85% percent of the previous 60-plus AFCARS data elements for American Indian and Alaska Native children established in the 2016 AFCARS Final Rule, which provided critical data elements including the first-ever data on requirements of the Indian Child Welfare Act (ICWA). AFCARS is the federal government's largest source of data on children who are in out-of-home placement.

The remaining ICWA data elements in the [2020 AFCARS Final Rule](#) include the following:

- Whether inquiries were made regarding if the child is an Indian child under ICWA.

- Whether ICWA applies for the child and the date that the state title IV-E agency was notified by the Indian tribe or state or tribal court that ICWA applies.
- Whether notification to the child's tribe of state child custody proceedings occurred.
- The tribal affiliation of the child, birth mother, birth father, foster parents, adoptive parents, and legal guardian.

NICWA has led efforts since the early 1990s to include ICWA data elements in AFCARS and has previously provided testimony and comments promoting the critical importance of new data elements in AFCARS to address disparities in outcomes and disproportionality in state foster care systems for American Indian and Alaska Native children. Of important note, ICWA is the only major federal child welfare law that does not have a structured and regular data collection system that tracks implementation.

While the lawsuit continues to move forward, NICWA urges tribes to consult with their state child welfare agency on how they will be implementing the remaining ICWA data elements and encourage them to collect data on all of the previous 60 data elements. The new Biden-Harris Administration will also be looking to hear from tribes on their position with regards to restoring the 2016 data elements, so NICWA encourages tribal nations to share their thoughts with DHHS leadership.

Budget

FY 2022 Budget Process Getting Underway Later Than Usual with Administration Change

During the transition from one president to the next, the federal budget process can look a little different than in other years. While the outgoing administration will have already worked on a budget to submit to Congress in case they continue in office, Congress will be looking more to the incoming president's budget priorities. Because the typical budget process for an administration can take up to 12 months, the incoming president has a much shorter amount of time and contact with existing agency staff to prepare and submit their budget priorities to Congress. This usually means the new president's priorities will be less detailed than usual and will be transmitted to Congress a little later than usual too. For Fiscal Year 2022, which begins October 1, 2021, the Biden Administration is expected to provide a more comprehensive budget priority document on May 27, 2021. NICWA is encouraging tribal nations to share budget priorities for human service programs like child welfare with their members of Congress and the new administration so they can be informed and have guidance on federal programs that serve American Indian and Alaska Native people.

For more information relating to this update, please contact NICWA Government Affairs Director David Simmons at desimmons@nicwa.org.