



**NICWA**

National Indian Child Welfare Association

# ICWA Best Practices

## for State Child Welfare Agencies After the Brackeen Decision

On April 6, 2021, [the Fifth Circuit Court of Appeals issued its en banc panel decision](#) in *Brackeen v. Haaland* (formerly known as *Brackeen v. Bernhardt*), the case regarding the constitutionality of the Indian Child Welfare Act (ICWA). The majority of the Court upheld the constitutionality of ICWA and the federal regulations, including confirming Congress's authority to enact legislation that protects and benefits tribes and Native 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. The commandeering doctrine prohibits the federal government from "taking control" of the resources of state governments for federal purposes, in this case namely state child welfare agencies. However, the Fifth Circuit decision found the vast majority of ICWA requirements are constitutional and remain intact.

### Impact on ICWA Cases in Texas, Louisiana, and Mississippi

The en banc decision is **not applicable** outside of Texas, Louisiana, and Mississippi, the states within the Fifth Circuit Court's jurisdiction. Currently:

- The ruling is effective as of June 1, 2021, when the Fifth Circuit issued its mandate.
- The decision is only binding upon federal courts, which typically do not hear ICWA cases.
- State courts within the Fifth Circuit's jurisdiction can decide if they will incorporate the Fifth Circuit's decision for cases within their court.

### Impact on Families with ICWA Cases

No matter the state, families with ICWA cases and child welfare workers handling ICWA cases may have questions regarding the implications of the *Brackeen v. Haaland* decision and the current standing of ICWA. It is important to ensure families and caseworkers have accurate information about the decision and its application, if any, in their case.

Standing ICWA requirements include:

- **A court may not issue the foster care placement of an Indian child without clear and convincing evidence supported by testimony.** The testimony of a qualified expert witness must determine whether a child's continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.
  - A "qualified expert witness" testimony must be part of evidence presented. The qualified expert witness may be designated from the child's tribe and cannot be the caseworker regularly assigned to the child. Supportive qualified expert witness testimony is required to support a state court's decision to place a child outside of their home.
- **Active efforts apply and must be provided.** "Active efforts" are the affirmative, active, thorough, and timely efforts intended to keep an Indian child with his or her family. Active efforts must be undertaken to provide remedial services to prevent the removal of an Indian child from their home and support the reunification of the child with their family after a removal. The requirement to provide active efforts also applies when termination of parental rights is being considered for an Indian child's parent(s).
- ICWA placement preferences apply regardless of whether the child's tribe intervenes in the case or the child's tribe can identify a preferred placement home.

## Best Practices for State Child Welfare Workers

The [Fifth Circuit Court of Appeals \*Brackeen v. Haaland en banc\* decision](#) upheld the constitutionality of ICWA and the federal regulations, and the provisions of ICWA still stand.

State child welfare workers should continue to follow the minimum standards for removal of Indian children outlined in ICWA. State workers can apply active efforts to prevent the removal of Indian children from their families, and if removed, to reunite children with their families by:

- Engaging early with the child's tribe to determine tribal membership for the child and discussing the investigation and case plan findings and goals.
- Ensuring caseworkers understand ICWA's application and the relevant requirements in the current phase of their case. [See NICWA's ICWA Compliance Guide here.](#)
- Emphasizing the temporary nature of foster care to foster parents and ensuring they understand the importance of their support for reunification efforts with the birth family.
- Making sure parental visitation occurs on a regular basis.
- Ensuring that efforts are being made to help connect the parents and child with cultural resources and supports.
- Conducting thorough relative searches of the child's family and making sure extended family members have adequate and timely information to help them participate as a support or placement resource.

Tribal governments and tribal child welfare agencies can provide critical support to states to aid in their proper implementation of ICWA, promote the best interests of Indian children, and produce better child and family well-being outcomes. State-tribal partnerships at the agency, individual worker, and court level support ICWA implementation.

## Additional Resources

[\*\*\*Brackeen v. Haaland: That One Big ICWA Case Decision Tree\*\*\*](#)  
Native American Rights Fund Factsheet

[\*\*\*A Guide to Compliance with the Indian Child Welfare Act\*\*\*](#)  
NICWA Toolkit

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*This resource is intended for state child welfare workers and agencies.*