

NICWA NEWS

Quarterly Newsletter • Summer 2023

The **LATEST** **INSIDE**

**Protecting Seven
Generations**





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The National Indian Child Welfare Association (NICWA) is a nonprofit, membership-based organization dedicated to the well-being of American Indian and Alaska Native children and families. Headquartered in Portland, Oregon, NICWA serves tribes, individuals, and private organizations throughout the United States and Canada by serving as the most comprehensive source of information on American Indian child welfare and acting as the only national Native organization focused on building tribal capacity to prevent child abuse and neglect.

Our Mission

The National Indian Child Welfare Association is dedicated to the well-being of American Indian and Alaska Native children and families.

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NICWA News is the quarterly newsletter for members and donors of the National Indian Child Welfare Association. Membership is available in multiple levels starting at \$35. For reprint requests, additional copies, or other information, contact us at info@nicwa.org



(Cover photo courtesy of Kyra Antone)

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Message from the Executive Director

Dear NICWA Members, Sponsors, Donors, and Friends,

This issue embraces the theme *Protecting Seven Generations* by focusing on NICWA's advocacy. Last month's Supreme Court decision in *Haaland v. Brackeen*, an overwhelming victory for Native children and families and tribal nations, affirmed the constitutionality of the Indian Child Welfare Act (ICWA). So much was at stake—for children, parents, communities, and tribal nations. We advocated relentlessly, educated allies, and worked in coalitions. We stood in solidarity for our children and in prayer.

On June 15, 2023, when the U.S. Supreme Court handed down their decision, my family and I were at the Leech Lake Reservation for the Day Family Big Drum Ceremony. This ceremony, like so many of our tribal ceremonies, is for the community to live a good life. It felt so appropriate to be able to be in community celebrating life when the ruling came down. When the decision was published, the Protect ICWA Campaign partners jumped into action. We discussed the implications and messaging with our attorneys, released press statements, took interviews with media across the world, and worked with the National Congress of American Indians to coordinate a panel discussion with tribal leaders early the following week.

We heard from many of you. By email, text, and phone call, you reached out to celebrate this unexpected and full-throated defense of ICWA. While we joyously exchanged messages about the Court "getting the decision right," I was reminded about the necessity of ICWA in the first place.

In the Leech Lake community, I had several opportunities to talk with individuals and small groups about the decision we'd just received. We've all learned that these celebrations are also linked with other feelings. The relief and exuberance were tempered by relatives recounting their experiences—sometimes publicly and sometimes privately—with the removal of children from their own families and the ongoing loss and grief we feel for our relatives who were taken and never made it back to us. We know we have to keep working for the well-being of our relatives.

In anticipation of the decision, we prepared ourselves to fight to gain back portions of ICWA that the Court may not have ruled favorably on. In the wake of a decision that unequivocally affirms the constitutionality of ICWA, we can't lose momentum. The law is clear, and now is the time to push for better implementation and compliance.

As you'll read about in this issue, our multi-pronged strategy is to

1. Lift up and strengthen best practices in tribal child welfare.
2. Enhance tribal-state relationships and the infrastructure that supports them.
3. Implore the federal government to continue to set clear standards in child welfare, including supporting effective tribal-state partnerships for ICWA implementation and the well-being of Native children.

We look forward to working with you on this agenda!

With gratitude for your partnership in advocacy,

Sarah L. Kastelic

Sarah L. Kastelic, PhD, MSW
(Alutiiq)





The Indian Child Welfare Act Stands Strong

On June 15, 2023, the U.S. Supreme Court affirmed the constitutionality of the Indian Child Welfare Act (ICWA) in a 7-2 vote. The case, *Haaland v. Brackeen*, was highly anticipated by tribal nations and advocates for Native children and tribal sovereignty. This ruling was a victory in a decades-long attack on ICWA in state and federal courts.

The modern fight over the constitutionality of ICWA started in *Adoptive Couple v. Baby Girl* (2013), commonly known as the “Baby Veronica” case. Over a decade ago, we saw the early underpinnings in Justice Alito’s opinion and Justice Thomas’s concurrence of claims the opposition raised in *Haaland v. Brackeen* regarding anti-commandeering, Tenth Amendment, and equal protection challenges. Since that case, ICWA challengers have latched onto language in Alito’s and Thomas’s opinions to form their arguments in a series of challenges in state courts and increasingly in federal courts.

The Baby Veronica case created a lot of anxiety in Indian Country, and as *Haaland v. Brackeen* worked its way through the courts, many were unsure where it would land. The majority opinion by Justice Barrett and concurring opinion by Justice Gorsuch, which patently rejected all challenges, made us and our partners breathe a collective sigh of relief.

First, ICWA is consistent with Congress’s constitutional authority. The Court clearly reaffirmed Congress’s power to legislate for the benefit of tribes and Indian people, commonly referred to as Article 1 under the United States Constitution. The court was also firm in its support of the trust relationship between tribes and the federal government.

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

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

Petitioners are trying to turn a general observation (that Congress’s Article I powers rarely touch state family law) into a constitutional carveout (that family law is wholly exempt from federal regulation). That argument is a nonstarter (Page 15).

Second, ICWA does not violate Tenth Amendment anti-commandeering principles. The Court’s decision was a wholesale rejection of the anti-commandeering argument. Where the opposition argued that the federal government was intruding upon state affairs, the Court held that ICWA’s requirements like notice, expert witness, and active efforts apply evenhandedly to states and private parties seeking foster care and adoption of Indian children.

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

Finally, no party had standing to raise the equal protection claims. To establish that a party has standing in a case to raise specific claims, they need to be able to allege an injury, prove that the injury is “fairly traceable” to the party

being sued (that you are suing the right person), and that an order from the court can provide relief to the parties claiming injury. The Court did not reach the merits of the equal protection or non-delegation challenges because neither the individual plaintiffs nor the State of Texas had standing.

The equal protection claims sought to characterize ICWA as a law based on the racial status of Indian people rather than their political status as members of sovereign tribal nations. The non-delegation claims challenged the authority of tribal nations under ICWA to bring tribal orders of placement preferences into state child custody proceedings as an impermissible act of delegating federal powers to other entities. By not addressing the merits of the claims, the Court has left a door open for additional lawsuits to be pursued in the future. The plaintiffs stated to the press that they plan to revive these equal protection challenges in court; however, the Court's thoroughness in the rest of the majority decision will make the task of finding an appropriate case and being successful in court much harder.

Texas also lacks standing to challenge the placement preferences. It has no equal protection rights of its own...and it cannot assert equal protection claims on behalf of its citizens because "[a] State does not have standing as parens patriae to bring an action against the Federal Government,"... That should make the issue open and shut (Haaland v. Brackeen, Page 32).

Because Texas is not injured by the placement preferences, neither would it be injured by a tribal resolution that altered those preferences pursuant to §1915(c). Texas therefore does not have standing to bring either its equal protection or its nondelegation claims (Page 34).

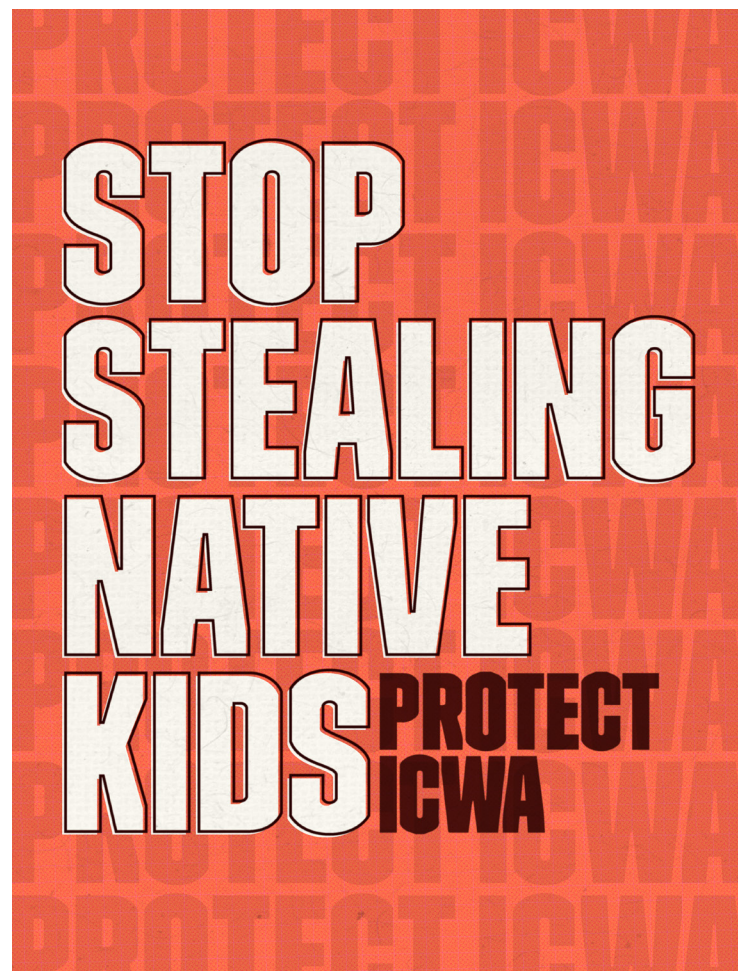
Justice Gorsuch, with Justices Sotomayor and Jackson joining in part, filed a concurring opinion in addition to joining the majority decision that provided more in-depth background on the history and need for ICWA and the United States Constitution's recognition and support of tribal sovereignty.

In affirming the constitutionality of the Indian Child Welfare Act (ICWA), the Court safeguards the ability of tribal members to raise their children free from interference by state authorities and other outside parties. In the process, the Court also goes a long way toward restoring the original balance between federal, state, and tribal powers the Constitution envisioned (Gorsuch, J., Concurring, Pages 1-2).

Still, the statute [ICWA] "has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities." And considerable research "[s]ubsequent to Congress's enactment of ICWA" has "borne out the statute's basic premise"—that "[i]t is generally in the best interests of Indian children to be raised in Indian homes" (Concurring, Page 12).

For over 40 years, tribal nations and Native families have fought to uphold the constitutional protections of their children. In *Haaland v. Brackeen*, we saw 502 Tribal Nations, 62 Native organizations, 23 states and D.C., 87 congresspersons, and 27 child welfare and adoption organizations unite in support of ICWA. Standing in solidarity with one another and recruiting a growing body of new allies to our cause is how we achieved success in this monumental decision. Now is the time to be emboldened in our work to ensure compliance with ICWA and strengthen its implementation.

To read our statement with the Protect ICWA Campaign, visit www.nicwa.org/press-releases.



Protecting Seven Generations: Moving Beyond Brackeen

June 15, 2023, will be a day that Indian Country will remember for a long time. On this date, the United States Supreme Court found the Indian Child Welfare Act (ICWA) was on solid legal ground and rebuffed the constitutional challenges to ICWA and tribal sovereignty more broadly. So, what are the next steps for Indian Country and its allies in improving ICWA implementation after this decision?

There are still many places across the country where ICWA compliance is inconsistent and where we don't have the necessary data to effectively target solutions. Effective partnerships between tribal nations and states are central to ICWA's success, but in many jurisdictions we don't have the tools, resources, and relationships needed to elevate this work. Tribal child welfare capacity is key to ICWA's successful implementation as tribes play a central role in assisting states in ICWA cases, yet tribes are severely underfunded when it comes to federal child welfare funding. When tribal capacity is insufficient, more Native children are likely to flow into state child welfare systems and more likely to not receive the services (active efforts) they need to return home. On the heels of the recent Supreme Court decision, now is the time to closely examine and pursue additional policy changes to improve ICWA implementation.

In response, NICWA has been conducting some of our own research, talking with tribal leaders and tribal child welfare staff, and assessing the environment to understand what we should be doing to improve ICWA's implementation over the

next several years. Our [2023 Policy Priorities](#) reflect some of the areas we think can be helpful, such as improving funding for tribal child welfare programs, increasing tribal leader engagement, improving tribal child welfare capacity and governance, establishing regular data collection related to ICWA requirements, and promoting policies that support decolonization of tribal programs and services. We think this is a good list, but there are other policy changes that could be helpful too. To promote further discussion in Indian Country and to further refine the thinking and strategies already underway, we are providing a list of policy options that we think are worth consideration.

Tribal Child Welfare Workforce

Tribal child welfare professionals' cultural knowledge and skills to work with federal agencies, state agencies, and law enforcement make them successful. Recruiting, training, and supporting their professional growth requires flexible resources that are tailored to the unique circumstances of tribal child welfare professionals are very limited. While improving child welfare workforce issues has been an ongoing discussion in child welfare reform broadly, solutions must address the distinct needs of the tribal workforce with resources that are commensurate to the need in Indian Country.

State ICWA Laws and Intergovernmental Agreements

State ICWA laws and agreements can be powerful means of improving compliance with ICWA. They provide opportunities



(Pictured: Tribal leaders, tribal ICWA workers, and advocates from New Mexico during oral arguments in *Haaland v. Brackeen*)

to address local implementation issues, help integrate the federal ICWA into the state's juvenile code, and may provide additional protections beyond the federal law where needed (such as required notice in voluntary proceedings). Agreements are used to define roles and responsibilities between individual tribes and their state child welfare agency, both at the central office level and at the branch or county level. Both laws and agreements can also be funding vehicles to direct federal and state resources to tribes.

State Agency Policy, ICWA Bench Guides, and ICWA Courts

Federal and state laws provide varying levels of clarity on statutes like ICWA. The lack of detailed requirements, which give states and tribes some discretion for tailoring the law to the local context, is why child welfare agency policy is needed to provide guidance on agency practices to implement the law. Agency policy, like state ICWA laws, can be an important tool to integrate ICWA into the agency's work and help onboard new child welfare staff. State court ICWA bench guides assist judges in understanding the federal law and their role as a juvenile court judge hearing child custody proceedings involving Indian children. In addition, several state juvenile court jurisdictions have established ICWA courts that are uniquely designed to hear ICWA cases.

Increasing Child Welfare Funding for Tribes

While many tribal communities have some of the higher needs for child welfare services, they receive a disproportionately low amount of federal funding (less than one-half of one percent of the total amount of federal child welfare funding available). In some cases, tribal nations are not even eligible for key federal programs that fund child welfare services, such as the Social Services Block Grant. In addition, tribal nations receive most of their funding from discretionary funding sources (not guaranteed) that can fluctuate from year to year depending on federal appropriations, leaving them vulnerable to changes in needs related to pandemics, epidemics, and natural disasters and shifting federal priorities.

Support for Cultural Practices

Federal child welfare law—outside of ICWA—is designed around the values and needs of state child welfare practice. This creates barriers to tribes using federal funds to support culturally based services, both for children under their jurisdiction and for those under state jurisdiction where the tribe provides services to Native children and families. For example, Title IV-E of the



Social Security Act requires the tribe to use a Title IV-E Clearinghouse approved prevention program or service. Unfortunately, there are only a few approved programs or services in the Clearinghouse that have been designed for tribal communities.

Data Collection

ICWA is the only major federal child welfare law that does not have regular data collection or a review process. This exacerbates inconsistency in implementation and creates barriers to policy change and accessing resources to address implementation challenges accurately. In 2016, a final rule was published that added new data elements for Native children and families served by state agencies. The data elements were to be added to the Adoption and Foster Care Analysis Reporting System (AFCARS). Many of the data elements addressed ICWA requirements. In 2020, a new final rule was published that eliminated 85% of the new 2016 data elements for Native children and families. The Biden Administration is now seeking to restore these data elements before the end of 2024. If restored, this will provide the first national data on ICWA implementation.

Brackeen was an important milestone in affirming the existing protections for Native children and families. However, for over three decades ICWA implementation has had challenges, and it continues to need attention. Improving tribal child welfare capacity strengthens tribal nations' partnerships with states and reduces the number of children coming into contact with state child welfare systems. NICWA remains committed to pursuing policy change to improve ICWA and will engage Indian Country to refine and prioritize a number of these policy recommendations in the coming months.

More States Develop ICWA Laws

With a victory in hand after the Supreme Court affirmed the constitutionality of the Indian Child Welfare Act (ICWA) on June 15, 2023, efforts to improve ICWA implementation continue. In 2023, Colorado, Maine, Montana, Nevada, North Dakota, and Wyoming joined 10 other states in enacting legislation to protect Native families. These state laws not only codify ICWA provisions into state law but some build upon the protections in the federal law to keep Native families together.

To learn more about the five newly-enacted state ICWA laws and Minnesota's updated state ICWA statute, see the summaries outlined below and on the following page.

Colorado

On May 4, 2023, Governor Jared Polis of Colorado signed [Senate Bill 211](#) into law to protect Native children and families in Colorado. The law acknowledges in one sentence that the State of Colorado will be protected by the Indian Child Welfare Act. SB 211 was sponsored by over 60 members of the legislature.

Maine

With unanimous support in both chambers, Governor Janet Mills signed the Maine Indian Child Welfare Act into law on June 30, 2023, to enshrine ICWA protections into state law. Sponsored by Senator Donna Bailey (D-Saco), [S.P. 804 – L.D. 1970](#) includes provisions and protections, such as the state entering into agreements with Indian tribes, providing expanded adoption placement preferences, and language that clarifies qualified expert witness qualifications and disqualifications that influence who can testify.

Montana

On May 22, 2023, Governor Greg Gianforte signed the Montana Indian Child Welfare Act into law to codify ICWA's federal protections for American Indian and Alaska Native children, families, and tribal nations. Sponsored by Representative Jonathan Windy Boy (D-Box Elder), [House Bill 317](#) prioritizes keeping Indian children close to their families and communities by incorporating language from the federal

statute and regulations. The law went into effect July 1, 2023, to provide temporary guidance for child custody proceedings involving Indian children while awaiting a decision from the Supreme Court in the *Haaland v. Brackeen* case (No. 21-376). While the state ICWA law includes an expiration date of June 30, 2025, Montana lawmakers added language to the final bill indicating their intent to revisit Indian child welfare issues in future sessions.

Nevada

On March 27, 2023, Assemblywoman Shea Backus (D-Clark) introduced Nevada Assembly Bill 444 to establish various provisions governing child custody proceedings to protect Indian children. AB444 was passed unanimously by the Nevada State Assembly in May of 2023 and almost unanimously by the Senate on June 13, 2023. The law codifies federal ICWA protections and outlines specific requirements of the Nevada Department of Health and Human Services Division of Child and Family Services and the State Court Administrator, including the provision of trainings necessary for child welfare personnel and the courts to carry out their duties and submission of biennial reports to the Senate and Assembly containing data regarding Indian children in dependency proceedings. AB444 also includes provisions governing tribal customary adoption as an alternative permanency option for Indian children who are wards of the state. The laws full text can be viewed here: [AB444](#)

North Dakota

With the leadership of Representative Jayme Davis (D-Rolette), a member of the Turtle Mountain Band of Chippewa, North Dakota passed [House Bill 1536](#) in an almost unanimous decision to codify ICWA protections in the North Dakota Century Code. The law also adds additional language to the third adoption placement preference, which reads “Another Indian family with whom the Indian child has a relationship or an Indian family from a tribe that is culturally similar to or linguistically connected to the Indian child’s tribe.” The fourth foster care placement preference also reads differently than the federal law: “A qualified residential treatment facility or residential care center for youth approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the needs of the Indian child.” HB1536 goes into effect on August 1, 2023.

Wyoming

[Senate File 94](#), sponsored by Senator Affie Ellis (R-WY), was enacted into law on March 9, 2023, to keep protections in place for Native children in the state of Wyoming in light of the *Haaland v. Brackeen* case. SF94 codifies ICWA into Wyoming statutes and details requirements and procedures for placing Indian children in shelter care or adoption. The law authorizes the state to enter into agreements with Indian tribes and includes an additional adoptive placement preference. SF94 went into effect July 1, 2023,

and it includes a sunset date, which means the act is set to be repealed, in its current form, on July 1, 2027. A month prior to the passage of WICWA, the Wyoming legislature also passed [House Bill 19](#) to create the Wyoming Indian Child Welfare Task Force, which is charged with studying federal and state ICWA protections and developing legislative recommendations.

Minnesota

The State of Minnesota passed Senate File 677 to update the Minnesota Indian Family Preservation Act, which was originally enacted in 1985. The new law adds the federal provisions, including procedures and requirements for child protection, placement, and permanency proceedings, to the Minnesota act. The legislation affirms Minnesota’s policy on tribal-state relations, including recognition that federally recognized tribes are sovereign political entities that have inherent authority to determine their own jurisdiction for Indian child custody or child placement proceedings, the authority to serve and protect their citizens. SF677 incorporates language so that counties and tribes in Minnesota may enter into written agreements and expands on the placement preferences outlined in ICWA. The first placement preference for foster care and adoption reads “a noncustodial parent or Indian custodian” and the adoption placement preferences expand to include “other persons or entities recognized as appropriate to be a permanency resource for the Indian child, by the Indian child’s parent or parents, Indian custodian, or Indian tribe.” The laws full text can be viewed here: [SF667](#).

Summary

Other states across the nation also introduced legislation in 2023, including [Arizona Senate Bill 1643](#), [Utah House Bill 40](#), and three bills out of the South Dakota legislature ([HB1229](#), [HB1168](#), and [SB191](#)). However, these bills were not adopted by the full legislature before they adjourned.

With the Supreme Court decision and the momentum of states passing their own state ICWA laws, policy in support of ICWA and tribal capacity should grow in the coming years. NICWA will continue to advocate for the benefits of tribal and state collaboration in child welfare.

43rd Annual Protecting Our Children Conference

April 7–10, 2024 | Seattle, Washington

2024 Conference Theme

Together We Stand: Preserving the Spirit of ICWA

The Indian Child Welfare Act (ICWA) of 1978 powerfully proclaims "...that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian families... (25 U.S.C. § 1902)." The spirit of ICWA ensures our children grow up with strong cultural identities, rooted in the language and traditions of our ancestors, so that our tribal communities remain strong.

For over forty years, tribal nations fought to uphold this declaration and constitutional protection of their children. This has never been more evident than the coalition-building, including grassroots efforts, that occurred during the *Haaland v. Brackeen* case. We saw 502 tribal nations, 62 Native organizations, 23 states and D.C., 87 congresspersons, and 27 child welfare and adoption organizations declare in unity their support for ICWA. Standing in solidarity with one another is how we achieved success.

With this decision on the record, Indian Country is emboldened in our work to ensure compliance with ICWA and strengthen its implementation. With ICWA's solid legal foundation affirmed, now is the time to work together to lift up tribal best practices and increase tribal child welfare capacity. To strengthen ICWA implementation, we must put our sights on tribal and state relationships, state ICWA laws, state-tribal policies and agreements, increased funding for tribal services including culturally based services, and federal policy and data collection.

NICWA's 43rd Annual Protecting Our Children Conference features innovative workshops, presentations, and cultural activities that provide the expertise and experience to support this advocacy agenda and build worker capacity to continue the important work of providing cultural best practices for Native children and families. We welcome you to join us in Seattle, Washington!

Call for Presentations will open in late August and registration will open on November 1st.



Generations Of Love by EJ Miller-Larson

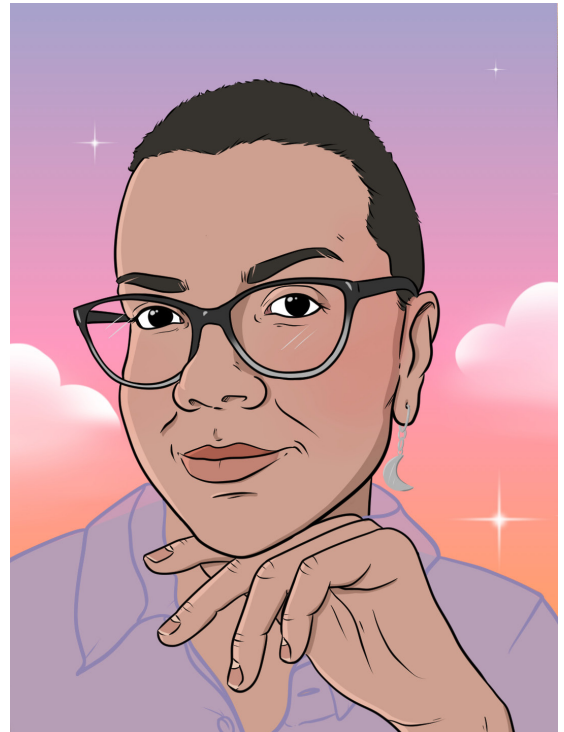
About the 2024 Art and Artist

Generations of Love was created to honor the strength and beauty of our Indigenous families. The wisdom passed down by our ancestors and the resilience of our communities is beyond measure. Our love for one another is something that cannot be replaced. As we continue to fight to keep Indigenous children in their communities, the artist knows it is important to remember that we are not fighting alone. From our ancestors to the generations yet to come, the love for our children transcends all time and space.

EJ Miller-Larson is a Queer, Two-Spirit artist and activist based in Green Bay, Wisconsin. They are a proud member of the Fond du Lac Band of Lake Superior Chippewa and the Oneida Nation of Wisconsin. EJ is an illustrator and bead worker who blends contemporary and traditional designs to create art that celebrates their culture.

Instagram: @ejmillerlarson

www.ejmillerlarson.com



Celebrating ICWA Donors

Last month, ICWA was upheld by the Supreme Court in a powerful victory for Indian Country and tribal sovereignty. We achieved this outcome together, and we want to share this incredible celebratory moment with our tribal, private foundation, corporate, and individual funders and donors.

We are full of gratitude for your financial support for our work to protect ICWA—for your efforts signing onto and promoting the amicus briefs that played a pivotal role with the Court—for spreading the word in your communities and across your networks about the generational stakes of this fight. All the ways you've joined us to protect and defend ICWA have made a difference. We know the work is not over, and we are committed to continuing to stand up for ICWA and for Native children and families.

We sincerely appreciate the 2022–2023 financial contributions of these tribal nations to protect ICWA:

THANK YOU!

Cowlitz Indian Tribe

Puyallup Indian Tribe

Suquamish Tribe

Muckleshoot Indian Tribe

Salt River Pima-Maricopa Indian Community

Wichita and Affiliated Tribes

Poarch Band of Creek Indians

San Manuel Band of Mission Indians

Yocha Dehe Wintun Nation

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NICWA
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2023–2024 NICWA Training Institutes

Join us for a culturally based training!



September 12–14, 2023
Oklahoma City, OK

- Positive Indian Parenting
- Understanding ICWA
- Cross-Cultural Skills in Indian Child Welfare



January 9–11, 2024
Albuquerque, NM

- Positive Indian Parenting
- Understanding ICWA
- Tribal Customary Adoptions



September 18-21, 2023
Virtual

- Positive Indian Parenting



April 10–12, 2024
Seattle, WA

- Positive Indian Parenting
- Understanding ICWA