

**Statement of Jack F. Trope, Senior Director, Indian Child Welfare Programs,
Casey Family Programs to the Indian Child Welfare Act (ICWA) Roundtable
hosted by the U.S. House Natural Resources Committee Democratic Staff**

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Introduction

Members of the Committee, thank you for inviting me to share with you Casey Family Programs' perspective on the Indian Child Welfare Act. My name is Jack Trope and I am a Senior Director, Indian Child Welfare Programs. Casey Family Programs is the nation's largest operating foundation dedicated solely to serving the needs of children who are in or are at risk of becoming part of the foster care system. Casey Family Programs has been serving children in for nearly 45 years, and we have come to believe that the goals of child welfare should be both to keep children safe and free from abuse or neglect, and to prevent the need for foster care in the first place by strengthening vulnerable families and their communities.

This morning, I thought it would be useful to share with you the following information about the Indian Child Welfare Act (ICWA):

- The history leading to the enactment of ICWA
- Why we consider ICWA to be vitally important and the gold standard in child welfare; and
- The threat to ICWA and the need for federal, state, and tribal governments to work together to ensure that Indian children and families continue to receive the protections that they need.

History of Family Separation and Cultural Suppression

The history of separation of Native families by non-Native governments has a long history in this country. As the recent Boarding School report from the Department of the Interior described, Indian children were sent to boarding schools – often through coercion – beginning in the 1880s and continuing into the mid-20th Century. There were 408 known Indian boarding schools based on the philosophy that the government should “Kill the Indian, save the man.” Children were sometimes taken away when very young. The intent of boarding schools was to strip away Indian identity. Children were punished for speaking their Native

languages, banned from participating in traditional cultural practices, and stripped of traditional clothing, hair and all things and behaviors reflective of their culture.¹

This was followed by the Indian Adoption Project of the 1950s and 1960s created by the Bureau of Indian Affairs and administered by the Child Welfare League of America which was designed to promote adoption of Native children from sixteen western states primarily by white adoptive families in the East and Midwest. The children adopted ranged in age from newborns to youth 11 years old. The then Executive Director of CWLA Shay Bilchik, apologized for their involvement in the project a half century later, stating that “No matter how well intentioned and how squarely in the mainstream this was at the time, it was wrong; it was hurtful; and it reflected a kind of bias that surfaces feelings of shame, as we look back with the 20/20 vision of hindsight.”²

While the Indian Adoption Project was taking place, large numbers of Indian children were also being removed from their families by state child welfare systems, often without due process and in circumstances that did not involve abuse or neglect. Two studies by the Association on American Indian Affairs in 1969 and 1976 found that 25-35% had been removed from their homes by child welfare agencies and that 90% of those removed had been placed with non-relative, non-Native families.³

ICWA: Basic Concepts and Philosophy

For these reasons, the Indian Child Welfare Act of 1978 was enacted. It was a response to problems identified in state child welfare systems and applies to children in state systems, but not children and families under tribal jurisdiction who are subject to the applicable Tribal Code, not ICWA. The purpose of the Act was to curtail state authority, not by replacing state law, but by adding federal standards to state child welfare laws and invalidating only those parts of state law that would be inconsistent with the ICWA.

¹ Bryan Newland, Federal Indian Boarding School Initiative: Investigative Report, May 2022 at https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf.

² See, e.g., Claire Palmiste. From the Indian Adoption Project to the Indian Child Welfare Act: the resistance of Native American communities. 2011. hal-01768178; Trace Hertz. Stolen Generations: Lost Children of the Indian Adoption Projects, Amazon Digital Services LLC – KDP Print US, 2016.

³ Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Committee on Indian Affairs, 95th Cong. at 539.

The key principles of the Act are:

- An emphasis on protecting the rights of biological parents and extended family as Congress believed that this would advance the best interests of Indian children
- Recognition of the importance of maintaining the child's connections with community and culture
- Incorporating and acknowledging pre-existing tribal sovereignty and the important role of tribes in protecting the well-being of tribal children

Some of the most important parental rights are:

- The requirement that active efforts be provided before children are removed or to reunify children with their families⁴
- A higher legal standard must be met before removal of a child or the termination of parental rights⁵
- Parents can seek a transfer to tribal court or veto a transfer request⁶
- Parents can have input into the placement of their children⁷

Connections with extended family are protected by requiring that relatives:

- Must be contacted as part of active efforts to keep families together or to reunify families⁸
- Are preferred placements if children must be removed for their safety⁹

The importance of connection with tribal culture and the tribal community is recognized by:

- Placement preferences (after extended family) for tribal foster homes, tribal families, and other Indian families¹⁰
- Application of the social and cultural standards of the Indian community¹¹

⁴ 25 U.S.C. §1912(d).

⁵ 25 U.S.C. §1912(e) and (f).

⁶ 25 U.S.C. §1911(b).

⁷ 25 U.S.C. §1915(c); 25 C.F.R. §23.132(c)(1).

⁸ 25 C.F.R. §23.2 (definition of active efforts).

⁹ 25 U.S.C. §1915(a)(1) and (b)(i).

¹⁰ 25 U.S.C. §1915(a)(2) and (3) and (b)(ii) and (iii).

¹¹ 25 U.S.C. §1915(d).

- Tribal involvement which helps maintain connection with the tribal culture and community¹²

The tribal rights recognized in ICWA include:

- Right to Notice¹³
- Right to Intervene¹⁴
- Right to have case transferred to tribal court (subject to certain exceptions)¹⁵
- Exclusive jurisdiction over children resident and domiciled on the reservation or wards of the tribal court (except for limited circumstances)¹⁶

ICWA as the Gold Standard

Like many other child welfare and adoption organizations, Casey Family Programs considers ICWA to be the Gold Standard for child welfare.¹⁷ This is because ICWA emphasizes keeping children safely with their parents/guardians whenever possible (active efforts requirement) or, if they cannot be kept with their parents/guardians, keeping them connected with their relatives, communities, and cultures (placement preferences, community standards, transfer to tribal court). We know children thrive with their families and in their communities. In fact, at Casey Family Programs, we have incorporated these principles into the Practice Model that we use for all children and families that we serve at our direct service Field Offices.

Research and experience support each of these core principles and support the idea that, whenever possible, children’s best interests are served by staying with their families. Removing children can be traumatic to both the child and the

¹² See, e.g., 25 U.S.C. §1911(c); 25 C.F.R. §23.2 (definition of active efforts).

¹³ 25 U.S.C. §1912(a).

¹⁴ 25 U.S.C. §1911(c).

¹⁵ 25 U.S.C. §1911(b).

¹⁶ 25 U.S.C. §1911(a).

¹⁷ See generally *Amicus curiae* brief filed by Casey Family Programs, et al. in the case of *Haaland v. Brackeen*, United States Supreme Court Nos. 21-376, 21-377, 21-378, 21-380 which can be found at <https://turtletalk.files.wordpress.com/2022/08/cfpamicus.pdf>; see also “How can child welfare systems apply the principles of the Indian Child Welfare Act as the “gold standard” for all children?” located at: <https://www.casey.org/media/22.07-QFF-SF-ICWA-Gold-Standard.pdf>

family and should occur only when the child cannot safely stay at home.¹⁸ Families who have suffered trauma, often across generations, need to receive services and supports to address their needs. You can best help the child by helping the family heal, not by separating the child from the family.

If the child needs to be removed for safety reasons, we know that a kinship placement is almost always preferable to placement with a non-relative. Research has shown that placements with extended family are more stable and less disruptive to the child¹⁹ and children placed with kin have fewer behavioral problems and mental health disorders.²⁰

This emphasis on extended family is a core belief in Indian cultures. When ICWA was being considered, Mel Tonasket, President of the Colville Tribe told Congress that “There is no such thing on my reservation as an abandoned child because even if you are a one-eighth cousin, if that child is left alone, that’s like your brother or sister, or your son or daughter. It’s been that way since our old people can remember.”²¹ Those beliefs continue to the present day, perhaps best reflected in a comment from Shana King, a parent mentor at the ICWA Law Center in Minnesota and a person with lived experience, who has said that, “In my family, my cousins were considered siblings, and my ‘aunties’ are my children’s grandmothers.”

In addition, emphasizing community ties is a best practice because it keeps the child connected to a network of relationships with caring adults and fosters relationship permanency. No one has ever complained that a child has too many caring adults in their life.

¹⁸ Amy M. Salazar et al., Trauma Exposure and PTSD Among Older Adolescents in Foster Care, 48 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 545, 547, 550 (2013); Monique B. Mitchell & Leon Kuczynski, Does Anyone Know What is Going On? Examining Children’s Lived Experience of the Transition into Foster Care, 32 Child & Youth Serv. Rev. 437, 438 (2009).

¹⁹ See Annie E. Casey Foundation, Variations in the use of kinship diversion among child welfare agencies (2019), <https://tinyurl.com/bdaruuud>.

²⁰ Marc A. Winokur et al., Kinship care for the safety, permanency, and well-being of children removed from the home for maltreatment, Cochrane Database Sys. Rev. (2014); Child Welfare Information Gateway, Kinship Care and the Child Welfare System 3 (May 2022), <https://tinyurl.com/bdz9j3bz>.

²¹ Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcommittee. on Indian Affairs, Senate Committee on Interior and Insular Affairs, 93rd Cong. at 225 (1974).

Moreover, connection with culture provides the child with a sense of identity and positive self-worth, reinforces intergenerational teachings and connection, and provides resilience.

In the case of ICWA itself, there is another key aspect of the law unique to Native children and that is the benefit of tribal involvement. Studies indicate that early tribal involvement in state court proceedings increases reunification of children with their parents and shortens the time required for reunification.²² In addition, tribes can help to identify extended family members and connect children and families with culturally appropriate, trauma-informed services and supports. In cases where transfer to tribal court is appropriate, tribal standards can be applied which emphasize this connection with family, culture, and community. Many tribal codes reflect these ideas. One example is The Native Village of Barrow (AK) Iñupiat Traditional Government Children’s Code which states that “A child has the right to learn about and preserve his identity throughout his life, including the right to maintain ties to his birth parents, his extended family, and his village. A child has the right to learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy.”

Does ICWA work?

The evidence suggests that when ICWA is applied properly, it leads to:

- Increased reunification rates
- Higher rates of kinship placement
- Lower rates of congregate care
- Lower rates of “aging out” of care²³

²² Capacity Building Center for Courts, ICWA Baseline Measures Project Findings Report 17, 19 (2020).

²³ See, e.g., Pima County Juvenile Court Center, Indian Child Welfare Act Court Data Brief 5 (March 2022), <https://tinyurl.com/ye28v4zu>; Capacity Building Center for Courts, ICWA Baseline Measures Project Findings Report 17 (2020).

Unfortunately, compliance with ICWA is uneven and as a result although rates are lower than pre-ICWA, out-of-home placements are still far too high, and most Indian children are still placed in non-relative, non-Native homes.²⁴

Thus, continuing efforts to support ICWA and enhance ICWA compliance are needed.

Do States Support ICWA?

The evidence suggests that state support for ICWA is widespread. The following states have a State ICWA: California, Colorado, Iowa, Michigan, Minnesota, Nebraska, New Mexico, Oklahoma, Oregon, Washington, Wisconsin, and Wyoming. The Colorado and Wyoming ICWAs were passed in 2023. In North Dakota and Montana, state ICWA bills passed by the Legislatures of both states have been sent to the Governor for signature.²⁵ Often, state ICWAs not only incorporate the federal ICWA, but also expand and clarify certain aspects of the federal ICWA to address the particular needs of their state.²⁶

In addition, specialty ICWA courts have been established in 11 states: Arizona (Maricopa and Pima Counties) California (Los Angeles and Sacramento), Colorado (Denver and Adams County), Minnesota (Carlton, Duluth, Minneapolis, St. Paul, and Dakota, Itasca and St. Louis Counties), Montana (Billings and Missoula), New Mexico (Albuquerque), New York (Erie County), Oklahoma (Tulsa), Oregon (Klamath County), Texas (El Paso) and Washington State (Spokane and Clallam County).

²⁴ Although the situation is improved from 1978, a disparity continues to exist for American Indian/Alaska Native children as those children are removed at approximately three times the national average (14.4 per 1,000 children as compared to 5.1 per 1,000 children) and 56% of those are placed with non-relative, non-Native families. Data compiled by Casey Family Programs Data Advocacy team through 2021 based upon the AFCARS data made available by the National Data Archive on Child Abuse and Neglect Data (NDACAN) at Cornell University.

²⁵ See <https://turtletalk.blog/icwa/comprehensive-state-icwa-laws>; see also <https://apps.montanafreepress.org/capitol-tracker-2023/bills/hb-317>; <https://www.ndlegis.gov/assembly/68-2023/regular/bill-overview/bo1536.html>; <https://legiscan.com/CO/bill/SB211/2023>.

²⁶ Kelly Gaines-Stoner, Mark C. Tilden and Jack F. Trope, *The Indian Child Welfare Handbook* (3rd Ed.), American Bar Association (2018) at 27.

ICWA courts are courts with a dedicated ICWA docket where judges take an active role in coordinating with all relevant stakeholders (parents, children [if of age], attorneys, agency social workers, and Tribal ICWA representatives) to achieve the letter and spirit of ICWA. Authentic tribal collaboration and partnership is key to the success of these courts.²⁷

Finally, as you probably know, the constitutionality of ICWA is currently being challenged in the Supreme Court by the state of Texas and some adoptive parents in the case of *Haaland v. Brackeen*. In response, 23 States and Washington DC filed an amicus brief supporting ICWA. Those states were: California, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington and Wisconsin.²⁸

Two states joined an amicus brief supporting Texas' challenge to ICWA.²⁹

Haaland v. Brackeen – the Supreme Court challenge

As mentioned, the *Haaland v. Brackeen* case is currently before the Supreme Court. The specific constitutional arguments in that case are that ICWA exceeds the authority of Congress provided by the Indian Commerce Clause, is a race-based law that violates the Equal Protection Clause, and that it commandeers state agencies and courts to enforce federal law in violation of the Tenth Amendment which protects states' rights. The United States is defending ICWA's constitutionality, as it has through three different administrations ever since the case was first filed in 2016, working together with five intervening tribal nations. Casey Family Programs filed an amicus brief in support of ICWA that was joined by 26 child welfare and adoption organizations. If the plaintiffs are successful in whole or in part in this case, we are concerned that it may jeopardize some of the

²⁷ <https://www.ncjfcj.org/child-welfare-and-juvenile-law/icwa-courts>.

²⁸ *Amicus curiae* brief filed by State of California, et al. in the case of *Haaland v. Brackeen*, United States Supreme Court Nos. 21-376, 21-377, 21-378, & 21-380 at <https://turtletalk.files.wordpress.com/2022/08/stateagamicus.pdf>.

²⁹ *Amicus curiae* brief filed by the States of Ohio and Oklahoma in the case of *Haaland v. Brackeen*, United States Supreme Court Nos. 21-376, 21-377, 21-378, & 21-380 which can be found at https://turtletalk.files.wordpress.com/2022/06/oklahomaohio_brackeen-amicus.pdf.

protections upon which Indian children and families rely and, if some of the more extreme arguments were to prevail, threaten tribal sovereignty itself.

It is critical that work continue to ensure that ICWA's purposes are achieved, compliance with ICWA increased, and that the gold standard principles of ICWA, which align with what research tells us works best for children are fully understood and implemented widely. Continuing and collaborative efforts between the federal government, state governments and tribal governments will be a critical component of ensuring that the best interests of Indian children are protected by keeping them connected to their parents, families, communities, and cultures.

Thank you for the opportunity to join this roundtable discussion.