

# ICWA & *Brackeen v. Haaland*: A Legal, Tribal, and State Examination

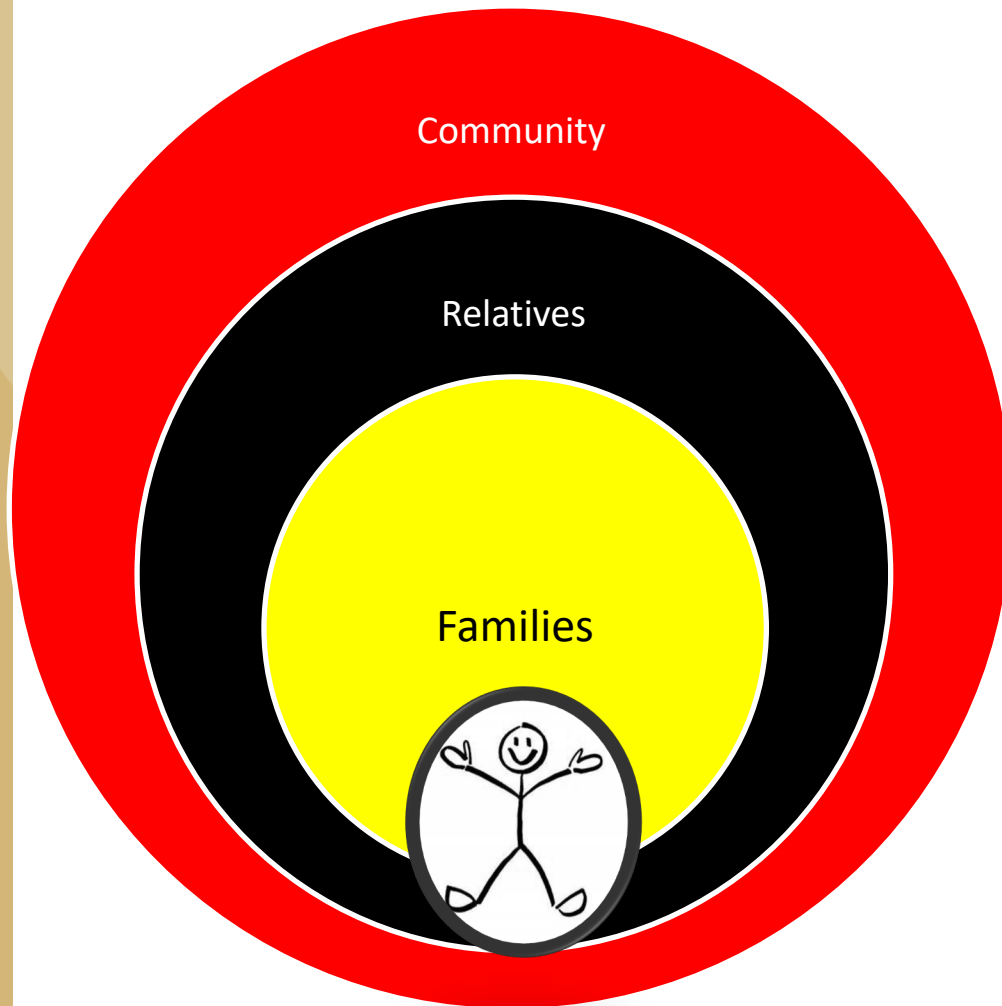
**Sheldon Spotted Elk, JD**  
*Judicial & National Engagement*

"Circle of Friends" (Pueblo Peoples) Escalante,  
Utah

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safe children | strong families | supportive communities

# Why the ***Gold Standard*** of child welfare?



**Active efforts** to keep children safely with their families or to reunify them with their families.

**Placement**

**Preferences** to keep them connected to identity and culture.

All within a community context  
**(Transfer)**.

# American Exceptionalism – White Supremacy

- More than half (*53 percent*) of Americans say that the world would be much better off if more countries adopted American values and the American way of life.
- Nearly three-quarters (*73 percent*) of Americans agree that the US has been consistently virtuous in its actions abroad.



American Progress



Dignity

# Brackeen v. Haaland

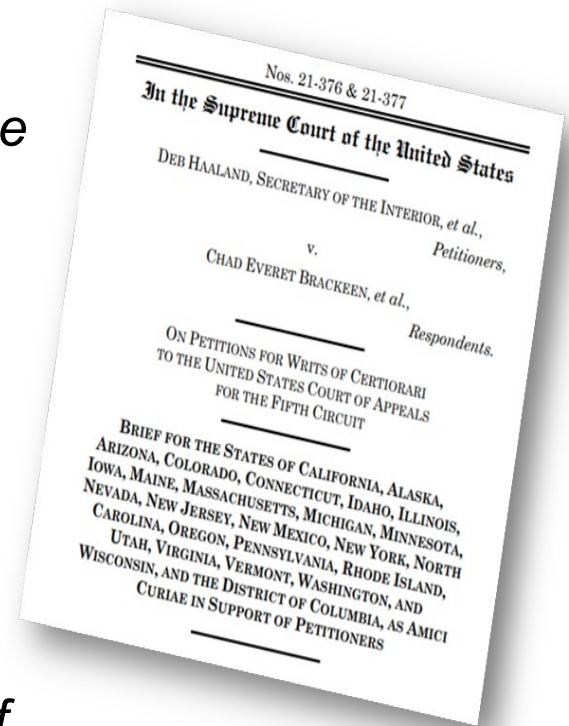
- **SCOTUS:**

*Oral Arguments November 9, 2022/ Opinion in June 2023*

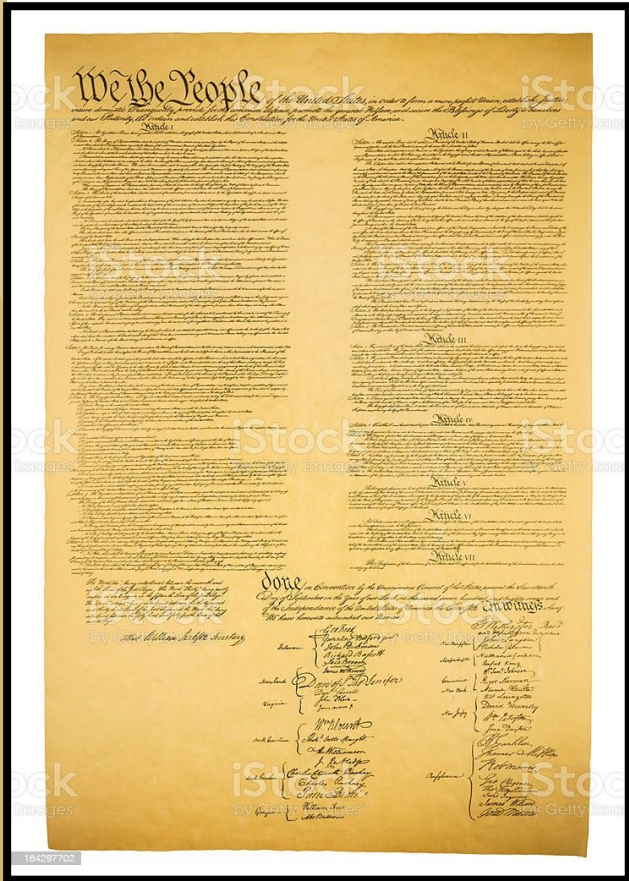
- 24 states & DC Amicus Brief in support of ICWA.

- 497 Tribes signed an Amicus saying:

*“ICWA remains one of the most important pieces of federal Indian legislation ever enacted. It has provided immense and lasting benefit to amici Tribes and tribal organizations and their collective goals in furthering tribal sovereignty and the best interests of Indian children.”*



# Brackeen v. Haaland (challenges to Tribal Sovereignty)

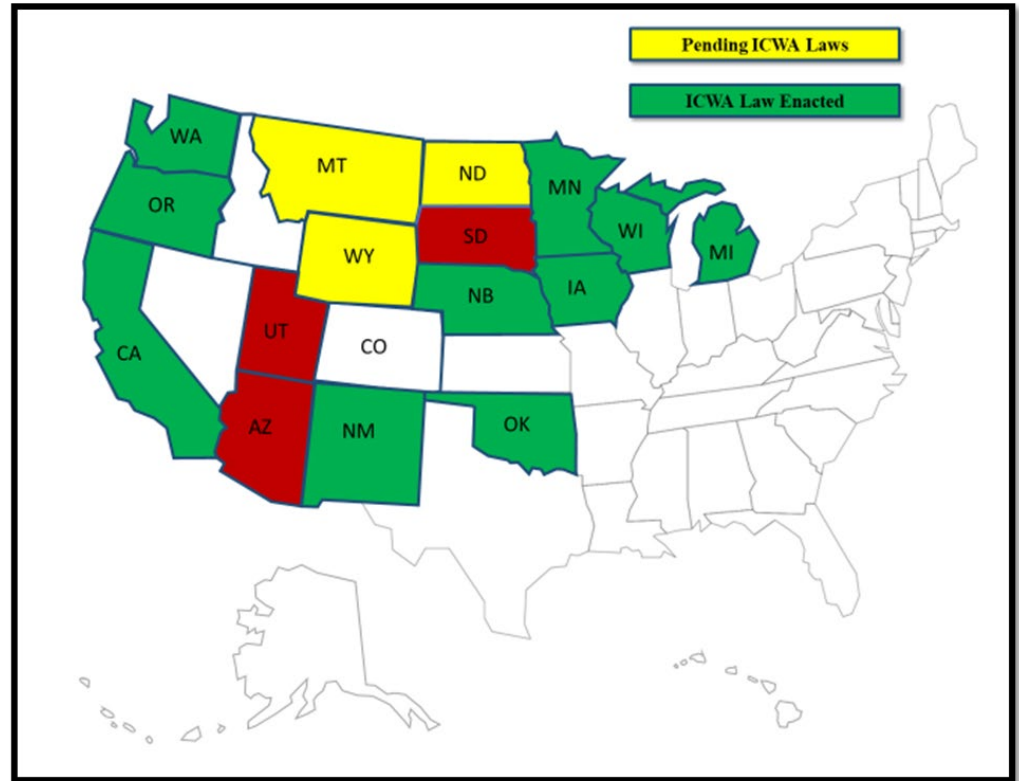


- **Indian Commerce clause**
  - The whole ICWA
- **Non-Delegations clause**
  - Placement Preferences (Tribal resolution/law)
- **Equal Protections (5<sup>th</sup> Amendment)**
  - Definition of Indian Child
  - Placement Preferences
- **States Rights (10<sup>th</sup> Amendment)**
  - QEW, AE, Record keeping

# Post-Brackeen Strategies, 1 of 4

1. **State ICWA Development:** The Uniform Law Commission is working on a model state ICWA law that state legislatures could use to pass [comprehensive state ICWA laws](#).

1. Currently 12 states with state ICWAs (States ICWA needed: ND, SD, CO, AZ, UT, MT, ID).
2. There is currently x2.7 disproportionality of AI/AN children in foster care ([2020 AFCARS](#)) or 10,941 AI/AN children, primarily in these states identified.



# Post Brackeen Strategies 2 of 4

**2. Leveraging social science research:** that demonstrates the practical effectiveness of legal activities enshrined in ICWA to develop policies and procedures for agency and state legal entities engaged in child welfare cases (e.g., [ICWA Court data](#) - early tribal involvement in the case positively impacts case outcomes).

# Post Brackeen Strategies 3 of 4

**3. ICWA Influence in State Statute:** Embedding ICWA-like protections into pre-existing Children's Codes. (See: [Washington HB 1227](#), e.g. “diligent efforts” “[state custody] necessary to prevent imminent physical harm”)



# Post-Brackeen Strategies 4 of 4

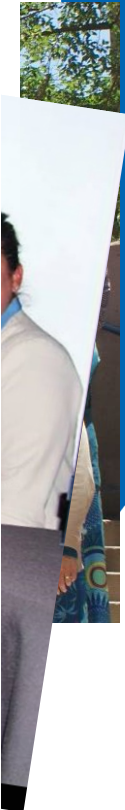
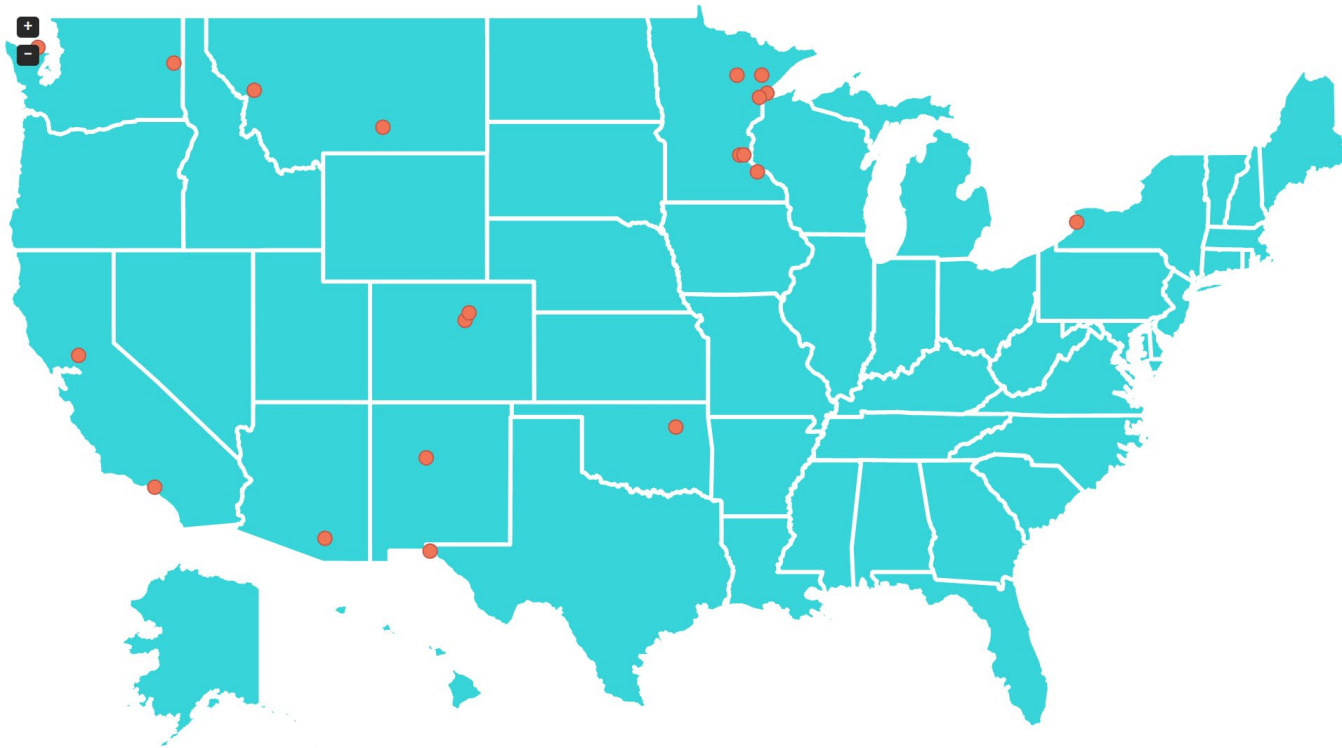
**4. Tribal Court/Code Support:** Committing federally funded court improvement resources and funds toward bolstering tribal court programs, or supporting Indigenous spaces for adjudicating dependency within the tribe itself (e.g. *Tribal Court Improvement Programs, Tiwahe, Tribal child welfare system development*)

# ICWA Court Movement

## ICWA Court Map

Below is a map of the current ICWA Courts. For more information about these courts or to be added to the map, please see the contact information below.

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# ICWA Court Results

- Outcomes:
- **Preferred placement:** time to notice; parents presence across the life of the case (including attorney).
- **Reunification:** Mother being present; Tribe being present at initial hearing 52% (compared to 40%)
- **Time to Permanency:** active efforts finding at initial hearing; tribal rep at initial hearing; time to confirm ICWA status: **Tribe being present shortens the time to permanency by 125 days.**
- **Time to return home:** Confirming child's ICWA status is significant. **Tribe at initial hearing return to home is reduced by 119 days.**
- **Relative custody/adoption:** Sample too small
- **Enhanced ICWA Application:** Parents attorney at hearing, Tribe being present, finding of ICWA early. Longer notice less ICWA application.



# Yellowstone ICWA Court

Yellowstone ICWA Court	<a href="#">Montana permanency outcomes in general</a> (2019):
<b>Reunification: 82%</b> <b>Guardianship: 14%</b> <b>TPR/Adoption: 4%</b>  <a href="#">AI/AN Montana Disproportionality:</a> x3.78	Reunification: 63% TPR/Adoption: 21% Relatives/Guardianship: 11% Aged out: 4% Other: 1%



# Children as Medicine



Richard West, Senior (Southern Cheyenne) – The 3<sup>rd</sup> Day



## Sources of Law:

- Values
- Story
- Ceremony
- Song
- Elders

# “I am an AGENT OF CHANGE”

- Cultural humility
- Gold standard representation
- Solution orientation



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# Indian Child Welfare Act

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Spokane Indian Bar Association:  
A legal Tribal & State Examination  
*March 9, 2023*

*Tleena Ives, Director of the office of  
Tribal Relations*



Washington State Department of  
**CHILDREN, YOUTH & FAMILIES**



## Responsibilities of the state in ICWA

- Responsibility to identify “Indian Child(ren)”- Inquiry
- Proper exercise of jurisdiction (when the child resides on a reservation or is a ward of the tribal court)
- Proper notice of proceedings
- “Active efforts” to prevent the break up of Indian families/reunify families
- Use of Qualified Expert Witnesses & proper standard of review
- Placement preferences
- Transfer to Tribal Court(s)





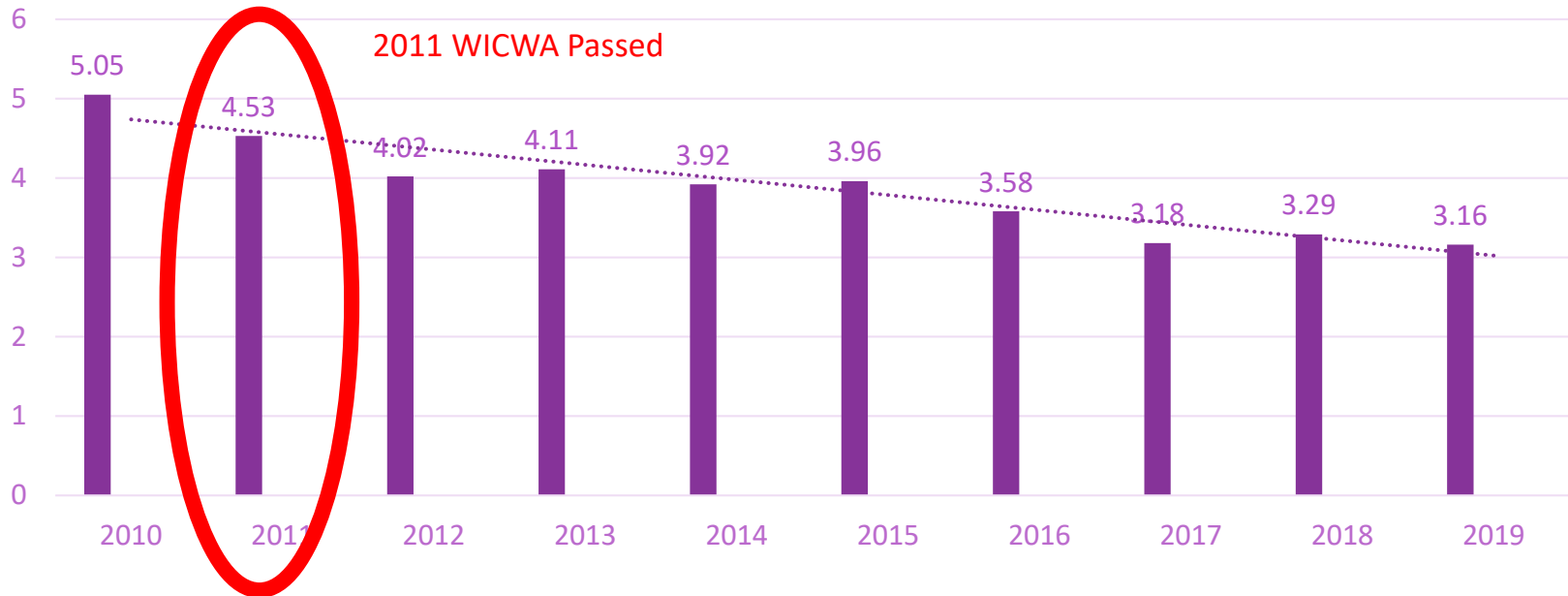
# Washington State Indian Child Welfare Act

- Court decisions – made by non-native judges – weakened the application of the Indian Child Welfare Act
- WICWA was passed in 2011
  - Clarified the “best interests of an *Indian* child”
  - Ensured that the court hears testimony from someone who understands tribal customs and culture before the breakup of an Indian family.
  - [RCW 13.38](#)



# Washington AI/AN Data Trends

AI/AN Children in WA foster care



# Brackeen v Haaland: State Amicus Brief

## Amicus

- ICWA is a critical tool for protecting Indian children and fostering state-tribal collaboration.
- ICWA and its implementing regulations are constitutional
- ICWA is a valid exercise of Congress's powers over Indian affairs.
- ICWA does not violate the anticommandeering doctrine.
- ICWA does not violate equal protection.





## Current work underway in Indian child welfare

- Updating the entire ICWA policy manual
- Tribal consultation
- Tribal Policy Advisory Committee (child welfare, early learning, child care, etc.; meetings twice/year)
- ICWA Subcommittee (meets bi-monthly)
- Work to define culturally appropriate services for Indian children and families – landscape analysis
- Increase funding to Indian Nation contracts



# Thank you!

**Contact:**

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