

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 81 (Ramos)
Version: June 18, 2024
Hearing Date: August 13, 2024
Fiscal: Yes
Urgency: Yes
AWM

PURSUANT TO SENATE RULE 29.10(b)

SUBJECT

Indian children: child custody proceedings

DIGEST

This bill codifies within State law certain provisions relating to Indian children¹ currently codified in the federal Indian Child Welfare Act of 1978 (ICWA), and renames the provisions of the Family Code, the Probate Code, and the Welfare and Institutions Code as the Californian Indian Child Welfare Act.

EXECUTIVE SUMMARY

For over a hundred years spanning the nineteenth and twentieth centuries, U.S. policy condoned and encouraged state governments and private citizens to forcibly remove Indian children from their homes, their parents, and their tribes, with the explicit goal of cutting them off from their families and heritage so that they could be “civilized.” It is impossible to overstate the damage this policy did to the children and families affected, as well as to the tribes who were deprived of their children and unable to pass on their culture. In 1978, when Congress could no longer overlook the destruction being wrought on Indian communities, it passed ICWA, which imposed minimum standards for proceedings involving the custody and placement of Indian children, as defined, with the overall goal of preserving the ties between an Indian child and their tribe whenever feasible.

While ICWA has been in effect for decades, it has recently been the subject of increased litigation from individuals who disagree with ICWA’s goal of maintaining tribal ties and from persons who wish to collaterally attack tribal sovereignty. One such attack reached the Supreme Court in 2023, after an en banc panel of the United States Court of

¹ Because the relevant federal and state laws uses the term “Indian” and does not capitalize “tribe,” this analysis does the same.

Appeals for the Fifth Circuit held that ICWA was unconstitutional; the Supreme Court reversed the Fifth Circuit and reaffirmed ICWA's viability.² The Supreme Court's ruling did not, however, reach all of the asserted arguments against ICWA – the Court declined to decide certain arguments because the petitioners lacked standing – leaving room for additional challenges.

Here in California, the Legislature has partially codified ICWA as a separate state legal regime: some of ICWA's requirements also expressly required under state law, while others – such as certain definitions – merely incorporate ICWA's provisions by reference. Because the Supremacy Clause of the United States Constitution requires Californians to follow federal law, California is required to comply with ICWA either way; but having ICWA's requirements additionally codified in state law can give Indian families protections even if ICWA is weakened. Additionally, setting forth ICWA's definitions in state law is more convenient for practitioners.

This bill, on an urgency basis, incorporates the applicable requirements of ICWA into California's Welfare and Institutions Code – including ICWA's definitions and family finding requirements – and adds new requirements relating to proceedings in the juvenile court involving an Indian child so as to better ensure that Indian children are given the greatest possible chance to remain with their parent or guardian, family, or tribe. The bill also renames the amended Welfare and Institutions Code provisions, as well as other Code provisions relating to Indian children, the California Child Indian Welfare Act. By expressly setting forth the definitions and other subject matter from ICWA in the Welfare and Institutions Code, this bill establishes a wholly independent state-law framework for ensuring that decisions relating to Indian children in the dependency system properly account for the child's tribal relationships and the interest in maintaining those ties. These provisions could, therefore, allow California to continue providing these protections to Indian children in the event that a court prohibits the enforcement of ICWA at the federal level.

This Committee is hearing this bill pursuant to Senate Rule 29.10(b). The Committee previously heard a version of this bill on July 11, 2023; the Committee passed the bill 11-0 on the Consent Calendar. Over the last year, the author and stakeholders have worked to ensure that the codification of ICWA is as precise as possible and does not result in unintended consequences. The primary difference between the bill that this Committee heard and the bill currently before the Committee is that the prior version of the bill made changes to the Family Code, Health and Safety Code, and Probate Code; the current version does not make those changes. According to the author and stakeholders, more time is needed to work on those Code provisions to ensure that ICWA is properly incorporated into state law. The version before this Committee also incorporates feedback from stakeholders, including the California Department of Social Services (CDSS).

² *Haaland v. Brackeen* (Jun. 15, 2023) 599 U.S. 255.

This bill is sponsored by the California Tribal Families Coalition and the Morongo Band of Mission Indians, and is supported by ACLU California Action, the Agua Caliente Band of Cahuilla Indians, the Alliance for Children's Rights, California Open, the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, Enterprise Rancheria of Maidu Indians California, Habematolel Pomo of Upper Lake, the Hoopa Valley Tribe, Jamul Indian Village of California, the Picayune Rancheria of the Chukchansi Indians, the Rincon Band of Luiseño Indians, the San Manuel Band of Mission Indians, Seneca Family of Agencies, the Tejon Indian Tribe, Tolowa Dee-ni' Nation, and the Torres Martinez Desert Cahuilla Indian Tribe. The Committee has not received timely opposition to this bill.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides that Indian tribes are domestic independent nations that exercise inherent sovereign authority which can be modified only through Congressional action. (*E.g., Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788-789.)
- 2) Establishes ICWA, which requires states to establish specific adoption preferences for a child who is a member of a federally recognized Indian tribe, or who is eligible to be a member and is the child of a member of a federally recognized Indian tribe, and to make specified efforts to notify the child's tribe when an Indian child is placed in foster care. (25 U.S.C. §§ 1901 et seq.)
- 3) Defines the following relevant terms within ICWA:
 - a) An "extended family member" is as defined by the law or custom of the child's Indian tribe or, in the absence of such law or custom, is a person who has reached the age of 18 years of age and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
 - b) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation, as defined.
 - c) "Indian child" means any unmarried person who is under 18 years of age and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.
 - d) "Indian child's tribe" means (1) the Indian tribe in which an Indian child is a member or eligible for membership, or (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.
 - e) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

- f) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village, as defined.
 - g) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoption under tribal law or custom; it does not include the unwed father where paternity has not been acknowledged or established.
 - h) "Reservation" means Indian country, as defined, and any other lands to which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.
 - i) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (25 U.S.C. § 1903.)
- 4) Establishes, in state proceedings involving the custody of an Indian child, or the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the child's Indian tribe, certain requirements relating to the proceedings, including:
- a) Granting jurisdiction of certain custody, foster care placement, and parental rights termination cases involving an Indian child to the child's tribe.
 - b) Granting the right to intervene in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child to the child's tribe and Indian custodian.
 - c) Requiring the provision of notice to an Indian child's parent, Indian custodian, and the Indian tribe in an involuntary proceeding involving an Indian child, as specified; granting the child's tribe the right to examine the reports and documents filed with the court in connection with foster placement and parental termination proceedings; and requiring a showing that "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of an Indian family were made and were unsuccessful before a foster care placement is made or parental rights are terminated.
 - d) Establishing adoption placement preferences for Indian children, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family, (2) other members of the Indian child's tribe, or (3) other Indian families, and similar foster care placement preferences.
 - e) Authorizing states and Indian tribes to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide

for concurrent jurisdiction between states and Indian tribes. (25 U.S.C. §§ 1911-1922.)

- 5) Provides that, in any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard. (25 U.S.C. § 1921.)

Existing state law:

- 1) Makes findings and declarations relating to the State's implementation of ICWA, including:
 - a) That there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members or citizens of, or are eligible for membership or citizenship in, an Indian tribe.
 - b) It is in the interest of an Indian child that the child's membership or citizenship in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of an Indian child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.
 - c) In all Indian child custody proceedings, as defined in ICWA, the court shall consider all of the findings contained in (a), strive to promote the stability and security of Indian tribes and families, comply with ICWA and other applicable federal law, and seek to protect the best interest of the child.
 - d) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member or citizen of an Indian tribe or (2) eligible for membership or citizenship in an Indian tribe and a biological child of a member or citizen of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the ICWA and other applicable state and federal law to the proceedings.
 - e) In any case in which applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided in ICWA, the court shall apply the higher standard.
 - f) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated ICWA. (Welf. & Inst. Code, § 224.)

- 2) Establishes the juvenile court, which is intended to provide for the protection and safety of the public and minors and nonminor dependents falling under its jurisdiction as dependents or wards. (Welf. & Inst. Code, §§ 202, 245.)
- 3) For purposes of matters relating to the juvenile court and other matters relating to dependent children addressed in Division 10 of the Welfare and Institutions Code, defines, unless the context requires otherwise, the terms “Indian,” “Indian child,” “Indian custodian,” “Indian tribe,” “reservation,” and “tribal court” as provided in ICWA; and, when used in connection with an Indian child custody proceeding, defines “extended family member” and “parent” as provided in ICWA. (Welf. & Inst. Code, § 224.1)
- 4) Defines “Indian custody proceeding” as a hearing during a juvenile court proceeding, or a proceeding under the Family Code or Probate Code, involving an Indian child that may culminate in specified outcomes, including:
 - a) Foster care placement of the Indian child, as specified, and including where a child is placed in foster care or another out-of-home placement as a result of a status offense.
 - b) Termination of parental rights.
 - c) Preadoptive placement, including the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to, or in lieu of, adoptive placement.
 - d) Adoptive placement. (Welf. & Inst. Code, § 224.1(d).)
- 5) Defines “active efforts” as affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with their family, as specified.
 - a) If an agency is involved in an Indian child custody proceeding, active efforts shall involve assisting the parent, parents, or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.
 - b) To the maximum extent possible, active efforts shall be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe and shall be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and tribe. (Welf. & Inst. Code, § 224.1(f).)
- 6) Establishes an affirmative and continuing duty for the county social worker or probation department to inquire whether a child for whom a petition to place them within the jurisdiction of the juvenile court has been filed is an Indian child, as specified. (Welf. & Inst. Code, § 224.2.)
- 7) Establishes requirements and procedures in cases involving an Indian child who has been declared a dependent of the juvenile court, including:

- a) Notice of the proceeding and specific hearings and acts must be sent to the child's tribe and family members, as specified.
- b) An agency involved in an Indian child custody proceeding must make active efforts, as defined, intended primarily to maintain or reunite an Indian child with their family.
- c) The Indian child's tribe and Indian custodian have the right to intervene at any point in the custody proceeding.
- d) The juvenile court shall give full faith and credit to the public acts, records, judicial proceedings, and judgments of any Indian tribe applicable to the proceeding to the same extent that such entities give full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity.
- e) If a parent or Indian custodian of an Indian child desires to be represented by counsel but is unable to afford counsel, the court shall appoint counsel.
- f) An Indian child may be placed with an extended family member, as defined.
- g) The requirements for removing an Indian child from their parent or guardian's custody, and the bar for refusing to return an Indian child to their parent or guardian's custody, are higher than for a non-Indian child.
- h) When placing an Indian child, separate placement preferences apply, including deferring to the child's Indian tribe's placement preferences where applicable. (*See generally* Welf. & Inst. Code, § 224-224.6; *id.*, div. 2, pt. 1 & div. 10.)

This bill:

- 1) Makes findings and declarations relating to the bill's codification of ICWA within state law, including:
 - a) Federally recognized tribes are sovereign nations with inherent rights to self-governance. Federally recognized tribes have the sole authority to determine their tribal citizenship, and this includes the right to regulate domestic relations involving their citizens. The federal government recognizes its trust relationship with federally recognized tribes and the unique political status of federally recognized tribes and their citizens. It is the policy of the State of California to support, protect, and uplift inherent tribal sovereignty. Tribes have been protecting and caring for their children from time immemorial. The State of California is committed to protecting essential tribal relations and the political status of federally recognized tribes by recognizing a tribe's right to protect the health, safety, and welfare of its citizens.
 - b) Child welfare and juvenile justice data demonstrates that Indian children involved in the child welfare and juvenile justice systems have better outcomes when they are connected to their family, extended family, tribe, Indian community, and culture.
 - c) Despite the passage of the federal ICWA and specified state laws, California continues to experience inconsistent implementation of ICWA and its related

- state law protections, thus continuing the harm and breakup of Indian families. Variation in practice undermines tribal sovereignty, furthers destructive impacts on tribes and tribal communities, puts the lives of Indian children and families at disproportionate risk for multiple adverse outcomes, and fails to address systemic racism.
- d) It is the intent of the Legislature to create a comprehensive act to protect and preserve Indian families in California and to aid in improving implementation of applicable state and federal laws. This bill will retain California's heightened standards, protections, and services and supports for Indian children. This act shall hereafter be known as the California Indian Child Welfare Act and shall include all provisions in this code, the Family Code, Health and Safety Code, and the Probate Code involving an Indian child to maintain clarity and consistency in provisions with application to Indian children, as defined in subdivision (b) of Section 224.1. Existing provisions, and any future amendments to provisions, applicable to Indian children in this code, the Family Code, the Health and Safety Code, or the Probate Code, or amending or creating programs designed to support Tribes or tribal organizations, Indian children, and parents or Indian custodians of Indian children, as these terms are defined in Section 224.1, in their participation in Indian child custody proceedings shall be considered part of the California Indian Child Welfare Act.
- 2) Provides both of the following in any case in which ICWA applies:
- a) The Indian child's tribe shall have the right to examine all reports or other documents filed with the court, including, but not limited to, the reports or other documents upon which any decision to place the Indian child in the custody of someone other than a parent or Indian custodian, or terminate parental rights, will be based.
 - b) Where the Indian child's tribe does not formally intervene, representatives of the Indian child's tribe, as defined, shall have the right to inspect the child's case file, as defined, and representatives of the Indian child's tribe have the right to copies of documents contained in and information related to the juvenile case file, subject to any other confidentiality laws.
- 3) Adds definitions, and modifies existing state-law definitions, to incorporate definitions from ICWA, within the Welfare and Institutions Code relating to an Indian child under the jurisdiction of the juvenile court, including the definitions of "Indian," "Indian custodian," "Indian organization," "Indian tribe," "Reservation," "Tribal court," "Indian child," "extended family member," "parent," and "Indian child custody proceeding."
- 4) Clarifies, within the definition of "active efforts," that when an agency knows or has reason to know that a child is an Indian child, active efforts shall start upon receipt of a referral regarding the Indian child or upon first contact with the Indian child or

family, whichever is earlier; and whenever a county child welfare agency is required to make reasonable efforts or provide reasonable reunification services, in any case involving an Indian child, those efforts and services shall meet this standard.

- 5) Clarifies that the duty to inquire whether a child is an Indian child begins upon a county department's first contact with the child or the child's family, including extended family; and that, at the first contact with the child and each family member, including extended family members, the county welfare department or county probation department has a duty to inquire whether that child is or may be an Indian child as described in this section.
- 6) Provides that a court's duty to inquire in any juvenile proceeding that could result in placement of an Indian child with someone other than a parent or Indian custodian, including proceedings where the parents or Indian custodian have voluntarily consented to placement of the child, begins at the first hearing on a petition.
 - a) At the commencement of the hearing, the court shall ask each party to the proceeding and all other interested persons present whether the child is, or may be, an Indian child, whether they know or have reason to know that the child is an Indian child, and where the child, the parents, or Indian custodian are domiciled.
 - b) The inquiry and responses shall occur on the record and be documented in the minutes.
 - c) At the first appearance in court of each party, the court shall ask all interested persons present whether the child is, or may be, an Indian child, on the record, as specified.
- 7) Clarifies that a juvenile court must give full faith and credit to the acts, records, judicial proceedings, and judgments of any Indian tribe applicable to the proceeding, regardless of whether the tribe intervenes in the child's case.
- 8) Expands the prohibition on permitting a person who is the employee of a person or agency recommending foster care placement or termination of parental rights to also prohibit persons who are the employees of the person or agency recommending pre-adoptive placement, adoptive placement, or adoption from serving as expert witnesses.
- 9) Authorizes CDSS to establish and administer programs designed to facilitate tribal participation in Indian child custody proceedings, as specified.
- 10) Clarifies that a child welfare agency has a child in temporary custody when the child is delivered by any person authorized to execute a warrant, not just law enforcement.

- 11) Clarifies that a court must give full faith and credit to the order of placement preferences of an Indian child's tribe; and requires any person involved in the placement of an Indian child to conduct a search for placements that meets the tribe's placement preferences with the tribe, with the primary responsibility for seeking the placement remaining on the person or department seeking the placement.
- 12) Permits a federally recognized tribe or tribal organization to approve homes for the purpose of emergency placements for Indian children and receive funding for those placements, provided that the tribe or tribal organization satisfies the specified requirements.
- 13) Clarifies the court's obligation to make specified findings regarding the active efforts to return an Indian child to their parent or guardian's custody, including the provision of remedial services and rehabilitative programs to the parent or guardian.
- 14) Clarify placement requirements and preferences for an Indian child who is taken into custody in connection with a juvenile justice proceeding.
- 15) Expressly provides that tribally approved homes are available for the same funding and resources as resource family homes, including emergency caregiver payments.
- 16) Updates the statutory role of the Office of Tribal Affairs (OTA) within CDSS to reflect the OTA's mission, existing obligations, and relationship with CDSS and other offices.
- 17) Requires that an Indian child's case plan include documentation of the required active efforts taken to provide remedial services and rehabilitative programs to the family.
- 18) Requires, in the case of an Indian child, the child's tribe to be included in the child's child and family team and be consulted in the development of the case plan.
- 19) Incorporates cross-references to the definitions being incorporated or clarified in statute in 3)-4).
- 20) Makes technical and conforming changes.

COMMENTS

1. Author's comment

According to the author:

The Indian Child Welfare Act was enacted nearly 45 years ago as the nation's first reverse-assimilation policy to prevent the documented pattern of unnecessary removals of Indian children from their families and communities. Although California has some of the strongest state ICWA statutes in the nation, there is still much work to be done. Since I came to the Assembly, I have authored four bills to strengthen ICWA in our state, including AB81, which was recently approved by a 75-0 vote of the State Assembly, showing that the protection of Indian children and their families is non-partisan issue. Bills like AB81 are crucial in the face of ongoing attacks on ICWA, and while we've made tremendous progress, we must continue moving forward, because we will not go back to the days when one in three Indian children were taken from their homes and away from their tribal communities. The data tells us that there is a positive effect to the emotional and physical wellbeing of Indian children when they remain connected to their Native community and their culture. That is why California must continue to stand with Tribes to uphold essential protections for Indian children and families and to ensure Tribes are empowered to take care of their own citizens.

On June 15, 2023, the United States Supreme Court held, unreservedly, that all challenges made to the federal Indian Child Welfare Act are rejected, some on the merits and others for lack of standing. Justice Coney-Barrett wrote the 7-2 opinion of the Court. This ruling is a major victory for tribal nations in California, the best interests of children, and the future of tribal cultures and lifeways. The decision affirms what tribal nations have long known: ICWA is the best practice in child welfare in general and deserves to be upheld as one of the first ever reverse assimilation policies that this country, and the State of California, have ever enacted. While the Supreme Court unequivocally rejected all claims against ICWA, there are legal nuances throughout the opinion that require updates to California state law.

2. Background on the need for, and the passage of, ICWA

This Committee's prior analysis of AB 81 set forth the long history of American governmental efforts to destroy Indian families, particularly by taking Indian children from their parents and tribes, in great detail. That analysis is incorporated herein by reference.

In brief, before ICWA was enacted, the federal government and governments of the states, in the nineteenth and twentieth centuries, deliberately stole Indian children from their families as a means of destroying Indian tribal culture. “Taking [Indian children] from their parents when small and keeping them away until parents and children become strangers to each other...the problem of the [Indian] could be solved by educating the children, not to return to the reservation, but to be absorbed one by one into the white population.”³ “State actors removed children with ‘few standards and no systematic review of judgments’ by impartial tribunals” and “Indian parents rarely received adequate notice, almost never received paid counsel, and generally had no meaningful opportunity to respond” to the removals.⁴ After decades of this practice:

It was estimated that state governments removed between 25 [percent] and 30 [percent] of all Indian children nationwide from their families, placing about 90 [percent] of those removed children in non-Indian homes. No one will ever know the exact numbers; far too many removals were paperless and lacked even rudimentary process.⁵

The United States did not halt the states’ practice of wantonly removing Indian children from their families until 1978, when Congress finally took action and passed ICWA. ICWA recognized “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”⁶ The stated policy of ICWA is:

[T]o protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.⁷

Among other things, ICWA requires states, in adoptive and foster placement decisions involving a child who is a member of a federally recognized tribe or eligible to be a

³ United States Department of the Interior, Federal Indian Boarding School Initiative: Investigative Report (May 2022), p. 38.

⁴ Fletcher & Sengel, Indian Children and the Federal-Tribal Trust Relationship, 95 Neb. L. Rev. 885, 954 (2017).

⁵ *Id.* at pp. 954-955.

⁶ *See* 25 U.S.C. § 1901(4).

⁷ *Id.*, § 1902.

member of a federally recognized tribe, to give certain preferences to the child's extended family, other members of the child's tribe, or another Indian family.⁸

ICWA's preferences for Indian children are based on a political classification, i.e., persons who are members or eligible to be members in a federally recognized Indian tribe.⁹ Indian tribes have a "unique legal status" under federal law, "based on a history of treaties and the assumption of a 'guardian-ward' status by the federal government over tribes."¹⁰ As such, statutes addressing Indians specifically have generally understood to treat Indians as members of quasi-sovereign tribal entities.¹¹

3. Haaland v. Brackeen and the continued attacks on ICWA

ICWA has been federal law for nearly 50 years. The past decade or so, however, has seen a rise in litigation challenging ICWA; generally speaking, the challengers are white potential adoptive parents who feel entitled to adopt Indian children free of ICWA's placement preferences intended to keep the child with their tribe.¹² This effort won a major victory when an en banc panel of the United States Court of Appeals for the Fifth Circuit held that ICWA is unconstitutional.¹³

On June 15, 2023, the United States reversed the Fifth Circuit and upheld ICWA in *Haaland v. Brackeen*.¹⁴ The Court expressly rejected the Fifth Circuit's holding that ICWA is unconstitutional under Article I and the Tenth Amendment to the United States Constitution.¹⁵ On the question of whether ICWA violates the Equal Protection Clauses of the Fifth and Fourteenth Amendments, the Court declined to reach the merits of the issue, instead holding that the parties raising the equal protection challenge lacked the necessary standing.¹⁶

Haaland was celebrated by many as "a major victory for tribes in California and across the nation, and most importantly, [as] a victory for tribal children, tribal families and

⁸ *Id.*, § 1915.

⁹ 25 U.S.C. § 1903(3), (4), (5), (8).

¹⁰ *Morton v. Mancari* (1974) 417 U.S. 535, 551.

¹¹ *Id.* at p. 554.

¹² *E.g., Adoptive Couple v. Baby Girl* (2013) 570 U.S. 637.

¹³ *Brackeen v. Haaland* (5th Cir. 2021) 994 F.3d 249 (en banc), *revd. sub nom. Haaland v. Brackeen* (Jun. 15, 2023) 143 S.Ct. 1609.

¹⁴ *Haaland, supra*, 146 S.Ct. at pp. 1622-1623.

¹⁵ *Id.* at pp. 1628-1638.

¹⁶ *Id.* at p. 1638.

the future of tribal nations.”¹⁷ But *Haaland* has not stemmed the tide of legal challenges to ICWA; attacks in various state courts are ongoing.¹⁸

4. This bill codifies provisions of ICWA in state law, and strengthens and clarifies procedures and requirements relating to Indian children under the jurisdiction of the juvenile court

Because ICWA is a federal law, California is required to comply with ICWA whether it is codified in state law or not.¹⁹ California has, nevertheless, codified portions of ICWA in state law, primarily through the Welfare and Institutions Code,²⁰ with additional references in the Family and Probate Codes. In some cases, California’s protections for Indian children and families go beyond what is required by ICWA.²¹

This bill is intended to accomplish two things. First, the bill fully codifies ICWA’s relevant definitions and other relevant requirements – such as requiring counsel to be appointed for an Indian child’s parents if they cannot afford counsel – within the Welfare and Institutions Code. The bill also incorporates the newly defined terms into the relevant sections of the Welfare and Institutions Code. These provisions of the bill are intended to provide an independent state-law basis for ICWA’s protections in the event that the ICWA is weakened by federal courts.

Second, the bill modifies and clarifies existing state-law protections for Indian children and families. These provisions include:

- Adding clarity to when the obligation to undergo active efforts to reunify an Indian child with their family begins, and the persons and agencies who have those obligations.
- Clarifying that an Indian child is considered to be in custody when they are placed in the custody of a child welfare agency by a person authorized to execute a warrant, regardless of whether the person who delivers the child into custody is a law enforcement officer.
- Clarifying that the placement preferences of an Indian child’s tribe must be given full faith and credit by the juvenile court.

¹⁷ California Tribal Families Coalition, Press Release: California Tribal Families Coalition Statement re U.S. Supreme Court Ruling on the Indian Child Welfare Act (Jun. 15), *available at* <https://caltribalfamilies.org/haaland-v-brackeen-supreme-court-ruling/> (link current as of August 9, 2024).

¹⁸ *E.g.*, *In the Matter of Welfare of Children of L.K.* (Minn. Ct. App., Jun. 3, 2024) __ N.W.3d __, 2024 WL 2808199 (rejecting equal protection challenge to ICWA’s placement preferences). The case is now pending before the Minnesota Supreme Court. (*See* Docket, *In the Matter of Welfare of Children of L.K.*, (Minn.) Case No. A23-1762.)

¹⁹ U.S. Const., art. VI, cl. 2.

²⁰ *See* Welf. & Inst. Code, §§ 224-224.6.

²¹ *Compare, e.g.*, 25 U.S.C. § 1912 with Welf. & Inst. Code, § 224.2. Additional requirements at the federal level have been imposed via regulations. (*See, e.g.*, 25 C.F.R. §§ 23.2, 23.120.)

- Clarifying that tribal emergency placements are eligible for the same funding as emergency resource family placements.
- Updating the Office of Tribal Services' mission and role.

In many cases, these changes to the Welfare and Institutions Code merely codify existing CDSS regulations or existing practices. In light of the ongoing challenges to ICWA and the importance of ensuring that Indian children are kept with their families whenever possible, the bill contains an urgency clause.

5. The differences between this version of the bill and the prior version previously heard by this Committee

This Committee has already heard this bill: on July 11, 2023, this Committee passed the bill with a vote of 11-0 on the Consent Calendar. The version of the bill passed by the Committee last year was both broader and narrower than the bill currently before the Committee.

The prior version of the bill was broader than the current version because it made changes to the Family, Health and Safety, and Probate Codes in addition to the Welfare and Institutions Code. Over the past year, the author and stakeholders determined that the changes to those other Codes are best dealt with in a separate bill. As a result, this bill amends only the Welfare and Institutions Code.

The prior version of the bill was narrower than the current version of the bill because it made fewer substantive changes to the Welfare and Institutions Code, and instead mainly incorporated ICWA's provisions into state law. The current version, in addition to adding ICWA's provisions into the Welfare and Institutions Code, makes substantive changes to the Welfare and Institutions Code to improve and clarify the obligations and procedures involved when an Indian child is before the juvenile court.

These changes, overall, were significant enough that the current version of the bill was classified as a "rewrite" of the bill under Senate Rule 29.10(b). As a result, this bill was referred back to this Committee for another hearing.

6. Arguments in support

According to the California Tribal Families Coalition, one of the sponsors of the bill:

Although ICWA was enacted over 40 years ago, Indian children continue to be overrepresented in the child welfare system at a rate at least two times that of White children – in some counties in California, the rate is as high as four times. This is because meaningful implementation has not yet been achieved consistently across the state. However, the federal ICWA is so important and so effective at rolling back past practices of Indian family separation, that California

passed similar legislation as early as 2006. As attacks on the federal ICWA continue throughout the nation, California's codification of its provisions may also be threatened.

This bill was introduced to strengthen California child welfare provisions leading up to a United States Supreme Court case known as *Haaland v. Brackeen*. In a 7-2 opinion on June 15, 2023, the Supreme Court unreservedly held that all challenges made to the federal Indian Child Welfare Act (ICWA) were rejected, some on the merits and others for lack of standing. The decision affirms what tribal nations in California have always known and advocated for – that Indian children and families require remedial protections to reduce disproportionality in child welfare and ICWA provides the protections needed to improve outcomes.

Although the Supreme Court decision was overwhelmingly positive, there are legal nuances throughout the opinion that California now has the opportunity to address in its own state law version of ICWA. AB 81 (Ramos) would strengthen California protections, in part, by including California state law citations in addition to references to the federal Indian Child Welfare Act. This provides clarity for practitioners in the courtroom to cite to state law and ensures that state law provisions remain regardless of what changes may happen to the federal Act moving forward.

SUPPORT

California Tribal Families Coalition (co-sponsor)
Morongo Band of Mission Indians (co-sponsor)
ACLU California Action
Agua Caliente Band of Cahuilla Indians
Alliance for Children's Rights
California Open
Cachil Dehe Band of Wintun Indians of the Colusa Indian Community
Enterprise Rancheria of Maidu Indians California
Habematolel Pomo of Upper Lake
Hoopa Valley Tribe
Jamul Indian Village of California
Picayune Rancheria of the Chukchansi Indians
Rincon Band of Luiseño Indians
San Manuel Band of Mission Indians
Seneca Family of Agencies
Tejon Indian Tribe
Tolowa Dee-ni' Nation
Torres Martinez Desert Cahuilla Indian Tribe

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

SB 824 (Ashby, 2023) expands CDSS's authority to grant an exemption to restrictions on a person serving as a resource family for a specific child when that person has a criminal conviction, to permit CDSS to grant an exception, among others, a person who is an extended family member of an Indian child as defined in ICWA. SB 824 is pending before the Assembly Appropriations Committee.

AB 2948 (Ramos, 2024) adds a final order of adoption issued by a tribal court as a qualifying circumstance to make a child eligible for the Adoption Assistance Program. AB 2948 has been passed by the Legislature and is awaiting the Governor's signature.

Prior Legislation:

AB 1862 (Ramos, 2022) would have established the Tribally Approved Homes Compensation Program to provide funding to eligible tribes and tribal organizations in California to assist in funding the costs associated with recruiting and approving homes for the purpose of foster or adoptive placement of an Indian child pursuant to ICWA. AB 1862 died in the Senate Appropriations Committee.

AB 686 (Waldron, Ch. 434, Stats. 2019) required the Judicial Council to authorize the use of telephonic or other remote access by an Indian child's tribe in proceedings where ICWA apply and required, when a tribe does not exercise its right to approve a home for a specific child, the county and foster family agency to apply prevailing social and cultural standards of the Indian community when approving a resource family for that child.

AB 3176 (Waldron, Ch. 833, Stats. 2018) revised and recast the state statutes implementing ICWA to comply with federal regulations, including revising the specific steps a social worker, probation officer, or court is required to take in making an inquiry of a child's possible status as an Indian child and the various notice requirements that are mandated during an Indian child custody proceeding.

PRIOR VOTES:

Senate Judiciary Committee (Ayes 11, Noes 0)
Assembly Floor (Ayes 75, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)
