POLISHING THE GOLD STANDARD: CAPACITY-BASED REFORM OF THE INDIAN CHILD WELFARE ACT

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INTRODUCTION

Native[1] children across the United States are overrepresented in foster care at rates up to twelve times their share of the general child population.[2] In South Dakota, for example, Native children comprise nearly 74 percent of foster children while constituting only 13 percent of the state's child population.[3] This trend is not new; for nearly a century, state departments removed entire generations of Native children from their tribes and placed them in non-Native households.[4] In 1978, Congress enacted the Indian Child Welfare Act (ICWA) to address such cruelty and protect Native families from unwarranted removals.[5] Yet even today, though ICWA remains a "gold standard" in federal Indian policy,[6] challenges have created uneven barriers to implementation.

The challenges, it turns out, are mostly practical. The Supreme Court's 2023 decision in *Haaland v. Brackeen* upheld ICWA's constitutionality, rejecting the appellants' equal protection and anti-commandeering arguments that threatened the Act's survival.[7] ICWA's legal framework—mandatory qualified expert witness (QEW) testimony, placement preferences favoring tribal members and extended family, and absolute rights to tribal intervention—endured.[8] With *Brackeen* now settled, attention can finally turn to

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1. This Note primarily uses "Native" to refer to Indigenous people, their children, and their communities. The term "Indian" appears only when referencing quoted legal sources, statute names, or established legal terminology. While both terms are used within Indigenous communities, this Note adopts the modern preference of "Native" while preserving "Indian" where embedded in legal language.

2. *AFCARS Data Collection for Native Children*, NAT'L INDIAN CHILD WELFARE ASS'N (May 27, 2020), https://www.nicwa.org/news/afcars-data-collection-for-native-children/ [https://perma.cc/6FTH-8KCC].

3. Makenzie Huber, *A Story Told in Data: Overrepresentation of Indigenous Children in the SD Foster Care System*, S.D. SEARCHLIGHT (Nov. 17, 2023, at 15:01 ET), https://southdakotasearchlight.com/2023/11/17/overrepresentation-of-native-american-indigenous-children-south-dakota-foster-care-system-data/ [https://perma.cc/G2Z6-RT3E].

4. *See* 25 U.S.C. § 1901(4); H.R. REP. NO. 95-1386, at 9 (1978); *infra* Part I.A.

5. *See* 25 U.S.C. § 1902.

6. *How Can Child Welfare Systems Apply the Principles of the Indian Child Welfare Act as the "Gold Standard" for All Children?*, CASEY FAM. PROGRAMS (Apr. 1, 2022), https://www.casey.org/icwa-gold-standard/ [https://perma.cc/J7T9-5MP6].

7. 143 S. Ct. 1609, 1641 (2023).

8. *See* 25 U.S.C. §§ 1912(e), 1915(b).

the uncomfortable reality that ICWA advocates have long understood but hesitated to point out: ICWA's uniform federal mandates assume tribal capacity that many tribes simply do not possess.

While larger tribes like the Cherokee Nation and the Sitka Tribe of Alaska operate sophisticated child welfare departments with dedicated social workers, legal staff, and comprehensive family services,[9] smaller tribes face a different situation. The Lower Brule Sioux Tribe and the Oglala Sioux Tribe, among others, struggle with understaffing, minimal budgets, and geographic barriers that make compliance with ICWA's procedural requirements a tremendous burden.[10] When state courts initiate ICWA proceedings, lower-capacity tribes may lack the personnel to provide the intensive "active effort" that ICWA demands.[11] The result is not merely an administrative inconvenience, but a disparate system in which well-resourced tribes can fully exercise their ICWA rights while smaller tribes must watch helplessly as their children disappear into state systems.

The implementation gap appears even more troubling when considered alongside the tension between ICWA and the Adoption and Safe Families Act (ASFA).[12] ASFA requires states to automatically initiate termination of parental rights when children have been out of their parent's custody for fifteen of the most recent twenty-two months, pushing state courts toward rapid permanency and adoption by non-Native families.[13] For tribes with limited capacity, ASFA's timelines transform compliance from difficult to

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9. *See* Chad Hunter, *Advocates Say ICWA's Legal Fate Transcends Child Welfare*, CHEROKEE PHOENIX (Oct. 28, 2022), https://www.cherokeephoenix.org/news/advocates-say-icwa-s-legal-fate-transcends-child-welfare/article_83138f18-562c-11ed-892a-ff80b923cd4a.html [https://perma.cc/6Q3X-KS8Q]; *What Lessons Can We Learn from ICWA Courts?*, CASEY FAM. PROGRAMS (June 23, 2025), https://www.casey.org/icwa-courts-strategies/ [https://perma.cc/3F6F-FUPC].

10. *See* Makenzie Huber & Annie Todd, *Staffing and Funding Problems Leave Tribal Child Welfare Offices Scrambling*, S.D. SEARCHLIGHT (Nov. 14, 2023, at 06:00 ET), https://southdakotasearchlight.com/2023/11/14/staffing-and-funding-problems-leave-tribal-child-welfare-offices-scrambling/ [https://perma.cc/45RQ-UGLK]; Jessica Lussenhop, *The Supreme Court Upheld the Indian Child Welfare Act. The Long Struggle to Implement the Law Continues.*, PROPUBLICA (June 21, 2023, at 11:00 ET), https://www.propublica.org/article/scotus-icwa-decision-questions-native-american-families [https://perma.cc/9RDV-X2MH].

11. *See* 25 U.S.C. § 1912(d).

12. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

13. *See id.* § 103(a)(3).

borderline impossible.[14] Coordinating with tribal courts takes time. Identifying culturally appropriate placement takes time. Yet ASFA's clock continues ticking, and under-resourced tribes cannot match the pace that even larger tribes struggle to maintain.[15]

There is no doubt that ICWA is well-intentioned and incredibly important, but a Native child's protection should not depend on whether their tribe has robust infrastructure or whether their state has voluntarily adopted special procedures. ICWA's uniform federal mandates unintentionally disadvantage smaller, lower-capacity tribes, operating against ICWA's goals of tribal sovereignty and child welfare. Though promising, piecemeal funding and state efforts cannot resolve these inequities. This Note argues that Congress should amend ICWA to incorporate capacity-based reforms—such as regional expert lists and the expansion of ICWA-designated courts—to ensure ICWA equitably empowers all tribes, regardless of their resources, while remaining responsive to the permanency timelines so crucial to Native children's outcomes.

Part I of this Note will provide background on ICWA, from its history and purpose to its current structure and the Supreme Court's recent interpretation in *Haaland v. Brackeen*. Part II will expand on ICWA's practical implementation problems, contrasting well-resourced tribes with the struggles of smaller tribes, and illustrating how recent federal legislation has begun to acknowledge these capacity disparities without adequately addressing them. Part III will then propose a combination of federal reforms, including a tiered system for QEWs, as well as specialized ICWA dockets, to allow for more consistent, equitable implementation of ICWA. Ultimately, this Note concludes that a more capacity-sensitive ICWA will both strengthen tribal sovereignty and better serve the best interests of Native children.

I. BACKGROUND

Understanding why capacity gaps matter requires first understanding what ICWA was meant to do. Below, Part I.A traces ICWA's history and purpose, from the crisis of mass child removal

14. *See* Lussenhop, *supra* note 10.
15. *See id.*

that prompted its passage to the interests it was written to protect. Part I.B then outlines ICWA's statutory structure, including placement preferences and the qualified expert witness requirement, before Part I.C turns to the Supreme Court's interpretation of the Act in *Haaland v. Brackeen*.

A. History and Purpose of the Indian Child Welfare Act

Beginning in the late 1800s, the United States government adopted forced assimilation as the official policy toward Native people.[16] The guiding philosophy, spoken by founder of the first off-reservation boarding school Richard Henry Pratt, was to "[k]ill the Indian in him, and save the man."[17] This approach was showcased through the Indian boarding school system, which forcibly removed hundreds of thousands of Native children from their families between 1879 and the 1960s.[18] These schools operated with a single purpose: strip Native children of their Indigenous identities.[19] Some children were only five years old when they were taken from their homes and sent to schools hundreds of miles away where speaking their languages, practicing their cultures, or maintaining contact with their families was forbidden.[20]

When the boarding school system came under scrutiny in the 1950s, federal policy shifted toward adoption.[21] The Bureau of Indian Affairs (BIA) launched the Indian Adoption Project to actively encourage white family adoptions of Native children, describing

16. *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1641-42, 1644 (2023) (Gorsuch, J., concurring).

17. Becky Little, *How Boarding Schools Tried to 'Kill the Indian' Through Assimilation*, HIST. (May 28, 2025), https://www.history.com/articles/how-boarding-schools-tried-to-kill-the-indian-through-assimilation [https://perma.cc/9WC2-SBDG].

18. *See id.*; *Sovereignty Under Attack*, NATIVE GOVERNANCE CTR. (June 13, 2023), https://nativegov.org/news/sovereignty-under-attack/ [https://perma.cc/R38H-WKFL]; Téa Cushman, *From Boarding Schools to Forced Adoption: A Legacy of American Genocide and Cultural Erosion in Indigenous Communities*, NEB. APPLESEED (Jan. 27, 2025), https://neappleseed.org/48305 [https://perma.cc/6954-DFUC].

19. *See Brackeen*, 143 S. Ct. at 1643 (Gorsuch, J., concurring).

20. *See* Cushman, *supra* note 18; NATIVE GOVERNANCE CTR., *supra* note 18.

21. NATIVE GOVERNANCE CTR., *supra* note 18; *see Brackeen*, 143 S. Ct. at 1644 (Gorsuch, J., concurring).

them as "waifs" in need of rescue.[22] The Project went further than boarding schools by permanently severing the legal ties between Native children and their families, making reunification impossible.[23] State child welfare agencies and private adoption organizations joined the effort, interpreting traditional Native child-rearing practices, extended family structures, and economic hardship as evidence of neglect.[24]

By the 1970s, approximately 75-80 percent of families living on reservations had at least one child removed from their home.[25] A 1974 study by the Association on American Indian Affairs found that 25-35 percent of all Native children had been separated from their families and placed in foster homes, adoptive homes, or institutions with 85 percent of separated children being placed in non-Native homes.[26] In response to decades of advocacy by Native leaders and growing evidence of harm,[27] Congress enacted ICWA in 1978 with intent to both protect the best interests of Native children and promote the stability and security of tribes.[28] The Act established minimum federal standards for state court proceedings involving Native children,[29] preempting state law where necessary to ensure equal protection across jurisdictions.[30] Congress grounded ICWA in its plenary power over Indian affairs and its entrusted responsibility to federally recognized tribes,[31] identifying the Act as necessary to stop "[t]he wholesale separation of Indian children

22. *See* Press Release, Bureau of Indian Affs., Adoptions of Indian Children Increase (Apr. 14, 1966), https://www.bia.gov/as-ia/opa/online-press-release/adoptions-indian-children-increase [https://perma.cc/P6RJ-S2WH].

23. *See* NATIVE GOVERNANCE CTR., *supra* note 18.

24. *See* Gabrielle Glaser, *The Brutal Past and Uncertain Future of Native Adoptions*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/nyregion/indian-child-welfare-act-supreme-court.html [https://perma.cc/XAV9-PJYM].

25. *ICWA History and Purpose*, MONT. DEP'T OF PUB. HEALTH & HUM. SERVS., https://dphhs.mt.gov/CFSD/icwa/icwahistory [https://perma.cc/KP4W-QJQ7].

26. H.R. REP. NO. 95-1386, at 9 (1978).

27. *See* NATIVE GOVERNANCE CTR., *supra* note 18; MONT. DEP'T OF PUB. HEALTH & HUM. SERVS., *supra* note 25.

28. 25 U.S.C. § 1902.

29. *See generally id.* §§ 1911-1923 (Child Custody Proceedings).

30. *Cf.* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

31. 25 U.S.C. § 1901(1)-(2).

from their families [as] perhaps the most tragic and destructive aspect of American Indian life today."[32]

ICWA's stated purpose seems to embody a congressional recognition that tribal sovereignty necessarily includes the right to maintain their communities by protecting their children's tribal connections. As later acknowledged by the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, ICWA is "based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected."[33] This connection is central to the importance of ensuring that all tribes, not just those with sizable resources, can meaningfully participate in ICWA proceedings.

B. ICWA's Statutory Structure

ICWA applies when a state court proceeding seeks foster care placement, termination of parental rights, or pre-adoptive/adoptive placement of an "Indian child," defined as an unmarried person under eighteen years old who is either a member of a federally recognized tribe or is biologically eligible for membership of the tribe.[34] As best practice, the National Indian Child Welfare Association suggests professionals should assume ICWA applies to a case until enough information is obtained to determine it does not.[35] Once ICWA applies, the Act imposes four core procedural protections relevant to this Note that distinguish Native child proceedings from the typical state child welfare case protected under ASFA.[36]

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32. H.R. REP. NO. 95-1386, at 9 (1978).

33. 490 U.S. 30, 50 n.24 (1989) (quoting *In re* Appeal in Pima Cnty. Juv. Action No. S-903, 635 P.2d 187, 189 (Ariz. Ct. App. 1981)).

34. 25 U.S.C. § 1903.

35. *The Indian Child Welfare Act: A Primer for Child Welfare Professionals*, CHILD WELFARE INFO. GATEWAY 4 (Apr. 2021), https://cwlibrary.childwelfare.gov/discovery/delivery/01CWIG_INST:01CWIG/1218691510007651 [https://perma.cc/V8UY-EHL9]; 25 C.F.R. § 23.107(b)(2) (2016); *see A Guide to Compliance with the Indian Child Welfare Act*, NAT'L INDIAN CHILD WELFARE ASS'N 3 (Oct. 2021), https://www.nicwa.org/wp-content/uploads/2025/02/NICWA-Guide-to-ICWA-Compliance-1.pdf [https://perma.cc/R8GK-DTMK].

36. *E.g.*, *ICWA Guide Online: Topic 19.9—Are ASFA and ICWA in Conflict?*, NAT'L INDIAN L. LIB., https://www.narf.org/nill/documents/icwa/faq/application2.html [https://perma.cc/9WKC-4WHH].

The first is qualified expert witness testimony. Neither foster care nor termination proceedings may be ordered absent testimony from a qualified expert witness.[37] This QEW must testify that the continued custody by the parent or Indian custodian is likely to result in serious harm to the child.[38] Critically, the QEW must have "specific knowledge" of Indian child-rearing practices and should ideally be a member of the child's tribe or at least familiar with the tribe's specific customs and culture.[39] The burden falls on the state to obtain this testimony.[40]

The second is placement preferences. When a Native child must be removed from their family, ICWA has statutory placement preferences that prioritize keeping the child within the tribal community.[41] Preference runs in descending order: first, members of the child's extended family; second, other members of the child's tribe; and third, other Native families.[42] State courts may only depart from these preferences for "good cause."[43]

The third is tribal notice and intervention. State courts must provide the child's tribe with notice of ICWA proceedings and an opportunity to intervene in a case.[44] Tribes have the absolute right to intervene in an involuntary proceeding,[45] as the tribe has its own

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37. 25 U.S.C. § 1912(e)-(f).

38. *Id.*

39. BUREAU OF INDIAN AFFS., U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 54 (2016) [hereinafter 2016 BIA GUIDELINES], https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf [https://perma.cc/3P4R-SQE3].

40. *See Qualified Expert Witnesses in ICWA Cases*, ALASKA LEGAL SERVS. CORP. 2 (2018), https://alaskatribes.org/wp-content/uploads/2018/12/QEW-FAQs.pdf [https://perma.cc/49BP-VJUX]. Tribes are never required to call their own QEW, but they may designate a person as a QEW and choose to call them in state proceedings. *Id.*; 2016 BIA GUIDELINES, *supra* note 39.

41. 25 U.S.C. § 1915.

42. *Id.* § 1915(a). ICWA also allows for the Native child's tribe to establish a different order of preference by resolution. *Id.* § 1915(c).

43. 25 C.F.R. § 23.129(c) (2026); *see also* 2016 BIA GUIDELINES, *supra* note 39, at 61-62 (defining the "good cause" standard as a limited exception proven by clear and convincing evidence and based on specific factors such as parental or child request, sibling attachment, extraordinary needs of the child, or unavailability of suitable placement after a diligent search).

44. 25 U.S.C. § 1912(a).

45. *See id.* § 1911(c).

sovereign interest in the child's welfare besides parental and state interests.[46]

And the fourth procedural protection is transfer to tribal court. Either the child's parent or the Native child's tribe may request the transfer of a proceeding to tribal court jurisdiction.[47] This provision allows tribes to apply their own laws and customs to these sensitive cases.[48]

Through the BIA, the Department of the Interior issued refined guidance on compliance with ICWA's statutory requirements.[49] These regulations clarified ambiguities that had developed over years of ICWA implementation, including the standards to depart from placement preferences and the qualifications necessary for QEWs.[50] While these regulations strengthened some of ICWA's protections, they did not address the underlying capacity issues that prevent many tribes from reaping the benefits.

C. Haaland v. Brackeen

In 2023, the Supreme Court affirmed the validity of the Indian Child Welfare Act despite constitutional objections.[51] *Haaland v. Brackeen* originated when non-Native foster and adoptive parents faced obstacles under ICWA's placement preferences and procedural requirements after seeking to adopt the Native children placed with them.[52] These prospective parents, joined by the State of Texas, argued in part that (1) Congress exceeded its constitutional authority in enacting ICWA, and (2) ICWA improperly commandeered state officials.[53] The Fifth Circuit issued a fractured en banc

46. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778-79 (June 14, 2016) [hereinafter 2016 BIA Final Rule] (recognizing that "ICWA balances the Federal interest in protecting the integrity of Indian families and the sovereign authority of Indian Tribes with the States' sovereign interest in child-welfare matters").

47. 25 U.S.C. § 1911(b).

48. *See I Want to Learn About My ICWA Legal Options*, BUREAU OF INDIAN AFFS., https://www.bia.gov/bia/ois/dhs/icwa/i-want-learn-about-my-icwa-legal-options [https://perma.cc/H789-TDKD] ("If the Tribe chooses to transfer the case to Tribal court, the case is governed by the Tribe's laws as a Sovereign Nation after transfer.").

49. *See* 2016 BIA GUIDELINES, *supra* note 39, at 4.

50. *E.g.*, 2016 BIA Final Rule, *supra* note 46, at 38846 (placement), 38830 (QEWs).

51. Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023).

52. *See id.* at 1625-26.

53. *Id.* at 1626-27.

decision with a slim majority striking down some provisions while upholding others.[54]

The Supreme Court rejected the appellants' challenges.[55] The 7-2 majority held that, because ICWA lies within Congress's broad plenary power, the Act passed constitutional scrutiny.[56] The Court also rejected the anti-commandeering argument, finding that the provisions of ICWA requiring state officers to administer federal programs were permissible because the requirements of ICWA are applied to private individuals and agencies as well as government entities.[57]

Haaland v. Brackeen represents a paramount victory for ICWA's defenders and for tribal sovereignty overall. The decision removes any constitutional cloud over the Act and affirms Congress's broad authority to legislate on Indian affairs and child welfare.[58] Justice Gorsuch's concurrence particularly reinforced the understanding that ICWA protects not only individual Native children but also tribal communities as whole political entities.[59]

That said, the Court addressed only ICWA's facial constitutional validity in *Brackeen*, or, in other words, whether Congress had the authority to enact the statute and whether its provisions violated federalism principles.[60] The opinion did not, and could not, resolve questions about how ICWA functions in practice, such as whether tribes possess adequate resources to exercise the rights affirmed in the decision, whether state courts comply uniformly with ICWA's mandates, or whether the Act's one-size-fits-all procedural requirements work equitably for tribes with widely different capacities.[61]

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54. *See id.* at 1626; Brackeen v. Haaland, 994 F.3d 249, 269 (5th Cir. 2021), *aff'd in part, vacated in part, rev'd in part*, 143 S. Ct. 1609 (2023).

55. *Brackeen*, 143 S. Ct. at 1623.

56. *See id.* at 1627-28.

57. *See id.* at 1632.

58. *Id.* at 1628-29.

59. *See id.* at 1661 (Gorsuch, J., concurring) ("The mass removal of Indian children by States and private parties, no less than a pattern of criminal trespasses by States and private parties ... threatens the Tribes' 'political existence.'" (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1882))).

60. *See id.* at 1626 (majority opinion).

61. *See id.* at 1646-47 (Gorsuch, J., concurring) (mentioning states' struggle to implement ICWA but nevertheless concluding the Act has "achieved considerable success" without further examining the implementation issues (quoting Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*,

The *Brackeen* litigation revealed the strategic bind that capacity concerns created for ICWA advocates. One dare not risk providing ammunition by raising implementation problems—especially not resource disparity—to those seeking ICWA's invalidation during years of constitutional uncertainty. Now that the constitutional battle is settled, focus can shift. With ICWA's validity secured, advocates and policymakers can openly acknowledge that when there is no capacity to exercise one's formal legal rights, the result is hollow sovereignty.

Brackeen thus marks not an endpoint but a beginning. The constitutional declaration of Congress's authority to regulate Indian child welfare proceedings implies that Congress also possesses the authority to amend ICWA to address implementation gaps.

II. THE IMPLEMENTATION GAP

A statute is only as effective as one's ability invoke it. Below, Part II.A contrasts how ICWA functions in high-capacity tribes with well-developed child welfare infrastructure against the struggles faced by lower-capacity tribes with limited staff and resources. Part II.B then considers how recent federal legislation, the Supporting America's Children and Families Act, has begun to acknowledge these capacity disparities without adequately addressing them.

A. Disparities in Tribal Capacity

Tribes with different levels of resources accordingly implement ICWA's mandates in different ways. Comparing these tribes side-by-side proves ICWA is not self-executing but rather depends on tribal infrastructure, staff, and funding. The comparison reveals that, though their legal obligations are formally identical, tribes with sufficient capacity can fully exercise the rights ICWA guarantees, while tribes without cannot.

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51 EMORY L.J. 587, 621 (2002))).

1. ICWA Implementation in High-Capacity Tribes

Haaland v. Brackeen's holding confirmed what ICWA advocates have known since the Act's enactment: Native children belong with their tribes, and complete tribal sovereignty requires the right to protect those connections.[62] But legal validation means little when tribes lack the practical capacity to exercise those rights the law guarantees. The reality is that ICWA's uniform federal mandates operate as though all federally recognized tribes possess equivalent resources, infrastructure, and geographic advantages. They do not. Stark disparities exist in tribal capacity to implement ICWA between well-resourced tribes that have built sophisticated child welfare systems and smaller tribes that struggle to simply answer the phone when state agencies call.[63]

The Cherokee Nation provides one of the most striking examples of a tribe that has successfully translated ICWA's mandates into functioning, comprehensive child welfare systems. Having more than 450,000 citizens and a yearly budget of over $3.5 billion, the Cherokee Nation operates as one of the largest employers in Oklahoma with approximately 11,000 employees across its reservation and subsidiaries.[64] Principal Chief of the Cherokee Nation, Chuck Hoskin Jr., has acknowledged that the Nation "lead[s] the way when it comes to defending ICWA in order to protect [Cherokee] children."[65]

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62. *See generally* AM. INDIAN POL'Y REV. COMM'N, TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 86-87 (1976), https://narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf [https://perma.cc/RRC4-N8KB] ("[I]ntrusion ... and interference with a child's ethnic identity with the tribe of his birth are ultimately the most severe methods of undermining retained tribal sovereignty and autonomy.... The policy of the United States should be to do all within its power to insure that Indian children remain in Indian homes.").

63. *See, e.g.*, Huber & Todd, *supra* note 10.

64. *Osiyo!*, CHEROKEE NATION, https://www.cherokee.org/ [https://perma.cc/A679-4K46]; *see* D. Sean Rowley, *Fiscal 2026 Budget Proposal Totals $3.65 Billion*, CHEROKEE PHOENIX (Sep. 4, 2025), https://www.cherokeephoenix.org/news/fiscal-2026-budget-proposal-totals-3-65-billion/article_8d5d6b4f-31f7-464b-984b-ba1dccfa6e9d.html [https://perma.cc/2LZS-8KVY].

65. *See* D. Sean Rowley, *Cherokee Nation Among Plaintiffs Challenging AFCARS Reporting*, CHEROKEE PHOENIX (Sep. 15, 2020), https://www.cherokeephoenix.org/services/cherokee-nation-among-plaintiffs-challenging-afcars-reporting/article_4d98c921-b033-512c-9aca-70a933aeba0b.html [https://perma.cc/7X53-XUAW].

The Cherokee Nation Indian Child Welfare (ICW) Department opened in 1980, two years after ICWA's passage, and has grown steadily ever since.[66] In October 2025, the Nation celebrated the grand opening of a new 40,000 square-foot ICW office in Tahlequah, its largest to date.[67] The building houses more than seventy ICW employees, with capacity for up to ninety-eight staff members, and features 6,000 square feet of storage space, conference rooms, classrooms, visitation rooms, an indoor playroom, and two outdoor playgrounds designed specifically for children interacting with the child welfare system.[68] Beyond the new main office, the Cherokee Nation operates four satellite ICW offices to extend its reach across fourteen counties, enabling staff to respond quickly to cases regardless of geographic location.[69]

The Cherokee Nation's ICW Department provides much more than the bare minimum that ICWA requires. Services include family preservation programs like reunification support,[70] parenting classes,[71] cultural connection resources (for example, equine and art therapy),[72] and comprehensive court advocacy.[73] The Department employs specialized staff including social workers, legal advocates, family support specialists, and cultural liaisons with the training

66. *See Cherokee Nation to Celebrate Grand Opening of New Indian Child Welfare Office*, ANADISGOI (Oct. 13, 2025), https://anadisgoi.com/index.php/government-stories/cherokee-nation-to-celebrate-grand-opening-of-new-indian-child-welfare-office [https://perma.cc/53WM-R2M5].

67. *See Cherokee Nation Celebrates Grand Opening of New ICW Office in Tahlequah*, ANADISGOI (Oct. 14, 2025), https://anadisgoi.com/index.php/government-stories/cherokee-nation-celebrates-grand-opening-of-new-icw-office-in-tahlequah [https://perma.cc/LL3J-TP6L].

68. *Id.*

69. *See id.* (Pryor, Sallisaw, Stilwell, Catoosa).

70. *See* Brittney Bennett, *Cherokee Nation ICW Serves Children with New Programs*, CHEROKEE PHOENIX (Aug. 11, 2017), https://www.cherokeephoenix.org/services/cherokee-nation-icw-serves-children-with-new-programs/article_8e5a2f1e-7c71-5eaa-87cd-52a77c0eba51.html [https://perma.cc/ZZ34-9MNL] (creating apartment-style setups for parents to spend time with their children when under supervision).

71. Sheila Stogsdill, *Cherokee Nation Launches New Child Welfare Office in Tahlequah*, FOUR STATES HOMEPAGE (Oct. 15, 2025, at 14:27 CT), https://www.fourstateshomepage.com/news/local/cherokee-nation-launches-new-child-welfare-office-in-tahlequah/ [https://perma.cc/Z6AA-6Q3U].

72. *See id.*

73. *See Court Advocacy and Permanency Services*, CHEROKEE NATION, https://icw.cherokee.org/court-advocacy-and-permanency-services/ [https://perma.cc/Q9G7-95PC] (including monitoring cases off Cherokee reservations, attending court hearings, and linking or transporting families to services).

and bandwidth to provide the active effort that ICWA demands in every case.[74] When a state court initiates an ICWA proceeding, the Cherokee Nation can immediately deploy qualified personnel to intervene, treating each of their calls "as an emergency."[75] The tribe's capacity means it can fully exercise every procedural protection ICWA provides.

The Sitka Tribe of Alaska presents another model of successful ICWA implementation, though through a different approach than the Cherokee Nation's resource-heavy model. With approximately 4,400 citizens living primarily on Baranof Island in southeastern Alaska, the Sitka Tribe developed what has become known as the "Sitka ICWA Partnership," a collaborative relationship with Alaska's Office of Children's Services that represents an intentional shift from decades of adversarial conflict to cooperative case management.[76]

The Sitka Tribe's situation illustrates both capacity and a strategic use of partnership to overcome resource limitations. Like many other tribes,[77] for years Sitka tribal children were removed from their families at rates 410 percent greater than their population demographic, with most adoptees placed in non-tribal homes without connection to their tribal identities.[78] The relationship between tribal workers and state child welfare professionals was

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74. *See, e.g.*, Chandler Kidd, *Indian Child Welfare Prioritizes Tribal Families, Children*, CHEROKEE PHOENIX (Aug. 7, 2017), https://www.cherokeephoenix.org/services/indian-child-welfare-prioritizes-tribal-families-children/article_40f3482c-3427-5da5-b0be-7c174fd7a6cc.html [https://perma.cc/X33R-T36F] (mentioning the 120 staff members employed by the Cherokee Nation's ICW, including a program manager, a director, investigators, an attorney general, and a tribal court judge); *ICW Program Staff Oklahoma Federally Recognized Tribes*, OKLA. INDIAN CHILD WELFARE ASS'N (Oct. 2024), https://www.oicwa.org/icw-program-list [https://perma.cc/YY5B-PGX4] (listing primary contacts for child protection, foster/adoption, court advocacy, and various training); *Job Descriptions*, TRIBAL INFO. EXCH., https://tribalinformationexchange.org/index.php/jobdescriptions/ [https://perma.cc/AXY4-PWND] (posting job descriptions for social workers, grant coordinators, attorneys, and tribal representatives, among others).

75. Kidd, *supra* note 74.

76. *See* HARV. PROJECT ON AM. INDIAN ECON. DEV., HONORING CONTRIBUTIONS IN THE GOVERNANCE OF AMERICAN INDIAN NATIONS 5, 39-40 (2018) [hereinafter SITKA ICWA P'SHIP], https://indigenousgov.hks.harvard.edu/sites/g/files/omnuum6806/files/hpaied/files/hn18_report_final_0.pdf [https://perma.cc/6P26-3PWW] (honoring the Sitka Tribe of Alaska for their partnership with the state).

77. *See supra* Part I.A.

78. SITKA ICWA P'SHIP, *supra* note 76, at 39.

intensely adversarial after historic sovereignty litigation and the practice of permanently removing Native children from their communities.[79] In 2001, the Tribe's "For Our Grandchildren" committee of elders charged tribal leaders with raising healthy generations "by all means necessary," prompting the Department of Social Services to move beyond historical grievances and actively engage with the state system.[80]

The Sitka ICWA Partnership demonstrates what modestly-resourced tribes can achieve through strategic relationship building rather than infrastructure alone. The Sitka invests in two full-time ICWA caseworkers and legal counsel with ICWA competence[81]—a modest staff by Cherokee Nation standards, but sufficient when combined with effective state partnership. Tribal and state caseworkers participate in extensive cross-training: Tribal workers enroll in the three-week Alaska Child Welfare Academy alongside state caseworkers, while state employees attend the Tribe's ICWA trainings—including "Motherhood/Fatherhood is Sacred," "Native Motivational Interviewing," and "Children in Need of Aid" curricula.[82] Because the agencies signed a confidentiality agreement allowing information to be shared freely and quickly, home visits for initial assessment and bi-weekly case review meetings to brainstorm family support strategies are conducted jointly.[83]

The results are amazing. The Sitka Tribe intervenes in 100 percent of cases involving a tribal child.[84] The Partnership has built one of the lowest removal rates in Alaska by preventing "screened-in" reports from becoming actual removals.[85] When out-of-home placement is necessary, the Partnership achieves a 95 percent ICWA-compliant placement rate, with children cared for by extended family or tribal citizens.[86] Even in rare circumstances requiring non-ICWA placement, caregivers must sign cultural

79. *Id.*; *see supra* Part I.A.
80. SITKA ICWA P'SHIP, *supra* note 76, at 40.
81. *Id.* at 41.
82. *Id.* at 40.
83. *Id.* at 40-41.
84. *Id.* at 41.
85. *Id.*
86. *Id.*

connection agreements to maintain the child's relationship with the Tribe.[87]

What distinguishes the Sitka's model is not massive infrastructure investment but rather the Tribe's cultivation of relationships that allow it to maximize limited resources. One tribal employee explained the approach: "We bring the noise for every kid. We go after them wherever they are. We are relentless."[88] By placing tribal workers in state proceedings from the start, the Tribe gains early opportunities to bring cases into tribal court or tribal services, allowing quicker movement within the guardrails of permanency timelines.[89] And the collaboration extends beyond Alaska; in April 2024, the Central Council of the Tlingit & Haida Indian Tribes of Alaska (which provides regional support for Southeast Alaska tribes, including the Sitka) signed a "historic agreement" with the State of Washington.[90] Under the agreement, Washington contributes $80,000 toward child welfare services in the Tlingit & Haida's Lynnwood office, which employs twenty staff members providing tribal court services, enrollment assistance, and case management.[91]

Both the Cherokee Nation and the Sitka Tribe have unquestionably implemented ICWA successfully, though through different methods. The Cherokee Nation demonstrates what substantial infrastructure and funding can achieve: full-time specialized staff in multiple office locations and comprehensive family services. The Sitka Tribe demonstrates what limited resources can achieve through strategic partnerships: remarkable outcomes with just two full-time ICWA caseworkers achieved through cross-training and trust-building with state agencies. Whether through resources or relationships, tribes share sufficient capacity to exercise the rights ICWA guarantees. These tribes exemplify what ICWA can achieve when capacity, in whatever form, matches mandate.

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87. *Id.*

88. *Id.*

89. *See infra* Part II.B (as required by the ASFA).

90. Joaqlin Estus, *Alaska Tribe Signs Historic Child Welfare Agreement with Washington State*, ICT NEWS (May 7, 2024), https://ictnews.org/news/alaska-tribe-signs-historic-child-welfare-agreement-with-washington-state/ [https://perma.cc/A3H9-CN4H].

91. *Id.*

2. ICWA Implementation in Lower-Capacity Tribes

The situation for smaller tribes with fewer resources stands in painful contrast. The Lower Brule Tribe in South Dakota, for example, houses a population of 1,689 on its reservation with total tribal membership sitting close to 3,400.[92] The Tribe's entire BIA Agency headquarters operates with just fifteen permanent employees[93] serving all Bureau functions for the area, not solely child welfare.[94] Both tribal membership applications and ICWA responsibilities are handled by the Tribe's Enrollment/ICWA Department[95]—dual functions that suggest severely limited specialized resources.

In August 2021, the Lower Brule's ICWA Director resigned; fourteen months later, the position was still vacant.[96] If there is no one to answer when the state calls to ask whether a removed child is a tribal citizen, that child cannot be placed with kin and may end up hours away from their community, even if they were eligible for ICWA protections.[97] The Tribe does not have its own Title IV-E agreement with South Dakota—a federal arrangement that would let it operate its own child welfare system and receive direct reimbursement from the federal government for foster and related services.[98] Instead, it depends entirely on the state's systems for

92. *See Lower Brule Sioux Tribe*, S.D. DEP'T OF TRIBAL RELS., https://sdtribalrelations.sd.gov/tribes/Lower-Brule-Sioux-Tribe.aspx [https://perma.cc/3Z3E-CV3D].

93. *Lower Brule Agency*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., https://www.bia.gov/regional-offices/great-plains/south-dakota/lower-brule-agency/ [https://perma.cc/6ZQJ-BN7N].

94. *Regional Offices*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., https://www.bia.gov/regional-offices [https://perma.cc/43WK-4ZPV] ("[E]xcept education, law enforcement and functions of an administrative nature.").

95. *Lower Brule Sioux Tribe Enrollment/ICWA Department*, KUL WICASA OYATE, https://www.lowerbrulesiouxtribe.com/copy-of-higher-education-grant-prog [https://perma.cc/J3BG-P6Z4].

96. *See* S.D. DEP'T OF SOC. SERVS., SOUTH DAKOTA ANNUAL PROGRESS AND SERVICE REPORT 155 (2023), https://dss.sd.gov/docs/childprotection/apsr/ASPR_2023.pdf [https://perma.cc/UQ6F-B5AA].

97. *See* Huber & Todd, *supra* note 10.

98. Title IV-E is a federal reimbursement program under the Social Security Act that enables states "to provide, in appropriate cases, foster care ... adoption assistance for children with special needs, kinship guardianship assistance, and prevention services." 42 U.S.C. § 670. States are guaranteed reimbursement for a percentage of eligible costs related to out-of-home placements if they have a plan approved by the Secretary of Health and Human

child protective services (CPS) through contracts.[99] The Tribe has no independent capacity to provide the comprehensive family services or cultural programming that wealthier tribes offer,[100] employing only one ICWA coordinator and no attorneys.[101] When ASFA's fifteen-month termination clock starts running, the Lower Brule has no staff cushion to absorb the urgent demands of locating family members[102] or arranging tribe-appropriate placement[103] before time runs out.

Even South Dakota's largest tribe, the Oglala Sioux on the Pine Ridge Reservation,[104] faces similar challenges.[105] In 2022, the Tribe declared a state of emergency over concern for its ICWA and CPS programs.[106] When Juanita Scherich, (former and current) ICWA Director for the Oglala Sioux, came out of retirement to return to her position, she found mountains of paperwork with hundreds of backlogged cases.[107] The office was still trying to catch up two years later.[108]

The salary structure reveals the depth of the Tribe's capacity crisis. The ICWA supervisor position—Scherich's role, which

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Services that meets the statutory requirements, including providing for foster care maintenance payments, adoption assistance, case planning, and case review programs. *See id.* § 671(a)-(b). Tribes may either (1) enter into their own Title IV-E agreements directly with the federal government to receive reimbursement and operate their own child welfare systems, or (2) access services and reimbursement through cooperative agreements with states. *See id.* § 679c(c), (e).

99. *See* S.D. DEP'T OF SOC. SERVS., CHILD & FAMILY SERVICES PLAN 146, https://dss.sd.gov/docs/childprotection/cfsf/2025-2029.pdf [https://perma.cc/3J4M-VQVV]. The consequence of this reliance is a struggle to financially compete with established state foster care networks even when tribe-appropriate placements exist but take time to arrange. *See id.*

100. *See, e.g.*, *supra* Part II.A.1.

101. *See* Lussenhop, *supra* note 10. *But see* S.D. DEP'T OF SOC. SERVS., SOUTH DAKOTA ANNUAL PROGRESS AND SERVICE REPORTS 208 (2024), https://dss.sd.gov/docs/childprotection/apsr/ASPR_2024.pdf [https://perma.cc/AA3M-5QF3] (naming an ICWA director as of October 2023).

102. *See* 42 U.S.C. § 675(1)(E) (requiring documentation of all attempts to find a fit and willing relative and/or living arrangement).

103. *See* 25 U.S.C. § 1915(d) (requiring placement decisions to meet the cultural and social standards of the child's Native community).

104. Etanhan Wotanin, *Which Is the Largest Tribe in South Dakota?*, LAKOTA TIMES (Apr. 6, 2017), https://www.lakotatimes.com/articles/which-is-the-largest-tribe-in-south/ [https://perma.cc/L8AF-HZ6Y].

105. *See* Huber & Todd, *supra* note 10.

106. *Id.*

107. *See id.*

108. *Id.*

oversees the entire program—pays $38,106 annually.[109] The three ICWA specialists and the reunification caseworker earn just $27,014 per year.[110] To put this into perspective, the national average base pay for an ICWA specialist is $51,000.[111] The Tribe's ICWA staff earn nearly half the national average.[112] Alicia Mousseau, Oglala's vice president, explained the circular problem: "We don't know what's truly needed until we have a full staff—we don't know what the actual caseload is or what the true need is until we have a well-oiled machine."[113] The office cannot retain staff or assess its true capacity,[114] and thus cannot demonstrate to funders what level of support would actually make a difference.

The Oglala Sioux receives Title IV-E funds through a state contract of $1.02 million annually as of 2021,[115] yet even this relatively substantial sum cannot overcome structural barriers. The Tribe operates its own CPS, "a reflection of tribal sovereignty"[116] but also a tremendous administrative and financial burden. In 2023, the Tribe was awarded $100,000 in one-time Tiwahe Initiative funding to develop an improved case management plan[117]—a grant that acknowledges the crisis but provides no sustainable staffing solution. Mousseau noted, "We always ask for more funding for services ... we have to start thinking outside of the box and thinking holistically."[118]

The Tribe's location in southwestern South Dakota does not help with its issues. Pine Ridge, headquarters for the Oglala Sioux's reservation, has a population of only 3,000 people.[119] As such, there is limited housing, meaning ICWA staff often commute long distances.[120] Staff cannot live where they work because housing does

109. *Id.*
110. *Id.*
111. *Id.*
112. *See id.*
113. *Id.*
114. *See id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *See, e.g.*, *id.* (relaying the story of Christian Blackbird, a staff member at the Crow Creek ICWA Office, who commutes to the reservation due to a lack of housing on site; the Crow Creek tribe has similar issues to the Oglala Sioux).

not exist, staff cannot remain in positions that pay far below market rate, and vacancies mean children fall through the cracks.

The state of South Dakota's tribal ICWA offices paints a grim picture. This is not the portrait of a system that can meet ICWA's blinkered standards. This is a system in crisis. ICWA requires "active effort[ ],"[121] but such effort requires staff to deliver comprehensive services, professionals to coordinate them, and funding to sustain them. When a tribe's entire ICWA operation consists of one or two people managing hundreds of cases while earning marginal wages in inadequate facilities, active effort becomes more aspirational than realistic.[122]

The QEW requirement[123] depends on capacity. For a tribe like the Cherokee Nation, identifying and compensating such experts may pose little challenge. For the Lower Brule or Oglala, finding even one person with the necessary qualifications and then securing their availability with compensation may seem impossible. Placement preference[124] similarly depends on capacity when considering the labor involved with assessing living arrangements, recruiting and licensing foster families, and maintaining cultural connections.[125] All of this requires staff, time, and funding.

The fundamental inequity is this: ICWA promises to guarantee the same rights to all Native children regardless of which tribe they belong to, but the law provides no mechanism to ensure all tribes have the capacity to exercise those rights. A Lower Brule child deserves the same amount of protection as a Cherokee child, but the Cherokee child benefits from a tribe with over seventy specialized staff members and a multi-billion dollar budget, while the Lower Brule child may have no ICWA director at all, just an empty office and unanswered phone calls. This is not an administrative inconvenience that we simply must accept for the excuse of the greater good. Inequity is a failure to deliver on ICWA's core promise.

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121. 25 U.S.C. § 1912(d).

122. *See id.*

123. *Id.* § 1912(e)-(f).

124. *Id.* § 1915.

125. *ICWA Guide Online: Topic 12.4—What are Active Efforts Compared to Reasonable Efforts*?, NAT'L INDIAN L. LIBR., https://www.narf.org/nill/documents/icwa/faq/active.html [https://perma.cc/55BM-PFPB].

B. Recent Legislation: Supporting America's Children and Families Act

On January 4, 2025, former President Joe Biden signed the Supporting America's Children and Families Act (SACFA) into law.[126] The bill passed with overwhelming bipartisan support, 405-10 in the House and unanimous in the Senate.[127] SACFA is the most significant federal legislation targeting ICWA implementation challenges in recent years.[128]

The Act includes several provisions designed to strengthen ICWA implementation capacity in tribes. Beginning in 2026, SACFA will direct 3 percent of all Child Welfare Services and Promoting Safe and Stable Families funding to formula grants for tribal child and family service programs.[129] This allocation does away with the system in which tribes compete for discretionary grants that often go to larger, better-resourced entities.[130] SACFA also doubles funding

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126. Supporting America's Children and Families Act, Pub. L. No. 118-258, 138 Stat. 2947 (2025).

127. *See* EMILIE STOLTZFUS & JESSICA TOLLESTRUP, CONG. RSCH. SERV., IN12424, SUPPORTING AMERICA'S CHILDREN AND FAMILIES ACT 1 (2025), https://www.congress.gov/crs_external_products/IN/PDF/IN12424/IN12424.7.pdf [https://perma.cc/WW6R-GNEC].

128. On December 23, 2024, President Biden signed the Native American Child Protection Act (NACPA) into law, broadening the National Indian Child Resource and Family Services Center's mission to include technical assistance on child maltreatment and family violence prevention. Pub. L. No. 118-160 § 2(3)(B), (D), 138 Stat. 2567, 2568-69 (2024). While NACPA is also a significant piece of federal legislation for tribal child welfare, it addresses the matter more generally rather than targets ICWA implementation directly, which is the focus of this Note.

129. § 107(a)(1)(A)(a), 138 Stat. at 2953-54; *see also* STOLTZFUS & TOLLESTRUP, *supra* note 127.

130. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107674, TRIBAL ISSUES: BARRIERS TO ACCESS TO FEDERAL ASSISTANCE (2024), https://www.gao.gov/products/gao-25-107674 [https://perma.cc/F6LR-B37K]. Larger tribes also often have the extra revenue to hire full-time, professional grant writers while smaller tribes may task their single social worker with writing complex, long federal applications on top of managing ICWA cases on their own. *See A Customer Experience Approach to Understanding Tribal Nations Experiences Accessing Federal Grants*, PERFORMANCE.GOV, https://www.performance.gov/cx/life-experiences/understanding-tribal-experiences-accessing-grants/ [https://perma.cc/LW4W-JXGG] ("An information technology (IT) Manager and grant writer from one Tribe said, 'You'll see it's the wealthiest Tribes [who are successful with grants] because they can afford the grant writers. The Tribes that have lower capacity don't have the resources to hire experts.'" (alteration in original) (emphasis omitted)).

for the Tribal Court Improvement Program[131] to two million dollars annually[132] and authorizes the Department of Health and Human Services (HHS) to streamline Title IV-B[133] reporting requirements for tribes receiving smaller grants ($50,000 or less),[134] seemingly acknowledging that administrative work can overly burden limited staff when compliance paperwork takes attention away from primary services.

The Act additionally aims to improve ICWA compliance through enhanced reporting and technical assistance.[135] In their Child and Family Services Plans, SACFA requires states to describe how they will ensure timely notice of CPS proceedings to tribes, maintain proper recordkeeping related to active efforts and transfers of jurisdiction, and document termination of parental rights.[136] Before this provision, while ICWA was federal law, there was very little accountability to ensure states were actually complying; now, states are forced to articulate their ICWA compliance strategies ahead of time rather than proceeding with ad hoc approaches. SACFA mandates that HHS, in consultation with tribes and states, develop a plan to provide technical assistance for ICWA implementation.[137]

After SACFA's enactment, the Administration for Children and Families published a request for public comment in July, seeking input specifically on *how* to provide the technical assistance required by SACFA.[138] The notice asks tribes, states, and tribal courts

131. This Program is a competitive grant within the broader State Court Improvement statute. *See* 42 U.S.C. § 629h(c)(3); *see Court Improvement Program*, ADMIN. FOR CHILD. & FAM. (June 27, 2024), https://acf.gov/cb/grant-funding/court-improvement-program [https://perma.cc/P9Y6-RW6F]. This Note will return to the Program in more detail. *See infra* Part III.B.

132. § 107(b)(3), 138 Stat. at 2955.

133. Title IV-B of the Social Security Act provides discretionary federal block grants for in-home child and family services. *See* 42 U.S.C. §§ 623(a), 629c(a), (c)(1). Unlike the reimbursement mechanism of Title IV-E, *see supra* note 98, Congress caps the total Title IV-B funding and allocates it among all states and eligible tribes upfront, *see* §§ 623, 629c, meaning more flexibility regarding how funds may be spent but less funding available overall.

134. § 107(a)(3), 138 Stat. at 2955.

135. *Id.* § 107(a)(2).

136. *Id.* § 107(a)(2)(A).

137. *Id.* § 107(a)(2)(B) (amending 42 U.S.C. § 628d to add § 429B).

138. Request for Public Comment on Providing Technical Assistance Related to the Indian Child Welfare Act, 90 Fed. Reg. 34506 (July 22, 2025).

to identify what forms of support would most effectively reduce ICWA implementation barriers.[139] The request for public comment indicates the United States government understands the existence of the implementation gap but is uncertain how to fix it. The comment period closed near the end of September, and officials planned consultations for the end of 2025.[140]

While a major step in the right direction, SACFA is limited in addressing the structural capacity disparities documented above. The 3 percent set-aside will increase resources available to tribal child welfare programs and, if administered sensitively with attention to capacity needs, could help narrow some disparities over time. Even then, funding alone does not solve every issue tribes face. Recall the Oglala Sioux Tribe's case backlog, stemming not solely from inadequate funding but from chronic understaffing and turnover due to a lack of available housing in and around the reservation.[141] Additional grant funding may allow the Tribe to increase staff salaries but it is unlikely to fully resolve the difficulty of attracting those qualified and willing to relocate to a reservation with limited local resources.[142] Where ICWA compliance depends on the consistent presence of specialized personnel, non-structural reform falls short as a solution.

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139. *Id.* at 34508-09.

140. *Administration for Children and Families (ACF) Seeks Tribal Comments and Consultation on Implementation of the Supporting America's Children and Families Act*, NAT'L INDIAN CHILD WELFARE ASS'N (Sep. 30, 2025), https://www.nicwa.org/news/administration-for-children-and-families-acf-seeks-tribal-comments-and-consultation-on-implementation-of-the-supporting-americas-children-and-families-act-p-l-118-258/ [https://perma.cc/L5ZG-6GDV]. As of March 2026, the technical assistance provision remains aspirational and consultations are ongoing. *See Administration for Children and Families (ACF) Extends Deadline for Tribal Comments on Implementation of the Supporting America's Children and Families Act (P.L. 118-258)*, NAT'L INDIAN CHILD WELFARE ASS'N (Feb. 2026), https://www.nicwa.org/wp-content/uploads/2026/02/Native-Child-and-Family-Policy-Update-February-2026-FINAL.pdf [https://perma.cc/B6YT-EASK] ("ACF has extended the deadline for Tribal comments for the Supporting America's Children and Families Act to March 11, 2026 ... based on the delays caused by the government shutdown in October."). Once implementation begins, efficacy will depend on how the assistance deals with the relevant challenges of maximizing capacity with minimal resources.

141. *See supra* note 114 and accompanying text.

142. *See supra* note 120 and accompanying text.

This criticism is not meant to diminish SACFA's significance.[143] Federal acknowledgement that proper ICWA implementation requires greater capacity marks a profound shift in understanding ICWA's shortcomings when it functions as a "one-size-fits-all" rule. SACFA establishes means of support that either did not exist before or were ineffective. These building blocks should be celebrated. However, even with ideal implementation, certain structural deficits require solutions beyond funding.

III. REFORM PROPOSALS

In sum, while tribes with robust institutional capacity can consistently invoke ICWA's protections, others lack the personnel and infrastructure to intervene before their children are absorbed into state systems.[144] SACFA reflects a growing federal awareness of this problem. Its funding increases and technical assistance provisions represent notable progress and may, over time, narrow some disparities. But money alone is not effective. Some obstacles are structural and persistent.

This Note proposes two structural reforms that work in tandem to address ICWA's implementation gap. First, establishing a tiered QEW system would ensure states can locate culturally appropriate experts while giving tribes—regardless of capacity—the flexibility to participate in and challenge expert testimony. Second, expanding specialized ICWA court dockets would put ICWA cases in the hands of judges who regularly handle them, using procedures that allow tribes to engage before cases move irreversibly forward under ASFA's timelines. If federally adopted, these reforms would grant more equitable implementation of ICWA, furthering the best interest of the child and empowering tribal sovereignty.

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143. *See Senate Approves H.R. 9076, Supporting America's Children and Families Act*, NAT'L INDIAN CHILD WELFARE ASS'N (Dec. 23, 2024), https://www.nicwa.org/news/senate-approves-h-r-9076-supporting-americas-children-and-families-act/ [https://perma.cc/92MU-43G6] (quoting Sarah Kastelic, Executive Director of NICWA: "This legislation is critically important to Native children and families who are in tribal or state child welfare systems").

144. *See supra* Part II.A.2.

A. Qualified Expert Witnesses

States bear the legal obligation to obtain QEW testimony before ordering foster care placement or terminating parental rights.[145] As best practice, professionals assume ICWA applies to a case until sufficient information determines it does not.[146] If states cannot locate an expert with specific knowledge of the child's tribal customs, the case stalls and the child remains in temporary care. Permanency is crucial for children.[147] Research shows that children need stable environments to developmentally and emotionally thrive.[148] Staying too long in precarious situations, especially going through multiple placements, is linked to trauma and attachment problems that carry on into adulthood.[149] ASFA's timelines exist precisely to avoid this harm. If a delay extends too long under ASFA, states must file for termination of parental rights[150]—the very outcome ICWA was designed to prevent.[151]

Capacity determines whether QEWs can be located quickly. When a child from a high-capacity tribe enters CPS proceedings, the state notifies the tribe, an expert is identified within days, and testimony

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145. *See* ALASKA LEGAL SERVS. CORP., *supra* note 40.

146. *See supra* note 35 and accompanying text.

147. *See The Importance of Permanency*, PA. CHILD WELFARE RES. CTR., https://www.pacwrc.pitt.edu/curriculum/CTC/MOD9/Handouts/HO07_ImprtncPrmncy.pdf [https://perma.cc/G3GA-FKF4]; Sarah A. Font & Lindsey Palmer, *Timely Permanency for Children in Foster Care: Revisiting Core Assumptions About Children's Options and Outcomes*, 58 CT. REV. 26, 26-27 (2022).

148. *See, e.g.*, Sonya J. Leathers, *Parental Visiting, Conflicting Allegiances, and Emotional and Behavioral Problems Among Foster Children*, 52 FAM. RELS. 53, 54 (2003).

149. *See What Impacts Placement Stability?*, CASEY FAM. PROGRAMS (May 12, 2023), https://www.casey.org/placement-stability-impacts/ [https://perma.cc/26S8-SY6K]; Savannah J. Perez, The Effects of Trauma From Multiple Placements of Foster Youth (June 7, 2019) (M.S.W. thesis, California State University, San Bernardino) (on file with CSUSB Scholar Works).

150. Jessica Lussenhop & Agnel Philip, *Native American Families Are Being Broken Up in Spite of a Law Meant to Keep Children with Their Parents*, PROPUBLICA (June 15, 2023, at 06:00 ET), https://www.propublica.org/article/native-american-parental-rights-termination-icwa-scotus [https://perma.cc/X7CN-MB3A] ("Once 15 months have passed since a child has been removed from their parent, in most cases child welfare agencies must file for termination of the birth parents' rights. If they don't, states can lose federal funding.").

151. *Id.* ("While ASFA incentivizes speedy decision-making, ICWA mandates efforts that can be more comprehensive and expensive for state and local child welfare offices. In 2005, South Dakota's Supreme Court became the first in the country to rule that ASFA does not take precedence over ICWA.").

is scheduled.[152] When a child from a lower-capacity tribe enters proceedings, identification may take weeks or months.[153] ICWA becomes an obstacle rather than protection. Judges facing difficult choices may appoint experts with minimal tribal knowledge just to move the case forward.[154] State agents may become less diligent in determining if ICWA applies, reasoning that triggering ICWA's QEW requirement would delay the child's chance at permanency.[155] ICWA's requirement for culturally informed expert testimony, an inherent protection, in practice becomes the very thing that severs children from their families. A three-tiered system for QEW identification would alleviate this kind of scrambling.

1. Tier One: Tribal Expert Lists

Tribes with enough capacity, like the Cherokee Nation, publish lists of their designated QEWs.[156] Where such lists exist, this reform would mandate that state courts defer to the tribe's designations when seeking expert testimony. Tribes with their own lists can respond promptly when states seek experts and can quickly identify counter-witnesses when needed. If no list exists (as participation in Tier One would be optional), the absence would automatically trigger access to Tier Two.

2. Tier Two: Regional Expert Registries

For tribes that do not have the capacity to maintain an up-to-date list or designate staff as QEWs, regional registries would provide a backup option. This reform would require registries to operate

152. *See supra* Part II.A.1.

153. *See supra* Part II.A.2.

154. *See, e.g.*, *In re* April S., 467 P.3d 1091, 1096 (Alaska 2020) (appointing a therapist without tribal knowledge as a sufficient QEW because the child's mental health issues were determined to be "plainly irrelevant" to their tribal culture).

155. *See* Melissa Gustafson, Note, *Indian Child Welfare Act: A Roadblock in a Native Child's Pathway to Permanency*, 40 ALASKA L. REV. 61, 83 ("[A]n appellate opinion ... stated that Kevin would have to endure the termination process all over again. The court found that the witness did not meet the heightened standard for expert testimony under ICWA." (footnote omitted) (citing Eva H. v. State, 463 P.3d 1050, 1051 (Alaska 2019)).

156. *See* OKLA. INDIAN CHILD WELFARE ASS'N, *supra* note 74.

through inter-tribal consortiums[157] or state-tribe partnerships[158] to maintain rosters of QEWs sufficiently familiar with the cultural practices of multiple tribes in the region. California, for instance, maintains a statewide ICWA expert witness directory on its government website.[159] The list contains experts' tribal affiliations, cultural knowledge areas, and contact information, all organized into the North, Bay Area, Central, and South regions.[160]

A federal registry modeled on California's design would offer a monetary advantage for lower-capacity tribes. Costs of establishing and maintaining the registries could be spread across multiple tribes or between the tribe and the state,[161] making QEW programs more financially sustainable for smaller organizations. Concerns about cultural specificity are valid, however. A Lakota expert from the Rosebud Sioux Tribe has cultural knowledge that may not be able to perfectly translate to a case involving a child from the Lower Brule Sioux Tribe, despite their proximity and shared heritage.[162] This concern, though, must be weighed against the current alternative: When no expert is available, either states proceed with inadequate testimony[163] that tribes lack the capacity to challenge (violating ICWA) or cases stall (triggering ASFA). A regional expert is generally preferable to an expert with no specific tribal knowledge whatsoever. To counteract this worry, the reform would prioritize matching experts to tribes with similar cultural practices.

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157. See *What Is an Inter-Tribal Consortium? A Legal Overview*, US LEGAL FORMS, https://legal-resources.uslegalforms.com/i/inter-tribal-consortium [https://perma.cc/3HAT-L932], for a legal overview of the term.

158. *See, e.g.*, SITKA ICWA P'SHIP, *supra* note 76 and accompanying text.

159. *See California ICWA Expert Witness List*, JUD. BRANCH OF CAL., https://courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa/california-icwa-expert-witness-list [https://perma.cc/8YPW-UJEX].

160. *Id.*

161. *See, e.g.*, 33 U.S.C. § 2269(d)(4)(A) (authorizing federal-tribal partnerships for water project studies subject to a 50 percent cost share).

162. *See History and Culture*, ROSEBUD SIOUX TRIBE, https://www.rosebudsiouxtribe-nsn.gov/history-culture [https://perma.cc/E8WV-QJU4] (listing the seven Lakota tribes, including the "Brule").

163. *See In re* April S., 467 P.3d 1091, 1096 (Alaska 2020); *see also supra* note 151 (providing additional context).

3. Tier Three: Fallback Procedures

Even with tribal lists and regional registries, situations will inevitably arise in which no QEW is available within a reasonable timeframe. Minnesota provides a model for a progressive fallback procedure.[164] Under Minnesota law, the state must first attempt to obtain a tribally designated QEW.[165] If "clear and convincing" evidence proves that "diligent efforts" cannot produce such an individual, courts are directed to a descending preference list: (1) a member of the child's tribe recognized as knowledgeable in tribal family organization or child-rearing customs; (2) a Native person from another tribe with substantial experience with child and family services for Native families generally and in the child's tribe; and (3) a non-Native expert witness under the Minnesota Rules of Evidence with substantial experience or knowledge in prevailing Native communities.[166] The statute also allows alternative methods, particularly electronic, for QEWs to testify.[167]

Federally establishing a similar progressive framework would prioritize tribe-specific knowledge while recognizing that perfect matches may not always be feasible. With this fallback procedure in place, courts will not be able to simply skip to generalized experts out of convenience. To ensure courts are complying, the reform would mandate state documentation of attempts to obtain QEWs through Tier One or Tier Two before resorting to Tier Three, and then, within Tier Three, documentation of clear findings that higher options in the fallback preference list proved genuinely unavailable.[168]

Implementing a tiered system for QEWs likely requires amending 25 U.S.C. § 1912(e) to authorize the BIA to establish tier criteria and triggering circumstances. Post-revision, the statute would specify that initial tier determination rests with the tribe, along

164. *See* MINN. STAT. § 260.771(6)(a)-(e) (2024).

165. *Id.* § 260.771(6)(b).

166. *Id.* § 260.771(6)(d).

167. *Id.* § 260.771(6)(e).

168. In true emergencies, of course, where immediate removal is vital to protect a child from imminent harm, courts are not required to find a QEW. *ICWA Quick Reference Guide: Involuntary Proceedings*, NAT'L CHILD WELFARE WORKFORCE INST. (2016), https://ncwwi.org/files/Community_Context/ICWA_Quick_Reference_Guide.pdf [https://perma.cc/C29S-3PFS].

with later control of qualifications and case assignments. Federal support is still necessary, though, especially for regional registries or electronic fallback methods of testimony. SACFA's 3 percent funding could support this work, or additional Title IV-E funds may be available specifically for QEW programs. BIA or HHS could provide technical assistance on development, training, or coordination. Regardless of statute revision or some other method of implementation, oversight should remain primarily with the tribes as opposed to state supervision.

There are several relevant points raised against this proposed reform, though none fatal. Critics concerned with tribal sovereignty may argue a federal structure interferes with self-determination. This misunderstands the system's design. The three tiers purely create more options. Nothing would change for tribes already operating their own successful programs, and lower-capacity tribes would likely feel a greater sense of flexibility and control. Administrative concerns may assume the reform adds even more paperwork to already overwhelmed courts and offices, but if implementation is done correctly—where information is published online in a central database—the system would streamline the process of finding and retaining a QEW. And statutory language and accountability policies would prevent any automatic defaulting to Tier Three for those anxious about procedure erosion.

The tiered QEW system would strengthen tribal sovereignty by recognizing a right to determine when tribal-specific expertise is necessary and when broader cultural knowledge is sufficient. For some tribes, sovereignty means maintaining their comprehensive QEW programs. For others, it means collaborating with neighboring tribes or states to build shared resources, or even just making sure their voices are heard. All deserve federal support. A tribe's inability to provide a QEW does not reflect a lack of sovereignty but a lack of resources. All children, no matter their tribe's capacity, deserve ICWA's QEW requirement as a protection, not a risk.

B. ICWA Courts

Despite what their name implies, ICWA courts are actually specialized dockets, not separate court systems.[169] Cases involving Native children are assigned to judges who handle ICWA cases at regular times in dedicated courtrooms that deliberately differ from typical child welfare proceedings.[170] ICWA courts display tribal flags and accommodate tribal customs.[171] Judges often come down from the bench to sit at tables with all parties and allot more time for discussion.[172] The environment flips the traditional adversarial nature of litigation on its head, and the results speak for themselves.

Research on Minnesota's St. Louis County ICWA Court found that when tribal representatives attend the first hearing, permanency and reunification happen four months faster in cases with early engagement compared to those without.[173] The Court schedules hearings on afternoon dockets to increase opportunities for statewide tribal representatives to attend in person when possible[174] but frequently invites them to participate remotely.[175] ICWA courts also resolve issues proactively through regular team meetings with all stakeholders, such as parents, tribal representatives, and attorneys.[176] Montana's Yellowstone ICWA Family Recovery Court, for example, handles CPS and criminal matters simultaneously with multidisciplinary weekly meetings, dissolving the need for separate court appearances for every procedural matter.[177]

When ICWA cases are scattered randomly amongst judges with limited ICWA knowledge, the burden falls onto parents or tribes to

169. *See* Adrea Korthase, Sophia I. Gatowski & Mark Erickson, *Indian Child Welfare Act (ICWA) Courts: A Tool for Improving Outcomes for American Indian Children and Families*, NAT'L COUNCIL JUV. & FAM. CT. JUDGES 2 (2021).

170. *See id.*

171. CASEY FAM. PROGRAMS, *supra* note 9 (including accommodations such as incorporating traditional medicines in the courtroom and respecting tribal holidays when scheduling meetings).

172. *Id.*

173. *See id.*

174. Korthase, Gatowski & Erickson, *supra* note 169, at 3.

175. *Id.* at 8 (describing driving parents to hearings, offering alternative transportation, or assisting parties in appearing remotely as additional engagement practices).

176. *Id.* at 1.

177. *See* CASEY FAM. PROGRAMS, *supra* note 9.

educate judicial leadership about the Act's requirements and tribal practices.[178] ICWA court judges already regularly inquire about ICWA eligibility and make compliant findings throughout a case,[179] significantly reducing tribal workload. Because they strive to understand tribal culture, ICWA courts foster trust.[180] So the question is not whether ICWA courts work, but why they are limited to a handful of jurisdictions.

As Superior Court Judge Elizabeth Stanley of Clallam County, Washington, noted, "There's nothing magic about an ICWA court.... [T]he law is the same. The practices are the same. And everything we talk about with ICWA courts can be applied in any case."[181] Federal support could accelerate expansion. SACFA doubled funding for the Tribal Court Improvement Program to provide more resources for tribal court infrastructure.[182] A similar approach for state courts could provide resources for training judges and staff or investing in more technology for remote participation, thereby reducing the implementation gap.

Like the tiered QEW system, ICWA court expansion likely needs statutory revision; specifically, amending 42 U.S.C. § 629h, the State Court Improvement Program,[183] to prioritize Title IV-B[184] distributions for states establishing ICWA dockets or to create a dedicated funding set-aside specifically for ICWA court establishment in states with significant Native child caseloads.[185] Such states with disproportionately large Native populations could be designated "high-impact ICWA states" and receive mandatory technical assistance[186] for developing ICWA dockets. This model

178. *See, e.g.*, Korthase, Gatowski & Erickson, *supra* note 169, at 7 ("[A]n observer witnessed a judge discourage parents from speaking while they were correcting agency staff about tribal affiliations, but then have to revisit the matter at a later hearing.").

179. *Id.*

180. *See* CASEY FAM. PROGRAMS, *supra* note 9 ("In the past, this has been done through visits by judges and other court staff to tribal communities, sharing meals together, and attending tribal cultural events.").

181. *Id.*

182. *See supra* note 131 and accompanying text.

183. The same statute establishing the Tribal Court Improvement Program. *See supra* note 131 and accompanying text.

184. *See supra* note 133.

185. Much like the $2 million set-aside already in place for the Tribal Court Improvement Program. *See supra* note 132 and accompanying text.

186. Possibly through SACFA. *See supra* Part II.B.

naturally pairs with the regional registry reform for QEWs.[187] If ICWA courts were established regionally, they could serve multiple tribes within a geographic area.[188]

Apart from unconstitutionality, which has already been dismissed,[189] a strong argument against expanding ICWA courts is the risk of judicial misinterpretation. ICWA docket meetings take place weekly; if a tribe's representative repeatedly fails to make an appearance, a judge may interpret the absence as disinterest in participating in the case. In such a circumstance, disparity lingers: Higher-capacity tribes thrive in collaboration, while lower-capacity tribe inadequacies are more readily apparent. This concern presumes ICWA courts impose a greater or additional burden on tribes, but they should instead do the opposite. ICWA courts would reduce overall workload, freeing staff to concentrate on the substantive decisions in scheduled meetings. Effort is reallocated, ultimately reducing rather than compounding administrative strain on lower-capacity tribes.

Voluntary adoption of ICWA courts does not solve the systemic issue described in this Note. States with the smallest Native populations—and, consequently, the least amount of political pressure—are exactly the jurisdictions whose under-resourced tribes need ICWA courts the most. Without federal intervention, ICWA court availability will continue to depend on geography rather than need.

CONCLUSION

ICWA stands as one of Congress's most important recognitions of tribal sovereignty. But Native child protections should not depend on mandates that assume uniform tribal capacity. Federal reform is needed to make ICWA more sensitive to the capacities of different tribes. A tiered QEW system sets up tribes to designate their own experts without interference while also gaining access to

187. *See supra* Part III.A.

188. This model could be particularly helpful for states like Alaska, whose tribes are spread across vast distances, and Oklahoma, whose tribes are located in geographic clusters. *See American Indian Population by County (1990-2022)*, VIVID MAPS (2018), https://vividmaps.com/american-indian-population/ [https://perma.cc/MWF6-XHCJ].

189. *See supra* Part I.C.

regional resources that identify QEWs without weeks of delays. In the rare case where neither option is feasible, a defined fallback procedure prevents hasty default. Expanded ICWA courts improve outcomes, accelerate permanent placement, and reduce legal trauma for Native families.[190] When combined with the tiered QEW system, ICWA courts enable full ICWA protections within crucial timelines. Post-*Brackeen*, policymakers need to abandon their worries about ICWA's constitutionality and polish the "gold standard" before it loses its shine.

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190. *See* CASEY FAM. PROGRAMS, *supra* note 9; Korthase, Gatowski & Erickson, *supra* note 169, at 13-14.

* J.D., 2027, William & Mary Law School; B.A., Philosophy, 2024, The College of William & Mary. Writing a Note is not a calm and steady process. It is fragmented and slow and done at odd hours aglow in blue light and, honestly, a little humiliating at times (law students are supposed to be good at writing, right?), and then, one day, it is done. You are holding a thing you made and people are calling it "scholarship." I would like to thank my partner, Rachel, and friends for repeatedly making an effort to find my topic as fascinating as I insisted it was, and my parents for putting up with "Just a couple more minutes!" over a year's worth of holidays and weekends. I would also like to thank Olivia Alexander at the Hampton City Attorney's Office, whose work advocating for children opened my eyes to the challenges Native families face in the child welfare system and inspired this piece. I am, despite the bruised fingertips, genuinely honored to have spent my last few semesters at this school thinking about a subject that deserves much more attention than a Note has pages for. Lastly, whatever is good here, my editors made better. Volumes 67 and 68 turned my drafts into something that now looks, deceptively, like it was always this coherent. Go Tribe.