Valley of Fire State Park

Native American boys take part at the Annual Paiute Tribe Pow Wow in Las Vegas.

Indian Child Welfare Act: Upheld by U.S. Supreme Court and Enacted into State Law

In 1978, Congress passed the Indian Child Welfare Act (ICWA) to respond to federal policy promoting removal of Indian children from their families. ICWA was established to protect the rights of Indian children and families in child welfare proceedings. The act recognizes the unique cultural heritage of tribes and seeks to preserve cultural integrity of tribal communities.

BY ASSEMBLYWOMAN SHEA BACKUS

Throughout history, the U.S. government enacted laws to address the "Indian problem." During the assimilation era of the late 1800s, Indian children were removed from their families and enrolled in government-run boarding schools aimed at erasing their tribal identities. Through the creation of Indian boarding schools, U.S. Army officer Richard Henry Pratt coined the phrase: "kill the Indian, save the man." This philosophy permeated Indian boarding schools for generations by eliminating native culture and languages.

In the 1950s, the federal government implemented policy to assimilate American Indians into mainstream America. One such policy was the Indian Adoption Project of the Bureau of Indian Affairs (BIA). This project was done with the help of churches and adoption agencies, and it encouraged removal of Indian children from their families, coupled with their adoption by nonnative families. In 2007, U.S. Sen. Ben Nighthorse Campbell (D-Colorado) described the assimilation era

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in this way: "If you can't change them, absorb them until they simply disappear."

ICWA was Congress's response to the crisis of large numbers of American Indian and Alaska Native children being removed from their families and tribes.[1] Eighty-five percent of the native children removed were placed in adoptive or foster care outside of their families and communities.[2]

According to the legislative record related to the passage of ICWA, "[t]he purpose of [ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum standards for the removal and placement of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs."[3] ICWA has been viewed as the gold standard in child welfare practices.

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ICWA applies to cases involving an Indian child who is subject of a child custody proceeding involving "the need for out-of-home placement of the child, including a foster care, preadoptive, or adoptive placement, or termination of parental rights." ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[4] Indian is defined by political status, not by race. ICWA does not apply to tribal court proceedings, family court proceedings involving both parents, and temporary placements where a parent may regain custody upon demand.[5]

It was not until 2016 when the BIA adopted the following clarifying regulations to ICWA: applicability, initial inquiries, emergency placements durations, notice requirements, procedures for transfer to a Tribal court and establish parameters of what is "good cause" to deny transfer, who may serve as a qualified expert witness, what and when placement preferences apply and parameters when departing from placement preferences for "good cause," requirements for voluntary proceedings, adult adoptees' rights to information about their Tribal affiliation, records states and the BIA must maintain regarding implementation of ICWA, and when action is to be invalidated for violation of ICWA.[6]

Over the years, challenges to ICWA have been pursued through the courts. The U.S. Supreme Court recently considered three consolidated cases involving multiple plaintiffs challenging the constitutionality of ICWA. In *Haaland v. Brackeen*,[7] the U.S. Supreme Court considered the following issues: "(1) whether the Indian Child Welfare Act of 1978's placement preferences – which disfavor non-Indian adoptive families in child-placement proceedings involving an 'Indian child' and thereby disadvantage those children – discriminate on the basis of race in violation of the U.S. Constitution; and (2) whether ICWA's placement preferences exceed Congress's Article One authority by invading the arena of child placement – the 'virtually exclusive province of the States,' as stated in *Sosna v. Iowa* – and otherwise commandeering state courts and state agencies to carry out a federal child-placement program."[8]

In response to challenges to ICWA, 17 states codified laws similar to ICWA to protect Indian children. In the 82nd Session of the Nevada Legislature, policymakers enacted Assembly Bill No. 444 (AB444). AB444 establishes various provisions governing proceedings relating to the custody, adoption, and protection of Indian children. During the legislative hearings, specific policy reasons were highlighted for why Nevada should adopt AB444. First, Nevada has significant indigenous populations (20 federally recognized tribes comprised of 28 tribal communities and more than 62,000 urban Indians[9]), and these communities have unique history and cultural heritage that should be respected and preserved. AB444 ensures that Indian children in Nevada maintain connections with their families, communities, and cultural traditions, which are critical to their well-being and long-term success. Second, establishing provisions governing proceedings relating to custody, adoption, and protection of Indian children or termination of parental rights will provide additional protections for them in state law. These protections include specific standards for child welfare proceedings involving Indian children and placement preferences that prioritize keeping children with their families within their communities. AB444 ensures these protections are applied consistently and uniformly in child welfare cases. Finally, incorporating ICWA into state law will help to address historical injustices and trauma experienced by tribal communities in Nevada and across the country.

AB444 passed unanimously out of the Assembly and Senate and was signed into law on June 13, 2023. Two days later, the U.S. Supreme Court, in a 7-2 decision, upheld ICWA. Justice Amy Coney Barrett delivered the court's opinion with Chief Justice John Roberts and Justices Sonia Sotomayor, Elena Kagen, Neil Gorsuch, Brett Kavanaugh, and Ketanji Brown Jackson joining. Gorsuch and Kavanaugh issued concurring opinions, while Justices Clarence Thomas and Samuel Alito filed dissenting opinions.

The court, in deciding whether Congress lacked authority to enact ICWA, recognized multiple sources providing Congress plenary power to legislate with respect to Indian tribes. First, the Indian Commerce Clause under Article I allows Congress to enact legislation to certain Indian affairs and not only to matters related to trade. Second, the Treaty Clause under Article II allows for treaties to authorize Congress to deal with Indian matters. Third, the inherent principles under the Constitution's structure empowers Congress to address special problems that are novel to Indians. Last, the trust relationship between the U.S. and tribes also empowers Congress to exercise its legislative powers. While

recognizing Congress's power to legislate when it comes to Indian affairs, the court recognized that such power is "not a series of blank checks." Accordingly, the court stressed "that Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even sizable sphere has borders." While the petitioners challenged each Constitutional authority allowing Congress to enact ICWA, the Supreme Court simply provided: "We have often sustained Indian legislation without specifying the source of Congress's power, and we have insisted that Congress's power has limits without saying what they are."

As to challenges raised that ICWA violated the Anticommandeering Clause, the court recognized that cases involving neglect were not limited to state actors; rather, cases could also be pursued by private individuals (e.g. guardianship, adoption). The court's opinion criticizes the lack of arguments made by petitioners in support of the challenges under the Anticommandeering Clause and recognizes that such challenges require "a heavy lift – and petitioners have not pulled it off." Accordingly, the court held that ICWA's requirements for active efforts to keep families together, notice to tribe and parents, heightened burden of proof, and expert testimony that a child is to suffer serious emotional or physical damage if the parent or Indian custodian retains custody did not violate the Anticommandeering Clause. As for challenge to ICWA's placement preference and requirement for state courts to transmit records to the federal government, the court relied upon the Supremacy Clause for states to uphold federal laws that are properly enacted by Congress's Article One powers.

The Supreme Court did not decide the last two issues of whether ICWA violates the Equal Protection Clause or Nondelegation Clause on the merits, as the court determined that none of the parties have standing to raise such challenges.

While the Supreme Court upheld ICWA, Nevada has codified state law protecting Indian children subject to abuse and neglect.

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ENDNOTES:

1. 25 U.S.C. § 1901 (1978).
2. H.R. Rep. No. 1386 at 9 (1978). *See also*, 25 U.S.C. § 1902 (1978).
3. *Id*. at 8.
4. 25 U. S. C. §1903(4) (1978).
5. 25 C.F.R. § 23.103; 81 FR 38778, 38867 (2016).
6. https://www.bia.gov/sites/default/files/dup/assets/bia/ois/raca/pdf/idc1-034295.pdf
7. *Haaland v. Brackeen*, 599 U.S. --- (June 15, 2023).
8. https://www.scotusblog.com/case-files/cases/brackeen-v-haaland/; *Sosna v. Iowa*, 419 U.S. 393 (1975).
9. nevadaindiancommission.org