

To: ULC Scope and Program Committee
From: Martha Walters and Elena Duarte, Co-Chairs, Study Committee on Indian Child Welfare Act Issues
Date: July 13, 2023
Re: REPORT OF THE STUDY COMMITTEE

CONTENTS OF THE STUDY COMMITTEE REPORT

I. Study Committee on Indian Child Welfare Act Issues 1
II. Current State of the Law 2
 a. Indian Child Welfare Act 2
 i. Major Provisions 3
 b. Current State Laws 5
III. *Haaland v. Brackeen* Outcome and Committee Recommendations 5
 a. ICWA Remains Untouched 5
IV. The Need for a State Law 6
V. The Potential Downsides of Drafting a State Law 6
VI. Benefits of and Feasibility of Uniformity 7
VII. Enactability 7
 a. Essential Need for Support From and Participation By Tribes. 7
 b. States Have and Continue to Act in This Area 8
 c. Timing of the ULC Process 8
 d. Native Presence in State 8
 e. Supporters/Opponents 8
VIII. Recommendation of the Committee 9

I. Study Committee on Indian Child Welfare Act Issues

The Uniform Law Commission approved the establishment of the Study Committee on Indian Child Welfare Act issues in early August 2022. Martha Walters and Elena Duarte were appointed co-chairs, and Kathryn Fort was appointed reporter. Additional commissioners appointed to the committee include Shea Backus (NV), Sarah Bennett (NM), Jennifer Clark (ND), Andrew Hemenway (AK), Debra Lehrmann (TX), Laura McConnell-Corbyn (OK),

Gregory Pinski (MT), Michael Tanoue (HI), Sam Thumma (AZ), Jerod Tuft (ND), Candace Zierdt (ND), Maxine Eichner (NC), David Biklen (CT), and Barbara Atwood (AZ). The committee co-chairs and reporter invited observers from state and tribal communities, including judges, practitioners, tribal leaders, and attorneys. The committee met five times via zoom from November 2022-July 2023. One meeting session was dedicated to education on the Indian Child Welfare Act, including its purposes and protections. This report reflects the considerations, conclusions, and recommendations of the committee.

II. Current State of the Law

The Indian Child Welfare Act, 25 U.S.C. 1903 et. seq. (ICWA), has been the subject of targeted attack in the federal courts by a limited number of organizations and attorneys.¹ On the other hand, an overwhelming number of tribes, a majority of states, and a large group of non-profits dedicated to improving the child welfare system continue to maintain that ICWA's legal standards are the "gold standard" for child welfare protection.² The law remains consistently bi-partisan, with state versions recently signed into law in Wyoming, Montana, North Dakota, Nevada, and Maine.³

As a result of that targeted litigation, the United States Supreme Court considered and recently decided *Haaland v. Brackeen*, No. 21-376.

a. Indian Child Welfare Act

Congress passed ICWA in 1978 after nearly ten years of legislative hearings and data collection. Through this work, it was apparent that in the 1970s, the wholesale and universal removal of Native children from their homes was a nationwide crisis. Between 25 and 35% of *all* Native children had been removed from their homes and placed with non-relatives.⁴ ICWA was designed to both prevent the removal of Native children from their reservation homes and provide protections to Native children outside of Indian Country.⁵ ICWA does this through both procedural and substantive provisions that apply in state courts.

¹ See Kathryn E. Fort, *The Road to Brackeen: Defending ICWA 2013-2023*, forthcoming 72 AM. U. L. REV. 101, fn 102 (2023) (listing constitutional challenges to ICWA and the attorneys involved from 2015-2022)

² Brief for the Casey Fam. Programs & Twenty-Six Other Child Welfare and Adoption Orgs as Amici Curiae Supporting Defendants, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022) (No. 21-376), <https://turtletalk.files.wordpress.com/2022/08/cfpamicus.pdf>;

³ See Congressional Record, Proceedings and Debates of the 95th Congress, 2nd Session, 38101-38112 (Oct. 14, 1978)(passage of the law by the House with no dissent and the support of both the Democratic and Republican members of the committee); Brief for 87 Members of Congress as Amici Curiae in support of Federal and Tribal Defendants, *Brackeen v. Haaland*, Supreme Court No. 21-376 (Aug. 19, 2022), Brief for the States of California, Arizona, and 22 other State Attorneys General, *Brackeen v. Haaland*, Supreme Court No. 21-376 (Aug. 19, 2022)(hereinafter State AG Brief)(including four Republican Attorneys General); Wyoming Indian Child Welfare Act, SEA No. 0089 (March, 9, 2023)(passage of the entire Indian Child Welfare Act into Wyoming state law by a super majority Republican legislature and signed by Republican governor), N.D. H.B. 1536 (signed into law May 8, 2023), Montana H.B. 317 (signed into law May 22, 2023), Maine Indian Child Welfare Act, S.P. 804 (signed into law June 30, 2023), Nev. A.B. 444 (signed into law June 12, 2023).

⁴ H.Rep. 95-1386 at 9 (1978).

⁵ *Id.* at 12.

Since ICWA’s passage, the Department of the Interior has also adopted federal regulations and guidelines to provide additional binding direction for states.⁶

i. Major Provisions

1. § 1903 Definitions: ICWA provides several key definitions that guide when the law applies. Specifically, to have a case where ICWA applies, a state court must have both an Indian child⁷ and a child custody proceeding.⁸ ICWA applies to both private and public removal of children from their parents.
2. § 1911 Jurisdiction: ICWA defines pre-existing inherent tribal jurisdiction and provides rules for how states defer to that jurisdiction for Indian children who are off the reservation.⁹ This section also guarantees mandatory intervention for the Indian child’s tribe in a state court proceeding. Under §1919, states and tribes can enter into agreements providing for the orderly transfer of jurisdiction on a case-by-case bases and agree to concurrent jurisdiction between tribes and states.
3. § 1912 Protections/Involuntary: The most substantive section of ICWA provides specific protections for parents in a child custody proceeding. The requirements include a heightened standard of proof for both a foster care placement¹⁰ and termination of parental rights,¹¹ the testimony of a qualified expert witness to support that standard,¹² and the requirement of the party removing the child to provide active efforts to reunify the family.¹³ In addition, this section guarantees counsel for indigent parents,¹⁴ notice of the proceedings to the Indian child’s tribe, parent, or Indian custodian,¹⁵ and the right for parties to examine all reports filed in the court proceeding.¹⁶
4. § 1913 Protections/Voluntary: ICWA provides specific due process protections to birth parents seeking to voluntarily terminate their parental rights. They include requiring any consent to such

⁶ 25 C.F.R. § 23, *Guidelines for Implementing the Indian Child Welfare Act*, U.S. Dep’t of the Interior (Dec. 2016), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewjggpqaolV9AhXzjokEHU TKB->

<https://www.bia.gov/sites/default/files/dup/assets/fbia%2Fois%2Fpdf%2Fidc2-056831.pdf&usg=AOvVaw0eEsiEy84MUvfb5T-dEoDm>

⁷ 25 U.S.C. 1903 (4) (“Indian child means 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”)

⁸ 25 U.S.C. 1903 (1).

⁹ 25 U.S.C. 1911 (b).

¹⁰ 25 U.S.C. 1912 (e).

¹¹ 25 U.S.C. 1912 (f).

¹² *Id.*

¹³ 25 U.S.C. 1912 (d).

¹⁴ 25 U.S.C. 1912 (b).

¹⁵ 25 U.S.C. 1912 (a).

¹⁶ 25 U.S.C. 1912 (c).

termination be made no sooner than ten days after the birth of the child, that the consent be given in front of a judge, and that the judge certify the parents understood the terms and consequences of the consent.¹⁷ This section also allows parents to withdraw their consent for any reason prior to the final decree for termination or adoption,¹⁸ and allows parents to withdraw consent within two years if there was fraud or duress.¹⁹

5. § 1914 Ability to Challenge Violations of 11, 12, 13: ICWA allows the tribe, parent or child petition a court to invalidate any action taken in violation of sections 1911, 12, or 13.
6. § 1915 Placement Preferences: ICWA provides specific guidance for foster care placement of children, which requires placing them in the least restrictive setting that approximates a family and any special needs, in reasonable proximity to their home, and then with a member of the child's family, a foster home approved of by the child's tribe, an Indian foster home licensed by the state or private agency, or an institution operated by a tribe.²⁰ For an adoption, children are to be placed with their extended family members, a member of their tribe, or a member of another Indian tribe.²¹ Tribes can rearrange the placement preferences.²²
7. § 1916 Return of custody: If an adoption fails, the biological parents of the child have the right to petition to have the child returned to their custody.
8. § 1917 Right to Information: Children who were adopted have the right as adults to determine any information they need to protect their tribal relationship or citizenship.
9. § 1920 Improper Removal: If a child is removed improperly or custody has been improperly retained, the court shall return the child to the parents absent a finding of substantial and immediate danger or threat of danger.
10. § 1921 Higher standard: If a state has higher standards for the protection of rights of parents, the higher standard shall control. ICWA is the federal minimum standard and states are allowed to legislate higher ones.
11. § 1922 Emergency Removal: ICWA allows states to temporarily remove children from their home on an emergency basis without the findings required by § 1912, so long as the court finds the removal is necessary to prevent the imminent physical damage or harm to the child.

¹⁷ 25 U.S.C. 1913 (a).

¹⁸ 25 U.S.C. 1913 (c).

¹⁹ 25 U.S.C. 1913 (d).

²⁰ 25 U.S.C. 1915 (b).

²¹ 25 U.S.C. 1915 (a).

²² 25 U.S.C. 1915 (c).

b. Current State Laws

Fifteen states have passed comprehensive state ICWA laws,²³ while other states have adopted the law by reference.²⁴ These state laws have varying levels of protection above the federal minimum standard. Most importantly, states have considered definitional changes to protect more Indian children,²⁵ they have limited the good cause exceptions to jurisdiction²⁶ and placement preference²⁷ decisions, and they have provided heightened requirements for active efforts²⁸ and qualified expert witness testimony.²⁹ They have also expanded tribal jurisdiction over child custody proceedings,³⁰ and otherwise worked with tribes to create stronger laws.

III. *Haaland v. Brackeen* Outcome and Committee Recommendations

Every act drafted by the ULC should be guided by the following considerations: First, whether there is a need for an act on the subject. Second, whether there is a reasonable probability that an act, when approved, either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly. That is, the act's preparation is likely to be a practical step toward uniformity of state law or at least toward minimizing the diversity of state law. Third, whether the subject of the act must be such that uniformity of law among states will produce significant benefits to the public through improvements in the law. And fourth, whether the act will maintain the integrity of well-balanced and well-settled law traditionally governed by the states.

In this instance, the answer to that question is affected by the Court's decision in *Brackeen*. We will first explain the state of the law after *Brackeen* and provide the Study Committee's recommendations. We will then discuss the considerations set out above.

a. ICWA Remains Untouched

In *Brackeen*, the Court determined the plaintiff's arguments were unavailing and upheld ICWA in its entirety on merits or rejected their arguments based on standing.

Nevertheless, the Study committee unanimously recommends that it continue to study whether a uniform or model state law would be appropriate.

²³ *Comprehensive State ICWA Laws*, <https://turtletalk.blog/icwa/comprehensive-state-icwa-laws/> (May 22, 2023) (California, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, Washington, Wisconsin, Wyoming).

²⁴ See Colorado S.B. 211 (signed into law May 4, 2023).

²⁵ See MCL 712B.3(k).

²⁶ See Minn. Stat. 260.771, Subd. 3(a) (2023).

²⁷ See Minn. Stat. 260.771, Subd. 7(j) (2023).

²⁸ See Oregon Indian Child Welfare Act, Or. H.B. 4214, Sec. 18 (2020).

²⁹ See New Mexico Indian Family Protection Act, N.M. H.B. 135, Sec. 17 (2022).

³⁰ See MCL 712B.7(3).

Despite federal ICWA being in place, many states have already adopted state ICWAs. There are good reasons that additional states may want to act to clarify and improve the act. It would be beneficial to provide a uniform or model state ICWA for states that have not acted and the sooner we begin the process the more opportunity there will be for uniformity at the state level.

The fact that ICWA remains in place gives the ULC time to evaluate the individualized state ICWA laws that 15 states have enacted, facilitate additional discussion with tribal leaders, and determine whether a uniform or model law with higher protections than ICWA, including possible clarification and updates, is possible and desired. Whether we continue to study or proceed to drafting, we will need to consider the scope of a proposed act in more detail than we have to date.

IV. The Need for a State Law

The committee has identified the following reasons to believe there is need for a state law to protect Native children and families. State law can provide clarification in areas that are currently unaddressed or unclear in federal law or are addressed only in federal regulations. Such improvements could provide broader uniformity than now exists. In addition to reviewing and synthesizing state ICWA laws and the ICWA regulations, the ULC could ensure a state law matched the terms and requirements in the Social Security Act, Title IV-E, to make it easier for states to adopt heightened standards to the appropriate hearings.³¹ In addition, there are ways in which a uniform law could incorporate widely understood uniform interpretations of the Act to both heighten the protections and provide uniformity.³²

The Study Committee recommends that any uniform or model law maintain or heighten the protections that ICWA provides and consider clarifying or updating those protections.

V. The Potential Downsides of Drafting a State Law

One potential downside to drafting a state law is that it is possible that by the time a drafting committee begins its work, states that are likely to pass a law already will have acted.

Second, it is possible a ULC drafting project could stifle creativity among the states. This could be detrimental to tribes and families and make it more difficult for states with higher standards to maintain current laws that provide increased protections to Native families. The ULC would need to guard against this possibility by making it clear from the outset that ICWA provides a minimum standard for state agencies and courts when encountering Native families in

³¹ After ICWA's passage, the federal government started highly regulating child protection issues in the state through their Spending Clause power. This has resulted in a shift in definitions of proceedings that ICWA uses but are often no longer used in the states.

³² See, for example, comments throughout the federal regulations front matter describing the number of states adopting certain burdens of proof for different decision points currently left out of the federal law. 25 C.F.R. 23.132(b).

their systems and that the ULC is not intended to preclude action by states that wish to adopt more stringent, protective, and creative standards.

VI. Benefits of and Feasibility of Uniformity

ICWA's intention, to provide uniform minimum standards across the country, may be the strongest argument for drafting a uniform state law to supplement it. A uniform minimum standard is essential to the operation of the child welfare systems of the states. As we know from the other child welfare laws the ULC has drafted, children and families may live in different states and travel across state lines and court decisions should not depend on the differences in state laws to ensure their protections.

Since 1978, there is a robust body of appellate case law that has led to different state court interpretations of the same ICWA provisions. These include what might be "good cause" to not transfer a case to tribal court, or what "active efforts" consists of. A uniform state law could improve uniformity in court decisions and thereby ensure equity in the child protection system for Native families across the country.

For states that want to provide greater protections for tribes, children, and families than ICWA provides, it is important that uniformity not force standards lower than states wish. However, there are opportunities where a uniform act could provide *heightened* standards.

VII. Enactability

The enactability of a uniform or model law is a key consideration for the ULC. The Study Committee believes that there is a reasonable probability that an act, when approved, either will be accepted and enacted into law by a substantial number of states or, if not, will be a practical step toward uniformity of state law or at least toward minimizing the diversity of state law.

a. Essential Need for Support from and Participation by Tribes.

The ULC should not undertake a drafting project without the support and participation of tribes and tribal leaders. ICWA was originally created and promoted by tribes and tribal leaders. While the Study Committee includes representatives of tribes, and it is essential that a drafting committee also be formed in partnership with tribes and tribal leaders, there is need to ensure that this inclusion be done deliberately. Passing a law for Native people without their participation and agreement is of particular concern to the committee and observers.

Assuming, as we do, that tribes and tribal leaders favor a ULC drafting project, that is a reason for the ULC to undertake the project. Historically, the ULC has looked for ways to work in partnership with Tribes (for instance, in drafting the Model Tribal Secured Transactions Act) and this project would be a way to maintain important ties with the Tribes.

The committee discussed working with tribes much in the same way the federal government would in this scenario—essentially contacting all tribes with a letter and offering to have full consultation with tribes. This allows tribes to designate who should attend and provide full feedback. This is one of the main reasons the committee recommends staying in study. The committee would like to have at least one, and preferably 2-3 remote opportunities for tribal consultation.

b. States Have and Continue to Act in This Area

The fact that 15 states already have enacted state law to protect Indian tribes, children and families is a strong indication that other states also will do so.

c. Timing of the ULC Process

The ULC drafting process takes time and states may wish to act more quickly than the ULC will be able to act. However, the outcome in *Brackeen* makes it less likely that states will see the need for immediate action. The ULC has the benefit of national expertise, and resources to create an ICWA law that incorporates both the regulations and other protections states have generally come to agreement on (see footnote 32 as an example) either through statute or case law. Many states have part time legislatures, and many may not be able to act for 12-24 months. Finally, at least two of the states, Montana, and Wyoming, that passed ICWA laws in light of *Brackeen* included sunset provisions. States will be considering these types of laws for years to come.

d. Native Presence in State

States without a strong Native presence may not have the motivation to pass a state Native child protection law, though the existence of a uniform or model law certainly makes it more likely for those states to consider passage. As an example, Illinois has no federally recognized tribes, but does have a strong urban Indian presence in Chicago. That presence has limited funding, and no attorneys with the necessary expertise, but may be able to lobby for a state ICWA law that was already drafted by the ULC.

e. Supporters/Opponents

As stated at the top of this report, the opponents of state ICWA laws and ICWA in general are relatively limited. These usually consist of adoption organizations³³ and some foster families, as well as other well-known organizations that make up

³³ See e.g., *Nat'l Council for Adoption v. Jewell*, 156 F.Supp. 3d 727, 730 (E.D. Va. 2015); Brief for the Am. Acad. of Adoption Att'ys as Amicus Curiae Supporting Petitioners, *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 621 (Cal. Ct. App. 2016) (listing the Academy of Adoption Attorneys as amicus curiae); Brief for the Acad. of Adoption and Assisted Reproduction Att'ys as Amicus Curiae Supporting a Writ of Certiorari, *R.K.B. v. E.T.*, 138 S. Ct. 1236 (U.S. 2018) (No. 17-942) (listing the Academy of Adoption Attorneys as amicus curiae).

the conservative legal movement.³⁴ Despite this, support for state ICWA laws is largely bipartisan, as demonstrated by the Republican supermajorities and governors passing state ICWA laws in Montana, North Dakota, and Wyoming. In addition, the amicus support of the law in the *Brackeen* case demonstrates that a vast majority of non-profits and organizations dedicated to children’s wellbeing, including but not limited to the American Academic of Pediatrics,³⁵ the American Psychological Association,³⁶ the National Association of Counsel for Children,³⁷ and Casey Family Programs,³⁸ support ICWA in its pre-*Brackeen* form. Just under many state Attorneys General supported ICWA.³⁹ An unparalleled number of tribes supported ICWA.⁴⁰ Parent defenders support the law.⁴¹ Former foster children and children with lived experience support the law.⁴²

Most states would find substantial support for a uniform or model law that maintains and clarifies the protections of ICWA.

VIII. Recommendation of the Committee

The Study Committee unanimously recommends that it continue to study whether a uniform or model law would be appropriate. The committee reasons as follows:

First, the Committee believes that it would be improper to move to Drafting without consultation with tribal nations. The Committee intends to use the time between now and its next report to hold 2-3 remote meetings with tribal representatives to discuss their interest in and support for drafting. The Study Committee will also continue to include other stakeholders, such

³⁴ See e.g., *Gila River Indian Cmty. v. Dep’t of Child Safety*, 395 P.3d 286, 287 (Ariz. 2017) (listing attorneys from the Goldwater Institute as counsel); *J.P. v. State*, 506 P.3d 3, 5 (Alaska 2022) (listing the Goldwater Institute as amicus curiae); *In re Matter of Adoption of T.A.W. v C.W.*, 383 P.3d 492, 494 (Wash. 2016) (listing the Goldwater Institute as amicus curiae); Brief for Pacific Legal Found. as Amici Curiae Supporting Petitioners, *Renteria v. Superior Ct. of Ca., Tulare Cnty.*, No. 16-cv-1685 (listing the Pacific Legal Foundation as amicus curiae); *Haaland v. Brackeen* (No. 21-376) Supreme Court Documents, <https://turtletalk.blog/texas-v-zinke-documents-and-additional-materials/texas-v-haaland-supreme-court-documents> (listing Cato Institute, Goldwater Institute, Pacific Legal Foundation, New Civil Liberties Alliance, Project for Fair Representation as Anti-ICWA Amicus Briefs)

³⁵ Brief for Am. Acad. of Pediatrics & Am. Med. Ass’n as Amici Curiae Supporting Respondents, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022)(No. 21-376).

³⁶]; Brief for Am. Psych. Ass’n et al. as Amici Curiae Supporting Petitioners, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022)(No. 21-376).

³⁷ Brief for Nat’l Ass’n of Couns. for Child. & Thirty Other Child’s Rights Orgs. as Amici Curiae Supporting Defendants, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022)(No. 21-376).

³⁸ Brief for the Casey Fam. Programs & Twenty-Six Other Child Welfare and Adoption Orgs as Amici Curiae Supporting Defendants, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022)(No. 21-376).

³⁹ Brief for the States of California, Arizona, and 22 other State Attorneys General, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022)(No. 21-376).

⁴⁰ Brief of 497 Indian Tribes and 62 Tribal and Indian Organizations as Amici Curiae in Support of Federal and Tribal Defendants, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022)(No. 21-376).

⁴¹ Brief for Fam. Def. Providers as Amici Curiae Supporting Respondents, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S., 2022)(No. 21-376).

⁴² Brief of Amici Curiae Former Foster Children in Support of Federal and Tribal Defendants, *Haaland v. Brackeen*, 142 S.Ct. 1205 (Mem) (U.S.C, 2022)(No.21-376).

as state agencies, court personnel, and private practice attorneys, in its study but will engage in more focused, official, consultation with the tribes as sovereign, pre-constitutional nations.

Second, the Study Committee will use this additional time to identify key areas in which ICWA is unclear or currently raising questions that may be resolved through state law. The committee intends to complete its research into the current state ICWA laws, five of which were passed in the last six months. The Committee would also like to update research from 2016 which looked at all state supreme court cases interpreting ICWA using the federal guidelines to see if there is additional agreement on standards beyond ICWA's floor.

Third, the Study Committee will consider a legal issue left open by *Brackeen*; that is, whether ICWA is subject to challenge on equal protection grounds, and, if so, whether state law can address any such concerns.

The Study Committee hopes to complete this work by the time of the mid-year Scope and Program meeting in January of 2024.