

June 5, 2023

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

EXECUTIVE SUMMARY

ALL COUNTY LETTER NO. 23-52

The purpose of this All County Letter is to provide a general overview of California's laws, policies and other authorities supporting federally recognized tribes, children and families, tribal sovereignty, tribal engagement and tribal culture given the case of [*Haaland et al. v. Brackeen et al. \(Brackeen\)*](#) pending in the Supreme Court of the United States. This letter reflects the California Department of Social Services' ongoing commitment to tribes, tribal sovereignty, and the well-being of Indian children and their families. This letter also presents the Department's expectations for counties' response to the Supreme Court of the United States' decision when it is published.



KIM JOHNSON
DIRECTOR

CALIFORNIA HEALTH & HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov



GAVIN NEWSOM
GOVERNOR

June 5, 2023

ALL COUNTY LETTER NO. 23-52

TO: ALL COUNTY CHILD WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
ALL CHIEF PROBATION OFFICERS
ALL COUNTY ER PROGRAM MANAGERS

SUBJECT: HAALAND ET AL. V. BRACKEEN ET AL.

REFERENCE: [ASSEMBLY BILL 923 \(CHAPTER 475, STATUTES OF 2022\)](#);
[ASSEMBLY BILL 2944 \(CHAPTER 104, STATUTES OF 2020\)](#);
[ASSEMBLY BILL 3176 \(CHAPTER 833, STATUTES OF 2018\)](#);
[ASSEMBLY BILL 1325 \(CHAPTER 287, STATUTES OF 2009\)](#);
[SENATE BILL 678 \(CHAPTER 838, STATUTES OF 2006\)](#);
[EXECUTIVE ORDER N-15-19](#)
[EXECUTIVE ORDER B-10-11](#);
[25 UNITED STATES CODE SECTION 1919](#)
[GOVERNMENT CODE SECTION 11019.81](#)
[WELFARE AND INSTITUTIONS CODE SECTIONS 224, 224.2,](#)
[224.3, 224.4, 349 AND 16001.9](#);
[MANUAL OF POLICIES AND PROCEDURES \(MPP\), CHILD](#);
[WELFARE SERVICES PROGRAM REGULATIONS, DIVISION 31,](#)
[CHAPTER 31-000, GENERAL REQUIREMENTS AND CHAPTERS](#)
[31-100 - 31-200](#);
[CALIFORNIA RULES OF COURT, RULE 5.530](#)

The purpose of this All County Letter (ACL) is to provide a general overview of California's laws, policies and other authorities supporting federally recognized tribes, children and families, tribal sovereignty, tribal engagement and tribal culture given the case of [Haaland et al. v. Brackeen et al. \(Brackeen\)](#) pending in the Supreme Court of the United States (SCOTUS). This letter reflects the California Department of Social Services' (CDSS) ongoing commitment to tribes, tribal sovereignty, tribal engagement,

protection of tribal culture and the well-being of Indian children¹ and their families. This letter also presents the CDSS's expectations for counties' response to the SCOTUS decision when it is published.

BACKGROUND

The federal [Indian Child Welfare Act \(ICWA\)](#) was enacted in 1978 to prevent the breakup of Indian families and to protect the best interests of Indian children, their families, and tribes. The ICWA is a remedial statute, that was designed expressly to address disproportionate rates of removal of Indian children, biased decision-making by state or local authorities, and a failure to recognize the unique interests, values and rights of tribes. The ICWA establishes minimum standards for state court proceedings including dependency, juvenile justice, probate guardianship, and family court proceedings involving Indian children when the proceeding may result in a voluntary or involuntary placement or adoption of the Indian child.

California has since enacted its own Indian child welfare laws, starting with the passage of [Senate Bill \(SB\) 678](#) (Chapter 838, Statutes of 2006) and later [Assembly Bill \(AB\) 1325](#) (Chapter 287, Statutes of 2009), [AB 3176](#) (Chapter 833, Statutes of 2018), and [AB 2944](#) (Chapter 104, Statutes of 2020).² These laws incorporate and expand upon the minimum federal standards contained in the ICWA itself. Thus, California statutes, independent of federal law, dictate that county child welfare services (CWS) agencies and probation departments have a responsibility to understand and meet specified procedural and substantive requirements for the protection and safety of Indian children and to help Indian children remain safely in, or return to, their homes whenever possible.

In *Brackeen*, the State of Texas and several individuals (plaintiffs) seek to have the ICWA declared unconstitutional. The plaintiffs have argued 1) that Congress lacked the authority to enact the ICWA, 2) that the ICWA discriminates based on race and 3) that the ICWA improperly commandeers state actors to implement federal law. The United States government and five sovereign tribes – the Cherokee Nation, the Oneida Nation, the Morongo Band of Mission Indians, the Navajo Nation and Quinault Indian Nation – have defended the ICWA as 1) well within Congress's authority, 2) reflecting political classifications, not racial ones, and 3) applying equally to state and non-state actors in child custody cases. Additionally, California took the lead in [a multi-state friend of the court brief](#) (joined by 23 states and the District of Columbia) in support of the ICWA.

¹ In California, "Indian child" means an unmarried person who is under age 18 and is either: 1) a member of a federally recognized tribe; or 2) is eligible for membership in such a tribe and is the biological child of a member of a tribe. ([Welfare and Institutions Code \(WIC\) § 224.1\(a\)](#) [cross-referencing the definitions from the Indian Child Welfare Act of 1978 (ICWA) at [25 USC § 1903\(4\) & \(8\)](#)]; [CDSS Manual of Policy and Procedure \(MPP\), Div. 31, § 31-002\(i\)\(4\)\(A\).](#)) It also includes "an unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless that person or their attorney elects not to be considered an Indian child." ([WIC § 224.1\(b\)](#); see also [MPP, Div. 31, § 31-002\(i\)\(4\)\(B\).](#))

² The laws enacted by these various bills collectively are referred to throughout this letter as "Cal-ICWA".

The SCOTUS heard oral argument in the case on November 9, 2022, and a decision is expected in late spring/early summer 2023.

The CDSS recognizes the uncertainty the *Brackeen* decision may create for Indian families, tribes, counties, and courts. The CDSS also recognizes the trauma the *Brackeen* case has already generated and the uncertainty it has caused for Indian families and tribes that value the protection of ICWA. The CDSS remains committed to supporting tribes and tribal families regardless of the outcome of this case. This commitment reflects the government-to-government relationship between the State and tribes and tribal organizations in California, as acknowledged and promoted in [Executive Order B-10-11](#), and more recently, with the passage of [AB 923](#), the Government-to-Government Consultation Act (Chapter 475, Statutes of 2022). It is also consistent with the State's responsibility to recognize the impact of historic trauma and promote healing for Indians in California, as affirmed in [Executive Order N-15-19](#). In addition, this commitment reflects the State of California's public policy set out in [Welfare and Institutions Code \(WIC\) Section 224\(a\) \(1\)](#), which reads: "There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members or citizens of, or are eligible for membership or citizenship in, an Indian tribe."

The CDSS examined the laws comprising Cal-ICWA, which are based on recognition of, and respect for, tribal sovereignty and child welfare best practices. Through this letter, the CDSS highlights many state requirements contained within Cal-ICWA that will likely remain in effect regardless of the outcome in *Brackeen*.

RESPECTING AND RECOGNIZING TRIBAL SOVEREIGNTY

Tribes are sovereign nations and will remain so regardless of the outcome in *Brackeen*. Many of California's laws, regulations, and other authorities, while related to and adopting the language of the ICWA, independently reflect California's respect for and recognition of tribal sovereignty. These laws are designed to address historical and current disproportional representation of Indian children in foster care and California's historical involvement in disruption of tribes and tribal culture. The CDSS will continue to utilize, to the full extent possible, this legal authority and guidance to protect tribal sovereignty and tribal families. In the CDSS' assessment the following are unlikely to be changed substantially by the SCOTUS decision due to their function of respecting and recognizing tribal sovereignty:

- The California [Executive Order B-10-11](#), which requires state agencies and departments to permit meaningful input from tribal governments and their representatives into the development of legislation, regulations, rules and policies on matters that may impact tribal communities. Further, in 2022 with the passage of [AB-923](#), the Legislature enacted [Government Code section 11019.81](#), which encourages the State of California and its agencies to engage in government-to-government consultation on agency actions that impact tribes.

Consistent with these authorities, the CDSS will continue to follow its [Tribal Consultation Policy](#)³ when developing policies related to child welfare and adoption programs.

- Tribal Title IV-E agreements and other state-tribe child welfare agreements, consistent with [25 United State Code section 1919](#), a provision within the ICWA which is not subject to direct challenge in *Brackeen*.⁴
- California state funding opportunities that support tribal sovereignty, including but not limited to the Tribal Dependency Representation program, the Tribally Approved Homes Compensation Program, Flexible Family Supports, and Excellence in Family Finding, Engagement, and Support.
- Homes and institutions licensed or approved under the authority of a sovereign tribe or operated by an Indian organization pursuant to sovereign authority.
- Tribal customary adoption.
- Inquiry as required by [WIC section 224.2](#).
- Notice as required by [WIC section 224.3](#), whenever it is known or there is reason to know a child who is the subject of an Indian child custody proceeding is an Indian child, will remain necessary to ensure that tribal members and tribes are properly informed of the nature of a proceeding that could disrupt the child's membership or eligibility for membership in the tribe.
- Intervention at any stage of an Indian child custody proceeding by the Indian child's tribe and Indian custodian per [WIC section 224.4](#). California has exercised its authority to determine that tribes have a right to intervene in child custody proceedings in order to protect the tribes' interest in the outcome of proceedings involving custody of their citizens.

Additionally, the CDSS will continue to implement the Foster Youth Bill of Rights (FYBOR), codified at [WIC section 16001.9](#), which reflects the personal rights of all youth in foster care. In relevant part, the FYBOR protects:

- 1) A youth's right to live in a home that upholds the prevailing social and cultural standards of their Indian community ([WIC § 16001.9 \(a\)\(1\);2](#));
- 2) The right to names and contact information of, and access to tribal representatives, when applicable ([WIC § 16001.9\(a\)\(11\)](#));
- 3) Contact with tribal members and the tribal community consistent with the prevailing social and cultural conditions and ways of life of the youth's tribe ([WIC § 16001.9\(a\)\(14\)](#));
- 4) The right to have child welfare, probation personnel, and legal counsel instructed on the Indian Child Welfare Act, cultural competency and sensitivity relating to best practices for providing adequate care to Indian children in out-of-home care ([WIC § 16001.9\(a\)\(20\)](#)); and
- 5) The right to recognition of their political affiliation(s) with an Indian tribe or Alaskan village, including determination of the child's membership or citizenship

³ The CDSS's Tribal Consultation Policy is being updated. The CDSS will announce when an updated policy is in effect.

⁴ This was noted in the en banc opinion on rehearing in the Fifth Circuit Court of Appeals [Brackeen v. Haaland](#), 18-11479, (2021) (Slip Opn., p. 7, fn. 4, and pp. 121-122).

in an Indian tribe or Alaskan village, to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village ([WIC § 16001.9\(a\)\(21\)](#)).

CHILD WELFARE BEST PRACTICES

The ICWA is commonly referred to as the “gold standard” for social work because it reflects child welfare best practices for services and supports designed to keep children safely in their homes by connecting the families to resources in their communities that are considerate of their culture.⁵ The laws composing Cal-ICWA reflect this gold standard as part of California's independent child welfare requirements.

The California requirements include, but are not limited to, the following:

- Tribal engagement which requires inclusion of an Indian child's tribe, family, and extended family, and their participation in, the provision of child welfare services, case-planning, family finding and engagement, placement determinations, and permanency determinations.
- Tribal participation in court proceedings pursuant to [WIC section 349](#) and [Rule 5.530\(b\) of the California Rules of Court](#), which leads to better outcomes for Indian children and their families.
- Consideration of the prevailing social and cultural practices of the Indian child's family and tribe. Child welfare data shows that doing this in cases involving Indian children results in the best outcomes for those children.

CDSS EXPECTATIONS

The CDSS expects counties to reach out to their tribes and tribal representatives to prepare for the *Brackeen* decision. Counties must engage with tribes with cultural humility and recognition that the very existence of the *Brackeen* case is traumatic for tribal communities. This outreach may include listening sessions where tribal voices are centered and that give room for grief or other emotional responses from the tribal participants. The CDSS Office of Tribal Affairs (OTA) is available to provide technical assistance to counties on tribal engagement. The OTA can be contacted at TribalAffairs@dss.ca.gov.

The CDSS also expects county CWS directors and probation chiefs to share this letter with all their staff working in child welfare. Regardless of the outcome in *Brackeen*, the CDSS expects counties to ensure minimal to no disruption in services to cases involving Indian children and their families and tribes. If children and families are receiving services required by the ICWA, those services should continue in order to maintain

⁵ [ICWA As the Gold Standard – Casey Family Programs](#)

stability and support for the Indian children and their families. The CDSS also reminds counties that all existing juvenile court orders will remain in effect unless and until modified by a court.

The CDSS will analyze the SCOTUS *Brackeen* decision and will provide more specific and detailed guidance based on the opinion. The CDSS expects county placing agencies to follow all state and federal laws as they currently exist consistent with the information in this letter. Subsequent guidance will clarify whether, in the CDSS' assessment, any provisions of California law are changed by the decision.

For questions regarding the information contained in this letter, please contact the ICWA State Plan at icwastateplan@dss.ca.gov which will be routed to the CFSD Assistant Deputy Director and the OTA Director.

Sincerely,

Original Document Signed By:

ANGIE SCHWARTZ
Deputy Director
Children and Family Services Division

STEPHANIE WELDON
Director
Office of Tribal Affairs

cc: All Federally Recognized Tribes