



ICWA at the Supreme Court & Learning from Promising Practice through ICWA Courts

SAFE STRONG SUPPORTIVE

Sheldon Spotted Elk

casey family programs

SAFE CHILDREN STRONG FAMILIES SUPPORTIVE COMMUNITIES SAFE CHILDREN STRONG FAMILIES SUPPORTIVE COMMUNITIES SAFE CHILDREN STRONG FAMILIES SUPPORTIVE COMMUNITIES SAFE CHILDREN STRONG FAMILIES SUPPORTIVE COMMUNITIES SAFE CHILDREN STRONG FAMILIES SUPPORTIVE COMMUNITIES SAFE CHILDREN STRONG FAMILIES SUPPORTIVE COMMUNITIES SAFE CHILDREN STRONG FAMILIES SUPPORTIVE COMMUNITIES

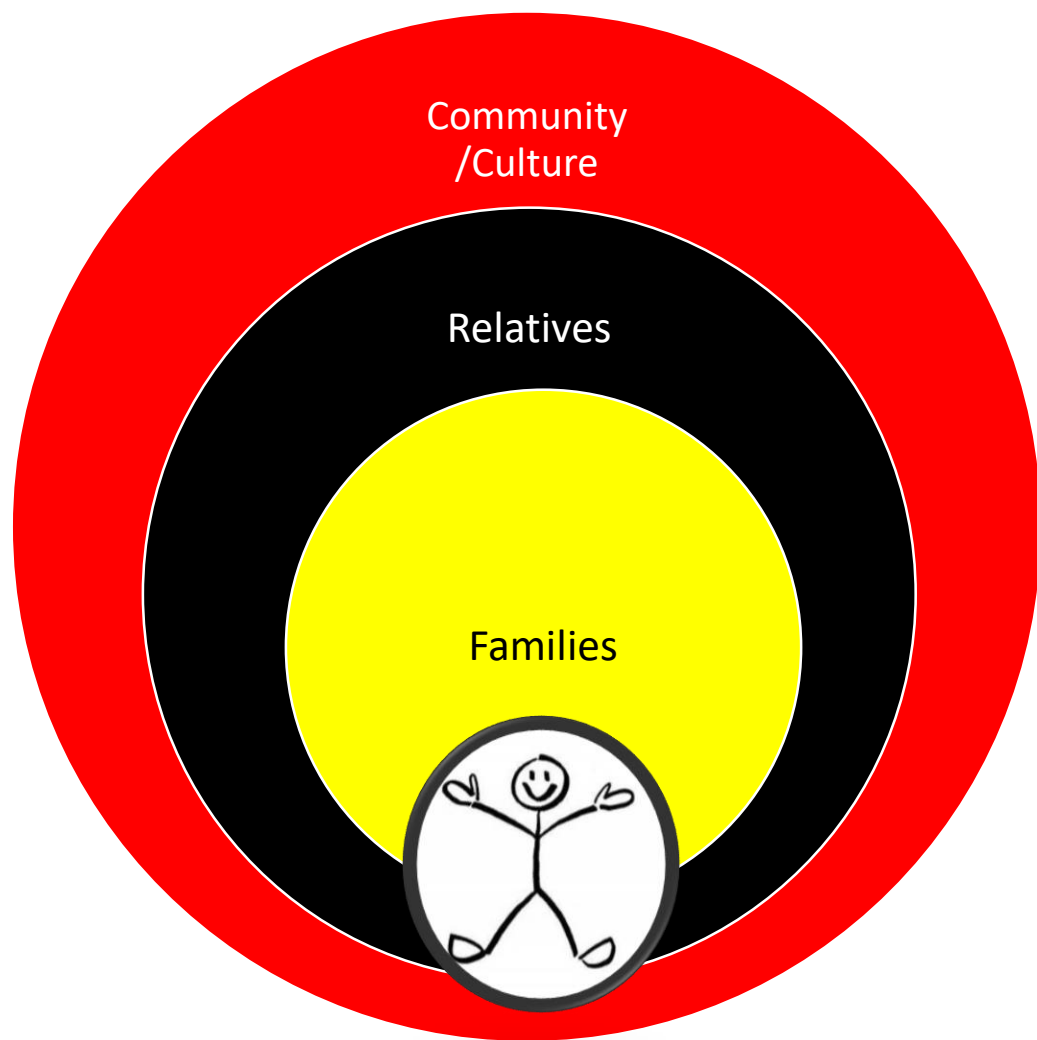
safe children | strong families | supportive communities

SAFE STRONG SUPPORTIVE

Exercise:

RESPONDENT PARENT ENGAGEMENT

Gold standard of child welfare



Active efforts to keep children safely with their families or to reunify them with their families.

Placement Preferences to keep them connected to identity and culture.

All within a community context (**Transfer**).

Indian Child Welfare Act (ICWA) as a reparative law

“After all, the ICWA is just words on a paper, it takes people working together for it to reach its highest aspirations.”

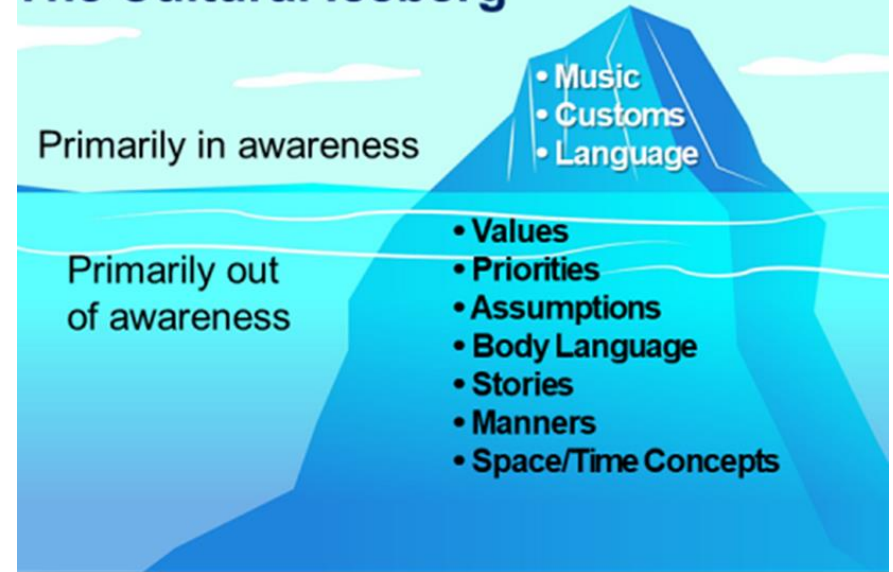
- Bertram Hirsch



Cultural Humility:

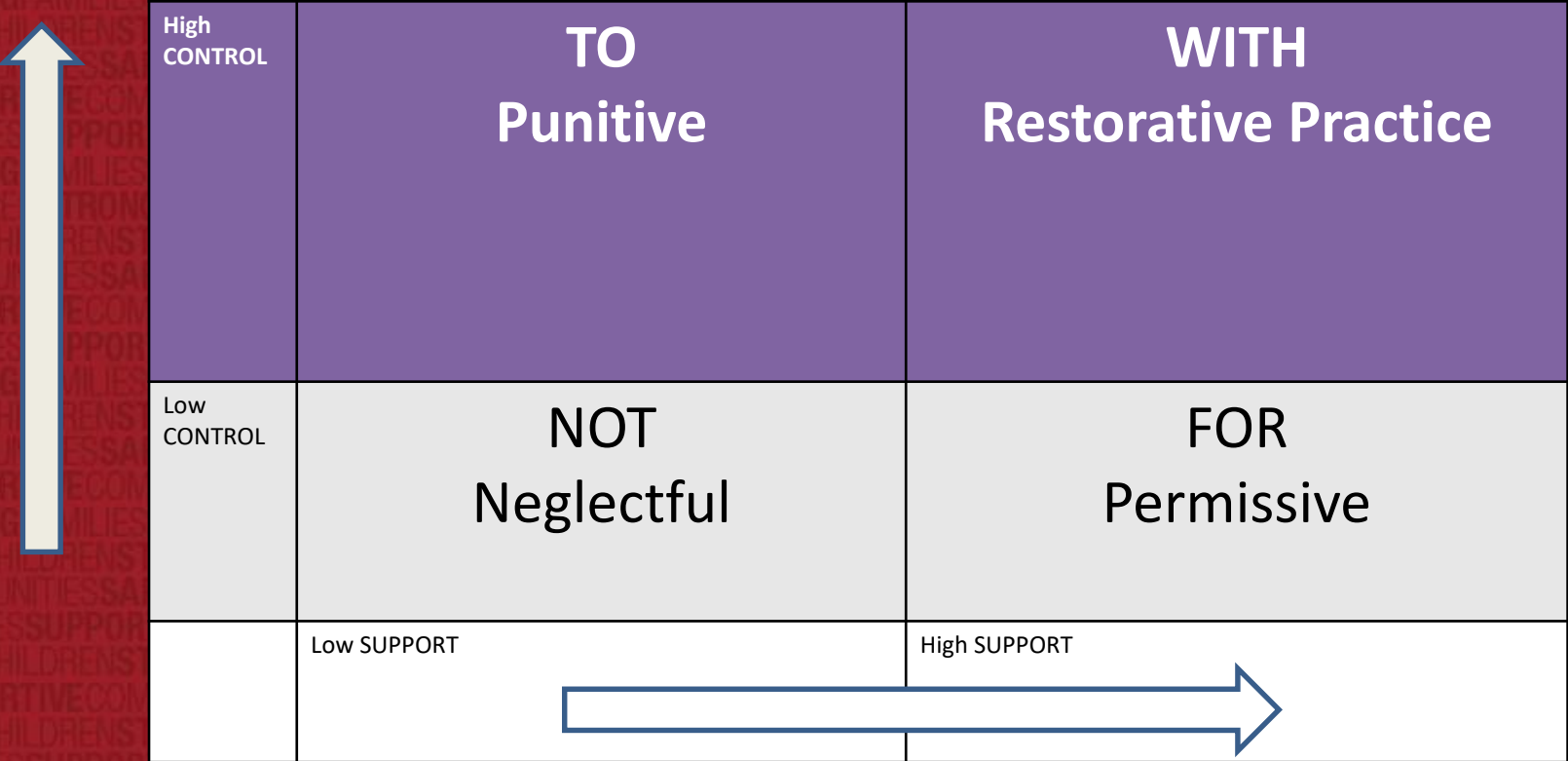
challenges us to *learn* from the people with whom we interact, reserve judgement, and bridge the cultural divide between our perspectives, in order to *facilitate well-being*, and *promote improved quality of life*.

The Cultural Iceberg



Restorative Justice social discipline window casey family programs

SAFE STRONG SUPPORTIVE



Paul McCold and Ted Wachtel, <https://www.iirp.edu/defining-restorative/social-discipline-window>

Haaland v. Brackeen at SCOTUS

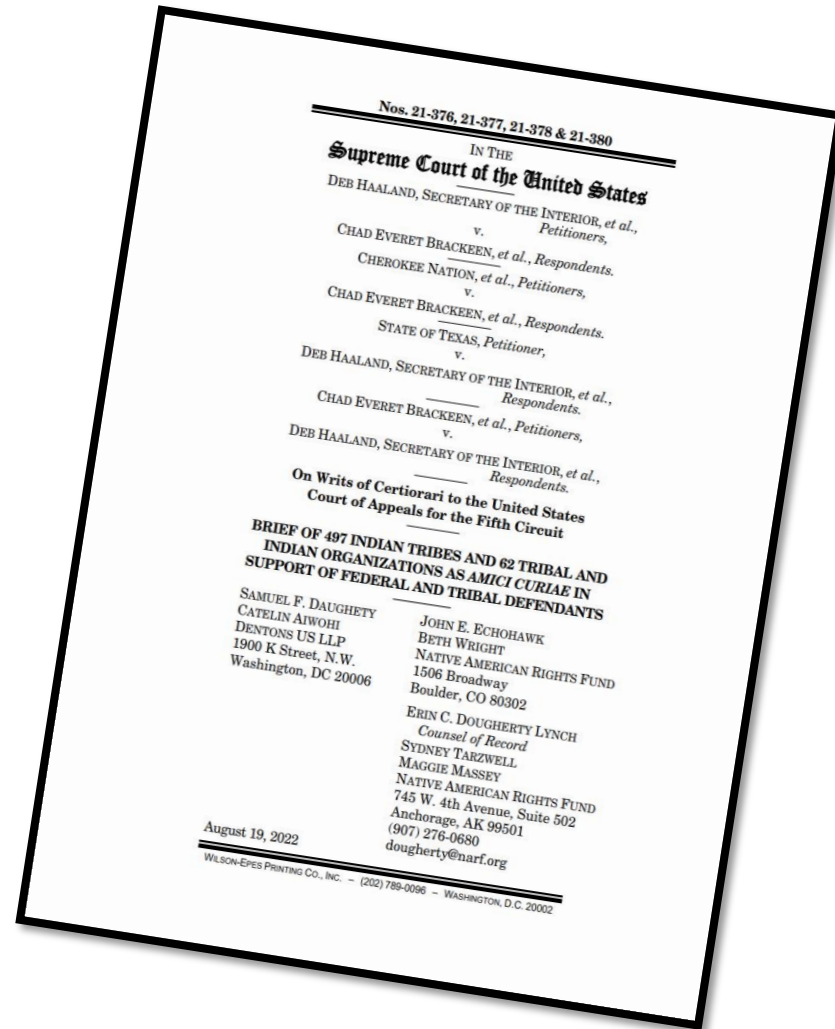
SCOTUS Oral Arguments:

November 9th

24 states & DC Amicus Brief in support of ICWA.

497 Tribes signed an Amicus saying:

“ICWA remains one of the most important pieces of federal Indian legislation ever enacted. It has provided immense and lasting benefit to amici Tribes and tribal organizations and their collective goals in furthering tribal sovereignty and the best interests of Indian children.”



Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HAALAND, SECRETARY OF THE INTERIOR, ET AL. *v.*
BRACKEEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 21–376. Argued November 9, 2022—Decided June 15, 2023*

This case arises from three separate child custody proceedings governed by the Indian Child Welfare Act (ICWA), a federal statute that aims to keep Indian children connected to Indian families. ICWA governs state court adoption and foster care proceedings involving Indian children. Among other things, the Act requires placement of an Indian child according to the Act’s hierarchical preferences, unless the state court finds “good cause” to depart from them. 25 U. S. C. §§1915(a), (b). Under those preferences, Indian families or institutions from any tribe (not just the tribe to which the child has a tie) outrank unrelated non-Indians or non-Indian institutions. Further, the child’s tribe may pass a resolution altering the prioritization order. §1915(c). The preferences of the Indian child or her parent generally cannot trump those set by statute or tribal resolution.

In involuntary proceedings, the Act mandates that the Indian child’s parent or custodian and tribe be given notice of any custody proceedings, as well as the right to intervene. §§1912(a), (b), (c). Section 1912(d) requires a party seeking to terminate parental rights or to remove an Indian child from an unsafe environment to “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent breakup of the Indian family,” and a court cannot order relief unless the party demonstrates, by a heightened burden of proof and expert testimony, that the child is

*Together with No. 21–377, *Cherokee Nation et al. v. Brackeen et al.*, No. 21–378, *Texas v. Haaland, Secretary of the Interior, et al.*, and No. 21–380, *Brackeen et al. v. Haaland, Secretary of the Interior, et al.*, also on certiorari to the same court.

Haaland v. Brackeen

No. 21-376

Released June 15, 2023

A full copy of the opinion is available
here: https://www.supremecourt.gov/opinions/22pdf/21-376_7l48.pdf

Haaland v. Brackeen Summary

In this 7-2 opinion (Alito and Thomas dissent) the Supreme Court **rejected all of the challengers' arguments**, and:

- Upheld Congress' Constitutional authority to protect Indian children
- Demonstrated a strong understanding of the principles of Indian law
- Recognized the sovereignty of tribal nations.

“The issues are complicated— so for the details, read on. But the bottom line is that we reject all of petitioners’ challenges to the statute, some on the merits and others for lack of standing.”

(p. 2)

- Justice Coney-Barrett

Overview

- ICWA is deemed consistent with Congress' Constitutional Authority under Article 1.
- Claims that ICWA's active efforts requirement (§ 1912(d)) and placement preferences (§ 1915) violated the principles of anti-commandeering are rejected on the merits.
- No party before the Court had standing to raise equal protection challenges to ICWA's placement preferences (§ 1915)

The Order

Affirms the judgment of the Court of Appeals regarding Congress's constitutional authority to enact ICWA.

- As this is an area where we previously won, **affirmation is appropriate.**

On the anti-commandeering claims, reverses.

- As this is an area where we previously lost, **reversal is necessary.**

On the equal protection and nondelegation claims, the court vacates the judgment of the Court of Appeals and remands with instructions to dismiss these claims for lack of jurisdiction.

- **These must be dismissed in the 5th Circuit** because the Supreme Court opinion holds that there was no standing for that court to hear these issues.

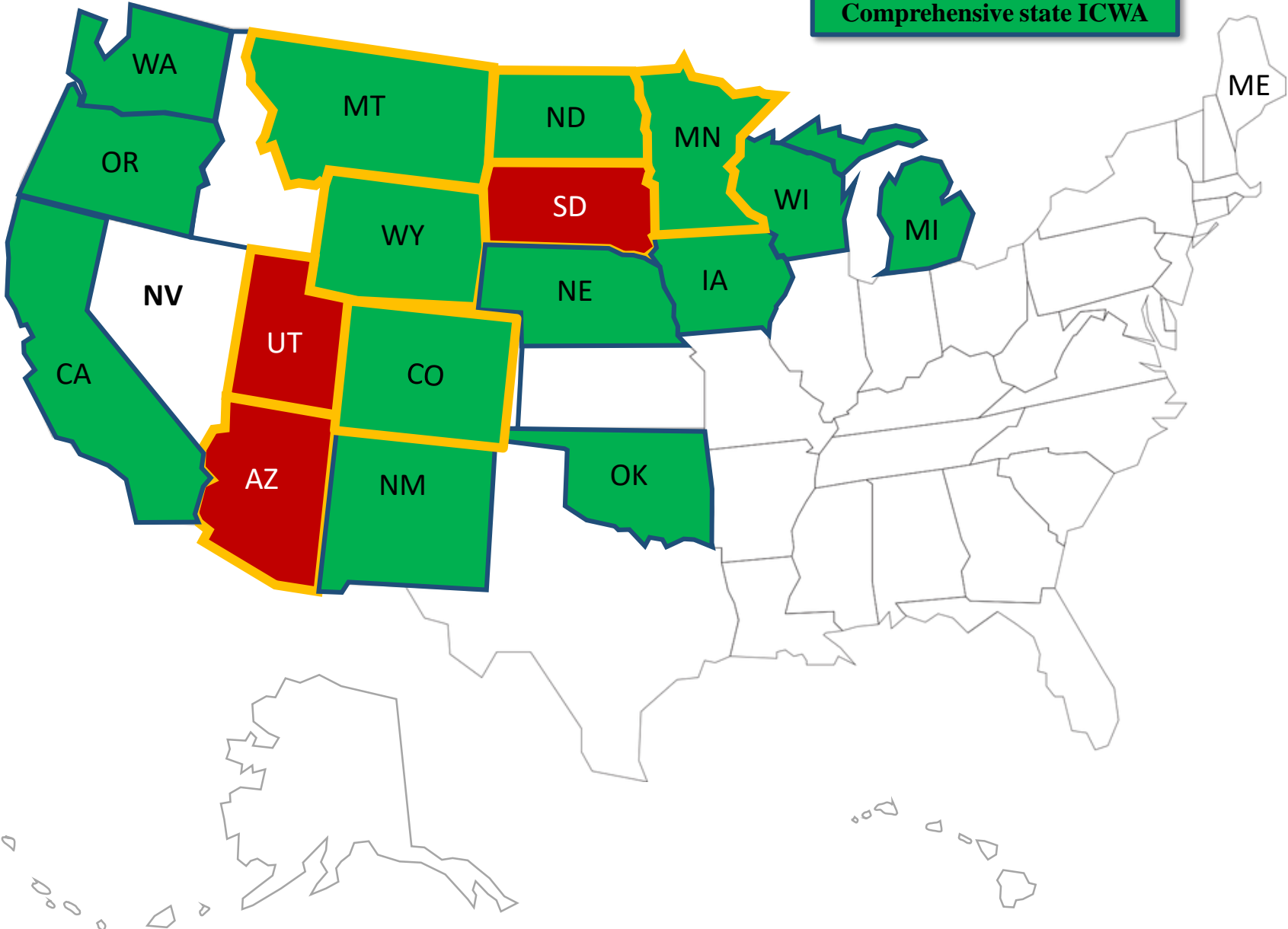
Haaland v. Brackeen

“Often, Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands. But that is not because this Court has no justice to offer them. Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life..... In adopting the ICWA, Congress exercised that lawful authority to secure the **right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history.** All of that is in keeping with the Constitution’s original design.”

Justice Gorsuch, concurrence

**Introduced/failed ICWA Laws
in 2023**

Comprehensive state ICWA



ICWA as Gold Standard

- Children’s right to their families and communities;
- Active efforts to preserve and reunify families;
- Valuing inclusive and diverse cultural practices;
- Authentic engagement with Tribes



Legal Responsibilities



- Identification of “*Indian Child(ren)*”
- Proper exercise of jurisdiction
- Proper notice of proceedings
- “*Active efforts*” to preserve the family
- Use of QEW & proper standard of review
- Placement preferences
- Transfer to Tribal Court(s)

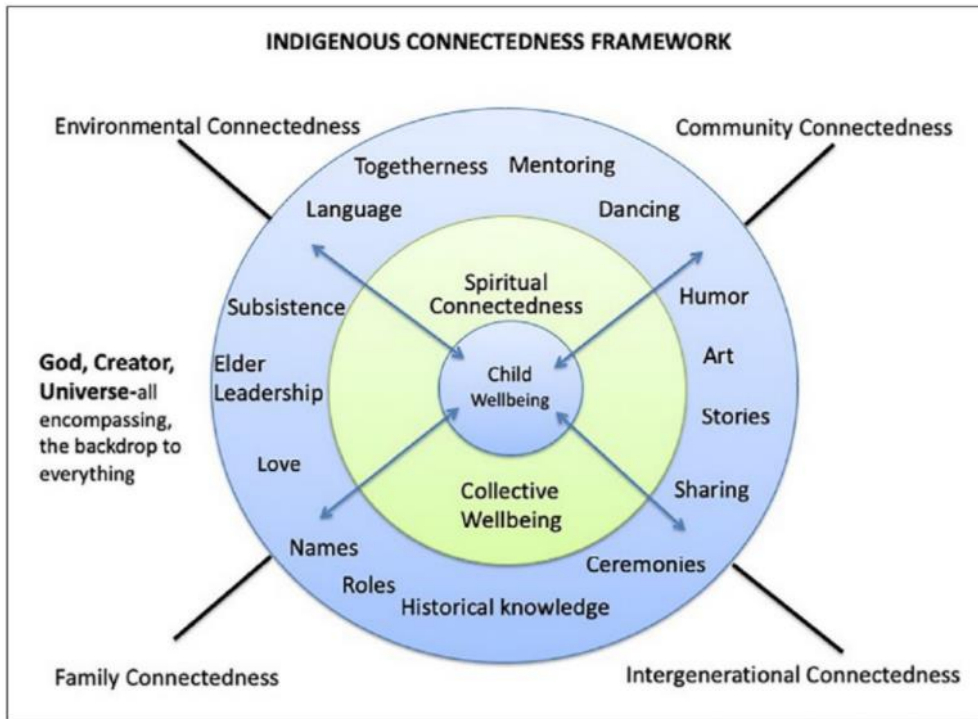
Active Efforts to prevent Removal



Table 1: Reasonable vs. Active Efforts

Reasonable Efforts	Active Efforts
Referral for services	<ul style="list-style-type: none"> ◆ Arranging services ◆ Aiding transportation ◆ Helping family engage
Managing case	<ul style="list-style-type: none"> ◆ Proactively engaging in diligent casework ◆ Follow-up ◆ Visits ◆ Service provision
Meeting minimum policy standards	<p>Creatively meeting the needs of the family involved, even if that means going above and beyond the minimum policy standards. For example:</p> <ul style="list-style-type: none"> ◆ More contact than required by policy ◆ More visitation than required by policy ◆ Engaging with extended family members
Mainstream service provision	Culturally appropriate service provision
Updating tribe/tribal social worker	<ul style="list-style-type: none"> ◆ Seeking service and case management suggestions ◆ Actively co-case managing when the tribe has available personnel

“*Connectedness*” as a policy?



- What does this framework mean for the timelines?
- What does this framework mean for Termination of Parental Rights?
- Bond and attachment plus infinity.

ICWA Court Movement

- 20 ICWA Court jurisdictions
- Significant impact for Indian children & families.
- What is gold standard lawyering or social work?



ICWA Court Results

1. ICWA determinations significantly earlier in case
2. Parents were frequently at the ICWA Court hearings (especially earlier);
3. Indian children were placed within the placement preferences at earlier stages of the case;
4. Case closure (permanency) 286 days earlier;
5. Higher permanent custody with relatives.
6. Tribal representatives were present more frequently.



ICWA Court Results

- Outcomes:
- **Preferred placement:** time to notice; parents presence across the life of the case (including attorney).
- **Reunification:** Mother being present; Tribe being present at initial hearing 52% (compared to 40%)
- **Time to Permanency:** active efforts finding at initial hearing; tribal rep at initial hearing; time to confirm ICWA status: **Tribe being present shortens the time to permanency by 125 days.**
- **Time to return home:** Confirming child's ICWA status is significant. **Mother engagement throughout the life of the case is the most significant predictor of reunification.**
- **Relative custody/adoption:** Sample too small
- **Enhanced ICWA Application:** Parents attorney at hearing, Tribe being present, finding of ICWA early. Longer notice less ICWA application.

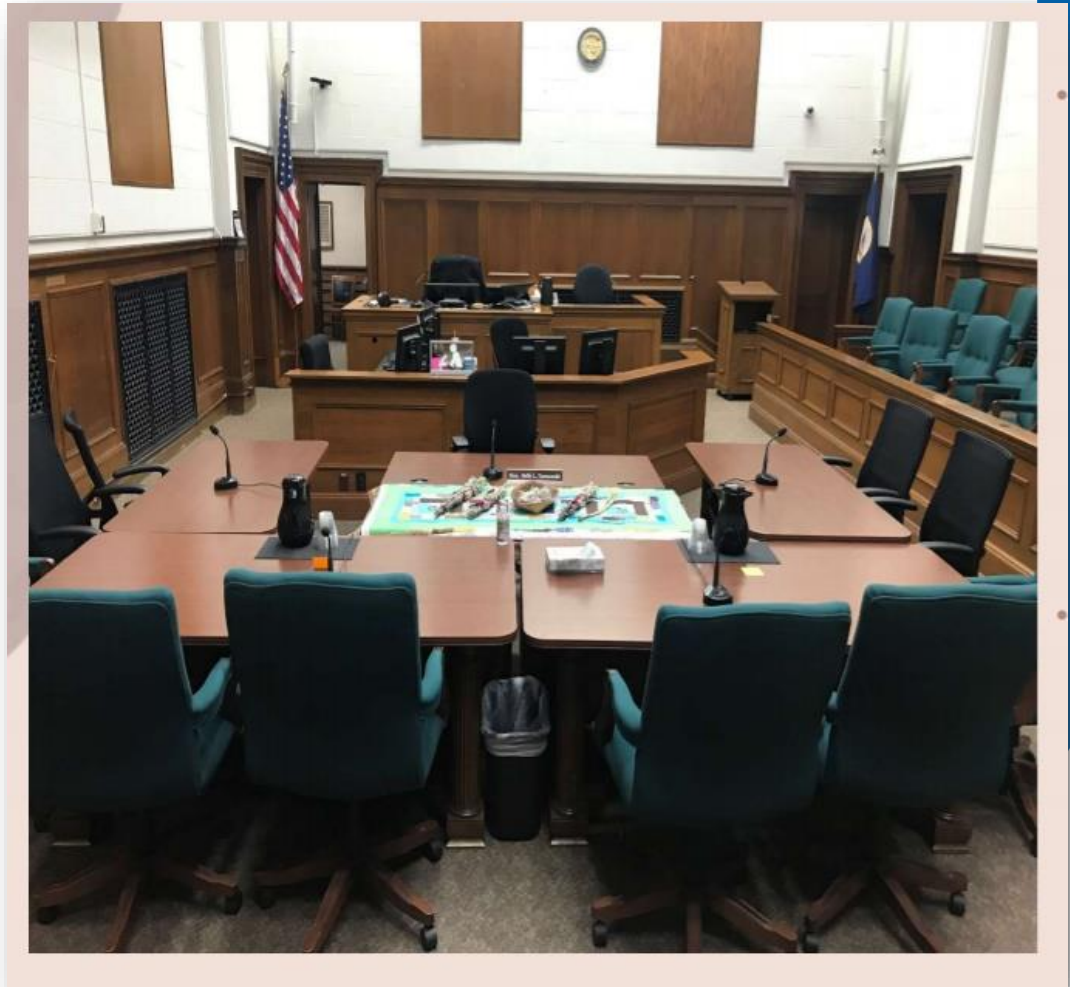


ICWA Court Innovation

St. Louis County (Duluth),
Minnesota, Judge Sally Tarnowski

Collaborative representation
model

- Everyone at the table;
- Everyone speaks;
- Medicines gifted from Tribes in the center of the circle (square table).



“I am an AGENT OF CHANGE”

- Cultural humility
- Gold standard representation
- Solution orientation

