

Indian Child Welfare Act (ICWA) 25 UCS § 1901 et seq., 25 CFR Part 23

1

ICWA

- governs foster care, termination of parental rights, and adoption of Indian children and imposes special standards and requirements when a child welfare agency acts to protect an Indian child.
- protects not only eligible children, but their families (including their non-Indian parents) and their tribes.

WARNINGS:

The word "Indian" will be used throughout this presentation to match the language of the law and regulations. While "Native American" or "indigenous" may be politically correct, "Indian" is the legally correct, defined term for ICWA.

2



ARTICLE I, SECTION 8, CLAUSE 3:
(THE CONGRESS SHALL HAVE POWER)

TO REGULATE COMMERCE WITH FOREIGN NATIONS,
AND AMONG THE SEVERAL STATES,
AND WITH THE INDIAN TRIBES;

Authority of Congress over Indian tribes derives from Commerce Clause; interpreted and reshaped by SCOTUS decisions regarding concept of tribal sovereignty.

SCOTUS has ruled that Congress (and only Congress) has intrinsic power to conduct business with and enact legislation concerning Indian **NATIONS** located within the borders of US.

Indian Commerce Clause US Constitution, Article I, Section 8, Clause 3

3

HISTORY:

- 1492: Columbus arrives
- 1607: Jamestown “settled”
- 1783: Treaty of Paris
- 1785: Treaty of New Hopewell
- 1789: US Constitution ratified
- 1830: Indian Removal Act
- 1832: Worcester v. Georgia
- 1838: Cherokee Trail of Tears

1492: >5 million Indians; 1900: ~237,000

- 1785 Treaty of Hopewell was among the first treaties signed between the U.S. government and the Cherokee. It acknowledged that the Cherokee and the U.S. had boundaries and that the U.S. would protect the Cherokee from whites trying to take their land. White settlers get Johnson City & area around Nashville; otherwise, Western border of US over near Asheville and Indians got all of Tennessee. Hopewell first to be signed & first to be broken (by John Sevier)
- Removal policy of the 1820's led to the 1830 Indian Removal Act directing President to enter into treaties to exchange lands occupied by Indians east of the Mississippi for lands to the west (i.e., Oklahoma). Those choosing to remain in the east would lose their Indian status and become citizens of their home state.
- SCOTUS held Cherokee Nation is sovereign entity, not subject to Georgia laws, only to treaties and acts of Congress. President Andres Jackson reputed to have said: “John Marshall has made his decision; now let him enforce it.”

4

HISTORY:

1868: Fort Laramie Treaty

1871: Indian Appropriations Act

1874: Gold discovered in Black Hills

1887: Dawes Act

•1868, US signed its last treaty with a confederation of tribes. Established Great Sioux Reservation west of Missouri River, designated Black Hills & much of ND, SD, MT, WY, NB & CO for “absolute & undisturbed use & occupation of Sioux Nation. Of course, reneged on treaty (gold was found—what do you expect!). Confined Indians to reservation.

•Indian wars continued, but US signed no more treaties. 1871 Indian Appropriations Act declared there would be no more.

[SIDEBAR: 1975 US Ct. of Claims wrote, “A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history.” 1980, SCOTUS agreed; ruled US illegally appropriated Black Hills. Awarded more than \$100 million in reparations. Sioux Nation refused the money (now worth > \$ 2.3 billion), insisting land sacred and never for sale. Monies being held in escrow by BIA]

1887 Dawes Act—allotment of lands (like “homesteads”) to Indians living on Indian land. Need census to determine who gets a piece. Once allotment to Indians is accomplished, can sell “excess” to settlers. Land may still be on a reservation or inside Indian Territory, but now owned by non-natives. Policy to eliminate traditional communal ownership and to “encourage” Indians to adopt “white” lifestyle.

5

HISTORY:

1819: Civilization Fund

1860: Fort Simcoe Boarding School on Yakima Reservation

1879: 1st students at Carlisle Indian Industrial School

Continental expansion continued, missionaries headed west and began mission schools to civilize the natives, supported in part by federal funds. The boarding school experience for Indian children began in 1860 when BIA established first Indian boarding school on Yakima reservation in Washington. By 1880's fed. govt. operated 60 reservation day- and boarding-schools for 6200 students.

The “savages,” however, were not getting civilized. Reservation schools not sufficiently removed from the influences of tribal life. According to the Commissioner of Indian Affairs Annual Report, 1888: “It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught how to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization....They must be withdrawn, in their tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work and to think after the manner of the white man.”

6

An Army officer, Richard Pratt, founded the most well-known of these schools, the Carlisle Indian School in Carlisle, PA. Many before/after pictures were distributed showing Indian children as they arrived on campus and again a few months later.



"A great general has said that the only good Indian is a dead one. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."

Richard Pratt, 1892

7



Cut braids, burned clothes, new names, punished for native language. Attendance NOT voluntary.

2022/2024 report to Sec. of Interior

1819-1969:

- * 417 federally funded boarding schools*
- * 1,025 "other institutions"*
- * At least 18,624 children attended*
- * At least 973 died*

1925: nearly 83% of school-age in boarding school

1928: Merriam Report recommended closing.

1971: 17% of Indian children still in boarding schools.

8

HISTORY

1958-1967 CWLA Indian
Adoption Project

Indian Adoption Project, sponsored by BIA ,managed by Child Welfare League of America.

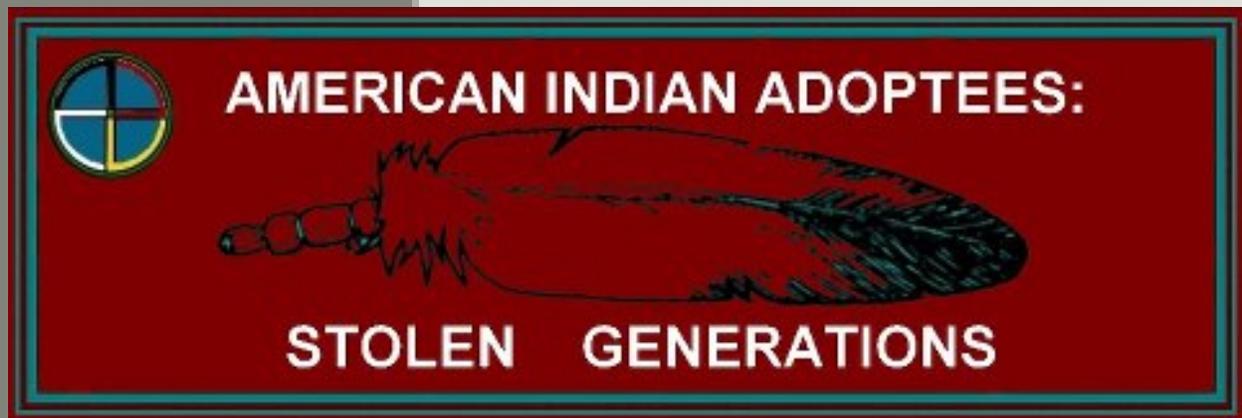
Pilot to place 50 children, officially placed 395. Other agencies joined the movement although not officially part of the program. Estimates more than 12,000 Indian children from Western States & Alaska placed for adoption with non-native families primarily in Eastern States (including Tennessee) between 1959 and 1976.

Surveys conducted in 1969 and 1974 showed that approximately 25-35% of all Indian children were separated from their families.

9

HISTORY:

"If you want to solve the Indian problem you can do it in one generation," one official put it. "You can take all the children of school age and move them bodily out of the Indian country and transport them to some other part of the United States. This would allow "civilized people" to raise the children, instead of their families or tribal communities."



10



Indian Child Welfare Act (ICWA) 25 UCS § 1901 et seq., 25 CFR Part 23

With that history, should not be surprised that tribes worked diligently to pass ICWA to stop loss of their children. In 1978, 25% to 35% of American Indian children were being placed in foster homes; 85% of those were outside their tribal communities.

11

ICWA: Interpretation



- BIA Guidelines (1979)
- Holyfield, 490 US 30 (1989)
- Baby Girl, 570 US 637 (2013)
- BIA Guidelines for Implementing ICWA (December 2016) (*non-binding guidelines*)
- ICWA Proceedings, 25 CFR part 23 (December 2016) (*binding regulations*)
- Brackeen, 599 US 255 (2023)

12

QUESTION 1:

When does ICWA apply?

25 USC § 1903

13

Application:

ICWA applies to

- any child custody proceeding
- where the court knows or has reason to know
- that an Indian child is involved.

14

QUESTION 2:

Who is an Indian child?

25 USC § 1903(4)

15

Definition: Indian child

- Unmarried person under the age of 18
- Who is a member of an Indian tribe
- Or the biological child of a member of an Indian tribe
- And eligible for membership.

Does not require legitimation or paternity order, just acknowledgment according to tribal custom.

Mother may be married to somebody else.

And provides same protections to non-Indian parent.

16

Definition: Tribe

Applies only to

- federally recognized tribes and
- Alaskan Native villages.

Does not apply to Canadian tribes or to an American tribe not currently recognized (regardless of where the Tribe's application may stand.)

Currently 573 federally recognized tribes; almost half (229) are in Alaska.

17

Membership (citizenship)

Determined by Tribe

Each tribe has its own requirements

Tribe's determination is conclusive

For example:

*Choctaw Nation (Oklahoma):
descendant from 1906 rolls*

*Mississippi Band of Choctaw Indians:
on rolls in January 1940 or child born
to enrolled member and at least ½
Choctaw.*

*Cherokee Nation (Oklahoma):
descendant from Dawes Rolls of
citizens and Freedman.*

*Eastern Band of Cherokee Indians:
descendant from 1924 roll & 1/16th
Cherokee*

18

QUESTION 3:

Who is protected?

19

ICWA protects:

- Indian children
- biological parents (even if non-Indian) of Indian children
- Indian custodians
- Indian tribes

But does NOT protect:

- unwed biological fathers who have never “acknowledged” paternity
- non-Indian custodians or parents who adopted an Indian child

Indian Custodian means a person who has legal custody under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child. E.g., child being raised by an aunt.

20

QUESTION 4:

What is a child custody proceeding?

25 USC § 1903(1)

21

Definition: child custody proceeding

Any action that may result in foster care, termination of parental rights, adoptive placement or adoption

- including a “voluntary” proceeding that could nevertheless prevent the parent from regaining custody
- and including out-of-home placement from a status offense
- but not a delinquent act

May apply in a delinquency case if proposed out-of-home placement is based upon the fitness of the parents rather than the criminal act by the child.

22

QUESTION 5:

How does the court know?

23

Definition: reason to know

- anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child
- the domicile or residence of the child or a parent/Indian custodian is on a reservation or in an Alaska Native village
- the child is, or has been, a ward of a tribal court
- the child or either parent has an ID indicating tribal membership

If you know or have reason to believe a child is an Indian child, must apply ICWA until otherwise determined. 25 C.F.R. § 23.107(b)

You want to

- * *avoid unnecessary delays*
- * *disrupted placements*
- * *duplicative proceedings*

24

WARNINGS

1. In **every** custody proceeding, the court is **required** to ask each participant whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child. [25 CFR § 23.107]

2. The child's status could change during the litigation if the parent discovers that transition from heritage to citizenship provides certain advantages.



25

QUESTION 6:

Who has jurisdiction?

25 USC § 1911

26

Jurisdiction: reservation child

Tribe has exclusive jurisdiction if child resides or is domiciled on reservation (or trust land).

- Domicile of child is domicile of custodial parent.
- Child could be domiciled on reservation without ever having been there.

So, a child born in a hospital 200 miles away from the reservation to a mother who lives on the reservation is “domiciled” on the reservation. That’s what Holyfield was about.

Emergency provisions similar to those of UCCJEA—ensure the child’s safety first and worry about jurisdiction second.

27

Jurisdiction: non-reservation child

State court has jurisdiction but is subject to

- transfer to tribal court OR
- intervention by tribe in State court proceeding

28

Definition: good cause

The State court may consider:

- objection of a child over 12
- *forum non conveniens*, that is, that it would be difficult for parents or witnesses to travel the distance to tribal court
- timeliness of request after adequate notice
- parents of child >5 are not available and child has no contact with Tribe

But may NOT consider:

- * *the stage of the proceedings*
- * *effect upon placement*
- * *child's connection with Tribe or reservation*
- * *socio-economic conditions or any negative perception of Tribal social services or judicial system*

29

QUESTION 7:

What's required in State court?

25 USC § 1912; 25 CFR 23.11

30

State court requirements--notice:

- 25 USC 1912(a) Notice

Must be sent by registered mail, return receipt requested, to:

- Parents
- Indian custodian
- Indian child's Tribe(s)

A copy of these notices must be sent to BIA.

Each new "proceeding" requires a new ICWA-compliant notice.

You are always required to provide return receipt, registered mail notice even if you have personal service.

Remember, this means the parent of an Indian child, not just an Indian parent; same notice required for BOTH parents.

If you can't identify the tribe, notice goes to Secretary of Interior.

A TPR is a new "proceeding" and requires new ICWA-compliant notice.

31

State court requirements--counsel:

- 25 USC 1912(b) Counsel

Must be appointed for indigent parents and Indian custodian.

Court may appoint counsel for child.

Counsel for parents and GAL for child are, of course, routine in Tennessee. Attorney fees for Indian custodian may be billed to Secretary of Interior.

32

State court requirements--reports:

- 25 USC 1912(c) Access to reports

Each party has a right to examine all reports or other documents

33

State court requirements active efforts:

- 25 USC 1912(d) Active efforts

Must prove active (not merely passive) but unsuccessful efforts to prevent breakup of Indian family

Generally interpreted to mean more than "reasonable efforts" but comparing apples to oranges.

*Separate laws
Separate purposes
Separate analyses*

34

Definition: active efforts

ASFA

“reasonable efforts”

Federal (IV-E) funding requirement

State may be relieved prior to removal or TPR based on prior TPR or aggravated circumstances (severe abuse)

Relative preference diminishes over time

TPR requires 15/22 months, child abandoned, or aggravated circumstances unless compelling reason not to file

ICWA

“active efforts”

Funding irrelevant

No exceptions

Relative preference always mandatory

ICWA may provide that compelling reason

35

Definition: active efforts

Problem--substance abuse

- reasonable: refer for A&D assessment
- active: make the appointment with the parent, drive parent there

Problem--visitation

- reasonable: schedule weekly visits at the office, be there to supervise
- active: schedule visits at aunt's home, drive parent there

36

State court requirements--QEW:

- 25 USC 1912(e) & (f) Qualified expert witness

Removal (aka “foster care placement”) and TPR adjudication each require testimony of “qualified expert witness”

37

Definition: qualified expert witness (QEW)

- must be qualified to testify regarding whether the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
- should be qualified to testify as to the prevailing social and cultural standards of the Indian child’s Tribe although that may not be relevant if child has not been reared on the reservation or with attention to tribal culture
- may be designated by the Tribe
- should be allowed to testify by simultaneous audiovisual transmission



Does not mean expert has to know anything about tribal culture, e.g., expert could testify to the harm that would result from returning a child to a sexual molester without any reference to tribal standards.

If QEW needs to testify from a remote location (e.g., New Mexico reservation), compliance with rules for audiovisual testimony will be required. TRCP 43.01

38

State court requirements— continued custody finding:

- 25 USC 1912(e)& (f) Continued custody finding

Each hearing requires finding that “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

This is your expert witness opinion question.

39

State court requirements— burden of proof:

- 25 USC 1912(e) & (f) Burden of proof for continued custody finding:

Foster care: clear & convincing

TPR: beyond a reasonable doubt

Again, remember this applies to BOTH parents.

40

QUESTION 8:

How does ICWA affect placement?

25 USC § 1915

41

Placement priorities:

Priority for foster care, including an emergency placement, or adoption (in the absence of “good cause”):

- child’s extended family
- Indian foster home approved by child’s Tribe
- other licensed Indian foster home
- an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs

This is a level system.

You have to exhaust all the options at one level before moving to the next.

And note what’s missing from that list—no regular DCS foster homes.

42

Definition: good cause

Any deviation from the placement priorities must be supported on the record by a clear and convincing finding that one or more of these factors exist:

- a parent's request;
- the Indian child's request;
- maintaining sibling attachment;
- extraordinary physical or emotional needs of the child;
- unavailability of a placement despite diligent search and active efforts

Since DCS has no system in place to identify Indian foster homes, consulting with the child's Tribe is the best option.

43

QUESTION 9:

What about voluntary proceedings?

25 USC § 1913

44

Voluntary proceedings

Foster care

Termination of parental rights

Adoption

Notice to Tribe not required for off-reservation child

State court has no jurisdiction for reservation child.

Includes any temporary custody/care arrangement, such as guardianship, institutional care, etc.

Considered voluntary if parent can regain custody upon demand.

Includes step-parent adoption.

Remember, applies to non-Indian parent as well.

45

Voluntary proceedings

25 USC 1913(a)-(d)

- Surrender or consent cannot be done until child is at least 10 days old.
- Can be withdrawn at any time before finalization.
- Can be challenged for fraud or duress up to 2 years after finalization.

If consent is withdrawn, for any reason, child must be returned immediately.

Forget Tennessee's 9-month "statute of repose".

46

QUESTION 10:

Has ICWA been challenged?

47

Existing Indian Family

Judicially created exception originating from Kansas in 1982 (& since repudiated there)

Court interpreted ICWA as being concerned only with removal of Indian children from an existing Indian family unit.

In re Jeffrey Thomas Morgan, No. 02A01-9608-CH-00206 (Tenn. Ct. App. Nov. 19, 1997)

“...wary of an exception to a federal statute created by state courts...” but nevertheless persuaded to adopt Existing Indian Family Doctrine.

In re K.L.D.R., No. M2008-00897-COA-R3-PT (Tenn. Ct. App. April 27, 2009)

...discern no reason to reach a different conclusion.”

2016 BIA Guidelines made it clear that this doctrine is not compatible with federal law.

48



"Hang the code, hang the rules. They're more like guidelines anyway."

Jack Sparrow

49

Brackeen

Attempt to adopt Navajo/Cherokee child over objection of Navajo Nation.

Challenge to ICWA & concept of Tribal sovereignty continued through 3 federal courts to SCOTUS.



50



Haaland v. Brackeen (June 2023)

51

Brackeen

In adopting the Indian Child Welfare Act, 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. (Gorsuch, concurring opinion)

52



“The Act is based on the fundamental assumption that it is in the Indian child’s best interest that [the child’s] relationship to the tribe be protected.”

53

Consequences

If you discover during your case that you are actually dealing with an Indian child, you must provide notice to the Tribe immediately and face the possibility that the entire case will be removed to Tribal court and that everything you have done so far will be invalidated.

If the Tribe chooses to intervene, even if for the sole purpose of providing testimony as to the child’s best interest, you must still adjust your case strategy to incorporate the heightened burden of proof, the specific required findings, and the expert witness.

The Indian child, parent or Tribe may petition to invalidate your custody or TPR order based on a violation of ICWA. [25 USC § 1914; 25 CFR § 23.137]

At best, failure to comply with ICWA is likely to result in significant delay to permanency; at worst, that non-compliance could cause disruption and many broken hearts.

54



55

For more information about ICWA, see:

Bureau of Indian Affairs: Extensive information about ICWA, including links to the law, guidelines and regulations as well as directory of individual tribal Designated Agents.

- <https://www.bia.gov/bia/ois/dhs/icwa>

Native American Rights Foundation, [A Practical Guide to the ICWA](#)

- <http://www.narf.org/nill/documents/icwa/>

McGirt v. Oklahoma, 140 SCt 2452 (2020). “On the far end of the Trail of Tears was a promise. . . we hold the government to its word.”

Haaland v. Brackeen, 599 US 255 (2023) (Gorsuch, J. concurring)

And enjoy reading [The Bean Trees](#) and [Pigs in Heaven](#) by Barbara Kingsolver

56