Indian Child Welfare Act
Past and Present

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Historical Context by Eras

- **Pre-Contact**
- **Military balance 1492—1832 (340 years)**
  - Sovereignty, Nation to Nation
  - Alliances, Revolutionary War
  - Treaties, Constitutional Recognition
- **Attempted removal and annihilation (1800—1870)**
  - Military threat, starvation, disease
  - Land Companies, leases,
  - Indian Removal Act, forced relocations
- **Assimilation policy (1855—1970)**
- **Self-determination policy (1968—Present)**
Consequences

- 50% loss of life
- 99% appropriation of land
- Historic trauma and intergenerational grief
- Poverty, and adverse childhood experiences
- Historic distrust
Post-Colonial Reality

- Disparities – racial inequity in economic security, health, education, social conditions
- Disproportionate representation in systems (over and under)
- Poor outcomes for AI/AN children in state/federal services
- Barriers to self-determination – funding
- ICWA not fully implemented
“Colonization dismembered our culture, our people, and our families. Our job is Re-membering.”

Theda Newbread
Blackfeet
Historical Trauma and Unresolved Grief

• **Historical trauma** is cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma (Brave Heart 1985-88)

• **Historical unresolved grief** accompanies that trauma


© Maria Yellow Horse Brave Heart, PhD
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Historical Trauma Response

• The *historical trauma response* (HTR) is a constellation of features in reaction to massive group trauma

• This response is observed among Lakota and other Native populations, Jewish Holocaust survivors and descendants, Japanese American internment camp survivors and descendants.

Trauma, Child Abuse, Mental Health

Depression, Anxiety, Substance Abuse

Mental Health Issues

Historic Trauma

Boarding School/Placements

Victims of Abuse, Loss, Trauma

Lack of Parenting Skills

Loss, Victimization

Damage Attachments

Complex Trauma

Removals

Collective Trauma

National Indian Child Welfare Association
Protecting Our Children • Preserving Our Culture
RISK FACTORS
What is an Adverse Childhood Experience (ACE)?

The experience of “significant abuse or household dysfunction during childhood”

Specific indicators:

- Recurrent physical abuse
- Recurrent emotional abuse
- Contact sexual abuse
- An alcohol and/or drug abuser in the household
- An incarcerated household member
- Someone who is chronically depressed, mentally ill, institutionalized, or suicidal in the household
- Mother is treated violently
- One or no parents
- Emotional or physical neglect

(Division of Adult and Community Health, National Center for Chronic Disease Prevention and Health Promotion, CDC, 2010)
Brockie’s Study (2011)

• 23% of Native youth experienced 4 or more ACEs
• Significant impact on four outcomes
  – Suicide
  – Poly-drug use
  – PTSD
  – Depression
1976
Indian Country Child Welfare Findings

- 25–35% of all AI/AN children nationwide were removed from their homes—of these children 85% were being placed in non-Indian homes.

- AI/AN children brought up in non-Indian homes suffered from a variety of adjustment and emotional disorders due to isolation from their families and culture.

- In many AI/AN adoption situations mothers were being pressured and coerced into “voluntarily” relinquishing their parental rights.
Congress passed ICWA acknowledging:

- **Sovereignty**: Tribe’s right to protect their families and children
- **Self-determination**: That tribes best know the needs of their families and children
- **The Trust Relationship**: Congress has a responsibility to right the wrongs of their past actions and ensure the well-being of AI/AN children
What Does ICWA Do?

• Establishes minimum federal standards for state removal of Indian children from their families

• Recognizes tribes inherent tribal jurisdiction over child custody proceedings

• Provides assistance to Indian tribes in the operation of child and family programs
Major Provisions ICWA

- Identification
- Active Efforts
- Notice
- Placement Preferences
- Tribal Intervention, Party to the Case
- Transfer of Jurisdiction
- Full Faith and Credit
- Tribal State Agreements
Why is ICWA Still Needed?

- Serves the Best Interest of Indian Children
- Reduces Continuing Disproportionality
- Addresses Needs, Disparities, and ACEs
- Corrects Past Harms
- Avoids Perpetuating Trauma
- Brings Tribal Resources to Families
- Recognizes Sovereignty
Overrepresentation of AI/AN children in care is related to poverty, poor housing, poor education, untreated mental health issues, and caregiver substance misuse.
Set Up for Failure

Are these problems that families can solve by themselves?
System engages the family

Family

Child

Assumes the family (with the support of Active Efforts) is the better parent.
Tips for Engaging Tribes

• Get involved in local community issues/ know each community
• Build and be aware of your circle of contacts for that community
• Talk to American Indian and Alaska Native experts:
  • Build relationships/trust
• Supervisors: encourage staff participating and getting involved with the community
• Be trauma informed
ICWA is necessary because it:

- Ensures that states consider tribal values when working with AI/AN children and families
- Empowers tribes to care for and serve their children in culturally appropriate ways
- Counterbalances bias in people and the system
- Expands the resources available to AI/AN children
- Protects the best interests and unique rights of AI/AN children as tribal members
- Fulfills the federal trust responsibility
Why is it so important that ICWA is correctly applied?

- It is a federal law
  - Attorneys, judges and social workers have ethical obligations to uphold the law
- Where ICWA is not followed proceedings can be invalidated
  - Child, parent or tribe can petition for the invalidation of foster care placement or TPR where the act has not been followed

FR G.1; G.2
ICWA applies to:

1) all **state child custody proceedings**

2) involving an **Indian Child**
   - Unmarried
   - Under 18 years of age
   - Tribal member or child of tribal member and eligible for membership

* Indian Child is term used in ICWA for AI/AN child who is a member or eligible for membership in federally-recognized tribe

25 USC § 1903(1), (4); 25 CFR § 23.2, 23.103 and FR A.3(e)
Application: What is a “Child Custody Proceeding”?

Both voluntary and involuntary
• Foster Care Placement
  – Foster care, institution, conservator or guardianship
• Termination of Parental Rights
• Pre-adoptive Placement
  – After TPR, but prior to adoption
• Adoptive Placement
  – Voluntary/involuntary

25 USC § 1903(1); 25 CFR § 23.103 and FR A.2; FR A.3(a)
Application: What is a “Child Custody Proceeding”?

Other state child custody proceedings covered:

- Status offenses, such as truancy or incorrigibility, that result in foster care, termination of parental rights or adoption

- Status offense could be adjudicated as a part of a juvenile delinquency proceeding that is not based upon the commission of a crime

25 CFR § 23.103 and FR A.2/A.3(a)
State proceedings not covered:
• Divorce/separation proceedings
• Child custody disputes between parents
• Juvenile delinquency proceeding based on actions that would be a crime if an adult

25 CFR § 23.103 and FR A.3(e)
Application and Identification or Inquiry: Who is an Indian child?

- State court must ask each participant if they know or have reason to know if child is an Indian child.
- If reason to know, but can’t confirm, court must:
  - Confirm due diligence was used to identify and work with tribe(s).
  - Treat child as an Indian Child until confirmed.

25 USC § 1903(4); 25 CFR § 23.107 and FR A.3 (c); B.2
Application: Who is an Indian child?

- **Has reason to know** a child is an Indian child:
  - Any participant informs the court that the child is an Indian child or has information related to this
  - Child gives the court reason to believe he/she is an Indian child
  - Domicile or residence of the child, parents, or Indian custodian is in Indian Country
  - Child is or has been ward of a tribal court
  - Parent or child possesses tribal ID card
  - Parent request for anonymity does not relieve any party from duty to comply with ICWA

25 CFR § 23.107 and FR A.3 (c); B.2
Notice

Notice must be sent by *registered or certified mail* with return receipt to child’s tribe(s) and child’s parents (or Indian custodian)

Notice is required for each initial proceeding and proceeding thereafter.

Emergency proceedings require notice, but not formal notice.

* Initial contact may occur electronically or in another format but this is not a substitute for formal notice

25 USC § 1912(a); 25 CFR § 23.111 and FR B.6
Notice

See BIA website for tribal agent’s contact information

If parent or Indian Custodian appears without attorney, court must inform them of right to counsel, right to petition transfer to tribal court, right to object to transfer, right to request additional time, and right to intervene.

25 USC § 1912(a); 25 CFR § 23.111 and FR B.6
• How do I support timely identification and notice? What tools/resources and practices do I use?

• How do I support the child becoming a member of their tribe (eligible, but not enrolled)?
Jurisdiction: What must the court do?

- The state court must make a determination of the *residence and domicile* of the child to determine if they have jurisdiction – contact the tribe.

- If the residence or domicile is on tribal lands or the child is a ward of the tribal court, the state court *must* dismiss the case, notify the tribe of its jurisdiction, and transmit all information to the tribe.

25 USC § 1911(a); 25 CFR § 23.110 and FR B.5
Transfer of Jurisdiction

- Upon petition by the tribe, parent, or Indian custodian, a child custody proceeding (FC or TPR) must be transferred to tribal court
  - The right to request a transfer occurs at each proceeding and at each stage of the proceeding

- UNLESS the following occurs
  - Either parent objects to the transfer
  - Tribal court declines jurisdiction
  - State court determines that “good cause” exists to deny transfer

25 USC § 1911(b); 25 CFR § 23.115-117 and FR C.1-C.2
Good cause restrictions:

- The court may not consider:
  - Whether or not the case is at an advanced stage when the tribe or parents/custodian have not received notice at an advanced stage
  - Whether there were prior proceedings where transfer was not requested
  - Whether transfer could effect the placement for the child
  - The child’s contacts with the tribe or community
  - Reservation socio-economic conditions or any negative perception of tribe or BIA social services or tribal court

25 CFR § 23.118 and FR C.3
Emergency Removal

The state may exercise temporary emergency jurisdiction when the child is at risk of *imminent physical damage or harm*

– Children domiciled on tribal lands who are temporarily off and children domiciled off tribal lands

25 USC § 1922; 25 CFR § 23.113 and FR A.2; FR B8
Emergency Removal

- Temporary emergency custody cannot be continued for more than 30 days unless court makes all of the following determinations:
  - Restoring child to parent or Indian custodian would subject child to imminent physical damage or harm
  - Court has been unable to transfer proceedings to the child’s tribal court
  - It has not been possible to initiate a child custody proceeding

25 CFR § 23.113; FR B.8
Intervention

- Tribes have a right to intervene in any ICWA proceeding at any point in the proceeding (involuntary or voluntary)
- When a tribe intervenes it is guaranteed all the privileges of any other party
- Courts should allow alternative methods of participation court proceedings (telephonic, videoconferencing, etc.)

25 USD § 1911(c); 25 CFR 23.111, 23.133 and FR B.7(d)
Tribal intervention: What does it look like?

<table>
<thead>
<tr>
<th><strong>Monitoring</strong></th>
<th><em>May change depending on tribal resources, agreement with case plan goals, changes in placement, or rulings by the court</em></th>
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<tbody>
<tr>
<td>Means following the case and reviewing records and other information, and sometimes making recommendations.</td>
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<table>
<thead>
<tr>
<th><strong>Active participant</strong></th>
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<tbody>
<tr>
<td>Means monitoring and participating in some or all court hearings and case reviews and making recommendations.</td>
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<tr>
<th><strong>Advanced participant</strong></th>
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<tr>
<td>Means monitoring and participating in all court hearings and case reviews, providing recommendations, and assisting in the coordination of services or resources for the family.</td>
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Involuntary Foster Care Placements

No foster care placement may be ordered without:

1) **Active efforts** to provide remedial services to prevent family breakup **25 USC § 1912(d)**

2) “**Clear and convincing evidence**” that “continued custody of a child by the parent is likely to result in serious emotional or physical damage to the child.” **25 USC § 1912(e)**

3) **Qualified expert witness** testimony **25 USC § 1912(e)**

4) **Placement preferences** must be followed. **25 USC § 1915(b)**
Active efforts are engaging families with appropriate services

25 USC § 1912(d); 25 CFR § 23.2 and FR A.4; FR B.1

<table>
<thead>
<tr>
<th>Reasonable</th>
<th>Active</th>
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<tbody>
<tr>
<td>Referral</td>
<td>Arranging Services, Aiding Transportation, Helping family engage</td>
</tr>
<tr>
<td>Managing Case</td>
<td>Proactively engaging in diligent casework, follow-up, visits, service provision</td>
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<tr>
<td>Meeting minimum policy standards</td>
<td>Creatively meeting the needs of the family involved (e.g., more face-to-face contact than required by policy)</td>
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<tr>
<td>Mainstream service provision</td>
<td>Culturally appropriate service provision</td>
</tr>
<tr>
<td>Updating tribe/tribal social worker</td>
<td>Seeking service and case management suggestions and actively co-case managing where tribe has available personnel</td>
</tr>
</tbody>
</table>
Active Efforts examples:

• Conducting a comprehensive assessment of Indian child’s family, with a focus on safe reunification as the most desirable goal;
• Identifying appropriate services and helping the parents to overcome barriers;
• Identifying, notifying, and inviting representatives of the Indian child’s Tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;

25 CFR § 23.2
Active Efforts examples (cont.):

- Conducting a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family support for the child and the child’s parents;
- Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of rehabilitative services provided by the child’s Tribe;
- Taking steps to keep siblings together whenever possible;

25 CFR § 23.2
Active Efforts examples (cont.):

- Supporting regular visits with parents or Indian custodians in the most natural setting possible;
- Identifying community resources and actively assisting the Indian child’s parents and child’s family, in utilizing and accessing those resources;

25 CFR § 23.2
Active Efforts examples (cont.):

• Monitoring progress and participation in services;

• Considering alternative ways to address the needs of the Indian child’s parents and, where appropriate, the family, if the optimum services do not exist or are not available;

• Providing post-reunification services and monitoring.

25 CFR § 23.2
Ensuring Active Efforts are Active Efforts

- How do I assess whether active efforts are or have been made? Is the emphasis on the family engaging the system or the system engaging the family?

- How do I support active efforts being made in my cases?

- What are some tools, resources, or practices I use to address situations where active efforts are not being made?
Testimony of qualified expert witnesses is **required** to support a state court’s decision to place the child outside of his/her home.

- It must be part of the evidence presented.
- Court or agency should request the assistance from the tribe or the regional BIA office to locate an appropriate QEW.
- A QEW should have specific knowledge of the child’s tribe, culture and customs.
- Can’t be state caseworker assigned to case.

25 USC §1912 (e)-(f); 25 CFR § 23.122 and FR D.4
Qualified Expert Witnesses: What do they do?

Specifically, they testify to:

• Their own qualifications
• Whether continued custody of the child by the parent or Indian custodian is likely to result in emotional or physical damage
• Whether foster care placement standards and adoptive placement standards have been appropriately applied
• Whether active efforts have been provided
Foster Care: Placement Preferences

• Placement in foster care must be with a family who is:
  – A member of the Indian child’s extended family (defined by tribe)
  – A foster home, licensed, approved or specified by the child’s tribe (on or off reservation)
  – An Indian foster home licensed or approved by an authorized non-Indian licensing authority
  – An institution for children approved by an Indian tribe or operated by an Indian org suitable to child’s needs
    (in this order of preference)

25 USC § 1915 (b); 25 CFR 23.131 and F.2
Foster Care: Placement Preferences

- Foster care includes guardianship or conservatorship
- The tribe can create different placement preferences
Placement Preferences: Good Cause

The party seeking to assert good cause must show one or more of the following considerations:

- Request of the parents after reviewing placement options that are ICWA compliant
- Request of child if she can understand the placement decision
- Presence of sibling attachment only maintained through non-compliant placement

25 CFR § 23.132 and FR F.4
Placement Preferences: Good Cause

• **Extraordinary** physical or emotional needs of the child
  – Does not include **ordinary** bonding or attachment that can happen in a non-compliant placement

• The unavailability of ICWA compliant placement after a showing of diligent search to locate one (use prevailing social and cultural standards of child’s tribe)

• Court may **not** consider the socio-economic status of one placement versus another.
Involuntary TPR

Termination of parental rights may not be ordered without:

1) **Active efforts** to provide remedial services to prevent family breakup §1912(d)

2) Evidence “**beyond a reasonable doubt**” that “continued custody of a child by the parent is likely to result in serious emotional or physical damage to the child.” § 1912(f)

3) A **qualified expert witness** (QEW) testimony § 1912(f)

4) **If adoption occurs, placement preferences** must be followed § 1915(b)
Adoption Placement Preferences

• Unless there is “good cause to the contrary,” adoptive placement of an Indian child must be with a family who is:
  – Child’s extended family (as defined by the tribe)
  – Other members of the child’s tribe
  – Other Indian families
    (in this order of preference)

25 USC § 1915 (a); 25 CFR § 23.130 and F.2
The good news...
Culture Matters

Protecting Our Children, Preserving Our Culture.

www.nicwa.org
What is a Protective Childhood Experience (PCE)?

Positive relationships and experiences while growing up that protect young people from negative influences and behaviors.

Specific Indicators:
- Supportive adults
- Positive peer groups
- School activities
- Family resources
- Spiritual/Religious Connection
- Connection with Tribal elders, learning a Tribal language
- Safe and strong community
Kinship Matters

grandmas matter

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American Indians and Alaska Natives in the United States