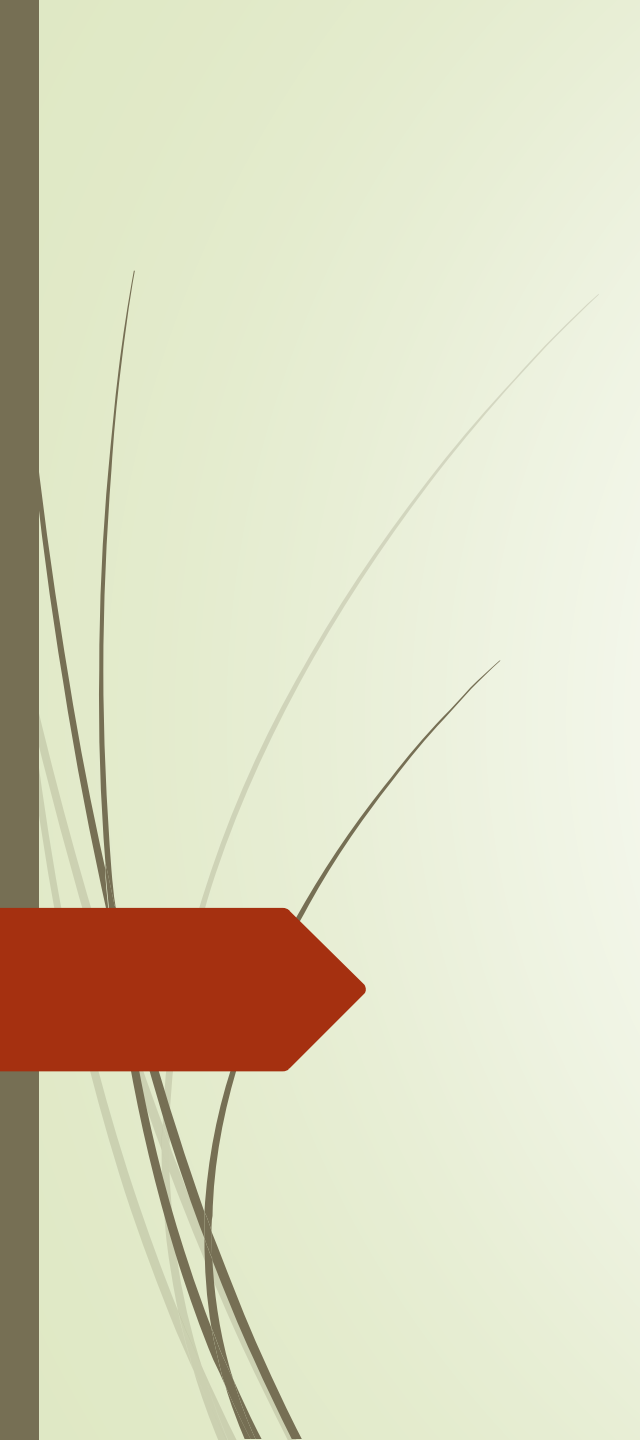




ICWA: Challenges to Honoring the Connections that Create Healing & Hope for Families

2025 Fall Family Defense Certification Training
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Golden Nugget Casino
Biloxi, Mississippi

Presenter

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History Lessons

- Prior to creation of the United States, the British and French entered into treaties (agreements between governments) with Native American tribes.
- Late 18th Century.
 - 1789 George Washington's administration's initial policy toward Native Americans was enunciated. "The Government of the United States are determined that their Administration of Indian Affairs shall be directed entirely by the great principles of Justice and humanity."
 - Reality was the intent was an expansion of the country and a quest for land and power.
- Boarding schools – explicit intent to force a new individual identity
- Adoption Era – explicit intent to create new family identity
- Federal policies of termination and assimilation intentionally created generations of children being separated from their families and tribes.
- Separating children from their tribal communities, threatened the very existence of tribes as sovereign nations, for Tribes as for any sovereign nation, children are the future
- ICWA was passed in response to this threat - to honor the connection between Tribes, as sovereign nations and tribal people as tribal citizens and to recognize this connection as the best interests of Indian children and families

Forcibly transferring children of one group to another group

- The forcible transfer of children of a protected group to another group is **the fifth punishable act of genocide**.
- It originally formed part of the definition of cultural genocide (which is not punishable as a crime) in 1948 and read as follows:

Destroying the specific characteristics of the group by (a) forced transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of the group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersal of documents and objects of historical, artistic, or religious value and objects used in religious worship.



The Why of ICWA

- In 1960s through the 1970s when ICWA became law, between 25 and 35 of all Native American children were separated from their families.
- In Minnesota, Association of American Indian Affairs found 1 in 8 American Indian children in adoptive homes and 1 in 4 American Indian children under the age of 1, where in adoptive homes

DEFINITION OF GENOCIDE

The current definition of Genocide is set out in Article II of the Genocide Convention:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Key Concepts Genocide

Forcible Transfer of Children

- **Child or children** not defined, but generally considered to be under the age of 18.
- **Forcible Transfer means**
 - Removing children from their parents or guardians and placing them in the custody of persons belonging to groups other than the one in which they had been raised up to the time of the transfer.
 - Also includes removing children from the physical place of residence, such as a neighborhood, village, district or community inhabited by members of the child's group and sending them to another location that is inhabited by members of a different group.
 - Must be by force or compulsion, without the consent of parent or guardians of the affected children.
 - Must be a member of a protected group.
 - Must be done with intent to destroy the group.

Conclusions of the Federal Indian Boarding School Initiative Investigative Report, Bryan Newland, Assistant Secretary- Indian Affairs, May 2022.

The intentional targeting and removal of American Indian, Alaska Native, and Native Hawaiian children to achieve the goal of forced assimilation of Indian people was both traumatic and violent. Based on initial research, the Department finds that hundreds of Indian children died throughout the Federal Indian boarding school system. The Department expects that continued investigation will reveal the approximate number of Indian children who died at Federal Indian boarding schools to be in the thousands or tens of thousands. Many of those children were buried in unmarked or poorly maintained burial sites far from their Indian Tribes, Alaska Native Villages, the Native Hawaiian Community, and families, often hundreds, or even thousands, of miles away. The Department's research revealed at least 53 different burial sites across the Federal Indian boarding school system and leads to an expectation that there are many more burial sites that will be identified with further research. The deaths of Indian children while under the care of the Federal Government, or federally supported institutions, led to the breakup of Indian families and the erosion of Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community.

Many more Indian children who survived the Federal Indian boarding school system live(d) with their experiences from the school(s). Moreover, several generations of Indian children experienced the Federal Indian boarding school system. The Federal Indian boarding school system directly disrupted Indian families, Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community for nearly two centuries. (Emphasis Added).



Conclusions of the Federal Indian Boarding School Initiative Investigative Report, Bryan Newland, Assistant Secretary- Indian Affairs, May 2022

Further review is required to determine the reach and impact of the violence and trauma inflicted on Indian children through the Federal Indian boarding school system. The Department has recognized that targeting Indian children for the Federal policy of Indian assimilation contributed to the loss of the following: (1) life; (2) physical and mental health; (3) territories and wealth; (4) Tribal and family relations; and (5) use of Tribal languages. This policy also caused the erosion of Tribal religious and cultural practices for Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community, and over many generations.



ICWA – the Why of Federal Legislation

- That the States, exercising their recognized jurisdiction over Indian child custody proceedings . . . **have often failed** to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities & families. ICWA §1901 (5)



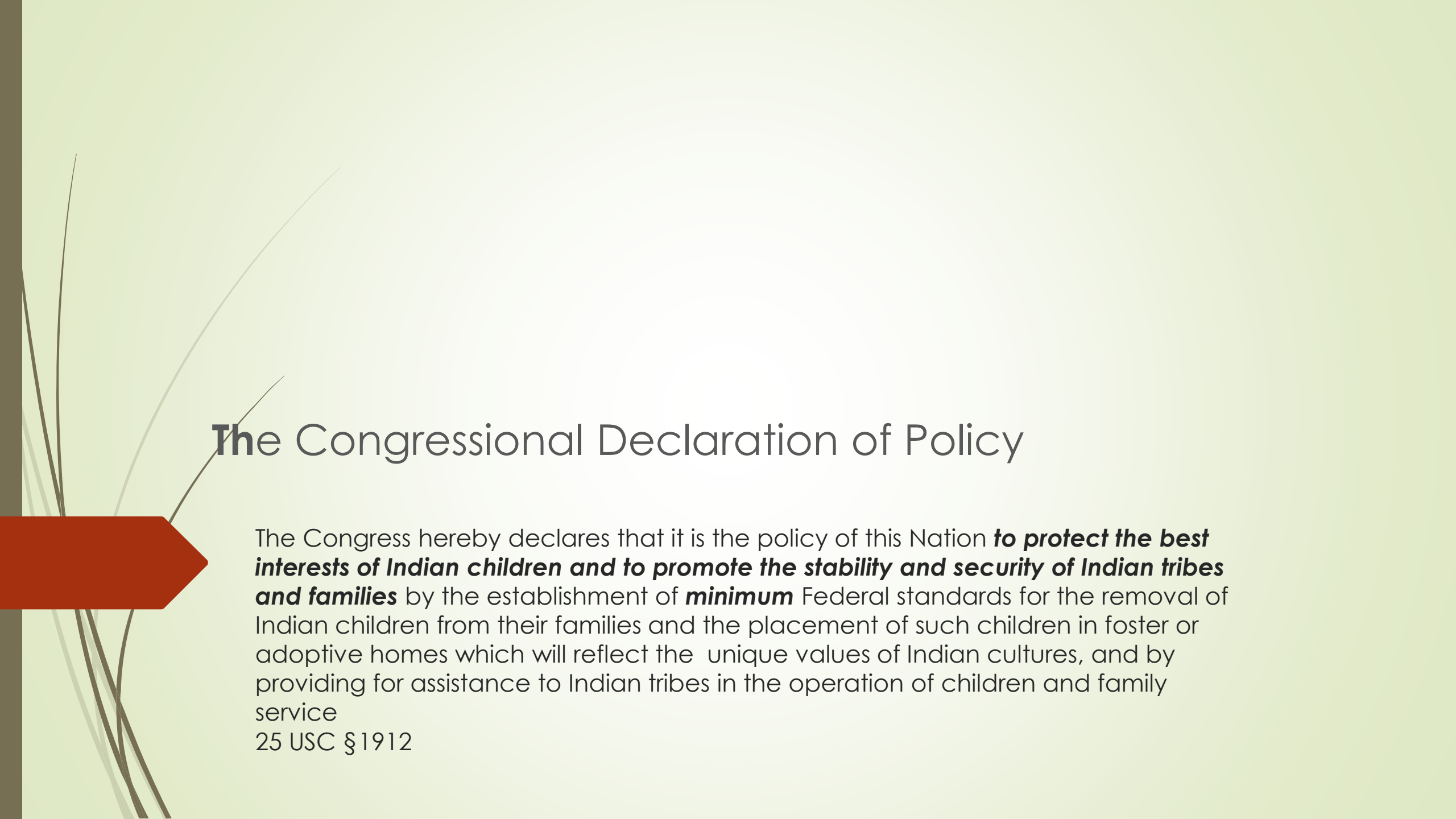
ICWA – a Federal Response

- The Indian Child Welfare Act (ICWA) was passed in 1978 to remedy the loss of Indian children through state court actions brought by Counties and Individuals which resulted in 1 in 4 and sometimes as high as 1 in 3 Indian children being removed from their families and tribal communities to be raised in primarily white adoptive and foster homes.
 - Extensive testimony was taken prior to the ICWA being passed about the devastation and trauma caused by often unwarranted removals of Indian children.
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Legislative history of ICWA ...

- No Due Process
- Parents did not receive notice
- Not told why children were removed
- Not told where children were
- Minimal judicial oversight
- No tribal involvement
- Withholding of government assistance until children were relinquished
- Consent to relinquishment or adoption while under anesthesia or in the middle of child birth.



The Congressional Declaration of Policy



The Congress hereby declares that it is the policy of this Nation ***to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families*** by the establishment of ***minimum*** Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian cultures, and by providing for assistance to Indian tribes in the operation of children and family service

25 USC §1912

The ICWA in Practice 25 USC §1912 -the force in parent representation



25 USC §1912

- (a) Notice; time for commencement of proceedings; additional time for preparation In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.
- (b) Appointment of counsel In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title. (
- (c) Examination of reports or other documents Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.
- (d) (d) Remedial services and rehabilitative programs; preventive measures Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
- (e) {e} Foster care placement orders; evidence; determination of damage to child No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- (f) (f) Parental rights termination orders; evidence; determination of damage to child No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

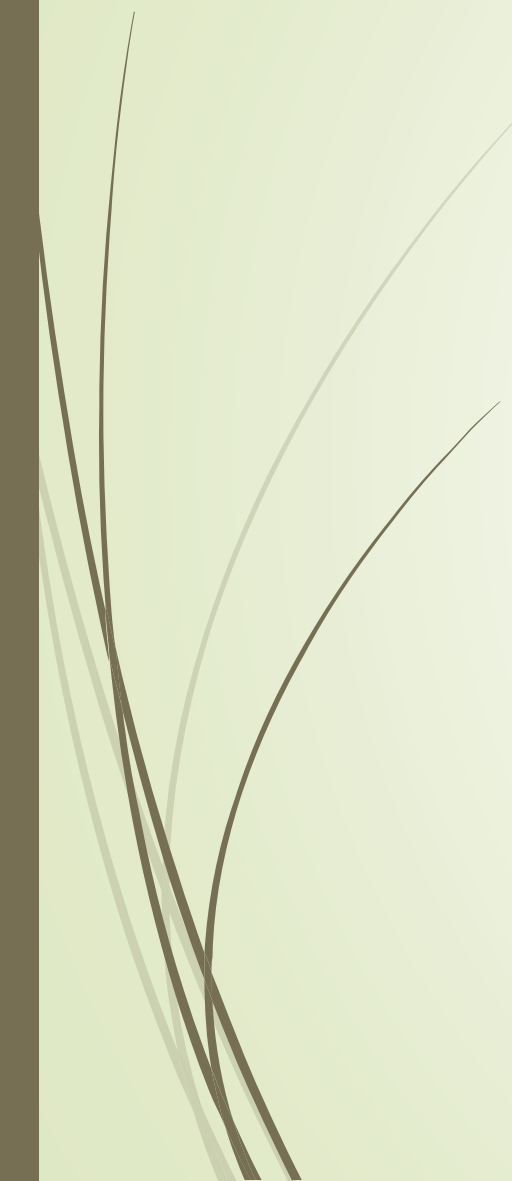


Gold Standard

- ICWA has long been recognized as the “Gold Standard” in child protection:
 - Ensures notice
 - Protects against systemic bias and racism by requiring higher standards.
 - Protects relationship of child to their parents, siblings, extended family and tribe.
 - Incorporates two important “protective factors” for Indian children
 - Cultural identity and relationship to family and tribe.
- ICWA authorizes State’s to pass laws that provide greater protections for Indian children and families.



The Minnesota Indian Family Preservation Act – ICWA sets the floor and not the ceiling

- MIFPA §260.751-260.835
 - Become law in 1985
 - Amended in 2015
 - 2023 and
 - 2024
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MIFPA – creating a response to families that honors family and tribal connections

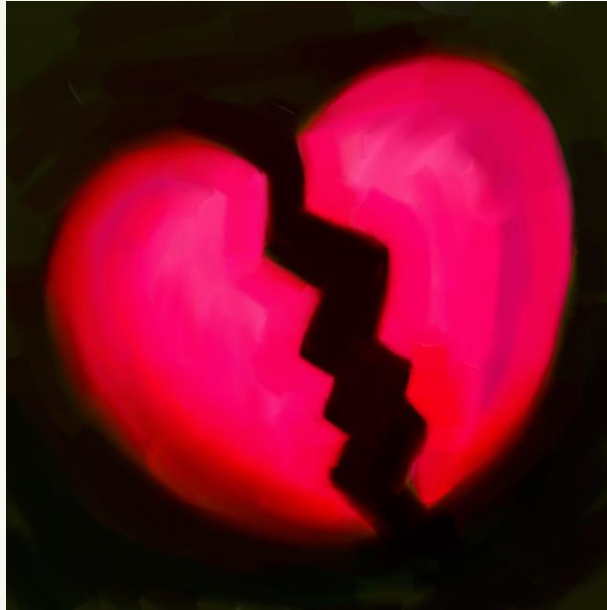
- Best Interests of an Indian Child §260.755
- Active Efforts to strengthen families and prevent out of home placements §260.755
- Qualified Expert Witness §260.771
- Placement Preferences §260.771



Best Interests – the



And the





Best Interests of an Indian Child

- Compliance with ICWA and MIFPA to preserve and maintain an Indian child's family.
 - The best interests of an Indian child support, the child's sense of belonging to family, extended family and tribe.
 - The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe
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Leading up to the US Supreme Court Decision

➤ **BACKGROUND**

- In 2017, three individual families and three states (including Texas) sued the United States (the Secretary of the Interior) in Texas federal court to have ICWA declared unconstitutional.
- One of the families is named Brackeen, thus the case name.
- The other party is Deb Haaland, Secretary of Interior
- Another family, the Cliffords, is from Minneapolis. They were also involved in Hennepin County litigation with White Earth and Robyn Bradshaw, a Law Center client.
- Four tribes—Cherokee Nation, Oneida Nation, Morongo Band of Mission Indians, and Navajo Nation—joined the case to defend ICWA. The United States is also defending ICWA.

➤ **LOCAL AND NATIONAL SUPPORT FOR ICWA**

- In August 2022, after the United States and the tribal parties filed their briefs, twenty-one other groups filed briefs in support of ICWA.
- Indian Tribes and Organizations (Native American Rights Fund)
 - 497 tribes
 - All 11 Minnesota tribes
 - 62 tribal and Indian organizations
- Members of Congress (87 total)
 - Sen. Amy Klobucher Lived experience (former foster children, non-Native adoptive families)
 - National (Casey Family Programs, American Bar Association)
 - Parent and child attorneys



Haaland v. Brackeen

- SUPREME COURT ORAL ARGUMENT. November 9, 2022
- Scheduled for one hour; lasted more than three hours.
- Justices: John Roberts, Sonia Sotomayor, Brett Kavanaugh
Clarence Thomas, Elena Kagan, Amy Coney Barrett, Samuel Alito, Neil Gorsuch, Ketanji Brown Jackson

Decision Issued June 15, 2023.

- 7:2 decision written by Justice Amy Coney Barrett. All Justices with the exception of Justice Clarence Thomas and Justice Samuel Alito joined the majority opinion.
- Justice Neil Gorsuch wrote a separate concurrence and Justice Brett Kavanaugh wrote a separate occurrence.
- Justices Clarence Thomas and Samuel Alito dissented.



The Plaintiffs Arguments

Respondents are the United States and the Tribal Defendants—Cherokee Nation, Oneida Nation, Morongo Band of Mission Indians, Quinault Indian Nation, and Navajo Nation—who intervened during the lower court proceedings in order to defend ICWA.

Addressing challenges to the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (“ICWA”) under four separate theories:

- (1) that Congress did not have the constitutional authority to enact ICWA;
- (2) that ICWA’s placement preferences violate the Equal Protection Clause;
- (3) that certain provisions of ICWA violate the anti-commandeering doctrine; and
- (4) one provision of ICWA violates the non-delegation doctrine.

The Decision:

DID CONGRESS HAVE THE POWER/AUTHORITY TO ENACT ICWA?

Yes. The Court resoundingly reaffirmed that “Congress’s power to legislate with respect to Indians is well-established and broad.”

The majority found four separate legal bases/foundations for Congress’s authority to enact ICWA:

- 1) The Indian Commerce Clause of the U.S. Constitution.
- 2) Congress’s plenary power to deal with Indians found explicitly and implicitly within the U.S. Constitution.
- 3) The U.S. Constitution’s adoption of powers that predate the U.S. Constitution and are necessarily inherent in any Federal Government -- “necessary concomitants of nationality”.
- 4) The trust relationship between the United States federal government and Indian people.

In his concurring opinion, Justice Gorsuch wrote:

“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.”



The Decision:

DOES ICWA VIOLATE THE FEDERAL ANTICOMMANDEERING DOCTRINE STEMMING FROM THE 10TH AMENDMENT BY REQUIRING STATES TO ENFORCE FEDERAL LAW OR TAKE CERTAIN ACTIONS?

(Anticommandeering Doctrine: the federal government cannot require states to adopt federal law or use state resources to enforce federal law.)

No. The Court held that:

1) The responsibility for enforcing ICWA lies with state courts. While Congress cannot require state executives or state legislatures to enforce federal law, it can require state courts to apply/enforce federal law (preemption).

2) ICWA's requirements apply equally to private individuals and agencies as well as government entities. Because the requirements do not solely apply to government entities Congress is not "commandeering" state governments to administer or enforce a federal program.



The Decision:

DOES ICWA OR THE BIA REGULATIONS VIOLATE THE FEDERAL NONDELEGATION DOCTRINE BY ALLOWING (OR DELEGATING THE RIGHT TO) INDIVIDUAL TRIBES TO ALTER THE PLACEMENT PREFERENCES ENACTED BY CONGRESS?

The Court did not address this issue because it found that no party before the Court had standing to raise this claim. A decision on this issue would not rectify the individual plaintiffs' claimed injury and Texas, as a state, does not have equal rights to advance.

(Standing: To establish standing, plaintiffs must show they suffered an injury that is traceable to the defendant's conduct and that the Court can do something about it.)



The Decision:

IS ICWA UNCONSTITUTIONAL BECAUSE IT VIOLATES EQUAL PROTECTION AND DISCRIMINATES ON THE BASIS OF RACE?

The Court did not decide this issue finding that no party before the Court had standing to raise this claim.

In a two-paragraph concurring opinion, Justice Kavanaugh raised concerns about equal protection stating that in some cases, Indian children may be denied a particular placement because of their race or that prospective foster or adoptive parents may be denied the opportunity to foster or adopt because of their race.

During oral argument, Justice Gorsuch clearly saw no constitutional problem emphasizing that the U.S. Constitution describes Indian tribes as separate sovereigns and that the distinctions drawn in ICWA are political not racial. This has already been explored and explained by the Court in its 1974 decision in *Morton v. Mancari*, 417 U.S. 535 (1974).



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 the Court has no justice to offer them. Our constitution reserves for Tribes a place – an enduring place – in the structure of American life. It promises them sovereignty for as long as they wish to keep it. And it secures the promise by divesting States of authority over Indian affairs and by giving the federal government certain significant (but limited and enumerated) powers aimed at building a lasting peace. 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 keeping with the Constitution's original design.