

INDIAN CHILD WELFARE  
ACT, MINNESOTA INDIAN  
FAMILY PRESERVATION  
ACT, AND THE  
TRIBAL/STATE AGREEMENT

Presented by:

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## Why the Need for the Indian Child Welfare Act?

- The number of American Indian children in out of home placement prior to 1978 was approximately 1 in 4. In some states, such as Minnesota, this rate was as high as 35%
- Up to 90% of Indian children were placed with non-Indians

# HISTORICAL OVERVIEW

Why is there a special law that applies to Indians?

What is sovereignty?

What is “Indian Policy”?

# AGREEMENTS AMONG EQUALS: 1787 - 1828

- ◉ U.S. Government and the U.S. Supreme Court recognized the government to government relationship
  - Tribes treated equal to foreign nation
  - Marshall Trilogy
  - Congress Enacted Laws protect Indian land loss or sale to Whites without federal government approval (1790)

# RELOCATION ERA - 1828 - 1887

- President Andrew Jackson
- Goal: Move eastern Indian Tribes west, then later to “educate and civilize”
- “Dominant federal Indian policy of the 19<sup>th</sup> Century”
- 1830 Congress passed “Indian Removal Act”: President could “negotiate” with Tribe to relocate to a “permanent” home. Broken within a few years.

# ALLOTMENT AND ASSIMILATION

## 1887 - 1934

- Federal policy driven by:
  - 1) desire for more land from Indian for White settlements
  - 2) Best way to help Indians overcome poverty was to assimilate into white society
- 1887 General Allotment Act/Dawes Act:
  - “extinguish tribal sovereignty; erase reservation boundaries; force assimilation of Indians into society at large” (Pevar at 8)
  - President divide communally held land to individual, surplus land sold

# INDIAN REORGANIZATION

1934 - 1953

- Radical policy change because:
  - Great Depression eliminated desire and financial ability non-Indian to buy land
  - Meriam Report, by Brookings Institute (1928) chronicled severe and hopeless conditions faced by Indians as result of Federal Governments prior policies
    - Extreme poverty
    - Devastating epidemics
    - Inadequate food
    - Inadequate education

- President Franklin D. Roosevelt
  - 1934: Wheeler-Howard/Indian Reorganization Act
  - Purpose: Rehabilitate Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism (Pevar 10)
  - First Indian policy is 100+ years that did not have explicit purpose of undermining status of Indian nations



- Protected remaining Indian land
- Secretary can add land
- Tribes encouraged adopt own “constitutions”, become federally chartered corporations and assert powers of self-government
- Sought to increase Indian influence in managing Indian programs
- Concerns IRA paternalistic, Tribes not included in development of IRA, Tribes still subject to substantial federal control

# TERMINATION & RELOCATION

## 1953 - 1968

- ◉ 1949 Hoover Commission report recommended “complete integration” of Indians into white society
- ◉ Assimilation in “best interests” of Indians
- ◉ Save money by eliminating programs
- ◉ 1953 - President Dwight D. Eisenhower
- ◉ Goal: terminate tribe’s trust relationship

- 109 Tribes terminated w/in 10 years
- PL83-280: 6 states criminal jurisdiction on Reservations
  
- 1956 - Relocation program
  - Job training and housing assistance if leave Reservation for urban areas
  - 35,000 entered program in 10 years
  - 1/3 return home
  - Jobs and housing promises not kept

# TRIBAL SELF DETERMINATION - 1968 TO NOW

◎ 1968 President Lyndon Johnson:

“We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination.”

1970: President Richard Nixon:

“This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian sense of autonomy without threatening his sense of community”

- ◎ 1983 President Ronald Reagan:
- ◎ “This administration intends to restore tribal governments to their rightful place among governments of this nation and to enable tribal governments, along with State and local governments, to resume control over their own affairs.”

- ◎ 1994 President Bill Clinton:
- ◎ All federal agencies must conduct their business with tribes on a government-to-government basis, respectful of tribal sovereignty

How does federal  
Indian policy  
impact your work  
with Indian families  
today?



- Removal of Indian children is seen by some American Indians as a continuation of governmental oppression
  - You don't know how to raise children, educate children, provide for children
  - I/We know better
  
- Effects of forced assimilation practices impacts whole being of individual, family and the tribe

- Physical, spiritual, emotional, mental impact
  - loss of language, tribal customs , family relationships, sense of belonging, connection to larger world
- Wounds from losses run deep;
- Anger and mistrust, sense of self
- This has been called “historical trauma” and “generational depression”
- This is part of reason Indians can’t “just get over it”

# EFFECTS ON INDIAN CHILDREN PRE-ICWA

Child Welfare League - intentional  
wholesale removal of Indian children

Some adults who were adopted out of their  
tribes and family experience:

- ◉ "split feather syndrome"
- ◉ sense of belonging
- ◉ sense of identity
- ◉ shame in not knowing tribal ways
- ◉ judgment for not knowing tribal ways

HOW ARE WE DOING?

**Has ICWA reduced OHP  
for Indian children?**

# 2011 MN DHS STATISTICS - OHP PER 1,000 KIDS

- African American/Black
- American Indian
- Asian/Pacific Islander
- Hispanic Ethnicity - any race
- Two or more races
- White

# 2011 MN DHS STATISTICS - OHP PER 1,000 KIDS

- 24.9 African American/Black
- 70.8 American Indian
- 4 Asian/Pacific Islander
- 10.8 Hispanic Ethnicity - any race
- 19.6 Two or more races
- 5.6 White

# WHAT DOES THAT MEAN?

In MN, in 2011:

American Indian children in OHP 13 x rate  
of White children

African American/Black children in OHP 5 x  
rate of White children

Children two or more races in OHP 4 x rate  
of White children

# How can we do better?

- Understand
- Respect and
- Apply the Law in a good way



# INDIAN CHILD WELFARE ACT (1978) (ICWA)

- ◉ Acknowledges political relationship between US Government and tribes as sovereigns
- ◉ Political not racial distinction
- ◉ Tribes are sovereigns that retain rights, thus are not 'given'
- ◉ Acknowledges tribes fundamental interest in protecting it's children and its right to do so
- ◉ ICWA sets minimum standards for child welfare practice with Indian families

# APPLIES WHEN:

- ◉ Child custody proceeding if:
  - Child is a member of a federally recognized tribe or if child's biological parent is a member and child is eligible
- ◉ Third Party Custody if:
  - non-parent may get custody of the child
- ◉ Does not apply in:
  - Delinquency unless termination possible
  - Dissolution
- ◉ Non-federally recognized tribes

# POLICY ARTICULATED

- ◉ Testimony
- ◉ 25 U.S.C. sec. 1901
- ◉ 25 U.S.C. sec. 1902
- ◉ Mississippi Band of Choctaw v. Holyfield

# MINNESOTA INDIAN FAMILY PRESERVATION ACT (1985) (MIFPA)

- ◉ M.S.A. sec. 260.755
- ◉ Clarifies and Raises minimum standards of ICWA
- ◉ Permits alternate tribes' involvement
- ◉ Requires Notice in voluntary FC within 7 days
- ◉ Requires Notice for voluntary preadoption or adoption upon filing TPR or within 90 days of temporary placement for adoption, whichever is first

# TRIBAL/STATE AGREEMENT

- ◉ Contemplated and authorized in ICWA and MIFPA
- ◉ Agreement among the MN Dept of Human Services and 11 tribes in MN on Indian Child Welfare
- ◉ Originally signed in 1998 after years of negotiation
- ◉ Renegotiation began in January 2005

# TRIBAL/STATE AGREEMENT BASED ON COLLABORATION

- ◉ Tribes, counties, GALs came together to discuss concerns
- ◉ Renegotiation took 2 years
- ◉ Based on collaboration
- ◉ Signed in a ceremony at the State Capitol in 2007
- ◉ Tribal leaders and elders are hopeful this is not another document with empty words

# KEY PROVISIONS:

## Jurisdiction:

- ⦿ Parties agreed to disagree on reach of County in Public Law 280 state
- ⦿ Paramount concern is to move forward in the spirit of ICWA/MIFPA
- ⦿ This is best achieved by the parties combining their abilities and resources in a collaborative manner at the outset and throughout

## ~ACTIVE EFFORTS~

- ◉ Defined in the 2007 Tribal/State Agreement at pages 9-10

<https://edocs.dhs.state.mn.us/lfservers/Legacy/DHS-5022-ENG>



## ~ACTIVE EFFORTS~

- ⦿ Rigorous concerted level of case work
- ⦿ Using social and cultural values, and conditions and way of life of the Tribe
  - to preserve the child's family
  - to prevent placement
  - to return the child at the earliest time possible

## ~ACTIVE EFFORTS~

- ◉ Acknowledge traditional helping and healing systems of the Tribe
- ◉ Use these systems as the core to help and heal the family and child
- ◉ Seek guidance from the Tribe on how the family is structured, how the family can seek help, what family and Tribal resources are available and what barriers the family faces

## ~ACTIVE EFFORTS~

- ◉ Identify and use Tribal, other Indian agency and state resources
- ◉ Notify and request involvement of the Tribe
- ◉ Seek Tribal participation at the earliest point possible
- ◉ Actively solicit Tribal advice throughout the case
- ◉ Ask Tribal representative to evaluate family circumstances and assist in developing a case plan

## ~ACTIVE EFFORTS~

- ◉ Consult Tribe on availability of Tribal support for the family
- ◉ Consult extended family members for help and guidance
- ◉ Use extended family member as a resource for the child
- ◉ Provide extended family members to allow them to be considered for placement of the child

## ~ACTIVE EFFORTS~

- ◉ Keep child in close contact with parents, siblings and other relatives
- ◉ Visitation in the parents' home, or other family members' homes, or other non-institutional setting
- ◉ Unsupervised visitation if consistent with protecting the child's safety. If visitation is supervised, consult Tribe on most natural setting that ensures child's safety.
- ◉ Provide concrete services throughout the case, such as financial assistance, food, housing, healthcare and transportation

## ~ACTIVE EFFORTS~

- ◉ Advocate, on behalf of the child, for these services
- ◉ DHS has best practices document with additional information

# BEST INTERESTS OF AN INDIAN CHILD

- ◉ Mississippi Band of Choctaw v. Holyfield
  - 490 U.S. 30 (1989)
- ◉ In re Adoption of M.T.S.
  - 489 N.W. 2d 285 (Minn.Ct.App. 1992)
- ◉ MN Tribal/State Agreement
  - Part I.E.5 / page 11

- ◉ Different from the best interests standard for a non-Indian child
  
- ◉ Supports the child's sense of belonging to:
  - Family,
  - Extended family,
  - Clan, and
  - Tribe



- ◉ Recognizes: tribe's interest in the child as a 'stand alone interest' that is separate from the child's immediate family and extended family
- ◉ Recognizes the importance and immediacy of family preservation

## ~INDIAN CHILD~

- ◉ Defined in Minnesota Statutes, section 260.755, subdivision 8

<https://www.revisor.mn.gov/pubs/>

## ~INDIAN CHILD~

- ⦿ Member of an Indian Tribe
- ⦿ Eligible for membership
  - Only Tribe defines membership

Child, believed to be Indian, treat as ICWA case until you hear from the Tribe

## ~ PARENT ~

- ⦿ Biological parent or Indian person who has lawfully adopted Indian child
- ⦿ Includes adoption under tribal law or custom
- ⦿ Does not include unwed father where paternity has not been acknowledged or established

## ~ INDIAN CUSTODIAN ~

- ◉ Indian person that has legal custody of an Indian child under:
  - tribal law or custom;
  - under state law; or
- ◉ To whom temporary physical care, custody and control has been transferred by parent
- ◉ Does not need to be in writing

# RIGHT TO COUNSEL

- Parent or Indian custodian has a Right to Court appointed legal counsel if indigency is determined by the Court in ANY
  - removal,
  - placement or
  - termination proceedings

# TRANSFER OF JURISDICTION TO TRIBAL COURT

- ◉ Presumption is for transfer jurisdiction
- ◉ No transfer if:
  - Tribe declines to accept transfer;
  - Either parent objects to transfer; or
  - Good cause exists
- ◉ Good cause to deny transfer includes:
  - Petition to transfer that is inexcusably filed when proceeding is at advanced stage;
  - Distance - however, telephone and conference call capabilities now that were not available when this provision identified in the BIA Guidelines

# QUALIFIED EXPERT WITNESS (QEW):

- ◉ Required separately for:
  - 1) out of home placement; and
  - 2) permanency
- ◉ Tribally designated QEW not subject to challenge



- ◉ When use of Tribe's QEW is not possible, use persons with expertise and capacities identified in TSA
- ◉ MN case law relies on BIA Guidelines
- ◉ QEW is different from expert witness

## ~PLACEMENT~

- ◎ 2007 Tribal/State Agreement provides guidance on how to assess prospective foster or adoptive homes. See pages 33-34 of the TSA

<https://edocs.dhs.state.mn.us/lfservers/Legacy/DHS-5022-ENG>

# ~PLACEMENT~

## TSA Guidelines to Assess Prospective Homes

- Motivation for application at this time
- Attitudes/expectations regarding own children and parent-child relationships
- Attitudes of extended family regarding child placement
- Attitudes of prospective home's own children regarding child placement
- Capacity of parents to provide for foster child's needs while giving proper consideration to own children

## ~PLACEMENT~

- ◉ Ability to love and accept child as the child is
- ◉ Ability to relate to birth parents
- ◉ Prospective parent's personal characteristics necessary to provide continuity of care throughout the child's need for placement
- ◉ Help the child learn about the child's situation
- ◉ Discern child's needs that the child is unable to verbally communicate
- ◉ Expectation of how people should react to authority, generosity or kindness

## ~PLACEMENT~

- ◉ Accept the child's relationship with own parents
- ◉ Avoid judging people based upon assumptions about child's background
- ◉ Understand how culture affects the way people act or react
- ◉ Willingness to ask for help

# ~FOSTER CARE PLACEMENT PREFERENCES~

- ◉ Extended family member
- ◉ Home licensed, approved or specified by the Tribe
- ◉ Indian foster home
- ◉ Institution approved by the Tribe, or operated by an Indian organization
- ◉ Extended family members
- ◉ Other Tribal members
- ◉ Other Indian families

## ~PLACEMENT PREFERENCES~

- ◉ Need good cause to not follow the order of placement preference
  - Good cause is defined in the 2007 Tribal/State Agreement at pages 12-13, paragraph 15

<https://edocs.dhs.state.mn.us/lfserv er/Legacy/DHS-5022-ENG>

## ~GOOD CAUSE~

- ⦿ Request of parent or child of sufficient age
- ⦿ Extraordinary physical or emotional needs of the child
- ⦿ Unavailability of suitable families after a diligent search consistent with the active efforts standard
- ⦿ Bonding or attachment to a foster family is not good cause



# ~PLACEMENT PREFERENCES~

- ◉ Family
- ◉ Non-relative home found by Tribe
- ◉ Non-relative Indian home found by someone else
- ◉ Institution

- ◉ Existing Indian Family Exception or Doctrine:
  - Court created exception to application of ICWA because child is not “Indian enough” because looks, location, religion, language, number of powwows attended, etc.
  - Expressly rejected in MN
  - Efforts by some to overturn

# COMPLIANCE WITH ICWA / MIFPA / TSA

## Why comply?

- Best for American Indian children, families and Tribes
- DHS must establish and maintain monitoring program to reduce non-compliance M.S.A. §256M.20
- Title IV-E State Plan: maintain and strengthen ICWA compliance
- Quality Assurance Reviews
- Invalidation of action pursuant to ICWA

# RESOURCES

Indian Child Welfare Act Law Center

612-879-9165

[www.icwlc.org](http://www.icwlc.org)

National Indian Child Welfare Association

[www.nicwa.org](http://www.nicwa.org)

# Questions?

Please feel free to contact:

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