

# Understanding and Applying ICWA: *Purpose, Strategies, Practice, and Resources*



MINNESOTA  
JUDICIAL  
BRANCH

*To provide justice through a system that  
assures equal access for the fair and timely  
resolution of cases and controversies.*

*MJB Mission Statement*

# Agenda

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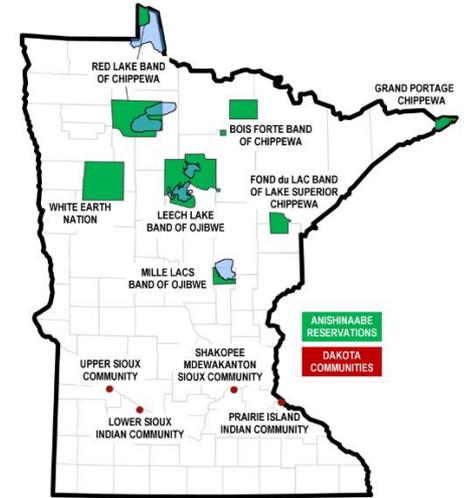
1. Opening Ceremony
2. Introductions and Learning Objectives
3. Historical and Cultural Perspectives of Indian Families
4. Trauma and Disparate Treatment of Indian Families Then and Now
5. Understanding and Applying Requirements of Indian Child Welfare Act (ICWA), BIA Regulations, and Minnesota Indian Families Preservation Act (MIFPA)
6. Next Steps for CJI Judges and CJI Teams

# A Few Group Agreements . . .

- Cherish diversity
- Be open and honest
- No question is a bad question
- It's okay to disagree – but don't be disagreeable
- All responses are valued
- Respect one another
- “No cell phone and laptop” zone
- Wait for a microphone
- Limit side conversations

# Section 1

## Opening Ceremony, Introductions, and Learning Objectives



**INDIAN LAND FOR SALE**

GET A HOME OF YOUR OWN

EASY PAYMENTS

PERFECT TITLE

POSSESSION WITHIN THIRTY DAYS

**FINE LANDS IN THE WEST**

IRRIGATED IRRIGABLE GRAZING AGRICULTURAL DRY FARMING

IN 1910 THE DEPARTMENT OF THE INTERIOR SOLD UNDER SEALED BIDS ALLOTTED INDIAN LAND AS FOLLOWS:

Location	Acres	Average Price per Acre	Location	Acres	Average Price per Acre

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# Opening Ceremony



# Introductions

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- Participant Introductions
  - ❖ Stakeholder groups present today?
  - ❖ Level of ICWA experience and knowledge?
- What burning question or ICWA implementation challenge do you have?

# Overall Learning Objectives

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By the close of today's training, you will be able to:

- Recognize the historical, philosophical, and legal underpinnings of ICWA and MIFPA
- Understand your role in ensuring positive outcomes for Indian children, their families, and tribes
- Understand and apply the letter of the law and the spirit of ICWA, MIFPA, federal regulations, and Minnesota's Tribal State Agreement (TSA)

# Section 2

## Historical and Cultural Perspectives of Indian Families

First WHY does ICWA exist,  
and then HOW do we apply ICWA



# Learning Objectives

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For this section of the training, our goal is for you to:

- Recognize the historical foundation of the Indian Child Welfare Act (ICWA)
- Understand the cultural and trauma perspectives underlying the ICWA
- Understand your role in promoting equity and fairness for Indian families by ensuring the ICWA is followed

# Learning Objectives



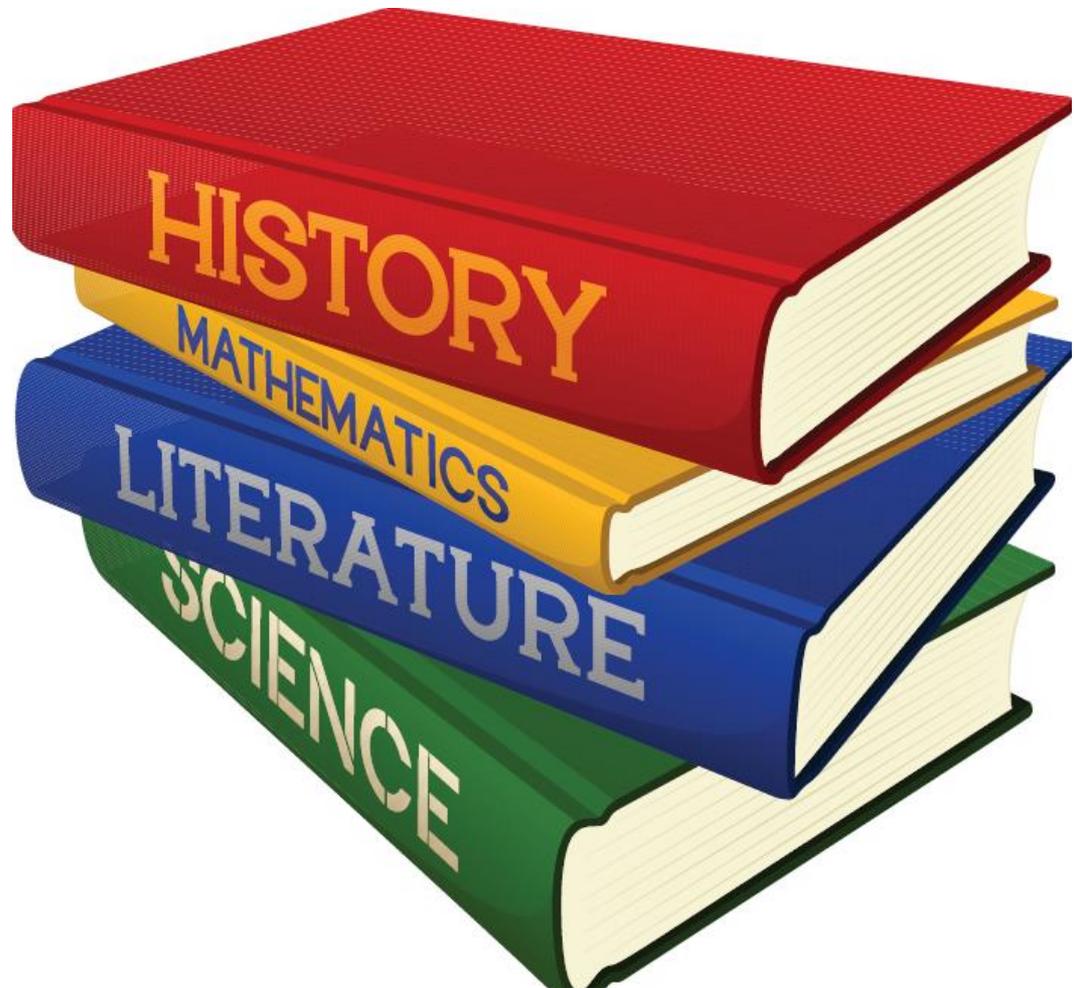
# Why ICWA is Still Needed Today

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**Video** (18:49 min.) *Bringing Our Children Home: Introduction to ICWA*

# Section 2a

## History Lessons: Myths and Realities



# History Lessons: The Reality

1492

*Happy Thanksgiving*



# History Lessons: The Reality

## *Christopher Columbus' letters and journals*

- “They were well-built, with good bodies and handsome features.... do not bear arms, and do not know them, for I showed them a sword, they took it ... and cut themselves out of ignorance... They would make fine servants.... With fifty men we could subjugate them all and make them do whatever we want.”
- “A hundred castellanos are as easily obtained for a woman as for a farm, ... plenty of dealers who go about looking for girls; those from nine to ten are now in demand.”
- “We can send from here, in the name of the Holy Trinity, all the slaves... I shall give them as much gold as they need .... and slaves as many as they shall order to be shipped.”

# Who Said This?

- “Indians and wolves are both beasts of prey, tho' they differ in shape.”  
*1783 - George Washington*
- "If ever we are constrained to lift the hatchet against any tribe, we will never lay it down till that tribe is exterminated or is driven beyond the Mississippi.”  
*1807 - Thomas Jefferson*
- “The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the state.”  
*1862 - Governor Ramsey (MN)*
- “I don't go so far as to think that the only good Indians are dead Indians, but I believe nine out of every ten are, and I shouldn't like to inquire too closely into the case of the tenth.”  
*1886 - Teddy Roosevelt*

# Section 2b

## Federal Indian Policy: Dealing with the “Indian Problem”



# History of Federal Indian Policy

**1492 – 1787**

## **Colonial & Confederation Periods: Tribal Independence**

- Historically, European governments dealt with tribes on a government to government basis
- Strategic decision by US government to enter into treaties rather than go to war

# Treaty . . .



**1881 Treaty of Traverse de Sioux**

Reprinted with permission of Minnesota Historical Society

# . . . Versus War



# History of Federal Indian Policy

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**1787 – 1828**

## **Agreements Between Equals**

- Indian tribes had equal status with foreign nations
- Prosecution of Whites who harmed Indians

# History of Federal Indian Policy

**1828 – 1850**

## Removal Era (Trail of Tears)

- 1829 - Andrew Jackson became President
- U.S. Supreme Court “Marshall Trilogy” – Legal basis for tribal sovereignty:
  - ❖ *Johnson v. McIntosh* (1823)
  - ❖ *Cherokee Nation v. Georgia* (1831)
  - ❖ *Worcester v. Georgia* (1832)
- 1830s – Passage of the Indian Removal Act
- Official tallies of the dead are over 10,000, but other accounts double and triple those numbers

# History of Federal Indian Policy



*Conditions created by these federal policies became the rationale for removing Indian children from their parents.*

## INDIAN LAND FOR SALE

GET A HOME  
OF  
YOUR OWN

✱

EASY PAYMENTS



PERFECT TITLE

✱

POSSESSION  
WITHIN  
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### FINE LANDS IN THE WEST

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# History of Federal Indian Policy

**1850 – 1887**

## **Reservation Movement**

- 1851 & 1871: Indian Appropriations Act authorized creation of reservations and ended treaties
- “Indian Wars”
  - Dakota War
  - Black Hawk War
  - Sioux Wars
  - Battle of the Rosebud
  - Battle of the Little Bighorn
  - Wounded Knee
- 1886 US v. Kagama: Congress has plenary power over tribes
- “Manifest Destiny”: Popular religious belief that U.S. should spread from Atlantic to Pacific in the name of God

# History of Federal Indian Policy: Minnesota Wars

## U.S. - Dakota War of 1862



## Sandy Lake Tragedy, 1850



# History of Federal Indian Policy

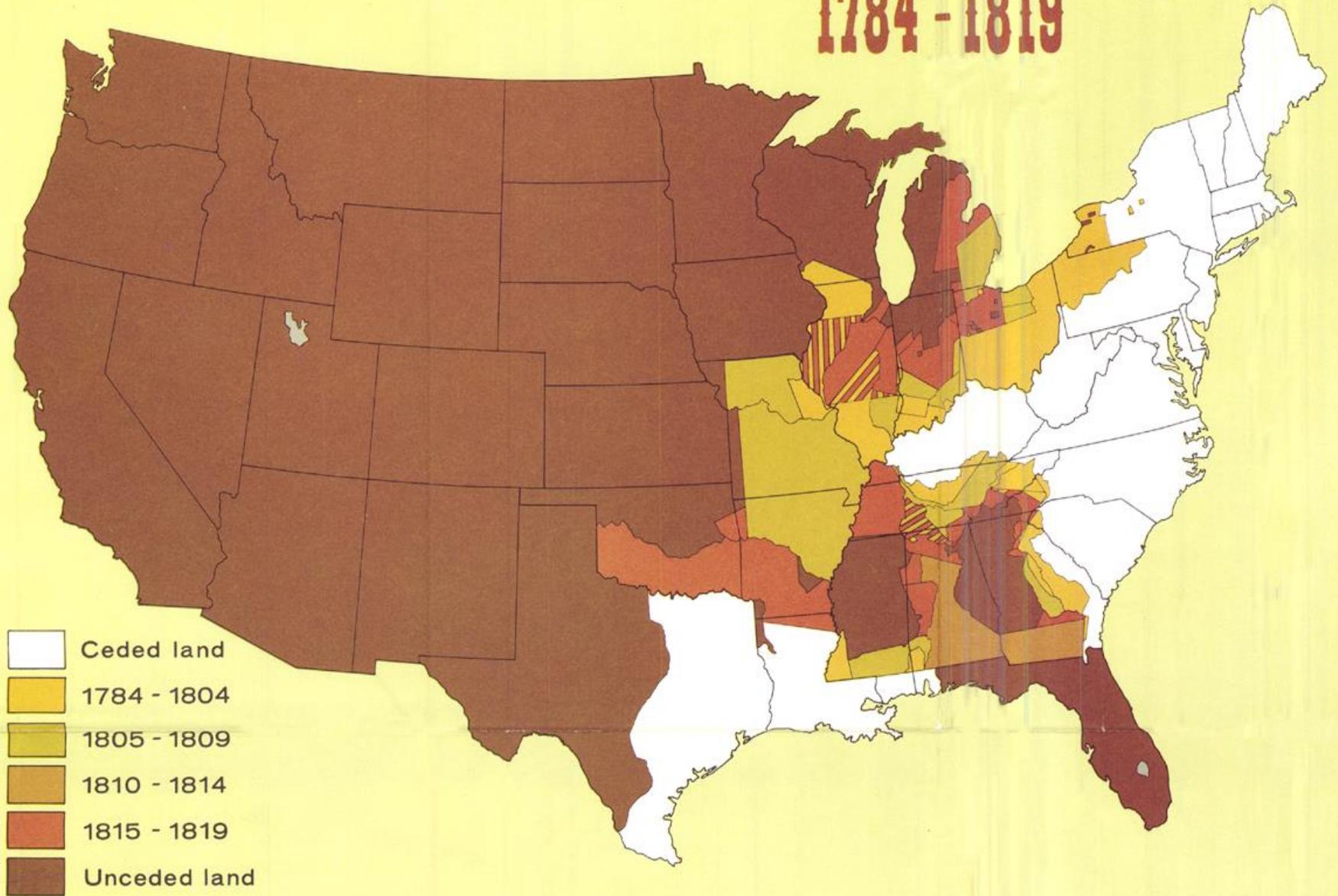
**1887 – 1928**

## **Allotments & Assimilation**

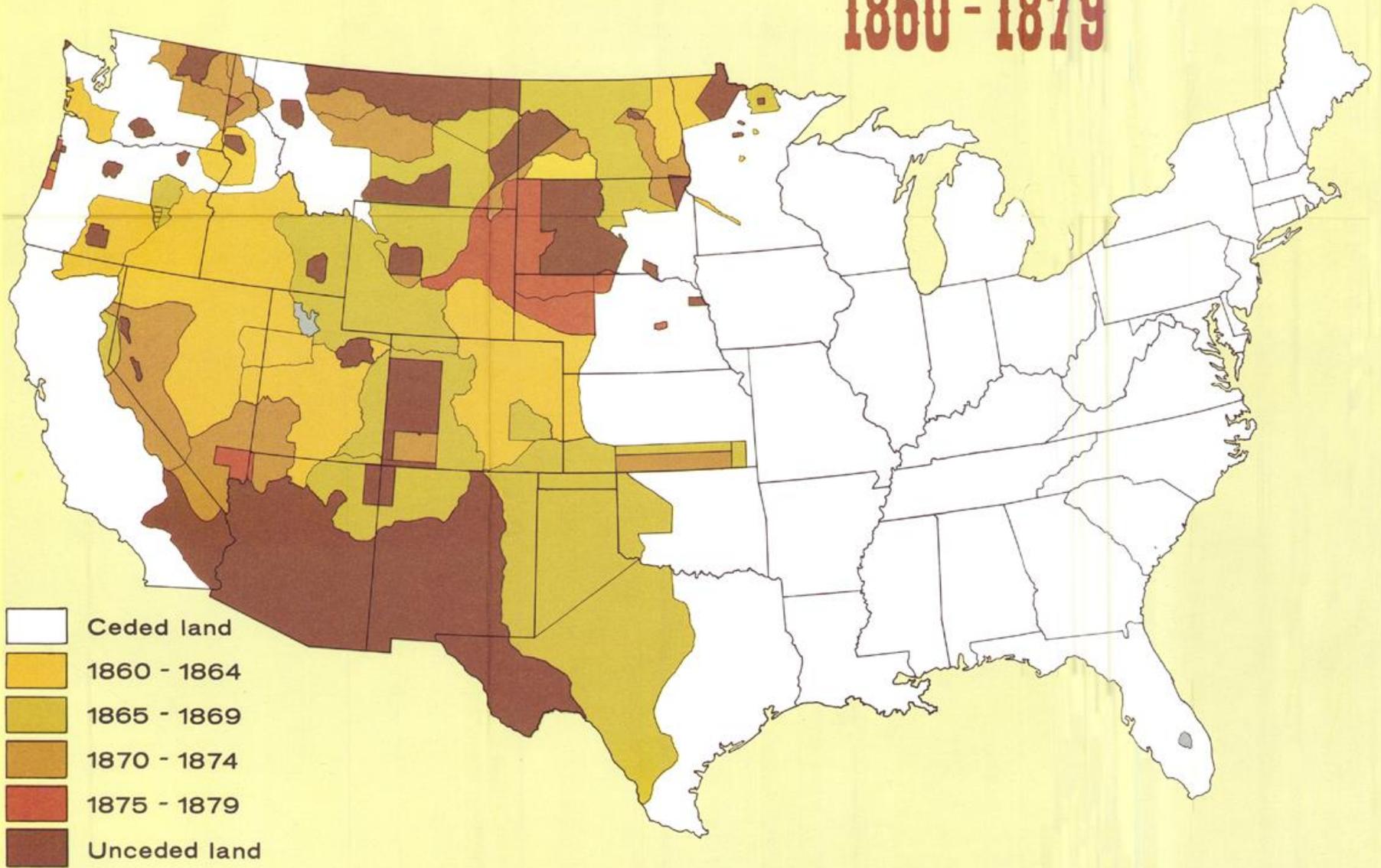
- Allotment Act of 1887 (“Dawes Act”): Ended grant of land to Tribes, instead provided land parcels to individuals with focus on “civilizing” them
- Curtis Act of 1898: 38 million acres in 1887 to 48 million in 1928
- Beginning of Indian Boarding Schools



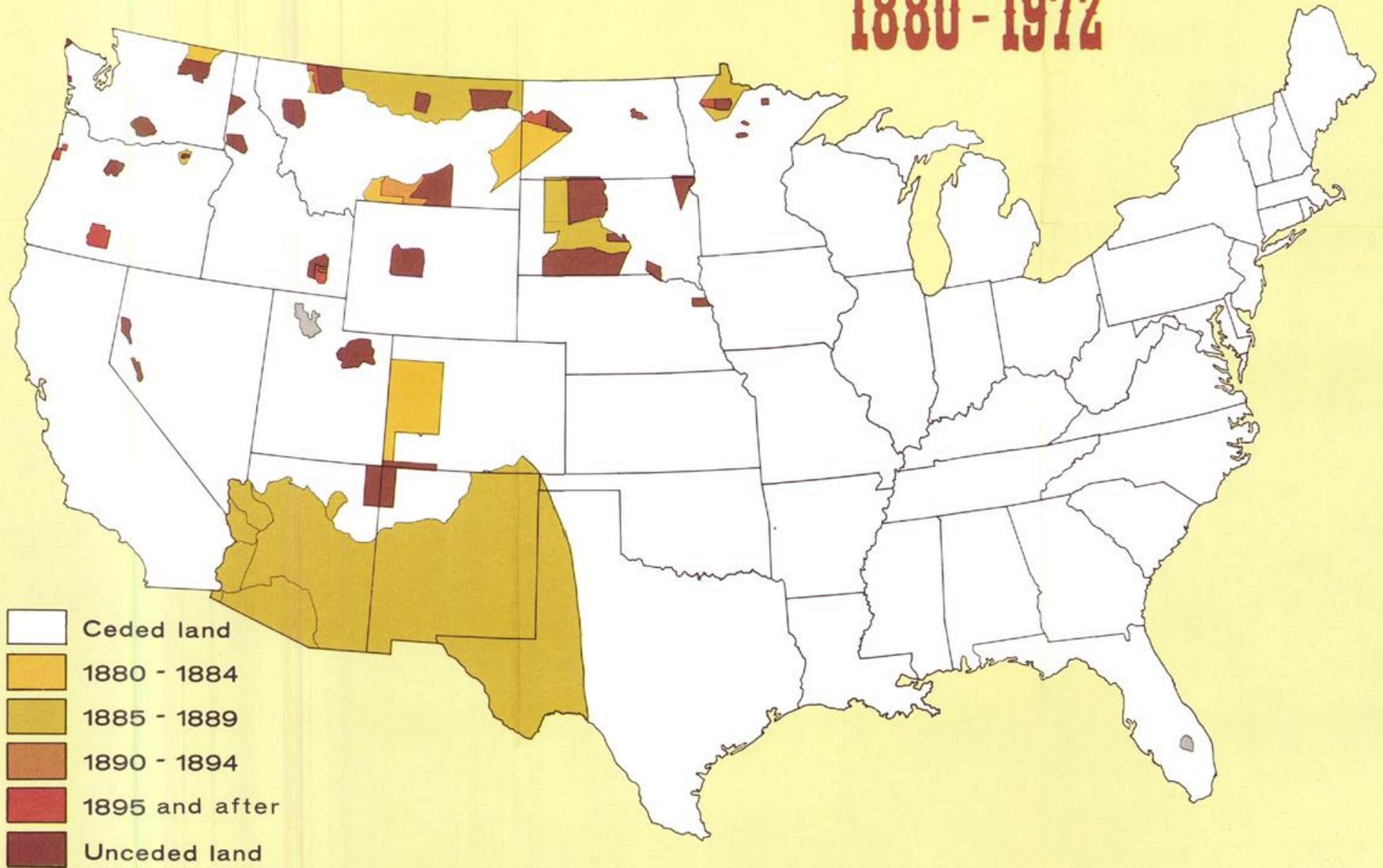
# 1784 - 1819



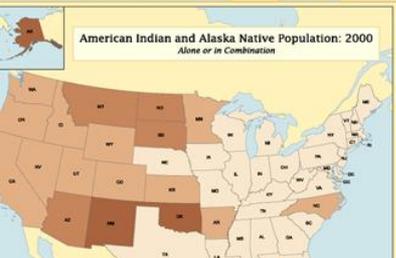
# 1860 - 1879



# 1880 - 1972



# American Indians and Alaska Natives in the United States



### Ten Most Populated Reservations and Off-Reservation Trust Lands: 2000

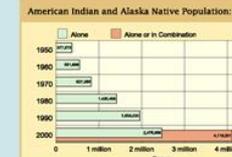
Reservation Name	Population	Off-Reservation Trust Land (sq. mi.)
Navajo Nation Reservation	174,000	15,100
Fort Apache Reservation (AZ)	12,000	1,000
Fort Apache Reservation (AZ)	11,000	1,000
Fort Apache Reservation (AZ)	10,000	1,000
Fort Apache Reservation (AZ)	9,000	1,000
Fort Apache Reservation (AZ)	8,000	1,000
Fort Apache Reservation (AZ)	7,000	1,000
Fort Apache Reservation (AZ)	6,000	1,000
Fort Apache Reservation (AZ)	5,000	1,000
Fort Apache Reservation (AZ)	4,000	1,000

### Legend

- American Indian Reservation and/or Off-Reservation Trust Land (Federal)
- Oklahoma Tribal Statistical Area
- Tribal Designated Statistical Area
- American Indian Reservation (State)

### Ten Places of 100,000 or More Population With the Highest Percentage of American Indians and Alaska Natives: 2000

Place	Percentage
Anchorage, AK	17.4%
Tulsa, OK	17.4%
Oklahoma City, OK	17.4%
Albuquerque, NM	17.4%
Green Bay, WI	17.4%



# History of Federal Indian Policy

**1928 – 1945**

## **Indian Reorganization Act**

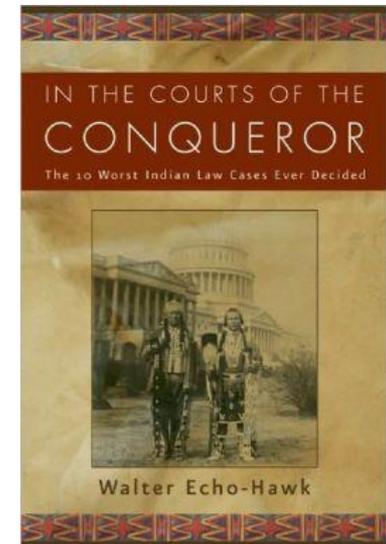
- 1928 Meriam Report: Surveyed conditions of Indians in 26 states, looking at 8 areas:
  - General Policy for Indian Affairs
  - Health
  - Education
  - General Economic Conditions
  - Family and Community Life and Activities of Women
  - The Migrated Indians
  - The Legal Aspects of the Indian Problem
  - The Missionary Activities among the Indians
- Report concluded Federal Indian policy was an absolute failure and harmful to the Indians

# History of Federal Indian Policy

## 1945 – Today

### *Self-determination*

- Government to government: Tribes are sovereign nations
- Trust relationship: Requires U.S. to protect tribal rights
- Plenary power: Gives Congress the ability to pass laws affecting citizens in sovereign tribal nations
- Indian Self-Determination and Education Act of 1975: Empowered and supported tribes in caring for members



# Section 2c

## Policies and Practices Necessitating the ICWA: Boarding Schools and Adoption Project



# The Boarding School Experience

- Attendance was mandatory
  - ❖ At age 5, children often removed by armed police
  - ❖ Children were placed hundreds, if not thousands, of miles away
  - ❖ Families faced loss of government food rations if they hid their children
  - ❖ Children often were unable to go home during summer and loaned out to local farmers as laborers
  
- Taught to become “Good Indians”
  - ❖ Hair was cut and children were forced to wear uniforms
  - ❖ Punished severely for practicing their language, culture, religion
  - ❖ Told that their old way of life was stupid, dirty and inferior
  - ❖ “Educated” to become laborers and forced to work very long hours
  - ❖ Children experienced physical, emotional, and sexual abuse on a daily basis

# From This . . .



PHOTOGRAPH BY U.S. ARMY SIGNAL CORPS,  
COURTESY OF THE ARIZONA HISTORICAL FOUNDATION

# To This . . .

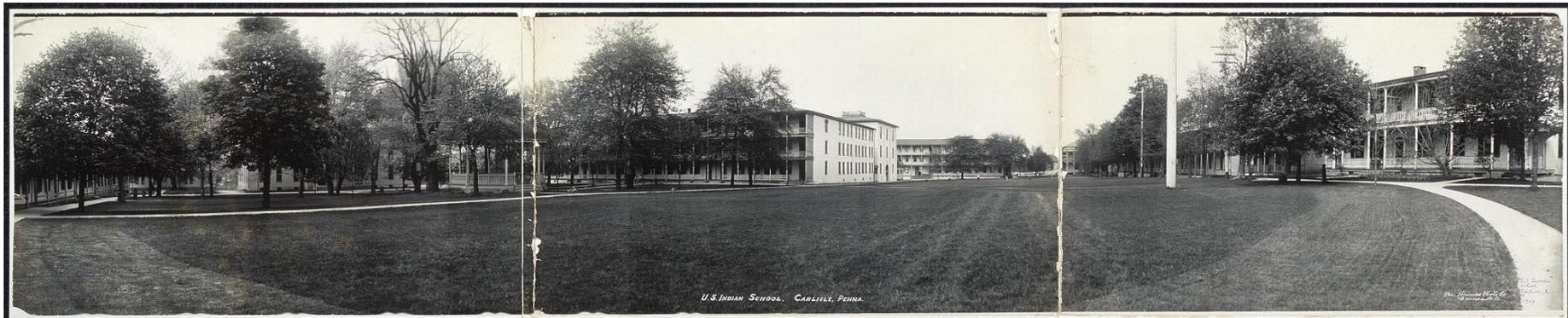


PHOTOGRAPH BY U.S. ARMY SIGNAL CORPS,  
COURTESY OF THE ARIZONA HISTORICAL FOUNDATION

# From This . . .



# To This . . .



Three Lakota Boys, Carlisle Indian Industrial School, ca. 1900

Kill the Indian to Save the Man



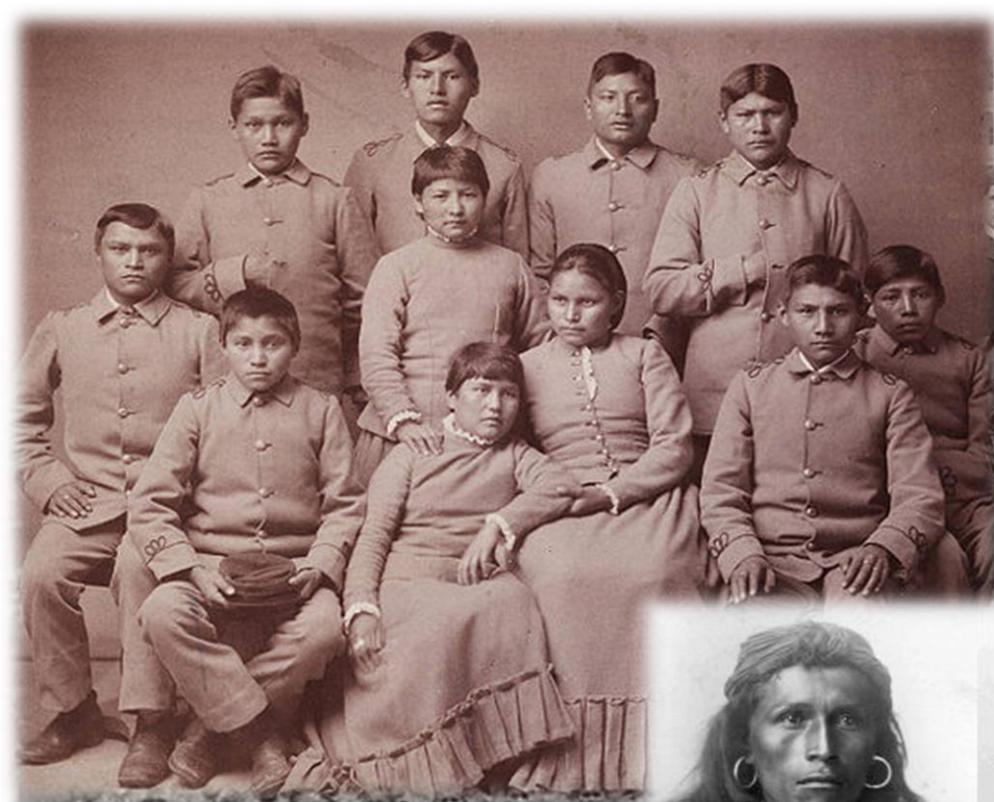
# Military Nature of Boarding Schools

Jails for children



Child-sized Handcuffs

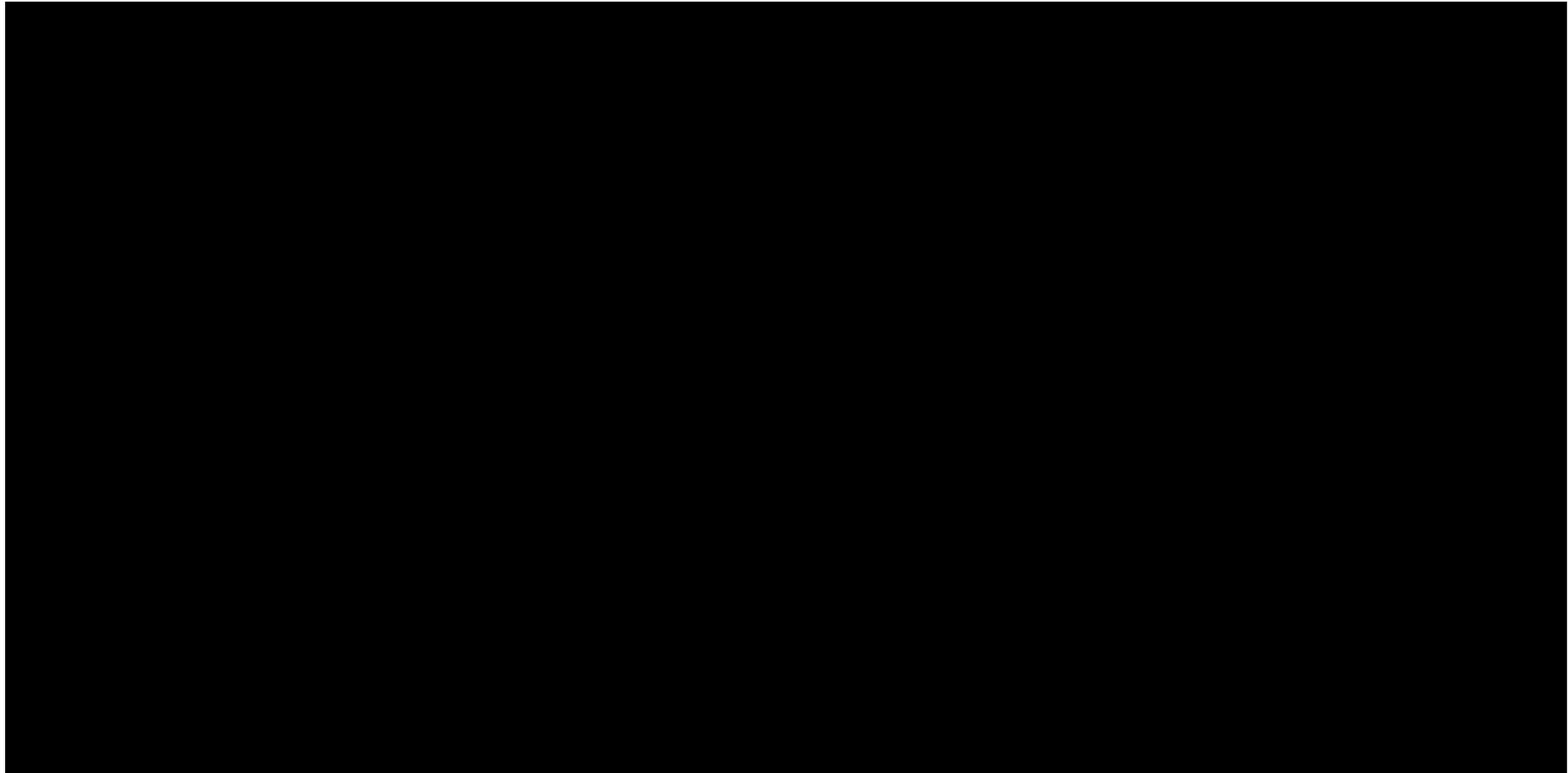




# Video

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**Video (9:54 min.)** *Unseen Tears:  
The Native American Boarding School Experience*



# The Boarding School Experience

## 1928 Meriam Report on condition of the schools

- Schools found to be overcrowded, underfunded, understaffed, and corrupt
- Children were malnourished, overworked, harshly punished, and poorly educated
- Children were routinely physically, emotionally, and sexually abused
- Disease and death rates were high
- Children ages 10, 11, and 12 spent at least four hours a day in heavy industrial labor that would have been a violation of child labor laws in most states

**Report concluded:** “The survey staff finds itself obliged to say frankly and unequivocally that the provisions for the care of the Indian children in boarding schools are grossly inadequate.”

# The Boarding School Experience

## 1846 Application for Enrollment in Non-reservation School: Eddie McKeig

*Copy*

8-1884  
**APPLICATION FOR ENROLLMENT IN A NONRESERVATION SCHOOL.**  
 (For a child enrolled at an Agency.)

For and in consideration of the Government of the United States assuming the care, education, and maintenance in the United States Indian School at \_\_\_\_\_

of Eddie McKeig M; date of birth 1846  
Chippewa

NAME OF FATHER (Full Indian and English.)	ETHNIC OR RACE	TRIBE	SEX	EDUCATION
<u>P. J. McKeig</u>	<u>Irish</u>	<u>White</u>		
NAME OF MOTHER	<u>Anna McKeig</u>	<u>Irish</u>	<u>Chippewa</u>	<u>Leech Lake</u>

I, P. J. McKeig, do hereby voluntarily consent and agree to his enrollment in said school for a period of 3 years, and also obligate myself to abide by all the rules and regulations for Indian schools.

The said child has been enrolled in the following schools:

NAME OF SCHOOL	DATE OF ENROLLMENT	DATE OF DISMISSAL	GRADE	GRAND
<u>Morris</u>	<u>3 years</u>	<u>end of term</u>		

P. J. McKeig  
 (Parent, guardian, or next of kin.)  
 P. O. address: Anna McKeig

Two witnesses:

# The Boarding School Experience

## 1908 Physician's Statement: Eddie McKeig

**PHYSICIAN'S CERTIFICATE.**

I hereby certify that I have this day carefully examined the above-named child herein proposed for transfer and find him to be in proper physical condition to attend school, and not afflicted with tuberculosis or any disease which would be a menace to the health of other pupils.

This 5th day of Sept., 1908

Polk Richards  
Physician at White Earth Agency.

**CERTIFICATE OF AGENT OR BONDED SUPERINTENDENT.**

I hereby certify that the statements made in the foregoing application and certificate, to the best of my knowledge and belief, are true; that the consent of E. McKeig was voluntary, and I recommend the transfer of the said child.

This 5th day of Sept., 1909

\_\_\_\_\_  
Agent or Superintendent.

**CERTIFICATE OF SCHOOL PHYSICIAN.**

I hereby certify that on \_\_\_\_\_, I made a careful examination of the physical condition of \_\_\_\_\_, the child named in the foregoing application, and found \_\_\_\_\_ to be \_\_\_\_\_

\_\_\_\_\_

I therefore recommend that the said child be \_\_\_\_\_ enrolled in this school.

This \_\_\_\_\_ day of \_\_\_\_\_, 190 \_\_\_\_\_

\_\_\_\_\_  
School Physician.

**SPECIAL NOTE.**

# Minnesota Indian Boarding Schools: Pipestone, MN 1892 - 1953

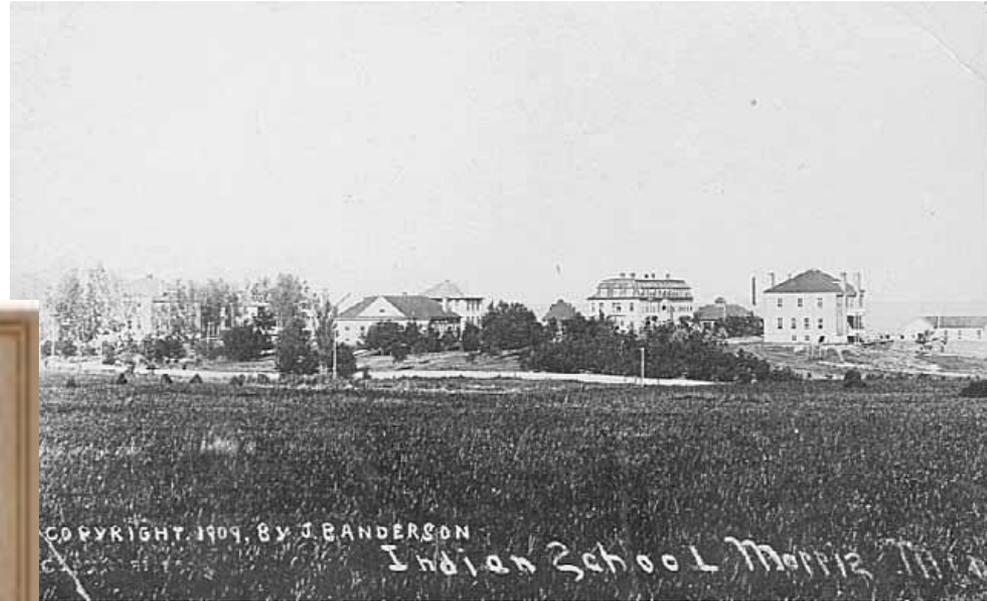


Photographs used with permission from the  
Minnesota Historical Society



# Minnesota Indian Boarding Schools: Morris, MN 1887 - 1909

Photographs used with permission from the  
Minnesota Historical Society



# Indian Boarding Schools: Not Just a Thing of the Past

- 1960s Kennedy Report on Bureau of Indian Education
  - ❖ Teachers felt their role was to civilize American Indian students, not educate them
  - ❖ Schools still had a *"major emphasis on discipline and punishment"*
  - ❖ BIA Education program focused on directing students to migrate into a city, away from reservation but failed to prepare students academically, socially, psychologically, or vocationally for urban life
- In 1973, 60,000 American Indian children estimated to have been enrolled in an Indian boarding school
- In 2012, the Bureau of Indian Education was responsible for educating approximately 41,051 American Indian and Alaska Native children at 183 elementary and secondary schools on 64 reservations in 23 states

# Boarding Schools: Not Just a Thing of the Past

(continued)

- Rampant sexual abuse at reservation schools existed until the end of the 1980s, in part because of pre-1990 loopholes in state and federal law mandating the reporting of allegations of child sexual abuse
- John Boone, teacher at BIA-run Hopi day school in Arizona, sexually abused as many as 142 boys from 1979 until his arrest in 1987
  - ❖ The principal failed to investigate a single abuse allegation
  - ❖ Acting BIA chief William Ragsdale admitted the agency had not been sufficiently responsive to allegations of sexual abuse, and he apologized to the Hopi tribe and others whose children BIA employees had abused

**Led to the 1990 Indian Child Protection and  
Family Violence Prevention Act (25 USC Chapter 34)**

# Indian Boarding Schools: Impact

- **Historical Trauma** - The collective emotional and psychological injury both over the life span and across generations, resulting from a cataclysmic history of genocide
- **Disenfranchised Grief** - The sense that you cannot grieve; that no one hears or is listening to your grief; the dominant culture acts as if you do not have grief, or do not need to grieve
  - – *Mary Yellow Horse Brave Heart*
- **Native culture is largely verbal** - If one or two generations are removed, the culture as a whole significantly suffers from the loss of history, language, teaching, learning, and communication
- **Healthy parenting was impacted** - Generations learned to parent from boarding school staff who were abusive; use of corporal punishment

# The Adoption Project

From 1958-1967, although legacy lasted much longer

- **Project:** 9 year federal contract
- **Goal:** Provide “White” adoptive parents for Native American children whose parents were deemed unable to provide a “suitable” home
- **Payment:** BIA paid states to “save” Native American children from “neglect”
- **Results:** Over 1,000 Indian children removed from their homes and placed in White adoptive homes or institutions

# 2001 Acknowledgment and Apology: Child Welfare League of America

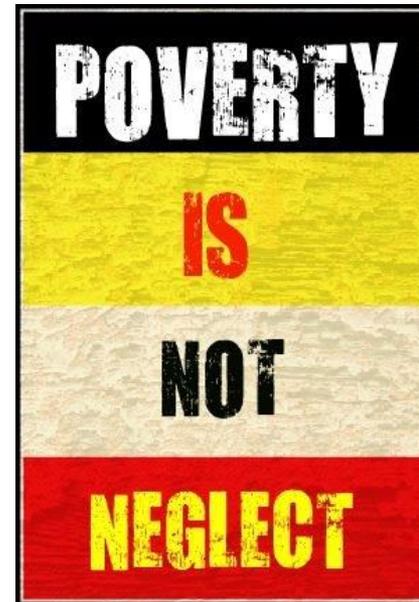
“The people who make up CWLA today did not commit these wrongs, but we acknowledge that our organization did. They are a matter of record. We acknowledge this inheritance, **this legacy of racism and arrogance.**”

“And we acknowledge that this legacy makes your work more difficult, every day. As we accept this legacy, we also accept **the moral responsibility to move forward in an aggressive, proactive, and positive manner**, as we pledge ourselves to see that nothing like what has happened ever happens again.”

- *Shay Bilchik, CWLA Director (2001)*

# Poverty as a Reason for Removal

- Only 1% of Indian children were removed because of abuse - 99% were based on alleged “neglect” or “social deprivation”
- White adoptive parents were seen as being able to provide a better home
- Mother was being “indiscreet”
- Poverty, poor housing, lack of modern plumbing, overcrowding
- Alcohol abuse, applied against Indian parents where it was not applied against non-Indian parents



Association on American Indian Affairs (AAIA) -  
Conclusion of 1969 & 1974 Studies

# Section Summary

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In this section, the goal was for you to:

- Recognize the historical foundation of the Indian Child Welfare Act (ICWA)
- Understand the cultural perspective underlying the ICWA
- Understand your role in promoting equity and fairness by ensuring ICWA is followed

# Questions

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# Section 3

## Trauma and Disparate Treatment of Indian Families: Then and Now



*Photo courtesy: CASA Alaska*

# Learning Objectives

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For this section of the training, our goal is for you to:

- Understand the historical, personal, and intergenerational trauma experienced by Indian people
- Recognize the issues of disproportionality and disparities experienced by Indian children and their families within the child welfare system today
- Recognize the associated implications for handling child abuse and neglect cases

# Overview of Trauma

- Historical trauma
- Intergenerational trauma
- Effects of out of home placement
  - ❖ Split Feathers



# Disproportionality Then and Now

- Indian children in the United States experience a variety of challenges
- American Indians and Alaska Natives live in poverty at higher rates than all other races (*U.S. Census Bureau*)
- They experience a variety of disparities from health (*Urban Indian Health Institute, 2010*) to education (*National Center for Education Statistic, 2008*)
- One of the most alarming is their overrepresentation in out of home placements, including child protection, children's mental health, developmental disability, and some delinquency foster care placements

# Disproportionality Then and Now

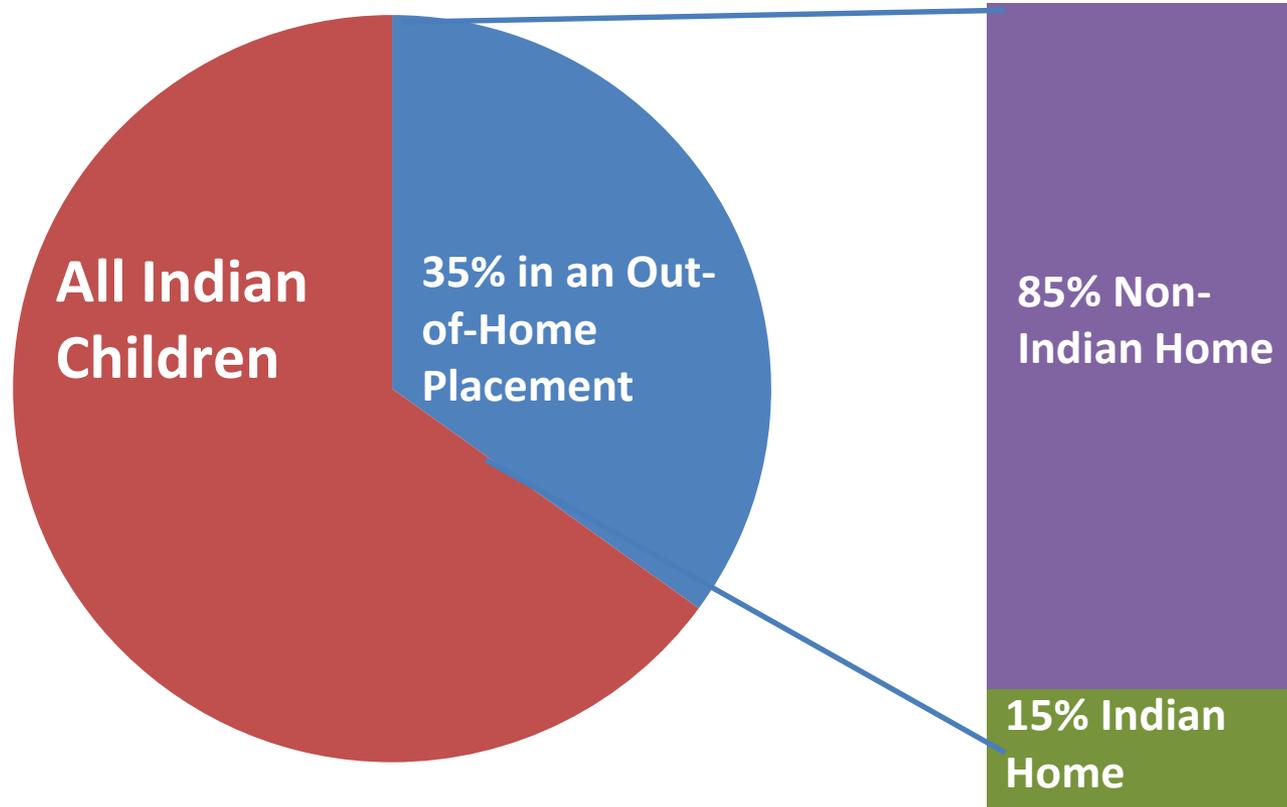
## 1969 & 1974 Association on American Indian Affairs Studies

- 25-35% of all Indian children were separated from their families, placed in foster homes, adoptive homes or institutions
- National rate of removal for Indian children was 25 times higher than non-Indian children
- More than 17% of school-aged Indian children from reservations were living in institutional facilities
- 85% of all Indian children in foster homes were in non-Indian homes



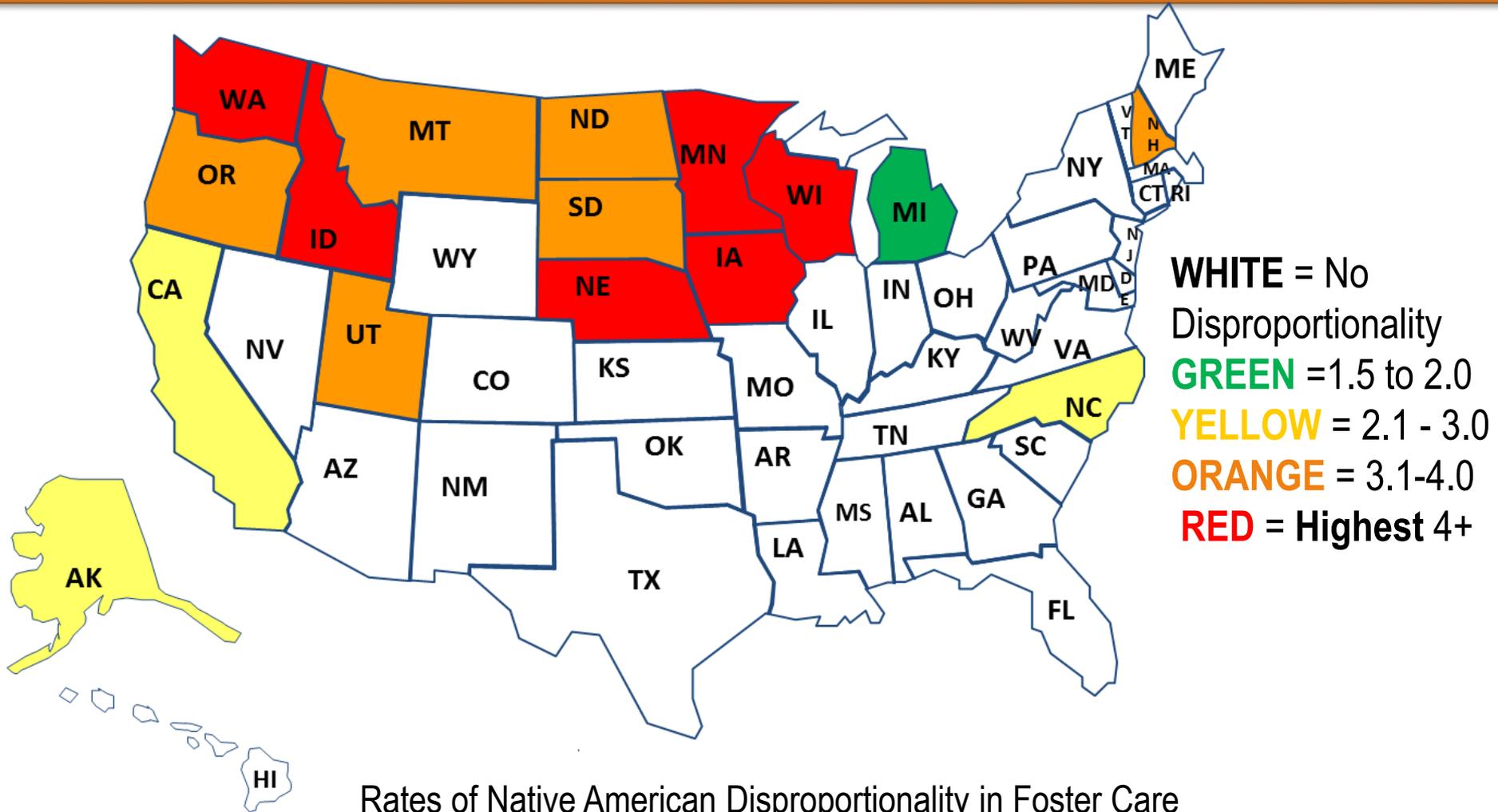
# Disproportionality Then and Now

## 1976: Indian Children and Out of Home Placement – Association of American Indian Affairs Study



\*Data is reflective of practice in certain states

# Disproportionality in Foster Care in Minnesota



Rates of Native American Disproportionality in Foster Care

# Disproportionality in Minnesota: 2016

- In Minnesota today, Indian children continue to be over-represented and experience bias in the system from initial contact to exit. In 2016, Indian children:
  - ❖ Had the highest rate of contact with the child protection system – they were 5.2 times more likely than White children to be “screened-in” as abused or neglected
  - ❖ Had the most disparate rate out-of-home placement – they were 17.6 times more likely than White children to be removed from home and placed in foster care
  - ❖ Were 20 times more likely than White children to be identified as victims of pre-natal exposure

# Disproportionality in Minnesota: Out-of-Home Placement (OHP) in 2017

- American Indian children in out of home placement in 2017 continued to experience disproportionality:
  - ❖ American Indian children account for roughly 1 in 50 children in the state, but 1 in 5 Indian children experienced OHP in 2017
  - ❖ Most American Indian children who were in OHP in 2017 did so because of parental drug abuse (37%) or alleged neglect (34%). American Indian children were in OHP for these reasons at higher rates than other racial groups
  - ❖ Most American Indian children who exited OHP in 2017 were reunified with their parents/primary caretakers

# Disproportionality in Minnesota: Out of Home Care (OHC) in 2017

(continued)

- ❖ American Indian children in OHC were somewhat younger than other racial groups
- ❖ Just over 50% of American Indian OHC episodes were supervised by County Social Services, about 42% were supervised by Tribal Social Services, and 3% were Corrections placements
- ❖ For those who exited OHC in 2017, the typical length of stay for American Indian children was over 2-3 months longer than other racial groups

# What This Means for Indian Children



- Indian children placed in non-Indian homes can dissolve their cultural ties
- Racial and cultural misunderstanding by child protection may influence the increased risk for Indian children
- Predictors of children being placed in out-of-home care are:
  - ❖ Caregivers having an alcohol problem
  - ❖ Caregiver having mental health issues
  - ❖ Caregivers having an inability to pay for basic needs
- Indian families are **NOT** more likely to suffer from these problems as compared to non-Indian families



# What This Means for Indian Children

With children of color overrepresented in the foster care system, these negative consequences need to be kept in mind when deciding to place the child in foster care.

- Children placed in foster care not only experience the trauma of being removed from their home, but a variety of other problems associated with out-of-home placement.
- Children placed in foster care are at increased risk for lower well-being measure such as:
  - ❖ Negative health outcomes and increased risk for chronic diseases
  - ❖ Increased rates of teen pregnancy, sexually transmitted infections and HIV
  - ❖ Serious emotional problems and other mental health issues
  - ❖ Increase risk for suicide
  - ❖ Decreased educational attainment
- Higher rates of unemployment
- Increased likelihood of incarceration
- Increased rates of poverty
- Higher probability that children in foster care are involved in delinquency cases

# Positive Outcomes of ICWA From a Tribal Perspective

- Sacredness of tribal youth is maintained
- Youth are contributing members of the community (Tribal and non-Tribal)
- Youth have a sense of belonging to the community (Tribal and non-Tribal) and are connected to their culture
- Youth are actively connected to Tribal and non-Tribal resources to achieve interdependency
- Youth recognize the importance of community involvement (Tribal and non-Tribal) and are involved in the process of creating positive change, utilizing mentoring programs, also serving as mentors
- Youth are continuously exposed to culture, customs, and traditions
- Achieve cultural permanency through creativity and continued partnership and collaboration with the tribe
- Non-Tribal custodians of Tribal youth have access to Tribal cultural and community resources and allow youth to meaningfully experience and explore their Tribal identity
- Tribes are preserved for 7 generations to come



# Section Summary

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For this section of the training, our goal was for you to:

- Understand the historical, personal, and intergenerational trauma experienced by Indian people
- Recognize the issues of disproportionality and disparities experienced by Indian children and their families within the child welfare system today
- Recognize the associated implications for handling child abuse and neglect cases and your role in helping to avoid disparate treatment

# Questions

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# Section 4

Understanding  
and Applying  
the  
Requirements  
of ICWA,  
Regs., and  
MIFPA



# Learning Objectives

For this section of the training, our goal is for you to:

- Value how critical it is to identify Indian children during the initial stages of child welfare proceedings and the ongoing duty to inquire throughout the case
- Value engaging and working with tribes as resources for decision making throughout the case
- Value the connection of Indian children to their tribe and community, including membership in their tribe
- Understand your role in promoting equity and fairness by ensuring ICWA is followed

# Legal Authority for ICWA Practice in Minnesota

In your folder, you will find some handouts of legal authority for ICWA practice requirements in Minnesota:

- Indian Child Welfare Act (1978) **(yellow)**
- 2016 Bureau of Indian Affairs (BIA) Regulations **(green)**  
**(starts on page 38867)**
- 2016 BIA Guidelines for Implementing ICWA **(blue)**
- Minnesota Indian Family Preservation Act (MIFPA)  
**(orange)**
- Minnesota Tribal State Agreement (TSA) **(pink)**

**Each slide includes citation to legal authority**

# Legal Authority for ICWA Practice in Minnesota

- The federal and state statutes, rules, and agreements all play an important role in implementing ICWA practice
- Where Minnesota's MIFPA provides a higher standard of protection to the rights of the parent or Indian custodian than the protection under ICWA, then the state court must apply the higher Minnesota standard
- The higher standards that need to be followed in Minnesota will be addressed during this training

# Overview of Requirements of ICWA, Regs, MIFPA, and TSA

- Congressional and Legislative Findings and Policy for ICWA and MIFPA
- Minnesota Tribal State Agreement
- Definitions
- When ICWA Applies
- Tribal Lineage Inquiry by Social Services Agency and Court
- Exclusive and Concurrent Tribal Court and State Court Jurisdiction
- Transfer to Tribal Court
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- Emergency Removal Proceedings
- Improper Removal of Child
- Notice of State Court Proceeding by Social Services Agency
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- How to Contact a Tribe
- Commencement of Foster Care Proceedings
- Active Efforts
- Standards of Proof and Required Evidence
- Qualified Expert Witnesses
- Placement Preferences
- Appointment of Counsel
- Voluntary Consent to Foster Care and TPR
- Petition to Invalidate Proceedings
- Maintaining and Accessing Records

# Section 4a

## Congressional and State Legislature Findings and Goals of ICWA and MIFPA



# Enactment of ICWA: Congressional Findings

## – Recognition of Cultural Bias

- “An alarmingly high percentage of Indian families are broken up, often by unwarranted removals”
- “An alarmingly high percentage of Indian children are placed in non-Indian foster and adoptive homes and institution”
- “State courts and agencies have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families”
- “Congress has plenary power over Indian affairs and has assumed the responsibility for protection and preservation of Indian tribes and their resources”
- **“There is no resource more vital to the continued existence and integrity of Indian tribes than their children”**

# Enactment of ICWA: Congressional Goals

By enacting ICWA, Congress established minimum standards of practice for state courts and agencies designed to achieve the following goals:

- To prevent the break-up of Indian families
- To protect the best interests of Indian children
- To promote the continued existence of Indian Tribes

# Enactment of MIFPA: Legislative Goals

When enacting MIFPA, the Minnesota Legislature identified the following policy and goals:

- Indian children are the future of Indian tribes and are vital to their very existence
- To protect the long-term interests (as defined by tribes) of Indian children, families, and tribes
- To preserve the Indian family and tribal identity, including the understanding that Indian children are damaged if family and child tribal identity are denied

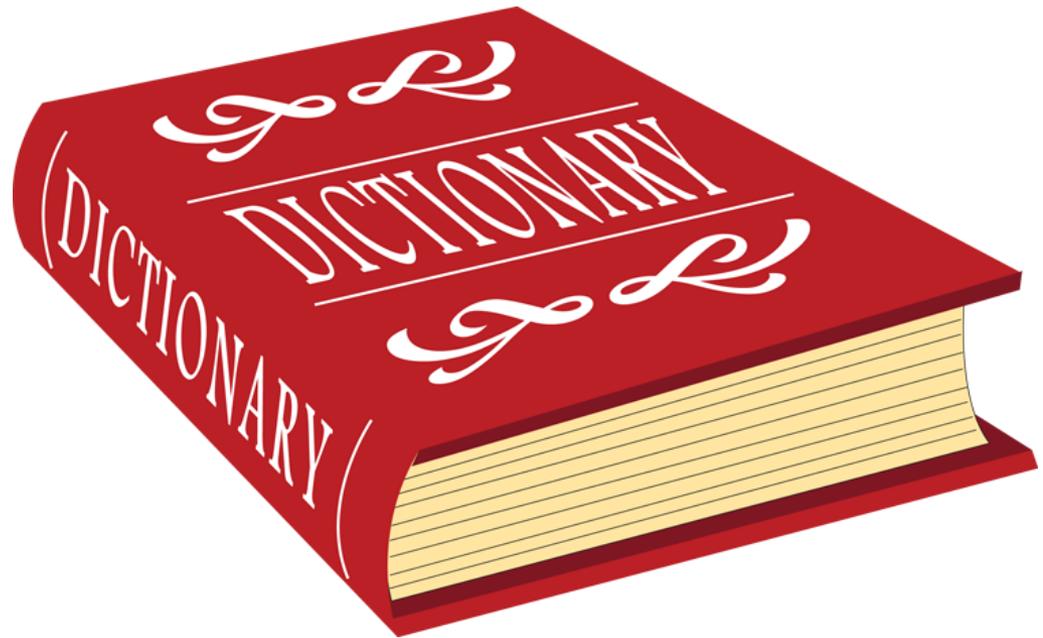
# Minnesota's Tribal State Agreement (TSA)

ICWA and federal Regulations encourage Tribes and States to enter into cooperative agreements regarding implementation of ICWA practices.

- Minnesota Tribal State Agreement signed in 1998 and revised in 2007
- Agreement between State of Minnesota (DHS) and the 11 federally recognized Tribes located within Minnesota
- Directs how child custody cases involving Indian children should proceed in State courts
- Describes best practices, including definitions of “active efforts” and “best interests”

# Section 4b

## Definitions



# Definition of “Indian Child”

- “Indian child” means any unmarried person who is under age 18 and is either:
  - ❖ a member of an Indian tribe; or
  - ❖ is eligible for membership in an Indian tribe ~~and is the biological child of a member of an Indian tribe~~
  
- In Minnesota, a biological parent does not need to be a member of a tribe in order for a child to be an Indian child

# Definition of “Indian Child”

- A determination by a tribe that a child is a member of the Indian tribe or is eligible for membership in the Indian tribe is solely within the jurisdiction and authority of the tribe to decide, and is conclusive
- Each tribe determines its eligibility requirements and can change their criteria and designation at any time

# Definition of “Indian Child’s Parent”

- “Indian child’s parent” means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or customs
- “Indian child’s parent” does not include an unwed biological father where paternity has not been acknowledged or established
- Paternity has been acknowledged when an unmarried father takes any action to hold himself out as the biological father of an Indian child

# Definition of “Child’s Indian Custodian”

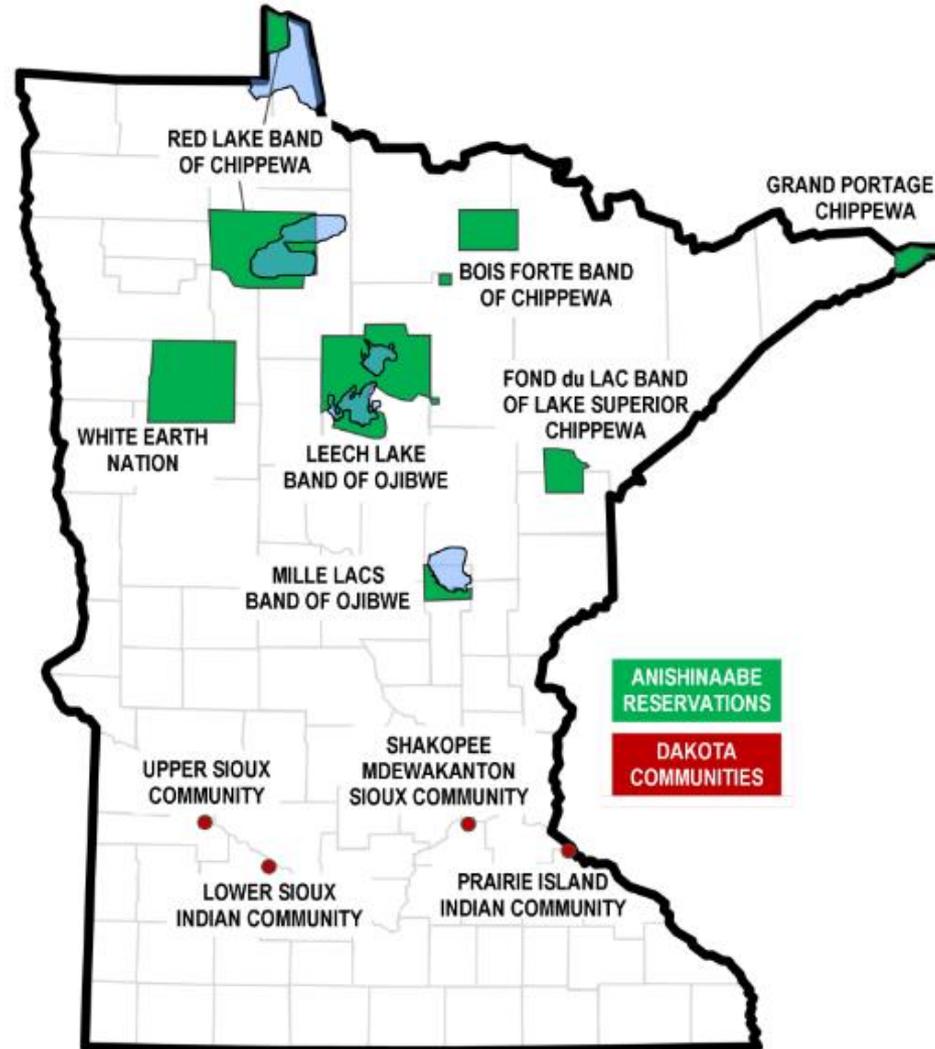
- “Child’s Indian custodian” means any Indian who has legal custody of an Indian child under applicable tribal law or custom or under applicable state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child
- An Indian may demonstrate that he or she is an Indian custodian by looking to tribal law or custom or to state law

# Definition of “Indian Child’s Tribe”

Indian child’s tribe means:

- ❖ The Indian tribe in which an Indian child is a member or eligible for membership
- ❖ If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child’s Tribe
- ❖ In the next section we will discuss how to determine a child’s tribe when the child may be a member of multiple tribes

# Minnesota's 11 Federally Recognized Indian Tribes



# Definition of “Best Interests of an Indian Child”

- “Best interests of an Indian child” means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act 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.

# Definition of “Best Interests of an Indian Child”

- Best interests must be informed by an understanding of the damage that is suffered by Indian children if family and child tribal identity and contact are denied
- Best interests means compliance with and recognition of the importance and immediacy of family preservation, using Tribal ways and strengths to preserve and maintain an Indian child’s family
- The best interests of Indian children are inherently tied to concept of belonging and are interwoven with the best interests of the Indian child’s tribe
- Belonging can only be realized for Indian children by recognition of the values and ways of life of the child’s Tribe and support of the strengths inherent in the social and cultural standards of tribal family systems.
- Family preservation shall be the intended purpose and outcome of these efforts

# Definition of “Voluntary Proceeding” or “Voluntary Foster Care Placement”

## ➤ **BIA Regulations: Voluntary Proceeding:**

A proceeding in which either parent or both parents or the Indian custodian has, of his or her or their free will, without threat of removal by a state agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

## ➤ **MIFPA: Voluntary Foster Care Placement**

A decision in which there has been participation by a local social services agency or private child-placing agency resulting in the temporary placement of an Indian child away from the home of the child’s parents or Indian custodian in a foster home, institution, or the home of a guardian, and the parent or Indian custodian may have the child returned upon demand.

# Section 4c

## When ICWA Applies



# When ICWA Applies

The requirements of ICWA apply whenever an Indian child is the subject of any of the following state court proceedings:

- **“Emergency proceeding”**
- **“Child custody proceeding”** (under MIFPA it’s called “child placement proceeding”), including:
  - ❖ **Involuntary proceeding** involving removal of an Indian child or that “could result in removal”
  - ❖ **Voluntary proceeding** where a parent or Indian custodian could be prohibited from regaining custody upon demand
  - ❖ **Pre-adoptive and adoptive placements**

# When ICWA Does Not Apply

- ICWA does not apply in:
  - ❖ Tribal court proceedings
  - ❖ Divorce or custody proceedings between parents
  - ❖ Delinquency proceedings
  - ❖ Criminal proceedings
  - ❖ Voluntary proceedings where a parent or Indian custodian CAN regain custody of the child upon demand

# Proceedings Where ICWA Applies in Minnesota

In Minnesota, ICWA applies to the following;

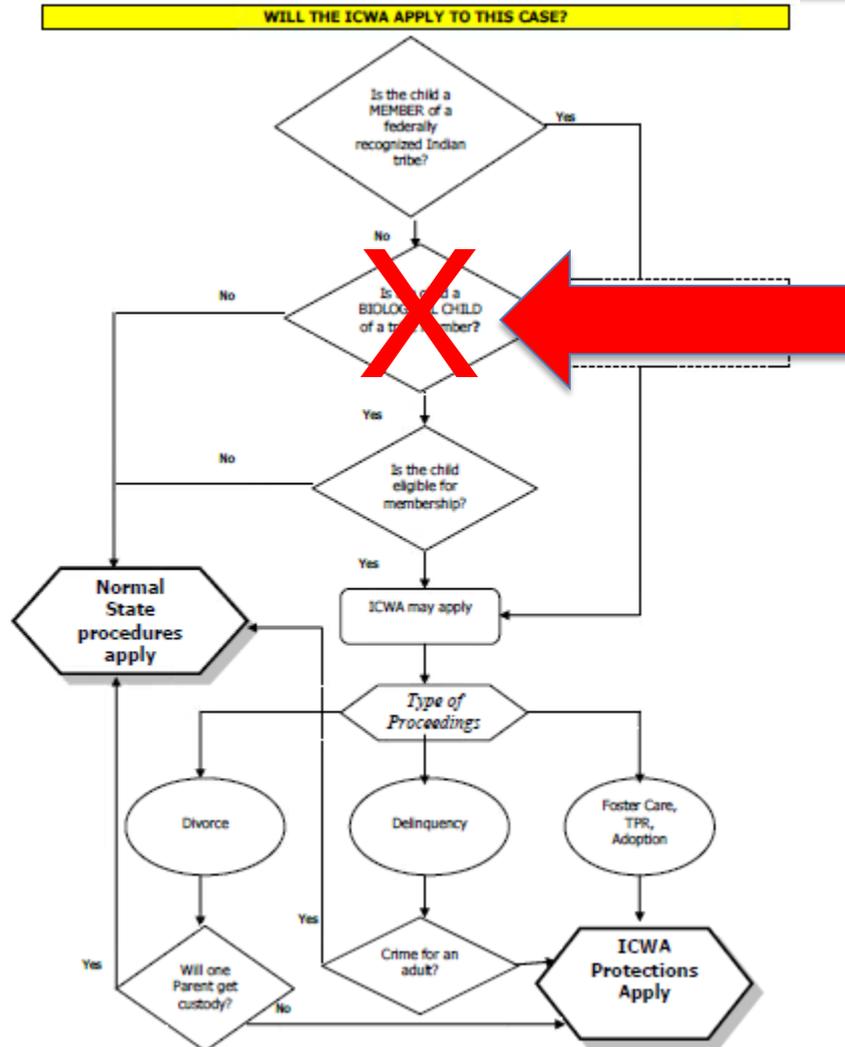
- Involuntary foster care placement (CHIPS)
- 260C voluntary foster care placements if child not returned home after 90 days, including children's mental health
- 260D Voluntary foster care for treatment, if child cannot be returned on demand
- Status offense (e.g., runaway, truancy) (because could result in placement)
- Protective supervision (because could result in placement)
- Trial home visit (because could result in placement)
- Termination of parental rights (TPR)
- Transfer of permanent legal and physical custody (TPLPC)
- Pre-adoptive placement
- Adoptive placement
- Third-party custody proceedings

# Determining When ICWA Applies

- In determining whether ICWA applies to a particular state court “child custody proceeding,” the judge must **not** consider factors such as:
  - ❖ Participation of the parents or child in tribal cultural, social, religious, or political activities
  - ❖ The relationship between the child and his/her parent(s)
  - ❖ Whether the parent(s) ever had custody of the child
  - ❖ The Indian child’s blood quantum

# Determining When ICWA Applies

This flow chart is available as a handout in your folder.



MIFPA does not require child to be child of a tribal member, so this step MUST be skipped in Minnesota

# Section 4d

## Exclusive and Concurrent Tribal and State Jurisdiction

# Determining Jurisdiction

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**Collaboration**

**Collaboration**

**Collaboration**

# Jurisdiction: Child Ward of Tribal Court

- In any voluntary or involuntary child custody proceeding, state court must determine if child is a ward of tribal court
- A child may be a ward of tribal court regardless of where child resides or is domiciled
- If a child is a ward of tribal court, state court has only emergency jurisdiction, tribe has exclusive jurisdiction, and state court must:
  - ❖ expeditiously notify tribal court of the pending dismissal of the state court proceeding
  - ❖ ensure tribal court is sent all records of the proceeding,
  - ❖ communicate with tribal court judge about any conditions or requirements that should be put in place regarding safe transition of child to jurisdiction of child's tribe; and
  - ❖ dismiss the state court proceeding

# Jurisdiction: Child Resides or Domiciled on Reservation

- In any voluntary or involuntary child custody proceeding, state court must determine child's **residence** and **domicile**
- A person may reside in one place and be domiciled in another
- Domicile means:
  - ❖ For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere
  - ❖ For an Indian child, the domicile of the Indian child's parents or Indian custodian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

# Jurisdiction: Child Resides or Domiciled on Reservation

(continued)

- If child resides or is domiciled on a reservation where tribe exercises exclusive jurisdiction over child custody proceedings, then state court has only emergency jurisdiction, tribe has jurisdiction, and state court must:
  - ❖ expeditiously notify tribal court of pending dismissal of state court proceeding
  - ❖ ensure tribal court is sent all records of the proceeding,
  - ❖ communicate with tribal court judge about any conditions or requirements that should be put in place regarding safe transition of child to jurisdiction of child's tribe; and
  - ❖ dismiss the state court proceeding

# Tribal Affiliation: “Existing Indian Family” Doctrine

- Court shall not determine applicability of ICWA or MIFPA to a child custody proceeding based upon:
  - ❖ whether an Indian child is or is not part of an existing Indian family
  - ❖ level of contact a child has or does not have with child's Indian tribe, reservation, society, or off-reservation community
- ICWA and MIFPA apply to child custody proceedings involving an Indian child whether or not child is in physical or legal custody of an Indian parent, Indian custodian, Indian extended family member, or other person at commencement of proceedings

# Section 4e

Transfer to  
Tribal Court

# Transfer to Tribal Court: Request to Transfer

- An Indian child's parent, Indian custodian, or tribe may request a transfer of a foster care, TPR, pre-adoptive, or adoption proceeding from state court to tribal court
- The request to transfer may occur at any time during the proceeding, including CHIPS, permanency, or adoption
- The request may be in writing or stated orally on the record
- Upon receipt of a request to transfer, the state court must promptly notify the tribal court in writing of the request and may request a timely response about whether the tribal court wishes to accept or decline the transfer

# Transfer to Tribal Court: Request to Transfer

- Upon receipt of a request to transfer to tribal court, the state court must transfer the proceeding unless:
  - ❖ Either parent (Indian or non-Indian) objects to a transfer
  - ❖ The tribal court declines the transfer, or
  - ❖ Good cause exists for denying the transfer
- Child age 12+ no longer has a right to object to a transfer to tribal court – this option was in the old Guidelines, but is not in the current Regulations
- If the state court determines there is reason not to transfer, the reason for the denial must be stated on the record

# Transfer to Tribal Court: Good Cause to Deny Transfer

- Any party to the proceeding must have opportunity to provide court with views about whether good cause to deny transfer to tribal court exists
- If a party believes good cause to deny transfer exists, the reasons for that belief must be stated orally on record or submitted in writing and be served upon all parties
- Establishing good cause to deny transfer to tribal court is a fact-specific inquiry determined on a case-by-case basis
- Party opposed to transfer of jurisdiction to tribal court has burden to prove by clear and convincing evidence that good cause to deny transfer exists

# Transfer to Tribal Court: What **IS** Good Cause to Deny Transfer

The court may find good cause to deny transfer to tribal court if:

- ❖ The Indian child's tribe does not have a tribal court or any other administrative body of a tribe vested with authority over child custody proceedings to which the case can be transferred and no other tribal court has been designated by the Indian child's tribe;  
or
- ❖ The evidence necessary to decide the case could not be adequately presented in tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship by any means permitted in the tribal court's rules.  
Without evidence of undue hardship, travel distance alone is not a basis for denying a transfer.

# Transfer to Tribal Court:

## What **is NOT** Good Cause to Deny Transfer

In determining whether good cause to deny transfer to tribal court exists, state court **cannot** consider following:

- ❖ Whether the foster care or TPR proceeding is at an advanced stage, if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the proceeding until an advanced stage
- ❖ Whether there have been prior proceedings involving the child for which no petition to transfer was filed
- ❖ Whether the transfer could affect placement of the child
- ❖ The Indian child's cultural connections (or lack of connections) with the Tribe or its reservation
- ❖ Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems

# Transfer to Tribal Court: Transfer Granted

- If the tribal court accepts the transfer, the state court must:
  - ❖ ensure the tribal court is sent all records of the proceeding
  - ❖ communicate with the tribal court judge to ensure the transfer of custody of the child is accomplished smoothly and in a way that minimizes disruption of services to the child and family
  - ❖ dismiss the proceeding

# Section 4f

Tribal Lineage  
Inquiry by  
Social  
Services  
Agency and  
Court



# Inquiry About Tribal Lineage by Social Services Agency: Initial Contact

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At the time the child comes to the attention of the social services agency, the agency shall inquire of the child, the child's parents and custodians, and other appropriate persons whether there is any reason to believe the child may have lineage to an Indian tribe

# Inquiry About Tribal Lineage by Court: EPC or Other Initial Hearing

- Judge must ask each person involved in an emergency or voluntary or involuntary child-custody proceeding whether the person knows or has reason to know the child is an Indian child
- Inquiry must include parties, participants, and attorneys, including foster parents and relatives in audience
- Inquiry must be made at commencement of the proceeding and all responses must be on the record
- Judge must instruct parties/participants to inform court if they subsequently receive information that child is or may be an Indian child

# Inquiry About Tribal Lineage by Court: Reason to Know

(continued)

- A judge has “reason to know” a child is an Indian child if:
  - ❖ court is informed by any party or participant involved in the proceeding the child is an Indian child or they have information indicating the child may be an Indian child
  - ❖ child gives court reason to know he/she is an Indian child
  - ❖ court is informed the domicile or residence of child, parent, or Indian custodian is on a reservation
  - ❖ court is informed child is or has been a ward of Tribal court
  - ❖ court is informed a parent or child possesses a tribal membership card

# Inquiry About Tribal Lineage by Court: Reason to Know

(continued)

- If there is reason to know child is an Indian child, but court does not have sufficient evidence to determine the child is or is not an “Indian child,” court must:
  - ❖ Treat child as Indian child until it is determined the child does not meet the definition of an “Indian child”
  - ❖ Confirm by way of a report, declaration, or testimony that agency used due diligence to identify and work with all of the tribes of which child may be a member (or eligible for membership) to verify whether child is in fact a member or a biological parent is a member and child is eligible

# “Indian Child” Determination

- The Indian child’s tribe determines whether the child is a member of the tribe or eligible for membership
- The tribe’s determination is solely within the discretion of the tribe and is conclusive
- The state court may not substitute it’s own determination regarding whether a child is or is not a member of a tribe
- Based upon the information provided by the tribe, the court determines whether the child is an Indian child and whether ICWA applies

# Determining “Indian Child’s Tribe” When Child May be a Member or Eligible in Multiple Tribes

- An “Indian child” is an unmarried person under the age of 18 who is a member of an Indian tribe or is eligible for membership
- (Regs) If child meets definition of “Indian child” through more than one tribe, deference should be given to tribe in which child is already a member, unless otherwise agreed to by the tribes
- (Regs) If child meets definition of “Indian child” through more than one Tribe, court must provide opportunity for Tribes to determine which should be designated as Indian child’s Tribe
  - ❖ If tribes reach agreement, state court must follow that agreement
  - ❖ If tribes are unable to reach agreement, state court designates tribe with most significant contacts based on factors specified in Regs

# Determining “Indian Child’s Tribe” When Child May be a Member or Eligible in Multiple Tribes

- (MIFPA) If child is a member of or eligible for membership in more than one tribe, Indian child's tribe is tribe with which the Indian child has the most significant contacts
  - ❖ If tribe with the most significant contacts does not express an interest in the outcome of the actions, any other tribe in which the child is eligible for membership that expresses an interest in the outcome may act as the Indian child's tribe

# Section 4g

## Notices



# Types of Notices

- Under the ICWA, Regulations, and MIFPA there are three types of notices:
  - ❖ Notices by social services agency
    - ✓ 24-hour notice of family assessment or investigation
    - ✓ 7-day notice of child receiving services
    - ✓ 7-day notice for voluntary foster care placement
  - ❖ Notices by petitioner (frequently the agency)
    - ✓ Registered/certified mail return receipt requested
  - ❖ Notices by court administration

# Social Services Agency **24-Hour** Notice: Family Assessment or Investigation

- When the agency has information that a **family assessment or investigation is being conducted** that may involve an Indian child, the agency shall notify the Indian **child's tribe** of the family assessment or investigation
  - ❖ The notice must be by phone **and** email or fax
  - ❖ The notice must be “immediate” – within **24 hours**
  - ❖ The agency shall request that the tribe or designated tribal representative participate in:
    - ✓ evaluating the family's circumstances
    - ✓ Identifying family and tribal community members
    - ✓ developing case plans

# Social Services Agency **7-Day** Notice: Child Receiving Services

- When the agency has information that a **child receiving services** may be an Indian child, the agency shall **notify all tribes** to which the child may have tribal lineage of:
  - ❖ Child's full name and date of birth
  - ❖ Biological parents' full names and dates of birth
  - ❖ Grandparents' and Indian custodians' full names and dates of birth, if known (if not known, must continue to request info and must provide to tribe once known)
- Notice must be by phone **and** email or fax
- Notice must be provided **within 7 days**
- Purpose of notice is to allow tribe(s) to determine if child is enrolled or eligible for membership and participate in services

# Social Services Agency **7-Day Notice:** Voluntary Foster Care Placement

- ICWA does not require notice be sent by registered/certified mail in voluntary foster care placements
- Under MIFPA, when an **Indian child is voluntarily placed** in foster care, social services agency must give notice of the placement to child's parents, Indian custodians, and tribal social services agency
  - ❖ Notice must be given **within 7** days, excluding weekends and holidays
  - ❖ MIFPA is silent about how notice must be given
- Within 24 hours of receipt of demand by parent or Indian custodian, child in voluntary foster care must be returned to parent or custodian

# Social Services Agency **7-Day Notice:** Voluntary Pre-Adoptive or Adoptive Placement

- ICWA does not require notice by registered mail return receipt requested in voluntary placements
- Under MIFPA, when an Indian child is voluntarily placed in a pre-adoptive or adoptive placement, social services agency must notify tribal social services agency
  - ❖ MIFPA does not specify timing of notice
  - ❖ Notice must be by registered/certified mail
  - ❖ If identity or location of child's tribe unknown, notice must be given to BIA Regional Office (see slide 127)

# Petitioner's Notice to Tribe, Parents, and Indian Custodian: **Registered/Certified Mail**

- In any state court child custody proceeding seeking **foster care placement or TPR** to an Indian child, the petitioner must send notice of the proceeding to:
  - ❖ Each tribe where the child may be a member or eligible for membership
  - ❖ The Indian child's parents (regardless of party or participant status)
  - ❖ The Indian child's Indian custodian, if applicable
- BIA Regional Director by personal delivery or registered/certified mail return receipt requested (see slide 127 for address)

# Petitioner's Notice to Tribe, Parents, and Indian Custodian: **Registered/Certified Mail**

(continued)

- Each notice must include the information in Regulation 23.111(d), including a copy of the petition
- Notice must be sent **by registered or certified mail** with return receipt requested
- A copy of each notice AND each return receipt must be filed in the court file
- Notice may also be sent by personal service or electronically, but such alternative methods **do not** replace registered/certified mail

# Petitioner's Notice to Tribe, Parents, and Indian Custodian: **Registered/Certified Mail**

(continued)

- DHS recently created a uniform statewide notice form
- Court must:
  - ❖ Inquire of Petitioner as to whether Petitioner provided notice to child's parents, Indian custodian(s), and tribe(s)
  - ❖ Ensure notice is sent to child's parents, Indian custodian(s), and tribe(s)
  - ❖ Ensure copies of each notice AND each return receipt is filed with court so court knows whether it can commence the foster care placement or TPR proceeding

# Petitioner's Notice to BIA Regional Office: Registered/Certified Mail

- In every case involving an Indian child, petitioner must send notice of proceeding to BIA Regional Office by registered/certified mail:

*(address in Regs on page 38866 is not correct – here's correct address)*

**Bureau of Indian Affairs Regional Office**

**5600 W. American Boulevard, Suite 500,**

**Bloomington, MN 55437**

**Phone: 612-713-4400**

- Send notice to this Minnesota Regional Office even if tribe is in another state
- Link to correct address of all BIA Regional Offices:

<https://www.bia.gov/regional-offices/midwest>

# Petitioner's Notice to BIA Regional Office: Registered/Certified Mail

(continued)

- Upon receipt of the agency's notice, the BIA Regional Office has 15 days to make reasonable and documented efforts to locate and notify child's Tribe and parents or Indian custodian and send copy of notice to court
- If within 15-days the BIA Regional Office is unable to verify child meets criteria of Indian child or is unable to locate parents or Indian custodians, BIA Office will inform court and state how much more time, if any, will be needed to complete the verification or search

# Petitioner's Notice to BIA Regional Office: Registered/Certified Mail

(continued)

- Even when the identity and address of a child's parents, Indian custodian, and tribe are known, the agency must send a copy of each notice to the BIA Regional Office by personal delivery or registered/certified mail, return receipt requested (see slide 127 for address)

# **Section 4h**

## **Notice of Hearings by Court Administration**

# Court Notice of EPC Hearing to Tribal Social Services by Phone and Email or Fax

- MIFPA provides that when a court has reason to believe a child in emergency protective care because of a court order or law enforcement hold is an Indian child, the court administrator or designee must as soon as possible and before the EPC Hearing takes place notify the **tribal social services agency by telephone and by e-mail or facsimile** of the date, time, and location of EPC Hearing

# Court **Notice of EPC Hearing** to All Parties and Participants **Using Any Method**

- Court administrator or a designee must use whatever methods are available (phone, email, fax, in-person contact) to notify all parties and participants of date, time, and location of EPC Hearing, including:
  - ❖ Indian child
  - ❖ Child's parents
  - ❖ Indian custodian
  - ❖ Tribal social services (per MIFPA must be by phone AND email or fax)
- Court shall make efforts to allow appearances by telephone or ITV for parents, Indian custodians, and tribal representatives
- Court admin must file EPC Hearing Contact List (or equivalent) in court file prior to EPC hearing (form in folder)

# Court **Notice of Other Hearings** to Child, Parents, Indian Custodians, and Tribe

- Juv Prot Rules require court administrator to notify all parties and participants (including Indian child, child's parents, Indian custodian, tribe(s), and tribal social services agency) of date, time, and location of all hearings following EPC
  - ❖ Notice must be in writing
  - ❖ May be separate notice or part of order from current hearing
  - ❖ Must be served at least 5 days prior to hearing (best practice is to serve at close of current hearing)
  - ❖ May be served personally at close of current hearing, by U.S. mail, through the E-Filing System, by e-mail or other electronic means agreed upon in writing by the person to be served, or as directed by the court

# Section 4i

## How to Contact a Tribe

# How to Contact a Tribe

To contact a tribe to provide notice or obtain information or verification, direct the notice or inquiry as follows:

- ❖ Many tribes designate an agent for receipt of ICWA notices and the BIA publishes a list of designated tribal agents for service of process at [www.bia.gov](http://www.bia.gov).
- ❖ For a tribe without a designated tribal agent for service of ICWA notice, contact the tribe to be directed to the appropriate office or individual.
- ❖ If you do not have accurate contact information for a tribe, or the tribe contacted fails to respond to written inquiries, seek assistance in contacting the tribe from the BIA Regional Office (see slide 127)

# **Section 4j**

**Intervention  
by Indian  
Child's Parent,  
Indian  
Custodian,  
and Tribe**

# Intervention

- ICWA and MIFPA provide that in any state court proceeding involving an Indian child's foster care placement or termination of parental rights, the child's Indian custodian and tribe shall have a right to intervene at any point in proceeding
- Under Minnesota's Juv. Prot. Rules, the following are automatically parties to CHIPS and permanency proceedings involving an Indian child, so no need to file notice of intervention:
  - ❖ Indian child's parent
  - ❖ Indian custodian
  - ❖ Indian child's tribe

# Intervention

- In Minnesota, child's tribe not required to formally intervene as already a party under Juvenile Protection Rules; however, should notify state court of intent to participate or not in proceedings
- Tribe may intervene/participate at any time in CHIPS and/or permanency
- Lack of participation by a tribe shall not prevent tribe from intervening in services and proceedings at later date
- At any stage of social services agency's involvement with an Indian child, agency shall provide full cooperation to tribal social services agency, including disclosure of all data concerning Indian child

# Section 4k

## Full Faith and Credit for Tribal Orders and Records

# Full Faith and Credit for Tribal Court Orders

- “The United States, every State, every territory or possession of the United States, and every Indian tribe **shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings** to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.”
- Granting full faith and credit to a document or court order, however, should be distinguished from the question of whether a proper evidentiary foundation has been laid to admit a document or court order into evidence

# Section 4I

## Standards of Proof and Required Evidence

# Standard of Proof and Required Evidence: Emergency Proceedings

- **Determination:** Emergency removal or placement of an Indian child is necessary to prevent imminent physical damage or harm to the Indian child
- **Evidence:** Testimony of qualified expert witness (QEW) **not** required
- **Standard of proof:** Clear and convincing evidence

# Standard of Proof and Required Evidence: Involuntary Out of Home Placement

- **Standard of proof:** Clear and convincing evidence
- **Evidence:** Testimony of at least one QEW
- **Determination:** Continued custody of child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
- **Connection:** Evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the child
- **Covers:** CHIPS foster care, protective supervision, trial home visit, transfer of permanent legal and physical custody

# Standard of Proof and Required Evidence: Involuntary Termination of Parental Rights

- **Standard of proof:** Beyond a reasonable doubt
- **Evidence:** Testimony of at least one QEW
- **Determination:** Continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
- **Connection:** The evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the child

# Section 4m

## Emergency Removal Proceedings

# Emergency Removal: Petition to Remove

➤ In addition to content required under Juv. Prot. Rule 45.02, a petition for an order authorizing emergency removal or continued emergency placement of an Indian child, or its accompanying documents, should include:

- ❖ Name, age, and last known address of child
- ❖ Name and address of child's parents and Indian custodians
- ❖ Tribal affiliation of child, parents, and Indian custodians
- ❖ Domicile and residence of child and name of tribe if child believed to live on reservation
- ❖ If child is believed to reside on a reservation where tribe exercises exclusive jurisdiction over child custody matters, statement about efforts made to contact tribe and transfer proceeding to tribe.

# Emergency Removal: Petition to Remove

(continued)

- ❖ Detailed account of circumstances leading agency to remove child
- ❖ A statement of the risk of imminent physical damage or harm to the Indian child and evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child
- ❖ Steps taken to provide to child's parents, Indian custodians, and tribe notice about emergency proceeding
- ❖ If parents and Indian custodians are unknown, detailed explanation of efforts to locate and contact them, including contact with Regional BIA Director

# Emergency Removal: Child Domiciled or Residing on Reservation

- ICWA allows emergency removal of an Indian child who resides or is domiciled on, but temporarily located off, an Indian reservation in order to prevent imminent physical damage or harm to the child
- The Indian child must be returned to the child's parent(s) (or to tribe if parents unavailable) as soon as threat of imminent physical damage or harm has passed or tribal court asserts jurisdiction, whichever is earlier
- If the child is not returned or case not transferred, the State Court "shall expeditiously initiate a child custody proceeding subject to the [ICWA]" unless a parent signs a voluntary placement agreement returning the child to the tribe

# Emergency Removal: Standard

- Any emergency removal or placement of an Indian child must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the Indian child

# Emergency Removal: Hearing and Findings

- The State court judge must:
  - ❖ Make a finding on the record regarding whether emergency removal or placement is necessary to prevent imminent physical damage or harm to child
  - ❖ Promptly hold a hearing on whether emergency removal or placement continues to be necessary whenever new information indicates emergency situation has ended
  - ❖ Immediately terminate emergency proceeding once court or agency possesses sufficient evidence to determine that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to child

# Emergency Removal: Terminating Emergency Proceeding

- An emergency proceeding can be terminated by one or more of the following actions:
  - ❖ Initiation of a child custody/placement proceeding (e.g., CHIPS, TPR, permanency)
  - ❖ Transfer of the child to tribal court jurisdiction
  - ❖ Restoring custody of the child to the parent or Indian custodian

# Emergency Removal: Terminating Emergency Proceeding

- An emergency proceeding should not be continued for more than 30 days, unless the court makes the following findings:
  - ❖ Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
  - ❖ The court has been unable to transfer proceedings to the jurisdiction of the appropriate Indian tribe; and
  - ❖ It has not been possible to initiate a “child custody proceeding”

# Section 4n

## Improper Removal of Child

# Improper Removal of Child

- Court must expeditiously determine if there was improper removal or retention of an Indian child if, in the course of any child custody proceeding, any party asserts or court has reason to believe that child:
  - ❖ may have been improperly removed from custody of parent or Indian custodian, or
  - ❖ has been improperly retained after a visit or other temporary relinquishment
- If court finds Indian child was improperly removed or retained, court must terminate proceeding and immediately return child to parent or Indian custodian, unless returning child to parent or Indian custodian would subject child to substantial and immediate danger or threat of such danger

# Section 4o

Locate the lime green document that supplements the next three slides



## ICWA Notice Requirements and Commencement of Admit/Deny Hearings November 2019

### NOTICE REQUIREMENTS

Under the ICWA, BIA Regulations, and MIFPA there are three types of notices:

1. **Notices by social services agency**
  - ✓ 24-hour notice given to Indian child's tribe whenever family assessment or investigation commenced ([Minn. Stat. § 260.761, subd. 2\(a\)](#))
  - ✓ 7-day notice given to Indian child's tribe when agency has information that an Indian child may be receiving services ([Minn. Stat. § 260.761, subd. 2\(b\)](#))
  - ✓ 7-day notice given to Indian child's parents, Indian custodian(s), and tribe(s) whenever voluntary foster care placement ([Minn. Stat. § 260.765, subd. 2](#))
2. **Notices by petitioner (frequently the social services agency):** In any state court child custody proceeding seeking foster care placement or TPR to an Indian child, the petitioner must serve notice as follows:
  - ✓ by registered/certified mail return receipt requested to: ([BIA Regulations § 23.111\(a\)-\(d\)](#)) (page 38870 – 38871)
    - ✦ Each tribe where the child may be a member or eligible for membership (the tribe will determine if the child is enrolled or eligible)
    - ✦ The Indian child's parents (regardless of party or participant status)
    - ✦ The Indian child's Indian custodian, if applicable
  - ✓ by personal delivery or registered/certified mail return receipt requested to: ([BIA Regulations § 23.111\(a\)](#)) (page 38866)
    - ✦ BIA Regional Office
  - ✓ A copy of each notice and a copy of each return receipt must be filed in the court file (*MNCIS has specific case events for each*)
3. **Notices by court administration**
  - a. **EPC Hearing:** ([Juv. Prot. Rule 42.02](#))
    - ✓ Court administrator or a designee (e.g., social worker) must use whatever methods are available (phone, email, fax, in-person contact) to notify all attorneys, parties, and participants of date, time, and location of EPC Hearing, including:
      - ✦ Indian child
      - ✦ Indian child's parents
      - ✦ Indian custodians, if any
      - ✦ Tribal social services (*contact must be by phone AND email or fax per MIFPA [Minn. Stat. § 260.761, subd. 2\(c\)](#)*)
    - ✓ Must file [EPC Hearing Contact List](#) (or equivalent) in court file prior to EPC hearing so judge may review who has and has not been contacted and determine what more needs to be done for notice
    - ✓ Must make efforts to allow appearances by telephone or ITV for Indian child's parents, Indian custodians, and tribal representatives

Commencement  
of Foster Care  
and TPR  
Proceedings  
(Admit/Deny  
Hearing) –  
Time Limits

# Commencement of Proceedings: Time Limitations

Info is also on lime green handout on page 2

- As noted earlier, the petitioner must serve notice on the child's parents, Indian custodians, tribes, and BIA Regional Office by registered/certified mail return receipt requested
- With the exception of an EPC hearing, no CHIPS or TPR Admit/Deny Hearing may be held until:
  - ❖ **At least 10 days after receipt of petitioner's notice** by each parent, Indian custodian, AND Indian child's tribe(s) (or BIA Regional Office where parent or Indian custodian or Tribe unknown to petitioner)

# Commencement of Proceedings: Time Limitations

*(continued)*

- ❖ **At least 30 days after receipt of petitioner's notice** by each parent, Indian custodian, AND Indian child's tribe(s) (or BIA Regional Office where parent or Indian custodian or Tribe unknown to petitioner) if a parent, Indian custodian, or tribe has requested up to 20 additional days to prepare for the child custody proceeding

# Commencement of Proceedings: Make a Record

- ❖ If the 10-day and 30-day time limitations have expired and the **identity or location of a parent, Indian custodian, or tribe is unknown or if a parent, Indian custodian or tribe has been served with petitioner's Notice but does not appear in court** at the Admit/Deny Hearing:
  - ✓ the petitioner should make a record of all steps taken to serve the ICWA notice by registered/certified mail; AND
  - ✓ the court should make findings regarding:
    - the adequacy of petitioner's active efforts to serve the notice by registered/certified mail return receipt requested; AND
    - the current status of all return receipts (are they in the court file)
- ❖ Petitioner must continue active efforts to identify, locate, and serve notice on absent parents, Indian custodians, and tribes

# Commencement of Proceedings: Make a Record

*(continued)*

- ❖ The court may decide to proceed with the Admit/Deny Hearing even if an Indian child's parent(s), Indian custodian(s), or tribes(s) are not identified or even if they are not present at the hearing, so long as:
  - ✓ the petitioner has served the required notices by registered/certified mail, including on the BIA Regional Office, AND
  - ✓ the court makes a record of petitioner's efforts to serve notice and current status of service for each parent, Indian custodian, and tribe and finds that those efforts are active efforts; AND
  - ✓ the 10-day and/or 30-day time limitations have expired, AND
  - ✓ a copy of the notice served on the BIA Regional Office is in the court file, along with a copy of the return receipt green card received from the BIA Regional Office

# Advisory of Rights

If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including right to:

- ❖ court-appointed counsel,
- ❖ request transfer to tribal court,
- ❖ object to transfer to tribal court,
- ❖ request additional time to prepare for the child-custody proceeding, and
- ❖ intervene if not already a party

# Section 4p

## Active Efforts and Active Efforts Determination

**Active efforts must be  
from first **contact** with  
the family to **closure****

# Active Efforts Start with the First Contact with the Family

When in doubt  
about how to  
proceed,  
“ask the tribe”



# Active Efforts Required

- “Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child 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
  - ❖ these efforts have proved unsuccessful.”
- **Prior to ordering** an involuntary foster-care placement or termination of parental rights, court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

# Active Efforts: Required Court Findings

- MIFPA requires that a court shall not order out of home placement or permanency placement for an Indian child unless the court finds the social services agency made active efforts to the child's family
- In determining whether the agency made active efforts, the court must make findings regarding whether the following activities were appropriate and whether the local social services agency made appropriate and meaningful services available to the family based upon that family's specific needs

# Active Efforts: Required Court Findings

- Court must make a finding about whether social services agency:
  - ❖ made efforts at earliest point possible to:
    - ✓ identify whether a child may be an Indian child, and
    - ✓ identify and request participation of Indian child's tribe at earliest point possible and throughout investigation or assessment, case planning, provision of services, and case completion
  - ❖ requested that a tribally designated representative with substantial knowledge of prevailing social and cultural standards and child-rearing practices within tribal community evaluate circumstances of Indian child's family and assist in developing a case plan that uses tribal and Indian community resources

# Active Efforts: Required Court Findings

- Court must make a finding about whether social services agency :
  - ❖ provided concrete services and access to both tribal and nontribal services to members of the Indian child's family, including but not limited to:
    - ✓ financial assistance,
    - ✓ food,
    - ✓ housing,
    - ✓ health care,
    - ✓ transportation,
    - ✓ in-home services,
    - ✓ community support services,
    - ✓ specialized services

# Active Efforts: Required Court Findings

- Court must make a finding about whether social services agency :
  - ❖ provided services in an ongoing manner throughout the agency's involvement with the family, to directly assist the family in accessing and utilizing services to maintain the Indian family, or reunify the Indian family as soon as safety can be assured if out-of-home placement has occurred
  - ❖ notified and consulted with child's extended family members, as identified by the child, the child's parents, or the tribe

# Active Efforts: Required Court Findings

- Court must make a finding about whether social services agency :
  - ❖ provided services and resources to relatives who are considered the primary placement option for an Indian child, as agreed by the local social services agency and the tribe, to overcome barriers to providing care to an Indian child, including:
    - ✓ child care assistance
    - ✓ financial assistance
    - ✓ housing resources
    - ✓ emergency resources
    - ✓ foster care licensing assistance and resources

# Active Efforts: Required Court Findings

- Court must make a finding about whether social services agency :
  - ❖ arranged for visitation to occur, whenever possible, in home of Indian child's parent, Indian custodian, or other family member or in another noninstitutional setting, to keep child in close contact with parents, siblings, and other relatives regardless of child's age and to allow child and those with whom child visits to have natural, unsupervised interaction when consistent with protecting child's safety;
  - ❖ consulted with tribal representative to determine and arrange for visitation in most natural setting that ensures child's safety

# Documentation of Active Efforts

- Every **social worker report** to court must provide a detailed list of specific efforts made, steps taken by, and services provided to child and family by agency
- Every **court order** must:
  - ❖ include a detailed list of specific efforts made, steps taken by, and services provided to child and family by the agency
  - OR
  - ❖ incorporate by reference the list of specific efforts stated in the social worker report to court (refer to page/paragraph);
- AND
  - ❖ must include a finding about whether those efforts were or were not active efforts under the circumstances

# Regulations Definition of “Active Efforts”

- Under the Regulations, active efforts means **affirmative, active, thorough, and timely efforts** intended primarily to maintain or reunite an Indian child with his or her family
- Active efforts must involve **actively assisting** parents or Indian custodian through steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan
- To the maximum extent possible, active efforts should be:
  - ❖ provided in a manner **consistent with prevailing social and cultural conditions** and way of life of Indian child’s Tribe
  - ❖ **conducted in partnership** with the Indian child, Indian child’s parents, extended family members, Indian custodians, and Indian child’s Tribe

# MIFPA Definition of “Active Efforts”

- Under MIFPA, active efforts means:
  - ❖ a **rigorous and concerted** level of effort
  - ❖ **ongoing** throughout the involvement of the social services agency
  - ❖ **continuously involving the Indian child's tribe** (“ask the tribe”)
  - ❖ using the **prevailing social and cultural values**, conditions, and way of life of the Indian child's tribe to preserve the Indian child's family and prevent placement of the child
  - ❖ if placement occurs, to **return the Indian child** to the child's family at the **earliest possible time**

# MIFPA Definition of “Active Efforts”

*(continued)*

- Under MIFPA, active efforts includes “**acknowledging traditional helping and healing systems** of an Indian child’s tribe and using these systems **as the core** to help and heal the Indian child and family”
- **Active efforts sets higher standard than reasonable efforts** to preserve family, prevent breakup of family, and reunify family
- Active efforts **includes reasonable efforts** as required by Title IV-E of Social Security Act, so if court makes a finding that active efforts have occurred that is sufficient for Title IV-E

# MIFPA Active Efforts Requirements: Ask the Tribe

MIFPA requires social services agencies to:

- ❖ **work with Indian child's tribe** and family to develop alternative plan to out-of-home placement
- ❖ before making a decision that may affect an Indian child's safety and well-being or when contemplating out-of-home placement of an Indian child, **seek guidance from Indian child's tribe** on family structure, how family can seek help, what family and tribal resources are available, and what barriers the family faces at that time that could threaten its preservation
- ❖ **request participation of Indian child's tribe** at earliest possible time and request tribe's active participation throughout case

# Active Efforts: Examples

Active efforts are to be tailored to the facts and circumstances of the case – the TSA provides the following examples:

- ❖ **Conducting a comprehensive assessment of the circumstances** of the 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**, including actively assisting the parents in obtaining such services
- ❖ **Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate** in providing support and services to the family and in family team meetings, permanency planning, and resolution of placement issues

# Active Efforts: Examples

*(continued)*

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

# Active Efforts: Examples

*(continued)*

- ❖ **Supporting regular visits with parents or Indian custodians** in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child
- ❖ **Identifying community resources** including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources
- ❖ **Monitoring progress and participation in services**

# Active Efforts: Examples

*(continued)*

- ❖ **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**

# Active Efforts Start with the First Contact with the Family

When in doubt about how to proceed, “ask the tribe”



# Section 4q

## Qualified Expert Witnesses

# Qualified Expert Witness: When Testimony Required

- Testimony of at least one Qualified Expert Witness (QEW) is required before court may order:
  - ❖ Removal of an Indian child from his/her parent or Indian custodian
  - ❖ Termination of parental rights
- Testimony of a QEW not required for an emergency removal
- Court may allow QEW to testify by alternative methods, such as in person, or by phone, Skype, ITV, or affidavit
- **Petitioner must present the testimony of a QEW to support the petition; other parties may also present testimony a QEWs; the judge will need to weigh the testimony**

# Qualified Expert Witness: Qualifications

- A QEW:
  - ❖ must be qualified to testify regarding whether child's continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to child
  - ❖ should be qualified to testify as to prevailing social and cultural standards of Indian child's Tribe
- **MN Supreme Court decision 5-16-18:** In a TPR proceeding involving an Indian child, "a district court cannot terminate parental rights unless it determines that evidence shows, beyond a reasonable doubt, that continued custody of the child is likely to result in serious emotional or physical damage to the child. Such determination must be supported by qualified expert witness testimony."

# Qualified Expert Witness: Who May Serve as QEW

- Child's tribe designates the QEW; qualifications of the QEW are not subject to challenge
  - ❖ County social worker regularly assigned to Indian child cannot serve as QEW in child-custody proceedings concerning child
  - ❖ Social services agency shall make diligent efforts to locate and present testimony of a QEW designated by child's tribe
  - ❖ Court or any party may request assistance of Indian child's tribe or Regional BIA Office in locating persons qualified to serve as expert witnesses (see slide 127 for contact info)

# Qualified Expert Witness: Who May Serve as QEW

*(continued)*

- If clear and convincing evidence establishes that a party's diligent efforts cannot produce testimony from a tribally designated QEW, the party shall demonstrate to the court that a proposed QEW is, in descending order of preference:
  - ❖ **Tribal Members** – member of child's tribe recognized by tribal community as knowledgeable in the tribe's customs and practices regarding family life and child rearing
  - ❖ **Lay Persons** – an Indian person from an Indian community who has substantial experience in delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child rearing practices within Indian child's tribe

# Qualified Expert Witness: Who May Serve as QEW

*(continued)*

- If clear and convincing evidence establishes that diligent efforts have been made to obtain a qualified expert witness who is a tribal member or a lay person, but those efforts have not been successful, a party may use an expert witness defined in Rule 702 of Minnesota Rules of Evidence:
  - ❖ **Professional Persons** – a person who has substantial experience in providing services to Indian families and who has substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community

# Section 4r

## Placement Preferences

# Placement Preferences: Generally

- ICWA and Regulations specify placement preferences applicable to Indian children in foster care, pre-adoptive, and adoptive placements
- Tribe may establish a different order for placement preferences
- Court must, where appropriate, consider placement preference of Indian child or Indian child's parents.
- Placement may not depart from preferences
  - ❖ based on solely on bonding or attachment that flowed from time spent in non-preferred placement made in violation of ICWA, or
  - ❖ socioeconomic status of any relative to another

# Placement Preferences: Adoption

- In any adoptive placement of an Indian child, a preference shall be given, in absence of good cause to contrary, to a placement with:
  - ❖ a member of child's extended family;
  - ❖ other members of Indian child's tribe; or
  - ❖ other Indian families
- If child's tribe has established a different order of preference than specified in ICWA or MIFPA, tribe's preference applies
- Where appropriate, court must also consider placement preferences of child or parents

# Placement Preferences: Foster Care or Pre-Adoptive

- A child placed in foster care or preadoptive placement shall be placed in the least restrictive setting that:
  - ❖ Most approximates a family, taking into consideration sibling attachment;
  - ❖ Allows the Indian child's special needs (if any) to be met; and
  - ❖ Is in reasonable proximity to the Indian child's home, extended family, or siblings.

# Placement Preferences: Foster Care or Pre-Adoptive

- If Indian child's tribe has not established a different order or preference, then preference must be given, in descending order, in absence of good cause to contrary, to placement with:
  - ❖ a member of Indian child's extended family;
  - ❖ a foster home licensed, approved, or specified by Indian child's tribe;
  - ❖ an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - ❖ 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.

# Placement Preferences: Court Determination Good Cause to Deviate

- Court must follow the order of placement preferences
- Court may place a child outside the order of placement preferences only if court determines there is good cause based on the:
  - ❖ reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences;
  - ❖ reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made;
  - ❖ testimony of a QEW designated by the child's tribe that supports placement outside the order of preference;
  - ❖ testimony by social services that diligent search has been made and this did not locate any families within the placement preferences

# Section 4s

## Appointment of Counsel

# Appointment of Counsel: Parents

- If a **parent or Indian custodian** involved in a removal, placement, or TPR proceeding is found to be indigent, the court **must** appoint an attorney for that person regardless of party or participant status
- Under Minnesota law, court has discretion to appoint counsel for indigent parents – this law is less protective of parents so it should not be followed and instead ICWA mandate for appointment of counsel must be applied

# Appointment of Counsel: Child

- Under ICWA, appointment of counsel for a child is discretionary with the court
- Under Minnesota law, McKenna's Law requires appointment of counsel for child age 10+ unless child waives right to counsel
- Minnesota law is most protective and must be applied

# Section 4t

## Voluntary Consent to Foster Care and TPR

# Voluntary Consent: Tribal Lineage Inquiry and Placement Preferences

- In any voluntary proceeding for foster care placement, TPR, or adoption, court must inquire whether reason to believe child is Indian child
- If reason to believe child is Indian child, court must ensure that social services agency has taken all reasonable steps to verify child's status, including contacting child's tribe
- When child being placed voluntarily, court must ensure that placement preferences are followed
- Content of consent form must comply with Reg. 23.126 (DHS form being drafted)
- Court staff follow CAPs when processing ICWA consent

# How Consent Obtained

Voluntary consent to foster care placement or TPR by parent or Indian custodian not valid unless:

- Executed in writing
- Recorded before a judge (court reporter or electronic record)
- Executed at least 11 days after birth of Indian child
- Consent accompanied by judge's certificate (finding) that :
  - ❖ terms and consequences of consent were fully explained in detail and were fully understood by parent or Indian custodian
  - ❖ parent or Indian custodian understood explanation in English or it was interpreted into a language understood by parent or Indian custodian

# Withdrawal of Voluntary Consent

The following limitations apply regarding withdrawal of consent:

- If voluntary consent to **foster-care placement**, the parent or Indian custodian from whom child removed may withdraw consent for any reason at any time and upon demand child must be returned to parent from whom child removed
- If voluntary consent to **termination of parental rights**, a parent or Indian custodian may withdraw consent for any reason at any time prior to entry of the final decree of termination
- If voluntary consent to an **adoptive placement**, a parent or Indian custodian may withdraw consent for any reason at any time prior to the entry of the final decree of adoption

# Withdrawal of Voluntary Consent to Foster Care: Demand for Return of Child

- While ICWA does not establish any formalities to demand return of child from voluntary foster care, under MIFPA demand for return of child must be a written notarized statement
- Active efforts requires social worker to help parent find and fill out notarized affidavit demanding return of child (form in folder)

# Section 4u

## Petition to Invalidate Proceedings

# Petition to Invalidate: Reasons

ICWA permits an Indian child, child's parent, Indian custodian, or tribe to petition the court to invalidate any action for foster care placement or termination of parental rights upon a showing that the action violated ICWA section:

- ❖ 1911 – dealing with exclusive jurisdiction and transfer to tribal court
- ❖ 1912 – dealing with notice to the child's tribe regarding district court proceedings, appointment of counsel, examination of reports, or testimony of a QEW
- ❖ 1913 – dealing with voluntary consent to foster care placement and termination of parental rights

# Petition to Invalidate: Procedure

- **Time limit:** No time limit for filing a petition to invalidate – it may be brought any time during or after a CHIPS or permanency proceeding
- **Form of petition**
  - ✓ **Motion:** A motion to invalidate may be brought regarding a pending juvenile protection matter
  - ✓ **Petition:** petition to invalidate may be brought regarding a juvenile protection matter in which juvenile court jurisdiction has been terminated

# Petition to Invalidate: Procedure

## ➤ **Form and Service**

- ✓ A motion or petition to invalidate must be in writing, filed with the court, and served pursuant to Rule 14.02.
- ✓ Upon receipt of a petition to invalidate a proceeding in which juvenile court jurisdiction has been terminated, the court administrator shall re-open the original juvenile protection file related to the petition

➤ **Hearing:** the court shall hold an evidentiary hearing within 30 days of the filing of the petition or motion

➤ **Findings and Order:** The court shall issue its decision within 15 days of the conclusion of the evidentiary hearing

# Section 4v

## Maintaining and Accessing Records

# Maintaining and Accessing Records

- Each party to a foster care or TPR proceeding involving an Indian child has right to examine all reports or other documents filed with court upon which any decision related to such action may be based
- State courts entering a final adoption decree or order must provide DHS and the child's tribal social services agency with a copy of the decree and information to show:
  - ❖ name and tribal affiliation of the child;
  - ❖ names and addresses of the biological parents;
  - ❖ names and addresses of the adoptive parents; and
  - ❖ identity of any agency having information relating to adoption

# Maintaining and Accessing Records

- If the court records contain an affidavit of the biological or adoptive parent or parents requesting anonymity, the court shall delete the name and address of the biological or adoptive parents from the information sent to the child's tribal social services agency.
- Upon request by an Indian child who has reached age 18 and who was the subject of an adoptive placement, the court that entered the adoption decree must provide the individual with information about the tribal affiliation of the individual's biological parents

# Summary

For this section of the training, our goal for you was to:

- Value how critical it is to identify Indian children during the initial stages of child welfare proceedings and the ongoing duty to inquire throughout the case
- Value engaging and working with tribes as resources for decision making throughout the case
- Value Indian children's connection to their tribe and community including membership in their tribe
- Understand your role in promoting equity and fairness by ensuring ICWA is followed

# Questions





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**Video: *We Shall Remain* (6:16 min.)**

# Section 5

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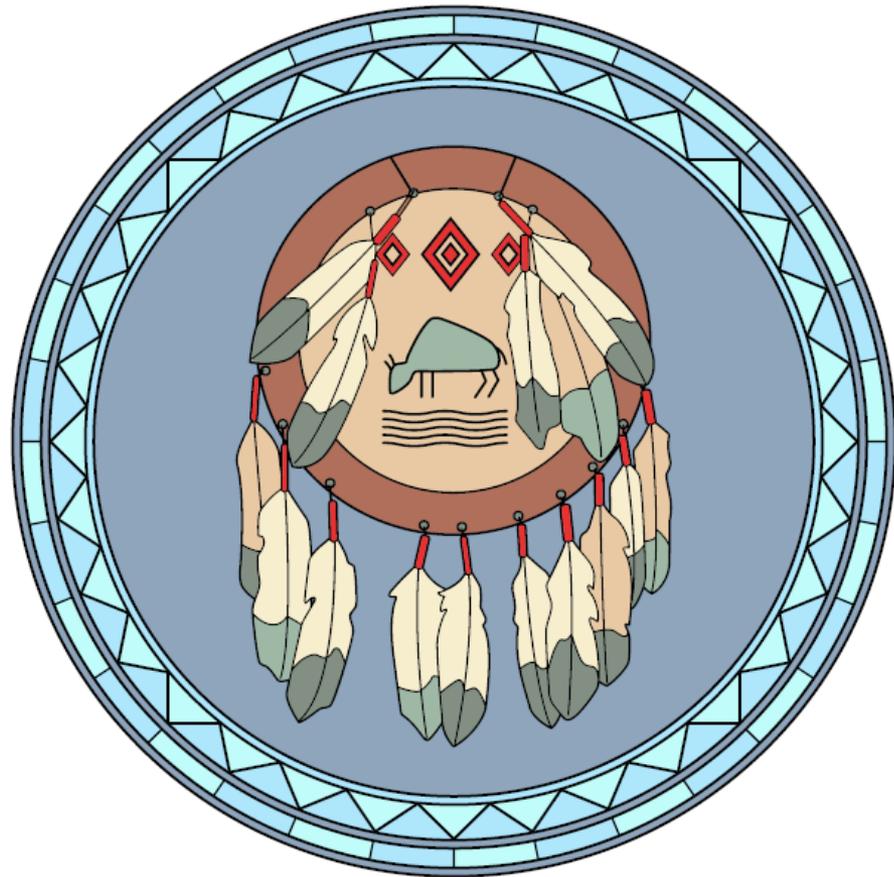
## Next Steps for CJI Judges and CJI Teams

# Assessing Your County's Practice

- Utilize these materials to engage in open discussion regarding county's successes, challenges, and resources
- Review policies or practice documents developed by the court and other partners
- Examine or collect baseline data
- Determine what the desired end result would look like to both the tribe and the state court jurisdiction when ICWA is followed in its entirety and begin to strategize how to achieve the desired result.

# Section 6

## Concluding Thoughts



# Concluding Thoughts

- Outstanding questions?
- What changes will your CJI team make to improve ICWA practice in your county?

# Questions

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