

# The ICWA

## Historical Context and Modern Dilemmas



Honolulu, Hawaii

August 9, 2013

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1.4  
Pitt River Indian Baby.

# Historical Backdrop to ICWA

## The Boarding School Era

- For more than a century, Indian children removed from their homes for no reason other than poverty and race
- Meriam Report sanctioned by Congress in 1928 to study the impact of boarding schools



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



PHOTOGRAPH BY U.S. ARMY SIGNAL CORPS,

# Historical Backdrop to ICWA

□ Meriam report found that:

- Even though Indian boarding schools reportedly created to educate Indian children and provide jobs skills
- Indian children malnourished, harshly punished, poorly educated and 50% mortality rate in schools



**The Haskell babies**

# Historical Backdrop to ICWA

- Indian Adoption Project- 1958-1967

- Indian Adoption Project National Resource Exchange (ARENA) formed in 1967



# ICWA Legislative History

- Four years of hearings, deliberation, debate
- The principal hearings were in 1974, 1977 and 1978 (93<sup>rd</sup>, 94<sup>th</sup> and 95<sup>th</sup> Congress)

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- In 1974, the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs conducted oversight hearings.
  - The most important committee reports were S. Rep. 3777, S.1214, H. Rep. No. 95-608. and H. Rep. No. 95-1386

# ICWA Legislative History

- During the 94<sup>th</sup> Congress, Task Force IV of the American Indian Policy Review Commission, addressed the issue of Indian child placements
- In 1976 and 1977, the Commission considered the findings and recommendations of the Task Force.
- Final report to Congress by the Commission made a number of recommendations many were included in H.R. 12533



SEARCHING

# Testimony Provided to Congress

- Reports from Michigan-state or church authority came to take the children away, forced adoptions in white courts
- Native American Child Protection Council in Detroit alleged kidnapping of Indian children (1970)
- By 1970's, 1 of every 8.1 Indian children in Michigan was adopted out of community, 1 in 90 Indian children in foster care

# Testimony Provided to Congress

- Executive Director of the Association on American Indian Affairs (William Byler) testified removal of Indian children was most casual kind of operation
- Byler testified that state social workers believed the Rosebud Reservation (SD) was by definition an unacceptable environment for children and children were removed without services or any investigation

# Testimony Provided to Congress

- Sisseton-Wahpeton tribal member (SD) testified state workers took their children, no notice to family and court placed burden on parent to prove suitability

- President of NCAI testified that state workers came to the door and took custody of Indian child by force

# Testimony Provided to Congress

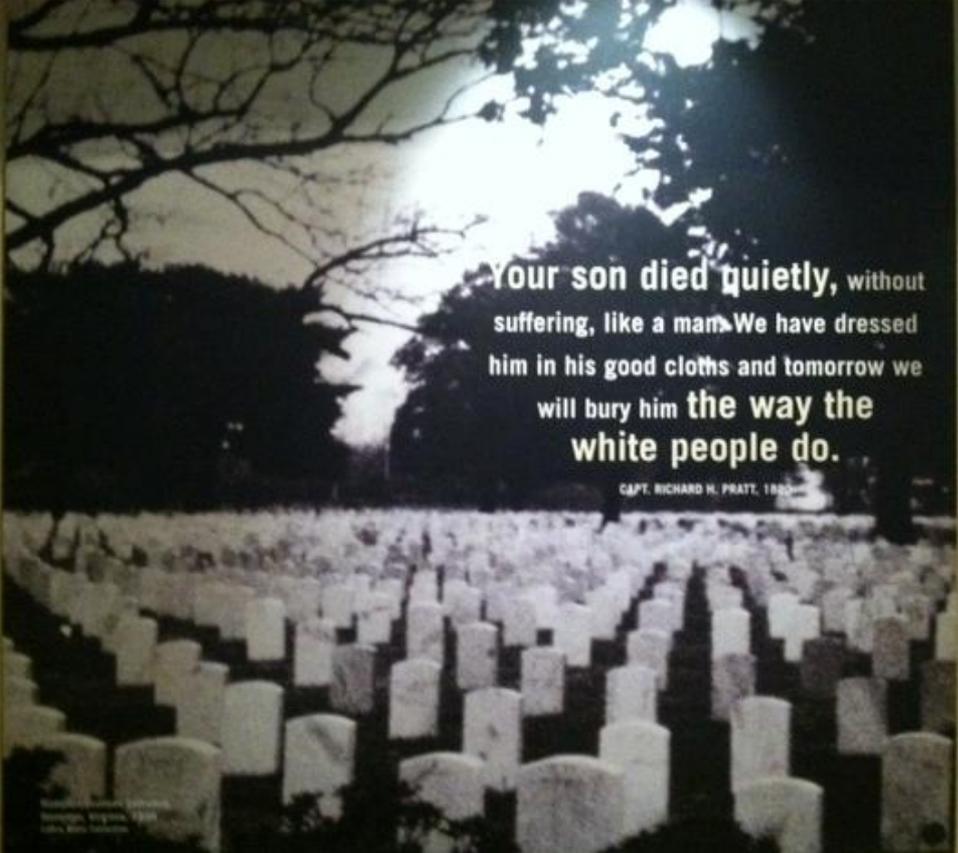
- William Gurneau testified that 80% of Indian families who had children removed received no services whatsoever
- Dr. Carolyn Attneave testified that Indian children were literally herded off to boarding schools like sheep or cattle
- Blandina Cardenas of HEW testified that 21 state study found need to encourage states to deliver services without discrimination and with respect to tribal custom



# Testimony Provided to Congress

- Witness after witness testified about the removal of Indian children often without scintilla of due process

- In 1971, 34,538 Indian children lived in institutional facilities this comprised 17% of school age population
- On the Navajo Reservation 90% of BIA school population in K-12 lived in boarding schools



Your son died quietly, without suffering, like a man. We have dressed him in his good cloths and tomorrow we will bury him the way the white people do.

CAPT. RICHARD H. PRATT, 1961

Richard H. Pratt  
1918-1961  
1961, 1961

# Testimony Provided to Congress

- In 1969 survey of 16 states, 85% of Indian children in foster care were placed in non-Indian homes
- 
- In South Dakota 40% of all adoptions 1967-68 were Indian, Indian population of state was 7%



Capt. Pratt with "Navajoes  
from New Mexico, as they  
arrived at the Carlisle School  
c. 1879  
Smithsonian Institution, 54624

## Navajos Arrive at Carlisle in PA

# Testimony Provided to Congress

- The North Dakota and the Northwest studies documented that only 1% of Indian children removed due to allegations of abuse
- Congress found a crisis in Indian child welfare



# Congressional Findings Led to ICWA

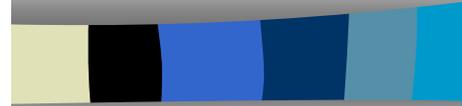
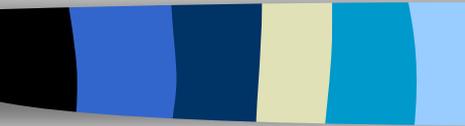
- HR report found Indian communities often shocked to learn that parents they regard as excellent caregivers judged unfit by non-Indian social workers

- HR report also stated that many social workers ignorant of Indian cultural values and social norms, made decisions that were wholly inappropriate in the context of Indian family life and frequently discovered neglect and abandonment where none existed

# Congressional Findings Led to ICWA

- Congress found the dynamics of Indian extended families largely misunderstood. An Indian child may have scores of relatives.

- Many social workers untutored in the ways of normal Indian family life considered leaving the child with persons outside the nuclear family as neglect and thus grounds for terminating parental rights.



# Indian Child Welfare Act 1978

- In 1974, Congress enacted the first federal legislation addressing child abuse and neglect, the Child Abuse Prevention and Treatment Act (CAPTA)
- CAPTA resulted in increase of children removed from their homes
- In ICWA, Congress recognized its trust responsibility to tribes included the protection of its children against attempts to destroy Indian culture and families



INDIAN HOME  
CASS LAKE MINN

# What Is ICWA?

- A mandatory federal law that provides requirements and standards for child-placing agencies and courts to follow in the placement of Indian children
- Provides procedural safeguards in actions involving Indian children.
- The purpose of ICWA is to provide states with higher standards when placing an Indian child

# When Does ICWA apply?

- An Indian child is an unmarried person under the age of 18, who 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 as determined by the Tribe.
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# When Does ICWA Apply?

- Foster care placements in home/institution/kinship
- Pre-adoptive placement in home or institutions
- Adoptive placements including private adoptions
- Termination of parental rights
- State court voluntary and involuntary Indian child custody cases, where custody may be awarded to someone other than biological parents

# When Does ICWA NOT Apply

- Award of custody to parent as part of divorce
- Intra-familial disputes (unless someone other than the parent may be granted custody)
- Placement based exclusively on criminal act (would be crime if committed by adult)

# Right to Notice and Intervention

ICWA requires that notice of all pending involuntary proceedings be sent to:

- the child's parents;
- an Indian custodian; or
- any tribe(s) that may be the child's tribe

# Tribal Court Jurisdiction

- Mandatory transfer to tribal court if child is a ward of the tribal court
- 
- ICWA creates presumption in favor of tribal court adjudication.
  - Good cause to deny transfer may be found.

# Active Efforts

- Active efforts to prevent the placement of an Indian child and to reunify the child with family must be provided.

# Active Efforts

- The placing agency must also satisfy the court that active efforts have been made to provide remedial and

rehabilitative services designed to prevent the breakup of the Indian family and those efforts have proved unsuccessful.

# Standards of Proof

- Foster care placement: Clear and convincing evidence standard
- Termination of parental rights: Beyond a reasonable doubt standard (the highest)

# Foster Care and Placement Preferences

- Extended family; Tribe can define
- Foster home approved by child's Tribe
- Indian foster home licensed by non-Indian authority
- Institutions approved by Indian tribe or operated by Indian organization

# Adoption Placement Preferences

- Extended family



- Members of Indian child's Tribe

- Other Indian families

# Basis for Modifying Placement Preferences

- The Tribe has a different placement preference
- Request of biological parent or child
- Extraordinary needs of the child
- Unavailability of suitable placement after diligent search

# The Gold Standard

- The provisions of ICWA should apply to all children

- Best interests of all children to be with family and remain in their communities

# QEW

No foster care or termination of parental rights order can be made without:

“



...testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

# When are ICWA experts used?

- ICWA child and ICWA matter: removal from home, termination of parental rights and placement decisions
- Before court to advise agency, tribe
- In court as the required expert
- This is a requirement on the agency in the presentation of their case.

# Who is the agency supposed to offer as a QEW

- Member of Indian child's tribe who is recognized by tribal community as



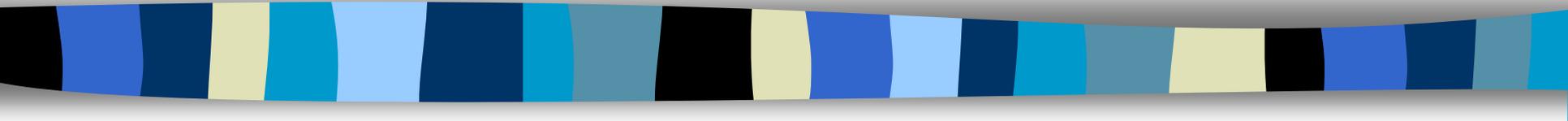
knowledgeable in tribal customs as they pertain to family organizations and childrearing practices

# OR:

- A “lay” expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child’s tribe

OR:

A professional person having substantial education and experience in the area of his or her specialty



# Key Issue:

- These three possible options are described in the federal law and its guidelines but some states have either state statute or state caselaw that narrows the options
- 
- If true in your jurisdiction, critical for the parent's attorney to be aware of
  - Potential argument for the parent's attorney that the court should narrow the categories

# Objecting to QEW qualifications

- Even if they technically qualify - is this person really qualified in the context of the spirit of ICWA?
- Is this person a member of the child's tribe?
- Does the tribe know that this person is the QEW in this case? Are they in agreement with the use of this QEW?

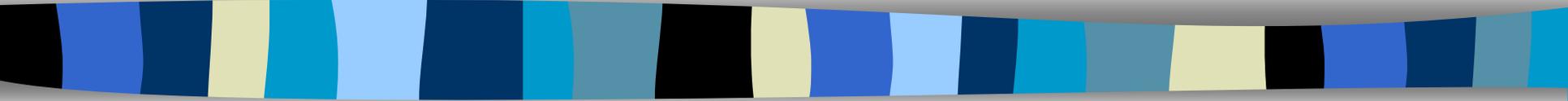
# Purpose of expert testimony ?

Congressional findings: Indian communities often shocked to learn that parents they regard as excellent caregivers judged unfit by non-Indian social workers

Many social workers untutored in the ways of normal Indian family life considered leaving the child with persons outside the nuclear family as neglect and thus grounds for terminating parental rights.

(H.R. Rep. 95-1386, 95TH Cong., 2ND Sess. 1978, 1978 WL 8515 at page 10.)

# Common Issues re: QEW:

- The agency does not offer a QEW at all.
  - The agency claims a QEW is not needed: “there are no cultural issues”
- 
- The agency offers its own worker as the QEW
  - The agency offers a written opinion by someone they say is a QEW
  - The agency wants the QEW to testify by phone

# Can the defense offer another qualified expert witness?

- Who actually decides who is an expert?
- Where could you find another QEW?
- Can the court listen to two or more QEWs?

# What is the expert actually supposed to testify about?

- Removal of an Indian child from his or her family must be based on competent



testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child

# Why do you need a QEW to prove likely damage to a child?

- The party who is seeking to have the child removed or parental rights terminated

must prove to the court that active efforts, in the context of the prevailing social and cultural conditions and way of life of the Indian tribe, have been made and that available family and tribal services and been used and that the risk is still present

# Why does the court need this?

- When is expert opinion generally allowed?

- 
- When specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. (Fed. Rules of Evidence 702)

# Key Point:

- The QEW is not there just to give the court a cultural context or to talk about the tribal way of life – they are to talk about this case and the ultimate decision in this case.
- 
- They must speak to the nexus between the parental conduct and serious FUTURE emotional or physical damage to the child AND whether there are ways to protect against that damage short of removal. (i.e.. active efforts)

# What is the QEW supposed to know and testify about?

- the tribe's history
- how children are viewed by the tribe
- child rearing in the tribe
- use of discipline
- cultural expectations
- tribe's services
- family's history
- protective issues in family
- particular incidents
- this child's needs
- agency responses
- tribe and family view of situation

# What if that is not what happens?

- If the QEW is not offering the testimony that is required under the statute, you may have a great objection / appealable issue or petition to invalidate under 25 USC 1914

# Foundation for any QEW.

- Qualifications and background;
- What do you know about this specific tribe's governing structure; family structure; child rearing practices...
- What have you done to prepare?
- Who did you speak to?
- What did you review?

# The QEW should be testifying about:

- The case – what happened, their review of the records, their interviews with all the relevant people
- How the cultural knowledge that the QEW has is relevant to the issues in the case
- WHAT exact serious physical or emotional damage is that they think is likely -

The Agency Should be Asking an Opinion Question and the QEW should be Answering!



Do you have an opinion within a reasonable degree of certainty as to whether continued custody by the child's parents would likely result in serious physical or emotional damage?

# Common Issues with QEW Testimony

- The QEW has only looked at the agency file and/or talked to the agency caseworker and actually knows nothing else independently about the case
- The court treats the QEW issue as though it is a “box to be checked” and not that it is substantive
- The QEW is “biased” in that he/she is personally related to or knows your client

# Defense Options:

- Don't concede that the CPS worker is an appropriate QEW
- Find out why there is no one from the tribe there as the QEW
- Argue that this is not what ICWA essentially requires
- Argue that it is reversible error
- Argue that the court cannot make the required ICWA removal findings until the agency produces a proper QEW

# Defense Options:

- Do not stipulate to a letter or a phone call – protect the record
- 
- Remind the court that there is a time frame for the court to receive the information and the court can and should adjourn for the QEW testimony

# Defense Options



Remind the court that the parent has a right to voir dire to see if the person is an appropriate QEW and to cross examine the substantive opinion evidence being offered against them

QUESTIONS?

