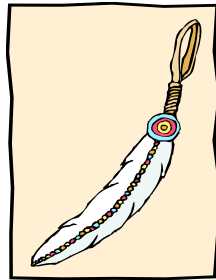


The Indian Child Welfare Act

What are Active Efforts?



Why ICWA?



Historical Facts

- ▶ There were an estimated 30 million Native Americans
- ▶ Today there are approximately 3 million.

■ Extermination

- Kill a buffalo and you kill an Indian
- Diseases (smallpox, tuberculosis)
- Trail of Tears
- Reservations/desolate/unknown land
- Indian Wars



Assimilation

- Civilization Fund Act of 1819 intended to “civilize” and “Christianize” Indians. The goal was to “civilize” Native Americans ridding them of their traditions and customs and teaching them reading and writing in the missionary schools
- “It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught how to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization. . . . They must be withdrawn, in their tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work and to think after the manner of the white man.

Comm. Ind. Aff. Ann. Rep., H.R. Exec. Doc. No .50-1, at XIX (1888).

Civilization Act, early 1800s

These military style boarding schools were a key point in the breakup of Indian families and inter-generational trauma.



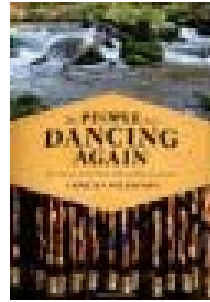
Results of Assimilation

- ▶ Devastating impact on Indian family
 - Loss of:
 - Language
 - Child's sense of his/her role in the extended family
 - Spirituality
 - Customs/traditions
 - Loss of cultural identity
 - Lead to:
 - Psychological problems
 - Cultural shame
 - Abnormal becoming acceptable



Termination

- ▶ 1954 Siletz, Coos, Coquille, Cow Creek, Grand Ronde and Klamath Tribes were terminated.



- ▶ Identity Crisis
 - Tribal members scattered
 - Languages lost
 - Connections with family members lost

Indian Adoption Project

- ▶ Child Welfare League of America formally apologized
- ▶ Children were thought to be better off in white mainstream homes
- ▶ Very little due process – sweep of children

The Indian Child Welfare Act

- ▣ **25 to 35** percent of Indian **children** were removed from their home
- ▣ **85 to 90** percent were placed in non-Indian homes
- ▣ Non-Indian judges and social workers did not understand traditional Indian child-rearing practices and viewed day-to-day life in the children's homes as contrary to their welfare.
 - **Not due to abuse and neglect but because it was believed the children would have a better life.**

ICWA

“The Congress hereby declares that it is the policy of this nation to protect the best interest of Indian children and to promote the stability and security of Indian Tribes and families.”

Purpose of ICWA

- ▶ Prevent the Unwarranted removal of Indian children from their families and Tribes because of cultural bias or ignorance
- ▶ Assure that children who are removed maintain affiliation with their culture and Tribe
- ▶ Maximize Tribal decision making regarding their Indian children
- ▶ Maintain Tribal sovereignty

The Spirit Behind the Act



Continued Need for ICWA Today

- ▶ Latest Oregon data shows Native American children are placed at more than **2 1/2 times** the number one would expect based on their share of population
- ▶ [2013 Child Welfare Data Book](#), published September 2014
- ▶ The National Indian Child Welfare Association describes same problem nationally (**51%** of children in foster care in South Dakota).

How Does This Apply to CRB

CRB Findings and
Recommendations

Legal Basics: Does the Indian Child Welfare Act apply?

- ▶ BIA Guidelines state that Agencies and state courts, in **every** court proceeding, **must ask** whether the child is or could be an Indian child
- ▶ If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member of is not eligible for membership in an Indian tribe.

Determining Whether a Child is an Indian Child

- ▶ **Agency** must ask if there is **reason to believe** the child is an Indian child
 - If there is must obtain verification in writing from all tribes as to member or eligible for membership
- ▶ **State courts** must ask at the start of any child custody proceeding, whether there is **reason to believe** the child is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggest or indicates the child is an Indian child

Source: BIA Guidelines for State Courts and Agencies

Determining Reason to Believe

- ▶ Any party informs the agency or court the child is an Indian child
- ▶ Any agency discovered information suggesting the child is an Indian child
- ▶ The child gives the agency or court reason to believe he/she is an Indian child
- ▶ The domicile or residence of the child, parents or Indian custodian is on an Indian reservation or in a predominately Indian community

Source: BIA Guidelines

Definitions of Reason to Know

- ▶ Knowledge that requires only an ordinary level of smarts to realize that a certain fact exists, or that there are sufficient and reasonable grounds for its existence.
 - Law Dictionary: [What is REASON TO KNOW? definition of REASON TO KNOW \(Black's Law Dictionary\)](#)

Definition of Indian Child

“Indian child’ means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”

[25 USC § 1903\(4\):](#)

Determination of Child’s Tribe

- ▶ Tribe’s determination is conclusive
- ▶ A tribe need not formally enroll its members. The only determinate factor is whether the tribe verifies the child is a member or eligible for membership



Finding #1

- ▶ Has DHS made active efforts to **prevent** or **eliminate** the need for removal of the children from the home
 - Applies if this is the **FIRST** review of the case
 - *What efforts, if any, did DHS make to avoid placing the child(ren) out of the home?*

BIA Guidelines for State Courts and Agencies

- ▶ **Purpose:**
Clarify minimum, Federal standards and best practices.
- ▶ When Requirement for **active efforts to prevent removal begin**
 - “from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or “Indian custodian in order to prevent removal
 - While investigating whether the child is a member of the tribe, eligible for membership, or biological parent is a member of a tribe

Emergency Removal

- ▶ Emergency removal is allowed only as necessary to prevent imminent physical damage or harm to the child.
 - BIA definition: **Present or impending risk of seriously bodily injury or death that will result in severe harm** if safety intervention does not occur.
- ▶ Should be severely limited
- ▶ Requires Affidavit of specific active efforts



Finding #4

- ▶ Has DHS made active efforts to provide services to make it possible for the child(ren) to safely return home?
 - This finding applies in ALL cases
 - *What services has DHS provided or offered?*
 - *Are additional services needed?*

BIA Guidelines Definition of Active Efforts

- Active Efforts (for findings #1 and #4)
 - **Engaging** the Indian child, his or her parents/extended family/Indian child's custodian
 - Taking steps to keep **siblings** together
 - Identifying **appropriate services**, helping parents to overcome barriers actively assisting parents in obtain services

BIA Definition of Active Efforts cont.

- ▶ Conducting or causing to be conducted a **diligent search for the Indian child's extended family members** for assistance and possible placement
- ▶ Taking into account the Indian child's tribe's **prevailing social and cultural conditions** and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards.

BIA Definition of Active Efforts cont.

- ▶ Offering and employing all available and **culturally appropriate family preservation strategies**
- ▶ Completing a **comprehensive assessment** of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal
- ▶ Notifying and consulting with **extended family members** of the Indian child to provide **family structure and support** for the Indian child. To assure **cultural connections**, and to serve as **placement** resources for the Indian child

BIA Definition of Active Efforts cont.

- ▶ Making arrangements to provide **family interaction in the most natural setting** that can ensure the Indian child's safety during any necessary removal
- ▶ **Monitoring** progress and participation in services
- ▶ Providing consideration of **alternative ways of addressing the needs** of the Indian child's parents and extended family, if services do not exist or if existing services are not available *

BIA Definition of Active Efforts cont.

- ▶ Supporting **regular visits and trial home visits** of the Indian child during any period of removal, consistent with the need to ensure the safety of the child



- ▶ Providing **post-reunification** services and monitoring

ACTIVE EFFORTS

Dept. of Human Services v. K.C.J., 228 Or App 70, 207 P3d 423 (2009): “[The] ICWA requires DHS to ‘satisfy the court that **active efforts** have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.’ 25 USC § 1912(d);

ORS 419B.498(2)(b)(C) (incorporating that standard into Oregon's juvenile code). *‘Active efforts’ entails more than ‘reasonable efforts’ and ‘impose[s] on the agency an obligation greater than simply creating a reunification plan and requiring the client to execute it independently.’*”

Reasonable vs. Active Efforts

| Reasonable Efforts | Active Efforts |
|--|--|
| <ul style="list-style-type: none"> ▶ Referring to typical services – DA/Parenting/counseling ▶ Providing a list of required services and approved providers ▶ Managing the case ▶ Meeting requirements set by policy ▶ Sending letter asking about child’s eligibility for enrollment | <ul style="list-style-type: none"> ▶ Referring to tribal/culturally appropriate services ▶ Helping client set appointments, providing transportation. ▶ Proactively engaging the family and the child’s tribe ▶ Meeting individual needs of the child and family ▶ Sending letter, calling tribe(s) and helping to complete application |

ACTIVE EFFORTS GUIDELINES



“ACTIVE EFFORTS – Principles and Expectations”

This document, published by the Oregon Judicial Department, was developed through the collaborative efforts of the federally recognized Tribes of Oregon, the Department of Human Services, and the Citizen Review Board, and provides concrete guidelines for use by courts, DHS staff, and CRBs in evaluating whether “active efforts” have been made in juvenile court dependency cases involving Indian children.

ACTIVE EFFORTS : Visitation

- ▶ Initial service plans and visitation plans should be developed in conjunction with the tribe.
- ▶ The initial service plans shall be written within 60 days of the placement and should include a written visitation plan. Frequent contact among the child, parents, and siblings is imperative to maintain cultural and family ties; unless there is a safety risk or threat of harm to the child.

Active Efforts: Child's needs

- ▶ A culturally appropriate assessment of the child's treatment needs should be completed within 60 days of placement.
- ▶ Active efforts includes more frequent contacts above and beyond policy requirements for face-to-face contact with the family, the child and the provider.

Finding #2

- ▶ Has DHS made diligent efforts to place the child with a relative or person who has a caregiver relationship
 - Applies in ALL cases
 - *Is the child placed with a relative?*
 - *Are there any other available relatives?*
 - *Are siblings placed together?*

BIA Definition of Extended Family Member

Extended family member:

- ▶ *defined by the law or custom of the Indian child's tribe*, or in the absence of such law or custom, is a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

25 U.S.C.. § 1903(2)

Finding #3

- ▶ Has DHS ensured that appropriate services are in place to safeguard the child's safety, health, and well being?
- ▶ This finding applies in ALL cases
- ▶ *What services are being offered to the child? (i.e. placement, education, mental/physical, family connection)*
- ▶ *Are additional services needed?*



BIA Guidelines Placement

- ▶ ICWA requires least restrictive, most family-like setting that meets the health and safety needs of the child and is in reasonable proximity to the child's home. *25 USC §1915.*
 - *This finding is the same as is required under state law for all children.*

ICWA PLACEMENT PREFERENCES

- ▶ **Social and cultural standards applicable:**
 - The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.
- **25 USC § 1915: Placement of Indian children**

ICWA PLACEMENT PREFERENCES

25 USC § 1915(b): *“In any foster care or pre-adoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with–*

- ▶ a member of the Indian child's **extended family**
- ▶ a foster home licensed, approved, or specified by the 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.”
- ▶ **Must follow the tribe's placement preferences**

ACTIVE EFFORTS: Placement Preference

All tribal or ICWA placement preferences shall be followed unless documented good cause to the contrary exists.

Every effort shall be made to locate relatives and to support utilization of relative placements. Consultation with the child's tribe is critical but does not, in and of itself, meet the requirements for a diligent search. Efforts should be clearly documented in the case record

Unavailability of Placement

- ▶ Court must find that active efforts have been made to find placements that meet the requirement
- ▶ A placement **cannot be considered unavailable if it**
 - **Conforms to the prevailing social and cultural standards of the Indian community in** which the Indian child's parent or family resides
 - Or with which the child's parents or extended family members maintain social and cultural ties
 - The court should only consider whether the placement in accordance with the preferences meets the physical, mental and emotional needs of the child.

When Placement Preferences Conflict with State Laws

- In re Jullian B., 82 Cal. App. 4th 1337, 99 Cal. Rptr. 2d 241 (Cal. App. 4th Dist. 2000)(State law requirement that adoptive placement not have criminal record **does not** supersede placement preference provisions of ICWA and state required to seek waiver in order to comply with ICWA.)

The End: Hats off to You



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