

# 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*

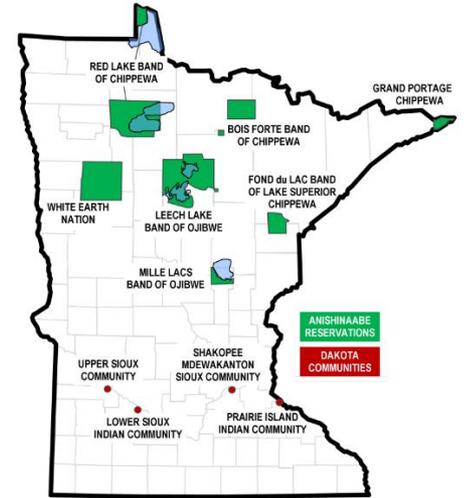
# Agenda

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1. Welcome, Introductions, and Learning Objectives
2. Historical and Cultural Perspectives
3. Trauma and Disparate Treatment
4. Understanding and Applying ICWA: Key Requirements
5. Applying What You've Learned: Case Scenario
6. Next Steps for CJI Judges and CJI Teams
7. Concluding Thoughts
8. Resources

# Section 1

## Welcome, Introductions and Learning Objectives



**INDIAN LAND FOR SALE**

GET A HOME OF YOUR OWN

EASY PAYMENTS

**FINE LANDS IN THE WEST**

IRRIGATED IRRIGABLE GRAZING AGRICULTURAL DRY FARMING

PERFECT TITLE POSSESSION WITHIN THIRTY DAYS

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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# Welcome



# Introductions

- Faculty Introductions
- Participant Introductions
  - ❖ Stakeholder groups present today?
  - ❖ Level of ICWA experience and knowledge?
  - ❖ Most important take away?
  - ❖ Burning question or challenge?

# 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 the ICWA
- Understand your role in ensuring positive outcomes for Indian children, their families, and tribes
- Understand and apply the letter and spirit of the ICWA

# 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 zone
- Wait for a microphone
- Limit side conversations

# Why ICWA is Still Needed Today

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**Video: [Bringing Our Children Home:  
Introduction to the ICWA](#)**

# Questions

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# Section 2

## Historical and Cultural Perspectives



# Learning Objectives

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

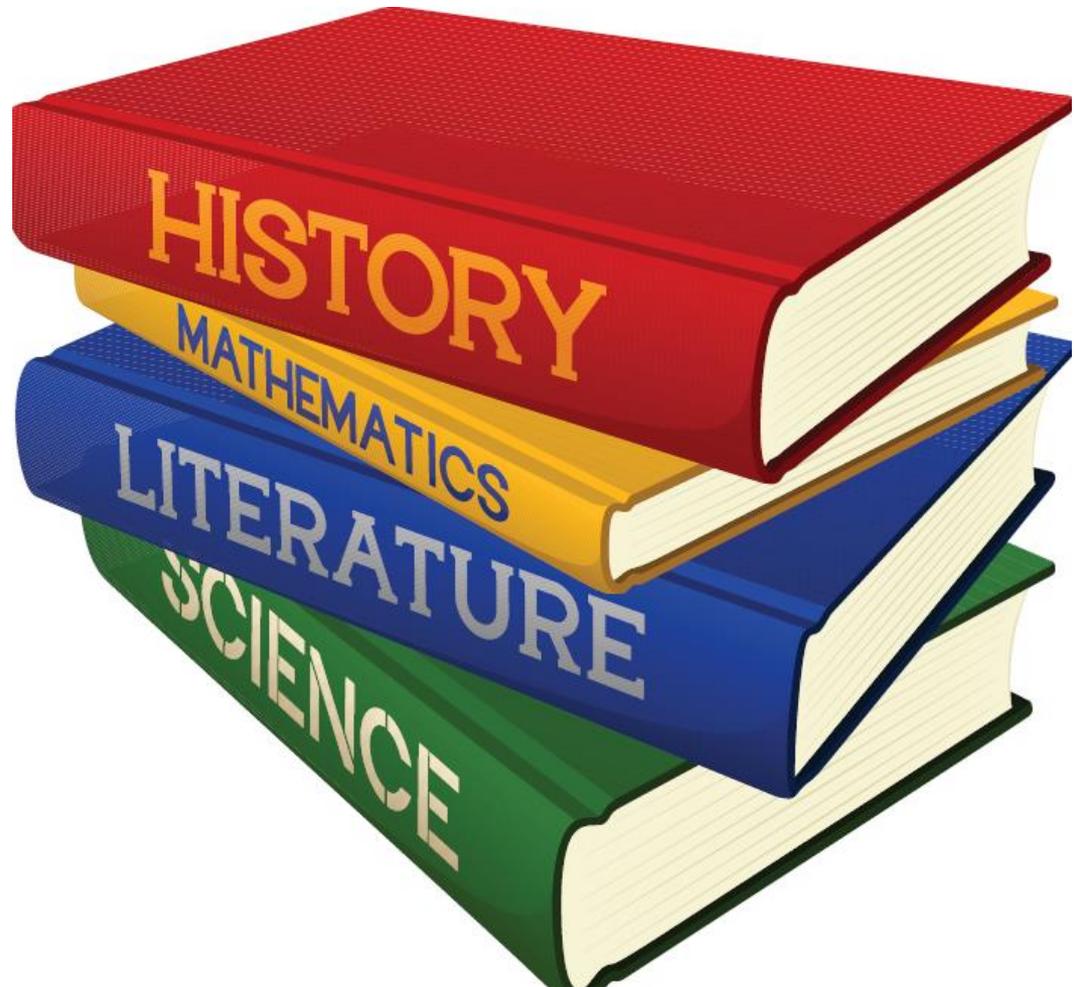
- Recognize the historical foundation of the Indian Child Welfare Act (ICWA)
- Understand the cultural perspectives underlying the ICWA
- Understand your role in promoting equity and fairness by ensuring the ICWA is followed

# Section Overview

- History Lessons: Myths and Reality
- Federal Indian Policy: Dealing With the “Indian Problem”
  - ❖ Values and laws affecting Indian Tribes
  - ❖ Tribal Sovereignty
- Policies and Practices Necessitating the ICWA
  - ❖ Boarding Schools
  - ❖ Adoption Project

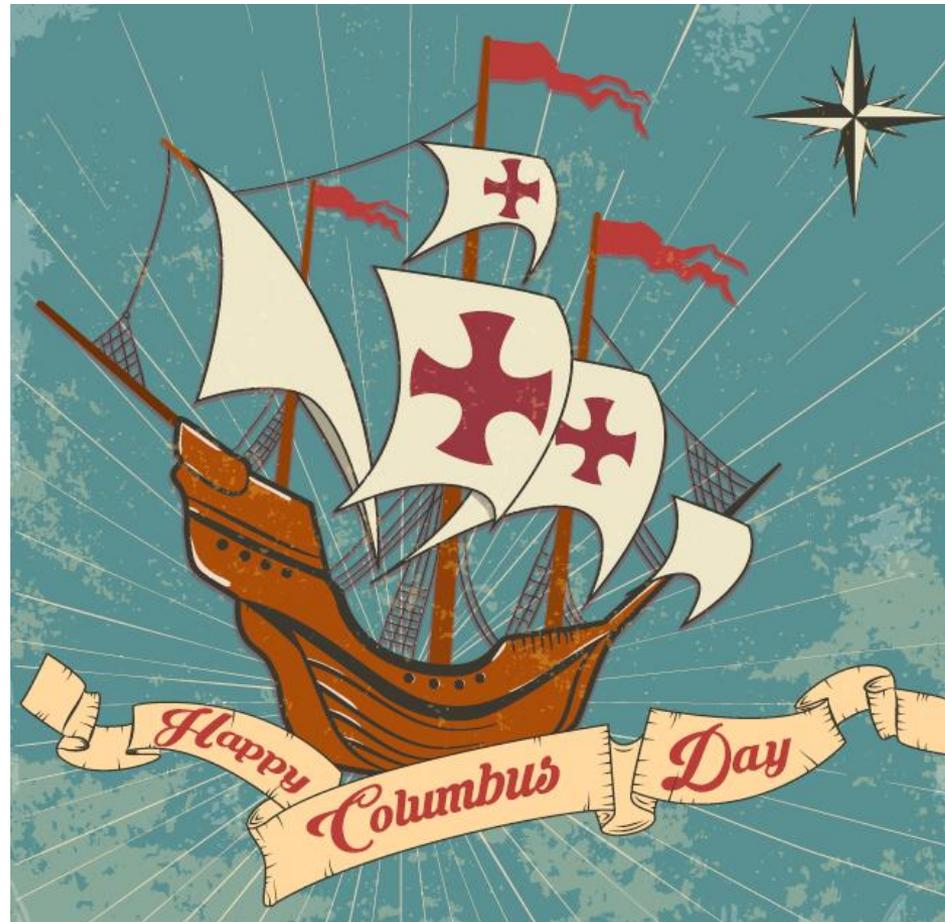
# Section 2a

## History Lessons: Myths and Realities



# History Lessons: What We Are Taught

1492



# History Lessons: The Truth

- ❖ “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.”

- *Christopher Columbus letters/journal writings*

# History Lessons: What We Are Taught



*Happy  
Thanksgiving*

# History Lessons: What We Are Taught

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In 1620, “[The Pilgrims] had arrived in December and were not prepared for the New England winter. However, they were aided by friendly Indians, who gave them food and showed them how to grow corn. When warm weather came, the colonists planted, fished, hunted, and prepared themselves for the next winter. After harvesting their first crop, they and their Indian friends celebrated the first Thanksgiving.”

- *The American Tradition* (textbook)

# History Lessons: The Truth

- In 1623, three years after landing on Plymouth Rock, Thomas Mather, a Pilgrim elder, gave special thanks to God for small pox in his Thanksgiving sermon
- In 1637, the Pequot Tribe had gathered for their annual Green Corn Festival
  - ❖ In the predawn hours, the Tribe's longhouses were surrounded by English and Dutch mercenaries
  - ❖ 700 Pequot tribal members were murdered
  - ❖ The next day, "A Day Of Thanksgiving" was declared by the governor of the Massachusetts Bay Colony

# Section 2b

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



# 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

# 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

# Federal Indian Policy

**1828 – 1887**

## Removal Era

- 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

# Federal Indian Policy



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

## INDIAN LAND FOR SALE

GET A HOME  
OF  
YOUR OWN

✱

EASY PAYMENTS



PERFECT TITLE

✱

POSSESSION  
WITHIN  
THIRTY DAYS

### FINE LANDS IN THE WEST

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# 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

# Federal Indian Policy: Minnesota

- U.S. - Dakota War of 1862
- Sandy Lake Tragedy, 1850



Photographs used with permission of Minnesota Historical Society

# Who Said This?

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"Indians and wolves are both beasts of prey, tho' they differ in shape."

"The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the state."

"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."

# Brief History of Federal Indian Policy

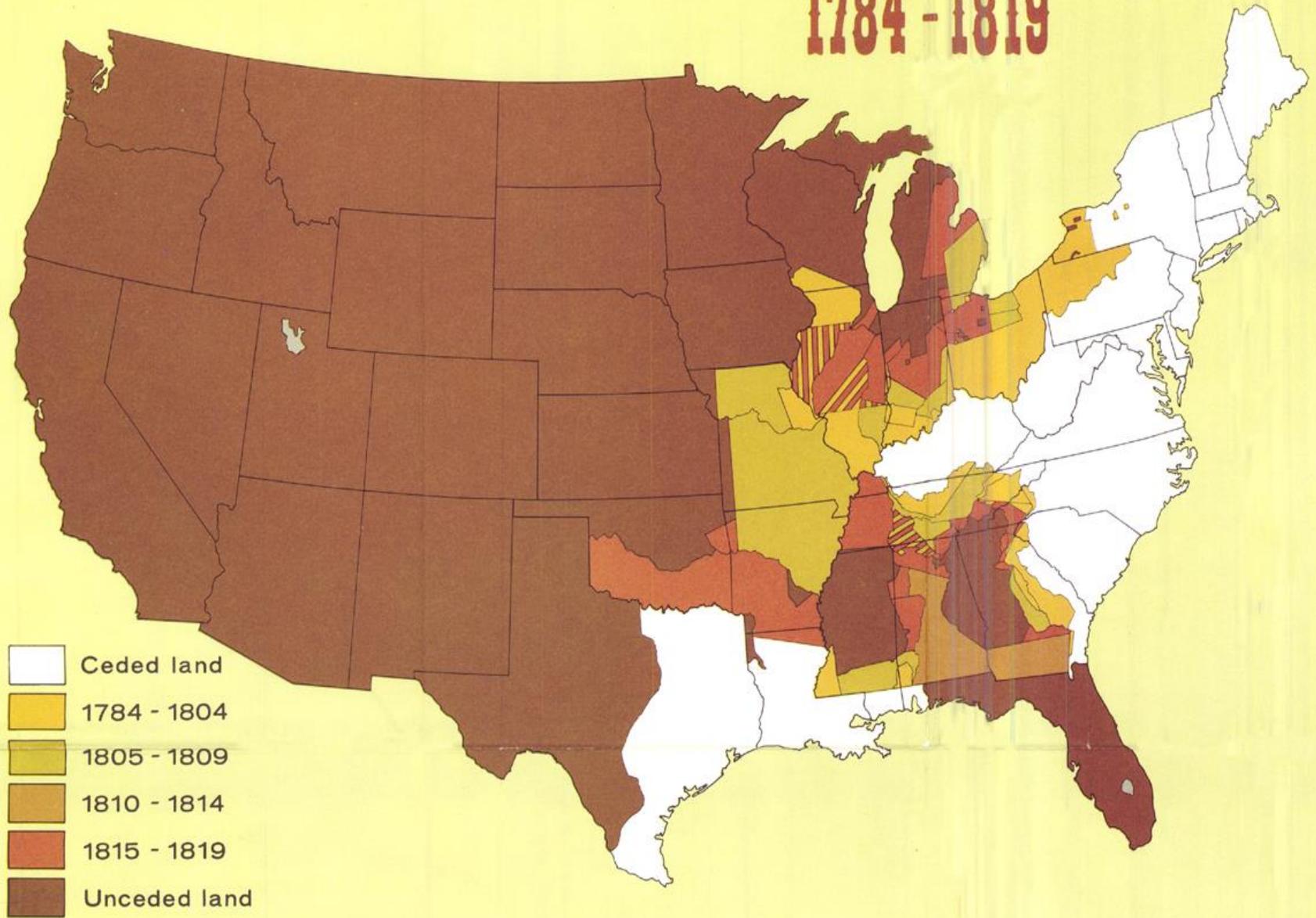
**1887 – 1928**

## **Allotments & Assimilation**

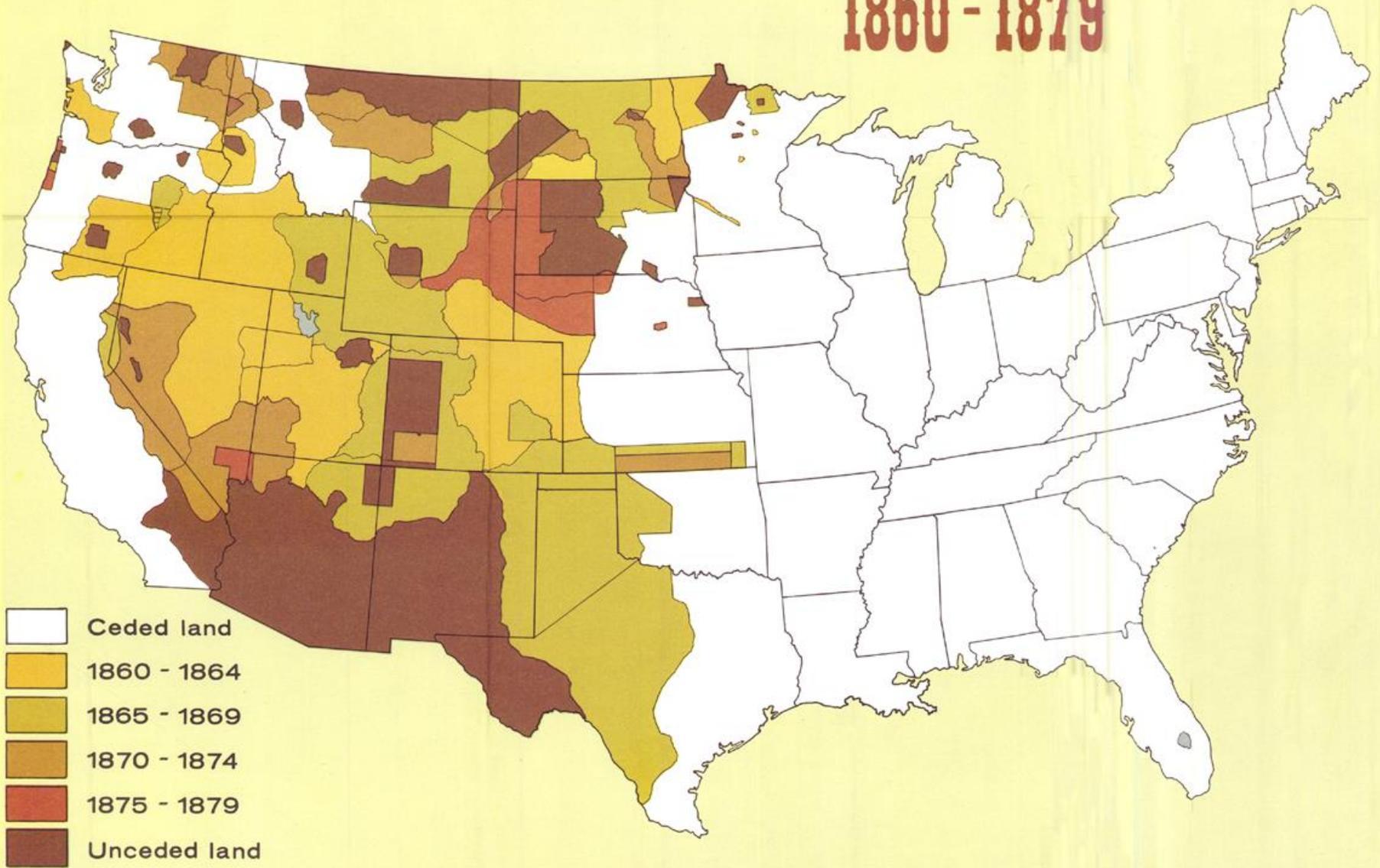
- Allotment Act of 1887 (“Dawes Act”): Ended grant of land to Tribes, instead provided land parcels to individuals with focus on “civilizing” them
- Curtis Act of 1898: 38 million acres in 1887 to 48 million in 1928
- Beginning of Indian Boarding Schools



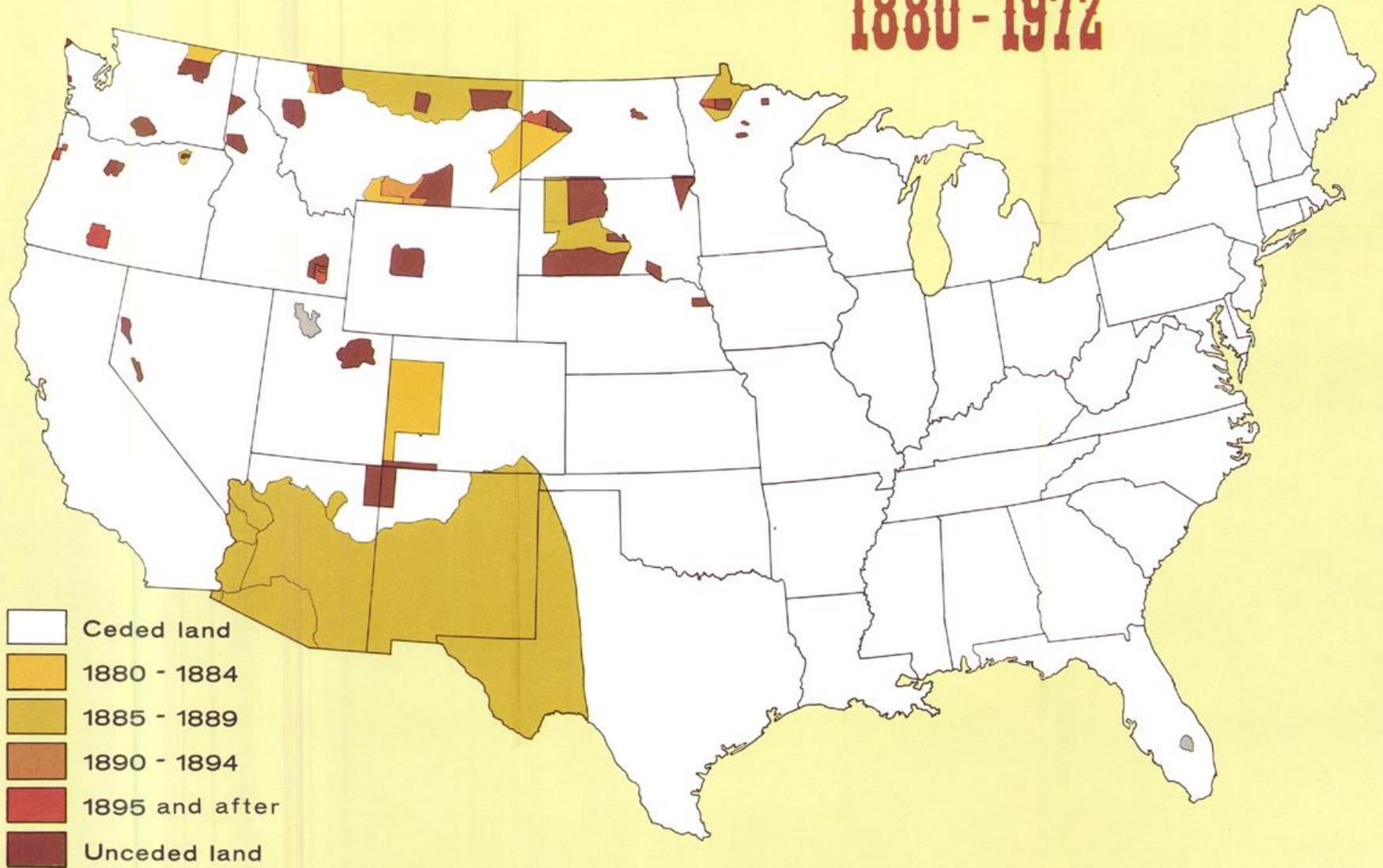
# 1784 - 1819



# 1860 - 1879



# 1880 - 1972



# American Indians and Alaska Natives in the United States



**American Indian and Alaska Native Population: 2000**  
Alone or in Combination



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

Major Native Reservation and Off-Reservation Trust Land (AZ, NM, UT)

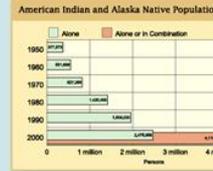
Reservation Name	Population
Fort Apache Reservation (AZ)	1,000
Fort Mojave Reservation (AZ)	1,000
Fort McDowell Reservation (AZ)	1,000
Fort Yuma Reservation (AZ)	1,000
San Carlos Reservation (AZ)	1,000
San Manuel Reservation (AZ)	1,000
San Xavier Reservation (AZ)	1,000
Yuma Indian Reservation (AZ)	1,000
Fort Huachuca Reservation (AZ)	1,000
Fort McDowell Indian Reservation (AZ)	1,000

**Legend**

- American Indian Reservation and/or Off-Reservation Trust Land (red)
- Oklahoma Tribal Statistical Area (orange)
- Tribal Designated Statistical Area (yellow)
- American Indian Statistical Area (green)

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

Place	Percentage
Anchorage, AK	1.0%
Tulsa, OK	0.7%
Oklahoma City, OK	0.6%
Albuquerque, NM	0.5%
Green Bay, WI	0.4%



# Brief History of Federal Indian Policy

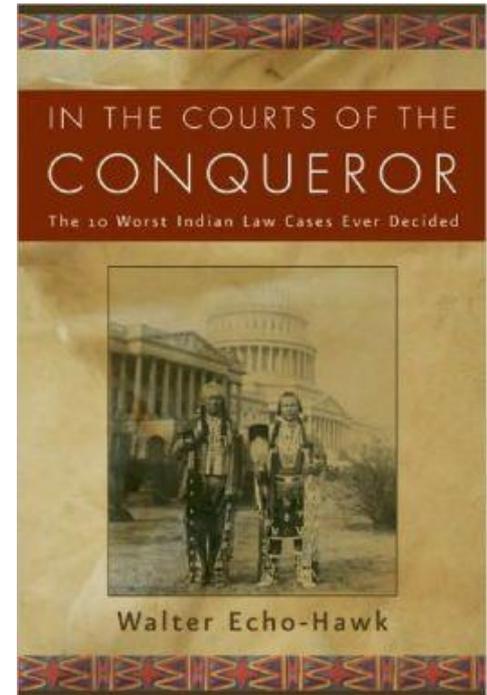
**1928 – 1945**

## **Indian Reorganization Act**

- 1928 Meriam Report: Surveyed the condition of Indians in 26 states, looking at 8 areas:
  - General Policy for Indian Affairs
  - Health
  - Education
  - General Economic Conditions
  - Family and Community Life & 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

# Today: Complicated Relationships, Conflicting Concepts

- 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



# Video

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**Video: Unseen Tears: Native American Boarding Schools**

**(9:54)**

# Boarding Schools

“We must either fight Indians, feed them, or else educate them. To fight them is cruel, to feed them is wasteful, while to educate them is humane, economic and Christian.” –1889

“I do not believe that Indians ... people who for the most part speak no English, live in squalor and degradation, make little progress from year to year, who are a perpetual source of expense to the government and a constant menace to thousands of their white neighbors, a hindrance to civilization and a clog on our progress have any right to forcibly keep their children out of school to grow up like themselves, a race of barbarians and semi-savages.” - 1892

# Boarding Schools

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“Only by complete isolation of the Indian child from his savage antecedents can he be satisfactorily educated...”

*John B. Riley, Indian School Superintendent*

"The parents of these Indian children are ignorant, and know nothing of the value of education... The agent should be endowed with some kind of authority to enforce attendance..."

*John S. Ward, United States Indian Agent, Mission Agency,  
California*

"Compulsion through the police is often necessary, ... It is better, in my opinion, to compel attendance through the police than taking up ration tickets for non-attendance."

*John P. Williamson, Dakota Agency* 38

# 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 were often 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

# The Boarding School Experience

*Copy*

8-1024  
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 McKee M; date of birth 1846;  
Chippewa  
(Tribe.)

NAME OF FATHER. (Both Indian and English.)	LETTER OR SIGN.	TRIBE.	RACE.	BRANCH OF INDIAN RESERVE.
<u>P. J. McKee</u>	<u>W</u>	<u>White</u>		
NAME OF MOTHER.				
<u>Anna McKee</u>	<u>W</u>	<u>Chippewa</u>	<u>Leech Lake</u>	<u>Full</u>

I, P. J. McKee, 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.  
(Parent, guardian, or next of kin.)

The said child has been enrolled in the following schools:

NAME OF SCHOOL.	DATE OF ENROLLMENT.	DATE OF DISCHARGE.	CAUSE.	GRADE.
<u>Morris</u>	<u>3 years</u>	<u>end of term</u>		

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

Two witnesses: \_\_\_\_\_

# The Boarding School Experience

**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 10th day of Sept., 1905

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 Dr. McKey was voluntary, and I recommend the transfer of the said child.

This 5th day of Sept, 1907

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.**

This form must be executed in duplicate when a child is transferred from a reservation to a nonreservation school. The Superintendent of the nonreservation school will retain the original for his files, and the duplicate shall be deposited in the Agency records. The agent will then send to the Commissioner of Indian Affairs his certificate as provided by law. All the blanks must be properly filled in every case.

If the information called for on any part of the blank is not known, that fact should be stated. No space should be left unfiled. Whether the parents are living or dead, their names must be given.

The person who signs the blank as consenting to the transfer should indicate his relation to the applicant by marking out the word "parent," "guardian," or "next of kin," leaving unmarked only the title appropriate to the signer.

6-430

# From This . . .



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

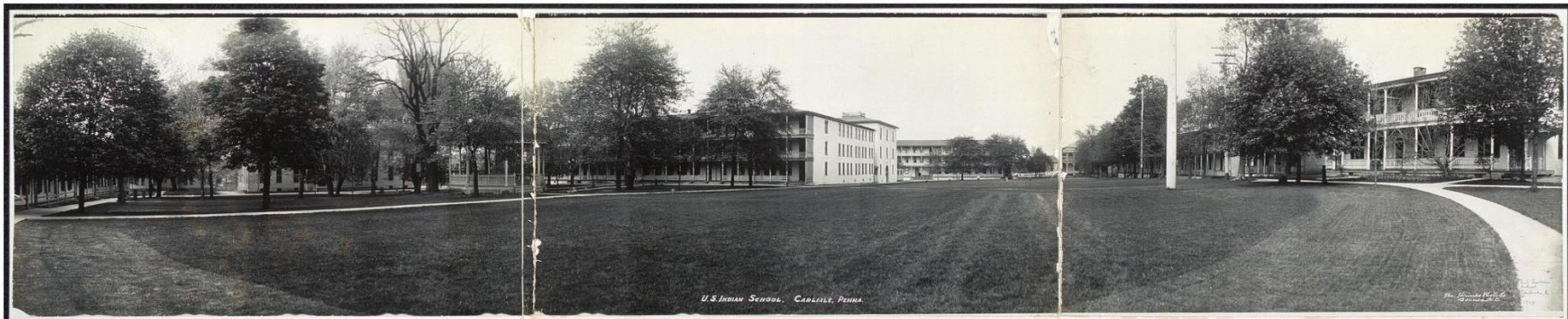
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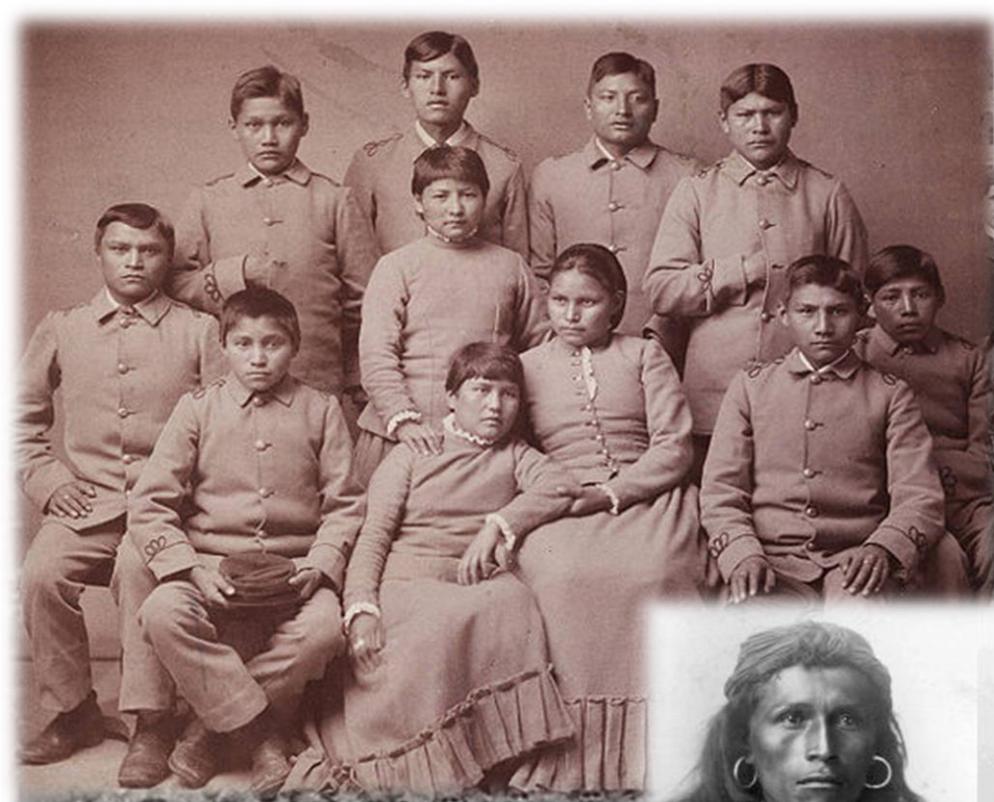


# From This . . .



# To This . . .





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# The Boarding School Experience

## **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.”

# 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

- 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, a teacher at the 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)**

# Boarding Schools: Pipestone, MN 1892 - 1953

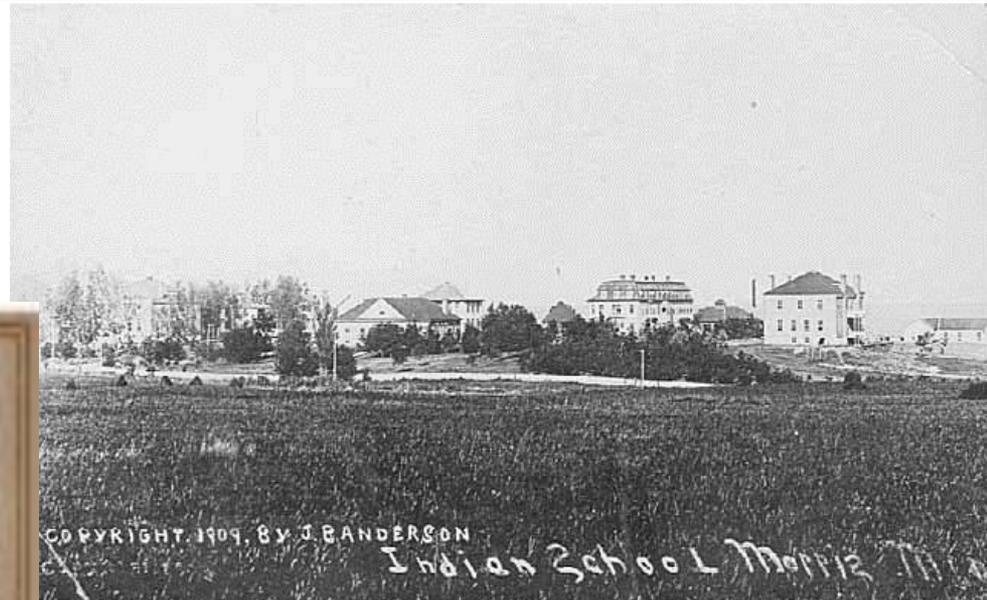


Photographs used with permission from the  
Minnesota Historical Society



# Boarding Schools: Morris, MN 1887 - 1909

Photographs used with permission from the  
Minnesota Historical Society



# 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 children removed and placed in White adoptive homes or institutions

# 2001 CWLA Acknowledgment and Apology

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“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.**”

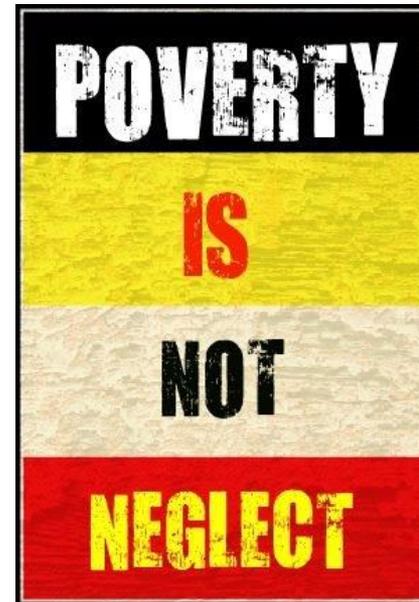
“And we acknowledge that this legacy makes your work more difficult, every day. As we accept this legacy, we also accept **the moral responsibility to move forward in an aggressive, proactive, and positive manner**, as we pledge ourselves to see that nothing like what has happened ever happens again.”

- 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 “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**



# Ongoing Unwarranted Reasons for Removal

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Even after the Indian Adoption Project officially ended, Indian children were still felt to be better off growing up non-Indian

- ❖ Child welfare workers often viewed material poverty as sufficient grounds for removal
- ❖ Currently, South Dakota Child Protection Services is being accused of viewing poverty as neglect and over aggressively removing Indian children from families

# Courts Before the ICWA

- Cultural biases regarding child rearing practices were used as justification for removal
- “Neglect” and “social deprivation” were the reasons cited for removal in 99% of cases in South Dakota
- Testimony from anyone besides the state’s case worker was rare
- Parents were coerced into voluntary agreements or relinquishments
- Attorneys were not provided for parents or children
- The burden was on the Indian family to prove they could provide for their children

# Passage of the ICWA: Prevent Further Unwarranted Removal

**In 1978, the Indian Child Welfare Act was enacted to prevent further unwarranted removal of Indian children from their families and Tribes**

- ❖ Congress found state-defined best interest standards failed to meet the best interests of Indian Children
- ❖ ICWA establishes minimum procedures necessary to meet the best interests of Indian Children – if ICWA is violated, then the best interests of the child are not met

**However, even after 37 years, many states are not following the mandates of the ICWA and it is now under attack**

# 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

# Section 3

## Trauma and Disparate Treatment



*Photo courtesy: CASA Alaska*

# Learning Objectives

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

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

# We Shall Remain

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Video: [We Shall Remain – Trail of Tears](#)

# 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

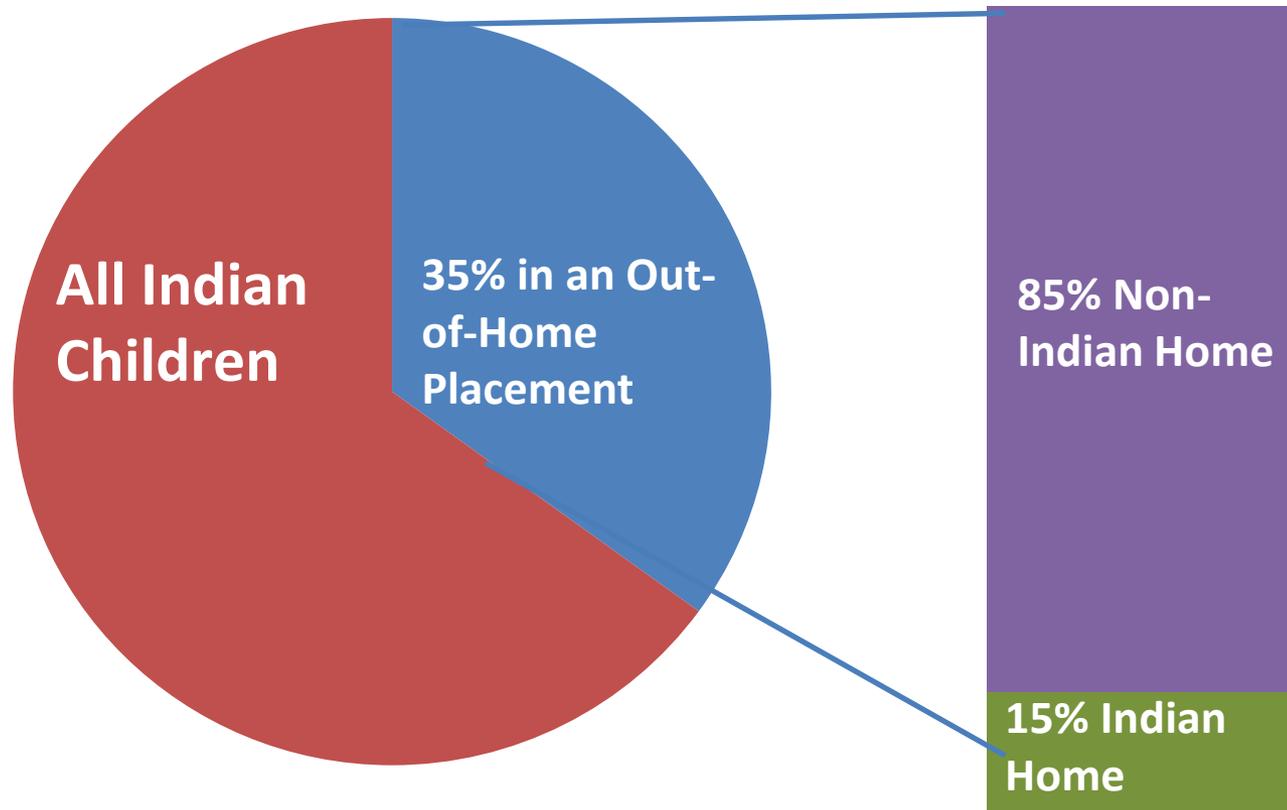
## 1969 & 1974 Association on American Indian Affairs Studies

- 25-35% of all Indian children were separated from their families, placed in foster homes, adoptive homes or institutions
- The 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 Then and Now

- Indian children are more likely to be confirmed as victims of neglect, but less likely to be confirmed as victims of abuse when compared to all other children (*Pew Charitable Trusts and National Indian Child Welfare Association*)
- American Indian children experience child abuse and neglect at a rate of 12.4 per 1000 children (*U.S. Health and Human Services, 2013*)
- Native American disproportionality rate has increased in the last 10 years from 1.5 to 2.1 (*NCJFCJ, 2013*)
- Disparities: Indian children/families are...
  - 2x more likely to be investigated
  - 2x more likely to have their case substantiated
  - 4x more likely to be placed in out of home care (*Hill, 2008*).



# Disproportionality in Minnesota: 2014

- In Minnesota today, American Indian children continue to be over-represented and experience bias in the system from initial contact to exit
  - ❖ 20.3 children per 1,000 were alleged victims of child maltreatment; American Indian children were 5.4 times more likely than White children to be subjects of alleged maltreatment
  - ❖ Native American children make up 1.4% of the MN population, but make up 19% of the foster care population
  - ❖ With the exception of American Indian children, all other race and ethnic groups showed a decrease in out of home care from 2005 to 2015

# Disproportionality in Minnesota: 2014

- American Indian children living in Minnesota continued to have:
  - ❖ the highest rate of contact with the child protection system – they are 5.5 times more likely than White children to be reported as abused or neglected
  - ❖ the most disparate rate out-of-home placement – they were 17.5 times more likely than White children to be removed from home and placed in foster care
  - ❖ one of the highest rates of guardianship with the commissioner of human services – they are 4.1 times more likely than White children to enter state guardianship
  - ❖ the highest rate of foster care re-entry

*Minnesota's Child Welfare Report 2014 (December 2015)*

# Disproportionality in Minnesota: 2014

- Indian women are more likely to experience intimate partner violence and sexual violence at higher rates than women of other races
- Minnesota Indian women represented 15% of all prostitution arrests even though they represent less than 2% of the population



# What This Means for Indian Children



- Indian children placed in non-Indian homes can dissolve their cultural ties (*ICWA Leg. History*)
- Racial and cultural misunderstanding by child protection may influence the increased risk for Indian children (*Carter, 2009; Carter, 2010*)
- Predictors of children being placed in out-of-home care are (*Carter et al, 2009*):
  - ❖ 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 measures (*Casey Family Programs*) such as:
  - ❖ Negative health outcomes and increased risk for chronic diseases
  - ❖ Increased rates of teen pregnancy, sexually transmitted infections and HIV (*Guttmacher Institute, 2011*)
  - ❖ 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

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

# Questions

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# Section 4

## Understanding and Applying ICWA: Key Requirements



# 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 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

# Enactment of Indian Child Welfare Act: Public Law 95-608 (1978)

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## Recognition of Cultural Bias

“In ICWA, Congress recognized cultural bias in the state court and social work systems, which affected Indian children and their families, and which placed the viability of tribes as political and cultural communities at risk.”

# Enactment of Indian Child Welfare Act: Public Law 95-608 (1978)

## 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.

# ICWA § 1901: Congressional Findings

- Congress has plenary power over Indian affairs
- Congress 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
- 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
- States have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families

# ICWA § 1902: Congressional Policy

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It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . .

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# Tribal State Agreement

Congressional Policy of § 1902 is reflected in Minnesota's Tribal State Agreement:

- Signed in 1998 and revised in 2007
- Negotiated agreement between the 11 Tribes located within Minnesota and the State of Minnesota
- Directs how child custody cases involving Indian children should proceed in State courts
- Describes best practices, including definitions of:
  - ❖ Active efforts
  - ❖ Best interest

# ICWA § 1903: When ICWA Applies

- ICWA applies in “Child Custody Proceedings”:
  - ❖ Foster care placement
  - ❖ Termination of parental rights
  - ❖ Preadoptive placement
  - ❖ Adoptive placement
  - ❖ Status offenses (e.g., runaway, truancy)
  - ❖ Third party custody proceedings
  
- ICWA does not apply in:
  - ❖ Custody proceedings between parents
  - ❖ Delinquency proceedings

# ICWA § 1903(4): Indian Child

- Indian Child means any unmarried person who is under age eighteen 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
- Tribe determines eligibility and can change their designation
- In Minnesota, biological parent does not need to be a tribal member

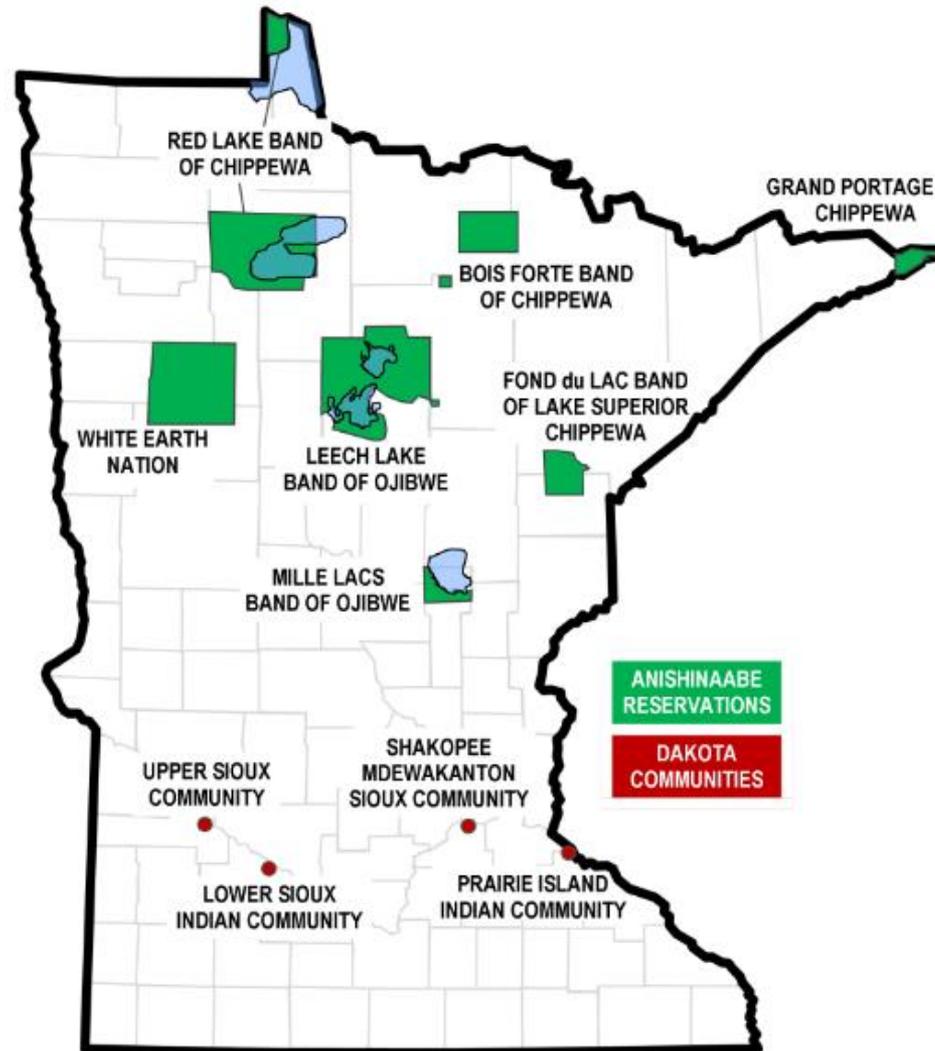
See also Minnesota Indian Family Preservation Act, Minn. Stat. § 260.755, subd. 8

# ICWA § 1903(5): Indian Child's Tribe

Indian child's tribe means:

- ❖ the Indian tribe in which an Indian child is a member or eligible for membership or
- ❖ in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts

# Minnesota Indian Tribes



# ICWA § 1911(a): Exclusive Jurisdiction

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“An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.”

# ICWA § 1911(a): Exclusive Jurisdiction - Minnesota

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**Collaboration**

**Collaboration**

**Collaboration**

# ICWA § 1911(a): Concurrent Tribal Court and State Jurisdiction

- If a child is a ward of tribal court, state court has only emergency jurisdiction
- If concurrent jurisdiction, state court must transfer upon request unless:
  - ❖ good cause not to transfer, or
  - ❖ either parent objects (Indian or non-Indian)
- Minnesota's Tribal State Agreement addresses exclusive jurisdiction

# ICWA § 1911(a): Limit on State Court Jurisdiction

Subject to emergency situations, state court must dismiss if:

- Court lacks jurisdiction
- Residence or domicile of child is on a reservation where the tribe exercises exclusive jurisdiction
- Child is a ward of tribal court

# ICWA § 1911(b): Transfer of Proceedings to Tribal Court

“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.”

# ICWA § 1911(b): Transfer of Proceedings to Tribal Court

A State Court shall transfer to tribal court a foster care placement or TPR proceeding involving an Indian child not domiciled or residing within the reservation of the child's tribe when:

- Requested to do so, and
- There is no good cause to the contrary, and
- Neither parent objects, and
- The tribal court does not decline jurisdiction

# ICWA § 1911(b): Transfer of Proceedings to Tribal Court – Good Cause to Deny Transfer

- Establishing good cause to deny transfer of jurisdiction to a tribal court is a fact-specific inquiry to be determined on a case-by-case basis
- Socioeconomic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems must not be considered in a determination that good cause exists
- The party opposed to transfer of jurisdiction to a tribal court has the burden to prove by clear and convincing evidence that good cause to deny transfer exists
- Opposition to a motion to transfer jurisdiction to tribal court must be in writing and must be served upon all parties

*Minn. Stat. § 260.771, subd. 3a(a)*

# ICWA § 1911(b): Transfer of Proceedings to Tribal Court – 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 the 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.

*Minn. Stat. § 260.771, subd. 3a(b)*

# ICWA § 1911(c): Intervention

“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.”

In Minnesota, the child's Indian custodian and Indian tribe are automatically parties to CHIPS and CHIPS Permanency proceedings

*Minn. Rule of Juvenile Protection Procedure Rule 21.01, subd. 1(c)*

# ICWA § 1911(d): Full Faith and Credit

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“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.”

# Overview of ICWA Requirements

- When ICWA applies
- Inquiry about “Indian child”
- Jurisdiction
- Transfer of Proceedings
- Notice
- Intervention
- Right to Counsel
- Active efforts
- Evidentiary burdens
- Qualified expert witness
- Placement preferences

# ICWA § 1912(a): Notice

- “Who sends notice: person seeking out of home placement
- “In any involuntary proceeding in a State Court, the party seeking foster care of or TPR to an Indian child shall notify:
  - ❖ The parent or Indian Custodian **AND**
  - ❖ The Indian child’s tribe **About**
  - ❖ The pending proceedings **AND**
  - ❖ The right to intervene
  - ❖ Right to Counsel

# Agency Notice to Tribes

## Minn. Stat. § 260.761, subd. 2

- If social services agency has information that a child receiving services may be an Indian child, the local social services agency shall notify the tribe by telephone and by e-mail or facsimile of the child's full name and date of birth, the full names and dates of birth of the child's biological parents, and, if known, the full names and dates of birth of the child's grandparents and of the child's Indian custodian
- This notification must be provided so the tribe can determine if the child is enrolled in the tribe or eligible for membership, and must be provided within seven days

# Agency Notice to Tribes

## Minn. Stat. § 260.761, subd. 2

- If information regarding the child's grandparents or Indian custodian is not available within the seven-day period, the local social services agency shall continue to request this information and shall notify the tribe when it is received.
- Notice shall be provided to all tribes to which the child may have any tribal lineage
- If the identity or location of the child's parent or Indian custodian and tribe cannot be determined, the local social services agency shall provide the notice required in this paragraph to the United States secretary of the interior

# Court Notice to Tribes

## Minn. Stat. § 260.761, subd. 2

- When a court has reason to believe that a child placed in emergency protective care is an Indian child, the court administrator or a designee shall, as soon as possible and before a hearing takes place, notify the tribal social services agency by telephone and by e-mail or facsimile of the date, time, and location of the emergency protective case hearing
- The court shall make efforts to allow appearances by telephone for tribal representatives, parents, and Indian custodians

# Court Notice to Tribes

## Minn. Stat. § 260.761, subd. 2

STATE OF MINNESOTA

COUNTY OF HENNEPIN

*In the Matter of the Welfare of the Child/ren of:*

█, Parent

**CHILD/REN:** █, born █  
█, born █  
█, born █

**TRIBE/S:**

█

**MOTHER:**

█, born █

Tribal Affiliation: █

FOURTH JUDICIAL DISTRICT

JUVENILE COURT DIVISION

**ICWA NOTICE FOR**  
**CHILDREN IN NEED OF**  
**PROTECTION AND SERVICES**

FAM No. █  
JC Case No. 27-JV-█  
HCHSPHD Case No. █

# Court Notice to Tribes – Voluntary Placement

## Minn. Stat. § 260.761, subd. 2

- Notice is also required in voluntary placements such as:
  - ❖ Voluntary Adoptive Placement (upon filing of TPR or within 90 days, whichever comes first)
  - ❖ Preadoptive Placement (upon filing of TPR or within 90 days, whichever comes first)
  - ❖ Voluntary Foster Care Placement (within 7 days)

*Minn. Stat. § 260.765*

- ICWA does not required notice by registered mail return receipt requested in voluntary placements

# ICWA § 1912(b): Appointment of Counsel

- “In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court appointed counsel in any removal, placement, or termination proceeding.
- The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.
- Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.”

# ICWA § 1912(c): Examination of Reports

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“Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.”

# ICWA § 1912(d): Active Efforts

“Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that:

- ❖ active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and
- ❖ that these efforts have proved unsuccessful.”

# ICWA § 1912(d): Active Efforts

Active efforts shall:

- Take into consideration the prevailing social and cultural conditions and way of life of the Indian child's tribe
- Involve and use the available resources of the extended family, the tribe, Indian social services, and individual Indian caregivers

# ICWA § 1912(e): Involuntary Foster Care Placement Orders

- **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
- **Evidence:** Testimony of at least one qualified expert witness
- **Standard of proof:** Clear and convincing evidence
- **Who secures QEW:** The local social services agency or any other party shall make diligent efforts to locate and present to the court a qualified expert witness designated by the Indian child's tribe  
*See also Minn. Stat. § 260.771, subd. 6*

# ICWA § 1912(f): Involuntary Termination of Parental Rights Orders

- **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
- **Evidence:** Testimony of at least one qualified expert witness
- **Standard of proof:** Beyond a reasonable doubt
- **Who secures QEW:** The local social services agency or any other party shall make diligent efforts to locate and present to the court a qualified expert witness designated by the Indian child's tribe

*See also Minn. Stat. § 260.771, subd. 6*

# ICWA § 1912(e) and (f) - (Qualified Expert Witness

A Qualified Expert Witness is required for:

- Removal of a child from his/her parent or Indian Custodian
- Termination of parental rights

# Qualified Expert Witness

## Minn. Stat. § 260.771, subd. 6

- The qualifications of a qualified expert witness designated by the child's tribe are not subject to a challenge in Indian child custody proceedings
- If clear and convincing evidence establishes that a party's diligent efforts cannot produce testimony from a tribally designated qualified expert witness, the party shall demonstrate to the court that a proposed qualified expert witness is, in descending order of preference:
  - ❖ **Tribal Members** – member of the child's tribe recognized by their 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 the delivery of child and family services to Indians and extensive knowledge of the prevailing social and cultural standards and child rearing practices within the Indian child's tribe

# Qualified Expert Witness

## Minn. Stat. § 260.771, subd. 6

- 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
- The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

# ICWA § 1913(a): Voluntary Consent to Foster Care or Termination of Parental Rights

Voluntary consent by parent or Indian custodian not valid unless:

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

# ICWA § 1913(b): Withdrawal of Voluntary Consent to Foster Care

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“Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian”

# ICWA § 1913(c): Withdrawal of Voluntary Consent to Termination of Parental Rights

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“In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.”

# ICWA § 1914: Petition to Invalidate

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“Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.”

# ICWA § 1915(a): Adoptive Placement Preferences

“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with:

- ❖ a member of the child's extended family;
- ❖ other members of the Indian child's tribe; or
- ❖ other Indian families.”

# ICWA § 1915(b): Foster Care or Pre-adoptive Placement Preferences

- Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met.
- The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.

# ICWA § 191b(b): Foster Care or Pre-adoptive Placement Preferences

- In any foster care or preadoptive 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.

# Placement Preferences

## Minn. Stat. § 260.771, subd. 7

- The court must follow the order of placement preferences required by the ICWA when placing an Indian child
- The court may place a child outside the order of placement preferences only if the 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;
  - ❖ the reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made

# ICWA § 1922: Emergency Removal

- State agency has authority to temporarily remove Indian child from parent or Indian custodian under certain circumstances
- Nothing in ICWA should be construed to prevent emergency removal to protect child from danger and imminent harm
- Emergency removal should last not more than 30 days

# ICWA § 1922: Emergency Removal or Placement of Indian Child

- ICWA allows emergency removal of an Indian child who is a resident of or 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 tribe **(not the parent)** as soon as the threat of imminent physical damage or harm has passed or the tribal court asserts jurisdiction, whichever is earlier
- If the child is not returned or case 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 **(not the parent)**

# Best Interests of an Indian Child

## Minn. Stat. § 260C.511

- The "best interests of the child" means all relevant factors to be considered and evaluated.
- In the case of an Indian child, best interests of the child includes best interests of an Indian child
- In making a permanency disposition order or termination of parental rights, the court must be governed by the best interests of the child, including a review of the relationship between the child and relatives and the child and other important persons with whom the child has resided or had significant contact.

# Best Interests of an Indian Child Minnesota Tribal State Agreement

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“The best interests of Indian children are inherently tied to the concept of belonging. 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.”

# 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

# Discussion

**Any thoughts about how the ICWA procedures are currently working in Minnesota?**

# Conclusion



# Section 5

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## Applying What You've Learned

# Self Reflection Questions

- What assumptions have I made about the cultural identity, genders and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that active efforts have been made in an individualized way to match the needs of the family?
- Am I considering relatives as a preferred placement option as long as they can protect the child and support the permanency plan?

# Case Scenario Activity: Applying What You've Learned

## ***Instructions:***

- Take a few minutes to read the case scenario.
- Divide into small groups and discuss the questions assigned by the faculty.
- Take about 5 – 10 minutes to reach agreement about the answer(s) to the assigned questions.
- Identify one person from your group who will report your group's responses to the larger group.

# Questions



# Section 6

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## Next Steps for CJI Judges and CJI Teams

# Assessing Your County's Practice

- Utilize the ICWA Discussion Guide to engage in open discussion with stakeholders of 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.

# Four Step Action Plan for Improving Outcomes for Indian Children

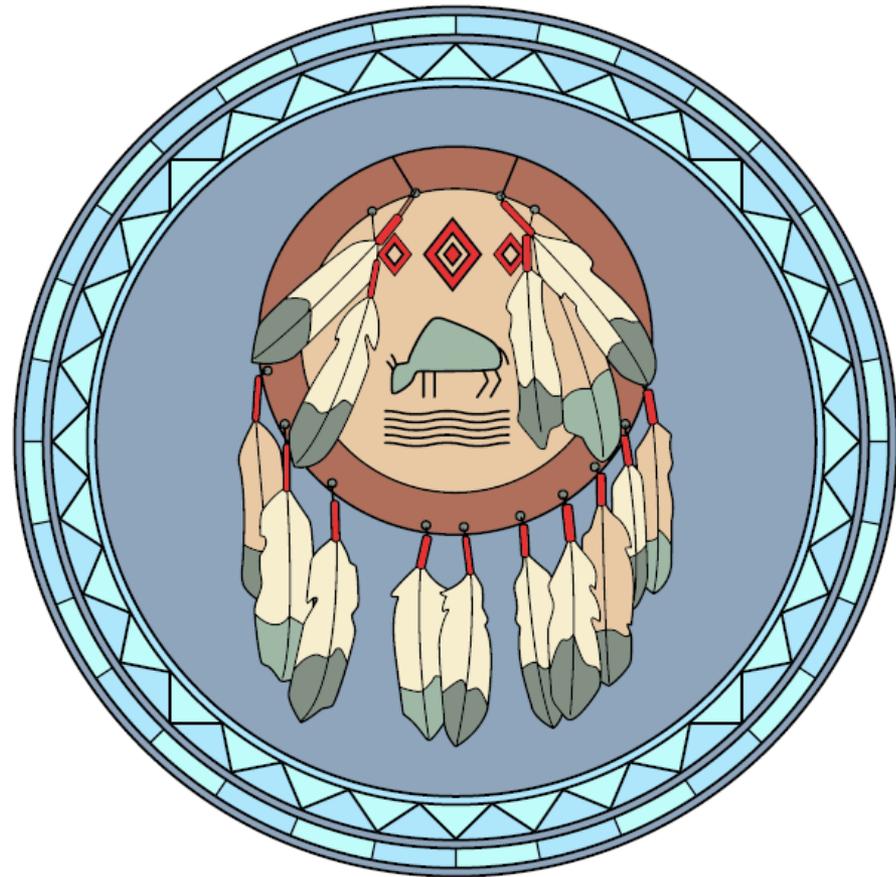
<b>MEANINGFUL &amp; ONGOING COLLABORATION</b>				
<u>Strategies</u>	<u>Responsibility</u>	<u>Outputs</u>	<u>Data</u>	<u>Due Date</u>
<i>What are the identified steps to improve current capacity or court performance related to this goal?</i>	<i>Who will lead this activity and who else will need to be involved?</i>	<i>What will be the result of this activity?</i>	<i>Are data currently available, if not, what is the plan to collect and analyze data?</i>	

One of the great lessons I've learned as a judicial leader is how important it is to follow-up and follow through on initiatives. I was shocked when confronted with the history of how our Indian families and communities were cruelly and systematically broken down by our government. I have come to understand that, because this is part of our history as Americans, it compels a responsibility for all of us to address, not just those who live in areas with a large Native population. Faced with these harsh realities and a sense of responsibility, it is easy to be inspired to want to make a change. All your best intentions, however, are only as good as your willingness to continue to stand behind them. To really make a difference, you must continue to revisit your initiatives and find ways to implement your intentions into a new way of business.

–Judge Darlene Byrne, Austin, Texas Model Court

# Section 7

## Concluding Thoughts



# Concluding Thoughts

- Outstanding questions?
- What were you most surprised to learn today
- What will you change in your practice immediately
- What do you think your CJI team can do to improve practice in your county

# Questions

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# Section 8

## Resources

# Resources

- The ICWA, 25 U.S.C. 1901 *et seq.*(1978)
- The Minnesota Indian Family Preservation Act, Minn. Stat. 260.751
- The BIA Guidelines
- The Minnesota Rules of Juvenile Protection Procedure
- The Tribal State Agreement as Amended in 2007
- The Department of Human Services Social Service Manual
- Department of Human Services Bulletins, November 24, 2004 #04-68-10
- ICWA Active Efforts Best Practice, MN Department of Human Services
- Chapter 35 Minnesota Judge's Benchbook