WEBINAR

Indigenous Sovereignty and the Indian Child Welfare Act

Join Native American and Indian Child Welfare Act (ICWA) advocates to learn about this important legislation and how states can act to preserve its protections.

Wednesday, April 19 | 3:00 pm ET





ICWA WEBINAR

Olga González Yaqui/Otomi







I ACKNOWLEDGE AND HONOR...

- Cheyenne, Arapahoe and Ute nations and all other original people who have called Colorado home
- Mother Earth and the land we walk upon
- The languages spoken here
- The ceremonies that took place here
- The teachings that took place here
- The trauma and joy that were experienced here
- All of the Indigenous people who are still here
- My own Yaqui and Otomi ancestors



WE ALL SHARE A HISTORICAL WOUND:

- We must acknowledge the harm that has been caused here in its many forms: genocide, land theft, forced removal, boarding schools, systemic racism and erasure
- By acknowledging these things, we begin to heal. And although we cannot change history, we can create our future. By healing the land, we also heal relationships to one another.
- By taking action to address the systemic issues that harm Indigenous people today, we begin to demonstrate our commitment to righting the wrongs of the past, to changing the status quo.

@soni_artist

A HISTORICAL CONTEXT



Before being burned alive by the Spaniards, chief Hatuey of the island of Hispanola was asked if he wanted to accept Christianity and go to Heaven. Hatuey asked if Spaniards go to Heaven, to which the priest that they do. Hatuey then stated that he'd rather go to Hell where he wouldn't see such cruel people.

"LA LLORONA" THE WEEPING WOMAN



BOARDING SCHOOLS



CULTURAL VALUES

- Children are sacred
- Children are gifts from Creator
- Children are respected
- Children learn and thrive when surrounded by elders and family
- Preservation of language, traditions, ceremonies
- Indigenous families support a strong bond
- Indigenous families support self-esteem
- Indigenous families ensure our survival



DON'T LET ICWA BE THE FIRST DOMINO





CLOSING

- May we live our traditional values and teachings
- May our work be our prayer
- May our ancestors and our children be healed as we work to heal ourselves

THANK YOU!



Olga González, CEO Original Wisdom Guiding Transformation Diversity, Equity, Inclusion, Justice and Healing Consultation, Facilitation and Coaching <u>o.g.consulting72@gmail.com</u> 303-669-5532 ICWA as the Gold Standard and the potential impact of the Brackeen case Presented as part of the Alliance for Early Success webinar April 19, 2023

> Presented by Jack F. Trope, Sr. Director, Indian Child Welfare Program



fostering families. fostering change

History of Family Separation and Cultural Suppression

Boarding Schools

Began in the 1880s, continued into the mid-20th Century

-357 known Indian boarding schools *"Kill the Indian, save the man.*"



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.



Association on American Indian Affairs 1960-70s found:



ICWA as the Gold Standard

Why the Gold Standard of child welfare?



Active efforts to keep children safely with their families or to reunify them with their families. **Placement Preferences** to keep them connected to relatives, identity and culture. All within a community context (Transfer).

Adjudication: Active Efforts

- Affirmative, active, thorough and timely efforts to maintain or reunite a child with his or her family
 - Involve assisting the parents/Indian custodian through the steps of a case plan and with accessing or developing necessary resources
 - Should be conducted in partnership with tribe, child, parents, extended family and consistent with tribe's social/cultural standards



Keeping Families Together

- Research and experience confirm that, whenever possible, children's best interests are served by staying with their families
- Removing children is traumatic to both the child and the family
- ➢ Families who have suffered trauma, often across generations, need to receive services and supports to address their needs ("help the child by helping the family heal, not by separating the child from the family")

Disposition: Placement Preferences

- Placement preferences apply to all foster care, preadoptive and adoptive placements.
- Foster care placement preferences, absent good cause:
 - 1. Relative
 - 2. Tribally-licensed or approved foster home
 - 3. Indian home licensed by non-Indian entity,
 - 4. Tribally approved or operated institution
- > Adoption placement preference, absent good cause:
 - 1. Relative
 - 2. Other members of the child's tribe
 - 3. Other Indian families

Continued Connection to Family and Culture

Pre – ICWA

Mel Tonasket – President, Colville Tribe - There is no such thing on my reservation as an abandoned child because even if you are a one-eighth cousin, if that child is left alone, that's like your brother or sister, or your son or daughter. It's been that way since our old people can remember.

Today

- The Native Village of Barrow (AK) Iñupiat Traditional Government Children's Code - A child has the right to learn about and preserve his identity throughout his life, including the right to maintain ties to his birth parents, his extended family and his village. A child has the right to learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy.
- Shana King MHA Nation/Three Affiliated Tribes Parent Mentor ICWA Law Center – Native Americans do not have a colonized understanding of family. In my family, my cousins were considered siblings, and my 'aunties' are my children's grandmothers.

Keeping Children Connected with Kin

- A kinship placement is almost always preferrable to placement with a non-relative
- Placements with extended family are more stable and less disruptive to the child
- Children placed with kin have fewer behavioral problems and mental health disorders



Keeping Children Connected with Culture and Community

- Emphasizing community ties keeps the child connected to a network of relationships with caring adults ("no one has ever complained that a child has too many caring adults in their life")
- Fosters relationship permanency
- Connection with culture provides the child with a sense of identity and positive self worth, reinforces intergenerational teachings and connection, and provides resilience

Bonding and Attachment

- The ICWA regulations provide that a placement may not depart from the ICWA placement preferences based solely upon ordinary bonding or attachment in a placement that was made in violation of ICWA
 - Commentary to the Regulations notes that "(s)ome theories, such as certain bonding and attachment theories, presented by experts in foster care, termination of parental rights, and adoption proceedings are based upon Western or Euro-American norms and may have little application outside that context."
 - Babies can and do form more than one attachment relationship and multiple attachments are normal in many indigenous communities
 - ICWA Guidelines state that a best practice is for courts and agencies to carefully consider whether the child's relationship with a non-preferred placement outweighs the long-term benefits of maintaining connections with the family and tribal community
- Researchers have found that the use of attachment theory in the courtroom has passed from the hands of researchers to inexperienced users who take a simplistic approach to this complex aspect of development, rather than recognizing behavior as an ongoing process of adaptation

Bonding and Attachment

- As a best practice, agency should facilitate connections between the Indian child and extended family and other potential preferred placements when it is necessary to place the child in a nonpreferred placement to promote reunification
- This allows the child to develop additional bonds with these preferred placements that could ease a transition to a preferred placement if reunification fails



Involvement of the Tribe

- Studies indicate that early tribal involvement in state court proceedings increases reunification of children with their parents and shortens the time required for reunification
- Tribes can help to identify extended family members and connect children and families with culturally-appropriate, trauma-informed services and supports
- Transfers to tribal court (when parents agree) ensure that appropriate tribal standards are applied to the Indian child and his/her family, standards which emphasize continued connection with family, culture and community

Haaland v. Brackeen

Brackeen v. Haaland, (a.k.a. Brackeen v. Zinke)

- Lawsuit brought by foster parents, a biological parent, and states of Texas, Louisiana and Indiana challenging constitutionality of ICWA, and seeking to invalidate the 2016 regulations based upon the APA
- Three specific cases are listed in the complaint cases from Texas, Minnesota and Nevada involving Navajo, Cherokee, Yselta del Sur and White Earth children
- Four tribes intervened (a fifth intervened at the appellate level)



Haaland v. Brackeen (a.k.a. Brackeen v. Zinke)

Constitutional issues raised included:

- ICWA exceeds the authority of Congress provided by the Indian Commerce Clause
- ICWA is a race-based law that violates the Equal Protection Clause
- ICWA commandeers state agencies and courts to enforce federal law in violation of the Tenth Amendment which protects states' rights
- ICWA improperly delegates authority to tribes to change the placement preferences

Haaland v. Brackeen

- ➤The Supreme Court granted the petitions for *certiorari*
- Oral argument took place on November 9

Haaland v. Brackeen

- Amicus briefs were filed in support of ICWA on behalf of 497 Tribes and 62 Indian Organizations, 87 Members of Congress, and 23 States and Washington DC
 - California, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington and Wisconsin
- Casey filed a brief on behalf of 26 child welfare and adoption organizations arguing that "ICWA is the gold standard"
- There were also briefs supporting ICWA by law professors, children's and parents' rights organizations, the ACLU, ABA, AAP, the APA and many others
- 2 states (Ohio and Oklahoma) and a handful of organizations filed in opposition to ICWA – most notable groups were the Academy of Adoption and Assisted Reproduction Attorneys (AAAA) and the National Council for Adoption

Haaland v. Brackeen

What are some of the possible outcomes and responses (partial list):

- Outcome: The Court upholds the constitutionality of ICWA completely. Obviously, this is the best outcome and the future challenges would continue to be how to better achieve compliance with ICWA
- Outcome: The Court upholds some of ICWA, but invalidates other parts. If the theory for this is equal protection (that the sections in question are race-based, not based on political status), it may require developing some work-arounds to address the substance of the affected sections. If the theory is commandeering (the 10th Amendment states' rights claims), then a response may be possible at the state level (state ICWAs, tribal-state agreements, etc.) or by linking requirements to the Spending Clause
- Outcome: The Court totally invalidates ICWA. If this is based upon a theory that it is beyond Congress' powers, then state-based remedies will likely still be possible. If it is based upon an equal protection theory, then significant parts of Indian law are at jeopardy and there are larger issues of tribal sovereignty at stake

States with comprehensive Indian Child Welfare laws

California, Iowa, Michigan, Minnesota, Nebraska, New Mexico, Oklahoma, Oregon, Washington, Wisconsin, Wyoming

States with proposed Indian Child Welfare laws (currently pending in the state Legislature)

Colorado, Montana, North Dakota

For Further Information

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