New Mexico Indian Family Protection Act
An overview of federal policies

1830: Removal

1848: Reservation

1887: Over 14,000 U.S. Calvary

1941-67: Boarding School Era

1978: 1/3 Removed Indian Child Welfare Act

1988: Self-Governance
Federal Policies

Federal Indian Boarding School Initiative Investigative Report

Federal records indicate that the United States viewed official disruption to the Indian family unit as part of Federal Indian policy to assimilate Indian children. “The love of home and the warm reciprocal affection existing between parents and children are among the strongest characteristics of the Indian nature.”

Newland, Bryan (May, 2022), Federal Indian Boarding School Initiative Investigative Report, (citing the Annual Report to the Secretary of the Interior XLI (1886), Commissioner of Indian Affairs, [hereinafter ARCIA for 1886])
Federal Polices

Chief of these is the long continued policy of educating the [Indian] children in boarding schools far from their homes, taking them from their parents when small and keeping them away until parents and children become strangers to each other. The theory was once held that the problem of the [Indian] could be solved by educating the children, not to return to the reservation, but to be absorbed one by one into the white population. This plan involved the permanent breaking of family ties, but provided for the children a substitute for their own family life by placing them in good homes of whites for vacations and sometimes longer, the so-called “outing system.” The plan failed, partly because it was weak on the vocational side, but largely by reason of its artificiality. Nevertheless, this worst of its features still persists, and many children today have not seen their parents or brothers and sisters in years.

Lewis Meriam, Institute for Government Research, The Problem of Indian Administration, 573-74 (1928)
History of the Indian Child Welfare Act

- Imagine one-fourth of all Caucasian children were removed from their families and placed in other homes, ... here is the REALITY:

- Lack of the basic knowledge of Indian culture child rearing practices, prejudiced attitudes of state officials resulting in the removal of children, simply for being Indian and appearing poor.

- In 1978, 25%-35% of all Native children were removed from their homes
  - 85% of Native children removed were placed outside of their families and communities

- Today, Native children are 3x more likely to be removed by state child welfare systems than non-Native children
  - 56% of adopted Native children are placed outside their families and communities
New Mexico’s Indian Family Protection Act

- Federal ICWA has been under attack since its inception
  - *Adoptive Couple v. Baby Girl*
  - *Brackeen v. Haaland*
- 2015: Tribes & NMTIC begin discussing the need for a state ICWA.
- July 2020: Drafting begins on the NM State ICWA legislation
- Dec/Jan 2020: Formal consultations by CYFD
- 2021 Session: HB 209 introduced, passed out of House, but did not move through Senate committee. Further discussions with Tribes.
- 2022 Session: HB 135 passed House and Senate and signed by Gov. Lujan Grisham as Indian Family Protection Act
ICWA (& IFPA) modified “Best Interests of the Child” to include an Indian child’s relationship to their tribe

When enacting ICWA, Congress knew that removing Indian children from their family and tribe could have “damaging social and psychological impact[s] on many individual Indian children.” ICWA therefore protects a child's interest in retaining “his or her tribal and cultural heritage.”

_In re Esther V_, 2011-NMSC-005, ¶ 43 (quoting _Miss. Band of Choctaw Indians_, 490 U.S 30, 32 (1989, quotation marks and citations removed))
ICWA (& IFPA) modified “Best Interests of the Child” to include an child’s relationship to their tribe

“The Senate Report on the ICWA incorporates the testimony of Louis La Rose, chairman of the Winnebago Tribe:

‘the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A–1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think ... they destroy him.’

Thus, the conclusion seems justified that the Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.”

ICWA (& IFPA) added the Indian child’s tribe as a party whose rights must be respected

“Congress enacted ICWA to protect the rights and interests of the parent, the tribe, and the child...While an abuse and neglect proceeding is designed to protect the best interests of the child and the rights of the parents, ICWA goes further by protecting the unique relationship between a tribe and its children...Congress knew that removing Indian children from their family and tribe could negatively impact the tribe's long-term...survival. ICWA furthers tribal sovereignty by ensuring that tribes are able to raise their children with their own cultural and societal values.

Original Inhabitants of the area that is now New Mexico
Sovereign Nation Lands in New Mexico today
Important Definitions

ICWA

- **Indian**: means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation

- **Indian Child**: means any unmarried person who is under age eighteen and is either
  - (a) a member of an Indian tribe or
  - (b) eligible for membership in an Indian tribe and *is the biological child of a member of an Indian tribe*

IFPA

- **Indian**: means whether an adult or child, a person who is:
  1) a member of an Indian tribe or
  2) eligible for membership in a Tribe

- **Indian Child**: means an Indian person, or a person whom there is reason to know is an Indian person, under eighteen years of age, who is neither:
  1) married; or
  2) emancipated

(see IFPA Section 44 c.f. 25 U.S.C. §1903(4))
Determination of Child’s Membership

"member" or "membership" means a determination made by an Indian tribe that a person is a member of or eligible for membership in that Indian tribe.

(see IFPA Section 44(U) c.f. 25 U.S.C. §1903(3))

Proceedings

- Investigation
- Custody
- Every Stage Afterward
Important Definitions

- **Child Custody Proceeding** - means an action for foster care placement, termination of parental rights, permanent guardianship or adoptive placement or an action pursuant to Section 32A-3A-8 NMSA 1978 or the Family in Need of Court-Ordered Services Act and includes investigations and other preliminary activities preceding the formal initiation of an action, but does not include:
  1) delinquency proceedings
  2) custodial proceedings or kinship guardianships pursuant to Chapter 40 NMSA 1978.
  *(see IFPA Section 2(C). c.f. 25 U.S.C. §1903(1))*

- **Extended Family Member** - means a person who is defined to be an extended family member by law or custom of an Indian child's tribe or, in the absence of such law or custom, means a person who is eighteen years of age or older and who is an Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, stepparent or godparent.
  *(see IFPA Section 2(F). c.f. 25 U.S.C. §1903(2))*
Important Definitions

**Fictive Kin** - means a person:

1) who is not a relative or an extended family member of an Indian child and who has a significant, family-like relationship with the child or the child's family, which relationship existed prior to the child's entry into foster care;

2) who meets the definition of “fictive kin” as established by an Indian child's tribe's law, custom or tradition; or

3) chosen by an Indian child who is fourteen years of age or older, regardless of when the relationship between the person and the Indian child was established, when it is in the best interest of the child to identify that person as fictive kin.

*(see Section 2(G))*
Notice to the Tribe

- In a child custody proceeding when the court knows or has reason to know that an Indian child is involved, the department shall notify the parent, guardian or Indian custodian and the Indian child's tribe, by certified mail with return receipt requested, of:
  1) the pending proceedings;
  2) the right of the Indian child's parent, guardian, Indian custodian and Indian child's tribe to:
     (a) intervention; and
     (b) petition the court to transfer the proceeding to the tribal court;
  3) the right of the Indian child's parent, guardian or Indian custodian to court-appointed counsel if the court determines that person is unable to afford counsel; and
  4) the right of the Indian child's tribe to participate in the child custody proceeding whether or not the Indian child's tribe intervenes.

*See IFPA Section 5(A) cf. 25 USC §1912*

- **Proceedings**
  - Investigation
  - Filing of Child Custody Proceeding
  - Termination of Parental Rights
  - Permanent Placement (Guardianship or Adoption)
Active Efforts

- [E]fforts that are affirmative, active, thorough and timely and that represent a higher standard of conduct than reasonable efforts.

  See IFPA Section 2(A) c.f. 25 U.S.C. §1912(d)

- Active efforts to maintain or reunite an Indian child with the Indian child’s family shall be made pursuant to the Indian Family Protection Act. Active efforts shall be tailored to the facts and circumstances of each case. The department shall not seek findings of futility or aggravated circumstances

- Identify family & Fictive Kin
Placement Preferences

- Foster Care
  - 1) Extended Family member of the Indian Child
  - 2) Foster home licensed, approved, or specified by the Indian child’s tribe
  - 3) Foster home licensed or approved by a licensing authority in New Mexico and in which one or more of the licensed or approved foster parents is an Indian.

- Under no circumstances shall an Indian child under 3 months of age be placed outside of the placement preferences provided in this section.

*(see IFPA Section 21 c.f. 25 U.S.C. § 1915(b))*
Placement Preferences

- Adoptive Placement
  1) Member of the Indian child’s extended family
  2) Other members of the child’s Indian tribe
  3) Other Indian families

See NMSA 32A-5-5 c.f. 25 U.S.C. § 1915(a)

- Cultural Compact

“The household into which an Indian child is placed for adoption or guardianship does not include a parent who is a member of the Indian child's tribe, the court shall require the parties to the adoption to enter a cultural compact, at the discretion of the Indian child's tribe, that documents the parties' agreement regarding how the Indian child will continue to actively participate in the Indian child's cultural learning and activities and engagement with family members.”

See IFPA Section 23
Qualified Expert Witness

- The court shall receive testimony from one or more qualified expert witnesses in all adjudicatory hearings pursuant to the Abuse and Neglect Act and all hearings to terminate parental rights. The court shall receive testimony from a qualified expert witness regardless of whether the parties to the proceedings have stipulated to a finding of abuse or neglect.

- The department shall request in writing that the tribe designate a QEW.

  *(see Section 17(A) c.f. 25 U.S.C. § 1912(e)-(f))*
QUESTIONS/COMMENTS
Upcoming Trainings

- Thursday, June 23, 2022 @ 12:00pm
  - Active Efforts and Placement
- Thursday, June 30, 2022 @ 12:00pm
  - Working with Tribes & Pueblos and Qualified Expert Witnesses
Contact Information

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