

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

### The Indian Child Welfare Act (ICWA):

### Nuts and Bolts, Best Practices and Tips for Child Welfare Stakeholders

Brooke Baracker-Taylor & Heather Webster



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

1

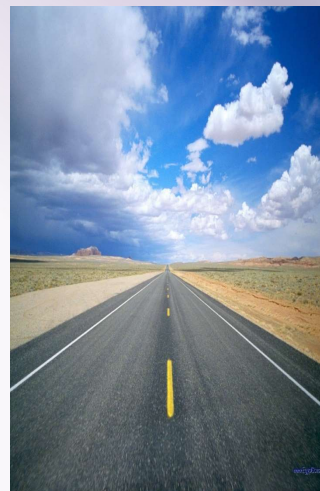
1

## Roadmap

- ICWA Bench Card
- Jurisdiction
- Judicial determination of ICWA Applicability
- Notice
- Transfer
- Tips from the Bench: Judge Souza

### Fall Moving the Dial Training:

Active efforts, Diligent Search, Placement Preferences, QEW, Permanency Options



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

2

2

## Best Practices

ICWA is truly the GOLD STANDARD by which ALL YINC cases should be handled

- Protects rights of all parties (child, parent, Tribes)
- Fosters relationships between children and extended family and children and their tribe/culture
- Achieves permanency in a timely manner
- Achieves culturally appropriate outcomes
- Improves tribal-state relationships



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

3

3

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

The Yellowstone County ICWA Court seeks to comply with the letter and spirit of the ICWA, improve tribal/state government-to-government relations, and achieve permanency for Native American children while maintaining cultural and family connections.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

4

4

## Tribal Sovereignty

**“Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.”**

*- Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians,  
at 1978 Senate hearings on ICWA*

- Improve/expand our cultural humility
- Challenge assumptions of “best interest” – nuclear vs. extended family
- Short term vs. long term benefits



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

5

5

## Complying with MCA and ICWA

### Binding Legal Authority

- Montana Code Annotated; § 41-3-101, et. seq.
- ICWA; 25 U.S.C. § 1901, et. seq.
- ICWA Regulations; 25 C.F.R. Part 23
- MT Supreme Crt and US Supreme Crt

### Persuasive Authority

- ICWA Regs. Commentaries; 81 Fed Reg. 38,778-38,876
- BIA Guidelines for Implementing the ICWA
- ICWA Guidelines; 81 Fed Reg. 96,476-96,477
- DPHHS Policy/Procedures



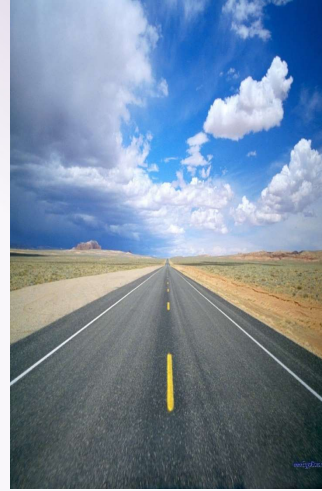
COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

6

6

## Roadmap

- ICWA Bench Card
- **Jurisdiction**
- Judicial determination of ICWA Applicability
- Notice
- Transfer
- Tips from the Bench: Judge Souza



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

7

7

## Jurisdiction

- **Exclusive – 25 U.S.C. § 1911(a)**
- **Concurrent – 25 U.S.C. § 1911 (b)**

“[T]ribes have an interest in the child which is distinct from, but on a parity with, the interest of the parents... It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children.”

*Mississippi Band of Choctaw Indians v. Holyfield*,  
490 U.S. 30, 53



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

8

8

## Exclusive Jurisdiction

Tribe has **exclusive jurisdiction** where:

- the child is **domiciled** on or resides within the Indian reservation
  - Should be interpreted in a way to not frustrate intent of ICWA
  - Domicile of child whose parents not married is domicile of the child's custodial parent



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

9

9

## Exclusive Jurisdiction

Tribe has **exclusive jurisdiction** where:

- the child is a **ward** of the Tribal Court (notwithstanding domicile)
  - Exception: P.L. 280
- Child need not be domiciled on reservation for tribal court to continue to exercise jurisdiction over a ward
- A Tribe's exclusive jurisdiction does not foreclose emergency jurisdiction when child temporarily



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

10

10

## Concurrent Jurisdiction

Section 1911(b) creates **concurrent, but presumptively tribal jurisdiction** if:

1. Child is not domiciled on reservation;  
AND
  2. Child is not a ward of the tribal court.
- If request to transfer, Court must hold a hearing. *In re M.E.M.*, 195 Mont. 329, 335, 635 P.2d 1313, 1317 (1981); *In re G.L.O.C.*, 205 Mont. 352, 356-57, 668 P.2d 235, 237 (1983).



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

11

11

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

## Practice Tips

### **SOCIAL WORKERS**

- Where the child is removed is not always where the child is domiciled.
- Be thorough with your questions.

### **ATTORNEYS**

- Get to know your tribal court clerks!
- Collaborate with ICW attorneys/agents



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

12

12

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

### Practice Tips

#### JUDGES

- Get to know tribal court judges
- Consider judicial conference call (UCCJEA)



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

13

13

## Emergency Proceedings

25 USC § 1922, Regs. § 23.113

#### Court's Role:

- Hold Hearing
- Findings on the record:
  - Is the emergency removal/placement necessary to prevent imminent physical damage or harm?
    - Consider **endangerment of the child's health, safety and welfare** and not just serious bodily injury and death. See Comments to Regs, 81 Fed Reg. 38,793-38794
  - Has the emergency ended?
- Terminate removal/placement if not necessary to prevent imminent physical harm or damage



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

14

14

## Emergency Proceedings

25 USC § 1922, Regs. § 23.113

- Emergency placement/removal should not last more than 30 days  
UNLESS:
  1. Returning the child would subject child to imminent physical damage or harm;
  2. Court has been unable to transfer jurisdiction to the Tribe;  
AND
  3. It has not been possible to initiate a child custody proceeding

Though notice is not required, Dept. must make statement of efforts to contact the Tribe, parents, and custodians!



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

15

15

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

## Tribal Intervention

25 U.S.C. § 1911(c)

- Indian child's Tribe (and Indian Custodian) has the right to intervene at any point in the proceedings.
- The Tribe's right to intervene is absolute.
- Intervention does not mean transfer of jurisdiction.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

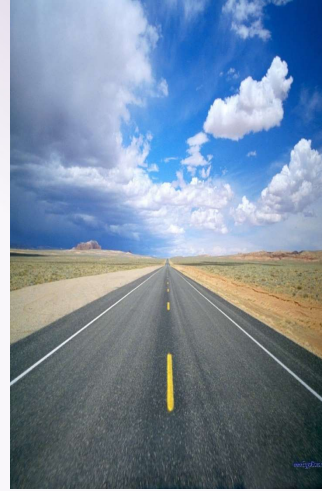
16

16



## Roadmap

- ICWA Bench Card
- Jurisdiction
- **Judicial determination of ICWA Applicability**
- Notice
- Transfer
- Tips from the Bench: Judge Souza



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

17

17

## Judicial Determination of ICWA Applicability

1. Is this a Child custody proceeding?
2. Is this an Indian child?
  - Identification
  - Verification



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

18

18

## Identifying Child as an Indian Child

### An Indian Child is

- Unmarried;
- Under the age of 18; and
- Either:
  - A member or citizen of an Indian Tribe; or
  - Eligible for membership or citizenship and the biological child of a member/citizen of an Indian Tribe

*Regs. § 23.2*

*25 U.S.C. § 1903(4)*



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

19

19

## Role of Court

“It is ultimately the duty of district courts to demand, ensure, and manifest, through sufficient findings of fact, Department compliance with all applicable ICWA tribal notice and enrollment eligibility requirements.”

*See In re S.R., 2019 MT 47, ¶ 18*



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

20

20

## Role of Court

- Inquiry **on the record** with every participant
- Confirm, **on the record**, Department used due diligence (not mere inquiry) to:
  - **identify** and work with all the Tribes of which there is reason to know the child may be an Indian child; and
  - **verify** membership status.

[Regs. § 23.107]



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

21

21

## Identifying Child as an Indian Child

### Identify all possible Tribal affiliations

- Both CPS and Court's responsibility
- Does a participant "know or have **reason to know** a child is an Indian child?"

#### DOES NOT REQUIRE

- affirmative evidentiary showing
- that parent be certain or unequivocal

#### DOES REQUIRE

".....something more than a bare, vague, or equivocal assertion of possible Indian ancestry without reference to any identified Indian ancestors with a reasonably suspected tribal connection."



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

22

22

## Identifying Child as an Indian Child

A court “has reason to know a child is an Indian child” under any of the following circumstances:

- A participant (the child, parent, agency), an attorney, or an Indian Tribe or organization, informs the court that the child is an Indian child or information has been discovered indicating that the child is an Indian child;
- The court is informed that the domicile or residence of the child, parent, or Indian custodian is on a reservation;
- The court is informed that the child is or has been a ward of a Tribal Court; or
- The court is informed that either parent or the child possesses an identification card indicating Tribal membership.

[Regs. § 23.107]



Practice Tip: Includes provision in ALL ORDERS that parents shall cooperate with filling out ancestry charts

COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

23

23

## Identifying Child as an Indian child

### **SOCIAL WORKER'S ROLE**

- Be thorough in diligent efforts to identify possible tribal connections
- Inquire with all family, the child, collaterals
- Hold FEM and ask for information about ancestors
- Request Genograms (bring blank genograms to court!)
- Be accurate and consistent in reporting information (per child; per tribe)
- Include details in every affidavit (and while testifying) about the efforts made to identify possible Tribal affiliations



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

24

24

# Identifying Child as an Indian Child

## Best Practices

### SOCIAL WORKERS

- Call ICWA Agent(s) IMMEDIATELY upon removal.
  - Facilitates early verification
  - Promotes tribal-state relationships, collaborative case management, identifying culturally appropriate services
  - Provides opportunity to search for family in partnership with the Tribe
  - Provides Tribe early notice of right to intervene, right to transfer
  - Part of diligent search and active efforts



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

25

25

# Identifying Child as an Indian Child

## Best Practices

### SOCIAL WORKERS

- Follow up with phone call & email to ICWA agent
- Call Enrollment Clerk for verbal verification if needed (some Tribes may prefer you go through ICWA Agent)
- Use Federal Register to contact tribes for enrollment/ citizenship information  
(Be wary of auto-generated forms!)

<https://www.federalregister.gov/documents/2021/10/04/2021-21464/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice>




COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

26

26

## Federal Register

Coushatta Tribe of Louisiana .....	Rayne Langley, ICWA Coordinator.	1984 CC Bel RD, Elton, LA 70532.	(337) 584-1437		rlangley@coushatta.org
Eastern Band of Cherokee Indians.	Jenny Bean, Family Safety Supervisor.	P.O. Box 666, Cherokee, NC 28719.	(828) 359-6149	(828) 359-6149	jennbean@ebcinsn.gov
Houlton Band of Maliseet Indians	Lori Jewell, ICWA Coordinator ..	88 Bell Road, Littleton, ME 04730.	(207) 532-3800	(207) 532-7287	ljewell@maliseets.com
Jena Band of Choctaw Indians ...	Mona Maxwell, Social Services Director.	P.O. Box 14, Jena, LA 71342 ...	(318) 992-0136	(318) 992-4162	mmaxwell@jenachoclaw.org
Mashantucket Pequot Indian Tribe.	Valerie Burgess, Director Child Protective Services.	102 Muhshee Mahchaq, P.O. Box 3313, Mashantucket, CT 06338.	(860) 396-2007	(860) 396-2144	vburgess@mptnnsn.gov
Mashpee Wampanoag Tribe .....	Maria Turner, ICWA Director .....	483 Great Neck Road—South, Mashpee, MA 02649.	(508) 477-0208	(774) 361-6034	maria.turner@mwtribe-nsn.gov
Miccosukee Tribe of Indians .....	Martha Vega, Director of Social Services	P.O. Box 440021, Tamiami Station, Miami, FL 33144	(305) 223-8380	(305) 894-5232	marthav@miccosukeetribe.com
Alabama—Quassarte Tribal Town	Samuel Deere, ICW Director .....	P.O. Box 187, Wetumka, OK 74883.	(405) 452-3659	(405) 452-3435	sdeere@alabama-quassarete.org
Cherokee Nation .....	Cherokee Nation Indian Child Welfare.	P.O. Box 948, Tahlequah, OK 74465.	(918) 458-6900	(918) 458-6146	lou-stretch@cherokee.org
Delaware Tribe of Indians .....	Aimee Turner, Department of Family and Children Services.	5100 Tuxedo Blvd., Ste. C, Bartlesville, OK 74006.	(918) 337-6510	(918) 337-6518	aturner@delawaretribe.org
Eastern Shawnee Tribe of Oklahoma.	Tamara Gibson, Child and Family Services Coordinator.	10100 S Bluejacket Road, Suite 3, Wyandotte, OK 74370.	(918) 666-7710	(888) 971-3908	tgibson@estoo.net
Kialagee Tribal Town .....	Jennie Lillard, ICW Coordinator	P.O. Box 332, Wetumka, OK 74883.	(405) 452-5388	(405) 452-3413	Jennie.Lillard@kialageetribe.net
United Keetoowah Band of Cherokee Indians in Oklahoma.	Director. Roxana Wilden, ICW Advocate	74859. P.O. Box 746, Tahlequah, OK 74465.	(918) 871-2839	(918) 431-0152	rwilden@ukb-nsn.gov
Wyandotte Nation .....	Tara Gragg, Social Worker .....	64700 E Hwy. 60, Wyandotte, OK 74370.	(918) 678-6355	(918) 678-3087	tgragg@wyandotte-nation.org



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

27


27

## Identifying Child as an Indian Child

Best Practices:

### ATTORNEYS

- Invite ICWA Agent to attend hearings by phone regardless of intervention
- Remind CPS to call and verify Tribal representative for: enrollment and social services.
  - \*Beginning of building relationships with Tribes and their agents.\*
    - Call ICWA Agent when working with new Tribe, advise of forthcoming docs, CPS names, court date, discuss telephonic appearance, inquire re: preferred QEWs, etc.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

28

28

## Identifying Child as an Indian Child

### Best Practices:

#### ATTORNEYS

- Bring Genogram to first hearing
- Share updated contact information with colleagues
- When “reason to know” triggered late in case, get in front of the Court and make a record. (Request status hearing, permanency hearing, etc.)



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

29

29

## Identifying Child as an Indian Child

### Best Practices:

#### JUDGES

- Remember to inquire of late comers (notwithstanding the Court’s previous determination)
- Be thorough with your inquiry; ask about the parent’s maternal and paternal tribal affiliations
- Include language in show cause order requiring parents to provide genograms/  
extended family information



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

30

30

## Verifying child's membership status

- Tribes – exclusive jurisdiction and authority to determine tribal membership. Regs. § 23.108(b)  
In the Matter of Riffle
- Can rely on documentation from Tribe § 23.108(c)
- File Notice of Tribal Determination with the Court!
- Address at every status and extension hearing!

**Defense attorney Practice Tip** – assist and encourage parent(s) to follow up with Tribe(s)



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

31

31

## Verifying Indian Child

### SOCIAL WORKER'S ROLE

- Obtain documentation from each Tribe, for each child, it has "reason to know" is an Indian child
- Send Verification Letters to all possible Tribes by CMRR and copy the Co Atty
- Send requests for verification to all possible tribes and always provide copy of request to Co Atty
- Keep accurate records of what Tribe(s) have responded
- [Practice tip: keep chart of tribes/per child to record efforts]
- Forward all tribal responses to Co Atty for filing



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

32

32



**Request for Verification of Child's Indian Status**

Date:

Tribe:

Address:

Regarding: Child's name (and any other aliases/tribal names/pre-adoptive name)  
 DOB  
 Address  
 Place of birth  
 Tribal affiliation/s

Dear (ICWA Designated Agent for Notice),  
 The Department of Public Health and Human Services has received a report of alleged child abuse and neglect concerning the above-named child. We have reason to know this child may be of American Indian descent.

**Family information is as follows:**


**Birth mother is:**  
 Birth mom's name. Birth mom's maiden name. Aliases/pre-adoptive name  
 DOB  
 Address  
 Place of birth  
 Tribal affiliation/s  
 Enrollment number

**Birth father OR putative father:** (Choose either birth or putative father; indicate if individual is on birth certificate, if known.)  
 Birth dad's name. Aliases/pre-adoptive name  
 DOB  
 Address  
 Place of birth  
 Tribal affiliation/s  
 Enrollment number

**Maternal grandmother** (both biological and adoptive, if applicable):  
 Maternal grandmother's name. Maternal grandmother's maiden name.  
 DOB/Address/Tribal affiliation/s  
 Enrollment number

**Maternal grandfather** (both biological and adoptive, if applicable):  
 Maternal grandfather's name.  
 DOB/Address/Tribal affiliation/s  
 Enrollment number

**Paternal grandmother** (both biological and adoptive, if applicable):  
 Paternal grandmother's name. Paternal grandmother's maiden name.  
 DOB/Address/Tribal affiliation/s  
 Enrollment number



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

33

33

**Paternal grandfather** (both biological and adoptive, if applicable):  
 Paternal grandfather's name.  
 DOB/Address/Tribal affiliation/s  
 Enrollment number

**Attach genogram if able.**

**Other information:**  
 include any other information that you may have, which could include (but is not limited to):

- Clan
- Adult siblings (include all information you have in similar fashion to the rest of the family above)
- Indian custodian (if different from previously listed relatives)
- Any other known relatives

An involuntary child custody proceeding has been initiated. \_\_\_ yes \_\_\_ no

The child is currently placed outside of parents' care. \_\_\_ yes \_\_\_ no

Pursuant to the Indian Child Welfare Act, 25 USC § 1901 et. seq., we are hereby requesting a verification of this child's Indian status. Please advise whether this child is:


- a) A member of your Tribe/s;
- b) Eligible for membership in your Tribe/s, and the biological child of a member of your Tribe/s; or
- c) is not a member of your Tribe/s and is not eligible for membership in your Tribe/s

Please respond to this request as soon as you are able. If additional information would be helpful, please do not hesitate to contact our office.

Thank you for your consideration and attention.

Child Protection Specialist name  
 Phone  
 Fax  
 Email  
 Mailing address

Child Protection Specialist supervisor  
 Phone  
 Fax  
 Email  
 Mailing address



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

34

34

## What if tribe does not provide verification?

### Practice Tips:

- Pick up the phone!
- Invite tribe to participate in court proceeding.
- Is there anything the State can do to facilitate a response?
  - Do you have the information you need?
  - Do you prefer email or fax original inquiry?
  - Explain stage of proceedings and prior efforts.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

35

35

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

### Team Break-out Session

**How can you as a stakeholder, and as a Team, assist in increasing Tribes' abilities to participate in critical stages of the proceedings?**

**Each stakeholder will decide an individual action step to complete prior to October's Moving The Dial**



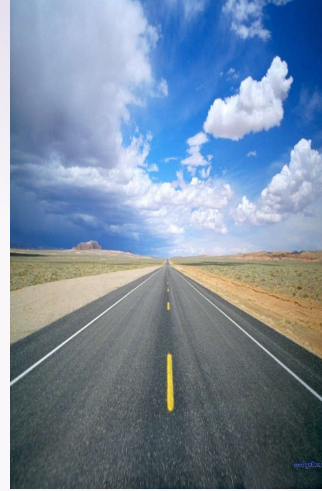
COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

36

36

## Roadmap

- ICWA Bench Card
- Jurisdiction
- Judicial determination of ICWA Applicability
- **Notice**
- Transfer
- Tips from the Bench: Judge Souza



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

37

37

## Notice Requirements – Tribes

25 U.S.C. § 1912(a)

- Send Notice by CMRR/RR to each Tribe with whom there is reason to know the child is affiliated
- Tribe must **receive** 10 days before proceeding
- File Return Receipt for each child/Tribe(s)
- Notice sent, at a minimum, for:
  - Foster Care Placement hearings (Show Cause/TIA; Adjudication/TLC, XTLC, Guardianship)
  - TPR hearings

### Best Practice:

Provide notice for ALL hearings (Placement, status and permanency hearings)



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

38

38

## Notice Requirements - Tribes

- If Tribe intervenes, MUST serve all pleadings

### Best Practices:

- Serve regardless of intervention
- Send notice for every proceeding and regularly collaborate with Tribe
  - In anticipation of a change in or breakdown of placement (Tribes may be able to assist Dept in supporting kinship placement to maintain placement)
  - Change of placement (inquiry with Tribe as to ICWA compliant placements, but remember onus is still on Dept.! Inquiry + Follow up!)
  - To consult/collaborate regarding change in permanency plan



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

39

39

## Notice Requirements - Tribes

### Best Practices:

- Ensure Tribes are receiving Orders (not just Petitions)
- Ensure record includes evidence of service.
- See also, § 41-3-432(4) MCA: Inquiry must be made at show cause hearing as to applicability of ICWA and if notice requirements were met.
- Failure to follow notice requirements is usually reversible error



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

40

40

## Notice Requirements – Parents/Indian Custodian

25 U.S.C. § 1912(a)

- Personal service on PARENTS for Initial and TPR offers greater protection of rights and is therefore acceptable under § 1912 (higher standard)
- Remember parents/IC need to **receive** notice 10 days prior to the hearing *\*but see § 41-3-430(3), MCA, regarding putative fathers and 25 U.S.C. § 1903(9).*
- File proofs of service with the court
- Parent/Indian Custodian can ask for 20-day continuance



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

41

41

## Notice Requirements-Parents

### Practice Tips

### COUNTY ATTORNEYS

- Put the CMRR tracking number sticker on the petition cert. of service
- Keep chart for each child and the tribe(s)
- Make it a practice to recite to the Court all the dates the Parents and Tribe received Notice



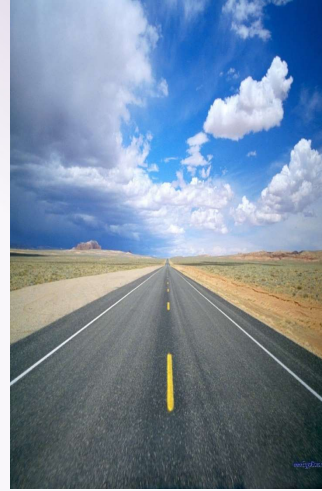
COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

42

42

# Roadmap

- ICWA Bench Card
- Jurisdiction
- Judicial determination of ICWA Applicability
- Notice
- **Transfer**
- Tips from the Bench: Judge Souza



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

43

43

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

# Transfer of Jurisdiction

25 U.S.C. § 1911(b), Regs. § 23.115-23.119

**"It is not ours to say...whether removing these children from their [pre]adoptive family should outweigh the interest of the Tribe....we must defer to the experience, wisdom and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."**

*Holyfield, 490 U.S. at 54*



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

44

44

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

# Transfer of Jurisdiction

## Who can request transfer?

- At any time/stage in the proceeding, orally on the record or in writing
  - Either parent (irrespective of custody and whether parent is non-Indian);
  - Indian Custodian;
  - Tribe



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

45

45

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

# Transfer of Jurisdiction

## What happens after a Petition to Transfer is Made?

- The State court must ensure that the Tribal court is promptly notified in writing of the transfer petition.
  - This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

[Regs § 23.116]



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

46

46

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

"Keeping Children Connected"

# Transfer of Jurisdiction

## Who can object to transfer?

- Either parent (irrespective of custody at time of removal and whether parent is Indian or non-Indian); OR
- Tribe.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

47

47

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

"Keeping Children Connected"

## Rule

Must be transferred unless, one of the following is established on the record by **clear and convincing evidence** (*In Re M.E.M. 635 P.2d 1313, 1317 (Mont. 1981)*):

- Either **parent objects**
- The Tribal Court affirmatively **declines** the transfer; or
- The Court determines **good cause** exists for denying transfer.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

48

48



## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

### Transfer of Jurisdiction

- If requested, presume the case will be transferred. However, transfer does not actually take place until the tribal court issues an order accepting jurisdiction.
- Transfer of jurisdiction does not necessarily mean physical transfer of a child back to a reservation.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

49

49

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

### Factors a court may NOT consider when determining "Good Cause" to deny transfer

- Whether the foster-care or TPR proceeding is an advanced stage if notice of proceeding was not received until an advanced stage.
- Whether there has been prior proceedings with no petition to transfer was filed.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

50

50

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

"Keeping Children Connected"

### Factors a court may NOT consider when determining "Good Cause" to deny transfer

- Whether transfer could affect placement.
- Cultural connections with the tribe or its reservation.
- Socioeconomic conditions or any negative perception of the tribal social services or judicial system.



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

51

51

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

"Keeping Children Connected"

### What factors *may* be considered in a good cause analysis?

- Modified doctrine of *forum non conveniens*
- Factors that do not frustrate the purpose of ICWA
- Addressing which Court is best positioned to adjudicate proceeding, not predictions about the outcome of the proceeding. *BIA Guidelines*, F.5

Remember: Transfer is the Rule and not the exception!



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

52

52

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

### Effectuating a smooth transfer of jurisdiction

- All parties should understand how the tribe makes its **decision and the process utilized** to transfer cases
- Navigating delays:
  - District Court can initiate **judicial conference**
  - District Court or County Attorney can **inquire** with ICW worker/tribal attorney/tribal court– “How much time is needed to accomplish a transfer or declination? What additional information can we provide that would be helpful?”
- District Court can set **status hearings**



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

53

53

## Moving The Dial

## ICWA Training for Child Welfare Stakeholders

*"Keeping Children Connected"*

### Team Break-out Session

**How does your jurisdiction navigate requests to transfer cases to Tribal Court at later stages in the proceedings?**

**If you have a tribal partner on your Team, allow time for him/her to describe the Tribe's process for transfer.**



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

54

54

**Moving The Dial**

**ICWA Training for Child  
Welfare Stakeholders**

## **Keeping Children Connected**

**Thank you for everything you do!**

**Brooke Baracker-Taylor**

**bbaracker2@mt.gov**

Assistant Attorney General

Child Protection Unit

406-970-7751

**Heather Webster**

**hwebster@yellowstonecountymt.gov**

Deputy Chief Yellowstone County Attorney

406-254-7935



COURT IMPROVEMENT PROGRAM - 2022 SUMMER TRAINING

55