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Karen Carroll has been part of the New York State Family Court Child Welfare Improvement Project since February 1998; initially as the project director in Buffalo, NY and, since 2006, as a Deputy Project Manager for the statewide project. Her role has been to support the NYS Family Courts and their collaborative partners in goal setting, engaging workgroups and implementing child welfare system change on a local and statewide level. She is the author of a Technical Assistance Brief for the National Council of Juvenile and Family Court Judges entitled *The Foster Care Independence Act of 1999 and The John H. Chafee Foster Care Independence Program, 2002*, co-author of "System Change through Collaboration...Eight Steps for Getting from There to Here," *Juvenile and Family Court Journal*, Fall 2002, and a co-author of "Adoption Now: A Joint Initiative of New York's Courts and Child Welfare System," *Child Welfare*, March/April 2007. She has presented on many topics related to child welfare practice and system change, including Collaborating for Better Child Welfare Outcomes, Tools for Engaging Youth in their Court Proceedings, The Lawyer's Guide to Agency Adoptions and The Basics of the Interstate Compact on the Placement. She is also the local Project Administrator for the Child Permanency Mediation Program in the Eighth Judicial District of New York.

Prior to her position with the NYS Unified Court System, Karen was in private practice in Washington, D.C. handling a wide variety of family law matters. She is a member of the Bar of the District of Columbia and the State of Maryland. She received her J.D. in 1994 from The Columbus School of Law at Catholic University of America and holds a B.A. in both Psychology and Interdisciplinary Social Sciences from the University of Buffalo. She is a trained mediator and a member of the WNY Group of Collaborative Law Professionals. She resides in Grand Island, New York with her husband and their four children.

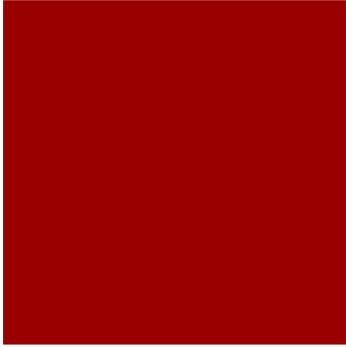
Important Message about the Documentary: **Unseen Tears**

Ms. Carroll's presentation on the Indian Child Welfare Act includes approximately five minutes of the documentary, "Unseen Tears: The Impact of Native American Boarding Schools in Western New York," a joint project of filmmaker Ron Douglas, Squeaky Wheel Buffalo Media Resources, and Native American Community Services of Erie and Niagara Counties. The Attorneys for Children Program sincerely appreciates permission to use the film clip for training purposes. The film can be viewed in its entirety on Youtube.



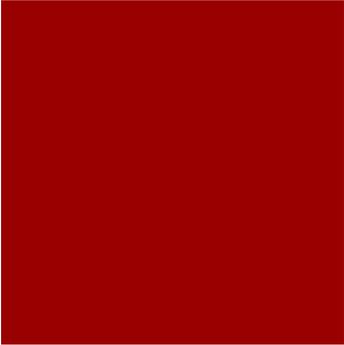
The ABC's of ICWA

Karen Carroll, Esq.
NYS Child Welfare Court Improvement Project
March 2012



Where to start:

- What questions do I **A**sk?
- On what do I **B**ase my analysis of applicability?
- How do I **C**hange the Art. 10 process?
 - Placement Options
 - Parties
 - Standards of proof
- What are the **D**ecision-making points?
- Why only Native cases? Why not **E**veryone?



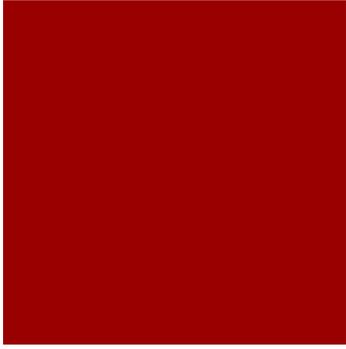
Why should this be important to me?

- ICWA is not “civil rights” legislation! This is not legislation that protects the civil rights of US citizens. This law governs our dealings with citizens of another sovereign nation.
- ICWA is legislation that supports the sovereignty of free and distinct Indian Nations that exist within our US borders (566 federally recognized Tribes and Nations; within NYS – 9 federal and 1 with NYS recognized).
- But why? Before the passage of ICWA in 1978 – between 25-35% of Indian children had been placed in non-Indian homes by state courts, child welfare systems and private adoption agencies.
- The US government engaged in an active policy of disbanding the Indian culture by disrupting the family and community structure.



Unseen Tears





Local Boarding School Legacy



- Carlisle Indian Industrial School – 1879-1910
 - 1st in the country – became the model
- Mohawk Institution (aka “Mush Hole”) – 1831-1969
 - Brantford, Ontario
- Thomas Indian School – 1905-1957
 - Irving, NY – Cattaraugus Indian Reservation
- Survivors are still alive
- Parents and Grandparents were raised in Boarding Schools

Shameful history of US policy toward the Nations and tribes

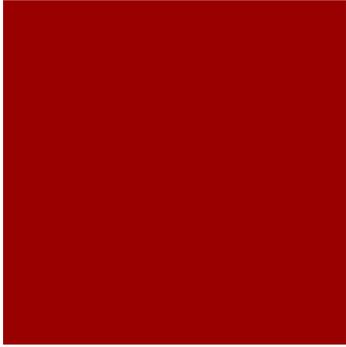


- The US government engaged in an active policy of disbanding the Indian culture by disrupting the family and community structure.
- Allotment Policy (1887-1934) – full assimilation by transferring tribal land and breaking down the Indian family
 - Civilization Act – intended to civilize and Christianize
 - Removal Act – develop “Indian Territory” west of the Mississippi
 - Indian Boarding Schools
 - Dawes Allotment Act – dividing of tribal land to create “nuclear” Indian families and destroy community land ownership
- Reorganization Policy (1928-1945) – federal government imposed written “constitutions” in tribes
- Termination Policy (1945-1961) – feds gave up
- Self-Determination Policy (1961-present) – ICWA and federal recognition of tribes, intended to help Indian Nations be self-sufficient



Ask the question!

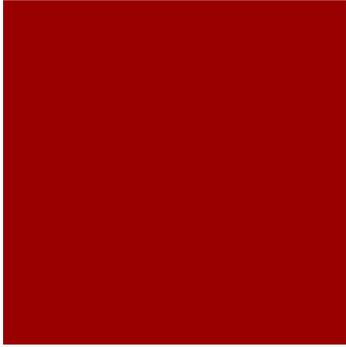
- Has this child been involved in a tribal court proceeding?
- Is this child living on a reservation or tribal land?
- Is this child Native American?
- Is this child a member of Indian tribe or Nation?
- Does this child have family who is Native?
- Is this child affiliated with an Indian tribe or Nation?
- Does this child have Native American heritage?
- Does this child have a family member who is Native American?
- Does the child's mother or father have Native American heritage?
- *The only wrong question - is no question!*



Intent of ICWA



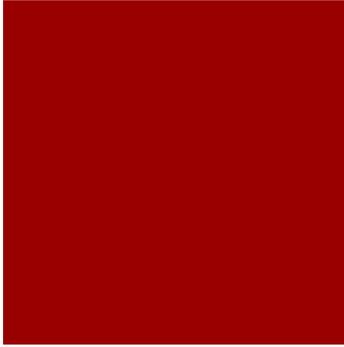
- The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902).
- See Mississippi Band of Choctaw Indians v. Holyfield, 490 US 30 (1989)



Initial Considerations

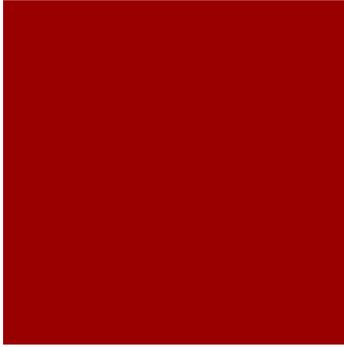
Does ICWA Apply?

- Evaluate:
 1. The child's status – "Is this an ICWA child?"
 2. The type of state action
- Determine what elements of ICWA apply to the proposed state action



Who is an Indian Child?

- Under federal ICWA law - 25 U.S.C. §1903(4)
- An Indian Child shall mean any unmarried person who:
 - a) Is under eighteen, **and**
 - b) Is a member of a federally recognized Indian Tribe, **or**
 - c) The child is the biological child of a member of a federally recognized Indian tribe **and** child is eligible for membership in any federally recognized Indian tribe.



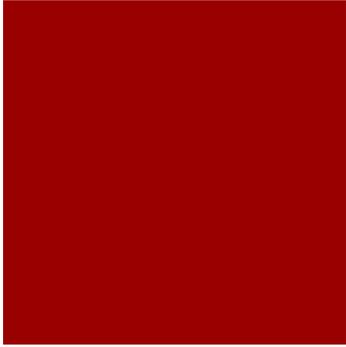
NYS Add-on's

- NY Soc Serv § 2 (36) + **18 NYCRR 431.18**
- An Indian Child shall mean any unmarried person who:
 - a) Is under eighteen, or
 - b) Is under the age of 21, entered foster care prior to his/her 18th birthday and remains in care, **AND IS A STUDENT ATTENDING A SCHOOL, COLLEGE OR UNIVERSITY OR REGULARLY ATTENDING A COURSE OF VOCATIONAL OR TECHNICAL TRAINING ...**

and who:

- i. Is a member of an Indian Tribe, or
- ii. Is eligible for membership in an Indian tribe, or
- iii. Is the biological child of a member of an Indian tribe and is residing on or is domiciled within an Indian reservation.

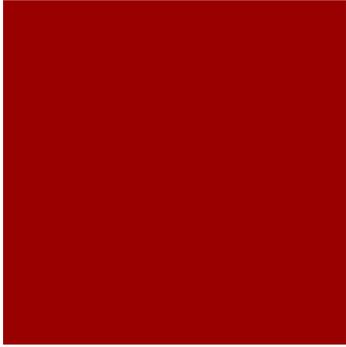
*** Indian tribe shall mean any tribe, band, nation or other recognized group or community of Indians **Recognized by the D of I, the State of New York OR BY ANY OTHER STATE...**



Bottom Line:

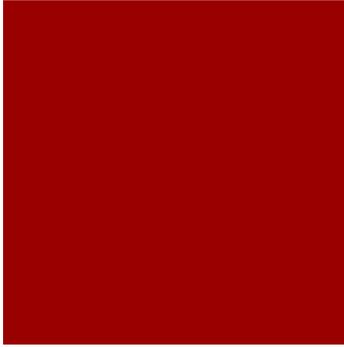
- Parties to a state court proceeding must defer to Indian tribes on questions of membership!





Notice

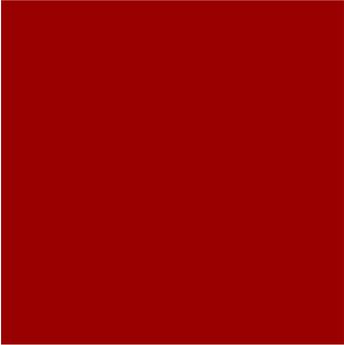
- Shall be provided to the child's parent or Indian custodian and the Indian child's tribe
- Registered mail, return receipt
- Notice given of the pending proceeding and of their right to intervene – see OCFS website at <http://www.ocfs.state.ny.us/main/nas/#icwa>
- If specifics are not known, notice is given to the Secretary of the Interior at the Bureau of Indian Affairs
- THEN FOLLOW THE PROVISIONS OF ICWA!



NYS Nations/Tribes

- (With Federal Recognition)
 - Cayuga Nation
 - Oneida Indian Nation
 - Onondaga Nation
 - Seneca Nation
 - Shinnecock Indian Nation (6/10)
 - St. Regis Mohawk Tribe
 - Tonawanda Band of Senecas
 - Tuscarora Nation

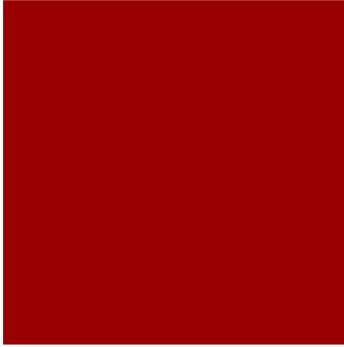
- (With State Recognition)
 - Unkechaug Indian Nation



Who's responsibility is this?



- 25 U.S.C. § 1912 (a) – “the party **(SOCIAL SERVICES OFFICIAL)** seeking the foster care placement of, or the termination of parental rights to, an Indian child shall notify the ... Indian child’s tribe, by registered mail with return receipt requested, or the pending proceedings and of their right to intervention.”
- “If the ... tribe cannot be determined, such notice shall be given to the Secretary [of the Department of Interior] in like manner.”
- <http://www.bia.gov/idc/groups/public/documents/text/idc012540.pdf> - Federal Register, Vol. 76, No. 101, 5/25/11 – updated annually!



Jurisdiction

■ Exclusive Jurisdiction:

- Involving a Indian child who resides or is domiciled within the reservation of such tribe
- Where an Indian child is a ward of a tribal court

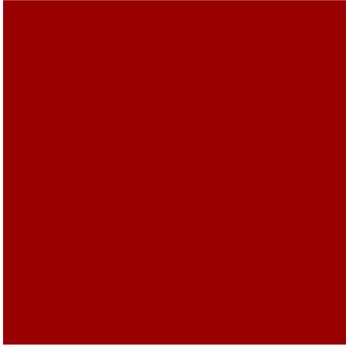
■ Transfer:

- Involving foster care placement of or termination of parental rights to an Indian child not domiciled or residing within the reservation
- Court shall transfer unless
 - "good cause to the contrary"
 - Objection by either parent
 - Tribal court declines

■ Intervention:

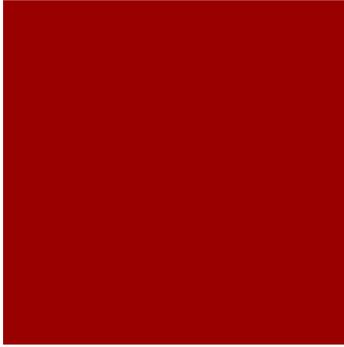
- In any state court proceeding involving foster care placement of or the termination of parental rights to an Indian child
- Tribe shall have a right to intervene AT ANY POINT

NY Soc Serv § 39(5 -7).



Applicability

- 25 U.S.C. § 1903:
- “child custody proceeding” shall mean and include:
 - “foster care placement” – cannot have the child returned upon demand (**ANY ACTION TO REMOVE AN INDIAN CHILD FROM HIS/HER PARENT ... FOR TEMPORARY PLACEMENT IN A FOSTER HOME OR INSTITUTION...**)
 - “termination of parental rights” – termination of the parent-child relationship
 - “preadoptive placement”
 - “adoptive placement”
 - **“SHALL NOT APPLY WHERE AN INDIAN CHILD IS FOUND BE BE A JUVENILE DELINQUENT PURSUANT TO ARTICLE 3 OF THE FCA OR IN A DIVORCE PROCEEDING, UPON AWARD OF CUSTODY TO ONE OF THE PARENTS”**

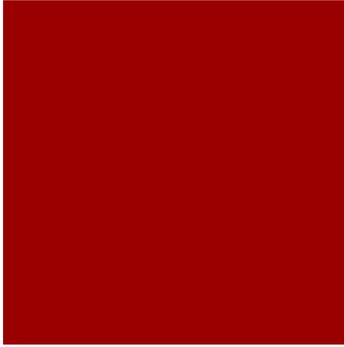


Removal



- DSS shall demonstrate that *active efforts* were made to alleviate the need to remove
 - Active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have proved unsuccessful
 - Efforts shall involve and use available resources from the child's extended family, tribe, Indian social services agencies and individual Indian care givers.

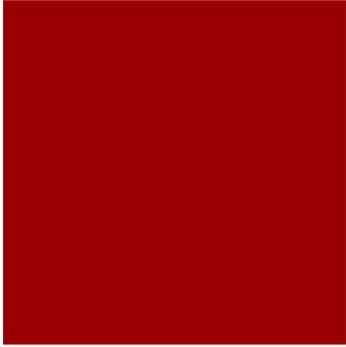
- Determination by the Court:
 - Clear and convincing evidence
 - Including the testimony of the QEW
 - "continued custody of the child in the home of the parent or Indian Custodian *is likely to result in serious emotional or physical damage to the child.*"



Qualified Expert Witness

- Member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as the pertain to family organizations and childrearing practices
- A lay expert witness having substantial experience in the delivery of child and family services to Indians AND have extensive knowledge of prevailing social and cultural standards and child rearing practices within the child's' tribe
- A professional person have substantial education and experience in the area of provision of service to Indian children and their families

18 NYRCC 431.18(a)(5) – NYS law is more specific!

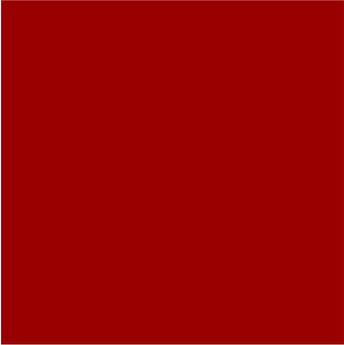


What do they speak to?



- to the critical issue - "continued custody of the child in the home of the parent or Indian Custodian *is likely to result in serious emotional or physical damage to the child.*"
- Also that active efforts have been made IN THE CONTEXT OF ACCEPTED NORM AND PRACTICE OF THE TRIBE and that tribal resources have been used

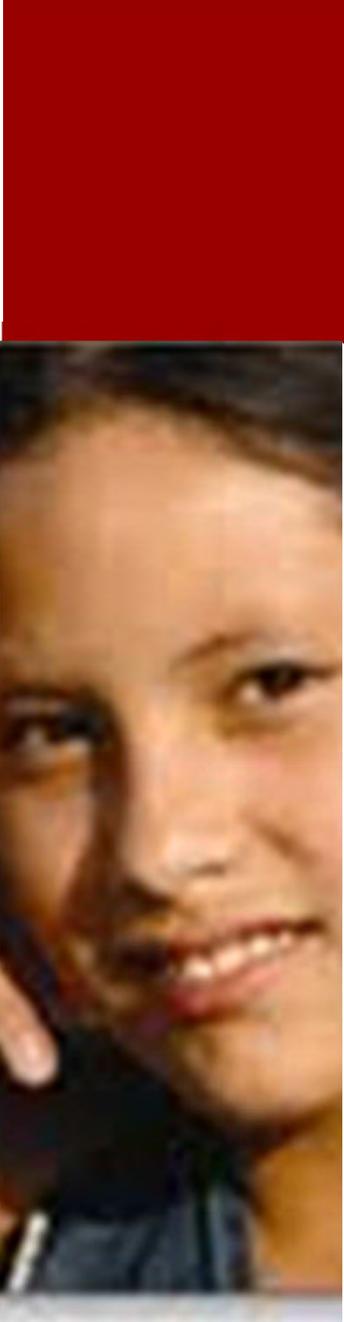
18 NYCRR 431.18(b)(1)&(2)



Foster Care Placement

- 25 U.S.C. § 1915(b)
- Shall be placed in the least restrictive setting which most approximates a family
- Within a reasonable proximity to his or her home
- Taking into account his or her special needs

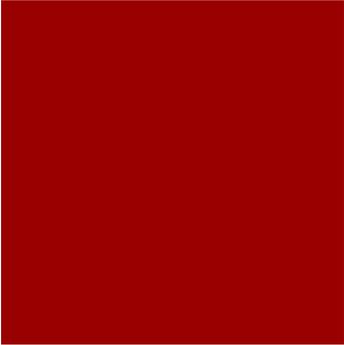




Placement Preferences

Preference shall be given, absence of good cause to the contrary, to a foster care or pre-adoptive placement with:

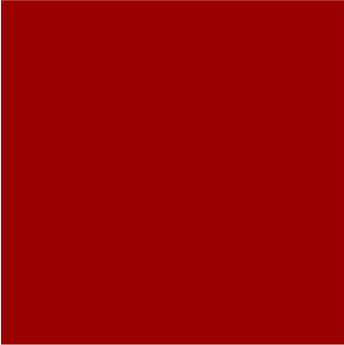
- 1) A member of the Indian child's extended family (as defined by law or custom of the child's tribe);
 - 2) A foster home licensed, approved or specified by the Indian child's tribe;
 - 3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - 4) An institution 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.
- ❖ A child's Indian tribe may establish a different order of preference by resolution
 - ❖ Criteria exist for diverging from the preferences 18 NYCRR 431.18(f)(2)



Termination of Parental Rights

- Determination by the Court:
 - *Proof beyond a reasonable doubt*
 - Active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have proved unsuccessful
 - Including the testimony of the QEW
 - “continued custody of the child in the home of the parent or Indian Custodian *is likely to result in serious emotional or physical damage to the child.*”





Adoption Placement Preferences

- 25 U.S.C. § 1915(a)

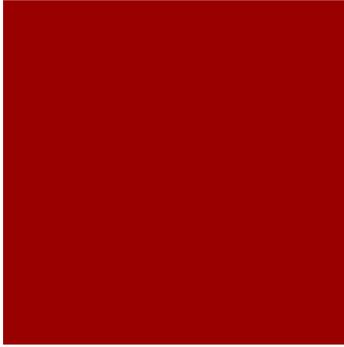
- Preference shall be given, absence of good cause to the contrary, to a placement with:
 - 1) A member of the child's extended family;
 - 2) Other members of the Indian child's tribe; or
 - 3) Other Indian families





Online Resources

- http://www.courts.state.ny.us/ip/cwcip/cip_training-documents.shtml
- <http://www.ocfs.state.ny.us/main/nas/#icwa>
- http://www.nyfedstatetribalcourtsforum.org/projects_icwa.shtml
- http://www.nicwa.org/indian_child_welfare_act/
- <http://www.childwelfare.gov/systemwide/courts/icwa.cfm>



The ABC's of ICWA

- **A**sk the question!
- **B**ase your analysis in recognizing Nation sovereignty, questioning state action and evaluating the critical impact on Native children beyond this generation!
- **C**hange your Art. 10 process!
- Pay attention to **D**ecision-making points!
- Because it's **E**veryone's responsibility!

1. See list of online resources page 24 of the presentation handout above
2. See also
http://www.ocfs.state.ny.us/main/documents/docs.asp?document_type=4&category_number=25 (OCFS Publications for Native American Services)