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### Testimony before the Commission on Native Children

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**MATTHEW L.M. FLETCHER**

*Harry Burns Hutchins Collegiate Professor of Law  
Professor of American Culture*

August 4, 2020

Ms. Gloria O'Neill  
Chairwoman, Commission on Native Children  
President/CEO, Cook Inlet Tribal Council

Transmitted via email

Dear Chairwoman O'Neill,

I am honored to write today to discuss jurisdictional matters under the Indian Child Welfare Act of 1978, or ICWA. I will survey areas where ICWA's jurisdictional provisions are working well, where they could be improved, and offer recommendations for the Commission.

I am the Harry Burns Hutchins Collegiate Professor of Law and Professor of American Culture at the University of Michigan. I also serve as an appellate judge for 13 federally recognized Indian tribes, including the Pokagon Band of Potawatomi Indians of Michigan and Indiana and the Poarch Band of Creek Indians, where I serve as chief appellate judge. I serve on the Michigan Tribal-State-Federal Judicial Forum, representing the Pokagon Band. I am a citizen of the Grand Traverse Band of Ottawa and Chippewa Indians.

### **Background on the Jurisdictional Provisions of ICWA**

ICWA established a workable and flexible framework to restore tribal jurisdiction over their own children. Jurisdiction over Indian child welfare matters resides presumptively in tribal forums, where they belong, instead of state courts.

ICWA covers child welfare matters involving Indian children in state courts. Indian children are children that are members of federally recognized Indian tribes or children eligible for membership whose parents are tribal members.<sup>1</sup> Child welfare matters include cases that involve or could lead to foster care placement, termination of parental rights, adoptive placement, and preadoptive placement.<sup>2</sup>

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<sup>1</sup> 25 U.S.C. § 1903(4).

<sup>2</sup> 25 U.S.C. § 1903(1).

ICWA recognizes exclusive tribal jurisdiction over child welfare matters involving Indian children who are domiciled on an Indian reservation.<sup>3</sup> For children not domiciled on an Indian reservation, ICWA still favors tribal jurisdiction. Absent “good cause to the contrary,” a veto of the parent, or refusal of the tribal court to accept the case, state courts must transfer Indian child welfare cases to tribal court.<sup>4</sup> States must provide notice to the affected Indian tribe and allow the tribe to intervene in the state court proceedings, regardless.<sup>5</sup>

Congress enacted ICWA because state governments had dramatically overreached into Indian country to remove as many as 35 percent of the nation’s Indian children from their homes.<sup>6</sup> States were even entering Indian country at will to remove Indian children, directly in the face of controlling legal authority affirming the powers of tribal governments.<sup>7</sup>

Prior to 1978 (and sadly for many years after), the typical Indian child welfare matter involved state officials making a unilateral decision that an Indian child living on or off the reservation was in need of intervention. State officials would remove the child from the home without any participation of tribal social services, law enforcement, or judicial procedure. Very frequently, state officials at removal would threaten or cajole Indian parents and custodians into “consenting” to the state’s action. If the state proceeded to an emergency removal hearing in state court, the state rarely would provide any form of due process to the Indian parents or custodians. There would be no notice, no opportunity to be heard, to right to participate in the hearing at all, and certainly no right to counsel for the Indian parents and custodians. Indian tribes would not be notified, nor would they have the right to participate or intervene.

### **Where ICWA’s Jurisdictional Provisions are Successful**

In the four-plus decades since its enactment, ICWA has led to a sea change in child welfare matters for *all children*. Quietly, ICWA has become one of the most successful civil rights statutes of the last half-century, perhaps longer.

When Congress enacted ICWA, state child welfare systems did little to protect parents, Indian and non-Indian, from abusive or erroneous removals of their children. There was no national model for the structure and process of a child welfare system. Procedural protections for parents were non-existent in many areas of the country. Predictable standards for the removal of children from their homes, for foster care placements, best interests of the child, and so on, did not exist. ICWA was the first national model for a child welfare system. ICWA and other federal child welfare laws that tied federal funding to compliance with federal standards in the child welfare space pushes states in the right direction. This is big reason why ICWA advocates refer to ICWA as the “gold standard.”<sup>8</sup> In virtually every state child welfare

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<sup>3</sup> 25 U.S.C. § 1911(a).

<sup>4</sup> 25 U.S.C. § 1911(b).

<sup>5</sup> 25 U.S.C. § 1911(c) (intervention); § 1912(a) (intervention).

<sup>6</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989); H.R. Rep. No. 95-1386, at 9 (1978).

<sup>7</sup> E.g., *Fisher v. District Court*, 424 U.S. 382 (1976) (affirming the exclusive power of tribes to adjudicate child welfare matters arising on Indian reservations).

<sup>8</sup> Joaquin R. Gallegos and Kathryn E. Fort, *Protecting the Public Health of Indian Tribes*, 12 *Harv. Pub. Health Rev.* 1 (2017); Tara Hubbard and Fred Urbina, *ICWA — The Gold Standard: Golden Nuggets of Evidence from Arizona*, 58 *ARIZ. ATTY.*, July/August 2022, at 32.

system, state workers and judges treat ICWA's procedural and substantive standards as the goal. These are standards designed to help real people and families.

ICWA's jurisdictional mandates also directed many state court case toward tribal social services providers and judiciaries. ICWA, coupled with other Indian affairs statutes such as the Indian Civil Rights Act of 1968<sup>9</sup> and the Indian Self-Determination and Educational Assistance Act of 1975 (also known as Public Law 638)<sup>10</sup> that encouraged and enabled tribes to develop and modernize their governments and judiciaries, went a long way toward allowing tribes to manage their own child welfare systems. ICWA also requires state courts to grant full faith and credit to tribal court orders involving Indian child welfare matters.<sup>11</sup>

The improvement in tribal social services and judicial capabilities also leads to more cooperation with state jurisdictions, leading to better outcomes. A recent study of Pascua Yaqui Tribe children in Pima County, Arizona concluded that 36 percent of children removed from their homes are reunited with their families in 2021, up from 13 percent in 2006.<sup>12</sup> Pima County also recently started a special ICWA court. Outcomes there are even better, with a 68 percent reunification rate.<sup>13</sup> The Pascua Yaqui Tribe is one of the great success stories in Indian country. In the late 1990s, when I worked in-house for the tribe, the government was just beginning to intervene in child welfare cases. Now tribal law enforcement and the tribal judiciary are incredibly successful models other tribes are trying to emulate.

In Washington, ICWA compliance by state actors was poor immediately after Congress passed the law, but compliance has risen over the decades.<sup>14</sup> Outcomes are much better as well. The Washington legislature passed the Washington Indian Child Welfare Act (WICWA) in 2011.<sup>15</sup> In 2020, the Washington Supreme Court issued a landmark opinion roundly affirming WICWA's protections where the state agency and the state court acted to prevent an Alaska Indian tribe from knowing about an Indian child welfare matter involving one of its citizens.<sup>16</sup> Earlier this year, the Washington Supreme Court enforced ICWA's requirement that states take "active efforts" to prevent the breakup of an Indian family, and if the state agency does not do that work, it must return the child to their family.<sup>17</sup>

ICWA authorizes and encourages tribal-state cooperation on Indian child welfare matters.<sup>18</sup> In Michigan, tribal, state, and federal judges have been working together since the 1990s to improve cooperation, with a focus on ICWA compliance and implementation. The long-term cooperation and communication between judiciaries set the framework for Michigan's legislature to adopt the Michigan Indian Family Preservation Act in 2013.<sup>19</sup> More recently, the Michigan Tribal-State-Federal Judicial Forum reported on numerous initiatives

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<sup>9</sup> 25 U.S.C. § 1301 et seq.

<sup>10</sup> 25 U.S.C. § 5301 et seq.

<sup>11</sup> 25 U.S.C. § 1911(d).

<sup>12</sup> Hubbard and Urbina, *supra*, at 35-36.

<sup>13</sup> *Id.* at 37.

<sup>14</sup> *See generally* Angelique Day and Cossette B. Woo, *Indian Child Welfare Act*, 28(1) CHILDREN'S VOICE 1 (2019).

<sup>15</sup> Wash. Rev. Code § 13.38.010 et seq.

<sup>16</sup> *Matter of Dependency of Z.L.G.*, 471 P.3d 853 (Wash. S. Ct. 2020).

<sup>17</sup> *In re J.M.W.*, 2022 WL 2840324 (Wash. S. Ct., July 21, 2022).

<sup>18</sup> 25 U.S.C. § 1919.

<sup>19</sup> Mich. Comp. Laws 712b.1 et seq.

between state and tribal judges that have enhanced Indian child welfare throughout the state.<sup>20</sup> The Forum's work led to the establishment of a reciprocal comity rule by which state and tribal courts will enforce each other's orders, judgments, awards, and so on.<sup>21</sup>

ICWA allows states to adopt laws more protective of the rights of the parents or custodians of Indian children.<sup>22</sup> Many states have done so. In all, ten states have enacted legislation substantially adopting ICWA as state law and filling in gaps in ICWA that provide greater protections to Indian families.<sup>23</sup>

In recent decades, ICWA has given Indian tribes the space to offer dramatic and successful examples of child welfare reform not often possible in many states. Consider the child welfare laws of the Nottawaseppi Huron Band of the Potawatomi. The code acknowledges that child welfare matters are not to be compartmentalized, impliedly referencing *Mno-Bmadzen*, the Anishinaabe philosophy of interconnectedness and inter-generational respect:

*Bode'wadmi* traditions and values recognize the interconnectedness of every person and everything in this world and that the actions of one individual, or of a group of individuals, will have an impact on the whole of our community. In all things we do as a government, it is our obligation to promote *Bode'wadmi* traditions and values by seeking consensus so that decisions that are made will benefit the whole of our community for this and the next seven generations.<sup>24</sup>

The code also instructs the tribal government and tribal judiciary to interpret the child welfare code in light of *Noeg Meshomsenane Kenomagewenen* (the Seven Grandfather Teachings):

In carrying out the powers of self-government in a manner that promotes and preserves our *Bode'wadmi* values and traditions, the Tribe strives to be guided by the Seven Grandfather Teachings in its deliberations and decisions. The rights and limitations contained in this chapter are intended to reflect the values in the Seven Grandfather Teachings to ensure that tribal youth and

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<sup>20</sup> Michigan Tribal-State-Judicial Forum, *Michigan's Judiciary Success Stories: How Tribal, State, and Federal Courts are Collaborating to Benefit Michigan's Families* (2017), [https://www.courts.michigan.gov/SysGlobalAssets/migrated/administration/scao/documents-\(lisa-and-deb-review\)/tribal-state-fed-success-stories-11-3\\_final.pdf](https://www.courts.michigan.gov/SysGlobalAssets/migrated/administration/scao/documents-(lisa-and-deb-review)/tribal-state-fed-success-stories-11-3_final.pdf).

<sup>21</sup> Mich. Ct. R. 2.615.

<sup>22</sup> 25 U.S.C. § 1921.

<sup>23</sup> Cal. Senate Bill 678 (2006) (amending numerous state laws), <https://turtletalk.files.wordpress.com/2015/08/californiaicwa.pdf>; Iowa Indian Child Welfare Act, Iowa Code § 232.B1 et seq.; Michigan Indian Family Preservation Act, Mich. Comp. Laws 712b.1 et seq.; Minnesota Indian Family Preservation Act, Minn. Stat. § 260.751 et seq.; Nebraska Indian Child Welfare Act, Neb.Rev.St. § 43-1501 et seq.; New Mexico Indian Family Protection Act, House Bill 135, <https://turtletalk.files.wordpress.com/2022/03/hb0135-1.pdf>; Oklahoma Indian Child Welfare Act, 10 Okla. St. Ann. § 40 et seq.; Oregon Indian Child Welfare Act, House Bill 4214, <https://turtletalk.files.wordpress.com/2020/06/oregon-icwa-passed.pdf>; Washington Indian Child Welfare Act, Wash. Rev. Code § 13.38.010 et seq.; Wisconsin Indian Child Welfare Act, Wis. Stat. § 48.028 et seq.

<sup>24</sup> Nottawaseppi Huron Band of the Potawatomi Tribal Court § 7-3.4.

community and other persons participating in youth development within the jurisdiction of the Tribe will be guided by the Seven Grandfather Teachings:

*Bwakawen* — Wisdom  
*Debanawen* — Love  
*Kejitwawenindowen* — Respect  
*Wedasewen* — Bravery  
*Gwekwadzewen* — Honesty  
*Edbesendowen* — Humility  
*Debwewin* — Truth<sup>25</sup>

The Nottawaseppi children's code is just one example of how tribal public policy rooted in culture is intended to preserve and protect Indian families. State public policy before ICWA (and sometimes quietly enforced even today) presumed that Indian families were inherently inferior to non-Indian families. Tribal nations fight against that presumption.

### **Where ICWA's Jurisdictional Provisions Need Improvement**

The structure of ICWA's jurisdictional provisions is solid. The weakness comes from a lack of state court compliance with them. And that is the result of the lack of an effective enforcement mechanism.

Family court cases in state courts are complicated, unusual, and tragic matters, often ongoing for years, even more than a decade in the saddest cases. The American legal system is a poor fit for child welfare. There are an enormous number of consequential and discretionary decision points involving judges, social services providers, parents, guardians *ad litem* (legal and layperson representatives of the children), foster parents, potential adoptive parents, and others. Critical points include without limitation decisions to remove children, emergency hearings after that removal, status updates that include a hearing on the best interests of the child, hearings on petitions to adopt, and hearings on the termination of parental rights. At any point, compliance or non-compliance with ICWA can be critical. Outside of final orders granting adoption petitions or termination of parental rights, the multitude of discretionary decisions are generally not appealable (they are referred to as "interlocutory appeals" and are disfavored by courts). Months might go by before anyone even becomes aware of deviation from ICWA and there might be no way to appeal these incremental but critical deviations. There are intense structural pressures preventing enforcement of ICWA.<sup>26</sup>

Current law requires Indian parents, Indian tribes, and other parties to seek leave to file an interlocutory appeal or wait for a final order to file an appeal. Usually, when the final order comes, parental rights have been terminated or an adoption petition has been granted. It is too often far too late to do much to assist that Indian family. Indian tribes often do not seek to transfer cases from state courts because they choose to dedicate their efforts toward reunification through the state court processes. Tribal parties suffer a penalty from state courts for waiting until the state moves to terminate parental rights. Additionally, if a party appeals the final state court order, many state courts do not notify the tribe about the appeal.

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<sup>25</sup> Nottawaseppi Huron Band of the Potawatomi Tribal Court § 7-3.6.

<sup>26</sup> See generally Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. \_\_ (forthcoming 2022), manuscript available at <https://ssrn.com/abstract=3946588>.

Sadly, the fundamental weakness of any child welfare system is a lack of resources. The large majority of Indian tribes have extremely limited resources. Tribes often cannot provide needed services to their children because of the lack of resources. The United States government took upon itself a duty of protection to Indian tribes (usually referred to as the trust responsibility), but the government has never fulfilled that promise.

### **Recommendations for the Commission**

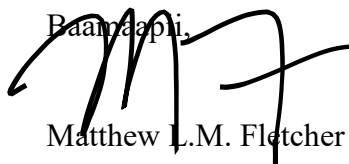
The Commission should recommend that Congress amend ICWA to provide for effective enforcement mechanisms. Those amendments could include (1) the establishment of express rights to bring interlocutory appellate court actions at more key points in state court child welfare matters, (2) the availability of attorney fees awards for Indian parents and Indian tribes in the event that a state or private actor violates ICWA or unsuccessfully opposes the application of ICWA in a state court proceedings, and (3) the provision of adequate resources for Indian parents and Indian tribes to enforce and defend ICWA in state courts.

The Commission should also recommend that Congress codify the “good cause to the contrary” regulations and guidance, and the regulations that forbid state courts from applying the so-called “existing Indian family exception” to ICWA.

The Commission should recommend that Congress directly tie state compliance with ICWA to the continued funding of child welfare programs under Title IV-E of the Social Security Act. States could ensure compliance (and therefore funding) by reaching cooperative agreements with Indian tribes and by enacting state laws that substantially adopt ICWA as state law or otherwise strengthening the protections of Indian families guaranteed by ICWA.

Finally, the Commission should urge Congress to fulfill its duties to Indian tribes and Indian people. Indian children are the core of the federal-tribal relationship. The United States’ past failures must be remedied.

I look forward to your questions.

Baanjaapi,  
  
Matthew L.M. Fletcher





# Indian Child Welfare Jurisdictional Provisions

Matthew L.M. Fletcher  
University of Michigan





# ICWA Background





## “Indian Child”

25 U.S.C. § 1903(4)

- Members of federally recognized Indian tribes, or
- Children who are eligible for membership in a federally recognized tribe with a parent who is a member of a federally recognized tribe





“Child welfare  
proceedings”

25 U.S.C. § 1903(1)

- Foster care placements
- Termination of parental rights
- Adoptive placements
- Preadoptive placements





## Court jurisdiction

25 U.S.C. §§ 1911(a), (b)

- Tribal Court Jurisdiction Exclusive – Indian child domiciled on an Indian reservation
- Tribal Court Jurisdiction Presumptive – Indian child domiciled outside of an Indian reservation





# Where ICWA Jurisdictional Provisions are Working



# Successful Jurisdictional Provisions

- Tribal Court Jurisdiction — Enhanced tribal court and tribal services capacities
- Authorization for cooperative agreements
- Full faith and credit provision
- State law providing greater protection for Indian parents





# Where ICWA Needs Improvement



# Recommendations

- Enforcement mechanisms needed:
  1. Interlocutory Opinions
  2. Attorney Fees
  3. Additional Tribal Resources
- Codify Regulations on Tribal Court Transfer and Indian Child Definition
- Tie State Compliance to Title IV-E Money