



Laying the Foundation:

Strengthening Court Practices

Under The Violence Against Women Act

March 4-5, 2026

Seven Feather Casino & Resort,
Canyonville, Oregon



Coming Up | UNIT 5

How to Preserve Rights for an ICWA Appeal

Kate Fort

Director of Indian Law Clinic, Michigan State University College of Law



UNIT 5

How to Preserve Rights for an ICWA Appeal

Kate Fort

Director of Indian Law Clinic, Michigan State University College of Law

ICWA APPEALS: TIPS AND STRATEGIES



KATHRYN "KATE" E. FORT

ICWA APPELLATE PROJECT



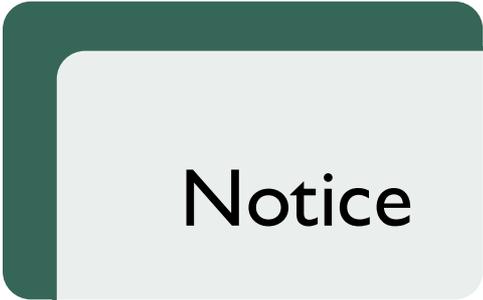
- ❖ Tracks appellate cases nationwide
- ❖ Provides limited representation for tribes in ICWA appeals
- ❖ Provides technical assistance and research for tribes
- ❖ Provides training for jurists and other legal professionals on ICWA

TODAY'S AGENDA

- Know the law
- What can be appealed
- When can it be appealed
- What are signs your case may be appealed and what to do
- Activity



ICWA AND TRIBAL RIGHTS



Notice



Intervention



Jurisdiction





NOTICE

EARLY AND OFTEN

OR

NOT AT ALL

INTERVENTION

1911 (c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.



25 C.F.R. § 23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

INTERVENTION: REGULATION



■A.3

Another barrier to Tribal participation in State court proceedings is that the Tribe may not have an attorney licensed to practice law in the State in which the Indian child custody proceeding is being held. Many tribes have limited funds to hire local counsel. The Department encourages all State courts to permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State, as a number of State courts have already done.

INTERVENTION: BIA GUIDELINES

LEGAL IMPLICATIONS OF INTERVENTION

Intervention of Right

- ICWA's standard

Permissive Intervention

- Non-ICWA cases

Responsibilities of Intervention

- Confidentiality
- Participation
- Party Status



JURISDICTION

1911 (a) Exclusive Jurisdiction

1911(b) Transfer of proceedings;
Declination by Tribal Court

1911(b) Good cause; parental
objection

JURISDICTION: TRANSFER

25 C.F.R. § 23.118 How is a determination of “good cause” to deny transfer made?

Stated orally or in writing

Objection made by a *party*

Court cannot consider (federal standard)

- Advanced stage/if no notice
- Prior proceedings
- Placement Change
- Cultural Connections
- Negative perceptions

AREAS OF PARTICIPATION OF TRIBAL INTERVENORS IN STATE COURT

Whether Active Efforts Happened

Assist with Finding Family or Tribal Placements

Assist with Qualified Expert Witness Testimony

PLACEMENT PREFERENCES

■ Adoptions

1. A member of the child's extended family.
2. Other members of the Indian child's tribe.
3. Other Indian families.

■ Foster care/Out of Home Placement and pre-adoptive placement

1. A member of the Indian child's extended family (no preference based on Native or non-Native relatives, but kinship is top preference);
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;
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.

PLACEMENT PREFERENCES-GOOD CAUSE EXCEPTION

- The Regulations place the burden of establishing good cause not to follow the order of preference on the party requesting the deviation.
- Good cause not to follow the order of preferences must be made on the record and should be based on one or more of the following, 25 C.F.R. 23.132:
 - Request of the parents if they have reviewed the placement options
 - Request of the child/sufficient age
 - Extraordinary physical, mental, or emotional needs of the child/specialized treatment services not available in the community
 - Unavailability of a placement after a diligent search

WHAT CAN BE APPEALED

- What is a final order?
 - Interlocutory appeal
- What are “justiciability” or “jurisdiction” concerns?
 - Standing
 - Timing
 - Procedure
- What is issue preservation?
 1. A specific and timely objection that
 2. the court rules on and
 3. both are on the record

WHEN ARE APPEALS LIKELY TO HAPPEN

- Parties to the case disagree (nearly infinite options here)
 - State v. parents
 - Tribe v. state
 - Foster parents v. Tribe
 - Foster parents v. Tribe and state
 - Child v. state

WHAT TO DO AT THE TRIAL LEVEL IF AN APPEAL MAY HAPPEN



Get information on the record

testimony at a hearing
Objection during a hearing
Written documents such as a motion practice



Contact your attorney; have an attorney at the hearings



Find an appellate attorney early

MANAGING JUDGES

-
- Good luck
 - Be respectful, but hold your position
 - Speak up, and make a clean record
 - If things get out of hand, remember there's always a transcript for your appellate attorney
 - Attempt, if possible, to solve the issues with the other parties directly

ACTIVITY

- Family Feud, kind of!
- In small groups, discuss your top answers and prepare to yell them out!
- Did your answers match my answers? Let's see--

WHAT ARE FOUR SIGNS YOUR CASE MIGHT BE GOING SIDeways (MAY END UP ON APPEAL)

Tribe and state do not agree on the case goals or outcomes

Foster parents try to intervene in the case

Judge is particularly rude or hostile to the Tribe

Case is in a different state you are not usually in

WHAT ARE THREE SIGNS YOUR CASE MIGHT DRAW OUTSIZED ATTENTION

Child is an infant in a non-preferred placement

Placement is questioning tribal determination of membership

Child's placement suddenly knows a **WHOLE LOT** about ICWA

WHAT FIVE THINGS SHOULD YOU DO IF YOUR CASE HAS APPELLATE RED FLAGS

Let your tribal attorney and/or tribal decision makers know what is going on

Find a local attorney to assist (if out of state)

Keep your case documents extremely well organized and take notes

Determine if your QEW testimony will get all of your concerns on the record

Ensure the court knows the Tribe disagrees—formally and on the record

WHAT ARE FIVE OPTIONS IF APPELLATE DECISION TREE HAS “NO” ON IT

Wait and see what happens

Talk to the other parties about where you are aligned on issues

Prepare your QEW testimony to ensure all concerns are addressed in that record

Support a parent or state brief rather than have the Tribe do the appeal

Negotiation or mediation to avoid an appeal entirely

Kate Fort
fort@msu.edu





Laying the Foundation:

Strengthening Court Practices

Under The Violence Against Women Act

March 4-5, 2026

Seven Feather Casino & Resort,
Canyonville, Oregon



Coming Up | UNIT 6

Trauma Informed Practice By Courtroom Role

Hon. Ron Whitener

Chief Judge for the Tulalip Tribes (retired), Co-Owner of The Whitener Group



Laying the Foundation:

Strengthening Court Practices

Under The Violence Against Women Act

March 4-5, 2026

Seven Feather Casino & Resort,

Canyonville, Oregon