

**MODULE 4**  
**Qualified Expert Witness**  
**Jurisdiction**  
**Emergency Removal**



**The**  
**Whitener**  
**Group**

**INDIAN CHILD WELFARE ACT TRAINING**

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For the Choctaw Nation

# INTRODUCTION

## Individual Reflection: Opening

Take a minute to jot down answers to these questions—don't over think them.

Something I couldn't stop thinking about while I watched the ICWA video clip is:

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Something I have heard about the McGirt Decision that I don't quite understand is:

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If I could change one part of ICWA it would be:

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One thing I learned last week that I don't want to forget is:

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# LECTURE

## Topic 1: Qualified Expert Witness

### LECTURE TAKEAWAYS

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A Qualified Expert Witness (QEW) is meant to counter bias in a State court proceeding

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QEWs are required at Foster Care Placement, Guardianship, and Termination of Parental Rights Proceedings

Any party can have a QEW but the State—or whomever is advocating for removal, guardianship or termination—must present one

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The QEW can testify to a lot of things but must testify to whether “the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage”



## MATERIALS

- Keeping Cultural Bias Out of the Courtroom: How ICWA “Qualified Expert Witnesses” Make a Difference:  
<https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1710&context=air>

## RELEVANT CITATIONS

### ICWA

#### **25 USC § 1912(e) Foster care placement orders; evidence; determination of damage to child.**

*No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of **qualified expert witnesses**, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.*

#### **25 USC § 1912(f) Parental rights termination orders; evidence; determination of damage to child.**

*No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of **qualified expert witnesses**, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.*

### Federal Regulations

#### **25 CFR § 23.122 Who may serve as a qualified expert witness?**

*(a) A qualified expert witness must be qualified to testify regarding whether the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child’s Tribe. A person may be designated by the Indian child’s Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child’s Tribe.*

*(b) The court or any party may request the assistance of the Indian child’s Tribe or the BIA office serving the Indian child’s Tribe in locating persons qualified to serve as expert witnesses.*

*(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.*

# SMALL GROUP LEARNING

## Discussion 1: Qualified Expert Witness

(15 min)

**Question 1:** Qualified expert witnesses must be determined to be “qualified” by the court. This means that the state attorney must ask them a series of questions to show the court that they are an expert in Choctaw child rearing practices. What five questions would you ask someone to determine whether they are an expert?

1) \_\_\_\_\_?

2) \_\_\_\_\_?

3) \_\_\_\_\_?

4) \_\_\_\_\_?

5) \_\_\_\_\_?

**Question 2:** If you were a qualified expert witness, how would you prepare to testify for a hearing? If you got asked by Choctaw to be a qualified expert witness, what topics would you like to be trained on and what types of exercises would help you prepare?

**Question 3:** Who do you know who would make a good qualified expert witness? Why? Should they be recruited?

# LECTURE

## Topic 2: Jurisdiction

### LECTURE TAKEAWAYS

When an Indian child is not domiciled on tribal lands, tribes have concurrent jurisdiction.

When an Indian child is domiciled on tribal land in a PL-280 state, tribes have concurrent jurisdiction.

When an Indian child is domiciled on tribal land in a non-PL-280 state, tribes have exclusive jurisdiction.

The McGirt decision did not just affect criminal jurisdiction, but also child welfare jurisdiction: it recognizes tribe's exclusive jurisdiction over all Indian children on their reservations in Oklahoma.

Without the ICWA § 1919, tribes would not be able to negotiate to change jurisdiction without an act of Congress.

Tribes have personal jurisdiction over their tribal members regardless of where they live.

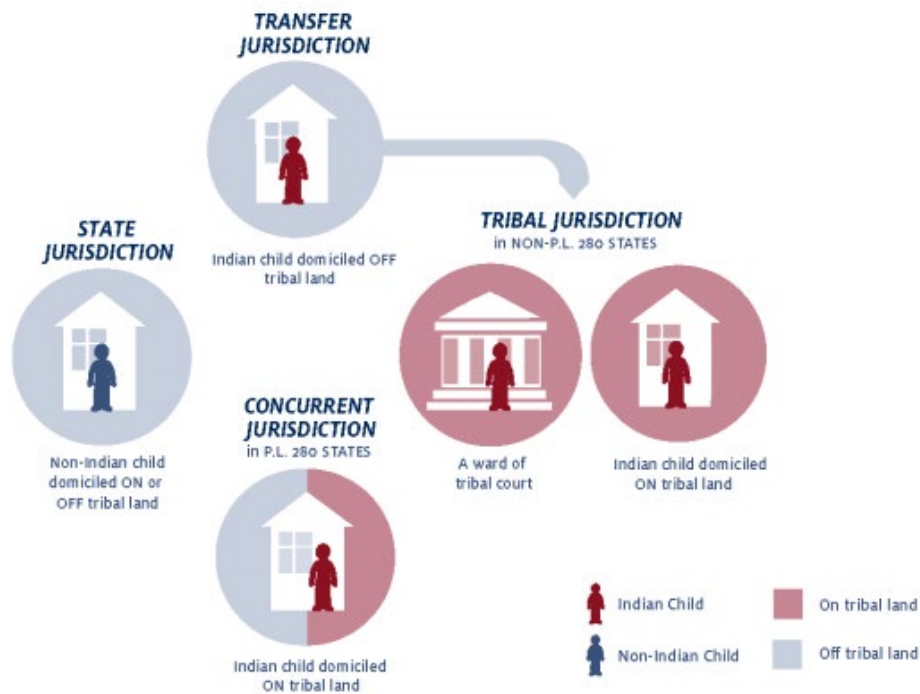


Figure 1. Jurisdiction in Indian Child Welfare Cases  
Starks, Smith, Jäger, Jorgenson, and Cornell, 2016  
[http://nni.arizona.edu/application/files/9214/7042/9035/2016\\_child\\_welfare\\_nicwa\\_conference\\_paper\\_final.pdf](http://nni.arizona.edu/application/files/9214/7042/9035/2016_child_welfare_nicwa_conference_paper_final.pdf)





## MATERIALS

### ICWA

25 USC § 1911(e) Foster care placement orders; evidence; determination of damage to child.

*(a) Exclusive jurisdiction*

*An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.*

*(b) Transfer of proceedings; declination by tribal court*

*In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.*

*(c)...*

*(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes*

*The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.*

### Federal Regulations

§ 23.110 When must a State court dismiss an action?

*Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:*

*(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.*

*(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.*

**25 CFR § 23.115 How are petitions for transfer of a proceeding made?**

*(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.*

*(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.*

**25 CFR § 23.116 What happens after a petition for transfer is made?**

*Upon receipt of a transfer petition, 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.*

**25 CFR § 23.117 What are the criteria for ruling on transfer petitions?**

*Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:*

*(a) Either parent objects to such transfer;*

*(b) The Tribal court declines the transfer; or (c) Good cause exists for denying the transfer.*

**25 CFR § 23.118 How is a determination of "good cause" to deny transfer made?**

*(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child custody proceeding.*

*(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.*

*(c) In determining whether good cause exists, the court must not consider:*

*(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;*

*(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;*

*(3) Whether transfer could affect the placement of the child;*

*(4) The Indian child's cultural connections with the Tribe or its reservation;*  
*or*

*(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.*

*(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.*

**25 CFR § 23.119 What happens after a petition for transfer is granted?**

*(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.*

*(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption.*

# LECTURE

## Topic 3: Emergency Removal

An emergency proceeding is:

any court action that involves an emergency removal or emergency placement of an Indian child

Standard for emergency removal or placement:

“necessary to prevent imminent physical damage or harm to the child”

The petition for emergency removal must contain very specific information

Whenever new information indicates that the emergency situation has end:

The court must promptly hold a hearing on whether the emergency removal or placement continues to be necessary

A foster care proceeding must occur or an emergency removal cannot be continued for more than 30 days unless:

- (1) Returning the child would subject the child to imminent physical damage or harm;
- (2) The court has been unable to transfer the proceeding to the Tribe; and
- (3) It has not been possible to initiate the foster care proceeding

In Oklahoma, even with one of the above creating good cause, the foster care proceeding must occur within 60 days



## RELEVANT CITATIONS

### ICWA

#### *Removal Standards*

**25 USC § 1922** Emergency removal or placement of child; termination; appropriate action

*Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.*

### Federal Regulations

#### **25 CFR § 23.2** Definitions

*Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.*

#### **25 CFR § 23.113** What are the standards for emergency proceedings involving an Indian child?

*(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.*

*(b) The State court must:*

*(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;*

*(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and*

*(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.*

*(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.*

*(c) An emergency proceeding can be terminated by one or more of the following actions:*

*(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;*

*(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or*

*(3) Restoring the child to the parent or Indian custodian.*

*(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:*

*(1) The name, age, and last known address of the Indian child;*

*(2) The name and address of the child's parents and Indian custodians, if any;*

*(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;*

*(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see [www.bia.gov](http://www.bia.gov));*

*(5) The residence and the domicile of the Indian child;*

*(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;*

*(7) The Tribal affiliation of the child and of the parents or Indian custodians;*

*(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;*

*(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and*

*(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.*

*(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:*

*(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;*

*(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and*

*(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.*

25 CFR § 23.114 What are the requirements for determining improper removal?

*(a) If, in the course of any child custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.*

*(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.*

## **OICWA**

### **§10-40.5 Emergency removal of Indian child from parent or custodian - Order.**

*A. When a court order authorizes the emergency removal of an Indian child from the parent or Indian custodian of such child in accordance with 25 U.S.C. Section 1922, the order shall be accompanied by an affidavit containing the following information:*

- 1. The names, tribal affiliations, and addresses of the Indian child, the parents of the Indian child and Indian custodians, if any;*
- 2. A specific and detailed account of the circumstances that lead the agency responsible for the removal of the child to take that action; and*
- 3. A statement of the specific actions that have been taken to assist the parents or Indian custodians so that the child may safely be returned to their custody.*

*B. No pre-adjudicatory custody order shall remain in force or in effect for more than thirty (30) days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. However, the court may, for good and sufficient cause shown, extend the effective period of such order for an additional period of sixty (60) days.*



# SMALL GROUP LEARNING

## Discussion 2: Emergency Removal

(10 min)

**Discussion:** Describe what you think looks like an emergency that requires immediate removal.

What does imminent mean?

What does severe physical damage or harm look like?

What about emotional harm?

What about neglect?

**Discussion:** How often does the state court adjudicate an ICWA petition with in 30 days? Within 60 days? What about tribal court? Why do you think it is important for the court to adjudicate the petition on these timelines?

# SMALL GROUP LEARNING

## Hypothetical

(15 min)

Children, a 2-year-old and 8-year-old, were removed because a neighbor reported that mother asked her to watch the children but didn't return for 3 days. The neighbor didn't know specifics but gave DHS the name of mother and father. Mother and the children had the last name Begay. Because they were looking for family to place the child with the neighbor also told them was in prison for the next 3 years, but was born in Tahlequah (something she knew because her mother was also born there and they had talked about it).

When mother returned on the fourth day, after she received a voice message from CPS and showed up in court just in time for the shelter hearing. She refused to explain where she had been or what happened saying it was personal business, but had no criminal history, no DHS history, and her neighbor had mentioned that nothing like this had ever happened before. The court ordered the children placed in shelter care.

Does ICWA apply?

Was removal appropriate?

Even if you disagree what active efforts would you provide in this case as you prepare for adjudication?

# SMALL GROUP LEARNING

## Hypothetical

(15 min)

State police are called because of a fight in an apartment complex. Witnesses saw father hit mother repeatedly in the parking lot. The children who were 6 and 7 were inside sleeping.

Police arrest father and call OKDHS. When OKDHS arrives mother is very cooperative, shares that she is a member of Choctaw, and tells OKDHS her mother lives up the street and her husband's family is in a neighboring town. Mother tells OKDHS she wants to leave her husband but doesn't know what to do. OKDHS provides mother with a referral for a DV program and helps her call the advocate. The children are placed with their grandparents. Mother works with the advocate for about six weeks, while the father remains incarcerated. She states that she is ready to leave and has moved in with her sister at an apartment that has an address the father doesn't know. She is working and the advocate testifies that she is engaged in the domestic violence group and has an individual counselor.

The OKDHS worker states that mother has always been a good mother, but that foster care is necessary because the mother continues to answer father's phone calls from the jail facility, and she has gone back to him after he was arrested 3 years ago. She also notes that the children are happy with their grandmother, who is paying for them to go to a private school where they are thriving. Because he was on probation when the fight occurred and he broke mother's occipital lobe, father is unlikely to be released from jail for months (and faces a sentence of multiple years).

The state has asked you, the Choctaw ICWA worker, if you will be the qualified expert witness. What do you do?

# SMALL GROUP LEARNING

## Hypothetical

(25 min)

Victoria S. is 10 years old. When she was 8, the state of Michigama removed her from her mother's care. Victoria's father has not been in the picture since she was born, though his parents have tried to help Victoria when they can. They live in the neighboring state of Illiandia. Her mother, Marilyn R., suffers from a chemical dependency that makes it difficult for her to parent Victoria. The family has an extensive history with the Department of Human Services (Agency), and the state's charges against mom are based on neglect issues—she is not facing criminal abuse charges.

Victoria and Marilyn are both citizens of the Black Lake Odawa Indian Nation (the Nation), a federally recognized tribe in Michigama. The Agency is aware of their citizenship and, in a rare moment of clarity, timely notifies the Nation when Victoria is removed. The Nation immediately moves to intervene, but does not transfer the case to tribal court, as the Nation is located 8 hours away from the county where Victoria and Marilyn live. The Nation's tribal attorney participates in the hearings by phone.

When Victoria was removed, she was placed with a local foster family, who are not Native. All of the parties agreed to the placement to facilitate Victoria and Marilyn's reunification. However, the Agency does very little to facilitate parenting time, and makes no effort to connect Marilyn with the Black Lake Treatment Facility, claiming the tribal social workers never call them back.

The Nation offers that there is a maternal great aunt and uncle who live on the reservation at Black Lake who would be happy to take Victoria, should she not be able to live with her mom. Under the Nation's code, matrilineal relatives are the preferred placement above all others, whether they are Native or non-native.

Eventually Victoria's paternal grandparents, Fred and Sue, realize what has happened, and they hire an attorney to let the Agency know they would like to take Victoria as soon as possible. Given their history with Marilyn, they are doubtful reunification will be successful. An attorney, *not* a guardian ad litem, represents Victoria and her stated preference is to go with her paternal grandparents, even though they live three hours from her mother. The Agency is concerned because Fred has a criminal record, and the grandparents have not completed a home study in Illiandia. The Agency does not engage in concurrent planning with Sue and Fred, stating that they are not licensed in either state, and that the preferred placement is with Victoria's aunt and uncle. However, the Agency also does not engage in concurrent planning with Victoria's aunt and uncle either.

Though Marilyn tries to recover from her addiction, the lack of an overnight treatment facility, the Agency's insistence on clean UA's before any visitation, and the lack of culturally appropriate services does not help. The Agency moves to permanency and schedules a termination hearing. At the termination hearing, the judge hears evidence from a qualified expert witness (QEW) from Black Lake. The QEW, Susan Mamagona,

states that while the Nation does not want Victoria to be returned to Marilyn, the Nation does not support termination of parental rights in any situation, and Victoria should be placed with her maternal relatives in Black Lake, where they can introduce Victoria to a wide network of extended family, and connect her in a concrete way to her culture, which the Nation believes will help Victoria maintain her health and mental balance as she grows up.

Victoria's social worker would also prefer her to be placed with her maternal aunt and uncle, as he believes it would be in Victoria's best interests to do so. The Nation points out that while they cannot support a termination of parental rights, a long-term juvenile guardianship would provide permanency and follow the requirements of ICWA.

The trial court orders Marilyn's parental rights to be terminated and places Victoria with her aunt and uncle at Black Lake. The court does not make any findings regarding active efforts, and states that the QEW testimony was sufficient for him to terminate parental rights.

Victoria appeals the determination to place her with her aunt and uncle and argues her preference is good cause to deviate from the tribal placement preferences. Can she win? Why or why not?

Marilyn appeals the court's lack of findings on active efforts. What is her best argument? Can she win?

Though Fred and Sue may or may not have standing, they also appeal the decision, claiming ICWA is unconstitutional as it applies to Victoria, and that she should be placed with them. The Nation appeals the termination of parental rights, citing the lack of QEW testimony, and cross appeal Fred and Sue, arguing ICWA is constitutional and that Fred and Sue lack standing. What are the tribe's best arguments? Can it win?

# CONCLUSION

## Individual Reflection: Closing

Take a minute to jot down answers to these questions—don't over think them.

One thing I learned today is:

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The most helpful part of this training was:

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Something I could have done better during this training is:

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