

The background features a blue gradient with several circular gauges and arrows. One large gauge on the left has numerical markings from 140 to 260. Other gauges are smaller and scattered across the frame. Arrows indicate a clockwise direction of rotation for the gauges.

ICWA NUTS AND BOLTS

CARRIE E. GARROW, CHIEF JUDGE, SAINT REGIS MOHAWK TRIBE

HEATHER LAFORME, NYS OFFICE FOR CHILDREN AND FAMILY SERVICES



HAUDENOSAUNEE SOVEREIGNTY

UNITED STATES PERSPECTIVE OF INDIGENOUS SOVEREIGNTY

Doctrine of Discovery – Framework of Dominance

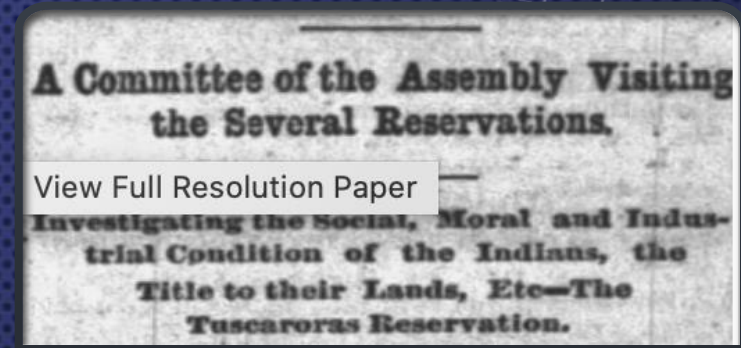
Supreme Court has said nations are in a “guardian/ward” relationship and constitutes “domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

The United States recognizes tribal sovereignty subject to considerable limitations. *U.S. v. Wheeler*, 435 U.S. 313 (1978).

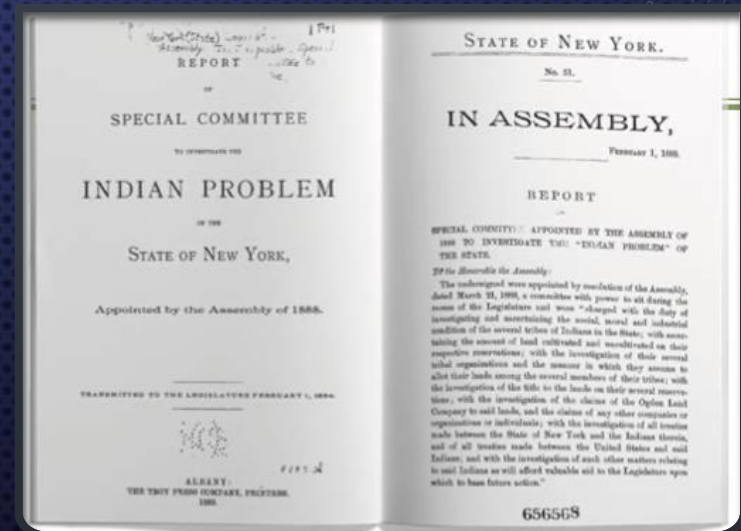
Federal laws and policies tried to deal with “Indian Problem”

HISTORY OF DISTRUST WITH NY

“Their present condition is infamously vile and detestable, and just so long as they are permitted to remain in this condition, just so long will there remain upon the fair name of the Empire State a stain of no small magnitude.” 1888 Whipple Report



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HISTORY OF DISTRUST WITH NY

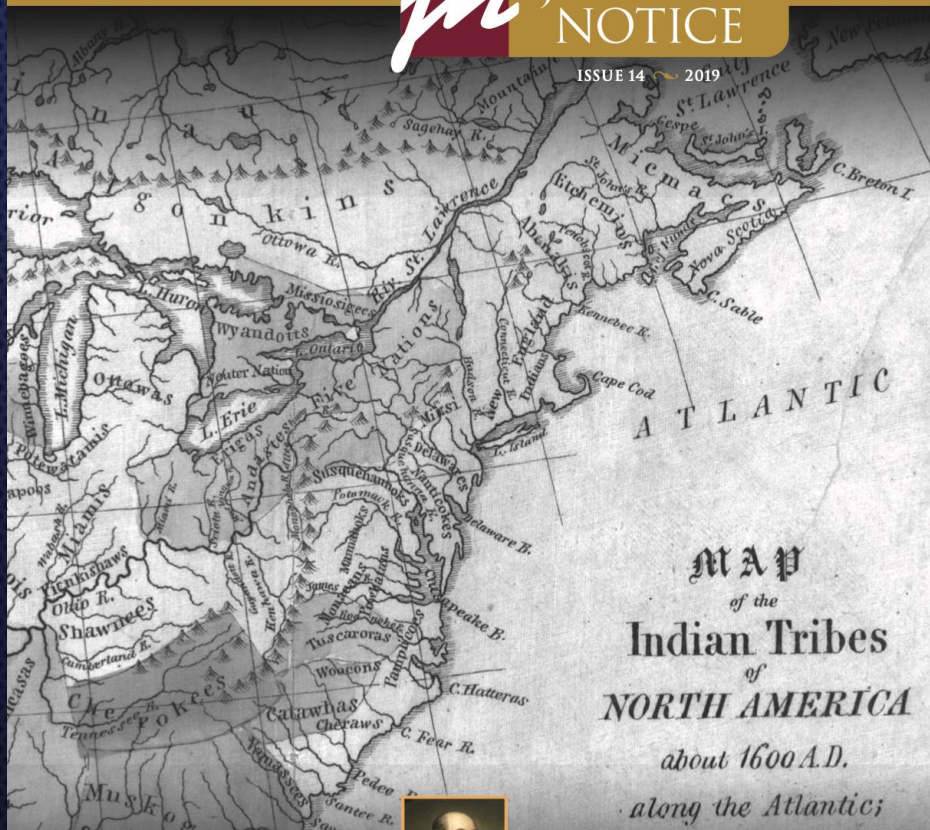


A PERIODICAL OF NEW YORK COURT HISTORY



JUDICIAL
NOTICE

ISSUE 14 2019



NY'S QUEST FOR JURISDICTION OVER INDIAN LANDS

<http://www.nyfedstatetribalcourtsforum.org/pdfs/Judicial%20Notice,%20Issue%2014.pdf>

1974 SENATE OVERSIGHT HEARINGS

- Numerous examples of separation of large of Indian children removed from families and tribes through adoption and foster care
- 25-35% of all Indian children separated from families, placed in adoptive families, foster care, or institutions
- NY - 1 out of 74.8 Indian children vs 1 out of 222.6 white children in foster care
 - 96.5% were in non-Indian foster homes
 - Indian children placed for adoption at a per capita rate 3.3 times rate of Non-Indian children



CONGRESSIONAL FINDINGS IN ICWA

No resource more vital to continued existence and integrity of Indian Tribes than their children

Alarming high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies

States ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families

§ 1902. *CONGRESSIONAL DECLARATION OF POLICY*

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.



PROCEEDINGS
COVERED BY
ICWA

foster care placement

termination of parental rights

preadoptive placement

adoptive placement

WHO IS AN INDIAN CHILD?

Unmarried person under age of 18

Member of Indian Tribe

Eligible for membership and biological child of member of Indian Tribe

New York – Biological child of a member of Indian nation/tribe and is residing on, or is domiciled within, an Indian reservation

Who gets to decide if a child is eligible?



TRIBAL COURT
EXCLUSIVE
JURISDICTION

Indian child residing or domiciled within the Reservation

Where an Indian child is a ward of a tribal court - notwithstanding the residence or domicile of the child

NOTICE

Required in any involuntary child custody proceeding

Notify child's parent or Indian custodian AND child's Nation/Tribe by registered or certified mail, return receipt

Of any pending proceeding and their right to intervention

Send it to Secretary of Interior

New York - If Nation/Tribe can't be determined – notify Office of Children and Family Services

TRANSFER

- Section 1911(b) - upon petition by Tribe/Nation or parent, a state court shall transfer to tribal court absent good cause
- Federal Regulations 23.117 – Must transfer unless
 - Parent object
 - Tribal Court declines
 - Good cause exists

TRANSFER – GOOD CAUSE

- Good Cause is not
 - Whether proceeding is in advanced stage if notice was not provided
 - Whether there have been prior proceedings involving the child for which no petition to transfer was filed
 - Whether transfer could affect the placement of the child
 - Child's cultural connections with Tribe or Reservation
 - Socioeconomic conditions or negative perception of Tribal or BIA social services or judicial systems

ACTIVE EFFORTS

- State must provide active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. § 1912(d)
- To place a child in foster care or terminate parental rights – petitioner must demonstrate
 - Active efforts have been done and unsuccessful

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

Nation participation in state court proceedings



STANDARD OF PROOF – FOSTER CARE PLACEMENT

foster care placement - 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

termination of parental rights - 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.



PLACEMENT PREFERENCE

Purpose – to keep child
with family and
community

Apply to involuntary
foster care and adoption
placements and to
voluntary adoptions

PLACEMENT PREFERENCE – FOSTER CARE

Nation/Tribe may establish different preferences

Member of child's extended family

Foster home certified, approved or specified by Indian child's Nation/Tribe and approved by appropriate social services district

Indian foster home certified or approved by authorized agency to provide foster care services

Institution for children approved by an Indian Tribe or operated by an Indian organization, which has a program to meet the needs of the child

PLACEMENT
PREFERENCE –
ADOPTION

Member of child's
extended family

Other members of child's
Indian Nation/Tribe

Other Indian families



DO WE STILL NEED ICWA?

- 1% AI/AN are investigated for maltreatment and 3% are placed in out-of-home care
- Urban study – AI/AN children almost two times more likely to be removed despite caregivers of white children slightly more likely to have drug and alcohol abuse problems