

Government Law and Policy and the Indian Child Welfare Act



By **Carrie E. Garrow**

CARRIE E. GARROW is the Chief Appellate Judge of the St. Regis Mohawk Tribal Court and the Executive Director of the Center for Indigenous Law, Governance & Citizenship at Syracuse University College of Law and an Adjunct Professor. She'd like to thank her Research Assistant, Michelle E. Hollebeke (J.D. Candidate 2015), for her hard work on this article, and the New York State Federal-State-Tribal Courts and Indian Nations Justice Forum for their work in educating and training on ICWA issues.





Introduction

Since the formation of the United States, Indian nations and Indian people have been impacted by the numerous laws and policies focused on acquisition of Indian lands and assimilation of Indian people. These federal laws and policies led to states, such as New York, breaking up Indian families and removing Indian children from their homes in order to achieve assimilation. This article provides an overview of these laws and policies, which led to the need for the Indian Child Welfare Act (ICWA). It then discusses ICWA's requirements and New York's implementation. With awareness of these issues, attorneys will be better equipped to represent their clients in family law cases when application of ICWA is required.

Overview of the Federal Government's Indian Laws and Policies

The federal government's laws and policies regarding Native Americans have fluctuated throughout the years; however, all eras were driven by the question of how to deal with Indian nations, people and their land.¹ Early in our history, European nations and a young United States dealt with Indian Nations using treaties, thus recognizing the sovereignty of Indian nations. This changed as the courts began to develop the foundation of federal Indian law, recognizing only limited sovereignty, and the Removal Era was ushered in. Beginning its foray into Indian law, the U.S. Supreme Court in *Johnson v. M'Intosh*² incorporated the Doctrine of Discovery into U.S. law.

The doctrine, based on papal bulls,³ gave recognized title to land to the United States, along with the right to extinguish the Indian Nations' title by purchase or by conquest.⁴ The Court ruled Indian Nations were vested only with a permanent right of occupancy to their lands.⁵ The Doctrine of Discovery continues to be cited by the Supreme Court.

Building upon *M'Intosh*, the Court in *Cherokee Nation v. Georgia* held that Indian Nations are in a "guardian/ward" relationship with the federal government and are not foreign nations but rather "domestic dependent nations."⁶ The Court followed with *Worcester v. Georgia*, holding that although they were domestic dependent nations, state law did not apply in Indian territory.⁷ Despite the Court's rulings, states wanted jurisdiction and pressured the federal government for access to Indian lands.

The Removal Act,⁸ passed by Congress in 1830, provided for the relocation of numerous Indian Nations to lands west of the Mississippi. The forced march of the Cherokee, known as the Trail of Tears, was emblematic of the process by which thousands of Indian people were removed from their lands and relocated to present-day Oklahoma and beyond the Mississippi valley.

Reservations

The Removal Era was followed by the Reservation Era. Using treaties, statutes, and executive orders, along with force, starvation and disease, the federal government moved Indian people onto smaller plots of lands, or reservations, so the government could access to gold mining and encourage the building of railroads.⁹ Provided with schools and missionaries, reservations were "envisioned as schools for civilization, in which Indians under the control of the [Bureau of Indian Affairs (BIA)] agent would be groomed for assimilation."¹⁰ Indian families could not leave the reservations, even to obtain food, practice their culture, or visit family members. The BIA established Courts of Indian Offenses on the reservations and used the law to criminalize and eliminate Indian cultural practices. The Major Crimes Act, adopted in 1885, granted federal courts concurrent criminal jurisdiction over enumerated serious crimes "committed in Indian country."¹¹

Allotment and Assimilation

As the 19th century came to a close, states were still demanding that the Indians give up more of their lands. The prior laws and policies had not been successful in assimilating the Nations. The Indian tenet of communal ownership of land was viewed as the stumbling block preventing the Indians from assimilating into white society. As a result, the Dawes Act,¹² often referred to as the General Allotment Act, was passed, and the Allotment Era began.

The Allotment Act converted tribal lands into individual allotments. Heads of households received an allotment of 160 acres and individuals received 80 acres. The Secretary of Interior was granted the power to negotiate with the Tribes to obtain the remaining land. The allotments were held in trust for 25 years, although land owners could petition the federal government to take the land out of trust, if the Indian land owner was deemed "ready." Due to allotment, 65% of tribal land was transferred to non-Indians.¹³ Indian lands were reduced from 138 million acres in 1887 to 48 million acres in 1934.¹⁴

In the State of New York, the Seneca Nation was specifically exempted from the Dawes Act due to a cloud over the title of their land, the result of land barons purchasing the right to buy the Seneca land. Other Indian Nations within the state were not exempt from the Dawes Act, however, and New York repeatedly passed legislation in attempts to allot those lands. However, the land holdings were so small they were never the focus of federal legislation.

The federal government provided funding for Indian boarding schools beginning in 1879, which government officials hoped would hasten the assimilation of Indian people. Education was an important tool to reach that goal, and the focus changed from keeping Indians on the reservation to the removal of their children from the home to separate them from the influence of their families, who reinforced cultural teachings. Captain Richard H. Pratt, the founder of the Carlisle Indian Industrial School, summed up the philosophy: "Kill the Indian, and Save the Man."¹⁵

The Meriam Report, published in 1928, revealed that allotment and its attendant assimilationist policies had failed. The Report noted assimilation "has resulted in much loss of land and an enormous increase in the details of administration without a compensating advance in the economic ability of the Indians."¹⁶ Several other studies and congressional investigations "led to important changes in federal Indian policy, changes that favored restoration of some measure of tribal self-rule. Of course, the federal strategy was to employ tribal culture and institutions as transitional devices for the gradual assimilation of Indians into American society."¹⁷ The Indian Reorganization Act¹⁸ (IRA) put an end to allotment and legislated a process by which Indian nations could reorganize their governments under the IRA by adopting written constitutions and, as a result, become eligible for federal funding. The IRA constitutions, often drafted by the Bureau of Indian Affairs, contained requirements for secretarial approval for any amendments, solidifying the BIA's role in Indian Affairs.

From Termination to Self-Determination

After the end of World War II, the federal government began to abandon all attempts to protect and strengthen tribal self-government and began the Termination Era.

The federal government began relinquishing federal supervision to the states by terminating federal recognition of the government-to-government relationship with Indian nations. Historian Laurence Hauptman noted

[T]he movement encouraged assimilation of Indians as individuals into the mainstream of American society and advocated the end of the federal government's responsibility of Indian affairs. To accomplish these objectives, termination legislation fell into four general categories: (1) the end of federal treaty relationships and trust responsibilities to certain specified Indian nations; (2) the repeal of federal laws that set Indians apart from other American citizens; (3) the removal of restrictions of federal guardianship and supervision over certain individual Indians; and (4) the transfer of services provided by the BIA to other federal, state, or local governmental agencies, or to Indian nations themselves.¹⁹

During this period, federal recognition was denied or terminated for 109 Indian nations. The largest impact was the loss of protection for land, as once federal recognition was terminated tribal lands were no longer held in trust and became subject to state property taxes. The BIA also began relocation programs to move Indian people off the reservations and into urban areas to find work. Congress

ern education, and criminalization of Indian culture all sought to change the Indian family. Congressional hearings, beginning in 1974 and continuing through 1978, on the widespread removal of Indian children by state welfare agencies illustrated that state governments followed the federal government's lead and focused on assimilating Indian families. Senator James Abourezk of South Dakota opened the congressional hearings, noting,

Up to now, however, public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian. The result of such policies has been unchecked: abusive child-removal practices, the lack of viable, practical rehabilitation and prevention programs for Indian families facing severe problems, and a practice of ignoring the all-important demands of Indian tribes to have a say in how their children and families are dealt with. . . . It has been called cultural genocide.²⁴

Testimony demonstrated the high rates of removal of Indian children in numerous states. In Minnesota, Indian children were placed in foster or adoptive homes at a rate of five times greater than non-Indian children.²⁵ In South Dakota, since 1948, 40% of adoptions involved Indian children, but Indian children made up only 7% of

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also began delegating concurrent criminal jurisdiction and limited civil jurisdiction to states. The first grant was to Kansas,²⁰ followed by New York.²¹ Then PL 280²² was enacted, which delegated to California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska concurrent criminal jurisdiction and limited civil jurisdiction.

Termination came to an end when President Nixon announced that termination was "morally and legally unacceptable, because it produces bad results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups."²³ Subsequently, the Self-Determination Era began with legislation that sought to strengthen tribal sovereignty, while still continuing the federal government's control over Indian affairs. Federal recognition was restored to several Indian nations that were the subject of termination. Several bills were passed to support self-determination, including the Indian Child Welfare Act.

The Need for the Indian Child Welfare Act Removal of Children – Congressional Hearings, 1974–1978

The previously discussed federal laws and policies had significant impact on Indian nations and families. The taking of land, removal of children, imposition of west-

the population.²⁶ Indian children in South Dakota were in foster care at a rate of 1,600% greater than non-Indians.²⁷ The State of Washington's Indian adoption rate was 19 times greater and the foster care rate was 1,000% greater than for non-Indians.²⁸ Indian children in Wisconsin were at risk of being separated from parents at a rate of 1,600% greater than non-Indian children.²⁹ And, in Oklahoma, 4.7 times more Indian children were in adoptive homes and 3.7 times more Indian children were placed in foster care than non-Indian children.³⁰

In New York, 1 out of 74.8 Indian children were in foster care, while the non-Indian rate was 1 out of every 222.6.³¹ An estimated 96.5% of those Indian children were placed in non-Indian foster homes.³² And New York's Indian children were placed for adoption at a per capita rate 3.3 times the rate of non-Indian children.³³

In addition to foster care and adoption, Indian children were still being placed in boarding schools run by the BIA. In 1971, 35,000 Indian children were living in boarding schools (17% of the Indian school-age population); 60% of all the Indian children enrolled in BIA schools.³⁴ One witness noted,

[O]n some reservations, the Bureau of Indian Affairs (B.I.A., part of the Department of the Interior) has made it policy to send children as young as six years

to a distant boarding school. This had formerly been widespread practice, with the overt aim of “helping” Indian children enter the mainstream of American life. Now, supposedly, the practice is confined to regions where other educational opportunities have not developed, where there are difficult home situations, or where behavior has been deviant. In the past, this educational practice has had a devastating effect on several generations of Indian children. It has affected their family life, their native culture, their sense of identity, and their parenting abilities. It is quite likely that the continuation of these practices today will have the same destructive impact. Ultimately the message is the same: It is better for Indian children to be reared by others than by their parents or their own people.³⁵

The processes used by state social workers to remove Indian children were riddled with problems. Only 1% of children removed from a North Dakota tribe were removed for physical abuse, while all others were removed based on “such vague standards as deprivation, neglect, taken because their homes were thought to be too poverty stricken to support the children.”³⁶ Parents were infrequently informed about any legal recourse and

and anger.³⁹ Testimony during congressional hearings noted the high number of school dropouts, the increasing rate of juvenile drug and alcohol abuse,⁴⁰ and the high percentage of youth involved in the criminal justice system who came from foster or group homes.⁴¹ The removal of children also often resulted in parents splitting up.⁴² Removed children often returned to their Nations as young adults, but continued to face difficulties. They would not know who their relatives were or have any connection to people on the reservation.⁴³ Additionally, “they were not adept at hunting or fishing or wild rice harvesting – skills useful on the reservation – nor had they obtained the skills or education necessary for a job in town. Appended to this were the psychosocial disabilities associated with the foster child syndrome (inability to trust, insecurity, free floating anxiety, difficulty in maintaining satisfying family living).”⁴⁴

The Indian Child Welfare Act

The Indian Child Welfare Act, adopted in 1978, enacts minimum federal standards to protect Indian children from unwarranted removal.⁴⁵ ICWA applies to child

ICWA recognizes Indian Nations’ exclusive jurisdiction over child custody proceedings when the Indian child “resides or is domiciled within the reservation of such tribe.”

rarely even saw a judge as social workers frequently used voluntary waivers to remove children.³⁷ As noted in the congressional hearing on July 24, 1978,

[t]he decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel or to have the supporting testimony of expert witnesses. Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments. In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights. It is an unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.³⁸

The impact on families and children was devastating. Children suffered from abandonment issues, depression

custody proceedings, which it defines as foster care placement, termination of parental rights, pre-adoptive placement, and adoptive placement.⁴⁶ An Indian child is defined as an unmarried person under the age of 18 who is a member of a Tribe or is eligible for membership and is the biological child of a member of an Indian Tribe.⁴⁷ The Tribe is the only entity that can determine membership or eligibility for membership and will do so upon receipt of notification, which is required by ICWA.⁴⁸

ICWA recognizes Indian Nations’ exclusive jurisdiction over child custody proceedings when the Indian child “resides or is domiciled within the reservation of such tribe.”⁴⁹ The statute does not define domicile, but the U.S. Supreme Court has held that children born out-of-wedlock to enrolled members domiciled on a reservation resulted in the children being also domiciled on the reservation.⁵⁰ Additionally, if the Indian child does not reside or is not domiciled within the reservation, the state court must transfer the proceeding to the tribal court “absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe.”⁵¹ Last, should the parent, Indian custodian or Indian child’s tribe wish to, they may intervene at any point in the proceeding regarding the Indian child.⁵²

In addition to jurisdictional requirements, ICWA requires notice to Indian parents, custodians, and Indian Nations, along with a raised burden of proof prior to

removal. First, the party seeking to take custody of the Indian child must notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings and of their right of intervention.⁵³ If a party cannot identify or locate the Nation or Indian parent or custodian, the notice shall be given to the Secretary of Interior.⁵⁴ Second, in order for a foster placement to be determined, there must be clear and convincing evidence, which includes input from a qualified expert witness, "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."⁵⁵ Finally, when parental rights are to be terminated, evidence, this time beyond a reasonable doubt must support "the conclusion 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."⁵⁶

ICWA also creates requirements for voluntary foster care placement and termination of parental rights. First, the consent of the parent must be in writing and recorded before a court with proper jurisdiction.⁵⁷ Additionally, the parent or legal guardian must be fully aware of the consequences of the provided consent.⁵⁸ When voluntary consent is given for foster care, the parent may withdraw at any time and the child shall be returned.⁵⁹ In a voluntary proceeding for termination of parental rights or adoptive placement, consent may be withdrawn at any time prior to entry of a final decree and the child shall be returned.⁶⁰

ICWA outlines preferences for foster care placement and adoption; however, the Indian child's tribe may establish a different order of preference for placement.⁶¹ The extended family of the child in question shall be given preference when adoption is necessary.⁶² If no member of the child's extended family wishes to adopt the child, preference is then given to a member of the child's tribe and, last, other Indian families.⁶³ For foster care and pre-adoption placements, ICWA requires that the child "be placed in the least restrictive setting . . . within reasonable proximity to his or her home."⁶⁴

New York's Laws and Policies Impacting Indian Families

New York also has a long history of laws and policies focused on assimilating Indian children and families, resulting in separation of children from families, as illustrated by the statistics above. The state viewed the federal policies as supporting its work toward assimilation, for example, "[t]he granting of [U.S.] citizenship had the earmarks of an invitation to the states to work toward further assimilation of Indian populations."⁶⁵

In 1888, as a reaction to the Seneca Nation of Indians' exemption from the Dawes Act, New York created the Whipple Commission, whose purpose was to investigate the social, moral, and industrial condition of the Nations, along with the status of their lands and treaties.⁶⁶ The

Commission examined Indian children's progress in several schools built on the Six Nations' territories.

During the hearings, William A. Duncan⁶⁷ testified that it was necessary to combine education and removal of Indian children, to keep them from the influence of their families.

[B]ut if you educate an Indian and leave him with his father and mother and tribe, he will always remain a savage; to my mind, these children are not being educated in the right way, even on our Onondaga reservation; that little school-house isn't worth that, so far as the education of these children is concerned, because they simply come in for two or three hours, and they go back into their homes and dwell with their pagan parents; they are brought up in the pagan religion and their pagan customs; I believe that the Indians on the Onondaga reservation ought to be saved, and they ought to be made good citizens; it can not be done in one year, and never will be done by keeping a nation within a nation; they should be made, as soon as possible, citizens.⁶⁸

The Commission opined that, the pagan way of life eradicated anything taught in the schools. "The influence of the pagan Indians is keenly felt against the schools here as elsewhere, and the home life of the children tends to undo much that is accomplished for their good during the day at school."⁶⁹

The Whipple Commission opined that the Thomas Asylum for Orphan and Destitute Indian Children. It was started as a collaboration between the Quakers and Presbyterian Church on Cattaraugus Seneca Indian Territory in 1855 and was run by New York State from 1875 to 1957. The Whipple Report noted, "The institution is a model one, and its present management well nigh perfection. A serious mistake, however, connected with this school is in the regulation which discharges these children from the care of the teachers when they reach sixteen years of age. At this age a large share of the expense upon the children has been incurred, while the benefits derived are not in proportion to the outlay. If these children could remain for even two or three years longer, until their character and habits should become matured and strengthened before again placing them among the often demoralizing influences of their people, it is believed that the results would be eminently more satisfactory."⁷⁰

Jon Van Valkenberg, Superintendent of the Thomas Asylum, was a firm supporter of removal of Indian children from the influence of their families and believed that the Nations should be reformed for the benefit of assimilated children.

After several years experience among the Indians, I have become fully convinced that the means of education and improvement will never be productive of the highest good as long as their tribal relations are continued. With a division of the lands, a home would not only be secured to the pagans and to their families, but

would provide such for the orphans and destitute children. It must indeed be humiliating for the intelligent and educated to live under laws established for their uncivilized ancestors of sixty or seventy years ago. The severalty act seems to me to be one of the most important steps toward the elevation of this people.⁷¹

In 1942, the Second Circuit ruled New York law did not apply on Indian territories,⁷² halting many years of the state's efforts to implement its laws on those territories. To overcome this ruling, New York formed the Joint Legislative Committee on Indian Affairs, which held numerous hearings across the state on various Indian territories. An early Committee report emphasized its focus: "An early settlement of the jurisdictional problem is believed imperative. The present system of dual responsibility is fostering disunity and internal strife among the Indians of this State and is further seriously retarding their assumption of the responsibilities and enjoyment of the privileges of citizenship."⁷³

The Committee subsequently submitted to Congress a bill for obtaining concurrent criminal jurisdiction and limited civil adjudicatory jurisdiction. Congress granted New York concurrent criminal jurisdiction in 1948.⁷⁴ New York celebrated the initial grant of concurrent jurisdiction, and the Committee wrote, "[Adoption] marks the next great forward step toward absorption of Indians into the general community of citizens."⁷⁵ Concurrent adjudicatory civil jurisdiction, granted in 1950,⁷⁶ was sought because it "would end their long isolation and inevitably work toward complete assimilation with the main body of citizens."⁷⁷ The state hoped eventually, through assimilation, the Nations "will reach the point of desiring to hold their lands in severalty as do western tribes, and to abandon present restrictions against ownership by non-Indians, even at the cost of having all such lands bear a fair proportion of the tax burden. Not until then will Indians complete the transition from hermithood to the vigorous and responsible citizenship assured by their intelligence, independence and courage."⁷⁸

New York's Implementation of ICWA

To implement ICWA, New York amended § 39 of the Social Services Law (SSL) and issued regulations found at 18 N.Y.C.R.R. § 431.18, which provide additional protections to Indian children. Unlike federal law, New York State does not require the child to be a biological child of a member of a tribe within the state.⁷⁹ New York's regulations include biological children of a member of any federally recognized tribe, who live on a reservation or tribal land, regardless of enrollment, to be covered under the act as well.⁸⁰ Last, New York includes children ages 18 to 21 who are in foster care, are attending school, or lack the ability to live independently, to encompass a larger population of Indian children.⁸¹

Congress's grant of concurrent civil jurisdiction to New York affected the state's implementation of ICWA,

as the Nations are required to obtain approval of the Secretary of the Interior for assumption of exclusive jurisdiction.⁸² The Office of Children and Families may enter into an agreement with the Tribe for the Tribe to assume the provision of foster care, preventive and adoptive services to Indian children.⁸³ A state-recognized Tribe may reassume exclusive jurisdiction, provided that the local commissioner has granted approval.⁸⁴ Once this is granted, the Tribe has exclusive jurisdiction over a child who resides with the Tribe or is domiciled there or when the child is a ward of the tribal court.⁸⁵

Unlike ICWA, New York's regulations include a definition of a qualified expert who may testify as to whether continued custody is likely to result in serious physical or emotion harm to the child. A qualified expert witness may be a member of the Indian child's Tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organizations and child-rearing practices.⁸⁶ Likewise, an expert witness may be a layperson who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.⁸⁷ An expert witness may be a professional person having substantial education and experience in the provision of services to Indian children and their families.⁸⁸

Finally, an additional protection is provided at the beginning of the child welfare process. When a social services official initiates a child custody proceeding involving an Indian child, the official must demonstrate to the court that, prior to the commencement of the proceeding, reasonable efforts were made to alleviate the need to remove the child from the home.⁸⁹ And the efforts shall include the Tribe's available resources.⁹⁰

Conclusion

A critical component to the implementation of ICWA is the understanding of the federal and state governments' history in Indian affairs. Numerous laws and policies were implemented to assimilate Indian people, and one result was the high rate of removal of Indian children from their families and Nations. The passage of ICWA created federal standards to protect families from unwarranted removal of their children. With these protections and an understanding of the need for these protections, attorneys will be better equipped to assist their clients in what can be difficult family law cases. ■

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7. 31 U.S. 515 (1832).
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22. 18 U.S.C. § 1162.
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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 40.
31. Report on Federal, State, and Tribal Jurisdiction, at 83 (1976).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Indian Child Welfare Act of 1977: Hearing before the United States Senate Select Committee On Indian Affairs on S. 1214*, 95th Congress 112–113 (1977) (statement of Carl E. Mindell and Alan Gurwitt in *The Placement of American Indian Children – The Need for Change*, American Academy of Child and Adolescent Psychiatry) at http://www.aacap.org/AACAP/Policy_Statements/1975/Placement_of_American_Indian_Children.aspx.
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37. *Id.* at 5.
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55. 25 U.S.C. § 1912(e).
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57. 25 U.S.C. § 1913(a).
58. *Id.*
59. 25 U.S.C. § 1913(b).
60. 25 U.S.C. § 1913(c).
61. *Id.*
62. 25 U.S.C. § 1915(a).
63. *Id.*
64. 25 U.S.C. § 1915(b).
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70. *Id.*, at 60–61.
71. *Id.*, at 70.
72. *United States v. Forness*, 125 F.2d (2d Cir. 1942).
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74. 25 U.S.C. § 232.
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82. 25 U.S.C. §§ 1911(a), 1918(a); SSL § 39.
83. SSL § 39.2.
84. SSL § 39.4.
85. SSL § 39.5(a).
86. 18 N.Y.C.R.R. § 431.18(a)(5)(i).
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88. 18 N.Y.C.R.R. § 431.18(a)(5)(iii).
89. 18 N.Y.C.R.R. § 431.18(d).
90. *Id.*