

A Guide to Compliance with the Indian Child Welfare Act



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National Indian Child Welfare Association

Protecting our children. Preserving our culture.

A Guide to Compliance with the Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) passed into law in 1978. The law protects American Indian and Alaska Native (AI/AN) children in state child welfare systems and helps them remain connected to their families, cultures, and communities. Compliance is mandatory. This guide is designed to help individuals understand ICWA's requirements and should be read in conjunction with the law (25 U.S.C. § 1901 et seq.) and binding federal regulations (25 C.F.R. Part 23). The information contained in this handout cannot replace the advice of competent legal counsel licensed in your state.

State ICWAs and Other State Law

A growing number of states have enacted their own ICWA laws or policies. These laws complement the federal ICWA and increase protections for AI/AN children and families. These state laws or policies may require additional efforts beyond what the federal ICWA requires. It is important to find out whether or not your state has additional ICWA laws and to review them in comparison to this guide. Add any notes on differences for your state to this guide before using. Also, many states supply forms and checklists for compliance that should be considered equally with the information presented here. Following this guide will assure compliance with the federal ICWA, but not necessarily state laws or policies.

Tribal-State Agreements

The first precaution in applying ICWA is to make sure there is no tribal-state agreement that has specific procedures to follow. Many tribes have agreements with state agencies on child welfare matters that may include additional requirements and alter the best practices listed below. It is important to find out whether or not your state has any tribal-state ICWA agreements and to review their requirements. Add any notes on differences based on the tribal-state agreement to this guide before using. Following this guide will assure compliance with ICWA, but not necessarily tribal-state agreements.

When Does ICWA Apply?

ICWA applies when there is a "child custody proceeding" involving an "Indian child". 25 U.S.C. § 1903 (2012); 25 C.F.R. § § 23.2, 23.103 (2016)

What is a "Child Custody Proceeding" for the Purpose of ICWA? 25 U.S.C. § 1903(1)

Child Custody Proceedings ICWA Does Cover

- Termination of parental rights
- Foster care placements
- Placements in an institution or with a conservator
- Guardianships
- Pre-adoptive placements
- Adoptive placements (includes conversion from foster care to adoptive placement)
- Voluntary placements and involuntary placements where parents can't regain custody of child "upon demand" (meaning no formalities or contingencies like contracts, court, or requiring a parent to pay for services before returning a child). 25 C.F.R. § 23.2
- Status offenses (juvenile delinquency proceedings that involve an offense that would not be a crime if committed by an adult, e.g., drinking, runaway, truancy, etc.)

Child Custody Proceedings ICWA Does Not Cover:

- Divorce proceedings or custody disputes between two parents
- Juvenile delinquency proceedings (violations of criminal law, see note on page 1)

Note: ICWA may also apply in a juvenile delinquency proceeding where the basis for the proceeding is a criminal act by the child, but the proposed out-of-home placement is based upon the fitness of the parents rather than the criminal act by the child.



To review
the law in its
entirety, visit
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Who is an “Indian Child” for the Purpose of ICWA? 25 U.S.C. § 1903(4)

ICWA only protects American Indian and Alaska Native children who are:

1. unmarried,
2. under 18, and
3. a tribal member **or** are eligible for tribal membership; *and* have a biological parent who is a tribal member.

How Do I Figure Out if the Child is a Tribal Member or Eligible for Membership?

Does the client family identify as American Indian, Alaska Native, or Native American?

At intake with a family (i.e., child protection investigation), and before every change or potential change in custody, the state case worker should ask a client family how they self-identify. For example, they should ask:

- Which of the following do you consider yourself a member: Asian American, Black/African American, American Indian or Alaska Native or Native American, White, Latino/a?

The state case worker should always follow up by asking:

- Do you have any Native American, American Indian, or Alaska Native ancestry?

If the client responds that they are not Native American, American Indian or Alaska Native, and do not have any related ancestry the state case manager should:

- Document this in case notes

If the client responds that they are American Indian, Alaska Native, or Native American, or believe there is Native ancestry the state case worker should:

- Ask the client family which tribe(s) they identify with and if they are a member and/or enrolled or registered
- Fill out a family tree chart with the help of client family or other genealogy form provided by the agency

If, in following the previous steps, a case worker has reason to know the child is Indian, she/he will need to identify the Indian tribe by:

- Consulting with extended family members and other relatives
- Contacting, as appropriate, the suspected tribe(s) (their designated tribal service agent for ICWA notice*), an appropriate Indian social services organization, or the Bureau of Indian Affairs (BIA)

If the parents are unavailable or unable to provide a reliable answer regarding the Native heritage of their children, workers then:

- Make a thorough review of all documentation in the case record (look for clues regarding Native ancestry)
- Contact the previous caseworker, if any
- Contact extended family identified by child or client family and ask about identification of the family

Note: If caseworkers and officers of the court know or have reason to believe a child is an Indian child, they must apply ICWA in a case until otherwise determined. 25 C.F.R. § 23.107(b) This will help avoid unnecessary delays or the potential for disrupted placements or proceedings in the future.



* A directory of these agents can be found at www.bia.gov/bia/ois/dhs/icwa



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If the Family Identifies as American Indian, Alaska Native, or Native American, How Do I Verify if the Child is a Tribal Member? 25 C.F.R. § 23.108

Send notice to the child's tribe via their designated tribal service agent for ICWA notice to get written confirmation that:

- The child is a member; or
- The child is eligible for membership *and* confirm a biological parent's membership

Note: If several tribes are identified by the client family, send the letter to all tribes identified.

Best practice includes telephone contact be made with the tribe's child welfare unit, enrollment office, and their designated tribal service agent for ICWA notice. Although this is not required by ICWA, it may help a case worker get quick confirmation and note that ICWA may apply to a case. Any phone conversation that confirms that ICWA may apply should be documented in the case file. Formal notice must still be sent to the tribe and the written response confirming tribal membership filed in the case file.

What if the child is a tribal member?

Once a tribe has determined that a child is a member, the response must be documented in the case record, including date and source of documentation. The caseworker should also:

- File the tribe's written statement declaring the child is a member in the case record,
- Incorporate the tribe's written statement declaring the child to be a member in any court hearing,
- Work with the understanding that ICWA applies throughout the entirety of the child welfare case

What if the tribe responds that the child is **eligible** for membership?

The state case worker should confirm the membership status of the biological parent. The response to both the child and parent's status must be documented in the case record, including date and source of documentation. The caseworker should also:

- File the tribe's written statement declaring the child's eligibility for membership in the case record
- Incorporate the tribe's written statement declaring the child is eligible for membership and the biological parent is a tribal member in any court hearing
- Assist the family in formally enrolling the child or establishing membership of the child. If necessary, the state case worker may counsel parents hesitant to enroll a child by emphasizing the positive benefits of tribal membership, particularly in child welfare and adoption proceedings
- Work with the understanding that ICWA applies throughout the entirety of the child welfare case

What if the child is not a tribal member and ineligible for membership?

Once a tribe has determined that a child is not a member and not eligible for membership, the response must be documented in the case record, including date and source of documentation. The caseworker should also:

- Document all steps taken to determine the child's Indian or tribal ancestry
- File the tribe's written statement declaring the child ineligible for membership in the case record
- Incorporate the tribe's written statement declaring the child ineligible for membership in any court hearing
- Work with the understanding that ICWA does not apply



Best practice includes telephone contact be made with the tribe's child welfare unit, enrollment office, and their designated tribal service agent for ICWA notice.



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What if the tribe does not respond?

If the tribe does not respond, the state case workers should call the ICW-designated tribal agent for service and inquire about the status of the inquiry and the membership status of the child. The state case worker should document the conversation in the case file.

What Are the Notification Procedures Required by ICWA? 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11, 23.111

Who receives notice?

- Parents
- “Indian custodian” (defined by ICWA as “Any Native person who has legal custody of the child under tribal law or custom or under state law or to whom temporary physical care, custody, or control has been transferred by the parent”)
- The child’s tribe (if child is affiliated with or eligible for membership in more than one tribe, all tribes should receive notice)
- The BIA receives a copy of these notices

How is notice sent?

Notice must be sent by registered or certified mail, return receipt requested. A copy of this notice should be filed in the case file and with the court, along with any returned receipts.

When should notice be sent?

No requests for a court proceeding (with the exception of emergency removals) can be made until:

- At least 10 days after receipt of notice by parents or Indian custodian, *or* after 30 days if 20 additional days are requested by the parents or Indian custodian to prepare for the proceeding; *and*
- At least 10 days after receipt of notice by the tribe, *or* after 30 days if the tribe requests an additional 20 days to prepare or the proceeding; *and*
- No fewer than 15 days after receipt of notice by the BIA, if you request their help to locate the tribe, parents, or Indian custodian. 25 C.F.R. § 23.11(c)-(d).

What if the tribe does not respond?

Even if a tribe does not respond to an official notice sent, or if it replies that it does not wish to intervene in the proceeding, continue to send the tribe notices of every proceeding. The tribe can intervene at any point in the proceeding and therefore it has the right to notice of all hearings related to the case.

How Does Transfer to Tribal Court Work?

Who can request a transfer of jurisdiction to tribal court?

ICWA allows the parent, Indian custodian, or child’s tribe to request that the child custody proceeding be transferred to tribal court.

If the tribe requests, orally or in writing, a transfer of the proceeding to its tribal court:

- The state case worker should inform the parents or Indian custodian of their right to object to the transfer

When is the state required to transfer the case?

The state court **must** transfer unless:

- The tribal court declines jurisdiction
- Either parent objects to such transfer
- The state court determines that “good cause” exists to deny the transfer

ICWA allows the parent, Indian custodian, or child’s tribe to request that the child custody proceeding be transferred to tribal court.

What if there is good cause?

If any party believes that good cause exists to not transfer the proceeding:

- Their reasons for such belief have to be documented with the court
- Other parties must be given the opportunity to respond



What does good cause to not transfer look like?

- Tribal court declines jurisdiction
- Child over 12 years old objects to the transfer
- It would be difficult to present the evidence and witnesses necessary in tribal court

✍ *Note: The perceived adequacy of a tribal court, advanced stage of the proceeding, socioeconomic conditions, or whether a transfer would affect the child's placement cannot be considered good cause to not transfer. 25 C.F.R. § 23.118*

The perceived adequacy of a tribal court, the type of court the tribe uses, or a tribe's use of a traditional decision-making processes cannot be considered good cause to not transfer.

What Services Are Required in ICWA Cases? 25 U.S.C. § 1912(d); 25 C.F.R. §§ 23.2

When should "active efforts" be made?

Active efforts must be undertaken to provide remedial services after an investigation and before a decision is made to place the child out of the home.

Active efforts must also be provided after the child has been removed in order to prevent the breakup of the family by working toward reunification.

What are "active efforts"?

"Active efforts" means not just an identification of the challenges a family faces and providing solutions. Active efforts are the *affirmative, active, thorough, and timely* efforts intended to keep an Indian child with his or her family.

These can be demonstrated by:

- Making a strengths-based evaluation of the family's circumstances that takes into account the prevailing social and cultural conditions and way of life of the child's tribe
- Intervening only when necessary. Workers conducting such an intervention should:
 - ◊ Develop a case plan with assistance from the parents or Indian custodian and in consultation with extended family members and the tribe, offering and employing all available and culturally appropriate family preservation strategies.

Active efforts require a state case manager make efforts to actively assist a family in making the changes necessary to keep a child safely in their home, or to make the changes necessary for a child to return safely and reunify with family.

- ◊ Seek out the necessary family preservation and wrap-around services to support the family with the child in the home, except where imminent physical or emotional harm may result.
- ◊ Involve the child, if of sufficient age, in the design and implementation of the case plan
- Assisting parents or Indian custodian and child in maintaining an ongoing familial relationship, including supporting regular visits in the most natural setting possible and taking steps to keep siblings together.
- Monitoring progress and participation in services, helping parents overcome barriers such as transportation, and actively assisting parents in obtaining services.



When Can a Child in an ICWA Case Be Removed from the Home? 25 U.S.C. § 1912(e)

To remove a child, the state must prove (and case records must document) that:

- Conduct or condition of the parent will result in serious physical or emotional damage to the child
 - ◊ There must be a causal relationship between the conditions and the serious damage that is likely to result to the child to meet this requirement of ICWA
 - ◊ Citing structural issues beyond the control of the parent, such as living in poverty, is not appropriate
- Active efforts were made to support the family in overcoming the challenges that presented imminent risk of serious physical or emotional damage to the child
 - ◊ The case record cannot simply state that such efforts were unsuccessful, but must document the specific efforts and how they were unsuccessful

What burden of proof is required for foster care placement?

ICWA states that a court may not issue the foster care placement of an Indian child in the absence of a determination—by clear and convincing evidence—supported by the testimony of a qualified expert witness that the child’s continued custody with the child’s parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

What is “clear and convincing” evidence?

This is a higher level of proof than most states require for foster care placement proceedings. It means that in order to be successful, the side favoring foster care placement must present evidence that is not just slightly more persuasive than the evidence against it, but clearly more persuasive.

Who are “qualified expert witnesses”? 25 C.F.R. § 23.122

The testimony of a qualified expert witness (QEW) is required to support a state court’s decision to place the child outside of his or her home.

- Must be part of the evidence presented
- Court or agency should request the assistance from the tribe or regional BIA office to locate an appropriate QEW
- The QEW may be designated by the child’s tribe
- The QEW cannot be the caseworker regularly assigned to the child

Where should a child in an ICWA proceeding be placed if removal from the home is necessary? 25 U.S.C. § 1915(c); 25 C.F.R. § 23.131(a)

The child should be put in the setting that:

- Is least restrictive
- Is most like family
- Is within a reasonable proximity to the child’s family
- Meets any special needs the child may have



“Clear and convincing evidence” means that in order to be successful, the side favoring foster placement must present evidence that is not just slightly more persuasive than the evidence against it, but clearly more persuasive.



Preference to the following types of placements **must** be given in the order provided, unless there is good cause to place the child elsewhere or the tribe has a different placement preference order 25 U.S.C. § 1915(b); 25 C.F.R. § 23.131(b):

1. Member of the child's extended family
2. Foster home licensed, approved, or specified by the child's tribe
3. Indian foster home licensed or approved by the state or other non-Native licensing authority
4. Institution for children approved by an Indian tribe or operated by an Indian organization that meets the child's special needs

The state case worker should contact the tribe to ask if they have a different order of placement preference.

The state case worker should perform a diligent search to comply with ICWA's placement preferences. This should include, at a minimum:

- Contact with tribe's social service program
- Search of state and county lists of foster homes
- Contact with other tribes and Native organizations with available placement resources

Note: ICWA placement preferences apply regardless of whether the child's tribe intervenes in the case or whether the child's tribe can identify a preferred placement home.

When placing a child in an ICWA case, what should be documented?

State case workers should document the placements of the child and all efforts to comply with the placement preferences.

Where required placement preferences have not been followed, then the state agency must:

- Demonstrate through clear and convincing evidence that a diligent search was made

The standard for proving that a placement was unavailable must conform to the main social and cultural standards of the parent's or extended family's Indian community. 25 C.F.R. § 23.132

What if it is necessary to move the child to a new placement?

If the child is to be moved from one placement to another, or if the foster family plans to move, the child's parents or the Indian custodian must be notified in writing. Workers should follow placement preferences outlined above, unless the child is returned to parents or Indian custodian. 25 U.S.C. § 1916(b)



Preference to the following types of placements must be given in the order provided, unless there is good cause to place the child elsewhere or the tribe has a different placement preference order:

1. Member of the child's extended family
2. Foster home licensed, approved, or specified by the child's tribe
3. Indian foster home licensed or approved by the state or other non-Native licensing authority
4. Institution for children approved by an Indian tribe or operative by an Indian organization that meets the child's special needs



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When Can a Parent in an ICWA Case Have Their Parental Rights Terminated? 25 U.S.C. § 1912(f)

To terminate parental rights, the state must prove (and case records must document) that:

- Conduct or condition of the parent is likely to result in serious risk of serious physical or emotional damage to the child if the parent has continued custody
 - ◊ This must include a causal relationship between the conditions and the serious damage that is likely to result to the child
- Active efforts were made to support the family in overcoming the challenges making continued custody of the child by the parent an imminent risk of serious physical or emotional damage to the child
 - ◊ The case record cannot simply state that such efforts were unsuccessful, but must document the specific efforts and how they were unsuccessful

What burden of proof is required for terminating the rights of a parent?

In order to ask the court to terminate parental rights, the agency as petitioner must show the court by evidence beyond a reasonable doubt—including the testimony of a qualified expert witness—that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

What is evidence “beyond a reasonable doubt”?

This is a higher burden of proof than most states require at termination of parental rights proceedings. It means that the side favoring termination must not only present a more convincing case than the opposition, but must be so convincing that it eliminates all reasonable doubts in the mind of the person deciding the case that the child will be at risk of serious physical or emotional damage if the parent maintains custody. If the evidence fails to do so, the court is obligated by ICWA to deny termination.

Who is a “qualified expert witness”?

See page 6.

After the parents’ rights are terminated where should the child in an ICWA case be placed? 25 U.S.C. § 1915(a); 25 C.F.R. § 23.130

Preference to the following types of placements **must** be given in the order provided, unless there is good cause to place the child elsewhere or the tribe has a different placement preference order:

1. Child’s extended family
2. Other members of the child’s tribe
3. Other Indian families

The state case worker should contact the tribe to ask if they have a different placement preference.

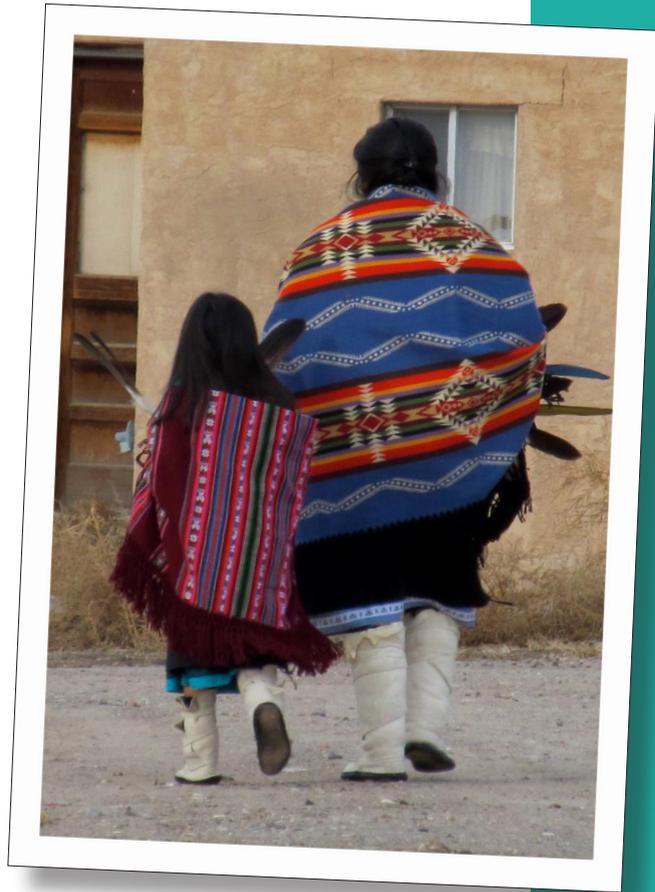
Note: ICWA placement preferences apply regardless of whether the child’s tribe intervenes in the case or can identify a preferred placement home.

When placing a child in an ICWA case, what should be documented?

State case workers should document the placements of the child and all efforts to comply with the placement preferences.

Where required placement preferences have not been followed, then the state agency must:

- Demonstrate through clear and convincing evidence that a diligent search was made



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The standard for proving that a placement was unavailable must conform to the main social and cultural standards of the parent's or extended family's Indian community. 25 C.F.R. § 23.132

What happens if the adoption is disrupted? 25 U.S.C. § 1916(a)

If an adoption is vacated or set aside, or adoptive parents voluntarily consent to termination of parental rights, the Indian parents or Indian custodians must be notified.

- Notice of their right for a return of their child must include a statement that such petition will be granted unless the court rules it is not in the child's best interest

What if There is an Emergency that Requires Removal of an "Indian Child"? 25 C.F.R. § 23.113

ICWA applies to emergency removals of Indian children.

Unless circumstances do not permit, the racial/ethnic status of the child should be immediately determined. For example, a case worker should ask:

- "Which of the following do you consider yourself a member? Asian American, Black/African American, American Indian or Alaska Native or Native American, White, Latino/a? If American Indian or Alaska Native or Native American, what is the name of your tribe?"

Emergency protective custody of any Indian child can be taken only if:

- The child is not located on the reservation of a tribe that has jurisdiction over child custody proceedings
- The child is in danger of **imminent** physical damage or harm

Emergency custody must be terminated when removal is no longer necessary to prevent imminent physical damage or harm to the child.

Petitions for emergency or shelter care should identify if there is reason to know a child is an Indian child, whether the tribe has jurisdiction, include the steps the agency has taken to notify the parents, Indian custodian, and tribe, and include what active efforts have been made to return the child home safely.

Emergency proceedings should not continue for more than 30 days, unless a court determines that:

1. Restoring the child to the parent would place the child in danger of imminent physical damage or harm,
2. The court has been unable to transfer jurisdiction to the tribe, AND
3. It has not been possible to initiate state child custody proceedings

Note: To "initiate state child custody proceedings", the state sets a hearing date and sends notice via registered or certified mail, return receipt requested to the parents, Indian custodian, and tribe, along with sending a copy of these notices to the Regional Bureau of Indian Affairs office.

Where should the child identified as Indian be placed in an emergency?

If the child is believed to be Indian, efforts shall be made to place the child during emergency care in a setting that follows the foster care placement priorities established by ICWA (see above).

How Do You Voluntarily Terminate Parental Rights and Place a Child for Adoption Under ICWA? 25 U.S.C. § 1913(c)

ICWA requires specific procedures for voluntary consent and specific information be collected at the time of consent to protect children's future connection to their extended family and tribe.

How must voluntary consent be given?

Consent cannot be accepted unless:

- The child is over 10 days old
- The consent is in writing and recorded before a judge
- The consent is accompanied by the judge's certificate ensuring that terms and consequences of the consent were:
 - ◊ Fully explained in detail and fully understood by the parents or Indian custodian
 - ◊ Fully explained in English or interpreted into a language understood by the parents or Indian custodian

What information should voluntary consent include?

Consent signed by Indian parents or Indian custodian should contain:

- Name and birth date of child
- Name of child's tribe
- Child's enrollment number or other indication of membership in the tribe
- Name and address of consenting parents or custodians (e.g., mother's birth and married name)
- Name and address of prospective parents, if known, for substitute care placements
- Name and address of person or agency through whom placement arranged, if any, for adoptive placements

Where should the child be placed?

Preference to the following types of placements must be given in the order provided, unless there is good cause to place the child elsewhere or the tribe has a different placement preference order:

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

The adoption case worker should contact the tribe to ask if they have a different order of placement preference. 25 U.S.C. § 1915(a); 25 C.F.R. § 23.130

The adoption and state case worker should also perform a diligent search to comply with ICWA's placement preferences. This should include, at a minimum:

- Contact with tribe's social service program
- Contact extended family members
- Search of state and county lists of foster homes
- Contact with other tribes and Native organizations with available placement resources



The National Indian Child Welfare Association is available to share and explain this information to stakeholders involved in tribal child welfare, including court officers, tribal councils, tribal child welfare staff, and state and county agencies. To find out how our staff may assist your community or program, contact NICWA at (503) 222-4044. Visit our website at www.nicwa.org.



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