

# A Guide to Compliance with the Indian Child Welfare Act

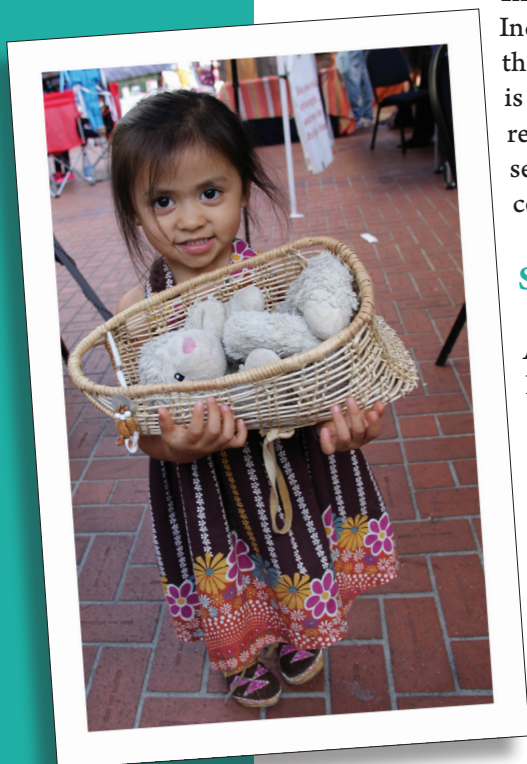


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# A Guide to Compliance with the Indian Child Welfare Act



The Indian Child Welfare Act 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.) itself. 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 compliment the federal ICWA and increase protections for AI/AN children and families. These state laws or policies may require additional efforts beyond the federal ICWA requires. It is important to find out whether or not your state has an ICWA law and review it in comparison to this guide. Add any notes or 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 review their requirements. Add any notes or 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:

1. A "child custody proceeding"
2. Involving an "Indian child"

## What is a "Child Custody Proceeding" for the Purpose of ICWA?

### Child Custody Proceedings ICWA Does Cover

- Foster care placements
- Guardianships
- Termination of parental rights
- 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"
- Divorce proceedings or custody disputes in which neither parent will get custody
- 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.)

*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 the NICWA website [nicwa.org](http://nicwa.org)



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Child Custody Proceedings ICWA **Does Not** Cover

- Divorce proceedings or custody disputes between two parents
- Juvenile delinquency proceedings (violations of criminal law)

**Who is an “Indian Child” for the Purpose of ICWA?**

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

1. Unmarried;
2. Under 18; and
3. A tribal member OR 3. Eligible for tribal membership; *and*  
has 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, Alaska Native ancestry?

If the client response 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
- 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 believe 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 child welfare units, enrollment office, their designated tribal service agent for ICWA notice\*), an appropriate Indian social services organization, or the Bureau of Indian Affairs

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 as discussed in the BIA ICWA Guidelines)
- Contact the previous caseworker, if any
- Contact extended family identified by child or client family and ask about identification of the family

*Note: As a best practice it is suggested that caseworkers and officers of the court assume that ICWA may apply in a case until otherwise determined. 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 <http://www.bia.gov/cs/groups/public/documents/text/idc012540.pdf>



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## If the Family Identifies as American Indian, Alaska Native, or Native American, How Do I Verify the Child is a Tribal Member?

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

- Confirm that the child is a member; or
- Confirm that the child is eligible for membership and confirm a biological parent's membership

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

Best practice includes telephone contact also 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 notate 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 should still be set 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, and:

- File in the case record the tribe's written statement declaring the child is a member
- Incorporate in any court hearing the tribe's written statement declaring the child to be a member
- 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:

- File in the case record the tribe's written statement declaring the child's eligibility for membership
- Incorporate in any court hearing the tribe's written statement declaring the child eligible for membership and the biological parent to be a member
- 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:

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



**Best practice includes telephone contact also 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 Notifications Procedures Required by ICWA?**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 (only if identity/location of the tribe and/or parent, or Indian Custodian cannot be determined)

How is notice sent?

Notice **must** be sent by registered 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 proceedings; *or*
- 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 for the proceeding; *or*
- No fewer than 15 days after receipt of notice by the Bureau of Indian Affairs

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

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

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



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#### What if there is good cause?

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

- They should share their reasons for such belief with the court
- Other parties should be given the opportunity to respond

#### What does good cause to not transfer look like?

- A proceeding is at an advanced stage
- Child over 12 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, 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?**

#### 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 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.**

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. It also requires 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.

These can be demonstrated by:

- Making an strength-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 that involves use of tribal Indian community resources
  - ◇ 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 case plan
- Assisting parents or Indian Custodian and child in maintaining an ongoing familial relationship
- Engaging the child's tribe early and working closely with the child's tribe to access culturally relevant resources and informal support networks



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## When Can a Child in an ICWA Case Be Removed from the Home?

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

- Conduct or condition of the parent will result in serious physical or emotional damage to the child
  - ◊ This must show a causal relationship between the conditions and the serious damage that is likely to result to the child is necessary 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 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"?

Persons with the following characteristics are considered most likely to be qualified expert witnesses:

- 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 organization and child rearing practices
- An expert with substantial experience in the delivery of child and family services to Native families and extensive knowledge of prevailing social and cultural standards of child rearing practices in the child's tribe
- A professional person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and child rearing practices within the Indian community.

This list is not meant to be exhaustive. The state case workers should enlist the assistance of the child's tribe to locate persons qualified to serve as expert witnesses. The BIA is also required to provide this assistance.



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Where should a child in an ICWA proceeding be placed if removal from the home is necessary?

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

Preference to the following types of placements should 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

The state case worker should contact the tribe to ask if they have a different 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, efforts to find suitable placements within those priorities shall be documented in detail.



**Preference to the following types of placements should 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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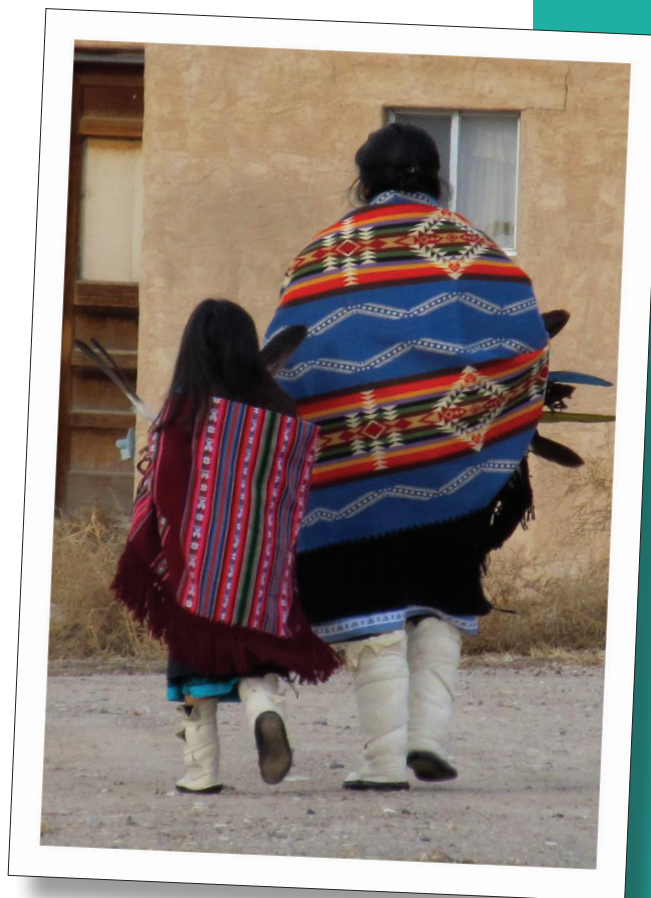
What if it is necessary to move the child to a new placement?

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.

## When Can a Parent in an ICWA Case Have Their Parental Rights Terminated?

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

- Conduct or condition of the parent is likely to result in imminent risk of serious physical or emotional damage to the child if the parent has continued custody
  - ◊ This must show a causal relationship between the conditions and the serious damage that is likely to result to the child is necessary to meet this requirement of ICWA
- 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 put on 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 physical or emotional damage if the parent maintains custody. If it fails to do so, the court is obligated by ICWA to deny termination.

Who is a “qualified expert witness”?

See above.

After the parents rights are terminated where should the child in an ICWA case be placed?

Preference to the following types of placements should 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.



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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, efforts to find suitable placements within those priorities shall be documented in detail.

What happens if the adoption is disrupted?

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
- Where parental rights have been terminated, it is up to the agency to decide whether or not to notify parents or Indian Custodian of their right to petition for a return of their child

## **What if There Is an Emergency That Requires Removal of an "Indian Child"?**

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.

In emergency proceedings, ICWA should be complied with whenever possible and child custody proceedings that fully comply with ICWA must be "expeditiously initiated." This could include transferring the case to the child's tribe immediately if the Indian child is a ward of the tribal court, or the child's tribe wishes to accept transfer of jurisdiction of the case from state court.

Where should the child who is 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).



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## How Do You Voluntarily Terminate Parental Rights and Place a Child for Adoption Under ICWA?

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 should 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 placement preference.

The adoption 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



*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](http://www.nicwa.org).*



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