

The Indian Child Welfare Act

A Family's Guide

A publication of the National Indian Child Welfare Association

Answers to Your Questions About ICWA

This brochure is not a substitute for legal counsel. You should always contact a lawyer for advice on any legal matter relating to ICWA.

What is ICWA and why was it passed?

"ICWA" stands for the Indian Child Welfare Act, which is a federal law passed in 1978. ICWA was passed in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.

How does ICWA protect American Indian/Alaska Native children and their families?

When ICWA applies to a child's case, the child's tribe and family have an opportunity to be involved in decisions affecting services for the Indian child. A tribe or a parent can also petition to transfer the case to their own tribal court. ICWA sets out federal requirements regarding removal and placement of Indian children in foster or adoptive homes and allows the child's tribe to intervene in the case.

Note: The terms Indian and American Indian/Alaska Native are used interchangeably throughout this document. Additionally, the term "tribe" includes all federally recognized Alaska Native villages and tribes located in the United States.

Who is covered by ICWA?

Indian children involved in state child custody proceedings are covered by ICWA. A person may define his or her identity as Indian but in order for ICWA to apply, the involved child must be an Indian child as defined by the law.

ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" (25 U.S.C. § 1903). Under federal law, individual tribes have the right to determine eligibility, membership, or both. However, in order for ICWA to apply, the child must be a member of, or eligible for membership in, a federally recognized tribe. ICWA does **not** apply to custody disputes between parents, juvenile delinquency proceedings where the offense would still be considered criminal if the child was an adult (e.g., NOT truancy or incorrigibility), or cases under tribal court jurisdiction.

How do I know if my child is eligible for membership in a tribe?

All tribes have the right to determine who is a citizen of their tribe, and different tribes have different requirements for eligibility. In order to understand these requirements for the particular tribe in question, contact the child's tribe. For more information on how to contact the child's tribe, please visit the Bureau of Indian Affairs' (BIA) website at www.bia.gov.

What if my child is Indian but is not a member of a federally recognized tribe?

If your child does not meet the definition of "Indian child" outlined in the act, ICWA would not apply to your child's case. Other federal and state laws, however, may provide other protections, including support for placing your child with relatives and the opportunity to be heard in court.

What considerations should be made in an ICWA case?

Caseworkers must make several considerations when handling an ICWA case, including

1. Providing active efforts to the family (see section entitled "What are active efforts?");
2. Identifying a placement that fits under the ICWA preference provisions;
3. Notifying the child's tribe and the child's parents of the child custody proceeding; and
4. Working actively to involve the child's tribe and the child's parents in the proceedings.

Your caseworker should be able to explain your rights under ICWA and any other case actions in a manner that is easy for you to understand.

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Who should you contact if you feel that your rights under ICWA are being ignored?

If you feel that ICWA is not being applied correctly in your child's case, you should contact the following people as soon as possible:

- A lawyer (Indian law experience preferred)
- The child's tribe (ICWA tribal contacts are listed on the BIA website, www.bia.gov)

The court may order different services or a different placement if it decides that ICWA is not being applied correctly.

What are "active efforts?"

States are required to provide active efforts to families, and the court will be asked to determine whether active efforts have been made. Under the federal regulations, "active efforts" mean the active and engaging, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. They also address the unique culture of the Indian child and family (25 C.F.R. § 23.2).

ICWA mandates the state make active efforts in every ICWA case in two areas:

1. To provide services to the family to prevent removal of an Indian child from his or her parent or Indian custodian
2. To reunify an Indian child with his or her parent or Indian custodian after removal

A cornerstone in the application of active efforts is active and early participation and consultation with the child's tribe in all case planning decisions. Additionally, active efforts are different from "reasonable efforts." For example, reasonable efforts might be only a referral for services, but active efforts would be to arrange for culturally-appropriate services **and** help families overcome obstacles in order to engage in those services. The federal regulations referenced above (25 C.F.R. Part 23) apply whether or not the child's tribe is involved in the custody proceedings.

For more information on ICWA and a list of Frequently Asked Questions, visit us online at: www.nicwa.org.

National Indian Child Welfare Association
5100 SW Macadam Avenue, Suite 300
Portland, Oregon 97215
Phone: (503) 222-4044
Fax: (503) 222-4007
Email: info@nicwa.org



NICWA

National Indian Child Welfare Association
Protecting Our Children • Preserving Our Culture

NICWA works to support the safety, health, and spiritual strength of Native children along the broad continuum of their lives. We promote building tribal capacity to prevent child abuse and neglect through positive systems change at the state, federal, and tribal level.

Our Vision Every Indian child must have access to community-based, culturally appropriate services that help them grow up safe, healthy, and spiritually strong—free from abuse, neglect, sexual exploitation, and the damaging effects of substance abuse.

Our Mission NICWA is dedicated to the well-being of American Indian and Alaska Native children and families.

To learn more about NICWA, visit www.nicwa.org.