

# STANDARD: IMPLEMENTING THE INDIAN CHILD WELFARE ACT

## PURPOSE

This standard is meant to provide guidance to Department staff about the Indian Child Welfare Act. The Department's goal is full compliance with the Indian Child Welfare Act, both the procedural requirements and the underlying intentions of the Act. To that end, the purposes of an ICWA Standard for the staff of Children and Family Services are –

- ✚ To understand and ensure the rights of Indian children, their families and their tribes according to provision of the Indian Child Welfare Act.
- ✚ To provide active efforts to Indian children and their families to prevent removal of the Indian child.
- ✚ To involve the tribes and extended families of Indian children in planning and caring for Indian children who are not living with their parents.
- ✚ To ensure that Indian children create and maintain connections to their Indian families and cultural ties.
- ✚ To provide the court with adequate information to make accurate findings regarding ICWA status and compliance so the court may make sound decisions about the future of children.

## INTRODUCTION

This standard will address the following elements of ICWA situations:

1. Identification of Indian children
2. Applicability of ICWA
3. Jurisdictional issues in ICWA cases
4. Notices requirements
5. ICWA-Specific Practices
  - a. Initial and on-going Active Efforts
  - b. Qualified Expert Witnesses
  - c. Placement Preferences
  - d. Involuntary Termination of Parental Rights
6. Voluntary Proceedings
  - a. Voluntary Termination of Parental Rights
  - b. Voluntary Placement in Out-of-Home Setting
7. Documentation Requirements for ICWA

**Definitions** (additional definitions can be found in Idaho Administrative Rules 16.06.01.010-013 – [Idaho Administrative Rules 16.06.01.010-013](#))

**Active Efforts** for ICWA:

ICWA mandates that the party seeking to remove an Indian child from the home of his parent(s) or Indian custodian must provide remedial and/or rehabilitative services to the family to (1) prevent the break-up of the Indian family; or (2) prepare the family for reunification. Active efforts is a standard that exceeds the

services and intensity of activities identified as “reasonable efforts” in ASFA. To review the Active Efforts Principles document go to: [here](#).

Adoptive Placement for ICWA:

The permanent placement of an Indian child for adoption including any action resulting in a final decree of adoption.

Adoption and Safe Families Act (ASFA):

A federal law passed in 1997 that sets a standard for child welfare services to children in out-of-home placements.

**Best Practice**

The standards for services to Indian children in out-of-home placements that are outlined in ICWA take precedent over ASFA when the two are interpreted to conflict. However, in EVERY CASE, the safety of a child supercedes all issues...

Child Custody Proceeding for ICWA:

Includes any state court action involving a foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement

Extended Family Member for ICWA:

A person defined by law or custom of the child’s tribe or in the absence of such law or custom, is a person 18 or older who meets Idaho’s Child Welfare Services relative relationship criteria (see Placement with Relative Standard).

Foster Care Placement for ICWA:

Any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home, institution, home of a guardian or conservator where the Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated.

Indian Child for ICWA:

1. A member of an Indian tribe as identified by the tribe; OR
2. Eligible for tribal membership and the biological child of a tribal member

Indian Child Welfare Act (ICWA):

A federal law passed in 1978 that assures Indian children are not unnecessarily removed from their families and allows families and the child’s tribe to be involved in the planning for an Indian child in out-of-home placements. The requirements in ICWA are the prevailing legal precedent for treatment of Indian children when involved in a custody proceeding in State court. Also referred to as “the Act.” To view the text of the ICWA law go to: [here](#). To view the BIA instruction for implementing the ICWA law go to: [here](#).

Indian Custodian for ICWA:

Any person with legal custody of an Indian child under tribal law, tribal custom, or State law; OR any person with temporary physical care, custody and control of an Indian child as a result of informal arrangements made with the child’s parents or by tribal custom. When parents voluntarily place a child with a third party that party becomes an ICWA Indian Custodian even if the placement is temporary. A child’s Indian custodian has the same standing as a parent in ICWA cases.

Intervention

The official action taken by an Indian child's tribe with the Department and/or state court notifying the Department/court that the tribe wants to be included as a party to all proceedings conducted for the Indian child.

Parent for ICWA is:

1. Any biological parent of an Indian child, OR any Indian person who has lawfully adopted an Indian child under State or Indian law or tribal custom.
2. **Not** inclusive of an unwed father whose paternity has not been acknowledged or legally established by state or tribal jurisdictions.
3. **Not** inclusive of non-Indian adoptive parents

Placement Preferences for ICWA:

ICWA identifies specific and prioritized out-of-home living arrangements in which an Indian child will be placed. The preferences are meant to assure the child will be staying as close to his/her family as possible and will be reflective of the unique values of the child's Indian culture.

Pre-adoptive Placement for ICWA:

The temporary placement of an Indian child in a foster home or institution after termination of parental rights but prior to an adoptive placement.

Qualified Expert Witness

A person who reviews a case and provides testimony in state court about the customs and standards of the Indian child's tribe and how it relates to the circumstances of the child and family. The qualified expert witness should be:

1. a member of child's tribe with knowledge of tribal customs relating to family organization and child rearing; OR
2. a lay person with substantial experience delivering services to Indians and extensive knowledge of tribal customs and practices; OR
3. a professional with substantial education and experience in his or her area of specialty.

Termination of Parental Rights (TPR):

A court action that ends the legal rights and responsibilities of a parent to their child.

Tribal Court:

A court with jurisdiction over child custody proceedings and is:

1. a Court of Indian Offenses, OR
2. a court established and operated under the code or custom of an Indian tribe, OR
3. any administrative body of a tribe which is vested with the authority over child custody proceedings

Tribal Membership for ICWA:

1. For ICWA, the tribes must be federally recognized as individual tribes, tribal confederations, native villages, or native corporations/.
2. Membership is determined by each tribe and does not necessarily require tribal enrollment.
3. The U.S. Dept of Interior-Bureau of Indian Affairs may identify an Indian child if no tribal membership determination is made by the child's tribe.

## ICWA STANDARD

### **Element #1: Identification of Indian Children**

The cornerstone of effective state-tribal relations in support of the provisions of ICWA is early identification of children with Indian heritage. One of the strong messages in ICWA is the prevention of the break-up of an Indian family. The early identification of Indian children sets the priority for providing intervention and support services that may keep the child safely with his or her family and eliminate the need for an out-of-home placement.

#### **Best Practice**

In EVERY case...at EVERY review:

- ✓ Ask parents, relatives, child, Indian custodian, referral source whether the child has Indian, Native Alaskan or other ancestry from indigenous people.
- ✓ Ask parents, relatives, child, Indian custodian, referral source if the child has ever been under the jurisdiction of any Tribal Court.

A genogram is an integral part of the family planning process when children become involved with children's services. In completing this family information, whenever family relationships are formed by adoption, it is important to ask questions about family heritage for both the child's adoptive and biological ancestors.

Frequently Indian heritage is not identified until after the Department and family have worked together for some time. Start the ICWA procedures from the moment the possible Indian ancestry is known. Document the child's Indian heritage and pertinent information on the genograms, in the alternate care plan in FOCUS and on the [ancestry form](#).

### **Element #2: Does ICWA Apply?**

ICWA applies to any "child custody proceeding" involving an "Indian child" in state court when the child is removed from the custody of the parent or Indian caretaker and that parent/Indian caretaker can not have the child returned to him or her upon request.

#### **Best Practice**

All actions where a child is or may be removed from the care of a parent or custodian could potentially become an ICWA covered proceeding, including:

- ✓ Foster Care Placements
- ✓ Termination of Parental Rights Actions
- ✓ Pre-Adoptive Placements
- ✓ Adoptive Placements
- ✓ Voluntary placements when child may not be returned upon demand

Ask -- Is this an Indian child?

- Is the child under 18 and unmarried?
- Is the child a member of a federally recognized Indian tribe?
- If not a tribal member, is the child eligible for membership AND the biological child of a tribal member?

If confirmed or possibly an Indian Child:

Ask -- Is this is an ICWA covered proceeding that may lead to...

- A foster care placement
- A termination of parental rights
- A pre-adoptive placement
- An adoptive placement

There are two types of court proceedings specifically excluded from ICWA:

child custody issues between parents and criminal court actions for offenses that would also be a crime if committed by an adult.

It is critically important that staff inform courts, attorneys and all parties to the case of any possible Indian heritage for a child to ensure ICWA provisions are applied. Once Indian heritage is indicated, children continue to be treated according to ICWA as Indian Children until they are specifically identified as non-members by their tribe or the Bureau of Indian Affairs, or a court has found the child not to be under the purview of the Indian Child Welfare Act.

### **Element #3: Jurisdiction Issues**

At any point during an investigation or action involving an Indian child who could possibly come within the jurisdiction of a tribal court, the appropriate tribal authorities must be notified immediately. In these cases where the Department is involved in an investigation, the regional Deputy Attorney General should also be notified.

ICWA identifies specific situations where tribal court has exclusive jurisdiction over child custody proceedings:

- The child is currently a ward of a tribal court prior to the incident that initiated the current action or investigation
- The issue initiating the current proceeding involves a child domiciled within the reservation boundaries who has a relationship to the tribe over which the tribal court could assert jurisdiction.
  - The state court may exercise emergency temporary jurisdiction while the child is off the reservation in order to prevent immediate physical damage or harm to the child, however the agency must transfer the case to the appropriate tribal court as quickly as possible.
- A tribal court has the option to request the state court to keep a case or take jurisdiction of a case that could be heard in tribal court.
- If an Indian child is the subject of a foster care placement or termination of parental rights proceeding in state court, the parents, Indian custodian or tribe may request that the case be transferred to tribal court.
  - The transfer jurisdiction provisions do not apply to pre-adoptive or adoption proceedings that are not also foster care placements or termination of parental rights proceedings.
  - Upon receipt of the case transfer request, the state court must transfer unless either parent objects, the tribal court declines jurisdiction, or the court determines good cause to the contrary exists for denying the transfer.
    - Good cause not to transfer a case must be shown by clear and convincing evidence.

### **Element #4: Notices of Action**

ICWA requires that any time an Indian child or possible Indian child is likely to be or is currently placed at a care setting outside their parent/caretaker's home, the child's parents, Indian custodian, and tribe MUST be given advance written notice of court hearings. If

paternity is established, notice is sent to both parents. The parents' Indian heritage is not a factor for the parental notice requirement.

Notice Links:

- [Template for Letter to Parents/Caretakers](#)
- [Template for Letter to Tribal Designated Agent](#)
- [Template for Notice of Court Proceedings](#)
- [Form with Ancestry Information](#)

If the child's tribal heritage is not specific, all possible tribes should be contacted as soon as possible to seek verification of the child's Indian status. Making telephone contacts with tribal social and/or legal services offices prior to sending letters is desirable if tribal membership for the child is likely. If the Indian child is not known to be a member of a specific tribe at the time of mailing, the notices must also be sent to the Department of the Interior- Bureau of Indian Affairs.

If the child's tribal affiliation is known but more than one federal recognized tribe is noticed, include a letter to the BIA – Portland Area Office:

[Template for Letter to BIA Office at Portland](#)

If the affiliation information indicates Indian heritage but no specific tribe is identified, send a letter to the BIA in Washington D.C.:

[Template for Letter to BIA Office at Washington D.C.](#)

ICWA requires that notice must be sent by registered mail with a receipt signature or by personal service. The notice must be received by the parent/tribe at least ten days prior to the court proceeding. If a parent or Indian custodian requests additional time to prepare for the proceeding, they are automatically granted an additional 20 days to prepare.

#### **Best Practice**

The additional 20 days preparation time offered to parents at their request is the ideal time to develop "active effort" plans supporting the reunification of the child's family.

ICWA provides that the notice must contain the following information:

- Name of child;
- Tribal affiliation;
- A copy of the petition or other document initiating the action;
- Name of the petitioner and attorney;
- Right to intervene;
- Right to appointed counsel (for parents);
- Right to 20 additional days to prepare;
- Location, address and phone of Court;
- Right to transfer to tribal court;
- Consequences of action;
- Confidentiality assurances

#### **Best Practice**

Finding that the child is an Indian child is not a prerequisite to providing notice. ICWA provides for notice to a tribe or tribes when the court has "reason to believe" that the child is an Indian child.

An Indian child's tribe has the right to intervene at any point in a foster care placement or termination of parental rights proceeding. The right to intervene is not limited to "involuntary" proceedings even though the act only provides for notice in "involuntary" proceedings. Because of the right of intervention and the right to seek transfer of the case to tribal court, **the best practice should be to provide notice to the tribe in every case.**

Every tribe notifies the Bureau of Indian Affairs annually by providing contact information for their designated ICWA agent. This contact information is published in the federal register each year. To find the addresses for notices to tribes review the designated ICWA agent lists that are sorted [alphabetically](#) and by the BIA [regional areas](#).

#### **Best Practice**

Tribe/family participation can help identify sources for:

- Kinship placements
- Traditional healing services
- Knowledge of family/clan ceremonies and practices
- Tribal cultural activities
- Family gatherings for building relationships
- IHS and tribal services treatment resources

An important purpose of the notice is to encourage participation of the child's tribe and family in the planning for this child. The tribal representative may choose not to petition for transfer the case to tribal court, not to officially intervene to become a full party to the case in court, and still participate in case planning for the child. Ideas and input from parents and extended family members will strengthen permanency planning. Outreach to the tribal and family representatives to consult, discuss and plan for the child should proceed continuously throughout the time the child is in an out-of-home placement.

Notice to all parties is to be sent at initial identification of the Indian child, when the child's placement is changed, and prior to the following court actions: all court hearings, six month review, permanency planning hearing, TPR's for parents, and adoption proceedings.

### **Element #5: Specific ICWA Requirements**

#### Initial and on-going Active Efforts

ICWA requires any party considering the removal of an Indian child from the home of his parents or Indian custodian to engage in "active efforts" by providing remedial and/or rehabilitative services to avoid removal of the child. Likewise, once removed from the home, "active efforts" must be on-going with the goal of providing services to the child and family that will support the safe return of the child to the home of the parent(s) or Indian custodian. Active efforts require the removing party to go beyond the reasonable efforts standard outlined in ASFA. Review the [Active Efforts Principles](#) document.

#### Qualified Expert Witness

ICWA requires that for all children who are possible or verified Indian children, the court must find that the child will likely suffer serious emotional or physical damage if the child remains or returns to the home of his parent or Indian custodian. This finding must be supported by the testimony of a qualified expert witness. The qualified expert must have knowledge of Indian culture and traditions and be capable of giving an opinion on whether

a particular Indian child's continued custody with the parent or Indian custodian would likely result in serious emotional or physical damage to the child. Regional procedures will be used by the caseworker to reimburse the **qualified expert** for the expenses and honorarium for their time spent researching and testifying.

**Best Practice**

Under ICWA, unfitness issues such as abandonment and unstable home environment are not automatic grounds for removal of an Indian child. The child must be likely to suffer serious emotional or physical damage to justify removal.

ICWA specifies two points in child custody proceedings when expert witness testimony must be provided to the court:

- (1) at the time the child is removed from the home of a parent or Indian custodian (testimony to be provided at the adjudicatory hearing if possible, but never delayed beyond 90 days from the child's removal date); and
- (2) prior to the termination of parental rights for either parent of an Indian child.

Use of a qualified expert witness helps to establish the enhanced levels of evidence outlined in ICWA. The evidence standard for removal of an Indian child is clear and convincing and the standard for termination of parental rights is beyond a reasonable doubt.

Placement Preferences

ICWA requires specific placement preferences for Indian and possibly Indian children entering foster care to be placed in the least restrictive setting and nearest their family. The placement preferences must be sought each time the child moves to a new living situation, with the relative placement always being the most desirable. The preferences are listed in order of priority:

- A member of Indian child's extended family (whether Indian or non-Indian);
- A foster home licensed, approved, or specified by child's tribe (this may include the tribe's approval of a non-Indian resource home);
- An Indian foster home licensed or approved by an authorized non-Indian agency; or
- An institution for children approved by an Indian tribe or operated by an Indian organization and that is suitable to meet the child's needs

When an Indian child's permanency plan is to find an adoptive or long-term guardianship placement, the ICWA placement preferences vary slightly and are:

- a member of the Indian child's extended family,
- other members of the Indian child's tribe; and
- other Indian families

ICWA does permit tribes to change the order of the placement preferences by enactment of a tribal resolution. The Act requires children's agencies and courts to adhere to the tribally altered preferences when a child is a member of that tribe. No tribes in Idaho have passed resolutions to change the placement preferences, but that is a question to ask when consulting with tribal court and tribal social services staff.

ICWA does refer to the courts' ability to deviate from the placement preferences if there is "good cause" but the Act does not define "good cause". BIA Guidelines provide that good cause may be found under the following circumstances:

- The request of the biological parents or the child when the child is of sufficient age. Often this request is involved when attempting to keep sibling groups together during their time in out-of-home placement.
- The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
- The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria

**Best Practice**

A diligent search for an Indian foster family would include contacts with extended family members, the tribal social services program, a search of all county/state listings for available Indian homes, and contact with national programs with available Indian placement resources.

Involuntary Termination of Parental Rights

**Best Practice**

Involuntary termination of parental rights under ICWA requires proof *beyond a reasonable doubt*.

ICWA requires that proceedings for involuntary termination of an Indian child's parental rights must include testimony of a qualified expert witness. In addition, involuntary termination of parental rights under ICWA requires proof beyond a reasonable doubt that continued custody would result in serious emotional or physical harm to the child. This extremely high standard of proof for termination of parental rights in ICWA cases reflects the fact that for most Indian people termination of parental rights is not recognized in their culture or their tribal legal system. In many instances, the child's family and tribe will either refuse or be unable to recognize parental termination orders entered by state courts.

**Best Practice**

Permanency planning for Indian children should take into consideration their tribe's beliefs about TPR. Permanent placement options that do not require TPR may be the best alternative, even though this prohibits many payment subsidies for the child.

Long term guardianship, relative placement, and customary adoptions without TPR are all acceptable permanency plans that meet ASFA guidelines.

**Element #6: Voluntary Proceedings**

Voluntary Termination of Parental Rights

ICWA requires specific actions and timelines when a parent(s) of an Indian child consents to termination of their parental rights. The consent must be:

- in writing

- recorded before a judge in a court of competent jurisdiction
- the judge recording such a consent must certify that the consequences of consenting were fully explained to the parent(s), in a language understood by the parent(s), and that the parent(s) confirmed the explanations were understood
- executed more than ten days after the birth of a child

Since the child’s tribe must be notified prior to voluntary TPR is completed, courts usually do not hear the testimony of a qualified expert witness for the case.

ICWA does allow for the parents’ withdrawal of consent up to the TPR order or entry of an order of adoption. There are no formal requirements for withdrawal of consent. The withdrawal request may be verbal. The right to withdraw consent to termination applies even when the parent may not have the right to immediate custody of the child. The right to withdraw consent may extend up to two years past an adoption if it can be shown that the consent was based on fraud or duress.

### Voluntary Placement in Out-of-Home Setting

The purpose of ICWA was not only to eliminate unwarranted involuntary removals of Indian children, but also to make voluntary displacement of children more difficult. As a result ICWA applies both to voluntary and involuntary proceedings that may result in the removal of an Indian child from his or her home. It also applies in many private proceedings whether voluntary or not.

<p><b>Best Practice</b></p> <p>Identification of an Indian child and potential ICWA applicability should be established for <i>any child</i> coming to DHW care via voluntary agreement. All ICWA provisions must be met at any point when the Indian child would not be returned to the parent/Indian caretaker immediately upon their request.</p> <p><b>If the potential exists for NOT returning the child upon the parent/caretaker’s request, immediately start active efforts to prepare for reunification of the family.</b></p>
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**The ICWA law uses the term “voluntary” in several sections with more than one meaning.** The first refers to a “voluntary placement” and is used to describe the situation when the parent(s)/Indian custodian may immediately have their child returned to them upon demand without requiring any court process. Idaho’s *DHW Children and Family Services Voluntary Placement Agreement* contains the necessary language to assure immediate return of the child to the parent’s care upon request.

In this case, the child’s voluntary placement for child protection or children’s mental health treatment services would NOT initially be governed by ICWA. However, if a voluntarily placed child continues living in the out-of-home setting and the case goes before a judge (including the 180-day judicial determination of need for continued care) the ICWA provisions **will** apply to the case. Voluntary placements of Indian children who come from a family with child protection risk factors can quickly move to court involvement if the family situation continues to deteriorate. Therefore, the suggested course is to treat agency-

supervised voluntary placements of Indian children from families with child protection risk factors as if ICWA applies.

#### **Best Practice Recommendation**

Agency-supervised voluntary placements of Indian children with child safety risk factors should be treated as if ICWA applies:

- ✓ The child's tribe should be notified of such placements, and
- ✓ The placement should comply with the ICWA placement preferences

The second situation is referenced in ICWA as a “voluntary *foster care* placement.” This term outlines a situation where a parent voluntarily enters into an arrangement that specifies a current or future point in their child's care when the parent may not have their child returned to them upon demand. This type of placement is governed by ICWA. If the voluntary agreement that is signed by the parent(s)/Indian custodian does not allow for immediate return of the child upon demand, then the agreement to place the Indian child in care must be:

- in writing
- recorded before a judge in a court of competent jurisdiction
- the judge recording such a consent must certify that the consequences of consenting were fully explained and understood by the parent
- signed more than ten days after the birth of a child

#### **Element #7: Documentation Requirements**

Inclusion of the explanation of the elements of ICWA compliance in the following:

- Intake worksheet
- Genogram/Ancestry Chart
- FOCUS entries
- Narrations
- Alternate Care Plan
- Court reports
- Copies of Notice Letters
- Registered mail receipts for Notice Letters
- Evidence to support qualifications of Expert Witnesses
- Tribal membership correspondence
- Evidence of suitability of families to meet placement preferences
- Explanation of recommendations if TPR not done

#### **RELEVANT LAWS and RULES**

[ICWA Text](#)

[Idaho Statute - Title 16 Juvenile Proceedings, Chapter 16 Child Protective Act](#)  
[Indian Custody Proceedings: BIA Guidelines for State Courts](#)

## **FORMS/GUIDANCE**

Active Efforts Document  
Alphabetical List of ICWA Contacts by Tribal Affiliation  
ICWA Designated Agent List by BIA Service Areas  
Qualified Expert Witness List

### Notice Templates:

- Ancestry Form
- Notice to parents/Indian caretaker
- Notice to Tribes' designated ICWA agent
- Hearing Information
- Notice to BIA Portland Area Office
- Notice to Dept. of Interior – BIA in Washington DC

## **WEB LINKS**

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

### Federally Recognized Tribes in Idaho:

Coeur d'Alene	<a href="http://www.cdatribe.com/">http://www.cdatribe.com/</a>
Kootenai of Idaho	<a href="http://kootenai.org/">http://kootenai.org/</a>
Nez Perce	<a href="http://nezperce.org/Main.html">http://nezperce.org/Main.html</a>
Northwestern Band of the Shoshone Nation	<a href="http://www.nwbshoshone-nsn.gov/">http://www.nwbshoshone-nsn.gov/</a>
Shoshone-Bannock Tribes	<a href="http://www.shoshonebannocktribes.com/">http://www.shoshonebannocktribes.com/</a>
Shoshone-Paiute Tribes	<a href="http://www.idahorcd.org/duckval.htm">http://www.idahorcd.org/duckval.htm</a>

Any variance to these standards shall be documented and approved by the Division Administrator, unless otherwise noted