

# Indian Child Welfare Act: All the Changes and Updates You Need to Know



**4<sup>TH</sup> ANNUAL INDIAN CHILD WELFARE  
CONFERENCE  
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## Courts Before ICWA

This is not old history.  
See:

*Oglala v. Van Hunnick*  
2015 WL 1466067 (D. S.  
D.)

- Cultural biases regarding child rearing practices were used as justification for removal
- Neglect and “social deprivation” were the reasons cited for removal in 99% of cases in South Dakota
- Testimony from anyone besides the state’s case worker was rare
- Parents were coerced into voluntary agreements or relinquishments
- Attorneys were not provided for parents or children
- The burden was on the Indian family to prove they could provide for their children

# Data and the Risks



- AI/AN children experience child abuse and neglect at a rate of 16.5 per 1000 children (U.S. Health and Human Services, 2007)
- Native disproportionality rates for foster care placement have increased in the last 10 years from 1.5 to 2.5 (NCJFCJ, 2015)
- 50 to 80% of all identified human trafficking victims are or have been involved with child welfare services at some point in their lives. (State of Alaska Task Force on the Crimes of Human Trafficking, 2013)



## What this Means for Children

With children of color overrepresented in the foster care system, these negative consequences need to be kept in mind when deciding to place the child in foster care.

- Foster care children not only experience the trauma of being removed from their home, but are at increased risk for lower well-being measures (Casey Family Programs) such as:
  - Negative health outcomes and increased risk for chronic diseases
  - Increased rates of teen pregnancy, sexually transmitted infections (STIs) and HIV (Guttmacher Institute, 2011)
  - Serious emotional problems and other mental health issues
  - Increase risk for suicide
  - Decreased educational attainment
  - Higher rates of unemployment
  - Increased likelihood of incarceration
  - Increased rates of poverty
- ❖ Removing AI/AN children from their homes can cut their cultural and traditional connections.

# Why ICWA?



ICWA is designed to remedy cultural mistakes that have resulted in Native American children being placed in out of home care through:

- Requiring a higher burden of proof for removal
- Requirements that caseworkers look beyond the surface
- Involving extended families and tribes in cases
- Judicial understanding of Native values and tribal sovereignty



State Courts have  
Responsibilities

Parents and Indian  
Custodians have  
Rights

Tribes have Rights



**The Indian child is the heart of the law. Responsibilities and rights are assigned under the law - all designed to protect the children.**

## Timeline of Selected Major ICWA-Related Events, 2013 - Present



- **Sept. 5, 2013** – Attorney General Eric Holder announced creation of American Indian and Alaska Native Children Exposed to Violence
- **August 2014** – Department of Justice filed an amicus brief on behalf of tribes and Indian parents involved in the court case *Oglala Sioux Tribe v. Van Hunnik*, (the case was filed by two tribes in South Dakota two parents against the presiding judge in South Dakota’s seventh circuit; the States Attorney for Pennington County, South Dakota; the Secretary of the South Dakota Department of Social Services, the person in charge of DSS Child Protection Services in Pennington County, South Dakota)

## Timeline of Selected Major ICWA-Related Events, 2013 - Present



- **November 2014** – AG Task Force Submits Formal Report on American Indian and Alaska Native Children Exposed to Violence. The report recommends promoting greater ICWA compliance as one way to promote well-being for American Indian and Alaska Native Children.
- **December 3, 2014** – Attorney General Eric Holder announces new Department of Justice Initiative to promote compliance with the Indian Child Welfare Act (ICWA)
- **February 24, 2015** – The Bureau of Indian Affairs released updated ICWA Guidelines, effective immediately
- **March 18, 2015** – The Bureau of Indian Affairs published a proposed Federal Rule to govern ICWA implementation



## Timeline of Selected Major ICWA-Related Events, 2013 - Present



- **March 30, 2015** – The United States District Court District of South Dakota Western Division ruled in favor of the tribes in *Oglala Sioux Tribe v. Van Hunnik*, holding that the named individuals developed policies and procedures for the removal of Indian children in violation of the Indian Child Welfare Act and the Due Process Clause. The opinion referred to both the old and the revised BIA Guidelines at least a dozen times stating that the Guidelines are “entitled to great weight.”
- **April 4, 2016** – Interior announces interagency partnership (MOU) with Justice and HHS to strengthen ICWA implementation and compliance

# ICWA Requirements



- Inquiry and Notice
- Transfer of Proceedings
- Intervention
- Right to Counsel
- Active efforts
- Evidentiary burdens
- Qualified expert witness
- Placement preferences

# When Does ICWA Apply?



- Child custody proceedings involving children who fit the definition of “Indian child”:
  - Foster care placement
  - Termination of parental rights
  - Pre-adoptive placement
  - Adoptive placement



## Indian Child Definition



An unmarried person under 18 who is either

- ✦ A member of a federally recognized Indian tribe;
- OR
- ✦ Eligible for membership in a federally recognized Indian tribe
- ✦ AND is the biological child of a member of a federally recognized Indian tribe.

# Inquiry



“In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved . . . .”

How do you know? You must ask.

**Agencies and courts must ask whether the child is or could be an Indian child in EVERY child custody proceeding until it has been determined.**

Revised BIA ICWA Guidelines, A.3(c)



# Notice

Minimum Standard  
– Must be sent  
registered mail,  
return receipt  
requested.

**Notice is required  
for each  
proceeding (not  
just the first or  
the last).**

Revised BIA ICWA  
Guidelines B.6

- In any involuntary proceeding in a State Court, the agency or court shall notify:
  - The parent or Indian Custodian  
AND
  - The Indian child's tribe  
About
  - The pending proceedings AND
  - The right to intervene

Includes but is not limited to temporary custody, removal, foster care placement, adoptive placement, TPR hearings.

# Notice Timelines



- **General rule:**

The tribe and parents/custodians must receive notice 10 days prior to a hearing and may request an additional 20 days

# Jurisdiction



## State Court

**A state court has jurisdiction over child custody proceedings involving an Indian child:**

- Where the child is domiciled or resides off an Indian reservation, and is not a ward of the tribal court (25 U.S.C. 1911(b));
- Where the state has been granted jurisdiction on the reservation under Public Law 280;
- Through a tribal-state agreement in which the tribe allocates jurisdiction to the state (25 U.S.C. 1919(a)); and
- Through limited emergency jurisdiction where a reservation-resident Indian child is temporarily off the reservation and the state has removed the child in an emergency situation to prevent imminent physical damage or harm to the child .

## Tribal Court

**A tribe has jurisdiction over child custody proceedings involving an Indian child:**

- Where the child is domiciled or resides on an Indian reservation (25 U.S.C. 1911(a));
- When the child is a ward of the tribal court, regardless of the child's domicile or residence (25 U.S.C. 1911(a)); and
- Concurrent jurisdiction where the child is domiciled or resides off an Indian reservation and is not a ward of the tribe's court (25 U.S.C. 1911(b)).





# Emergency Removal

The time period for temporary custody without a hearing has been shortened from 90 days to 30 days except in extraordinary circumstances.

Revised BIA ICWA Guidelines, B.8

- ICWA allows emergency removal of an Indian child who is off the reservation in order to prevent imminent physical damage or harm.
- The Indian child must be returned home as soon as the threat of imminent physical harm has passed or the tribal court asserts jurisdiction, whichever is earlier.
- If the child is not returned or case transferred, the State Court “*shall expeditiously initiate a child custody proceeding subject to the [ICWA]*”



## Transfer of Proceedings

**Factors that should NOT be considered “good cause”:**

**Proceeding is at an advanced stage**

**Level of contacts child has with Tribe**

**Socio-economic conditions or perceived inadequacies of the Tribe or tribal entities**

**Prospective Placement**

Revised BIA ICWA Guidelines, C.2

A State Court shall transfer to tribal court a foster care placement or TPR proceeding involving an Indian child not domiciled or residing within the reservation of the child’s tribe when:

- Requested to do so,
- There is no good cause to the contrary,
- Neither parent objects, and
- The tribal court does not decline jurisdiction



## Right to Intervene



In any state court proceeding for the foster care placement or TPR of an Indian Child, the child's Indian custodian and tribe have:

- The right to intervene
- At any point in the proceeding

**State courts should allow participation (as needed) for family members and tribes by telephone, videoconferencing, or other methods if it possesses the capability.**

BIA Revised Guidelines, B.7

# Right to Counsel



- ICWA mandates that the state court appoint counsel for an indigent parent or Indian custodian in a “removal, placement, or termination proceeding”
- ICWA also allows a state court to appoint a lawyer for the Indian child but does not make that appointment mandatory (the statute provides that appointment of counsel for the child depends on the best interest of the child)

# Active Efforts



Any party seeking foster care placement or TPR of an Indian child shall satisfy the court that:

- ❖ **Active efforts** have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family; and
- ❖ These active efforts have been unsuccessful.

Take into consideration the prevailing social and cultural conditions and way of life of the Indian child's tribe; and

Involve and use the available resources of the extended family, the tribe, Indian social services, and individual Indian caregivers.



## Active Efforts cont.:



The requirement to engage in active efforts begins from the moment the possibility arises that an agency case may result in the need for an Indian child to be placed outside the home or custody of parent or Indian custodian.

**Active efforts must be conducted while investigating whether the child is a member of a tribe or eligible for membership.**

Revised BIA ICWA Guidelines, B.1



## ASFA and Active Efforts

**ASFA's  
exceptions to  
reunification  
efforts do not  
apply to  
ICWA  
proceedings.**

Revised BIA ICWA  
Guidelines, A.2

ASFA does not alter ICWA's **active**  
efforts requirement.

Even where ASFA may relieve the State from  
proving reasonable efforts (e.g., when  
aggravated circumstances exist), **active  
efforts must be proved.**

Active Efforts are required in every ICWA  
case.

# Heightened Burden of Proof



- **No Foster care placement in the absence of**
  - clear and convincing evidence (including testimony of at least one qualified expert witness)
  - that continued custody is likely to result in serious emotional or physical damage to the child
- **No TPR in the absence of evidence:**
  - beyond a reasonable doubt (including testimony of at least one qualified expert witness)
  - that continued custody is likely to result in serious emotional or physical damage to the child





## Qualified Expert Witness

Descending Order:

Member of the Indian  
child's tribe, recognized as  
knowledgeable

Member of another tribe,  
recognized by Indian  
child's tribe

Layperson recognized by  
child's tribe as having  
substantial experience  
delivering services to tribes  
and knowledge of child's  
tribe's practices

Professional person who  
can demonstrate  
knowledge of practices  
within child's tribe

Revised BIA ICWA Guidelines, D.4

- Person qualified to address whether continued custody will result in serious emotional or physical damage to the child
- Requires knowledge of tribal culture, family and child-rearing practices
- Cannot be an employee of the agency seeking foster care placement or TPR
- The QEW is the State's witness

# Placement Preferences, Foster Care Placement



Absent good cause to the contrary, a State court shall follow these preferences for the foster care placement of an Indian child:

- 1<sup>st</sup> Extended Family
- 2<sup>nd</sup> Foster home licensed by Tribe
- 3<sup>rd</sup> Indian foster home licensed by State
- 4<sup>th</sup> Institution approved by Tribe
- 5<sup>th</sup> Other foster homes licensed by State

Indian tribes are permitted under ICWA to change the order of the act's placement preferences, so you must investigate with each tribe you encounter the order of its particular preference scheme

## Further information about “good cause” to deviate from placement preferences:



- Does not include normal bonding or attachment that may have resulted from a non-compliant placement
- Should not be based on an independent consideration of the child’s best interests
- Should not consider the socio-economic status of any placement relative to another
- Placement may not be considered unavailable if it conforms to prevailing social and cultural standards of the Indian community.

Revised BIA ICWA Guidelines, F.4



## Placement Preferences, Adoptive Placement

Absent good cause to the contrary, a State court shall follow these preferences for the adoptive placement of an Indian child:

- 1<sup>st</sup> Member of child's extended family
- 2<sup>nd</sup> Other members of the child's Indian tribe
- 3<sup>rd</sup> Other Indian families



## Voluntary Placements

Voluntary placements that do not prohibit the child's parent/Indian custodian from regaining custody upon demand are not covered by ICWA. (Written agreement with explicit terms required.)

Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or place the child in a preadoptive or adoptive placement are covered by ICWA.

When a parent or Indian custodian voluntarily consents to foster care placement or relinquishment and TPR, it must be in writing and clear that the parent understand what they are agreeing to do.

Whenever a parent(s) or Indian custodian(s) seek to temporarily place an Indian child out of the home, or to voluntarily terminate parental rights, consent to placement must:

- Not be given prior to or within 10 days after birth;
- Be in writing; and
- Be recorded before a judge

# Best Interests of the Child



In ICWA, Congress determined that retaining an Indian child in his or her culture or placing an Indian child in a culturally appropriate placement best serves the needs of that Indian child.

25 U.S.C. 1902

# Links



How to find the Revised BIA ICWA Guidelines:

<http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>

How to find the MOU:

<http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-033719.pdf>

# Miigwech – Thank you

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