

Indian Child Welfare Act: An Introduction

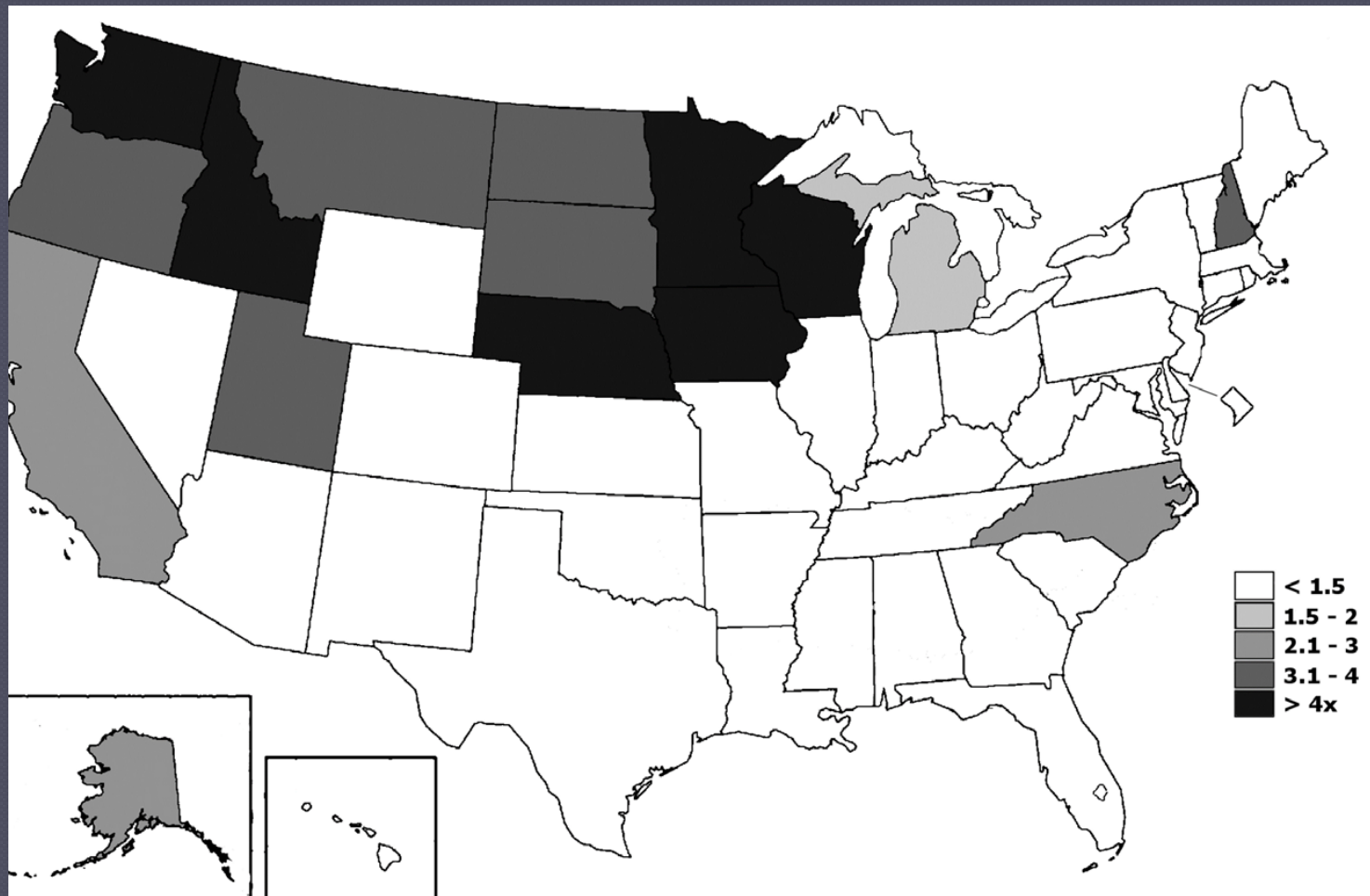
Oregon Mini Child Abuse and Neglect Institute
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Why do we have an Indian Child Welfare Act?

Congress passed ICWA in 1978 in response to their findings that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies” and that states “often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 U.S.C. § 1901



According to the 2018 Child Welfare Data Book (published May 2019), Indian children in Oregon are placed in foster care at 3.2 times the rate one would expect based on their share of the general population.



Native American Children in State Foster Care Systems

The rate at which children identified as Native American are in state foster care per their percentage of the total state population. In the darkest states, Native American children are 4 times or more as likely to be in foster care as they are in the general population. Data from Summers, Alicia. *Disproportionality Rates for Children of Color in Foster Care*. National Council of Juvenile and Family Court Judges, 2015.

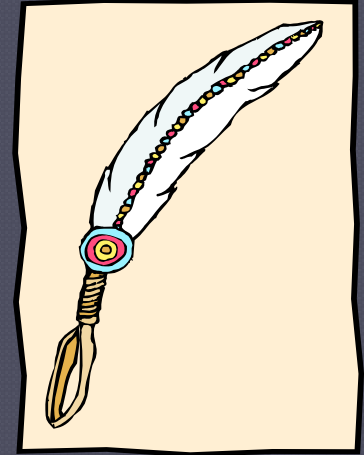
Policy and Objectives

It is the policy of this Nation to protect the best interests of Indian children. 25 USC § 1902

3 objectives:

1. Eliminate the need to remove Indian children from their families and tribes
2. Assure that Indian children who must be removed be placed in homes that reflect their unique cultures
3. Encourage tribal court adjudication of child custody proceedings that involve Indian children

When does the ICWA apply?



ICWA applies when there is:

1. A “**child custody proceeding**”
2. Involving an “**Indian child**”

A “child custody proceeding” is defined in 25 U.S.C. § 1903 as:

- foster care placements
- termination of parental rights
- pre-adoptive placements
- adoptive placements
- **voluntary proceedings** (where parent cannot regain custody upon demand)
- emergency removals

When ICWA applies...

ICWA applies when there is:

1. A “**child custody proceeding**”
2. Involving an “**Indian child**”



A child is an “Indian child” under ICWA if:

- She/he is an unmarried person under the age of 18, and
- The child is a member of a federally recognized tribe, or
- The child is eligible for membership in a federally recognized tribe and is the biological child of a member/citizen of a federally recognized tribe.

Tribes have sole authority to determine their membership.

How can you know if a child is an “Indian child”?

The court should ask in **every child custody proceeding**:

Do you know, or is there reason to know, if the child is an “Indian child” under the Indian Child Welfare Act?

Indications of “reason to know” include:

- Someone tells the court the child is an Indian child
- The domicile/residence of the child or parent/Indian custodian is on a reservation or in an Alaska Native village
- The child is or has been a ward of a tribal court
- Either parent or child has an ID indicating tribal membership

If there is “reason to know” the child is an Indian child, treat the child as if ICWA applies unless and until it is determined on the record that the child is not an Indian child.

Who has jurisdiction over a child custody proceeding involving an Indian child?

Indian child's tribe has exclusive jurisdiction over the case if:

- 1) Indian child's domicile/residence is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings or
- 2) Indian child is a ward of the tribal court

In these cases, the state court must dismiss the action.

The court must expeditiously notify the tribal court of the pending dismissal, dismiss the state court child-custody proceeding, and ensure the tribal court is sent all information about the proceeding, including pleadings and court record. 25 CFR § 23.110

What does the ICWA require?

NOTICE REQUIREMENTS

ACTIVE EFFORTS

CLEAR AND CONVINCING EVIDENCE

QUALIFIED EXPERT WITNESS TESTIMONY

PLACEMENT PREFERENCES

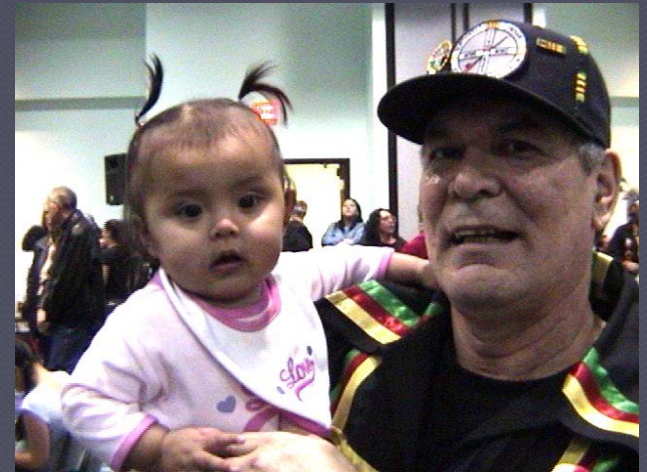
TRANSFER TO TRIBAL COURT

RIGHT OF TRIBE TO INTERVENE



What are the notice requirements for child-custody proceedings involving an Indian child?

- The court must ensure that the party seeking placement promptly sends notice of each child-custody proceeding.
- Notice must be sent to each tribe where the child may be a member, the child's parents, and, if applicable, the child's Indian custodian.
- Notice must be sent by registered or certified mail with return receipt requested.
- Notice must contain the requirements set forth in 25 CFR § 23.111(d).



What time limits and extensions apply to the notice requirements?

No foster care placement or TPR proceeding may be held until **AT LEAST 10 DAYS AFTER RECEIPT** of the notice of that particular proceeding. 25 CFR § 23.112

The parent, Indian custodian, and tribe each have a right to request and be granted up to 20 additional days from the date notice was received to prepare for the proceeding.

NOTE: These notice requirements do not apply to emergency removals.

What are Active Efforts?



Prior to ordering a foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

ACTIVE EFFORTS:

Affirmative, active, thorough, and timely efforts intended to maintain or reunite an Indian child with his/her family.

NOTE: If removal occurred during an emergency, DHS shall be considered to have made active efforts. ORS 419B.340(3)

What is the applicable standard of evidence?

The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the parent/Indian custodian is likely to result in serious emotional or physical damage to the child.

For termination of parental rights, the standard is beyond a reasonable doubt.

For both, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody will result in serious emotional or physical damage to the child.

Who may serve as a qualified expert witness?

Must be qualified to testify regarding whether the child's continued custody by the parent/Indian custodian is likely to result in serious emotional or physical damage to the child,

Should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.

The social worker assigned to the case may not serve as the qualified expert witness.



What placement preferences apply in foster-care or preadoptive placements?

The child must be placed in the least restrictive placement that:

1. Most approximates a family
2. Allows the Indian child's special needs to be met, and
3. Is in reasonable proximity to the Indian child's home, extended family, or siblings.

Placement Preferences:

1. Extended family
2. Foster home licensed, approved, or specified by the tribe
3. Indian foster home licensed/approved by a non-Indian licensing authority, or
4. Institution for children approved by an Indian Tribe or operating by an Indian organization which has a suitable program for the child

How are petitions for transfer of a proceeding made? What happens after a petition for transfer is made?

A parent, Indian custodian, or child's tribe may request, at any time, orally on the record or in writing, that the state court transfer a foster care or TPR proceeding to tribal court. 25 CFR § 23.115

Upon such a request, the state court must ensure that the tribal court is promptly notified in writing of the transfer petition. 25 CFR § 23.116



What are the criteria for ruling on transfer petitions?
How is a determination of “good cause” to deny transfer made?

The state court must transfer the child-custody proceeding unless:

- Either parent objects to the transfer
- The tribal court declines the transfer or
- Good cause exists for denying the transfer 25 CFR § 23.117

If the court believes or any party asserts that “good cause” to deny transfer exists, the reasons must be part of the record.

In determining whether “good cause” exists, the court must not consider the circumstances listed in 25 CFR § 23.118.

Intervening in the Proceedings

The child's tribe has the right to intervene at any time in a state court proceeding for the foster-care placement or termination of parental rights to an Indian child. 25 CFR § 23.111



Sioux children in the Genoa Industrial School for Indian Youth in Nebraska in 1910, courtesy of the Adoption History Project, University of Oregon

Shelter Hearings: Putting it all together

In every case, the court should inquire if there is knowledge or reason to know if the child is an Indian child. If so, ICWA applies.

Next, the court should confirm that the ICWA notice requirements have been met **AND** a qualified expert witness is available to testify.

If so, the shelter hearing should proceed.

If not, the court may hear testimony to determine if an emergency removal applies. If the court determines an emergency removal applies, the court may order a foster-care placement for the child.

If not, the court cannot order a foster-care placement for the child and must set over the shelter hearing until notice can be given and/or a qualified expert witness can testify.

Shelter Hearing for an Indian Child

If the shelter hearing can occur, the court must make the following findings:

- Whether active efforts were made prior to removal to prevent the breakup of the Indian family
- Whether there is clear and convincing evidence, supported by the testimony of a qualified expert witness, that continued custody of the child by the parent/Indian custodian is likely to result in serious emotional or physical damage to the child
- Whether the child is placed within the placement preferences as required by 25 U.S.C. §1915(b), and, if not, whether there is good cause not to follow the placement preferences.

Shelter Hearing for an Indian Child

Other inquiries:

- Did parents/Indian custodian receive proper notice?
- Did all applicable tribes receive proper notice?
- Was notice sent to BIA?
- Does child reside on reservation or is child a ward of tribal court?
- What efforts were made to identify extended family?
- Do parents understand English?
- Is emergency removal/placement necessary to prevent imminent physical damage or harm to child?

What are the standards for emergency proceedings involving an Indian child?

An emergency removal is a removal/placement of an Indian child under state law without the full suite of ICWA protections.

The state court must:

- Make a finding on the record that the emergency removal/placement is necessary to *prevent imminent physical damage or harm* to the child

A petition to a court requesting the emergency removal of an Indian child must include the requirements set forth in 25 CFR § 23.113(d).

At any time that the court or agency receives information or evidence that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm, the court must terminate the emergency proceeding.

How is an emergency proceeding terminated?

An emergency proceeding can be terminated by one or more of the following actions:

- Initiation of a child-custody proceeding subject to the provisions of ICWA
- Transfer of the child to the jurisdiction of the appropriate Indian Tribe
- Return the child to the parent or Indian custodian

An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court determines that restoring the child to the parent/Indian custodian would subject the child to imminent physical damage or harm, the court has been unable to transfer the proceeding to the appropriate tribe, and it has not been possible to initiate a “child-custody proceeding”

Emergency Removal

If the court is able to determine that emergency removal is necessary, DHS is required to “expeditiously initiate” a child-custody proceeding subject to all ICWA hearing requirements.
(25 U.S.C. §1922, 25 U.S.C. §1912(e), 25 CFR §23.113)



What does ICWA require for Termination of Parental Rights?

Notice requirements were met - 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)

Active Efforts were made to provide remedial services and rehabilitation programs designed to prevent the breakup of the family, and those efforts were unsuccessful

Evidence beyond a reasonable doubt, including testimony of qualified expert witness, that continued custody of the child by the parent/Indian custodian is likely to result in serious emotional or physical damage to the child. This standard of evidence applies to all elements required for TPR.

Resources

NCJFCJ Indian Child Welfare Act Judicial Benchbook

<https://www.ncjfcj.org/ICWABenchbook>

Code of Federal Regulations

<https://www.ecfr.gov/cgi-bin/text-id.x?SID=f9d5403791ac0704a524cabb1c4934d7&mc=true&node=sp25.1.23.i&rgn=div6>

US Code- Indian Child Welfare

<http://uscode.house.gov/view.xhtml?path=/prelim@title25/chapter21&edition=prelim>