

Appendix I

A Guide to Compliance With the Indian Child Welfare Act

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Following is a guide to Indian Child Welfare Act (ICWA) compliance. This information, including the flow chart on page 12, is from the National Indian Child Welfare Association's curriculum, "Cross Cultural Skills in Indian Child Welfare: Guide for the Non-Indian" (1987), with information derived from Oregon Children's Services Division's "A Guide and Checklist to ICWA Compliance," developed by Maria Tenorio, ICWA Specialist, Salem, Oregon, 1986.

State rules and regulations may vary from this guide; therefore, workers should make sure they know what their agency requires. Also, many States supply sample letters and/or checklists for compliance. Following this guide will ensure compliance with the Act, but not necessarily State rules.

WHEN THE ACT APPLIES

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. Several tribes now have agreements with State agencies on child welfare matters.

Not Covered

Juvenile delinquency proceedings (violations of criminal law) are not covered with two exceptions:

- Juvenile delinquency proceedings where parental rights may be terminated; and
- Status offenses (juvenile delinquency proceedings which involve an offense that would not be a crime if committed by an adult, e.g., drinking, being a runaway, and being a truant)

Divorce proceedings when one parent is granted custody

Voluntary placement if the parent may regain custody "upon demand" (placement preferences still apply)

Covered

- Foster care placements
- Termination of parental rights
- Preadoptive placements

Adoptive placements (include conversion from foster care to adoptive placement)

- Both voluntary and involuntary placements if parents can't regain custody of child "upon demand"
- Divorce proceedings in which neither parent will get custody
- Juvenile delinquency proceedings where parental rights may be terminated
- Status offenses (juvenile delinquency proceedings which involve an offense that would not be a crime if committed by an adult, e.g., drinking, being a runaway, and being a truant)

Initial Determination

Oral Inquiry

At intake, and in every change or potential change in custody, the worker orally requests racial/ethnic data by reading aloud the racial/ethnic categories for the client's self-identification and asks: "Which of the following do you consider yourself a member: Asian, Black, Hispanic, Indian, White?"

If the family member responds that he or she is Indian or believes there is Indian ancestry, the worker fills out a family tree chart with the help of client family or other form provided by the agency.

Indian Tribe Verified

If the Indian tribal name and/or address is given, proceed to next section.

Indian Heritage Uncertain

If the parents are unavailable or unable to provide a reliable answer regarding the Indian heritage of their children—

- Make a thorough review of all documentation in the case record;
- Contact the previous caseworker, if any; and
- Make a close observation of the physical characteristics of the child, parents, siblings, and relatives.

Indian Tribe Unknown

If, in following the above steps, you have reason to believe the child is Indian, you will need to identify the Indian tribe by—

- Consulting with other relatives or extended family members; and
- Contacting, as appropriate, the suspected tribe, an Indian social services organization, or the Bureau of Indian Affairs.

Inquiry to Indian Tribe

- The worker checks with the child's tribe to determine whether the child is a member or is eligible for membership. If several tribes are suspected, the worker should send the inquiry letter to all of them.
- The worker can also telephone tribe(s), since this inquiry does not constitute the required official notice to a tribe. Any phone conversation should be documented in the case record with a letter to the effect, "As we discussed by phone today, you believe (stated)... etc."

Tribe Does Not Respond

If the tribe does not respond, call the tribal enrollment officer and follow up with a letter documenting the conversation.

Child Eligible for Membership

- If the tribe responds that the child is eligible for membership, request (or assist the family in filling out) application forms. Proceed to next section.
- If necessary, counsel parents hesitant to enroll a child by emphasizing the positive benefits of tribal membership.

Child Eligible 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; and
- 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.

Cultural Heritage Protection

For cases in which ICWA does not apply, but the child is biologically an Indian, and considered Indian by the Indian community, follow the Act in your case planning. Respect the child's right to participate in the culture of origin, particularly if such child is identifiably Indian by physical features and/or social relationships declaring the child to be Indian.

THE STATE MAY HAVE NO JURISDICTION

Exclusive Jurisdiction

Some tribes have exclusive jurisdiction over child welfare matters. If the child is a member of such a tribe, the child must be released to his or her parents unless this is an emergency (protective services) removal. You may wish to make a referral to the tribe's social services department to notify them of the family's difficulties.

Nationwide tribes with exclusive jurisdiction as of 1987 are Yakima, Spokane, Colville, and Muckleshoot (Washington); Omaha (Nebraska); Penobscot (Maine); Lac Courte Oreilles and Ho-Chunk Nation (formerly known as the Wisconsin Winnebago) (Wisconsin); Passamaquoddy (Maine); White Earth (Minnesota); and Warm Springs and Burns Paiute (Oregon).

Tribal Court Ward

A tribe has exclusive jurisdiction over tribal court wards, regardless of the child's residence or domicile.

If there is reason to believe that the child has resided or is domiciled on the reservation, phone the tribal court clerk to ask whether the child is a ward of the tribal court.

If yes, the child must be released to parents or custodians unless this is an emergency (protective services) removal. You may wish to make a referral to the tribe's social services department at the same time.

If not, be sure to document this fact in the case record.

NOTICE

Timelines

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 custodian, OR after 30 days if 20 days is requested by the parents or custodian to prepare for the proceeding; 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 BIA. (See below.)

Who Receives Notice

- Parents, always
- Custodian, if one is involved
- Tribe, always
- If child is affiliated with or eligible for membership in more than one tribe, all tribes should receive notice
- The BIA only if the identity/location of parents or custodians cannot be determined

Service of Notice

Notice should be served in person whenever possible; otherwise, notice should be served by registered mail, return receipt requested. File a copy of this notice with the court, along with any returned receipts or other proof of service.

Tribe Does Not Respond

Even if a tribe does not respond to an official notice sent, or if the tribe replies that it does not wish to intervene in the proceeding, continue to send the tribe notices of every proceeding. It is important to keep the tribe informed because the tribe can intervene at any point in the proceeding to assert its interest and the tribe has the right to notice of all hearings, motions, and other actions related to the case.

Translation of Notice

If there is reason to believe that the parent or Indian custodian will not understand the notice because of possible limited English proficiency, a copy of the notice shall be sent to the BIA Area Office nearest to the residence of that person. BIA staff should be requested to arrange to have the notice explained in the language that the person best understands. The BIA, by Federal regulation, is required to assist in identifying interpreters.

Transfer to Tribal Court

Section 191 L(b) of ICWA allows the parent or custodian or Indian tribe to transfer the proceeding to tribal court. The State court must transfer the proceeding unless the tribal court declines jurisdiction,

either parent objects to such transfer, or if the court determines that good cause exists to deny the transfer.

If the tribe requests orally, or in writing, a transfer of the proceeding to its tribal court—

- Inform the parents or custodians of their right to object to the transfer.

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

- They should state in writing their reasons for such belief; and
- Their written statement must be distributed to all parties so that everybody has the opportunity to provide the court with their views.

Services To Prevent Out of Home Placement

Active efforts must be undertaken to provide remedial services subsequent to an investigation and before a decision is made to place the child out of the home. Proceed by—

- Contacting the tribal social services program for involvement at the earliest possible point; and
- Using other community services specifically designed for Indian families:
 - Extended family;
 - Urban Indian program, when appropriate; and
 - Individual Indian caregivers, such as medicine men.

Definition of Active Efforts

Active effort means not just an identification of the problems or solutions, but efforts showing an active attempt to assist in both arranging for the best-fitting services and helping families to engage in those services. *These can be demonstrated by—*

- Making an evaluation of the family's circumstances that takes into account the prevailing social and cultural conditions and the way of life of the child's tribe and/or Indian community.
- Intervening only when supported by relevant, prevailing Indian social and cultural standards regarding intervention in familial relationships by people who are not members of the family:
 - Develop a case plan with assistance of the parent/custodian that involves use of tribal Indian community resources;
 - Encourage maintenance of the child in his or her own family except where physical or emotional harm may result; and
 - Involve the child, if old enough, in the design and implementation of the case plan.
- Providing time and resources to prevent family breakup in at least equal measure to time and resources provided to other families.
- Assisting parents or custodian and child in maintaining an ongoing familial relationship.

Documentation

All remedial services offered to the family need to be recorded to demonstrate that, prior to petitioning for removal, active efforts were made to alleviate the need to remove the child. The case record cannot simply state that such efforts were unsuccessful, but efforts must *be shown* to be unsuccessful.

Before court proceedings to remove a child are initiated, case records should document that:

- Conduct or condition of the parent will result in serious physical or emotional harm to the child; and
- Efforts were made to counsel and change the parent's behavior, but did not work.

Documentation in the case record should relate indications of the likelihood of serious emotional or physical damage to particular conditions in the home, showing a causal relationship between the conditions and the serious damage that is likely to result to the child. (For example, it is not adequate to show that the parent abuses alcohol. It is necessary to show how, because of alcohol abuse, the parent may cause emotional or physical damage to the child.)

BURDEN OF PROOF

Through ICWA, Congress has declared that an Indian child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Nor can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is dangerous for the child to remain in his or her present conditions.

Foster Care Placement: Clear and Convincing Evidence

ICWA states that a court may not issue an order effecting a foster care placement of an Indian child in the absence of a determination, supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, 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.

Termination of Parental Rights: Evidence Beyond a Reasonable Doubt

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 one or more qualified expert witnesses, 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.

Clear and Convincing

This is a high level of proof, though not as high as proof beyond a reasonable doubt. 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.

Beyond a Reasonable Doubt

This 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. If the court fails to do so, the court is obligated by the Act to deny termination.

Qualified Expert Witnesses

Persons with the following characteristics are considered most likely to qualify as experts:

- 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;
- A layperson 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 child's tribe; or
- 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 or limited in any manner. Enlist the assistance of the Indian child's tribe in locating persons qualified to serve as expert witnesses. The BIA is also required to provide this assistance.

PLACEMENT OF INDIAN CHILDREN

A diligent search to follow the Act's placement preferences shall include, at a minimum—

- Contact with the tribe's social services program;
- Search of State and county lists of Indian homes; and
- Contact with other tribes and Indian organizations with available placement resources.

Foster Care/Preadoptive

Contact the tribe to ask whether it has a different placement preference from the following:

1. Member of child's extended family;
2. Foster home licensed, approved, or specified by the Indian child's tribe;
3. Indian foster home licensed or approved by an authorized non Indian; or
4. Institution for children approved by an authorized non-Indian licensing authority.

Change of Placement: Notify Parents

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 custodians must be notified in writing. Follow placement preferences outlined above, unless the child is returned to parents or custodians.

Adoptive Placements

Contact the tribe to ask whether it has a different placement preference from the following:

1. Child's extended family;
2. Other members of the child's tribe; or
3. Other Indian families.

Disrupted Adoptive Placements

If an adoption is vacated or set aside, or adoptive parents voluntarily consent to termination of parental rights, the Indian parents or 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 custodians of their right to petition for a return of their child.

Documentation

Written records are to be maintained on each child, separate from the court record, of all placements and efforts to comply with required placement records. This record shall contain the following:

- The petition or complaint;
- All substantive orders entered; and
- Complete record of placement determination.

Where required placement preferences have not been followed, efforts to find suitable placements within those priorities shall be documented in detail.

Voluntary Placements

Consent cannot be accepted unless—

- The child is older than 10 days old;
- The consent is in writing and recorded before a judge; and
- 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 Indian parents or custodians; and
 - ★ Fully explained in English or interpreted into a language understood by the parents or custodians.

Consent signed by Indian parents or custodians should contain the following:

- 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;
- Name and address of prospective parents, if known, for substitute care placements; and
- Name and address of person or agency through which placement is being arranged, if any, for adoptive placements.

EMERGENCY REMOVALS

Unless circumstances do not permit such inquiry, the racial/ethnic status of the child shall be immediately determined by asking:

Of which of the following do you consider yourself a member?

Asian Black Hispanic Indian White

Indian: Name of tribe and/or band:

Emergency protective custody of any Indian child can be taken only if—

- the child is not located on the reservations of tribes that have jurisdiction over child custody proceedings; and
- the child is in danger of imminent physical damage or harm.

Placement

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 placement priorities established by either the tribe or ICWA:

1. A member of the child's extended family;
2. A foster home licensed, approved, or specified by the Indian child's tribe;
3. An Indian foster home licensed or approved by an authorized non Indian licensing authority; or
4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

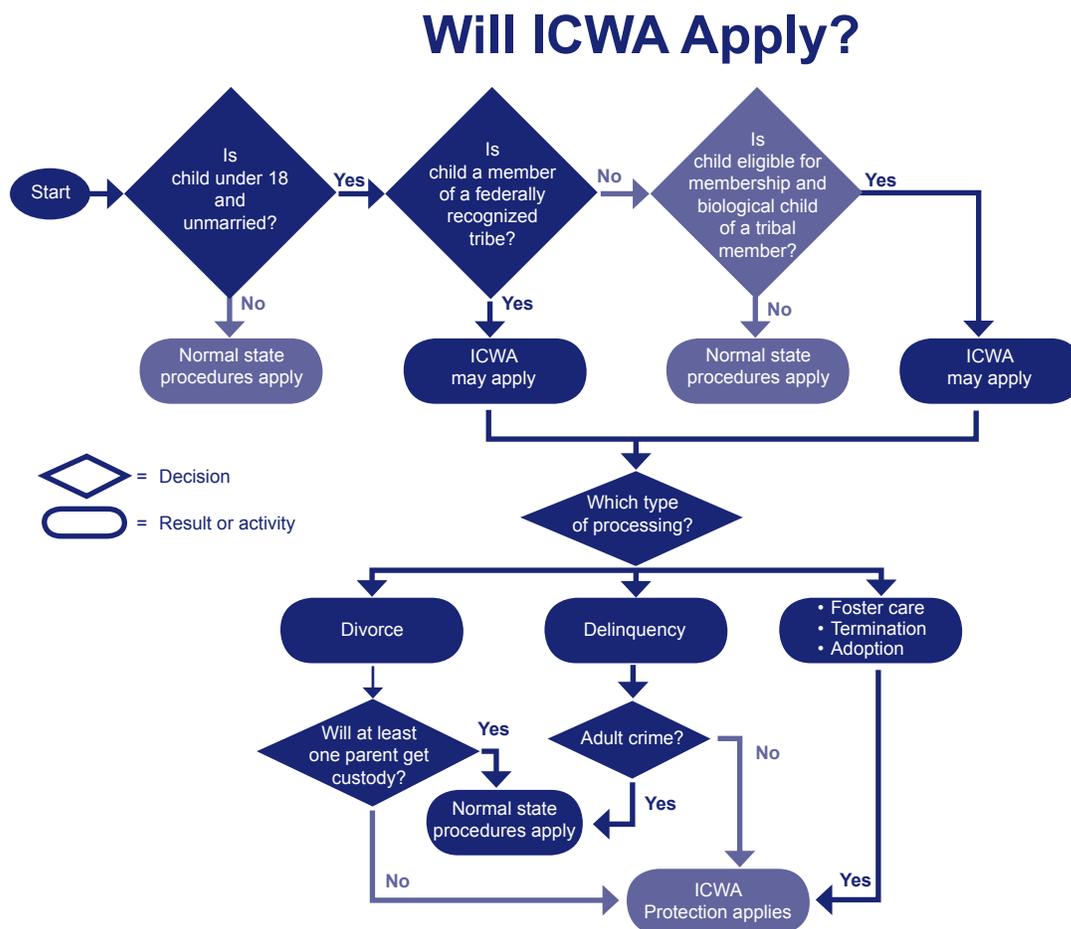
Termination of Placement

Emergency custody must be terminated when removal is no longer necessary to prevent imminent physical damage or harm to the child, or the appropriate tribe exercises jurisdiction over the case.

Continuation of Custody

If termination of an emergency removal is not possible, a court order should be obtained authorizing continued protective custody. The petition filed in such a proceeding should include the following in addition to that information required by State law:

- The name, age, tribal affiliation, and last known address of the Indian child;
- The name and address of the child's tribe and parents and/or Indian custodian, if any. If unknown, the agency shall provide a detailed description of efforts made to locate them;
- If known, whether the residence or domicile of the parent, Indian custodian, or child is on or near a reservation, and which reservation;
- A specific and detailed account of the circumstances that led to the conclusion that the child would suffer imminent physical damage or harm; and
- A specific plan of action to restore the child to his or her parents or Indian custodian, or to transfer the child to the jurisdiction of the appropriate Indian tribe.



Source: National Indian Child Welfare Association. (2002). *Online ICWA course*. Accessed September 18, 2006, at <http://www.nicwa.org/services/icwa/index.asp>