

**NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES
BISMARCK, NORTH DAKOTA
December 1, 2016**

PI 16-44

TO: County Social Service Offices
Tribal Social Service Offices
Regional Supervisors

FROM: Marlys Baker, Administrator, Child Protection Services Program

SUBJECT: Jurisdiction for Children on an Indian Reservation

PROGRAMS: Child Protection Services 640

RETENTION: Until Manualized

EFFECTIVE: December 12, 2016

Jurisdiction for Children on an Indian Reservation 640-05-40-01

When the alleged victim of a report of suspected child abuse or neglect is a Non-Native American child living on the Indian Reservation, the county that encompasses the Reservation area where the child is located has the responsibility for the assessment. The county will coordinate with Tribal Social Services in completing the assessment.

Jurisdiction Involving Children on an Indian Reservation

When the alleged victim of a report of suspected child abuse or neglect is an enrolled or enrollable member of a federally recognized tribe living on the Indian Reservation, the tribe will have jurisdiction for assessment/investigation of any report of suspected child abuse or neglect.

When the alleged victim of a report of suspected child abuse or neglect is not an enrolled or enrollable member of a federally recognized tribe living on the Indian Reservation, the tribe will determine whether the child is

otherwise considered in "Indian Child" under jurisdiction of the tribe for assessment/investigation of any report of suspected child abuse or neglect.

When the tribe determines that the alleged victim is not under tribal jurisdiction, the county that encompasses the Reservation area where the child is located has the responsibility for the assessment. The county will coordinate with Tribal Social Services in completing the assessment.

In any assessment involving an Indian Child, it must be determined whether the Indian Child Welfare Act applies.

The Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) passed into law in 1978. The law protects American Indian and Alaska Native (AI/AN) children in state child welfare systems and helps them remain connected to their families, cultures, and communities.

ICWA only protects American Indian and Alaska Native children who are:

1. Unmarried;
2. Under 18; and
3. A tribal member OR
4. Eligible for tribal membership; AND has a biological parent who is a tribal member

ICWA applies when there is:

1. A "child custody proceeding"
2. Involving an "Indian child"

Child Custody Proceedings ICWA Does Cover:

- Foster care placements
- Guardianships
- Termination of parental rights
- Pre-adoptive placements
- Adoptive placements (includes conversion from foster care to adoptive placement)

- Voluntary placements and involuntary placements where parents can't regain custody of child "upon demand"
- Divorce proceedings or custody disputes in which neither parent will get custody
- Status offenses (juvenile delinquency proceedings that involve an offense that would not be a crime if committed by an adult, e.g. drinking, runaway, truancy, etc.)

Note: ICWA may also apply in a juvenile delinquency proceeding where the basis for the proceeding is a criminal act by the child, but the proposed out-of-home placement is based upon the fitness of the parents rather than the criminal act by the child.

Child Custody Proceedings ICWA Does Not Cover

- Divorce proceedings or custody disputes between two parents
- Juvenile delinquency proceedings (violations of criminal law)

To Determine if the Child is a Tribal Member or Eligible for Membership:

At intake with a family (i.e. child protection assessment), and before every change or potential change in custody, the CPS worker should ask a client family how they self-identify. For example:

- Whether the client family identifies as American Indian, Alaska Native, or Native American
- Which of the following do you consider yourself a member: Asian American, Black/African, American, American Indian or Alaska Native or Native American, White, Latino, etc.?

The worker should always follow up by asking:

- Do you have any Native American, American Indian, Alaska Native ancestry?

If the client response that they are not Native American, American Indian or Alaska Native, and do not have any related ancestry the state case manager should:

- Document this in case notes

If the client responds that they are American Indian, Alaska Native, or Native American, or believe there is Native ancestry the state case worker should:

- Ask the client family which tribe(s) they identify with and if they are a member and/or enrolled
- Fill out a family tree chart with the help of client family or other genealogy form provided by the Agency

If, in following the previous steps, a worker has reason to believe the child is Indian, she/he will need to identify the Indian tribe by:

- Consulting with extended family members and other relatives
- Contacting, as appropriate, the suspected tribe(s) (their child welfare units, enrollment office, their designated tribal service agent for ICWA notice*), an appropriate Indian social services organization, or the Bureau of Indian Affairs

If the parents are unavailable or unable to provide a reliable answer regarding the Native heritage of their children, workers then:

- Make a thorough review of all documentation in the case record (look for clues regarding Native ancestry as discussed in the BIA ICWA Guidelines)
- Contact the previous caseworker, if any
- Contact extended family identified by child or client family and ask about identification of the family members

“Reason to Know”

ICWA rule requires State courts to ask each participant in an emergency or voluntary or involuntary child-custody proceeding, whether the participant knows or has “reason to know” that the child is an Indian child.

Indications of “reason to know” include—

- Anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child;
- The domicile or 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 Tribal court; or
- Either parent or the child has an ID indicating Tribal membership.

Note: As a best practice it is suggested that caseworkers and officers of the court assume that ICWA may apply in a case until otherwise determined. This will help avoid unnecessary delays or the potential for disrupted placements or proceedings in the future.

Verifying the Child is a Tribal Member

If the Family Identifies as American Indian, Alaska Native, or Native American, tribal membership must be verified.

Send notice to the child's tribe via their designated tribal service agent for ICWA notice to:

- Confirm that the child is a member; or
- Confirm that the child is eligible for membership and confirm a biological parent's membership

Note: If several tribes are identified by client family, send the letter to all tribes identified. Best practice includes telephone contact also be made with the tribe's child welfare unit, enrollment office, and their designated tribal service agent for ICWA notice.

Although this is not required by ICWA, it may help a case worker get quick confirmation and notate that ICWA may apply to a case. Any phone conversation that confirms that ICWA may apply should be documented in the case file. Formal notice should still be set to the tribe and the written response confirming tribal membership filed in the case file.

When the child is verified as a tribal member

Once a tribe has determined that a child is a member, the response must be documented in the case record, including date and source of documentation, and:

- File in the case record the tribe's written statement declaring the child is a member
- Incorporate in any court hearing the tribe's written statement declaring the child to be a member
- Work with the understanding that ICWA applies throughout the entirety of the child welfare case

When the child is eligible for tribal membership

The worker should confirm the membership status of the biological parent. The response to both the child and parent's status must be documented in the case record, including date and source of documentation:

- File in the case record the tribe's written statement declaring the child's eligibility for membership
- Incorporate in any court hearing the tribe's written statement declaring the child eligible for membership and the biological parent to be a member
- Assist the family in formally enrolling the child or establishing membership of the child. If necessary, the state case worker may counsel parents hesitant to enroll a child by emphasizing the positive benefits of tribal membership, particularly in child welfare and adoption proceedings.
- Work with the understanding that ICWA applies throughout the entirety of the child welfare case

When the child is not a tribal member and ineligible 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
- 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
- Work with the understanding that ICWA does not apply

Best practice includes telephone contact also be made with the tribe's child welfare unit, enrollment office, and their designated tribal service agent for ICWA notice.

If the tribe does not respond

If the tribe does not respond, the workers should call the ICW designated tribal agent for service and inquire about the status of the inquiry and the membership status of the child. The worker should document the conversation in the case file.

Notifications Procedures Required by ICWA

Who receives notice?

- Parents
- "Indian Custodian" (defined by ICWA as "Any Native person who has legal custody of the child under tribal law or custom or under state law or to whom temporary physical care, custody, or control has been transferred by the parent")
- The child's tribe (If child is affiliated with, or eligible for, membership in more than one tribe, all tribes should receive notice)
- The BIA (only if identity/location of the tribe and/or parent, or Indian Custodian cannot be determined)
 - ◆ To Contact Tribes

If you do not have accurate contact information for a Tribe, or the contacted Tribe fails to respond to written inquiries:

- Seek assistance from the BIA local or regional office or the BIA's Central Office in Washington, DC (see www.bia.gov)
- Find the Tribe's designated Tribal agent for service of notice
 - BIA publishes a list each year in the Federal Register
 - The list is also available at: www.bia.gov under the "Office of Indian Services" and "Division of Human Services"

Sending Notice

Notice must be sent by registered mail, return receipt requested. A copy of this notice should be filed in the case file and with the court, along with any returned receipts.

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 Indian Custodian, or after 30 days if 20 additional days are requested by the parents or Indian Custodian to prepare for the proceedings; 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 or the proceeding; or
- No fewer than 15 days after receipt of notice by the Bureau of Indian Affairs

If the tribe does not respond

Even if a tribe does not respond to an official notice sent, or if it replies that it does not wish to intervene in the proceeding, continue to send the tribe notices of every proceeding. The tribe can intervene at any point in the proceeding and therefore it has the right to notice of all hearings related to the case.

Transfer to Tribal Court

ICWA allows the parent, Indian Custodian, or child's tribe to request that the child custody proceeding be transferred to tribal court.

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

- The worker should inform the parents or Indian Custodian of their right to object to the transfer

The state court must transfer unless:

- The tribal court declines jurisdiction
- Either parent objects to such transfer
- The state court determines that "good cause" exists to deny the transfer

Determine jurisdiction.

The Indian child's Tribe has exclusive jurisdiction over the case if the Indian child's domicile or residence is on a reservation where the Tribe exercises exclusive jurisdiction over child custody proceedings or the child is a ward of Tribal court. A parent or Indian custodian and the Indian child's Tribe may request a transfer of a foster-care or termination-of-parental-rights (TPR) proceeding to Tribal jurisdiction, at any stage and at any time, orally on the record or in writing. Upon such a request, the court must transfer unless:

- Either parent objects to such transfer;
- The Tribal court declines the transfer; or
- Good cause exists for denying the transfer.
- The reasons for denial must be on the record.

Good cause

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

- They should share their reasons for such belief with the court
- Other parties should be given the opportunity to respond

Good cause to not transfer examples:

- A proceeding is at an advanced stage
- Child over 12 objects to the transfer
- It would be difficult to present the evidence and witnesses necessary in tribal court

Note: The perceived adequacy of a tribal court, the type of court the tribe uses, or a tribe's use of a traditional decision-making processes cannot be considered good cause to not transfer.

Services that Are Required in ICWA Cases

"Active Efforts"

"Active efforts" means not just an identification of the challenges a family faces and providing solutions. It also requires a state case manager make efforts to actively assist a family in making the changes necessary to keep a child safely in their home, or to make the changes necessary for a child to return safely and reunify with family.

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

Active efforts must also be provided after the child has been removed in order to prevent the breakup of the family by working toward reunification.

Active efforts can be demonstrated by:

- Making a strength-based evaluation of the family's circumstances that takes into account the prevailing social and cultural conditions and way of life of the child's tribe
- Intervening only when necessary. Workers conducting such an intervention should:
 - Develop a case plan with assistance from the parents or Indian Custodian that involves use of tribal Indian community resources
 - Seek out the necessary family preservation and wrap-around services to support the family with the child in the

home, except where imminent physical or emotional harm may result

- Involve the child, if of sufficient age, in the design and implementation of case plan
- Assisting parents or Indian Custodian and child in maintaining an ongoing familial relationship
- Engaging the child's tribe early and working closely with the child's tribe to access culturally relevant resources and informal support networks

Removing a Child in an ICWA Case from the Home

To remove a child, the state must prove (and case records should document) that:

- Conduct or condition of the parent will result in serious physical or emotional damage to the child
 - This must show a causal relationship between the conditions and the serious damage that is likely to result to the child is necessary to meet this requirement of ICWA. Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself meet the standard of evidence.
 - Citing structural issues beyond the control of the parent, such as living in poverty, is not appropriate
- Active efforts were made to support the family in overcoming the challenges that presented imminent risk of serious physical or emotional damage to the child
 - The case record cannot simply state that such efforts were unsuccessful, but must document the specific efforts and how they were unsuccessful

Burden of proof required for foster care placement

ICWA states that a court may not issue the foster care placement of an Indian child in the absence of a determination—by clear and convincing evidence—supported by the testimony of a qualified expert witness 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.

“Clear and convincing” evidence 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.

“Qualified expert witnesses”

Persons with the following characteristics are considered most likely to be qualified expert witnesses:

- 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
- An expert with substantial experience in the delivery of child and family services to Native families and extensive knowledge of prevailing social and cultural standards of child rearing practices in the child’s tribe
- 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. The workers should enlist the assistance of the child’s tribe to locate persons qualified to serve as expert witnesses. The BIA is also required to provide this assistance.

Placement of a child in an ICWA proceeding be placed if removal from the home is necessary

The child should be put in the setting that:

- Is least restrictive
- Is most like family
- Is within a reasonable proximity to the child’s family
- Meets any special needs the child may have

Preference to the following types of placements should be given in the order provided, unless there is good cause to place the child elsewhere or the tribe has a different placement preference order:

1. Member of the child's extended family
2. Foster home licensed, approved, or specified by the child's tribe
3. Indian foster home licensed or approved by the state or other non-Native licensing authority
4. Institution for children approved by an Indian tribe or operative by an Indian organization that meets the child's special needs

The worker should contact the tribe to ask if they have a different placement preference.

The worker should perform a diligent search to comply with ICWA's placement preferences.

This should include, at a minimum:

- Contact with tribe's social service program
- Search of state and county lists of foster homes
- Contact with other tribes and Native organizations with available placement resources

Note: ICWA placement preferences apply regardless of whether the child's tribe intervenes in the case or whether the child's tribe can identify a preferred placement home.

When placing a child in an ICWA case, document:

Document the placements of the child and all efforts to comply with the placement preferences.

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

Emergency Removal of an "Indian Child"

Unless circumstances do not permit, the racial/ethnic status of the child should be immediately determined. For example, a case worker should ask:

- “Which of the following do you consider yourself a member?” (Asian American, Black/African, American, American Indian or Alaska Native or Native American, White, Latino, etc.)
- “If American Indian or Alaska Native or Native American, what is the name of your tribe?”

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

- The child is not located on the reservation of a tribe that has jurisdiction over child custody proceedings
- The child is in danger of imminent physical damage or harm

Emergency custody must be terminated when removal is no longer necessary to prevent imminent physical damage or harm to the child.

In emergency proceedings, ICWA should be complied with whenever possible and child custody proceedings that fully comply with ICWA must be “expeditiously initiated.” This could include transferring the case to the child’s tribe immediately if the Indian child is a ward of the tribal court, or the child’s tribe wishes to accept transfer of jurisdiction of the case from state court.

Emergency placement of the child who is identified as Indian

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 foster care placement priorities established by ICWA (see above).

Adapted from, “A Guide to Compliance with the Indian Child Welfare Act”;
The National Indian Child Welfare Association, 201;
http://www.nicwa.org/Indian_Child_Welfare_Act/documents/2015Guide%20to%20ICWA%20Compliance.pdf