

Nebraska Indian Child Welfare Act



A CASE MANAGEMENT GUIDE

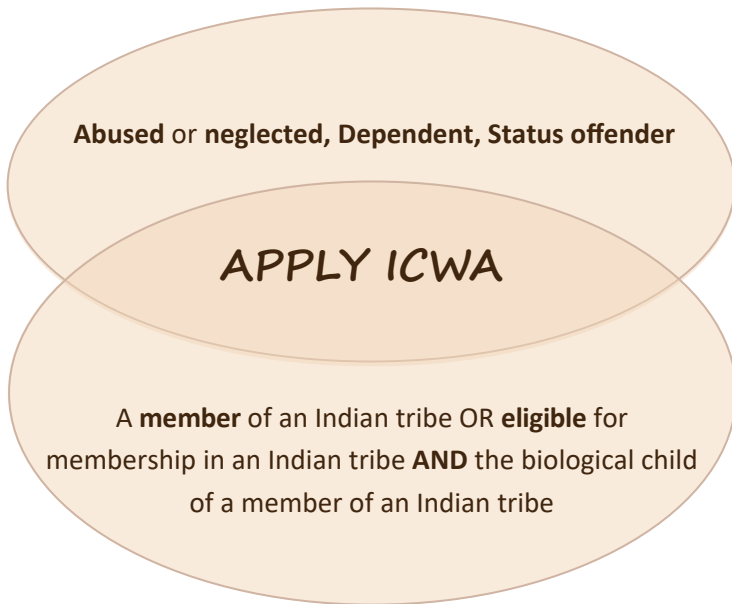
April 2020

The Law

The federal Indian Child Welfare Act (ICWA) was enacted in 1978. In 1985, Nebraska codified the federal ICWA and in 2015, the Nebraska legislature clarified many ICWA provisions. The law aims to protect Indian children in state child welfare systems and help them remain connected to their families, cultures, and communities. Compliance is mandatory.

- Federal Law (1978)—U.S. Code, Title 25, Chapter 21, §§1901, *et seq.*
- Code of Federal Regulations—25 C.F.R. 23 (2016)
- State Law (2015)—Nebraska Revised Statutes, §§43-1501, *et. seq.*

ICWA applies anytime DHHS becomes involved with a child who is:



Inquiry

§§ 43-279.01; 43-1514

When do you or the court ask about membership?

The court and DHHS must inquire about ICWA eligibility at certain intervals to ensure ICWA compliance. This includes:



Both court* and non-court cases



Whenever a relative, including a parent, is identified



Throughout the case: intake, initial assessment, ongoing

*Judge required to inquire at the first court hearing

How might you ask about membership?

EXPLAIN that if the child is a member or eligible for membership in a tribe, there could be additional:

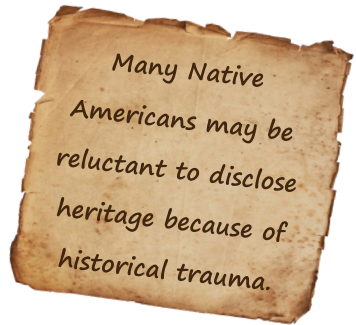
- Protections
- Rights
- Services

ASK if the child or any relative is:

- A member in a tribe
- Eligible for membership in a tribe
- May have any tribal affiliation or Native American ancestry

ASK if the child or any relative of the child has:

- Received health services from an Indian Health Center
- Received benefits or assistance from an Indian organization
- Lived on or near a reservation
- Attended a powwow, gourd dance, hand game, sweat lodge or other Indian cultural event or ceremony
- Spoken an Indian language
- Attended a boarding school



Active Efforts

§§ 43-1503(1); 43-1505(4); 25 CFR 23.2

What are active efforts?

Active efforts means providing case management that is:

- 1) more than reasonable efforts to preserve and reunify the family;
- 2) culturally relevant;
- 3) tailored to the facts and circumstances of the case;
- 4) conducted in partnership with the Indian child and the Indian child's parents, extended family members known to DHHS, Indian custodian and Tribe; and
- 5) actively assisting with accessing or developing resources necessary to satisfy the case plan.

This includes, but is not limited to:

- Placing siblings together whenever possible
- Identifying and engaging Tribe's ICWA Specialist
- Exhausting tribally appropriate family preservation services
- Asking family and Tribe's ICWA Specialist about traditional and customary support and services provided by:
 - ◊ Tribe
 - ◊ Extended family or other Tribal members if extended family unavailable
- Informing and actively assisting family members in accessing resources (housing, financial, transportation)
- Promoting and monitoring family's access to and progress in culturally appropriate resources provided by extended family, Tribe, tribal community, or Indian caregiver

When are active efforts required?

Active efforts are required as soon as CFSS knows or has reason to know that ICWA applies.

Provide active efforts report at
EVERY COURT HEARING
and send to the Tribe within **3 DAYS** of filing



Tribe's ICWA Specialist

What to ask the Tribe's ICWA Specialist

ACTIVE EFFORTS

- Do you believe active efforts have been provided?
- What services may be available to the child(ren) and family through your Tribe? What culturally relevant services would you like DHHS to seek for this family?

NOTICE

- Did you receive the ICWA notice about the child(ren) involved in this case?
- Do you need additional information to verify eligibility?

TRIBAL INVOLVEMENT

- Do you need more information to make a determination about intervention or transfer of jurisdiction?

PLACEMENT

- Does the Tribe have its own placement preferences?
- Do you know of any relatives or other tribal members who may be willing and available to be considered for placement?
- Do you have information we should include in a cultural plan?
- Are you or is someone in your Tribe able to assist us with developing a cultural plan?

QUALIFIED EXPERT WITNESS (QEW)

- Do you or does someone in your office serve as a QEW for your Tribe's ICWA cases? Or, does the Tribe have a policy about QEW testimony?
- Does your Tribe have a tribal resolution identifying who may serve as a QEW for your Tribe's ICWA cases?
 - ⇒ May the County Attorney contact those QEWs directly or should requests for QEW testimony go through your office?

GENERAL COMMUNICATION

- What is the best way to contact you with updates and to provide case documents — phone, email, fax, or mail?
- Do you want to participate in meetings by telephone? If you cannot participate by phone, may I send you an email update about family team meetings, school meetings and other case meetings?
- Do you know how to participate in court hearings by phone? (Provide contact information for the Judge's bailiff or the clerk of courts.)

Notice

§§ 43-1505; 43-1505.01; 43-1506

In both non-court and court-involved cases, the tribe(s), parents, and the Indian custodian must receive notice if the CFSS knows or has reason to know that an Indian Child is involved. This notice must include necessary family information for the tribe to make a determination regarding ICWA eligibility and the next court date, if applicable.

	<i>NON-COURT CASE</i>	<i>COURT CASE</i>
WHO do I notify?	1. Tribe(s) 2. Parents 3. Indian Custodian	
HOW do I notify?	<ul style="list-style-type: none"> • Letter on N-FOCUS (send registered mail, return receipt requested) • Telephone OR • Fax OR • Email 	<ul style="list-style-type: none"> • Letter on N-FOCUS (send registered mail, return receipt requested)
WHEN do I notify?	Within 5 calendar days of DHHS offering services	As soon as there is a reason to know ICWA applies

NOTES:

Tribe's Response to Notice

As sovereign nations, tribes have sole authority to determine membership within the tribe. After you provide the required notice to a tribe, there are four possible responses you might receive from the tribe.

TRIBE'S RESPONSE	DOES ICWA APPLY?	COULD ICWA APPLICABILITY CHANGE?
Child is a member	YES	NO
Child is eligible for membership and parent is a member	YES	NO
Child is eligible for membership but parent is not a member of the child's Tribe	MAYBE	YES <ul style="list-style-type: none"> • Parent could be a member in a different tribe
Child is not a member nor eligible for membership	NO	YES <ul style="list-style-type: none"> • Child or parent could be a member in a different tribe • Tribe could change membership requirements • Child or parent could become a member at a later date
No response regarding child's membership nor eligibility	MAYBE	YES <ul style="list-style-type: none"> • Non-court <ul style="list-style-type: none"> ⇒ Contact Tribe's ICWA Specialist monthly • Court <ul style="list-style-type: none"> ⇒ Contact Tribe's ICWA Specialist ⇒ Share status with county attorney and DHHS legal

PRACTICE TIP!

If family provides information or CFSS has reason to know the child is an Indian child, DHHS must comply with ICWA pending membership determination.

Tribal Involvement

§§ 43-1504; 43-1506

How could tribes be involved?

Tribes have five options when an Indian child has been identified. In all cases, the Tribe *may* participate in or consult on family team meetings and other case planning meetings. The Tribe *may* also identify or provide culturally relevant services.

1. NO TRIBAL INVOLVEMENT

Tribes are not required to participate in services or proceedings.

2. TRIBAL INVOLVEMENT

The Tribe may participate, consult, or provide services in both non-court and court-involved cases.

3. INTERVENTION

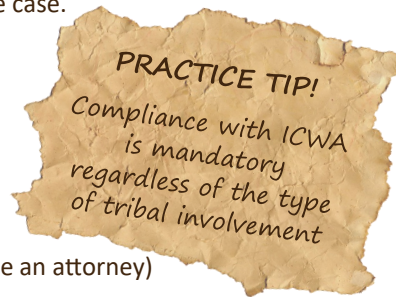
The Tribe could become a party to the juvenile case.

When is intervention denied?

- Never

What are the Tribe's rights?

- Call witnesses
- Present recommendations
- Have a representative present (may not be an attorney)
- Participate by telephone or live audiovisual means



.....
When a Tribe selects any of the options above, DHHS is responsible for case management.
.....

WHEN CAN THE TRIBE BE INVOLVED?

ANY stage of the case.



Tribal Involvement

4. EXCLUSIVE JURISDICTION

The tribal court is the only court that has the right to hear the case.

When does a tribe have exclusive jurisdiction?

1. Indian child is a ward of tribal court **OR**
2. Indian child resides or is domiciled on a reservation

5. TRANSFER

The juvenile court sends the case to the tribal court.

Who can request a transfer to tribal court?

- Tribe
- Either parent or Indian Custodian

What qualifies as good cause for the juvenile court to deny transfer?

- No tribal court to hear case
- Other grounds determined on a case-by-case basis

When can a case be transferred?

- Any stage of the case

When is transfer denied?

- Either parent objects
- Tribal court declines
- The juvenile court finds good cause not to transfer

PRACTICE TIP!

Whenever transfer is possible, contact DHHS Legal and DHHS ICWA Program Coordinator

.....
If exclusive jurisdiction or transfer occurs, the Tribe is responsible for case management and DHHS is no longer involved.
.....

NOTES:

Placement Guidelines

§ 43-1508

If a Tribe has their own set of placement preferences, you must follow those preferences. If a Tribe does not have its own set of placement preferences, placements must follow standards set forth in Nebraska law.

Foster Care or Preadoptive Placement Preferences

When considering foster placement for children covered by ICWA, placements must first:

- Be the least restrictive setting
- Consider and meet the child's special needs, if any
- Be within a reasonable proximity to the child's home

Preferences given in descending order:

1. A member of the Indian child's extended family
2. Other members of the Indian child's Tribe or Tribes
3. A foster home licensed, approved, or specified by the Indian child's Tribe or Tribes
4. An Indian foster home licensed or approved by an authorized non-Indian licensing authority
5. A non-Indian family committed to enabling the child to have extended family time and participation in the cultural and ceremonial events of the Indian child's Tribe or Tribes
6. An Indian facility or program for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to the Indian child's needs
7. A non-Indian facility or program for children approved by an Indian tribe.

Adoptive Placement Preferences

Preferences given in descending order:

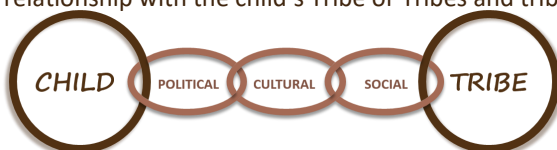
1. A member of the Indian child's extended family
2. Other members of the Indian child's Tribe or Tribes
3. Other Indian families
4. A non-Indian family committed to enabling the child to have extended family time and participation in the cultural and ceremonial events of the Indian child's Tribe or Tribes

Placement Guidelines

§§ 43-1503(2); 43-1508

Best Interests for Out-of-Home Placement

Placement should reflect the **unique values** of the **child's Tribal culture** and is best able to assist the child in establishing and developing the political, cultural, and social relationship with the child's Tribe or Tribes and tribal community.



Deviation from Placement Preferences

Any party can present to the court by clear and convincing evidence good cause to deviate from preferences:

- Parent preference
- Child preference if the child is at least 12
- Extraordinary physical or emotional needs of child (need expert testimony)
- Unable to comply with preference after diligent search

Cultural Plan



A cultural plan is required if:

1. Child is placed in non-Indian home **OR**
2. Child is placed in an Indian home not affiliated with the child's Tribe.

A Cultural Plan contains strategies to promote connectedness to the child's extended family and tribal members and their customs and culture. Cultural plans will be reviewed and updated annually or at the time of a placement change.

PRACTICE TIP!

Communicate with the ICWA Specialist and child's Tribe about what is their definition of "family." It may open up kinship options that had not previously been considered.

PRACTICE TIP!

Develop a plan with Tribe's ICWA Specialist, foster family, parent/custodian, family, and child!

Qualified Expert Witness (QEW)

§§ 43-1503 (15); 43-1505 (5) & (6)

What is a QEW?

An expert witness testifying that the “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

Who qualifies as a QEW?

In identifying a QEW, specific qualifications should be considered. Preference is given to people who are **experienced and/or knowledgeable** about the **social and cultural standards and childrearing practices** within the Indian child’s Tribe. As a last resort, a professional with substantial education in his or her specialty may serve as a QEW.

How is a QEW identified?

The Tribe’s ICWA Specialist may know if the Tribe has identified tribal members or other individuals to serve as QEWs in ICWA cases. You should share any names with the county attorney immediately.

When is a QEW required?

- Child Custody Proceeding
- Termination of Parental Rights



NOTES:

Relinquishment

§ 43-1506

Requirements

1. In writing
2. Executed before a judge
3. Certified by a judge that terms and consequences were explained and understood
4. Certified by a judge that hearing was in a language the parent understood
5. Child is at least 10 days old

PRACTICE TIP!

ICWA still applies after a relinquishment in both court and non-court cases!

Differences for ICWA Cases

- Parent may withdraw relinquishment for *any* reason before the decree or order of final termination
- Parent may withdraw relinquishment if obtained through *fraud or duress* for up to 2 years after adoption decree
- Separate notice must be sent to the Department of the Interior



NOTES:

Resources

Nebraska Resource and Referral System (NRRS)

Search for culturally appropriate services at nrrs.ne.gov


Specific provider or service

- Click on “Search for Providers & Services” 
- Search by 1) selecting the location of services, 2) entering a keyword or name of provider, or 3) selecting the type of service(s) needed. Then look for the buffalo symbol  to identify the culturally appropriate services.

Culturally appropriate services by location

- Click on “Native American Resources”



- Enter the location and click search
- All of the services are culturally appropriate and identified with the buffalo symbol 

Additional ICWA Resources

Bureau of Indian Affairs Department of the Interior



BIA - Great Plains Regional Office
Human Services - MC-303
115 4th Avenue SE, Suite 400
Aberdeen, SD 57401
Telephone: (605) 226-7343
Fax: (605) 226-7446

<https://www.bia.gov/regional-offices/great-plains>

<https://www.bia.gov/bia/ois/dhs/icwa>

Code of Federal Regulations

Indian Child Welfare Act



www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings

BIA Guidelines for Implementing the ICWA

www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf

National Indian Child Welfare Association

www.nicwa.org

Native American Rights Fund

www.narf.org

NDHHS Public Site

dhhs.ne.gov/Pages/Indian-Child-Welfare.aspx

Nebraska Indian Child Welfare Coalition (NICWC)

www.nicwc.org

Contacts

My ICWA Specialist

Name:

Email:

Phone:

My ICWA Advocate

Name:

Email:

Phone:



NOTES:

FOR ADDITIONAL INFORMATION CONTACT

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In Partnership
Nebraska DHHS and UNL CCFL

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