Our Children, Our Sovereignty, Our Culture, Our Choice

ICWA Guide for Tribal Governments and Leaders

Introduction - A Word From the Authors

Our tribes are threatened by the removal of our youngest and most vulnerable members, our children. As leaders we want to make informed decisions to protect the future of our tribe, our culture, our children and families. Historically, we have seen state and federal programs compromise our dignity and culture by breaking up our families and tribes. Even today we hear of unwarranted removal of our Indian children and the attempts to keep them separated from their culture and tribal identity. The Indian Child Welfare Act (ICWA), when complied with, can help prevent these unwarranted removals and ensure Indian children are kept safe while remaining with their families. The purpose of this Guide is to recommend actions that tribal leadership can take towards ensuring compliance with ICWA.

The recommendations that appear in this guide were made by tribal court judges, tribal attorneys, tribal educators who train on ICWA, tribal legislators, a former Tribal Governor/Social Services Director, Counsel for the County (who was also a tribal member), and directors of social services for tribal child welfare programs. It is important to note that these are recommendations, not mandates, made by individuals who work in various arenas in child welfare.

> "Let us put our minds together and see what kind of life we can make for our children.
>
> - Sitting Bull
> Hunkpapa Lakota

Caution: every state and child welfare jurisdiction interprets ICWA compliance differently. Tribal leaders, ICWA designated agents, and Native social service providers should be aware of any MOUs (memoranda of understanding), child welfare protocols, and court standards that can impact outcomes for Native children and families.

Capacity Building
CENTER FOR TRIBES

This document created by: Rose Margaret Orrantia, Tom Lidot and Lucille Echohawk with legal review by Suzanne Garcia, Attorney. Contact the Center for Tribes for more information: info@cbc4tribes.org; 1-800-871-8702.

Tribal Leadership and ICWA, the Role of Tribal Leaders

As leaders, it is time to determine our destiny where our children are concerned. We must ensure states comply with ICWA and respect tribal sovereignty. We must also ensure our tribe is clear about our rights and responsibilities when it comes to ICWA. As tribal communities we must take a stand, and participate fully in child welfare matters that threaten our identity, our sovereignty, our culture, and our future. How do we want our children's cases handled? How do we ensure that states respect our sovereignty and follow ICWA?

Here are four recommended actions tribal leaders can take to address these questions:

1. **Develop or update children's codes and ensure policies and procedures are in place to support and protect children and families.**
2. **Be at the table! Make sure there is tribal presence and representation.**
3. **Ensure our staff, advocates, attorneys, and expert witnesses are informed and effective when advocating for our children.**
4. **Know our rights in ICWA cases**

This Guide describes each of these recommendations in more detail.

> "When we walk upon Mother Earth, we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.
> - Oren Lyons, Onondaga Nation

1. Develop or update children's codes and ensure policies and procedures are in place to support and protect children and families.

Leaders should ask themselves: As it relates to ICWA, how do we want our children's cases handled? Should we intervene or take jurisdiction? These questions should drive our decisions to create tribal child protection codes and policies that protect our children and their connection to their heritage and tribal identity and which should be reflected in the day to day operations of our social service programs. Know the difference between taking jurisdiction and intervening. Consider developing and/or reviewing your current Child Protection Codes. They should integrate the culture and tradition of your tribe and ensure the safety and protection of your children in a fair and honorable manner.

Child Protection Codes are important because they guide staff to make decisions that reflect your community's values. Some things to consider:

- From the beginning, whether by informal communication or receipt of ICWA notice, the tribe should indicate if they are interested in taking jurisdiction or intervening. This decision is often based on resources. Consider: "How will this child maintain connection to family and culture?"
- It is recommended that tribes intervene in every case to assure on-going communication

between the state court, state child welfare, and the tribe. This is especially important as new laws require states to inform tribes when their children are receiving or changing psychotropic medications. Is the medical condition of the child being reviewed in a timely manner?

- What is the difference between Intervention and taking Jurisdiction? When a tribe intervenes they become a party to the case and they may: appear in court, receive all documents that are pertinent to the case, make recommendations about placement for the child if out-of-home care is needed; make recommendations about permanency. Taking jurisdiction means that the tribe has complete control of the case.
- Exercise sovereignty by checking to see if tribal customary adoption is an option for permanent placement for the child. Remember tribal customary adoption is the right of the tribe not the state.
- Protect a child's well-being and be confident that the placement (temporary or permanent) has been checked by your staff and considered safe. Make sure your staff know the families in the community. If the child is away from the reservation make sure the family with whom the child is placed supports reunification, connection to the tribe, and the child's cultural identity.
- Ensure your social services and ICWA program staff have appropriate support without political or inappropriate influences that can create an imbalance within the community.
- Make the protection of children a priority at tribal council meetings to ensure adequate staffing and funding for your program and children.

For more information about developing Child Protection Codes please see: http://www.tribal-institute.org/2008/Handouts%20for%20Conferece/PowerPoints/D8_TribalLegalCodeResources.pdf

> **When you are in need, the qanruyun [words of wisdom] makes you like an old man or woman, clothes you, gives you a cane, and brings you where you wouldn't think to go. The qanruyun holds your hand and takes you.**
>
> **- Yup'ik Elder, Frank Andrews, from the *Wise Words of the Yup'ik People by A. Fienup-Riordan***

2. Be at the table! Make sure there is tribal presence and representation.

Tribes have a right to participate in all state child welfare court proceedings when the child is a member of or eligible for membership. Tribes can also advocate for children through the Spirit of ICWA when the child is not eligible for membership but is part of the community. The Spirit of ICWA can also apply to those tribes that are state recognized or non-federally recognized. What is important is that tribes maintain connection to their descendants in the hope that one day the child will want to fully participle both culturally and politically and be an active citizen of their tribe. In order to ensure that tribes are properly represented in court proceedings, tribal leadership can:

- Specify a designee to handle representation in all ICWA matters.

- Make sure ICWA matters are handled in a timely and organized manner. Have a central phone number that is dedicated to ICWA and child welfare matters.
- Ensure ICWA advocates, tribal attorneys or legal counsel understand ICWA and the tribe's children's codes.
- Make the commitment to have representation by ICWA advocates or tribal attorneys to appear in court for every hearing. If they cannot appear in person it is recommended that they appear via Skype, phone, or other forms of communication.
- Always intervene in a case, even if only for purposes of monitoring the case. It's important to make this decision as soon as possible. The tribe should always intervene in writing so that it can become a party to the case.

- Encourage the Tribal Council designee that will be dealing with ICWA matters to have a close relationship with the Enrollment Department. This will allow the tribe to determine eligibility for membership and enrollment in a quick and timely manner.
- Ensure proper documentation and record keeping for all ICWA cases.

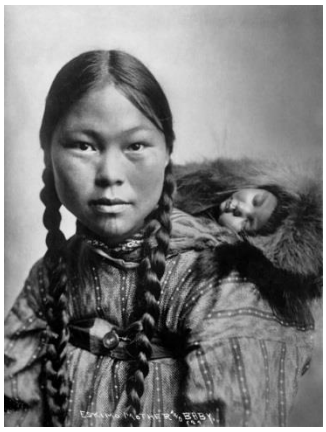
3. Ensure tribal staff, advocates, attorneys, and expert witnesses are informed and effective when advocating for our children.

Tribal leaders need to know that tribal staff, advocates, attorneys, and expert witnesses understand how the state handles ICWA cases, how tribal codes reflect tribal sovereignty throughout the process, and especially the legal process in court. Additionally, all parts of tribal government should work together to ensure the success of a case, including: courts, law enforcement, education, Tribal TANF, and others. Some things to consider:

- Remember that a tribe's child protection codes and policies and procedures provide structure to social services and give confidence to leadership that children's cases are being competently managed.
- The tribe's social worker or advocate needs to see the notices as soon as possible and be informed on the timelines by which the tribe needs to respond to notice.
- Tribal social services need to work closely with their enrollment office to expedite responses to ICWA notices and make a determination if the child is a member or eligible for membership.

- If the tribe has a court, are you able to decide in a timely manner if you will take jurisdiction?

- Tribes need to inform the state or county social worker what resources are provided by the tribe and should also identify family of the child who is being removed for appropriate ICWA placement.



- The tribe should be able to contact the foster parents of their ICWA eligible child, particularly if the child is in a non-Indian placement, for the purpose of offering cultural services, especially for those children in urban areas.

- Tribal leaders should ensure that there is proper documentation and record keeping for all ICWA cases.

> "What is life? It is the flash of a firefly in the night. It is the breath of a buffalo in the wintertime. It is the little shadow which runs across the grass and loses itself in the sunset.
>
> - Qwatsinas (Hereditary Chief Edward Moody), Nuxalk Nation

4. Know our rights in ICWA cases

Because of the government to government relationships between tribal, state, and federal governments, tribal leaders can play a vital role in ensuring that the rights contained in ICWA are not infringed on by state and federal workers.

Brief Overview of Rights of the tribe in an ICWA Case

The Indian Child Welfare Act secures for tribes the following rights:

- to hear and determine child custody proceedings in a manner established by tribal code or custom or administrative action

- to exercise exclusive jurisdiction over child custody proceedings involving Indian children resident or domiciled on the reservation (exceptions exist in Public Law 280 states)

- to exercise exclusive jurisdiction over children who are wards of the tribal court, regardless of whether the children are located on or off of an Indian reservation or within or outside of a Public Law 280 state

- to petition a state court to transfer jurisdiction of a voluntary or involuntary foster care placement or termination of parental rights proceeding to the tribe's court

- to decline to exercise jurisdiction over a state child custody proceeding where a parent or an Indian custodian has requested the state court to transfer jurisdiction to the tribe

- to intervene in a state court voluntary or involuntary foster care placement or termination of parental rights proceeding

- to receive notice from the state court of an involuntary foster care placement or termination of parental rights proceeding and due process may require notice in voluntary proceedings
- to examine all documents filed with the court which may affect involuntary foster care placement or termination of parental rights, if the tribe is a party to the proceedings
- to petition a court of competent jurisdiction under 1914 to invalidate a state court ordered foster care placement or termination of parental rights, regardless of whether the underlying proceeding was voluntary or involuntary, on the grounds that such action violates any provision of 1911, 1912 or 1913 of the Act, in an ICWA proceeding
- to alter the order of preference for the placement of children in foster or adoptive homes. 25 U.S.C. 1915(c). State courts and agencies are then required to follow the tribe's order of preference
- to define who is an extended family member for purposes of the foster care and adoptive placement preferences
- to petition the Secretary of the Interior to reassume whatever jurisdiction over child custody proceedings a state may have acquired pursuant to Public Law 280
- to enter into agreements with states governing the care and custody of Indian children and the general or case-by-case exercise of jurisdiction over child custody proceedings
- to request and receive from the Secretary of the Interior any information that would assist the tribe in determining whether to grant tribal membership to an Indian child or in determining any rights or benefits associated with that membership

Tribe's rights taken from *A Practical Guide to the Indian Child Welfare Act by the Native American Rights Fund.* For a more in-depth description as well as reference to legal citations go to*:* *http://www.narf.org/*.

> **"Nothing is so strong as gentleness, nothing so gentle as real strength.**
> **- Sitting Bull**

"May the Sun bring you new energy by day. May the Moon softly restore you by night. May the Rain wash away your worries. May the Breeze blow new strength into your being. May you walk gently through the world and know its beauty all the days of your life.

- Apache Blessing

Capacity Building
CENTER FOR TRIBES

info@cbc4tribes.org; 1-800-871-8702