

## ICPC & ICWA Compliance

*Understanding the Implications of the  
Indian Child Welfare Act  
in the Administration of the  
Interstate Compact on the Placement of Children*

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## Commonalities of ICPC & ICWA

### Both Laws:

- Applicable in all 50 states
- Include Protections for Children
- Involve Jurisdictional Issues
- Focus on Best Interests of Child
- Include Voluntary & Involuntary Cases
- Include Foster Care & Adoptive Placements

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## Applicable ICPC Provision

### ICPC Article III:

a). No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency **shall comply** with each and every requirement set forth in this article and with the **applicable laws** of the receiving state **governing the placement of children** therein.

Since ICWA is a federal law that addresses the placement of an Indian child in **all 50 states**, it is one of the "**applicable laws**" which govern the placement of children.

All ICPC offices thus have an obligation to monitor for compliance by the "sending agency" with the provisions of ICWA:

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## 100A & ICWA Monitoring

The image shows a portion of a legal form, likely a petition for adoption or guardianship. A red arrow points to a field labeled 'IS THIS CHILD AN INDIAN CHILD?' with a 'YES' or 'NO' selection area.

The 100A requests that the sending party clearly designate the ICWA status of the child by indicating if ICWA does or does not apply to the child.

This box should be filled out for every 100A.

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## Other Sources of ICWA Info

- Legal Documents
  - "Findings" by the court
  - Affidavits
  - Court Orders
- Medical & Social Histories
- Narrative Reports on Child
- Other Documents
  - Tribal membership cards
  - Certificate of Indian Blood
  - Birth Certificates

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## The History Behind ICWA

Our treatment of Native Americans includes:

- Dispossession of homelands
- Relocation *The Removal Act of 1830 Trail of Tears*
- Confinement on Reservations
- Genocide *Massacre at Wounded Knee, 1890*
- Dissolution of Tribes *The Allotment Act & Dawes Act, 1887*
- Forced Assimilation *Indian Boarding Schools*
- Removal & Adoption of children by non-Indian families  
*1950's CWLA Indian Adoption Project*

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### Massacre at Wounded Knee



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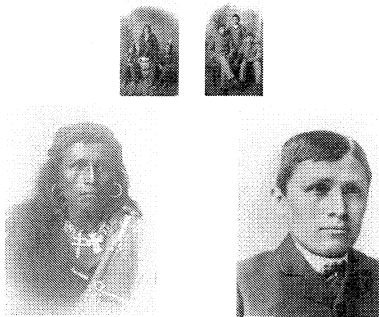
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### Assimilation: Before & After



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### Testimony before Congress

***Testimony before Congress on ICWA***

"... that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . ."

Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians

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**Video: "Children of a Proud People"**

- Video (2007) by **Spaulding for Children**
- This presenter participated in the development of this video, which included the participation of representatives of a number of Indian tribes.
- This 33 minute video provides an overview of the Indian Child Welfare Act and how it is viewed by Native Americans.

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**ICPC & ICWA**

In approving an interstate placement, it is vital that ICPC offices determine if ICWA applies and if the sending party has fully complied with the requirements of both federal and state law related to ICWA.

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**Purpose of ICPC**

**ICPC Law, ARTICLE I. Purpose and Policy**  
It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(a) Each child requiring placement shall receive **the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications** and facilities to provide a necessary and desirable degree and type of care (emphasis added).

(b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby **promoting full compliance with applicable requirements** for the protection of the child (emphasis added).

(c) The proper authorities of the state from which the placement is made may obtain **the most complete information** on the basis on which to evaluate a projected placement before it is made (emphasis added).

(d) Appropriate jurisdictional arrangements for the care of children will be promoted.

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### Summary of Criteria for ICPC Placements

Each Child shall receive **Maximum Opportunity** for a Placement which is:

- In A Suitable Environment
- With Qualified Persons
- In Full Compliance with Requirements
- Based on Most Complete Information Available
- Not Contrary to Interests of Child

Articles I & III

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### When Does ICWA Apply?

- To Placements of "Indian" Children  
"child custody proceedings" 25 USC 1903
- **Involuntary Custody Cases**
  - Involuntary Foster Care
  - Involuntary Termination of Parental Rights
- **Voluntary Placements**
  - Voluntary Termination of Parental Rights
  - Voluntary Adoptions

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### When Does ICWA Not Apply?

- Juvenile Delinquency placements
- Custody actions as part of a Divorce case

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**To Whom Does ICWA Apply?**

- ICWA places a duty on the Courts of each State to determine if a child is an “Indian Child” and whether or not the case is subject to the law.
- The person or agency seeking the involuntary placement has duty to provide Notice.
- ICWA does not compel **ANY** action by the tribes.
- ICWA does give specific rights to the parents of Indian children as well as rights to the tribes.

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**Who is an “Indian” child?**

**Two-fold test** 25 USC 1903 (4)

- Child is a member of a federally recognized tribe.

**OR**

- Child is eligible for membership **AND** is the biological child of a member of a tribe.

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**Tribal Membership**

- Tribal Membership is a “political” status of membership in a sovereign nation
- Membership criteria is set by each tribe
  - Blood Quantum standards
  - Ancestry standard
  - Residency standard
- Child may be connected to more than one tribe

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### **Monitoring for Notice**

#### **Involuntary Child Custody Proceedings:**

ICWA requires Notice to tribe & parent/custodian

- Involuntary foster care placement
- Involuntary termination of parental right

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### **Monitoring for Notice**

#### **Voluntary Child Custody Proceedings:**

- Not specifically required in federal ICWA
- May be required under state laws
- May be required in "Dual Status" cases
- Tribal right to intervene may require notice

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### **Notice Compliance**

- Can be found in the legal documents
- Note if tribal representative attended hearings
- Adoption documents may include a letter to the tribe nor other formal notice.

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### **“Split Status” ICWA Cases**

Many cases may involve **BOTH** voluntary and involuntary elements.

**EXAMPLE:**

If the birth mother gives voluntary consent to an adoption but the birth father does not, then any action to terminate his rights would be an involuntary action, requiring notice to him & to the tribe under ICWA

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### **Birth Fathers**

- **ICWA definition of “parent”:**  
excludes an unwed father who has not acknowledged or established paternity
- **Stanley v. Illinois**  
U.S. Supreme Court rules that unwed fathers have a right to notice of legal hearings.
- **Voluntary versus Involuntary**  
Many adoptions either terminate birth father’s rights involuntarily or rule his consent is not necessary, but either of these could be “involuntary” under ICWA

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### **Notice & State Law**

A number of states have enacted state laws related to the Indian Child Welfare Act

- Oklahoma
- Iowa
- Minnesota
- Washington
- North Dakota
- Nevada
- California
- Colorado
- Others ???

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### **“Existing Indian Family”**

A number of state courts have interpreted ICWA as not applying to situations where an Indian child is not being removed from an “existing Indian family.”

This so-called “Existing Indian Family Exception” has been challenged in a number of courts. Oklahoma’s Supreme Court recently reversed itself and no longer accepts this concept. Other states are reviewing it.

The position of each state’s courts will impact how the Notice requirements of ICWA are applied.

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### **Jurisdiction**

#### **Tribal Court**

- If child resides on reservation or Indian land or is a ward of the Tribal court, then the Tribe has ***Exclusive Jurisdiction***
- State Court case may be transferred to tribal court

#### **State Court**

- If either parent objects to transfer, case stays in state court.
- Tribe has the right to intervene in state court.

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### **Tribal Intervention**

- Allowed at any point in legal proceedings
- Tribe may choose to have attorney or not
- Right to notice of all subsequent hearings
- Right to access court file \ receive pleadings
- Right to question witnesses
- Right to call witnesses
- Right to object (eg: placement preferences)
- Right to request transfer to tribal court
- Ability to monitor placement until finalization

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### Tribal Rights & Intervention

- *How can a tribe exercise its ICWA right to intervene, if it does not receive notice of placements and related hearings?*
- This is an unresolved legal issue which will vary from one state court system to another, depending upon court rulings.

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### Consent Requirements

- Voluntary placements
  - Voluntary Foster care
  - Voluntary Termination of Parental Rights
  - Voluntary Adoption
- Executed in writing
- Done in front of Judge
- In a Court of competent Jurisdiction
- Must include the Judge's Certification
- Understood English or had Interpreter

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### The 10 Day Standard

- The parent of Indian child may not give a legal consent for placement prior to the child being **TEN** (10) days of age.
- *ICPC should compare the child's DOB with the date of the Consent document.*
- Invalid if PRIOR to 10 day period.

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### Right to Revoke

A voluntary consent **MAY** be Revoked

- **At Any Time**
- **For Any Reason**

**UNTIL** – One of **two thresholds** are met

- Court issues an order Terminating Parental Rights, or
- Court issues a Final Decree of Adoption

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### Legal Risk Placements

- Many adoptions are made under some degree of Legal Risk
- “Legal Risk” exists when the rights of the birth parents are not entirely severed.
- Some states do not allow Legal Risk placements in ICPC adoptions
- Adoptive parents must sign a written Acknowledgement of Risk

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### Legal Risk & ICWA

- Much greater degree of risk for an ICWA placement
- Document should address risks related to:
  - ICWA status of child
  - Parent’s Right to Revoke
  - Right of Tribe to Intervene
  - Right of Tribe to object to placements outside of ICWA preferences

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### ICWA Placement Preferences

- Set in federal law (25 USC 1915)
- Must follow preferences unless Court finds “good cause” to vary.
- Different preferences for foster care & adoption

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### Adoption Preferences

ICWA provides 3 preferences in adoptions:

- A member of the child’s extended family
- Other members of the Indian child’s tribe
- Other Indian families

Non-Indian families do not fall within the ICWA preferences

A Court must find that “good cause” exists to depart from the ICWA preferences in order for an Indian child to be adopted by a non-Indian family

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### Foster Care Preferences

**Foster care placements should be:**

- Least Restrictive Setting
- Approximates a family
- Can meet child’s special needs, if any
- Within Reasonable Proximity to home

**Foster Care Placement Preferences:**

- A member of Indian child’s extended family
- Foster home licensed by tribe
- Indian foster home licensed by non-tribal org
- Institution approved by tribe or operated by an Indian organization & suitable to meet child’s needs

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**Tribal Preferences**

- A tribe may establish a different order of placement preferences
  
- Done by a resolution approved by the tribal governing body

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**Levels of Evidence**

**Foster Care Placements**

- Clear & Convincing Evidence
  
- Testimony of qualified expert witness
  
- Continued custody likely to result in serious emotional or physical harm to child

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**Levels of Evidence**

**Termination of Parental Rights** (involuntary)

- Beyond a Reasonable Doubt
  
- Testimony of qualified expert witness
  
- Continued custody likely to result in serious emotional or physical harm to child

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### Legal Residence of Child

#### Holyfield Case

(Mississippi Band of Choctaw Indians v. Holyfield)

#### The U.S. Supreme Court found:

- A child can not establish residency on own
- Legal residency of child is with parent
- Parent can use another jurisdiction to place the child to avoid jurisdiction based on residency

**ICPC:** *Where is the parents' residency?*

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### Review of ICPC Focus on ICWA

- Is the child an "Indian child" per ICWA?
- Does ICWA apply?
- Is Notice Required?
- Was Notice Provided & Documented?
- Does family fall within ICWA preferences?
- Did the Court find "good cause" to vary from ICWA preferences?

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### Reviewing ICPC \ ICWA Adoptions

- Was Consent given before Judge?
- Was child at least 10 days old at consent?
- If Adoption, is it fully voluntary or split?
- Does "Legal Risk" form address ICWA?
- Does adoptive family fit preferences or has "good cause" been established?

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