

MODULE 2

ICWA 101

Intervention

Transfer

Active Efforts to Prevent Removal and Removal Proceedings



**The
Whitener
Group**

INDIAN CHILD WELFARE ACT TRAINING

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For the Choctaw Nation

INTRODUCTION

Individual Reflection: Opening

Take a minute to jot down answers to these questions—don't over think them.

One thing I do every day for my own self-care is:

One reason why (or how) ICWA helps Choctaw families is:

One reason why it is important for me to understand ICWA is:

One thing I learned last week that I don't want to forget it:

LECTURE

Topic 1: ICWA 101

LECTURE TAKEAWAYS

ICWA protects tribal jurisdiction in child welfare cases and provides a process to transfer any case from the state court to tribal court

In non-PL 280 states the tribe has jurisdiction when the child is either domicile on the reservation or a ward of tribal court

ICWA applies when an “Indian Child” is in a “Child Custody Proceeding”

Indian Child

Child who is a member of a tribe OR eligible for membership and whose parent is a member

Child Custody Proceeding

- » Foster Care Placement (includes Guardianships);
- » Termination of Parental Rights;
- » Pre-adoptive Placement;
- » Adoption Proceeding

Tribes have the right to intervene in state ICWA cases which makes them a party to the case

Major Elements of ICWA that Apply at Child Custody Proceedings:

- » Inquiry/Notice
 - » Active Efforts
 - » Testimony of a Qualified Expert Witness
 - » Heightened Burden of Proof
 - » Placement Preferences
-

At an “Emergency Removal” there is a special burden for removal or placement of a child

If the Elements of ICWA described above (except placement preferences) are not followed the hearing may be invalidated

MATERIALS

- [OAC 340:75-19-6 Tribal Intervention](#)

RELEVANT CITATION(S)

ICWA

25 USC § 1911 Indian tribe jurisdiction over Indian child custody proceedings.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 USC § 1912 Pending Court Proceedings

(c) Examination of reports or other documents.

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

Federal Regulations

25 CFR § 23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

25 CFR § 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

Topic 3: Transfer

LECTURE TAKEAWAYS

Transfer is the default

Parent, the Indian custodian, or the Tribe may request transfer

The right to request a is available at any stage in each foster-care or termination-of-parental-rights proceeding

Tribe must be notified in writing of the transfer petition

Court may request a timely response regarding declination of the transfer.

Court may only decline to transfer if

- » Tribe Declines
 - » Parent Objects
 - » There is a finding of good cause
-

Transfer is a jurisdictional not a substantive question

Good Cause may not be:

- » Whether the proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice until an advanced stage
- » Whether there have been prior proceedings and no request for transfer;
- » Whether transfer will change the placement of the child;
- » The child's cultural connections with the tribe or its reservation; or
- » SES conditions or any negative perception of Tribal social services/court systems.

MATERIALS

- [OAC 340:75-19-7 Transfer of proceeding to tribal court](#)

RELEVANT CITATION(S)

ICWA

25 USC § 1911. Indian tribe jurisdiction over Indian child custody proceedings
(b) Transfer of proceedings; declination by tribal court.

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

Federal Regulations

25 CFR § 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

25 CFR § 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

25 CFR § 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

25 CFR § 23.118 How is a determination of "good cause" to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated

orally on the record or provided in writing on the record and to the parties to the child custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

25 CFR § 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption.

Topic 4: Active Efforts to Prevent Removal and Removal Proceedings

LECTURE TAKEAWAYS

Before the court can order guardianship placement, or termination of parental rights, the state must prove:

- » Active efforts have been made to reunify the family; and
- » That these efforts have proven unsuccessful

Active efforts must be documented in detail in the record

Active efforts are more than reasonable efforts

They are affirmative, active, thorough, and timely

Active efforts should

- » Involve assisting the parent through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.
- » Be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe
- » Be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child's Tribe

Federal Regulations provide a list of active efforts examples

MATERIALS

- [BIA Quick Reference Sheet Active Efforts](#)
- [Family Justice Initiative Maintaining Active Efforts During COVID-19](#)

RELEVANT CITATION(S)

ICWA

25 USC § 1912(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of... an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Federal Regulations

25 CFR § 23.120 How does the State court ensure that active efforts have been made?

- (a) Prior to ordering an involuntary foster-care placement and termination of parental rights,, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.*
- (b) Active efforts must be documented in detail in the record.*

§ 23.2 Definitions.

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;*
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;*
- (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the*

Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

SMALL GROUP LEARNING

Discussion 1: Intervention

(20 min) 12:10-12:30

Activity: Rank 'em up!

Rank the considerations for deciding whether to intervene and discuss:

_____ Distance of the case from Choctaw Nation

_____ Staff Capacity

_____ Relationship with the state/state worker

_____ Current trajectory/permanency plan in the case

_____ Clear Legal Issues/Lack of ICWA compliance

_____ Lack of state understanding of the culture of the family

Discussion: At Choctaw who decides whether and when to intervene in a state ICWA case? What is Choctaw's process for deciding when to formally intervene?

- a. Is this process written down anywhere (Code? Policies? Procedures? Internal memo?)
- b. How is the decision to intervene communicated to relevant Choctaw Departments (Social Services, Legal, Enrollment, etc.)?

Discussion 2: Transfer

(20 min) 12:40-1:00

Activity: Break it down now.

What are the major difference between how a child welfare case is handled by Oklahoma v. Choctaw? What laws/policies are different? What processes are different? What other things are different?

	Choctaw	State
Active Efforts are provided		
Adjudication is by Clear and Convincing Evidence		
TPR requires proof Beyond a Reasonable Doubt		
Guardianships more common/favored than TPR/Adoption		
Tribal Customary Adoption is available		
Specialty Court (e.g. family treatment court) is available		
Parents are provided Attorneys		
Children are provided GALs/Attys		
Known systemic bias		
Large dockets/High caseloads		
Law and Practice is more about Family Preservation		
Law and Practice is more about Child Safety		

Discussion: What do you think Oklahoma case workers, attorneys, and lawyers know about the Choctaw child welfare program, court and child welfare code? What do other state's case workers, attorneys and lawyers know?

- a. How does Choctaw educate its state partners about its child welfare program, court and code?
- b. How does Choctaw advocate for transfer to tribal court?

Discussion 3: Active Efforts

(20 min) 1:10-1:30

Activity: But make it active!

Pretend you are a state caseworker (regardless of your current position!). Below are efforts that would likely be considered “reasonable,” what should you, the state caseworker, do in an ICWA case to make them “active.”

Reasonable Effort	Active Effort
Engage the parents in drafting a case plan	Example: Engaging the tribal case worker, extended family and any elder mentors in drafting a case plan. Facilitate a family team decision-making process to craft the case plan.
Refer parent to relevant services (e.g., counseling, parenting class, or housing)	
Arrange weekly visitation	
Ask parent about possible family placements	
Provide foster parents with basic health and family information about the child(ren)	
Send Choctaw your court reports prior to the hearing	
Tell parent to attend AA meetings regularly per court order	

Activity: Let's see what we've got...

On the next page, create a service map of the services Choctaw can offer. List all the services you can think of, be creative!

Parental Support

Mental Health

Substance Abuse

Domestic Violence

Health Care

Corresponding Legal Issues

Housing

Discussion: Does the state know about these services? Do members? How can Choctaw provide better community education on the services?

What can Choctaw offer out-of-state families in these areas of support?

Who helps coordinate all of these services? Do case managers have the tools they need to fill this role? Is there a forum or place that service providers talk to one another? Are there services agreements (MOUs) in place to coordinate these services?

Now go back to the service map. What services are missing/does Choctaw still need to help families be successful?

Individual Reflection: Closing

Take a minute to jot down answers to these questions—don't over think them.

One thing I learned today is:

One thing we talked about today that I have been doing well in state ICWA cases is:

One thing I think I can do better after today in state ICWA cases is:
