

The INDIAN CHILD WELFARE ACT *and*
ACTIVE EFFORTS:
PAST *and* **PRESENT**

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Acknowledgments: Funding for this publication was provided by the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention through Award #2018-CT-FX-K001 to the National Council of Juvenile and Family Court Judges. Points of view or opinions expressed are those of the report contributors and do not necessarily represent the official position or policies of the funder or the National Council of Juvenile and Family Court Judges.

Suggested Citation: Hartway, L. & Korthase, A. (2020) *The Indian Child Welfare Act and Active Efforts: Past and Present*. Reno, NV: National Council of Juvenile and Family Court Judges.





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Judge Sally Tarnowski, Sixth Judicial District, Minnesota

Judge Korey Wahwassuck, Itasca County District Court, Minnesota

The **INDIAN CHILD WELFARE ACT** *and* **ACTIVE EFFORTS:** **PAST** *and* **PRESENT**

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to address the widespread practice of state entities removing American Indian and Alaskan Native children from their homes and families. Congress found “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that a high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”¹

This publication is a companion to others developed by the National Council of Juvenile and Family Court Judges (NCJFCJ) regarding ICWA for judges, court staff, attorneys, child welfare professionals, and other stakeholders involved in child welfare cases. It focuses on the use of active efforts as an essential tool in the implementation of ICWA and as a best practice in child welfare. It is intended to provide the history behind ICWA and, in doing so, outline both the why and the how of active efforts in ICWA implementation.

States are required to provide reasonable efforts to prevent removals and to safely

reunify families, unless a court relieves the agency of this obligation.² In each state and in state courts across the country, there are many court opinions examining the difference between those reasonable efforts requirements and ICWA’s active efforts requirements.³ Instead of focusing on comparisons between active efforts and reasonable efforts in terms of level of services, the federal regulations implementing ICWA focus on “the quality of the actions necessary to constitute active efforts (affirmative, active, thorough, and timely) and providing examples and clarification as to what constitutes active efforts.”⁴

“I cannot begin to walk in those shoes, but I can try to gain trust; I can ask questions of parents and families to hear what is going on with them; I can ask what they feel is needed to keep their children safe, and I can help to see they get the support they need.”

Judge Sally L. Tarnowski

Sixth Judicial District, Minnesota

WHY HISTORY MATTERS

Judges, attorneys, and case workers have a lot to understand with each child welfare case. With high caseloads, following the heightened requirements of federal law for ICWA cases may seem particularly overwhelming. However, from a historical perspective it is especially important. While all of ICWA's obligations exist to ensure tribal children and families have the opportunity for the best case outcomes, it is essential to understand the history of ICWA to give meaning to these requirements, particularly active efforts, which are regarded as providing the gold standard in child welfare cases.⁵

ICWA was the result of several congressional hearings and investigations. The legislative record leading to its enactment is hundreds of pages. The investigation lasted four years and concluded that up to 35% of American Indian children lived in foster care, adoptive care, or institutions.⁶ The record shows both the practice of the “wholesale removal of Indian children from their homes...”



and the devastating impacts to children, Indian families, Indian tribes, and their communities.⁷ Years later, the Supreme Court in *Mississippi Choctaw Indians v. Holyfield* highlighted the legislative record and the history of ICWA as a key part of its decision. Although it dealt primarily with issues of domicile and jurisdiction, the decision nevertheless underscores the importance of history in understanding ICWA, including active efforts.

“The requirement of ‘active efforts’ to PREVENT the break-up of an Indian family is one of the critical tools we have, as judicial officers, to stop the intentional or negligent destruction of families who are citizens of proud tribal nations.”

Judge Doris Fransein (Ret.)

Tulsa County, Oklahoma

The active efforts portion of ICWA is one of the ways Congress sought to address these harms.

It provides guidance for the child welfare system to strive for the best case outcomes from the very beginning of a case. This remains critical because while American Indian children are no longer removed at the pre-ICWA rate, they continued to be disproportionately represented in the child welfare system.⁸ The use of active efforts, therefore, remains necessary to mitigate the wrongs that ICWA, as a federal law, is meant to make right.

Though ICWA does not define the term active efforts, the federal regulations implementing ICWA state that they are “affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.”⁹ It requires that services be provided in order to permit the Indian child to remain or be reunited with his/her parents, whenever possible, and also to protect against unwarranted removals. The level and nature of the services should

enable parents who are, or may readily become, fit parents retain or regain custody of their child.¹⁰ With removals being such a catalyst for the creation of ICWA, it makes sense that the law’s implementation hinges so greatly on the use of active efforts.

“It is important to understand why the ICWA was needed and what it was intended to address. This helps us to recognize the role the tribes should have in a case and to ensure that statutory provisions are appropriately followed.”

Judge Sally L. Tarnowski

Sixth Judicial District, Minnesota



WHY ONGOING COLLABORATION IS HELPFUL

When a state child welfare agency or court has an ICWA case, it should proceed as though it is working with a tribe. This means it is working with sovereign nations within the United States, each with its own structure, culture, history, and traditions.¹¹ Each nation also has its own inherent authority to govern itself. It is important for state agencies and courts to understand that, like within their own agencies and governance, changes may occur. This could mean, for example, that tribes may change membership requirements or the membership enrollment process during the time a case is open. Thus, ongoing communication with tribes and familiarity with their governance structure is crucial.¹² While understanding every historic or political aspect of a tribe is unrealistic, it is possible to have a strategy on how to engage tribes in the work of the agency and court systems.

Ongoing efforts to consult and collaborate with tribes regarding implementation of ICWA's active efforts is foundational to the process. "[T]o the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's Tribe, and in partnership with the child, parents, extended family, and Tribe. This is consistent with congressional direction in ICWA to

"Consultation, like communication generally, is a two-way street. It's not about one system telling the other how it's going to be; it requires a willingness to really listen and gather input."

Judge Korey Wahwassuck

Ninth Judicial District, Minnesota

conduct Indian child-custody proceedings in a way that reflects the cultural and social standards prevailing in Indian communities and families."¹³ The ICWA Guidelines offer examples of active efforts that focus on cooperation between state agencies and tribes, including inviting tribes to participate in providing support services and identifying community resources as well as conducting diligent search for extended Indian family members.¹⁴ By including tribes in meetings involving everything from specific case decisions to overarching policy and practice, state systems can improve relationships with tribes and learn about culturally appropriate resources, thereby improving the chance for positive results in implementing active efforts. Collaboration with tribes can also assist in identifying resources for families

"I must never lose sight of the reality that while each family's needs are unique, so too are the customs and resources of each tribal community."

Judge John J. Romero, Jr.

Children's Court, New Mexico

that connect them with their tribe and such a connection can serve as a protective factor in building resilience. Each of these positive steps impacts case outcomes and tribal families in the community. Even where there are no tribal nations or communities in an area, it is still important to reach out to urban Indian centers or the tribes of the families who appear in court, even doing so remotely through phone or video participation if necessary.

“Each parent’s needs are different as are each tribe’s. We need to work together to provide the best support to families to reunify with their children, and if they are not able to reunify themselves, to ensure that tribes, who know their families, determine what is best for the child.”

Judge Sally L. Tarnowski

Sixth Judicial District, Minnesota

Tribal-state forums are one way judges and child welfare professionals can work toward a sustained relationship with local tribes.¹⁵ In addition, it is important to include tribal judges, court staff, child welfare workers, and attorneys when possible in state-wide training opportunities. Relationships can be fostered by allowing state and tribal staff to share knowledge, successes, and challenges.

Judges, attorneys, and child welfare professionals are responsible for making serious decisions in a way that establishes

and maintains confidence in the systems they represent. At the same time, “[w]ith 574 federally recognized Tribes, state systems and actors cannot possibly know everything necessary to understand the historical and cultural framework necessary for successful implementation of ICWA.”¹⁶ It is crucial to understand how agencies and courts can be humble when they do not understand tribal culture. Seeking to understand the cultural components at play means a better understanding of the case and a better chance of making informed decisions for the best outcomes.

“When we acknowledge that we don’t, and can’t possibly, know everything, we are much more likely to ask questions, to challenge our assumptions. We are more likely to ask for help. That’s what being ‘humble’ is all about. Trust is much more easily established between child welfare system actors and families and Tribes if we are open to, value, and seek out input.”

Judge Korey Wahwassuck

Ninth Judicial District, Minnesota



WHY UNDERSTANDING TRIBAL FAMILIES IS BENEFICIAL

It is not only important to understand the history of ICWA, it is also helpful to understand individual families in order to evaluate the best ways to assist them for positive outcomes. When any state court or agency is involved in the removal of an Indian child from their family and home, ICWA requires the use of active efforts to both prevent the removal of the child and/or to reunite the child with their family.¹⁷ In order to understand how active efforts can lead to the best outcomes, it is important to understand not only how to include tribal culture while implementing the law but also to understand both family structures within a particular tribal culture and the history of individual families. In doing so, the agency and the court system can better understand the resources and support available to

parents and children during a very difficult time.

The regulations recognize that services and case plans will vary with the facts and circumstances of each case, but they also require that active efforts include assisting parents through the steps of a case plan as well as with assessing and developing the resources necessary to meet the requirements of that plan.¹⁸ Active efforts must be consistent with the social and cultural conditions and the way of life of the Indian child's tribe and conducted in partnership with the Indian child and the Indian child's parents, family, and tribe.¹⁹

"All families are not alike. It is important that we understand where the tribe and the person are coming from and the circumstances of each particular case. My experience growing up does not match the experiences of those who are before me, and the only way that I will gain an understanding of their journey is to listen to them, to ask questions, and to inquire of them what they need in order to get their children back."

Judge Sally L. Tarnowski
Sixth Judicial District, Minnesota

“Tribal history is important if for no other reason than understanding historical trauma and its impact on those tribal families who appear before us today. History also teaches us to understand and respect the culture, the strength, pride, and endurance of the tribes. Americans are fascinated with their genetic links to other nations and have used their ancestors’ nationality or culture to explain their current dispositions, likes or dislikes of food, music, etc. But when working with family preservation and identifying the strengths within a family system, the judge’s understanding and acceptance of the history of the families’ ancestors should provide him/her/they with the respect and perhaps empathy to repair unnecessary separation and promote the importance of the tribal citizenship and culture.”

Judge Doris Fransein (Ret.)

Tulsa County, Oklahoma



HOW TO IMPLEMENT ICWA BEST PRACTICES

An understanding of the history of ICWA, its purpose and goals and the collaboration between state and tribal systems it promotes, can lead to a better understanding of the families involved in the child welfare system as well as provide a solid basis upon which to realize active efforts as a best practice in child welfare. Below are some practical recommendations on how judges, attorneys, and case workers can carry out the requirements of ICWA’s active efforts as well as resources available to assist.

ONGOING AND INCLUSIVE ICWA TRAINING:

The requirements of ICWA and its interaction with other state and federal requirements can be confusing for courts and child welfare agencies. Creating opportunities for training on ICWA and/or encouraging staff to take advantage of trainings sponsored by others

is one way to ensure that everyone has the information they need in order to understand implement ICWA and its active efforts requirements. Holding trainings as often as possible can also address staff turnover and reinforce ICWA practice among veteran court and agency workers. The inclusion of tribal judges, court staff, child welfare workers, and attorneys whenever possible in any training opportunities will not only improve collaboration among agencies, it will ensure tribal perspective is incorporated into the training and by extension help improve outcomes in ICWA cases.

STARTING ACTIVE EFFORTS EARLY TO PREVENT REMOVAL:

ICWA's regulations and guidelines provide judges clear guidance that active efforts are a tool to prevent the removal of children from the home.²⁰ This is in line with the principle that removal from the family is warranted only if minimally adequate standards and safety are not possible within the home. It echoes the standard of, "imminent physical damage or harm to the child," that case workers and courts must meet at any initial removal and emergency removal hearing.²¹

At outset of their interaction with a family, if a case worker or court has reason to know the child is an Indian child they should proceed under ICWA's emergency hearing requirements. 25 U.S.C. § 1922; 25 C.F.R § 23.113; ICWA Benchbook, pgs. 11, 13 and 14.

This means that implementation of active efforts cannot begin only after a removal has taken place, but instead can and should be used by child welfare agencies early in their interactions with Indian children, their families, and their tribe(s). Such an approach ensures that agencies are able to develop plans and provide services to Indian children and families that promote the safety of the children within the home and avoid the breakup of Indian families.

WHERE REMOVAL IS UNAVOIDABLE, ACTIVE EFFORTS IS A TOOL TO ASSIST AND REUNIFY:

Where agencies and courts have determined that removal from the home is in the best interest of the child, active efforts can provide invaluable guidance and assistance in reuniting and reunifying Indian families. The ICWA Guidelines recognize that active efforts need to be tailored to the facts and circumstances of each case but offers that steps such as keeping siblings together whenever possible and supporting regular visits with parents and/or Indian custodians in a natural setting should be considered and used.²² These, along with the collaboration with the child's tribe and the use of preferred-tribal placement can ensure that Indian children remain connected to their families, community, and culture all of which offer important resilience factors. They can also provide opportunities to strengthen and support the family and lead them towards reunification.

FOCUSING ON THE QUALITY OF SERVICES:

In applying active efforts, it is important to focus on the services provided to the family and to monitor those services. In order to ensure the proper services are offered, it is important to work with the child's tribe. A jurisdiction demonstrates a commitment to this effort when tribal representatives are consistently included in hearings, meetings such as family team decision meetings, and general court policy and practice decision making meetings. Tribes vary in the services they can provide depending on their resources, but it is important they have a voice in the decision on what services are provided and ordered.

DOCUMENT ACTIVE EFFORTS ON THE RECORD:

ICWA's regulations and guidelines require the documentation of active efforts on the record. Although each state's courts rules of evidence may differ and courts will decide the level of documentation necessary in each case, active efforts provided to each family must be documented in the case record. The regulations offer recommendations on the content of that documentation including:

- the issues targeted by the agencies' active efforts;
- a list of active efforts that would best address the families' issues with the supporting reasons for the choices made;
- details of how the agency provided active efforts; and

- the results of those active efforts.

It is also important to recognize that families' needs may change during the course of a case, so the type of services provided may need to be adjusted accordingly.

"Before ICWA's passage, state and private child welfare agencies looked at Indian parents through a biased lens, imposing their own non-Indian socioeconomic norms, ignoring cultural differences in Indian families, totally ignorant of Indian cultural values and social norms. ICWA's legislative history shows that removal of Indian children from their homes and placement in non-Indian foster care and adoptive homes led to a generation of Indians separated from their tribal communities, their tribal traditions and culture lost to them, with these Indian children suffering life-long emotional effects caused by loss of their Indian identity... Active efforts, if provided according to the letter and spirit of ICWA, are an opportunity to stop this cycle before it even begins."

Judge Korey Wahwassuck

Ninth Judicial District, Minnesota

RESOURCES TO ASSIST WITH MEANINGFUL, EARLY, AND CONTINUOUS ENGAGEMENT WITH THE CHILD'S TRIBE:

- The decision of using technology, whether that be telephonic or internet, should be discussed with tribal representatives. The following resources outline different options and considerations:
 - <https://www.ncjfcj.org/publications/court-focused-technology-platform-comparison-guide/>
 - <https://www.ncsc.org/services-and-experts/technology-tools>
- While states have specific resources around engagement of the tribes in that state, it is also important to understand that tribal families, like non-tribal families, move to different states. Therefore, the following links provide resources from a national perspective:
 - <https://www.acf.hhs.gov/cb/focus-areas/tribes>
 - https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/january-2017/improving-outcomes-in-indian-child-welfare-cases--strategies-for/
- Whether parties are appearing by phone or in person, it is important for them to feel valued. This could be done with time-certain calendaring, especially for the tribal representatives who may need

to appear in multiple courts in multiple time zones each day. It can also be done by making sure representatives are noticed properly, appear on the forms as a party, etc. Finally, it may be done by ensuring there are culturally- appropriate alternatives to the courtroom setting, such as family group decision making and mediation:

- <https://www.ncjfcj.org/publications/research-report-assessing-time-certain-calendaring-dockets/>
- <https://www.ncjfcj.org/publications/assessing-mediation-in-clark-county-nevada-eighth-judicial-district/>
- <https://www.childwelfare.gov/topics/permanency/planning/mediation/>

ENDNOTES

- 1 <https://www.ncjfcj.org/publications/indian-child-welfare-act-judicial-benchbook/>
- 2 2 U.S.C. § 671(a)(15) (2018).
- 3 See, e.g. In Re P.S.E., 86 N.W. 2d 110 (2012), see also In Re C.F., 230 Cal. App.4th 227 (2014).
- 4 25 C.F.R. § 23.2; *Guidelines for Implementing the Indian Child Welfare Act*, U.S. Dept. of Interior, Office of the Asst. Sec. Indian Affairs, Bureau of Indian Affairs (December 2016), p. 39 (ICWA Guidelines).
- 5 See ICWA Guidelines, p. 39, citing 81 Fed. Reg. 38788, 38813-38814 (2016).
- 6 *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-3 (1989).
- 7 Holyfield, 490 U.S. at 33.
- 8 Shamini Ganasarajah, et al., *Technical Assistance Bulletin: Disproportionality Rates for Children of Color in Foster Care, Fiscal Year 2015*, National Council of Juvenile and Family Court Judges 5 (September 2017).
- 9 25 C.F.R. § 23.2; ICWA Guidelines, p. 39.
- 10 *Id.*
- 11 <http://www.ncai.org/about-tribes>.
- 12 *Id.*
- 13 ICWA Guidelines, p. 40.
- 14 *Id.* at p.41.
- 15 The ICWA Guidelines offer additional collaborative resources as examples. See ICWA Guidelines, p. 90. See also, <https://www.courts.ca.gov/forum.htm>; <https://www.kansasjudicialcouncil.org/about/advisory-committees/tribal-state-judicial-forum>; <https://www.azcourts.gov/stfcf/>; and <http://www.mncourts.gov/Help-Topics/TCSCF.aspx>.
- 16 Judge Wahwassuck.
- 17 25 U.S.C. § 1912(d).
- 18 25 C.F.R. § 23.2; ICWA Guidelines, p. 40.
- 19 *Id.*
- 20 25 U.S.C. 1912(d); ICWA Guidelines, p. 39.
- 21 25 C.F.R. § 23.2; ICWA Guidelines, p. 40.
- 22 ICWA Guidelines, p. 41.



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