



**AMERICAN INDIAN  
GOVERNANCE AND POLICY INSTITUTE**

UNIVERSITY OF MONTANA

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**A Guide to  
Understanding the  
Indian Child Welfare  
Act in Montana**



# TABLE OF CONTENTS

<b>1. Introduction</b>	<b>1</b>
<b>2. Who We Are</b>	<b>2</b>
<b>3. Contributors</b>	<b>3</b>
<b>4. What is the Indian Child Welfare Act?</b>	<b>4</b>
<b>5. The Indian Child Welfare Act in Montana</b>	<b>5</b>
<b>6. Federal ICWA Background</b>	<b>6</b>
<b>7. Haaland v. Brackeen</b>	<b>7</b>
<b>8. The Montana Indian Child Welfare Act HB317(2023)</b>	<b>8</b>
<b>9. Before &amp; After the MICWA</b>	<b>10</b>
<b>10. Implications of Haaland v. Brackeen</b>	<b>12</b>
<b>11. Extension of the MICWA SB147(2025)</b>	<b>13</b>
<b>12. SB147(2025) The Proposed Revision</b>	<b>14</b>
<b>13. Active Efforts</b>	<b>15</b>
<b>14. Placement Preferences</b>	<b>17</b>
<b>15. ICWA Confidentiality Provisions</b>	<b>18</b>
<b>16. Roles &amp; Responsibilities</b>	<b>19</b>
<b>17. MICWA Definitions</b>	<b>24</b>
<b>18. Key Definitions in ICWA</b>	<b>25</b>
<b>19. Additional Resources</b>	<b>26</b>

"On February 1, 2020, I lost my daughter. She was 35, she left me seven grandkids...If me and their grandma did not step up and we did not adopt our grandkids, they probably would have got caught up in this foster care system, the adoption system. And why [the cultural compact] it was important to me is because we're talking about these compacts [cultural compacts] and how it relates to real life experience. 65 years ago, I got initiated as a grass dancer at Fort Belknap powwow... it was throughout that time, in the late 60s, when I started learning how to sing at a drum. I have a gift that I'm giving my grandsons, a drum made of buffalo hide. These are the things of our real life experiences... There are four sets of laws that we as humans abide by. First one is God's law. He has a set of laws that govern the universe, the Heaven. The second one is natural law. Those are the laws that govern nature, Mother Nature. Third one is ceremony law. This is a part of the compact that is not existent within the [Montana] law here. And those are the ceremonies, the ways of life that is spoken of in [the cultural compact]. Fourth one is human law. And those human laws [are] the experience, hands on, experience that those little ones are going to be able to come home to experience... [those] type[s] of ceremonies that they were born into... all these things are combined into one, because we were all put here for a reason... We're all gifted with these, these children [are gifted] with a good spirit in mind...And so when you take a look at this [access to Ceremony through the Cultural Compact], these are the things that are at the true nature of and the spirit of this law. And when we start taking a look at just the black and white wording of the law that's before us, how in the heck are we going to find out the real true meaning of what this [cultural compact] is going to actually have with true experiences?

I just turned 66 last year, and I'm just I'm still learning, but at the same time, with my life experience, you better believe it that I'm going to make sure that my grandsons, my granddaughters, are going to learn my ways. I have two great granddaughters, and they too are going to... have Indian names, and that's one thing, that when we're called into that life hereafter, we're all being called by our Indian name. God is not going to... going to call me Jonathan Windy Boy, your time's up. He's going to say nimitowa says hasta Mukta. That's what they're going to say, and that's...what my grandkids are going to live up to. They're the ones that are going to carry on what I've been fortunate to be carrying on with some of the ceremonies and those positions that I hold..."

## Jonathan Windy Boy

January 27, 2025 Public Health Welfare and Safety  
Senate Committee of the 69<sup>th</sup> Montana Legislature



## Who We Are

AIGPI is an Indigenous-founded and Indigenous-led research institute and think tank certified under the Montana Board of Regents.

Founded in 2020 by Heather Cahoon (*Upper Kalispel/Confederated Salish and Kootenai Tribes*), envisioned this institute as a resource providing Tribal leaders with the same level of policy research, analysis, and legal expertise provided to state and federal policymakers. Now led by Kristina Lucero (*Tseyicum band of the WSÁNEĆ nation*), aspires to strengthen relationships with Tribal communities to amplify Indigenous-led research with culturally-appropriate responses that support Tribal governments, economies, and communities.

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## Our Mission

Addressing the challenges federal Indian policy created for Indigenous communities with a cultural lens and response creates opportunities for healing and overcoming disparities marked in Western systems. With sovereignty as the North star, AIGPI supports Tribal governments in navigating the evolving political landscape to ensure Tribal voices are contributing to the policymaking that impact Indigenous peoples. Our research also educates local, state, and federal actors to support Tribal consultation and relationship-building and how their role can uphold sovereignty and chip away at the disparities created by their systems.



# Contributors

## Margery Hunter Brown Indian Law Clinic,

Alex Blewitt III School of Law

Established in 1980, the Margery Hunter Brown Indian Law Clinic provides students with practical experience regarding Indian law issues. Indian Law Clinic projects commonly focus on issues and problems affecting tribal governments, justice systems, and Indian people. Students work on a variety of projects promoting tribal sovereignty, cultural preservation, access to justice, and economic development within Indian Country. Students may work on matters in tribal, state, or federal courts.

## American Indian Governance & Policy Institute

Holly Hutchinson

Silver Little Eagle, 2025 *Baucus Leaders MT Intern*

## Montana Office of the State Public Defender

Lisa Woodward, Esq.

Kelly Driscoll, Esq.

# What is the Indian Child Welfare Act?

The Indian Child Welfare Act (ICWA) was passed by Congress in 1978 in response to America's history of unwarranted placements of American Indian children. This policy heightens the States' and Courts' burden when placing American Indian children in adoption, foster care, and involuntary proceedings. ICWA provides avenues in child welfare proceedings to keep American Indian children connected to their families and Tribal culture when possible. Despite being considered a "gold standard" for child protection practices, disparities continue to exist in protecting American Indian children's safety and well-being.

## The Indian Child Welfare Act in Montana

Present-day disparities in the foster care system are also a result of the federal government's chronic and ongoing underinvestment in Tribal communities. While the federal funding structure today is more inclusive of Tribal communities, the amount of funds and compliance monitoring tied to funding are still not enough to meet the needs of American Indian children and their families.

The State of Montana is no exception, American Indian children are in foster care at a rate nearly four times higher than their rate in the general population. The state's ongoing discrimination and inconsistent application of ICWA's best practices contribute to this issue, despite the added protections ICWA guarantees.

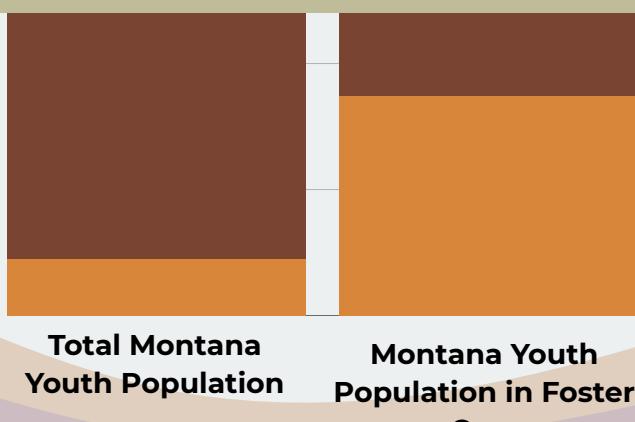
Given these issues, it is essential for Montana policymakers, legal practitioners, and department advocates to prioritize effective, unambiguous implementation mechanisms when making decisions for funding state services. More funding is needed to support preventative services, build capacity, and improve data collection measures. Such funding would increase access to support services families need before a child is removed from their home, build infrastructure to ensure employees are supported, and build systems of measurements that are tailored to the historical and intergenerational traumas created by federal Indian policies. By understanding and upholding the principles of ICWA, practitioners and policymakers can work to promote stability and security for Indian Tribes and families, while ensuring that children are placed in safe and nurturing homes.

# The Indian Child Welfare Act in Montana

## ICWA Courts in Montana



**"Native American children in 2020 made up about 9 percent of Montana's child population; they accounted for 35 percent of the state's foster care population" (Montana Judicial Branch, n.d.)**



**50% of the state representatives who spoke on HB317 on the Senate floor reflected an understanding of political classification**

"MONTANA IS THE CHILD REMOVAL CAPITAL OF AMERICA...MONTANA IS THE WORST STATE IN THE COUNTRY FOR REMOVING CHILDREN, THREE TIMES HIGHER THAN THE NATIONAL AVERAGE."

**Sharon Kickingwoman**  
January 27, 2025

"49% of American Indian children in the state will be subject to a CPS investigation compared to 37% of them are subject to CPS investigations for white children."

Kelly Driscoll  
Public Health, Welfare, and Safety  
Montana Senate Committee Hearing  
on Montana House Bill 317 (2023)

March 22, 2023

# Federal ICWA Background

*and the legal challenges behind introducing the Montana Indian Child Welfare Act*

**Montana House Bill 317 (2023)**

**Montana Senate Bill 147 (2025)**

The Federal Indian Child Welfare Act, enacted in 1978, aims to address the atrocities of federal Indian policy that encouraged the genocide of America's Indigenous population by preserving the connection between Native American children and their families, Tribes and cultural heritage. The Act requires states to follow a specific line of succession when placing Indian children whom are removed from their homes.

The ICWA ensures that states prioritize placing Indian children with family members, families of the same Tribe living on the same reservation, or a Native American family before considering a non-Native home.

Prior to the enactment of ICWA, about 75 to 80 percent of Native American families living on reservations nationwide "lost at least one child to the foster care system,"

(Montana DPHHS, n.d.)

25 to 35 percent of all Indian children had been separated from their families and placed in foster care, adoptive homes, or in institutions

- 90 percent of these placements were with nonrelative, non-Indian families

(Gaines-Stoner et. al., 2018)

## 1978: ICWA BECOMES FEDERAL LAW



# Haaland v. Brackeen

## *Biggest Court Case Challenging ICWA*

The U.S. Supreme Court case, *Haaland v. Brackeen* (formerly *Brackeen v. Zinke* and *Brackeen v. Bernhardt*) challenged the federal Indian Child Welfare Act (ICWA), alleging that the Act violated the U.S. Constitution.

In 2018, a federal district court in Texas ruled that the ICWA was unconstitutional. Petitioners of this suit, *Brackeen v. Zinke* included a birth mother, foster and adoptive parents, and the State of Texas. Filing this suit in federal court against the United States, the petitioners argued that (1) Congress lacks authority to enact ICWA (2) requirements of the ICWA violate the anticommandeering principle of the Tenth Amendment (3) ICWA employs racial classifications that hinder non-Indian families from adopting or fostering Indian children and (4) §1915(c) violates the nondelegation doctrine. §1915(c) is the provision that allows tribes to alter the prioritization order of placements (*Brackeen v. Zinke*, 2018).

District Court Judge Reed O'Conner ruled that (1) the ICWA illegally discriminates based on race, (2) that the ICWA places unconstitutional burdens on state agencies and courts, and (3) that the ICWA imposes impermissible burdens on Indian tribes (Native American Rights Fund, 2019). The ruling in *Haaland v. Brackeen* was significant as a federal judge has never before ruled ICWA as unconstitutional, and because courts have consistently rejected arguments against the ICWA that federal Indian statutes exceed Congress' authority or violate the Equal Protection Clause. This ruling created uncertainty about the future of ICWA and federal laws that protect tribal sovereignty.

The case was appealed by the federal government and four intervening tribes to the Fifth Circuit Court of Appeals, and eventually the U.S. Supreme Court granted the writ of certiorari to hear the case in February 2022. Oral arguments were heard in the U.S. Supreme Court as *Haaland v. Brackeen* in November 2022 (Native American Rights Fund, n.d.).

### **2018: TEXAS FEDERAL DISTRICT COURT JUDGE RULES ICWA UNCONSTITUTIONAL**

**2013: INITIAL MICWA INTRODUCED**

# The Montana Indian Child Welfare Act

## HB 317 (2023)

As anticipation grew around the country following the *Brackeen*, state law makers, tribal leaders, tribal attorneys, and child welfare advocates began considering the introduction of state ICWA laws – including Montana. In 2022, Tribal legal advocates began consulting with Montana Tribal leaders and other state stakeholders to introduce a Montana state ICWA bill that addressed unique challenges in Montana county courts.



### HB317 KEY PROVISION

The Montana Indian Child Welfare Act emphasizes the importance of Tribal involvement in placement options for Indian children within the state.

In light of the pending Supreme Court case regarding the Indian Child Welfare Act, 2023 Rep. Jonathan Windy Boy, D-Box Elder, sponsored House Bill 317 which was brought before the House Human Services Committee. The legislation garnered substantial backing from various stakeholders, including Indigenous advocacy groups, Native adoptees, and non-Native speakers. Over 30 individuals testified in support, sharing their personal experiences, expertise, and emphasizing the importance of the legislation.

### 2022: HAALAND V. BRACKEEN ORAL ARGUMENTS HEARD

2022: DRAFTING THE MICWA

JANUARY 2023 - THE MICWA  
INTRODUCED ON THE HOUSE FLOOR

# The Montana Indian Child Welfare Act

## HB 317 (2023)

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### HB317 Key Supporters

- American Civil Liberties Union
- Montana American Indian Caucus
- Forward Montana
- Blackfeet Tribe
- Confederated Salish and Kootenai Tribes
- Northern Cheyenne Tribe
- Crow Tribe
- Little Shell Chippewa Tribe
- Fort Peck Assiniboine & Sioux Tribes
- Chippewa Cree Tribe
- Rocky Mountain Tribal Leaders Council
- Montana Coalition Against Domestic and Sexual Violence
- Child Welfare Workers
- Montana Human Rights Network
- former Casey Foundation director (in personal capacity)
- Western Native Voice
- Montana Indian Law Section
- Montana Budget & Policy Center

House Bill 317, the MICWA, was amended in a conference committee after two separate versions of the bill cleared both chambers. The committee accepted parts of the amendment unanimously, while other portions were removed due to 3-3 tie votes. The sunset date of June 30, 2025 remained in the bill. Additionally, the section that would void the entire Act if the U.S. Supreme Court rules the Federal ICWA unconstitutional or unenforceable was reinstated.

A new section was added back to the bill in the conference committee outlined ***requirements for qualified expert witnesses*** in child custody proceedings, which remained in the final bill.

**MAY 3<sup>rd</sup> THE MICWA PASSES  
THE HOUSE & SENATE FLOORS**



# Before & After the MICWA

## HB 317 (2023) Major Provisions

### Federal “Active Efforts”

- No statutory definition
- Regulations define as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family"

**Following the conference committee amendments, On May 3, 2023 the conference committee report was adopted by both chambers, following House votes (64-32) and Senate votes (37-13) for passage. On May 22, 2023, Gov. Greg Gianforte signed HB317 into law.**

### Federal Jurisdiction Transfer

- Transfer to tribal court required "in the absence of good cause to the contrary"

### MICWA “Active Efforts”

- More detailed definition: "affirmative, active, thorough, and timely efforts meeting the requirements of [section 12] that are intended primarily to maintain or reunite an Indian child with the child's family and that are *tailored to the facts and circumstances of the case*"
- Provides detailed examples of "active efforts":
  - Comprehensive assessment of the circumstances of the Indian child's family with safe reunification as the desirable goal
  - Identifying services and assisting parents in overcoming barriers, including obtaining services
  - Involving tribal representatives in supporting family and in family team meetings, permanency planning, and resolution of placement issues
  - Conducting a diligent search of the Indian child's extended family members
  - Offering and employing all available and culturally appropriate family preservation strategies and facilitating the usage of remedial and rehabilitative services provided by the tribe
  - Taking steps to keep siblings together whenever possible
  - 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
  - Identifying community resources (e.g., housing, financial, transportation, mental health, substance abuse, peer support) and assisting the child's parents and family in accessing and utilizing the resources
  - Monitoring progress and participation in services
  - Considering alternative ways to address the needs of the Indian child's parents and family if the optimum services do not exist or are not available
  - Providing post-reunification services and monitoring
- Identifying services and assisting parents in overcoming barriers, including obtaining services
- Explicitly states that "**referral to a service or program does not constitute an active effort if the referral was the sole action taken**"

### MICWA Jurisdiction Transfer

- Explicitly states what cannot be considered as "good cause"
  - Whether there have been prior proceedings involving the child for which no petition to transfer was filed
  - Whether the child custody proceeding is at an advanced stage
  - Whether the transfer could affect the placement of the child
  - The child's cultural connections with the tribe or its reservation
  - Socioeconomic conditions or any negative perception of the tribal or Bureau of Indian Affairs social services or judicial systems)
- Detailed procedures for post-transfer coordination between state and tribal courts \*

**MAY 22<sup>ND</sup> GOVERNOR  
GIANFORTE SIGNS HB317(2023)  
INTO LAW**

# Before & After the MICWA

## *HB 317 (2023) Provisions*

### Federal Emergency Removal

- Brief provision allowing emergency removal to prevent "imminent physical damage or harm"

### MICWA Emergency Removal

- Detailed emergency procedures
- Specific petition requirements
- 30-day time limit on emergency proceedings
- Detailed findings requirements for courts

### Federal Qualified Expert Witness

- Requires "testimony of qualified expert witnesses" in parental rights termination cases
- QEWS is required to testify that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

### MICWA Qualified Expert Witness

- Provides detailed definition of "qualified expert witness"
- Requires consultation with the tribe on expert witness selection
- Prohibits** department child protection specialists from serving as qualified expert witnesses in their own cases
- Requires expert to be qualified regarding both likelihood of harm **AND** "prevailing social and cultural standards of the Indian child's tribe"

### Federal Consent & Voluntary Proceedings

- Consent invalid if given within 10 days of birth

### MICWA Consent & Voluntary Proceedings

- More detailed certification requirements for voluntary consent
- Specific language requirements for court certification

### Federal Training Requirements

- No specific training mandates

### MICWA Training Requirements

- Requires ICWA training for child protection specialists

### Federal Placement Preferences

- Lists placement preferences but limited detail on "good cause" exceptions

### MICWA Placement Preferences

- More detailed placement preference requirements
- Specific criteria for determining "good cause" to depart from preferences
- Prohibits departure based solely on socioeconomic status
- More detailed standards for determining placement availability

### Federal Full Faith & Credit

- No specific language

### MICWA Full Faith & Credit

- Added Provision:** "The state shall give full faith and credit to the public acts, records, judicial proceedings, and judgments of any Indian tribe that are applicable to Indian child custody proceedings"



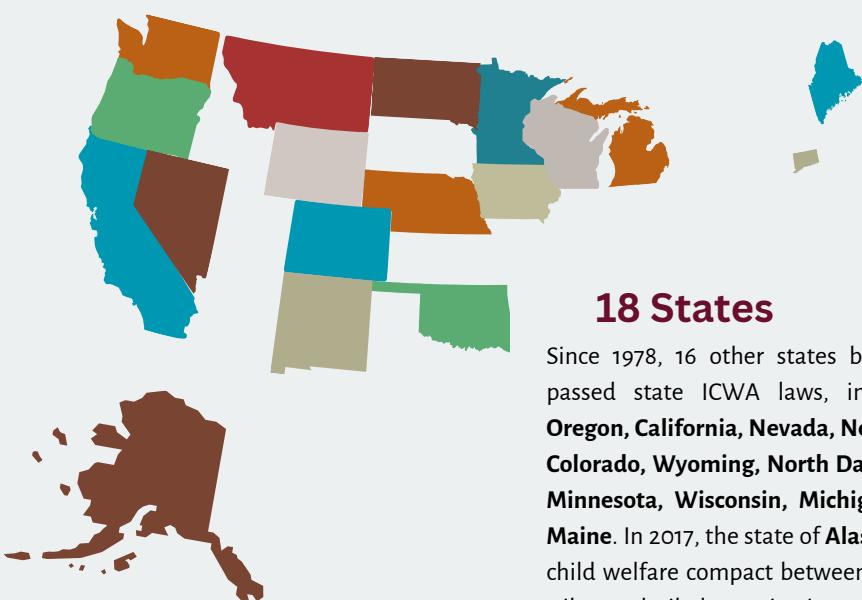
"Where State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this [federal ICWA], that standard shall be applied." (Native American Rights Fund, n.d.)

# *Haaland v. Brackeen Outcome and implications for MICWA*

On June 15, 2023, the Supreme Court issued its ruling upholding ICWA (7-2). The Court rejected all constitutional challenges to the ICWA (Haaland v. Brackeen, 2023).

## ***Haaland v. Brackeen Implications: State ICWA Laws***

The U.S. Supreme Court's decision of *Haaland v. Brackeen* that upheld the ICWA confirmed the validity of strengthening implementation of the federal ICWA laws and building on its foundations by passing State ICWA laws, an approach taken by Montana and other states. States are encouraged to consult and collaborate with tribal nations when passing State ICWA laws and revisions to best address issues within State jurisdiction and support tribal child welfare systems (Pardue, 2023).



### **18 States**

Since 1978, 16 other states besides **Montana** have passed state ICWA laws, including **Washington**, **Oregon**, **California**, **Nevada**, **New Mexico**, **Oklahoma**, **Colorado**, **Wyoming**, **North Dakota**, **Nebraska**, **Iowa**, **Minnesota**, **Wisconsin**, **Michigan**, **Connecticut**, and **Maine**. In 2017, the state of **Alaska** established a tribal child welfare compact between certain Alaska Native tribes and tribal organizations and the state of Alaska.

"ICWA is the floor, meaning that the state is free to pass laws that provide even greater protections for tribes and Indian families."  
Brooke Barker Taylor, Human Services House Committee Hearing on HB317(2023)  
February 1, 2023

## ***SB147(2025) INITIAL BILL DRAFTING BEGINS***

**JUNE 15<sup>TH</sup> 2023: THE SUPREME COURT UPHELD THE ICWA**

# Extension of MICWA - SB147(2025)

## *and Implications for MICWA*

In Montana's 2025 legislative session, Sen. Jonathan Windy Boy D-Box Elder (formerly Rep. Jonathan Windy Boy) introduced SB147(2025) to remove the June 30, 2025, sunset date and to ultimately strengthen the Spirit of ICWA by enhancing tribal-state cooperation principles.

- More comprehensive
- Adds procedural safeguards
- Enhances tribal consultation requirements
- Strengthens cultural preservation mandates
- Increases documentation and reporting requirements

### Hackeen v. Haaland Implications: State ICWA Laws

SB147 included language of implementing an avenue by which adoptive parents could access resources that apply to Indian children/citizens by requiring a Cultural Compact. The bill also clarified the standard for Emergency Removals, provided additional requirements for Guardianships, required consultation with an Indian child's Tribe on a Permanency plan, provided additional grounds that a Court may have reason to know a child is an Indian child, requiring denial of a transfer of jurisdiction to be in writing, revising requirements for QEWs, Active Efforts, Evidence, and Placement preferences, along with amendments to sections of the statute.

Initially, SB147 was tabled in the Senate Public Health and Human Safety Committee, but was pulled from committee with a blast motion (29-21 in favor of blast motion) by bill sponsor Sen. Jonathan Windy Boy. SB147 returned to the floor and passed the Senate (30-19). The original twenty-seven pages long bill which included language of the Cultural Compact and other comprehensive strengthening measures passed the Senate, however in the House Human Services Committee, SB147 was amended to a two-page document, and primarily repealed section 55 of HB317(2023) which contained a termination date of June 30, 2025. The chambers concurred on the amended bill and on May 12, 2025, Gov. Greg Gianforte signed SB147 into law (Montana Legislative Services, n.d.).



MAY 12<sup>TH</sup> 2025 GOV. GREG GIANFORTE SIGNS  
SB147 INTO LAW. MICWA IS PERMANENT!

# SB147(2025) The Proposed Revisions

## SB147 Transfer Requirement

- SB147 requires denials of jurisdiction transfers to be in **writing**

## SB147 Cultural Compact Requirement

- Requires cultural compacts between prospective adoptive parents/guardians and the child's tribe when the household doesn't include a tribal member
- Must be specific to each Indian child and evolve as child matures
- Becomes part of court record and is enforceable

## SB147 Emergency Removal Standards

- Requires "**clear and convincing evidence**" for emergency removal of Indian children

## SB147 Qualified Expert Witness Requirements

### Additional QEW Testimony Specifications

- Courts may accept declarations/affidavits from a QEW in lieu of testimony only with specific stipulations: the parties have stipulated on the record and the court is satisfied that stipulation is made knowingly, intelligently, and voluntarily.
- Requires petitioner to file declaration with the court describing efforts to identify qualified expert witnesses
- QEWs shall testify as to whether continued custody of an Indian child by or return of the Indian child to the parents or Indian custodian is likely to result in serious emotional or physical damage to the Indian child at the **show cause hearing, adjudication hearing, dispositional hearing, guardianship hearing, and termination hearing**

## SB147 Expanded Guardianship Requirements

**SB147** adds extensive new requirements for guardianships involving Indian children:

- Clear and convincing evidence language added to the guardianship appointment in that the department has made active efforts to reunite the parent and child
- Consultation with the child's tribe on potential guardians and whether the Indian child's tribe is in agreement
- The court must review cultural compacts entered into between the child's tribe and the child's guardian
- Annual guardianship reporting requirements, including the condition of the ward, the ward's estate, cultural participation, and contact with extended family
- The guardianship report must include the date the guardian serves the report on the Indian child's tribe
  - Must be mailed by first-class to the person identified in the most current federal register as the designated tribal agent for ICWA notice purposes
  - On failure, the court shall order the guardian to file the report and give good cause for the guardian's failure to file a timely report

## SB147 Placement Preference Provisions

- A placement may not depart from the preferences based solely on the ordinary bonding or attachment that developed from time spent in a nonpreferred placement
- Ongoing obligation for diligent search for preferred placement throughout the case, which must be documented and in the record
- The court shall inquire into the efforts to secure a preferred placement at each hearing
- Regular status hearings (no less than every 30 days) for non-preferred placements to review the department's efforts in preferred placement search
- **Enhanced Notice Requirements for Placement Changes:** Excluding emergency removals, if the department intends to change the placement of the child, the department is required to, at least 2 days prior to the change in placement:
  - Provide a written notice of the change to the child's tribe, parents, Indian custodian, guardian ad litem, and counsel for the child, parents, Indian custodian, and tribe.
    - Notice must provide the date the placement change is to occur and the reason for the placement change.
    - If a child's tribe or a party objects, the child's tribe or counsel for the party shall notify the court and other parties

## SB147 Termination Requirements

### Additional Enhanced Requirements

- SB147 adds that the court may not terminate parental rights unless evidence beyond a reasonable doubt is presented that:
  - Consultation with the child's tribe occurred before filing parental rights termination petitions
  - "In cases where the child's tribe does not support termination, the department consulted with the child's tribe regarding alternatives to termination, and there is good cause not to follow the tribe's alternate permanency plan."
- Bonding between the Indian child and the Indian child's foster parent may not be considered as a factor in terminating parental rights

## SB147 Removal from Adoptive or Foster Care Placement Provision

- If a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parents voluntarily consent to the termination of their parental rights to the child, the department shall make diligent efforts to contact the child's tribe

## SB147 Active Efforts Requirements

\*see next page

# Active Efforts

## **ACTIVE EFFORTS \*\*Specified by SB147(2025)**

**Tailored to the facts and circumstances of the case**

Examples:

- Conducting a comprehensive assessment of the circumstances of the Indian child's family with a focus on safe reunification as the most desirable goal
- Asking the parent, child, and Indian custodian who their support system is and utilizing this support system whenever possible, including but not limited to the following
  - Meetings
  - Transportation
  - Parenting supervision
  - Assistance in locating parents not yet engaged with the department or whose whereabouts are unknown
  - Facilitating contact between the child and the child's extended family whenever possible
  - Connecting or providing opportunities to connect the child with cultural activities, cultural resources, and tribal contacts
  - In cooperation with the Indian child's tribe of affiliation, unless a parent objects, take steps to enroll the child in the tribe to finalize enrollment before permanency
  - Assisting kin with practical supports through the licensing process and actively supporting relatives in overcoming barriers to licensure
- Referral to a service or program does not constitute an active effort if the referral was the sole action taken. Assistance with referrals may include, but is not limited to:
  - Seeking input and consultation from the parent and the child's tribe when determining which providers to refer the parent to
  - Offering to assist the parent in contacting a provider to access a service and providing this assistance if requested by the parent
  - Offering to assist the parent in completing application paperwork related to accessing the service, and providing this assistance if requested by the parent
  - Offering transportation assistance to access a provider; and
  - Following up with the parent and the provider to determine whether service has been successfully coordinated and addressing any barriers

### **SB147 Active Efforts**

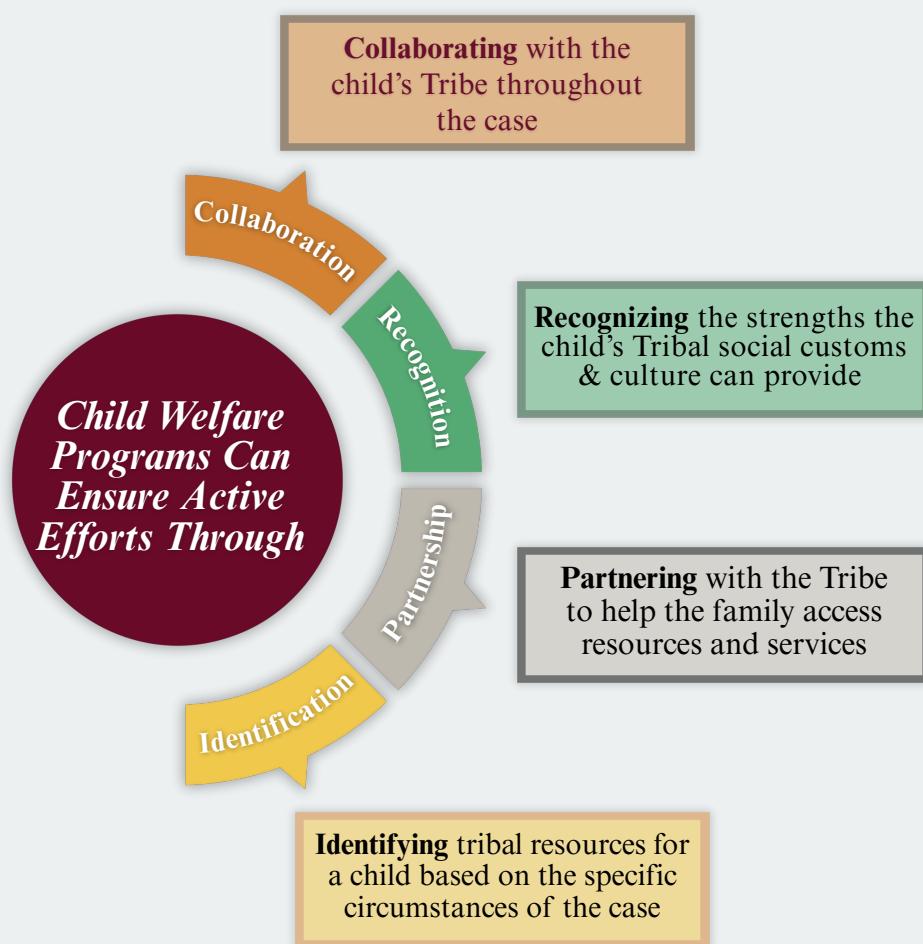
#### **Requirements**

##### **Additional Enhanced Requirements**

- "The party seeking to affect a foster care placement shall demonstrate by **clear and convincing evidence** that it has engaged in active efforts to prevent the breakup of the Indian family. The party seeking to terminate parental rights shall demonstrate by **proof beyond a reasonable doubt** that it has engaged in active efforts to prevent the breakup of the Indian family."

# Active Efforts

The ICWA term “active efforts” implies a more heightened responsibility compared to “reasonable efforts”. The term is included when discussing remedial services and rehabilitative programs, as well as preventive measures: “Any party seeking to effect a foster care placement of, or termination of a parental righter to an Indian child under State law shall satisfy to the court that active measures 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.” (25 U.S.C. § 1912 (d))



Essentially, this means that the state has an obligation to provide services and other types of interventions to prevent the necessity of removing a child from parental care and if the child is removed, the state has a duty to assist in the reunification of the child and maintain or reunify the Indian child with their family.

“Active efforts” = Engaging the family  
 “reasonable efforts” = Offering referrals to the family, and leaving it to them to seek out assistance. (Native American Rights Fund, n.d.)



# Placement Preferences

In order to ensure that Indian children maintain connections to their Tribe, culture, and extended family, ICWA established placement preferences for Indian children in foster care, pre-adoptive, and adoptive placements (25 U.S.C. § 1915).

## Order of Preference for Foster Care and Pre-Adoptive, and Adoptive Placements (25 U.S.C. § 1915(b))

- 1** EXTENDED FAMILY: A MEMBER OF THE CHILD'S EXTENDED FAMILY
- 2** FOSTER HOME: A FOSTER HOME LICENSED, APPROVED, OR SPECIFIED BY THE CHILD'S TRIBE
- 3** INDIAN FOSTER HOME: AN INDIAN FOSTER HOME LICENSED OR APPROVED BY AN AUTHORIZED NON-INDIAN LICENSING AUTHORITY
- 4** TRIBALLY APPROVED INSTITUTION: AN INSTITUTION FOR CHILDREN APPROVED BY AN INDIAN TRIBE OR OPERATED BY AN INDIAN ORGANIZATION WHICH HAS A PROGRAM SUITABLE TO MEET THE CHILD'S NEEDS

ICWA placement preference applies **regardless** of whether the child's Tribe intervenes in the case or whether the child's tribe can identify a preferred placement home.

## Deviating from Placement Preference

In order to ensure that Indian children maintain connections to their Tribe, culture, and extended family, ICWA established placement preferences for Indian children in foster care, pre-adoptive, and adoptive placements (25 U.S.C. § 1915).

## Order of Preference for Adoptive Placements (25 U.S.C. § 1915(a))

- 1** EXTENDED FAMILY: A MEMBER OF THE CHILD'S EXTENDED FAMILY
- 2** TRIBAL MEMBERS: OTHER MEMBERS OF THE CHILD'S TRIBE
- 3** INDIAN FOSTER HOME: AN INDIAN FOSTER HOME LICENSED OR APPROVED BY AN AUTHORIZED NON-INDIAN LICENSING AUTHORITY
- 4** TRIBALLY APPROVED INSTITUTION: AN INSTITUTION FOR CHILDREN APPROVED BY AN INDIAN TRIBE OR OPERATED BY AN INDIAN ORGANIZATION WHICH HAS A PROGRAM SUITABLE TO MEET THE CHILD'S NEEDS

**Good Cause Exceptions**  
Courts may deviate from the placement preferences if "good cause" is shown. Factors that may be considered include the child's best interest, the child's special needs, or the unavailability of a suitable placement within the preferred categories. (*Mississippi Band of Choctaw Indians vs. Holyfield*, 490 U.S. 30 (1989)).

# ICWA Confidentiality Provisions

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## Adoption Records

ICWA stipulates that any information related to an Indian child's adoption must remain confidential (25 U.S.C. § 1951(b)). This includes the adoptee's identity, the biological parents' identities, and other sensitive information.

## Limited Disclosures

Information from adoption records can only be disclosed under certain circumstances, such as: with the written consent of the adoptee who has reached the age of majority, when disclosure is mandated by a court-order, which typically requires a showing of good cause, or in situations where disclosure is necessary to protect the health, safety, or welfare of the adoptee or other individuals (25 U.S.C. § 1951(b)).

## Court Orders

When a Court Order is required for the disclosure of confidential adoption records, the party seeking access must demonstrate good cause for the release of the information. Good cause typically involves a compelling reason or substantial need that outweighs the confidentiality interests of the parties involved.

## Safeguarding

State agencies must take appropriate measures to protect the privacy of records related to child custody proceedings involving Indian children. This may include storing records securely, limiting access to authorized personnel, and implementing proper data protection protocols.

# Roles & Responsibilities

***ICWA Specialists, Child Protection Specialists, Attorneys, Advocates***

## Indian Child Welfare Specialists' Roles & Responsibilities

- Develop Indian foster homes and other Indian placement resources
- Provide technical advice to Tribal, State, and County agencies and District courts on matters pertaining to Indian child welfare
- Assist in negotiating cooperative agreements to provide foster care services to Indian children
- Conduct training seminars on implementing the federal Indian Child Welfare Act of 1978;
- Apply for and accept grants and other funds for Indian child welfare activities
- Develop and maintain a list of attorneys to represent indigent parents and Indian custodians in Indian child welfare proceedings
- Make recommendations to the department on legislation and rules concerning Indian child welfare matters
- Perform other duties regarding Indian child welfare matters as determined by the director

## Child Protection Specialists' Roles & Responsibilities

- Investigate allegations of child abuse, neglect, and endangerment
- Perform safety and risk assessments after a report has been made
- (Temporary) Emergency Protective Services – if the Indian child is in immediate or apparent danger.

## Tips for Attorneys and Advocates



Develop strong relationships with Tribal representatives and cultural experts to better understand the unique cultural, social, and historical context of each case.



Consult with Tribes as early as possible. Tribes possess cultural resources and expertise essential for making informed decisions and planning.



Ensure that you are well-versed in both state and federal ICWA laws, as well as any relevant Tribal codes or ordinances.



Prepare your witnesses, especially Qualified Expert Witnesses (QEWS), to provide clear, concise, and culturally relevant testimony.



Utilize culturally relevant resources, such as Tribal-specific parenting programs, in your case plans and service recommendations.



Collaborate closely with Tribal ICWA workers to ensure effective communication, coordination, and compliance with ICWA requirements



Actively advocate for the preservation of cultural identity in all aspects of the case, including visitation, case planning, and placement decisions.

# Roles & Responsibilities

## *State Courts*

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### **Determine if ICWA Applies**

The court must verify that the child is an Indian child and evidence needs to be provided. Whether or not the child is an enrolled member or is eligible for membership is determined by the Tribe.

### **Yes, ICWA Applies**

In any involuntary child custody proceeding, the court must provide the opportunity for Tribes to determine which Tribe should be designated as the Indian child's Tribe. If the Indian child is not residing or domiciled with the reservation of their Tribe, the court may transfer jurisdiction to the Tribe absent objection by either parent.

### **Transfer of Jurisdiction Pending**

While the transfer to Tribal jurisdiction is pending, the court is allowed to conduct additional hearings and enter Orders that are in the best interest of the child. These Hearings and Orders must comply with the requirements of the federal ICWA.

### **Tribe Declines Jurisdiction**

If the Indian child's Tribe declines jurisdiction, then the state court may proceed with the child custody proceeding in compliance with ICWA.

### **Tribe Accepts Jurisdiction**

If the Indian child's Tribe accepts jurisdiction, then the Court must dismiss the child custody proceeding without prejudice and provide all the records related to the case to the Tribal court.

### **Right to Counsel**

If the Tribe declines jurisdiction the first task that must be completed by the state court is providing right to counsel for the Indian child's parent or Indian custodian as well as the Indian child. Each party will have access to evidence that has been filed with the court.

### **Active Efforts**

The court shall make written findings that the petitioning party has provided active efforts [page 10, 15-16] and the efforts must be documented in detail in the record. In the case of removal, the standard is "clear and convincing;" in the case of termination, the standard is "beyond a reasonable doubt;" and in both cases, the State bears the burden.

### **Evidence Required to Order for Foster Care or Terminating Parental Rights**

A court may order foster care placement if the petitioning party has provided clear and convincing evidence that active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family and that the efforts were unsuccessful. Clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, to demonstrate that continued custody by the child's parent, Indian custodian, is likely to result in serious emotional or physical damage to the child.

A court may terminate parental rights of the child if active efforts were made to prevent the breakup of the Indian family and the efforts were unsuccessful, and continued custody of the child by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The evidence must include testimony of one or more qualified expert witnesses.

# **Roles & Responsibilities**

## **State Courts**

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### **Emergency Removal or Placement of the Indian Child**

In the event of an emergency removal or placement of an Indian child, the court must share their findings on the record as to why emergency removal or placement is necessary, hold a hearing to determine if the emergency removal or placement is still necessary, and terminate the emergency removal or placement if the court finds it no longer necessary.

An emergency proceeding may not last more than 30 days unless the court decides that the Indian child's safety is at risk if they are reunited with their parent/Indian custodian, the court hasn't been able to transfer jurisdiction to the Indian child's Tribe, and if it hasn't been possible to initiate a child custody proceeding.

### **Involuntary versus Voluntary Foster Care Placement**

In an involuntary foster care placement hearing, the court needs to certify on the record that the terms and consequences of the stipulation or consent were fully explained in detail and were fully understood by the parent or Indian custodian.

In a voluntary foster care placement hearing, the consent provided by the parent or Indian custodian will not be valid unless it is executed in writing and recorded before a judge of a court of competent jurisdiction, and accompanied by the judge's written certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.

If an Indian child is improperly removed, then the court must decline jurisdiction and return the child to their parent or Indian custodian.

### **Placement Preferences**

There is a list of placement preferences the court must follow that can be found of page 17 of this document. It is the court's duty to follow this list unless the Indian child's Tribe has a different order of placement preferences.

### **Terminating of the Parent-Child Legal Relationship**

A district court may order a termination of the parent-child legal relationship on the factual grounds that the parent is convicted of a felony in which sexual intercourse occurred or the parent has committed an act of sexual intercourse without consent, sexual assault, or incest that caused the child to be conceived.

### **Temporary Emergency Protective Services**

If temporary emergency protective services occur, a district court should hold a hearing within 5 business days of the child's removal. The hearing will determine whether the removal should continue beyond the 5 days.

#### **Court Finds Temporary Emergency Protective Services Necessary**

If the out-of-home placement is deemed necessary, then the court shall establish guidelines for visitation by the parents, parent, guardian, or the person having physical or legal custody of the child as well as review the availability of options for a kinship placement and make recommendations if appropriate.

#### **Court Finds Temporary Emergency Protective Services Unnecessary**

If the out-of-home placement is deemed unnecessary, then the child must be immediately returned to the person(s) who has(have) legal custody.

# **Roles & Responsibilities**

## ***State Courts***

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### **Alternative Dispute Resolution Proceeding**

At any stage of the proceedings, the court may order an alternative dispute resolution proceeding that could include: a family engagement reading, mediation, or a settlement conference.

A party who does not wish to participate in this proceeding may file a motion to object to the Order.

### **Permanency Hearing**

A permanency hearing determines the permanent placement of a child no later than 12 months after a judge determines that child has been abused or neglected or 12 months after the first 60 days that the child has been removed from their home.

### **Cases of Abandonment**

If an Indian child is abandoned, the court may give priority to a member of the abandoned child's extended family. If more than one extended family member requests custody, the court needs to determine which placement is in the best interest of the child.

### **Granting a Petition to Adopt**

In determining whether to grant a petition to adopt, the court must consider all relevant factors in determining the best interests of the child. Factors that will weigh in the court's decision are the parent's parenting ability, the future security for a child, and familial stability.

### **Contested Adoption Proceeding**

In a contested adoption proceeding, the court shall consider the nature and length of any relationship already established between a child and any person seeking to adopt the child, the nature of any family relationship between the child and any person seeking to adopt the child and whether that person has established a positive emotional relationship with the child, the harm that could result to the child from a change in placement, whether any person seeking to adopt the child has adopted a sibling or half-sibling of the child, and which, if any, of the persons seeking to adopt the child were selected by the placing parent or the department or agency whose consent to the adoption is required.

### **Indian Child Placement**

The court shall determine if the requirements of the federal ICWA have been met.

# MICWA Definitions

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**Active Efforts:** affirmative, active, thorough, and timely efforts meeting the requirements of [section 12] that are intended primarily to maintain or reunite an Indian child with the child's family and that are tailored to the facts and circumstances of the case.

**Adoptive Placement:** the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

**Child Custody Proceeding:** any state or private proceeding, other than an emergency proceeding, that may culminate in a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement.

(b) The term does not include a placement based on:

- (i) an act that, if committed by an adult, would be considered a crime; or
- (ii) an award, in a dissolution proceeding, of custody to one of the child's parents.

**Court of Competent Jurisdiction:** a court that has jurisdiction over the relevant subject matter under federal, state, or Tribal law.

**Department:** the Department of Public Health and Human Services provided for in 2-15- 2201.

**Foster Care Placement:** an action removing an Indian child from the child's parent or Indian custodian for temporary placement in a foster home or institution or with a relative, guardian, conservator, or suitable other person under which the parent or Indian custodian may not have the child returned on demand, but parental rights have not been terminated.

**Indian:** a person who is a member of an Indian tribe or who is an Alaska Native and member of a regional corporation as established in 43 U.S.C. 1606.

**Indian Child:** an unmarried Indian person who is under 18 years of age and who is:

- (a) a member of an Indian Tribe; or
- (b) eligible for membership in an Indian Tribe and is the biological child of a member of an Indian Tribe.

# MICWA Definitions

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**Indian Child's Family or Extended Family Member:** an individual defined by the law or custom of the Indian child's Tribe as a relative of the Indian child.

(a) If the Indian child's Tribe does not identify family members by law or custom, the term means an adult who is the Indian child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, cousin, stepparent, or step-grandparent. A stepparent or step-grandparent may be considered a family member even following termination of the marriage.

**Indian Child's Tribe:** a Tribe or Tribes in which an Indian child is a member or is determined eligible for membership.

**Indian Custodian:** an Indian person who under Tribal law, Tribal custom, or state law has legal or temporary physical custody of an Indian child or to whom the parent has transferred temporary care, physical custody, and control of the Indian child.

**Indian Tribe or Tribe:** any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary of the interior because of their status as Indians.

(a) The term includes an Alaska Native village as defined in 43 U.S.C. 1602.

**Member or Membership:** a determination by an Indian Tribe that an individual is a member of or eligible for membership in that Indian Tribe.

**Parent:** a biological parent of an Indian child or an individual who has lawfully adopted an Indian child, including adoptions made as tribal customary adoptions.

(a) The term does not include an unwed father whose paternity has not been acknowledged or established under Title 40, chapter 6, part 1, or the applicable laws of another state.

**Pre-adoptive Placement:** the temporary placement of an Indian child in a foster home or institution after the termination of parental rights but before or in lieu of adoptive placement.

**Termination of Parental Rights:** any action resulting in the termination of the parent-child relationship.

**Tribal Court:** a court or body vested by an Indian Tribe with jurisdiction over child custody proceedings. The term includes but is not limited to a federal court of Indian offenses, a court established and operated under the code or custom of an Indian Tribe, and an administrative body of an Indian Tribe vested with authority over child custody proceedings.

# Key Definitions in ICWA

**Indian Child:** An “Indian child” is defined under the ICWA as an unmarried person who is under the age of 18 and is either a member of an Indian Tribe, or is eligible for membership in an Indian Tribe and is the biological child of a member of an Indian Tribe (25 U.S.C. § 1903(4)). The determination of whether a child is an Indian child depends on the membership criteria of the particular Tribe involved.

**Indian Tribe:** An “Indian Tribe” under ICWA is any federally recognized Indian tribe, band, nation, or other organized group or community that is recognized as eligible for the services as provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village (25 U.S.C. § 1903(8)). There are currently more than 570 federally recognized Tribes in the United States.

**Foster Care Placement:** A “foster care placement” refers to any action that removes an Indian child from their parent or Indian custodian for temporary placement in a foster home or institution, or with a guardian or conservator, where the parent or Indian custodian cannot have the child returned upon demand, but where the parental rights have not been terminated (25 U.S.C. § 1901(3)(i)). It is important for professionals to understand that ICWA applies to these placements to ensure the protection of the rights of the Indian child, parents, and Tribes in these situations.

**Termination of Parental Rights:** “Termination of parental rights” refers to any action that results in the termination of the parent-child relationship (25 U.S.C. § 1903(1) (ii)). ICWA sets forth specific procedural and substantive requirements to protect the rights of Indian parents and Tribes before parental rights can be terminated in child custody proceedings involving Indian children.

**Adoptive Placement:** An “adoptive placement” is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption (25 U.S.C. § 1903(1)(iv)). ICWA establishes placement preferences and other safeguards to protect the rights of Indian children, parents, and Tribes in adoptive placements.

**Extended Family Member:** An “extended family member” is defined by the law or custom of the Indian child’s Tribe or, in the absence of such law or custom, by the definition found in the federal law as a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent (25 U.S.C. § 1903(2)). Extended family members play a crucial role in ICWA as they may serve as preferred placements for Indian children in child custody proceedings.



## Additional Resources

When collaborating with judges or other court personnel who may need more information on implementing ICWA in court situations, consider directing them to the Indian Child Welfare Act Judicial Benchbook. This valuable resource, created by the National Council of Juvenile and Family Court Judges, offers comprehensive guidance on applying ICWA in judicial settings.

National Indian Child Welfare Association (NICWA): NICWA is a national organization that works to support the well-being of American Indian and Alaska Native children and families. They provide training, technical assistance, and policy resources on ICWA implementation.

(<https://www.nicwa.org/>)

