



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

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Dear Tribal Leader:

One of our greatest responsibilities is ensuring that tribal families are supported so that our communities continue to thrive for future generations. Family, community and culture are the foundation upon which our youth stand and grow. Over the past few years of this Administration, many voices have formed a chorus calling for a regulation to strengthen implementation of the Indian Child Welfare Act (ICWA). Tribal leaders joined that chorus, expressing unanimous support for action that reinforces ICWA's protections for families and youth. Today, we announce a final rule to do just that.

As you are all too aware, Native children are still more likely to be removed from their homes and communities than other children, despite the fact that ICWA has been in place for more than 30 years. Just last year, a Federal court found wholesale, systemic ICWA and constitutional violations in a particular county. Hearings that resulted in immediate and sometimes long term removal of Native children typically lasted less than 5 minutes, and parents were not advised of their rights to contest the removal of their child or to testify at the hearing. This final rule works to protect children, parents and tribes from such disparities by providing clear sideboards to promote ICWA compliance.

While the final rule does not incorporate all recommendations received by tribes, the final rule bends toward justice. I invite you to review the final rule at [www.dia.gov](http://www.dia.gov). Based on tribal input on the proposed rule, you may be especially interested in the following features of the final rule:

- The final rule promotes accountability for following ICWA by requiring state courts to ask whether ICWA applies at the beginning of each proceeding. Specifically, the final rule requires state courts to ask all participants at the beginning of *each and every* child custody proceeding (including voluntary proceedings) whether they know or have a reason to know the child is an "Indian child" (i.e., subject to ICWA). The rule also sets out factors that indicate a "reason to know" a child is an Indian child, so that the court and participants have clear direction on when they must inquire further into a child's potential Indian status.
- In recognition that ICWA represents the "gold standard" in child welfare, the rule requires that, if there is reason to know that the child is an Indian child, state courts are to treat the child as an "Indian child" unless and until it is determined that ICWA does not apply.
- The rule and its preamble make clear that there is no so-called existing Indian family doctrine or exception to ICWA's applicability. The rule prohibits the consideration of

certain listed factors, because they are not relevant to the inquiry of whether the statute applies. If a child-custody proceeding concerns a child who meets the statutory definition of “Indian child,” then the court may not determine that ICWA is inapplicable based on factors such as the participation of the parents or the Indian child in tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her Indian parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.

- The rule clarifies that only tribes may determine who their citizens are and, where there is a question about whether the child is an Indian child, requires states to exercise due diligence in working with tribes to verify membership.
- In the wake of publicized cases of states misusing emergency removal and placement procedures, the rule identifies certain information to be included in the petition for emergency removal and placement and on the record and limits how long emergency removals and placements may last. The rule requires that an emergency removal or placement must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. It requires a prompt hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended, and prohibits the emergency removal or placement from lasting beyond 30 days unless three strict conditions are met.
- The rule requires prompt notice to tribes and parents (by registered or certified mail, return receipt requested) of any involuntary proceeding for foster care or termination of parental rights. For voluntary proceedings in which there is reason to believe the child is an Indian child, the rule requires the party seeking placement to take all reasonable steps to verify the child’s status, which may include contacting the child’s or parent’s tribe.
- The rule provides an extensive, detailed definition of “active efforts” to ensure that efforts to maintain or reunite an Indian child with his or her family are affirmative, active, thorough, and timely. The rule prohibits a state court from ordering foster care placement or termination of parental rights unless it determines that active efforts were made to prevent the breakup of the Indian family and that those efforts were unsuccessful. The rule also requires that active efforts be documented in detail in the official court record.
- The rule incorporates the statutory standards of evidence that must be met to place any Indian child in foster care or terminate parental rights, and emphasizes that, in meeting those standards of evidence, there be a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will harm the particular child who is the subject of the child custody proceeding.
- The rule incorporates the statutory prohibition on placing any Indian child in foster care (or terminating parental rights) without testimony of a qualified expert witness that the parent’s continued custody of the child will cause harm to the child. The rule adds that the qualified expert witness should have knowledge of the prevailing social and cultural

practices of the tribe and helps protect against bias by prohibiting the state social worker assigned to the child's case from serving as the qualified expert witness.

- The rule confirms that tribes have jurisdiction over Indian child custody proceedings, and prohibits state court judges from finding “good cause” to deny transfer of a proceeding to tribal court based on certain factors. The factors are:
  - 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;
  - Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
  - Whether transfer could affect the placement of the child;
  - The Indian child's cultural connections with the tribe or its reservation; or
  - Socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.
  
- The rule confirms that placement preferences apply to both involuntary and voluntary child custody proceedings. The placement preferences are vitally important to helping keep Indian children with extended family and tribal communities. The rule also imposes parameters on what state courts may consider to be “good cause” to depart from the placement preferences including:
  - Requiring that a diligent search be conducted to find suitable placements meeting the preference criteria, before unavailability of a suitable placement may be used as a basis for “good cause”;
  - Prohibiting a finding of “good cause” based on the socioeconomic status of any placement relative to another placement; and
  - Prohibiting a finding of “good cause” based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.
  
- The final rule also addresses voluntary proceedings by requiring safeguards to ensure that a parent's voluntary consent to foster care, adoption, or termination of parental rights is truly voluntary, free from any threat by a state court or agency. The final rule also clarifies the scope of ICWA, such that if a parent cannot obtain return of the child upon verbal demand without any formalities or contingencies, then ICWA applies.
  
- Several tribes mentioned that state courts or agencies denied them access to records regarding Indian child custody proceedings. The final rule clarifies that tribes are sovereign entities entitled to a government-to-government exchange of information necessary for the government agencies' performance of duties. The rule specifies that states must provide tribes with the petition and all other information regarding initiation of the child custody proceeding and make placement records available for review, and clarifies that tribes who are parties to proceedings are entitled to receipt of all documents upon which a decision may be based.

Many of these provisions are the result of your input and I thank you for your participation in the development of this rule. The rule is currently being processed by the Federal Register and we expect it to publish in the coming weeks. The rule will become effective 180 days following publication and will only apply to proceedings initiated after the rule becomes effective, in order to allow the Department time to issue updated guidelines and provide training on implementation of the rule and for states to adjust their policies and practices.

Tribal voices remain critical to ensuring the consistent implementation of ICWA. Every day, your government works with state and local governments to promote and protect the health and welfare of tribal communities. This new rule provides an important tool for tribal leaders and communities to promote family. Through this collaboration, Native youth and parents will receive the support needed to maintain a bright future for Indian country.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence S. Roberts". The signature is fluid and cursive, with a large loop at the end.

Lawrence S. Roberts  
Acting Assistant Secretary – Indian Affairs