

Preserving Native American Families in New Mexico

The Indian Child Welfare Act &
The Adoption & Safe Families Act



A Resource for Judges, Attorneys,
Social Workers, Child Advocates, and Others
Who Work with Children and Families

Introduction

Native Americans in New Mexico live in 19 Pueblos, two Apache Tribes, and the Navajo Nation, as well as off-reservation throughout the state, especially in Albuquerque, Farmington, and Gallup. Overall, Native Americans represent nearly 10% of our population.

The Pueblos, Tribes, and Nations in New Mexico – each of which is a sovereign, self-governing entity – vary considerably from one another in language, government, judicial structure, custom, and tradition. The National Council of Juvenile and Family Court Judges, in their *Native American Resource Directory*, acknowledges that it is difficult to generalize about Native American cultural traditions or customs, recommending that judges and others who wish to know more seek information directly from local tribal authorities.



Appropriately addressing the needs of Indian children who come into the State's child welfare system because of abuse or neglect has long been a priority of New Mexico's Courts; the Children, Youth & Families Department; the Court Improvement Project of the New Mexico Supreme Court, and the Tribal-State Judicial Consortium. In addition, the Court Improvement Project and the Tribal-State Judicial Consortium have identified improving outcomes for Indian children in abuse/neglect cases as a primary goal, whether served by Tribal agencies and courts or State agencies and courts.

The U.S. Congress recognized the importance of protecting the rights of Indian children and tribes when it passed the **Indian Child Welfare Act of 1978** (25 U.S.C. §1902). The purpose of the Act is:

- to protect the best interests of Indian children, and
- to promote the stability and security of Indian tribes and families.

According to the National Council of Juvenile and Family Court Judges, prior to the passage of this Act, Indian children were removed from their homes and placed in foster and adoptive placements, including institutional placements, at rates far higher than non-Indian children. Adoption rates for Indian children were eight times higher than for non-Indians, and 90% of adoptions were in non-Indian homes.

The **New Mexico Children’s Code** (NMSA 32A-1 et seq) specifically supports ICWA. It also recognizes the role of tribal law enforcement and tribal social services in protecting children from abuse and neglect. Among the key provisions are:

- Tribal law enforcement and tribal social services agencies are identified as agencies to whom suspected child abuse/neglect involving an Indian child residing in Indian country may be reported. (32A-4-3.A.)
- CYFD must make reasonable efforts to determine whether any child taken into custody is an Indian child and, if so, the Department must give notice to the child’s tribe. (32A-4-6.C.)
- “In absence of good cause to the contrary,” state courts must transfer abuse/neglect and adoption proceedings to the jurisdiction of the child’s tribe upon the petition of the child’s parent, custodian or tribe. (32A-1-9.D.)
- If an Indian child is placed in foster care or a pre-adoptive placement, that placement must be with a member of the extended family, a foster home licensed by the tribe, an Indian foster home licensed by the state, or an institution approved by the tribe. (32A-4-9.A.)
- If the proceedings remain in the state court, the dispositional judgment must include findings as to whether or not ICWA placement preferences have been followed and whether or not the treatment plan includes maintaining the child’s cultural ties. These issues must also be reviewed at periodic judicial reviews. (32A-4-22.A.[10]) and 32A-4-25.G.)
- Termination of parental rights (TPR) proceedings must comply with ICWA, including the requirement that the grounds for TPR shall be proved beyond a reasonable doubt. (32A-4-28.E.)



While these provisions exist in the Children’s Code, the Indian Child Welfare Act is not applied consistently throughout the state. In various studies conducted by the Court Improvement Project, it was evident that a number of people working in the child welfare field are not familiar with the terms and requirements of the Act.

This booklet is intended to provide an overview of the terms of ICWA, the relationship of ICWA to the Adoption and Safe Families Act (ASFA), and other information about serving Indian children in New Mexico.

When Does ICWA Apply?

For ICWA to apply, the proceedings must be “child custody proceedings” (*i.e.*, foster care, termination of parental rights [TPR], and adoption). In addition, ICWA applies when the child is under 18 and either:

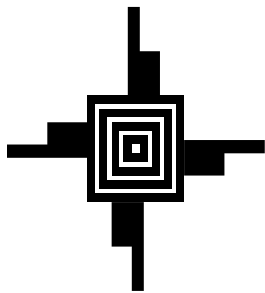
- a member of a federally recognized Indian tribe, OR
- eligible for membership in the tribe and the biological child of a tribal member.

Some of the key provisions of ICWA are summarized in this booklet. These provisions address jurisdiction, intervention, and full faith and credit; removal requirements, and placement preferences.

Jurisdiction, Intervention, & Full Faith & Credit

In most situations, tribes have exclusive jurisdiction over any child custody proceedings regarding an Indian child who lives on the tribe’s land and whenever an Indian child is a ward of a tribal court, regardless of residence.

In the event there are foster care or TPR proceedings in a state court concerning a child who is a tribal member, but who is not living on tribal land, the state court shall, in the absence of good cause to the contrary, transfer proceedings to the tribes’ jurisdiction. However, the tribal court may decline jurisdiction. In addition, the Indian’s child parent may request or veto a transfer to tribal court.



- **Notification & Intervention:** In any state court proceeding regarding foster care or termination of parental rights of an Indian child, the child’s Indian custodian and the child’s tribe must be notified and have the right to intervene at any point.
- **Full Faith & Credit:** All federal, state, and tribal courts shall give full faith and credit to the child custody proceedings of any tribal court, to the extent that such entities give full faith and credit to the judicial proceedings of any other entity.

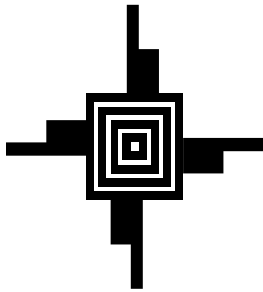
Requirements for Removing an Indian Child from Home

Under ICWA, an Indian child may only be removed from home and placed in foster care when there is **clear and convincing evidence** that remaining with the parent or custodian will likely result in serious physical or emotional harm.

This evidence must be supported by **testimony from an expert witness**, that is, someone who is an expert in the child's tribe, not someone who is an expert on ICWA. According to BIA guidelines, qualified expert witnesses may include tribal members knowledgeable about community custom and tradition relating to family and child-rearing, about child and family services for Indian children, or about social and cultural standards within the child's tribe.

Finally, there must have been **active efforts to prevent removal** which were not successful. *Active* efforts are generally construed as more rigorous than *reasonable* efforts. According to BIA guidelines, such efforts should "involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers."

The same requirements exist to terminate parental rights, except there must be **evidence beyond a reasonable doubt**.



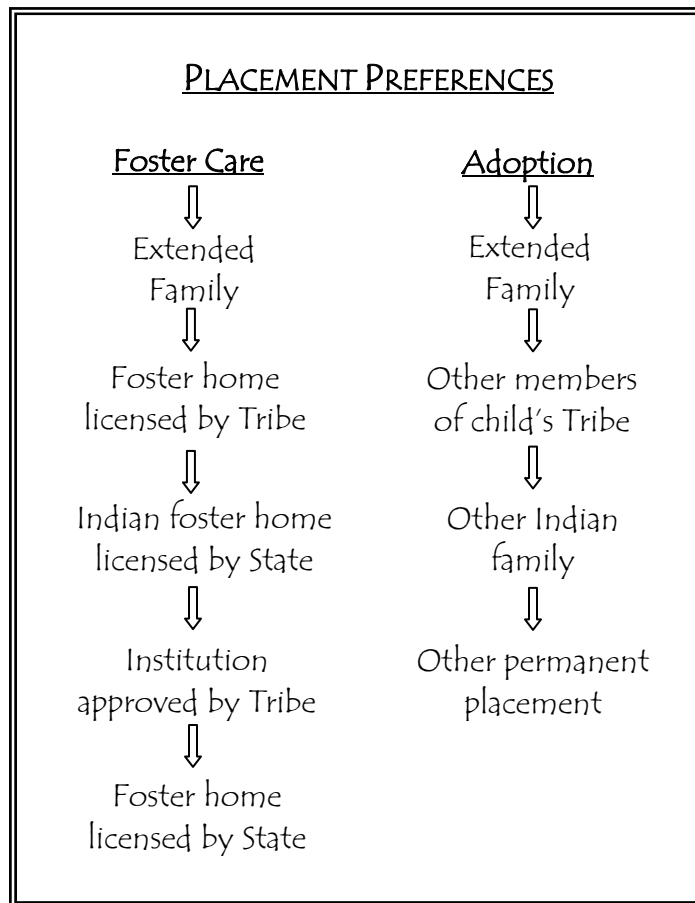
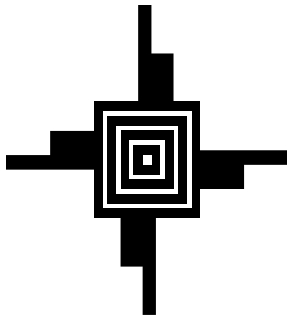
In order to remove an Indian child from his or her home, there must be:

- clear and convincing evidence of the likelihood of serious physical or emotional harm;
 - supported by expert testimony;
- AND
- evidence that active efforts were made to prevent removal, but they were not successful.

Placement Preferences

If an Indian child must be removed from his/her home, ICWA requires that very specific placement preferences be followed. If the tribe has identified its own placement preferences, reflecting the social and cultural standards of the community, those preferences must be followed.

If the tribe has not identified its own placement preferences, absent good cause to the contrary, preference must be given to placements in the following order:



What is ASFA? Does It Apply to Tribal Courts?

The **Adoption and Safe Families Act** (Public Law 105-89) became federal law in November 1997. This Act, commonly referred to as ASFA, amends Title IV-E of the Social Security Act. The Title IV-E Foster Care and Adoption Assistance Program provides federal funds for foster care, adoption assistance, and independent living services.

ASFA applies to all state child welfare systems, including the courts, as well as to any tribes which operate their own Title IV-E Foster Care and Adoption Assistance programs. At the time this booklet was written, tribes may operate their own Title IV-E programs only through tribal-state agreements (as is the case for Cochiti, Nambe, Picuris, Santa Ana, and Santa Clara Pueblos, the Jicarilla Apache Tribe, and the Navajo Nation) or through a federal waiver (as is the case for Zuni Pueblo).

In general ASFA speeds up the time frames for **permanency** for children and requires that the child's **safety** and **well-being** be paramount concerns in all decisions about services, placement, and permanency planning.



The many, complex requirements of Title IV-E, including those added or modified by ASFA, must be met or the child welfare system could lose Title IV-E funds. Courts play an important role in meeting many of these requirements, including:

- a child may not be removed from home without a judicial determination that remaining in the home would be detrimental to the welfare of the child and that reasonable efforts to prevent removal have been made;
- the status of a child in custody must be reviewed at least every six months by the court or by administrative review;
- a permanency hearing must be held no later than 12 months after the child enters foster care;
- a petition for termination of parental rights must be filed if a child has been in foster care for 15 of the last 22 months, except in certain rare instances;
- reasonable efforts to reunify the family must be made unless the court finds that such efforts are no longer necessary.

ASFA & Its Relationship to ICWA

Since the passage of ASFA, there have been some concerns in the child welfare system about possible conflicts between ASFA and ICWA. According to *Adoption and Safe Families Act of 1997: Issues for Tribes and States Serving Indian Children* (Jack Trope and David Simmons, the National Indian Child Welfare Association, The National Resource Center for Organization Improvement, November 1999), ASFA does not specifically address how its provisions would interface with the Indian Child Welfare Act and should not be viewed as affecting the application of ICWA. States must still:

- provide notice to tribes of custody proceedings involving a child member of that tribe,
- transfer jurisdiction to tribal courts when requested,
- make *active* efforts to prevent removal and reunify the family, and
- follow ICWA placement preferences.

However, there are some issues which could arise as states attempt to integrate their compliance with ASFA with their implementation of ICWA, and Trope and Simmons provide guidance in terms of that integration.



Reasonable vs. Active Efforts

ASFA identifies certain circumstances in which *reasonable efforts* to prevent removal of a child from home or to reunify the child with his or her family are not required. **Does this affect ICWA's requirement for *active efforts*, which is generally construed as a more rigorous requirement?**

Although ASFA relieves a state or tribe from making reasonable efforts under certain circumstances, it does not prohibit these efforts from being made. Making active efforts on behalf of an Indian child to prevent placement or to reunify the child with his/her family would not conflict with ASFA. According to Trope and Simmons, the state should refrain from asking the court to make a judicial determination that reasonable efforts are no longer required in a case involving an Indian child.

Termination of Parental Rights

Under ICWA, parental rights may be terminated only when there is evidence, including the testimony of expert witnesses, beyond a *reasonable doubt* (the most difficult standard to meet) that serious emotional or physical damage would likely occur should the child remain with his/her parents. **How does this affect the ASFA provision setting forth situations under which a TPR petition must be filed?**

One of the exceptions to filing a TPR petition under ASFA is when a child is placed with a relative. This is consistent with ICWA placement preferences and may apply in the case of an Indian child *placed with extended family*. Also, the *legal standard* for TPR under ICWA may constitute a compelling reason for not filing. Finally, the interpretation of *active* efforts as required by ICWA (to include involving extended family, the tribe, and Indian social services agencies) may support a claim that reasonable efforts were not provided, and so filing a TPR would not be required.



Permanency Hearing

According to ASFA, a permanency hearing is required within 12 months of the date the child entered foster care. **Do ICWA requirements affect permanency hearing requirements?**

Not directly, since ICWA has no comparable provision. ASFA time frames prevail. However, permanency plan decisions must meet the substantive requirements of ICWA. In other words, TPR may be an acceptable permanency plan only IF the ICWA legal standard for termination can be met. Any plan for an Indian child which contemplates an out-of-home placement must meet ICWA placement preferences.



Cross-Jurisdictional Placements

ASFA requires that a state not deny or delay placement for adoption when the adoptive family is outside the jurisdiction responsible for the case. **Do ICWA requirements affect requirements for cross-jurisdictional placements?**

Again, not directly, since there is not a comparable provision in ICWA. If a state is attempting to meet ICWA requirements, this may permit the state to delay or deny a cross-jurisdictional adoptive placement. ICWA placement preferences must be followed.

Tribal Sovereignty and Tribal Courts

Government to Government – Understanding State and Tribal Governments (National Conference of State Legislatures and National Congress of American Indians, June 2000) and *Native American Resource Directory for Juvenile and Family Court Judges* (the Permanency Planning for Children Department of the National Council of Juvenile and Family Court Judges, *Technical Assistance Bulletin*, Vol. VII No. 4, June 2003), provide useful information on a range of issues related to tribal and state governments. Some of the information from those sources is cited here.



What is meant by tribal sovereignty?

According to *Government to Government*, “The essence of tribal sovereignty is the ability to govern and to protect the health, safety and welfare of tribal citizens within tribal territory...This policy of respect for tribal sovereignty is found in the U.S. Constitution, nation-to-nation treaties, federal statutes, case law, executive orders, and other administrative policies...Many state governments also have explicitly recognized the governmental status of Indian tribes through various state recognition processes.” In New Mexico, the Indian Affairs Department is dedicated to strengthening the government to government relationship between State and Tribal governments through “recognizing and respecting the sovereign status of Tribal governments.”

Are tribal courts different than state and federal courts?

Yes. As noted in the *Native American Resource Directory*, although some tribal courts are modeled after Anglo-American courts, many are not, and, regardless, there may be some significant differences. For example:

- Tribal judges are often tribal members and may or may not be lawyers. In some tribes they are elected; in others they are appointed by the tribal council.
- A tribe’s code, which may or may not be written, often includes customary and traditional practices. In some tribal courts, the testimony of tribal elders regarding tribal custom and tradition may be considered and documentary evidence may not be required.
- Tribal courts usually follow their own precedent and are not bound by opinions of federal and state courts.

FOR FURTHER INFORMATION...

Government to Government – Understanding State and Tribal Governments; Johnson and Kaufmann (National Conference of State Legislators); Dossett and Hicks (National Congress of American Indians); June 2000.

“Guidelines for State Courts; Indian Child Custody Proceedings;” Department of the Interior Bureau of Indian Affairs; *Federal Register*, Vol. 44, No. 228; November 26, 1979.

Indian Child Welfare Act Checklists for Juvenile and Family Court Judges; Technical Assistance Brief; Permanency Planning for Children Department, National Council of Juvenile and Family Court Judges; Reno, Nevada, June 2003.

“The Indian Child Welfare Act: In the Best Interests of the Child and Tribe;” Robert J. McCarthy; *Clearinghouse Review*, December 1993.

Native American Resource Directory for Juvenile and Family Court Judges; Technical Assistance Bulletin, Volume VII, No. 4; Permanency Planning for Children Department, National Council of Juvenile and Family Court Judges; Reno, Nevada, June 2003.

P.L. 105-89 Adoption and Safe Families Act of 1997 Issues for Tribes and State Serving Indian Children; Simmons and Trope, The National Indian Child Welfare Association, Inc.; The National Resource Center for Organization Improvement, November 1999.

American Indian Law Center, Inc.
505-277-5462; <http://lawschool.unm.edu/AILC>

National Child Welfare Resource Center on Legal & Judicial Issues
ABA Center on Children and the Law
202-662-1731; www.abanet.org/child/rclji

National Council of Juvenile and Family Court Judges
775-327-5300; www.pppncjfcj.org

National Indian Justice Center
707-579-5507; www.nijc.indian.com

National Tribal Justice Resource Center
303-245-0786; www.tribalresourcecenter.org

New Mexico Administrative Office of the Courts
505-827-4800; www.nmcourts.com

New Mexico Indian Affairs Department
505-476-1600; www.state.nm.us/oia

Office of Tribal Justice; U.S. Department of Justice
202-514-8812; www.usdoj.gov/otj

Protective Services; NM Children, Youth and Families Department
505-827-8400; www.cyfd.org

Pueblos, Tribes, and Nations in New Mexico

Acoma Pueblo	San Juan Pueblo
Cochiti Pueblo	Sandia Pueblo
Isleta Pueblo	Santa Ana Pueblo
Jemez Pueblo	Santa Clara Pueblo
Laguna Pueblo	Santo Domingo Pueblo
Nambe Pueblo	Taos Pueblo
Picuris Pueblo	Tesuque Pueblo
Pojoaque Pueblo	Zia Pueblo
San Ildefonso Pueblo	Zuni Pueblo
San Felipe Pueblo	

Jicarilla Apache Tribe

Mescalero Apache Tribe

The Navajo Nation



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For further information about the New Mexico Court Improvement Project
and the New Mexico Tribal-State Judicial Consortium,
contact the Administrative Office of the Courts, 505-827-4800