

Federal ICWA Regulations

SSIS Worker Mentor Meeting

Minnesota Dept. of Human Services

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Acronyms

• Acronyms used in this training:

- ICWA: Indian Child Welfare Act
- TPR: Termination of parental rights
- BIA: Bureau of Indian Affairs
- CFR: Code of Federal Regulations
- U.S.C.: United States Code

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2

Acronyms, cont.

• Minnesota acronyms used in this training:

- MIFPA: Minnesota Indian Family Preservation Act




Contents

- Background
- New BIA Rule
 - Overview of the New Rule
 - Highlights of the New Rule
 - Effective Date of New Rule
 - Federal Implementation of ICWA
 - Resources

BIA ICWA Rule - On-Site Training 2016
U.S. Department of the Interior

Background and Overview



Background

- Congress passed the Indian Child Welfare Act (ICWA)¹ in 1978
 - Congress concluded, based on its extensive fact-finding that –
 - State and private agencies were:
 - Removing Indian children from their homes and communities at a higher rate than non-Indian children
 - Placing them in non-Indian homes
 - Cultural biases & ignorance of Native cultural and social standards were a cause
 - Negative effects on children, families, Tribes
 - Established minimum Federal standards (procedural and substantive) for State child custody proceedings involving an "Indian child"

¹25 U.S.C. § 1901 et seq. BIA ICWA Rule - On-Site Training 2016
U.S. Department of the Interior

Background (cont'd)

- Why did BIA pursue this rule? Why now?
 - In 30+ years since ICWA enacted:
 - Indian children are still removed from their homes and communities at a disproportionately higher rate than other children
 - Implementation of ICWA by States has been inconsistent
 - Different interpretations from State to State
 - Different interpretations even from court to court within States
 - During consultations on the 2015 update to the Guidelines, many commented on the need for binding regulations

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Overview of the New Rule

- The rule implements the substantive & procedural standards of ICWA (the Act) to:
 - Provide a uniform Federal standard
 - Promote nationwide consistency
 - Provide clarity that will reduce litigation and produce better outcomes for children
- Final rule in Federal Register at 81 FR 38778 (June 14, 2016)
- Will be codified at 25 CFR 23
 - Updates current § 23.11 and adds §§ 23.101 - 23.144

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Highlights of the New Rule

- This training will review the following highlights of the rule:
 - Determining Whether ICWA Applies
 - Types of Proceedings
 - "Indian child"
 - Notice
 - Jurisdiction & Handling Requests to Transfer Jurisdiction
 - Adjudication of Involuntary Proceedings
 - Emergency Proceedings
 - Voluntary Proceedings
 - Placement Preferences
 - Recordkeeping & Ongoing Obligations

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Applicability



Applicability Types of Proceedings

- ICWA and the rule have provisions that apply to:
 - An emergency proceeding
 - A child-custody proceeding
 - Foster-care placement
 - Termination of parental rights (TPR)
 - Preadoptive placement (after TPR)
 - Adoptive placement
- ICWA and the rule have provisions that apply to:
 - **Involuntary** child custody proceedings and
 - **Voluntary** child custody proceedings (see later slides for how to distinguish whether a proceeding is voluntary)

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U.S. Department of the Interior § 25.2, § 25.103 18

Applicability "Indian Child"

- ICWA only applies to proceedings involving an "Indian child" based on the statutory definition:
 - A member of a federally recognized Tribe* or
 - Eligible for membership with a federally recognized Tribe and has biological parent who is a member

*Note: The BIA publishes a list of federally recognized Tribes in the Federal Register each year. The most recent list is available at 81 Fed. Reg. 26826 (May 4, 2016).

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U.S. Department of the Interior § 25.2 21

**Applicability
"Indian Child"**

- In identifying whether the child is an "Indian child," court may not look at so-called "Existing Indian Family Exception" factors:
 - Participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities;
 - Relationship between the Indian child and his or her parents;
 - Whether the parent ever had custody of the child, or
 - The Indian child's blood quantum

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U.S. Department of the Interior § 25.2, § 25.103 11

**Applicability
Minnesota's definition of "Indian child"**

- "Indian child" means an unmarried person who is under age 18 and is:
 - (1) a member of an Indian tribe; or
 - (2) eligible for membership in an Indian tribe.
- A determination by a tribe that a child is a member of the Indian tribe or is eligible for membership in the Indian tribe is conclusive. For purposes of this chapter and chapters 256N, 260C, and 260D, Indian child also includes an unmarried person who satisfies either clause (1) or (2), is under age 21, and is in foster care pursuant to section 260C.451.

**Applicability
Identifying Whether ICWA Applies**

- Rule requires court to ask whether the child is an "Indian child" in each and every child custody proceeding
 - Must ask each participant in the proceeding whether they know or have a reason to know the child is an Indian child
- Lists factors indicating a "reason to know"
 - Anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child
 - The domicile or residence of the child or parent/Indian custodian is on a reservation or in an Alaska Native village
 - The child is, or has been, a ward of Tribal court
 - Either parent or the child possesses an ID indicating Tribal membership

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U.S. Department of the Interior § 25.107 11


Applicability
Identifying Whether ICWA Applies (cont'd)

- If there is a "reason to know", the court must:
 - Confirm, on the record, that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether:
 - The child is a member or
 - A biological parent is a member and the child is eligible for membership
 - Treat the child as an Indian child, unless and until it is determined on the record that the child is not an "Indian child"

§ 20.107 11

Applicability
Identifying Whether ICWA Applies (cont'd)

- Determining if child is an Indian child
 - Verification from Tribe - Tribes have the final say on membership and eligibility for membership
 - State court may rely on Tribal membership card
 - Where the child is a member or eligible for membership, courts must determine the Indian child's Tribe for purposes of the Act



§ 20.108 11

Applicability
Identifying Whether the Minnesota Indian Family Preservation Act (MIFPA) Applies

Minnesota Statute, section 260.761 requires the following inquiry of tribal lineage:

"The local social services agency or private licensed child-placing agency shall inquire of the child, the child's parents and custodians, and other appropriate persons whether there is any reason to believe that a child brought to the agency's attention may have lineage to an Indian tribe. This inquiry shall occur at the time the child comes to the attention of the local social services agency."

Notice



Notice

- Notice to the parent, Indian custodian (if applicable), and Tribe is vitally important to, for example:
 - Provide direction on how to participate in the proceedings
 - Allow Tribes opportunities to provide assistance/resources to the child and family
 - Minimize disruptions and promote stability for the child
- Statute prohibits any foster-care placement or TPR proceeding from being held until at least **10 days after receipt** of the notice of that particular proceeding (with extensions allowed at option of parent or Tribe)

98-1148-104-104 Training 2016
U.S. Department of the Interior § 23.11, § 23.111 17

Notice (continued)

- In involuntary proceedings, requires notice:
 - By registered or certified mail, return receipt requested
 - Be filed with the court, with proof of service
 - Copy to BIA Regional Director
- Lists notice contents, requires notice be clear & understandable



98-1148-104-104 Training 2016
U.S. Department of the Interior § 23.11, § 23.111 18

Notice
Minnesota Requirements for Agency and Court Notice to Tribes

- Start of Family Assessment/Family Investigation: agency shall notify the Indian child's tribe by telephone and email/fax within 24 hours.
- Child receiving services: agency shall notify all tribes to which child may have lineage by telephone and email/fax of child's name; child's DOB; name/DOB of child's parents; and name/DOB of child's grandparents and child's Indian custodian, if known, within 7 days.
- Child placed in emergency protective care (EPC): court shall notify as soon as possible and before a hearing takes place, the tribal social services agency by telephone and email/fax of the date/time/location of EPC hearing.

JURISDICTION



Jurisdiction

- State courts must determine jurisdiction
 - Tribe has exclusive jurisdiction if
 - The Indian child's domicile or residence is on a reservation
 - The child is a ward of Tribal court



§ 23.110 21

Requests to Transfer Jurisdiction

- Procedures for Requests to Transfer Jurisdiction
 - Right of parent / custodian and Tribe to request a transfer to Tribal jurisdiction
 - At any stage and at any time, orally on the record or in writing, in each foster-care or TPR proceeding
- Criteria for Review of a Transfer Petition
 - State court **must** transfer unless:
 - Either parent objects to such transfer;
 - The Tribal court declines the transfer; or
 - Good cause exists for denying the transfer

BA-CWSA Rule - On-Site Training (2016)
U.S. Department of the Interior § 23.119 24

Requests to Transfer Jurisdiction (cont'd)

- Good Cause to Deny Transfer
 - Reasons must be on the record
 - Court **must not** consider:
 - Whether the 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

BA-CWSA Rule - On-Site Training (2016)
U.S. Department of the Interior § 23.119 25

Adjudication of Involuntary Proceedings



Adjudication of Involuntary Proceedings

- The court must make certain findings / follow certain procedures before ordering an involuntary foster-care placement or TPR:
 - Active Efforts
 - Standard of Evidence
 - Causal Relationship
 - Qualified Expert Witness

BA-CAR-100 - On-Site Training (2016)
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27

Adjudication of Involuntary Proceedings (cont'd)

- Active Efforts
 - Before ordering an involuntary foster care placement or TPR, the court must conclude that:
 - Active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful.
 - Active efforts must be documented in detail in the record.
 - Definition of active efforts
 - Alternative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family
 - See expansive definition of § 252.
 - Examples of active efforts

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§ 25.109 28

Minnesota Requirements for Active Efforts

- Minn. Stat. section 260.762, subd. 1: "Active efforts includes acknowledging traditional helping and healing systems of an Indian child's tribe and using these systems as the core to help and heal the Indian child and family.
- Agencies shall:
 1. Work with the Indian child's tribe and family to develop an alternative plan to foster care
 2. Seek guidance from the child's tribe on family structure, how the family can seek help, what family and tribal resources are available, and what barriers the family faces and
 3. Request participation of the child's tribe at the earliest possible time and request the tribe's active participation throughout the case

Minnesota Requirements for Active Efforts, cont.

Courts shall not order an Indian child in foster care or permanent placement unless the court finds that the agency made active efforts; whether the activities listed below were appropriate; and whether the agency made appropriate and meaningful services available to the family based on the family's specific needs:

1. (a) Whether the agency made efforts at the earliest point possible to identify a child as an Indian child and (b) identified and requested participation of the child's tribe at the earliest point possible and throughout the case
2. Whether agency requested a **tribally designated representative** to evaluate the circumstances of the child's family and assist in developing a case plan

Minnesota Requirements for Active Efforts, cont.

3. Whether the agency provided **concrete services** and access to both tribal and nontribal services on an ongoing manner throughout the case to members of the child's family including:

- Financial assistance
- Food
- Housing
- Health care
- Transportation
- In-home services
- Community support services

4. Whether the agency notified and consulted with the child's **extended family members** to provide support to the child and parents, to inform the agency and court as to cultural connections and family structure, to assist in identifying cultural services and supports to the child's family, and to serve as placement and permanency resource for the child

Minnesota Requirements for Active Efforts, cont.

5. Whether the agency provided **services and resources to relatives who are considered the primary placement option** for the child, as agreed to by the agency and the tribe, to overcome barriers to caring for the child, including:

- child care assistance
- financial assistance
- housing resources
- emergency resources
- foster care licensing assistance and resources

6. Whether the agency arranged for **visitation** to occur in the home of the child's parent, Indian custodian, or other family member, or other non-institutional setting

Adjudication of Involuntary Proceedings (cont'd)

- Standards of Evidence
 - Foster-care placement
 - (1) Clear and convincing evidence,
 - (2) Including the testimony of qualified expert witness(es),
 - (3) That the child's continued custody by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child
 - TPR
 - (1) Evidence beyond a reasonable doubt,
 - (2) Including the testimony of qualified expert witness(es),
 - (3) That the child's continued custody by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child

BA ICWA Rule - On-Site Training 2016 § 23.121 29

Adjudication of Involuntary Proceedings (cont'd)

- Causal Relationship
 - For a foster-care placement or TPR, the evidence must show a causal relationship between:
 - The particular conditions in the home and
 - The likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding
 - Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself meet the standard of evidence

BA ICWA Rule - On-Site Training 2016 § 23.121 30

Adjudication of Involuntary Proceedings (cont'd)

- Qualified Expert Witness
 - Must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
 - Should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe
 - A person may be designated by the Tribe as being qualified to testify to the prevailing social and cultural standards
 - Court or any party may request the Tribe or BIA's assistance in locating qualified expert witnesses
 - Must not be the social worker regularly assigned to the Indian child

BA ICWA Rule - On-Site Training 2016 § 23.122 31

Minnesota Requirements for Qualified Expert Witness

- The agency, or other party, shall make diligent efforts to locate and present to the court a qualified expert witness (QEW) designated by the child's tribe.
- If the agency/party cannot obtain testimony from a tribally designated QEW, it shall submit to the court its diligent efforts to obtain one

Minnesota Requirements for Qualified Expert Witness

- If there is clear and convincing evidence of the agency's/party's diligent efforts, then the agency/party shall demonstrate to the court that a proposed qualified expert witness is, in descending order of preference:
 1. A member of the child's tribe who is recognized by the child's tribal community as knowledgeable in tribal customs related to family organization and child-rearing practices or
 2. An Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the child's tribe

Adjudication of Involuntary Proceedings (cont'd)

- Each party to proceeding involving an Indian child has a right to:
 - Timely examine all reports and other documents filed or lodged with the court upon which any decision may be based
- Court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, if it possesses the capability
 - Examples: participation by telephone, videoconferencing

Emergency Proceedings



Emergency Proceedings

- Emergency proceeding
 - Limits on emergency proceedings in recognition of trauma caused by removal and that, once removed, may be harder to return child
 - May be used only when necessary to prevent "imminent physical damage or harm to the child"
 - Must be as short as possible because they do not include the full suite of ICWA protections
 - 30-day limit on emergency removal / placement
 - If new information indicates that the emergency situation has ended, the court must promptly hold a hearing
 - At any court hearing during the emergency, court must determine whether the emergency continues
 - Petition contents

BA CWA Rule - On-Or-After Training (2016)
U.S. Department of the Interior § 20.2, § 20.103 14

Voluntary Proceedings



Voluntary Proceedings

- Rule clarifies what is "involuntary" vs. "voluntary"
 - Voluntary means either parent, both parents, or the Indian custodian has consented to the placement or TPR
 - Of his or her or their free will.
 - Without a threat of removal by a State agency.
- The only voluntary placement excluded from ICWA is where the parent of Indian custodian can regain custody "upon demand"
 - "Upon demand" means simply upon verbal request, without any formalities or contingencies

BA ICWA Rule - On Site Training 2016
U.S. Department of the Interior § 23.2, § 23.100

Voluntary Proceedings

- Requirements in Voluntary Proceedings
 - Inquiry - whether child is an "Indian child"
 - Verification - if reason to believe the child is an Indian child, take all reasonable steps to verify the child's status with the Tribe
 - Placement preferences
 - State courts must ensure that the placement for the Indian child complies with §§ 23.129 - 23.132

BA ICWA Rule - On Site Training 2016
U.S. Department of the Interior § 23.124

Voluntary Proceedings

- Requirements in Voluntary Proceedings
 - Parental consent requirements
 - In writing and recorded before a court of competent jurisdiction
 - Must include any conditions to the consent
 - Not valid if prior to, or within 10 days after, the birth
 - Court must explain terms & consequences of consent and certify that parent understood
 - Parent or Indian custodian may withdraw consent to:
 - Voluntary foster-care placement at any time
 - Voluntary TPR at any time prior to the entry of a final TPR decree
 - Voluntary adoption at any time prior to the entry of a final decree of adoption

BA ICWA Rule - On Site Training 2016
U.S. Department of the Interior § 23.125

Placement Preferences



Placement Preferences

- Placement preferences apply in any preadoptive, adoptive, or foster-care placement (voluntary or involuntary) of an Indian child
 - If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply
- Court must apply the placement preferences, unless there is a determination on the record that good cause exists

BA-ICWA-10-1 - On-Site Training 2016
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§ 21.120 49

Placement Preferences

- Placement Preferences – Adoptions**
- (1) A member of the Indian child's extended family,
 - (2) Other members of the Indian child's Tribe, or
 - (3) Other Indian families
- Placement Preferences – Foster Care & Preadoptive***
- (1) A member of the Indian child's extended family;
 - (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;
 - (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - (4) 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
- *And the child must be placed in the least-restrictive setting that (1) most approximates a family, (2) allows the Indian child's special needs to be met, and (3) is in reasonable proximity to the Indian child's home, extended family, or siblings

BA-ICWA-10-1 - On-Site Training 2016
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§ 21.130, § 21.131 51

Placement Preferences (cont'd)

- **Placement Preferences – Good Cause to Depart**
 - Party asserting good cause should bear the burden of proving good cause exists by clear and convincing evidence
 - Court's determination should be based on one or more of the following considerations:
 - (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
 - (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
 - (3) The presence of a sibling attachment that can be maintained only through a particular placement;
 - (continued...)

BA-ICWA-Sub - On-Go Training 2016
U.S. Department of the Interior § 20.102 41

Placement Preferences (cont'd)

- **Placement Preferences – Good Cause to Depart (cont'd)**
 - Court's determination should be based on one or more of the following considerations: (cont'd)
 - (4) The extraordinary physical, mental, or emotional needs of the Indian child
 - E.g., specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
 - (5) The unavailability of a suitable preferred placement after court determines a diligent search was conducted, but none has been located.
 - For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community.

BA-ICWA-Sub - On-Go Training 2016
U.S. Department of the Interior § 20.102 42

Placement Preferences (cont'd)

- **Placement Preferences – Good Cause to Depart (cont'd)**
 - **Limitations on Court's Determination**
 - A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.
 - A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

BA-ICWA-Sub - On-Go Training 2016
U.S. Department of the Interior § 20.102 43

Minnesota Requirements for Placement Preference –
Good Cause to Depart

1. Reasonable request of one or both of the child's parents
2. Reasonable request of the Indian child
3. Testimony of qualified expert designated by the child's tribe that supports placement outside the placement preferences due to extraordinary physical or emotional needs of the child
4. Testimony by the agency that a diligent search has been conducted that did not locate any available, suitable families that meet the placement preference criteria

KEY: Testimony of the child's bonding or attachment to a foster family alone, without 1-4 above, shall not be considered good cause to depart from placement preference.

Recordkeeping & Ongoing Obligations



Recordkeeping & Ongoing Obligations

- States must:
 - Maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child; and
 - Information that must be included in record:
 - The petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination, and detailed documentation of the efforts to comply with the placement preferences
 - Make the record available within 14 days of a request by an Indian child's Tribe or the Secretary
- States must provide BIA with final adoption decrees of Indian child
 - See rule for what information must be included with decrees

604 ICWA Rule - On Site Training 01/10
U.S. Department of the Interior § 25.138 - § 25.141 14

Recordkeeping & Ongoing Obligations

- **Adoption Fails Through**
 - Court must notify biological parent (or prior Indian custodian) and Tribe whenever:
 - A final adoption decree has been vacated or set aside; or
 - Adoptive parent has voluntarily consented to the termination of his or her parental rights to the child
- **Adult Adoptee Applies for Information**
 - Upon the application adult adoptee, the court that entered the final decree of adoption must inform the adoptee of parents' Tribal affiliations and provide other information necessary to protect any rights resulting from the individual's Tribal relationship

2014 ICWA Rule - On-Going Training 02/16
U.S. Department of the Interior **§ 23.128 - § 23.141** 17

Effective Date of the New Rule

- The rule is effective on **Monday, December 12, 2016**
 - Affects all Indian child-welfare proceedings initiated after **Monday, December 12**

2014 ICWA Rule - On-Going Training 02/16
U.S. Department of the Interior **§ 23.142** 18

Federal Implementation & Resources



Federal Implementation of ICWA

- Federal inter-agency ICWA workgroup
 - U.S. Department of the Interior
 - Assistant Secretary – Indian Affairs
 - Bureau of Indian Affairs
 - U.S. Department of Health & Human Services (HHS)
 - Administration on Children, Youth, and Families, Children's Bureau (ACYF)
 - U.S. Department of Justice

84 ICWA Rule - On-Site Training 2016
U.S. Department of the Interior 24

ICWA-Related Resources from BIA

- Go to: www.bia.gov and click on the "Indian Child Welfare Act" icon in the right-hand margin
 - This training material
 - Copies of handouts
 - More in-depth training materials
 - The final rule
 - Information on the inter-agency partnership
 - When finalized, the updated guidelines

84 ICWA Rule - On-Site Training 2016
U.S. Department of the Interior 25

ICWA-Related Resources from ACYF

- Available from the Capacity Building Collaborative and Center for States on <https://capacity.childwelfare.gov/>
 - **Authentic Voices Video Series**
 - **LGBTQ Toolkit** (expected release September 2016)
 - **State/Tribal Partnerships Learning Experience** (expected release late September 2016)

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U.S. Department of the Interior 26

ICWA-Related Resources from ACYF (cont'd)

- Available from the Child Welfare Information Gateway: <https://www.childwelfare.gov>
 - Tribal-State Relations
 - Major Federal Legislation Concerned With Child Protection, Child Welfare, and Adoption
 - Information Gateway's Adoption Triad: Customary Adoption
- Web Sections
 - Indian Child Welfare Act
 - Training Resources for Working With American Indian and Alaska Native Families
 - Topical Training for Caseworkers: Working With American Indian Families
 - Developing Culturally Competent Adoption Services
 - Children From Minority Groups in Out-of-Home Care
 - Permanency and American Indian Children

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Questions?

- Implementation Questions:
 - Debra Burton, ICWA Specialist, BIA
 - Debra.burton@bia.gov
 - (202) 513-7610
- Regulation Questions:
 - Elizabeth Appel, Office of Regulatory Affairs - Indian Affairs
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Indian Child Welfare Act or Minnesota Indian Family Preservation Act issues

Contact: **Shirley M. Cain**, Native American Equity Policy Specialist
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