MINNESOTA JUDICIAL BRANCH

FAQ – Indian Child Welfare Act (ICWA)

This document is intended for child welfare partners participating in ICWA training through the Children's Justice Initiative (CJI) Program at the State Court Administrator's Office. It answers frequently asked questions (FAQs) raised during training events about juvenile protection cases involving Indian children.

When ICWA applies to a juvenile protection case, when does the emergency removal end and the foster care proceeding begin? Is it when the return receipt (or "green card") is filed or when the Admit/Deny Hearing (ADH) is held?

Emergency removal may end when the ADH is held, depending on the outcome. The emergency standard generally continues until there's been an admission or adjudication by trial.

What happens when the ADH isn't for weeks (perhaps beyond the time limits of Rule 46.02 of the Rules of Juvenile Protection Procedure)? Does the court need to make the emergency finding again?

The ADH should not start (except to enter a denial) until copies of all ICWA Notices and return receipts for the parents, tribe(s), and Bureau of Indian Affairs (BIA) Regional Office have been filed. If all ICWA Notices and return receipts have not been filed, then the hearing scheduled as an ADH should be changed to an Emergency Protective Care (EPC) Hearing and the judicial officer should make continued "emergency" findings about whether the child is in imminent danger of serious emotional damage or serious physical damage or harm. If the child is in imminent danger, the child should continue to be in foster care. If the child is not in imminent danger, the child protection proceeding may continue, but the child should be returned immediately to the care of the parent(s).

In juvenile protection cases, when does the legal standard change from the "emergency" standard of "imminent serious emotional damage or serious physical damage or harm" to the foster care placement standard of "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional damage or serious physical damage to the child"? Is it as soon as the emergency removal is ended or later such as after CHIPS adjudication?

The standard changes after the Child in Need of Protection or Services (CHIPS) adjudication, it's the determination that changes it. The emergency standard continues until there is an adjudication resulting from either an admission or a trial.

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What happens when the tribe does not respond to the agency's ICWA Notice, despite repeated phone calls and emails? Must the court continue to hold repeated EPC Hearings, or may the court hold an ADH?

For many tribes across the U.S. there is only one person responsible for responding to all ICWA Notices and requests, making it difficult for that person to respond. If there has been no response after repeated attempts and after the ADH has been rescheduled or continued, the court can take the testimony of the agency social worker about the specific steps taken by the social worker to contact the tribe, including asking the local, regional, or central BIA office in Washington, D.C., for help with contacting the tribe, and the tribe's response or lack of response. Based on that testimony, the court could then make a finding as to whether the steps taken by the social worker did or did not constitute active efforts to engage the child's Indian tribe. If the court determines active efforts were not made to engage the tribe, the court could direct the social worker to take specific additional steps. If the court determines active efforts were made to engage the tribe, the court could then decide that ICWA does not apply (unless or until the tribe responds otherwise) and the court could commence the ADH. If it does that, the court should continue to inquire about eligibility at every subsequent hearing.

Does ICWA Notice/re-eligibility need to be served at the start of a Termination of Parental Rights (TPR) or permanency case if there has already been a finding at the CHIPS stage that ICWA does not apply (for example, at the CHIPS stage, parent says there is ancestry, but tribe says no eligibility)?

Yes. For the TPR or permanency proceeding, the child-placing agency or individual petitioner should serve the ICWA Notice on all parents, tribes, Indian custodians, and the BIA Regional Office even if it was already served as part of the CHIPS proceeding. One reason for this is because it is a new proceeding with a new summons and petition. Another reason is because a tribe's eligibility criteria can change over time and although the tribe may determine that someone is not a member or eligible for membership at one point in time, the tribe may determine that person is a member or eligible for membership at another point in time.

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Should the ICWA Notice be served again in the TPR or permanency proceeding if, during the CHIPS proceeding, the court made a finding that ICWA applies?

Yes. In those situations, the child-placing agency or individual petitioner should serve the ICWA Notice again because it is a new proceeding with a new summons and petition and tribes may want to engage differently at this stage. For example, they may want to involve themselves in the TPR or permanency proceeding even if they chose not to involve themselves in the CHIPS proceeding or vice versa. And, as noted above, a tribe may have changed their definition of membership eligibility to include the child and that tribe may now want to be involved.

If there is voluntary placement of an Indian child or voluntary services to an Indian child's parents, are active efforts required?

Yes. Under the spirit of ICWA, any time a case involves an Indian child who is in voluntary or involuntary out-of-home placement, the child-placing agency is required to make active efforts from the time of contact with the family to closure of the case. This includes voluntary foster care for treatment scenarios where the court has approved the placement and the parent is not able to have the child returned upon demand (making it a child custody proceeding).

Is a Qualified Expert Witness (QEW) required in a family court Third-Party Custody case? Is the Petitioner required to make active efforts or just fulfill ICWA Notice requirements?

Yes. A QEW is required for all out-of-home placements if the third-party is someone other than one of the parents. Similarly, active efforts are required to be made by the Petitioner, along with serving the necessary ICWA Notice.

In a family court Third-Party Custody case where the government agency isn't involved, who is responsible for making active efforts?

The Petitioner is responsible for making active efforts when there is no government agency involved.

Does ICWA apply to a juvenile court Transfer of Permanent Legal and Physical Custody (TPLPC) case?
Yes. The Minnesota Indian Family Preservation Act (MIFPA) states that ICWA applies to TPLPC proceedings in juvenile court and testimony of a QEW is required.

In an involuntary permanency proceeding, such as a TPLPC or TPR, can the court rely on the testimony of the QEW given during the CHIPS foster care proceeding?

No. New QEW testimony is required for each type of involuntary permanency, including TPR and TPLPC.