



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Active Efforts and Resources

Why Are Active Efforts Important?

Active efforts are described in the Indian Child Welfare Act (ICWA) as important steps in providing remedial services and rehabilitative programs to prevent the breakup of the Indian family. Active efforts should be thoroughly documented and proven in court proceedings when involuntary foster care or termination of parental rights occurs.

Often, state or county agencies or assimilation programs established by the federal government entailed removal of Indian children from their tribal communities based on poverty and a lack of knowledge or understanding about cultural practices and the importance of connection to the tribal community. Indian children were then placed in non-Indian homes or institutional environments. These practices were based on the belief that Indian children raised in non-Indian environments would be better cared for or assimilated into American society. Over the years, these removal procedures created an overrepresentation of Indian children in out-of-home care.

To address the disparate treatment and prevent the continued breakup of Indian families, Congress enacted the Indian Child Welfare Act in 1978.¹ For more information on the historical factors leading up to the passage of ICWA, please see the *American Indian Policy Review Commission Final Report* at <https://files.eric.ed.gov/fulltext/ED164229.pdf>.

What Is the Legal Definition of Active Efforts?

Newly revised ICWA regulations were published in June 2016 by the Bureau of Indian Affairs (BIA).² In December 2016, ICWA guidelines were released to provide additional information regarding ICWA compliance.³

¹ See Indian Child Welfare, 25 U.S.C. §§ 1901–1963, www.courts.ca.gov/documents/IIB.pdf.

² See Indian Child Welfare Act, 25 e-C.F.R. §§ 23.1–23.144 (2018), www.ecfr.gov.

³ U.S. Department of the Interior, *Guidelines for Implementing the Indian Child Welfare Act* (ICWA Guidelines; December 2016), www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

Federal Definition

Active efforts are affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. When an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan, including accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe. Active efforts are to be tailored to the facts and circumstances of the case.⁴ For additional citations on providing active efforts, see subdivision (d) of section 1912 of title 25 of the United States Code, Family Code section 177(a), Welfare and Institutions Code section 361.7, and rule 5.484(c) of the California Rules of Court.

Active Efforts Emergency Situations

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

...

- (e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:
- (1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
 - (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and
 - (3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.⁵
- (25 C.F.R. § 23.113.)

The ICWA guidelines recommend that "[s]tate agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family."⁶ An example of an emergency situation is when a crime is committed in which both parents are arrested, no family is in the home at the time of arrest, and the police notify the on-call emergency child welfare worker to bring the children to an emergency shelter. The child welfare worker arrives, discovers one or both of the parents are tribal members, and the parents have a case active in that county's social services family maintenance unit. The child welfare worker reaches out to the tribal representative to work together in locating a family or tribal member to provide temporary foster care immediately.

⁴ See Definitions, 25 e-C.F.R. § 23.2 (2018).

⁵ ICWA Guidelines, § C.5, Outer limit on length of emergency removal, p. 27.

⁶ *Id.*, § C.8, Active efforts in emergency situations, p. 29.

What Is the Difference Between Reasonable Efforts and Active Efforts?

When ICWA applies to child-custody proceedings, the agency involved must provide active efforts to assist the Indian family in remaining together. Reasonable efforts are insufficient. For a clearer understanding of reasonable and active efforts, see the chart below.

Reasonable Efforts	Active Efforts
Choosing standard items for the case plan	Working with the tribal representative and parents to identify goals for case plan and resources
Giving the parents a list of parenting classes	Going over the list of parenting classes with the parents, locating a culturally appropriate class, and assisting the parents in signing up for classes that their schedules allow them to attend
Identifying general counseling one time per week in the case plan	Locating culturally appropriate behavioral health resources; accompanying the parents, child, and/or family to the intake appointment; and having regular contact with the service provider
Documenting that the child is eligible for enrollment	Taking the necessary steps to secure tribal membership for a child if the child is eligible for membership in a tribe (Cal. Rules of Court, rule 5.484(c)), including contacting the tribal representative to find out how to get the child enrolled in the tribe and following the procedures of that tribe to get the child enrolled
Locating a standard substance abuse treatment program	Locating a culturally appropriate substance abuse treatment program and identifying when the child can visit or stay with the parent in the program
Placing child in a frequently used non-Indian foster home	Using ICWA placement preferences properly for the child's temporary home, beginning with contacting the family and tribe to begin identifying a home

Tip: If you work for a county agency, your agency may want to consider contracting with a genealogist to assist with tribal enrollment procedures for your clients. For additional information about working with a genealogist, please contact Vida Castaneda, Senior Analyst, Tribal/State Programs Unit at vida.castaneda@jud.ca.gov or 415-865-7874.

What is the Required Evidence for Active Efforts?

Evidentiary Requirements for Removal or Termination of Parental Rights

According to 25 Code of Federal Regulations part 23.121(c) (2018), “evidence must show a causal relationship between . . . custody [and] . . . serious emotional or physical harm.⁷ 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

⁷ See 25 e-C.F.R., § 23.121 (2018).

constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.⁸

In any child custody proceeding listed in rule 5.480 of the California Rules of Court, the court may not order placement of an Indian child unless it finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage and it considers evidence regarding prevailing social and cultural standards of the child's tribe, including that tribe's family organization and child-rearing practices.

(1) Testimony by a "qualified expert witness," as defined in Welfare and Institutions Code section 224.6, Family Code section 177(a), and Probate Code section 1459.5(b), is required before a court orders a child placed in foster care or terminates parental rights.

(2) Stipulation by the parent, Indian custodian, or tribe, or failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the person or tribe has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them. Any such stipulation must be agreed to in writing.

(3) Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of Welfare and Institutions Code section 361, will not support an order for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage.⁹

(Cal. Rules of Court, rule 5.484(a)(1)–(3).)

Documenting Active Efforts

On any ICWA case, the documentation of the active efforts to prevent the breakup of the Indian family must be clear and thorough. According to regulation 23.120(b), "[a]ctive efforts must be documented in detail in the record."¹⁰ This requirement is to ensure that the judicial officer can make the proper legal findings and orders and that the qualified expert witness can provide an accurate assessment from the reviewed written documentation provided and can prevent the potential of appeal. The social worker, probation officer, or petitioner is responsible for providing and documenting active efforts.

⁸ *Id.*, § 23.121(d) (2018).

⁹ Cal. Rules of Court, rule 5.484 (Placement of an Indian child), www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_484.

¹⁰ See Adjudication of Involuntary Proceedings, 25 e-C.F.R., § 23.120 (2018).

What Resources Are Available for American Indian/Alaska Native Families?

Many services are available for American Indian/Alaska Native individuals and families. These services are often free of charge and located within your region. Here are some examples of the different types of resources:

- ❖ Medical clinics
- ❖ Dental clinics
- ❖ Behavioral health programs
- ❖ Youth services
- ❖ Tribal CASA
- ❖ Substance abuse programs
- ❖ Domestic violence services
- ❖ Indian education programs

If you are interested in a resource outside your county, you may contact the resource agency directly to find out if it works with children and families outside the county area.

Please visit our resources and services database for more information about locating services in specific areas or topic searches: www.courts.ca.gov/5807.htm.

How Does Someone Qualify for Resources Available to American Indian/Alaska Native Individuals or Families?

In California, if you are an enrolled member of a federally recognized tribe or listed on the California Judgment Fund Rolls or a descendant of a person listed on the California Judgment Fund Rolls, you may be able to qualify for services available to American Indian/Alaska Native individuals. If you qualify, you could potentially use services such as Indian education services, behavioral health resources, or medical, dental, Tribal TANF, or substance abuse programs. The intake worker or representative for the resources you are interested in using will be able to tell you if you can access these resources. Resources available to American Indian/Alaska Native families, whether in an urban or a rural environment, are often at no cost or are charged on a sliding scale.

Additional References

If you are interested in tracing your ancestry, you can view these helpful resources:

- ❖ California Indian Legal Services, *How do I trace my California Indian Ancestry?* (2014), www.calindian.org/wp-content/uploads/2015/09/SelfHelpTracingCAIndianAncestry.pdf
- ❖ Bureau of Indian Affairs, Genealogy section (as of July 2018), www.bia.gov/bia/ois/tgs/genealogy

To view reference sheets on the following topics, please visit the web addresses provided:

- ❖ Active efforts, provided by the BIA:
www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041405.pdf
- ❖ Active efforts, provided by Judge Leonard P. Edwards:
www.courts.ca.gov/documents/BTB_23_5N_5.pdf
- ❖ Dependency: www.courts.ca.gov/documents/ICWA-SSDRequirements.pdf
- ❖ Delinquency: www.courts.ca.gov/documents/ICWAProbationRequirements.pdf
- ❖ Family: www.courts.ca.gov/documents/ICWAFamilyCtsRequirements.pdf
- ❖ Probate: www.courts.ca.gov/documents/ICWAProbateCourtRequirements.pdf