



JOB AID: ICWA Inquiry. Overview of key requirements of AB 3176, clarifying how probation and child welfare are required to implement ICWA inquiry as of January 1, 2019

The focus of inquiry and investigation is always to determine whether the child is or may be an Indian child—i.e., a member of a federally recognized tribe or eligible for membership and the biological child of a member.

Early Investigation of Indian Status by the Agency

AB 3176 confirms California law by clarifying that both probation and child welfare have a *continuing* duty to investigate a child’s possible Indian status beginning at *first contact* with the child and family.

- This applies to *all* children.
- The agency cannot wait to inquire until court action or removal is contemplated. When a report of child abuse or neglect is made, the reporting party must be asked if he or she has information that the child may be an Indian child (224.2(a)).¹
- If probation or child welfare receives temporary custody of a child, it must inquire whether the child is or may be an Indian child and where the child, parents, or Indian custodian is domiciled (224.2(b); 306(b)).

“Reason to Believe” and Early Communication with Child’s Tribe

When the agency’s early investigation gives “reason to believe” (224.2(e)) that the child is an Indian child, further inquiry is required. This inquiry must include:

- Interviewing the child, parents, Indian custodian, and extended family members;
- Contacting the Bureau of Indian Affairs (BIA) and California Department of Social Services; and
- Contacting tribes with which the child may be affiliated and others who may have information about the child’s potential status.

Contact with the tribes must include, at a minimum, making telephone, facsimile, or electronic mail contact with each tribe’s designated agent for receipt of ICWA notice and sharing information identified by the tribe as necessary for the tribe to make a membership or eligibility determination, as well as information on the current status of the child and the case. *At this point, however, there would be no requirement to send formal ICWA notice by registered or certified mail, return receipt requested.*

At the first court hearing, including the detention hearing in a dependency case, to ensure that the agency has fulfilled its duty of inquiry, the agency must submit materials to the court that evidence that the agency has asked the child, parents, legal guardian, Indian custodian, and all extended family members with which the agency has had contact whether the child is, **or may be**, an Indian child, and

¹ This and all future references are to the Welfare and Institutions Code, unless otherwise stated.

where the child and parents or Indian custodian are domiciled, i.e., if they live on an Indian reservation or in an Alaska Native Village (224.2(b)). This evidence can be provided on the *Indian Child Inquiry Attachment* (form ICWA-010(A)), in the court report, or in some other form of attachment. What is important is to ensure that the names of the individuals asked, the questions that were asked, and the responses that were given are provided in enough detail to show that the requirements of Welfare and Institutions Code section 224.2(b) were fulfilled.

“Reason to know” and ICWA requirements

Based on the information that the agency received as a result of its inquiry, the agency should decide whether that information provided a “reason to believe” the child could be an Indian child.

- If so, the agency should conduct further inquiry, including interviewing the parents, child, available extended family members, and other relevant individuals;
- Contacting the California Department of Social Services and/or BIA; and, most important, engaging in an exchange of information with tribes with which the child is potentially affiliated (224.2(e)(1)–(3)).

This exchange of information, however, does not constitute formal ICWA notice. At this point the exchange of information includes at a minimum telephone, facsimile, or electronic mail contact to each tribe’s designated agent for receipt of notices under ICWA. If, during this initial or further inquiry, the agency has “reason to know” that the child is an Indian child, then the agency has a further obligation to provide the tribe or tribes with formal notice under ICWA.

Unlike “reason to believe,” which is not defined in the statute, the factors that give the agency and the court “reason to know” that the child is an Indian child are stated in section 224.2(d). They include any of the following circumstances:

- The child, a parent, a member of the extended family, or basically anyone else with an interest in the child tells the court that the child is an Indian child or that he or she has information indicating that the child is an Indian child.
- The residence or domicile of the child or parents or Indian custodian is on a reservation or Alaska Native village.
- There is information that the child is or was under the jurisdiction of a tribal court.
- The child or a parent possesses an identification card (or other document from a tribe or the BIA) indicating membership or citizenship in an Indian tribe

As discussed above, when there is reason to know that the child is an Indian child, the agency must:

- Compile and present evidence by way of report, declaration, or testimony that the agency has used due diligence, including at a minimum the above, to work with all tribes to determine the child’s status;
- Ensure that formal ICWA notice was provided to the tribe or tribes; and
- Treat the child as an Indian child unless and until the court can make a finding on the record that the child does not meet the definition of an Indian child.

The Role of the BIA and CDSS in ICWA inquiry

Inquiring whether a child is an Indian child is required in *all* state child custody cases. The goal of inquiry is to determine Indian status -- i.e., membership/citizenship in a federally recognized tribe or political connection as eligible for membership and the child of a member of a federally recognized tribe.

Because of complicated law and history, heritage (descent/blood quantum derived from historic tribes) is often a determining factor in finding the child's contemporary federally recognized tribe.

Tribal membership standards commonly require demonstrated connection to an ancestor listed on an historic federal roll or schedule and/or a specified quantum of Indian blood. For this reason, detailed ancestry information must be provided to tribes to enable the tribe to exercise its sovereign authority to determine its membership. Neither the Bureau of Indian Affairs or the CDSS possess authority to make tribal membership determinations.

Due to complicated law and history, Identification of Indian status often begins from a racial designation or inquiry about Indian heritage. Respondents may not answer by identifying to a federally recognized tribe (something they may not know) but rather to an historic or ancestral tribal affiliation(s).

- The role of the Bureau of Indian Affairs and the CDSS is to assist in identifying the federally recognized tribes a child may be a member of or eligible for membership in. When the child's federally recognized tribe is not known or readily identified, inquiry should include questions about the child's affiliation with an historic or Tribal ancestral group.
- The Bureau of Indian Affairs and the CDSS may then assist with locating the identity of and contact information for federally recognized tribes affiliated with the identified ancestral group.
 - For example, if the ancestral group of "Cherokee" is identified, the Tribal Affiliation list maintained by the Bureau of Indian Affairs identifies to that historic Cherokee affiliation 4 separate federally recognized tribes. Similarly, if the ancestral group of "Paiute" is identified, the Tribal Affiliation list identifies to that historic Paiute affiliation 26 federally recognized tribes.

To assist in identifying and contacting the child's tribe, the Bureau of Indian Affairs makes available on its website the list of federally recognized tribes, and a tribal leaders directory at <https://www.bia.gov/tribal-leaders-directory>. It also makes available a list of *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice* at <https://www.bia.gov/bia/ois/dhs/icwa>. The designated agent list identifies who the Bureau of Indian Affairs recommends as the tribe's contact for Indian child welfare purposes.

Federally recognized tribes may not correspond to historic (ancestral) tribal groups. Because Indians commonly identify to their historic tribal or ancestral group, the Bureau of Indian Affairs maintains a *List of Designated Tribal Agents By Tribal Affiliation* which may be viewed on the BIA website at <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/webteam/docx/idc1-033200.docx>.

Possible Inquiry Results

Inquiry is required in all state child custody cases and results in one of the following categories (that may be subject to change based upon additional information):

Category/Class	What it is	What it requires
Non-Indian	No indication that the child is Indian (member or eligible for membership and the child of a member)	There is a continuing duty to inquire about whether the child is or may be an Indian child throughout the life of all state child custody cases. ICWA does not otherwise apply.
<i>Reason to believe</i> (Heritage cases)	While at times a child's Indian status and identify of their tribe can be readily confirmed, commonly this information is not available. Rather, inquiry may produce vague statements of possible heritage and guesses at possible tribal affiliation, often to historic/ancestral tribal groups rather than to specific federally recognized tribes. AB 3179 refers to this group as <i>reason to believe the child may be an Indian child</i> .	<i>Reason to believe</i> requires only further inquiry/investigation to confirm Indian status and identification of child's federally-recognized tribe(s). Due diligence is required but ICWA does not otherwise apply.
<i>Reason to know</i>	Federal ICWA regulations and state law list facts that provide reason to know the child is Indian (i.e., a member or eligible for membership and the child of a member of a federally-recognized tribe).	Reason to know requires further inquiry and application of ICWA minimum federal standards to the case (e.g., notification, active efforts, expert testimony, placement preferences, etc.)
<i>Indian child</i>	Children whose Indian status can be confirmed (i.e., children who are a member or eligible for membership and the child of a member of a federally-recognized tribe)	Indian status requires application of ICWA minimum federal standards to the case (e.g., notification, active efforts, expert testimony, placement preferences, etc.) The child's tribe may exercise rights and opportunities provided by ICWA to the child's tribe.
non-federally-recognized Indian child	Non-federally-recognized tribes are groups that may be self-identified, petitioning for federal recognition, or state recognized. They do not enjoy the rights and privileges of federally recognized tribes.	WIC §366.6 permits a court to allow a child's non-federally-recognized tribe to participate in a juvenile case, similar to a CASA volunteer. ICWA does not otherwise apply.