CHAPTER 11:
The Indian Child Welfare Act (ICWA)

11.1 INTRODUCTION

The Indian Child Welfare Act (ICWA)[1] is a federal statute that was adopted to protect Indian families and to preserve the ties between Indian children and their tribes.[2] When ICWA applies, it pre-empts inconsistent state law provisions in child welfare cases. Guidance to interpretation of the Act is found in case law and in the Department of Interior, Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings, usually referred to as the BIA Guidelines.[3]

11.2 DEFINING TERMS RELEVANT TO ICWA

ICWA applies to "child custody proceedings" involving an "Indian child."[4] Some ICWA provisions also may be triggered in paternity proceedings and in certain voluntary arrangements for child placement.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] 25 U.S.C. §§1901-1963 (2010).

[2] At the time ICWA was passed, an extraordinary number of Indian children were being removed from their families by state courts and social services agencies and placed in non-Indian homes and institutions. For example, the American Indian Child Resource Center reports that in the 1970's, 92.5% of adopted American Indian children in California had been placed with non-Indian families. This ratio for out-of-culture placement was six times more than that of any other minority group in the country. The adoption rate for Indian children was 8.4 times greater than the adoption rate for non-Indian children. There were 2.7 times as many Indian children in foster care as non-Indian children. *See* American Indian Child Resource Center, *About ICWA*, http://www.aicrc.org/icwa.html (visited October 20, 2010); B.J. JONES, THE INDIAN CHILD WELFARE ACT: THE NEED FOR A SEPARATE LAW, (1996); Carol Locust, *Split Feathers… Adult American Indians Who Were Placed in Non-Indian Families as Children*, 13 PATHWAYS 11 (September/October 1998), *available at* http://splitfeathers.blogspot.com/2010/02/split-feathers-study-by-carol-locust.html (last visited October 20, 2010).

[3] The BIA Guidelines can be found at 44 Fed. Reg. 67 (1979). The BIA Guidelines for State Courts were originally published in the Federal Register in 1979. They have never been formally adopted as regulations of the Bureau of Indian Affairs and thus are not binding. Rather, the Guidelines are a non-binding resource regarding interpretation of ICWA.

[4] 25 U.S.C. § 1904.

A. "Indian Child"

IWCA applies to actions involving an "Indian child." The Act defines an Indian child as a child who is either **(a) a member of an Indian tribe, or (b) who is eligible to be a member of an Indian tribe and who is a biological child of a tribal member**.[5] Whether a child is a member of or eligible for membership in a tribe is determined by the tribe. Tribal determinations of membership are entitled to deference in state courts and are entitled to full faith and credit under ICWA.[6]

ICWA applies only to federally-recognized tribes and to Alaska native villages and corporations. There are more than 500 federally recognized Indian tribes in the United States. The Department of Interior is required by federal law to maintain and publish an annual list of federally-recognized tribes.[7]

Each tribe has its own rules for determining tribal membership.[8] Thus, it is imperative that the Idaho Department of Health and Welfare (IDHW) and the prosecutor consult with the tribe directly to determine if a child is a tribal member or is eligible for tribal membership. The Bureau of Indian Affairs (BIA) Guidelines provide that if the tribe fails to make a determination of membership or eligibility, then determination may be made by the Department of the Interior, with its determination to be conclusive in the state court.[9] The Idaho Supreme Court has held that where the tribe and the BIA are unable to make the determination of tribal membership, the state court must then make the determination.[10]

In order to ensure that the provisions of ICWA are complied with, steps must be taken in every case to determine whether the child is an Indian child. If there is any reason to believe that the child is an Indian child, notice must be provided and efforts must be made to verify the child's status. Thus the BIA Guidelines recommend that notice be provided to tribes for the purpose of determining whether the child is an Indian child under the following circumstances:

- A party, tribe, or private agency informs the court that the child may be an Indian child;
- A public welfare agency discovers relevant information indicating that the child may be an Indian child;
- The child believes s/he is an Indian child;

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[5] *Id*.
[6] 25 U.S.C. § 1911(d). The federal courts have long recognized that sovereignty concerns requiring tribal determinations of members are binding on state and federal courts. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The BIA Guidelines also provide that tribal determinations of membership are conclusive. BIA Guidelines, § B.1(b)(i).
[7] The most recent list at the time of the publication of this Manual was dated October 1, 2010. *See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 75 Fed. Reg. 60810-01 (Oct. 1, 2010). The National Congress of American Indians maintains an up to day unofficial list of Tribes on its website at http://www.ncai.org/Tribal-Directory.3.0.html.
[8] Determining tribal membership is exclusively a tribal function because such determinations are a fundamental incident of tribal sovereignty. Determinations of tribal membership or eligibility for membership are not subject to review or question by non-tribal courts or by the courts of other tribes. BIA Guidelines §§ B.1(b)(i) and B.2.
[9] BIA Guidelines § B.1(b)(ii).
[10] In the Matter of Baby Boy Doe, 123 Idaho 464, 469-70, 849 P. 2d 925, 930-31(1993).

- The child's residence or domicile is an Indian community or the child's biological parents or Indian custodian is from an Indian community; or
- An officer of the court has information suggesting that the child is an Indian child.[11]

If the identity of the child's tribe is unknown, all possible identified tribes should be contacted as early as feasible to seek verification of the child's Indian status.

B. "Parent"

"Parent" is defined by ICWA as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child including adoptions under tribal law or custom."[12] ICWA specifically provides that the term "parent" does "not include the unwed father where paternity has not been acknowledged or established."[13] Thus, putative fathers who have not established paternity are not considered parents for purposes of ICWA.

C. "Indian Custodian"

ICWA defines "Indian Custodian" as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child"[14]. Indian custodians have many of the same rights as a parent in an ICWA case.[15] Thus, where tribal law recognizes that a third party who has legal custody pursuant to an informal process, such a third part has standing in the ICWA case in state court as an Indian Custodian.

D. "Extended Family Member"

ICWA provides that the term "extended family member" is "defined by the law or custom of the Indian child's tribe." If the tribe does not have such law or custom, ICWA provides that an extended family member is "a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."[16]

E. "Child Custody Proceedings"

ICWA defines "child custody proceedings" to include any action involving a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. Most child welfare cases fall within the definitions of "foster care placement" and "termination of parental rights.[17]

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[11] BIA Guidelines § B.5.
[12] 25 U.S.C. § 1903(9).
[13] *Id*.
[14] 25 U.S.C. § 1903(6).
[15] *See* Ted W. v. State, Dept. of Health & Social Services, Office Of Children's Services 204 P.3d 333, 337 (Alaska 2009); Pam R. v. State, Dept. of Health and Social Services, Office of Children's Services, 185 P.3d 67 F/N 6 (Alaska 2008).
[16] 25 U.S.C. § 1903(2).
[17] 25 U.S.C. §1903(1).

F. "Foster Care Placement"

The act defines "foster care placement" as "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated."[18] Foster care placements do not include voluntary placements of a child by his or her parent or Indian custodian.[19] If a child is placed pursuant to a parent's stipulation at adjudication or disposition, the placement is not considered voluntary and is a "foster care placement" pursuant to ICWA.

G. "Termination of Parental Rights"

ICWA applies to any action resulting in the termination of the parent-child relationship.[20]

H. "Pre-Adoptive Placements" and "Adoptive Placements"

The Act applies both to private and agency adoptions and to adoptions that take place as part of a child protection case. Official state involvement through, for example, a child protection action, is not required.

"Pre-adoptive placement" is defined by ICWA to include "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement." Many guardianships and long-term foster care placements fall within this provision

ICWA defines "adoptive placement" as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[21]

I. Private Custody Actions

Generally, ICWA does not apply to custody disputes between parents. However, ICWA may be triggered if custody of an Indian child is to be awarded to a non-parent as a result of private custody litigation.[22] Similarly, ICWA may be triggered if a non-parent family member independently seeks guardianship or custody of a child.[23] ICWA may also be triggered if a *de facto* custodian seeks custody of a child.[24]

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[18] 25 U.S.C. §1903(1)(i).
[19] Voluntary placements are discussed in more detail later in this chapter.
[20] 25 U.S.C. §1903(1)(ii).
[21] 25 U.S.C. §1903(1)(iii) & (iv).
[22] There is a conflict of authority regarding whether I.C.W.A. applies in a purely intra-family dispute although the weight of authority supports the conclusion that I.C.W.A. does apply. See J. Thompkins, Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions, 81 U. Colo. L. Rev. (Fall 2010); In re custody of A.K.H., 502 N.W. 2d 709 (Minn. App. 1993)(holding I.C.W.A. applied in custody dispute between parents and grandmother of child); In re Bertelson, 617 P.2d 121 (Mont. 1980) (I.C.W.A. does not apply to intra-family disputes).
[23] Guardianship of Ashley Elizabeth, 863 P.2d 451 (N.M. App. 1993).
[24] It is unclear at this time what impact the new Idaho *DeFacto* statute will have, as no other states have similar legislation and the statute has not been reviewed by the courts as it pertains to an Indian Child.

J. Juvenile Corrections Act Proceedings

The BIA Guidelines expressly provide that ICWA does not apply to most juvenile corrections cases.[25] However, placements of juveniles resulting from juvenile status offenses where the juvenile conduct would not be criminal if the juvenile were an adult are covered by the Act. When a JCA proceeding is expanded into a CPA proceeding pursuant to IJR 16, the CPA proceeding is governed by ICWA.

K. Voluntary Mental Health Placements Pursuant to Idaho Code § 20-511A

Voluntary placements, such as mental health placements pursuant to Idaho Code §20-511A, in which the parent or Indian custodian can regain custody of the child upon demand, are also excluded from ICWA.

L. Voluntary Foster Care Placements

ICWA uses the term "voluntary" in two distinct ways. The first situation, which this manual refers to as a "voluntary placement," is an out-of-home placement in which parents may demand immediate return of the child. This type of placement would not involve the filing of a CP petition but would be a voluntary agreement between IDHW and the parent. This type of voluntary placement is not governed by ICWA. The second situation, referred to as a "voluntary *foster care* placement," arises after the filing of a CP petition when the parent voluntarily enters into an arrangement in which the parent may *not* demand immediate return of the child. This type of placement is governed by ICWA, and the parent's consent to the placement must comply with ICWA.

When a parent consents to a voluntary foster care placement in which the parent may not demand immediate return of the child, a full blown CPA case is not required to comply with ICWA. However, ICWA requires that the parent's consent must be in writing and recorded before a judge in a court of competent jurisdiction. The judge recording such consent must certify that the consequences of consenting to voluntary foster care placement were fully explained and were understood by the parent. Thus, the parent must appear before the judge for questioning. Such consent may only be executed more than ten days after the birth of a child.[26] ICWA also provides for the withdrawal of consent at any time in a voluntary foster care placement.[27] The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent should be sufficient. If consent is withdrawn, the parent has an unqualified right to regain custody of the child *unless* an involuntary action is then initiated by the state.[28]

Though full application of the Act is not required, best practice is to apply the Act and make the active efforts finding and the serious physical and emotional harm finding through testimony

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[25] BIA Guidelines § B.3(a).
[26] 25 U.S.C. § 1913(a).
[27] 25 U.S.C. § 1913(b).
[28] B.J. JONES, ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 69-71(2d ed. 2008) (hereinafter ICWA HANDBOOK).

of a qualified expert witness at the elevated burden of proof. If the matter proceeds to an involuntary termination, these findings will become relevant in the termination action.

Finally, ICWA provides that the parent or Indian custodian of the child may regain custody of the child where the consent was improperly obtained.[29]

11.3 WHEN ICWA APPLIES, WHAT CHANGES IN THE CPA CASE?

ICWA imposes three categories of requirements on covered cases. First, ICWA imposes procedural requirements that govern jurisdiction, notice, intervention, and counsel. Second, ICWA imposes substantive requirements for the removal of Indian children including imposing a higher standard in determining whether the state has worked hard enough to avoid removal of the child. The state must make sufficient remedial services and rehabilitative programs to prevent the breakup of the family after removal, evaluate the nature of the circumstances supporting removal, and ensure through expert testimony, evidence and an elevated burden of proof that an Indian child is only removed if continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Third, in addition to these jurisdictional and substantive requirements, ICWA imposes limitations on the placement of Indian children to ensure that to the extent possible they are not separated from their tribe and/or his or her Indian culture.

A. Procedural Requirements of ICWA

ICWA imposes procedural obligations on the court affecting jurisdiction, governing notice, providing for tribal intervention in child welfare cases, and conferring a right to counsel to indigent parents and Indian custodians.

B. Jurisdictional Requirements of ICWA

1. *Exclusive Jurisdiction*

a. ICWA Provisions Regarding Indian Children Domiciled Within the Reservation

ICWA provides that tribal courts have *exclusive* jurisdiction over any child custody proceeding involving an Indian child domiciled within the reservation of the tribe asserting jurisdiction.[30] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[31] In addition, the tribal court retains exclusive jurisdiction over any Indian child who remains a "ward" of the tribal court, notwithstanding the child's domicile.[32] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Holyfield v. Mississippi Band of Choctaws*.[33]

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[29] 25 U.S.C. § 1913(d).
[30] 25 U.S.C. § 1911(a). The only potential exception to exclusive jurisdiction for reservation domiciled Indian children arises if a state has assumed jurisdiction under Public Law 280. 18 U.S.C. §1162. *See* discussion of P.L. 280 below.
[31] Twin City Construction v. Turtle Band of Chippewa Indians, 867 F. 2d 1177 (8th Cir. 1988), *vacated*, 911 F. 2d 137 (8th Cir. 1990).
[32] 25 U.S.C. § 1911(a).
[33] 490 U.S. 30 (1989).

Domicile is broadly defined for purposes of ICWA. In *Holyfield*, the United States Supreme Court held that the term "domicile" in the ICWA exclusive jurisdiction provision has the same meaning as it does for purposes of diversity jurisdiction – that is, a person is domiciled in a location if she/he resides in that location and intends to remain or, if temporarily away, to return.[34] Furthermore, the Court reasoned that the jurisdiction provisions of ICWA must be interpreted to accomplish the purpose of the Act. Thus, a child who is temporarily residing off the reservation but who intends to return to the reservation is domiciled on the reservation. In *Holyfield*, the Court held that twin infants born off the reservation after their mother left to escape the reach of ICWA were "domiciled on the reservation" for purposes of ICWA because their mother was a reservation domiciliary.

For purposes of ICWA, the term "reservation" is broadly defined using the definition of the Major Crimes Act.[35] Thus, the reservation includes any territory within the exterior boundaries of the reservation, including fee-held land, any dependent Indian community, and any Indian allotment and the rights-of-way running through them.

b. Concurrent Jurisdiction Resulting From P.L. 280

Despite what appears to be clear language in ICWA, ambiguity regarding the exclusivity of tribal court jurisdiction exists in states governed by Public Law 280. As a result of P.L. 280, despite the appearance of exclusive tribal jurisdiction, Idaho state courts and tribal courts currently exercise concurrent jurisdiction in cases involving reservation-domiciled Indian children.

Public Law 280 is a 1950's Congressional enactment granting states the option to extend their jurisdiction over reservations within their borders.[36] In 1963, Idaho adopted legislation pursuant to Public Law 280 purporting to exercise jurisdiction over "dependent, neglected and abused children."[37] The ICWA jurisdictional provisions may arguably be a revision of P.L. 280 with regard to Indian child welfare cases. If so, to the extent that ICWA and state jurisdiction under P.L. 280 appear to conflict, the ICWA jurisdictional provisions should control. In the only federal court to consider the conflict between P.L. 280 and ICWA, the Ninth Circuit determined that the exclusive jurisdiction provisions of ICWA were not intended to displace concurrent state court jurisdiction under P.L. 280.[38]

c. State Court Emergency Jurisdiction

State courts may exercise emergency temporary jurisdiction while the child is off the reservation in order to prevent immediate physical damage or harm to the child.[39] ICWA provides that such a temporary emergency placement should "terminate immediately when it is no longer necessary

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[34] 490 U.S. at 43.
[35] 25 U.S.C. 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act.
[36] 67 Stat. 588 (1953).
[37] IDAHO CODE ANN.§ 67-5101 (2010).
[38] Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). For a discussion of *Doe v. Mann* in light of Idaho law, *see* Clay Smith, *Doe v. Mann: The Indian Child Welfare Act, the Rooker-Feldman Doctrine, And Public Law 280*, THE ADVOCATE, Feb. 2006 at 14.
[39] 25 U.S.C. § 1922.

to prevent imminent physical damage or harm to the child."[40] Moreover, ICWA expressly provides that the state agency involved must "expeditiously" initiate a child custody proceeding that complies with ICWA, transfer jurisdiction to the appropriate tribe, or restore the child to the parent or Indian custodian.[41]

2. *Transfer Jurisdiction*

If an Indian child is the subject of a foster care placement or termination of parental rights proceeding in state court, the parents, Indian custodian, or tribe may request that the case be transferred to tribal court.[42] The transfer jurisdiction provisions do not apply to pre-adoptive or adoption proceedings that are not also foster care placements or termination of parental rights proceedings.

If an appropriate request to transfer to tribal court is made, the case must be transferred unless one of the following exceptions to transfer apply. First, the court may decline to transfer the case if either parent objects to the transfer. Second, the state court may retain the case if the tribal court declines to accept jurisdiction. Third, the court may decline to transfer the case if it finds good cause not to transfer.

a. Good Cause Not To Transfer

The burden of proving good cause to decline a transfer is on the party opposing the transfer. Good cause not to transfer a case must be shown by clear and convincing evidence.[43] Courts should consider the rights of the child as an Indian, the rights of the Indian parents or custodian, and the rights of the Tribe in making the good cause determination.[44]

The BIA Guidelines suggest that good cause not to transfer a case exists under the following circumstances:

- The Indian child's tribe does not have a tribal court as defined by ICWA;
- The proceeding was in an advanced state when the petition to transfer was received, and the petitioner did not file the petition promptly after receiving notice of the hearing;
- The Indian child is over twelve years of age and objects to the transfer;
- The evidence necessary to try the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or
- The parents of a child over five years of age are not available and the child has little or no contact with the tribe or members of the tribe.[45]

[40] *Id*.
[41] *Id.*
[42] 25 U.S.C. §1911(b).
[43] BIA Guidelines § C.3(d).
[44] *Id.*
[45] BIA Guidelines § C.3.

The BIA Guidelines specifically provide that "[s]ocioeconomic conditions and the perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists."[46]

b. Advanced Nature of the Proceeding[47]

The BIA Guidelines suggest that good cause to decline transfer exists when a) the proceedings are at an advanced stage when the request is made and b) the party requesting the transfer did not Act promptly after receiving notice of the proceedings. Tribes often do not seek transfer of cases while they are in the child protection system and before they reach the parental termination stage. This is particularly true while the permanency plan for the child is reunification with the parents. While the practice varies from tribe to tribe, the adjudication and disposition in the child protection arena is expensive and time consuming for many tribal court and social service systems. If, however, parental termination appears likely, many tribes will either intervene or seek transfer of the case at that time. For many tribes the concept of parental termination is a culturally foreign notion. Tribal leaders and the social workers will often say that even if a state court terminates parental rights, in the tribe's view that family relationship is still intact. The possibility of such a transfer underscores the importance of active tribal involvement in child protection cases.

c. A Child Over Twelve Years of Age Objects[48]

The BIA Guidelines suggest that a court should decline transfer if the Indian child is over twelve (12) years of age and objects to the transfer. This ground for denying transfer jurisdiction was rejected by the drafters of ICWA. The child does not have standing in an ICWA case to directly request transfer or to object to transfer. ICWA does not give the child a formal voice in placement. This approach contrasts sharply with the approach of many states which give older children a voice in decisions made about them. The drafters of ICWA were concerned about defeating the goal of the Act through a child's veto of jurisdiction, especially given the malleability of even older children.

The BIA included this ground for denying transfer in the Guidelines because it clearly believed that an older child should play a role in decisions affecting his or her placement. As the Guidelines have not been adopted as regulations by the Department of the Interior, a court should not feel compelled by the Guidelines to decline transfer jurisdiction based on the child's objection. While the child's objection, by itself, may not be a basis for transfer under the Act, a court should consider an older child's views as a factor when making a decision about transfer.

d. Inconvenient Forum[49]

The BIA Guidelines support a finding of good cause not to transfer where the evidence in the case could not be adequately presented without undue hardship to parties or witnesses. Care

[46] *Id.*
[47] BIA Guidelines § C.3(b)(i)
[48] BIA Guidelines § C.3(b)(ii).
[49] BIA Guidelines § C.3(iii).

should be taken that this ground is not used inappropriately to defeat the purpose of ICWA. The BIA Guidelines advise that neither the perceived inadequacy of tribal court systems nor the socio-economic conditions on the reservation may be a basis for declining transfer. Thus a court should ensure that transfer to tribal court will in fact bring undue hardship and cannot be abated through the use of standard procedures, such as the taking of testimony telephonically.

e. Child has Little Contact With Tribal Members[50]

The BIA Guidelines suggest that where the natural parents of a child are unavailable, such as where their parental rights have already been terminated, and where the child is over five years of age and has had little or no contact with the tribe or its members, a court may find good cause to decline transfer. The reasoning behind this provision appears to be that a younger child has a greater ability to adapt to the new culture context of the Tribe.

f. Best Interests of the Indian Child

Some courts have declined to transfer a case to tribal court based on the best interests of the Indian child.[51] Neither the express language of the statute, the BIA Guidelines, nor the legislative history support the notion that the best interests of the child is a basis for finding good cause to decline to transfer a case to tribal court.

State courts rejecting the use of the best interests of the child standard to defeat transfer jurisdiction have reasoned that the purpose of ICWA was to limit the role of state courts in the placement of Indian children. These courts have recognized that ICWA imposes a legislative presumption that it is in the best interests of an Indian child to maintain contact and ties with his or her tribe and tribal community.[52]

C. Notice of an ICWA Action

When there is reason to believe that the child is an Indian Child, notice must be provided to the child's parents, any Indian custodian, the Indian child's tribe, or, if the tribe is not identified, the Department of the Interior. ICWA requires that notice must be by registered mail and must be received at least ten days prior to the proceeding. ICWA's notice requirements are separate and apart from the notice/ service of process requirements under state law. The concepts of notice

[50] BIA Guidelines § C.3(iv).

[51] In the Interest of J.L., 654 N.W. 2d 786 (S.D. 2002); In re Appeal in Maricopa County Juvenile Action No JS-8287, 828P. 2d 1245 (Ariz. App. 1991)(best interests of child are relevant consideration in good cause determination); In re Robert T, 246 Cal. Rptr. 168(App. 1988)(Court may consider best interests of the child in deciding whether to decline transfer); In Matter of Adoption of T.R.M., 525 N.W. 2d 298 (Ind. 1988)(finding that national policy of protecting best interests of children required consideration of best interests as grounds to decline to transfer jurisdiction); In re M.E.M., 635 P. 2d 1313 (Mont. 1981)(clear and convincing evidence of best interests of the child could constitute good cause to decline transfer jurisdiction).

[52] In the Interest of Eleanor Armell, 550 N.E. 2d 1060 (Ill. App. 1990)(considering state best interest of the child test as a basis for denying transfer to tribal court would be contrary to the legislative intent of ICWA and would frustrate the act's purpose); Yavapai-Apache Tribe v. Meja, 906 S.W. 2d 152 (Tex. App. 1995)(consideration of best interests of the child as a basis for denying transfer jurisdiction was an abuse of discretion, inconsistent with the purposes of ICWA); In the Interest of J.L.P., 870 P. 2d 1252 (Colo. App. 1994)(best interests of the child standard inapplicable to decisions to transfer jurisdiction).

and service should be distinguished. The child's Tribe is notified but not served. The BIA Guidelines provide for personal service in lieu of registered mail.[53] The other parties to the case are entitled both to notice under ICWA and are required to be served under state law.

In Idaho, personal service of the petition is required by the state Child Protective Act, Termination of Parental Rights statute, and Adoption statute.[54]

ICWA provides that the notice must contain the following information:

- Name of child;
- Tribal affiliation;
- A copy of the petition or other document initiating the action;
- Name of the petitioner and attorney;
- Right to intervene;
- Right to appointed counsel;
- Right to 20 additional days to prepare;
- Location, address, and phone of the court;
- Right to transfer to tribal court;
- Consequences of action; and
- Confidentiality.[55]

As a matter of best practice, the Department should send any information it has regarding the child, such as the child's date of birth, the parents' names and dates of birth, the genogram, and any other documents to the tribe. This information will assist the tribe in making an appropriate determination of the child's status.

1. *Notice to the Indian Child's Tribe*

The child's tribe has the right to notice in any involuntary foster care or termination of parental rights proceeding involving an Indian child.[56]

Failure to provide notice is jurisdictional and deprives the court of ongoing authority in the case.[57] However, courts have held that if the need for notice is not discovered until after the proceeding has begun, rulings of the court to that point are not void.[58] For example, where the proceeding begins as a voluntary proceeding but becomes involuntary, notice must be sent at the time the case becomes involuntary. Likewise, if it is not discovered until after the proceedings have progressed that the child is an Indian child, despite appropriate inquiry, notice must be

[53] BIA Guidelines § B.5(e).
[54] *See* §§ 16-1611, 16-2007 and 16-1506.
[55] The BIA Guidelines provide that the notice should contain a statement, based on the general confidentiality of child welfare proceedings, that the tribal officials should keep the information contained in the notice confidential and should not reveal it to anyone who does not need the information in order to exercise the tribe's rights. BIA Guidelines § B.5(xi).
[56] 25 U.S.C. § 1912(a).
[57] *See, e.g.*, In re K.A.B.E., 325 N.W.2d 840 (S.D. 1982); In re M.C.P., 571 A. 2d 627 (Vt. 1989).
[58] Family Independence Agency v. Maynard, 592 N.W. 2d 751 (Mich. App. 1999).

given at that point. Even where notice should have been provided but was not, courts do not typically invalidate all actions taken in the potentially-defective proceedings. Rather, those actions may be validated if, upon providing notice, it turns out that the child was not an Indian child.[59]

Finding that the child is an Indian child is not a prerequisite to giving notice to a tribe of a pending action. ICWA provides for notice to a tribe or tribes when the court has "reason to believe" that the child is an Indian child.[60] The drafters of ICWA anticipated that the tribe would participate in the determination of whether the child was eligible for membership in an Indian tribe. The BIA Guidelines suggest that notice to a tribe be provided if any of the following facts are present in a case:

- A party, tribe, or private agency informs the court that the child may be an Indian child;
- A public welfare agency discovers relevant information indicating that the child may be an Indian child;
- The child believes s/he is an Indian child;
- The child resides or is domiciled in an Indian community or the child's biological parents or Indian custodian is from an Indian community; or
- An officer of the court has information that the child is an Indian child.[61]

Notice to the Child's Parents or Indian Custodian

Upon receiving notice, ICWA provides that the child's parents (regardless of whether they are Indian) or Indian custodian are entitled to an additional twenty days to prepare for the proceeding upon making a request.[62]

D. Tribal Intervention in State Court Proceedings

An Indian child's tribe has the right to intervene at any point in a foster care placement or termination of parental rights proceeding.[63] The right to intervene is not limited to "involuntary" proceedings even though the Act only provides for notice in "involuntary" proceedings. Because of the right of intervention and the right to seek transfer of the case, best practice is to provide notice to the tribe in every case in which a court action is filed.

E. Right to Counsel

ICWA provides for counsel for any indigent parent or Indian custodian in "removal, placement or termination proceedings."[64] The right to counsel applies to all the actions covered by ICWA:

[59] *See, e.g. id.*
[60] 25 U.S.C. § 1912; BIA Guidelines §B.5.
[61] BIA Guidelines § B.5.
[62] 25 U.S.C. § 1912(a).
[63] 25 U.S.C. § 1911(c).
[64] 25 U.S.C. § 1912(b).

pre-adoptive, adoption, foster care placements, and termination of parental rights (TPR) proceedings.

If there is no state right to counsel in all the circumstances covered by ICWA, a state court can apply to the Department of Interior for reimbursement of the cost of providing counsel. Appointment of an attorney for the Indian child is not required.

11.4 SUBSTANTIVE REQUIREMENTS OF ICWA COVERING THE REMOVAL OF INDIAN CHILDREN FROM THEIR HOMES

In order to remove an Indian child from his or her home in an involuntary foster care proceeding, the party seeking to remove must show, and a court must find, that "active" efforts have been made to provide remedial and/or rehabilitative services to prevent the breakup of the Indian family and that these efforts have been unsuccessful.[65]

In addition, a court must find by clear and convincing evidence, supported by the testimony of qualified expert witnesses, that continued custody with the Indian parents or Indian custodian is likely to result in serious emotional or physical damage to the child.[66] These findings should be made at the adjudicatory hearing, as it will generally not be possible to have a qualified Indian expert in place and the evidence to make the findings may not yet be available prior to the adjudicatory hearing.

In addition to meeting the requirements of ICWA, in a Child Protective Act case, the court must also make all the necessary state and federal findings necessary to preserve Title IV-E funding for the child. These findings are discussed in detail throughout this manual and in the relevant section of Chapter 12.

A. Active Efforts

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is generally considered to be a higher standard than the reasonable efforts findings generally required under state law and the Adoption and Safe Families Act.[67]

The comments to the BIA Guidelines make clear that "breakup" means more than divorce. The Comments state that "Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health."[68]

The legislative history makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that the efforts be culturally relevant. The BIA Guidelines provide that active efforts "shall take into account the prevailing social and cultural conditions and the

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[65] 25 U.S.C. § 1912(d).
[66] 25 U.S.C. § 1912(e).
[67] ICWA HANDBOOK, *supra* note 24, at 57-58.
[68] BIA Guideline § D.2, comment.

way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers."[69]

Section 1912(d) does not include a specific burden of proof. Most courts have concluded that the burden of proof applicable to the particular proceeding is applicable to the "active efforts" requirement. Thus, in an involuntary foster care placement the burden of proof would be preponderance of the evidence.[70]

B. Serious Emotional and Physical Damage

As previously noted, Congress intended the threat to the child be substantial before the state can break up an Indian family by removing a child. Addressing the type of evidence necessary to meet the standard, the BIA Guidelines state that "evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding."[71] Rather, the Guidelines suggest that the evidence must show a "causal relationship between the conditions that exist and the damage [to the child] that is likely to result."[72] Under this test, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child *unless* the child is in danger.[73]

C. Qualified Expert Witness

ICWA requires that the court's finding of likely serious emotional or physical damage to a child be supported by the testimony of a qualified expert witness.[74] The legislative history of ICWA establishes that a qualified expert must have knowledge of Indian culture and traditions and must be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.[75] Congress envisioned that the qualified expert would be more than a social worker.[76] The purpose of the expert witness requirement was to diminish the risk of bias by providing information to the court about tribal customs and practices. Thus, courts should ensure that ICWA experts have sufficient knowledge related to tribes to fulfill the role intended by Congress.

The BIA guidelines suggest that an ICWA expert should be:

- a member of child's tribe with knowledge of tribal customs relating to family organization and child rearing; or

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[69] BIA Guidelines § D.2.
[70] ICWA HANDBOOK, *supra* note 24 at 58.
[71] BIA Guidelines § D.3(c).
[72] *Id.*
[73] See BIA Guidelines § D.3 Commentary.
[74] 25 U.S.C. § 1912(e).
[75] *To Establish Standards for the Placement of Indian Children in Foster or Adopted Homes, To Prevent the Breakup of Indian Families, and For Other Purposes*, H. REP. NO. 95-1386 at 22 (1978).
[76] *Id.* at 21.

- a lay person with "substantial experience" delivering services to Indians and "extensive knowledge" of tribal customs and practices; or
- a professional with "substantial education and experience in his or her area of specialty."[77]

In *In the Matter of Baby Boy Doe*,[78] the Idaho Supreme Court upheld the finding of the trial court that an expert with a M.S.W. degree who was a member of the Ute Tribe and a judge of its tribal court was a qualified expert witness under ICWA.

D. Additional Substantive Requirements for Involuntary Termination of Parental Rights

Like involuntary foster care proceedings, no termination of parental rights may be ordered in the absence of a determination supported by evidence beyond a reasonable doubt, including the testimony of a qualified expert witness, that continued custody would result in "serious emotional or physical harm."[79] In addition, the court must find that the petitioner has made "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[80]

In addition to terminating the rights of parents of an Indian child, it is unclear of the rights of the Indian custodian must also be terminated in applicable cases.[81]

E. Consent to Termination of Parental Rights

ICWA provides that a parent or Indian custodian of an Indian child may consent to termination of his or her parental rights. The consent must be in writing and recorded before a judge in a court of competent jurisdiction. The judge recording such consent must certify that the consequences of consenting to voluntary termination of parental rights were fully explained and were understood by the parent or Indian custodian. Thus the parent consenting to termination of parental rights must be present before the judge so that he or she may be questioned regarding the circumstances of the termination. Such consent must be executed at least ten days after the birth of a child.

ICWA also provides for the withdrawal of consent. The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent should be sufficient. The right to withdraw consent to termination applies even when the parent may not have the right to immediate custody of the child. The right of a parent to withdraw his or her consent expires upon the entry of the order terminating parental rights or upon the entry of an order of adoption.

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[77] BIA Guidelines § D.4
[78] 127 Idaho 452, 902 P. 2d 477 (1996).
[79] 25 U.S.C. § 1912(f).
[80] 25 U.S.C. § 1912 (d).
[81] *See* 25 U.S.C. §§ 1912(f) and 1913. ICWA does not include Indian custodians within the definition of "parent" in 25 U.S.C. § 1903(9). The provisions relating to serious physical or emotional harm and voluntary termination refer to the Indian custodian but the active efforts provision and the withdrawal of consent for a voluntary termination provision do not. No cases were located in which an Indian Custodian's "parental rights" were terminated.

However, even after a final decree has been entered in the case, consent can be withdrawn and custody regained based on fraud and duress. This right to withdraw consent based on fraud and duress exists unless the child has been adopted for more than two years.[82]

F. Placement Preferences of ICWA

One of the most important purposes of ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture."[83] In *Holyfield,* the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[84] Congress recognized that even where the child was removed from his or her parents, the child's best interests and the interests of the tribe would be served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[85]

1. *Foster Care and Pre-Adoptive Placements*

The placement preferences of ICWA apply to both voluntary and involuntary placements, to pre-adoptive placements, and to placements made in contemplation of termination of parental rights.[86] Section 1915 of the Act requires that the child be placed in the "least restrictive setting that most approximates the child's family and that is within a reasonable proximity to the child's home."[87]

Under the Act, the standard for whether a particular placement is acceptable is that it is within the "prevailing social and cultural standards of the Indian community in which the parent or extended family resides" or with which the parent or extended family "maintain social or cultural ties."[88] The ICWA foster care placement preferences apply even where the child has not resided in an Indian family.[89]

Thus, in the absence of good cause to the contrary, ICWA imposes the following placement preference, in the order of their applicability:

- A member of the Indian child's extended family as defined by ICWA[90];
- A foster home licensed, approved, or specified by the child's tribe;
- An Indian foster home licensed or approved by an authorized non-Indian agency; or

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[82] 25 U.S.C. § 1913(d).
[83] 25 U.S.C. § 1902 (The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.).
[84] 430 U.S. at 36.
[85] 25 U.S.C. § 1902.
[86] 25 U.S.C. § 1915(b).
[87] 25 U.S.C. § 1915.
[88] 25 U.S.C. § 1915(d).
[89] *See* ICWA HANDBOOK, *supra* note 24 at 84-85.
[90] 25 U.S.C. § 1903(2).

- An institution for children approved by an Indian tribe or operated by an Indian organization and that is suitable to meet the child's needs.[91]

ICWA permits tribes to change the order of the placement preferences by resolution and requires that state courts adhere to the tribally-altered preferences. The tribal resolution must comply with the ICWA mandate that the placement be the "least restrictive setting…"[92]

ICWA provides that the court may consider the preference of the child's parents for placement, but such parental preferences are not dispositive of placement issues.[93]

2. *Good Cause to Deviate from the Foster Care Placement Preferences*

The Act provides that courts may deviate from the placement preferences if there is "good cause" to do so. State courts are in conflict regarding whether the level of proof for good cause is a preponderance of the evidence or clear and convincing evidence.[94]

ICWA does not define "good cause". However, the BIA Guidelines provide that good cause may be found under the following circumstances:

- At the request of the biological parents or the child, when the child is of sufficient age;
- When mandated by the extraordinary physical or emotional needs of the child, as established by testimony of a qualified expert witness; or
- When the unavailability of suitable families for placement persists, even after a diligent search has been completed for families meeting the preference criteria.[95]

3. *Request of the Biological Parents or Child*

Section 1915(c) of ICWA provides that a state court should consider the wishes of the parent, where appropriate, when making placement decisions. This first ground for deviating from the placement preferences in the BIA Guidelines appears to be an attempt to implement this section of the Act. Where a foster care placement is being made, the wishes of the parent might carry significant weight, where appropriate. However, in cases involving an adoptive placement where the parent's rights have been terminated, a parent's wishes regarding the adoptive placement should not be entitled to significant weight. This is especially true where the parent's wishes would not serve the purposes of the Act. The United States Supreme Court made clear in *Holyfield* that a parent should not be able to unilaterally defeat the intent of the Act. [96] Finally,

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[91] 25 U.S.C. § 1915(b).
[92] 25 U.S.C.§ 1915(c).
[93] *Id.*
[94] *See* ICWA HANDBOOK, *supra* note 24 at 139, citing Adoption of N. P. S. 868 P. 2d 934 (Alaska 1994)(holding that a mere preponderance of the evidence is sufficient) and In re Custody of S. E. G., 507 N.W. 2d 872, 878 (Minn. Ct. App. 1994*), rev'd on other grounds,* 521 N.W. 2d 357 (Minn. 1994), *cert. denied sub nom.* Campbell v. Leach Lake Band of Chippewa Indians, 513 U.S. 1127 (1995)(holding clear and convincing evidence is necessary).
[95] BIA Guidelines §F.3.
[96] 430 U.S. at 38.

the Comments to this section of the Guidelines suggest that parental requests should be weighed to protect the confidentiality of parents who request deviations from the Guidelines.[97]

In addition to the wishes of the parents, the BIA Guidelines suggest that the wishes of an older child might be the basis for deviating from the placement preferences of the Act. The Guidelines do not define "older child." In other contexts (e.g. objections to transfer jurisdiction), ICWA provides for the consideration of the wishes of a child older than twelve years of age.

4. *Extraordinary Emotional or Physical Needs of the Child*

The BIA Guidelines provide that where the child is in need of "highly specialized treatment services that are unavailable in the community where families who meet the preference criteria reside," a court may deviate from the placement preferences. The Guidelines require that the opinion of a qualified expert witness support this ground for deviation.[98]

5. *Inability to Comply with the Placement Preferences*

The Guidelines permit deviation from the placement preferences where, after a diligent search, a placement complying with the preferences cannot be located. The Guidelines define a diligent attempt as "at a minimum, contact with the child's tribal social services program, a search of all county or state listings of available Indian homes, and contact with nationally known Indian programs with available placement resources."[99]

G. Adoptive Placement Preferences

The placement preferences for adoptive placements differ from the preferences for foster care placements and pre-adoptive placements. Pursuant to §1915(a), preference must be given for the adoption of an Indian child to:

- a member of the Indian child's extended family;
- other members of the Indian child's tribe; and
- other Indian families.[100]

As with the preferences in foster care placements, the court must follow these preferences in adoptions unless the tribe has altered the preferences by resolution or good cause exists to deviate from the preferences.

H. Removal from a Foster Home

Every placement of an Indian child must be made in accordance with the placement preferences. Thus, if an Indian child is removed from a foster home or other institution, the placement

[97] BIA Guidelines §F.3 Commentary.
[98] BIA Guidelines §F.3 and Commentary.
[99] *Id.*.
[100] 25 U.S.C. § 1915(a).

preferences apply to future placements, unless the removal is for the purpose of returning the child to his or her parents or Indian custodian.[101]

I. Return of Child to Parent or Indian Custodian

If a decree of adoption is set aside or if the adoptive parents consent to the termination of their parental rights, ICWA provides that a biological parent or prior Indian custodian may petition for return of the child. The court must grant the petition unless it is shown that returning the child to his or her former custodian is not in the best interests of the child. The proceeding seeking return of a child is subject to the procedural protections of section 1912 of ICWA including notice to the tribe, parents and Indian custodian, appointment of counsel, a finding of active efforts, and of serious emotional damage supported by the testimony of a qualified expert witness.[102]

11.5 THE IDAHO CHILD PROTECTION ACT AND ICWA INTEGRATED

A. Referral & Investigation

Under the Idaho Child Protection Act (CPA), a case is initiated when a child is removed from the home through a declaration of imminent danger, on order to remove the child, the conversion of a Juvenile Corrections Act case to a CPA case, or the filing of a Petition under the Act. In addition, children may be removed from the home through the use of a voluntary agreement with IDHW prior to the initiation of a case. The initiation of a case through any of these mechanisms triggers ICWA if the child is an Indian child.

During the investigation stage and at the time a case is initiated, IDHW should be taking steps to determine whether the child is an Indian child.

B. Initiation of the Case

Once the case is initiated, notice of the pending proceeding must be provided to the Indian child's tribe, parents, and Indian custodian. ICWA requires that 10 days notice be provided. This will not usually be possible in most cases where a shelter care hearing must be held within 48 hours.

ICWA was drafted prior to the institution in most states of emergency removal proceedings such as the shelter care hearing under Idaho law. To blend the federal Act with modern state practices, in consideration of ICWA's emergency removal provisions, states have taken the position that the tribe and parents of the Indian child must receive notice 10 days prior to the adjudicatory hearing.

In addition to the ten-day notice requirement, ICWA provides that the tribe and parents must be given an additional 20 days to prepare for the proceeding, at their request. The request for additional does not have to be in writing.

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[101] 25 U.S.C. § 1916(b).
[102] 25 U.S.C. 1916(a).

Given the ICWA time frames for notice and the mandatory extension of time, it is imperative that the Indian child's status be determined as early as possible in each case and that notice be provided to the tribe and the parents as early as possible before the adjudicatory hearing.

Upon the filing of the petition, counsel should be appointed for indigent parents. This step, required by ICWA, is consistent with Idaho law which also requires appointment of counsel for parents.

C. Shelter Care

If possible at shelter care, the court should make findings regarding whether the child is an Indian child. Depending on how the case arose, these findings may or may not be possible. However, the earlier they are made, the more likely later phases of the case will comply with ICWA.

Even where the Indian child's tribal affiliation is known, notice is provided to the tribe and parents prior to shelter care, and all parties are present, it will not generally be possible to make the required ICWA findings of active efforts to prevent the breakup of the Indian family and serious emotional and physical damage at the shelter care hearing. This is because the finding of serious emotional and physical damage must be supported by the testimony of a qualified expert witness. Such expert testimony will rarely be available at shelter care. In addition because of the heightened burden of proof, it is difficult to gather all the necessary evidence in the 48-hour shelter care timeframe.

It is always appropriate for a court to monitor the progress of the state in determining the child's status as a member of a Tribe or the child's eligibility for Tribal membership and/or preparing to make the required ICWA showings at the shelter care hearing as appropriate progress on these matters will ensure that the case is not delayed later in the process.

D. Adjudicatory Hearing

1. *Procedural Matters: Phase I*

At Phase I, adjudication, the court should make findings as to whether the child is an Indian child, the basis for the court's exercise of jurisdiction pursuant to ICWA, and whether the notice to the tribe and parents complied with the requirements of ICWA.

Different tribes approach their involvement in ICWA cases involving tribal children in different ways. Some tribes regularly seek transfer of ICWA cases to tribal court. Others intervene and actively participate in state court cases involving tribal children. Still other tribes quietly monitor the case but do not intervene and participate as a party during the adjudicatory and planning phases. Occasionally, tribes may not intervene until later in the proceedings, such as when a termination is filed. The tribe has the right to intervene at any point in the proceeding.[103]

[103] 25 U.S.C. §1911(c).

These different approaches are the result of different cultural practices among tribes and are driven, in part, by the tribal resources available for child welfare. ICWA anticipates many different levels of tribal involvement in cases. While it can be frustrating for state courts and for the Department when the tribe is not active or when it intervenes unexpectedly, the decision regarding involvement is the tribe's, is supported by ICWA, and must be accommodated by the court and parties.

2. *Substantive Matters: Phase I*

In addition to resolving procedural issues, the required ICWA findings must be made at Phase I of the adjudicatory hearing. Thus, in addition to the findings under the CPA and federal IV-E findings, the court must find that (1) IDHW made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those services were unsuccessful; and (2) continued custody with the parents will result in serious physical or emotional damage to the child. This second finding must be supported by the testimony of a qualified expert witness. The second finding is subject to a clear and convincing standard of review under ICWA. The expert's testimony may not be waived. If the parties plan to stipulate at the adjudicatory, an affidavit from a qualified expert must be included that will support a finding under ICWA. Alternatively, a separate hearing can be set for the qualified expert witness to testify regarding the serious physical or emotional harm provision under 25 U.S.C. § 1912 (f),

ICWA does not provide any exceptions to the active efforts requirement which would allow a streamlined process for situations in which the facts would support a finding of aggravated circumstances under state law. Thus, in a case involving an Indian child, courts should not make findings of aggravated circumstances and should ensure that the normal ICWA process toward permanency is observed.

3. *Substantive Matters: Phase II*

During Phase II, disposition, the court must evaluate whether the disposition for the child put forth by IDHW complies with the placement preferences of ICWA. If one of the parties argues that the placement does not meet the placement preferences, the Court will need make a finding of good cause or it must reject the proposed placement and direct the Department to recommend a complying placement or to present evidence of good cause to support a non-complying placement.

E. Case Plan Hearing and Review Hearings

By the time case plan or review hearings are held, ideally the child's Indian child status has been firmly established, the required ICWA findings have been made if the child has been removed from the custody of his or her parents, and the child is placed in an ICWA preferred placement.

What remains at this time is for the court to continue monitoring the child's status as an Indian child if the issue has not been resolved and to monitor the ICWA-compliant placement. If the child's placement must be altered, the same rules apply to the new placement as to the

original placement. In addition, the court should ensure that active efforts are being made to provide remedial services and rehabilitative programs to the family.

F. Permanency Hearing

ICWA alters the permanency options for the child in several ways. Many tribes do not recognize the concept of termination and thus a tribe may oppose a termination action even though they have been supportive of the case previously. In addition, the stricter requirements under ICWA make the case harder to prove. ICWA does not establish independent grounds for termination, however, the serious physical or emotional harm requirement under 25 U.S.C. § 1912 (f) does require the testimony of a qualified expert witness and evidence that is beyond a reasonable doubt. The active efforts finding must also be made. As a result of these factors, termination of parental rights may be less common in ICWA cases.