# CHAPTER 11:
# The Indian Child Welfare Act (ICWA)

## 11.1 INTRODUCTION

The Indian Child Welfare Act (ICWA)[1] is a federal statute that was enacted to protect Indian families and to preserve the ties between Indian children and their tribes.[2] When the ICWA applies, it pre-empts inconsistent state law provisions in child welfare cases unless the state law provides for a higher standard of care than does the ICWA.[3] The Bureau of Indian Affairs has issued Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (the "BIA Guidelines").[4]

## 11.2 DEFINING TERMS RELEVANT TO THE ICWA

The ICWA applies to "child custody proceedings" involving an "Indian child," and may apply in some JCA and guardian cases.[5] 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 the 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 (2012).

[2] At the time Congress passed the ICWA, state courts and social services agencies were removing an extraordinary number of Indian children and placing them in non-Indian homes and institutions. For example, the American Indian Child Resource Center reports that in the 1970s, 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, *ICWA*, http://aicrc.org/icwa/ (last visited April 29, 2015); 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 April 29, 2015).

[3] BIA Guidelines § A.5.

[4] Revised BIA Guidelines were recently published by the BIA on February 25, 2015 and can be found at 80 Fed. Reg. 10146 (Feb. 25, 2015). At the time of the publication of this Manual, the Guidelines are an authoritative but non-binding resource regarding interpretation of the ICWA. The Guidelines provide that, "These guidelines provide minimum Federal standards to ensure compliance with ICWA and should be applied in all child custody proceedings in which the act applies." BIA Guidelines § A.5(a). ***As of the publication of this Manual, the Bureau of Indian Affairs had proposed regulations making the BIA guidelines mandatory.***

[5] 25 U.S.C. § 1903.

### *A. "Indian Child"*

The 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.[6] 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 the ICWA.[7]

The 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. Federal law requires the Department of Interior to maintain and publish an annual list of federally recognized tribes.[8]

Each Tribe has its own laws for determining tribal membership.[9] 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 BIA Guidelines specifically provide that "[t]he state court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes."[10]

To ensure compliance with the ICWA, steps must be taken early in every case to determine whether the child is an Indian child. If there is any reason to believe the child is an Indian child, notice must be provided and efforts must be made to verify the child's status. The Idaho Supreme Court has held that the trial court erred in finding that the ICWA did not apply where the tribe was unable to certify the child's status with certainty, but the record contained substantial evidence that the child was an Indian child.[11]

The BIA Guidelines recommend that in every child welfare case, the Department and the guardian *ad litem* certify whether they have discovered or know of any information that suggests or indicates that the child is an Indian child.[12] As part of the certification process, the court may require the agency and/or the guardian to provide the following information:

---

[6] *Id*.
[7] 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 only a child's tribe may make the determination of whether the child is a member of the tribe. BIA Guidelines § B.3(a).
[8] The most recent list at the time of the publication of this Manual is dated January 14, 2015. *See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 80 Fed. Reg. 1942 (January 14, 2015). The National Congress of American Indians maintains an up-to-date unofficial list of tribes on its website at http://www.ncai.org/tribal-directory (last visited March 29, 2015).
[9] Determining tribal membership is exclusively a tribal function because such determinations are a fundamental component 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.3(b) and (c).
[10] BIA Guidelines § B.3(d).
[11] In the Matter of Baby Boy Doe, 123 Idaho 464, 469-70, 849 P. 2d 925, 930-31 (1993).
[12] BIA Guidelines § B.2(b).

> (1) Genograms or ancestry charts for both parents including known names, current and former addresses, birthdates, places of birth and death, tribal affiliation and other identifying information.
> (2) Addresses for the domicile and residence of the child and the child's parents and/or custodians and information about whether any of these individuals are domiciled on the reservation.[13]

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 the 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."[14] The ICWA specifically provides that the term "parent" does "not include the unwed father where paternity has not been acknowledged or established."[15] Thus, putative fathers who have not established paternity are not considered parents for purposes of the ICWA. However, the BIA Guidelines elaborate that "to qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through DNA testing."[16] For this reason, a man may be a putative father under the ICWA, even though he would not be recognized as a putative father under Idaho law.

### *C. "Indian Custodian"*

The 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."[17] Indian custodians have many of the same rights as a parent in an ICWA case.[18] Thus, where tribal law recognizes that a third party has legal custody pursuant to an informal process, the third party has standing in the ICWA case in state court as an Indian custodian.[19] For example, another relative such as an aunt or grandparent may be caring for the child and be the Indian custodian.

---

[13] *Id*.
[14] 25 U.S.C. § 1903(9).
[15] *Id*.
[16] BIA Guidelines § A.2 (definition of "Parent").
[17] 25 U.S.C. §1903(6). NOTE: The ICWA and proposed Regulations both identify an Indian custodian as "any Indian person who has legal custody," while the recently released BIA Guidelines identify an Indian custodian as "any person who has legal custody."
[18] *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 n.6 (Alaska 2008).
[19] Many Tribal Codes are available online and can be consulted to determine whether an individual would be recognized as an Indian Custodian under tribal law. However, many tribes recognize Indian Custodians as a matter of tribal customary law and practice.

### *D. "Extended Family Member"*

The ICWA provides that the term "extended family member" is "defined by the law or custom of the Indian child's tribe."[20] If the tribe has not codified a definition of "extended family member," the 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."[21]

### *E. "Child Custody Proceedings"*

The 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."[22]

#### 1. "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."[23] Foster care placements do not include voluntary placements of a child by his or her parent or Indian custodian where the parent or custodian may demand return of the child.[24] 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 the ICWA.

#### 2. "Termination of Parental Rights"

The ICWA applies to any action resulting in the termination of the parent-child relationship.[25]

#### 3. "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 the 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

[20] 25 U.S.C. § 1903(2).
[21] *Id.*
[22] 25 U.S.C. § 1903(1).
[23] 25 U.S.C. § 1903(1)(i).
[24] Voluntary placements are discussed in more detail later in this chapter.
[25] 25 U.S.C. § 1903(1)(ii).

in lieu of adoptive placement."[26] Many guardianships and long-term foster care placements fall within this provision.

The ICWA defines "adoptive placement" as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[27]

### *F. Private Custody Actions*

Generally, the 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.[28] Similarly, the ICWA may be triggered if a non-parent family member independently seeks guardianship or custody of a child.[29] The ICWA may also be triggered if a *de facto* custodian seeks custody of a child.[30]

### *G. Juvenile Corrections Act Proceedings*

The BIA Guidelines expressly provide that the ICWA does not apply to most juvenile corrections cases.[31] 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.[32] When a JCA proceeding is expanded into a CPA proceeding pursuant to IJR 16, the CPA proceeding is governed by the ICWA.

### *H. Voluntary Foster Care Placements*

The 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 the ICWA.[33] 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

---

[26] 25 U.S.C. § 1903(1).
[27] 25 U.S.C. § 1903(1)(iii) to (iv).
[28] There is a conflict of authority regarding whether the ICWA applies in a purely intra-family dispute although the weight of authority supports the conclusion that the ICWA 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 ICWA applied in custody dispute between parents and grandmother of child); In re Bertelson, 617 P.2d 121 (Mont. 1980) (the ICWA does not apply to intra-family disputes).
[29] Guardianship of Ashley Elizabeth, 863 P.2d 451 (N.M. App. 1993).
[30] It is unclear at this time what impact Idaho's *de facto custodian* statute will have, as few other states have similar legislation and these statutes have not been reviewed by the courts as they pertain to an Indian Child.
[31] BIA Guidelines § A.3(a).
[32] Status offenses include, but are not limited to truancy, runaway, and minor in possession of tobacco.
[33] BIA Guidelines § A.3(f) (The BIA Guidelines describe this situation as a placement that does not "operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand."); BIA Guidelines § A.1.(The Guidelines define the term "upon demand" as meaning that "the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses.").

the child. This type of placement is governed by the ICWA, and the parent's consent to the placement must comply with the 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 the ICWA. However, the ICWA requires that the parent's consent must be in writing and recorded before a judge in a court of competent jurisdiction. In addition, the BIA Guidelines recommend that notice of voluntary proceedings be provided to the tribe and that the tribe be notified of its right to intervene.[34] The judge recording such consent must certify that the consequences of consenting to voluntary foster care placement were fully explained to the parent in detail and were understood by the parent. The consent should be explained in the language of the parent or Indian custodian.[35] 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.[36] The ICWA also provides for the withdrawal of consent at any time in a voluntary foster care placement.[37] The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent may 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.[38] The BIA Guidelines provide that the withdrawal of consent should be in writing and that the withdrawal should be filed in the same court where the consent document was executed.[39]

Though full application of the Act is not required in the case of a voluntary foster care placement, if a child protection case has been filed, the best practice is to comply with the ICWA and make the active efforts finding and the serious physical and emotional harm finding through testimony 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, the ICWA provides that the parent or Indian custodian of the child may regain custody of the child where the consent was improperly obtained.[40]

## 11.3 THE IMPACT OF THE ICWA ON A CPA CASE

The ICWA imposes three categories of requirements in covered cases. First, the ICWA imposes procedural requirements that govern jurisdiction, notice, intervention, and counsel. Second, the ICWA imposes substantive requirements for the removal of Indian children, including imposing a higher standard for determining whether the state met the duty to avoid removal of the child. The state must provide 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 qualified 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

[34] BIA Guidelines §§ E.1(b), B.6.
[35] BIA Guidelines § E. 2(c).
[36] 25 U.S.C. § 1913(a).
[37] 25 U.S.C. § 1913(b).
[38] 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).
[39] BIA Guidelines §§ E.4, E.5.
[40] 25 U.S.C. § 1913(d).

is likely to result in serious emotional or physical damage to the child. Third, in addition to these jurisdictional and substantive requirements, the 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 their Indian culture.

### *A. Procedural Requirements of the ICWA*

The 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 the ICWA*

#### 1. Exclusive Jurisdiction

##### a. *ICWA Provisions Regarding Indian Children Domiciled Within the Reservation*

The 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.[41] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[42] 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.[43] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Mississippi Band of Choctaw Indians v. Holyfield*.[44]

Domicile is broadly defined for purposes of the 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.[45] Furthermore, the Court reasoned that the jurisdiction provisions of the ICWA must be interpreted to accomplish the purpose of the Act. The BIA Guidelines provide that the domicile of an Indian child is determined either by the domicile of the child's parents, or if the parents are not married, by the domicile of the child's mother.[46] 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 the ICWA were "domiciled on the reservation" for purposes of the ICWA because their mother was a reservation domiciliary.

---

[41] 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.
[42] Twin City Construction v. Turtle Band of Chippewa Indians, 867 F. 2d 1177 (8th Cir. 1988), *vacated*, 911 F. 2d 137 (8th Cir. 1990). Many Tribes have procedures for transferring the case to the child's Tribe.
[43] 25 U.S.C. § 1911(a).
[44] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[45] *Id*. at 43.
[46] BIA Guidelines § A.2 (definition of "Domicile").

For purposes of the ICWA, the term "reservation" is broadly defined using the definition of the Major Crimes Act.[47] 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 the ICWA, ambiguity regarding the exclusivity of tribal court jurisdiction exists in states that have assumed jurisdiction granted by Public Law 280.[48] Public Law 280 is a separate piece of federal legislation from the ICWA. Public Law 280 is a 1950's Congressional enactment granting states the option to extend their criminal jurisdiction over reservations within their borders. In 1963, Idaho used the authority granted to it by Congress to "assume and accept" jurisdiction over limited areas of the law, including "dependent, neglected and abused children" in Indian country located in Idaho.[49] Thus, Idaho is considered an "optional" Public Law 280 state. Such state jurisdiction did not displace existing tribal jurisdiction, but is assumed to be concurrent to the tribe's jurisdiction. This concurrent jurisdiction appears to conflict with the tribal exclusivity provisions in the ICWA.[50] However, because the ICWA was adopted after P.L. 280, and because the ICWA's explicit purpose was to address the very specific problem of Indian children being placed at extremely disproportional rates in non-Indian foster and adoptive placements without benefit of tribal input, the ICWA jurisdictional provisions should control. However, in the only federal court decision to consider the apparent conflict between P.L. 280 and the 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 for a mandatory P.L. 280 state, specifically, California.[51]

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.[52] The ICWA provides that such a temporary emergency placement should "terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child."[53] Moreover, the ICWA expressly provides that the state agency involved must "expeditiously" initiate a child custody proceeding that complies with the ICWA, transfer jurisdiction to the appropriate tribe, or restore

---

[47] 25 U.S.C. § 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act; *See also* BIA Guidelines § A.2 (definition of "Reservation").
[48] 67 Stat. 588 (1953).
[49] IDAHO CODE ANN. § 67-5101 (2010).
[50] 25 U.S.C. § 1911(a).
[51] Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). *Doe* originated in California, a mandatory P.L. 280 state, while Idaho is not a mandatory state. The Court's reading of P.L. 280 and the ICWA has been criticized. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][b][ii] n. 107 (2005)(reviewing the case and concluding that "[t]he Ninth Circuit's reading is questionable"). 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; Jake J. Allen, *Chipping away at the Indian Child Welfare Act: Doe v. Mann and the Court's "1984" Interpretation of ICWA and PL 280*, unpublished student paper, available at https://www.law.msu.edu/indigenous/papers/2007-03.pdf (last visited March 29, 2015).
[52] 25 U.S.C. § 1922.
[53] *Id*.

the child to the parent or Indian custodian.[54] The interaction between the ICWA and the emergency removal of an Indian Child is discussed later in this chapter.[55]

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.[56] 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. The Act does not impose any timeframe for a request to transfer jurisdiction. The BIA Guidelines provide that a request to transfer jurisdiction may be made at any stage of a proceeding and/or during each discrete proceeding. Thus a request to transfer may be made in a termination of parental rights proceeding even though no request was made during the child protection proceeding.[57]

If a request to transfer to tribal court is made, the case must be transferred unless one of the following exceptions to transfer applies. First, the state 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 state court may decline to transfer the case if it finds good cause not to transfer.[58]

*a. Good Cause Not To Transfer*

Pursuant to the BIA Guidelines, the burden of establishing good cause not to transfer is on the party opposing transfer.[59] The Guidelines further provide that parties "must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists."[60] If a state court concludes that there is good cause not to transfer a case to tribal court, the reasoning for the conclusion must be stated in writing and made available to the parties who requested transfer.[61]

In evaluating a request to transfer, the court should *not* consider the following factors:

- whether a case is in advanced stage or whether the transfer would result in a change of placement[62]
- the Indian child's contact with the tribe or reservation
- socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems, or
- the tribal court's prospective placement for the Indian child.[63]

[54] *Id.*
[55] *See infra* at § 11.4
[56] 25 U.S.C. § 1911(b).
[57] BIA Guidelines §§ C.1(b) to (c).
[58] 25 U.S.C. §§ 1911(b) to (c); BIA Guidelines § C.2(a).
[59] BIA Guidelines § C.3(e).
[60] BIA Guidelines § C.3(b).
[61] BIA Guidelines § C.3(a).
[62] BIA Guidelines § C.3(c).
[63] BIA Guidelines § C.3(d).

With regard to the advanced stage of the proceeding or the need to change the child's placement, the Guidelines explain that the intention of the ICWA was to presume tribal jurisdiction over state jurisdiction and to protect the rights of the Indian tribe as well as the child and parents. They conclude that, "whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe."[64]

### *C. Notice of an ICWA Action*

When there is reason to believe that the child is an Indian Child, notice of the proceeding must be provided to the child's parents, any Indian custodian, and the Indian child's tribe.[65] The BIA Guidelines formerly provided that if the child's tribe is not identified, notice could be provided to the Department of the Interior. This provision has been eliminated from the revised Guidelines.[66] The revised Guidelines now provide that if the identity or location of the parents, Indian custodians or the child's tribe cannot be ascertained, notice of the proceeding must be sent to the BIA Regional Director who may not make a determination of tribal membership, but who may be able to assist in identifying the child's tribe.[67] The ICWA requires that notice must be by registered mail and must be received at least ten days prior to the proceeding. The ICWA's notice requirements are separate and apart from the notice/service of process requirements under state law. The concepts of notice and service should be distinguished. The child's tribe is notified but not served. The BIA Guidelines provide for personal service or electronic notification, in addition to registered mail as required by the Act.[68] The non-tribal parties to the case are entitled to notice under the ICWA and also 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.[69]

The BIA Guidelines provide that the notice must be in "clear and understandable" language and contain the following information:

- Name of child, the child's birthdate and birthplace.
- The name of each tribe in which the child is a member or may be eligible for membership.
- A copy of the petition or other document initiating the action.
- The name and address of the petitioner and of the petitioner's attorney.
- A statement setting out the parent's or Indian custodian's or tribe's right to intervene.
- A statement setting out the parent's or Indian custodian's right to appointed counsel.
- A statement setting out the right to 20 additional days to prepare.

---

[64] BIA Guidelines § C.3(c).
[65] 25 U.S.C. § 1912(a).
[66] *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings: Summary, 80 Fed. Reg. at 10148 ("The updated guidelines delete the provision allowing BIA, in lieu of the tribe, to verify the child's status. This provision has been deleted because it has become increasingly rare for the BIA to be involved in tribal membership determinations, as tribes determine their own membership.").
[67] BIA Guidelines § B.6(e).
[68] BIA Guidelines § B.6(b).
[69] *See* §§ 16-1611, 16-2007, 16-1506.

- The mailing address and telephone numbers of the court and information related to all parties to the proceeding and individuals notified pursuant to the ICWA notice provisions.
- A statement setting out the right to petition the court to transfer the case to tribal court.
- A statement setting out the legal consequences of the proceeding on the future custodial and parental rights of the Indian parents or Indian custodians.[70]

In order to assist tribes in making membership determinations, the BIA Guidelines recommend that the following additional information should be provided with the notice, if available:

- Genograms or ancestry charts for both parents that are as complete and accurate as possible
- The addresses for the domicile and residence of the child, the child's parents, and/or the Indian custodians
- Whether either parent is domiciled on or a resident of an Indian reservation or a predominantly Indian community[71]

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.[72]

Several state courts have held that failure to provide notice is jurisdictional and deprives the court of ongoing authority in the case.[73] However, courts also 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.[74] 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 given at that point. Where notice should have been provided but was not, some courts have invalidated all actions taken in the potentially defective proceedings, while other courts have validated some of the earlier proceedings.[75] If it subsequently turns out that the child was not an Indian child, earlier actions of the court may be validated.[76]

Finding that the child is an Indian child is not a prerequisite to giving notice to a tribe of a pending action. The ICWA requires notice to a tribe or tribes when the court has "reason to believe" that the child is an Indian child.[77] The drafters of the ICWA anticipated that the tribe would participate in the determination of whether the child was eligible for membership in an

[70] BIA Guidelines § B.6(c).
[71] BIA Guidelines § B.6(d).
[72] 25 U.S.C. § 1912(a).
[73] *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).
[74] Family Independence Agency v. Maynard, 592 N.W. 2d 751 (Mich. App. 1999).
[75] *See* In re Kahlen W., 233 Cal.App. 3d 1414, 285 Cal. Rptr. 507 (5th App. Dist. 1991).
[76] *See, Id.*
[77] 25 U.S.C. § 1912; BIA Guidelines § B.5.

Indian tribe. The BIA Guidelines suggest that a tribe receive notice 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 information suggesting 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 parents are, or Indian custodian is known to be on an Indian reservation or in a predominantly Indian community, or
- An employee of the agency or an officer of the court involved in the proceeding has knowledge that the child is an Indian child.[78]

2. Notice to the Child's Parents or Indian Custodian

Upon receiving notice, the ICWA provides that the child's parents (regardless of whether they are Indian) or Indian custodian are entitled to an additional twenty days, upon request, to prepare for the proceeding.[79]

### *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.[80] 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*

The ICWA provides for counsel for any indigent parent or Indian custodian in "removal, placement or termination proceedings."[81] The right to counsel applies to all the actions covered by the ICWA: 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 the ICWA, the statute provides for the Department of Interior to reimburse the state for the cost of providing counsel.[82]

The ICWA does not require the appointment of an attorney for an Indian child. However, Idaho Code section 16-1614 requires that for a child under the age of twelve years, the court shall appoint a guardian *ad litem* for the child and counsel to represent the guardian *ad litem*. For a child age twelve and older, the court shall appoint counsel to represent the child and may, in addition, appoint a guardian *ad litem*.

---

[78] BIA Guidelines § B.2(c).
[79] 25 U.S.C. § 1912(a).
[80] 25 U.S.C. § 1911(c).
[81] 25 U.S.C. § 1912(b).
[82] *Id.*

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

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.[83]

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.[84] 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 a Child Protective Act case, in addition to meeting the requirements of the ICWA, the court must also make all the 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 a higher standard than the reasonable efforts findings generally required under state law and the Adoption and Safe Families Act.[85]

In 2013, the United States Supreme Court held that the active efforts requirement applies when a child is removed from a family member who has a legally recognized relationship with the child. Thus, active efforts were not required in a case where a child was placed for voluntary adoption over the objection of an unwed father who had not established parental rights pursuant to state law and who had never had any form of custody of the child.[86]

The BIA Guidelines make clear that the requirement of active efforts is triggered "the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian."[87]

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 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."[88]

---

[83] 25 U.S.C. § 1912(d).
[84] 25 U.S.C. § 1912(e).
[85] ICWA HANDBOOK, *supra* note 24 at 57-58. See BIA Guidelines.
[86] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).
[87] BIA Guidelines § B.1(a).
[88] BIA Guidelines § D.2.

The BIA Guidelines provide an extensive list of examples of actions that constitute active efforts including:

- Engaging the child, parents and extended family
- Keeping siblings together
- Identifying appropriate services for parents and assisting them in obtaining the services
- Identifying and involving members of the child's tribe
- Conducting a diligent search for extended family members for assistances as well as placement
- Taking into account the tribe's prevailing social and cultural customs and way of life
- Offering and utilizing all culturally appropriate family preservation strategies
- Completing a comprehensive assessment of the child's family circumstances with a focus on reunification
- Notifying and consulting with extended family members
- Providing family interaction in the most natural setting that can ensure the child's safety
- Identifying community resources
- Monitoring progress and participation in services
- Providing alternative ways of addressing needs where services are unavailable
- Supporting regular visits and trial home visits
- Providing post-reunification services and monitoring[89]

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.[90] The Idaho Supreme Court has concluded recently that the burden of proof on active efforts is preponderance of the evidence.[91]

### *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. As with the finding of active efforts, the U.S. Supreme Court has recently held that this requirement applies when the child is removed from a family member who has some form of custody or legally recognized relationship with the child.[92] Addressing the type of evidence necessary to meet the standard, the BIA Guidelines state that "clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding." The Guidelines further provide that "[e]vidence that shows only the existence of community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child." [93]

---

[89] BIA Guidelines § A.2 (definition of "Active Efforts").
[90] ICWA HANDBOOK, *supra* note 24 at 58.
[91] Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015).
[92] ICWA HANDBOOK, *supra* note 24 at 58. *See* Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013).
[93] BIA Guidelines § D.3(c).

Given this explanation of the standard, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child *unless* the child is in danger.

### *C. Qualified Expert Witness*

The 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.[94] The legislative history of the 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.[95] Congress envisioned that the qualified expert would be more than a social worker.[96] 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 the ICWA experts have sufficient knowledge related to tribes to fulfill the role intended by Congress.

The BIA guidelines provide that an ICWA expert should be (in descending order of preference):

- A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe.
- A layperson who is recognized by the child's tribe as having substantial experience in the delivery of child and family services to Indians and knowledge of prevailing social and cultural standards and child rearing practices within the child's tribe, or
- A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.[97]

In *In the Matter of Baby Boy Doe*,[98] 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 involving an Indian child from a different tribe. However, this case was decided before the current BIA Guidelines were issued.

### *D. Additional Substantive Requirements for Involuntary Termination of Parental Rights*

Pursuant to ICWA, no involuntary termination of parental rights may be ordered in the absence of a determination supported by evidence beyond a reasonable doubt. The evidence supporting termination of parental rights must include the testimony of a qualified expert witness that

[94] 25 U.S.C. § 1912(e).
[95] *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).
[96] *Id.* at 21.
[97] BIA Guidelines § D.4(a).
[98] In the Matter of Baby Boy Doe, 127 Idaho 452, 902 P. 2d 477 (1996).

continued custody would result in "serious emotional or physical harm."[99] 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.[100]

In addition to terminating the rights of parents of an Indian child, it is unclear if the rights of the Indian custodian must also be terminated in applicable cases.[101] If the custodial rights arose as a result of a prior court order (as opposed to custom and practice), the court should address the continuing effectiveness of that order, if possible and appropriate.

Finally, an Indian Custodian has the same rights to active efforts and counsel for any foster care placement or other involuntary proceeding in a state court.[102]

### *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."[103]

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.[104] 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. The BIA Guidelines provide that the court "must explain the consequences of the consent in detail, such as any conditions or timing limitations for withdrawal of consent."[105]

Pursuant to the BIA Guidelines, the consent must contain the following information:

- The name and birthdate of the Indian child
- The name of the Indian child's tribe, identifying tribal enrollment number, if any, or other indication of the child's membership in the tribe
- The name and address of the consenting parent or Indian custodian
- Any conditions to the consent.[106]

The Guidelines further provide that "a certificate of the court must accompany a written consent and must certify that the terms and consequences of the consent were explained in detail

---

[99] 25 U.S.C. § 1912(f).
[100] 25 U.S.C. § 1912(d). As discussed previously, the Idaho Supreme Court has held that the "active efforts" finding is subject to a preponderance of the evidence standard of review; *See* Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015).
[101] *See* 25 U.S.C. §§ 1912(f),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 "custodial rights" were terminated.
[102] 25 U.S.C. § 1912 (a)-(d).
[103] 25 U.S.C. § 1913(a).
[104] *Id*.
[105] BIA Guidelines § E.2(b).
[106] BIA Guidelines § E.3.

in the language of the parent or Indian custodian…and were fully understood by the parent or Indian custodian."[107]

The consent to terminate parental rights may not be executed prior to the birth of the Indian child or within 10 days of the child's birth.[108]

The ICWA also provides for the withdrawal of consent to termination of parental rights at any time prior to the entry of a final decree of termination or adoption.[109] The BIA Guidelines provide that in order to withdraw consent the parent must execute an instrument under oath stating her or his intention to withdraw consent and file the instrument in the court where the consent is filed.[110] Once consent is withdrawn, the clerk of courts is required to promptly notify the party with whom the child is placed, and the child must be returned to the parent or Indian custodian as soon as practicable.[111]

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.[112]

### *F. Placement Preferences of the ICWA*

One of the most important purposes of the ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture."[113] In *Holyfield*, the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[114] Congress recognized that even where the child was removed from his or her parents or Indian Custodians, 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.[115]

#### 1. Foster Care and Pre-Adoptive Placements

The placement preferences of the ICWA apply to both voluntary and involuntary placements, to pre-adoptive placements, and to placements made in contemplation of termination of parental

---

[107] BIA Guidelines § E.2(c).
[108] 25 U.S.C. § 1913(a); BIA Guidelines § E.2(e).
[109] 25 U.S.C. § 1913(c).
[110] BIA Guidelines § E.5(a) (The statute does not specify any form for the withdrawal of consent).
[111] BIA Guidelines § E.5(b)
[112] 25 U.S.C. § 1913(d).
[113] 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.).
[114] Holyfield, *supra* note 44, at 36.
[115] 25 U.S.C. § 1902. In *Adoptive Couple v. Baby Girl*, the Supreme Court held that these preferences may not apply in a voluntary adoption situation where the child has not been removed from a recognized family member and no one is before the court who meets the preferred placement criteria offering to serve as a placement for the child. Adoptive Couple, 321 S. Ct. at 633.

rights.[116] 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."[117]

The ICWA placement standard is whether the placement 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."[118] The ICWA foster care placement preferences apply even where the child has not previously resided in an Indian family.[119]

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

- A member of the Indian child's extended family as defined by the ICWA.[120]
- 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
- 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.[121]

The 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."[122] Tribal resolutions and enactments regarding the ICWA placement preferences can often be found on the appropriate tribal website.

The ICWA provides that the court may consider the wishes of the child's parents for placement, but parental requests are not dispositive of placement decisions.[123]

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

The Act provides that courts may deviate from the placement preferences only upon a showing of "good cause" to do so. Prior to release of the updated BIA Guidelines state courts were in conflict regarding whether the level of proof for good cause is a preponderance of the evidence or clear and convincing evidence.[124] The BIA Guidelines provide that the agency must demonstrate good cause by clear and convincing evidence.[125]

---

[116] 25 U.S.C. § 1915(b).
[117] 25 U.S.C. § 1915.
[118] 25 U.S.C. § 1915(d).
[119] *See* ICWA HANDBOOK, *supra* note 24 at 84-85.
[120] 25 U.S.C. § 1903(2).
[121] 25 U.S.C. § 1915(b).
[122] 25 U.S.C. § 1915(c).
[123] *Id.*
[124] *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); 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).
[125] BIA Guidelines §§ F.1(b) and F.4(b).

The BIA Guidelines provide that as the agency conducts its search for a placement that complies with the placement preferences, it should provide notification about the placement hearing and explanation of the actions to be taken at the hearing. This notification should be provided to the following:

- The child's parents and/or Indian custodians
- All of the known or reasonably identifiable members of the child's extended family
- All foster homes licensed, approved or specified by the child's tribe
- All Indian foster homes located in the child's state of domicile that are licensed or approved by any authorized non-Indian licensing authority.[126]

The BIA Guidelines provide that the reasons for the belief that there is good cause to deviate from the placement preferences must be stated in writing or on the record and must be provided to the parties to the proceeding and to the Indian child's tribe. The finding of good cause may be based on the following considerations:

- The request of the parents, if they certify that they have reviewed the placement options that comply with the preferences.
- The request of the child if she or he is able to understand and comprehend the decision that is being made.
- The extraordinary physical or emotional need of the child, and/or
- The unavailability of a complying placement.[127]

a. Request of the Biological Parents or Child

Section 1915(c) of the 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 implements 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.[128] The BIA Guidelines also specify that the parents' consent is conditioned on their review of the placement options that comply with the preferences.[129]

In addition to the wishes of the parents, the BIA Guidelines provide that the wishes of an older child may be the basis for deviating from the placement preferences of the Act. The Guidelines do not define "older child" but provide that the child should be able to "understand and comprehend" the placement decision.[130]

[126] BIA Guidelines § F.1(b)(1)-(4).
[127] BIA Guidelines § F.4(c).
[128] Holyfield, 430 U.S. at 38.
[129] BIA Guidelines § F.4 (c)(1).
[130] BIA Guidelines § F.4 (c)(2).

b. 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.[131] The extraordinary services may not include "ordinary bonding and attachment" that may have occurred in a non-complying placement or the extended time the child may have been placed in such a placement. Furthermore, the needs of the child do not include a general "best interests" inquiry because "the placement preferences reflect the best interests of an Indian child in light of the purposes of the Act."[132]

c. 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 including the notifications described above as well as a showing that active efforts have been made to locate a placement that complies with the preferences.[133] The Guidelines further provide that a placement may not be considered to be unavailable if it conforms to the prevailing social and cultural standards of the Indian community in which the child's parent or extended family resides or maintains social and cultural contacts.[134] Specifically, the guidelines provide that the court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child and may not depart from the preferences based on the socio-economic status of a placement relative to another placement.[135]

### *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
- Other Indian families[136]

The BIA Guidelines also provide that "the court should, where appropriate, also consider the preference of the Indian child or parent."[137]

---

[131] BIA Guidelines § F.4 (c)(3).
[132] *Id*.
[133] BIA Guidelines § F.4 (c)(4).
[134] *Id*.
[135] *Id.*
[136] 25 U.S.C. § 1915(a).
[137] BIA Guidelines § F.2(b).

As with the preferences in foster care placements, the court must follow these preferences in adoptions unless the tribe has altered the preferences by tribal 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 preferences apply to future placements, unless the removal is for the purpose of returning the child to his or her parents or Indian custodian.[138]

### *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, the 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 parent or 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 the 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.[139]

## 11.5 THE IDAHO CHILD PROTECTION ACT AND THE ICWA INTEGRATED

### *A. Referral & Investigation*

Under the Idaho Child Protective Act (CPA), a case is initiated when:

- A child is removed from the home through a declaration of imminent danger
- A judge orders the child's removal
- A Juvenile Corrections Act case is expanded to a CPA case, or
- A petition is filed 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. An investigation that may lead to any of these actions should include an investigation into whether the child is an Indian child.[140] From the beginning of its investigation, IDHW should be taking steps to determine whether the child is an Indian child.

### *B. Initiation of the Case*

Once the case is initiated, the court must ask whether there is reason to believe that the child is an Indian child and all parties to the case must certify on the record whether they have

[138] 25 U.S.C. § 1916(b).
[139] 25 U.S.C. § 1916(a).
[140] BIA Guidelines § A.3 (c).

discovered or know of any information that suggests or indicates that the child is an Indian child.[141]

Notice of the pending proceeding must be provided to the Indian child's tribe, parents, and Indian custodian. The 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.

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

In the case of an emergency removal the BIA Guidelines require that "all practical steps" must be taken to "immediately notify" the child's parents, Indian custodians and the child's tribe of the hearings on the emergency removal.[142]

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

### *C. Special ICWA Considerations in Cases Initiated by Emergency Removal*

There are two ways a child can be removed from the home in Idaho that implicate the emergency removal provisions of the ICWA. The first situation is where a law enforcement officer declares a child in imminent danger pursuant to Idaho Code section 16-1608. The second is where the child is removed pursuant to a summons that includes an order to remove the child under Idaho Code section 16-1611(4).

Where a child is removed from the home **pursuant to a declaration** made under Idaho Code section 16-1608, the standard of removal under Idaho law is similar but not the same as the BIA Guidelines. The BIA Guidelines permit removals "as necessary to prevent imminent physical damage or harm to the child."[143] Idaho law permits removals "where it is necessary to prevent serious physical or mental injury to the child."[144]

Where a child is removed from the home **pursuant to a summons** that includes an order of removal, Idaho law does not refer to this as an emergency removal, however this would be an emergency removal under ICWA. The ICWA standard for removal differs significantly from the Idaho standard for issuing an order for removal. Idaho law requires a showing that continuation in the home is contrary to the welfare of the child and that removal is in the best interests of the

[141] BIA Guidelines § B.2 (b).
[142] BIA Guidelines §§ B.8 (b)(4) to (5). Idaho Code section 16-1609 provides for notice of emergency of removal and Idaho Code section 16-1612 provides for service of the summons and order of removal. Where there is reason to believe a child is an Indian child, service of these documents should also be made upon the child's tribe and the child's Indian custodian.
[143] 25 U.S.C. § 1922; BIA Guidelines § B.8(a).
[144] § 16-1608(1)(a) (2009).

child.[145] In the case of an Indian child the ICWA requires an additional showing and an additional finding of imminent physical damage or harm.[146]

The BIA Guidelines also require that the request for emergency removal or for continued emergency removal must be accompanied by an affidavit containing the following information:

- The name age and last known address of the child.
- The name and address of the child's parents and Indian custodians.
- If the parents and/or Indian custodians are unknown, a detailed explanation of what efforts have been made to locate them.
- The facts necessary to determine the residence and domicile of the Indian child.
- If either the child's residence or domicile is believed to be on an Indian reservation, the name of the reservation.
- The tribal affiliation of the child and of the parents and/or Indian custodians.
- If the tribe has exclusive jurisdiction, the steps being taken to transfer the child to the tribe's jurisdiction.
- A statement of the active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.
- A statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child.[147]

The emergency removal must be as short as possible. The BIA Guidelines require that IDHW "diligently investigate" and document whether the removal "continues to be necessary to prevent imminent physical damage or harm to the child." The removal must be terminated as soon as the emergency situation has ended.[148]

The Guidelines require that each involved agency or court take all practical steps to notify the parents, Indian custodian and Indian tribe of hearings relevant to the emergency removal and keep records of the steps taken to comply with the general notice provisions of the ICWA.[149]

Finally, the BIA Guidelines provide that the temporary custody of the child pursuant to an emergency removal may not continue for more than 30 days unless a hearing is held after notice as provided in the BIA Guidelines. At the hearing the court must make one of two findings. First, custody may be continued if the court determines, by clear and convincing evidence and the testimony of a qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child.[150] Second, custody may be continued if the court finds that extraordinary circumstances exist.[151]

[145] § 16-1611(4).
[146] BIA Guidelines § B.8(a).
[147] BIA Guidelines § B.8(d).
[148] BIA Guidelines § B.8(b).
[149] BIA Guidelines § B.8(c)(4)-(6).
[150] BIA Guidelines § B.8(f)(1).
[151] BIA Guidelines § B.8(f)(2).

### *D. Shelter Care*

At the shelter care hearing, the court should inquire whether there is any reason to believe the child is an Indian child. If possible, the court should make a finding on the child's Indian status at the shelter care hearing. If there is any reason to believe that the child is an Indian child and if the child is going to be placed or kept in shelter care, then the ICWA standard for emergency removal applies and the child should be treated as an Indian child until the court determines that the child is not an Indian Child.[152] The court must find that the placement of the child is necessary to prevent imminent physical damage or harm to the child.[153] Both this finding and the findings required by Idaho Code section 16-1615 must be made.

The BIA Guidelines require the 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. The court also monitors the preparations 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.

### *E. Adjudicatory Hearing*

1. Phase I: Procedural Matters

At Phase I, adjudication, the court must make findings as to whether the child is an Indian child, the basis for the court's exercise of jurisdiction pursuant to the ICWA, and whether the notice to the tribe and parents complied with the requirements of the 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.[154]

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. The 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 the ICWA, and must be accommodated by the court and parties.

2. Phase I: Substantive Matters

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

[152] BIA Guidelines § B.8(c)(1).
[153] BIA Guidelines § B.8(a).
[154] 25 U.S.C. § 1911(c).

findings, the court must evaluate whether active efforts for the Indian child have been offered and documented. 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 or Indian custodian will result in serious emotional or physical 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 proof under the 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 the 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).

The 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. Phase II: Disposition

During Phase II, disposition, the court must evaluate whether the disposition for the child put forth by IDHW complies with the placement preferences of the ICWA. If one of the parties argues that the placement does not meet the placement preferences, the court must make a finding of good cause based on clear and convincing evidence 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.

### *F. 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 or Indian custodian, 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 efforts to secure an ICWA-compliant placement if such a placement has not been identified. If the child's placement must be altered, the new placement must comply with the placement preferences or must be supported by a finding, based on clear and convincing evidence, that there is good cause to deviate from the placement preferences. In addition, the court should ensure that active efforts are being made to provide remedial services and rehabilitative programs to the family.

### *G. Permanency Hearing*

As detailed previously, the ICWA alters the permanency options for the child in several ways. Many tribes do not recognize the concept of termination of parental rights and thus a tribe may

oppose a termination action even though the tribe has supported other permanency options including guardianship. In addition, the stricter requirements under ICWA make the case harder to prove. The ICWA does not establish independent grounds for termination; however, the serious emotional or physical damage 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.

## CONCLUSION

Congress has declared that it is the policy of this nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families.[155] This congressional policy is codified in the Indian Child Welfare Act. Compliance with this congressional mandate is crucial to providing stability, security, and timely permanence to Indian children.

[155] 25 U.S.C. § 1901.