

Common Core 3.0

Let the Spirit Lead: the Indian Child Welfare Act
Participant's Guide



Version 3.0 | 2015

“Let the Spirit Lead...” ICWA: In the Best Interest of the Indian Child | Trainer’s Guide

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Introduction to Common Core

California's Common Core Curricula for Child Welfare Workers is the result of the invaluable work and guidance of a great many people throughout the child welfare system in California and across the country. It would be impossible to list all of the individuals who contributed, but some groups of people will be acknowledged here.

The Content Development Oversight Group (CDOG) a subcommittee of the Statewide Training and Education Committee (STEC) provided overall guidance for the development of the curricula. Convened by the California Social Work Education Center (CalSWEC) and the California Department of Social Services (CDSS), CDOG membership includes representatives from the Regional Training Academies (RTAs), the University Consortium for Children and families in Los Angeles (UCCF), and Los Angeles County Department of Children and Family Services.

In addition to CDOG, a Common Core 3.0 subcommittee comprised of representatives from the RTAs, the Resource Center for Family Focused Practice, and counties provided oversight and approval for the curriculum development process.

Along the way, many other people provided their insight and hard work, attending pilots of the trainings, reviewing sections of curricula, or providing other assistance.

California's child welfare system greatly benefits from this collaborative endeavor, which helps our workforce meet the needs of the state's children and families.

In compliance with the Indian Child Welfare Act (1978) and the California Practice Model, social workers must identify American Indian/Alaska Native children in the system. For an overview of *Implementing the Indian Child Welfare Act* view:

<https://www.youtube.com/watch?v=BIQG65KFKGs>

The curriculum is developed with public funds and is intended for public use. For information on use and citation of the curriculum, please refer to:

http://calswec.berkeley.edu/CalSWEC/Citation_Guidelines.doc



FOR MORE INFORMATION on California's Core Curricula, as well as the latest version of this curriculum, please visit the California Social Work Education Center (CalSWEC) website: <http://calswec.berkeley.edu>

Curriculum Introduction

This curriculum is adapted from the Tribal STAR eight-hour full-day training. This curriculum is intended to provide participants with an understanding of ICWA that incorporates the spirit of the law and the historic context for its necessity. This training attempts to change common perceptions about American Indians/Alaska Natives and assist participants in achieving the cultural humility required to engage with tribal children, families, caregivers and tribes.

The trainer will find language reflective of current best practices, including Safety Organized Practice and family finding, included in the curriculum in an effort to ensure this curriculum is consistent with the current practice model.

Agenda

1. Pre-Test, Welcome, Introductions, Housekeeping
 - Pre-Test
 - Training overview, e-Learning review, ICWA Basic Provisions
 - Focused Discovery Activity: What Do We Want to Gain From Today?
 - Compassion Icebreaker
2. Historical Context of ICWA
 - Removal and Relocation
 - Boarding Schools
 - California Indians
 - Indian Adoption Project
 - Two Apologies
 - History, Purpose and Spirit of ICWA
3. Historical Trauma
4. Remedying Bias: Contributions
5. Tribal Sovereignty
6. ICWA Requirements and Social Work Practice
 - Inquiry and Notice
 - Active Efforts
 - Placement
 - Concurrent Planning
 - Qualified Expert Witness
 - Current Events
7. What did we get out of today?
8. Post-Test, Evaluation, Wrap-Up

Learning Objectives

Knowledge

- K1.** The participant will understand the relationship between U.S. history and the Indian Child Welfare Act (ICWA), and will be able to identify three events that led to the passage of ICWA.
- K2.** Participants will understand regional differences of California Indian history and will identify two regional historic events that resulted in historical trauma.
- K3.** Participants will identify two examples of the effects of historical trauma that affect engaging and working with Indian children, families and tribes.
- K4.** Participants will recognize that tribes are sovereign nations and that being American Indian/Alaska Native is both a political and cultural distinction.
- K5.** Participants will be able to identify five basic provisions of the Indian Child Welfare Act.
- K6.** The participants will be able to identify engagement and teaming with tribes as a part of the new practice model.
- K7.** Participants will understand the differences between reasonable and active efforts, that active efforts begin immediately when there is reason to know a child is American Indian or Alaska Native, and will be able to change a reasonable effort into an active effort.
- K8.** Participants will understand ICWA placement preferences and that they are important to one of ICWA's purposes.
- K9.** Participants will recognize guardianship and tribal customary adoption as concurrent planning options for American Indian and Alaska Native children.
- K10.** Participants will be able to describe two positive child welfare outcomes from a tribal perspective and will be able to identify legal consequences to non-compliance with ICWA.
- K11.** The participants will recognize the legal ramifications related to non-compliance with ICWA.

Skills

- S1.** Participants will demonstrate awareness of culturally appropriate engagement for the purpose of identifying American Indian/Alaska Native children.
- S2.** Participants will demonstrate the ability to change reasonable efforts into active efforts.

Values

V1. Participants will value engaging and teaming with tribes, tribal service providers and designated ICWA agents and advocates as resources for decision making, ICWA compliance, and implementation of the Practice Model.

V2. Participants will value keeping an American Indian/Alaska Native child connected to their community, culture, and tribe to ensure positive child welfare outcomes and ICWA compliance.

The Changing Perceptions of American Indian People

"Made by the same Great Spirit, and living in the same land with our brothers, the red men, we consider ourselves as the same family; we wish to live with them as one people, and to cherish their interests as our own."

—*From: Thomas Jefferson: To the Miamis, Powtewataminies, and Weeauki— Warren, Robert P. 1982*
Chief Joseph of the Nez Perce, A Poem, Excerpt Frontpiece



"The more we can kill this year, the less will have to be killed the next war, for the more I see of these Indians, the more convinced I am that they will all have to be killed or be maintained as a species of paupers."

—*William Tecumseh Sherman—*



"When the last Red Man shall have perished, and the memory of my tribe shall have become a myth among the white men, these shores will swarm with the invisible dead of my tribe, and when your children's children think themselves alone in the field, the store, the shop, upon the highway, or in the night when the streets of your cities are silent and you think them deserted, they will throng with the returning hosts that once filled them and still love this beautiful land. The White Man will never be alone."

—*Chief Sealth of the Duwamish—*



"That a war of extermination will continue to be waged between the races, until the Indian race becomes extinct, must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the [Indian] race is beyond the power of wisdom of man to avert."

—*California Governor Peter H. Burnett—*

ICWA CHALLENGES

What do you think the challenges would be if you are assigned an ICWA case?

What are the challenges your colleagues with ICWA cases have experienced?

If you currently have ICWA cases, what are your challenges?

What do you think the primary reasons ICWA cases are being appealed in California?

WHAT DO YOU HOPE TO GET OUT OF TODAY?

THE INDIAN CHILD WELFARE ACT

PURPOSE AND BASIC PROVISIONS



FIVE PROVISIONS

INQUIRY AND NOTICE

ACTIVE EFFORTS

PLACEMENT

CONCURRENT PLANNING

QUALIFIED EXPERT WITNESS



PURPOSE AND BASIC PROVISIONS

Purpose: In adopting ICWA, Congress declared that the policy of the United States is to protect the best interests of Indian children and promote the stability and security of Indian tribes and families. This purpose is accomplished through the establishment of minimum federal standards for the removal of Indian children from their families and their placement in foster or adoptive homes that reflect the unique values of Indian culture. The purpose is also accomplished by providing assistance to Indian tribes in the operation of child and family service programs. In other words *if* an Indian child must be placed in out-of-home care, there is a process that every Agency must follow, including ensuring connections between the child and his or her tribal community.

Who is an Indian child? An Indian child is any unmarried person who is less than 18 years of age and is also:

- A member of an Indian tribe, or
- is eligible for membership in an Indian tribe and
- is the biological child of a member of an Indian tribe.

It is important to note that the child is not required to be a member of a tribe to be considered an Indian child. The child only needs to be eligible for membership in accordance with the tribe's law, custom or tradition relating to membership.

What is an Indian tribe? An Indian tribe is any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary of Interior because of their status as Indians. Approximately every other year, a list of federally-recognized tribes is published in the federal register.

Who determines who is an Indian child? Only an Indian tribe determines whether a child is a member or eligible for membership in the tribe. A child does not have to be enrolled in the tribe in order to be considered an Indian child unless the tribe requires enrollment a prerequisite to membership in accordance with the tribe's laws, customs and traditions.

To What Cases does ICWA apply? ICWA applies to the following types of proceedings:

- a. Child custody proceedings:
 - Foster care placement
 - Termination of parental rights

- Pre-adoptive placement
- Adoptive placement
- Divorce proceedings or custody disputes in which neither parent will have custody of the child.

To what cases does ICWA not apply?

ICWA does not apply to

- a. Delinquency proceedings. However, if the child is being temporarily or permanently removed from the family home because of protective issues in the home, rather than the conduct of the child, ICWA *does* apply.
- b. Divorce proceedings, if custody is granted to one of the parents.

When does ICWA apply? The case should be treated as an ICWA case **immediately** if there is reason to know that a child is or may be Indian. At the same time efforts need to be made to notify the tribe and confirm whether the child is an Indian child under ICWA. “Reason to know” that a child is an Indian child includes, but is not limited to, information from parents, family, caregivers, etc., who say the family is Native American; the family receives services from tribal services providers (such as Indian Health); the family resides on an Indian reservation or in a known Indian community or Rancheria. Best practice is to assume the child is an Indian child until information indicates otherwise.

When does ICWA not apply? ICWA does not apply when the court determines ICWA is inapplicable after there has been 1) a full and complete inquiry, 2) proper and adequate notice, and 3) neither the tribe nor the BIA have confirmed the child is an Indian child within 60 days. If the tribe or BIA subsequently confirms the child is an Indian child, the court must reverse its finding.

Tribal Participation. Tribal participation in child dependency proceedings may occur in several ways. A tribe may decide to intervene in the proceeding. If a tribe has a tribal court, it may petition to take jurisdiction. If the tribe has exclusive jurisdiction the case *must* be transferred to the tribe. In California, only two tribes have exclusive jurisdiction: Washoe Tribe and Yurok. A tribe may also choose not to participate. Whether the tribe petitions to intervene or not, and whether the tribe requests transfer of jurisdiction or not, the case must still be treated as an Indian case and all the provisions of the Act followed.

THE BOARDING SCHOOL EXPERIENCE

The political approach by the Federal government was to remove children from the reservation and place them in boarding schools with hopes of “civilizing” them. Boarding schools were rigid and military-like and were designed to separate a child from his family, tribal community, tribal values, culture and language and to change him in such a way that he would not be able to return to his people.

The first attempt to educate the American Indian was by religious groups in the 1870’s and 1880’s. The focus was on converting and civilizing the Indian and the curriculum was the Bible. The Carlisle Indian School, founded in 1879, was the first established boarding school for Indian children. Carlisle’s model of instruction emphasized religion, academic training and institutional labor, and was adopted by other boarding and mission schools in years to come.

Boarding schools were the primary mechanism for educating Indian children until the 1920’s. The Meriam Report, an economic and social study of conditions in Indian Country published in 1928, documented failures and inadequacies of boarding schools¹. The report stated “frankly and unequivocally that the provisions for the care of the Indian children in boarding schools are grossly inadequate.”² Dietary deficiencies contributed to the poor health of the children, the facilities were overcrowded, healthcare was substandard, and the schools were supported by the labor of the children themselves.³ Children faced harsh physical discipline, many were physically and sexually abused.

The boarding schools left a negative impact on the caregiver capacities of adults who were raised in the institutions. Tribal cultures had mechanisms that taught youth the responsibilities of becoming adults, parents, and active members of one’s community. During puberty rites, young men and women were taught values that governed child-rearing and community responsibility. During the Boarding School era, many of the teachings were lost and the ability of tribal people to raise and maintain successful families diminished. These challenges are often observed through the need for parenting classes, and through the need for youth to find culturally appropriate mentors and role models who successfully navigate contemporary

¹ Meriam, Lewis, Comp.; And Others. The Problem of Indian Administration. Report of a Survey Made at the Request of Honorable Hubert Work, Secretary of the Interior, and Submitted to Him, February 21, 1928. Brookings Institution, Washington, D.C. Department of the Interior, Washington, D.C

² Ibid at page 11.

³ Ibid 11-12.

culture while maintaining a tribal identity.

Personal Activity:

Write a few words that will help you remember what is important about boarding schools.



CALIFORNIA INDIANS

Did you know ...

“The history of California Indians is the story of an attempt to survive a series of invasions and the hardships that ensued.”

-- Dwight Dutschke, “A History of American Indians in California”

- Mission San Diego de Alcalá was founded in 1769, the first of 21 missions. The Spanish forcibly remove Indians from their homelands to the missions where they were kept as slaves. The Spanish viewed the Indians, including those who converted to Christianity, as expendable. Conditions at the missions were dismal, with the Indians being often being tortured and starved. The mission system would ultimately devastate California Indians.
- Mexico became independent from Spain in the early 1820's. During his tenure as governor, Jose Figueroa ended the mission system and large land grants were given to Mexican citizens, such as Johann Sutter, to settle on behalf of Mexico. California Indians resisted the outsiders, but the violence inflicted on the resisting Indians was devastating:

“...invited the wild Indians and their Christian companions to come and have a feast...the troops, the civilians, and the auxiliaries surrounded them and tied them up... At every half mile or mile we put six of them on their knees to say their prayers. Each one was shot with four arrows....We baptized all the Indians and afterwards they were shot in the back.”

--Jose Maria Amador 1837

- In 1850, the Act for the Government and Protection of Indians was passed by the first session of California's legislature. The Act permitted any white settler to enslave Indian children, prohibited Indians from testifying in court against any non-Indian, from having alcohol and for Indians to be sold as punishment for certain crimes.
- More than 100,000 Indians died in the first two years of the California Gold Rush as a result of both random and organized violence against them.
- The federal government negotiated 18 treaties with 139 California tribes. But the treaties were never ratified by the United States senate, and instead were placed in a secret file under an injunction of secrecy where they remained until 1905.

- In 1901, Sherman Institute in Riverside became the first hospital for Indians, but later became a boarding school.
- The efforts of California Indians to sue the federal government under the Jurisdictional Act of 1928 resulted in the creation of the federal Indian Claims Commission in 1946 was the result of efforts by California Indians to sue the federal government over the theft of their lands in the 19th century. After 20 years of tortuous maneuvering all separate claims were consolidated into a single case. A compromise settlement of 47 cents per acre was offered for lands that were purchased for a minimum of \$1.50 per acre. By a questionable vote, claimants accepted the settlement and in 1972, 60,000 California Indians were paid \$633 to settle land claims resulting from the 18 unratified treaties. What is of significance is that the entire claims process was conducted outside of normal court proceedings protected by the Constitution. Thus Indians are the only class of citizens in the United States who are denied constitutional protection of their lands by extra-constitutional means.
- In the 1950's the BIA termination policy came to California. The Rancheria Termination Act, which targeted to smallest, least organized and most isolated tribes, transferred Rancheria lands to individual Indians, which terminated the trust relationship with a number of tribes. Approximately forty Rancherias and reservations were removed from federal trust status and federal services, including housing and health care abruptly ended. Many of those tribes have not regained their federal recognition.

“The amazing adaptive capabilities of California Indians have demonstrated the resiliency and genius of these much misunderstood and hard-working tribes ... under the most unfavorable of circumstances. We enter the next century filled with optimism:”

--Edward Castillo, “A Short Overview of California Indian History”⁴

⁴ Castillo, Edward. “A Short Overview of California Indian History.” accessed on November 26, 2015 at <http://www.nativeamericancaucus.org/content/california-indian-history>.

Other references for this fact sheet:

Santa Barbara Indian Center and Dutschke, Dwight. “A History of American Indians in California,” in CA Department of Parks and Recreation, Office of Historic Preservation, ed. Five Views (SacramentoL OHP, 1988) accessed on December 30, 2015 at http://www.nps.gov/parkhistory/online_books/5views/5views1.htm

California Rural Indian Health Board, California Tribal Epidemiology Center. Riverside-San Bernardino County Indian Health Community Health Profile. Sacramento, CA May 2010.

Personal Activity:

Write a few words that will help you remember what is important California Indian history?



TWO APOLOGIES

**Kevin Gover's Remarks
at the Ceremony Acknowledging the 175th Anniversary
of the Bureau of Indian Affairs, September 8, 2000**
(edited for length)

"In March of 1824, President James Monroe established the Office of Indian Affairs in the Department of War. Its mission was to conduct the nation's business with regard to Indian affairs. We have come together today to mark the first 175 years of the institution now known as the Bureau of Indian Affairs. [...]

From the very beginning, the Office of Indian Affairs was an instrument by which the United States enforced its ambition against the Indian nations and Indian people who stood in its path. And so, the first mission of this institution was to execute the removal of the southeastern tribal nations. [...] As the nation looked to the West for more land, this agency participated in the ethnic cleansing that befell the western tribes. [...]

This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. [...] The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. [...] So many of the maladies suffered today in Indian country result from the failures of this agency. [...]

Let us begin by expressing our profound sorrow for what this agency has done in the past. Just like you, when we think of these misdeeds and their tragic consequences, our hearts break and our grief is as pure and complete as yours. We desperately wish that we could change this history, but of course we cannot. On behalf of the Bureau of Indian Affairs, I extend this formal apology to Indian people for the historical conduct of this agency.

And while the BIA employees of today did not commit these wrongs, we acknowledge that the institution we serve did. We accept this inheritance, this legacy of racism and inhumanity. And by accepting this legacy, we accept also the moral responsibility of putting things right. [...]"

**Apology of Shay Bilchik, Executive Director
Child Welfare League of America**
Keynote Speech delivered at National Indian Child Welfare Association (NICWA) Conference
Tuesday, April 24, 2001
Anchorage, Alaska
(edited for length)

“Now the Child Welfare League of America, the organization I represent, has never been a part of the U.S. government. But most of its members, public and private child welfare organizations, represent a profession that has always been dedicated to improvement, in its positive and sometimes negative sense. For that reason, I think that you and all the people you represent deserve an accounting of one phase of our history. [...]

These are the facts. Between 1958 and 1967, CWLA cooperated with the Bureau of Indian Affairs, under a federal contract, to facilitate an experiment in which 395 Indian children were removed from their tribes and cultures for adoption by non-Indian families. This experiment began primarily in the New England states. CWLA channeled federal funds to its oldest and most established private agencies first, to arrange the adoptions, though public child welfare agencies were also involved toward the end of this period. Exactly 395 adoptions of Indian children were done and studied during this 10-year period, with the numbers peaking in 1967.

ARENA, the Adoption Resource Exchange of North America, began in early 1968 as the successor to the BIA/CWLA Indian Adoption Project. Counting the period before 1958 and some years after it, CWLA was partly responsible for approximately 650 children being taken from their tribes and placed in non-Indian homes. For some of you, this story is a part of your personal history.

Through this project, BIA and CWLA actively encouraged states to continue and to expand the practice of “rescuing” Native children from their own culture, from their very families. Because of this legitimizing effect, the indirect results of this initiative cannot be measured by the numbers I have cited. Paternalism under the guise of child welfare is still alive in many locations today, as you well know. [...]

While adoption was not as wholesale as the infamous Indian schools, in terms of lost heritage, it was even more absolute. I deeply regret the fact that CWLA’s active participation gave credibility to such a hurtful, biased, and disgraceful course of action. I also acknowledge that a CWLA representative testified against ICWA at least once, although fortunately, that testimony did not achieve its end.

As we look at these events with today’s perspective, we see them as both catastrophic and unforgivable. Speaking for CWLA and its staff, I offer our sincere and deep regret for what preceded us.”

ICWA HISTORY

In the mid-1970's, as a result of activism by Indian tribes tired of their children being removed, the United States Congress authorized the creation of the American Indian Policy Review Commission. The Commission created 11 task forces to address key aspects of the federal Indian relationship. Task Force Four dealt with the issues of federal, state, and tribal jurisdiction, including child welfare.

The Task Force Four Final Report cites a frequently asked question: since both Indian and non-Indian systems act in the best interests of the child, what difference does it make as to who makes the decision about Indian children? According to the report, the difference is that the decisions were inherently biased by the cultural setting of the decision maker when decisions are made by non-Indian authorities. **The report further notes a curious paradox: that many early non-Indian commentators praised familial and tribal devotion to their children. Yet now, after generations of contact and conflict with western "civilization," so many Indian families are perceived as incapable of child rearing.**

In the Congressional hearings preceding ICWA's passage, Congress found: 1) that Indian children are vital to the continued existence of Indian Tribes and therefore must be protected; 2) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of children by public and private agencies and that an alarmingly high percentage of such children are then placed in non-Indian homes and institutions; and 3) that the States have failed to recognize the tribal, social, and cultural standards prevailing in Indian communities and families.

Congress, in passing the Indian Child Welfare Act of 1978, stated that it was the United States' policy to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. To do so, minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes reflecting the unique values of Indian culture were established.

The Indian Child Welfare Act was passed to remedy bias and the problems of unresolved grief and loss from the historic traumas of the past.

FOLLOWING THE SPIRIT OF ICWA



JUDICIAL COUNCIL OF CALIFORNIA

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



Following The Spirit of the Indian Child Welfare Act (ICWA)

A guide to understanding the benefits of providing culturally appropriate services to Native American families from non-federally recognized tribes within the juvenile dependency and delinquency systems⁵

In an effort to ensure proper inquiry and noticing and to reduce the number of ICWA-related appeals in child welfare cases, this handout is intended to help social workers and others respond when they encounter children and families that report American Indian or Alaska Native ancestry yet find they are not from a federally recognized tribe. What is good social work practice in these cases, and how can courts support culturally centered practice that results in positive outcomes?

How to Provide “Spirit of the Law” ICWA Services

- Find out which tribes and Native American resources are in your area.
- Visit and establish connections with local tribes and Native American resources regardless of federal recognition status.
- Request ICWA training from tribal resources, California Department of Social Services training academies, or with staff from the Judicial Council of California.
- Conduct a proper inquiry of possible Native American ancestry in every case at the front end and throughout the duration of the case if family members provide additional lineage information.
- Connect a child and family with their tribe and local Native American resources regardless of tribal affiliation.
- Assist the child or family with the tribal enrollment process but understand it is up to the tribe to determine who is or is not eligible for enrollment.
- Conduct placements consistent with ICWA placement preferences even though not technically required. In the case of non-federally recognized tribes, tribal members would likely meet requirements as nonrelated extended family members because tribal communities tend to be related or close-knit communities.

⁵ This document was developed with the Fresno County Department of Social Services, Child Welfare Services, and Placer County System of Care as part of the American Indian Enhancement of the Casey Family Programs/Child and Family Policy Institute of the California Breakthrough Series on addressing disproportionality 2009–2010 in collaboration with the American Indian Caucus of the California ICWA Workgroup, Child and Family Policy Institute of California, Stuart Foundation, and Tribal STAR.



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- Consider the child’s tribal members as viable options for holiday visits, tutors, mentors, Court Appointed Special Advocates, etc.

The Benefits of Providing “Spirit of the Law” ICWA Services

- If the child’s tribe is seeking federal recognition and is granted such recognition, formal ICWA case services, such as active efforts to prevent the breakup of the Indian family, will be required. If ICWA active efforts are attempted before the federal recognition, it is less disruptive for the child than having to change services and placement to make them in accordance with ICWA.
- Welfare and Institutions Code section 306.6 leaves the determination of services to individuals of non-recognized tribes to the discretion of the court that has jurisdiction.
- Even if individuals are not associated with a federally recognized tribe, they can still be part of an Indian community, which can serve as a strength and provide resources that enhance resilience factors for youth.
- Native American agencies that serve youth regardless of their tribe’s status can have youth groups that provide mental health and substance abuse services as well as fun trips, at no cost to the county.
- Many resources available to Native Americans do not require status in a federally recognized tribe (such as tribal Temporary Assistance for Needy Families (TANF), Native American health centers, and title VII Indian education programs).
- Some Native American health centers can access funding for residential treatment in and out of the state for children who are from non–federally recognized tribes.
- When culturally centered practice is provided as early as possible, it can result in positive outcomes for tribal youth.
- Linking a child to cultural resources that support his or her development into a healthy self-reliant adult can reduce the number of times the person may enter public systems.
- Culturally centered practice provided at the front end and throughout the lifespan of the case, regardless of the recognition status of the tribe, can reduce the public burden of cost over time.

Historical Background

- In 1848, gold was discovered in Coloma, California.



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- In 1851 and 1852, representatives of the United States entered into 18 treaties with tribes throughout California that would have provided for more than 7.5 million acres of reserve land for the tribes' use. These treaties were rejected by the U.S. Senate in secret session. The affected tribes were given no notice of the rejection for more than 50 years, and the promised reserve lands were never provided.
- In 1928, a census was conducted to determine the number of American Indians in California, resulting in the establishment of the 1933 California Indian Rolls (also referred to as the California Judgment Rolls). The purpose of the census and the rolls was to determine the number of Indians in California who had families alive in 1851–1852, when treaties were signed by the original Californians.
- From 1953 to 1964, called the “Termination Era,” the U.S. Congress terminated the federal recognition status of more than 40 California tribes. These tribes were deemed as not federally or state recognized, though previously descendants of these tribes were federally recognized.
- Many tribes that were terminated are currently seeking federal recognition by the U.S. government.
- Tribal communities throughout California are active and thriving, whether or not they have federal recognition.
- Descendants of family members listed on the California Judgment Rolls can use this documentation of Native American ancestry to provide information as to tribal affiliation. *Note:* Finding an ancestor on the roll does not mean an individual is an enrolled member in that particular tribe. Only one tribe can be listed on this document, and it is possible to descend from more than one tribe.
- Senate Bill 678, passed in 2006 by the California Legislature, allows participation of non–federally recognized tribes, on request and at the discretion of the judge in the dependency matter. This expands the option and availability of culturally appropriate services to children from non-recognized tribes.

Additional Tips for Practice

- Some tribes include descendants as members, not only those who are enrolled.
- Best practices will vary depending on the location, available resources, and tribe.
- If you are having challenges in working with the family, local Native American agencies or tribes can assist.
- If the family requests additional resource information to trace its lineage, you can provide the following resource information:
 - The tribe;
 - Mission church records;
 - Mormon genealogical records;
 - Historical societies and museums;
 - Genealogical Web sites; and
 - Historical statistical information and documents in the county of the family's origin

TRIBAL SOVEREIGNTY

Tribal Sovereignty and Child Welfare⁶ Practice Tips for social workers to understanding government to government relations in ICWA cases.

Sovereignty is a word of many meanings. Merriam Webster defines Sovereignty as a: supreme power especially over a body politic; b: freedom from external control: see autonomy; c: controlling influence⁷. Generally, the term refers to the inherent right or power to govern. Under the U.S. constitutional system, this right is inherent in the people and is exercised through their representative local, state, and federal governments. This is somewhat comparable to the inherent sovereignty of Indian people in the tribal context.⁸

As recognized by Congress, the executive branch, and the Supreme Court, tribes' right to govern their members and remaining territories derive from a sovereignty that pre-dates European arrival. Treaties entered with tribes by the U.S. and other countries is one example of the longstanding relationship between the United States and tribes as sovereign nations.

The principal attributes of tribal sovereignty today can be generally summarized as follows: (1) Indian tribes possess inherent governmental power over all internal affairs, (2) the states are precluded from interfering with the tribes' self-government, and (3) Congress has plenary (i.e., near absolute) power to limit tribal sovereignty and thereby limit the first two attributes.⁹ The federal policy of tribal self-determination, with its beginnings in the 1930s and a renewal in the 1970s, had created opportunities for tribes to retain their sovereignty and to overcome some of the restraints arbitrarily or improperly

⁶ This document was developed by the American Indian Enhancement team in collaboration with the National Resource Center for Tribes, and Tribal STAR with technical support from the Hon. William Thorne. The American Indian Enhancement Team is an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC) resourced through the Annie E. Casey Foundation, California Department of Social Services, CalSWEC, Casey Family Program, Child and Family Policy Institute of California, and the Stuart Foundation. Revised 11/2015.

⁷ Sovereignty. 2009. In *Merriam-Webster.com*. Retrieved July 15, 2009, from <http://www.merriam-webster.com/dictionary/sovereignty>

⁸ Utter, Jack, *American Indians: Answers to Today's Questions: H-8s: Legal Status and Tribal Self-Government* 1993

⁹ *Ibid.*

placed on that sovereignty over the past 150 years¹⁰.

Social workers who have American Indian/Alaska Native children on their case load may be unaware that the Indian Child Welfare Act applies to their case or of the affect the law and tribal sovereignty may have on their case. Why is there a law that specifically targets American Indian children in child welfare? Why aren't there other laws that address the needs of other groups such as African Americans or Hispanic/Latinos? Simply put, being American Indian is not only a cultural distinction; it is also a political one. The United States has a government-to-government relationship with American Indian/Alaska Native tribes and through that relationship has the obligation to protect the best interests of American Indian children and to promote the stability and security of Indian tribes and families¹¹

Tribes exercise their sovereignty in *many ways*, including designating ICWA representatives to receive notice from state child welfare agencies and state courts; appointing an ICWA representative in order to ensure that the tribe is informed and can respond to the notice; defining expert witness criteria, and recommending Tribal Customary Adoption as a permanency option for its children.

Tips for Social Workers

1. Learn about the tribe(s) in your county and state. You can obtain a copy of ICWA designated agents at <http://www.tribal-institute.org>.
2. Be aware that when a tribe intervenes in an ICWA case involving their child, the tribe is then a party to the case and legally entitled to the same rights as all other parties to the case.
3. In cases where the child's tribe is geographically too far to participate in the court process the tribe may designate a representative to appear in court on the tribe's behalf.
4. If the child's tribe does not intervene in a case or assume jurisdiction, the case continues to maintain ICWA status and culturally appropriate active reunification services are still required.
5. Tribes exercise sovereign status in many ways, including during Tribal Customary Adoption, and to define criteria for expert witness.

¹⁰ Ibid.

¹¹ 25 U.S.C. §1902

6. Communicate with tribes as though you were contacting the governor's office of a neighboring state. Show the same level of respect and adhere to appropriate protocols as you are dealing with representatives of a sovereign nation.
7. Respectfully consider what the tribe has to say; otherwise the tribe may decide to pursue legal avenues which could be timely and costly. If respect and courtesy is established early on in the relationship there is a greater potential for collaboration on case options. The more options, the better chances for positive outcomes for Indian children.
8. Attempt to resolve the case informally before having to resolve the case before a judge.



THE INDIAN CHILD WELFARE ACT

PURPOSE AND BASIC PROVISIONS



FIVE PROVISIONS

INQUIRY AND NOTICE

ACTIVE EFFORTS

PLACEMENT

CONCURRENT PLANNING

QUALIFIED EXPERT WITNESS



INQUIRY AND NOTICE

INQUIRY

Many children who are eligible for the protection of the Indian Child Welfare Act do not appear to be Indian. Many are of mixed racial heritage, African American-Indian, Caucasian-Indian, Latino-Indian, and Asian/Pacific Islander-Indian. In the southwest area of the country, including California, many children have Spanish or Hispanic surnames. Do not assume that a child is not American Indian because the child does not look American Indian, or because the surname would indicate a different ethnic group.

File Edit Search Action Associated Attach/Detach Window Help Toolz

Summary | ID | Demog. | Address | Names | Related Clients | ID Num | Juv. Cit. # | Search Log | AFDC-FC | Attorneys | Service Providers | **ICWA** | Adoption Info | AAP Eligibility

ICWA

Tribal Membership

Tribal Affiliation	Tribe	Child Status	Parent

Tribe Location: [Dropdown] Tribal Affiliation: [Dropdown] Tribe: [Dropdown] **Family Tree**

Child Membership Status: [Dropdown: Member] Status Date: [Dropdown: 12/10/2003] Enrollment Number: [Text] **Membership Status / Date**

Ancestor Information

Relative Type	Name

Relative Type: [Dropdown] Name: [Form with fields: Title, First, Middle, Last, Suffix]

The court, social services, probation and any party seeking foster care placement, guardianship or adoption (including tribal customary adoption (the petitioner) all have an ongoing duty to inquire about whether a child is an Indian child. If there is reason to know an Indian child is

involved in the proceeding, further inquiry must be made. Inquiry should be made at the initial intake and again if the child will be placed in foster care.

Reason to know exists when:

- A person having an interest in the child provides information suggesting the child is a member or eligible for membership in a tribe and/or one or more of the child's biological parents, grandparents or great grandparents was or is a member of a tribe;
- The residence or domicile of the child, parents, or Indian custodian is in a predominantly Indian community
- The child or family has received tribal services or benefits or federal services available to Indians.

Best Practice Tip: Presume the child is an Indian child unless and until information is discovered that indicates otherwise.

Inquiry should be made of anyone who reasonably could be expected to have information regarding the child's membership in a tribe or eligibility for membership in a tribe and include: parents, Indian custodian, extended family members; the child (if old enough); and tribes. Information for contacting the tribes can be found in the Federal Register listing of ICWA agents, the Federal Register listing of federally-recognized tribes or by contacting the BIA or CDSS.

When inquiry is made, the following questions should be asked:

- Names, former names, aliases, maiden names of biological parents, grandparents, great grandparents and Indian custodians
- Current and former addresses
- Birthdates
- Places of birth and death
- Tribal enrollment numbers
- Name of tribe(s) and contact information
- Any other identifying information, if known.

Best Practice Tip: If a child is moving into permanency on the adoption track and the records do not indicate whether the child is Indian or may be Indian, make the inquiry before proceeding with the adoption. Document the information clearly in the files.

NOTICE

Notice is critical to ensuring ICWA compliance. Notice allows a tribe to determine whether a child is an Indian child, advises the tribe of pending proceedings and ensures the tribe has an opportunity to intervene or assume jurisdiction of the case. Without notice to the tribe, ICWA's underlying policy is undermined.

Notice must be provided when the Court, social worker, probation officer or petitioner knows or has reason to know an Indian child is involved in the proceedings. The Court, social worker, probation officer or petitioner are responsible for providing notice to 1) the parents or Indian custodian; 2) all tribes of which the child may be a member or eligible for membership; 3) any agents for the tribe who may be designated by the tribe to receive notice; 4) the Bureau of Indian Affairs and 5) the Secretary of the Interior. Information for contacting the tribe(s) can be found in the Federal Register listing of ICWA agents, the Federal Register listing of federally recognized tribes or by contacting the BIA or CDSS.

Notice is provided by registered mail with return receipt requested. Notice must include the following information:

- Hearing information (date, time, type)
- Identifying information of child and name of the tribe
- Copy of the petition
- Statement of the rights of the party receiving the notice, including: the right to intervene, to transfer the case to tribal court, to counsel, and the potential legal consequences on custodial/parental rights)
- Statement that information in the notice and other court documents is confidential and anyone receiving notice shall maintain confidentiality
- Family history information (names, addresses, birthdates, birthplaces, tribal enrollment information and any other identifying information if known)
- Child's birth certificate
- Location and contact information for the court
- Information about all parties notified (except where disclosure creates a risk of harm as a result of domestic violence, child abuse, sexual abuse, stalking)

Notice must be received ten days prior to the hearing except if the hearing is a detention hearing, and then notice must be given as soon as possible after filing the petition. If the court, social worker, probation officer or petitioner subsequently receives information that is required in the notice that was not previously provided, notice must be sent again. Those giving notice must file proof of notice with the court in advance of the hearing.

Anyone who knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child or who counsels a party to conceal this information is subject to court sanction.

Skill-building Activity: How do you complete inquiry?

You, the social worker, are visiting a family and notice American Indian art / artifacts in the living room. This includes a Native American poster and a figurine of an American Indian and a buffalo, among other items. During the initial investigation you learn that the child, his mother, his mother's sister, and sometimes the child's maternal grandmother are sharing the two bedroom apartment. During this visit only the mother and sister are visiting with you; the grandmother is in another part of the house. You state that if they are American Indian/Alaska Native there may be additional services available to the child and family and ask the mother and her sister whether they or the child are members of an American Indian or Alaskan tribe. They both answer "no". Then you ask if they know if the father is a member of a tribe. The mother answers "no," but her sister states "I asked him where his family came from and he said originally they are from Montana, and he mentioned a tribe but I can't remember which one."

What do you do next to identify whether this is an Indian child?

What do you do if you are not able to reach the father or any of the father's relatives?



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Social Work Practice Tips for Inquiry and Noticing *Reasons Why People Do Not Claim to Be American Indian*¹²

There are many reasons why individuals do not claim their American Indian heritage. This has implications for ICWA compliance especially in the area of inquiry and noticing. If an Indian child is not known to be American Indian/Alaskan Native (AI/AN) how can social workers and service providers ensure culturally effective services and case plans?

Below is a brief list of responses that can be given by individuals that do not claim their American Indian heritage.

- *“I know we’re part Indian but not enough.”*
- *“I, my mom, or my dad was adopted.”*
- *“No one knows the real history anymore, that person passed a long time ago.”*
- *“No one talks about it.” And/or “We don’t talk about it with anyone.”*
- *“I heard our family was disenrolled.”*
- *“It was painful so we don’t talk about it.”*
- *“We heard different stories and are not sure if it’s true or not.”*
- *“Grandpa only talked about it late at night.”*
- *“It’s in the past now, you can’t go back.”*
- *“Someone lost the papers.”*
- *“I can’t prove it.”*
- *“I didn’t know until recently, so I don’t think we qualify.”*
- *“When dad came here to work we lost our history.”*
- *“I don’t know our history, but I heard something. We were told we didn’t need to know.”*
- *“No one speaks the language anymore, so we don’t talk about it*

¹² This document was developed as part of the American Indian Enhancement of the Annie E. Casey, Casey Family Programs, & Child and Family Policy Institute of the California Breakthrough Series (BSC) on addressing disproportionality 2009-2010 with support from the Bay Area Collaborative of American Indian Resources (BACAIR), Human Services Agency of San Francisco Family and Children Services, Alameda County Social Services, and in collaboration with the American Indian Caucus of the California ICWA Workgroup, Child and Family Policy Institute of California, Stuart Foundation, and Tribal STAR. Revised January 2016.



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Practice Tips to ensure effective inquiry:

1. It is important to ask every family and every child if they have American Indian/Alaska Native ancestry even though they may not “look” as though they have American Indian/Alaska Native ancestry. Remember that many American Indian families will have Spanish last-names as a result of the influence of Spanish Missions from 1769 – 1823.
2. Encourage social workers/intake workers to *state (rather than ask)*, “if you are AI/AN or believe you may be affiliated with a tribe, there are additional services (ICWA) that are available to you.”
3. Talking to that family historian may yield a lot of information. Ask them “who are the keepers of the family history?” Usually there is one family member, or a few, who are gifted in this area.
4. Consider asking families about specific areas relatives may have lived or originated from. “Has anyone in your family ever lived on a reservation?”
5. Consider asking if they also have ever utilized Native American services, or if anyone has in the family?
6. Remember to continue to cultivate and build trust-based communication with children and families and continue to ask if they have AI/AN ancestry throughout the life of the case.
7. Document all your efforts of inquiry and document all you do to achieve proper inquiry and notice.

Background

It is a significant challenge for American Indians who have been removed from their tribe to claim tribal ties to a Native American community. This can be due to the complex process of identifying ancestors and being able to establish family blood lines. How an individual comes to know their heritage, and how much they know varies from region, to tribe, to family. With over 500 recognized tribes, over 100 terminated tribes, and countless unrecognized tribes across the United States each family has a unique history with their tribe. As a result of federal and state policies that promoted assimilation and relocation (1830s Removal Era through 1950s Termination Era), many individuals and their families lost connection to their relations, customs,



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and traditions. The effects of boarding schools, and religious proselytizing, left many with the perception that it was better to pass as non-Indian than to claim their tribal status. In 1952 the federal government initiated the Urban Indian Relocation Act designed to increase the American Indian workforce in eight cities (Los Angeles, San Francisco, San Jose, St. Louis, Cincinnati, Dallas, Chicago, and Denver,).

Historical and federal efforts to quantify and track the American Indian/Alaska Native populations through the census, and the establishment of “Indian Rolls” resulted in documentation of enrollment in a tribe, often verified by blood quantum (amount/percentage of documented American Indian/Alaska Native blood). Tribal nations are not uniform in determining who is a tribal member through this manner. Some tribes acknowledge descent and ancestry verified by proof of family lineage rather than ‘how much Indian blood’. Conversely, in some cases, tribal enrollment policies exclude many individuals from enrollment for political, historical, and reasons known only to their tribal membership. Enrollment in a tribe may only be open at certain times, which can also affect an individual’s eligibility for enrollment.

Many descendants have only bits and pieces of information, sometimes passed along with quiet dignity, often with a longing to know more. What information was passed along may have been shrouded in shame or secrecy for unknown reasons resulting in reluctance to share the information. The number of families that are disconnected from their ancestral homeland grows exponentially each generation and many individuals find connection to Native American communities through intertribal, regional, and local cultural events. These community events enable a sense of belonging and kinship, and provide support for resilience through access to programs such as Title VII Indian Education, and Tribal TANF, that do not require proof of enrollment.

Scale of Assimilation from Traditional to Acculturated to Assimilated

The attributes or characteristics below this scale from Traditional to Acculturated to Assimilated in terms of cultural identity in the American Indian and are not all inclusive. It is important to remember that this is a scale and there is some fluidity and flexibility between each of the definitions. This shows the importance of the need for thoughtful engagement based on where an American Indian/Alaska Native person is on the scale. It is important for social workers not to accept stereotypes of American Indians that we see in the movies and television, or that we read about in books.

Traditional	←————→	Acculturated	←————→	Assimilated
<ul style="list-style-type: none"> • Speaks Native language, choosing not to speak language of dominant culture • Understands & practices tribal customs & traditions • Participates in tribal governance, religious, ceremonial & social activities • Acts in appropriate ways at religious, ceremonial & social activities • Practices traditional spirituality • Feels emotionally connected to tribe(s) • Socializes exclusively with other Native American people • Chooses to live on reservation and may grow crops or have a farm • Everyday life centers around immediate and extended family and Tribal community on the reservation • Walks and lives in the traditional Indian world 		<ul style="list-style-type: none"> • May be bi- or tri-lingual (speaks & understands Native language) • Understands tribal customs & traditions as well as customs of dominant society • Participates in tribal governance, religious, ceremonial & social activities and is familiar with and comfortable participating in like activities of the dominant culture • Acts in appropriate ways at religious, ceremonial & social activities both Tribal and non-Tribal • May practice both traditional spirituality and that of the dominant culture • Feels emotionally connected to tribe(s) • Socializes with other Native American people as well as with non-Tribal people • May have homes both on reservation and in urban area and lives in both • May grow crops or have a farm on reservation • Immediate and extended family very important to individual • Walks and lives in both worlds 		<ul style="list-style-type: none"> • Speaks only language of dominant culture • Has no connection to or understanding of tribal customs or traditions • Participates in religious, ceremonial and social activities of dominant culture • Practices spirituality of dominant culture Feels emotionally connected to dominant culture • Socializes solely with people from the dominant culture • Lives in housing of dominant culture • Has no connection to reservation • Primary relationships are with nuclear family • Makes no claims to Native ancestry and may even deny Native ancestry if questioned • Walks and lives in the world of dominant culture

Practice Tips:

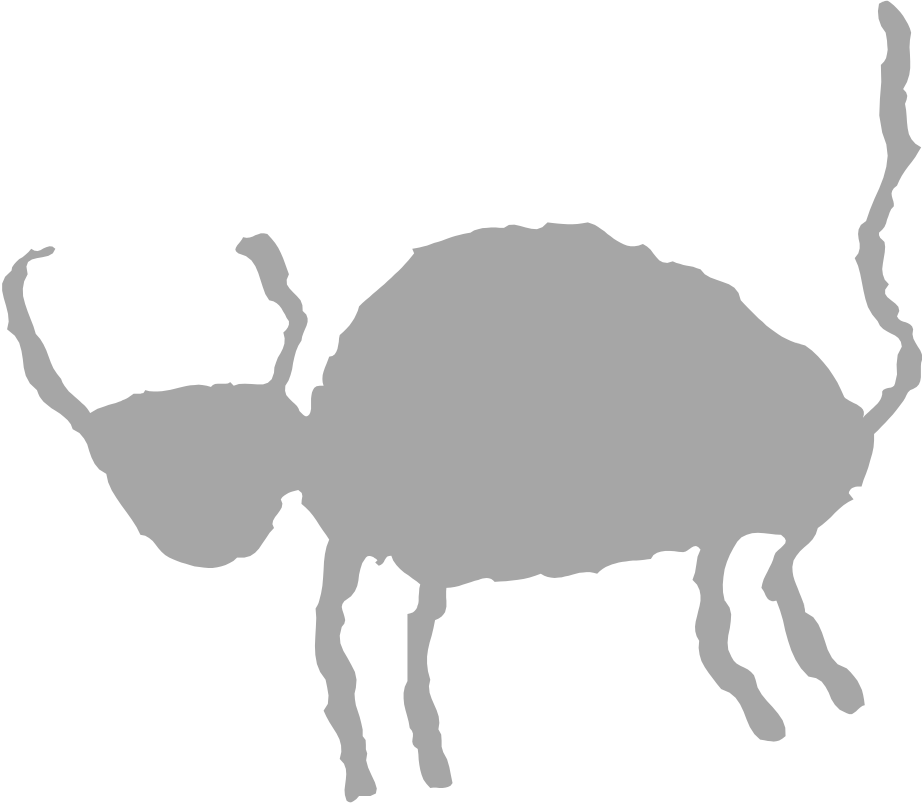
Consider protocol when approaching families and individuals who practice their traditional ways. Traditional families and individuals may not communicate in ways a social worker is used to.

Families and individuals who are acculturated will have some awareness of resources and systems, but will need support and follow through. Some protocol may be useful in supporting trusting relationships.

Assimilated families and individuals may or may not value their culture and heritage the same way as acculturated and traditional individuals. They may need encouragement and guidance on how to maintain ties to their cultural resources.

Personal Activity:

Write a few words that will help you remember what is important about inquiry and notice.



ACTIVE EFFORTS

According to the Bureau of Indian Affairs *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* (80 FR 10146, effective February 25, 2015), active efforts are intended primarily to maintain and reunite an Indian child with his or her family and tribal community. Active efforts constitute reasonable efforts defined by Title IV-E of the Social Security Act, but are separate and distinct from requirements of the Adoption and Safe Families Act. Compliance with active effort provisions of the Indian Child Welfare act requires:

1. A demonstration that active efforts were made not only prior to the commencement of the proceeding, but also active efforts were made until the proceeding.
2. A demonstration that active efforts were made until the commencement of the proceeding.
3. Documentation of what active efforts were made.
4. A showing that active efforts have been unsuccessful.

Active efforts include, but are *not* limited to:

1. Engaging the Indian child, his or her parents, family members and custodian;
2. Taking steps necessary to keep siblings together;
3. Actively engage the family and their safety network in a process to help them identify appropriate services and ways to overcome barriers, including actively assisting parents in engaging in services;
4. Actively engage the family and their safety network in a process to help them identify , notify, and invite representatives of the Indian child's tribe to participate;
5. Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and/or possible placement;
6. Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting assistance of representatives designated by that tribe who have substantial knowledge of the prevailing social and cultural standards;
7. Offering and employing all available and culturally appropriate family preservation strategies;
8. Completing a comprehensive and balanced assessment of the circumstances of the Indian child's family (what is working well, what are the concerns, etc.), with a focus on safe reunification as the most desirable goal;

9. Notifying, creating an ongoing safety network with and consulting with the Indian child's extended family members to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
10. Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
11. Actively engage the family and their safety network in a process to help them identify community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assist the Indian child's parents or extended family in utilizing and accessing those resources;
12. Monitoring progress and participation in services and engage the safety network in this process so they are able to support the family when the county is no longer involved.
13. Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;
14. Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
15. Providing post-reunification services during monitoring.

The requirement to engage in active efforts begins 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 in order to prevent removal. Active efforts must be conducted while investigating whether the child is a member of a tribe, is eligible for membership in a tribe or whether a biological parent of the child is a member of a tribe.

SKILLBUILDING ACTIVITY: ACTIVE EFFORTS VS. REASONABLE EFFORTS

Activity 1: For the list of activities below, mark whether it is an “Active Effort” or a “Reasonable Effort.”

	<u>Active Effort</u>	<u>Reasonable Effort</u>
Refer for counseling	<input type="checkbox"/>	<input type="checkbox"/>
Ask local tribe for referrals for Native American service providers	<input type="checkbox"/>	<input type="checkbox"/>
Make an appointment for counseling	<input type="checkbox"/>	<input type="checkbox"/>
Give mother the address to her drug testing appointment	<input type="checkbox"/>	<input type="checkbox"/>
Have the children’s father use the phone on your desk to make a doctor’s appointment	<input type="checkbox"/>	<input type="checkbox"/>
Contact client by phone every month while she is in rehab	<input type="checkbox"/>	<input type="checkbox"/>
Contact the manager of the apartment complex to inquire about an apartment for rent for the family	<input type="checkbox"/>	<input type="checkbox"/>
Call every month to check in with the foster parent	<input type="checkbox"/>	<input type="checkbox"/>
Check the phone book for Native American counselors	<input type="checkbox"/>	<input type="checkbox"/>
Make sure the client has a contact phone number for the parenting education services	<input type="checkbox"/>	<input type="checkbox"/>
Inform the client of the days and times of local AA/NA meetings	<input type="checkbox"/>	<input type="checkbox"/>
Refer the client to the local tribal TANF program for assistance with housing and employment	<input type="checkbox"/>	<input type="checkbox"/>

Activity 2: Change the reasonable efforts into active efforts.

Personal Activity:

Write a few words that will help you remember what is important about active efforts.

PLACEMENT

Who is extended family? Extended family is defined by the laws or customs of the child's tribe. If there is not a law or custom defining extended family, then an extended family member is anyone who is at least 18 years old and the child's grandparent, aunt or uncle, sibling, brother-in-law or sister-in-law, niece or nephew, first or second cousin or stepparent.

What is the order of preference for foster care placement? ICWA prescribes a specific order of placement for an Indian child who is in foster care or a pre-adoptive placement. A child in such placement must be placed in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. The child must be placed within reasonable proximity to his or her home, also taking into account any special needs of the child. In the absence of good cause to the contrary, the placement preferences are as follows:

1. a member of the Indian child's extended family;
2. foster home licensed, approved or specified by the Indian child's tribe;
3. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

What is the order of preference for placement for a permanent or adoptive placement? For an Indian child who will be in adoptive placement, the preferences are as follows:

1. a member of the child's extended family;
2. other members of the Indian child's tribe; or
3. other Indian families.

There is no fourth item in the order of preference that allows for adoption of Indian children by non-Indians.

Can different order of placement be used? A different order of placement may be used if the Indian child's tribe establishes a different order of preference by resolution, and the agency or court affecting placement but abide by this preference as long as it is the least restrictive setting appropriate to the needs of the child.

What standards are used in applying preference requirements? It is important to remember that *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 members maintain social

and cultural ties applies in meeting ICWA placement preference requirements. Why is this important? Recall that historically bias played a major role in the unwarranted removal of Indian children from their homes: social workers often based their decisions to remove on their own standards of cleanliness, child-rearing, and care with no understanding or consideration given to the cultural standards of the community.

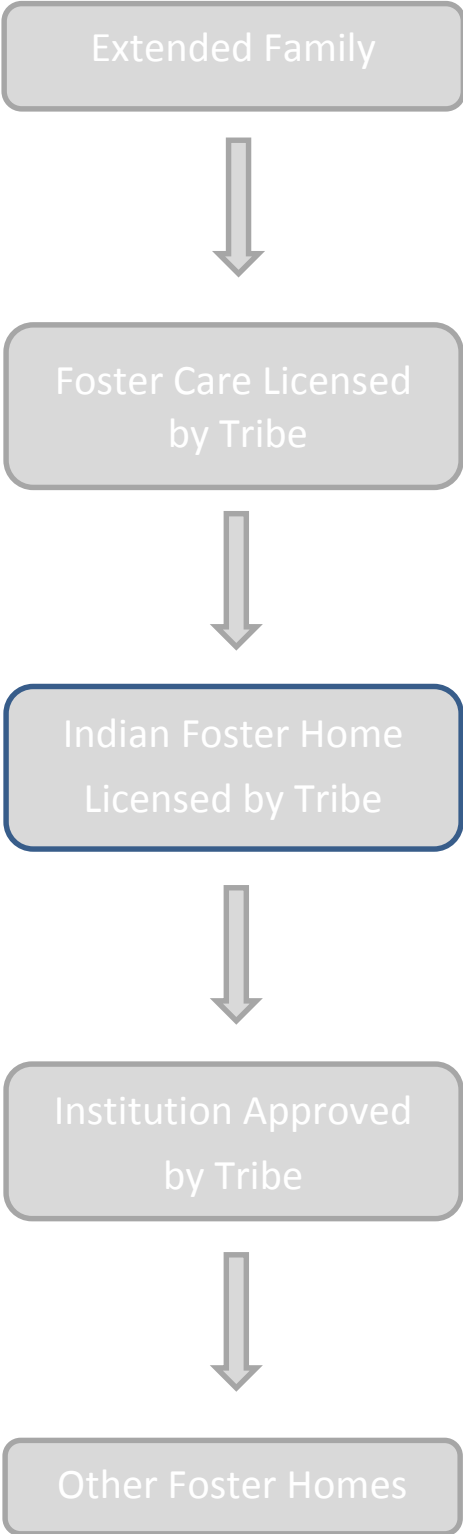
When else do placement preferences apply? Placement preferences also apply whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, except where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

NOTE: ICWA does not prevent the emergency removal of an Indian child who is a resident of or domiciled on a reservation, but temporarily located off the reservation, or the placement of that child in foster care in order to prevent physical damage or harm to the child. However, the authority involved in the emergency removal or placement must ensure it terminates immediately when it no longer is necessary to prevent imminent physical damage or harm to the child. The intervening authority must expeditiously initiate a child custody proceeding, transfer the child to the tribe’s jurisdiction or return the child to the parent or Indian custodian as may be appropriate.

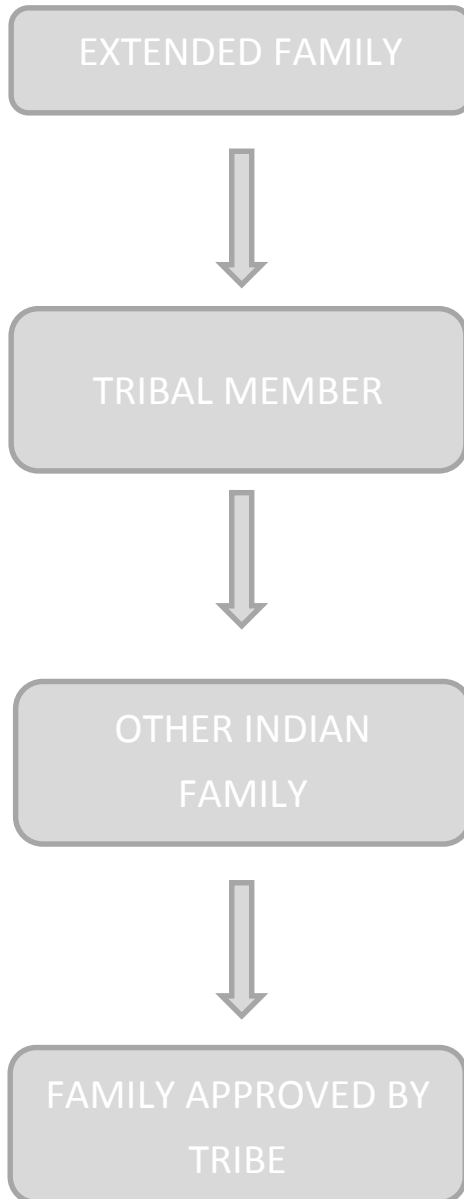
Personal Activity:

Write a few words that will help you remember what is important about placement.

ICWA FOSTER CARE PLACEMENT PREFERENCES



PERMANENCY PREFERENCES



ACTIVITY

1) Write the order of placement for a foster care placement as described in the ICWA;

2) Write order of preference for a pre-adoptive or adoptive placement.

CONCURRENT PLANNING

Concurrent planning is a practice technique used by social workers in which the social worker and the family simultaneously plan for *reunification* and an *alternate permanent placement* if reunification is not possible.

The purpose of concurrent planning is to eliminate delays in permanency for children in foster care. It requires consideration of all reasonable permanent placement options—including reunification-- as early as possible after a child's entry into foster care and pursuing those that will best serve the child's needs.

Concurrent planning is more important in an ICWA case because in California, tribal customary adoption is recognized as a permanent placement option. Tribal customary adoption is virtually the same as an ordinary adoption, except parental rights are not terminated. Concurrent planning must occur immediately upon the child being placed in out-of-home care and in consultation with the child's Indian tribe.

Questions to consider when recommending a permanency plan for Indian children:

1. How should the agency and the court approach concurrent planning in an ICWA case?
2. How involved should the child's tribe be in concurrent planning?
3. What unique considerations are there in permanency planning for Indian children?
4. What different permanency options should be considered for Indian children?



Personal Activity:

Write a few words that will help you remember what is important about concurrent planning and tribal customary adoption.



“Indian families stick together like Gorilla Glue, the strongest adhesive in the world. My mother and father both lived within two miles of where they were born, and my grandmother lived one mile from where she was born. Ever since the Spokane Indian Reservation was founded back in 1881, nobody in my family had ever lived anywhere else. We Spirits stay in one place. We are absolutely tribal. For good or bad, we don't leave one another.”

--Sherman Alexie, *The Absolutely True Diary of a Part-Time Indian*
New York: Little, Brown and Co., 2007.

EXPERT WITNESS

When must a qualified expert witness be used? The testimony of one or more qualified expert witnesses must support a conclusion that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. Foster care placement of an Indian child may not be ordered until the party seeking placement establishes this conclusion. Likewise the termination of parental rights may not be ordered until a determination is made that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. Evidence supporting this conclusion must include the testimony of one of more qualified expert witnesses.

What does a qualified expert witness do? A qualified expert witness addresses the issue of whether continued custody by a parent or Indian custodian is likely to result in serious emotional or physical damage (detriment) to the child. The qualified expert witness also provides the court with information about the social and cultural aspects of Indian life in order to diminish the risk of any cultural bias. Additionally, the qualified expert witness provides testimony as to whether the child was in imminent danger at the time of removal when that removal took place without remedial services to prevent it and whether decisions are being unduly influenced by inappropriate cultural biases. Qualified expert witness testimony is not required to support the active efforts finding, but the expert can speak to this issue and help identify culturally appropriate remedial services and rehabilitative programs designed to prevent the break-up of the family.

Who may be a qualified expert witness? A social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leaders, tribal historian, or tribal elder are all able to be a qualified expert witness. Those likely to be a qualified expert witness are:

- 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 child rearing practices;
- Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices with the child's tribe;
- A professional person with substantial education and experiences in the area of his or her specialty.

Qualified expert witnesses cannot be an employee of the person/agency recommending foster care placement or termination of parental rights. County social workers are disqualified from being expert witnesses in the same county where the workers are employed.

When should an expert witness be contacted? It is helpful if the petitioner identifies the expert witness, or witnesses, upon initial contact with the child and asks the tribe for its qualified expert witnesses. If no tribe is involved, begin the recruitment early and avoid waiting until the hearing is near. The Judicial Council of California, Administrative Office of the Courts' Center for Children, Families and Courts Indian Program has posted a list of individuals who are identified as qualified experts for ICWA purposes. This list is a resource and any agency or individual seeking to use an individual on the list is responsible for independently evaluating that person for suitability for participating in an ICWA proceeding.

Tribal and Expert Witnesses

Frequently tribes are asked for qualified expert witness testimony. Tribes can provide testimony about the relevance of cultural norms in a particular case and county/state compliance or lack of compliance with ICWA requiring compliance with those norms. The tribal qualified expert witness may be a tribal member, social worker, ICWA worker, tribal elder, tribal historian, tribal service provider or tribal spiritual leader. Tribes outside of California often decline to provide their own qualified expert witness—they seldom have the resources to do so.

It is the responsibility of the removing party to obtain qualified expert witness testimony. However, in some cases, it is beneficial to the tribe to provide a rebuttal witness, and often for the children's attorney and the parents' attorney. These options are seldom used and need to be encouraged. Qualified expert witness testimony can have an enormous impact on a case and counties should always try and work with tribes to secure qualified expert witnesses.

Note that the court may accept a declaration or affidavit in lieu of live testimony from the qualified expert witness but only if the parties have consented in writing and the court is satisfied the consent is knowingly, voluntarily and intelligently made.

Personal Activity:

Write a few words that will help you remember what is important about qualified expert witnesses.

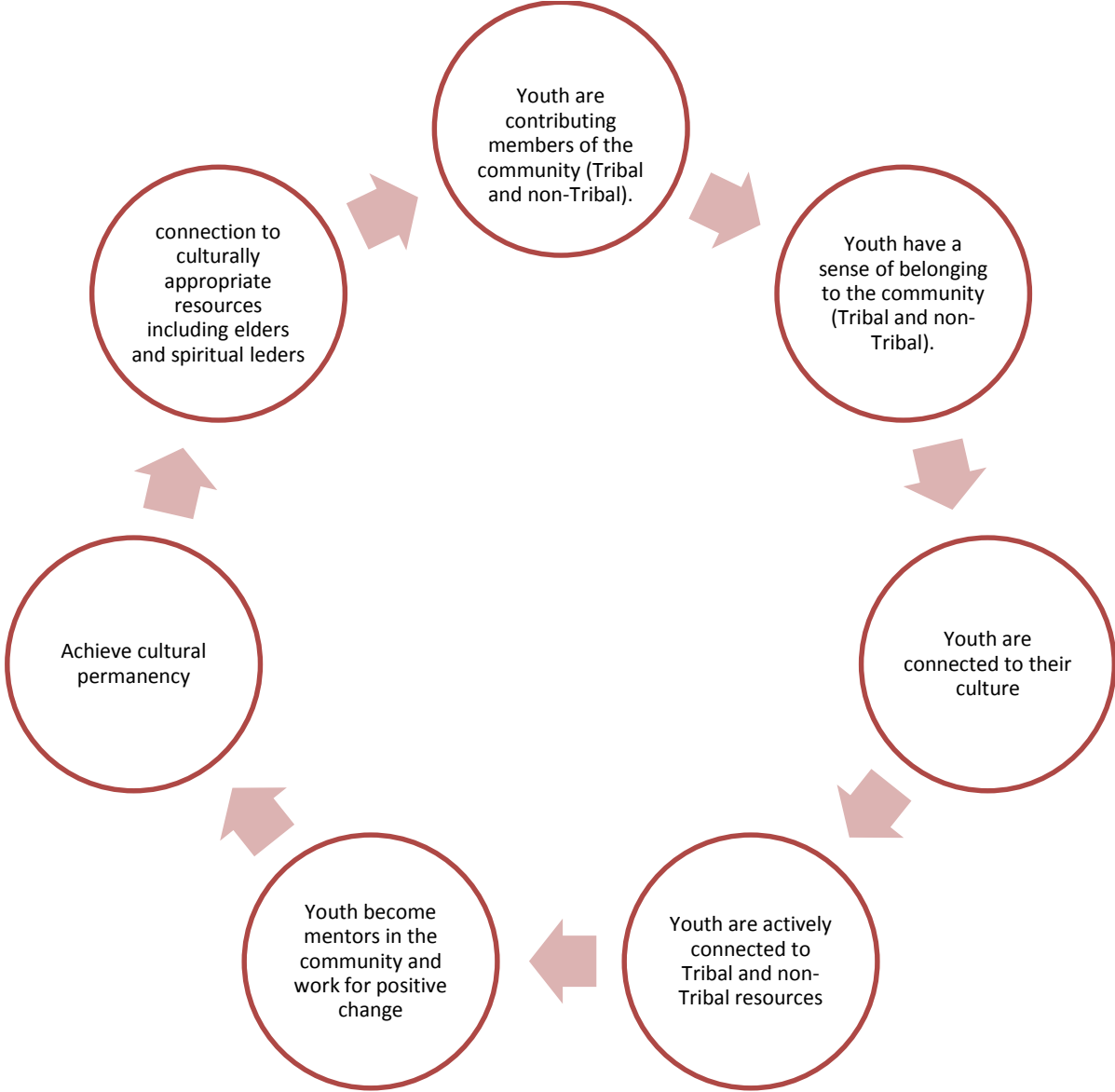


CURRENT ISSUES /OUTCOMES FROM A TRIBAL PERSPECTIVE

- Lawsuits challenging ICWA
- Tribally Approved Foster Homes: Tribes are now able to complete background checks, part of the process of approving foster homes for children in dependency
- New Statewide Practice Model: Best practices in California include partnering with Indian tribes to meet the needs of Indian children and families
- After 18 Care: AB 12 (Extended Foster Care) contains provisions to ensure ICWA applies to American Indian youth and that they are eligible for benefits
- US Department of Justice ICWA Compliance Initiative: In December 2014 during the White House Tribal Nations Conference, US Attorney General Eric Holder announced that the DOJ was launching an effort to actively identify state-court cases where the US can file briefs opposing the unnecessary and illegal removal of Indian children from their families and communities. The DOJ will collaborate with the Department of Interior (BIA) and Health and Human Services to promote compliance. Additionally, the initiative will promote training for state judges and agencies; promote Tribes' authority to make placement decisions; track data about where ICWA is violated and take action to ensure ICWA compliance.
- The American Indian Enhancement (AIE) Project Toolkit provides resources to assist in developing programmatic infrastructure for child welfare agencies to improve outcomes for American Indian and Alaska Native families and children in the child welfare system.



Positive Outcomes from a Tribal Youth Perspective

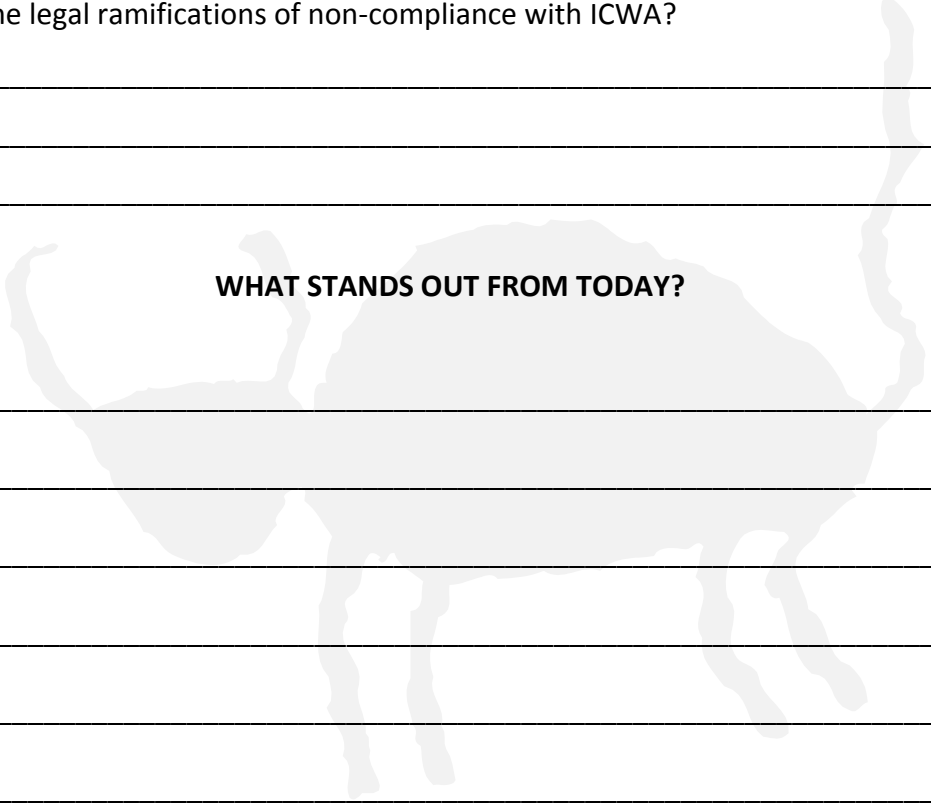


PERSONAL ACTIVITY

What are some of the positive outcomes of ICWA compliance for tribal youth?

What are the legal ramifications of non-compliance with ICWA?

WHAT STANDS OUT FROM TODAY?



TRIBAL STAR PRODUCTS AND SERVICES

THE SUMMIT

The Summit Curriculum provides in-depth information that supports managers and supervisors of programs that serve Tribal youth. The curriculum provides an overview of the issues facing child welfare and Indian Child Welfare workers and includes recommendations, Tips for Protocol, and other resources designed to enhance cross-cultural relationships at the micro and macro levels.

The Summit Workbook for participants is a booklet that is distributed to trainees, and provides an overview of the issues facing child welfare and Indian Child Welfare workers and includes recommendations, Tips for Protocol, and other resources designed to enhance cross-cultural relationships at the micro and macro levels.

The Tribal STAR Journal is a small booklet designed to help participants remember core Native American values and provides blank pages for notes, reminders, and contact information.

The Summit PowerPoint is the interactive multi-media PowerPoint that helps trainees follow the workbook and begin to understand key concepts provided in the Summit Curriculum. The PowerPoint provides prompting questions at the beginning of each section to stimulate thought and gauge understanding about each module.

THE GATHERING

The Gathering Curriculum provides in-depth information that supports front-line staff of programs that serve Tribal youth. The curriculum provides an overview of the issues facing child welfare and Indian Child Welfare workers and includes recommendations, Tips for Protocol, and other resources designed to enhance cross-cultural relationships at the micro and macro levels.

The Gathering Workbook for participants is a booklet that is distributed to trainees, and provides an overview of the issues facing child welfare and Indian Child Welfare workers and includes recommendations, Tips for Protocol, and other resources designed to enhance cross-cultural relationships at the micro and macro levels.

The Tribal STAR Journal is a small booklet designed to help participants remember core

Native American values and provides blank pages for notes, reminders, and contact information.

The Gathering PowerPoint is the interactive multimedia PowerPoint that helps trainees follow the workbook and begin to understand key concepts provided in the Summit Curriculum. The PowerPoint provides prompting questions at the beginning of each section to stimulate thought and gauge understanding about each module.

THE INDIAN CHILD WELFARE ACT (ICWA)

Let the Spirit Lead...In the Best Interest of the Indian Child Curriculum includes engagement strategies that encourage participation of local and regional Tribal representatives when implementing training at the local level. The two most critical aspects of this curriculum are knowledge of the historical significance of the ICWA and skills for engagement with Tribal people and communities. The curriculum provides a brief history of ICWA to provide a cultural and historical context, and focuses on the following ICWA requirements: Inquiry and Noticing, Placement, Active vs Reasonable Efforts, Concurrent Planning, and Expert Witness. Participants increase skills around inquiry and identification of an Indian child, and understanding of the Spirit of ICWA.

Let the Spirit Lead...In the Best Interest of the Indian Child Workbook for participants is a booklet that is distributed to trainees, and provides an overview of ICWA requirements, social work practice tips, skill building worksheets, and questions for participants to consider as they experience the training.

Let the Spirit Lead...In the Best Interest of the Indian Child PowerPoint is the interactive multi-media power point that helps trainees follow the workbook and begin to understand key concepts provided in the curriculum. The PowerPoint provides prompting questions at the beginning of each section to stimulate thought and gauge participant understanding about each segment.

THE COLLABORATIVE

The Collaborative is an adapted half-day training designed to introduce Tribal and non-Tribal child welfare workers to the challenges of serving Tribal foster youth. It covers a brief historical overview and concludes with recommendations that support increased communication and collaboration among providers that strive to achieve positive outcomes for Tribal youth

The Collaborative Workbook is recommended for use with The Collaborative training

and provides an overview of the issues facing child welfare and Indian Child Welfare workers and includes recommendations, Tips for Protocol, and other resources designed to enhance cross-cultural relationships at the micro, macro, and macro levels. This workbook is provided directly to trainees.

The Tribal STAR Journal is a small booklet designed to help participants remember core Native American values and provides blank pages for notes, reminders, and contact information.

The Collaborative PowerPoint is the interactive multi-media PowerPoint that helps trainees follow the workbook and begin to understand key concepts provided in the Summit Curriculum. The PowerPoint provides prompting questions at the beginning of each section to stimulate thought and gauge understanding about each module.

TRAINING FOR TRAINERS (T4T) – CREATING CONNECTIONS

T4T Creating Connections Curriculum provides in-depth information for those who may want to train the Tribal STAR Summit or Gathering. It provides a checklist to assist with trainer preparedness and trainer tips to enhance group discussions. The curriculum provides approaches to training sensitive topics and an overview of the issues facing child welfare and Indian Child Welfare workers and includes recommendations, Tips for Protocol and other resources designed to enhance cross-cultural relationships at the micro and macro levels.

POWERPOINTS

The Resiliency PowerPoint is approximately seven minutes of factors that contribute to the resilience of Tribal youth. Intended to be shown without any music or audio narrative to induce the viewer into reflective thought, modeling one of the recommendations presented, that learning can occur in silence

The Contributions PowerPoint provides a brief overview of some of the contributions of Native American/Alaska Native culture to western mainstream society. This self-guided (not timed) PowerPoint is intended to illuminate some of the many contributions that can support positive conversations between Tribal and non-Tribal participants. It also serves as a reminder of the Tribal achievements that many Tribal youth and families may have forgotten, and can reclaim to strengthen a sense of positive identity and dignity.

RESOURCES (ONLINE)

The ***Tribal STAR Resources document online*** provides a compendium of articles that were reviewed and utilized in the development of the Summit, Gathering, Collaborative, and Training for Trainer (T4T) curricula. All Tribal STAR training materials are provided on the Resources document online, including: curricula, workbooks, the Journal, posters and related PowerPoint presentations. It also contains related resources, articles, maps, and information to support further understanding and collaboration among providers of services to Tribal foster youth.

MSW MODULES

Tribal STAR has developed three (3) MSW modules designed to fill a standard 1.25 hour course session with a combination of lecture and interchangeable activities designed to increase awareness of American Indian history, values, and culture as they relate to policy, human behavior and generalist practice. Each module includes a format to accommodate guest speakers from the field and is also intended to increase MSW students' awareness of fairness and equality.

Policy

The Impact and Limitations of Indian Child Welfare Act module is intended to expand MSW Students awareness of the history, impact, and limitations of the Indian Child Welfare Act (ICWA). This 1.25 hour module is also intended to increase MSW Students' awareness of fairness and equity in relation to policy driven services to culturally specific populations.

Behavioral

Understanding the Effects of History upon Culture and Behavior of American Indians is a module intended to expand MSW awareness of cumulative collective trauma and how culture influences human behavior in this population by providing a menu of lectures, activities intended to fill a standard 1.25 hour session.

Practice

Considerations for Culturally Sensitive Social Work Practice with American Indians is a 1.25 hour session that addresses the fact that although American Indians represent a small percentage of the population, there exists a disproportionality of youth and families served by Child Welfare and ICWA programs. It provides guided instruction that

supports the ability to develop stronger practice skills when serving American Indians and strengthens the cross-application to other ethnic groups.

MSW RESOURCE CD

The ***Tribal STAR Resource CD for MSW Modules*** provides a compendium of articles that were reviewed and utilized in the development of the MSW modules focusing on Policy, Behavior and Practice. All Tribal STAR MSW training materials are provided on the Resource CD, including modules, the Journal, posters and related PowerPoint presentations. It also contains related resources, articles, maps and information to support further understanding and collaboration for faculty and providers of services to Tribal foster youth.

DIGITAL STORIES

The ***Tribal STAR Digital Stories*** is a DVD that contains three personal accounts of being touched by the Child Welfare System. *Paul's Story: Forever Hurt* is an account of a father and his daughter who were affected by both the state and Indian Child welfare systems. *Wakeem's Story: Finding Connection* is an account of a challenged Tribal youth who is reconnecting with heritage and tribal relations. *Justine's Story: For Future Generations* is shared from the perspective of a Tribal youth, who has been touched by state and Indian Child welfare systems, and she gives advice to case managers and other youth on the journey.

TRIBAL STAR NEWSLETTER

The ***Tribal STAR Newsletter "Drumbeats"*** is a bi-monthly publication of resources, stories, events, and articles that keep readers informed of current issues affecting services for Tribal youth in the child welfare system. It is also intended to support collaboration and networking among the diverse service providers that strive to increase positive outcomes for Tribal youth.

PUBLICATIONS

The ***Checklist for Judges*** provides an overview of current issues facing Tribal youth and is designed to assist Judges in making culturally responsive determinations in cases involving Tribal youth.

Bringing Them Back

Bringing Them Back is a summary of points brought up at the 2003 NICWA Conference at which primarily Tribal participants were asked “How can we assist Tribal youth in returning to their Tribal communities?”

Tips for Protocol

Tips for Protocol was developed to assist service providers of Tribal foster youth in cultivating successful long-term relationships between Tribal and non-Tribal partners. It provides practical recommendations for Tribal youth.

Tips for Cross Cultural Training

Tips for Cross Cultural Training when working with Tribal communities provides an overview of the challenges one may face when training Tribal and non-Tribal participants. It provides practical solutions to support effective outcomes for the trainer.

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GLOSSARY OF TERMS

Active vs. Reasonable Efforts

Active efforts require more than reasonable efforts. Active efforts describe direct work in engagement with Indian children and their families to assist them in meeting goals, while reasonable efforts describe non-direct practices such as referring a family to other services, which requires them to access their own resources in order to participate in those services.

Blood quantum

A method of defining the quantity of a person's origins through their blood lines. Some tribes require a specific blood quantum, such as 1/8, in order to be eligible to formally enroll in the tribe.

Clan

A group of people tracing their descent from a common ancestor or family and united by a common interest or characteristics. Clan customs and traditions may, among other things, define relationships between members, or may bestow certain responsibilities on its members within the tribe.

Concurrent Planning

A child welfare system practice that requires social workers to begin discussing both reunification plans and alternative permanent placement plans early in their work together. Tribal customary adoption is a permanent planning option recognized by California law and must be considered during the concurrent planning process. Tribes must be consulted during this process as well.

Cumulative Historic Trauma

United States policies of forced assimilation, which included forced removal from tribal homelands, prohibition of spiritual and religious practices, resulted in trauma and loss to Native American children, families and communities. The grief and loss resulting from cumulative and compound traumas is unresolved for many, and has passed from generation to generation, and is referred to as historic or cumulative historic trauma.

Extended Family

ICWA states that the extended family of an Indian child is defined by the law, customs or traditions of the tribe. In the absence of law, custom or tradition, extended family is an adult grandparent, aunt or uncle, sibling, brother-in-law or sister-in-law, niece, nephew, first or second cousin or a stepparent.

Family

American Indians consider themselves kin to other American Indians and Alaska Native populations, who may or may not be direct biological relations. The concept of nuclear families is considered foreign to American

Indians. Underlying this definition is the concept of relatedness, being connected to all Indian people regardless of tribe, location, or the status of families.

Indian Country

The legal definition of Indian Country may be found in federal statutes and regulations. Generally, Indian Country includes Indian reservations, certain select Indian communities, Alaska Native villages, Rancherias and Indian allotments. However, the term is often understood to mean Native American/Alaska Native people who are served through tribal organizations or services and communities not included in the legal definition that have substantial Native American/Alaska Native populations.

Inquiry

Inquiry, an important aspect of ICWA, is the act of timely identifying whether or not the child is an Indian child under the provisions of the law.

Kin or Kinship

Kin are relatives or family. Kinship are the bonds between individuals that, for American Indian/Alaska Native peoples, extend beyond blood relationships on both sides to friends and members of their clan or tribal community.

Moiety

Tribes often have two or more complimentary subdivisions (moieties) which, together, constitute the whole. Each is a part of a system that shares clan and tribal responsibilities. During ceremonies, each moiety will have different roles and responsibilities. Moieties, like clans, can be an additional resource in determining placement for an Indian child.

Notice

Notice is the process of completing required forms and providing them to Indian tribes as required by state and federal law. Notice of the proceedings is given to tribes, parents or Indian custodians and provides them the opportunity to identify whether the child is eligible to be a member or is a member, and the opportunity to intervene in the case.

Qualified Expert Witness

A qualified expert witness is asked to address whether continued custody of an Indian child by a parent or Indian custodian will likely result in serious physical or emotional damage to the child. A qualified expert witness must be either 1) a member of the child's tribe, recognized by the child's community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; 2) a person with substantial experience in the delivery of child and family services to Indians and has extensive knowledge of the prevailing social and cultural standards and child rearing practices with the child's tribe; or) a professional person with substantial education and experience in the area of his or her specialty. A qualified expert witness cannot be the social worker assigned to the case or a social worker from the agency

managing the case.

Placement Preferences

The order of preference for placement of the Indian child in out-of-home care.

Relatedness

Indian concepts emphasize that children are embedded within a complex and dynamic set of relations that include self, kin, and universe. A traditional American Indian belief is that all American Indians are related to one another.

Tribal Customary Adoption

California law allows Indian children and families to realize the permanency and support of adoption without the termination of parental rights, thereby, allowing for the continuation of cultural practices.

Tribal Community

An intimate relationship of members who are bound together by shared belief, values, ties of loyalty, and family. For example, among urban Indians, they may not come from the same tribes, but share a relationship based on like values, beliefs, and culture.

Tribal Member

An individual or family recognized by blood or kinship, as a part of a tribe, clan, or moiety, and entitled to participate in tribal events and governance.

Tribe

Sovereign Indian nations with inherent powers of self-government and self-determination. Tribes can be federally-recognized or non-federally recognized



TRIBAL STAR

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APPENDICES

APPENDIX A: THE INDIAN CHILD WELFARE ACT (ICWA) UNITED STATES CODE TITLE 25 - INDIANS CHAPTER 21 - INDIAN CHILD WELFARE

Contents CHAPTER 21 - INDIAN CHILD WELFARE

- § 1901. Congressional findings.
- § 1902. Congressional declaration of policy.
- § 1903. Definitions. SUBCHAPTER I - CHILD CUSTODY PROCEEDINGS
- § 1911. Indian tribe jurisdiction over Indian child custody proceedings.
- § 1912. Pending court proceedings.
- § 1913. Parental rights; voluntary termination.
- § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations.
- § 1915. Placement of Indian children.
- § 1916. Return of custody.
- § 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court.
- § 1918. Reassumption of jurisdiction over child custody proceedings.
- § 1919. Agreements between States and Indian tribes.
- § 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception.
- § 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child.
- § 1922. Emergency removal or placement of child; termination; appropriate action.
- § 1923. Effective date.

SUBCHAPTER II - INDIAN CHILD AND FAMILY PROGRAMS

- § 1931. Grants for on or near reservation programs and child welfare codes.
- § 1932. Grants for off-reservation programs for additional services.
- § 1933. Funds for on and off reservation programs.
- § 1934. "Indian" defined for certain purposes.

SUBCHAPTER III - RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

- § 1951. Information availability to and disclosure by Secretary.
- § 1952. Rules and regulations.

SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

- § 1961. Locally convenient day schools.
- § 1962. Copies to States. § 1963. Severability.

§ 1901. Congressional findings Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds - (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have

Power * * * To regulate Commerce * * * with Indian tribes (FOOTNOTE 1) " and, through this and other constitutional authority, Congress has plenary power over Indian affairs; (FOOTNOTE 1) So in original. Probably should be capitalized. (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources; (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

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.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term - (1) "child custody proceeding" shall mean and include - (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship; (iii) "preadoptive placement" which shall mean 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; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be 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;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means 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;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) "parent" means 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. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such t

(c) State court proceedings; intervention In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian familie

(b) Foster care or preadoptive placements; criteria; preferences Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with - (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable The standards to be applied in meeting the preference requirements of this section shall be 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 members maintain social and cultural ties.

(e) Record of placement; availability A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody (a) Petition; best interests of child Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child. (b) Removal from foster care home; placement procedure Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession (1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things: (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe; (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe; (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multiracial occupation of a single reservation or geographic area. (2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected. (c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval. (d) Pending actions or proceedings unaffected Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning

the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

§ 1931. Grants for on or near reservation programs and child welfare codes (a) Statement of purpose; scope of programs The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to - (1) a system for licensing or otherwise regulating Indian foster and adoptive homes; (2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children; (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; (4) home improvement programs; (5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters; (6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs; (7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and (8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings. (b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection

with funds provided under titles IV-B and XX of the Social Security Act (42 U.S.C. 620 et seq., 1397 et seq.) or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

§ 1932. Grants for off-reservation programs for additional services The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to - (1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs; (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children; (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

§ 1933. Funds for on and off reservation programs (a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts. (b) Appropriation authorization under section 13 of this title Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title. § 1934. "Indian" defined for certain purposes For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show - (1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement. Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended. (b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of

entitlement to enrollment Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter. § 1961. Locally convenient day schools (a) Sense of Congress It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families. (b) Report to Congress; contents, etc. The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades. § 1962. Copies to the States Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

APPENDIX B: GUIDELINES FOR STATE COURTS AND AGENCIES IN INDIAN CHILD CUSTODY PROCEEDINGS (80 FR 10146, effective February 25, 2015)

SUPPLEMENTARY INFORMATION:

I. Background These updated BIA guidelines provide standard procedures and best practices to be used in Indian child welfare proceedings in State courts. The updated guidelines are issued in response to comments received during several listening sessions, written comments submitted throughout 2014, and recommendations of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence.

Congress enacted ICWA in 1978 to address the Federal, State, and private agency policies and practices that resulted in the “wholesale separation of Indian children from their families.” H. Rep. 95-1386 (July 24, 1978),

at 9. Congress found “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions” **25 U.S.C. 1901**(4). Congress determined that cultural ignorance and biases within the child welfare system were significant causes of this problem and that state administrative and judicial bodies “have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” **25 U.S.C. 1901**(5); H. Rep. 95-1386, at 10. Congress enacted ICWA to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture.” H. Rep. 95-1386, at 8. ICWA thus articulates a strong “federal policy that, where possible, an Indian child should remain in the Indian community.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (citing H. Rep. 95-1386 at 24).

Following ICWA's enactment, in July 1979, the Department of the Interior (Department) issued regulations addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for and administration of Indian child and family service programs as authorized by ICWA. See **25 CFR part 23**. Those regulations did not address the specific requirements and standards that ICWA imposes upon State court child custody proceedings, beyond the requirements for contents of the notice. Also, in 1979, the BIA published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings. 44 FR 67584 (Nov. 26, 1979). Although there have been significant developments in ICWA jurisprudence, the guidelines have not been updated since they were originally published in 1979. Much has changed in the 35 years since the original guidelines were published, but many of the problems that led to the enactment of ICWA persist.

In 2014, the Department invited comments to determine whether to update its guidelines and what changes should be made. The Department held several listening sessions, including sessions with representatives of federally recognized Indian tribes, State court representatives (*e.g.*, the National Council of Juvenile and Family Court Judges and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments from those at the listening sessions and also received written comments, including comments from individuals and additional organizations, such as the Christian Alliance for Indian Child Welfare and the American Academy of Adoption Attorneys. An overwhelming proportion of the commenters requested that the Department update its ICWA guidelines and many had suggestions for revisions that have been included. The Department reviewed and considered each comment in developing these revised Guidelines.

II. Statutory Authority

The Department is issuing these updated guidelines under ICWA, **25 U.S.C. 1901** *et seq.*, and its authority over the management of all Indian affairs under **25 U.S.C. 2**.

III. Summary of Updates

The 1979 guidelines included “commentary” for each section, which was intended to explain the requirements of each section. The updated guidelines are clearer, making the commentary unnecessary. Recognizing the important role that child welfare agencies play in ICWA compliance, these updated guidelines broaden the audience of the guidelines to include both State courts and any agency or other party seeking placement of an Indian child. The guidelines identify procedures to address circumstances in which a parent desires anonymity in a voluntary proceeding. Those procedures clarify that a parent's desire for anonymity does not override the responsibility to comply with ICWA. The guidelines also establish that agencies and courts should document their efforts to comply with ICWA. The following paragraphs include section-by-section highlights of the substantive updates that these guidelines make to the 1979 version.

Section A. General Provisions (formerly, entitled “Policy”)

The updated guidelines add several provisions to section A, to provide better context for the guidelines and clear direction on implementing the guidelines. For example, this section includes definitions of key terms used throughout the guidelines, such as “active efforts” and “child custody proceeding.” The phrase “active efforts” has been inconsistently interpreted. The guidelines' definition is intended to provide clarity—particularly in establishing that “active efforts” require a level of effort beyond “reasonable efforts.”

Section A also includes an applicability section, which incorporates many of the provisions of the 1979 guidelines' section B.3. In addition, section A:

- Clarifies that agencies and State courts must ask, in every child custody proceeding, whether ICWA applies;
- Clarifies that courts should follow ICWA procedures even when the Indian child is not removed from the home, in order to allow tribes to intervene as early as possible to assist in preventing a breakup of the family; and
- Provides that, where agencies and State courts have reason to know that a child is an Indian child, they must treat that child as an Indian child unless and until it is determined that the child is not an Indian child.

These clarifications are necessary to ensure that the threshold question for determining whether ICWA applies (is the child an Indian child?) is asked, and asked as soon as possible. If such inquiry is not timely made, a court proceeding may move forward without appropriate individuals aware that ICWA applies and that certain procedures must be followed. Tragic consequences may result

The updated guidelines also add a section regarding how to contact a tribe, in case the agency or State court is unfamiliar with whom to contact.

Section A is intended to make clear that there is no existing Indian family (EIF) exception to application of ICWA. The EIF doctrine is a judicially-created exception to the application of ICWA. Since first recognition of the EIF in 1982, the majority of State appellate courts that have considered the EIF have rejected it as contrary to the plain language of ICWA. Some State legislatures have also

explicitly rejected the EIF within their State ICWA statutes. The Department agrees with the States that have concluded that there is no existing Indian family exception to application of ICWA.

Section A also clarifies that ICWA and the guidelines apply in certain voluntary placements.

Section B. Pretrial Requirements

The updated guidelines, and section B in particular, promote the early identification of ICWA applicability. Such identifications will promote proper implementation of ICWA at an early stage, to prevent—as much as possible—delayed discoveries that ICWA applies. Often, those circumstances resulting from delayed discoveries have caused heartbreaking separations and have sometimes led to noncompliance with ICWA's requirements. By requiring agencies and courts to consider, as early as possible, whether ICWA applies, the updated guidelines will ensure that proper notice is given to parents/Indian custodians and tribes, that tribes have the opportunity to intervene or take jurisdiction over proceedings, as appropriate, and that ICWA's placement preferences are respected.

With regard to early discovery, section B requires agencies and courts to consider whether the child is an Indian child, and sets out the steps for verifying the tribe(s) and providing notice to the parents/Indian custodians and tribe(s). Section B also adds guidance regarding the evidence a court may require an agency to provide of the agency's investigations into whether the child is an Indian child.

With regard to application of ICWA, the updated section B clarifies when the Act's requirement to conduct “active efforts” begins. ICWA requires “active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” See 25 U.S.C. 1912(d). The updated section B clarifies that active efforts must begin from the moment the possibility arises that the Indian child may be removed. This updated section also clarifies that active efforts should be conducted while verifying whether the child is an Indian child; this clarification ensures compliance with ICWA in cases in which the status of whether the child is an Indian child is not verified until later in the proceedings.

Section B adds a new paragraph clarifying that the tribe alone retains the responsibility to determine tribal membership. This section makes clear that there is no requirement for the child to have a certain degree of contact with the tribe or for a certain blood degree, and notes that a tribe may lack written rolls. 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. See *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). (“Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.”) BIA may assist in contacting the tribe to ensure a determination, however.

The updated section B also expands upon procedures for determining a child's tribe in the event that more than one tribe is identified as the child's tribe. Specifically, it changes the criteria for

determining with which tribe the child has “significant contacts,” adding that the parents' preference for membership will be considered, and deleting factors that are subjective or inapplicable to infants.

With regard to providing notice to Indian tribes and the child's parents/Indian custodians, the updated section B:

- Clarifies that notice is required for each proceeding (not just for the first or last proceeding);
- States that notice must be sent, at a minimum, by registered mail, return receipt requested, and that personal service or other types of service may be in addition to, but not in lieu of, such mail; and
- Clarifies that the tribe has the right to intervene at any time.

This section also clarifies how guidelines apply if the child is transferred interstate.

The updated guidelines expand upon the emergency procedure provisions in light of evidence that some States routinely rely upon emergency removals and placements in a manner that bypasses implementation of ICWA. *See Oglala Sioux Tribe v. Hunnik*, Case No. 5:13-cv-05020-JLV, *Amicus Brief of the United States*, at *5-6 (D.S.D. Aug. 14, 2014) (involving allegations that: (1) Defendants are conducting perfunctory 48-hour hearings that do not adequately gather or evaluate information necessary to determine whether emergency removals or placements should be terminated, and that the orders issued at the end of the 48-hour hearing do not adequately instruct State officials to return the child to the home as soon as the emergency has ended; (2) Defendants are violating the Due Process Clause by preventing parents from testifying, presenting evidence, or cross-examining the State's witnesses at the 48-hour hearing; and (3) parents are not being provided adequate notice or the opportunity to be represented by appointed counsel and that the State courts are issuing orders to remove Indian children from their homes without basing those orders on evidence adduced in the hearing). Because ICWA was intended to help prevent the breakup of Indian families; therefore, emergency removals and emergency placements of Indian children should be severely limited, applying only in circumstances involving imminent physical damage or harm. The updated section B clarifies that the guidelines for emergency removal or placement apply regardless of whether the Indian child is a resident of or domiciled on a reservation. This section also explicitly states the standard for determining whether emergency removal or emergency placement is appropriate—*i.e.*, whether it is necessary to prevent imminent physical damage or harm to the child—and provides examples. The guidelines clearly state that the

emergency removal/placement must be as short as possible, and provides guidance on how to ensure it is as short as possible. It also shortens the time period for temporary custody without a hearing or extraordinary circumstances from 90 days to 30 days. This shortened timeframe promotes ICWA's important goal of preventing the breakup of Indian families.

Section C. Procedures for Transfer to Tribal Court

The updated section C deletes the requirement that requests to transfer to tribal court be made “promptly after receiving notice of the proceeding” because there is no such requirement in ICWA. Instead, the updated guidelines clarify that the right to transfer is available at any stage of a proceeding, including during an emergency removal. The updated section C also clarifies that the

right to request a transfer occurs with each distinct proceeding. ICWA contains no restriction on the right to request a transfer occurring at the first, last, or any specific child custody proceeding. A tribe may decide that transfer is not appropriate until it reaches the stage where parental termination is being determined.

The updated section C also updates the “good cause” factors for denying transfer to tribal court. The updated criteria are more general; in summary, good cause may be found if either parent objects, the tribal court declines, or the State court otherwise determines that good cause exists. The updated guidelines specifically omit some of the factors that were the basis for finding that “good cause” exists under the 1979 guidelines. One such factor that should no longer be considered is whether the proceeding was at an advanced stage. As mentioned above, there may be valid reasons for waiting to transfer a proceeding until it reaches an advanced stage. Another factor that should no longer be considered is the level of contacts the child has had with the tribe—this factor unnecessarily introduces an outsider’s evaluation of the child’s relationship with the tribe and cannot sensibly be applied to infants.

The updated guidelines also specify that it is inappropriate to conduct an independent analysis, inconsistent with ICWA’s placement preferences, of the “best interest” of an Indian child. The provisions of ICWA create a presumption that ICWA’s placement preferences are in the best interests of Indian children; therefore, an independent analysis of “best interest” would undermine Congress’s findings. Finally, the updated guidelines provide that the tribal court’s prospective placement of an Indian child should not be considered, because it invites speculation regarding the tribal court’s findings and conclusions and, therefore, undermines the independence of tribal court decision making.

Section D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

The updated section D establishes that parties have the right to examine records and reports in a timely manner; this ensures that parents/Indian custodians and tribes have the opportunity to examine information necessary to protect their rights under ICWA. This updated section also expands significantly on how to comply with the Act’s “active efforts” requirement. Specifically, the updated guidelines

- Require demonstration that “active efforts” were made, not only “prior to” the commencement of the proceeding, but also “until” the commencement of the proceeding;
- Require documentation of what “active efforts” were made; and

Require a showing that active efforts have been unsuccessful. The updated section D also provides guidance regarding how to identify an appropriate “qualified expert witness.” Commenters indicated that some States rely on witnesses’ qualifications as child care specialists, or on other areas of expertise, but do not require any expert knowledge related to the tribal community. The updated guidelines establish a preferential order for witnesses who are experts in the culture and customs of the Indian child’s tribe. This will ensure that the expert witness with the most knowledge of the Indian child’s tribe is given priority.

Section E. Voluntary Proceedings

ICWA applies to voluntary proceedings that operate to prohibit an Indian child's parent or Indian custodian from regaining custody of the child upon demand; nevertheless, evidence suggests that ICWA is sometimes ignored or intentionally bypassed in voluntary proceedings. The updated section E clarifies that, even in voluntary proceedings, it is necessary to determine whether ICWA applies, and to comply with ICWA's provisions. To ensure that parents and Indian custodians understand the significance of their consent, the updated section E requires the consent document to identify any conditions to the consent and requires the court to explain the consequences of the consent before its execution. It also addresses steps for withdrawal of consent. The updated section E further restates the statutory restriction that a consent given prior to or within 10 days after birth of an Indian child is not valid.

Section F. Dispositions

The updated guidelines provide more information regarding when and how to apply ICWA's placement preferences for foster and adoptive placements. In some cases, agencies fail to conduct any investigation of whether placements that conform to ICWA's placement preferences are available. The updated section F requires that:

- The agency bears the burden of proof if it departs from any of the placement preferences and must demonstrate that it conducted a diligent search to identify placement options that satisfy the placement preferences, including notification to the child's parents or Indian custodians, extended family, tribe, and others; and
- The court determines whether “good cause” to deviate from the placement preferences exists before departing from the placement preferences.

The updated section F also adds provisions to ensure that “good cause” determinations are explained to all parties and documented.

Evidence suggests that “good cause” has been liberally relied upon to deviate from the placement preferences in the past. Commenters noted that, in some cases, a State court departed from the placement preferences because an Indian child has spent significant time in a family's care, despite the fact that the placement was made in violation of ICWA. The guidelines attempt to prevent such circumstances from arising by encouraging early compliance with ICWA (see sections A and B, in particular). The guidelines also specify in section F that “good cause” does not include normal bonding or attachment that may have resulted from a placement that failed to comply with the Act. As in other parts of the guidelines, this section clarifies that an independent consideration of the child's “best interest” is inappropriate for this determination because Congress has already addressed the child's best interest in ICWA. Because ICWA does not allow for consideration of socio-economic status in the placement preferences, this section also now clarifies that the court may not depart from the preferences based on the socio-economic status of one placement relative to another, except in extreme circumstances.

Section G. Post-Trial Rights

ICWA is intended to protect the rights, not only of Indian children, parents and Indian custodians, but also of Indian tribes. The updated guidelines establish that an Indian child, parent or Indian custodian, or tribe may petition to invalidate an action if the Act or guidelines have been violated,

regardless of which party's rights were violated. This approach promotes compliance with ICWA and reflects that ICWA is intended to protect the rights of each of these parties.

Adults who had been adopted by non-Indian families and seek to reconnect with their tribes often face significant hurdles in obtaining needed information. The updated guidelines attempt to protect those adults' rights to obtain information about their tribal relationship by specifying that, even in States where adoptions remain closed, the relevant agency should facilitate communication directly with the tribe's enrollment office.

The guidelines also recommend that courts work with tribes to identify tribal designees who can assist adult adoptees to connect with their tribes.

Finally, the updated guidelines clarify that the requirement to maintain records on foster care, preadoptive placement and adoptive placements applies not only in involuntary proceedings, but also in voluntary proceedings.

IV. Guidance

These guidelines supersede and replace the guidelines published at 44 FR 67584 (November 28, 1979).

Guidelines for State Courts and Agencies in Indian Child Custody Proceedings

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Guidelines for State Courts and Agencies in Indian Child Custody Proceedings

A. General Provisions

A.1. What is the purpose of these guidelines?

These guidelines clarify the minimum Federal standards, and best practices, governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress' intent in enacting the statute, and the canon of construction that statutes enacted for the benefit of Indians are to be liberally construed to their benefit. In order to fully implement ICWA, these guidelines should be applied in all proceedings and stages of a proceeding in which the Act is or becomes applicable.

A.2. What terms do I need to know?

Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15)). Active efforts include, for example:

- (1) Engaging the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s);
- (2) Taking steps necessary to keep siblings together;

- (3) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (4) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate;
- (5) Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement;
- (6) Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;
- (7) Offering and employing all available and culturally appropriate family preservation strategies;
- (8) Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (9) Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
- (10) Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
- (11) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;
- (12) Monitoring progress and participation in services;
- (13) Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;
- (14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
- (15) Providing post-reunification services and monitoring.

“Active efforts” are separate and distinct from requirements of the Adoption and Safe Families Act (ASFA), 42 U.S.C. 1305. ASFA's exceptions to reunification efforts do not apply to ICWA proceedings.

Agency means a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.

Child custody proceeding means and includes any proceeding or action that involves:

(1) *Foster care placement*, which is 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 parent or Indian custodian cannot have the child returned upon demand, although parental rights have not been terminated;

(2) *Termination of parental rights*, which is any action resulting in the termination of the parent-child relationship;

(3) *Preadoptive placement*, which is 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; or

(4) *Adoptive placement*, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Continued custody means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or State law.

Domicile means:

(1) For a parent or any person over the age of eighteen, physical presence in a place and intent to remain there;

(2) For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother. Under the principle for determining the domicile of an Indian child, it is entirely logical that "[o]n occasion, a child's domicile of origin will be in a place where the child has never been." *Holyfield*, 490 U.S. at 48. *Holyfield* notes that tribal jurisdiction under 25 U.S.C. 1911(a) was not meant to be defeated by the actions of individual members of the tribe, because Congress was concerned not solely about the interests of Indian children and families, but also about the impact of large numbers of Indian children adopted by non-Indians on the tribes themselves. *Id.* at 49.

Extended family member is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, 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.

Imminent physical damage or harm means present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.

Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 CFR part 1606.

Indian child means any unmarried person who is under age eighteen and is either: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.

Indian child's tribe means: (1) the Indian tribe in which an Indian child is a member or eligible for membership; or (2) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts.

Indian Child Welfare Act (ICWA) or Act means 25 U.S.C. 1901 et seq.

Indian custodian means any person who has legal custody of an Indian child under tribal law or custom or under State law, whichever is more favorable to the rights of the parent, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a tribe, or a majority of whose members are Indians.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. 1602(c).

Parent means 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. It does not include an unwed father where paternity has not been acknowledged or established. 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.

Reservation means Indian country as defined in 18 U.S.C 1151, including any lands, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

Status offenses mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (*e.g.*, truancy, incorrigibility).

Tribal court means a court with jurisdiction over child custody proceedings, including a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe vested with authority over child custody proceedings.

Upon demand means that the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses.

Voluntary placement means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions.

A.3. When does ICWA apply?

(a) ICWA applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights.

(b) There is no exception to application of ICWA based on the so-called "existing Indian family doctrine." Thus, the following non-exhaustive list of factors should not be considered in determining whether ICWA is applicable: the extent to which the parent or Indian child participates in or observes tribal customs, votes in tribal elections or otherwise participates in tribal community affairs, contributes to tribal or Indian charities, subscribes to tribal newsletters or other periodicals of special interest in Indians, participates in Indian religious, social, cultural, or political events, or maintains social contacts with other members of the tribe; the relationship between the Indian child and his/her Indian parents; the extent of current ties either parent has to the tribe; whether the Indian parent ever had custody of the child; and the level of involvement of the tribe in the State court proceedings.

(c) Agencies and State courts, in every child custody proceeding, must ask whether the child is or could be an Indian child and conduct an investigation into whether the child is an Indian child. Even in those cases in which the child is not removed from the home, such as when an agency opens an investigation or the court orders the family to engage in services to keep the child in the home as part of a diversion, differential, alternative response or other program, agencies and courts should follow the verification and notice provisions of these guidelines. Providing notice allows tribes to intervene as early as possible in a child custody proceeding and provides an opportunity for the tribe to bring resources to bear to assist the family in preventing a breakup of the family.

(d) If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.

(e) ICWA and these guidelines or any associated Federal guidelines do not apply to:

(1) Tribal court proceedings;

(2) Placements based upon an act by the Indian child which, if committed by an adult, would be deemed a criminal offense; or

(3) An award, in a divorce proceeding, of custody of the Indian child to one of the parents.

(f) Voluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand are not covered by the Act.

(1) Such placements should be made pursuant to a written agreement, and the agreement should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand.

(2) Nevertheless, it is a best practice to follow the procedures in these guidelines to determine whether a child is an Indian child and to notify the tribe.

(g) Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a preadoptive or adoptive placement are covered by the Act.

A.4. How do I contact a tribe under these guidelines?

To contact a tribe to provide notice or obtain information or verification under these Guidelines, you should direct the notice or inquiry as follows:

(1) Many tribes designate an agent for receipt of ICWA notices. The Bureau of Indian Affairs publishes a list of tribes' designated tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its Web site at www.bia.gov.

(2) For tribes without a designated tribal agent for service of ICWA notice, contact the tribe(s) to be directed to the appropriate individual or office.

(3) If you do not have accurate contact information for the tribe(s) or the tribe(s) contacted fail(s) to respond to written inquiries, you may seek assistance in contacting the Indian tribe(s) from the Bureau of Indian Affairs' Regional Office and/or Central Office in Washington DC (see www.bia.gov).

A.5. How do these guidelines interact with State laws?

(a) These guidelines provide minimum Federal standards and best practices to ensure compliance with ICWA and should be applied in all child custody proceedings in which the Act applies.

(b) In any child custody proceeding where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires that the State court must apply the higher standard.

B. Pretrial Requirements

B.1. When does the requirement for active efforts begin?

(a) The requirement to engage in “active efforts” begins from 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 in order to prevent removal.

(b) Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe.

B.2. What actions must an agency and State court undertake in order to determine whether a child is an Indian child?

(a) Agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the child is an Indian child, the agency must obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.

(b) State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child.

(1) In requiring this certification, the court may require the agency to provide:

(i) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or

(ii) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.

(2) If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe, under paragraph (a).

(c) An agency or court has reason to believe that a child involved in a child custody proceeding is an Indian child if:

(1) Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;

(2) Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child;

(4) The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian reservation or in a predominantly Indian community; or

(5) An employee of the agency or officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

(d) In seeking verification of the child's status, in a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the agency or court must keep relevant documents confidential and under seal. A request for anonymity does not relieve the obligation to obtain verification from the tribe(s) or to provide notice.

B.3. Who makes the determination as to whether a child is a member of a tribe?

(a) Only the Indian tribe(s) of which it is believed a biological parent or the child is a member or eligible for membership may make the determination whether the child is a member of the tribe(s), is eligible for membership in the tribe(s), or whether a biological parent of the child is a member of the tribe(s).

(b) The determination by a tribe of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member of that tribe, is solely within the jurisdiction and authority of the tribe.

(c) No other entity or person may authoritatively make the determination of whether a child is a member of the tribe or is eligible for membership in the tribe.

(1) There is no requirement that the child maintain a certain degree of contacts with the tribe or for a certain blood quantum or degree of Indian blood.

(2) A tribe need not formally enroll its members for a child to be a member or eligible for membership. In some tribes, formal enrollment is not required for tribal membership. Some tribes do not have written rolls and others have rolls that list only persons that were members as of a certain date. *See United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979). The only relevant factor is whether the tribe verifies that the child is a member or eligible for membership.

(d) The State court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes.

B.4. What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe?

(a) Agencies are required to notify all tribes, of which the child may be a member or eligible for membership, that the child is involved in a child custody proceeding. The notice should specify the other tribe or tribes of which the child may be a member or eligible for membership.

(b) If the Indian child is a member or eligible for membership in only one tribe, that tribe should be designated as the Indian child's tribe.

(c) If an Indian child is a member or eligible for membership in more than one tribe, ICWA requires that the Indian tribe with which the Indian child has the more significant contacts be designated as the Indian child's tribe.

(1) In determining significant contacts, the following may be considered:

- (i) Preference of the parents for membership of the child;
 - (ii) Length of past domicile or residence on or near the reservation of each tribe;
 - (iii) Tribal membership of custodial parent or Indian custodian; and
 - (iv) Interest asserted by each tribe in response to the notice that the child is involved in a child custody proceeding;
- (d) When an Indian child is already a member of a tribe, but is also eligible for membership in another tribe, deference should be given to the tribe in which the Indian child is a member, unless otherwise agreed to by the tribes. However, if the Indian child is not a member of any tribe, an opportunity should be provided to allow the tribes to determine which of them should be designated as the Indian child's tribe.
- (i) If the tribes are able to reach an agreement, the agreed upon tribe should be designated as the Indian child's tribe.
 - (ii) If the tribes do not agree, the following factors should be considered in designating the Indian child's tribe:
 - (A) The preference of the parents or extended family members who are likely to become foster care or adoptive placements; and/or
 - (B) Tribal membership of custodial parent or Indian custodian; and/or
 - (C) If applicable, length of past domicile or residence on or near the reservation of each tribe; and/or
 - (D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and/or
 - (E) Self-identification by the child; and/or
 - (F) Availability of placements.
 - (iii) In the event the child is eligible for membership in a tribe but is not yet a member of any tribe, the agency should take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe.
- (3) Once an Indian tribe is designated as the child's Indian tribe, all tribes which received notice of the child custody proceeding must be notified in writing of the determination and a copy of that document must be filed with the court and sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.
- (4) A determination of the Indian child's tribe for purposes of ICWA and these guidelines does not constitute a determination for any other purpose or situation.

(d) The tribe designated as the Indian child's tribe may authorize another tribe to act as a representative for the tribe in a child custody case, including, for example, having the representative tribe perform home studies or expert witness services for the Indian child's tribe.

B.5. When must a State court dismiss an action?

Subject to B.8 (emergency procedures), the following limitations on a State court's jurisdiction apply:

(a) The court must dismiss any child custody proceeding as soon as the court determines that it lacks jurisdiction.

(b) The court must make a determination of the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the State court must dismiss the State court proceedings, the agency must notify the tribe of the dismissal based on the tribe's exclusive jurisdiction, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.

(c) If the Indian child has been domiciled or previously resided on an Indian reservation, the State court must contact the tribal court to determine whether the child is a ward of the tribal court. If the child is a ward of a tribal court, the State court must dismiss the State court proceedings, the agency must notify the tribe of the dismissal, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.

B.6. What are the notice requirements for a child custody proceeding involving an Indian child?

(a) When an agency or court knows or has reason to know that the subject of an involuntary child custody proceeding is an Indian child, the agency or court must send notice of each such proceeding (including but not limited to a temporary custody hearing, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested to:

(1) Each tribe where the child may be a member or eligible for membership;

(2) The child's parents; and

(3) If applicable, the Indian custodian.

(b) Notice may be sent via personal service or electronically in addition to the methods required by the Act, but such alternative methods do not replace the requirement for notice to be sent by registered mail with return receipt requested.

(c) Notice must be in clear and understandable language and include the following:

(1) Name of the child, the child's birthdate and birthplace;

(2) Name of each Indian tribe(s) in which the child is a member or may be eligible for membership;

(3) A copy of the petition, complaint or other document by which the proceeding was initiated;

(4) Statements setting out:

(i) The name of the petitioner and name and address of petitioner's attorney;

(ii) The right of the parent or Indian custodian to intervene in the proceedings.

(iii) The Indian tribe's right to intervene at any time in a State court proceeding for the foster care placement of or termination of a parental right.

(iv) If the Indian parent(s) or, if applicable, Indian custodian(s) is unable to afford counsel based on a determination of indigency by the court, counsel will be appointed to represent the parent or Indian custodian where authorized by State law.

(v) The right to be granted, upon request, a specific amount of additional time (up to 20 additional days) to prepare for the proceedings due to circumstances of the particular case.

(vi) The right to petition the court for transfer of the proceeding to tribal court under 25 U.S.C. 1911, absent objection by either parent: *Provided, that* such transfer is subject to declination by the tribal court.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the proceeding and individuals notified under this section.

(viii) The potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

(d) In order to assist the Indian tribe(s) in making a determination regarding whether the child is a member or eligible for membership, the agency or court should include additional information in the notice, such as:

(1) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or

(2) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.

(3) In the event that a parent has requested anonymity, the agency and court must take steps to keep information related to the parent confidential and sealed from disclosure.

(e) If the identity or location of the Indian parents, Indian custodians or tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to believe the child is an Indian child, notice of the child custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided (see section B.6.(c) of these guidelines regarding notice requirements). The Bureau of Indian Affairs will not make a determination of tribal membership, but may, in some instances, be able to identify tribes to contact.

(f) Because child custody proceedings are usually conducted on a confidential basis, information contained in the notice should be kept confidential to the extent possible.

(g) The original or a copy of each notice sent under this section should be filed with the court together with any return receipts or other proof of service.

(h) If a parent or Indian custodian appears in court without an attorney, the court must inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court, the right to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(i) If the court or an agency has reason to believe that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court or agency must, at no cost, provide a translated version of the notice or have the notice read and explained in a language that the parent or Indian custodian understands. To secure such translation or interpretation support, a court or agency should contact the Indian child's tribe or the local BIA agency for assistance in locating and obtaining the name of a qualified translator or interpreter.

(j) In voluntary proceedings, notice should also be sent in accordance with this section because the Indian tribe might have exclusive jurisdiction and/or the right to intervene. Further, notice to and involvement of the Indian tribe in the early stages of the proceedings aids the agency and court in satisfying their obligations to determine whether the child is an Indian child and in complying with 25 U.S.C. 1915.

(k) If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child.

(l) The notice requirement includes providing responses to requests for additional information, where available, in the event that a tribe indicates that such information is necessary to determine whether a child is an Indian child.

B.7. What time limits and extensions apply?

(a) No hearings regarding decisions for the foster care or termination of parental rights may begin until the waiting periods to which the parents or Indian custodians and to which the Indian child's

tribe are entitled have passed. Additional extensions of time may also be granted beyond the minimum required by the Act.

(b) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional 20 days from the date upon which notice was received in accordance with 25 U.S.C. 1912(a) to prepare for participation in the proceeding.

(c) The proceeding may not begin until all of the following dates have passed:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice in accordance with 25 U.S.C. 1912(a);

(2) 10 days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the party seeking placement) has received notice in accordance with 25 U.S.C. 1912(a);

(3) 30 days after the parent or Indian custodian has received notice in accordance with 25 U.S.C. 1912(a), if the parent or Indian custodian has requested an additional 20 days to prepare for the proceeding; and

(4) 30 days after the Indian child's tribe has received notice in accordance with 25 U.S.C. 1912(a), if the Indian child's tribe has requested an additional 20 days to prepare for the proceeding.

(d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

B.8. What is the process for the emergency removal of an Indian child?

(a) The emergency removal and emergency placement of an Indian child in a foster home or institution under applicable State law is allowed only as necessary to prevent imminent physical damage or harm to the child. This requirement applies to all Indian children regardless of whether they are domiciled or reside on a reservation. This does not, however, authorize a State to remove a child from a reservation where a tribe exercises exclusive jurisdiction.

(b) Any emergency removal or emergency placement of any Indian child under State law must be as short as possible. Each involved agency or court must:

(1) Diligently investigate and document whether the removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing to hear evidence and evaluate whether the removal or placement continues to be necessary whenever new information is received or assertions are made that the emergency situation has ended; and

(3) Immediately terminate the emergency removal or placement once the court possesses sufficient evidence to determine that the emergency has ended.

(c) If the agency that conducts an emergency removal of a child whom the agency knows or has reason to know is an Indian child, the agency must:

(1) Treat the child as an Indian child until the court determines that the child is not an Indian child;

(2) Conduct active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child;

(3) Immediately take and document all practical steps to confirm whether the child is an Indian child and to verify the Indian child's tribe;

(4) Immediately notify the child's parents or Indian custodians and Indian tribe of the removal of the child;

(5) Take all practical steps to notify the child's parents or Indian custodians and Indian tribe about any hearings regarding the emergency removal or emergency placement of the child; and

(6) Maintain records that detail the steps taken to provide any required notifications under section B.6 of these guidelines.

(d) A petition for a court order authorizing emergency removal or continued emergency physical custody must be accompanied by an affidavit containing the following information:

(1) The name, age and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) If such persons are unknown, a detailed explanation of what efforts have been made to locate them, including notice to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov);

(4) Facts necessary to determine the residence and the domicile of the Indian child;

(5) If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation;

(6) The tribal affiliation of the child and of the parents and/or Indian custodians;

(7) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

(8) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction;

(9) A statement of the specific active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody; and

(10) 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.

(e) At any court hearing regarding the emergency removal or emergency placement of an Indian child, the court must determine whether the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. The court should accept and evaluate all information relevant to the agency's determination provided by the child, the child's parents, the child's Indian custodians, the child's tribe or any participants in the hearing.

(f) Temporary emergency custody should not be continued for more than 30 days. Temporary emergency custody may be continued for more than 30 days only if:

(1) A hearing, noticed in accordance with these guidelines, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one 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; or

(2) Extraordinary circumstances exist.

(g) The emergency removal or placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal or placement no longer exists, or, if applicable, as soon as the tribe exercises jurisdiction over the case, whichever is earlier.

(h) Once an agency or court has terminated the emergency removal or placement, it must expeditiously:

(1) Return the child to the parent or Indian custodian within one business day; or

(2) Transfer the child to the jurisdiction of the appropriate Indian tribe if the child is a ward of a tribal court or a resident of or domiciled on a reservation; or

(3) Initiate a child custody proceeding subject to the provisions of the Act and these guidelines.

(i) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

B.9. What are the procedures for determining improper removal?

(a) If, in the course of any Indian child custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained, such as after a visit or other temporary relinquishment of custody, the court must immediately stay the proceeding until a determination can be made on the question of improper removal or retention, and such determination must be conducted expeditiously.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parents or Indian custodian, unless returning the child to his parent or custodian would subject the child to imminent physical damage or harm.

C. Procedures for Making Requests for Transfer to Tribal Court

C.1. How are petitions for transfer of proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's tribe may request, orally on the record or in writing, that the State court transfer each distinct Indian child custody proceeding to the tribal court of the child's tribe.

(b) The right to request a transfer occurs with each proceeding. For example, a parent may request a transfer to tribal court during the first proceeding for foster placement and/or at a proceeding to determine whether to continue foster placement, and/or at a later proceeding, for example at a hearing for termination of parental rights.

(c) The right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal.

(d) The court should allow, if possible, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

C.2. What are the criteria and procedures for ruling on transfer petitions?

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the State court must transfer the case unless any of the following criteria are met:

(1) Either parent objects to such transfer;

(2) The tribal court declines the transfer; or

(3) The court determines that good cause exists for denying the transfer.

(b) To minimize delay, the court should expeditiously provide all records related to the proceeding to the tribal court.

C.3. How is a determination of "good cause" made?

(a) If the State court believes, or any party asserts, that good cause not to transfer exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties who are petitioning for transfer.

(b) Any party to the proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child because the Act created concurrent, but presumptively, tribal jurisdiction over proceedings involving children not residing or domiciled on the reservation, and seeks to protect, not only the rights of the Indian child as an Indian, but the rights of Indian communities and tribes in retaining Indian children. Thus, 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.

(d) In addition, in determining whether there is good cause to deny the transfer, the court may not consider:

(1) The Indian child's contacts with the tribe or reservation;

(2) Socio-economic conditions or any perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems; or

(3) The tribal court's prospective placement for the Indian child.

(e) The burden of establishing good cause not to transfer is on the party opposing the transfer.

C.4. What happens when a petition for transfer is made?

(a) Upon receipt of a transfer petition the State court must promptly notify the tribal court in writing of the transfer petition and request a response regarding whether the tribal court wishes to decline the transfer. The notice should specify how much time the tribal court has to make its decision; provided that the tribal court has at least 20 days from the receipt of notice of a transfer petition to decide whether to accept or decline the transfer.

(b) The tribal court should inform the State court of its decision to accept or decline jurisdiction within the time required or may request additional time; provided that the reasons for additional time are explained.

(c) If the tribal court accepts the transfer, the State court should promptly provide the tribal court with all court records.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

D.1. Who has access to reports or records?

(a) The court must inform each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child of his or her right to timely examination of all reports or other documents filed with the court and all files upon which any decision with respect to such action may be based.

(b) Decisions of the court may be based only upon reports, documents or testimony presented on the record.

D.2. What steps must a party take to petition a State court for certain actions involving an Indian child?

(a) Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, active efforts have been made to avoid the need to remove the Indian child from his or her parents or Indian custodians and show that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail and, to the extent possible, should involve and use the available resources of the extended family, the child's Indian tribe, Indian social service agencies and individual Indian care givers.

D.3. What are the applicable standards of evidence?

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious harm to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious harm to the child.

(c) 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. Evidence 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.

D.4. Who may serve as a qualified expert witness?

(a) A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.

(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.

(3) A layperson who is recognized by the Indian 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 childrearing practices within the Indian child's tribe.

(4) 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.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

E. Voluntary Proceedings

E.1. What actions must an agency and State court undertake in voluntary proceedings?

(a) Agencies and State courts must ask whether a child is an Indian child in any voluntary proceeding under sections B.2. to B.4. of these guidelines.

(b) Agencies and State courts should provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under section B.6. of these guidelines.

E.2. How is consent to termination of parental rights, foster care placement or adoption obtained?

(a) A voluntary termination of parental rights, foster care placement or adoption must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain the consequences of the consent in detail, such as any conditions or timing limitations for withdrawal of consent and, if applicable, the point at which such consent is irrevocable.

(c) 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 in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian.

(d) Execution of consent need not be made in open court where confidentiality is requested or indicated.

(e) A consent given prior to or within 10 days after birth of the Indian child is not valid.

E.3. What information should a consent document contain?

(a) The consent document must contain 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, and the name and address of the consenting parent or Indian custodian. If there are any conditions to the consent, the consent document must clearly set out the conditions.

(b) A consent to foster care placement should contain, in addition to the information specified in subsection (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

E.4. How is withdrawal of consent achieved in a voluntary foster care placement?

(a) Withdrawal of consent must be filed in the same court where the consent document was executed.

(b) When a parent or Indian custodian withdraws consent to foster care placement, the child must be returned to that parent or Indian custodian immediately.

E.5. How is withdrawal of consent to a voluntary adoption achieved?

(a) A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption, whichever occurs later. To withdraw consent, the parent must file, in the court where the consent is filed, an instrument executed under oath asserting his or her intention to withdraw such consent.

(b) The clerk of the court in which the withdrawal of consent is filed must promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and the child must be returned to the parent or Indian custodian as soon as practicable.

F. Dispositions

F.1. When do the placement preferences apply?

(a) In any preadoptive, adoptive or foster care placement of an Indian child, the Act's placement preferences apply; except that, if the Indian child's tribe has established by resolution a different order of preference than that specified in the Act, the agency or court effecting the placement must follow the tribe's placement preferences.

(b) The agency seeking a preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in sections F.2. or F.3. of these guidelines, and explain why the preferences could not be met. A search should include notification about the placement hearing and an explanation of the actions that must be taken to propose an alternative placement to:

- (1) The Indian child's parents or Indian custodians;
- (2) All of the known, or reasonably identifiable, members of the Indian child's extended family members;
- (3) The Indian child's tribe;
- (4) In the case of a foster care or preadoptive placement:
 - (i) All foster homes licensed, approved, or specified by the Indian child's tribe; and
 - (ii) All Indian foster homes located in the Indian child's State of domicile that are licensed or approved by any authorized non-Indian licensing authority.
- (c) Where there is a request for anonymity, the court should consider whether additional confidentiality protections are warranted, but a request for anonymity does not relieve the agency or the court of the obligation to comply with the placement preferences.
- (d) Departure from the placement preferences may occur only after the court has made a determination that good cause exists to place the Indian child with someone who is not listed in the placement preferences.
- (e) Documentation of each preadoptive, adoptive or foster care placement of an Indian child under State law must be provided to the State for maintenance at the agency. Such documentation must include, at a minimum: the petition or complaint; all substantive orders entered in the proceeding; the complete record of, and basis for, the placement determination; and, if the placement deviates from the placement preferences, a detailed explanation of all efforts to comply with the placement preferences and the court order authorizing departure from the placement preferences.

F.2. What placement preferences apply in adoptive placements?

- (a) In any adoptive placement of an Indian child under State law, preference must be given in descending order, as listed below, to placement of the child with:
 - (1) A member of the child's extended family;
 - (2) Other members of the Indian child's tribe; or
 - (3) Other Indian families, including families of unwed individuals.
- (b) The court should, where appropriate, also consider the preference of the Indian child or parent.

F.3. What placement preferences apply in foster care or preadoptive placements?

In any foster care or preadoptive placement of an Indian child:

- (a) The child must be placed in the least restrictive setting that:

- (1) Most approximates a family;
 - (2) Allows his or her special needs to be met; and
 - (3) Is in reasonable proximity to his or her home, extended family, and/or siblings.
- (b) Preference must be given, in descending order as listed below, to placement of the child with:
- (1) A member of the Indian child's extended family;
 - (2) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;
 - (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - (4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

F.4. How is a determination for “good cause” to depart from the placement preferences made?

- (a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child's tribe.
- (b) The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of “good cause” to deviate from the placement preferences.
- (c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:
- (1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.
 - (2) The request of the child, if the child is able to understand and comprehend the decision that is being made.
 - (3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.
 - (4) The unavailability of a placement after a showing by the applicable agency in accordance with section F.1., and a determination by the court that active efforts have been made to find

placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) 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 any placement relative to another placement.

G. Post-Trial Rights

G.1. What is the procedure for petitioning to vacate an adoption?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that consent was obtained by fraud or duress, or that the proceeding failed to comply with ICWA.

(b) Upon the filing of such petition, the court must give notice to all parties to the adoption proceedings and the Indian child's tribe.

(c) The court must hold a hearing on the petition.

(d) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the decree of adoption, order the consent revoked and order that the child be returned to the parent.

G.2. Who can make a petition to invalidate an action?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster care placement or termination of parental rights where it is alleged that the Act has been violated:

(1) An Indian child who is the subject of any action for foster care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's tribe.

(b) Upon a showing that an action for foster care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) There is no requirement that the particular party's rights under the Act be violated to petition for invalidation; rather, any party may challenge the action based on violations in implementing the Act during the course of the child custody proceeding. For example, it is acceptable for the tribe to petition to invalidate an action because it violated the rights of a parent, or for a parent to petition to invalidate an action because the action violated the statutory rights of the tribe. ICWA is designed to provide rights to ensure that tribes, parents, and children are protected. In light of Congressional findings in ICWA, it is presumed that the Indian child is disadvantaged if any of those rights are violated.

(d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

G.3. What are the rights of adult adoptees?

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree must inform such individual of the tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include tribal membership, resulting from the individual's tribal relationship.

(b) This section should be applied regardless of whether the original adoption was subject to the provisions of the Act.

(c) Where State law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs should be sought to help an adoptee who is eligible for membership in a tribe to become a tribal member without breaching the Privacy Act or confidentiality of the record.

(d) In States where adoptions remain closed, the relevant agency should, at a minimum, communicate directly with the tribe's enrollment office and provide the information necessary to facilitate the establishment of the adoptee's tribal membership.

(e) Agencies should work with the tribe to identify at least one tribal designee familiar with 25 U.S.C. 1917 to assist adult adoptees statewide with the process of reconnecting with their tribes and to provide information to State judges about this provision on an annual basis.

G.4. When must notice of a change in child's status be given?

(a) Notice by the court, or an agency authorized by the court, must be given to the child's biological parents or prior Indian custodians and the Indian child's tribe whenever:

(1) A final decree of adoption of an Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child; or

(3) Whenever an Indian child is removed from a foster care home or institution to another foster care placement, preadoptive placement, or adoptive placement.

(b) The notice must inform the recipient of the right to petition for return of custody of the child.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. The waiver may be revoked at any time by filing with the court a written notice of revocation. A revocation of the right to receive notice does not affect any proceeding which occurred before the filing of the notice of revocation.

G.5. What information must States furnish to the Bureau of Indian Affairs?

(a) Any state entering a final adoption decree or order must furnish a copy of the decree or order to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information:

(1) Birth name of the child, tribal affiliation and name of the child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to the enrollment or eligibility for enrollment of the adopted child.

(b) Confidentiality of such information must be maintained and is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

G.6. How must the State maintain records?

(a) The State must establish a single location where all records of every voluntary or involuntary foster care, preadoptive placement and adoptive placement of Indian children by courts of that State will be available within seven days of a request by an Indian child's tribe or the Secretary.

(b) The records must contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

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Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

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