

# STANDARD FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT

## Table of Contents

<b>Page</b>	
2	Purpose
3	Introduction
3	Terms
6	Element #1 - Identification of Indian Children
9	Element #2 - Does the ICWA Apply?
11	Element #3 - Jurisdictional Issues: Legal Intervention; Case Transfer; and Protective Supervision
15	Element #4 - Notice of Pending Proceedings
20	Element #5 - Additional ICWA Provisions:
20	Working with the child's tribe;
21	Active Efforts;
22	Qualified Expert Witness
24	Placement Preferences
25	Involuntary Termination of Parental Rights
27	Element #6 - Voluntary Termination of Parental Rights
29	Examples

# STANDARD FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT

## PURPOSE

The purpose of this standard is to provide direction and guidance to the Child and Family Services (CFS) program regarding implementation of the Indian Child Welfare Act. This standard is intended to achieve statewide consistency in the development and application of CFS core services and shall be implemented in the context of all applicable laws, rules and policies. The standard will also provide a measurement for program accountability.

*ICWA Sec 1902 - The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.*

**The Department's goal is full compliance with the Indian Child Welfare Act, both the procedural requirements and the underlying intentions of the Act. To that end, the purpose of this standard is to describe practice which meets that goal and includes the following:**

- To understand and ensure the rights of American Indian/Alaska Native children, their families and their tribes according to provisions of the Indian Child Welfare Act;
- To provide active efforts to American Indian/Alaska Native children and their families to prevent removal;
- To involve the tribes and extended family of American Indian/Alaska Native children in planning and caring for children who are not living with their parents;
- To ensure that American Indian/Alaska Native children maintain connections to their tribe; and
- To provide the court with adequate information to make accurate findings regarding ICWA status and compliance so the court may make sound decisions about the future of children.

## **INTRODUCTION**

This standard will address the following elements of the ICWA:

- Element #1** Identification of American Indian/Alaska Native children
- Element #2** Applicability of the ICWA
- Element #3** Jurisdictional issues in ICWA cases including Protective Supervision
- Element #4** Notice requirements
- Element #5** Additional ICWA provisions
  - Initial and ongoing active efforts
  - Qualified expert witnesses
  - Placement preferences
  - Involuntary termination of parental rights
- Element #6** Voluntary Proceedings
  - Voluntary termination of parental rights
  - Voluntary placement in out-of-home setting

## **TERMS**

### **Active Efforts**

The ICWA mandates that the party seeking to remove an American Indian/Alaska Native child from the home of his parent(s) or Indian custodian to provide remedial and/or rehabilitative services to the family to: (1) prevent the break-up of the Indian family; or (2) prepare the family for reunification. The primary difference between Active and Reasonable Efforts is that the former includes active involvement with the child's tribe in both planning and service provision. See Active Efforts Principles document on the ICWA external website and the CW/ICWA SharePoint site.

### **Adoptive Placement**

The placement of an American Indian/Alaska Native child for adoption including any action resulting in a final decree of adoption.

### **Child Custody Proceeding**

Includes any state court action involving a foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement.

### **Customary Adoption**

An adoption which occurs under the customs, laws or traditions of child's tribe. Termination of parental rights (TPR) is not required to effect the tribal customary adoption. Through customary adoption, tribes are allowed to meet the permanency needs of their children while honoring their own tribal values and beliefs.

### **Extended Family Member**

A person defined by law or custom of the child's tribe or in the absence of such law or custom, an extended family member is an individual related by blood, marriage or adoption.

### **Foster Care Placement**

Any action where an American Indian/Alaska Native child is removed from his parent's or Indian custodian's home for temporary placement in a foster home or other foster care setting where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

### **Indian**

An Indian is any person who is a member of an Indian tribe, or who is an Alaska Native. For purposes of the ICWA, tribes determine their own membership requirements. **For purposes of this document American Indian/Alaska Native will be abbreviated as AI/AN.** Under the AFCARS Race category in FOCUS, AI/AN is defined as follows: A person whose origins include any of the original peoples of North, Central, or South America, and who maintains tribal affiliation or community attachment.

### **Indian Child**

A child is an Indian child under ICWA if he or she is an unmarried person who is under the age of 18 and (1) is a member of a federally recognized Indian tribe; OR (2) is the biological child of a member of a federally recognized Indian tribe and is eligible for membership in any federally recognized Indian tribe.

### **Indian Child Welfare Act (ICWA)**

A federal law passed in 1978, which assures AI/AN children are not unnecessarily removed from their families and allows families and the child's tribe to be involved in the planning for an AI/AN child in out-of-home placements. The requirements in ICWA are the prevailing legal precedent for treatment of AI/AN children when involved in a custody proceeding in State court. The Indian Child Welfare Act can be viewed on both the external ICWA website and the CW/ICWA SharePoint site.

### **Indian Custodian**

Any person with legal custody of an Indian child under tribal law, tribal custom, or State law; OR any person with temporary physical care, custody and control of an Indian child as a result of informal arrangements made with the child's parents or by tribal custom. When parents voluntarily place a child with a third party that party becomes an Indian Custodian under the ICWA even if the placement is temporary. A child's Indian custodian has virtually the same standing as a parent in ICWA cases.

### **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 the Interior because of their status as Indians.

### **Intervention**

The official document from an AI/AN child's tribe to the Department and/or state court notifying the Department/court that the tribe/corporation wants to be included as a party to all proceedings conducted for the child.

### **Parent for purposes of ICWA**

- (1) Any biological parent of an Indian child, OR any Indian person who has lawfully adopted an Indian child under State or Indian law or tribal custom.
- (2) Not inclusive of an unwed father whose paternity has not been acknowledged or legally established by state or tribal jurisdictions.
- (3) **Not** inclusive of non-Indian adoptive parents.

### **Placement Preferences**

ICWA identifies specific and prioritized out-of-home living arrangements in which an AI/AN child will be placed. The preferences are meant to assure the child will be living as close to his/her family as possible and will be reflective of the unique values of the child's Indian culture.

### **Pre-adoptive Placement**

The temporary placement of an AI/AN child in a foster home or institution after TPR, but prior to or in lieu of an adoptive placement.

### **Qualified Expert Witness**

A person who is most likely to be a qualified expert witness in the placement of an AI/AN child is:

- (1) A member of the AI/AN child's tribe who is recognized by the tribal community as knowledgeable in tribal customs pertaining to family organization and child rearing practices;
- (2) An individual who is not a tribal member who has 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 within the Indian child's tribe;
- (3) A professional person who has substantial education and experience in a pertinent specialty area and substantial knowledge of prevailing social and cultural standards and child rearing practices within the Indian community; or

A qualified expert witness is not necessarily an expert on the ICWA, but an expert on the child's tribe.

### **Termination of Parental Rights (TPR)**

A court action that severs the legal relationship between a parent and their child.

### **Tribal Affiliation**

Tribal affiliation is the specific tribe, to which an Indian person is enrolled, is a member or considered a member of the community.

### **Tribal Court**

A court with jurisdiction over child custody proceedings and is:

- (a) a Court of Indian Offenses;
- (b) a court established and operated under the code or custom of an Indian tribe;  
or
- (c) any administrative body of a tribe which is vested with the authority over child custody proceedings.

### **Tribal Membership**

1. For ICWA, the tribe must be federally recognized as a tribe, an Alaska native village, or a native corporation.
2. Membership is determined by each tribe and does not necessarily require tribal enrollment.
3. The U.S. Dept of Interior-Bureau of Indian Affairs may identify an Indian child if no tribal membership determination is made by the child's tribe (according to the BIA guidelines).

## **IMPLEMENTING THE STANDARD**

### **ELEMENT #1 – IDENTIFICATION OF INDIAN CHILDREN**

#### **Begin Efforts to Identify an Indian Child Early**

The first step of following the provisions of ICWA is the identification of an Indian child. It is critical to have this information as early as possible for a number of reasons:

- **For the child still living at home**, active efforts to prevent removal of the child from their family may be started. In the case of Indian children, active efforts to prevent removal are required, rather than the reasonable efforts required for all other children. See Element #5 for more information on active efforts.
- **For in-home cases where the child is at danger of removal** and is believed to be an Indian child, knowing the Indian status of the child helps the worker engage the child's tribe around available services and providing culturally relevant services. It also provides an opportunity for the tribe to be involved with any order of removal when necessary to ensure the child's safety.
- **For cases of imminent danger** where we don't know the family and there is out of home placement, gathering information about the child's Indian status is important so that active efforts to reunify can be begun immediately and the notice process can begin.
- **If the Indian child is removed**, early identification supports the child being placed according to the ICWA placement preferences and allows the child's tribe timely notice of any court proceedings as well as the opportunity to participate in case planning or request transfer of the matter to tribal court.

### **When and how to inquire about the child's race and Indian ancestry**

There are a number of opportunities to inquire about a family's American Indian/Alaska Native (AI/AN) race and ancestry including the following:

- Completion of the first 6 pages of the Child's Social and Medical Information Form before or at the time of the shelter care hearing is an opportune time to make inquiry. Page 3 asks specifically about Race and AI/AN ancestry. Race is a self-identified category and must be recorded as specified by the parents or if parents are not available, other family members. Parents should be shown the race category choices and asked: "Which group do you feel best describes you and which one best describes your child?"
- **The AI/AN race category is defined as follows:** A person whose origins include any of the original peoples of North, Central, or South America, and who maintains tribal affiliation or community attachment.
- Regardless of the self-identified "race" response, inquire whether or not the child has AI/AN ancestry. If the answer is "yes", assist the family to complete the Indian Status Information Form and Indian Ancestry Chart.
- A person may define his or her identity as AI/NA, but in order for ICWA to apply, the involved child must be an Indian child as defined by the Act (ICWA) and identified by a specific tribe(s).

**NOTE:** An individual may endorse having Indian ancestry without identifying themselves as AI/AN with regard to race. In some cases, an individual can also self-identify as AI/AN, but not claim identifiable Indian ancestry. Individuals have the right to self-identify their race and as a social worker, you cannot make the decision to change the person's self-identified choice of race.

In the case where the individual self-identifies their race as AI/AN, but has little specific tribal information, ask for additional detail in order to assess his/her understanding of their background such as locations, family names, etc. Without names, including a family name(s), enrollment information and tribe specific information (name of the tribe), neither the worker nor the tribe has very much detail to go on in researching the child's possible tribal affiliation.

- At any point that parents and/or families members do acknowledge Indian or Alaska Native ancestry, they must be given the **ICWA brochure** which gives background information on the Indian Child Welfare Act, why we are inquiring and what additional rights they have if their child is subject to the ICWA.
- During the process of completing the family's genogram, it is important to ask questions about family heritage for both the child's biological and adoptive (when applicable) ancestors on both the maternal and paternal sides of the family. When the genogram is done very early in the case, this is an ideal opportunity to gather

detailed information on Indian ancestry (complete the Indian Status Information Form), especially if it was not done earlier.

- Only when the Indian Status Information Form and Indian Ancestry Chart are both completed in sufficient detail to identify the tribe(s) with whom the child may be affiliated **will a decision be made** to: (1) send notice to tribes with whom the parents or child have an affiliation; or (2) gather additional information for the purposes of identifying possible tribal affiliation such as talking with another family member who might have more detailed information. Guidance for completing the Indian Status Information Form can be found on the CW/ICWA Sharepoint site.

### **How do I know if I have “reason to believe” this may be an Indian child?**

Red flags include the following responses to your inquiries:

- Parents/family identify their race as “AI/AN” and/or identify that they have Indian ancestry;
- Parents or other family members give the name of a specific tribe;
- Ancestry is supported by the name, birth date, specific tribal affiliation(s) or general tribal location of at least one of the child’s Indian grandparents;
- Parents indicate that one or both of them are enrolled tribal members;
- Parents indicate that they are eligible for enrollment as members of a specific tribe, but are not enrolled; and/or
- Parents indicate that at least one of the child’s grandparents is enrolled in a specific tribe or may be eligible for enrollment in a specific tribe(s).

Most tribes, under federal government pressure, established base rolls of tribal members. Since the base rolls were established, each tribe has enrolled members whom it determined met the tribe’s specific eligibility criteria. No one is “automatically” enrolled. For eligible members, enrollment is a personal/family choice. The more completely the individual’s blood line can be traced on the ancestry chart, the more information the tribe has to make a determination of whether the child and/or parents are tribal members or eligible for membership.

After diligent efforts at inquiry with parents and family members and there is no last name or no family name and the specific tribe upon which the ancestry is based is unknown, you have probably reached a dead end for now.

### **Family names and specific tribe names are the keys for tribes to search their records to determine membership.**

In the absence of names and birthdates, specific tribal name, family names, enrollment card numbers, certificates of Indian blood, treatment at an IHS facility, having lived on a specific reservation, **or** some other type of identifying information connecting an individual to a specific tribe or tribes, the family and child may well have American Indian or Alaska Native heritage, but the tribe is unknown and may not be knowable or traceable.



**Some practical examples of how to proceed with inquiry can be found at the end of this standard**

## **ELEMENT #2 – DOES THE ICWA APPLY?**

There are two components to ICWA eligibility:

- Does the child meet the definition of an Indian child for purposes of ICWA? and
- Is the type of court proceeding consistent with those proceedings covered under the ICWA?

### **Children subject to the ICWA**

A child is an Indian child under ICWA if he or she is an unmarried person who is under the age of 18 and (1) is a member of a federally recognized Indian tribe; OR (2) is the biological child of a member of a federally recognized Indian tribe and is eligible for membership in any federally recognized Indian tribe.

### **Tribal determination of membership or eligibility for membership**

Only the child's tribe can make the determination regarding membership or eligibility for membership. Enrollment cards, Certificates of Indian Blood or other means of verifying enrollment or membership are issued by tribes to their members. Each tribe has different membership criterion and each tribe makes their own determination according to that criteria. Those criteria may also change from time to time and be written or unwritten.

In some cases a child may be determined by the tribe as subject to ICWA because they determine that the child is a member of their community or because the child is a grandchild of a tribal member. Whatever the process the tribe has in place for making these determinations, the determinations are to be given full faith and credit.

**NOTE:** Technically, the ICWA provisions do not apply until there is written confirmation by the tribe that the child is an Indian child for purposes of the ICWA. . However, when it is likely that the child will be subject to ICWA, delaying the application of ICWA provisions such as placement preference and active efforts only compounds issues for the child and can lead to later placement changes that could have been prevented. It can also result in delays working with the child's tribe regarding service provision to the child and family.

### **Applicable court proceedings**

***ICWA Sec. 1903- (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) "pre-adoptive 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*

The ICWA applies to any child custody proceeding involving an Indian child in state court when the child is removed from the custody of the parent or Indian caretaker and that parent/Indian caretaker cannot have the child returned to him or her upon request and where the parent's rights have not been terminated.

This includes any court proceedings that may lead to any of the following:

- A foster care placement;
- A termination of parental rights;
- A pre-adoptive (such as the hearing to place an Indian child through the ICPC) or an adoptive placement

### **Non applicable court proceedings**

There are two types of court proceedings specifically excluded from the ICWA:

- Child custody issues between parents
- Criminal court actions for offenses that would also be a crime if committed by an adult.

### **DJC expansion exception**

When a commitment under the Juvenile Corrections Act (JCA) is expanded to include legal custody under both the Juvenile Corrections Act and the Child Protective Act (CPA) according to Idaho Juvenile Court Rules – Rule 16, it is considered a child custody proceeding subject to the ICWA. Under this dual custody the child has typically been removed from their home by the court under the JCA.

If the Department becomes aware of the expansion hearing ahead of time and has reason to believe that the child is an Indian child, we should provide notice of the proceeding to the child's tribe as soon as we have adequate information for notice. Many times, the Department does not become aware of the expansion until it has happened. When this happens, it is much like a situation of imminent danger where we are unable to prevent the child coming into Department custody.

Once the expansion occurs and there is a possibility that the child is an Indian child, staff should proceed with Elements 1,2,3,4 and 5.

**NOTE:** Under this scheme of dual custody the child is committed to the state's custody under the Juvenile Corrections Act (where ICWA does not apply) and the Child Protective Act (where ICWA does apply). In most cases, DJC continues to have placement responsibility until they discharge the child's commitment and are not responsible for complying with ICWA. Thus DJC is not compelled to meet the ICWA provisions regarding placement preferences or active efforts to reunify. The Department will make diligent efforts to comply with those provisions of the ICWA which are possible for it to influence.

**In every case**, when diligent efforts have been undertaken and the child's Indian status has not been or cannot be confirmed, the Department may request that the court to make a finding that the child is not an Indian child and the ICWA does not apply.

### **ELEMENT # 3 JURISDICTION ISSUES**

#### ***ICWA Sec 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 tribe. (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.***

The ICWA identifies specific situations where tribal court has exclusive jurisdiction over child custody proceedings when:

- The child is currently a ward of a tribal court prior to the incident that initiated the current action or risk assessment; and
- The issue initiating the current proceeding involves a child domiciled within the reservation boundaries who has a relationship to the tribe over which the tribal court could assert jurisdiction.

The state court may exercise emergency temporary jurisdiction while the Indian child is temporarily off the reservation in order to prevent immediate physical damage or harm to the child, however the agency must transfer the case to the appropriate tribal court as quickly as possible.

### **Concurrent Jurisdiction – P.L. 280**

Public Law 280 is a 1950's Congressional enactment granting states the option to extend their jurisdiction over reservations within their borders. In 1963 Idaho adopted legislation pursuant to Public Law 280 to exercise jurisdiction over "dependent, neglected and abused children" on the reservation.

In all cases, the tribal court has the opportunity to exercise concurrent jurisdiction over child custody proceedings as follows:

- A tribe has the option to legally intervene in the state court case or request transfer of jurisdiction of a case that could be heard in tribal court;
- If an Indian child is the subject of a foster care placement or termination of parental rights proceeding in state court, the parents, Indian custodian, and tribe may request that the case be transferred to tribal court; and
- Upon receipt of the case transfer request, the state court must transfer unless either parent objects, the tribal court declines jurisdiction, or the court determines good cause to the contrary exists for denying the transfer.

### **Good Cause to the Contrary**

Determination of good cause to the contrary as described in the BIA Guidelines:

*a. Good cause not to transfer the proceeding exists if the Indian's child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.*

*b. Good cause not to transfer this proceeding may exist if any of the following circumstances exists:*

*(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing;*

*(ii) The Indian child is over twelve years of age and objects to the transfer;*

*(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; and*

*(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.*

*c. Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems **may not** be considered in a determination that good cause exists.*

*d. The burden of establishing good cause to the contrary shall be on the party opposing the transfer.*

The tribe may choose not to legally intervene to become a party to the court case, or choose not to petition for transfer of the case to tribal court, but still participate in case planning and recommending or providing services. Ideas and input from parents, extended family members and a representative of the child's tribe will strengthen permanency and concurrent planning. Outreach to tribal and family representatives for consultation, discussion and planning for the child should occur continuously while the child is in an out-of-home placement whether the tribe legally intervenes in the case or not.

Family and tribal participation is critical in planning; however the Department has the final and sole responsibility to determine where a child will be placed. In Department placements, unless a tribe has legally intervened and become a party to the court case, the tribe may not participate in final decision making regarding placement selection.

An Indian child's tribe has the right to (legally) intervene at any point in a foster care placement or termination of parental rights proceedings. The right to intervene is not limited to involuntary proceedings even though the act only provides for notice in involuntary proceedings.

### **ICWA and Protective Supervision**

When the court has ordered protective supervision in a case, what is required by ICWA and Department practice expectations depends on the circumstances of the case and whether the child was ever removed from the home. The three following scenarios review what is required under various circumstances.

#### **Scenario 1 Child not removed from the home**

CFS receives a referral and the social worker completes a safety assessment, which finds there are safety issues. However, the child is not in imminent danger and safety threats do not justify an Order of Removal. Based on the safety assessment, the worker completes a Report of Investigation for Protective Supervision and files it with the court. At the adjudicatory hearing, protective supervision is ordered and there is no removal of the child from the home.

**Qualified Expert Witness:** There is no requirement for the testimony of a Qualified Expert Witness as the child is not removed.

**Notice requirement:** Notice of hearings is not required.

**Best Practice:** The CFS social worker will need to work with and involve the child's tribe. Communication and coordination with the child's tribe is part of the worker's active efforts to prevent any future removal. It would be best practice to send an inquiry letter regarding membership or eligibility for membership to the child's tribe.

**Scenario 2 Child returned home at the shelter care hearing OR the adjudicatory hearing.** There is a removal episode and the child is returned home under protective supervision at the shelter care hearing OR the adjudicatory hearing.

**Qualified Expert Witness:**

For a child returned home at the Shelter Care Hearing the testimony of a Qualified Expert Witness **is not required**. For a child not returned home at the Adjudicatory Hearing the testimony of a Qualified Expert Witness **is required**.

**Notice requirement:** Because the child has been removed from the home, a notice of pending proceeding to the child's tribe is required at the time of removal and should continue for all subsequent hearings.

**Best Practice:** When the case goes from custody to protective supervision, the CFS social worker will continue to work with the child's tribe including providing notice to the tribe of all subsequent hearings. While this notice is not an ICWA requirement because the child is in their own home, it is important for the tribe to have the opportunity to participate.

**Scenario 3 returns home sometime after the adjudicatory hearing.** There is a removal episode and, sometime after the adjudicatory hearing, the child is sent home under protective supervision.

**Qualified Expert Witness:** A testimony of a Qualified Expert Witness is required as the child was removed from the home.

**Notice requirement:** Because the child has been removed from the home, a notice of pending proceeding to the child's tribe is required at the time of removal.

**Best Practice:** When the case goes from custody to protective supervision, the CFS social worker will continue to work with the child's tribe including providing notice to the tribe of all subsequent hearings. While this notice is not an ICWA requirement because the child is in their own home, it is important for the tribe to have the opportunity to participate.

***ICWA Sec 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.***

#### **ELEMENT #4: NOTICE OF PENDING PROCEEDINGS**

##### **Sending Notices of Pending (court) Proceedings**

An important part of providing notice is to request confirmation of the child's tribal affiliation and to encourage participation of the child's tribe and family in planning for the child. The ICWA requires when the court knows or has reason to know that an Indian child is involved and is currently placed in a care setting outside their parent/caretaker's home, that the child's parents, Indian custodian and tribe MUST be given advance written notice of pending proceedings regarding the foster care placement or termination of parental rights. If paternity is acknowledged or established, notice is sent to both parents. In ICWA cases, the Indian custodian shall be treated the same as a parent. The parents' AI/AN heritage are not a factor for the parental notice requirement. Both parents receive notice even if one parent is Indian and the other parent is non-Indian.

**NOTE:** Situations where paternity has not been legally established by DNA, marriage of the putative father to the child's mother at the time of the birth of the child or the father is not named on the birth certificate can lead to confusion about how to proceed. If you have the name of the putative father and the name of the father's tribe, you have reason to believe that this is an Indian child and it is important that the father's tribe(s) be noticed immediately. Without the legal establishment of paternity, the tribe may decline to proceed any further and may not be willing or able to make a determination about the child's membership status. The tribe may recognize another standard for paternity and be able to make the determination regarding the child's membership status.

##### **Mailing Notices to Parents, Indian Custodians and Tribes**

###### ***ICWA Sec 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.***

ICWA requires that notices of (court) proceedings seeking the foster care placement of or termination of parental rights to an Indian child be sent to the child's parent(s) or Indian custodian and the child's tribe via Registered Mail with Return Receipt Requested. A phone call to the ICWA designated agent with details of the case and saying that the notice is coming is highly recommended.

If we know that the child is an Indian child at the point of removal, the child's tribe should be contacted immediately and advised of the "imminent danger" removal, the requirement for a shelter care hearing within 48 hours and the time and location of that hearing in the event that the tribe wants to send a representative to the shelter care hearing to appear on behalf of the tribe and request to intervene and/or transfer jurisdiction to the tribe.

The ICWA notice of the pending proceeding that goes to the child's tribe(s) ***must*** be sent to the tribe's designated ICWA Agent with all available information attached to help the tribe identify whether the child is an Indian child. All other mailings may be made via regular first-class mail. If the Notice of Proceedings was returned as undeliverable, every effort must be made to locate the tribe's designated ICWA agent and valid address and another registered mailing with return receipt requested must be made. Using the most recent version of the Federal Register which lists each of the tribe's and Alaska village's ICWA designated agent as it appears on the Child Welfare/ICWA SharePoint site will assure correct identification of both tribes and agents.

**NOTE:** The Federal Register is updated annually, however, a specific tribe may request that another person be named in the interim as their ICWA Designated Agent for purpose of delivery of notices. An announcement of any requested change will be posted on the ICWA Share Point and, if it involves a local tribe, a change will be made on the list of Tribes in Idaho. An e-mail with the replacement designated agent will be sent to ICWA liaisons and other staff in need of this information.

**NOTE:** The ICWA requires notice be sent to the Indian child's parent(s), Indian Custodian and tribe(s) ***prior*** to being placed into foster care and when terminating parental rights, even if a tribe has not previously responded to prior notices. A child's Indian status may change during the child custody proceedings and additional notice should be made if you obtain additional information which may change the child's Indian status. An example would be when you receive additional information about the child's family members such as information about specific tribal affiliation, paternity



confirmation on child's father, enrolled family members, and specific information including full names, birthdates, or the location of family members. Providing notice at termination of parental rights is also critical because the tribe may have changed its membership eligibility requirements or may want to exercise exclusive jurisdiction in the case by petitioning for transfer of the case to tribal court.

Templates for sending notice and inquiry can be found on the FACS Share Point site under FACS...CW...ICWA...Forms.

Letter to Parents/Indian Custodian  
Letter to ICWA Designated Agent (for the child's tribe)  
Notice of Court Proceedings  
Ancestry Chart

### **Examples of when and where to send notice**

When and where to send notice to a child's tribe can be confusing. The following are examples that address some of the more frequently encountered situations involving notice. These examples are not exhaustive, but should provide guidelines for how to proceed in situations that are commonly encountered. Whenever there is a question of how to proceed, workers should consult with their supervisor and ICWA regional liaison. The ICWA Program Specialist at Central Office is available to consult with any of these individuals. When a worker calls, he/she should have either the supervisor or the ICWA liaison on the phone as well.

- When at least one of the child's biological parent(s) is an enrolled member of a tribe, the family is probably Indian and it is highly likely that the child is Indian for purposes of ICWA. While the child's tribe is the only entity authorized to make that determination, it is recommended that the worker make a phone call immediately to the tribe's designated ICWA agent with as much information as you have about the child's family. Advise the tribe that you will be sending a Notice of Proceedings and required information immediately and that you will need a written determination from the tribe.
- If each parent is enrolled in different tribes, notice must be sent to both tribes. The ancestry charts showing both parents should be sent to both tribes. With rare exception, an individual cannot be enrolled in two tribes at the same time. It will be up to the parents and the tribes which tribe the child will be a member of.
- When you have information that any of the child's grandparents are enrolled members of a specific tribe, call the tribe and send notice immediately as in the first example above. It is best if you have the grandparent's name, tribal affiliation and enrollment number. However, in the absence of an enrollment number you must have the grandparents first and last name, or the family name, birth date (at least birth year) and specific tribal affiliation at a minimum.
- In situations where you have the name or family name, birth date, birthplace and specific tribal affiliation of one or more of the grandparents, but no further information, look up the tribe on the BIA ICWA designated agent list and call the

designated agent to verify the family's tribal affiliation and whether the child might be subject to ICWA. Send notice and all required notice enclosures to the specific tribe.

- When you have no grandparent's names and birthdates, no family name, no enrollment information and/or no specific tribe named by the family...the tribe is unknown. In these cases send notice to the Secretary of the Interior. Continue to try to collect information perhaps talking with extended family members. At the time that more specific information becomes available, notify a specific tribe.
- Names and sketchy tribal information. Parents report that the child's grandmother is Sioux. He gives you her name or family name. You will need to get more specific tribal information such as which specific Sioux tribe. The specific tribe can be narrowed down by having information about the grandmother's birth location, reservation on which she lived, where her family was from or where she lives now. You could also call the Plains BIA office to get some help if you know the name and possible location. If you have the name and nothing more specific than a non specific tribal name such as Sioux, Apache, Cherokee, Pueblo, Paiute, document the information you have and send notice accordingly. Without any further assistance from the BIA on identifying potential tribes, the tribe is unknown and notice goes to the Secretary of the Interior.
- When inadequate information is sent to a tribe(s) they will not be able to make a determination about the child's ICWA status. Available names, family names, and specific tribal information should be shared.

**NOTE:** Identification of Alaskan Natives regarding the status of one of their children has some additional challenges. There are 13 Alaskan regional corporations of which individual Alaska Natives may be shareholders. Alaska Natives may identify themselves as a member of a specific corporation(s). The corporation's primary role is to distribute dividends to individual eligible Alaska Natives and provide support for local villages in their regional area. The dividends are part of the corporation's profits from business holdings such as gas, oil or wireless communication. For purposes of ICWA, being a shareholder in a corporation is not necessarily synonymous with tribal affiliation, as shares may be inherited. Inquire about the parent's tribe/village and send notice to the ICWA designated agent at that location. While a corporation's enrollment office may assist you in determining the shareholder's tribe, they DO NOT PROCESS notices, so do not send notices to any regional Alaskan Corporation.



There are 12 regional corporations within Alaska. The 13<sup>th</sup> Regional Corporation is based in Seattle. There are also 29 village corporations that opted to participate.

An Alaskan Native may also identify themselves as a member of one of the five general cultural groupings. The [Alaska Native](#) population represents eleven distinct cultures who speak twenty different languages. This diverse Alaska Native population is often organized based on five cultural groupings drawing upon cultural similarities or geographic proximity. The [Athabascan](#) live in the interior of Alaska, the [Yup'ik/Cup'ik](#) live in western Alaska primarily on the coast, while the [Iñupiaq/St. Lawrence Island Yupik](#) live on the north coast. The [Aleut and Alutiq](#) live on the string of islands extending towards Asia; and the [Tlingit, Haida & Tsimshian](#) groups live in southeast Alaska bordering British Columbia.

You are not yet at the village level where Notice needs to occur. Follow-up questions should include:

- Are you tribally enrolled? If so, which village?
- Do you belong to a corporation? If so, which one?
- Do you have a federal Certificate of Degree of Indian Blood (CDIB)?

It is possible that they have been federally recognized as an Alaska Native (as evidenced by their CDIB), but may not be a member of a specific tribe/village. The Corporation of which they are a shareholder may possess information on the individual's tribal status. Part of the process of becoming an original shareholder is establishing that you are an Alaska Native.

### **When tribe is unknown**

Again, if information indicates Indian heritage but no specific tribe is identified, send notice to the Secretary of the Interior, Washington D.C. with a courtesy copy to any Regional Bureau of Indian Affairs Offices within the region where the alleged tribe is located if known. The template for the letter to the Secretary of the Interior in Washington, D.C. can be found on the ICWA forms page of the FACS SharePoint site. The ICWA requires notice of the pending proceedings and the right of intervention of the parent, Indian custodian and the Indian child's tribe. Notice must be accompanied by a copy of the pending proceedings. The Department form for the Notice of Pending Proceedings and Right to Intervene and the required enclosures follow the BIA guidelines for what must be sent to the child's parents, the child's Indian custodian (if there is one) and the child's tribe.

A copy of the ancestry chart (or genogram) and Indian Status Information Form must accompany the notice in order for the tribe to make a determination if the child is subject to ICWA. The current ancestry chart shows both the maternal and paternal side of the child's family. Information that must be provided on the ancestry chart or genogram (when available) includes the following:

- Child's date of birth;
- Parents/Indian custodian's names, dates of birth; place of birth; and specific tribal affiliation;
- Child's maternal and paternal grandparents' names, dates of birth, place of birth and specific tribal affiliation.

Please add to the chart any additional information you may have about the following:

- Any other relevant extended family information;
- Names of families or family names of persons with tribal ties;
- Sibling information; and
- Any other information that you have that will help the tribe specifically identify the child as an Indian child (confirm) or rule it out (deny).

Tribes regularly provide the Bureau of Indian Affairs with contact information for their designated ICWA agent for purposes of service of notice. This contact information is published in the federal register each year. To find the addresses for notices to tribes' review the designated ICWA agent list on the external ICWA website or on the CW/ICWA SharePoint site.

## **ELEMENT #5: ADDITIONAL ICWA PROVISIONS**

### **Working with the Indian child's tribe**

An Indian child's tribe has the right to legally intervene at any point in a foster care placement or termination of parental rights proceeding. The tribe may choose not to petition for transfer of the case to tribal court, not to petition to legally intervene to become a party to the case in court, but still participate in case planning and

recommending or providing services. Ideas and input from parents, extended family members and a representative of the child’s tribe will strengthen permanency and concurrent planning. Outreach to tribal and family representatives for consultation, discussion and planning for the child should occur continuously while the child is in an out-of-home placement whether the tribe legally intervenes in the case or not.

If a specific tribe is identified in a case, the tribe should be notified to provide them with an opportunity to assist in obtaining appropriate services to prevent placement. If placement becomes necessary, then the tribe should also be consulted on the case, including identifying appropriate placement options, qualified expert witnesses, and concurrent planning options that are culturally appropriate.

**Active Efforts**

Prior to the removal of an Indian child from the home of his parents or Indian custodian there must be “active efforts” to provide remedial and/or rehabilitative services to avoid removal of the child. An exception is a declaration of imminent danger by law enforcement where there was no previous agency contact with the child and family. Once removed from the home, “active efforts” must be on-going with the goal of providing services to the child and family that will support the safe return of the child to the home of the parent(s) or Indian custodian.

Active efforts are often referred to as going “beyond the reasonable efforts” required by ASFA in non-Indian cases. Often the differences are exemplified as follows:

**Reasonable efforts**

**Active efforts**

Referring for services .....	Active engagement of the child’s tribe
Managing a case.....	Arranging services and helping families engage in those services
Meeting minimum policy requirements.....	Proactively engaging in diligent casework activity
	Creatively meeting the needs of children and families
	Using methods and providing services that are culturally appropriate

For children in foster care, the Idaho standard of practice for CFS social workers is greater than what is identified above as reasonable efforts. Workers need to look at active efforts as not necessarily more vigorous or a higher level of effort or more “doing for” the client, but rather the quality of what the casework looks like. The casework efforts need to respond to cultural differences and needs to involve the child and family’s tribe. Tribal involvement for case consultation and recommendations on services and placements are critical to making active efforts.

### **Documentation of communication with the child’s Tribe**

With regard to sending notice, verbal communication with a child’s tribe is important, but written verification of the child’s ICWA status is required. Examples of important written documentation include:

- (1) written notice to the tribe;
- (2) written verification from the tribe regarding child’s Indian/ICWA status;
- (3) documentation of tribal participation in staffing, court hearings and other opportunities where input to case planning occurred; and
- (4) any and all contacts with the child’s tribe.

### **Qualified Expert Witness**

***BIA Guidelines for State Courts - Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:***

- (i) 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.*
- (ii) 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 childrearing practices within the Indian child’s tribe.*
- (iii) A professional person having substantial education and experience in the area of his or her specialty.*

***ICWA Section 912 - (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.***

The ICWA requires that for an Indian child, the court must find that **the child will likely suffer serious emotional or physical damage if the child remains or returns to the home of his parent or Indian custodian.** This finding must be supported by the testimony of a qualified expert witness. Except in cases where other specific knowledge is required, i.e. extreme physical abuse cases or sexual abuse cases, the qualified expert should have knowledge of Indian culture and traditions and be capable of giving an opinion on whether a particular Indian child's continued custody with the parent or Indian custodian would likely result in serious emotional or physical damage to the child. Departmental procedures will be used by the caseworker to reimburse the qualified expert for the expenses and honorarium for their time spent making a case specific assessment and their testimony in court. See ICWA external website for list of Qualified Expert Witnesses and Reimbursement Procedures.

The ICWA specifies two points in child custody proceedings when expert witness testimony must be provided to the court:

- At the time the child is removed from the home of a parent or Indian custodian (testimony to be provided at the adjudicatory hearing if possible, but never delayed beyond 90 days from the child's removal date); and
- Prior to the termination of parental rights for either parent of an Indian child.

Use of a qualified expert witness helps to establish the levels of evidence required by the ICWA. The evidence standard for removal of an Indian child is clear and convincing and the standard for termination of parental rights is beyond a reasonable doubt.

### **Serious emotional and physical damage standard for removal and TPR**

Based on the allegations and the testimony of the expert witness, the judge must make a finding as to whether returning a child home would pose serious emotional and physical damage to the child. The serious emotional or physical damage test of ICWA was intended to replace the "best interests of the child" test used in non-ICWA cases. Under the serious emotional and physical damage test, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child unless the child is in danger.

Prior to the ICWA, Indian children were often removed when they were in the care of relatives (Indian custodians), receiving medical care from a tribal member, or receiving a non-traditional tribal education. By enacting the serious emotional and physical damage requirement, Congress intended to prevent removal under such circumstances (from Idaho Child Protection Manual)

## Placement Preferences

### *ICWA Sec 1915 - (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.*

All out-of-home placements must be in the least restrictive setting and nearest the child's family. The ICWA, however, requires additional specific placement preferences for Indian children entering foster care. The placement preferences must be followed any time an Indian child enters an out-of-home care placement and each time an Indian child moves to a new living situation. The preferences for foster care placement and for adoptive placement have some differences. The lists are in order of priority, unless otherwise changed by the Indian child's tribe through tribal resolution. This type of resolution process is not typically done on a case by case basis. The altered preference priorities may be part of tribal code, existing tribal law or an earlier resolution made by the tribe. It is important to ask if the tribe has a different placement priority.

**NOTE:** A diligent search for an Indian foster family would include contacts with extended family members, the tribal social services program and a search of all county/state listings for available Indian homes.

Section 1915(b) of the ICWA cited above establishes the following order of preference for **foster care placement** of an Indian child as follows:

- (1) A member of the Indian child's extended family;



- (2) A 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.

Section 1915(a) of the ICWA cited above establishes the following order of preference for **adoptive (and guardianship) placements** of an Indian child:

- (1) A member of the Indian child's extended family;
- (2) Other members of the Indian child's tribe; or
- (3) Other Indian families.

The ICWA does allow the Department to deviate from the placement preferences if there is "good cause." BIA Guidelines provide that good cause may be based on one or more of the following considerations:

- The request of the biological parents or the child when the child is of sufficient age. Often this request is involved when attempting to keep sibling groups together during their time in out-of-home placement;
- The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness; and
- The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

The burden of establishing the existence of good cause not to follow the order of preferences shall be on the party urging that the preferences not be followed.

### **Involuntary Termination of Parental Rights**

Section 1912 (e) and (f) of the ICWA requires that proceedings for involuntary termination of an Indian child's parental rights must include testimony of a qualified expert witness. In addition, involuntary termination of parental rights under the ICWA requires proof beyond a reasonable doubt that continued custody would result in serious emotional or physical harm to the child. This extremely high standard of proof for termination of parental rights in ICWA cases reinforces the importance of the ICWA's focus on preventing the break-up of Indian families. It also communicates the seriousness of the consequences of making an error when terminating the parent rights of an Indian child from their parents/tribe.

Tribes vary with regard to termination of parental rights and adoption. Some tribes provide for termination of parental rights and adoption in their law and order codes. These legal proceedings are conducted through the tribal court. Some tribes do not recognize termination of parental rights, but provide for customary adoption according to tribal traditions. Customary adoption does not generally require TPR. In some tribes a child's family makes informal arrangements whereby the child can be protected and have a permanent placement within the tribe. Some tribes do not recognize termination of parental rights, but do not actively oppose termination of parental rights in state court.

Some tribes regularly wait to request a transfer of jurisdiction to tribal court once the child is freed for adoption in state court.

These issues can become sources of conflict and misunderstanding. This is why it is all the more important to work with the child's tribe on case planning and services including foster care placement as a critical component of active efforts.

Legal guardianship and relative placement without TPR are all acceptable permanency plans that meet ASFA, ICWA and Idaho Code.

### **ASFA exceptions to termination of parental rights**

According to ASFA, when a child has been in foster care for 15 of the most recent 22 months, the state must file or join a petition for the termination of parental rights. The worker can make a determination not to file a petition for TPR in a specific case if one of the exceptions identified below exists:

- A relative is caring for the child;
- The worker has documented in the case plan a compelling reason for determining that filing a petition to terminate parental rights would not be in the best interest of a child and the specific compelling reason has been approved by the court; or
- The worker has not provided services to the Indian child's family that is necessary for the safe return of the Indian child to their home.

Indian children, who are members of, or who are eligible for membership of, an Indian tribe, frequently fall within one of the exceptions to the termination of parental rights filing requirement of ASFA. Permanency planning hearings should take place within the time scheduled by ASFA. However, the decision concerning the permanency plan for the Indian child must continue to be governed by the requirements of both ICWA and ASFA.

### **Expert Witness testimony at the Termination of Parental Rights hearing**

The evidence presented at the TPR hearing must be beyond a reasonable doubt. The testimony of the expert witness must be that:

- The continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; **and**
- The worker made active efforts to provide the family with culturally appropriate remedial and rehabilitative services designed to reunify the family; **and**
- Those active efforts failed to remedy the concerns that required court intervention for the Indian family; **and**
- The Indian family is beyond rehabilitation.

“In other words, the caseworker must be proactive in her approach with the parents and support the client in complying with the service plan rather than expecting the plan be performed by the client alone. The services offered must take into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe.” .....Active Efforts from In re J.L., 483 Mich. 300; 770 N.W. 2d 853 (2009).

## **ELEMENT #6: VOLUNTARY PROCEEDINGS**

### **Voluntary Termination of Parental Rights**

The ICWA requires specific actions and timelines when a parent of an Indian child voluntarily consents to termination of their parental rights. The consent must be:

- In writing;
- Recorded before a judge in a court of competent jurisdiction;
- Certified by the judge that the consequences of consenting were fully explained to the parent(s), in a language understood by the parent(s), and that the parent(s) confirmed the explanations were understood; and
- Executed more than ten days after the birth of a child.

In any voluntary termination, the ICWA allows for the parents’ withdrawal of consent up to the TPR order or entry of an order of adoption. There are no formal requirements for withdrawal of consent. The withdrawal request may be verbal. The right to withdraw consent to termination applies even when the parent may not have the right to immediate custody of the child. The right to withdraw consent may extend after an adoption if it can be shown that the consent was based on fraud or duress or lack of proper ICWA notification.

### **Private and agency adoptions**

Much of the ICWA case law and discussion around voluntary terminations involves the voluntary relinquishment of newborn Indian children. There are often many questions about whether or not notice has to be sent to the child’s tribe. There is case law on both sides of this issue and it is especially difficult when the child has not been born and relinquishing Indian parent wants to remain anonymous. While not specifically stated in IDAPA Rules Governing Child Care Licensing, in order to abide by the provisions and the intent of ICWA, it is the Department’s position that notification of the child’s tribe is the most appropriate approach.

### **The ICWA uses the term “voluntary” in several sections with more than one meaning**

The term “voluntary placement” and is used to describe the situation when the parent(s)/Indian custodian may request voluntary placement of their Indian child, but may have their child returned to them immediately upon demand without requiring any court process. Idaho’s *DHW Child and Family Services Voluntary Placement Agreement* contains the necessary language to assure return of the child to the parent’s care upon request per voluntary agreement protocol. CFS placement options include a foster home, group home and/or residential care.

Under Idaho law and Department rule and policy, this type of voluntary placement can be for a period not to exceed 180 days (6 months) and does not require an initial court hearing. A court hearing is required if the placement will exceed 180 days. If there is a request for additional time, the court reviews the need for the placement to continue.

A voluntary placement (requested by the child's family) for child protection or treatment would NOT *initially* be governed by the ICWA. However, if a voluntarily placed child, at any point in time, cannot be returned to the parent or custodian on demand, the ICWA provisions **will apply to the case**. Voluntary placements of Indian children who come from a family with child protection risk factors can quickly move to court involvement if the family situation continues to deteriorate. Therefore, the suggested course is to treat agency-supervised voluntary placements of Indian children from families with child protection risk factors as if the ICWA applies from the beginning of the voluntary placement. That is, contact the tribe regarding their ability/desire to participate in case planning and services with the family and the Department.

During the time the child is in a voluntary placement and you are working with the Indian family, you should be making active efforts to reunify the child and family.

The other use of the term "voluntary" referenced in the ICWA is "voluntary *foster care* placement." This term outlines a situation where a child protection action begins, but the parent(s)/Indian custodian voluntarily agree to the child protection action, the child is placed and the parent may not have their child returned to them upon demand. While this type of placement is governed by the ICWA, this is not an option provided for under Idaho law or Department rule or policy.

In the past, many Indian children were removed from their families and tribes under the auspices of voluntary foster care placement, but families were unable to secure the immediate return of their children upon request. The additional protections in the ICWA were designed in response to this practice and as a means to keep Indian families together.

**Any action taken not consistent with this standard must be pre-approved by the FACS Division Administrator or designee. The action, rationale and approval must be documented in the file.**

## Examples

- Child's parent or parents indicate that the one or both of them is an enrolled member of a tribe (these may be two different tribes) and that one or both of their parents were enrolled members. This is an Indian family, but until the child's tribe makes a determination if the child is eligible for membership, you do not know if the child is **subject to ICWA**. If the child is not subject to ICWA, you would still work with the family and the tribe(s) to provide culturally relevant services. If the child is not subject to ICWA then tribal notice, Qualified Expert Witness, case transfer and active efforts **do not apply**. Because the child is not subject to ICWA doesn't change the fact that this is an Indian family.
- You have the maternal grandmother's name, birth date and report that she was Sioux. There are 15 different Sioux tribes (i.e. Oglala, Yankton, Rosebud, Standing Rock, Spirit Lake, etc) primarily located in North and South Dakota. Narrowing down the possible number of Sioux tribes is necessary. A follow up question could be: Where did the grandmother live, where is she or her people from? Once you have attempted to narrow down the location, you might want to call the Central Plains BIA. Based on the name, family name and the location, the BIA office staff may be able to narrow the choice of tribes based on location and their familiarity with the family name. You could also call or e-mail and fax the ancestry chart to each of the 15 Sioux tribes to determine if the family name is familiar to any of the tribes? Document your efforts. Do your best to get the most specific information you can.
- The parents report that they have Apache, Navajo, Comanche, Cherokee and Sioux ancestry. There are 8 different Apache tribes, 1 Navajo, 1 Comanche, 3 different Cherokee tribes and 15 different Sioux tribes. This information is not specific enough for notice. You will need more specific information such as names, family names, specific tribe name, reservation, locations, enrollment numbers and an ancestry chart reflecting how the people and tribes fit into the person's ancestry before you can go much further with tribal inquiry and notice.
- Parents report that they think that maternal great grandmother was Indian, but they can't remember the name of the tribe, but that it started with a "C". They only have her first name and that she came from Louisiana or Alabama, they are not sure. You locate some possibilities (Alabama-Coushatta Tribe of Texas, Coushatta Tribe of Louisiana, Jena Band of Choctaw Indians, Mississippi Band of Choctaw Indians, Chitimacha Tribe of Louisiana, and the Poarch Band of Creek Indians). Even with possible tribes, without names or family names the tribe will have little information to go on. If you notice these tribes, the most likely response is that there is not enough information.