

**Indian Child
Welfare Act
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Revised Guidelines: Overview

February 25, 2015, DOI/BIA released revised ICWA Guidelines for state courts and agencies effective immediately

- These supersede and replace the 1979 guidelines
- Expand application from just state courts to state courts and child welfare agencies

<http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>

Proposed Federal Regulations: Overview

- March 20, 2015, DOI/BIA released a Notice of Proposed Rulemaking (NPRM) for new proposed ICWA regulations
 - Over 2,100 comments received; the most for any BIA regulation ever promulgated.
 - DOI/BIA will analyze comments and issue a final rule

<http://www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf>

Section A – General Provisions

Provide minimum federal standards and best practices to ensure compliance with ICWA

- Where applicable state (or other federal law) provides a higher standard of protection to parents, those are to be followed

Section A – General Provisions

Important terms clarified with new definitions:

- Active efforts- more than reasonable efforts
 - Provides 15 examples of active efforts
- Continued custody- physical and/or legal custody that a parent already has or had at any point. All biological mothers are deemed to have had prior custody.
- Custody- physical and/or legal custody under any applicable tribal law or tribal custom or state law.

Section A – General Provisions

- **Domicile** - Physical presence and intent to remain. For Indian children domicile is that of their parents or, if unmarried, of the mother.
 - May be a place the child has never been
 - Cannot be defeated by the individual action of parent
- **Imminent Physical Damage or Harm** - present or impending risk of serious bodily injury or death that will result in severe harm w/o safety intervention.
- **Parent** - any biological parent of an Indian child (or adoptive parent). Does not include an unwed father where paternity has not been acknowledged or established. Acknowledging or establishing includes:
 - 1) Acknowledging paternity to the court in the action at hand; or 2) DNA testing.

Section A – General Provisions

Require courts and agencies to:

- Inquire in every proceeding if a child is or could be an Indian child
- Should ask even in proceedings where the child is not removed (e.g., investigations, alternative response, differential response)
- If reason to believe the child is an Indian child, apply ICWA unless or until the court determines that the child is not a member or eligible for membership in an Indian tribe

Section A – General Provisions

- Provide instructions on how to contact a tribe to verify the ICWA-eligibility of a tribe:
 - 1) contact tribal agent identified by the tribe as the ICWA notice recipient,
 - 2) contact tribe directly,
 - 3) contact BIA to assist in identifying tribal contact.

Section A – General Provisions

ICWA applies to any Indian child in a State child custody proceeding. The Guidelines reject the *Existing Indian Family Exception (EIF)*. Courts may not consider

- Whether the Indian parent ever had custody of the child
- The extent to which parents or children are connected to the tribe, Indian communities or customs

Voluntary proceedings where there is consent to a foster care, pre-adoptive or adoptive placement or termination of parental rights are covered by the Act; informal placements where child can be returned upon demand are not

Section B – Pretrial Requirements

- Court should allow alternative methods of participation in court hearings
 - telephonic, videoconferencing, etc.
- Active efforts should:
 - Begin at the moment a case or investigation begins that may lead to removal
 - Be conducted while verifying a child’s ICWA-eligibility

Section B – Pretrial Requirements

Agencies should ask every family whether there is reason to believe a child is an Indian child

- The agency should also ask whenever the state opens an investigation or provides family services (including alternative response/differential response)

Court should ask all parties to certify on the record whether there is reason to believe the child is an Indian child

- Can request genograms or domicile/residence information as part of the certification

If there is reason to believe the child is an Indian child, then the court must confirm that the agency used active efforts to engage the child's tribe(s) to verify membership or eligibility for membership

Section B – Pretrial Requirements

An agency or court has reason to believe that a child is an Indian child if any party, agency (or employee thereof), officer of the court or the child provides/has discovered information that the child is Indian or if the domicile or residence of the Indian child is on a reservation or in a predominantly Indian community

Where anonymity is a concern the obligation to determine ICWA eligibility is not relieved.

- Relevant documents, however, must be kept confidential/under seal

Section B – Pretrial Requirements

Only a tribe can determine child's membership

- No requirement that a child have certain contacts with tribe or certain blood quantum
- Tribe need not formally enroll a child for the child to be a member
- State cannot substitute its judgment
- BIA can no longer provide determination

Guidance provided on how to determine the tribe if the child is a member or eligible for membership in two or more tribes

Section B – Pretrial Requirements

Court must make a determination of the residence/domicile of Indian child and dismiss case if tribe would have exclusive jurisdiction (absent emergency circumstances); if previously resident/domiciled on reservation, state court must contact the tribal court to determine whether child is a ward of the tribal court

Notice is required for each initial proceeding and every “child custody proceeding” thereafter, both involuntary and voluntary proceedings. Must be sent by registered mail with return receipt to:

- Each tribe in which a child may be a member or eligible for membership
- Child’s parents (or Indian custodian)

Notice may be sent in another format but this must supplement registered mail, return receipt

Section B – Pretrial Requirements

Detailed contents for notice included in Guidelines.

Tribe may request additional information if needed to determine if the child is an Indian child

Information contained in the notice should not be considered public to the extent possible.

If parent appears in court without an attorney, court must inform parent of rights under the Act, including the right to an attorney

If a child is transferred between two states via the Interstate Compact for the Placement of Children (ICPC), both states' courts must send notice to the tribe

Section B – Pretrial Requirements

State may only remove or place a child on an emergency basis to prevent imminent physical damage or harm

- Must be as short as possible

- Applies to both children domiciled on reservation who are temporarily off reservation and children domiciled off reservation

If agency knows/has reason to know the child is an Indian child agency must

- Treat child as Indian child: provide notice, active efforts, take steps to confirm if child is an Indian child

- Temporary emergency custody cannot be continued for more than 30 days without full ICWA-compliant child custody proceeding unless “extraordinary circumstances”

Section B – Pretrial Requirements

- Guidelines include detailed information about what should be included in an emergency petition
- Emergency removal must terminate as soon as it is no longer necessary to prevent imminent physical damage or harm to the child or if the tribe exercises jurisdiction over the case; all parties to the Court should be permitted to provide information relevant to the agency's decision which should be evaluated by the Court at its hearing on the emergency removal

Section C – Transfer to Tribal Court

The tribe, parent, or Indian custodian a child custody proceeding may request orally or in writing that a case be transferred to tribal court

- the right to request applies to each distinct child custody proceeding
- may be requested at any stage of the proceeding

State Court must transfer the case unless

- Either parent objects to the transfer
- Tribal court declines jurisdiction
- State court determines that “good cause” exists to deny transfer

Presumption in favor of transfer

Section C – Transfer to Tribal Court

In determining good cause, the court may not consider:

- whether or not the case is at an “advanced stage”
- whether transfer would result in a change of placement for the child
- the child’s contacts with the tribe or reservation
- the socio-economic conditions or any perceived adequacy of the tribal agency or court
- the tribal court’s prospective placement for the child

The burden to establish “good cause” to not transfer is on the party opposing the transfer.

Tribal court should be notified of the request for transfer and provided with at least 20 days to respond

Section D – Involuntary Proceedings

State must show active efforts were provided prior to removal and before TPR

- Must show that active efforts have been unsuccessful
- Active efforts must be documented in detail
- Should include extended family, tribe, Indian social services agencies, and Indian care givers

Section D – Involuntary Proceedings

Clear and convincing evidence must show a causal connection between conditions in the home and serious physical or emotional harm to the child (the standard in ICWA)

- Evidence of poverty, single-parenting, inadequate housing, substance abuse, or non-conforming social behavior by itself cannot meet the standard of proof

Section D – Involuntary Proceedings

A Qualified Expert Witness (QEW) should have specific knowledge of the child's tribe, culture, and customs

The following individuals are preferred in this order:

- Member of the Indian child's tribe who is recognized as knowledgeable in tribal family organization and child rearing
- Member of another tribe who is recognized by the child's tribe as a QEW based on their knowledge and service delivery
- Layperson recognized by the child's tribe as having substantial experience and knowledge with the tribe, customs, and culture concerning child-rearing
- A professional person having substantial education and knowledge in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices in the child's tribe

Court or agency may request the assistance from the tribe or the regional BIA office to locate an appropriate QEW

Section E – Voluntary Proceedings

Must ask whether a child is an Indian child

- Should provide notice to the tribe

Must be executed in writing and recorded before a judge

- Need not be in open court if confidentiality requested

Includes guidance on the content of consent

Withdrawal must be in the same court as the consent document

- In adoptions, parent must file an instrument executed under oath asserting withdrawal
- Clerk must then notify the party by or through whom the adoption is occurring and child must be returned
- Consent to TPR or adoption may be withdrawn at any time prior to the entry of a final TPR or adoption, whichever occurs later

Section F – Dispositions

Placement preferences must be followed, unless there is good cause to not do so

If the preferences cannot be met, the agency must

- Demonstrate through clear and convincing evidence that a diligent search has been conducted
- Include notification and explanation provided to:
 - Parents/Indian custodians
 - All known/reasonably identifiable extended family members
 - The tribe
 - For foster care or pre-adoptive placement specifically
 - All of the homes approved/licensed by the tribe
 - All Native foster homes in the State

Section F – Dispositions

The party seeking to assert “good cause” must show one or more of the following considerations:

- Request of both parents after reviewing ICWA preferences
- Request of child if she can understand the decision at hand
- Extraordinary physical or emotional needs of the child
 - Cannot include ordinary bonding or attachment due to a noncompliant placement
 - Does not include an independent best interest determination because the Act itself lays out what is in the best interest of an Indian child
- Unavailability of placement after a showing of active efforts to find a placement

Court may not consider the socio-economic status of one placement versus another.

Section F – Dispositions

Where there is a request for anonymity, the court should consider whether additional confidentiality protections are warranted

- A request for anonymity does not relieve the agency or court of the obligation to comply with the placement preferences

Section G – Post-Trial Rights

Within two years of the adoption, a parent who consented can vacate due to fraud or duress

Child, parent, or tribe can invalidate any action where certain ICWA requirements (e.g., jurisdiction, transfer, intervention, notice, standard of proof, consent provisions) were not followed

- Any party can bring forward issues with regard to the rights of another party that were violated

Section G – Post-Trial Rights

Court that entered final decree should inform an adult adoptee of tribal affiliation of parents and info necessary to protect the individual's tribal rights (including membership)

- Applies regardless of when the adoption took place
- BIA can be used to facilitate this effort
- Where adoptions are closed, courts should at a minimum communicate directly with the tribe's enrollment office
- State and tribe should identify one tribal designee to assist adult adoptees with the process of reconnecting with tribes and to provide information to judges about this provision

Section G – Post-Trial Rights

State must furnish to BIA all final adoption decrees/orders from state court

- Specific information is required (includes enrollment info)
- This information is not subject to FOIA (privacy is protected)

State must establish single location for all voluntary/involuntary foster care, pre-adoptive placement, and adoptive placements and make available within 7 days upon request by the Indian child's tribe or DOI

- Should include at a minimum the complaint, all substantive orders, and record of placement determination

Court Cases Referencing the New Guidelines

- *In the Matter of M.K.T.* – Okla. Court of Civil Appeals (May 1, 2015) – Rejected provisions in BIA Guidelines precluding independent inquiry of best interest and consideration of ordinary bonding.
- *National Council for Adoption v. Jewell* – E.D. Va. – Lawsuit filed challenging Guidelines in their entirety
- *A.D. and C v. Washburn* – D. AZ – Specifically challenging provisions on transfer, active efforts, placement preferences

Other Recent Court Cases Addressing ICWA

- *Oglala Sioux Tribe v. Van Hunnik* (D.S.D. 2015) [993 F.Supp.2d 1017] – Failure to give parent right to challenge and confront basis for emergency removal of children violates ICWA and Due Process clause
- *In re Spears* (Mich. Ct. of Appeals, 2015) – Applied MIFPA (state ICWA) to reverse denial of transfer to tribal court (even though old ICWA Guidelines supported denial)
- *In the Matter of A.R.W.* (Wyoming Supreme Court, 2015) [2015 WY 25] – ICWA found not to apply to non-custodial non-Indian father as there is no breakup of the Indian family

Other Recent Court Cases Addressing ICWA (cont.)

- *Doe v. Jesson* (D. Minn. 2015) – Denied preliminary injunction that would have enjoined application of tribal notice and intervention rights in a voluntary proceeding as provided for in MIFPA (State ICWA)
- *Native Village of Tununak v. Alaska* (Alaska Supreme Court 2014) [334 P.2d 165] – Even though grandmother stated in open court that she was willing to adopt her granddaughter, placement preference not applied because she had not filed a formal petition
- *In the Matter of B.B.* (Utah Dist. Ct. 2015) – No tribal right to intervene in voluntary proceedings; tribe must be represented by an attorney

For Further Information

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