

# STANDARD FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT

## PURPOSE

The purpose of this standard is to provide direction, guidance, and statewide consistency regarding implementation of the Indian Child Welfare Act. The standard will also provide a measurement for program accountability.

The Indian Child Welfare Act (ICWA) is a federal statute that was passed to prevent the unwarranted separation of Indian families, maintain ties between Indian children and their Tribes, and provide a voice to Tribes in decision-making regarding their children.

**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 Indian<sup>1</sup> children, their families and their Tribes according to provisions of the Indian Child Welfare Act;
- To provide Active Efforts to Indian children and their families to prevent removal and reunify children with their family;
- 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 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 [Indian children](#).

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<sup>1</sup> "Indian child" refers to all native children as defined by the Indian Child Welfare Act.

## **INTRODUCTION**

This standard will address the following sections of ICWA:

### **Definition of Terms as Defined by ICWA**

**Section 1 -** Identifying Indian Children

**Section 2 -** Applicability of ICWA

**Section 3 -** Notice of Pending Proceedings

**Section 4 -** Types of Tribal Involvement

**Section 5 -** Applying ICWA Provisions

- Active Efforts
- Qualified Expert Witnesses
- Serious Emotional and Physical Damage Standard
- Placement Preferences for Foster Care and Pre-Adoptive Placements

**Section 6 -** TPR Proceedings

- Voluntary Termination of Parental Rights
- Involuntary Termination of Parental Rights

### **CFS Staff Requirements**

## **DEFINITION OF TERMS AS DEFINED BY ICWA**

### **Active Efforts**

Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. (page 13)

### **Adoptive Placement**

The permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

### **Child Custody Proceeding**

Includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes: foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement.

### **Continued Custody**

Physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody.

### **Custody**

Physical custody or legal custody or both, 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.

### **Customary Adoption**

An adoption which occurs under the customs, laws or traditions of a child's tribe. Termination of parental rights 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.<sup>2</sup>

### **Domicile**

For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal and permanent home, to which that person intends to return and remain indefinitely even though the person may be

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<sup>2</sup> Customary adoptions cannot be completed in State court. If a tribe suggests a customary adoption be initiated, discuss options with a supervisor.

currently residing elsewhere. For an Indian child, the domicile of the Indian child parents or Indian custodian or guardian. In the case on an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

**Emergency proceeding**

Includes any court action that involves an emergency removal or emergency placement of an Indian child.

**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.

**Foster-Care Placement**

Any action where an Indian 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 and member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

**Indian Child**

Any unmarried person who is under age 18 and either: (1) is a member or citizen of an Indian Tribe, or (2) is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

**Indian Child's Tribe**

(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 described in § 23.109.

**Indian Custodian**

Any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or tribal custom or State law.

**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, including any Alaska Native village as defined in U.S.C. 1602 (c).

**Intervention**

The legal process by which an Indian Tribe or Indian custodian becomes a party to a State court proceeding involving the foster care placement, or termination of parental rights to, an Indian child.

**Parent or Parents for purposes of ICWA**

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 biological father where paternity has not been acknowledged or established. A parent of an Indian child does not need to be Tribal member in order to receive ICWA protections and rights.

**Pre-adoptive Placement**

The temporary placement of an Indian child in a foster home or institution after termination of parental rights, but prior to or in lieu of an adoptive placement.

**Qualified Expert Witness**

A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe. The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

**Voluntary Proceeding**

Voluntary proceeding means a child-custody proceeding, where either parent, both parents, or the Indian custodian has, of his or her free will, without a threat of removal by a State agency, consented to the placement for the Indian child, or a proceeding for voluntary termination of parental rights.

## **IMPLEMENTING THE STANDARD**

### **SECTION 1: IDENTIFYING INDIAN CHILDREN**

CFS and the courts must inquire of each parent or participant in a child custody proceeding if they “know or have reason to know” that a child is an Indian child. Additional steps must be taken by the caseworker, and the court, if there is reason to know that the child is an Indian child.

Inquiry about Indian ancestry **must** be done **early and often** for every family and must *at least* take place during the following interactions with the family. There is also an ongoing duty to inquire about the possibility of Indian ancestry throughout the duration of the case.

- During the intake process;
- As part of the Safety Assessment or removal episode;
- Prior to or at the Shelter Care hearing (The first six pages of the Child’s Social and Medical Information Form must be completed with the family and Indian Status form);
- During the FGDM process;
- During completion of the family’s genogram (It is important to inquire and document about both the child’s biological and adoptive ancestors, when applicable, on both sides of the family);

In cases where a family member identifies possible Indian ancestry but has little or no specific tribal information, ask for additional details in order to assess his or her understanding of their background such as family names, locations, etc. It may be necessary to contact relatives identified to seek additional information regarding possible Indian ancestry. Completing a genogram with the family early in the case is helpful with this process. Without family names, enrollment information, and specific tribal information, neither the worker nor the Tribe has much detail to research possible tribal affiliations for the child.

CFS and the court have “reason to know” that a child is an Indian child when:

- A parent or participant in a child custody proceeding, an Indian Tribe, or Indian organization informs the court or CFS that the child is an Indian child;
- The child informs the court or CFS that he or she is an Indian child;
- The domicile or residence of the child, child’s parent, or child’s custodian is on a reservation;
- The court or CFS is informed that the child is or has been a ward of a tribal court;

- Either parent or the child possesses an identification card indicating membership in an Indian Tribe.

If there is “reason to know” that a child is an Indian child but court does not have sufficient to determine whether the child is or is not an Indian child, the court must confirm, by way of report, declaration, or testimony of the caseworker, *that CFS has used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member or eligible for membership*, to verify whether the child is a member or the biological parent is a member and the child is eligible for membership.

ICWA does not require inquiry by the court at each hearing *within* a proceeding. However, if a *new child custody proceeding* is initiated for the same child (such as a proceeding to terminate parental rights) the court must again inquire as to whether the child is an Indian child or there is “reason to know” that a child is an Indian child.

## **SECTION 2: APPLICABILITY OF ICWA**

It is important to determine at the outset of any State court child custody proceeding whether ICWA applies. Doing so promotes stability for Indian children and families and conserves resources by reducing the need for delays, duplication, appeals and attendant disruptions. There are two questions to ask in determining whether ICWA applies:

- Does ICWA apply to this child?
- Does ICWA apply to the proceeding?

### **Does ICWA Apply to This Child?**

ICWA applies when you have an “Indian child” who is unmarried, under age 18 and either:

- A member or citizen of an Indian Tribe; or
- Is eligible for membership/citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.
- If the child is considered a member by the Tribe.

The Indian Tribe has the sole discretion to determine whether the child is a member, eligible for membership, or whether the biological parent is a member of the Tribe. CFS must consult with the Tribe directly to determine if a child is a tribal member or eligible for tribal membership.

Once a specific Tribe is identified, the social worker must determine if that Tribe is listed as a federally recognized Indian Tribe on the BIA’s annual list, viewable at [www.bia.gov](http://www.bia.gov). Some Tribes are recognized by States (or Canada) but are not recognized by the Federal Government. ICWA applies only if the Tribe is a federally recognized Indian Tribe and therefore listed on the BIA list.

The parent need not be a member of a Tribe at the time of the commencement of the child custody proceeding to satisfy the requirement.

Once ICWA applies, it will continue to apply even though the child reaches age 18.

### **Rule 16 Expansions**

ICWA does apply to Rule 16 expansion resulting in a child placed in foster care.

If the Department becomes aware of the expansion hearing in advance and has reason to know 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.

### **ICWA and Protective Supervision**



When a child is found to be unsafe through a Comprehensive Safety Assessment and CFS intends to petition the court for protective supervision, the worker must determine whether the child or either parent is a member of a federally recognized Indian tribe. If the child or either parent is in fact a member, the CFS worker will contact the tribe to inform of agency involvement using [ICWA Protective Supervision Letter to Tribes](#). Contact must be made within 10 days of determination of an unsafe child.

The purpose of sending the ICWA Protective Supervision Letter is to allow the tribe the opportunity to participate in the case to prevent removal of the child. If protective supervision fails and the child must be removed from the home, this contact and tribal involvement may be used as evidence at the redispotion hearing to show CFS used active effort to prevent the break-up of the Indian family. Notice of Pending Proceeding to the Parents or Indian custodian, tribe and BIA would be required if removal ultimately occurs. (See Section 3)

## SECTION 3: NOTICE OF PENDING PROCEEDINGS

### **Mailing Notices to Parents, Indian Custodians, Tribe(s) and BIA.**

The following notices must be sent by **Registered Mail, Return Receipt Requested**,<sup>3</sup> to the Parents or Indian Custodian (if applicable), and the Tribal Designated Agent for each Tribe where the child may be a member or eligible for membership. Notices must be received at least **10 days prior** to the hearings below.

- Adjudicatory/Re-Disposition Hearing
- Permanency Hearing
- Termination of Parental Rights
- Adoption Hearing

Tribal Designated Agents are listed in the BIA Federal Register and is updated annually; the link can be found on the [ICWA share site](#). **It is highly recommended to call the Tribal Designated Agent prior to sending notice to verify the agent listed is correct, give brief details of the case and inform the agent the notice is coming.**

Copies of all above notices shall also be sent by registered mail, return receipt requested, to the Regional BIA Director:

**Portland Regional Director  
Bureau of Indian Affairs  
911 NE 11th Avenue  
Portland, Oregon 97232**

All other mailings (other than the four hearings listed above) may be made via first-class mail.

A copy of each notice sent must be filed with the court with any return receipts or other proofs of service.

### **What documents are required for the Notice to Parents, Indian Custodian, Tribe(s) and BIA?**

- [Parent/Indian Custodian Cover Letter](#)
- [ICWA Designated Agent/Tribal Inquiry Letter](#)
- [Notice to the BIA](#)

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<sup>3</sup> BIA Regulations allow for notice to be sent via Certified mail in addition to Registered mail however, IDAPA 16.06.01.051.01 requires CFS to send the notice via Registered mail return receipt requested.

- [Notice of Pending Proceedings](#)
- [Indian Child Ancestry Chart/Genogram](#)
- [Indian Status Information Form](#)
- Copy of the Petition/Endorsement Upon Summons
- If available copies of Tribal Identification cards or other pertinent documents
- Other documents to send when applicable: Report of Investigation, Progress Reports, Permanency Reports, Paternity Tests, Alternate Care Plan and Case Plan.

If we know 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. An inquiry of Tribally licensed foster homes should also be made in order to place the child in a ICWA compliant foster home. The Tribe should be verbally notified of the requirement for **shelter care hearing** within 48 hours and given information regarding the hearing in the event the Tribe wants to send a representative to the hearing. Official notice of the adjudicatory hearing must be sent by registered mail even if the Tribe is present for the shelter care hearing.

If a child meets the definition of an Indian child through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes. If the child meets the definition through more than one Tribe because the child is a member in more than one Tribe or is not a member of a Tribe but is eligible for membership in more than one Tribe, the Court must provide the opportunity for the Tribes to determine which should be designated as the Indian child’s Tribe.

If the identity or location of the child’s parents, the child’s Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child custody proceeding must be sent to the appropriate BIA Regional Director. To establish Tribal identity, as much information as is known regarding the child’s direct lineal ancestors should be provided. The BIA will not make a determination of Tribal membership but may, in some instances, be able to identify tribes to contact.

## SECTION 4: TYPES OF TRIBAL INVOLVEMENT

- The Tribe can take jurisdiction of a case at any point in a case. When this occurs, a case will be opened in Tribal Court and the State court case will be dismissed.
- A Tribe can intervene in a State court case. When this occurs, the Tribe becomes a party in the State court case. An Indian child's Tribe has the right to intervene at any point in a foster care placement or termination of parental rights proceeding.
- A Tribe can choose to neither take jurisdiction nor intervene but can choose to participate in case planning and recommending or providing services. Outreach to tribal and family representatives for collaboration, 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. While Tribal participation is critical in planning the Department has the final and sole responsibility to determine where a child will be placed. 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.

### **Exclusive Jurisdiction:**

Tribes have *exclusive* Tribal Court 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 comprehensive safety assessment; and/or the issue initiating the current proceeding involves an Indian child that resides or is domiciled within the reservation boundaries where the Tribe exercise exclusive jurisdiction over child custody proceedings except that a 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. In this case the case must be transferred to the appropriate Tribal Court as quickly as possible. In order for transfer to be complete tribal court must accept the transfer.

### **Concurrent Jurisdiction:**

In all cases, Tribes may exercise *concurrent* jurisdiction over child custody proceedings involving the foster care placement or termination of parental rights to an Indian child as follows:

- Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer for a foster care or termination of parental rights proceeding to the jurisdiction of the child's Tribe.

- The right to request a transfer is available at any stage in each foster care or termination of parental rights proceeding.
- 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. If the transfer occurs, the Department should work with the Tribe to ensure a smooth transition of the case in a way that minimizes the disruption of services to the child and family.

**Good Cause to the Contrary:**

If the State court believes, or any party asserts, that ‘good cause’ to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding. The burden of establishing good cause to the contrary shall be on the party opposing the transfer. Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

In determining whether good cause exists, the court must NOT consider:

- Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child’s parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
- Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- Whether transfer could affect the placement of the child;
- The Indian child’s cultural connection with the Tribe or its reservation; or
- Socio-economic conditions or any negative perception of Tribal or BIA social services or judicial systems.

## SECTION 5: APPLYING ICWA PROVISIONS

Once 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

ICWA requires “active efforts, and replaces the “reasonable efforts” normally found in the Child Protective Act. Active efforts means **affirmative, active, through and timely efforts** intended primarily to maintain or reunite an Indian child with his or her family.

Where the Department is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s Tribe and should be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, but are not limited to, for example:

- Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- Identifying, notifying and inviting representatives of the Indian child’s Tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;
- Conducting or causing to be conducted a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child’s parents;
- Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child’s Tribe;

- Taking steps to keep siblings together whenever possible;
- Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child’s parents or, when appropriate, the child’s family, in utilizing and accessing those resources;
- Monitoring progress and participation in services;
- Considering alternative ways to address the needs of the Indian child’s parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- Providing post-reunification services and monitoring.

Active efforts applies at the onset of a comprehensive safety assessment and prior to the removal of an Indian child. An exception is a declaration of imminent danger by law enforcement where there was no previous agency involvement 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.

### **Qualified Expert Witness (QEW)**

ICWA specifies two proceedings when Qualified Expert Witness testimony must be provided to the court; Adjudicatory/Re-Disposition Hearing and the Termination of Parental Rights Hearing.

### **Qualified Expert Witness testimony at the Adjudicatory/Re-Disposition Hearing**

When a child is removed from the home of a parent or Indian custodian, a QEW must give testimony at or prior to the Adjudicatory/Re-Disposition hearing. Use of the QEW is required to establish the levels of evidence required by ICWA. The State must show through the testimony of a QEW, there is **clear and convincing evidence that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child**. The QEW will also testify as to any active efforts made by the Department.

- CFS social worker should work with the child’s Tribe to identify and locate an appropriate, qualified expert witness. The social worker will provide the QEW with all information and documents necessary for the QEW to be able to render an opinion about the contained custody of the child. If the Tribe is unable to provide a QEW prior to the adjudicatory/re-disposition or TPR hearing, a list of potential expert witnesses can be found on the ICWA external website for list of [Qualified Expert Witnesses](#) and [QEW Reimbursement Procedure](#).

### **Qualified Expert Witness testimony at the Termination of Parental Rights Hearing**

A QEW must give testimony at or prior to the Termination of Parental Rights Hearing. Use of the QEW is required to establish the levels of evidence required by ICWA. The State must show beyond a reasonable doubt through testimony of the QEW,

- 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.

### **Serious Emotional and Physical Damage Standard for Removal and TPR**

The serious emotional or physical damage test of ICWA was intended to replace the “best interest 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. Based on the evidence and the testimony of the expert witness, the **court MUST make a finding as to whether returning a child home would pose serious emotional and physical damage to the child.**

### **Placement Preferences**

#### **What Placement Preference Apply in Foster-Care or Pre-Adoptive Placements?**

In any foster-care or pre-adoptive placement of an Indian child under State Law, including changes in foster-care or pre-adoptive placements, the child must be placed in the least-restrictive setting that:



- Most approximates a family, taking into consideration sibling attachment;
- Allows the Indian child’s special needs (if any) to be met; and
- Is in reasonable proximity to the Indian child’s home, extended family, or siblings. In any foster-care or pre-adoptive placement of an Indian child under State Law, where the Indian child’s Tribe has not established a different order of preference, 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 that is 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 child’s needs.**
- If the Indian Child’s Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe’s placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child.
- The court must, where appropriate, also consider the preference of the Indian child or the Indian child’s parent.

**What Placement Preferences Apply in Adoptive Placement?**

In any adoptive placement of an Indian child under State law, where the Indian child’s Tribe has not established a different order of preference, 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. Other members of the Indian child’s Tribe; or**
- 3. Other Indian families.**

- 4. If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.**
- 5. The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.**

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 6: TPR PROCEEDINGS**

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

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.

### **Consent to Termination of Parental Rights or Adoption can be withdrawn:**

- At any time prior to the entry of a final decree of termination.
- At any time prior to the entry of a final decree of adoption. However, if a parent(s) or Indian custodian(s) parental rights have already been terminated, then the parent or custodian may no longer withdraw consent to adoption.

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

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 per 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 direction of the case moves towards TPR or the child is freed for adoption in State court.

These issues can become sources of conflict and misunderstanding. Therefore, it is even 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.

**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.**

## **CFS Staff Requirements**

### **Intake**

- CFS staff must ask the referent if the child(ren) or family has any known Indian ancestry.
- CFS staff will gather as much information as possible of the child(ren) and family's Indian ancestry including but not limited to; membership, enrollment, if the child(ren) reside on an Indian reservation or attends an Indian school. If the referent does not know specific information about Indian ancestry or tribal affiliation, CFS staff must ask who in the family would have more information.
- CFS staff must ask if the child(ren) is a ward of a Tribal Court.
- CFS staff will ensure that the "Race and Indian Ancestry" categories on the person profile are correct.
- CFS staff will include any information gathered regarding the child(ren)'s and family's Indian ancestry in the narrative section of the presenting issue.

### **Safety Assessment**

In situations where there is an endorsement upon summons, imminent danger or the child is determined unsafe.

- During the first contact with the child(ren)'s family, CFS staff must inquire if the child has Indian ancestry on the maternal and paternal sides of the family. If yes, the staff will gather as much specific information as possible and complete the Ancestry Chart/Genogram, Indian Status Information, and if available make copies of Tribal Identification cards or other pertinent tribal identification documents.
- CFS staff will include information gathered in the Comprehensive Safety Assessment and court reports.
- CFS staff is responsible for ensuring accurate information is gathered and notices are sent to the appropriate Tribe(s) when a child is removed from the home. Federal law states that Tribes **MUST** receive notice 10 days prior to the Adjudicatory/Re-Disposition hearing. If the Tribe does not receive timely notice the hearing **MUST** be rescheduled and notice sent again within timeframes listed. Best practice is to inform

the Tribe via telephone that the child has been removed and notice has been/is being sent as soon as possible.

- If a child is not removed but decision is made the child is unsafe and the case will be opened for protective supervision the case worker will make contact with the child's tribe.
- CFS staff is responsible for obtaining a QEW prior to the Adjudicatory/Re-Disposition hearing.
- CFS staff must ensure iCARE information under the person profile and ICWA screen is accurate and up to date. This includes ancestry information, notices sent, tribal responses and any relevant documents are uploaded and narratives are present.
- CFS staff will work with tribal partners and family to identify appropriate placement for child(ren) in compliance with the ICWA placement preferences.
- CFS staff will apply active efforts.

### **Case Management/Permanency**

- CFS staff will coordinate and invite tribal partners to participate in FGDM's, home visits, case staffing's, placement selection meetings, sibling matrix meetings, permanency planning, and any other decision-making meetings regarding the child(ren) and family.
- CFS staff will work with tribal partners and family to identify appropriate placement for child(ren) in compliance with the ICWA placement preferences.
- CFS staff will send notice to of pending proceedings via registered mail return receipt requested in the following court hearings; Adjudicatory/Re-Disposition Hearing, Permanency Hearing, and Termination of Parental Rights. At every other hearing, it is acceptable for the courts to send notice through official court notice procedures for other hearings. Federal law states that Tribes MUST receive notice 10 days prior to the hearing. If the Tribe does not receive timely notice the hearing MUST be rescheduled and notice sent again within timeframes listed.
- CFS staff shall work with the prosecutor to identify and obtain a QEW prior at the Termination of Parental Rights hearing.
- CFS staff must ensure iCARE information under the person profile and ICWA screen

is accurate and up to date. This includes ancestry information, notices sent, tribal responses and any relevant documents are uploaded and narratives are present.

- CFS staff will apply active efforts.