Summary of the 2016 ICWA Guidelines

A publication of the National Indian Child Welfare Association

On December 12, 2016, the Bureau of Indian Affairs (BIA) released new guidelines for interpreting the 2016 Indian Child Welfare Act (ICWA) regulations. The 2016 guidelines replace the guidelines that were published in 2015 and are formatted so that they can be read side-by-side with the regulations. Unlike the regulations, the guidelines are not binding law; instead they are meant to explain the law and regulations to courts, state child welfare agencies, private adoption agencies, tribes, and family members. In other words, the guidelines can be viewed as the BIA's guide for best practice regarding implementation of ICWA and its corresponding regulations. This summary of the guidelines' key provisions is not meant to be an exhaustive description of all of the guidelines' provisions, but rather a description of the key provisions that practitioners will encounter on a regular basis and contain new information not contained in the law or regulations. A copy of the 2016 guidelines can be found online at www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm.

Description of Key Provisions

Considerations in providing access to state court ICWA proceedings (A.3)

The regulations encourage states to provide alternative methods of participating in state child custody proceedings, such as teleconferencing. The guidelines go on to say that state courts should also consider allowing non-attorneys to represent the tribe in state court proceedings. The guidelines acknowledge that many tribes are not in a financial position to hire an attorney to represent them in court, and that many state courts have already recognized this and allowed non-attorneys or attorneys licensed in another state to represent tribes.

Definition of an Indian child (B.1)

The guidelines highlight how important it is for the parties and the court to ask whether the child is an Indian child as soon as possible. The guidelines also clarify that in order for the court to determine that there is "reason to know" that a child is an Indian child, the court has to confirm that the parties used due diligence to

1) Identify the tribe;
2) Work with the tribe to verify that the child is a member or is the child of a member and eligible for membership; and
3) Treat the child as an Indian child unless or until the tribe confirms that the child is not an Indian child.

The guidelines also encourage the state courts and agencies to interpret factors that lead to a "reason to know" expansively. In other words, when in doubt, the state courts and agencies should err on the side of caution and find that there is a "reason to know" that a child is an Indian child. If there aren't any factors supporting a "reason to know" that the child is an Indian child, then the state agency (or other party seeking placement) should document the basis for this conclusion in the case file.

Determining when ICWA applies (B.2)

Throughout the guidelines, the BIA makes clear that ICWA applies to state child custody proceedings involving an Indian child *regardless* of whether individual family members themselves are Indian. This is because ICWA is triggered whenever there is a state "child custody proceedings" involving an "Indian child." The child's family meets the definition of Indian family

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because the child meets the definition of an Indian child. This is repeated in Section E.5 on active efforts, too. The guidelines also provide additional information/examples regarding the difference between voluntary and involuntary proceedings, as well as ICWA's application to status offenses, guardianships/conservatorships, intra-family custody disputes, and placement with a parent.

The Existing Indian Family Exception (B.2)

The guidelines once again confirm that state courts are prohibited from considering this judicially created exception to the application of ICWA.

Identifying the tribe (B.4)

The guidelines clarify that if you need assistance in identifying the child's tribe, you should contact the regional BIA office where the possible tribe is located. However, if you do not have that information, then you can contact your BIA regional office. When information for the child indicates only a tribal ancestry group (e.g., Sioux or Cherokee), then the state agency and court are encouraged to contact all tribes in that ancestral group.

Contacting the tribe (B.6)

The guidelines clarify that while the regulations primarily focus on written forms of contact with the child's tribe, state and private agencies and courts are encouraged to also pursue contact through email or phone to assist in the process of inquiry and services coordination. Documentation of these informal contacts is encouraged.

Verifying tribal membership (B.7)

The guidelines remind us that tribes, as sovereign governments, have the exclusive authority to determine their political citizenship and whether a child is an Indian child. Tribes can verify a child's membership or eligibility through written verification, but they may also verify by testifying before the court.

The guidelines also recognize that agencies need to send enough information to tribes in order for them to make the determination. The guidelines lay out a helpful list of things agencies should provide, including:

- Genograms or ancestry/family charts for both parents;
- All known names of both parents (maiden, married, and former names or aliases), including possible alternative spellings;
- Current and former addresses of the child's parents and any extended family;
- Birthdates and places of birth (and death, if applicable) of both parents;
- All known tribal affiliations (or Indian ancestry if tribal affiliations not known) for individuals listed on the ancestry/family charts; and
- The addresses for the domicile and residence of the child, his or her parents; or the Indian custodian and whether these are on an Indian reservation or in an Alaska Native Village.

The guidelines add that if a tribe fails to respond to multiple verification requests and the agency asked the regional BIA offices for assistance in contacting the tribe, then a court may make a limited determination of whether the child is an Indian child. This determination would only apply to the child custody proceeding at hand for the purposes of applying ICWA. In addition, if new evidence comes to light, the court may need to alter its determination. The guidelines also encourage the state or private agency to document requests for information or verification to the child's tribe regarding the child or parent's tribal citizenship and provide this for the court file.

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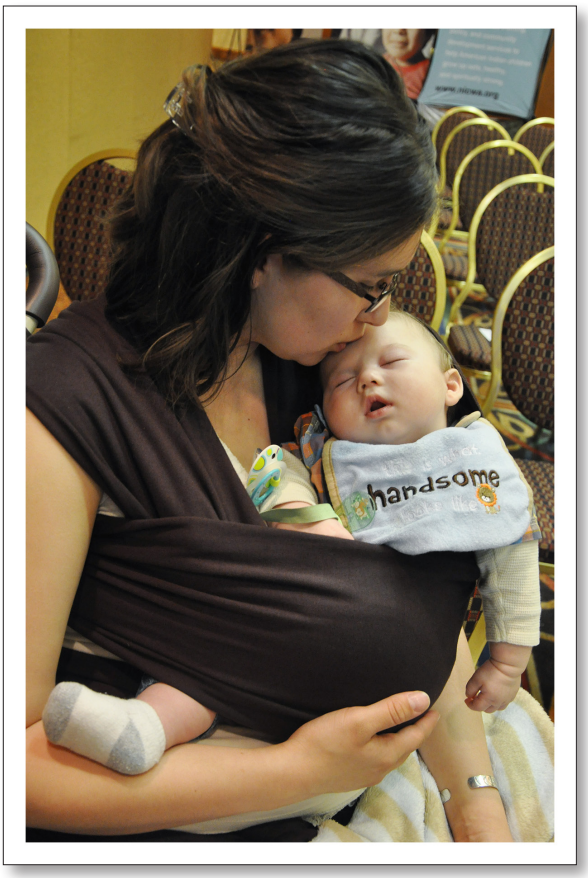
Emergency proceedings (Section C)

For the most part, the guidelines restate what the regulations say about emergency removals. The guidelines clarify that "imminent physical damage or harm" means "immediately threatened with harm, including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence."



For the termination of the emergency removal, the guidelines clarify that the state agency can initiate a child custody proceeding by setting the hearing date and sending out formal notice as specified by ICWA.

For notice in emergency proceedings, the guidelines recommend agencies take all practical steps to contact the parents, Indian custodians, and tribes. This includes contact by telephone or in person, email, or other written notices.

The guidelines recognize that state emergency proceedings may vary in their timeframes and procedures, and that states should adapt the regulations to their particular procedures. However, the regulations in this area are intended to ensure that emergency proceedings do not extend beyond 30 days unless specific conditions are met. Continuing emergency proceedings beyond 30 days should not occur in most cases and should be concluded by either initiating foster care proceedings or returning the child to the parents.

Emergency placements of Indian children should be in alignment with the ICWA placement preferences for foster care. When that is not possible, the state should have a concurrent plan on how to locate and place the Indian child in an ICWA preferred placement as soon as possible.

The guidelines also recognize the critical importance of providing active efforts as soon as possible for families of Indian children who are at risk of being placed in an emergency placement or have been placed in an emergency placement. The guidelines encourage state agencies to work with the parents, the child's tribe, and other parties (e.g., extended family) to develop and coordinate active efforts to help reunify the child with their parents.

Requirements for notice (D.1)

The guidelines stress that prompt notice is vitally important because it gives the parents and tribe the ability to respond to allegations, intervene, seek transfer, and locate preferred placements. So, in addition to the formal notice required by ICWA before the start of each proceeding, the guidelines also recommend that states send notice of:

- Each individual hearing within a proceeding;
- Any change in placement;
- Any change to the child's permanency plan or concurrent plan;
- Any transfer of jurisdiction to another state.

Method of notice (D.2)

The guidelines state that tribes may agree to waive their right to formal notice and receive notice in another way. However, tribes cannot waive or affect the rights of parents or other parties to receive formal notice. The guidelines also encourage states, as a matter of best practice, to proactively contact the tribe in addition to sending formal notice to better facilitate timely communication and response, coordination of services, and effective decision making.

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Contents of notice (D.3)

The guidelines note that even though a petition for a child custody proceeding may contain confidential information, providing a copy of it to tribes is a government-to-government exchange of information necessary for the governments to perform their duties.

Notice to the BIA (D.4)

The copy of the notice that has to be sent to the Regional BIA office can also be provided by personal delivery (if that is easier than registered or certified mail, return receipt requested).

Right to an attorney (D.9)

The statute and regulations state that indigent parents of an Indian child have the right to the appointment of legal counsel in child custody proceedings. The guidelines go on to explain that the best practice is to have counsel appointed early in the case and to have a single attorney represent the parent for the entirety of the case, rather than just for a particular proceeding.

Lack of response (D.10)

The guidelines state that if a tribe does not respond to notice or responds that it is not interested in participating in a proceeding, the state agency or court must still send notice of subsequent proceedings for which notice is required. In cases where the tribe does not respond, the best practice is to follow up by telephone.

Active efforts (Section E)

The guidelines recommend that the court inquire into active efforts at every court hearing and actively monitor the agency's compliance with the active efforts requirement. Since ICWA doesn't provide a standard of evidence for review of whether active efforts were made, the guidelines recommend that courts use the same standard of evidence as what's being used in the proceeding (i.e., courts should use clear and convincing evidence for foster care placements and evidence beyond a reasonable doubt for TPRs).

The guidelines go a step further than the regulations by recognizing the importance of using culturally based services and their proven efficacy with Indian families. They include several specific examples of culturally based services that could be appropriate.

The guidelines also provide a helpful list for how agencies can document active efforts, including:

- The issues the family is facing that the state agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
- A list of active efforts the state agency determines would best address the issues and the reasoning for choosing those specific active efforts;
- Dates, persons contacted, and other details showing how the state agency provided active efforts;
- Results of the active efforts provided and, where results were not satisfactory, whether the state agency adjusted the active efforts to better address the issues.

Tribe's exclusive jurisdiction (Section F)

The guidelines state that the tribe's designated ICWA contact (see annual list on bia.gov) will know whether the tribe exercises exclusive jurisdiction. The guidelines also note that ICWA's transfer provisions apply to both involuntary and voluntary foster care and TPR proceedings. In addition, tribes have inherent jurisdiction over domestic relations, including the welfare of child citizens of the tribe, even *beyond* that authority confirmed in ICWA. So, it may also be appropriate to transfer preadoptive and adoptive proceedings to a tribe.

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The guidelines also clarify that ICWA establishes a presumption that a state must transfer jurisdiction to the tribe upon request. Parents may object to the transfer, but good cause should be limited. Congress intended the good cause not to transfer provision to allow states to apply a modified doctrine of "forum non conveniens" (this means if the tribal court wasn't convenient, such as if it was too far away for the parents and other parties) to decide not to transfer. If a state court considers distance as a reason for good cause not to transfer, then it must also weigh any accommodations that could address the hardships caused by the distance.

The guidelines recommend that in determining whether there is good cause to deny transfer to tribal court, courts use clear and convincing evidence as the standard of proof.

To support a smooth transition of jurisdiction that ensures that the tribe will have the necessary information to provide for the child's needs, the guidelines suggest that the state agency and court look further than information contained in the court record and provide other information that might help the tribe understand and meet the child's needs (e.g., service eligibility).

Qualified expert witnesses (G.2)

Congress noted that the phrase "qualified expert witness" is meant to apply to expertise beyond normal social work qualifications. As a result, the guidelines repeat that the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's tribe. However, the guidelines also state that this social and cultural knowledge may not be necessary in all cases. The BIA gives the example that a leading expert on issues regarding sexual abuse of children may not need to know about specific tribal cultural knowledge in order to testify that returning a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child.

The guidelines also recommend that the qualified expert witness be someone familiar with that particular child. The qualified expert witness will be able to provide better testimony if he or she has met with the parents and extended family and has observed interactions between the parents and child.

Placement preferences (Section H)

According to the guidelines, considering the child's or parents' preference is allowed under the law; however, it does *not* require a court to follow a child's or parents' preference; rather it only requires that the court consider that preference, if appropriate. This applies to both foster care and adoptive placements.

The definition of "extended family" given by the regulations includes brothers and sisters. The guidelines, though, clarify that siblings should be 18 or older before they qualify as extended family for a preferred placement.

The guidelines also helpfully provide a list of efforts agencies and other parties should use (and document) to show that they conducted a diligent search for placements, including:

- Asking the parents for information about extended family, whether members of an Indian tribe or not;
- Contacting all known extended family, whether members of an Indian tribe or not;
- Contacting all tribes with which the child is affiliated for assistance in identifying placements;
- Conducting diligent follow up with all potential placements;
- Contacting institutions for children approved or operated by Indian tribes if other preferred placements are not available.

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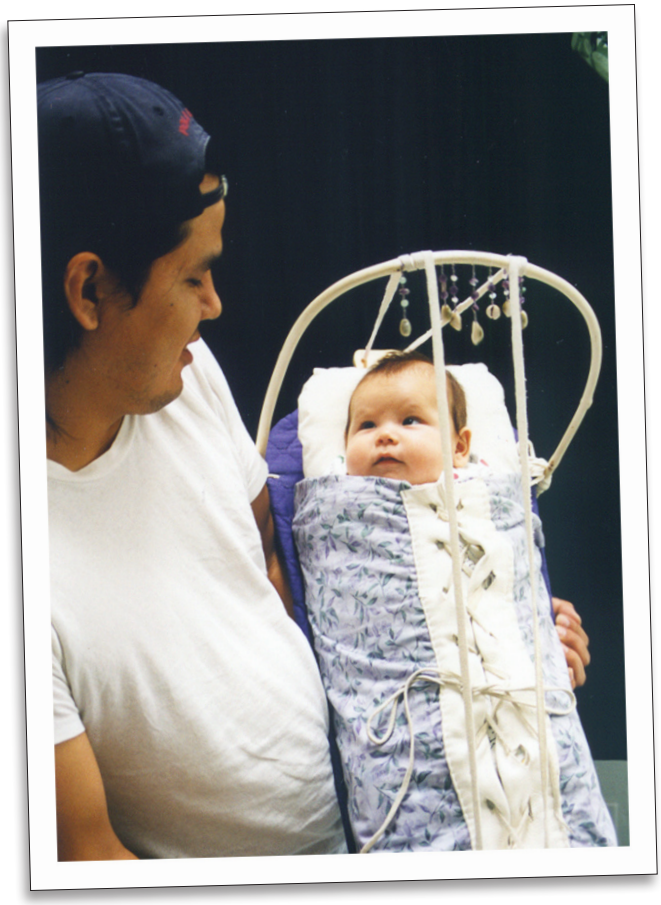

The guidelines also recommend that courts treat any individual who falls into a preferred placement category and who has expressed a desire to provide foster care to or adopt the Indian child as a potential preferred placement. Courts should not find that a preferred placement isn't available simply because an individual has not completed formal steps in the process. Family members may not know how to file a petition, have language or education barriers, or may live far away. As a matter of best practice, states should establish that an individual can meet the requirements by testifying in court or by sending some other written statement stating their interest.

In determining whether there is good cause to depart from the placement preferences, the guidelines clarify that a court can find that good cause does not exist (and apply the placement preferences) even when one or more of the factors listed in the regulations for good cause exists. The guidelines also explain that the preference of a parent or child should only be considered where appropriate. The law only requires that courts consider the preference, not that they have to follow it.

Withdrawal of parents' consent (I.7)

The guidelines repeat the regulations where they say that a parent may withdraw consent to TPR any time prior to the final court decision of TPR and may withdraw consent to adoption any time prior to the final court decision of adoption. However, the guidelines then clarify that if a parent's or Indian custodian's parental rights have already been terminated, then the parent or Indian custodian may not withdraw their consent to an adoption, because they no longer qualify as a parent or Indian custodian.

Record keeping and reporting (Section J)

The guidelines recommend that court records include any documentation of preferred placements contacted, and if they were found ineligible, provide an explanation. The guidelines then leave it up to the state courts and agencies to figure out who should carry this duty out.

The guidelines also explain that states cannot refuse to provide a party to an ICWA proceeding (such as a tribe who has intervened) access to information about the proceeding.

ICWA violations (Section K)

The guidelines stress that the two-year statute of limitations for challenging consent gotten through fraud or duress is a *minimum* timeframe. Courts should go with a state's statute of limitations whenever it is longer.

If a parent, Indian custodian, tribe, or child is petitioning to invalidate a decision for any other ICWA violation, they can challenge the decision in a different court from the one where the original proceedings took place. Furthermore, the petition to invalidate might affect more than one action. For example, if a TPR is invalidated, this will also affect an adoption proceeding.

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