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## 705.1.1 Indian Child Welfare Act (ICWA) Description

### Philosophy

Native American children have a unique political status not afforded other children. As members of sovereign tribal governments, this political status, as well as the history of biased treatment of Native American children and families under public and private child welfare systems, is the basis for the enactment of the Indian Child Welfare Act (ICWA) of 1978, Public Law No. 95-608, 92 Stat. 3069 codified at 25 U.S.C. §§1901-63. (To view the United States Code on ICWA, [click here.](#))

### Purpose Of The ICWA

The purpose of the ICWA is to preserve and strengthen Native American families and Native American culture. ICWA establishes “minimum Federal standards for the removal of Native American children from their families and placement in foster or adoptive homes which will reflect the unique values of Native American culture...” 25 U.S.C. §1902. It is through the children that the elders’ teachings, values, language, unique practices, and traditions are passed on and preserved. ICWA is a federal law; it supersedes state law where the two are in conflict.

The best interests of Native American children are inherently tied to the concept of belonging, which is key to the theme of temporary and permanency planning. Belonging can only be realized for Native American children by recognition and enhancement of the support networks that exist in the child’s extended family, clan, or tribal systems. Permanency develops from identification with these systems through a sense of connectedness.

It is the principles of Child and Family Services to support these purposes through full compliance with and conscious adherence to the requirements of ICWA.

## 705.2 Determining When ICWA And Related Agreements Apply

### Major objectives:

Child and Family Services will make agreements with Native American tribes to implement child welfare programs.

### **Applicable Law**

#### **25 U.S.C. §1919**

States and Native American tribes are authorized to enter into agreements with each other respecting care and custody of Native American children and jurisdiction over child custody proceedings

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75 Practice Guidelines

- 76 A. Agreements between states and American Indian/Alaska Native Tribes:  
77 1. The first step in applying the ICWA is to become familiar with the  
78 provisions of the tribal-state agreements, state laws, or principles. The  
79 state of Utah presently has agreements with the Navajo Nation and the  
80 Ute Indian Tribe.  
81 2. State law or tribal agreements establish a higher standard of protection for  
82 Native American parents than ICWA, and that higher standard must be  
83 followed.  
84
- 85 B. Determine ICWA applicability:  
86 1. ICWA applies to "child custody proceedings" in state courts. A "child  
87 custody proceeding" is defined as 25 U.S.C. §1903(1), to include: Foster  
88 care placements; termination of parental rights; pre-adoptive placements;  
89 and adoptive placements.  
90 2. Proceedings covered by ICWA:  
91 a. Foster care placements, 25 U.S.C. §1913(a) and §1912(e);  
92 b. Termination of parental rights, 25 U.S. C. §1903(1)(ii);  
93 c. Pre-adoptive placements, 25 U.S.C. §1903(1)(iii);  
94 d. Adoptive placements (includes conversion from foster care to  
95 adoptive placement), 25 U.S.C. §1903(1)(iv);  
96 e. Both voluntary and involuntary placements;  
97 f. Divorce proceedings in which neither parent will get custody;  
98 g. Any transfers of placement;  
99 h. Juvenile delinquency proceedings where parental rights may be  
100 terminated;  
101 i. Status offenses (juvenile delinquency proceedings that involve an  
102 offense that would not be a crime if committed by an adult, e.g.,  
103 drinking, runaway, truancy, etc.).  
104
- 105 3. Proceedings NOT Covered by ICWA:  
106 a. Juvenile delinquency proceedings involving violations of criminal  
107 law;  
108 b. Divorce proceedings where one parents is granted custody, 25  
109 U.S.C. §1903(1).  
110

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### 705.3 Determination Of An "Indian Child" (Native American Child)

111  
112  
113 Major objectives:

114 Child and Family Services will make diligent efforts to identify every child who is subject  
115 to the ICWA.  
116

117 **Applicable Law**

118 25 U.S.C. §1903 defines an "Indian child" as: Any child unmarried and who is under 18  
119 and is either a member of a Native American tribe or is eligible for membership in a  
120 Native American tribe and is the biological child of a member of a Native American tribe,  
121 (4). As a sovereign nation, it is the tribe that determines membership. A tribe's  
122 determination regarding membership or eligibility for membership is final, conclusive,  
123 and binding on the courts.  
124

125 Practice Guidelines

- 126 A. Inquire at Intake in **ALL** cases whether the child/parents are American  
127 Indian/Alaska Natives (AI/AN). This is important because ICWA requires that  
128 "active efforts" be made to provide "remedial services and rehabilitative programs  
129 designed to prevent the breakup of the Native American family..." 25 U.S.C.  
130 §1912(d). If AI/AN children are not properly identified early in a case, it is unlikely  
131 that the active efforts requirement will be met  
132
- 133 B. Inquire whether the child/parents are AI/AN at **ALL** stages of the case following  
134 Intake. This should include every court hearing and at every change or potential  
135 custody change.
- 136 1. This will facilitate the proper management of ICWA cases at an earlier  
137 point in the permanency planning process.
  - 138 2. It will eliminate the sudden "surprise discovery" that there is a Native  
139 American child involved.  
140
- 141 C. If the child's parents are unavailable or unable to provide a reliable answer  
142 regarding the Native American heritage of their child, the Child and Family  
143 Services caseworker will consider the following in determining the child's Native  
144 American heritage:
- 145 1. A thorough review of all documentation in the file, including contact with  
146 previous workers.
  - 147 2. Consultation with relatives/collaterals providing information that suggests  
148 the child/parent may be American Indian.
  - 149 3. Examination of any other information bearing on the determination of the  
150 child's Native American heritage, such as communication from other  
151 sources including Native American tribes and organizations.

- 152  
153 D. Upon receiving protective custody of an AI/AN child residing outside the  
154 boundaries of the reservation, the Child and Family Services caseworker will:  
155 1. Contact and staff the case with the state ICWA specialist.  
156 2. Inform the Assistant Attorney General that there is reason to believe that  
157 the child is a Native American child and subject to the requirements of the  
158 ICWA prior to initiating a petition. This will ensure that proper federal  
159 requirements of the ICWA and associated procedures are followed.  
160 3. Advise the Tribal/Nation's ICWA representative through notice of taking  
161 protective custody of the AI/AN child.  
162 a. A Child and Family Services caseworker should establish tribal  
163 contact as early as possible in an ICWA case.  
164 b. Child and Family Services caseworkers must work in partnership  
165 with tribal social workers throughout the course of a child custody  
166 proceeding involving a Native American child. Having the tribe's  
167 social worker and tribal attorney on board at the beginning of the  
168 case sets the stage for assistance, advice, positive conjoint efforts,  
169 tribal intervention, possible transfer of the case, the sharing of  
170 critical, culturally relevant resources and information, and maximum  
171 input on placement decisions.  
172 c. Child and Family Services caseworkers should continually maintain  
173 contact with tribal social workers.  
174  
175 E. Child and Family Services will gather the following information, if available, from  
176 the child or parent or Native American custodian and any other person with  
177 knowledge of the child or parent's tribal affiliation. The information will assist in  
178 the confirmation or determination of tribal membership:  
179 1. The name of the tribe or tribes that the child and parent are a member of  
180 or eligible for membership in.  
181 2. The tribal enrollment certification, identification numbers, or other  
182 documents that show the child and/or parent(s) are a member or eligible  
183 for membership in a tribe.  
184 3. The birth mother's maiden name, and names of the maternal and paternal  
185 grandparents and biological and/or legal father(s).  
186 4. Birth dates and birthplaces of the child and parent(s).  
187 5. Social Security Numbers of the child and parent(s).  
188 6. Degree of Indian Blood and/or Certificate of Indian Blood (CIB) of child  
189 and parent(s).  
190 7. If either birth parent was adopted, obtain the name of his or her birth  
191 parents (if available).

- 
- 192 8. Other information about extended family members including dates of birth  
193 and addresses of grandparents, aunts, uncles, cousins, great grandparents,  
194 stepparents, and first and second cousins.  
195
- 196 F. When the child's tribe has been identified and the above information gathered  
197 and documented in SAFE, the Child and Family Services caseworker will contact  
198 (by letter or phone) the tribe's membership/enrollment office to ask them to make  
199 a determination whether the child is a member or eligible for membership in the  
200 tribe. If the child is connected to more than one tribe, all of the relevant tribes  
201 must be contacted.
- 202 1. "Member" is defined by some tribes as a descendent and does not equal  
203 enrollment.  
204 2. Formal notice to the tribe regarding the court process is still required.  
205 3. The tribal worker will work with the Child and Family Services caseworker  
206 once the tribe is notified and throughout the case process.  
207
- 208 G. If the tribe does not respond, call the tribal enrollment officer or other tribal  
209 employees or officials responsible for, or knowledgeable about, tribal  
210 membership.
- 211 1. Several follow-up calls may be necessary as many of the tribes are  
212 understaffed.  
213 2. Follow the call with a certified letter documenting the conversation.  
214
- 215 H. If the tribe responds that the child is not an enrolled member, but is eligible for  
216 membership and the biological child of a member of a Native American tribe, the  
217 Child and Family Services caseworker will:
- 218 1. Request (or assist the family in completing) tribal membership application  
219 forms for the child.  
220 2. Encourage the child's parents or Native American custodian to enroll the  
221 child in the tribe to facilitate cultural ties and establish eligibility for  
222 potential tribal benefits.  
223
- 224 I. Once a tribe has determined that a child is not a member and not eligible for  
225 membership enrollment, ICWA does not apply. The Child and Family Services  
226 caseworker will:
- 227 1. Document all steps taken to determine the child's Native American or  
228 tribal ancestry.  
229 2. File the tribe's written statement declaring that the child is neither a  
230 member of the tribe nor eligible for membership (and the biological child of  
231 a member of a Native American tribe).

- 232 3. Incorporate in any court hearing the tribe's written statement declaring  
233 that the child is neither a member of the tribe nor eligible for membership  
234 (and the biological child of a member of a Native American tribe).  
235
- 236 J. If the tribe determines the child is a member or is eligible for membership and the  
237 biological child of a member of a federally recognized tribe, ICWA APPLIES.  
238 1. Some tribes define descendants as "members" for ICWA services. Child  
239 and Family Services caseworkers must follow ICWA whenever a Native  
240 American child is determined to be a "member" of a tribe.  
241 2. If the child was determined to be covered by ICWA (or if eligibility is not  
242 yet determined) and there are past or pending custody proceedings, the  
243 case must be treated as an ICWA case and is subject to ICWA procedures  
244 until the child is determined to be non-Native American.  
245
- 246 K. The Child and Family Services caseworker should document in SAFE:  
247 1. All inquiries (oral or written) regarding the child's ethnicity.  
248
- 249 L. When the child was initially determined to be Native American, the Child and  
250 Family Services caseworker should also document::  
251 1. Family history chart.  
252 2. Tribal enrollment number.  
253 3. Tribal ID card.  
254 4. Certificate of Degree of Indian Blood (CIB).  
255 5. Other evidence such as a letter from the tribe, Bureau of Indian Affairs.  
256 6. Documentation from the Indian Health Service, medical clinic or school,  
257 etc.  
258

## 259 705.4 Emergency Removal Of A Native American Child

260  
261 Major objectives:

262 When there is an emergency removal, the Child and Family Services caseworker will  
263 immediately cause an inquiry to be made as to the residence and domicile of the child.  
264

### 265 **Applicable Law**

#### 266 **25 U.S.C. §1915**

267 If the child is believed to be Native American, the Child and Family Services caseworker  
268 must undertake diligent efforts to place the child during emergency care in a setting that  
269 complies with the placement preference set forth in §1915(b) or (c) of the ICWA  
270 (including cases involving emergency placements).  
271

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272 Practice Guidelines

- 273 A. After making a removal, the following conditions must be immediately considered  
274 unless circumstances do not permit such inquiry, and the Native American status  
275 of the child must be immediately determined:
- 276 1. If the child is Native American, the name of the tribe and/or band must be  
277 determined and the tribe must be contacted.
  - 278 2. It is determined by the tribe that has jurisdiction over the child custody  
279 proceedings whether the child is domiciled on the reservation.
  - 280 3. It is determined that the child is in danger of imminent physical danger or  
281 harm.
  - 282 4. Determining the status of a Native American child:
    - 283 a. A member of the Native American child's extended family;
    - 284 b. A foster home licensed, approved, or specified by the Native  
285 American child's tribe;
    - 286 c. A Native American foster home licensed or approved by an  
287 authorized non-Native American licensing authority; or
    - 288 d. An institution for children approved by a Native American tribe or  
289 operated by a Native American organization that has a program  
290 suitable to meet the child's needs.
- 291
- 292 B. The Native American child's tribe has the right to establish a different order of  
293 placement preferences, and the state court is required to follow the order as long  
294 as it is the least restrictive setting appropriate to the particular needs of the child.  
295
- 296 C. Where appropriate in foster care placements, the preference of the Native  
297 American child or parent is to be considered.  
298
- 299 D. Where a consenting parent requests anonymity, the state court or state will give  
300 weight to the parent's request in applying the placement preferences (25 U.S.C.  
301 §1915(c)).  
302
- 303 E. Emergency custody is terminated when:
  - 304 1. Removal is no longer necessary to prevent imminent physical damage or  
305 harm to the child.
  - 306 2. The appropriate tribe exercises jurisdiction over the case.  
307
- 308 F. If termination of an emergency removal is not possible, a court order should be  
309 obtained authorizing continued protective custody.  
310
- 311 G. The Child and Family Services caseworker will obtain the following information  
312 for inclusion in the petition:

- 
- 313 1. The name, age, tribal affiliation, and last known address of the Native  
314 American child.
- 315 2. The name and address of the child's parents, Native American custodian (if  
316 any), and the tribe(s).
- 317
- 318 H. If the name and location of the child's parents, Native American custodian (if any),  
319 or tribe is unknown, the Child and Family Services caseworker should document  
320 the diligent efforts undertaken to obtain this information.
- 321
- 322 I. If the name and location of the parent, Native American custodian, or tribe is  
323 known, the Child and Family Services caseworker must obtain from the tribe  
324 whether the residence or domicile of the parent, Native American custodian, or  
325 child is on or near a reservation, and identify the reservation.
- 326
- 327 J. Develop a specific and detailed account of the circumstances that led to the  
328 conclusion that the child would suffer imminent physical damage or harm. These  
329 facts should be well documented.
- 330
- 331 K. Set forth a specific plan of action describing the "active" reunification efforts that  
332 have been undertaken and which are planned to restore the child to his or her  
333 parents or Native American custodian.
- 334
- 335 L. Develop a specific plan of action to physically transfer the child to the jurisdiction  
336 of the appropriate Native American tribe pursuant to 25 U.S.C. §1911(b), in  
337 cooperation with the tribal social worker.
- 338

## 339 705.5 Notice

340 Major objectives:

341 Child and Family Services must send notice to the tribe(s), the parents, and the Native  
342 American custodian whenever a child custody proceeding is initiated.  
343

### 344 **Applicable Law**

#### 345 **25 U.S.C. §1912(a)**

346 Formal notice of custody proceedings is required by §1912(a) of the ICWA. Congress, in  
347 enacting ICWA, recognized that the tribe has a direct interest in its children. The tribe is  
348 entitled to notice as a party, because, from a Native American perspective, a child is a  
349 sacred and precious resource that belongs to the entire tribe.  
350  
351

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352 Practice Guidelines

- 353 A. No foster care placement or termination of parental rights proceeding may be  
354 held until the tribe(s), parents, and Native American custodian have received  
355 proper notification and ICWA timelines have been followed.  
356
- 357 B. There are specific timelines set forth in §1912(a) of ICWA. This provision states  
358 that a custody proceeding cannot go forward until:
- 359 1. At least 10 days after receipt of notice by the parents or Native American  
360 custodian, or after 30 days if 20 additional days are requested by the  
361 parents or custodian to prepare for the proceedings.
  - 362 2. At least 10 days after receipt of notice by the tribe, or after 30 days if the  
363 tribe requests an additional 20 days to prepare for the proceeding.
  - 364 3. At least 15 days after receipt of notice by the Secretary of the Interior  
365 (Bureau of Indian Affairs) if the identity or location of the parent or Native  
366 American custodian and the tribe cannot be determined.  
367
- 368 C. Those to receive the ICWA notice of each proceeding are:
- 369 1. Parents.
  - 370 2. Native American custodian, if any.
  - 371 3. Tribe.
  - 372 4. Additional tribes (if the child is affiliated with or eligible for membership in  
373 more than one tribe, all tribes should receive notice).
  - 374 5. Bureau of Indian Affairs in Washington, D.C. as well as the appropriate  
375 Bureau of Indian Affairs area office if identified/location of parents or  
376 custodians cannot be determined.  
377
- 378 D. Notice is served by the following:
- 379 1. Notice may be provided by registered mail, returned receipt requested.
  - 380 2. Notice must be filed with the court, along with any returned receipts or  
381 other proof of service.
  - 382 3. The case files must be properly documented regarding proof of service.
  - 383 4. Even if the tribe does not respond, an official notice is sent of every future  
384 proceeding.
  - 385 5. Even if a tribe replies that it does not wish to intervene in the proceeding,  
386 notices of every future proceeding are sent.
  - 387 6. Determination must be made that the parent was proficient in the English  
388 language.
  - 389 7. If there is a reason to believe that the parent or Native American custodian  
390 will not understand the notice because of possible limited English  
391 proficiency, a copy of the notice must be sent to the Bureau of Indian  
392 Affairs Area Office nearest to the residence of that person, and a request

- 393 must be made to the Bureau of Indian Affairs staff to arrange to have the  
394 notice explained to that person in the language that he or she best  
395 understands. The written request must be properly documented in the  
396 case file.
- 397 8. If a person is assigned to explain the notice to the parent or Native  
398 American custodian in the language that is best understood, the details of  
399 the assistance rendered must be documented in the case file.

## 401 **705.6 American Indian/Alaska Native Parent Or Indian Custodian** 402 **Rights To Legal Counsel**

### 403 Major objectives:

404 The Child and Family Services caseworker will, at the earliest point in the case, advise the  
405 parents or Native American custodian of their right to court-appointed legal counsel.  
406

### 407 **Applicable Law**

#### 408 **25 U.S.C. §1912(b)**

409 Pursuant to §1912(b) of ICWA, the court is mandated to appoint legal counsel for an  
410 indigent parent or Native American custodian in any removal, placement, or termination  
411 proceeding  
412

### 413 Practice Guidelines

- 414 A. Inform the AI/AN parents or Native American custodian of the procedures that  
415 must be followed to have legal counsel appointed.  
416
- 417 B. The right to counsel applies in proceedings initiated by the state and those  
418 initiated by private parties, such as stepparent adoption proceedings and  
419 intrafamily disputes.  
420
- 421 C. The right to counsel also extends to pre-adoptive and adoptive placement  
422 preferences.  
423  
424

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## 705.7 Jurisdiction

### Major objectives:

- A. In every case involving a Native American child, the Child and Family Services caseworker must routinely ask the child's tribe whether the child is a ward of the tribal court under any prior tribal court proceedings.
- B. Once it is determined that a case is a child custody proceeding under ICWA and that the child is Native American, it must then be determined which court has jurisdiction.

### **Applicable Law**

#### **25 U.S.C. §1911(a) and (d)**

- A. Exclusive jurisdiction is vested with the tribal court over any child custody proceeding involving a Native American child who:
  - 1. Resides or is domiciled within the reservation or is a ward of the tribal court, regardless of the child's domicile.
  - 2. If an order establishing tribal court wardship is currently in force, the state court must accord full faith and credit to any tribal court orders, records, and judicial proceedings.

### Practice Guidelines

- A. Concurrent jurisdiction lies with the tribal and state court when a child resides or is domiciled off the reservation and the child is not a ward of the tribal court.
- B. A foster care placement or termination of parental rights proceeding may be transferred to tribal court under §1911(b) of ICWA absent:
  - 1. The tribal court's declination of the case.
  - 2. "Good cause" to the contrary.
  - 3. Objection by a parent.
- C. Some tribes might decline jurisdiction due to limited resources (e.g., no tribal court, or limited medical or mental health services). If a tribe declines jurisdiction, Child and Family Services will still give notice to the tribe.
- D. In every case involving an AI/AN child, the Child and Family Services caseworker will:
  - 1. Work closely with the Assistant Attorney General and Tribal Attorney to clarify initial jurisdiction.
  - 2. Ask the tribal social worker early in the case whether the tribe would like the jurisdiction to be transferred to their tribal court.

- 466 3. Work closely with the tribal social worker, if the tribe accepts transfer of  
467 the case, to coordinate appropriate legal documents required by the state  
468 court to effectuate the transfer and to make arrangements for the physical  
469 transfer and delivery of the child.  
470 4. Continue to involve the tribal social worker, even when a tribe declines  
471 transfer of a case. The tribal social worker can play a significant role in the  
472 concurrent planning process for the long-term well-being of the child.  
473

### 474 **705.7.1 Transfer Of Jurisdiction To An Indian Tribe With A Title IV-E** 475 **Agreement**

#### 476 **Major objectives:**

477 **It is important to provide essential documents and information to the Tribe that are**  
478 **necessary to continue an Indian child's eligibility under Title IV-E and Medicaid**  
479 **programs under Title XIX and provide for continuity of care when the child's case is**  
480 **transferred to Tribal jurisdiction where Title IV-E benefits can continue.**  
481

#### 482 **Practice Guidelines**

- 483 **A. In order to provide for the continuation of coverage, the Child and Family**  
484 **Services caseworker will work with the eligibility worker and the health care**  
485 **nurse to provide a packet with the following information to the Tribe:**  
486  
487 **1. The court order from the shelter hearing showing that continuation in the**  
488 **home from which the child was removed would be contrary to the welfare**  
489 **of the child or that reasonable efforts to prevent the removal of the child**  
490 **have been made.**  
491 **2. All documents related to the child's Title IV-E eligibility under sections**  
492 **472 and 473 of the Social Security Act:**  
493 **a. Relevant court orders.**  
494 **b. Title IV-E/Medicaid application.**  
495 **c. Determination forms.**  
496 **d. Support documentation.**  
497 **e. Birth certificate or other verification of citizenship.**  
498 **f. Review documents.**  
499 **g. Placement licensing information.**  
500 **h. Federal benefits (SSA/SSI) information.**  
501 **3. All documents that the state has that relates to the child's IV-E eligibility**  
502 **or potential eligibility for other federal benefits such as death benefits,**  
503 **WIC, Headstart and others.**  
504 **4. A copy of the current Child and Family Services Plan developed with the**  
505 **Child and Family Team, a list of the members of the Child and Family**

- 506 **Team with contact information, and minutes from the Child and Family**  
507 **Team Meeting used to develop that plan.**
- 508 **5. The Health Report from SAFE that includes all health care information**  
509 **about the child recorded by Child and Family Services.**
- 510 **6. Any educational records of the child, including school enrollment**  
511 **information.**
- 512 **7. Information on all placements that the child has had in the current out-of-**  
513 **home care episode including the most recent provider's contact**  
514 **information and a copy of their foster care license including the expiration**  
515 **date of the license.**
- 516
- 517 **B. Once the packet is complete, the caseworker will contact the Tribal worker at**  
518 **the Tribe and notify him or her that the packet will be sent and confirm address**  
519 **information for the Tribal worker. The packet will then be sent to the Tribal**  
520 **worker.**
- 521

## 705.8 Tribes' Right To Intervene

### Major objectives:

If the tribe declines jurisdiction, the tribe still will have the right to participate as an interested party or to intervene at any point in the proceeding.

### **Applicable Law**

#### **25 U.S.C. §1911(c)**

ICWA grants the tribe the authority to intervene in any state court foster care placement or termination of parental rights proceeding "at any point in the proceedings."

### Practice Guidelines

- 534 A. The tribes should be encouraged to intervene early in the child custody  
535 proceeding.  
536
- 537 B. The right to intervene extends to voluntary as well as involuntary proceedings.  
538
- 539 C. If the tribe intervenes, it is a party to the proceeding and has the same rights to  
540 notice of all hearings and assert its interest, the right of access to court records,  
541 the right to retain counsel if it chooses, the right to appeal, the right to present  
542 witnesses, to cross-examine witnesses, and to present other relevant evidence at  
543 the hearing.  
544
- 545 D. Tribal recommendations should be documented in the case file and court reports.  
546

547 **705.9 Transfer To Tribal Court**

548 Major objectives:

549 Child and Family Services will advise parents or Native American custodian that ICWA  
550 allows the parent or Native American custodian or Native American tribe to transfer the  
551 proceeding to tribal court.  
552

553  
554 **Applicable Law**

555 **25 U.S.C. §1911(a) and (d)**

- 556 A. Exclusive jurisdiction is vested with the tribal court over any child custody  
557 proceeding involving a Native American child who:  
558 1. Resides or is domiciled within the reservation or is a ward of the tribal  
559 court, regardless of the child's domicile.  
560 2. If an order establishing tribal court wardship is currently in force, the state  
561 court must accord full faith and credit to any tribal court orders, records,  
562 and judicial proceedings.  
563

564 Practice Guidelines

- 565 A. The state court must transfer, unless the tribal court declines jurisdiction, either  
566 parent objects to such transfer, or if the court determines that good cause exists  
567 to deny the transfer.  
568  
569 B. If the parent or Native American custodian requests, either orally or in writing,  
570 workers should recommend such a transfer. If not, the grounds on which the  
571 worker would oppose a transfer petition must be documented.  
572  
573 C. If the tribe requests, either orally or in writing, workers should recommend such a  
574 transfer. If not, the grounds on which the worker would oppose a transfer  
575 petition must be documented.  
576  
577 D. If any party believes that good cause exists not to transfer the proceeding, they  
578 must document in writing their reasons for such belief in the case record and  
579 court file.  
580  
581 E. Written statements must be distributed to all parties so that everybody has the  
582 opportunity to provide the court with their views.  
583

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## 705.10 Active Efforts Required To Prevent Family Breakup

584  
585  
586 Major objectives:

- 587 A. Child and Family Services will undertake active efforts to provide remedial  
588 services to the Native American family subsequent to an investigation and before  
589 a decision is made to place the child out of the home.
- 590 B. The rehabilitative effort should take into account the prevailing social and cultural  
591 conditions and the way of life of the child's tribe. These requirements are meant  
592 to assure that both evaluation of the problem and development of the treatment  
593 plan are culturally appropriate and not tainted by cultural bias.

594  
595 **Applicable Law**

596 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.

597  
598 Practice Guidelines

- 599 A. The Child and Family Services caseworker will offer the provisions of services of a  
600 remedial nature designed to rehabilitate and prevent the breakup of Native  
601 American families to the same extent that are available to non-Native American  
602 families when eligible.
- 603
- 604 B. Prior to initiating a petition before a state court for foster care placement or  
605 termination of parental rights, the Child and Family Services caseworker will  
606 undertake active efforts to provide remedial services and rehabilitative programs  
607 to the family designed to prevent its breakup.
- 608
- 609 C. In determining the type of remedial services that are appropriate, consider the  
610 following:
- 611 1. Are the Native American child's or Native American parent's cultural  
612 values, beliefs, and religious practices tied to the child's tribe?
  - 613 2. Does the Native American child or parent or Native American custodian  
614 maintain cultural ties to a tribe?
  - 615 3. Is the Native American child or parent or Native American custodian willing  
616 to accept services provided by the tribe or an organization such as an  
617 AI/AN cultural and/or service center?
  - 618 4. Is there an organization such as an AI/AN cultural and/or service center  
619 that can offer culturally appropriate services to Native American children  
620 and their families in close proximity to the Native American child, parent,  
621 or Native American custodian? Are these services designed to prevent  
622 removal or reunify Native American families?

- 623 5. Is the Native American child's tribe able and willing to provide services that  
624 eliminate the risk factors that prevent the child from living safely at home?  
625 6. Is there a contract provider who has access to culturally American Indian  
626 programs and/or resources?  
627  
628 D. To reduce the potential for cultural bias when evaluating home and family  
629 conditions and making decisions affecting Native American children and families,  
630 the Child and Family Services caseworker should involve the tribe and Native  
631 American organizations at the earliest possible point of intervention.  
632  
633 E. Services in the community specifically designed for Native American families are  
634 to be used where available, including resources of the extended family, the tribe,  
635 urban Native American organizations, tribal family service programs and individual  
636 Native American caregivers, e.g., medicine men or women, and other individual  
637 tribal members who may have developed special skills that can be used to help  
638 the child's family succeed.  
639  
640 F. In order to demonstrate that "active efforts" have been made, the Child and  
641 Family Services caseworker must assure that due consideration has been given to  
642 the cultural needs and values of the family and that resources have been diligently  
643 sought to provide family services.  
644

## 705.11 Active Efforts Versus Reasonable Efforts

### Major objectives:

The Child and Family Services caseworker will extend to the American Indian/Alaska Native families an intense level of services to be sure to satisfy ICWA.

### **Applicable Law**

Utah Code Ann. [§62A-4a-105](#). Division responsibilities.

### Practice Guidelines

Definition of Active Efforts – Active efforts mean not just an identification of the problems or solutions, but efforts showing an active attempt to assist in bridging the gap.

- 657  
658 A. Do caseworkers consider cultural conditions and way of life of the child's tribe  
659 and/or Native American community in making judgments about the family?  
660  
661 B. Do caseworkers intervene only when supported by relevant, prevailing Native  
662 American social and cultural standards regarding intervention in familial  
663 relationships by non-family?

- 664  
665 C. Do caseworkers develop a case plan with assistance of parent/custodian that  
666 involves use of tribal Native American community resources?  
667  
668 D. Do caseworkers encourage maintenance of the child in his or her family except  
669 where physical or emotional harm may result?  
670  
671 E. Do caseworkers involve the child, if of sufficient age, in the design and  
672 implementation of case plan?  
673  
674 F. Do caseworkers provide time and resources to prevent family breakup in at least  
675 equal measure to time and resources provided to other families?  
676  
677 G. Do caseworkers assist parents or custodian and child to maintain an ongoing  
678 familial relationship?  
679

## 680 705.12 Termination Of Parental Rights

### 681 Major objectives:

682 Child and Family Services will recognize the unique nature of termination proceedings  
683 when AI/AN child is involved. Child and Family Services as petitioner must show the  
684 court by evidence beyond a reasonable doubt, including the testimony of one or more  
685 qualified expert witnesses, that continued custody of the child by the parent or Native  
686 American custodian is likely to result in serious emotional or physical damage to the child.  
687

### 688 **Applicable Law**

#### 689 **25 U.S.C. §1912(f)**

691 The termination of parental rights standard set forth in 25 U.S.C. §1912(f) of ICWA  
692 requires evidence beyond a reasonable doubt.  
693

### 694 Practice Guidelines

- 695 A. Only where the standard can be satisfied that serious emotional or physical  
696 damage is likely to result to the child would termination of parental rights be  
697 appropriate and adoption a potentially appropriate plan for the Native American  
698 child.  
699  
700 B. The testimony of qualified expert witnesses is required by the ICWA.  
701  
702 C. When the ICWA termination standard cannot be met, the permanency plan will  
703 need to provide for a different option (e.g., a long-term guardianship, a relative  
704 placement, or continued efforts at reunification).

- 705  
706 D. Where a parent is making progress toward reunification by the time of the 12-  
707 month hearing, it may be appropriate to continue reunification as the permanency  
708 goal.  
709  
710 E. Any permanency plan developed for a Native American child that provides for  
711 out-of-home placement, including an adoptive placement, must comply with the  
712 placement preferences outlined in 25 U.S.C. §1915.  
713 1. The child must be placed in a manner consistent with the foster/pre-  
714 adoptive placement preferences established by ICWA, which are:  
715 a. Member of the child's extended family;  
716 b. Foster home licensed, approved, or specified by the Native  
717 American child's tribe;  
718 c. Native American foster home licensed or approved by an authorized  
719 non- Native American; or  
720 d. An institution for children approved by a Native American tribe or  
721 operated by a Native American organization that has a program  
722 suitable to meet the child needs.  
723 2. In any adoptive placement, preference will be given, in absence of good  
724 cause to the contrary, to a placement with:  
725 a. A member of the child's extended family;  
726 b. Other members of the Native American child's tribe; or  
727 c. Other Native American families.  
728

### 729 **705.13 Qualified Native American Expert Witness**

730  
731 Major objectives:

732 The Child and Family Services caseworker will enlist a qualified Native American expert  
733 witness who is experienced and knowledgeable about Indian culture, childrearing  
734 practices, and traditions to render an opinion as to whether a Native American child is  
735 suffering from some form of physical or emotional harm because of the behavior of the  
736 family.

#### 737 **Applicable Law**

##### 738 **25 U.S.C. §1912(e) and (f)**

739 The testimony of qualified Native American expert witnesses is required by ICWA  
740 before a foster care placement or a termination of parental rights may be ordered.  
741

#### 742 Practice Guidelines

- 743 A. Child and Family Services caseworkers will:  
744

- 
- 745 1. Enlist the state ICWA specialist to serve as an expert witness or contact to  
746 help locate a qualified expert witness.
- 747 2. Enlist the assistance of the Native American child's tribe in locating  
748 persons qualified to serve as expert witnesses.
- 749 3. Enlist the assistance of the closest Bureau of Indian Affairs area office in  
750 locating persons qualified to serve as expert witnesses.
- 751 4. Contact official reservation tribal organizations or urban Native American  
752 programs that serve children and families to locate potential expert  
753 witnesses.
- 754
- 755 B. "Qualified expert witnesses" who are routinely relied on in ICWA hearings  
756 include:
- 757 1. A member of the Native American child's tribe who is recognized by the  
758 tribal community as knowledgeable in tribal customs as they pertain to  
759 family organization and child-rearing practices.
- 760 a. Medicine men;
- 761 b. Medicine women;
- 762 c. Tribal leaders;
- 763 d. Tribal ICWA specialist.
- 764 2. A lay person having substantial education and experience in the area of his  
765 or her specialty along with substantial knowledge of prevailing social and  
766 cultural standards and childrearing practices within the Native American  
767 child's tribe.
- 768 a. Native American child welfare workers;
- 769 b. Day care workers;
- 770 c. Bureau of Indian Affairs resource: knowledge of customs and  
771 culture of tribes they serve;
- 772 d. Tribal ICWA specialist;
- 773 e. State ICWA specialist.
- 774 3. A professional person having substantial education and experience in the  
775 area of his or her specialty along with substantial knowledge of prevailing  
776 social and cultural standards and childbearing practices within the  
777 community.
- 778 a. Psychologists;
- 779 b. Psychiatrists;
- 780 c. Social workers;
- 781 d. State ICWA specialist.
- 782

783 **705.14 Recognition Of Tribal Licensing And/Or Approval Of Standards**  
784 **For Foster Homes**

785 Major objectives:

786 Child and Family Services will recognize foster homes within and outside Native  
787 American country that are certified, approved, or licensed as meeting the foster home  
788 licensing requirements under state law.  
789

790  
791 **Applicable Law**

792 Utah Code Ann. [§62A-2-117](#). Licensure of tribal foster homes.  
793

794 **25 U.S.C. §1901-1963**

795 The ICWA provides that tribes may develop and implement tribal foster home standards.  
796 The office will license tribal foster homes according to standards developed and  
797 approved by the tribe.  
798

799 Practice Guidelines

800 A. If the tribe has not developed standards, the office will license tribal foster homes  
801 pursuant to this chapter.  
802

803 B. Many regional offices will want to make greater efforts and work more  
804 cooperatively with tribes to recruit Native American foster care and adoptive  
805 homes, and to encourage tribes to develop programs to recruit and license Native  
806 American foster care and adoptive homes.  
807

808 **705.15 Higher Standards Of Proof**

809 Major objectives:

810 Child and Family Services will recognize these higher standards and will seek to meet the  
811 standards when taking custody of an AI/AN child.  
812

813  
814 **Applicable Law**

815 **25 U.S.C. §1901-1963**

816 ICWA mandates higher standards of proof in child custody proceedings involving AI/AN  
817 children than the state's requirements in those cases involving non-Native American  
818 children.  
819

820 Practice Guidelines

821 Through ICWA, Congress declared that a Native American child may not be removed  
822 simply because there is someone else willing to raise the child who is likely to do a better

823 job or because it would be “in the best interests of the child” for him or her to live with  
824 someone else. Nor can a placement or termination of parental rights be ordered simply  
825 based on a determination that the parents or custodians are “unfit parents.” It must be  
826 that it is dangerous for the child to remain in his or her present conditions.

827

## 828 **705.16 Out-Of-Home Placement Of Native American Children**

829

### Major objectives:

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831

832

833

834

Child and Family Services caseworkers will give preference to the foster and pre-  
adoptive placements, unless the Native American child’s tribe has established a different  
order of placement. The caseworker should also contact the tribe to discuss tribal  
placement preferences as early as possible in case development.

835

### **Applicable Law**

#### **25 U.S.C. §1915(d)**

836

837

838

839

840

The preferences and standards recognized are the prevailing social and cultural  
standards of the Native American community in which the parent or extended family  
resides or with which the parent or extended family maintains social and cultural ties.

841

842

843

844

845

846

847

NOTE: The significance of Native American community standards cannot be  
overemphasized. In enacting this provision Congress realized that even where a Native  
American child’s bond to the parents or custodian is severed, state courts must make  
every effort to recognize and preserve the tie between the Native American child and  
the child’s tribe in order to protect the future and sustainability of the tribe itself.

### Practice Guidelines - Documentation

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849

850

851

852

Documentation in the case file should relate indications of the likelihood of serious  
emotional or physical damage to particular conditions in the home, showing a causal  
relationship between the conditions and the serious damage that is likely to result to the  
child.

853

854

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856

857

A. For example, it is not adequate to show that the parent abuses alcohol. It is  
necessary to show, because of alcohol abuse, the parent may cause emotional or  
physical damage to the child.

858

859

860

861

862

863

B. In cases of placement, document the active efforts that were unsuccessful.

C. The case record must document that before initiating court proceedings to  
remove a child, that:

a. The conduct or condition of the parent will result in serious physical or  
emotional harm to the child.

- 864           b.       Efforts were made to counsel and change the parents' behavior, but they  
865                    did not work.

866

867 Practice Guidelines - Foster Care/Kinship And Adoptive Placements

868 A.       ICWA requires:

869       1.       The child must be placed in the least restrictive setting available, 25 U.S.C.  
870                    §1915(b).

871       2.       The child must be placed in reasonable proximity to the child's permanent  
872                    home, 25 U.S.C. §1915(b).

873       3.       Inquiry must be made of the child's tribe regarding the tribe's customary  
874                    definition of extended family, 25 U.S.C. §1903(2).

875

876 B.       The child must be placed within the foster/pre-adoptive placement preferences  
877                    established by ICWA, which are:

878       1.       Member of the child's extended family.

879       2.       Foster home licensed, approved, or specified by the Native American  
880                    child's tribe.

881       3.       Native American foster home licensed or approved by an authorized non-  
882                    Native American.

883       4.       An institution for children approved by a Native American tribe or  
884                    operated by a Native American organization that has a program suitable to  
885                    meet the child's needs.

886

887 C.       In any adoptive placement, preference will be given, in absence of good cause to  
888                    the contrary, to a placement with:

889       1.       A member of the child's extended family.

890       2.       Other members of the Native American child's tribe.

891       3.       Other Native American families.

892

893 D.       The Child and Family Services caseworker should:

894       1.       Contact the tribe to ask if they have a different placement preference than  
895                    those set forth in ICWA.

896       2.       Ask the tribal social worker about concurrent planning options early in the  
897                    case.

898       3.       File appropriate documents to show that a diligent search was undertaken  
899                    to follow ICWA's placement preference.

900       4.       Contact the tribe's social service office for input.

901       5.       Establish contact with the child's extended family.

902       6.       Conduct a search of state and county lists of available Native American  
903                    homes.

- 
- 904           7.     Contact other tribes and Native American organizations with available  
905           placement resources.  
906
- 907   E.     Documentation that must be in the record.  
908        1.     If the placement is outside the preferences established by ICWA, the  
909           record must document the reason.  
910        2.     If any party believes that good cause exists to place the child outside the  
911           placement preferences, the reasons for that belief must be documented in  
912           the record  
913        3     If there is a finding(s) in a court order of good cause to place a child outside  
914           the placement preferences of ICWA, the reasons must be documented in  
915           the record  
916

917 Practice Guidelines - Voluntary Placements And Adoptions

- 918   A.     ICWA applies to voluntary placements involving public and private agencies. For  
919           valid consent to be given, the following conditions must be met:  
920        1.     The child is over 10 days old.  
921        2.     The consent is in writing and recorded before a judge.  
922        3.     The consent is accompanied by the judge's certification that the terms and  
923           consequences of the consent were fully explained in detail and fully  
924           understood by the Native American parents or Native American custodian.  
925
- 926   B.     §1913(b) of the ICWA grants a parent or Native American custodian the right to  
927           withdraw consent to the termination of parental rights prior to the entry of the  
928           final order of termination.  
929
- 930   C.     Consent should be obtained from both parents. If not, the non-consenting  
931           parent's rights must be terminated involuntarily in accordance with ICWA.  
932
- 933   D.     If the case involved an unwed father and the father sought to acknowledge or  
934           establish paternity, the state should acknowledge that paternity.  
935
- 936   E.     The consent signed by the Native American parents or custodians should contain:  
937        1.     Name and birth date of child.  
938        2.     Name of child's tribe.  
939        3.     Child's enrollment number or other indication of membership in the tribe.  
940        4.     Name and address of consenting parents or Native American custodian.  
941        5.     Name and address of prospective parents, if known, for substitute care  
942           placements.  
943        6.     Name and address of person or agency through which placement was  
944           arranged, if any, for adoptive placements.

- 945 7. Parents' right to withdraw consent from termination and regain custody of  
946 child before entry of official order.  
947 8. Parents'/Native American custodian's right to be notified if the adoption is  
948 set aside or vacated or otherwise unsuccessful and the right to petition  
949 court for custody.  
950 9. A statement of the parents' right for parental consent to be signed in  
951 closed court.  
952

## 705.17 Change Of Placements

953  
954 Major objectives:

955 The Child and Family Services caseworker will notify the parent and/or Native American  
956 custodian and the child's tribe in writing prior to a change in placement or before the  
957 foster family moves.  
958

959  
960 **Applicable Law**

961 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.  
962

963 Practice Guidelines

964 If an AI/AN child in a foster or pre-adoptive placement is to be moved from one  
965 placement setting to another or if the foster family moves (requiring a change in  
966 placement) the placement preferences will be followed, unless the child is returned to  
967 the parent or Native American custodian from whose custody the child was originally  
968 removed.  
969

## 705.18 Records Of Placement

970  
971 Major objectives:

972 Child and Family Services will maintain a written record of each placement of each Native  
973 American child and of the efforts to comply with the placement preferences established  
974 by ICWA.  
975

976  
977 **Applicable Law**

978 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.  
979

980 Practice Guidelines

- 981 A. Written record of placement. This record will be maintained in SAFE, separate  
982 from the court report, and will contain, at a minimum, the petition or complaint, all  
983 substantive orders entered during the proceeding, and the complete record of the  
984 placement determination.  
985

- 986 B. Where the placement does not meet the preference priorities, the efforts to find  
987 suitable placement within those priorities will be recorded and documented in  
988 detail. Documentation will also be provided showing that the placement chosen  
989 is in the least restrictive setting possible, meets the child's special needs, and as  
990 much as possible, in cases of foster care placement, is close to the child's own  
991 home.  
992
- 993 C. At any time, upon the request of the Native American child's tribe or the  
994 Department of the Interior, Child and Family Services will make available records  
995 of every foster care, pre-adoptive, and adoptive placement of each Native  
996 American child maintained by Child and Family Services.  
997

## 705.19 Involuntary Adoptive Placements

### Major objectives:

Child and Family Services will observe the adoption preferences as indicated in ICWA.

### **Applicable Law**

#### **25 U.S.C. §1915(a)**

§1915(a) of the ICWA outlines the adoptive placement preferences:

1. A member of the child's extended family.
2. Other members of the Native American child's tribe.
3. Other Native American families.

### Practice Guidelines

- 1011 A. The tribe has the authority under §1915(c) to establish, by resolution, a different  
1012 order of preference.  
1013
- 1014 B. The county/state or court effectuating the placement must follow the tribe's  
1015 alternate preference order as long as it is the least restrictive setting appropriate  
1016 to the particular needs of the child.  
1017
- 1018 C. Where appropriate, the Native American child's preference or parents'  
1019 preferences will be considered.  
1020
- 1021 D. Where a consenting parent requests anonymity, the court or state agency will  
1022 give weight to the parent's request in applying the preferences.  
1023
- 1024 E. The Child and Family Services caseworker should contact the tribe very early to  
1025 ask if they have a different placement preference than those set forth in the  
1026 ICWA.

- 1027  
1028 F. Documentation that must be in the record:  
1029 1. If any party believes that good cause exists to place the child outside the  
1030 placement preferences, the reasons for that belief must be documented in  
1031 the record.  
1032 2. If there is a finding(s) in a court order of good cause to place a child outside  
1033 the placement preferences of ICWA, the reasons must be documented in  
1034 the record.  
1035

## 705.20 Disrupted Adoptive Placements

1037  
1038 Major objectives:

1039 Child and Family Services will notify the tribal authorities in the event of an adoption  
1040 disruption.

### 1041 **Applicable Law**

#### 1042 **25 U.S.C. §1912**

1043 The notice should include a statement of their right to return of their child and such  
1044 petition should be supported by Child and Family Services unless it can be demonstrated  
1045 that it is not in the child's best interest as defined by 25 U.S.C. §1912.  
1046

### 1047 Practice Guidelines

#### 1048 **Documentation:**

- 1049  
1050  
1051 A. Written records are to be maintained on each Native American child, separate  
1052 from the court record, of all placements and efforts exerted to comply with  
1053 required placement preferences provisions of ICWA.  
1054  
1055 B. The record should contain:  
1056 1. The petitions or complaint;  
1057 2. All substantive orders entered;  
1058 3. Complete record of placement determination.  
1059  
1060 C. 25 U.S.C §1915(b) Upon request, the placement records will be made available to  
1061 the Native American child's tribe or the Secretary of the Interior.  
1062  
1063 D. Where required placement preferences have not been followed, make sure  
1064 efforts to find suitable placements within those priorities are documented in  
1065 detail.  
1066

## 705.21 Confidentiality

Major objectives:

Child and Family Services will make routinely available to the AI/AN parent or Native American custodian all reports or other documents that are filed with the court.

**Applicable Law**

Utah Code Ann. [§62A-4a-105](#). Division responsibilities.

Practice Guidelines

- A. The Child and Family Services caseworker should openly consult with the tribal social worker to develop case planning.
- B. Upon request, the placement records will be made available to the Native American child's tribe or the Secretary of the Interior.
- C. Confidentiality and protection of children and adults should be considered and addressed when providing documents.

## 705.22 Full Faith And Credit For Public Acts, Records, And Judicial Proceedings Of Tribes

Major objectives:

Child and Family Services will recognize its responsibility to give full faith and credit to the public acts, records, and judicial proceedings of any Native American tribe with regard to Native American custody proceedings.

**Applicable Law**

**25 U.S.C. §1911(D)**

The United States, every state, every territory or possession of the United States, and every Native American tribe will give full faith and credit to the public acts, records, and judicial proceedings of any Native American tribe applicable to Native American 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.

## 705.23 ICWA Training

Major objectives:

Regions, contractors, and individual workers will receive on a regular and ongoing basis training regarding the intent and application of the ICWA. Child and Family Services will encourage other regular participants in the system to obtain or to participate in such training.

1108

1109 **Applicable Law**

1110 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.

1111

1112 Practice Guidelines

1113 A. The state ICWA specialist will set forth a format for training to improve the  
1114 understanding of ICWA, which will provide a solid working knowledge of ICWA.

1115

1116 B. The state ICWA specialist will coordinate with the state training coordinator to  
1117 integrate/ICWA into existing and ongoing training for state employees.

1118

1119 C. The state ICWA specialist will coordinate joint training and dialogue with state  
1120 and tribal child welfare agencies and court personnel to strengthen existing  
1121 working relationships.

1122